Faculty of Law
Universitas Gadjah

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

KAECL
Korean Association for European Constitutional Law

**International Seminar**

# "Advancing Legislative System for Global Issues"

## Proceedings of The Seminar

**August, 18th, 2010**
**Faculty of Law**
**Universitas Gadjah Mada**

# BACKGROUND

Climate change is often considered as one of the most serious issues faced in the twenty first Century. Recent study shows in the last 50 years, global warming is mostly caused by human activities. This is because industrial activities, deforestation and forest fire still occur in many regions in the world. In the future the impact of global warming event will be greater. The concentration of certain gases commonly called 'green house effect' continuously increases. The impact of global warming is that within one hundred years, the production of staple food such as wheat, rice and corns will be decreased up to 30%. This leads to most of people in rural areas specifically in developing countries will suffer from hunger and bad nutrition.

To overcome the impact of global warming, it is necessary to create common awareness and build commitment to change the behavior of the people toward the nature. In addition, it is also important to create regulation in order to guarantee the quality of environment. In relation to this issue, in 2009 the government of Indonesia enacted Law No. 32/2009 concerning The Protection and Management of Environment. This Law obliges the central government and regional government to make study on strategic environment (*Kajian Lingkungan Hidup Strategis*- KLHS). The aim is to ensure that the sustainable development principle is integrated in developing, policies, plans, and programs in the region. In case the result of KLHS shows that the maximum limit has been achieved, policies, plans, and development programs should be conducted in line with the KLHS recommendation and all activities should not be allowed. Therefore, the formulation of local regulation should be in line with sustainable development principle both in the long term development plan and short term development plan. In order to build a smart regulation, it is necessary to have a measurable assessment.

In a multicultural society, policies in regard to anticipate climate change can not be separated with local wisdom. The failure of development in the past is partly because the strong implementation on monoculturalism, and in the same time ignoring multiculturalism, including the rights of minority. In a democratic society, multiculturalism needs to be developed in legislation system. This can be done, for example, by granting special autonomy through legislation in order to strengthen national integrity.

Some issues in regard to develop a more democratic country need to be deeply discussed. It is, further, significant to make a forum to discuss the aforementioned issues in order to obtain views and perspectives from legal scholars. Therefore, it is very relevant to hold the International Conference on ***"Advancing Legislative System For Global Issue"***

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# SCHEDULE AND VENUE

This conference will be conducted on:

**Day/ Date : Wednesday August, 18th 2010**

**Duration : 08.00 – 17.00 WIB**

**Venue : Room 3.1.1. Building 3 Faculty of Law UGM Jl. Sosio Yustitia Bulaksumur Yogyakarta**

# ACTIVITIES

1. This conference aims to obtain comprehensive inputs regarding the development of legal system in Korea and Indonesia specifically in implementing multiculturalism and sustainable development.
2. This conference invites academia from both Korean universities and the Faculty of Law Universitas Gadjah Mada as a speakers and panelists

# PARTICIPANTS

Participants of this conference will be approximately 100 people. These include Deans of The Faculty of Law and Faculty of Politics and Social Science, Academia, Lecturers of Constitutional law, Administrative law and Environmental law, Research Centers, Postgraduate students, Officials from Department of Justice and Human Rights, Legal Department of Local government, Local Parliament Secretariat, Environmental activist and NGOs

# SPEAKERS

1. Prof. Dr. Byun Hae Cheol, Chairman of KAECL
"Integration and Public Law in Multicultural Society"

2. Director, Dr. Chan-ho Park, KLRI
"Low Carbon Green Growth Act for Climate Change Adaptation in Korea (TBD)"

3. Abdullah Abdul Patah, S,H.,LL.M, UGM
"Compatibility of Indonesian Act No. 32 of 2009 in Responding to Climate Change Issues"

4. Prof. Dr. Kim Hyung Nam, Dankook Univ., Seoul
"Impact of Integrity Phenomenon about judicial Review Standard in Global Society"

5. M Fajrul Falaakh, SH, MA, M.Sc. UGM
"Human rights mechanism in a plural context: A preliminary review of ASEAN 'Constitution' and AICHR"

6. Prof. Dr. Fugikawa Hisaaki, Aoyama Gakuin Univ., Tokyo
"Integration and Labor Law in Japan"

7. Prof. Dr. Ryu, Si Jo, PUFS, Pusan
"Indonesian Community and Law in Korean"

8. Enny Nurbaningsih, SH., MH. UGM
"Regulation Impact Assessment: An Instrument for Advancing Local Regulation"

9. Prof. Dr. Park Zin Wan, Kyungbuk Univ., Daegue
"A Discourse on the Constitutionality of the Rights enshrined in the International Migration Convention"

# PANELISTS

1. Prof. Dr. Lee Kwang Youn, SKKU
2. Wahyu Yun Santoso, SH., LL.M. UGM
3. Prof. Dr. Koh, Mun Hyun
4. Totok Dwi Diantoro, SH., M.Sc. UGM
5. Prof. Dr. Park, Jong Bo, Hanyang Univ., seoul
6. Prof. Dr. Lim ji Bong, Sogang Univ., Seoul
7. Prof. Dr. Nurhasan Ismail, SH., MSi. UGM
8. Dr. Lee, Kyung Hee, KLRI
9. Andy Omara, SH., MPub&IntLaw. UGM
10. Prof. Dr. Choi, Kyeong Ok, Youngsan Univ., Pusan
11. Prof. Dr. Kim Kyong Je, Dongkuk Univ., Seoul
12. Aminoto, SH., M Si. UGM
13. Prof. Dr. Jang, Jin Sook, Pukyung Univ., Pusan
14. Zaenal Arifin Mochtar, SH., LL.M. UGM
15. Prof. Dr. Kim, Ju Young

# LIST OF SPEAKERS, PANELISTS AND COMMITTEE

| Name of Participants | Organisation / Instituition | Country |
|---|---|---|
| Prof. Dr. Marsudi Triatmodjo, S.H., LL.M. | UGM, Dean of Faculty of Law | Indonesia |
| Kim Ki Pyo | President of KLRI | South Korea |
| Prof. Dr. Byun Hae Cheol | Chairman of KAECL | South Korea |
| Dr. Chan-ho Park | Director of KLRI | South Korea |
| Abdullah Abdul Patah, S.H., LL.M. | UGM, Faculty of Law | Indonesia |
| Prof. Dr. Lee Kwan Youn | SKKU | South Korea |
| Wahyu Yun Santosa, S.H., LL.M | UGM,Faculty of Law | Indonesia |
| Prof. Dr. Koh, Mun Hyun | -- | South Korea |
| Totok Dwi Diantoro, S.H., M.Sc. | UGM, Faculty of Law | Indonesia |
| Prof. Dr. Park, Jong Bo | Hanyang University, Seoul | South Korea |
| Prof. Dr. Kim Hyung Nam | Dankook University, Seoul | South Korea |
| M. Fajrul Falakh, S.H., M.A., M.Sc | UGM, Faculty of Law | Indonesia |
| Prof. Dr. Fugikawa Hisaaki | Aoyama Gakuin University, Tokyo | Japan |
| Prof. Dr. Lim ji Bong | Sogang University, Seoul | South Korea |
| Prof. Dr. Nurhasan Ismail, S.H., M.Si. | UGM, Faculty of Law | Indonesia |
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| Prof. Dr. Ryu, Si Jo | PUFS, Pusan | South Korea |
| Enny Nurbaningsih, S.H., M.H. | UGM, Faculty of Law | Indonesia |
| Prof. Dr. Park Zin Wan | Kyungbuk University, Daegue | South Korea |
| Prof. Dr. Kim Kyong Je | Dongkuk University, Seoul | South Korea |
| Aminoto, S.H., M.Si. | UGM, Faculty of Law | Indonesia |
| Prof. Dr. Jang Jin Sook | Pukyung University, Pusan | South Korea |
| Zaenal arifin Mochtar, S.H., LL.M | UGM, Faculty of Law | Indonesi |
| Prof. Dr. Kim, Ju Yong | Myongji University, Seoul | South Korea |
| Sandra Dini Febri Aristya, S.H., Mr.DPSI.R | UGM, Faculty of Law | Indonesia |
| Haniah Ilhami, S.H.,LL.M. | UGM, Faculty of Law | Indonesia |

| | | |
|---|---|---|
| Irine Handika Ikasari, S.H. | UGM, Faculty of Law | Indonesia |
| Rimawati, S.H.,M.Hum | UGM, Faculty of Law | Indonesia |
| Anugrah Anditya, S.H.,M.T. | UGM, Faculty of Law | Indonesia |
| Karina Dwi Nugrahati Putri, S.H. UGM | UGM, Faculty of Law | Indonesia |
| Dr. Sigit Riyanto, S.H., LL.M. | UGM, Faculty of Law | Indonesia |
| Andi Sandi Ant.T.T., S.H., LL.M. | UGM, Faculty of La | Indonesia |
| Mailinda Eka Yuniza, S.H., LL.M. | UGM, Faculty of Law | Indonesia |
| Sawitri  UGM, Faculty of Law | UGM, Faculty of Law | Indonesia |
| Nur Lely Roza, S.IP. | UGM, Faculty of Law | Indonesia |
| Ika Nilasari Saputri, S.Pd. | UGM, Faculty of Law | Indonesia |
| Bernadus Purnawan, S.S. | UGM, Faculty of Law | Indonesia |
| Dani Arifianto | UGM, Faculty of Law | Indonesia |
| Khairul Triharnanto | UGM, Faculty of Law | Indonesia |
| Ahmad Nabriz | UGM, Faculty of Law | Indonesia |
| Sapta Novida Dananjaya | UGM, Faculty of Law | Indonesia |
| Nicolas Desta Pramana | UGM, Faculty of Law | Indonesia |
| Michelle Ayu Chinta Kristy | UGM, Faculty of Law | Indonesia |
| Fardan Rahmat Sutan | UGM, Faculty of Law | Indonesia |
| Adi Mantani | UGM, Faculty of Law | Indonesia |

# RUN DOWN

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|---|---|
| **08:00 ~ 09: 00** | **Registration** |
| **09:00 ~ 09.45** | **Opening Ceremony** |
| | Prof. Dr. Marsudi Triatmojo<br>Dean of Faculty of Law, Universitas Gadjah Mada<br><br>Kim Ki Pyo<br>President of KLRI |
| | Keynote Speech<br>Prof. Dr. Byun Hae Cheol, Chairman of KAECL<br>***Integration and Public Law in Multicultural Society*** |
| **09:45 ~ 11: 30** | First Session<br>**Global Climate Change Adaptation and Green Growth Paradigm** |
| | Director, Dr. Chan-ho Park, KLRI<br>***Low Carbon Green Growth Act for Climate Change Adaptation in Korea (TBD)***<br><br>Abdullah Abdul Patah, S,H.,LL.M, UGM<br>***Compatibility of Indonesian Act No. 32 of 2009 in Responding to Climate Change Issues***<br><br>**Panels:**<br>1. Prof. Dr. Lee Kwang Youn, SKKU<br>2. Wahyu Yun Santoso, SH., LL.M. UGM<br>3. Prof. Dr. Koh, Mun Hyun<br>4. Totok Dwi Diantoro, SH., M.Sc. UGM<br>5. Prof. Dr. Park, Jong Bo, Hanyang Univ., seoul |
| | Questions and Answers |
| **11:30 ~ 13:00** | **L u n c h** |
| **13:00 ~ 14:45** | Second Session<br>**Integration of Laws in Multi-Cultural Society** |
| | Prof. Dr. Kim Hyung Nam, Dankook Univ., Seoul<br>***Impact of Integrity Phenomenon about judicial Review Standard in Global Society***<br><br>M Fajrul Falaakh, SH, MA, M.Sc. UGM<br>***Human rights mechanism in a plural context: A preliminary review of ASEAN 'Constitution' and AICHR*** |

| | |
|---|---|
| | Prof. Dr. Fugikawa Hisaaki, Aoyama Gakuin Univ., Tokyo<br>***Integration and Labor Law in Japan***<br><br>**Panels:**<br>1. Prof. Dr. Lim ji Bong, Sogang Univ., Seoul<br>2. Prof. Dr. Nurhasan Ismail, SH., MSi. UGM<br>3. Dr. Lee, Kyung Hee, KLRI<br>4. Andy Omara, SH., MPub&IntLaw. UGM<br>5. Prof. Dr. Choi, Kyeong Ok, Youngsan Univ., Pusan |
| | Questions and Answers |
| **14:45 ~ 16:45** | Third Session<br>**Regulation Impact on Local Government Autonomy** |
| | Prof. Dr. Ryu, Si Jo, PUFS, Pusan<br>***Indonesian Community and Law in Korean***<br><br>Enny Nurbaningsih, SH., MH. UGM<br>***Regulation Impact Assessment: An Instrument for Advancing Local Regulation***<br><br>Prof. Dr. Park Zin Wan, Kyungbuk Univ., Daegue<br>***A Discourse on the Constitutionality of the Rights enshrined in the International Migration Convention***<br><br>**Panels:**<br>1. Prof. Dr. Kim Kyong Je, Dongkuk Univ., Seoul<br>2. Aminoto, SH., M Si. UGM<br>3. Prof. Dr. Jang, Jin Sook, Pukyung Univ., Pusan<br>4. Zaenal Arifin Mochtar, SH., LL.M. UGM<br>5. Prof. Dr. Kim, Ju Young |
| | Questions and Answers |
| **16:45** | **Closing** |

# *Opening*

**OPENING REMARKS**

**Prof. Dr. Marsudi Triatmojo**

Dean of Faculty of Law, Universitas Gadjah Mada

***The President of KLRI, H.E. Dr. Kim Ki-Pyo, Director of ALIN, Dr. Chan-ho Park, Chairman of KAECL, Professor Byun Hae Cheol, distinguished guests, ladies and gentlemen,***

On behalf of Universitas Gadjah Mada and the Faculty of Law, I warmly welcome you to Yogyakarta and to the University. We are delighted to have you with us and hope your stay will be fruitfull and enjoyable. It is my honor and privilege to welcome each of you to this international seminar entitled '**Advancing Legislative System for Global Issues**'.

Let me first extend my thanks to Honorable **Dr. Kim, Ki-Pyo** and **Dr. Chan-ho Park** who have generously agreed to sponsor this activity, and of course on your busy schedule you have kindly willing to visit our humble city of Yogyakarta. I also have to thank to **Professor Byun Hae Cheol** who has initiated this activity, and more specifically who has given a trust to us to organize this activity. Then, I also extend my thanks to distinguished international and national speakers and participants who have kindly set a spare time from your busy schedule to come here to grace the occasion of this international seminar.

This seminar is jointly organized by Faculty of Law Universitas Gadjah Mada in collaboration with Korea Legislation Research Institute (KLRI) and Korean Association for European Constitutional Law (KAECL). For your kind information, Faculty of Law UGM and I personally have known and involved with KLRI since 2005 when KLRI launched its program of Asian Legal Information Network (ALIN). ALIN is an entity to guide the participation of leading universities, research institutions, and government agencies in major Asian countries. If I am not mistaken, right now ALIN has 22 institutions from 14 countries as its members. And, for the KAECL, I have known its Chairman, Prof Byun, since the inaugural ALIN General Meeting. Since then, I have been invited 4 or 5 times to visit Hankuk University as a speker in seminar or to deliver lecture in Prof Byun class.

*Ladies and gentlemen ...,*

This seminar is quite unique and ambitious. We are going to discuss 2 big issues, climate change and multiculturalism, in one day.

The first issues, climate change, is often considered as one of the most serious issues faced in the twenty first Century. Recent study shows in the last 50 years, global warming is mostly caused by human activities. This is because industrial activities, deforestation and forest fire still occur in many regions in the world. In the future the impact of global warming event will be greater. The concentration of certain gases commonly called 'green house effect' continuously increases. The impact of global warming is that within one hundred years, the production of staple food such as wheat, rice and corns will be decreased up to 30%. This leads to most of people in rural areas specifically in developing countries will suffer from hunger and bad nutrition.

To overcome the impact of global warming, it is necessary to create common awareness and build commitment to change the behavior of the people toward the nature. In addition, it is also important to create regulation in order to guarantee the quality of environment. In relation to this issue, in 2009 the government of Indonesia enacted Law No. 32/2009 concerning The Protection and Management of Environment. This Law obliges the central and regional governments to make study on strategic environment (*Kajian Lingkungan Hidup Strategis* – KLHS). The aim is to ensure that the sustainable development principle is integrated in developing, policies, plans, and programs in the region. In case the result of KLHS shows that the maximum limit has been achieved, policies, plans, and development programs should be conducted in line with the KLHS recommendation and all activities should not be allowed. Therefore, the formulation of local regulation should be in line with sustainable development principle both in the long and short terms development plan. In order to build a smart regulation, it is necessary to have a measurable assessment.

Then, the second issues, multiculturalism. In a multicultural society, policies in regard to anticipate climate change cannot be separated with local wisdom. The failure of development in the past is partly because the strong implementation on monoculturalism, in the same time ignoring multiculturalism, including the rights of minority. In a democratic society, multiculturalism needs to be developed in legislation system. This can be done for example by granting special autonomy through legislation in order to strengthen national integrity.

*Ladies and gentlemen ...,*

Once again, my very best wishes to all of you. I know the organizers of this seminar have put in many days, even weeks, of hard work to ensure that your time here will be well spent.

Thank you.

***Congratulatory Remarks***

President, Kipyo Kim
Korea Legislation Research Institute

Ladies and gentlemen,
Ladies and gentlemen, May I warmly welcome you all, to the International Seminar. It is my big pleasure that this conference is held in Yogyakarta, Indonesia. I firmly believe that this conference will be as successful one. On behalf of my institute KLRI, I would like to express my special thanks to the Faculty of Law of Universitas Gadjah for their kind assistance in the organization of this International Conference.
Since the establishment of ALIN, we UGM and KLRI have seen continuous increase in terms of enthusiasm to act together. The Asia Legal Information Network (ALIN) is an open network initiated by the Korea Legislation Research Institute. Partnership is voluntary and open to any governmental agencies, institutions on legal research and other organizations related to legal information. Membership now stands at 22 institutions in 14 countries. We all have acknowledged that international legal and academic exchange, collaborative research and other international cooperation on various levels are already in progress.

Just as the title of conference today is「 Advancing Legislative System for Global Issues」, this is the time to devise ways to understand foreign laws. This conference will enable us to improve ways of communication of legal information among nations. We will be able to compare and study current issues in the legal systems and practices of each nation easier and faster, and furthermore seek ways of cooperation to narrow down a gap in legislation among nations. And I also believe this conference at the beautiful and historical city, Yogyakarta, will be a beneficial and valuable experience for all participants.

Lastly, I would like to express my sincere gratitude to Dean Marsudi Triatmojo and his staff for their hard work for this conference as well. And I have to particularly thank Prof. Byun Hae Cheol and KAECL(: Korean Association for European Constitutional Law) for their support to this conference. Once again, thanks you all attending this international conference despite the long distance travel and your busy schedules.

Thank you very much!

# Keynote Speech

***Integration and Public Law in Multicultural Society***

Prof. Dr. Byun Hae Cheol
Chairman of KAECL

**Introduction**

To refer any groups as a community, whether its members were conscious or not, at least the elements that characterize the community must be in existence. Some components may be formed naturally in everyday life through the years, and others may be formed artificially under certain rituals. For example, referring Koreans as 'white people' is a component derived from a daily practice that people like to wear white clothes. Also, referring them as 'bear's offspring' is intentionally formed based on totemism to strengthen the national identity against Mongolian intrusion in Koryo dynasty.

Today, most modern states advocating democracy form the national identity based on social consensus of a nation and specify it in a written Constitution. It can be understood in the context of the Constitution of the Republic of Korea. Recently, it is in progress to discuss amending the Constitution operated stably from 1987 and accepting new constitutional needs. In addition, discussion on the national identity based on an unwritten Constitution is progressed actively. The constitutional dispute over 'the Special Act on the Construction of the New Administrative Capital' means whether the fact that Seoul is the capital of Korea can be one of the components that form the political, economic, social, and cultural community.

The constitutional court ruled that "The capital is the place which has core government agencies, performs political and administrative functions, and symbolizes the nation", clarifying that "the location of constitutional institutions, especially the president and the national assembly, is one of the essential constitutional matters that reveal the national identity".

Accelerating a recent discussion on the national identity implies a change of social members themselves. The proliferation of migrant workers, marriage immigrants, and free movement of locals and overseas citizens makes a new culture flow into the nation and raises a question of the national identity. And we can emphasize the phenomenon of refugee from the North Korea who could be originally considered as Korean, but lived for a long time under different system. That is a question of integration in a multicultural society.

In constitutional law, the integration means, at least, that the members of a State live under a same Constitution as a basic norm of the community. In a globalization era, most society became multicultural, in which the members and the activities of the community are broadly open to the other communities. According to the Ministry of Justice, total passengers were 35,206,504 in 2009 in Korea (19,586,995 Nationals and 15,619,509 Foreigners).[1] And, there were 1,180,598 foreign

[1] Cf. http://www.moj.go.kr/HP/COM/bbs_03/ListShowData.do.

residents, including 80,985 foreign students, 125,087 marriage migrants, 306,283 foreign workers, 177,955 illegal residents, etc. They are from China(48%), U.S.(11%), Vietnam(8%), Philippines(4%), Japan(4%), Thailand(3.4%), Mongolia(2.6%), Indonesia(2.4%), etc.[2] These statistics show well that the human exchanges were not unilateral but multilateral.

This paper studies how we can accept a multicultural society constitutionally and embody it based on the administrative law. Moreover, this paper studies the extent of openness based on the current legislation of a multicultural society.

**Enlarged opportunities to be a citizen**

**A. Problems on the Nationality**

In terms of the nationality, Korea has traditionally kept the principle of *jus sanguinis*, especially, the paternal lineage. The children of foreigner-father and national-mother could not automatically, by their birth, get Korean nationality. However, the maternal lineage is actually allowed by amending the Nationality Act in 1997. And the naturalization procedures for the foreign spouses of Korean national were simplified.

However, the dual citizenship is not allowed in Korea. Recently, overseas residents, especially, who have the citizenship in North America, asked for the dual citizenship. In the end of a long discussion, Korean Government decided to keep one nationality policy but to give a chance to dual national to choose one national instead of automatic loss of Korean nationality, if dual national does not abandon foreign nationality in 6 months.[3]

[2] http://www.moj.go.kr/HP/TIMM/imm_06/imm_2010_03.jsp

[3] Article 12 (Obligation of Dual National to Choose One Nationality)
(1) A person who has nationalities of both of the Republic of Korea and a foreign country by birth or pursuant to this Act (hereinafter referred to as a "dual national") before fully turning twenty years of age shall choose one nationality before fully turning twenty-two years of age; and a person who becomes a dual national fully turning twenty years of age shall choose one nationality within two years from such time pursuant to Articles 13 and 14: Provided, That anyone who is enlisted in the first militia service under Article 8 of the Military Service Act
Military Service Act shall choose one nationality within three months from the time of enlistment, or within two years from the time he/she falls under any subparagraph of paragraph (3).
(2) A person who did not choose a nationality under paragraph (1) shall lose nationality of the Republic of Korea after fully turning twenty-two years old under paragraph (1) or the lapse of two years.
(3) Any person who was born while his lineal ascendent stays abroad without the intention of permanently residing in any foreign country may make a declaration of renouncement of his Korean nationality as provided for in the provisions of Article 14, when the person falls under any of the following subparagraphs, with respect to his obligation for military service:

1. When he has completed, or is deemed to have completed, his active military service, full-time reserve service or replacement status;
2. When he is exempt from military service; and
3. When he is enlisted in the second militia service.

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]

The European Convention on Nationality in1997, in which having a dual nationality is declared as a individual right and the legal status of dual national is enhanced,[4] could be a good guide to the study of dual nationality.

**B. Voting Rights of Overseas Citizens[5]**

At first, Korean citizens living overseas will be able to participate in some elections: presidential election, proportional election of members of National Assembly and Local Assembly, etc. Recently, it has been realized by the amendment of the Act on the Election of Public Officials and the Prevention of Election Malpractices (February 5, 2009).

Korean citizens who have established permanent residence overseas asked for the right to vote. For example, Korean citizens above twenty years of age who were living in Japan, filed a constitutional complaint against Article 37 (1) of the Act on the Election of Public Officials and the Prevention of Election Malpractices that specified certain residential requirements for voting and thereby denied Korean citizens living overseas the right to vote. In this Overseas Citizens Voting Rights Ban case[6], the Court upheld the above provision. Because "even if it is undesirable to deny overseas residents the voting rights, as long as there is a reasonable basis, such denial is not excessive restriction on basic rights. Therefore, the above provision does not depart from the Article 37 (2) limit on restriction on basic rights."

According to the Court, "it will be ideal to grant all overseas residents voting rights, promote their national pride as Korean citizens, elevate their love of the country, and generate in their daily lives keener interest in the fate of the country. However, it is unrealistic to recognize the voting rights of North Korean citizens or other Japanese residents participating in the pro-North Chosun Federation ('*jo-chong-ryeon*') when the nation remains divided. It is difficult to assure the fairness in voting once it is open to overseas citizens. Also, it is practically impossible to deliver the election and candidate information, campaign, and send ballots to all overseas residents, and retrieve them within the statutory election period. Furthermore, the right to vote is correlated to the duty to pay tax and serve in the military, and overseas residents have not performed these duties.**"**

In other case[7], the Court also upheld Article 38 (1) of the same Act that denied the absentee voting of study-abroad students and overseas representatives of Korean companies who essentially

[4] For example, Chapter Ⅴ – Multiple nationality
Art. 16 - Conservation of previous nationality
A State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.
Art. 17 - Rights and duties related to multiple nationality
1. Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.
2. The provisions of this chapter do not affect:
   a. the rules of international law concerning diplomatic or consular protection by a State Party in favour of one of its nationals who simultaneously possesses another nationality;
   b. the application of the rules of private international law of each State Party in cases of multiple nationality
http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm
[5] Byun, Hae Cheol, "Globalization and Electoral System", HUFS Law Review, Vol.33-4, pp. 138 – 143.
[6] 11-1 KCCR 54, 97Hun-Ma253, January 28, 1999.
[7] 11-1 KCCR 218, 97Hun-Ma99, Mar. 25, 1999.

retain their permanent residence in Korea. It was on the ground that overseas absent ballots are costly and difficult to administer fairly. The Court also reasoned that, "unlike domestic absentee voters, the above groups are responsible for their absence, and finally that the absentee voting is merely an administrative amenity made available to the voters, and its lack does not deny the voting right itself. Therefore, the issue is subject to legislative discretion."

But, the Court has recently changed its precedent decisions and admitted overseas residents voting rights.[8] In this case, the Court reasoned that it could not be justified to deny all overseas residents' voting right by the technical problems to assure the fairness in voting and abstract dangers for Japanese residents participating in the pro-North Chosun Federation ('*jo-chong-ryeon*'). And, the Court has also declared as unconstitutional Article 38 (1) of the same Act that denied the absentee voting of study-abroad students and overseas representatives of Korean companies who essentially retain their permanent residence in Korea.

From next election, more than 2, 29 million people (Korean citizens who established permanent residence overseas, study-abroad students and overseas representatives of Korean companies) will be able to join for exercising their right to vote.[9]

**C. Education for the young generation, educated abroad**

For the young generation who are educated in different cultures in foreign countries, children who come home from abroad may enter or transfer to elementary schools which have established special classes for students returning from abroad. And for children who live abroad, Korean school has been established in main cities of abroad.

**D. Refugee from North Korea**

The number of refugees from North Korea was recently increased. Actually, about 18,000 refugees from North Korea live in Korea. As they are called as 'Sae Teo Min', they have a lot of difficulties to be integrated into South Korea. Act on the Protection and Settlement Support of Residents Escaping from North Korea(1997.7.17, amended 2010.3.26) is to provide for such matters relating to protection and support as are necessary to help North Korean residents escaping from the area north of the Military Demarcation Line (hereinafter referred to as "North Korea") and desiring protection from the Republic of Korea, as swiftly as possible to adapt themselves to, and settle down in, all spheres of their lives, including political, economic, social and cultural spheres.(Art. 1)

The Korean government shall provide persons subject to protection with special protection on the principle of humanitarianism. (Art.4 al.1) Persons subject to protection shall strive to lead healthy and cultural lives by adapting themselves to the free and democratic legal order of the Republic of Korea.(al.3) The criteria for provision of protection of and support for persons subject to protection shall be reasonably determined in consideration of their age, members of a family,

[8] 19-1 KCCR 859, 2004Hun-Ma644, June 28, 2007.
[9] This increasing number of electors will play a very important role to the elections. For example, the presidential election was wined by a majority of about 390,000 in 1997 and about 570,000 in 2002. And, it was about 280,000 votes for a seat in proportional legislative election in 2008. cf. the Cho-Sun Ilbo, January 30, 2009, p. 3.

school education, personal career, self-supporting ability, health conditions and personal possessions. (Art.5 al.1)

In reality, we have had many difficulties in answering to this kind of questions. Their high unemployment rate shows well.[10]

### 1. Enlargement of the Foreigners' rights

Whether a foreigner is entitled to basic rights, it has been one of the most important and fundamental questions in constitutional theory. In a Nation-State, its Constitution protects normally its citizens' rights. However, we know that there are no differences between a "foreigner" and a "national" as human beings, who breathe the same air. In a globalization era, it seems that the foreigners' rights are increasingly protected by the national Constitution and the international norms. In Korean doctrine, a foreigner is supposed to be entitled to fundamental rights which are acceptable within their characteristics (for example, human dignity, the right to pursue happiness, the principle of equality, etc.). According to the Korean Constitutional Court (KCC), a "foreigner" has a status similar to that of a "national," and therefore, a foreigner is entitled to the basic rights in principle.[11]

#### A. Principle of equality

The KCC declared that it violates the principle of equality not to apply the Act on the Immigration and Legal Status of Overseas Koreans to ethnic Koreans with foreign nationalities who emigrated prior to the establishment of the Republic of Korea, which make up most of the ethnic Koreans in China and the former Soviet Union.

#### B. Enfranchisement to the Foreigners in grassroots level[12]

Foreigners' right to vote shall be admitted under certain conditions.[13] They can participate in local election where they live. In the case of Yeongdeungpo-gu, Kumchon-gu, Guro-gu, Jung-gu, Jongno-gu and Yongsan-gu in Seoul, and in the case of Kimpo, Hwaseong-si, Yeosu city, and Ansan in Gyeonggi-Do, foreign residents account for more than 5% of the total. However, as it is not easy to meet the qualifications, the number of foreign voters in a recent local election (June 2, 2010) is very limited. It was about 11,678.[14]

#### C. Foreign workers' rights[15]

[10] 15.5% for men, 12.6% for women; The annual report of Ministry of Unification (2009) on the economic activities of Residents Escaping from North Korea.
[11] 13-2 KCCR 714, 99Hun-Ma494, November 29, 2001, Act on the Immigration and Legal Status of Overseas Koreans Case
[12] Byun, Hae Cheol, "Globalization and Electoral System", HUFS Law Review, Vol.33-4, pp. 143 – 145.
[13] Article 15 (2) 3 of the Act on the Election of Public Officials and the Prevention of Election Malpractices, amended in 2005. 8. 4.

[14] National Election Commission, "Information System on Elections", http://10.36.10.22:6318/index.xhtml .

[15] 19-2 KCCR 297, 2004Hun-Ma670, August 30, 2007, Labor Rights of Foreign Trainees of Industrial Technology Case.

In this case, the Constitutional Court declared unconstitutional the regulation of Ministry of Labor which intruded upon the right to equality of foreign trainees of industrial technology by applying only some parts of Labor Standard Act to foreign trainees of industrial technology.

The labor rights include not only "a right for a working seat" but also "a right for a working environment". Since the latter has a character of liberty right to defend the infringement upon the human dignity, it includes the right to claim a healthy working environment, a just reward for work, and the guarantee of reasonable working conditions and a foreign worker could enjoy this right. In other words, according to concrete contents of labor right, the right to demand social and economic policies to the government for the acceleration of employment is the social right which should be applied to Korean people. However, since the right to claim a minimum working condition for the workers in order to secure basic means of living and get their human dignity guaranteed under capitalistic economic order has a character as a liberty right, it would be appropriate that a foreign worker could enjoy the right in this case.

Respecting the decision of KCC, the government abolished the foreign industrial trainee system in January 1, 2007 and adopted 'the employment permit system' which equally guaranteed the basic rights in Labor Standard Act such as retirement allowances and vacation for foreign workers as well. Therefore, the improvement in the level of system has already been in place.

**D. Other questions**

First of all, the right on education for the children of foreign residents has to be mentioned.[16] The right on education is considered as one of the most necessary rights for realizing human dignity.[17] According to the Framework Act on Treatment of Foreigners Residing in the Republic of Korea, their regular education in schools could be supported by the Government or local government.(Art.11) The government and local government have to take the necessary measures for protecting human rights of foreign residents and their children and preventing unreasonable discrimination.(Art.10) In Korea, the elementary and secondary education being compulsory to complete, it is applicable not only to the children of nationals but also to those of foreigners. (Art.19 al.1 of Enforcement Decree of the Elementary and Secondary Education Act)[18] It is not coincident with the international convention on the children's rights that requires a compulsory education up to 18 years old.

[16] Choi, Yooncheol, "The Right on Education for the Children of Multiculti-Family", Public Law, Vol.38-1-2(2009.10), pp. 161.
[17] 13-2 KCCR 762, 2000Hun-Ma278, November 29, 2001, School Operational Committees in Private Schools Case.
[18] Article 19 (Admission Procedures for Children of Korean Nationals Abroad)
(1) Where sons, daughters, or children protected by any Korean national abroad or by any foreigner, enter or first transfer to any domestic elementary school, the principal of the relevant school having jurisdiction over the place of residence may substitute the procedures for admission or transfer referred to in Articles 17 and 21 by verifying the contents of the confirmation of fact on entry into and departure from Korea, or of the confirmation of alien registration under Article 88 of the Immigration Control Act

Immigration Control Act

through a joint utilization of the administrative information pursuant to Article 21 (1) of the Electronic Government Act: *Provided*, That where the said Korean national abroad, or the said foreigner disagrees with such verification, the principal of the relevant school shall have him/her submit documents that may verify the fact on entry into and departure from Korea, or the fact on alien registration, or documents that may verify the fact of his/her residence in Korea, such as a written contract

In practice, it is not easy to realize it. Because it needs special programs which are answering to diverse questions, for example, diverse languages, religions, cultures, etc. In case of the children of illegal foreign residents, it is worse. It is needed to establish special classes or programs for students from abroad.

The public nature of education has been increasingly emphasized in the modern countries. In order to ensure stable and continuous development of a nation, education needs to be open to all children whether they are national or not and legal residents or not.

**Conclusion**

Many social conflicts resulted from the failure of integration in multicultural society. For example, in France, several riots were continually raised by the second or/and third generation of migrants in 2005, 2007, 2010.[19] This country has a long history of immigration since, at least, the Declaration of the Rights of Man and Citizens in 1789. French People have considered their history of immigration sometimes positive, which gave dynamics to the country and sometimes negative, which raised social conflicts.[20]

The history of integration in many countries shows us the way which we should walk on. First of all, we have to respect each other as we are the same human being. And, we have to accept the differences between other cultures, religions, etc. In these regards, having a Constitution as basic norm would be able to play an important role in harmonizing the differences and regulating their limits.

for lease, letter of guarantee of his/her next-door neighbor. <*Amended by Presidential Decree No. 19507, Jun. 12, 2006; Presidential Decree No. 20635, Feb. 22, 2008*>

[19] Joong-Ang Ilbo, July 19, 2010, p. 17.

[20] Limousin, Alain, "L'histoire de l'immigration en France : Une histoire impossible ", , Pouvoirs, No.47, p. 5.

**Bibliography**

Byun, Hae-Cheol, "Globalization and Electoral System", HUFS Law Review, Vol.33-4(2009.11), pp. 137 – 158.

Choi, Yooncheol, "The Right on Education for the Children of Multiculti-Family", Public Law, Vol.38-1-2(2009.10), pp. 147 - 173.

Deveaux, Monique, Cultural Pluralism and Dilemmas of Justice, Cornell University Press, 2000.

Kim, Jungsoon, Legal Study on the Social Integration of Foreign Migrants, KLRI, 2009.

Lee, Jongsoo, "Nationality and multicultural Society", in proceedings of seminar on "Constitution and multicultural Society"(2010.3), pp. 43 – 61.

Leveau, Rémy et de Wenden, Catherine, "La deuxième generation", Pouvoirs, No.47, pp. 61 – 73.
Limousin, Alain, "L'histoire de l'immigration en France : Une histoire impossible ", , Pouvoirs, No.47, pp. 5– 21.

Ryu, Sijo, "Civil Liberties in a Multicultural Society", , in proceedings of seminar on "Constitution and multicultural Society"(2010.3), pp. 83 – 104.

Cho-Sun Ilbo, January 30, 2009, p. 3.

Joong-Ang Ilbo, July 19, 2010, p. 17.

http://www.ccourt.go.kr
http://www.moleg.go.kr
http://www.moj.go.kr
http://www.unikorea.go.kr

http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm

First Session

## Global Climate Change Adaptation and Green Growth Paradigm

# Low Carbon Green Growth Act for Climate Change Adaptation and New Global Paradigm in Korea

Dr. Chan ho Park
Director of KLRI

**Introduction**

Discuss on the reduction of greenhouse gas(GHG) emissions is caught up in controversy that all recent international conferences deal with it and the international community introduces effective measures such as economic and social system including system design, green financial support and technical development for GHG reduction to respond effectively to climate change.[21] This international dimension of the actual GHG reduction efforts has been started with United Nations Framework Convention on Climate Change (UNFCC) in 1992 and The Kyoto Protocol in 1997.[22] Since the Kyoto Protocol, climate change measures developed into the auction plan to reduce GHG emissions and energy-saving issues are being instituted as a measure for reducing GHG emissions.

Challenges for addressing climate change and the Korean green growth legislation are closely related to the interaction, but there seems to be a conceptual difference between the two. Climate change system on the developed countries has been developed as a systemic design of regulations for reducing GHG emissions. The Korean green growth legislation, the Framework Act on Low Carbon, Green Growth,[23] on the other hand, focuses on not only a regulation for reducing GHG emissions but also a development strategy through green technology.[24] This approach, as new paradigm in climate change, can be a model to make all over the world including developing countries participate global climate change responses.

For the initial goal until 2012 on the Kyoto Protocol, the participating countries adopted the Bali Road Map in 2007 that developed countries would consider "measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives."[25] Meanwhile, the Bali Road Map reached that developing countries would consider nationally appropriate mitigation actions in the context of sustainable development,

[21] *See* Elizabeth Burleson, Climate Change Consensus: Emerging International Law, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 543, at 544~47(2010).
[22] IPCC, Climate Change 2007: Mitigation of Climate Change (Cambridge University Press, 2007).
[23] The Framework Act on Low Carbon, Green Growth, Act no. 9931, January 13, 2010 (hereinafter The Act).
[24] See The Act §42 command and Control of GHG and Energy Consumption.
[25] See Ad Hoc Working Group on Further Commitment for Annex I Parties under the Kyoto Protocol, Fourth Session, Bali, Indon., Dec. 3~15, 2007.

supported by technology and enabled by financing and capacity-building, in a measurable, reportable and verifiable manner.[26]

GHG reductions do not have to be limited to the extent of the responsibility on the Kyoto Protocol; rather we need to set up a desirable goal which can embrace all countries in the world into the reductions. GHG regulatory system is expected to be converted into a regulatory framework setting reduction targets based on the exact national GHG emissions and the subsequent segment, and the GHG inventory reliability of The Act would play a key role in climate change system after the Kyoto Protocol era.[27]

**Foreign Climate Change System and U.S. MRV System**

Each county has their own regulations on GHG emissions or emission trading system which are enacted i) as general act for climate change and the subsequent individual regulations for GHG emissions or emission trading; or ii) as individual acts by sectors of climate change without general act.

**The United States of America**

**Clean Air Act**

The Environmental Protection Agency (EPA) has been taking a responsibility to regulate greenhouse gas pollution under the Clean Air Act (CAA) since the U.S. Supreme court decision in 2007.[28] Unlike Korea, the U.S. EPA had denied its authority over GHG regulation, but finally the Supreme Court confirmed EPA's general authority to regulate GHG emissions on the ground that GHG was air pollutant under CAA article 202 (a) 1.[29]

[26] David B. Hunter, International Climate Negotiation: Opportunities and Challenges for the Obama Administration, 19 Duke Envtl. L. & Pol'y F. 247, at 251(2009).

[27] Harald Winkler, Measurable, Reportable and Verifiable: the keys to mitigation, in the Copenhagen Deal, Cimate Policy No. 8, at 534-35(2008).

[28] Massachusetts v. EPA, 127 S.Ct. 1438, 1446(2007): Charles De Saillan, United States Supreme Court Rules EPA must Take Action on Greenhouse Gas Emissions, 47 Nat. Resources J. 793, at 803~805(2007): the Court turned to the merits of the case, beginning with the question of the EPA's authority under the Clean Air Act to regulate greenhouse gases. The Court had no trouble concluding that the EPA had such authority. It dismissed the EPA's assertions that Congress did not intend the agency to regulate greenhouse gases, and therefore such gases do not fall within the Act's definition of "air pollutant." Such a reading is foreclosed by the text of the statute, the Court ruled, quoting the Clean Air Act's "sweeping definition of 'air pollutant'" in section 302(g). The Court derided the EPA's indicia of congressional intent as "post enactment legislative history" having little bearing on Congress's intent when it enacted section 202(a)(1). Nor was the Court persuaded by the EPA's argument that regulation of global gas emissions from new motor vehicles would interfere with the DOT fuel economy standards. The EPA's mandate to protect health and the environment is wholly independent of DOT's mandate to promote energy efficiency, and there is no reason why the two agencies cannot implement the programs to "avoid inconsistency." The Court concluded that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt" [*804] substances covered by the Clean Air Act's "capacious definition of 'air pollutant,'" and are subject to regulation under the Act.

[29] 42 U.S.C. § 7602(g).

> The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by product material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the [EPA] Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

**Authority between Federal Government Agencies**

Even after the Supreme Court decision, the U.S. government had a difficulty on deciding authority on GHG regulation among Department of Transportation (DOT), National Highway Traffic Safety Administration (NHTSA), Department of Energy (DOA), and Department of Homeland Security (DHS).[30]

On this matter, after all, the legislative basis was embarked that EPA had authority on GHG regulation and other relevant agencies could consult or participate on it based on that if several government agencies were relevant to one environmental affair then the environmental impact assessment agency had a responsibility to oversight it under National Environmental Policy Act (NEPA).[31]

**Australia**

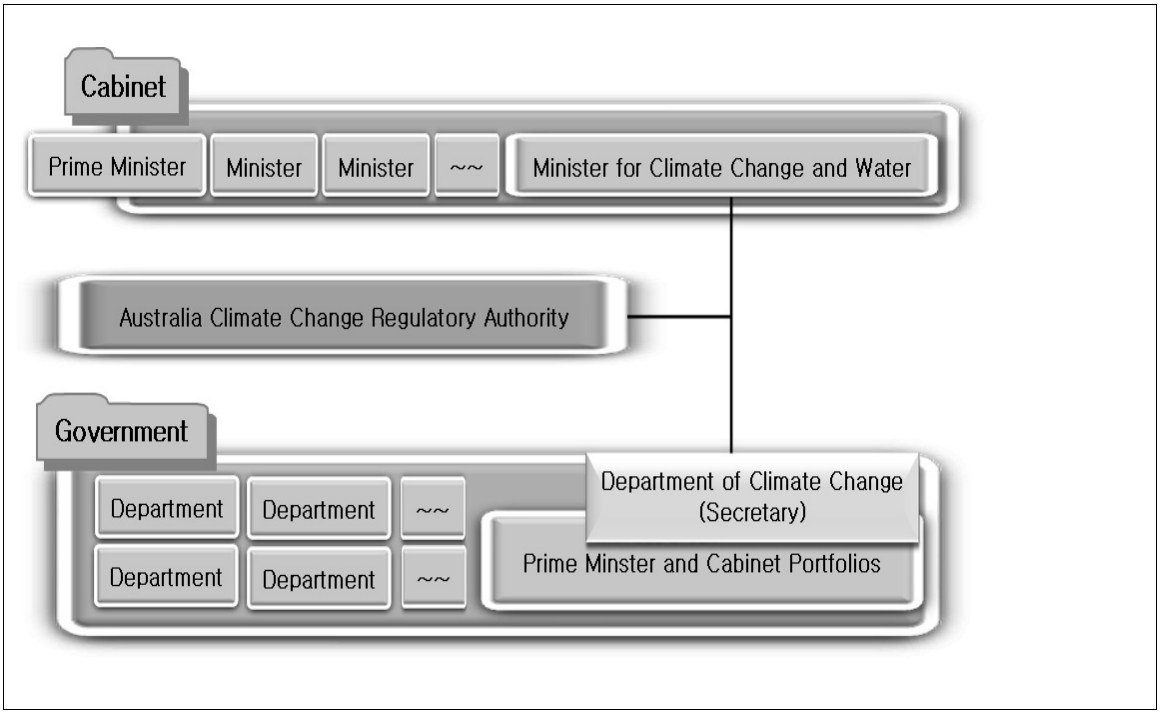
Australia build unified climate change regulatory framework through a legislation to prevent a dual regulation and to develop an effective regulatory framework.[32] The purposes of regulatory unification were to improve results and effects of the regulations by reducing the risk of conflicts between government agencies' authorities and responsibilities and to allocate reasonable responsibilities and takes by ensuring flexibility and consistency of enterprise reporting system. Furthermore, this unification plays its role to reduce GHG and to coordinate responsibilities of enterprises by lightening the burden from regulations by two or more agencies for those enterprises.

[30] There are at least two problems with the Executive Order. First, it creates only a vague mandate to "cooperate" among the three agencies rather than providing any one of them with the principal authority to develop federal climate change policy in connection with motor vehicle emissions of GHGs. Second, it vests supervisory authority in an entity, the Office of Management and Budget, that lacks expertise in the substantive scientific issues most relevant to the development and implementation of climate change policy. Robert L. Glicksman, Balancing Mandate and Discretion in the Institutional Design of Federal Climate Change Policy, 102 Nw. U. L. Rev. Colloquy 196, at 210~212(2008).

[31] 40 C.F.R. § 1501.

[32] *See* Australian Climate Change Regulatory Authority Bill 2009 - Explanatory Memorandum.

**Australia Federal Government Climate Change Regulatory Authority**

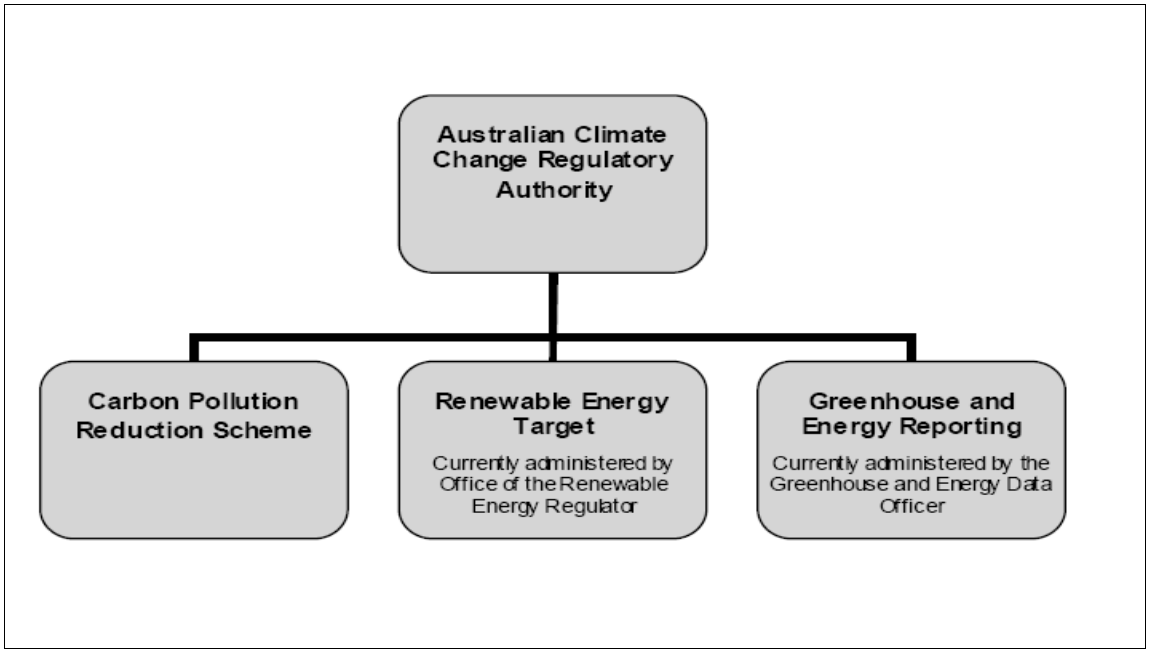



Australia also is taking on the project to establish Australian Climate Change Regulatory Authority and the relevant bill is under consideration in the Parliament of Australia. The bill is to establish the regulatory authority on following the three major climate change legislations.

. Carbon Pollution Reduction Scheme Act 2009
. National Greenhouse and Energy Reporting Act 2007
. Renewable Energy (Electricity) Act 2000

The bill enables Australian Climate Change Regulatory Authority to perform the functions of Office of the Renewable Energy Regular and Greenhouse and Energy Data Officer and new task of "Carbon Pollution Reduction Scheme," and those two existing agencies will be abolished.

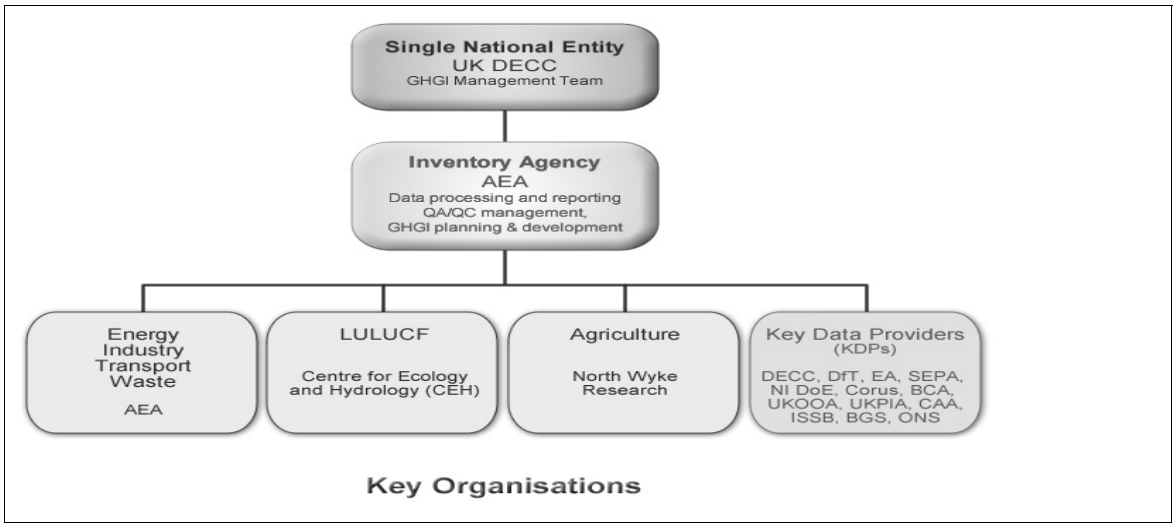
**Proposed Australian Climate Change Regulatory Authority Organization**




**The United Kingdom**

The Single National Entity for climate change in the United Kingdom was changed from Department of Environment, Food and Rural Affairs (DEFRA) to Department of Energy and Climate Change (DECC). DECC was established as a unified agency having authority on energy affairs of Department for Business, Innovation and Skills and climate change affairs of DEFRA in 2008.

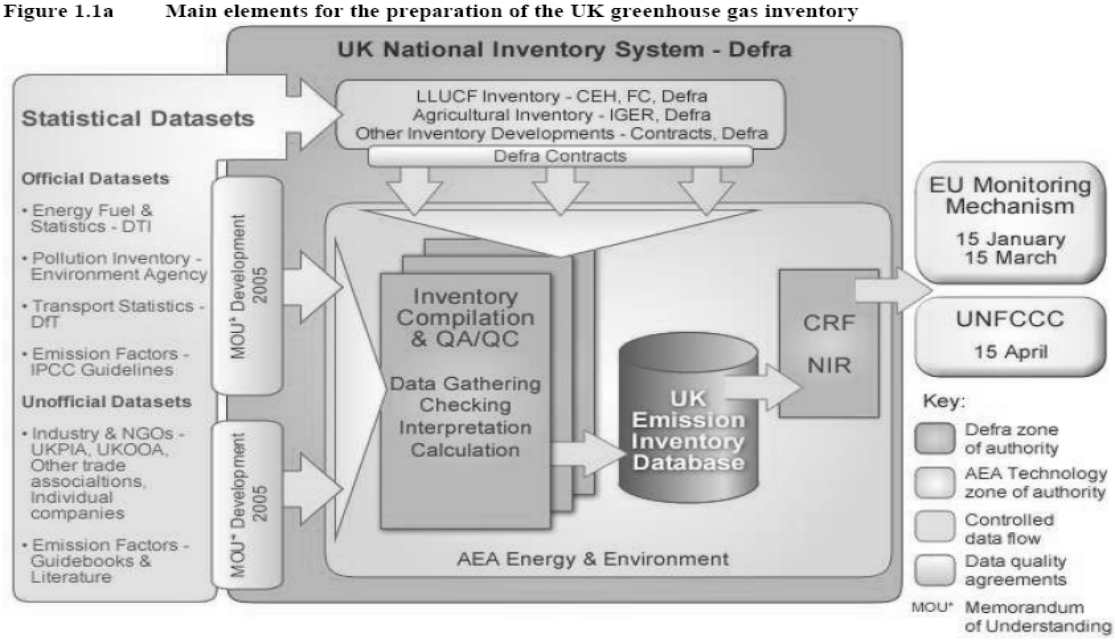
**The United Kingdom GHG Regulatory Organization**




The AEA Energy & Environment, established as the independent Inventory Agency under DECC, operates UK Greenhouse Gas Inventory National System (GHGI).

The United Kingdom GHG Inventory System

**Figure 1.1a** **Main elements for the preparation of the UK greenhouse gas inventory**




**Types of GHG Emission Reduction Targets**

Carbon Dioxide (CO2), Methane ($CH_4$), Nitrous Oxide ($N_2O$), Perfluorocarbons (PFCs), Hydrofluorocarbon (HFCs) and Sulphur Hexafluoride ($SF_6$) are the major six GHGs under the Kyoto Protocol. There are some countries which regulate other gases caused greenhouse effects than those six gases.

Types of GHG Reduction Targets

| | EU | Germany | UK | Australia | USA | Japan |
|---|---|---|---|---|---|---|
| CO2 | ○ | ○ | ○ | ○ | ○ | ○ |
| $CH_4$ | ○ | ○ | ○ | ○ | ○ | ○ |
| $N_2O$ | ○ | ○ | ○ | ○ | ○ | ○ |
| PFCs | ○ | ○ | ○ | ○ | ○ | ○ |
| HFCs | ○ | ○ | ○ | ○ | ○ | ○ |
| $SF_6$ | ○ | ○ | ○ | ○ | ○ | ○ |
| Etc. | | Duty to report | | Duty to report | Duty to report | Duty to report |

**Types of Controlled Facilities under GHG Emission Reduction Programs**

Types of Facilities regulated for a GHG emission reduction are designated in different ways by countries depending on their specific circumstances.

Standard of GHG Reduction Facility Determination

| | | |
|---|---|---|
| Germany | Standards | -Specific regulated facilities are designated by the Greenhouse Gas Emission Trading Act<br>- E*nergy-intensive* industries, *such* as facilities used energy above 20MW, refineries and the making of *steel.* |
| | quantity | 1850 |
| Australia | Standards | Facilities emit GHG above 25,000 tons and Businesses emit GHG above 125,000 tons each year. |
| | quantity | Approximately 1,000 businesses (nearly 1% of all businesses in Australia) |
| UK | Voluntary parties making a climate change contract with government to get waver of a climate change tax on energy use. | |
| USA | Businesses emit GHG above 25,000 tons each year. | |

**Mandatory Reporting of Greenhouse Gases in the United States of America**

**Background**

Discuss on the reduction of greenhouse gas(GHG) emissions is caught up in controversy that all recent international conferences deal with it and the international community introduces effective measures such as economic and social system including system design, green financial support and technical development for GHG reduction to respond effectively to climate change.[33] The United States of America and China are the key countries in GHG emissions reduction system. In fact, the GHG emission in the two countries is considerable amount in the world. Those two countries also can exercise influence to consensus on the future processes of international negotiations.

The U.S. climate change policy has changed to a positive stance since the Obama administration began.[34] The Obama administration switched over from the Bush administration's negative climate change policy to an active form and, on this ground, Mandatory Reporting of Greenhouse Gas, C.F.R (MRR) and emission trading legislations (Waxman bill, etc.) have emerged.

For the initial goal until 2012 on the Kyoto Protocol, the participating nations adopted the Bali Road Map in 2007 that developed countries would consider "measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation

[33] *See* Elizabeth Burleson, Climate Change Consensus: Emerging International Law, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 543, at 544~47(2010).

[34] David B. Hunter, International Climate Negotiation: Opportunities and Challenges for the Obama Administration, 19 Duke Envtl. L. & Pol'y F. 247(2009).

and reduction objectives."[35] Meanwhile, the Bali Road Map reached that developing countries would consider nationally appropriate mitigation actions in the context of sustainable development, supported by technology and enabled by financing and capacity-building, in a measurable, reportable and verifiable manner.[36] In sum, a construction of the MRV system applies to both developed and developing countries[37] and is the most important institutional measure for the reliability of the GHG inventory.[38]

This MRR system was enacted as MRR in the United States in October 2009. The U.S. MRR is more specific act than Europe and other developed countries legislation. The Code of Federal Regulation (C.F.R.) title 40 regulates relevant matters[39] and EPA has an authority on them under Clean Air Act (CAA).

**Overview of MRR (Framework)**

EPA has launched on MRR since 2008.[40] The Congress called for a mandatory GHG reporting system to reduce GHG emissions from all every sectors of the economy. As a part of this work, EPA enacted CFR on Mandatory Reporting of Greenhouse Gases based on CAA.[41] EPA examined its rule reporting of emissions resulting from upstream production and downstream sources to get related information about GHG emission, and setting the amount of GHG emission and the period of it are the most controversial part in the progress of MRR enactment.[42]

The GHG reporting system initiated to be discussed through open door policy and aimed to build a system for reducing or capturing up to 85% of the total amount of GHGs from businesses emitting large amount of GHGs according to the Congress's request. There was specific pollutant or energy usage reporting systems for a public purpose in federal, states, or other commonwealths as well. Indirect GHG emission other than MRR direct GHG emission was also considered. Main Issues

***Regulatory Targets and Global Warming Potential (GWP)***

MRR limits the target substances to $CO_2$, $CH_4$, $N_2O$, HFCs, PFCs and $SF_6$. Even more, the substances of HFCs and PFCs are limited by considering a measurement technology and an amount of emissions. These gases are called as Greenhouse Gases and the amount of those gases are calculated through GWP by considering global warming leverage.

The owners and operators of any facility that emits 25,000 metric tons of GHG per year should report their emission amount. Unlike Japan, Australia or UK, the U.S. MRR limits the regulation targets to facility rather than corporation or business enterprise. The Australian National Greenhouse and Energy Reporting Act (NGER) regulates GHG emissions from businesses including

[35] See Ad Hoc Working Group on Further Commitment for Annex I Parties under the Kyoto Protocol, Fourth Session, Bali, Indon., Dec. 3~15, 2007.
[36] David B. Hunter, International Climate Negotiation: Opportunities and Challenges for the Obama Administration, 19 Duke Envtl. L. & Pol'y F. 247, at 251(2009).
[37] Hunter, supra note 6, at 251.
[38] Harald Winkler, Measurable, Reportable and Verifiable: the keys to mitigation, in the Copenhagen Deal, Cimate Policy No. 8, at 534-35(2008).
[39] *See* 40 C.F.R. Parts 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054 and 1065.
[40] Consolidated Appropriation Act 2008, Public Law 110-161, 121 Stat. 1844, 2128(2008).
[41] 42 U.S.C. 85 § 7414, 7542.
[42] Environmental Protection Agency(EPA), 40 CFR parts 86, 87, 89 et al: Mandatory Reporting of Greenhouse Gases; Final Rule, Federal Register Vol. 74 No. 209. at 56264(Oct. 30, 2009).

facilities, and Japan controls those emissions from businesses or franchises as well. This difference on GHG regulation targets seems to be ground that while the purpose of GHG emission regulation was to control businesses on the premise of emission trading system in Australia and Japan, the purpose of the U.S. regulation was to collect the information for GHG inventory system. MRR establishes that GHG emissions reporting targets are owners and operators of certain facilities that directly emit GHG as well as certain fossil fuel suppliers and industrial GHG suppliers.[43]

***Reporting Methods***

The MRR has been effective since January 1, 2010 and the annual GHG report must be submitted no later than March 31 of each calendar year for GHG emissions in the previous calendar year.

Each annual GHG report shall contain the following information: ①total quantity of GHG aggregated for all GHG from all applicable sources, ②total quantity of GHG aggregated for all GHG from materials depending on the type being supplied for the production, ③the amount of electric power generation (in kilowatt-hours), ④ the amount of produced synthetic fertilizers and nitrogen in it, and ⑤ activity data such as GHG information in the facility unit or process, ⑥QA/QC datas and etc.

The reporter should get a certification for their emission reports from institutions or individuals pre-certified by EPA prior to submitting the reports to EPA.[44]

***Measurement of GHGs for Car Engines***

The U.S. GHG emission system requires the GHG emission facility to report their emission data to EPA and to be under EPA's oversight based on those reports.[45] As a result, it actually affects energy manufacturers and suppliers such as fossil fuel suppliers and industrial gas suppliers, direct greenhouse gas emitter, large vehicles and special purpose vehicle manufacturers and of those engine manufacturers.[46]

Generally, GHG emissions are measured by the end-product production process in case of the reporting system by businesses emitting those gases. The U.S. MRR system, however, requires not the business but the facilities emitting GHG gases for the purpose of GHG inventory system construction. For this reason, on the vehicle GHG emission matters, engine manufacturers are responsible to report the amount of GHG emission in the processes of manufactures and the estimated amount of GHG based on the average utilization rate of those engines in the United States of America.

**Review**

The U.S. MRR announced in October 2009, in fact, affects energy suppliers, chemical manufacturers and suppliers, its attendant direct GHG emitters, vehicle and engine manufacturers and other several facilities. The EU MRV system has already implemented and the national GHG emission are reported by the UNFCC recommendation. The U.S. MRV system has implemented since December 29, 2009. The EPA has authority on the U.S. MRV system of CFR under the CAA.

[43] Focus, Mandatory Greenhouse Gas Reporting Proposed, 19 No. 4 Air Pollution Consultant 4.1(2009).
[44] Mandatory Reporting of Greenhouse Gases(Code of Federal Regulation) §98.3 and § 98.4.
[45] Environmental Protection Agency(EPA), 40 CFR parts 86, 87, 89 et al: Mandatory Reporting of Greenhouse Gases; Final Rule, Federal Register Vol. 74 No. 209. at 56260(Oct. 30, 2009).
[46] *Id.*

For a global climate change response, the Kyoto Protocol and the Bali Road Map urges to build an effective system for GHG emission reductions. Kyoto Protocol and the Bali Road Map requires developed countries to set quantified emission limitation and reduction objectives; for developing countries, they still announces abstract action plans including effective measures for GHG emission reductions. However, both developed and developing countries urgently need to establish a "measurable, reportable and verifiable," MRV system. The emission trading is the most-talked-about system with GHG emission reductions in climate change agenda. The emission trading is a regulatory mechanism through a market and the GHG inventory reliability based on MRV system would be the key for the successful introduction of emission trading system. For this reason, developed countries are making a connection between the allocation of emission trading and the GHG inventory.

In contrast, it is not clear that the MRR bases on quantified emission limitation and reduction objectives through effective regulatory measurements or emission trading system. Rather, it seems to regulate GHG emissions by reporting from specific facilities emitting the large amount of GHG. Nonetheless, emission trading scheme will be discussed before long in the light of fact that the Waxman bill is currently in the Congress.

The Korean Framework Act on Low Carbon, Green Growth is introducing the target management system in MRV. The government directly regulates facilities emitting the large amount of GHG. Therefore, the emission trading legislation should be linked with this target management system.

**Review of Korean Framework Act on Low Carbon, Green Growth**

**Overview**

In December 2009, South Korean government enacted the Framework Act on Low Carbon, Green Growth for sustainable pushing ahead and streamlining regulations. Also, in April, enforcement ordinance came into effect in order to establish a firm foothold for pushing ahead major green growth policy starting 2010.

The purpose of this Act is to achieve reduction in greenhouse gases and energy conservation at the same time. The political background to achieve this purpose is stated "measure of climate change," "sustainable development," and "enhancement of energy efficiency." Also, the background brought the framework on the establishment of "the Green Growth Committee" and authorized it to do as a deliberating function for arrangement tasks between government agencies and sustainable enhancement of green growth policy.

This Act consists of seven chapters and sixty-four provisions from the establishment of national strategy for green growth to the specific fulfillment, and it regulates on reduction of GHGs and energy conservation.

The primary characteristic of the Act is that the system of this Act connects both reduction of GHGs and energy consumption in parallel, and accomplishes both of them. This is similar to the legal system which regulates the standard of GHGs and energy use under the object of MRV system in NGER in Australia. However, major countries such as the U.S. and the E.U., take unified regulative object that the object of standard is only GHGs.

The Act can be divided in four parts. The first part, enhancement system of government, is divided in central and local Green Growth Committee and establishment of governmental enhancement

plan for unifying the institution of regulation, supervision, and arrangement. The second part consists of establishment of institutional framework for corporations such as green growth industries and financial supports in order to actively handle with the measure of climate change.

The third part regulates MRV System, Registry, and Verification etc. which are the core of the Act. Also, this part set up the basic rules about the emission trading system.

The fourth part enacts the policy concerning transportation, construction, and land development which are expected to substantial reduction effects. Within these parts, South Korean government tries to switch to the newer legal system with introducing legislation in order to change existing laws concerning energy problems such as Energy Act, Sustainable Development Act, Air Environment Conservation Act and etc.

Moreover, the government primarily takes method to achieve reduction of GHGs and energy efficiency through the regulation, and it tries to find measures to support.

The basic frame of this regulation is introduced specific legal measures to regulate from MRV system in Australia, the United States, and European countries to regulate in the Framework Act on Low Carbon, Green Growth in South Korea. MRV System does not end as mere regulation, but systemize the emission trading scheme and national plan for reduction of GHGs. Therefore, the reliability of this system is very important point.

**Issues under the Act**

As a generalized law which is covering existing energy-related laws, environmental laws, sustainable development laws, this Act is intended to develop a new model for measure of climate change with establishment of national policy concerning the Bali Roadmap under the Kyoto Protocol. Although this Act seemed to be a generalized law as politically enhanced method, we need to examine the problems for unifying the object of the regulation with comparison to the laws of other countries. This is to reduce the shock in the market through the achievable regulating measures, because this Act, which established two main purpose, reduction of GHGs and energy conservation, may bring some legal problems.

According to the legislative trend of the measure of climate change in foreign countries, the trend classifying the regulation and support is distinct. Also, it has legislative effort for establishing reduction of GHGs system using MRV method under the 2007 Bali Roadmap. Especially, it establishes the reliability of the National Greenhouse Gas Comprehensive Information Management System (National Inventory), and organizes institutional connection system such as emission trading system.

In legislative trend of the foreign countries, we need to focus that inevitably accompanied regulation for measure of climate change or green growth is followed by environment related laws, and that support plan such as Feed-In-Tariffs system as an institutional measure through the energy related laws.

This paper examines the Act and enforcement ordinance based on following issues:

- Establishment of plan for reduction of national GHG
- Support to development and business of green-technology
- Introduction of target management system of GHG and energy

**Establishment of plan for reduction of national greenhouse gas**

Article 25 of the enforcement ordinance on the Act states that national reduction plan of GHG is to reduce 30% compared to 2020 BAU forecast of emission, which is based on the Article 42, paragraph 1 of the Act. Since South Korea is not obliged country yet to reduce GHG, it does not need to state national greenhouse gas reduction target under 2009 Bali Roadmap. Also, it is doubt whether the reduction target has actual effect under its forecasts.

Article 25, paragraph 1 of the enforcement ordinance on the Act states that national reduction target is to reduce 30% compared to BAU forecast based on the Article 41, paragraph 1(1). Compared to the reduction targets of foreign countries, this standard is the same reduction target under the GHG total emission, but somewhat flexible reduction target excluded standard year. However, establishment of reduction target under the standard of emission forecasts is not a problem under international law, because Korea is not an obliged country to establish reduction target based on the standard year under the Kyoto Protocol and Bail Roadmap. Rather, since Japan presents reduction target only as its policy and does not enact, it is presumed as preemptive measures to stress the developing countries' participation.

Other foreign countries enacted and stated under laws with based on standard year of 1990 under the Kyoto Protocol.

Although to enact and state greenhouse gas reduction target seemed a burden to its industries on the surface, it practically can be functioned as institutional tools to regulate some changes of reduction target due to the international negotiations. Especially with the establishment of sectional reduction target, it can be a guideline concerning the national economy and industry, because the reduction of each industrial sector can be adjusted by reflecting national total reduction.

**Support to Development and Business of Green-Technology**

Support to development and business of green-technology, which is stated in the Article 29 and 16 of the enforcement ordinance on the Act, is the government's practical support system to ease the burden of regulation for the measure of climate change. However, as stated above, it is anticipated that many corporations apply management strategy which stresses corporate social responsibility to show their efforts to reduce greenhouse gas. It can be possibly occurred to green bubble.

The important purpose of the Act is to make corporations bring a new development power as green industry through the government's financial support for developing green technology, and to develop a new model for the measure of climate change which can be connected with each other.

Considering current circumstances that failed to introduce carbon tax (costs) under the Act and related laws, and failed to enhance measures to support substantial industries due to the government's financial burden, the governmental support for developing green technology is the main factor for the green growth. In other words, it is important to establish support system for green technology development to achieve the purpose of law while it prevents green bubble.

The Act and its enforcement ordinance takes a method, which establishes green investment firm through public institute's investment that makes funds through private financial market for creating green banking. The established green investment firm either invests more than 60% of its total amount of fund, trust fund or capital to green technology or business, or invests to a corporation which has a marketing division of certified green technology and business with that more than 30%

its total sales are from green sales. This is institutional plan to prevent green banking, which is directly injected government funds, from investing in name only green product.

**Introduction of Target Management System of GHG and energy**

The target management system of GHG and energy is the most controversial part under the Act and its enforcement ordinance. The controversial issues were (i) establishment of institution to regulate six GHG materials which were not a substantial object to be regulated under existing Korean laws, (ii) guideline to select a management agency which can directly effect to industry, and (iii) justification of regulation under proceedings of target management. Especially, institutional plan is the most important part to prevent a dual regulation and to unify the target management of GHG and energy stated under the Act.

Moreover, target management system can be successful to achieve the reduction of GHG through assessing, allocating and trading of emissions with substantially connection to laws of the emission trading scheme which is prepared to enact for the introduction of limited amount emissions trading scheme under the Article 46 of the Act.

Under the procedural aspect of target management, it is anticipated that result report for target management under the Article 42, and statement report and verification under the Article 44 are possibly duplicated. This issue was to institutionally or procedurally unify each other, because this can be much burden to corporation as a regulation receiving organ.

Although it is not clearly defined under the Act, the Green Growth Committee is charge of final deliberation of the policy, and each government agencies takes the related policy. This problem occurs conflict and redundancy of the policy. It is potential problem that the Green Growth Committee does not have any legal authority to arrange for the substantial management of its policy.

Unlike Korea, the Ministry of Environment is charge of the task in foreign countries. Some country such as Australia established the Climate Change Division to unify both establishment of policy and enforcement system. However, foreign countries could easily unify the system because they regulates only GHG, and recognizes energy conservation as a method for reduction of GHG. Unlike that of foreign countries, Korean laws in executive agencies such as the Ministry of Environment or the Ministry of Knowledge Economy are directly conflict each other, because Korean government regulates both reduction of greenhouse gas and energy conservation as the same purpose and object of regulation.

The legal system in Japan is similar to Korean's one. To solve the problem, the report of GHG emissions from "specific emission company (management company in Korea)" need to be reported to related central government agencies, and the agencies must report it to the "Japanese Ministry of Environment and the Ministry of Economy and Industry."

Since the United States, the European Union, and Australia regulate only GHG as an object of regulation, the Ministry of Environment is solely charge of the tasks. Especially in the United States, it was possible to unify the tasks to the EPA because frame article related to regulating GHG was stated in CAA which is the Act in charge of the EPA, and amended to CFR by enacting MRR in December, 2009.

The existing enforcement ordinance is similar to the system of Japan, but it stated that the Ministry of Environment takes the role as a Single Entity, and that sectional governmental agency becomes a subject to administrative action. The basic reason why South Korea cannot be applied the model in

the United States or Japan is that the administrative action is necessary for establishing target from government agencies because Korea introduces target management system separately as well as the emission trading scheme. In other words, it is politically not easy to unify to one governmental authority to regulate GHG separately from the administrative action of each agencies, because "the Ministry of Knowledge Economy," "the Ministry of Land, Transport and Maritime Affairs," "the Ministry for Food, Agriculture, Forestry and Fisheries," and "Ministry of Environment" are in charge of the tasks under the classification system of IPCC.

That is, although international trends of GHG regulation is that the Ministry of Environment is unified as a sole authority, Korean system which is divided to sectional agency, primary one (the Ministry of Environment), and policy deliberation one (the Green Growth Committee), can be an appropriate model with considering legal system and relations among the authorities of government agencies.

**Unification of Target Management**

With comparison to the foreign laws, it is an inevitable result and anticipated the chaos to enforce the Act, because the Act regulates both GHG emissions and energy conservation.

As this result, the Article 47 of the Act stated that each the Ministry of Knowledge Economy and the Ministry of Environment defines the standard for "the efficiency of average energy consumption of automobiles and allowable emission of greenhouse gases from automobiles." However, since the vehicle manufacturer, as a receiving object of regulation, is allowed to choose the measuring method, it is doubt to achieve substantial effects. In other words, under the Korean legal system, it is divided into two legislative purposes, reduction of GHGs and energy conservation. However, most of the bills in the foreign countries such as Japanese "the Act on Measures of Global Warming," "20-20-20 General Bill" of the European Union, Australian "Carbon Pollution Reduction Scheme Bill," and "Waxman Bill" of the United States are set "reduction of greenhouse gas" as a purpose of law, and unified GHG as an object of regulation.

To evaluate the Act and its enforcement ordinance within this aspect, it is still set two parallel object of regulation that only states combined management both GHG and energy. However, it is defined to establish GHG centered information system through the Article 26, paragraph 1 and Article 36 (Management system of general information) of the enforcement ordinance. It, therefore, seemed to be built the frame to unify for improvement of system such as the emission trading scheme in the future.

It is appropriate to establish target management of GHG and energy as the formation stated below.

**Selection of Management Company**

Management Company means a receiving regulation object that is appointed by government due to its excessive emission of GHG and excessive usage of energy. Since the management company is directly regulated and obligated to reduce GHG and conserve the energy, the standard is controversial issue.

To appoint the management company, the first issue is whether the object is each facility or corporation based on business management power. The second issue is how to decide the standard of GHG emission.

Under the existing Act and its enforcement ordinance, it appoints the corporation with the standard of corporate body, which is with more than 25,000 tons of GHG emissions and more than 100 terajoules of energy usage.

In Japan the separated standard is established in accordance with business sectors such as cement or iron, but changed to corporate unit after the amendment in 2008. In the United States, the management facility is appointed with which emits more than 25,000 tons of GHGs.

In Korea, it is established the standard in accordance with the unit of corporate body that can be added a place of business under the enforcement ordinance. Unlike other countries' standards, this is to impose a duty to the CEO of the corporate body who sustains management power due to the obliged reduction system as the target management. In the United States, if a person in charge of reports related contents precisely, all of proceedings are ended, because it is only necessary to report the amount of GHGs emissions or usage of energy under MRR. That is, it is possible to establish the standard in accordance with the place of business unit because they do not have any obligation to reduce such as an executive order. In Korea, however, it is appropriate to impose the responsibility to corporate body under the system which includes an administrative action under the Act, and has its duty to report the implementation plan and the result of reduction.

Although there was a resistance against the appointment in accordance with corporate unit under the enforcement ordinance, it is merely a rationale to oppose. If it establishes the total amount in corporate unit, it is combined to report the data of the amount of GHG emissions and usage of energy of each place of business. However, the company which is not appointed the place of business may only establish the total target of reduction. In this case, corporation can manage the amount of reduction flexibly based on its yearly business result and management strategy of each business sector of the corporate body. This may bring the substantial result to ease the burden of regulation.

**Conclusion**

To evaluate green growth under the legal aspect, it is implicit multiple definition, and achievable to manage harmoniously among justification of regulation to GHG, its supports and development of technology. These regulations should be supported by legislative efforts such as ① promoting system (unification of regulating authority), ② rationalization of regulated object, ③ rationalization of regulating measure and method, ④ finding an appropriate measure to support in accordance with a new regulation. The legislative direction related to the regulation is summarized by rationalization of regulation system. However, an introduction of a measure to support needs to be considered as legislative issues such as introduction of carbon tax and prevention of green bubble under green marketing of corporations.

Under the aspect from the regulation, the important principle of the climate change policy is to establish an accurate and efficient regulation system, and this may directly effect to the economy (Better Regulation Committee (BRC) of the United Kingdom Stern Review). The regulation against GHG is introduction of a new regulation system to the law, and is establishment of an appropriate regulation system with considering the existing regulation system such as energy efficiency.

Other countries' policies concerning the measure of climate change proceed with focusing on the reduction of GHG. Also, the improvement of energy related system such as increasing energy

efficiency is considered as one of the most important measures for reduction of GHG. The introduction of various regulation systems for reduction of GHG is considered as an aspect of social costs, and this regards as the change of general social system for introduction of new regulation system.

That the most important role of the government for substantial reduction of GHG is to establish efficient regulation system to prevent dual regulation is a common issue among countries. With a new regulation system, that is, with a presumption that the GHG reduction is a new sector of environmental regulation, there is a conflict with existing regulation of air pollution material and regulation of energy efficiency.

From the perspective of people or corporation, the conflicts among the regulation are considered as increase of administrative burden and additional costs for obliged reduction. Also, from the perspective of government, the regulation is considered as increase of administrative burden for introduction of the emissions trading scheme and establishment of inventory, and as financial burden for support in order to offset the regulation against corporations.

For this practical issue and the issue of redundant regulation, the Department for Environment, Food and Rural Affairs (DEFRA) in the United Kingdom states an important principle that it possibly occurs redundant regulation in some sector for reduction of GHG. As the important principle, that a policy is paralleled by which promotes understanding of industry is a helpful guidance for Korean government to enhance the hesitant policy due to the regulative burden.[47]

[47] DEFRA, The Government's Response to the Better Regulation Commission's Report, at 5(2007)

# Compatibility of Indonesian Act No. 32 of 2009 in Responding to Climate Change Issues

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**PREFACE**

In responding to global issues , a lot of efforts have been undertaken by the government of Indonesia. Among others, the enactment of several rules and regulations which provide the mechanism and instruments to combat and abate environmental pollution and damaging. So far, after the ratification on United Nation convention on Climate Change in 1994, the Indonesian government has issued a lot of new acts and governmental regulations to replace the previous acts and governmental regulations which were considered no longer potent enough to respond to global issues.

The new acts and governmental regulations that are now in force concern several importance aspect of activities that might contribute to climate change issues. They are acts and regulation on forestry, mining , energy, oil and natural gas and etc

Above all, a new integrated environmental law recently was passed concerning the Protection and Management of Environment. This act serves as an umbrella act for other environmental rules and regulations.

Actually this new environmental act is the third environmental act the government of Indonesia has ever issued. Ten years after the Stockholm Conference, precisely in 1982 we managed to enact our first environmental law act ( the act No 4 of 1982). It was in force only 15 years. This act later on was revoked and replaced by the second environmental act (the act No 23 of 1997) which was passed in 1997 and was in force for 12 years. To adapt to present issues finally in October last year the government enacted a new environmental act ( the act No 32 of 2009) which is expected to be able to respond to present domestic and global issues.

Looking into the Environmental Act No 32 of 2009, we will find out some considerations which encourage the government to pass a new environmental act. They are :

1. The good and healthy environment is the basic right of every Indonesian citizen as it is prescribed in article 28 H of our constitution
2. The development of our national economy as it is prescribed in our constitution is carried out based on the principles of sustainable development and environmental oriented
3. The spirit of regional authority in carrying out the government of united state of republic of Indonesia has brought about the changes in relation and authority between central government and local government, including in the field of protection and management of the environment.
4. The degradation of environment quality has posing a threat to the sustainability of human and other living things' livelihood , therefore it is considered necessary to protect and manage the environment seriously and consistently by all stakeholders

**What has the Indonesian government done to respond to global issues ?**

To respond to the global issues the Indonesian government has passed lot of rules and regulations. Among others are :

- The Act No 6 of 1994 on Ratification of UN Climate Change Convention.
- The Act No 41 of 1999 on Forestry
- The governmental Regulation No 45 of 2004 on Forestry Protection
- The Governmental Regulation No 4 of 2001 on Controlling Environmental Pollution and Damaging Relating to Forest and Terrain fire
- The Act No 22 of 2001 on Oil and Natural Gas
- The Act No 30 of 2007 on Energy
- The Act No 4 of 2009 on Mineral and Charcoal Mining
- The Act No 32 of 2009 on Protection and Management of Environment

**THE ACT NO 32 OF 2009 ON THE PROTECTION AND MANAGEMENT OF ENVIRONMENT**
**What are the considerations to enact this new act ?**

According to the act the considerations taken by government to enact this act are:

1. The good and healthy environment is the basic right of every Indonesian citizen as it is prescribed in article 28H of our constitution
2. The development of national economy as it is prescribed in our constitution is carried out based on the principles of sustainable development and environmental oriented
3. The spirit of regional autonomy in carrying out the government of united state of republic of Indonesia has brought about the changes in relation and authority between central government and local government, including in the fields of protection and management of the environment
4. The degradation of environment quality has been posing a threat to the sustainability of human and other living things' livelihood, therefore it is considered necessary to protect and manage the environment seriously and consistently by all stakeholders

What is the environment according to the Act No 32 of 2009 ?

According to the Act No 32 of 2009
The environment is the spatial entity with all objects, potentials, conditions and living organism, including man and his behavior, which influence the nature itself, continuance of the life and welfare of man and other living thing organism

This act contains 3 branches of law :

- Administrative Environmental Law
- Criminal Environmental Law
- Civil Environmental Law

Each branch of law has its own instruments for preventing and abating environmental pollution and environmental damaging

**Rights prescribed in the law No 32 of 2009**

1. Right to live in good and healthy environment as part of basic right
2. Right to obtain environmental education. Access to information, participation and justice in

carrying out the right to the good and healthy environment
3. Right either to propose or to object to a plan of an activity which has been assumed to bring impacts to environment
4. Right to participate in protection and management of the environment according to environmental rules and regulations
5. Right to complain due to the assumption of environmental pollution or environmental damaging

**Duties of everyone prescribed in The No 32 of 2009**

1. To conserve environmental function and to control environmental pollution and damaging
2. For the doer of an activity, he or she has an obligation to deliver information concerning the protection and management of the environment correctly, accurately, openly and at the right time.
3. For the doer of an activity, he or she has the obligation to maintain the sustainability of the environmental functions and to comply with rules and regulations regarding environmental quality standard and criteria of environmental damage standard.

**Principles prescribed in the Law No 32 of 2009**

- Principle of state responsibility
- Principle conservation and sustainability
- Principle of corresponding and balancing
- Principle of integrity
- Principle of advantage
- Principle of precautionary
- Principle of justice
- Principle of ecoregion
- Principle of living variety
- Polluter pays principle
- Principle of participation
- Principle of local wisdom
- Principle of good governance
- Principle of local autonomy
- Principle of strict liability
- Principle of burdens of proof
- Principle of subsidiary / ultimum remidium

**The objectives of the protection and management of environment**

- To protect Indonesian territory from environmental pollution and damaging
- To guarantee the safety and healthy of the life of human being.
- To guarantee the sustainable life of beings and the conservation of ecosystem
- To maintain the functions of the environment
- To reach the harmony and the balance of the environment
- To guarantee that the justice is done for present and future generation
- To guarantee the fulfillment and the protection of environmental right as part of basic right
- To control the utility of natural resources wisely
- To realize the sustainable development
- To anticipate the global environmental issues

**The Environmental Administrative Law**
The instruments provided by The Law No 32 of 2009 In The Prevention phase

- The Environmental Strategic Study
- Zoning
- Environmental Quality Standard
- Environmental Damage Quality Criteria
- Analyses Concerning Environmental Impact
- Environmental Management And Supervision Efforts
- Licensing
- Environmental Economic Instruments
- Environmental Based Rules And Regulations
- Environmental Based Fund
- Environmental Risk Analyses
- Environmental Audit
- Other Instruments Needed Later According To The Development Of The Science And Technology

**Environmental Strategic Study**
Is a document prepared by central and local government to assure that the principle of sustainable development has become the base and integrated into the development of certain area and/or discretion, planning and/or program

**Strategic environmental study contains the studies of :**

1. Environmental supporting and receiving potentials for development
2. Environmental impact and risk analysis
3. Service performance/ecosystem service
4. Efficiency of natural resources utilization
5. Degree of vulnerability and adaptation to climate change

**Zoning**
Zoning involves the designation of certain area as restricted to particular uses, such as industrial, commercial or residential area from industrial zone.

**Environmental quality standard**
To determine whether the pollution has occurred, the environmental quality standard is needed to measure it

**Environment Quality Standard composes of**

- Water quality standard
- Wastewater quality standard
- Seawater quality standard
- Ambient air quality standard
- Emission quality standard
- Nuisance quality standard

- Other quality standard according to the development of the science and the technology

**Criteria of environmental damage standard**
To determine the occurrence of environmental damage, criteria of environmental damage standard is stipulated
Environmental damage standard criteria consists of :
Ecosystem and climate change damage standard criterion

**Criteria of ecosystem damage standard consists of :**

- Damage standard criteria of land for the production of biomass
- coral
- forest burning
- mangrove
- meadow
- peat moss/tuft
- karst ( rough limestone country with underground drainage )
- Any other damage standard criterion according to the development of science and technology

**Criteria of climate damage standard consists of :**

- The rising of temperature
- The rising of sea surface level
- The storm
- The drought

**Analysis concerning environmental impact / ACEI**

It is actually a whole process which consist of four documents. They are :

- Frame of reference
- Environmental impact analysis
- Environmental management plan
- Environmental monitoring plan

**What is The Analysis concerning environmental impact ?**
It is actually a tool for planning preventive action against environmental damage that might result from a planned development activities

**What the definition of ACEI as prescribed in the act No 32. 2009 ?**
A study concerning significant impact of an planned business and/or activity to environment that is needed for a process to make a decision regarding the operation of the business and/or the activity.

**What kind of business/activity that is obliged to have the ACEI ?**
According to article 22 (1) of the act no 32. 2009 : Every business/activity which results in significant impact to the environment has to own ACEI

**Environmental management effort/ environmental monitoring effort**

- The business and/or activity that is not obliged to have ACEI is obliged to prepare Environmental management effort and Environmental monitoring effort.
- Governor or Regent/mayor will determine the type of business and /or activity that is obliged to be equipped with Environmental management effort and Environmental monitoring effort

**PERMIT/LICENCING**

Kinds of permit which relate to the establishment of business/activity

- Location permit
- Permit to build a building
- Business place permit/Nuisance permit
- Business permit
- Waste water discharging permit
- Emission discharging permit
- Environmental permit, etc

**ECONOMIC INTSTRUMENTS**

1. In the framework of conserving environmental function, the central and local government are to develop and stipulate the environmental economic instruments
2. The so called economic instruments consist of
   a. The planning of economic development and activity
   b. The environmental funding
   c. The Incentive and disincentive

3. The planning of economic development and activity consist of :
   a. The balance of natural resources and environment
   b. The arrangement of gross domestic product and gross regional domestic product which include the arrangement of natural resources and environment
   c. The mechanism of interregional environmental compensation
   d. The internalization of environmental expenditure

4. The environmental funding instruments consist of :

   a. The guaranty fund for environmental restoration
   b. The environmental pollution, damage, and restoration fund.
   c. The trusteeship fund/ aids for conservation

5. The incentive and disincentive are applied in the forms of :

- The provision of goods and services which are harmless to the environment
- The application of the environmental tax, retribution and subsidy
- The development of the system of financial institution and capital market which are harmless to the environment
- The development of trade system of waste water/emission discharge permits
- The development of system of payment for environmental services

- The development of environmental insurance
- The development of environmental harmless labeling system
- The development of appreciation system for good performance in the field of environmental protection and management

6. The further provisions concerning economic instruments will be elaborated in the coming governmental regulation

**Environment based fund**

1. The Central Government, the Central People Representative Body, The Local Government and The Local People Representative Body are required to allocate reasonable fund to pay for :
    - Environmental Protection and Management Activities.
    - Environmental Development Program

2. The government is required to allocate special reasonable environmental allocation fund to contribute to any local government which has good performance in protecting and managing environment

3. Besides, in the framework of restoring the environment which has suffered degradation because of environmental pollution and damaging by the time this Act is being enacted, the central government and the local government are required to allocate some funds for the restoration of the environment

**ENVIRONMENTAL RISK ANALYSIS**

Every business and or/activity which has the potential to cause significant impact to environment, to produce a threat to ecosystem, life, health and safety of human being, is required to prepare Environmental Risk analysis.

The environmental Risk Analysis consists of :

- Risk Study
- Risk management
- Risk Communication

Followup provisions of this matter will be prescribed in the coming Governmental Regulation

Environmental Audit

1. The government encourage the managers of business and or/ activities to prepare Environmental Audit in the framework of upgrading their environmental performance
2. The Minister of Environment requires preparation of Environmental Audit to :
    - Certain business and or/activities which have high risks to environment
    - Managers of business and or/activities who show no compliance to environmental rules and regulations
3. Managers of business and or/activities are required to carried out environmental Audit

**Administrative sanctions**

- Written admonition
- Executive Coercion
- Environmental permit freezing
- Environmental permit revocation

**CIVIL ENVIRONMENTAL LAW**

Dispute/Legal Controversy Resolution :

1. In the court/ litigation
2. Out of the court / non litigation

The choice of the way to resolve the controversy is done voluntarily by the parties of the dispute. Litigation can only be carried out if the effort to resolve the dispute out of the court as it have been chosen by the parties is stated fruitless by one of the party.

**NON LITIGATION**

1. Non litigation way of resolving the dispute is meant to reach an agreement concerning:
the form and the amount damage
the restoration measure after the pollution or damaging
certain measure to assure that there will not be any more pollution or damaging.
The measure to prevent the coming up of negative impact to environment.

2. In resolving dispute out of the court, the service of mediator or arbiter can be utilized
society can establish free and impartial institutions that provide the service of resolving out of court dispute.
Government and local government can facilitate the establishment of that kind of institution

LITIGATION

Kinds of liability :

- Liability on fault ( artical1365 of Civil code/ article 87 of the Act No 32 of 2009)
- Liability on risk / Strict liability( article 88 of the Act No 32 of 2009 )

If strict liability principle is applied, the shifting of burdens of prove principle is also applied to neutralize the unfairness

**What is the criteria of the business/activity that can be imposed strict liability principle ?**

The criterias are :

- They use dangerous and poisonous substance
- They discharge dangerous and poisonous waste
- They produce a serious threat to environment

**WHO HAVE LEGAL STANDING ?**

1. The persons who have direct interests,person, legal person (corporate/state)
2. The persons who don't have direct interests ( persons whose livelihood are disturbed )
3.The NGO ( this institute represents the environment )
4. The person who are outside of the sufferers' group but so concerned with their environment

**What the requirements for the NGO in order be allowed to bring suit ?**
The requirements are :

- They must have legal person status.
- They must have a statute
- They must have rules of association
- In their statute must be a statement that their main duty is to conserve the environment and they have done it

**How to bring suit in environmental case ?**

- one by one ( if the amount is not too many)
- in a group ( class action ) ( if the amount is too many )

**CRIMINAL ENVIRONMENTAL LAW**
**KINDS OF CRIME PRESCRIBED IN THE ACT NO 32 OF 2009**

- Formal crime = the crime of which prosecution based on the act committed
- Material crime = the crime of which prosecution based on the negative impact of the act committed
- Corporate crime = the crime committed by a corporate

**Who can be the suspects in criminal case?**
They are :

- the doer
- the co doer
- the helper
- the inciter

**Who can be the suspects in environmental corporate crime ?**
They are :

- The one who gives order
- The one who act as the manager of that corporate
- The lower employee who commits environmental crime merely in order to execute his or her employer' order is not prosecutable

**What are the criminal sanction prescribed in the Act No 32.2009 ?**
They are :

- Fine , maximum of 15 billions
- Imprisonment, maximum of 15 years

**How to enforce criminal environmental law ?**
Through principle of Subsidiary
The criminal environmental law will be enforced as an alternate remedy if some requirements are fulfilled.
The requirement are :
1. Effort to resolve the case through administrative measures and civil proceedings proves ineffective.
2. The fault of the polluter/damager is so severe

3. The negative impact of the pollution or damaging to environment is so great
4. The pollution or damaging has caused social unrest
5. The preliminary proof is enough
6. The perpetrator is clear

# CRITICAL NOTES FROM PANELIST

## ADOPTING GREEN PROVINCE POLICY IN PURSUING GREEN REGIONAL GOVERNANCE

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A. Green Growth in Development[48]

Over centuries, even today, environment and economic is like two sides of a coin, people cannot neglect each other even if in the reality they do. Balancing the need to pursue economic growth and protetion of environment, it is now emerge the jargon of "green growth". Green growth term, indeed, is not a brand new idea. It is based on the "ecological efficiency" paradigm, in which advocates growth in Gross Domestic Product (GDP) that maintains or restores environmental quality and ecological integrity, while meeting the needs of all people with the lowest possible environmental impacts.[49] Ecological efficiency thus can be defined as a strategy that seeks to maximize economic output while minimizing the ecological burdens. In the common economic analysis of environmental problem, this strategy suits to the concept of internalized the externalize.

The ecological efficiency approach seeks to harmonize economic growth and environmental sustainability by promoting fundamental changes in the way societies produce and consume, as called for in the Johannesburg Plan of Implementation (JPoI).[50] It is a comprehensive and holistic approach designed to encompass and integrate the three pillars of sustainable development: economic development, social development and environmental sustainability.[51]

The ecological approach, so called as Green Growth approach, thus endeavors to synchronize economic development with environmental sustainability into coherent decision making, planning and implementation processes at all levels of governance (green governance). It attempts to initiate both system and policy changes, to present the environment as an opportunity for economic development while ensuring future sustainability.[52] Green Growth also defines an evolution towards a more sustainable low-carbon economy in which the sustainable use of ecosystem goods and services are critical to long-term economic and social viability. Green Growth consists of five main tracks: green tax and budget reform, sustainable consumption and production, green businesses, demand side management and sustainable infrastructure.[53]

The implementation of green growth approach into action needs system changes which seeks on how to multiply the economic growth advantage while in the other hand protect the environmental degradation. These system changes include: [54]

[48] This chapter is adopted from my previous article entitled "*Adopting Green Growth Approach for Climate Change in Indonesia*" published in Asia Law Quaterly Vol. 1 No. 2 October 2009.
[49] UN-ESCAP, 2008. *Green Growth at a Glance*. UN-Publication.
[50] Johannesburg Plan of Implementation, World Summit on Sustainable Development – Johannesburg 2002. http://www.wsscc.org/fileadmin/files/pdf/For_country_pages/Thematic_networking/Johannesburg.pdf
[51] *Ibid.*
[52] UN-ESCAP. *Op. Cit.*
[53] UN-ESCAP. *Op. Cit.*
[54] UN-ESCAP, 2008. *The Green Growth Approach for Climate Action*, *Op. Cit*.

a. Improving the eco-efficiency of consumption.
   This system change can be pursue through demand-side management; the application of economic and regulatory instruments as well as incentive and discentive policy; promoting education for sustainable development; promoting environmentally friendly goods and services; the promotion of the 3Rs (recycle, reduce, reuse)[55] and the society empowerment on the environment conservation.
b. Improving the eco-efficiency of production.
   Policy on improving the ecologically efficiency of production should not only pollution controls but also eco-efficient economic planning;[56] the application of economic and regulatory instruments, particularly on environment taxation; the deregulation and stimulation of markets for environmentally friendly goods and services; and the application of industrial ecology concepts (clean production).
c. Promotion of more effective decision-making (greening the governance).
   Improving environmental decision making (green governance), especially for the policies that reflect the value of environmental goods and services, appropriate measures of growth and investment in natural capital.

The system change on three components above are necessary as main cause of continued damage to the global environment is patterns of production and consumption which are unsustainable.[57] The consumption patterns of advance countries, which tend towards excess, directly affect the exploitation of natural resources in developing countries which are attempting to catch up with industrialized countries. Excessive demands and resource-consuming lifestyles have led to great pressure on the environment. At the same time, people in poorer communities are unable to meet their basic needs for food, health services, shelter and education.

Indonesia, which is currently listed a low-middle income country with per capita income of income US$ 1,000 and a total number of inhabitants below the absolute poverty line of around 27 million,[58] hopes to encourage economic growth and increase the prosperity and quality of life for its population. Towards the year 2020 it is estimated major changes will affect national development implementation procedures, due to accelerated development in various fields, namely the economy, society, politics, cultural growth, as well as science and technological progress. Environmental issues will likely become an increasingly important as evidenced by a deterioration in conditions. The Indonesian population will continue to grow and place additional burdens on the natural resource base; however, smaller families will continue to be encouraged.[59]

On achieving system change mentioned above, there are five tracks approach can be promoted, which are: the Green Tax and Budget Reform; Development of Sustainable Infrastructure; Promotion of Sustainable Consumption and Production; Greening the Market and Green Business; and Eco-efficiency Indicators.[60] Subsequently, one of the key embracing objectives of the Green

[55] Today, some communities introduce the new R, which can be defined as Replace or Replant or even Rethink.
[56] Chung, Rae Kwon & Hyun-Hoon Lee, 2005. *Towards Environmentally Sustainable Economic Growth (Green Growth) in Asia and the Pacific*.
[57] UN-ESCAP. *Op. Cit.*
[58] Delegation of Indonesia, 2006. *Role of Public Policy in Providing Sustainable Consumption Policies: Changing Consumption Pattern in Indonesia*. Presented on the Second Green Growth Policy Dialogue, Beijing: 23-24 May 2006.
[59] *Ibid.*
[60] Thampi, Siva. *Green Growth for Green Industry*, slides presented in Preparatory Meeting for the International Conference

Growth approach is to ensure that the benefits of economic growth will be enhanced through sound and rational policies for overall improvement in the quality of life of peoples.

**B. GREEN PROVINCE AS A PART OF GREEN GROWTH APPROACH IN INDONESIA**

The concept of sustainable development is introduced in the Bruntland Report in 1978[61], in which under its journey has undergone various metamorphoses of formula and ideas to translate these concepts. This concept proposes that any development done by people in fulfilling the needs of present generations should pay attention to the sustainability and also take into account the benefit and welfare of future generations. In its original idea, sustainable development defined as the development that "meets the present needs without compromising the future generation's ability to meet their own needs".[62]

One of thus metamorphoses is derived as a pioneering policy called "green growth approach," or environmentally sound growth approach. This policy was adopted by South Korea as a pilot project for the initiation of green growth approach in the context of adaptation to climate change in 2008.[63] Another form as a translation of the green growth approaches that later became the concept of green province. Not only in Indonesia, but some countries, like Canada and Australia, also implement these green province policies.[64]

In Indonesia, the concept was initiated "seriously" in mid-2009 when the President approved the Province of Bali as a green province. [65] The word "seriously" referred to the full support from the government, since actually green province policies have been introduced in the reconstruction program of Aceh-Nias by the Reconstruction and Rehabilitation Agency (BRR) NAD-Nias, but not yet officially adopted in government policy.[66] The inauguration of this policy then held within The 11st Special Session of the Government Council / Global Environment Forum of the United Nations of Environment Programme (UNEP) in 22 February 2010.

Politically speaking, Bali Green Province (BGP) Program will be able to lift Bali as "high profile" area because of support from various parties continued to flow since the program rolled out. The program is also expected to be able to provide benefits in various sectors, including politics and economy for the province. While in the economic side, BGP will provide a positive impact on tourism sector to promote more healthy and clean environment. However, to realize these dreams, Bali Government must faces several obstacles, ranging from garbage problem, the excessive use of chemical fertilizers and pesticides, also limited electrical energy.

on Green Industry, Bangkok, 4 March 2009.

[61] Bruntland Report is a report of world environment situation and condition, which was arranged by the *World Commission on Environment and Development* (WCED) as a result of Stockholm Conference on Human Environment 1972. This commission in led by a true environmentalist Mrs. Harleem Bruntland who was the Prime Minister of Norway. This report then published for public entitled "*Our Common Future*" and become a primary referrence of world environment at that time.

[62] WCED, 1990. Our Common Future, Terjemahan.

[63] UN-ESCAP, 2008. *The Green Growth Approach for Climate Action*, Background Document for the 3rd Policy Consultation Forum of the Seoul Initiative Network on Green Growth: Green Growth and Sustainable Consumption and Production for Climate Action. 18-20 September 2008, Cebu, Philippines.

[64] http://www.fallflavors.ca/index.php

[65] Antara news

[66] BRR NAD-Nias, 2008. *Pengendalian Pembangunan Lingkungan dan Konservasi di NAD-Nias Dalam Rangka Perwujudan Kebijakan* "*Green Province*". Banda Aceh: Pusat Pengendalian Lingkungan dan Konservasi BRR NAD-Nias.

The concept of "green province" was based on economic considerations and environmental issues. With the establishment as green province, all government policy areas must be environmentally sound. Likewise, business units should be based on environmental rules, including on licensing procedures.[67] One thing needs to be concerned about, of course, is on how the prospect and realization of this concept. It is crucial since “green province” program is a pilot program that requires full commitment from local government and all elements of society, while on the one hand, the limited facilities as well the complexity of regulation and the existing problems can be a hindered obstacle.

**C. GREEN PROVINCE POLICY: A NEW TREND IN REGIONAL AUTONOMY**

Main question has always arised on the cross discussion between economic growth and environment conservation, for developing countries particularly, is on how will developing countries meet the difficult global challenges before developed countries, while simultaneously improving people's lives and conserving our natural resources?. Thus, achieving environmentally sustainable development for developing countries is another hard challenge to conquer while they still need to fight for their daily life. Anticipating this challenge, the governments in the Asian and Pacific region have unanimously agreed to respond to these challenges through the promising path of environmentally sustainable economic growth, or "Green Growth".[68]

While knowledge and information can help the individual to resist rising consumerism and to embrace the philosophy behind the growing global movement of “green” consumers, a basic condition needed is the availability of sustainable choices. This prerequisite condition can be pursued by infrastructure development. The development, indeed should provides opportunities for socially inclusive, non-State involvement in service delivery and thereby broader-based economic growth that meets needs more efficiently. Communities can themselves become investors in infrastructure development. Concisely, the autonomy is needed in order to achieve ecologically sustainable development.

The decentralization regime in Indonesia is brought by the Act No. 22/1999 (the Regional Government Act 1999). This sudden political change – just after the collapse of political regime in Indonesia – creates euphoria from local governments to ‘empower’ themselves with any available resources to compete against national government.[69] The main problem occurred during the implementation of the Regional Government Act was the interpretation of the local government competences stated in Article 10 Act No. 22/1999. The article states that local governments shall be autonomous in broadest sense to regulate and take care of its own affairs. Several conflicts of interest among provinces aroused as it led to the amandment with Act No. 32/2004 (the Regional Government Act – RGA 2004).

Decentralization aims to bring the decision-making process and its implementation closer to the target population, at the same time reduces the central government’s costs and improves efficiency by reducing the size of the central bureaucracy.[70] Related to the environmental issues,

[67] Taken from http://www.jurnalnasional.com/show/newspaperrubrik=Kesra&berita=128926& pagecomment=1
[68] UN-ESCAP, 2007. *Green Growth at a Glance*.
[69] Barron, P. Diprose, R. and Woolcock, M. 2007, *Local Conflict and Development Projects in Indonesia: Part of the Problem or Part of a Solution?*. World Bank Policy Research Working Paper 4212, April 2007.
[70] Niessen, Nicole. Decentralized Environmental Management, on Faure, Michael. and Niessen, Nicole (eds). 2006,

there was a substantial shifting of authority on environmental management from the central government to the regional governments. In accordance with the Government Regulation No. 38 of 2007, regional government is now giving full authority to manage the environment. This authority surely brings an advanced step on promoting more green development.

Major paradigm of sustainable natural resources management is one reason behind the application of the green province concept in Indonesia. Early initiation and adoption of this concept has officially been applied at the time of reconstruction of Nanggroe Aceh Darussalam (NAD) after the tsunami hit in December 26, 2006. The damage is not only suffered its natural ecosystems in coastal areas, but also in artificial ecosystems such as infrastructure, housing, school buildings, and other places. The rehabilitation and reconstruction needed natural resources in large numbers, especially the need for materials such as wood materials, sand, rock, gravel and so forth. There were activities conducted by opening the forest to build infrastructure like roads, there was also a need to do land acquisition or even alter the existing landscape. The activities were must be carried out based upon the green reconstruction policies, in which minimize the damage occured.[71]

Other efforts to realize the Green Province is by doing well in rehabilitation of forest areas and outside area (land owned by the community) with many types of plants. It was also proposed as an effort to support global policy on climate change that already declarated in COP 13 (Conference of Parties) in Bali 2007, especially on REDD (Reduction Emission from Deforestation and Forest Destruction) matters. Bali Green Province Program (BGP), which officially launched on February 22, 2010 will provide many positive effects for the island. If this program can be done well, there will be a very positive multiplier effects for the Balinese. As long as all the stakeholders are actively participating in the activities. Economically, Bali will also reap the benefits of this program.

BGP program is expected to provide solutions to various problems faced by the Bali environment. The total area of the Province of Bali is relatively small ie + 5632.86 km2 or 0.29 percent of the Indonesian archipelago. But as a world tourism destination, Bali has an important position in Indonesia. Bali was chosen as the location for frequent meetings of national and international, in which Bali Indonesia takes role as a gateway to the world, no matter how small problems that occurred in Bali, the echo will quickly spread overseas. Thus, initiating Bali as Green Province is a smart idea. Soon, East Kalimantan also eager to be appointed as the next green province. So, hopefully, this policy can be a new trend for the regional governments to achieve more better green growth achievement in the future.

*Environmental Law in Development: Lessons from the Indonesian Experience*. UK: Edward Elgar Publishing Ltd. p. 149.
[71] BRR NAD-Nias, 2008. *Op. Cit.*

**MORE READING MATERIALS**

Agyeman, J., Bullard, R. D., & Evans, R. 2003, *Just Sustainabilities: Development in an Unequal World*. London: Earthscan.

Chung, Rae Kwon & Hyun-Hoon Lee, 2005. *Towards Environmentally Sustainable Economic Growth (Green Growth) in Asia and the Pacific*.

Ekins, Paul and Julia Tomei. 2006, *Eco-Efficiency and Resource Productivity: Concepts, Indicators and Trends in Asia-Pacific.* Presented on the Second Green Growth Policy Dialogue, Beijing: 23-24 May 2006.

Ekins, Paul and Julia Tomei. 2006, Stimulating *Eco-Efficiency* in *Asia and the Pacific*: *The Role of Public Policy.* Presented on the Second Green Growth Policy Dialogue, Beijing: 23-24 May 2006.

Niessen, Nicole. Decentralized Environmental Management, on Faure, Michael. and Niessen, Nicole (eds). 2006, *Environmental Law in Development: Lessons from the Indonesian Experience*. UK: Edward Elgar Publishing Ltd. p. 149.

UN-ESCAP, 2008. *The Green Growth Approach for Climate Action*, Background Document for the 3rd Policy Consultation Forum of the Seoul Initiative Network on Green Growth: Green Growth and Sustainable Consumption and Production for Climate Action. 18-20 September 2008, Cebu, Philippines.

UN-ESCAP, 2008. *The Greening Growth in Asia and the Pacific.* UN-Publication.

UN-ESCAP, *State of the Environment in Asia and the Pacific 2005: Economic Growth and Sustainability*. United Nations publication, available at http://www.unescap.org/esd/environment/soe/2005

# SEA as an Prevention Instrument of Environmental Pollution and Degradation (a half hearted provision)

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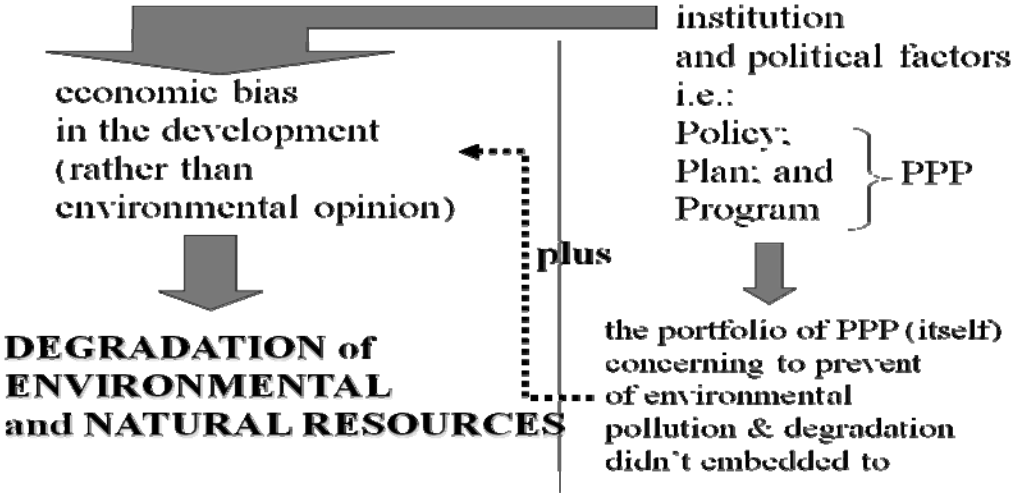
**The logic of background**




**Core of SEA:**

- SEA is a systematic process for evaluating the environmental consequences of proposed policy, plan or program initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision making on par with economic and social considerations [Sadler and Verheem,1996]

- SEA is a process directed at providing the authority responsible for policy development (the 'proponent')—during policy formulation—and the decision-maker (at the point of policy approval) with a holistic understanding of the environmental and social implications of the policy proposal, expanding the focus well beyond the issues that were the original driving force for new policy [Brown and Therievel, 2000]

- SEA is a process of integrating the concept of sustainability into strategic decision-making [Department of Environmental Affair and Tourism-DEAT Pretoria, 2000]

- SEA is a series of systematic analysis, holistic, and participatory to ensure that the principles of sustainable development has become a basic and integrated in the development of a region and/or policy, plan and/or program (PPP) [Art 1 point 10 LEPM 32/2009]

**A good quality SEA process:**

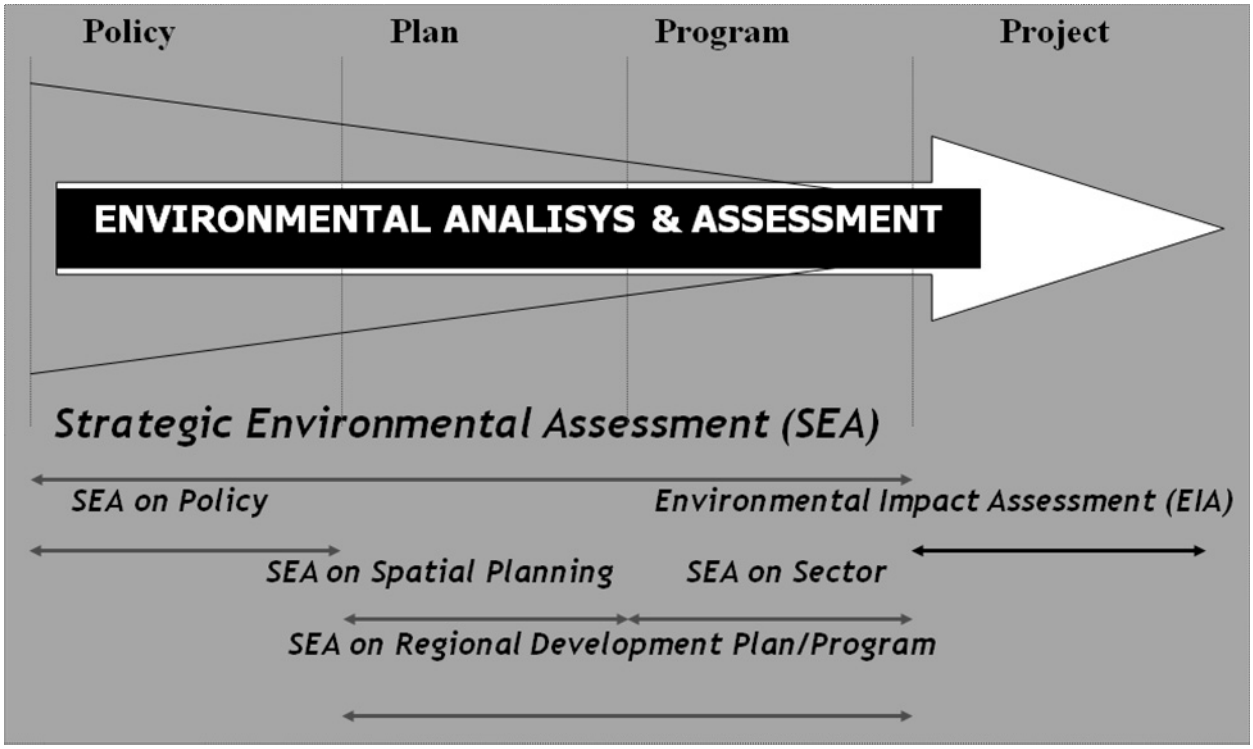
informs planners, decision makers and affected public (stakeholders) on the sustainability of strategic decisions, facilitates the search for the best alternative and ensures a democratic decision making process. For those purpose, SEA process is:

- ✓ **integrated**→ ensure appropriate environmental assessment; addresses the

interrelationships of bio, social & economic aspects

- ✓ **sustainability-led**→ facilitates identification of development options & alternative proposals that are more sustainable
- ✓ **focused**→ provides sufficient, reliable and usable information for development planning and decision making; customized to the characteristics of the decision making process
- ✓ **accountable**→ is the responsibility of the leading agencies for the strategic decision to be taken; is carried out with the professionalism, rigor, fairness, impartiality and balance; is subject to independent checks and verification; documents and justifies how sustainability issues were taken into account in decision making
- ✓ **participative**→ informs and involves interested and affected public & government bodies throughout the decision making process; explicitly addresses their inputs and concerns in documentation and decision making; has clear, easily-understood information requirements and ensures sufficient access to all relevant information
- ✓ **iterative**→ ensures availability of the assessment results early enough to influence the decision making process and inspires future planning; provides sufficient information on the actual impacts of implementing a strategic decision should be amended and to provide a basis for future decisions

**SEA & EIA**



**The different of SEA & EIA (UNEP, 2000)**

| | **SEA** | **EIA** |
|---|---|---|
| Stage | PPP | Project |
| Attribute | Mandatory but limited | Mandatory |
| Decision | Decision making based on SD principle | Environmental feasibility for proposal project |
| Domain of 'work area' | **Spatial Planning, Middle-Long term Dev Plan, & others sector of certain PPP** | Site based project |
| Cumulative of Impact | Early warning of cumulative impact phenomena | Limited analysis of cumulative impact |
| Deep of assessment | Broad, shallow, and not more as framework | Narrowed, deep, and detailed |
| Articulation | Sequencing process, overlapping components, and PPP is still on going process as well as iterative | Project has already formulated, clear from beginning till end |
| Focus | Focused on sustainability agenda, work on the source of environmental impact problem | Focused on adverse impact and management of environmental impact |

**Art. 15 (2) LEPM 32/2009:**

Government and regional government should initiate the SEA into the preparation or evaluation of:

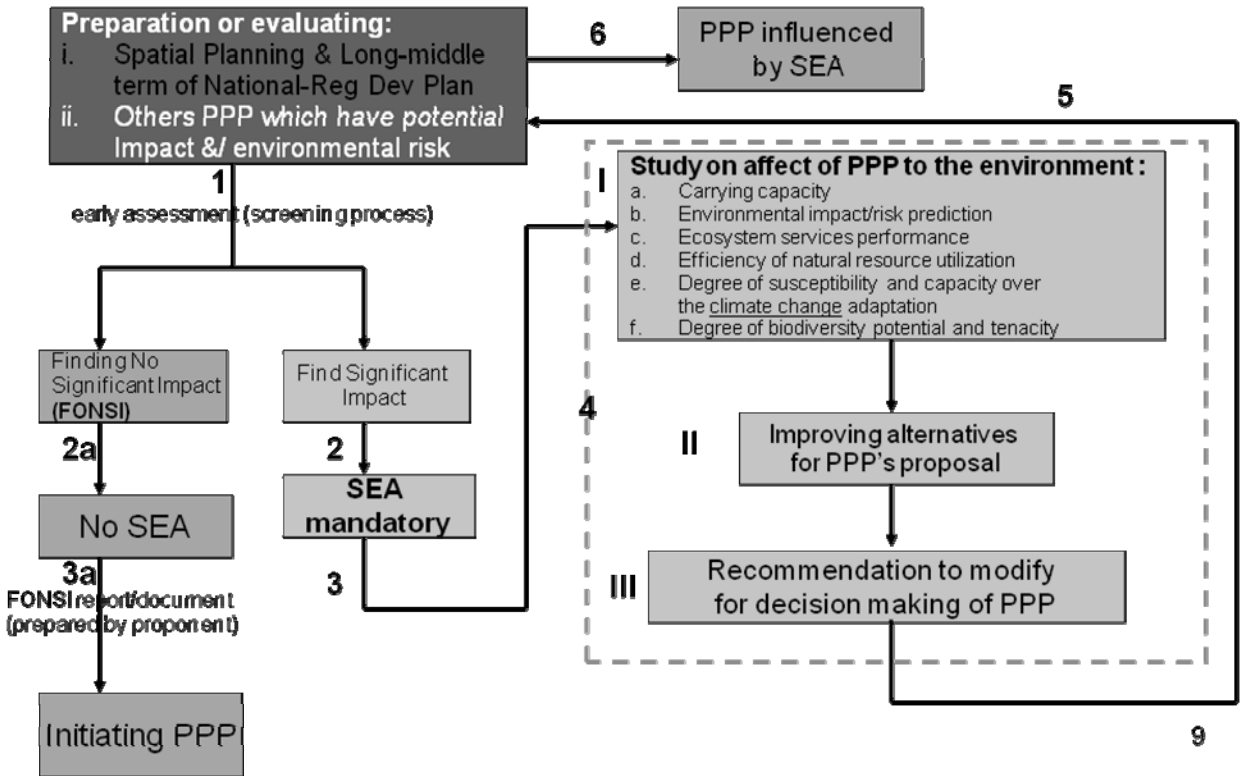
- ***Spatial planning as well as detailed plan, the long-middle term of (national, province & district) development plan; and***
- ***Policy, plan, and/or program which have potential impact and/or environmental risks.***

**Elucidation Art. 15 (2) b:**

Impact and/or environmental risks encompass:

- climate change;
- degradation, depletion, and/or extinction of biodiversity;
- increasing the intensity and scope of disaster (flood, landslide, aridity, and/or soil as well as forest fire;
- declining the quality and quantity of natural resources;
- increasing the conversion of forest and/or land;
- increasing the number of poor people or endangered sustainable livelihood of community; and/or
- increasing the risk of human health and safety.

**SEA of PPP process:**




**The consequent of SEA result:**

Art 17 (2) LEPM 32/2009:

If SEA result stated that environmental carrying capacity had been over saturated:

- ***PPP's proposal should be modified as SEA recommendation suggest to; and***
- ***Projects and/or activities which had been exceeded the carrying capacity is prohibited.***

**After all (SEA as a new issue):**

- In the tendency of local origin revenue paradigm by regional government→ hard to expect that SEA will be initiated seriously considered/integrated the environmental aspects.
- In the centre of bureaucrat mentality if SEA has been initiated together with decision making of PPP, hard to ensures that PPP will be enforced as SEA result as for.
- BECAUSE despite mandatory, but no penalty!

Second Session

Integration of Laws in Multi-Cultural Society

# Impact of Integrity Phenomenon about Judicial Review Standard in Global Society: Double Standard's Spread into Korea and Germany

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Dankook University, Seoul

**Introduction**

Most of us in massive and complex societies in which the quality of life is dependent on decision making processes operating somewhere beyond horizon. Especially judicial review as a decision making process has used to be an important cornerstone of most countries.
Nowadays so many people thought and realized that its function to preserve individual rights does work well in multi-cultural society.
In this viewpoint, since Americans have revered their constitution, judicial review system has well used in the United States.
Nonetheless many constitutional law scholars have questioned how they can they devise some standards about judicial review.
As you know, most constitutions already contain rules as well as standards.
The American Constitution, for example, says that people under the age of thirty- five cannot be president, and that laws can be enacted only with the concurrence of both the House and the Senate. These and many other constitutional provisions operate as rules. But in the most famous cases, the American Constitution is generally taken to establish standards rather than rules.
The right to "freedom of speech," to "equal protection of laws," the right to be free from unreasonable searches and seizures," the prohibition on "cruel or unusual punishments"-all these are understood to establish standards to be specified in the context of actual cases.[72]
In short, when meet written constitution, we can easily find rule, otherwise we should contrive to discover standards case by case.
So I'd like to name the process to find out standards judicial review.
In American Judicial Review System, the cornerstone of the legal institution, which is admired and emulated throughout the world including Korea, constitutional scholars from time to time had used to estimate 'Double Standard' most general one in its history.
Double Standard came from Carolene Products Footnote, which is the most famous footnote in American Constitutional Law's arena.
It means that civil rights like freedom of speech were to be preferred to economic rights in the U.S. Constitution. Namely, the U.S. Supreme Court has had a tendency to accord a closer, higher level of scrutiny to cases in civil libertarian category than in the economic one since U.S. v. Carolene Products Company Case(1938).
Owing to so-called double standard, the Court came to accept legislative action in the economic sphere but kept and, of course, continues to keep a very close watch over legislative activities

[72] Cass R. Sunstein, Legal Reasoning and Political Conflict, p.171.

described as 'basic' or 'cultural.'[73]
Recently the Court has modified the traditional double standard to give 'strict judicial scrutiny' to certain types of equal protection and due process cases, especially the former.
A long time ago, many countries including Korea have imported the U.S. Judicial Review system to curb their last governments' dictatorial actions whether they already imported U.S. legal system or not.
As you know, my country Korea imported the German Constitutional Court system about 20 years ago in order to try to give strict scrutiny to Korean equal protection cases and furthermore to protect Korean people's basic freedoms.
Nonetheless I'd like to express that it seems its trial was failed even though on its face, the Korean Constitutional Court has achieved a great success that there were so many judicial review cases in Korea. Since having retrospection of Korean political history, lots of dictatorial governments wanted to ignore the need of judicial review system in their judiciary for preserving their dictatorship. So with invisible governmental control, the Korean Constitutional Court has slightly managed to have judicial review system.
In the process, I found out strange and interesting trend of Korean judicial review. According to its original concept, double standard means the U.S. Supreme Court would like to accord a strict scrutiny to political equal protection cases when controversies confronted between the government and civilian who are shouting for his or her freedom of political speech. But there has been just a little bit chance to accord a strict scrutiny in the Korean Constitutional Court.
In the other cases, the Court has used to do a strict scrutiny to economic cases on the contrary to the U.S. Supreme Court's judicial review style. So many Korean judges and justices didn't like to have a conflict with political figures, including Korean Presidents.
Also I am willing to check it out double standard's influence and new style in Korea and other countries in global society.

**1. A Brief History of Korean Judicial Review**

In its origin, the term of 'Judicial Review' should use in Common Law countries, whereas Continental Law (Congressional Statutes are the first concept of law) countries including Germany, Korea and Japan would better choose the term of 'Scrutiny of Congressional Statutes' Constitutionality'.
American judicial review is the ultimate power, which is in the hands of the courts to declare any law, any official action based on law, and any other action by public official that it deems to be in conflict with the constitution unconstitutional.
Judicial Review System in Korea was bifurcated, which separated the Korean Supreme Court's judicial review which scrutinizes constitutionality of rule and regulation from the Korean Constitutional Court's judicial review which reviews constitutionality of congressional statutes. It is thought that when the framers of the Korean Constitution had planned to make judicial review system bifurcated, they were so sure that it could prevent the Korean Judiciary from being so powerful in Korean governmental system, although the judiciary's original function is to protect civilian's constitutional rights. Absolutely that idea was just childish in such a degree, every Korean can find out at present.
I think that is why my country Korea was bursting his democratic flower at that time. Frankly, about 60 years ago only political chaos prevails but real civil right can not be found in Korea.
When making the First Constitution of Korea (1948), the framers were obliged to accept a bill of Seong-Mahn Lee who was a typical political leader and at that time the chairman of the House of Representatives.

[73] See, Hyung Nam Kim, "A Study of Double Standard in Constitutional Adjudication".(in SungKyunKwan University, Doctoral Dissertation, 1997).

After all, he became the first President of Korea with such a great political influence.
So unfortunately according to the bill, my country's first constitution should choose a freaky institution, 'Constitutional Committee' which can have the power of judicial review with French Style. Absolutely the committee was not a court but just administrative agency. That became a corner stone of disgrace of Korean government which won't make a mind to protect human rights seriously.
There were many trials to establish a real court undertook a duty to review congressional statutes' constitutionality for protecting civil rights during last five decades. Nonetheless every trial failed according to dictator's lust for political power.
At last September 1, 1988 right after the sixth Republic established, Korea fulfilled to build a real judicial review system through importing special court of German Style, so called the Constitutional Court.
So the Korean Constitutional Court was established by Korean People's absolute consent through nationwide demonstration in 1987.

**2. Judicial Review System in the Korean Constitutional Court**

In short, there are two types of judicial review in Korea.
The one is Review of Congressional Statutes' Constitutionality, the other is Constitutional Complaint.

**A. Review of Congressional Statutes' Constitutionality[74]**

**[Procedure for requesting a decision]**

Submitting a written request to the Constitutional Court creates a formal request for a decision. Such a request should be stated with specialty on each matter sought to be reviewed.
In cases concerning review of statutes, the written request shall be made by a district court, in which some litigation is pending. But the court's request should be vested in the litigant. That means the litigant can ask for the district court's request with his or her legal problem.
When it is necessary for a district court to ascertain the unconstitutional possibility of some congressional statute, the court has to make a request for the Constitutional Court's scrutinizing of that.
In principle, the district court's request should start with a written request, which shall outline the questioned clause of some congressional statute and specify the reason why it should be held unconstitutional.
The Constitutional Court shall review the constitutionality of the statute only within the limit of the request, which a district court raised.

**[Standards of review]**

Frankly, I should tell the truth the Korean Constitutional Court can't find its own proper standards of review. Maybe it will get an excuse such like that we have a concept the constitution is pre-interpretive text. What standards the Constitutional Court deploys for examining a statute's constitutionality? Really can you believe what the court did get perfect standard on a case?

I think it is a problem of legal philosophy. It is so profound thing to be understood.

[74] See, The Korean Constitutional Court's Act.

At this time I think whether the Constitutional Court did find and devise some proper standards won't be a big problem and Korean standards of review should be introduced even though they are so minute.
First of all, I'd like to show you 'principle of proportion', which was originated from Germany. That means it is a standard concerning the proportion of governmental interest to private interest in reviewing congressional statute's constitutionality. Since it was imported from Germany, principle of proportion has played a decisive role to review a statute's constitutionality in the Court. At present, it looks like so boring and routine standard. The standard, principle of proportion, has been used as almost sole review standard in the Court. That was the reason.
I think principle of proportion is so similar to some concept which contains Balancing Test and Less Restrictive Alternatives altogether in the U.S. Supreme Court.

**B. Constitutional Complaint (Verfassungsbeschwerde)**

The Constitutional Court has distinctive feature of jurisdiction over Constitutional Complaint, which is known as a peculiar system from Germany.
According to the Constitutional Court Act, anybody whose constitutional rights have been infringed by the executive, the legislature, and the judiciary, may petition for relief or remedy to the Constitutional Court. Generally, the constitutional complaint doesn't need the district court's request like review of statute.
In addition, any litigant in a district court whose application for request about review of statute was rejected by the court may have recourse to the Constitutional Court through special constitutional complaint as another appeal.
Also in the complaints the Constitutional Court has usually used principle of proportion with reviewing official action or statute's constitutionality.

**3. Two Cases which used 'new style double standard'**

**A. Review of Constitutionality of Article 5(2) of State Property Act**

**[Facts]**

In the course of a civil trail filed to recover inherited real property, the applicant who was requesting for review of statute's constitutionality (hereinafter "the applicant"), Min-Tae Han et al., contended his title was based upon the fact that late father of the applicant had purchased in 1935 and had continuously possessed it, and that after the death of his father, the applicant inherited the real property by filing to the Public Notice Registration. Yet During the Korean War (1950-1953), almost all of documents of Public Notice Registration were burned, unfortunately the proof of applicant who was actual owner of that real property disappeared. Actually the applicant had possessed that real property without any legal proof since the end of Korean War.
Even though he didn't have any legal proof about his title, there was a good relief for him. That was statutory acquisition.
According to Korean Civil Law, article 245 (1) provided that a person who has possessed a unknown real property with good will for his title without infringing thought of the real property for twenty years shall have the title on it with register to the Public Notice Registration.
Without actual possession, the government had registered it to the Public Notice Registration as if the government had a title on it.
Afterwards according to article 245 (1) of Korean Civil Law, the applicant tried to register to the Public

Notice Registration but failed.
Because Article 5(2) of State Property Act gave the exception of statutory acquisition to real property that the government owns.
So in the meantime of civil trial, the applicant asserted that the clause of State Property Act infringed his constitutional right for property, asked a request for review of statute's constitutionality. At last the trial court approved his application. So the Constitutional Court should examine this case.

**[Arguments]**

The argument raised in this case was whether the said act that gave exception national property from statutory acquisition is unconstitutional or not.

**[Opinion of the Court]**

By 6 to 3 vote, the Constitutional Court held that the said article 5 (2) of State Property Act concerning with the exemption of statutory acquisition for real property for the non-use of the administration was unconstitutional.

**[Reasoning of the Opinion]**

The Court had a reason that state property, which was in small plots, should be treated as analogous to private property. So the title of that property was like private right, also disposition of that was like private contract. In conclusion, miscellaneous property of the government is tantamount to private property.

**[Evaluation of the Case]**

According to original double standard, in this case the Court had better to accord a minimum rationality test, because the above case was concerned with typical economic problem.
In general, he U. S. courts have used to regard as constitutional so many statutes of economic sphere unless proved to the contrary by a complainant, but views with a suspicious eye legislative and executive experimentation to cultural freedoms guaranteed by the Bill of Rights.
In this case, the argument was concerned with economic freedom; nonetheless the Court accorded strict scrutiny without hesitation.
So I'd like to name it 'Reverse Double Standard'.
B. Review of Constitutionality of Article 7(1) and (5) of the National Security Act

**[Facts]**

The applicant, Dae-Hyun Chang was indicted for violating article 7 (1) and (5) of the National Security Act. Article 7 (1) of the act provides that "any person who praises, encourages or sympathizes with activities of an anti-government organization or its members, or any person who receives orders from it; and any person who by any means whatever gives benefits to an anti-government organization, shall be imprisoned for a term of not more seven years".
Also article 7 (5) states that "any person who, for the purpose of performing the acts mentioned in article 7 (1), (2), (3) or (4), produces, imports, possesses, transports, distributes, sells or acquires a document, writing any other expressive article shall be imprisoned for the same term prescribed in article 7 (1), (2), (3) or (4), respectively.

According to the prosecutor, the applicant possessed and distributed books and articles, which were concerned with anti-government and which benefited anti-government organization. At that time, arguing that the clauses of the act were unconstitutional because they were extremely ambiguous or obscure, the applicant asked for request of constitutional review to the trial court. The trial court granted the request.

**[Argument]**

The Argument was whether the provisions of the above statute were unconstitutional because of infringing freedom of expression.

**[Opinion of the Court]**

By 8 to 1 vote, the Constitutional Court held that article 7 (1) and (5) of the National Security Act are conditionally constitutional. That means variable decision from Germany. So it depends on whether political condition will be powerful or not.
Admittedly the form of decision will be a mysterious concept.

**[Reasoning of the Opinion]**

When the expressions used in the questioned clauses, such as 'member', 'praise', 'encourage', 'activities', 'sympathize' are literally interpreted, they are both vague and overbroad.
However the Court reasoned because peculiar military confrontation between South and North Korea continues, these provisions shouldn't be declared unconstitutional yet.

**[Evaluation of the Case]**

This case was typically concerned with freedom of expression as preferred freedom. In Palko v. Connecticut (1937), Justice Cardozo emphasized that "one may say that the freedom of thought and expression is the matrix, and indispensable condition, of nearly every other form of freedom."
I think arguments of the Court's majority opinion were just an excuse for their political logic.
Constitutional Law Scholars should recall one famous dissenting opinion in Milk Wagon Drivers Union v. Meadowmoor Dairies.
Justice Black asserted that "Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body. In fact, this privilege is the heart of our government! If that heart be weakened, the result is debilitation; if it be stilled, the result is death."

**4. Double Standard's influence in Germany**

Long time ago 'Rechtsstaat' doctrine, which is different from 'Rule of Law' doctrine ruled in Germany. They believed that all statutes in German Legislatures would control every area in whole country and it could eliminate social problems about human rights.
So German constitutional adjudication might be so different from U.S. Judicial Review, which is the power to consider the constitutionality of legislative acts or administrative actions when the issue is raised as a prerequisite to lawsuits pending before the courts.[75]
'Concrete Normen Kontrolle', the typical style of German Judicial Review, should be concerned with

[75] Myung-Sun Yun, A model of Protecting Constitutional Rights, (Seoul: Kyung-Hee University Press, 2004), p.147.

statutes' constitutionality.

Anyway the German Constitutional Court admitted double standard's influence in Germany through one case.[76]

In that case, it delivered that Das Grundrecht auf freie Meinungsausserung(the right to express individual's mind and opinion)

is a typical cherished human right and also it is the matrix, indispensable condition of nearly every other form of freedom.[77]

At this point we must review seriously it adopted Palko case in the U.S. Supreme Court directly without comment.

Since that case was announced, double standard's influence is continued still now why the fact mental rights like Article 2 of the German Constitution should be treated as preferred right in constitutional adjudication was persisted

**Conclusion**

Many constitutional scholars scolded double standard is too much abstract to rule actual case. To be admitted, I would like to accept bitter opinion about double standard. However originally constitutional provisions leave gaps and ambiguities, and they have to be specified through implementing doctrines or standards that do not appear in the constitution itself.[78]

Some of the largest debates in American law involve the appropriate interpretive stance toward constitutional provisions that are incompletely specified and for that reason, threaten to produce grave uncertainty, judicial tyranny, or both.

Perhaps judges will take "equal protection of laws" as means such a multi-cultural society like America. Furthermore double standard born by 'Footnote 4'[79] is well concerned about the issue of integration in multi-cultural society.

As you know, Footnote 4 is consisted of 3 sentences; one of them can be read as a tool to protecting constitutionally fundamental rights.[80]

So Professor Ely insisted judicial review's function is to re-enforce representation, which is connected to representative democracy.[81]

Also absolutely double standard now exists is thus a matter of record-but so is the collaterally complicating development of an extremely difficult double standard within a double standard, under which the higher or privileged category side of the basic double standard is further divided into various subcategories that are judicially accorded separate recognitions of review entitlement. These categories or classifications range from the topmost one of "suspect" legislation or executive action to the bottommost one of legislation or executive action reviewed by the judiciary on the basis of mere standards or perceptions of "reasonableness."[82]

At such two viewpoints double standard in global society will take a role as integrity standard. One is double standard can be interpreted as a tendency of judicial self-restraint, the other is it can be accepted as an instrument to reinforce representation in global politics.

[76] Luth Case, BVerfGE 7, 198(208).
[77] Palko v. Connecticut, 302 U.S. 319(1937).
[78] Sunstein, op.cit., p.172.
[79] Justice Stone's footnote in U.S. v. Carolene Products Company(1938).
[80] "Nor need we enquire whether similar considerations enter into review of statutes directed at particular religious or national or racial minorities; whether prejudice against discrete and insular minorities may be special condition."
[81] John Hart Ely, Democracy and Distrust, p.103.
[82] See, Henry J. Abraham, Freedom and the Court, p.7.

# Human rights mechanism in a plural context: A preliminary review of ASEAN 'Constitution' and AICHR

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**Background**

For a long time human rights was considered "taboo" within ASEAN and was never the subject of detail deliberations. Principle of non-interference preserved this attitude among ASEAN members.

A carefully drafted Joint communiqué of the 26th ASEAN Ministerial Meeting, July 1993, says: Human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balance and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances ... the promotion of human rights should not be politicized.

Christie and Roy in Politics of Human Rights in East Asia (2001:2) maintained: there was some consensus of the East Asian elites to promote and preserve authoritarianism and disregarding democracy and universal ideas of human rights.

- However, ASEAN countries have evolved, e.g.:
    - Establishment of human rights institutions in the Philippines (1987), Indonesia (1993), Thailand (1998)and Malaysia (1999);
    - Establishment of the Working Group on ASEAN Human Rights Mechanism (1995);
    - Signing of Declaration of Cooperation among ASEAN human rights institutions in 2007;
    - Signing of the ASEAN Charter in 2007;
    - Launching of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) at the 15th ASEAN annual summit in October 2009.
- Is this the right, feasible mechanism in a diverse ASEAN context?
- AICHR 2009 and ASEAN Charter 2007 were achieved as collective effort of ASEAN countries. The process reflected a clear example of a politically negotiated but legally binding ASEAN document par excellence.
- But there is no provision for suspension or expulsion of members for non-compliance–this is in line with the retention of the principle of consensus in decision-making and non-interference among ASEAN ten member states.
- Ten ASEAN members have all ratified the ASEAN Charter.

***ASEAN CHARTER 2007***

ASEAN member states finally have the "mother of all documents" that could be the source of common reference and that should prevail over all other ASEAN organizational instruments.

- The ASEAN Charter reflects the prevailing regional realities. It is intended to be a broad framework of rules, regulations and procedures to govern the conduct of relations among ASEAN members.
- The Charter also ensures compliance of ASEAN members.
- The existence of a fully ratified Charter marks the beginning of a new era for the organization. It has every right to function well as a rules-based organization with, inter alia, clearly defined principles, purposes, legal personality, membership, organs, decision-making process, settlement of disputes mechanisms, privileges and immunities, protocols and practices, identity and conduct

of external relations.

- Is ASEAN Charter similar to EU'constitution' (which one?). Certainly, the ASEAN Charter is resulted from long negotiation. It may be called a negotiated pact (or constitution?).

**AICHR & ASEAN Charter 2007**

- AICHR is said to be a logical consequence of the ASEAN Charter.
    - Preamble of the Charter: "Adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;"
    - Purposes (Art. 1): 7. "To strengthen democracy, enhance good governance, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;"
    - Principles (Art. 2): 2. "ASEAN and its Member States shall act in accordance with the follo wing Principles:(i) Respect for fundamental freedoms, the promotion and protection of h uman rights, and the promotion of social justice"
    - Specifically, the legal basis for the constitution of the ASEAN human rights body can be found in Article 14 of the Charter which states that:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

- The AICHR aims to promote regional cooperation on human rights and curb human rights abuses committed against nationals of the ten ASEAN member countries.
- The AICHR is a platform where ASEAN member states may discuss, debate and criticize one another's violations and collectively apply pressure on violating member states;

**Is AICHR reliable?**

- Is AICHR poised to make substantive progress on regional human rights or is it doomed to remain a "toothless tiger"?
- AICHR demonstrates ASEAN's increasing recognition of the importance of human rights for the general well being of all citizens in the region, consistent with the notion of transforming ASEAN into a "people-oriented" organization.
- AICHR may now represent the only feasible mechanism of cooperation for the politically diverse ASEAN members, especially using it as a enabling institution to promote the well-being of 500 million ASEAN people."Will ASEAN countries push for further reforms related to this mechanism?

**Moving into the future with proviso**

- Ruti Teitel, 2000, Transitional Justice: development of human rights, especially in relations to dealing with past abuses, is alternately constituted by, and constitutive of the undergoing political transition. The strengthening of human rights is therefore contextualized and partial (or gradual).
- Hence, successful execution of the AICHR will require: the sharing of common perception of the primacy of human rights; minimizing the state's politically oriented response toward human rights problems; a culture shift within ASEAN(e.g. specifically regarding the principle of non-interference).

# Integration and Labor Law in Japan

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My theme is integration and labor law in Japan.
I am worrying about the theme. We have to discuss the integration law.
Could we integrate the law internationally?
I focused in wages. Labor market.
I hope I can contribute to your seminar. I did not complete my material, please forgive my unaccomplished work. Nevertheless, I have prepared certain points.

Legal standards consist of collectiving the legal standard, controlling the industries, and controlling the union activities.

In Europe and America, industries based on union.
We can see different legal standards in union legislation, for example the difference between Pancasila and liberalization. This is why after the ratification, the involved countries should adjust the standard.

However, I have to argue, the system of wages should be upgrade. This is very principal. Between Japanese people and Indonesian people have an equal treatment. In Indonesia, there are many outsourcing. In Korean and Japan too. Indonesia has simple legislation, Japan and Korea have complex legislation.

I would like to make a point about legal integration standard. We cannot deny that this is dealing with social integration and economic integration. In this context, what the integration should do? Some kind of hazard? We should integrate it. We should ignore the protection from each country. It is very important to consider the substances and mental standard.

# CRITICAL NOTES FROM PANELIST

## MOVEMENTS IN INDONESIAN LEGAL DEVELOPMENT

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There are two point from the Presentations

- ❑ The ASEAN Charter gives an additional basis for National Legal Making : Cultural, Economic, social, and Political Human Rights of Local People/Peoples

**THE SAME PRINCIPLE WE FIND IN:**

- ➢ International Convention (at least 12th Convention
- ➢ Article 18 B (2) Indonesian 1945 Constitution
- ➢ MPR Decision Number IX/MPR/2001
- ➢ Article 3 Act No.5, 1960 on Basic Agrarian Law
- ➢ Article 5 and 6 Act No.39, 1999 on Human Right

- ❑ Judicial Review as a Method of scrutiny and Correction against all Regulations considered not accommodate The Human Rights

But the problems still exist especially in Multiculturalism Country like Indonesia. The Reality shows :

- ■ Indeed, it's easy to accommodate the cultural, economic, social, and political human right in National Regulations
- ■ The difficulty is how to make the regulation an instrument to increase local peoples welfare.
- ■ The reality is law becomes a dominant factor for increasing poverty of local communities
- ■ The question is what happened with the Indonesian law?

- ➢ Inconsistency between the higher regulations with the lower one or among the same level regulations in different sectors
- ➢ National Law is still influenced by "elites spirits" or "distributive justice"
- ➢ National Law prevents local communities from getting access to use and exploit natural resources, whereas according to customary law they had free access.

After economic crisis, social riot, and political change in 1998, there have been three movement of Indonesian legal development

A. Decentralization of law making

- ● delegate legislative authority to Provincial, District , and Rural Government
- ● Its orientation is so that law substantively is more responsive to the unique local needs or interest and social value, especially of local communities in each region
- ● But in fact, its implementation has not yet been suitable with the above orientation

- ➢ Regional Regulations only become instrument to achieve the province and district

government interest : increasing regional government earnings

- Regional Regulations contain inconsistent provisions compared to Act or Government Regulations
- The Regional Regulation still marginalizes the need, interest, traditional and historical right of local communities
- Its consequences : poverty is still part of their life

B. Recentralization of Law Making

- Central Government, under applying Act No.34, 2004 retract parts of law making authority of regional government. Full autonomy of regional government was cancelled and converted new term : Distribution of Power between central and regional government
- In this new movement, state law has still been characterized by
- becomes a tool of covering up central government interest
- A little bit public participation in the process of law making
- Inconsistency with what Article 18 B (2) Constitution says that State must recognized and respect the existence and the traditional/historical right of local community
- access of local community to natural resources has still been closed. In this case, there are contradictions of provisions : according to customary law they have free access to occupy or take or use natural resources but according to state law it's criminal if they do so
- All it means that state law has marginalized the function of customary law , where the last law became guarantee factor for their wellbeing

B. Legal Pluralism Movement

- This movement, supported by Non Government Organizations, is more political than legislative process
- This movement aims : (a) to grow consciousness of either People Representative Board (DPR) or Central Government that there is inconsistency between Act especially regarding natural resources and 1945 Constitution; (b) to advocate local community to have access to natural resources and make sure that what they do is not criminal; (c) to alleviate "starving" local people burden and give "hopes" for the better future life; (d) to push DPR and Central Government to change the development orientation of law politics : to fully and really recognize and respect the historical right of local community.
- This movement takes form of requesting Constitution Court (Mahkamah Konstitusi) to do "Legislative Review" against Act considered inconsistency with Constitution and cancel them. But influence of this movement is not enough strong to make the DPR and Central Government to obey Constitution Court Decisions

# The roles and functions of Law for integration in a multi-cultural society

Dr. Kyunghee Lee
Researcher of KLRI

## Ⅰ. What are the issues of specific legal field; Labor/Social Security legislation for social integration?

### 1. What are the unique characteristics of the task for multi-cultural integration in the Indonesian/Japanese labor market?

In Korea domestic migration of foreigners started in earnest since the late 1980s. Especially after 1990s, the new issues have appeared in legislation related to migration of foreigners by significant changes in the labor market. Moreover, population aging occurs the lack of economically active population has happened due to low fertility in the 2000s.

Therefore, both domestic migration of foreigners and exponential growth of the naturalized citizen have become a part of society in Korea. This is causing the cultural and social changes which are difficult to explain simply by the existing Nationality Act. The concern for multi-cultural integration is building up as one of the national agenda in Korea. The compression growth through trade-oriented industrialization might be the trademark of Korea. In particular, the proliferation of multinational or transnational corporations is accelerating international trade as well as cultural exchange.

In this structure of population, the problem of low fertility and population aging is a common issue of Korea and Japan. In addition, this issue makes a change in the labor market, and the common phenomenon such as the shortage of local workers as well as the influx of foreign workers is shown in the so-called difficult and dangerous industries. However, the social and cultural responses regarding these changes of the labor market are bound to have regional characteristics. Therefore, the social challenge relate to the integration of a diverse culture may not be able to resolve with legal action.

Especially multiculturalism that has relatively distinct cultural characteristics within the Asian region eventually will have the unique characteristics of each region. Also legal and social response of multicultural integration will have the characteristics.

Then, what are special characteristics (or regionality) of social and legal response about Multicultural Integration in Japan/Korea/Indonesia?

**2. Will illegal presence as distinguished from lawful presence be excluded from the multi-cultural integration? In terms of human rights, isn't it the minimum task that the rights should be guaranteed?**

In the case of Korea, the number of migrant workers was only 6000 people in December 1987. In 2007, 20 years later, it was estimated at more than 400,000 people. Among those, it was estimated that about 180,000 people were migrant workers with work visa and over 200,000 people were illegal presence. In 1994, the so-called legal labor of foreigners became possible due to enforcement of industrial trainee system. However, the rapid growth of the number of illegal presence couldn't be prevented because the scale of absolute introduction was small. In 2002, abnormal labor market has been formed because nearly 80% of total foreign workforces were illegal presences. Accordingly, the Employment Permit System has been integrated and enforced since 2007. Therefore, among migration workers with work visa, the people who are flowed in Korea by non-professional employment visa through the Employment Permit System are reaching almost 57%. However, the rate of illegal presences is still exceeding 48% of the whole immigration workers.

Thus, the fact can not be overlooked that most multi-cultural entity flowed in labor market are 'illegal' presences in fact. It is a matter for consideration whether the range should be limited to the so-called "legality" in a legal task for multi-cultural integration.

**The number of migrant workers in Korea, 1987 ~ 2006 (unit : person)**

| Year | Total | Legal immigrants | | | | | Unenrolled workers |
|---|---|---|---|---|---|---|---|
| | | Subtotal | Work visa holders | | Industrial trainees | | |
| | | | Nonprofessional employees | Workers after training | Recommendation of industry groups | Overseas Investment Corporation | |
| 1987 | 6,409 | 2,192 | - | - | - | - | 4,217 |
| 1994 | 81,824 | 33,593 | - | - | 18,816 | 9,512 | 48,231 |
| 2002 | 362,597 | 73,358 | - | 12,191 | 25,626 | 14,035 | 289,239 |
| 2005.9 | 337,358 | 149,450 | 36,710 | 48,284 | 34,409 | 6,558 | 187,908 |
| 2006.6 | 394,511 | 166,599 | 95,005 | 46,031 | 31,886 | 6,806 | 189,220 |

**3. What is the status of the security and the industrial accident compensation to immigrant workers, and what are the tasks for them?**

Now, the development of international society has formed the so-called "international community" as "one world". As a result, the era that social security was operated as the independent system of each country has passed. Moreover, one of legal fields for helping or forming integration of different cultures is the social security legislation. In other words, one of the legislation to lead and protect harmony of diverse cultures is just the social security legislation.

Moreover, cross-border movement of workers is increasing day by day in Indonesia, Korea and Japan. Thus, the concern is required about the legislation to integrate cross-border workers in the labor market.

In particular, the security and the industrial accident compensation of workers are one of the foundations to prevent the risk of integration

Recently, the Korea Labor Institute researched whether migrate workers have the experience of the industrial accident. The study showed that 16.7% of respondents experienced an industrial accident.

Even 42.3% of respondents paid for medical treatment by themselves. It considered the fact that three-quarters of the pollee are regarded as illegal presences by allowing for the rate of illegal presences in korean labor market.

Even though the countries are fully equipped with the legislation protecting workers such as accident compensation, these problems are common. Therefore, we need to think whether the security of workers and the accident compensation legislation will be able to do a role in the labor market which has the high rate of illegal migrate workers.

**4. What is the status of the right to associate of migrant workers (in Japan), and what are the tasks of that?**

Workers unit voluntarily and have the right to organize like collective bargaining in order to improve their economic and social status such as maintenance or improvement of working conditions. In principle, migrant workers are legally guaranteed the right to organize union as well. However, there is a danger of deportation in case of the collective behavior due to the status of trainees, not workers, or because of illegal immigrants.` In fact, systematic activities of migrate workers has not been easy. By the way, recently there is a case that migrant workers are trying to organize a union systematically. It causes the problem of legal judgment as follows; Can illegal presences be a member of an association?; Can labor union formed by only migrant workers within any businesses place and any industries be approved, not a union within a company or in a particular industry?

## Ⅱ. What are the legal principles beyond legal regionality related to multi-cultural phenomenon?

The theme of this session is understood as "the legal function for the integration". This conference is very meaningful in terms of international discussion related to legislation of this topic. However, there are several points that should be considered for approach followed by legal field of each country to common topic.

Rifkin's prediction is one of the global issues that the recognition and the concept of country such as ″country that is not the territory″, ″concept of multi-layered citizen", and "Shared sovereignty" will be changed fundamentally. In other words, the fundamental changes related to legal connection between country and citizens will be happened.

However, these global changes and social integration are able to be considered as the phenomenon of the denotative issues of law as well as the task. Moreover, the denotative issues of law has its own regionality or special characteristics. Also the legal area is one of strong reflections about historicity and regionality of each country. Nevertheless, the migration between countries or regions of the population is requiring the changes of each country's own laws and principles. Then, what can be provided as the legal principles beyond reciprocity in order to legal resolution of the denotative issues of law by a number of countries ?

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**IS EMPLOYING DOUBLE STANDARD BENEFICIAL FOR THE CONSTITUTIONAL COURT IN DECIDING A CASE?**

Most Constitutions in the world set rules but they do not necessarilly set standards. Generally, standard can be found from cases. Double standard essentially means a set of principles that applies differently and ussually more rigorously to one group of people or circumstance than to another.[83] In the context of judicial review, the word 'double standard' originally come from the US in the case of the US v Carolene Product Company Case. In this case, the US Supreme Court preferred the civil rights like freedom of speech rather than economic rights. In the sense that The Supreme Court put higher level scrutiny to cases in civil libertarian rather than economic matters. This phenomenon, can be said, influences the work of judicial review system in Korea

*How Double standard operate in Korean Constitutional Court?*

Two cases which Used 'New Style Double Standard'

1. Review on Constitutionality of Article 5(2) of State Property Act
   This case concerning a person who inherited real property but later all documents concernng the property were burned. According to Korean Civi Law article 245 (1) This guarantee a person possessed an unknown real property with good will for his title shall have the title on it with register to public notary registration.

   **Reverse Double Standard** Since in this case the Court preferred to economic rights which is the opposite toward the original double standard which preferred to civl political rignts.

2. A Person was indicted for violating article 7 (1) and (5) of the National Security Act. 'a person who praises, encourages, or sympathizes with anti government organizations…….shall be imprisoned for a term of not more seven years.' Aplicant believes that the article is obscure and ambiguous. The constitutional Court decide that article 7 are conditionally constitutional. Meaning that it depends on the political condition whether it is powerful or not. In that time the military confrontation between South and North Korea continues.
   In this case the opinion of judges were an excuse for their poilitcal logic and they put less consideration on the freedom of Thought and expression.

*How double standard operate in German Constitutioanl Court?*

It can be seen in Luth Case, B VerfGE7, 198 (208). In this case the rights to express individual ooppinion is a kind of human rights and indispansible condition of nearly every other form of freedom.

[83] Merriam Webster Collegiate Dictionary

*Is Employing Double Standard Beneficial For The Constitutional Court In Deciding A Case?*

Employing double standard in deciding a case can be problematic. On the one hand double standard may be useful in protecting peoples rights. On the other hand it may also treathen judicial authorities.

The usefullness of double standard are

a. It may fill the ambiguity of norms in the constitution. It is generally understood that the norms in the constitution are often 'too general and can be interpreted in several different ways or ambigu. In this situation employing double standard may overcome this ambiguity. This is because the court double standard provides certain preference for the court in deciding a case..
b. It may also fill the gap between the norm in the constitution and the actual case in the reality. This is because using double standard, even though it is considered too abstract, may provides answer to such a situation.

Eventhough there are some usefulness, employing double standard may also create a danger. This includes:

a. Employing certain principles or standards are often too abstract to rule actual case. In implementing certain princples or standard it is important to appropriately interprete the constitutional provision, which is not easy.
b. The dificulty in finding appropriate interpretation may leads to the danger that using double standard may treaten certainty and may create judicial tyranny.

*How than the appropriate way to employ double standard?*

Thus it should be very careful and cautious in employing double standard. This means that the use of double standard should be in line with the purpose of justice and minimizing the danger or the risk in using double standard.

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**HOW HUMAN RIGHTS MECHANISM DEVELOP IN A DIVERSE SOCIETY?***

## A. The Diverse Characteristics among South East Asian Countries

South East Asian countries are often said a region with very diverse characteristics. The diversity of South East Asian Countries is not only reflected in their historical legacies, their strategic outlook, and the composition of the population but also in their national identity such as multiethnic, multilingual and multireligion[84]

The diversity of South East Asian countries can be described as follows: Economically, some of South East Asian countries are developing or under developed countries, but this is not the case of Singapore.[85] Singapore is, arguably, considered as developed countries in the sense that its national income is the highest among other South East Asian countries.[86]

In their historical context, most South East Asian countries including: Indonesia, The Philippines and Malaysia, experienced colonialism in their history. Thailand, however, never experienced colonialism in its history.[87]

In addition, South East Asian Countries are also diverse in their political ideology. Some South East Asian Countries such as Myanmar, Vietnam and Laos are socialist countries whereas other countries such as Thailand and Brunei Darussalam are kingdom and sultanate countries.[88]

The diversity of religions, languages and ethnics is also found in South East Asian countries. Three major world religions— Islam, Christianity and Buddhism — are existed in the South East Asian Countries.[89] In Indonesia, Islam is the majority but this is not the case in other countries. In the Philippines and Thailand, for example, Christianity and Buddhism are perhaps the majority. Major and minor languages as well as various races are also present in South East Asia.

* This paper is part of the earlier version of the paper titled "The International Legal Personality of ASEAN: Does Its Capacities to Perform International Act Depend on a Charter?"
[84] Leo Suryadinata, 'Toward An Asean Charter: Promoting An Asean Regional Identity', in Rodolfo Severino (ed) *Framing The ASEAN Charter: an ISEAS perspective*, (2005) 41 <http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf> at 4 May 2006
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

While it is true that South East Asian countries are so diverse, there is a common sense among them to foster close cooperation particularly in economics and politics.[90] The cooperation, however, must consider the diversity of South East Asian Countries. This is important to maintain the stability and good relationship among them. This rises the question what kind of cooperation is appropriate for South East Asian Countries: cooperation with less formality and less legally binding instrument or with formal and legally binding instrument?

In general, there are two different attitudes toward the establishment of regional organizations: western's countries view of institutionalization (western model) and Asian countries view of institutionalization (Asian model).[91] Western model considers the institutionalization of regional organizations is not merely a forum of discussion, more than that it is an organization with clear mandates and organizational structure.[92] Its decisions are also binding for its members. The above characteristics are important to ensure the effectiveness in reaching consensus and for implementing its programs.[93] In other words, enforcement of organizational structure and binding agreement are regarded as important factors in establishing regional organizations.

Asian model, however, considers that consensus to achieve agreement is an important factor in establishing regional institutions. This model emphasizes an 'informal, spontaneous, and consensus-oriented approach'.[94] This model is perhaps suitable for regions with huge diversity. This is because this model is also more tolerant, negotiable in reaching decision and implementing policy. As a result, it may reduce the possibility of conflict.

The fact that there is a great diversity among South East Asian countries is certainly one of the reasons why the governments of South East Asian Countries establish a form of regional cooperation which has informal, flexible in nature such as ASEAN.

**B. The "ASEAN Way": Is the ASEAN way a sufficient approach to deal with the current situation?**

Unlike other international organizations which often have strict and binding rules, ASEAN has specific ways to maintain its relationship with its members. The following part will examine three central features of ASEAN (also known as ASEAN Way) namely: non

[90] Ibid.
[91] Hirano, above n 9.
[92] Ibid, 9.
[93] Ibid, 8-9.
[94] Ibid, 9.

interference, informality and no legally binding decision. This is important to gain better understanding regarding ASEAN, particularly on how it operates.

**1. Principles of non Interference**

The concept of non interference in internal affairs of a state by another state or other states is an established norm of the international order.[95] As stated in article 2 (7) of the United Charter:

> 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

As an international organization, ASEAN also adopted this principle since its establishment. Besides following the UN Charter, ASEAN's acceptance of this principle is somewhat closely related to the past experience of its members. The bad history of colonialism in the South East Asian countries made South East Asian countries believe that the accommodation of this principle is crucial.[96] Another reason is that during the Cold War there was a continuing intervention by the great power (the USSR and the USA) in the world including South East Asian countries.[97] The above situation is supported by the relatively fragile states in South East Asian Countries after colonialism.[98]

The principle of non interference or non intervention of the Association of South East Asian Nations (ASEAN) can be seen in numerous documents. Firstly, it implied in the founding declaration of ASEAN namely the 1967 Bangkok Declaration. The preamble of this declaration states that the Association is based on 'the spirit of equality and partnership'.[99] This implies that each of the ASEAN members has equal position. Therefore, they cannot intervene other states' internal affair. ASEAN's commitment to follow the non interference principle was more obvious at its later stage. As can be seen in the 1971 Declaration on the Zone of Peace, Freedom and Neutrality, ASEAN recognized that for every state has the right to lead its national existence free from outside interference.[100]

[95] Simon S. C. Tay, 'Institutions and Processes: Dilemmas and Possibilities', in Simon S. C. Tay, Jesus P. Estanislao and Hadi Soesastro (eds) *Reinventing ASEAN* (2001) 250.
[96] Ibid, 251.
[97] Ibid, 250.
[98] Ibid.
[99] The ASEAN Declaration (Bangkok Declaration) 1967, above n 77.
[100] Zone of Peace, Freedom and Neutrality Declaration 1971, <http://www.aseansec.org/1215.htm> at 4 May 2006.

In 1976 this principle became one of the six basic principles of ASEAN in regard to their interstate relations. As stated in the 1976 ASEAN Concord[101] and the Treaty of Amity and Cooperation: no states shall interfere in the internal affairs of one another.[102] It is also stated in article 11 of the Treaty that 'member states shall endeavour to strengthen their respective national resilience in their political, economic, socio cultural, as well as security fields in conformity with their respective aspirations, free from external interference as well as internal subversive activities in order to preserve national identities.'[103]

In practice, this principle helped ASEAN to establish a semblance of security community, especially between the late 1980s and early 1990s.[104] It also has contributed to the ASEAN success story. This principle, however, has come under pressure in a globalized era. Global issues such as human rights and environment which emphasize the interdependence between nations threat this principle.[105] This is because states have a duty and right to legitimately examine and intervene in the affairs of other states which violate norms.

In the case of ASEAN, this principle is also under strain since it can not sufficiently address regional problems. Three cases: human rights violation in Myanmar, internal conflict in Cambodia and the haze problem in Indonesia are examples how the non interference principle becomes potential constrain.

Allegation of Human rights violation in Myanmar somewhat challenged the non interference principle. The refusal of the Myanmar government to recognize the victory of National League for Democracy (led by Aung San Suu Kyi) in the national election in 1990 made many international human rights groups questioned the legitimacy to the Myanmar

[101] The 1976 Declaration of ASEAN Concord. <http://www.aseansec.org/1216.htm> at 4 May 2006.
'Member states shall vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous relationships, and in accordance with the principles of self determination, sovereign equality and non-interference in the internal affairs of nations.'
<http://www.aseansec.org/1216.htm> at 4 May 2006.
[102] the Treaty of Amity and Cooperation 1976, <http://www.aseansec.org/1217.htm> at 4 May 2006.
The six basic principles of ASEAN which guide their interstate relations are:
1. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
2. The right of every State to lead its national existence free from external interference, subversion or coercion;
3. Non-interference in the internal affairs of one another;
4. Settlement of differences or disputes by peaceful means;
5. Renunciation of the threat or use of force;
6. Effective cooperation among themselves. [102]
[103] Article 11 of the Treaty of Amity and Cooperation 1976, <http://www.aseansec.org/1217.htm> at 4 May 2006.
[104] Robin Ramcharan, 'ASEAN and Non interference' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2003) 53.
[105] Tay, above n 12, 251.

Government.[106] While the US and European Union restricted economic relation with Myanmar, ASEAN preferred to build 'constructive engagement' with Myanmar.[107]

With constructive engagement, ASEAN hoped that internal human rights situation would improve so that Myanmar membership in ASEAN might proceed smoothly.[108] This engagement, however, was completely failed as human rights situation in Myanmar worsen. The above case shows that non interference principle failed to significantly change the human rights situation in Myanmar. The situation perhaps will be different if ASEAN gave clear sign to Myanmar that ASEAN will give sanction to Myanmar if the human rights situation did not improve.

Another example is internal conflict in Cambodia. ASEAN postponed the membership of Cambodia because of the internal conflict in Cambodia. The conflict began with the 'a violent process of leadership change in 1997 by Prime Minister Hun Sen.'[109] As a result, Prince Ranariddh and Sam Rainsy (opposition leader) were forced to leave the country.[110] 'ASEAN's reaction to the coup was to express deep regret, to suspend Cambodia's admission, to demand cease fire and to call upon Hun Sen and Prince Ranariddh to resolve their difference peacefully.'[111] This reaction is in line with the non interference principle of the Association.

In addition, ASEAN also offered good office to Cambodia.[112] This effort, however, did not succeed since one party (Hun Sen) was uncooperative and accused ASEAN of interfering Cambodia's internal affair.[113] This resulted in the withdrawal of ASEAN in Cambodia's political process and left Cambodia without real outcome.

The last example is the haze problem in Indonesia in 1997. The burning of forests by Indonesian agricultural- industrialists to create plantations for pulpwood, oil palm and rice, created regional problem. The haze blanketed not only Indonesia but also other surrounding countries such as Singapore, Brunei, Malaysia, Thailand and the Philippines. The haze was not only creating environmental and health issues but also economic impact. Such as in Singapore where the haze made the Changi Airport and Singapore based airlines lost US $ 6.9 million in revenue.[114]

[106] Ramcharan, above n 21, 53.
[107] Ibid.
[108] Ibid, 54.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid, 55.

Indonesian official, however, stated that the haze was internal problem of Indonesia.[115] ASEAN could not do anything to tackle the problems. This was because of the non interference principle of ASEAN.

Simon Tay –a member of Singapore's parliament- however, argued that in dealing with the problem of haze, the Asian way which prescribes non intervention in internal affair is misconceived notion.[116] He argued that the haze was not internal matter since the effect of the haze was not only occurred in Indonesia but also in other surrounding countries.[117] The ability or inability of ASEAN to deal to the fires will test the working relationship between the member states and affect the Association's credibility in the eyes of other members.[118]

The three cases mentioned above show that the principle of non intervention can not adequately resolves the recent problems. ASEAN, perhaps, should reconsider this principle for its future.

**2. Principle of Informality and no legally binding decision**

As an international organization, ASEAN can be described as a regional organization with minimum formality. Since its establishment in 1967, ASEAN has a two pages declaration.[119] It had no criteria of memberships other than location in South East Asia and the compliance of the general principles of international behavior.[120]

The informality of ASEAN can be seen in many ways. In terms of its organizational structures, ASEAN has only a simple bureaucratic apparatus.[121] In the past ASEAN did not have permanent secretariat. The informality of ASEAN is also seen in the labels used to describe the other institutions within ASEAN. Rather than using the term multilateral security mechanism, ASEAN preferred to use 'dialogue forum' e.g. the use of ASEAN Regional Forum (ARF) rather than ASEAN security organization.[122]

[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Bangkok Declaration which established ASEAN is only two pages long. As Cited by Rodolfo Severino, 'Framing The ASEAN Charter: An ISEAS Perspectives' in Rodolfo Severino (ed) *Framing The ASEAN Charter: an ISEAS perspective*, (2005) 3 <http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf> at 4 May 2006
[120] The ASEAN Declaration (Bangkok Declaration), above n 77.
[121] David Capie and Paul Evans, 'The ASEAN Way', in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2003) 45.
[122] Ibid, 46.

The consultative process in resolving problems is another form of ASEAN's informality. Rather than using legalistic and binding rules, ASEAN prefer to use dialogue. [123] Bilateral meeting among the States heads of ASEAN, for example, provides some flexibility in discussing sensitive issues without disrupting ASEAN harmony. This is perhaps one of the reasons why ASEAN did not have regional dispute settlement mechanisms.

The adoption of this principle clearly reflects the cautious approach of the member of ASEAN in building their relationship. For some observers, the adoption of this principle is important because it can 'prevent confrontation and the development of intra associational groups or factions.'[124] The consensus method also gives opportunities for the member of Association for 'face saving' which is considered important for the solidarity and the cohesion of South East Asian Countries.[125] Bilateral meeting among the States heads of ASEAN provides some flexibilities and in discussing sensitive issues without disrupting ASEAN harmony.

While the consensus method is clearly the appropriate method for the highest level, is such method efficient in all level? The implementation of this method, especially in the lower level, frequently reduced the effectiveness of ASEAN cooperation.[126] This is because there is no certain rule to be followed. They must discuss and negotiate the matter first before achieving the decision. And it frequently takes times.

The three main features of ASEAN -informal nature, non interferences and no legally binding decision-were certainly the appropriate features of ASEAN especially in its early stage. This is because these features can sufficiently accommodate the diversity of South East Asian Countries. In addition, the "ASEAN Way" also has enabled ASEAN to maintain the peace among its members.

For recent situation, however, as human rights and the environmental issues become global issues and the more complex problems and challenges, ASEAN should review the above principles particularly the non intervention principle.

## V. CONCLUSION

The Bangkok Declaration 1967 was merely a 'political declaration.'[127] This is because the declaration did not require ratification from states members and did not

[123] Ibid, 45.
[124] Muthiah Alagappa, 'Institutional Framework: Recommendations for Change', in Shandu, Siddique et.all (eds) *The ASEAN Reader* (1992) 64.
[125] Ibid.
[126] Ibid, 65.
[127] Scoot Gallacher and Siva Somasundram, 'ASEAN Charter: Giving ASEAN Formal Status,' 13 April 2006 <http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Articles/A+-

provide the establishment of ASEAN, as an international organization.[128] In addition, ASEAN operated in informal approach which was implemented on the basis consensus, non interference and non binding decision the so called ASEAN way.

While the ASEAN way worked well in the early establishment of ASEAN, it does not sufficient to address the current situation. Global issues such as human rights and environment creates interdependency among countries. Every state has a right to intervene other countries if the countries violate human rights or commit environmental damage.

ASEAN, therefore, has an intention to create a formal charter for ASEAN which may include clearer machinery. The hope is, with a charter, ASEAN existence will be recognised by both domestic and international institutions. ASEAN charter will also serve as a legal and institutional framework of ASEAN.

The realization of the ASEAN charter, however, is not an easy task. This is because ASEAN is so diverse in terms of their economy, politics and culture. ASEAN, therefore, should create a common sense among its members. While it is difficult to create 'common identity', 'unity in diversity' may be more appropriate for ASEAN.[129]

+C+ASEAN+Charter+%96+Giving+ASEAN+formal+status> at 4 May 2006.
[128] Ibid.
[129] Suryadinata, above n 1, 43.

## Bibliography

**B**angkok Declaration which established ASEAN is only two pages long. As Cited by Rodolfo Severino, 'Framing The ASEAN Charter: An ISEAS Perspectives' in Rodolfo Severino (ed) *Framing The ASEAN Charter: an ISEAS perspective*, (2005) 3 <http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf>

David Capie and Paul Evans, 'The ASEAN Way', in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2003) 45.

Muthiah Alagappa, 'Institutional Framework: Recommendations for Change', in Shandu, Siddique et.all (eds) *The ASEAN Reader* (1992) 64.

Leo Suryadinata, 'Toward An Asean Charter: Promoting An Asean Regional Identity', in Rodolfo Severino (ed) *Framing The ASEAN Charter: an ISEAS perspective*, (2005) 41 <http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf>

Robin Ramcharan, 'ASEAN and Non interference' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2003) 53.

Scoot Gallacher and Siva Somasundram, 'ASEAN Charter: Giving ASEAN Formal Status,' 13 April 2006 <http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Articles/A+-+C+ASEAN+Charter+%96+Giving+ASEAN+formal+status>

Simon S. C. Tay, 'Institutions and Processes: Dilemmas and Possibilities', in Simon S. C.

Tay, Jesus P. Estanislao and Hadi Soesastro (eds) *Reinventing ASEAN* (2001) 250.

The ASEAN Declaration (Bangkok Declaration) 1967

Zone of Peace, Freedom and Neutrality Declaration 1971, <http://www.aseansec.org/1215.htm>

The 1976 Declaration of ASEAN Concord. <http://www.aseansec.org/1216.htm>
'Member states shall vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous relationships, and in accordance with the principles of self determination, sovereign equality and non-interference in the internal affairs of nations.' <http://www.aseansec.org/1216.htm>

The Treaty of Amity and Cooperation 1976, <http://www.aseansec.org/1217.htm>
Article 11 of the Treaty of Amity and Cooperation 1976, <http://www.aseansec.org/1217.htm>

The ASEAN Declaration (Bangkok Declaration), above n 77.

Third Session
**Regulation Impact on Local Government Autonomy**

# Indonesian Community and Law in Korean

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## Ⅰ. Status and characteristics of Korea as a multicultural society

Korean society has been rapidly urbanized, globalized and liberalized since the great industrialization in 1970s. As a result, there has been rapid aging, an unbalanced gender ratio in rural villages, and worker shortages in cities. These have become major social issues and Korea has gradually accepted a large number of immigrants by marriage and foreign workers. So far, although it is a non-immigration country, foreign residents in Korea have increased to 2% of the population. That means Korea is not a nation state any more, but can be called a multinational state or a multicultural society. During the last ten years, many multinational communities and multicultural family communities have appeared around some industrial complexes and in rural villages. Moreover, those foreign residents naturally form cultural minority groups. Therefore, whether they can adapt well to the established social system or not became a key variable for the stability and unification of Korean society. In fact, there has been conflict from the prejudice against different races, cultures and religions, and also a number of human rights violations have been found, such as economic disadvantage, violence, and unfair labor practices. These problems are major social and political issues domestically, and diplomatic issues internationally.

As more foreign residents come in, more conflict and polarity between foreign cultures and established culture have appeared. Korean society is now really in need of a multicultural approach instead of a monocultural one to solve the social and cultural imbalance based on its rapid multiculturalization. In earlier days, some multicultural phenomena existed among diplomats, sojourning employees and foreign students, but the impact was not so great. However, for the last ten years, as various foreign residents, including marriage immigrants, foreign workers and overseas Koreans, have become members of Korean society, foreign communities with various cultural identities have needed to be reckoned with. As seen above, Korean society is running on the highway to a multicultural society, and many foreign communities began to request better social and political solutions to realize coexistence of people with different cultures. As is well known, the majority of foreign residents, such as marriage immigrant women from South-east Asia and foreign workers, are still being discriminated against and abused in many ways. Particularly, in this report, we would like to take a look at multicultural phenomena and legal issues around the Indonesian community in Korea.

## Ⅱ. The tasks of Korea for Indonesian communities in Korea

### 1. Current state

At the end of December 2009, the number of foreign residents in Korea was 1,168,477 and the number of Indonesians was 29,859; 2.56% of the foreign residents. Also, among 870,636 registered foreigners, Indonesians occupy the sixth place after Chinese, Vietnamese, Filipinos, Americans and Thais. Looking over the increase and decrease of the population of Indonesians since 2005 when there were 25,590 residents we see +42.11% in 2006, -27.09% in 2007, +12.79% in 2008, and -0.18% in 2009. After hitting a ceiling in 2008, it has been showing signs of stagnation. Since the employment permit system was implemented after abolishing the industrial trainee system in December 2009, there were 24,632 industrial trainees (D-3 visa) and industrial training employees (E-8 visa) in Korea. Among them, the population of Indonesians was 2,083, 8.46% of the industrial trainees, occupying the fourth place after Chinese, Vietnamese, and Filipino trainees. And there were 237,160 foreign workers with E-9-2~7 visa employed under the employment permit system, and among them Indonesian workers were 19,587 people, 8.26% of the whole, occupying the fifth place after Chinese, Vietnamese, Thai and Filipino. The number of Indonesian marriage immigrants was 390, 0.31% of the entire marriage immigrants (124,794). Meanwhile, the number of Indonesian students studying in Korea (D-2, D-44) is only 394, 0.49% of 80,985 foreign students. From the above, we can understand that most Indonesian people stay in Korea for jobs or training, but only a few stay for marriage or study.

### 2. Tasks

Seeing the dispersion of foreign residents throughout Korea, most foreigners are from Asia such as China, Vietnam, Mongolia, the Philippines, Indonesia, etc. Especially, speaking about Indonesians, they make up only 0.5% of marriage immigrants and students, and that means almost all Indonesian residents are workers or trainees.

In the industrial trainee system, foreigners could get an E-8 visa and work for two years after training for one year as industrial trainees with a D-3 visa. In this case, because they were permitted to stay not as legal workers but as trainees, they could be easily compelled to do repetitive work with long working hours although they had the right to acquire advanced skills and knowledge. From bad to worse, not being protected by the labor law, they were frequently vulnerable to exploitation and violations. Eventually, many of them left their work to become illegal aliens. Actually, in order to correct these problems of the system, the employment permit system newly started in 2004. The system allows employers who have failed to hire native workers to legally hire an adequate number of foreign workers. Under this system, foreigners are usually permitted to engage in manufacturing, construction and service businesses that are experiencing serious labor shortages, and they can also be protected by labor related laws like native workers. Particularly, small and medium sized enterprises, whose workers are less than 300, can take precedence to hire foreign laborers. The size of the inflow of foreign workers will be determined at an adequate level, taking into account the trends in the supply and demand. To dispatch workers, eight countries (the Philippines, Thailand, Mongolia, China, Kazakhstan, Sri Lanka, Vietnam, and Indonesia) have made sending contracts to Korean ministries. Under this system, the foreign workers are to be legally hired with an E-9 visa, and the contract can be renewed for a 1-year period but the whole period cannot exceed 3 years.

The employment permit system is also implemented in EU and the US, where the government authority confirms the validity and allows employers to hire foreigners when those who want to hire foreign workers submit the type of business and the purpose. Employers who have obtained permission from the government can attract foreign workers by themselves or through non-profit corporations or public organizations authorized by presidential decree. Jobseekers also have to get qualifications from the government or public organizations authorized by the sending countries. Employers are to make employment or labor contracts with the foreign laborers, which note thorough working conditions including wages, working hours, days off, and vacations, as well as forbidding accompanying families. The working period is set at a maximum of three years to prevent settlement of foreign workers in Korea, and employers and foreign workers are to decide every year whether to renew the labor contract. Foreigners who left Korea after having worked in Korea under the employment permit system cannot be employed again under the same system unless they have stayed outside of Korea for more than six months. Considering the short working period (three years) under the employment permit system, accompanying family is banned. However, after the contract period, many foreigners are likely to choose to become illegal residents to stay in Korea instead of going back to their countries**.** Then they might become vulnerable to wage exploitation, various abuses and bad working conditions; falling into places where there are no human rights. Particularly, most Indonesians in Korea are working laborers rather than marriage immigrants or students, so they tend to be illegal residents more than people from other countries. At the end of December 2009, Indonesian residents in Korea occupied 2.56% of foreign residents, and 2.98% of registered foreigners. They prefer to stay for long periods and, therefore, the number of Indonesian illegal residents is 4,955 (19.89%), which occupies a higher percentage than the total illegal staying rate, 15.2%. This is not only because a larger number of Indonesians are laborers and they have already spent higher job expenses and air fares, so they are in worse conditions to recover the opportunity costs than people from other Southeast Asian countries. This is why the growth of Indonesian communities is a bit slower.

## Ⅲ. Conclusion - The legal tasks of Korea for multicultural societies

Korean multicultural society has been formed by a rapidly increasing inflow of foreigners from Southeast Asian countries owing to international marriages, study and job seeking. Observing the stages toward multiculturalization, in the first step, the population of foreign residents increases. In the second step, foreign resident communities and group residential areas appear. In the last step, immigrant communities start to get reproduced and settle down. Actually, Korea is just about to enter a multicultural society. In the early stage of entering a multicultural society, there may be hostile attitudes of native residents against foreigners. For instance, they show hospitality to marriage immigrants, but, on the contrary, ironically they discriminate and abuse foreign laborers because of the lack of understanding about different cultures. In this situation, government policies on multicultural society are likely to put more weight on social unification and assimilation than on respect and recognition of the identities of different cultures. Now in Korea, it is more important than any other thing to stabilize and settle down the multicultural society. In addition, we have to solve social dangers related to multicultural society, like various crimes committed by minority race

groups, unemployment, and conflict among different races, in order to unify this society and to move forward to a wholesome society.

In this point, it is hard for Indonesians to grow into a stable foreign community in Korea because the rate of workers is higher than marriage immigrants and students, so they might have rare opportunities to contact native Koreans and convey their cultural characteristics. Besides, owing to their religion, many Indonesians tend to become members of Muslim communities. And because their population is also lower than other Southeast Asians, progress in forming a national community is also rather meager. Thus, for the better settlement of the Indonesian community, the purpose of staying in Korea should be improved in quality. Moreover, if foreigners from specific countries keep coming in, the population of foreign residents might increase up to 2.8% in 2010, 5% in 2020 and 9.2% in 2050. Therefore, we had better find solutions now in order to relieve many potential social risks that may result from the failure of social unification and the exclusion of cultural minority groups, who are rapidly increasing, even at this point.

In addition, we also need to correct and improve the regulations and laws related to multicultural issues. There are already several rules related to multicultural issues in Korea, such as the *Act on the Treatment of Foreigners in Korea, Support for Multicultural Families Act,* and *Act on Cultural Support for Multicultural Society (proposal)*, but each of them is overseen by different government departments and they overlap each other. Also, there are insufficient coordination functions in them, and administrative tasks overlap. Furthermore, foreigners are strictly restricted to obtain qualifications for stay by *Immigration Control Law* and *Act on Foreign Workers, Employment, Etc.* to prevent their settlement. At this point, to move forward to a more liberal and equal multicultural society, we may have to take some multiculture-friendly policy decisions, like amendment of the regulations to restrict settlement of foreigners.

# Regulation Impact Assessment: An Instrument for Advancing the Quality Local Regulation

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**PROBLEMS**

- There is no harmonization and synchronization oflegislation in central level with the local level
- The condition of legislation in Indonesia is very complicated because every regulation give space to delegation, and the extent of discretion which contains a general arrangement issued by the Central Government.
- Lack of studies in the establishment of regulations in the local areas.
- Each Local Government only has limited Legal Drafter who understand the substance of the regulation and the technique of drafting.
- Environmental policy in Indonesia is still considered not in good sinergy with other policies
- Perda is a major factor affecting the business climate (Survey KPPOD, GTZ, Swisscontact)
- Once decentralization initiated (2001 – 2004), Perda began to boom in number as many as 15 520 Perda, and of which only 5.654 were reported to the Ministry of Home Affairs. The government has problem directly monitoring Perda's throughout Indonesia. A total of 515 of 1.262 Perdas have been canceled by the Minister of Home Affair, while 747 Perdas are still in the assessment process. According to an article in Kompas, October 5, 2009 there were 1.999 new Perdas in the process of assessment by the Ministry of Finance.

Article 237 of Act No. 32/2004 :

All provisions of laws and regulations directly related to the autonomous region shall base and adjust the regulations in accordance with this Act.

What is meant by this regulation in this Article 237 is sectoral legislation such as the Forestry Act, Water Act, Fisheries Act, Agriculture Act, Health Act, Land Act and Act of Plantation should be in harmony with the decentralized local affairs

As indicated by the DPR Program of National Legislation (Prolegnas) result it turmed out that:

- Not all of the sectoral legislations are programmed to be revised in order to create harmony with the decentralized local affairs
- The making of the sectoral legislation is still under way and has not up to the present been completed.
- However , despite although some of the sectoral legislation have been in effect, they not in harmony with the decentralized local affairs

**What is the Implication for the local government?**

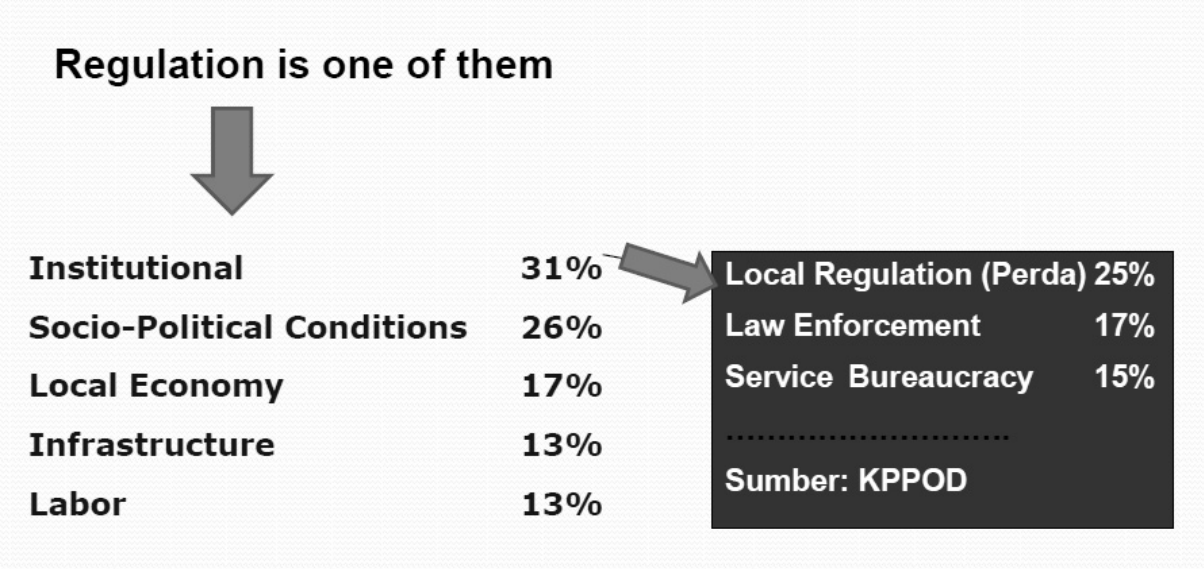
In the hierarchy of the legislation, Perda is on the lowest rung. According to the principles of legislation Perda should not contradict the higher legislation.

Perda is burdened with the higher legislation and also regulations which are not in harmony with it. It is there for difficult to make a good Perda. In reality, most local governments are reluctant to make a new Perda as a delegation regulation because of the disharmony in the higher legislation.

So far Perda has done things that are considered simply or easy to improve the Regional Own Revenue (PAD). Besides, the local should regulate 41 substances of Perda Taxes and

Retributions as delegation of the law no. 28 / 2009 (UU PDRD).

**Bussiness Obstacle**




**How to Improve the Quality of the Local Regulations?**

Implicitly, Law No. 10/2004 requires the establishment of regulations under the principles of :

| Formal | Material |
|---|---|
| ○ clarity of purpose;<br>○ institutional or right-forming organs;<br>○ Fitness of type and substance;<br>○ implementable;<br>○ system efficiency and effectiveness;<br>○ clarity of drafting, and<br>○ openness | ○ protection;<br>○ humanity;<br>○ nationality;<br>○ kinship;<br>○ archipelago;<br>○ Unity in Diversity;<br>○ justice;<br>○ similarities in the legal status and governance;<br>○ order and legal certainty; and / or<br>○ balance and harmony |

**Principles in Law No. 10 / 2004 in line with OECD checklist:**

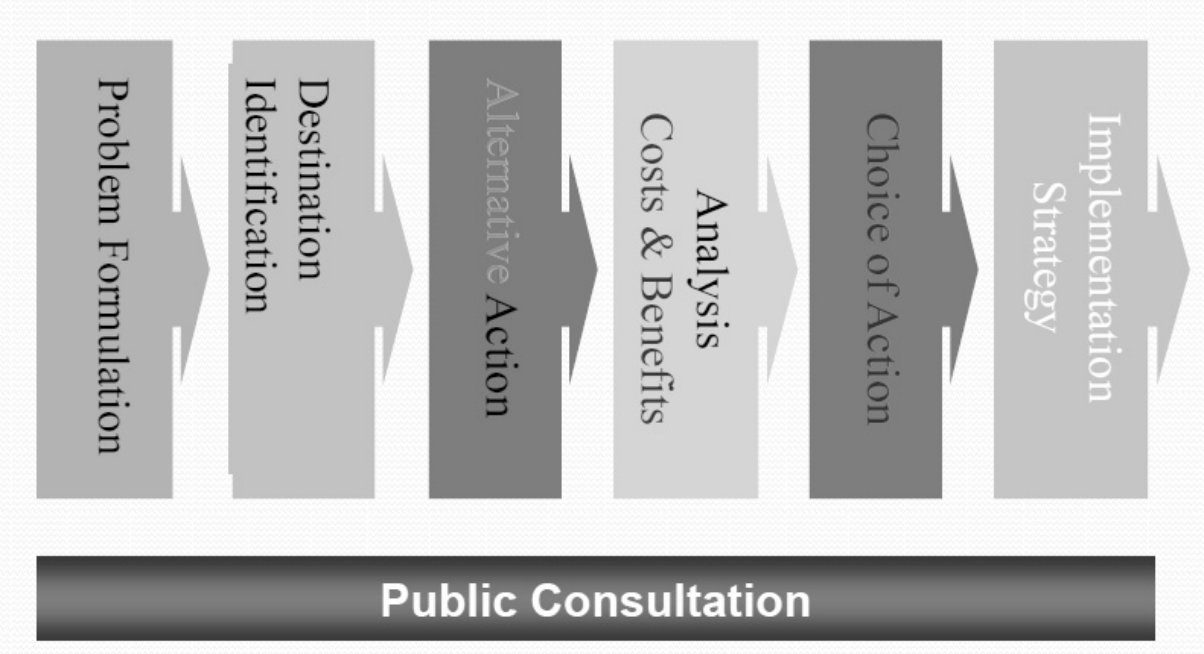
- Has the problem been formulated precisely by perda?
- Is the local government action of making such regulations reasonable?
- Is Perda is the best action?
- Is there a legal basis for such a local government action?
- Which of the government level is the most propore to perform this action?
- Do the benefits exceed the costs in enacting the governments?
- Are the effects of distribution quite transparent in society?
- Is the formulation of the regulations clear, consistent, easily understood, and accessable by the public?
- Do all interested parties have an opportunity to express their opinion (the public participation aspects)?
- How can the levels of compliance with the local regulation be achieved? (Is it by formulating harsh criminal penalties or administrative sanctions?, is the sanction executable by the officer?)

Note: the checklist can show the quality of the regulation

**Benefits of Using RIA Instruments**

- RIA provides decision-makers to weigh the ease-benefit which should be balanced for every action related to the issuance of regulations;
- RIA connects high-quality rules with good governance, and economic development;
- RIA provides empirical data to make appropriate regulatory decisions;
- RIA provides clear guidelines for consultation with stakeholders to improve transparency, builds trust and public accountability, and
- RIA findings associated with the lowest-cost solutions can help reduce implementation costs by the government as well as transaction costs by businesses.

**Regulatory Impact Assessment (RIA) Stages**




**RIA Implementation Barriers**

- No legal protection for RIA yet
- Lack of political will and weak leadership
- Inadequate allocation of funds for regulation base on RIA
- Inadequate database of all the legislations and regulations
- Stakeholders are not so much involve in the making of legislations and regulations
- Low human resource capacity (the scarcity of Legal Drafting experts)

**Solution**

- Simplification RIA stages with emphasis on phase problems and goals, analysis of costs and benefits, as well as on public consultations.
- Inserting the RIA simple substance into DPRD regulation (Tatib DPRD) i.e Establishment of Perda on specific chapter in DPRD regulation.

- Establishment of Perda which binds DPRD and the Executives to regulate the Establishment Procedures of the Local Law Products, involving a set of phases of establishing regulation process based on RIA.

**RIA Institutionalization**

There must be political commitment of the Head of the Region and the Regional Representatives Council (DPRD)

RIA Team requires permanent structures and should be instituted early.

The permanent RIA Team members sould be composed at least of representatives from the Legal Department, and Regional Development Planning Agency (BAPPEDA) and the Regional Revenue Service (DISPENDA) or Revenue Agency and Finance Area (BPKD).

For particular proposes, technical representatives from local government departments can be added to the permanent RIA Team.

The permanent RIA team can also be equipped with an ad hoc team representing

the stakeholders (Universities, NGOs, Business Associations and related institutions).

To support the RIA team activities, some fund is needed to finance the information collection, public consultations, experts fee, office equipment, meeting rooms and

permanent support staff/secretariat.

# A Discourse on the Constitutionality of the Rights enshrined in the International Migration Convention (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families)

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## Ⅰ. Introduction

In the age of globalization, the constitutionally guaranteed freedom of migration is not limited to the freedom of migration within the State anymore. To find a means of living, laborers usually migrate to a State where a wage level is higher than their own State's and try to engage in employment. Nevertheless, emphasis on competition and economic growth from Globalization does not necessarily provide positive effects on the protection of the rights of migrant workers. When a worker migrates to a host State with his or her family, and lives with them in the host State, the rights of migrant workers, as human rights of laborers, should be guaranteed in the workplace in the host State and in the extensive social context. In this respect, the freedom of migration of laborers has economic and social significance internationally.

Domestic implementation of the legislation and jurisprudence of the Court which ensures the rights of migrant workers' departure from their State of origin, entry into a host State, residence and integration in the host State, and economic and social fabric in a broad sense. Article 39 of the Treaty establishing the European Economic Community, as seen in the case of European Court of Justice, considers the employers' position as well as the workers' position. In Mr. and Mrs. F. v Belgian State (Case 7/75), the Advocate-General[130] of the European Court of Justice, Trabucchi, claimed that migrant workers should be regarded as human beings, and not merely as the source of a work force.

The protection of the workers who are not employed in their State of origin has brought attention on all spheres of the United Nations system. The United Nations adopted the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and established legal ground for the protection of migrant workers at international level. For the protection of the rights provided in the Convention, it also stipulates the procedure of individual communications in Article 77. Article 87, Paragraph 1 of the Convention states "the present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession". The Republic of El Salvador and the Republic of Guatemala deposited their twentieth instrument of ratification to the UN Secretary-General on March 14, 2003 and the Convention officially entered into force on July 1, 2003. In spite of its entry into force, its actual effectiveness and influence have not reached a satisfactory level. Although 42 States have acceded to the Convention as of August 10, 2009, major countries of immigration including the Member States of the European Union and the U.S. as well as

[130] The European Court of Justice is composed of one judge per member state – currently 27 – and eight Advocate Generals (AG).

the Republic of Korea have not acceded to the Convention. These States have not even expressed their interest in accession to the Convention. However, the accession to the Convention is constantly discussed in Korea because it changed from a 'sending' country – Korea sent mine workers and nurses to Germany a long while ago – to a 'receiving' country. In this regard, how would the accession to the Convention, which provides an important resettlement standard in terms of the promotion of human rights and labor rights, influence domestic legal order? This has become the greatest concern in Korea.

With regard to Korea's accession and ratification to the Convention, whether the Convention's protection of the rights of migrant workers and their family members who are undocumented or in an irregular situation as well as documented or in a regular situation complies with the protection of basic rights under Korea's Constitutional order should be reviewed on a preferential basis. Amongst the rights provided by the Convention, discussions on reservation regarding the provisions in conflict with or unacceptable to the Constitutional order should take place first. Due to the characteristics of human rights treaties which require all member States of absolute and objective liabilities of their implementation, based on a compelling law (ius cogens), reservation of human rights treaties is not desirable and cannot be justified. Nevertheless, the reservation is accepted from the point of view of controlling time in adapting domestic legal order to the international human rights treaties[131]. The Korean government's basic stance on accession to the Convention was expressed in the Universal Periodic Review on Korea in May 2008. The government expressed that it respected the intention and spirit of the Convention but realistically it was impossible to accede to the Convention, considering the fact that the provisions of the Convention might conflict with those of the main Korean domestic laws. However, the government also expressed that it would make every effort to protect human rights regarding health, safety, and employment of migrant workers and their family members provided in the Convention[132].

In regard to the Government's adherence to its position, the main issue of accession to the Convention is that it extensively recognizes foreign workers' rights who are illegally employed by defining migrant workers as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national' under the Article 2, Paragraph 1. Most countries are not willing to recognize these illegal migrant workers. By extensively recognizing the rights of migrant workers who are illegally employed, namely diminishing the differences in the rights between legal migrant workers who are regularly employed and illegal migrant workers, the purpose to remove the root cause of economic exploitation against illegal migrant workers might be justified and realized. However, this causes weakening of the basic aim of migrant workers' registration and regularization which is adhered to by receiving countries including the European Union and raises some problems in that it justifies migrant workers' illegal movement and employment.

Under the Convention, a wide range of undocumented or irregular workers are to be recognized as migrant workers. To legalize foreigners with illegal status that have stayed in Korea for less than 4 years conflicts with the purpose of the Employment Permit System (EPS) which was adopted in August 2004 to introduce legal migrant workers. The restrictions on shift of workplaces under the EPS might conflict with the freedom of movement of workplaces provided in the

[131] See Lee. Jooyoun. Effectiveness of Reservation to Human Rights Treaties, Issue. 3, Vol. 51, Collection of Treatises, The Korean Society of International Law, p.120-121
[132] See Cho, Tae-ik. Discussion paper on Civil and Political Rights under the International Migration Convention, A Penal Discussion on International Migration Convention, National Human Rights Commission of Korea, 2009, p.98.

Convention[133]. Furthermore, the Convention ensures social basic rights of migrant workers and their family members. In that the level of guarantee of nationals' social basic rights should be decided in consideration of the State's financial conditions. The issue of how the State's budgetary burden would be able to cope with and enhance the legalization of migrant workers' basic rights would be raised.

**II. The Concept and Definition of 'Migrant Workers' and the Issue of its Interpretation.**

As a condition precedent to the review on conflict between the Convention and domestic legal order regarding the accession of the Convention, one should look at the concept of migrant workers provided in the Convention. The term 'migrant worker' has different meanings and extra linguistic connotations in different regions around the world. Migrant workers defined by the United Nations have extensive conceptions and includes persons who work outside of their home countries. Migrant workers are also used to describe persons who move to other countries to find work such as seasonal work and for their own work[134]. Article 2, Paragraph 1 of the Convention defines migrant workers as follows: The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. Accordingly, to be interpreted as a migrant worker under this Convention, ① in a State of employment, not a State of origin, ② a person should be to be engage in, is engaged in, or has been engaged in ③ a remunerated activity. In regard to the types of migrant workers, Article 2, Paragraph 2 of the Convention provides the types of migrant workers as frontier worker, seasonal worker, seafarer, worker on an offshore installation, itinerant worker, project-tied worker, and specified-employment worker. The Convention also separately gives examples of persons who shall not be regarded as migrant workers[135].

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Article 1 of the European Convention on the Legal Status of Migrant Workers which was enacted by the Council of the Europe in Strasbourg on November 24, 1977 defines 'migrant worker' as 'a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment'.

Article 2 of the Act on the Employment, etc. of Foreign Workers provides the definition of a foreign worker as follows: The term "foreign worker" means any person who has no nationality of the Republic of Korea and provides or is willing to provide work in a business or in a place of business for the purpose of wage. The aforementioned two Conventions and the Act on the Employment, etc. of Foreign Workers all define migrant workers as a person who is to provide or

[133] Ibid, p. 101. Korea has concluded MOUs with 15 countries in Asian region to introduce labor force under the Employment Permit System.
[134] Wikipedia, the free encyclopedia.
[135] (a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;
(b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;
(c) Persons taking up residence in a State different from their State of origin as investors;
(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;
(e) Students and trainees;
(f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

provides work in a State of which he or she is not a national for the purpose of a wage.

In this regard, the Convention recognizes persons who are to engage in, is engaging in, or has been engaged in a remunerated activity as migrant workers. With this expansion of the meaning of migrant workers includes undocumented migrant workers as well as documented migrant workers. Accordingly, it provides a legal basis to regard undocumented workers - so called illegal workers - as migrant workers. This might conflict with the Employment Permit System (EPS) which aims for registration of migrant workers[136].

III. The Possibilities of Acceptance of the Rights provided in the Convention to Constitutional Order.

Ensuring rights guaranteed by the Convention for migrant workers who reside in Korea relates to an issue of constitutional subjectivity of aliens' basic human rights. To apply transnational human rights in one State, the human rights should have basis in reality. That is because the nature of human rights without any legal guarantee in international and domestic legal order cannot develop human rights to be the rights which are beyond basic conception of ensuring human rights. Accordingly, to be ensured of their effectiveness in domestic law, human rights should be adjusted to a State's understanding of basic rights. However, a State's primary legitimacy effort made it possible to implement human rights in its domestic law, paying the price for basic rights' nationwide legal subordination[137].

Claiming human rights as a universal conception of natural law which transcends time and space extends its aspect to international law, beyond the sovereignty of a State[138]. Recognizing aliens' legal capacity by expanding general dignity expands human dignity-based constitutional non-discrimination rule (Diskrimierungsverbot) by narrowing the differences between aliens and its nationals through combining common elements of human rights(Menschenrechte) and civil rights(Bürgerrechte). Therefore, the basis of the human rights on the natural law[139], which plays an essential role in ensuring the grounds and levels of effectiveness of basic rights in domestic legal order, breaks down the boundary between nationals and aliens[140].

The issue of identifying a person who claims his/her basic rights as constitutional rights is an issue of subject of the understanding of basic rights. Amongst basic rights, civil rights (Bürgerrechte) can be distinguished from human rights (Menschenrechte). Amongst basic rights which are guaranteed by the Constitution, there are basic rights which are only subject to its nationals and other basic rights which are subject to all natural persons including aliens and stateless persons. The term 'aliens', which is discussed as a subject of basic rights, means aliens who reside inside the State. No Korean academics deny the aliens' subjectivity of basic rights. Nevertheless, aliens' subjectivity is reserved in regards to the political rights which are a prerequisite for sovereign power of the people and social basic rights. Although aliens are guaranteed their basic rights in principle, Article 6, Paragraph 2 of the Constitution stipulates, 'The status of aliens shall be guaranteed as prescribed by international law and treaties' and enables separate and partial limitation of their basic rights in the principle of reciprocity. As the subjectivity of aliens' basic rights are not provided in Korean Constitution, the primary basis for aliens' basic rights are whether the basic rights concerned are

[136] See Chae, Hyungbok. Discussion paper on Civil and Political Rights under the International Migration Convention. A Penal Discussion on International Migration Convention, National Human Rights Commission of Korea, 2009, p.11.
[137] U. Di Fabio, Das Recht offener Staaten. Grundlinien einer Staats- und Rechtstheorie, Tübingen 1998, p. 61.
[138] Vgl. W. Waldstein, Das Naturrechtr in der modernen Staatsphilosophie, in: Festschrift für M. Kriele zum 65. Geburtstag, 1997, S. 920 f.
[139] Vgl. R. Herzog, Hierarchie der Verfassungsnormen und ihre Funktion beim Schutz der Grundrechte, EuGRZ 1990, S. 483.
[140] See Park, Zin-Wan. Equality and Pluralism, Issue. 1, Vol. 6, Constitutional Study, Korea Constitutional Law Association, 2000, p.201.

included in human rights. The Constitutional Court already recognized aliens' basic rights in terms of dignity and value of human being, the right to pursue one's happiness, and equal rights. Personal freedom (Article 12 and 13), freedom of movement (Article 14), freedom of residence (Article 16), freedom of privacy (Article 17), freedom of communication (Article 18), freedom of conscience (Article 19), freedom of religion (Article 20), freedom of science and the arts (Article 22), right to a trial (Article 27), right to claim criminal indemnity (Article 28), right to claim for national compensation (Article 29), and right to claim remedies for crime victims (Article 30) in the Constitution are the basic rights guaranteed to aliens.

**1. Assuring migrant workers' freedom to immigrate**

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides more extensive and detailed provisions than the ILO's relevant conventions and the European Convention on the Legal Status of Migrant Workers[141]. One of the most critical features of this convention is that with regard to rights subjectivity, it gives basic human rights to not only migrant workers who are documented or in a regular situation but also to those undocumented or in an irregular situation – illegal migrant workers – and their families. The purpose of such a wide coverage is to prevent family breakups caused by various problems between migrant workers and their family members and to protect those in an irregular situation from becoming subject to illegal trades or economic exploitations. That is to overcome illegal migrant labor by overcoming the differences in the scope of rights protection between the documented and undocumented workers. The ultimate purpose of the wide coverage of the convention, therefore, is to eradicate illegal migrant labor, which is the fundamental cause of sufferings facing every migrant worker and their family.

Nevertheless, the convention guarantees in Part IV, Article 64 to 71 a separate set of rights for those documented or in a regular situation – legal migrant workers – just as the marriage law distinguishes between de jure marriage and de facto marriage, and thus induces de jure marriage. At the same time, it also stipulates in Part VI a separate set of provisions for the promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers. These provisions call for the cooperation and duties of state parties to promote lawful labor.

However, the Constitution does not recognize the freedom of immigration, as part of the freedom of migration (Freizügigkeit), of the illegal migrant workers, who fall into the concept of migrant workers, a premise of the Convention. The reason is that the Constitution's Article 14 on the freedom of residence and migration does not include that of aliens. Only aliens with immigration permission, therefore, can immigrate into Korea. This means that it is constitutional for the government to expel those who illegally entered the county without permission if it follows a legitimate procedure.

In this respect, the Convention stipulates, "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually," thereby banning collective expulsions of migrant workers and members of their families. The European Convention on Human Rights also prohibits the collective expulsion of aliens in Protocol 4 (EMRK ZP 4), Article 4. The article implies that individual expulsions are basically not banned under the European Convention[142]. Of course the article can be seen as an example of the prohibition of inhuman or degrading treatment, stated in Article 2 of the European Convention. For example, the denial of labor permission or government subsidies to a certain group of aliens may

[141] Chae, H. International Human Rights Law. 2009. p. 377 Nopi-gipi press.
[142] Zimmermann, A., in: R. Grote/T. Marauhn (Hrsg.), EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, Kap. 27 side note 1.

be a form of the prohibited collective expulsion[143].

Article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families bans only collective expulsions of migrant workers and their families, and allows individual expulsions in pursuance of a decision in accordance with law as stated in Article 22, Paragraph 2. And this applies not only to legal migrant workers who have entered the country by permission but also to illegal or undocumented workers. Premised on this principle, Article 56 imposes limitations on expulsion of migrant workers by stipulating that as part of their rights, migrant workers and members of their families may not be expelled from a state of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in Part III. Article 22 of the Convention is based on Article 13 of the International Covenant on Civil and Political Rights:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The European Convention on Human Rights, reflecting this regulation from the covenant, stipulates procedural safeguards relating to expulsion of aliens in Protocol 7, Article 1, Paragraph 1: "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a. to submit reasons against his expulsion,
b. to have his case reviewed, and
c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

However, Article 1, Paragraph 2 states, "An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order (interesse der öffentlichen Ordnung) or is grounded on reasons of national security (nationale sicherheit)," thereby acknowledging that individual expulsions can be practiced for the purpose of public order and national security. The legal basis of the minimum procedural safeguards in expulsion of aliens is the principle of a constitutional government (Rechtsstaatsprinzip)[144].

With regard to the procedural safeguards relating to expulsion of aliens, as stated in Article 13 of the International Covenant on Civil and Political Rights and in Protocol 7, Article 1, Paragraph 1 of the European Convention on Human Rights, the aliens are those lawfully in the territory of a State Party. Therefore, illegal immigrants cannot be protected under these two conventions. Different from the two, Korea's Immigration Control Law uses only "aliens" without the expression "lawfully." But in the same law, the range of aliens subject to coerced expulsion includes ones who violate comprehensive domestic legal procedures, which means illegal immigrants may not be protected. In this respect, the minimum procedural safeguards mentioned in Article 22 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which can be applied to expulsion of illegal immigrants, seem to include the basic conditions and their three cases listed in Protocol 7, Article 1, Paragraph 1 of the European Convention on Human Rights. As Article 1 indicates, an expulsion of a migrant worker must be a lawful decision that has been reached in accordance with law. And the decision should be notified in a language that the worker understands so that he or she can express his or her own opinion about the decision. Also, reasons for the expulsion should be stated in the contents of the notification.

[143] EKMR No. 25129/94 – Tahiri (1995); Zimmermann, Ibid,. Kap. 27 side note 128.
[144] Zimmermann, Ibid,. Kap. 27 side note 133.

To examine the Korean law in terms of procedural safeguards relating to individual expulsion of aliens, there is a need to look into Article 46, Paragraph 1, Item 2 and Article 11, Paragraph 1, Item 3 of Korea's Immigration Control Law, which specifies the reasons for coerced expulsions of aliens, the legal basis of alien expulsions in the Korean law. Article 46, Paragraph 1, Item 2 stipulates that an alien may be expelled when it has been discovered that he or she had entered the country with any violation stated in Article 11, Paragraph 1, Item 3 as reasons for the prohibition of entry, or when any violation occurred after his or her entry into the country. Article 11, Paragraph 1, Item 3 provides the conditions for prohibition of entry or coerced expulsion in a very abstract and vague language: "Persons who have substantial reasons for being recognized as threatening the public interest or security.[145]" I personally believe that it is fairly probable that the above article can be declared unconstitutional (verfassungswidrig) for violating the Constitution's Article 37, Paragraph 2 about the general law reservation (allgemeines Gesetzesvorbehalt) if a request for adjudication on the constitutionality of statutes (konkrete Nomenkontrolle) or a constitutional complaint (Verfassungsbeschwerde) is filed with the Constitutional Court. The above article violates the principle of certainty (Bestimmtheitsgrundsatz) because it lacks clarity in stipulating restrictions on civil rights derived from the principle of constitutional reservation of the law (rechtsstaatlicher Vorbehalt des Gesetzes). Further, the due process of law from Article 12 of the Constitution, or the procedural safeguards relating to expulsion stated by the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, is also applied to the administrative justice system, beyond the criminal system, and therefore, it is possible to say that coerced expulsions based on the Immigration Control Law, which can be interpreted as unconstitutional, violate the due-process-of-law regulation of the Constitution as well. Given this, if Korea is to accede to the convention, the regulations of the Immigration Control Law should be amended to be clearer, with the unconstitutional ambiguity removed.

In addition, Article 46, Paragraph 1, Item 12 of the Immigration Control Law defines subjects of coerced expulsion as "other persons who come under Items 1 to 11 and the order of the Ministry of Justice," entrusting the grounding of coerced expulsion to the order[146]. The article's constitutionality can be judged by the essentiality formula (Wesentlichkeitsformel) of the German Federal Constitutional Court, which is in accordance with the essentiality theory (Wesentlichkeitstheorie). According to the theory, only fundamental and essential matters about the government organization and operation, including ones about the formation of the citizens' rights and obligations (e.g. restrictions on civil rights), can come to the legislature, whereas inessential (unwesentliche) matters may be dealt by the administration or the justice, not by the statute. Article 40 of Korea's Constitution should be construed as a declaration of the principle of parliament reservation (Parlamentsvorbehalt), which articulates that in accordance with the essentiality theory (Wesentlichkeitstheorie), the essential decisions (die wesentliche Entscheidung) in legislative enactment (Rechtsetzung) should be reserved for the parliament. From this perspective, the parliament-made statute must decide critical matters, and the orders, a subordinate law, should take the specifics and details in pursuance of human rights protection – even when aliens are involved as in coerced expulsion. Therefore, entrusting such an essential matter eligible for the parliament reservation to the order is in violation of the prohibition of comprehensive legislation entrustment based on Articles 75 and 95 of the Constitution.

Also, Article 3, Paragraph 2, Item 9[147] of the Korean law of administrative procedure, which

[145] See Kim, J. Note on the Civil Liberties of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Forum on the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. National Human Rights Commission of Korea. 2009. p. 107.
[146] See Kim, J. Ibid., 2009. p.107.
[147] See Kim, J. Ibid., 2009. p.107.

specifies that some administrative procedures including the notification of reason does not apply to emigration and immigration of aliens, may be reviewed to see whether it violates Article 11 of the Constitution and the procedural safeguards relating to individual expulsion of aliens stipulated in the convention. No issue of unconstitutionality arises because the convention does not ban individual expulsions but only requires implementation of the procedural safeguards in accordance with law in the procedure of expulsion, and the Constitution's stipulations on civil rights can surely be interpreted the same way.

**2. Marital agreement, family foundation, and the protection of family life**

Family life includes the relationship between parents or a parent(father or mother) and their children, regardless of whether or not the family is formed legally and the children are born in wedlock[148]. So, the concept of family is established without any relevance to the marriage. The 'Common-law marriage (or De Facto marriage) is also included in the concept of family[149]. Furthermore, it also covers the relationship among siblings, and the relationship between grand children and grand parents[150]. Lastly, it includes the relationship between the parents and adopted children, as well. It, however, is unclear whether the concept of family can be established with regard to the conjugal relations as far as the children are out of the question. On the contrary, Article 9 of the 'Charter of Fundamental Rights of the European Union' distinguishes marriage from family. Thus, the family is formed with the birth of a baby[151].

Family is natural and the most fundamental group unit of society. Nevertheless, the 'Universal Declaration of Human Rights', 'International Covenant on Civil and Political Rights', 'European Convention for the Protection of Human Rights and Fundamental Freedoms', and the 'Charter of Fundamental Rights of the European Union', they all distinguish marriage from family. Article 16 of the Universal Declaration of Human Rights (UDHR) stipulates the right to marry in Paragraph 1, the protection of marriage in Paragraph 2, and the protection of family in Paragraph 3(Article 16 of the UDHR: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.). In addition, Article 23 of 'International Covenant on Civil and Political Rights (ICCPR)' also provides the protection of family and marriage(Article 23 of the ICCPR: (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2)The right of men and women of marriageable age to marry and to found a family shall be recognized. (3)No marriage shall be entered into without the free and full consent of the intending spouses. (4)States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.). It distinguishes marriage from family life and stipulates them in separate provisions. 'The fundamental right to marry and right to found a family' are stipulated in both Article 12 of 'European Convention for the Protection of Human Rights and Fundamental Freedoms' and Article 9 of 'Charter of Fundamental Rights of the European Union'.

The 'right to marry' and the 'right to found a family' are two separate fundamental rights.

[148] EGMR-ZE, Nr. 31178/96 (2001) = NJW 2003, 1921/1922.
[149] EGMR, Nr. 16969/90 (1994) Rn.44=FamRZ 1995, 110; Nr. 25735/94 (2000) Rn.43.
[150] EGMR, Nr. 6833/74 (1979) Rn. 45.
[151] EGMR, Nr. 10730/84 (1988) Rn. 59.

Nonetheless, since family foundation has significant relevance to marriage, these two separate areas are stipulated in one incorporated Article. 'Right to marry and right to found a family' as the fundamental rights of an individual, contains institutional guaranty (Institutsgarantie) for the legal concepts (Rechtsinstitute) of marriage and family, from constitutional aspect. As a result, from the aspect of institutional guaranty, the constitutional order raises an important interpretational question regarding how to set a level of the obligation of protection (Schutzpflicht) for the marriage and family.: the level of recognizing the fundamental rights or going further? Marital agreement and family foundation as fundamental rights as well as existing right of family protection are all defensive rights (Abwehrrechte) and at the same time, it also contains the protective measures (Schutzgehalte) calling for the nation's obligation for the protection of fundamental rights (grundrechtliche Schutzpflicht) regarding the protection of marriage and family.

Article 44, Paragraph 1 of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families', as stipulated in both the UDHR and the ICCPR, also stipulates States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers. Paragraph 2 stipulates that States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. Furthermore Paragraph 3 stipulates that States of employment, on humanitarian grounds, shall favorably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

**1) Rights to Marry and to Found a Family**

'The rights to marry and to found a family' is the call for protection of the new process of making something out of nothing whereas 'the right to protect marriage and family life' is the protection of existing marriage and family. Marriage means life community (Lebensgemeinschaft) between man and woman. In some countries, however, where the same sex marriage is allowed, 'the fundamental rights for life community of the same sex couples' (Grundrechte auf homosexuelle Lebensgemeinschaften) can be over-applied. However, in Korea only the marriage with opposite sex is protected because the Article 36, Paragraph 1 of the Constitution of the Republic of Korea (ROK) provides, "Marriage and the family life should be established and maintained based on human dignity and equality of sex, and the ROK guarantees it." Nevertheless, if a transsexual tries to marry a person with opposite sex, it is reasonable that this case be protected as the liberty to marry. if a marriage takes place according to free and independent decision, the marriage is legally protected. This condition can be also effectively applied to the case of family foundation. A transsexual as well is able to claim this fundamental right.

The liberty to found a family protects the right to have a child because as mentioned beforehand, the child is an indispensible element for the concept of family. It protects not only the birth of a child but the adoption of a child. Due to the nature of this right, the legal personality is not recognised for the corporate body.

As a result, if the labor-receiving country prohibits marital agreement and family foundation or hinders the fundamental liberty, the restrictions on fundamental rights are established. The birth restrictions, compulsive fertility, and prohibition or hindrance of marriage are good examples of the restrictions. Since these are not stipulated in the domestic law, regarding marriage and family foundation, there is no case that it is contradictory to the domestic regulations.

**2) The protection of family life**

Both Article 8 of the 'Charter of Fundamental Rights of the European Union' and Article 7 of the 'European Convention for the Protection of Human Rights and Fundamental Freedoms' stipulate the protection of family life. In the precedents of the ECJ, the protection of family life has played an important role. In the ECJ precedents, the protection of family life has had the importance in the relevance with the freedom to move and the freedom to work of workers (Dienstleistungsfreiheit[152]. The restriction of family life, just as adopted not knowing his(or her) father, is established in the case that custody of the child or the right to educate are deprived. In general, separating a child from his (or her) parents falls under the restriction of the fundamental rights. Thus, the conditional segregation through the deportation of a family member also comes under the restriction of the fundamental rights. Nevertheless, the European Court of Human Rights views that the deportation should be allowed for the foreign family members who committed serious crime[153]. And the creation of the grace period (Frirstensetzung) is commanded[154]. Unlike Korea, the ECJ does not allow the deportation of foreign spouse for the reason of breaching the Immigration Control Act[155].

The most important issue that 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' emphasizes for the protection of marriage and family of migrant workers is the question of protection of family reunification. Of course, the question of protection of the right to reunite with their family for the immigrant workers can be justified in the aspect that it is an extension of the existing constitutional area of protection for marriage and family life. However, it is not that simple in the sense that if the immigrant worker builds up the foundation for the family life in immigrant country, he is no longer an immigrant worker, but the question of settlement of immigrant workers can be raised up. The problem of cultural clash is also raised considering the position of western countries which views the nuclear family as the concept of family[156] and the position of developing countries which regard the extended family as the concept of family[157], the position of islamic countries, in particular[158]. In this regard, some interpret the Article 44 of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' as a mere recommendation or guidance and thereby restricting the clash with the domestic law[159]. The problem of the present Article is that it gives too much discretionary power to the destination country. It can be understood that this Article gives the country directly involved a 'carte blanche' for it to control and restrict the migration of the families of migrant workers in an effective way. The Article is recognised to be applied only to registered migrant workers. The right to reunite with their family members who are separated from one another is the core contents of the family protection. As far as we interpret that in domestic legal order, the right to reunite with family is not the directly recognised right but the provisionally recognized right according to the penalty from the relevant regulations. It does not collide with the interpretation of the fundamental human rights which does not recognize the freedom of immigration for foreigners. However, this Article also possesses a positive meaning - it strongly calls the States Parties to the Convention for taking measures for the family reunification of the immigrant workers.

[152] EuGH, Rs. 60/00, Slg. 2002, I-6279 Rn. 38 ff.
[153] EGMR-ZE, Nr. 43359/98 (2001) = NJW 2003, 2595.
[154] EGMR, Nr. 52853/99 (2003) Rn. 48 = NJW 2004, 2147.
[155] EuGH, Rs. 60/00, Slg. 2002, I-6279 Rn. 42 ff.
[156] Working Group Report (June 1985) n. 42 above. 32. paras. 152-5.
[157] Working Group Report (Oct. 1986) n. 76 above. 10. paras. 51 ; Working Group Report (Oct. 1987) n. 86 above, 41-2 paras. 217.
[158] Wi, Eunjin, The Social rights issues of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families', The Discussion on the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' National Human Rights Commission of Korea, 2009, p.90.
[159] *Ibid.*, p.91-92.

The Convention is reasonable in the sense that it does not apply this article to the non-documented migrant workers and regarding the range of the protected members of the family, which is different from the definition of family[160] in Article 4 of the Convention, and it constraints to the spouses, or those who are treated equally to the spouses by the law and non-married minor children[161]. This type of family protection also has the relevance to the 'Convention on the Rights of the Child, (CRC)'. Considering that the Article 44 of the Convention constraints the conceptual definition to the non-married minor children and that it acknowledges the right to reunite with family only to the documented migrant workers, there is no particular point of clash with the domestic legal order. Until the present, the right to reunite with family for non-documented migrant workers are not recognized.

## Ⅳ. Non- Discrimination Rule

Paragraph 2, Article 7 of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' provides:

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

It stipulates the non-discrimination with respect to Rights (Diskrimierungsverbot) therein. This rule stipulates the reasons for prohibition of discrimination in detail. Compared to the general rule of equality stipulating the equality before the rule of law, the non-discrimination rule is classified to an exclusive rule of equality. The core of the non-discrimination of the Convention is the command prohibiting discrimination as a separated rule of equality which goes beyond the security of general rule of equality as the standard of solving problems of social integration, with regard to the establishment of multi-cultural society consisting of various migrant workers in the States Parties. Through this rule of non-discrimination, the realization of equality based on human dignity reaches to migrant workers. In regard to the non-discrimination, the Treaty of Amsterdam introduced the eight wide non-discriminatory compositions of the Article 13 of the 'Treaty establishing the European Community (TEC)' to the Community law system: sex, race, ethnicity, religion or ideology, disability, sexual orientation. In 2000, Paragraph 1 of the Article 21 of the 'Charter of Fundamental Rights of the European Union' newly added the nine non-discriminatory compositions apart from the eight compositions of the Article 13 of the TEC: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." As a whole, 19 reasons for the prohibition of discrimination are stipulated in different Community laws. Among the reasons for the prohibition of discrimination listed in the Paragraph 1, Article 21 of the Charter, sex, race, colour, ethnic or social origin, and religion or belief are partly based upon international law and common constitutional transmission. On the other hand, all these reasons for the prohibition of

[160] For the purpose of the Article 4 of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families',, the term 'members of family' refer to those who are married to the migrant workers or their children.
[161] Wi, *op.cit.*, p.91.

discrimination refer to the prohibition of discrimination against the features connected to an individual[162]. It is worth noting that the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' concretely specifies that the marital status, in other words, whether or not he (or her) has a spouse, does not become the reason for the prohibition of discrimination from the aspects of rights protection of immigrant workers as well as the members of their family.

The dominating opinion of the 'Charter of Fundamental Rights of the EU' listing the detailed reasons for the prohibition of discrimination and the 'ROK Constitution' is that we should not interpret the reasons for prohibition of discrimination listed in the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' as the breach of the non-discrimination rule in Article 11, Paragraph 2 of the ROK Constitution because they all are understood as the not limited but exemplified list.

Article 11, Paragraph 1 of the ROK Constitution guarantees the principle of equality, stipulating, "All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." The general principle of equality include the fundamental rights as well as subjective rights of an individual. Although the Korean Constitution stipulates the principal agent of the equal right is 'all citizens', in general, the principal agent of the equal right is not only citizens but also all human being.

Beside the Article 11, Paragraph 1 which stipulates the general principle of equality and non-discrimination, in Article 11, Paragraph 2, it provides, "No privileged caste shall be recognized or ever established in any form." Also it does not recognize the special social status stipulating in Paragraph 3, "The awarding of decorations and distinctions of honor in any form shall be effective only for recipients, no privileges shall ensue therefrom." The Article 31, Paragraph 1 of the Constitution guarantees the equal opportunity for education, providing "All citizens shall have an equal rights to receive an education corresponding to their abilities." The Article 32, Paragraph 4 guarantees the prohibition of discrimination for female workers stipulating, "Special protection shall be accorded to working women, and they shall not be subject to unjust discrimination in terms of employment, wages, and working conditions." The Article 36 guarantees the equality of sexes, providing "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of sexes and the State shall do everything in its power to achieve that goal." If these equal rights-related rules are interpreted as the rights of men, not that of citizens, we cannot interpret the regulations of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' as the breach of the domestic Constitutional regulations.

## Ⅴ. Assuring Basic Labor Rights for Migrant Workers

In individual labour relations, principles of non-discrimination in working conditions including wages, working hours and recognition of migrant workers' rights, namely job placement and training, and etc are very interrelated and often raised in discussions of labour rights for migrant workers. Article 25 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter International Migrant Convention) states;

Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of

[162] Park, Zin-Wan. The Realization of Equality in the Multicultural Society of Europe and Protection of Cultural, Religious, and Linguistic Diversity. Issue 1. Vol. 15. World Constitutional Study. Korea Constitutional Law Association. 2009. p.127-128.

the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

Furthermore, Article 25, Paragraph 2 of International Migrant Convention stipulates that "It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article."

The concept of working condition (Arbeitsbedigungen /conditions de travail) provided in Art 26 of International Migration Convention does not include wages for one's labour, and this clearly shows the concept includes simply the course of occupational activities. As possessors of basic human rights, if working condition of migrant workers is unfavourable from that of citizens in a country of employment, then it refers their basic rights are limited (or violated). Migrant workers are in disadvantage when the same or comparable activities are the matter of concern.

Besides, when a country of employment treats migrant workers disadvantageously or enacting any laws which can result violation against the workers' rights, then a country of employment is restraining the workers' basic rights.

A country of employment has an obligation to legislate law to prohibit any kind of discrimination against and prevent adverse working condition for migrant workers.

Regarding the principles of non-discrimination, Constitution of the Republic of Korea states individual's equality in Article 11, Paragraph 1, Item 2, as well as prohibits unjust discrimination against women in terms of employment, wages and working conditions in Article 32, Paragraph 4. Furthermore, Article 6 of Labour Standards Act (Equal Treatment)[163], and Article 22 of 'Act on Foreign Workers Employment, Etc.[164]' prohibit discrimination against nationality thus no labour related laws are contrary to the International Migrant Convention in working condition.

While Act on Foreign Workers Employment, Etc. has no penal provisions in discrimination against nationality, Labour Standards Act does in its Article 6, thus, violation of Article 6 will lead to punishment by fine not exceeding five million won according to Article 114 of the same law.

Industrial Training System or Employment-after-Training System concerned as violation of non-discrimination in working conditions was abolished in December, 2006, because Committee on Foreign Workers held on July 27, 2005, concluded that all the systems for foreign workers would be integrated to Employment Permit System from the first of January, 2007. After the abolition of the previous system, Industrial Training System was found unconstitutional[165]. On its decision, the Constitutional Court said labour rights does not only include "job placement" but also "working condition" and recognised foreign workers too possess the aforementioned rights, admitting the latter rights on "working condition" characterises as a fundamental rights to defend oneself from violation of his/her dignity and includes right to claim favourable working environment, just wages, and reasonable working condition." The Court also stated Industrial Training System is violation of equality because labour standards provided in Labour Standards Act were not assured to foreign industrial trainees because of their possessive title, despite they were actually working: It is not rational that 'industrial trainees,' due to the title, were not protected under the Labour Standards regulated in the law even though they were in actual relations with employers, for example, offering

[163] Article 6 of Labour Standards Act: "an employer shall not discriminate against workers by sex, or take discriminatory treatment in relation to the conditions of employment according to nationality, religion or social status."
[164] Article 22 of Act on Foreign Workers Employment, Etc: "An employer shall not give unfair and discriminatory treatment to foreign workers on grounds of their status."
[165] Constitutional Court, decision Date: 30th of August, 2007, Case No. 2004헌마(Hun-Ma)670 (decision of constitutional Court confirms industrial technical training system is unconstitutional).

their service and receiving money for the labour. The employer should facilitate necessary working condition (inc. ability to provide a place to stay) announced by the Small and Medium Business Administration (Article 28, Framework Act on Small and Medium Enterprises); be allocated a number of trainees to the ability (Article 32, Paragraph 2, the second asterisk). Thus, it is certainly a discrimination against foreign industrial trainees excluding them to be protected under Labour Standard Act. Furthermore, the Constitutional Court concluded that there should be law-based in order to limit the right to enjoy working condition, namely fair wages and equal remuneration for work of equal value, stipulated in Article 5 of Labour Standard Act and Article 7 of International Covenant on Economic, Social, and Cultural Rights, and it is against the principle of reservation of law since it is regulated in "a Guide for protection and control of Foreign Industrial Technical trainees'[166].

Article 40, Paragraph 1 of International Migrant Convention ensures right to form associations and trade unions for migrant workers and their family: "Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests." Article 12, Paragraph 1 of Charter of Fundamental Rights of the European Union stipulates right to freedom of peaceful assembly and to freedom of association and it reads "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests." Including Freedom of association and trade union as a form of freedom of right to assembly (Koalitionsfreiheit) is similar to that of Article 3, Paragraph 3 in the Fundamental Law(Grundgesetz) of Germany.

Article 40, Paragraph 1 of the International Migrant Convention contains the right to form associations and trade unions(Koalitionsfreiheit), and the freedom of association provided in Article 12, Paragraph 1 of EU Charter of Fundamental Rights is influenced by Paragraph 11 of the Community Charter of the Fundamental Social Rights of Workers (Gemeinschafts Charta der Soziale Grundrechte der Arbeitnehmer, GSGA) (freedom of association in order to constitute professional organisations or trade unions)[167]. Right to assembly is also dealt in European courts as a form(Unterfall) of freedom of association[168].

Freedom of association is an essential element in freedom and civil society(freiheitliche und demokratische Gesellschaft). The freedom of association covers essential of Freedom of assembly (Koalitionsfreiheit), thus it includes freedom of right to build a union or form an organization. Thus, right of collective bargaining and action is stated in Article 28 of the EU Charter of Fundamental Rights. The Charter stipulates freedom of assembly in the chapter two, freedom, as fundamental rights. On the other hand, right of collective bargaining and action are categorized in Chapter four, solidarity, which contains rights (Grundrechte auf wirtschaftliche Leistungen)[169] related to the fundamental social rights and the similar provisions for the protection. In the provisions regulated in Chapter four, there are rights of freedom closely related to fundamental social rights. Since the three primary labour rights, right to assembly, and right of collective bargaining and action, are characterized as rights of freedom constituted based on the contract, they do not have the characteristics of fundamental social rights which the individual could obtain from other private individuals(Grundrechte auf staatliche Leistung)[170]. Considering the Constitutional Court of Korea

[166] February 23, 1998. 2. 23. No. 369 Regulation of Ministry of Labour.
[167] Erläuterungen des Präsidiums des Europ. Konvents, ABl 2004 C 310/434.
[168] EuGH, Rs. 18/74, Slg. 1974, 933 Rn. 10, 12; Rs. 193/87, Slg. 1990, I-95 Rn. 13, 21.
[169] E. Stein/G. Frank, Staatsrecht, 18. Aufl., Tübingen , (2002) p. 427.
[170] E. Stein/G. Frank, ebd., pp. 426~427.

and its scholars' analytical position on this issue, fundamental rights stipulated in this provision can be understood as the special freedom of right.

In addition to coalition(Koalition), it is connected to exercise of right to collective bargaining and action in the course of wage negotiation and labour disputes. Every natural man is recognized to be a possessor of basic rights, and this is available to foreigners as well; they have rights to any kind freedom of association including to form a union and political party.

For rights of migrant workers and their family members, Article 26 of the international labour convention provides;

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned; (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned; (c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

International Migrant Convention fundamentally recognises three primary labour rights. However, in detail, only documented or legal migrant workers have right to organize trade union and others have only rights to participate assembly and activities and join trade union. Some criticise the Convention is below the other previous standards of protection on rights of foreign workers saying the Convention divides foreign workers into legal and illegal and has separate provision according to the division. The Convention is even criticised to be less sufficient than International Human Rights Covenants (A & B) and ILO Convention 87 which recognise three primary labour rights and right to form a trade union to all, regardless their stay is legal or illegal[171].

No theory and precedent in the Constitution is against that the legally staying foreign workers possess three primary labour rights; however it is controversial whether this should be recognised as right, namely basic right stipulated in Article 33 of the Constitution, or as legal rights stated in legislative bill[172]. The latter claim is based on the examples that the U.K. and the U.S. protect the aforesaid rights by separate laws. From here, three primary labour rights only remain a matter of legal policy in a state. Nevertheless, it contradicts to protection of right to form a trade union for illegally residing foreign workers. Ministry of Labour and Trade Unions are divided over this issue and even precedents in lower courts are not consistent. Association of trade union assured to documented foreign workers in present International Migrant Convention does not conflict with South Korean national laws. Besides, the Convention states the right freely to choose their work place in Article 52 and 53; however, it also says, "limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are

[171] Choi, Hong-Yoep, Issues of labor rights in International Migrant Convention), Forum on the International Migrant Convention, National Human Rights Commission of Korea, 2009, p. 55.

[172] In constitutional policy, it is controversial whether to recognise right to assembly, and collective bargaining and action as rights in the Constitution. With regard this, new opinions have been expressed that it is appropriate for legislator to recognise the three primary labour rights as legal rights in labour law within the scope of legislation. However, for the recognition and design of the rights, it is problematic that legislator is bound by the decision of the Supreme Court. In other countries, it is rare that these rights are recognized as fundamental rights except Korea and Japan. When the right of collective bargaining is recognized in case that multi labour unions and unification of bargaining parties are accepted, the right of collective bargaining of a worker who cannot engage in collective bargaining due to the exclusion from unified bargaining would be deprived. Also, those who do not join in labour union will have hard times in engaging in collective bargaining with or without labour unions. The U.S. ensures the freedom of association in her Constitution, and the right of collective bargaining and action are guaranteed in her laws. In comparison, Germany does not recognize the right of collective bargaining and action while it recognizes the freedom of association for the maintenance and improvement of labor and economy conditions (German Constitution, Article 9, Paragraph 3. Chong, Jong-Sup. Theory of Constitutional Study. 2009. p.541. Parkyoung Press.

assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements."

**VI. Assuring fundamental social rights for Migrant Workers**

The Convention stipulates the regulation concerning the rights with respect to social security in Article 27. Even though the regulation is formally included in Part III, Human Rights of All Migrant Workers and Members of their Families, it is uncertain that the rights concerning social security in Article 27 are applied to undocumented migrant workers in the same way as to documented migrant workers[173]. Paragraph 1 of Article 27 states, "With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm." Also, Paragraph 2 stipulates, "Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances." In light of these Paragraphs, Article 27 is a principle regulation for the protection of social security of migrant workers. The examples of the identity of fundamental social rights and social security of other countries need to be examined in regard to this issue.

Limitation resulted from reciprocity can be discussed as the recognition of the fundamental social rights for foreigners becomes problematic in such case of Paragraph 2 of Article 27. In consideration of this aspect, reciprocity is not a standard of judgment on the identity, but a judgment on the limitation of fundamental social rights. It is not desirable, however, since reciprocity can be used not to recognize fundamental social rights for foreigners, but to deny it[174]. Nevertheless, on sensitive issues, it is a potential measure to control the interests among State Parties for the Convention and to recognize each nation's legal system.

Article 6, Paragraph 2 of the Constitution of the Republic of Korea, which states that status of aliens shall be guaranteed in accordance with international laws and treaties, adopts reciprocity for the legal status and protection of rights for foreigners. Reciprocity is recognized in Article 8 of the Framework Act on Social Security[175] and Article 3 of the Foreigners Land Acquisition Act[176].

It is generally known that the Constitution of the Republic of Korea denies the fundamental social rights of foreigners while many discussions were raised on the legal characters of practical rights for foreigners. Legal evidence, however, on this matter is not clearly suggested. The denial of

[173] Wi, Eunjin, The Social rights issues of the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families', The Discussion on the 'International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families' National Human Rights Commission of Korea, 2009, p.75.

[174] In terms of the criticism on reciprocity, "Reciprocity, as a legal ground imposing restrictions of foreigners' rights, is invalid. Reciprocity is a diplomatic principle that induces its counterpart to sign a treaty. A nation is a subject to be pressured by this kind of policy. In reality, however, foreign individual is sacrificed as a result of adopting reciprocity. It is incompatible with the concept of human dignity which the Constitution prescribes in sense that an individual should not be the means, but the end." See Cheon, Kwang-Seok, Constitutionality of the Republic of Korea, 2009, p.158-159. Beopmun Press.

[175] Article 8 of the Framework Act on Social Security (applied to foreigners) states that application of the social security system for foreigners who reside in Korea is based on the rule of reciprocity, but need to follow the related laws.

[176] Article 3 of the Foreigners Land Acquisition Act (Reciprocity) states that the Minister of Ministry of Land, Transportation and Maritime Affairs can prohibit or limit the acquisition or transfer of land in its territory according to the Executive Order which prohibits or limits nationals, domestic corporation or organization, which are founded on the laws of Korea, or the government of Korea from obtaining or transferring land in its territory.

every foreigner's fundamental social rights in the same light is unacceptable. It is undeniable that fundamental social rights of foreigners should be protected when the minimum provision for foreigners is closely related to the protection of human dignity. Yet, the level of aid depends on the economic power of a country.

If a country can afford financial aid for foreigners, fundamental social rights of foreigners need to be guaranteed for the rights of receiving aid for survival. In this regard, Article 8 of Social Security Act recognises reciprocity. Nevertheless, as mentioned above since reciprocity is no longer persuasive, the domestic theories or cases of courts are criticized for their adoption of reciprocity. That is because the legal system of each country is different, and the level of protection for basic rights are different from each country.

Social security in Article 27 of the Convention is guaranteed through the contribution of the person directly concerned and the means of medical insurance, and thereby the protection of social security for foreigners does not seem to have problems. In the decision of the Constitutional Court, social insurance has the compulsory characteristic as it should guarantee the medical benefits for people regardless of the level of their incomes. In case of public assistance, which is provided by the government for those who cannot make a living, it can be controversial whether the government recognizes fundamental social rights of foreigners. In addition, the use of social welfare facility or education provided by the government can be extended to documented or legal migrant workers.

Social insurance includes national pension, national health insurance, unemployment insurance, and industrial accident compensation insurance. Public assistance related laws include the National Basic Living Security Act. Social welfare service and related welfare services are the Welfare Law for the Aged, Welfare Law for the Disabled, and the Child Welfare Law. For the documented or legal migrant workers, these regulations can be applied if reciprocity is considered since it is not against the Constitution.

Article 6 of the Industrial Accident Compensation Insurance Act limits its scope to 'every business or workplace which hires workers', and Paragraph 2, article 5 of the same Act adopts the conceptual definition of workers according to the Labor Standards Act. Therefore, migrant workers are obviously within its application. Furthermore, precedents of the Supreme Court even extend the application of the Industrial Accident Compensation Insurance Act to undocumented migrant workers[177]. Although the precedents, of course, could be considered to be against the Employment Permit System, they can be justified in sense that it is the recognition of legal effects which are created from the status of a worker whose labor relations are already organized and formed. The precedents can meet the position of current international law system which guarantees the social security as the human rights from the international stand point.

In addition, concerning public assistance, it is necessary to review the legal characteristic of fundamental social rights of our Constitution for the recognition of fundamental social rights for migrant workers. The Constitutional Court of Korea recognizing the freedom of lawmakers for the application of fundamental social rights states, "Even if specific rights which enable one to request the minimum financial aid for living as human can be directly drawn in certain circumstances, the actual rights which guarantee more than minimum aid can be legally recognized after a state comprehensively considers various factors including financial circumstances"[178]. Therefore, in spite of the Constitution, the right to receive social security depends on the specific regulations, and the contents of the right and its effective timing belongs to the law makers' discretion, which automatically makes the right to receive aid depend on the legislation policy of a state. Therefore, the same right of migrant workers belongs to the legislation policy of a state. In this case, reciprocity in Article 8 of the Framework Act on Social Security acts as the standard of the scope.

[177] Supreme Court, decision Date: 15th of September, 1995, Case No. 94누(Nu)12067.
[178] Constitutional Court, decision Date: 21st of July, 1995, Case No. 93헌가(Hun-Ga)14.

Nevertheless, it is reasonable that Article 28 of the right to request immediate treatment and Article 30 of the right for education of migrant workers' child can be applied to migrant workers regardless of their legal status because it is a matter of human dignity; the rule of nondiscrimination can apply in these cases. In such cases, human dignity in Article 10 and the rule of nondiscrimination in Article 11, the rights to equality of the Constitution guarantee such rights.

**VII. Conclusion**

The most significant matter for the realization of global constitutional order through the Constitutionalization of International Law[179] is to systemize the international declarations and treaties based on the protection of human rights, and to put the regulations which govern the actions of states in practical statutory forms. The international Convention on the Protection of the Rights of all Migrant Workers and Members of their Families can be considered as one of the efforts in this regard.

A society where migrant workers and nationals coexist is a multicultural society. Multicultural society in which various social, political, ideological, cultural, and economical interests are unlimitedly and justifiably expressed is one form of the pluralistic societies, and in such society, the members should not be discriminated by their nationality, skin tone, religion, ethnicity, tribal membership, or cultures. In this multicultural society, legal protection for its dynamic openness should be extended to migrant workers and through such process, migrant workers should have the right of freedom. As a prior task for Korea to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, we reviewed the constitutionality of the rights in the Convention.

[179] See Park, Zin-Wan, Globalization, Sovereignty, and Constitution – Constitutionalization of International Law. Constitutional Studies Vol. 14, Article 3. Academy of Korea Constitutional Studies 2008. p. 1-28.

# CRITICAL NOTES FROM PANELIST

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**Main Problem**

- In the problem of authority to issued Perda not only because of the lack of ability from local government.
- But also; state captured corruption; disharmony between anticorruption rules and bussines rules; and, the formulation of autonomy.

**State Captured Corruption**

- Link between state actor and business actor to 'screw up' the regulation.
- Several regulation are made from the corruptive relation between the state and the market.
- The issue of "hot money" in legislation process.
- Perda also has same problem, specially Perda for retribution, taxes, and investment.

**Disharmony**

- Some areas of rules in Indonesia still have to be synchronized. The bearer between public and private law still unclear.
- The problem; Perda with good impact for business but not for public.

**Problem of Autonomy**

- We still on process with the real meaning of AUTONOMY.
- We still have problem with uncertainty of local (sub-national) authority and central (national) authority.
- Is the sequential decentralization will be the answer?

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In the age of globalization, the constitutionally guaranteed freedom of migration is not limited to the freedom of migration within the State anymore. Domestic implementation of the legislation and jurisprudence of the Court which ensures the rights of migrant workers' departure from their State of origin, entry into a host State, residence and integration in the host State, and economic and social fabric in a broad sense.

As a condition precedent to the review on conflict between the Convention and domestic legal order regarding the accession of the Convention, one should look at the concept of migrant workers provided in the Convention. Ensuring rights guaranteed by the Convention for migrant workers who reside in Korea relates to an issue of constitutional subjectivity of aliens' basic human rights. To

apply transnational human rights in one State, the human rights should have basis in reality.The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides more extensive and detailed provisions than the ILO's relevant conventions and the European