

AMICUS BRIEF

IN THE MATTER OF
“CONFIRMATION OF
CONSTITUTIONALITY OF EPS
ACT ARTICLE 25(4) AND ITS
ENFORCEMENT DECREE
30(2)” UNDER
CONSIDERATION BY THE
CONSTITUTIONAL COURT OF
THE REPUBLIC OF KOREA

AMNESTY
INTERNATIONAL



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Case Number: 2007HunMa1083
**In the matter of “Confirmation of Constitutionality
of EPS Act article 25(4) and its Enforcement
Decree 30(2)” under consideration by the
Constitutional Court**

INTRODUCTION

1. Amnesty International submits this *amicus curiae* brief on the issue of the constitutionality of limiting job changes for migrant workers with respect to Article 25(4) of the Act on Foreign Workers' Employment (the Employment Permit System (EPS) Act, the law governing the EPS) which is now before the Constitutional Court of the Republic of Korea (South Korea), as a public organization interested in the adjudication of this constitutional complaint under Article 74(1) of the Constitutional Court Act of South Korea.¹

2. This brief aims to demonstrate that the EPS Act which restricts labour mobility of migrant workers and its inflexibility places migrant workers in a particularly vulnerable position and provides employers with the opportunity to exert disproportionate power over them resulting in discrimination and other abuses. This brief also aims to demonstrate how this lack of labour mobility is a major reason for migrant workers being subjected to human rights abuses, in violation of South Korea's international legal obligations under human and labour rights treaties.

3. Amnesty International is submitting this brief with an annex containing a recent report relevant to this case: "Disposable Labour: Rights of Migrant Workers in South Korea" (ASA 25/001/2009) to aid the Constitutional Court in its deliberations.

INTEREST OF AMICUS CURIAE

4. Amnesty International, 1 Easton Street, London WC1X 0DW, United Kingdom, is a company limited by guarantee. Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights. Amnesty International has a varied network of members and supporters around the world. At the latest count, there were more than 2.2 million members, supporters and subscribers in over 150 countries and territories in every region of the world.

Amnesty International is a democratic, self-governing movement. Major policy decisions are taken by an International Council made up of representatives from all national sections.

5. Amnesty International has extensive experience in submitting *amicus curiae* briefs and other third-party submissions in international and national courts over the past two decades to assist them in resolving fundamental questions of international law. For example, the organization has intervened before the European Court of Human Rights in a number of cases, and the Inter-American Court of Human Rights. In addition, Amnesty International has made a number of submissions to national courts, including the United Kingdom House of Lords and the US Supreme Court. Amnesty International submits that it is thus well placed to assist the Court with wider international law issues.

THE BACKGROUND TO THE HEARING IN THIS CASE

6. The Constitutional Court sat on 14 October 2010 to decide whether limiting job changes for migrant workers under the EPS Act is constitutional.

7. This brief aims to demonstrate that:

- the EPS Act restricts labour mobility of migrant workers contributing to their excessive dependence on their employer.
- this restriction is a major reason for discrimination, exploitation and other abuses of migrant workers' rights by their employers.

8. The EPS contravenes established international human rights and treaty obligations of Korea, including under the International Covenant on Economic Social and Cultural Rights and the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

THE EPS RESTRICTS LABOUR MOBILITY OF MIGRANT WORKERS

9. Although the EPS does not prohibit change of workplace, various restrictions make the process difficult and at the very least, labour mobility is discouraged by the government and employers relying on the EPS. Under article 25 (Permission for Change of Business or Workplace) of the Act on Foreign Workers' Employment (EPS Act, the law governing the EPS),² migrant workers are only allowed to change their job a total of three times in the three-year period through the job centre.³

10. The inability to change jobs freely severely hinders migrant workers from raising issues of abuse in the workplace, lack of overtime pay, violence or sexual attacks. In order to ensure continued employment, they are more likely than South Korean workers to put up with poor training, inadequate safety measures, and insufficient medical leave.

11. In addition, their employer must agree to the change by signing a release document,

unless they have violated labour laws. As a result, EPS workers cannot in practice withdraw their labour from their employer without losing their legal status, thus risking arrest, imprisonment and deportation. When employers refuse to release migrant workers, some find conditions so unbearable that they have no choice but to leave anyway and become irregular workers. Therefore, their freedom to choose their employer, as outlined in article 6(1) of the International Covenant on Economic, Social and Cultural Rights,⁴ is greatly limited:

“The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts....”

12. Moreover, Article 15 and Article 32 of the South Korean Constitution provides for the right to freedom of occupation and the right to work respectively. In 2007, the Constitutional Court recognised that the right to work as provided in Article 32 of the Constitution should apply not just to South Korean nationals but also to migrant workers.⁵ As it operates in practice, the EPS perpetuates vulnerability of migrant workers to human rights abuses. The process for changing jobs is onerous and leaves migrant workers highly dependent on the existing employer’s agreement to release them, even when these employers are often the abusers of their human rights. The labour mobility of migrant workers provided under the EPS Act does not effectively protect the human rights of migrant workers.

RESTRICTIONS OF LABOUR MOBILITY OF MIGRANT WORKERS IS A MAJOR REASON FOR THEIR EXPLOITATION AND OTHER ABUSE BY THEIR EMPLOYERS

13. Restrictions of labour mobility, along with the migrant workers being tied to their employers and excessive freedom of employers to terminate contracts, lead to a host of human rights abuses of migrant workers.

14. Additionally, if a new employment is not found within three months of leaving a job,⁶ migrant workers lose their legal status, and thus, are subject to arrest, detention and deportation. As a majority of migrant workers are not proficient in the Korean language, the process of going to a district job centre, receiving a list of registered companies who are hiring, visiting the companies on the list and checking out the working conditions is very difficult for many of them.

15. In order to change jobs, migrant workers are essentially dependent on the goodwill of

their employer to sign the release papers. Where permission is not granted, migrant workers face becoming irregular. A typical case in point, documented by Amnesty International, is KS, a 29-year-old Sri Lankan male EPS worker, who worked in May 2004 at a factory in Osan, Gyeonggi province that made hamburgers and pork cutlets. Working all day in a refrigerated area, he found it difficult to adjust to the extreme cold: "I couldn't work there anymore. After two months, I asked my boss to allow me to change jobs, but he wouldn't sign my release papers. So, I couldn't find another job. The Sri Lankan Embassy intervened on my behalf, but my boss still refused." KS could not work under those conditions so he, like many other regular migrant workers, decided to leave the job without the employer's consent and become irregular.⁷

16. Article 25(1)-2 of the EPS Act provides job changes that are not the fault of migrant workers would not be counted against them.

"In case it is deemed impossible to continue to work in a workplace because of business shutdown, closure and other reasons not attributable to the foreign worker."⁸

Accordingly, a Ministry of Labour directive instructs that a job change due to a reason that is not the fault of the migrant worker is not to be counted as one of the three changes permitted.⁹ Despite this directive, an overwhelming majority of migrant workers interviewed by Amnesty International were not aware of this. Interviews with migrant workers and the Migrants' Trade Union (MTU) revealed that staff members at job centres were also not aware or did not follow the procedure.¹⁰ The South Korean government should take all necessary measures to safeguard persons within its jurisdiction from infringements of the right to work.

17. In considering the obligations of the government of Korea under the ILO Convention No. 111, Discrimination (Employment and Occupation), the Committee of Experts on the Application of Conventions and Recommendations (CEACR) explained how the current EPS contributes to the dependence of migrant workers on their employers, thereby increasing their vulnerability to abuse and exploitation. The Committee stated:

"...the Committee considers it important that the Government keeps the operation of the Employment Permit System under review, with a view to further diminishing the migrant worker's dependency on the employer by providing for appropriate flexibility to change workplaces, as a means of avoiding situations in which migrant workers become vulnerable to discrimination and abuse. Migrant workers suffering such treatment may refrain from bringing complaints out of fear of retaliation by the employer, including termination or non-renewal of their contract. At the same time, bringing a complaint would appear necessary in order to establish that the employer has violated the contract or legislation, which is a requirement for being granted permission to change the workplace. Even in cases where a migrant worker launches a complaint, he or she is confronted with uncertainty as to whether this would lead to a change of workplace."¹¹

18. The CEACR went on to call on the Republic of Korea:

"to keep the operation of the Employment Permit System under review with a view to further decreasing the level of dependency of migrant workers in relation to their employers. In this regard, the Committee invites the Government to consider allowing

migrant workers to apply for a change of business or workplace for significant personal reasons".¹²

19. In 2009, in considering the obligations of the Republic of Korea under the same Convention, the Committee again raised the issue of the dependence of migrant workers on their employers on the basis of the inflexibility of the EPS, stating:

"The Committee requests the Government to continue to provide information on the measures taken or envisaged to allow for appropriate flexibility for migrant workers to change their workplaces which may assist in avoiding situations in which migrant workers become vulnerable to discrimination and abuse."¹³

20. In December 2009 the UN Committee on Economic Social and Cultural Rights, in considering the Republic of Korea's compliance with its international obligations under the International Covenant on Economic, Social and Cultural Rights, stated:¹⁴

"The Committee is concerned that migrant workers are subject to exploitation, discrimination and unpaid wages.

The Committee recommends that the employment permit system that has already recognized migrant workers as workers entitled to labour law protection be further reviewed. It also recommends that particular attention be paid to the fact that the three-month period stipulated for a change in job is highly insufficient. This is especially true in the current economic situation, in which migrant workers often have little choice but to accept jobs with unfavourable work conditions just to retain a regular work status."

CONCLUSION

21. In the light of existing international law and evidence, Amnesty International urges the Constitutional Court to rule that it is unconstitutional for the EPS to continue restricting labour mobility of migrant workers as it contravenes South Korea's international legal obligations under human rights and ILO treaties and increases migrant worker vulnerability to discrimination, exploitation and other abuse. The removal of restrictions on the number of times migrant workers can change jobs, the removal of the time limit and greater flexibility for migrant workers when they search for new employment will mitigate the vulnerability of migrant workers and enhance the protection of their human rights.

SIGNATURES

Amnesty International South Korea

Amnesty International, International Secretariat

ENDNOTES

¹ According to Article74(1) of the Constitutional Act, “State agencies or public organizations which are interested in an adjudication on a constitutional complaint, and the Minister of Justice may present to the Constitutional Court an amicus brief on the adjudication”.

² EPS Act, Act no.6967, 16 August 2003, amended on 29 February 2008, available at: www.moleg.go.kr/FileDownload.mo?flSeq=25686.

³ Change of jobs is permitted in “exceptional cases where the current employment relations cannot be continued due to such reasons as follows: Justifiable reasons for changing workplaces: (a) In the event the employer terminates the employment contract under justifiable cause or refuses to renew it; (b) In the event a foreign worker cannot continue to work at a workplace due to the suspension of business, closure of business or other reasons for which the worker is not responsible; (c) In the event an employer is restricted from hiring foreign workers or cancelled the employment permit for foreign workers under the EPS due to a violation of human rights such as physical assault, delayed payment of wages and deterioration of working conditions; or (d) In the event a foreign worker is not fit to continue work at the workplace due to an injury but is able to work at another workplace and other events.” From the Ministry of Labour, Guide to Employment in Korea for Foreign Workers (What Foreign Workers Need to Know When Working in Korea), June 2007, pp15-17.

⁴ South Korea is a state party to the ICESCR since its accession in January 1990.

⁵ Constitutional Court decision of 30 August 2007, 2004HunMa670.

⁶EPS Act which was amended on 9 October 2009 provides for the time allowed for migrant workers to change jobs to be extended to three months. The earlier version of the EPS Act only provided two months .

⁷ Amnesty International interview with KS in Osan on 1 November 2008.

⁸ EPS Act, Act No 6967, 6 August 2003, last amended on 9 October 2009.

⁹ Amnesty International meeting with the Ministry of Labour in Gwacheon on 24 July 2009.

¹⁰ See Amnesty International’s report, “Disposable Labour: Rights of migrant workers in South Korea,” (AI Index: ASA 25/001/2009), p21.

¹¹ ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea (ratification: 1998) Published: 2008, Document No. (ilolex): 062008KOR111, paragraph 7.

¹² ILO, CEACR, Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea (ratification: 1998) Published: 2008, paragraph 8(b).

¹³ ILO, CEACR: Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea (ratification: 1998) Published: 2009. Document No. (ilolex) 062009KOR11.

¹⁴ Committee on Economic Social and Cultural Rights, Concluding observations: Republic of Korea, 17 December 2009, UN Doc. E/C.12/KOR/CO/3, para21 [Emphasis in original].

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