

WOMEN MIGRANT WORKERS IN AGRICULTURE:
HUMAN RIGHTS CHALLENGES IN A GLOBAL MARKET

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Executive Summary

This thesis analyzes the legal human rights obligations states have toward migrant women in the agricultural industry. Labor, immigration, and anti-discrimination policies in the United States, Germany, and South Korea are compared to draw conclusions about the global state of affairs for this group of workers. The research explores the various ways human rights deficits are constructed for agricultural workers whose vulnerabilities are compounded by migratory status and gender.

Chapter 1 connects legal structures concerning migrant labor to the framework of precarious work to explain the current structures within historic, economic, and political milieus. The literature review will cover the need for migrant workers, the demand for flexibility in employment relationships, the state's mandate to tailor immigration policy around the need for labor, and the role of vulnerable populations within that system.

Chapter 2 discusses the role of international and regional bodies in ensuring rights protections for women migrant workers. United Nations treaties and ILO Conventions along with the European Social Charter and the prospects for other regional bodies are examined and analyzed, setting the stage for the next chapter on domestic-level laws and policies.

Chapter 3 details the current labor, immigration, and anti-discrimination policies in each state and explains the socio-historical factors that created them. The chapter identifies obvious gaps in human rights protections and evaluates state practice in ensuring workers' dignity. The chapter also details what recourse migrant workers have when their rights are violated, as well as the invisible problems concerning enforcement issues with current provisions, revealing contradictions between official government stances and the lived reality of migrant workers.

Chapter 4 explores the role of trade unions, organizations including non-governmental organizations, social movements, and the role of sending countries in increasing public awareness of low-skilled women migrant workers' issues.

Finally, the conclusion summarizes ways the current systems are being reformed. It will analyze the research findings and give recommendations for improving the practical human rights of women migrant workers in the agricultural sector. Finally, it will identify the limitations of the present research and offer advice on future human rights research in the field of gendered precarious migrant work.

LIST OF ABBREVIATIONS

AFBF – American Farm Bureau Federation

AFL-CIO – American Federation of Labor and Congress of Industrial Organizations

AWPA – Seasonal Agricultural Worker Protection Act

AICHR – ASEAN Intergovernmental Commission on Human Rights

ASEAN – Association of Southeast Asian Nations

APF – Asia Pacific Forum of National Human Rights Institutions

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CIW – Coalition of Immokalee Workers

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECSR – European Committee of Social Rights

ESC – European Social Charter

EFFAT – European Federation of Food, Agriculture and Tourism Trade Unions

EPS – Employee Permit System

EU – European Union

EVW – European Migrant Workers Union

FAO – Food and Agriculture Organization of the United Nations

FFP – Fair Food Program

FLSA – The Fair Labor Standards Act

HRW – Human Rights Watch

ICCPR –International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR – International Covenant on Economic, Social, and Cultural Rights

ICRMW – International Covenant on the Protection of the Rights of Migrant Workers and
Members of their Families

IG BAU – Trade Union for Building, Forestry, Agriculture and the Environment

ILO – International Labour Organization

IUF – International Union of Food, Agricultural, Hotel, Restaurant, Catering, and Tobacco
and Allied Workers’ Associations

KCTU – Korean Confederation of Trade Unions

MTU – Migrants’ Trade Union

NAFTA – North American Free Trade Agreement

NGO – Non-governmental organization

NHRCK – The National Human Rights Commission of the Republic of Korea

NLRA – The US National Labor Relations Act

NLRB – The US National Labor Relations Board

OSHA – Occupational Safety and Health Act

SMEs – Small and Medium-sized Enterprises

UN – United Nations

US – United States

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Introduction

The topic of this thesis is personal, related to my experience as a migrant worker—a German-American English instructor working off fixed-term, one-year contracts in South Korea. Despite having a relatively privileged position, I have experienced the vulnerability of relying on an employer for the ability to continue living in a country I have come to call my home. This research is a product of wanting to know how the situation for women migrant workers can be improved, with a focus on women in agriculture. The choice in industry reflects an oft-overlooked yet vital sector for the world's population. The systemic inequities faced by those who work in agriculture demands attention as an issue of deep importance, for as basic as food is for survival, so too should be the human rights protections of those who produce it.

Thesis Problem

Agricultural work is an important aspect of women's livelihoods: "48 % of the economically active women in the world—and 79 % in developing countries—report that their primary activity is agriculture."¹ At the same time, agricultural work is often invisible, not only because it usually takes place in rural areas or is considered part of domestic work, but also because so many migrant workers are irregular and do not feel secure enough to publicize their stories.² These workers are particularly vulnerable to exploitation through temp agencies, face strict scrutiny by immigration officials, have difficulty changing employers, and thus suffer unnecessary hardships, including

¹ Doss, Cheryl. "If Women Hold up Half the Sky, How Much of the World's Food Do They Produce?" In *Gender in Agriculture: Closing the Knowledge Gap*. (Dordrecht: Springer; New York: Food and Agriculture Organization of the United Nations, 2014), 69.

² For this thesis research, requests for interviews with migrant workers in Korea were repeatedly denied by their bosses due to the "tendency of workers to speak poorly of their employers," and some workers did not feel comfortable exposing their irregular status. In addition, long working hours prevent having free time for an interview: a sudden call to work on Sunday prevented two of the three female mushroom farm workers who agreed to be interviewed by me from attending the meeting.

loss of payments and physical and sexual abuse. The ILO has identified migrants in the agricultural sector as particularly vulnerable to economic exploitation and trafficking.³ For these reasons, current prevailing practices governing migrant labor deserve careful scrutiny under the human rights framework.

Human Rights Watch (HRW) wrote on the situation of migrant farmworkers in 2005 in the US, finding that:

More than 1,000 agricultural workers in Florida have been subjected to forced labor and slavery... Approximately 83 percent of agricultural workers nationally have no health care coverage. Most also work excessive hours, suffer increased injuries due to the physically demanding nature of their work, and are routinely exposed to dangerous toxins... [and] [t]he wages of agricultural workers in Florida are insufficient to guarantee the preservation of health and well-being.⁴

Women farmworkers are also exposed to sexual harassment and violence. Human Rights Watch interviewed one-hundred and sixty “farmworkers, growers, law enforcement officials, attorneys, service providers, and other agricultural workplace experts in eight states” in the US.⁵ Nearly all of them stated that sexual harassment and violence was a major concern for workers; furthermore, nearly all of the fifty-two workers interviewed stated that they were or knew someone who had been a victim of the crimes.⁶ “Sexual violence and harassment in the agricultural workplace are fostered by a severe imbalance of power between employers and supervisors and their low-wage, immigrant workers.”⁷ While the situation has recently improved for Florida’s agricultural workers

³ ILO website. “ILO says forced labour generates annual profits of US\$ 150 billion.” 20 May 2014.

⁴ Human Rights Watch. Human Rights of Florida's Farm Workers are under Serious Threat: Letter to Santiago A. Cantón, executive secretary, Inter-American Commission on Human Rights, 1 March 2005.

⁵ Human Rights Watch. *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, 15 May 2012.

⁶ Ibid.

⁷ Ibid.

since the HRW report was published (to be discussed in Chapter 4), many other farmworkers in the US still face these conditions.

An Amnesty International report on the abuses of migrant farm workers in the Republic of Korea (hereafter Korea) states that “restrictions on changing jobs severely hindered migrant workers from raising abuses at work, such as late or non-payment of wages or benefits, inadequate safety measures, and physical or sexual violence.”⁸ A study conducted in 2014, a survey on the human rights conditions of female migrants with E-6 visas from the Industry-University Cooperation Center at Hanzhong University, showed that in 2013, “there were human rights violations against the [agricultural and livestock] migrant workers in such various areas as labor contracts, working conditions, living environment, and industrial disasters.”⁹ Korea’s case illustrates the uphill battle against visa regulations, lack of access to justice, and the importance of monitoring by human rights bodies.

The U.S. Department of State human rights report by the Bureau for Democracy, Human Rights and Labor reported violations concerning child labor on small farms in Germany,¹⁰ although it noted that there were enough labor inspectors to ensure enforcement of the law. While labor abuses are nearly impossible to eradicate completely, Germany’s case highlights the need for state inspections and enforcement to address problems when they happen.

The three jurisdictions have historic threads tying them together. The legal tradition of Korea was influenced by Germany, with an earlier constitution following that of Weimar, and both having civil law systems. Additionally, the United States transplanted its labor laws in Korea after World

⁸ Amnesty International. *Bitter Harvest. Exploitation and forced labour of migrant agricultural workers in South Korea*, October 2014, 11.

⁹ National Human Rights Commission of the Republic of Korea. Annual Report 2013, 59.

¹⁰ United States Department of State. Bureau of Democracy, Human Rights and Labor. “Germany 2015 Human Rights Report.” Country Reports on Human Rights Practices for 2015, 28.

War II. Korea's constitution at the time closely resembled Japan's, and still retains some similarities after the drafting process in Japan with the Americans directly involved. Likewise, Germany's Basic Law after WWII was formed with American supervision.

All are labor importing states, meaning that there are more net immigrants than emigrants. The United States has a long history of migration, whereas Germany has more recently become a destination for migrants and South Korea importing labor only within the last few decades; however, it is likely to import even more workers in the future as its population ages.

Main Concepts

This thesis uses the framework of precarity to place the economic and migratory realities of migrant women farmworkers in the context of global processes. The terms “precarity” and “precariousness” are distinguishable in that the first is a condition of the modern era in which we all live,¹¹ characterized not only by financial insecurity, but by global security and climate change concerns as well.¹² “Precariousness” can be used in a more specific context to refer to employment or migratory status and the anxiety produced when someone cannot exert power over their status.¹³

Guy Standing's idea of the “precariat,” a “dangerous” class of workers able to find solidarity with one another to overthrow current financial systems¹⁴, is not specifically useful for this thesis, which is more concerned with the legal construction of precarious employment and migration than the making of class consciousness. While the concept of the precariat has been picked up by legal

¹¹ Butler, Judith. "Precarious Life, Vulnerability, and the Ethics of Cohabitation." *The Journal of Speculative Philosophy* 26(2), 2012, 134-51.

¹² Lorey, Isabell. 2011. "Governmental Precarization." Trans. Aileen Derieg. Transversal: EIPCP Multilingual Webjournal, 15 February 2012.

¹³ Rodgers, G. and Rodgers, J. *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. Brussels: International Labour Organisation, 1989.

¹⁴ Standing, Guy. *The Precariat: The New Dangerous Class*. London, UK; New York, NY: Bloomsbury, 2014.

scholars, Standing's conclusion in "A Precariat Charter" calling for the implementation of a basic universal income¹⁵ has not been taken seriously.¹⁶

Rodgers and Rodgers, writing for the International Labour Organization (ILO), define precariousness as including a combination of multiple elements: "instability, lack of protection, insecurity and social or economic vulnerability," noting that one element alone does not produce precarity but a confluence of such factors, "and the boundaries around the concept are inevitably to some extent arbitrary." Elaborating further, work with a "short time horizon" or a substantial risk of job loss and irregular workers, regardless of nationality, with little ability to exert control over their working conditions are considered precarious. Importantly, "work is more insecure the less the worker (individually or collectively) controls working conditions, wages, or the pace of work." In addition, legal protection, the ability to collectively organize, and favorable "customary practice – protected against, say, discrimination, unfair dismissal or unacceptable working practices, but also in the sense of social protection, notably access to social security benefits (covering health, accidents, pensions, unemployment insurance and the like)" affect worker precariousness. Lastly, "low income jobs may be regarded as precarious if they are associated with poverty and insecure social insertion."¹⁷ Rodgers and Rodgers also state that the rise of atypical work characteristics greatly determine overall trends toward precariousness in labor markets.¹⁸

The researchers identify three main trends on the demographics of atypical workers: "they tend to be women; they tend to be young; and they tend to be less educated and skilled than the population

¹⁵ Standing, Guy. "A Precariat Charter." *Europeana*, 2014.

¹⁶ Based on presentations and conversations at the conference "Precarious Work, Current Reality and Perspectives" which I attended at the University of Lodz in March of this year. Many presentations quoted Standing's work, yet labor lawyers expressed the importance of defending current labor rights over getting "distracted" by the issue of a universal basic income.

¹⁷ Rodgers and Rodgers, *Precarious Jobs in Labour Market Regulation*, 3.

¹⁸ *Ibid.*, 6.

average for their age-sex group” and “[i]mmigrants ...are overrepresented among temporary workers.”¹⁹ These criteria apply to most, if not all, of the population that is the subject of this research.

In 1964, economist Paulo Sylos-Labini identified agriculture as a sector particularly characterized by precarious employment. He made it clear that labor analyses needed to move beyond employment/unemployment figures, as precarious labor is often paid under the table and thus official government data does not count their work. He also identifies daily wage earners in the agricultural sector as typical precarious workers affected by the labor issues enumerated above. He states that employers on small farms are also precarious, and that modern industrial farming is pushing these workers out of earning wages, too.²⁰ Precariousness is thus a condition faced by many levels of the agricultural industry.

Yet, low-skilled migrant laborers remain the quintessential precarious worker, facing the compounded uncertainties of both short-term contracts and dependent migrant status. Usually, these workers rely on the discretion of their employers to retain visa sponsorship, forcing some laborers to endure rights-violating conditions or lose the economic benefits that motivated them to find work in the first place. According to Bridget Anderson, “immigration laws mean that migrant workers are cast in relations of domination and subordination to (citizen) employers through the creation of particular types of dependency.”²¹ State-sanctioned inequality between migrants and

¹⁹ Ibid., 8.

²⁰ Sylos-Labini, Paolo. "Precarious Employment in Sicily." (*International Labour Review* 89(3), March 1964), 268.

²¹ Anderson, Bridget. "Precarious Pasts, Precarious Futures." In *Migrants at Work*. Eds. Cathryn Costello and Mark Freedland (Oxford: Oxford University Press, 2014), 33.

national workers restrict the free choice of labor. These power relations help to create the vulnerability faced by migrant farmworker women.

There is some debate on the use of the term “vulnerable.” Anderson argues that “vulnerability” does not encompass the phenomenon of weakening social relations and that “vulnerable workers” are bound to notions of victimhood.²² By contrast, Judith Butler reasons that without vulnerability, there would be no ground to stand on for rights claims, and it is only through vulnerability in ourselves that we can respond to the ethical call to reduce vulnerability for others—social, economic, and bodily vulnerability.²³ Indeed, these dimensions of vulnerability echo human rights claims for the legal features of social security benefits defined by Rogers and Rogers and has similarities with my personal justification for this thesis topic.

The use of the term “women” stems from the distinction that data collectors have chosen to make between sex and gender, the first being biological and the second sociological.²⁴ The literature chooses the term “women” rather than “female” since agricultural data surveys rely on self-reporting. Agricultural data collectors have noted the importance of “self-perceptions by individuals and communities of what it means to be ‘male’ or ‘female’ in a given society.”²⁵ Respondents have the choice to check a box which they feel best represents them.

Agricultural researchers have noted the gendered nature of much of farm work. Economist Cheryl Doss notes that “[w]omen are involved in many tasks that were traditionally male tasks; and men are increasingly involved in activities that have a higher return, regardless of whether the crops

²² Anderson, Bridget. “Migration, Immigration Controls and the Fashioning of Precarious Workers.” *Work, Employment and Society* 24(2), 2010, 303.

²³ Butler, Judith. “Precarious Life, Vulnerability, and the Ethics of Cohabitation,” 142.

²⁴ Quisumbing, Agnes R., et al. “Closing the Knowledge Gap on Gender in Agriculture,” in *Gender in Agriculture*, 6.

²⁵ Behrman, Julia A., Ruth Meinzen-Dick, and Agnes R. Quisumbing. “Understanding Gender and Culture in Agriculture: The Role of Qualitative and Quantitative Approaches.” In *Gender in Agriculture*, 32.

were traditionally women's crops.”²⁶ Consequently, it is important to document socially constructed differences in farm laborers' experiences and recognize the blending roles of men and women.

Agricultural employers demand female laborers for a number of reasons, from the delicacy with which they pick fruit to leave the product undamaged,²⁷ to stereotypes regarding the supposed “docile”²⁸ nature of women workers. In addition, competition with men in the low-skilled labor market may leave women with lower-paying agricultural work compared to men's access to higher-paying jobs.²⁹

Generally, women agricultural workers are described as

...farmers on their own account, as unpaid workers on family farms and as paid or unpaid labourers on other farms and agricultural enterprises. They are involved in both crop and livestock production at subsistence and commercial levels. They produce food and cash crops and manage mixed agricultural operations often involving crops, livestock and fish farming. All of these women are considered part of the agricultural labour force.³⁰

However, to limit the scope of this thesis, it will focus on those who voluntarily work as paid laborers on family farms and agricultural enterprises in crop and livestock production of food and

²⁶ Doss, Cheryl. "Data Needs for Gender Analysis in Agriculture." In *Gender in Agriculture*, 64.

²⁷ Pianigiani, Gaia. "A Woman's Death Sorting Grapes Exposes Italy's 'Slavery.'" *The New York Times*. April 11, 2017.

²⁸ International Labour Organization. "Preventing Discrimination, Exploitation, and Abuse of Women Migrant Workers: An Informational Guide" (2003), 20.

²⁹ August 27th, 2017 interview conducted with Ahn, Young Gyu, the Education and Cultural Team Leader at the state-funded Uijeongbu Support Center for Foreign Workers in Korea. Interpreted by Hwang, Jeong Eun. According to Ahn, about 90% of the foreigners using the center are male factory workers from the Asian countries with which South Korea has signed E-9 visa agreements. Most of the women who use the center work in agriculture. When asked why farm owners wanted to hire women specifically, he answered that agricultural employers don't necessarily avoid hiring women, but that men simply avoid agriculture jobs because factory work is higher-paying.

³⁰ Food and Agriculture Organization of the United Nations. *The state of Food and Agriculture 2011. Women in Agriculture: Closing the gender gap for development*. (Rome: FAO, 2011), 7.

cash crops. Marriage migrants working on their families' farms and immigrant women in detention centers doing underpaid work are, unfortunately, outside the scope of this thesis.

This research specifically addresses migrant workers as defined by Art. 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990): "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."³¹

Thus, this thesis will distinguish between the rights of migrants and nationals, men and women, and agricultural workers and non-agricultural workers to reach conclusions about the state of rights protections for women migrant agricultural laborers.

Aim and Objectives

The field of research on women migrants has primarily focused on domestic work, in some ways marginalizing the research concerning women migrants to stereotypically feminine work. While domestic workers no doubt need and deserve this attention paid to their experiences, the gendered realities of other work sectors are difficult to see in academic research, reinforcing the sparsity of knowledge on other kinds of working women. Relatively less attention has been paid to women who migrate for 3-D work (dirty, dangerous and demanding).³² This thesis aims to address this gap in the research with an international comparison of the human rights impacts of labor and immigration policies on farmworker women.

Comparing the trans-continental experiences of women from various backgrounds and in different legal, cultural, historic, and economic realities, I aim to add nuance to the gendered transnational

³¹ International Organization for Migration (IOM). *International Migration Law. Glossary on Immigration*. (Geneva: IOM, 2004), 41.

³² An English translation of a commonly used Japanese expression

labor market and an assessment of human rights protections for a marginalized group. I would like to illustrate how international and national laws protect, or fail to protect, the human rights of migrant working women in agriculture and illustrate some ways of this reality is changing.

The analysis will focus on how and why women's rights are violated by existing agriculture industry exemptions in labor law provisions. It will also identify best practices (standardized contracts, u-visas in the US) for the prevention of abuses and how to aid those who experience hardships due to the nature of their work. In addition, by framing the issue as one of precarious work, the economic, migratory, and gendered nature of human rights denial can be viewed together with the social and economic forces which have framed current law.

Although human rights law has not solved the issue of precarious work, and may seem an odd weapon against the powerful economic bodies involved in structuring current food supply chains, it may still serve well to pressure decision-makers towards more sustainable practices.

Remedying human rights abuses for these women requires a multi-pronged and coordinated approaches by governments, businesses, and civil society that recognize migrant women agricultural workers' dignity as laborers, migrants, women entitled to protections against sex-based crimes and with reproductive rights and as "citizens" in a sociological sense with agency who can advocate for change. To add an economic incentive to change, consumers are increasingly showing concern for ethically produced goods.

Methodology

The thesis relies on a number of methodologies to reach conclusions about the state of human rights for migrant farmworker women. First, human rights reports from national and international human rights bodies are utilized to paint a broad picture of the conditions this demographic faces.

Second, interviews with two experts in the field and a woman migrant worker in Korea provide an informed perspective of the issues faced by work migrants in Korea. Published interviews for first-hand experiences of migrant working women, along with my personal experience, inform the analysis. This research also provides analysis of international treaty law, UN treaty body recommendations, and domestic case law and legislation. Secondary sources have been gathered from online journals and books on gendered migration, labor rights, and precarious work. Throughout the research, comparative analysis of each of the chosen jurisdictions will undergird the conclusions found in the closing chapter.

Using an interdisciplinary approach that weaves together human rights law, policy making, and sociology, I will analyze how each jurisdiction is working towards recognizing and addressing the vulnerabilities faced by women migrants, since those groups are most exploited by precarious labor practices, trafficking, and sexual violence. Finally, I will examine current state immigration and labor policies and recommend policy changes and non-legal strategies for accomplishing human rights targets.

Chapter 1 Background and Framework

1.1 Structural Changes in Agriculture

Agriculture is unavoidably precarious. Natural fluctuations in the weather, the spread of diseases detrimental to both crops and animals, and changes in climate all affect the profitability and seasonal stability of agricultural production. Despite this, human policies can help ameliorate the fluctuations experienced by those in the industry.

What statistical data shows is that in Europe structural changes in agricultural have led to shrinking numbers of farms that are getting larger in size, while at the same time, precarious working arrangements are on the rise. The number of agricultural holdings is decreasing in Germany, down 25% from the year 2000 to 2010.³³ But those farms are getting bigger. According to data from 2016, Germany leads the EU in the proportion of very large farms (defined as producing at least 100,000 euro's worth of products).³⁴ The effect of the concentration of wealth and farm ownership on the conditions of workers is worth investigating.

There appears to be a correlation between structural adjustment in agriculture and the shrinking size of the regular agricultural workforce. Between 2000 and 2010, there was a 26% decrease in regularly employed agricultural workers, from over 1,000,000 persons in 2000 to just under 750,000 in 2010.³⁵ While the farming output has remained relatively stable, the regular agricultural workforce has been shrinking. Across Europe, “full-time, permanent employment... is lowest (39-

³³ Eurostat. “Agricultural Census in Germany.” From the results of the European Union (EU) Farm structure survey (FSS) 2010.

³⁴ Eurostat. “Figure 2.3: Share of total number of farm holdings, by economic size of farm, 2013 (% of total)” In *Agriculture, forestry and fishery statistics — 2016 edition*. (Luxembourg: Publications Office of the European Union, 2016), 32.

³⁵ Eurostat. “Table: Farm structure key indicators by NUTS 2 regions DE 2000 and 2010.” From the results of the European Union (EU) Farm structure survey (FSS) 2010.

29%) in agriculture, fisheries and forestry where freelancers, i.e. self-employed people without employees, prevail (53%).”³⁶ With over half of the employees in agriculture labelled as “self-employed,” the possibility for labor rights protections is diminished across all demographics of workers.

Trends in the US and Korea resemble those of Europe. For example, the number of Korean men registered as employed in agriculture and fisheries has fallen from 15,681 in 1993 to 4,332 in 2016.³⁷ In the US, only the largest farms (over 2,000 acres) have experienced a growth in numbers; at the same time, chemicals, fertilizer, and feed costs have grown more than labor costs.³⁸ Keeping farm output high and maintaining low labor costs by using migrant labor has become increasingly common.

SMEs (Small and Medium-sized Enterprises) that cannot move overseas to exploit cheap labor respond to market pressures by the “downgrading of manufacturing processes, deregulation, and flexibilization of employment, with increased emphasis on cost-cutting measures and subcontracting.”³⁹ Trade deals have fueled a competitive “race to the bottom” as employers and produce buyers seek to lower production costs. Importing migrant labor is one way of ensuring profitability in a competitive market environment.

The numbers indicated that structural change in agriculture is shrinking the numbers of those responsible for rights protections of workers, while the numbers of migrant agricultural workers

³⁶ Directorate General for Internal Policies of the European Parliament. *Precarious Employment in Europe: Patterns, Trends and Policy Strategies*. (PE 587.303), 3.

³⁷ Statistics Korea ‘농림어업종사자와 외국인아내와의 혼인’ [Marriages between Men in Agriculture and Fisheries and Foreign Women]. (2017).

³⁸ United States Department of Agriculture. “Figure 1. Profile of the Nation's Agriculture 2012 Census of Agriculture” (AC-12-A-51, May 2012), 12.

³⁹ Taran, Patrick A. and Eduardo Geronimi. “Globalization, Labor and Migration: Protection is Paramount.” In *ILO International Migration Programme: Perspectives on Labor Migration*. (2002), 4.

has not significantly decreased, and has rather increased in some states. This is backed up by ILO findings: “Globalization and trade liberalization have had contradictory impacts on employment conditions in countries of destination. Demand for cheap, low-skilled labour in industrialized countries ... remains evident in agriculture, food-processing,” and other industries.⁴⁰

1.2 Structural Conditions and the Need for Migrant Labor in Agriculture

Castles and Miller describe the drafting of the North American Free Trade Agreement (NAFTA) in the 1990s, when the president of Mexico proposed that tomatoes be grown in Mexico rather than in the US by Mexican farm labor. However, US employers pushed back with strong political force, illustrating the origin of the “persistence of the EU’s Common Agricultural Policy and US farm subsidies, both of which are costly to taxpayers, disadvantageous to consumers and highly damaging to agriculture in poor countries.”⁴¹ Thus, it is with concerted state effort that agricultural production remains in economically developed countries at the detriment of all but employers and relatively low numbers of local farm workers. With the renegotiation of NAFTA after the US 2016 election, the future is murky for the trade agreement, but the US remains one of the largest agricultural exporters in the world, with Mexico a net importer of food.⁴²

Explaining the causes of such arrangements, Castles and Miller found that competition from Asian countries led to the “new international division of labor,” neoliberal restructuring, and a third phase in the 1990s which saw the reemergence of exploitative forms of labor and Global South social

⁴⁰ Ibid., 3

⁴¹ Castles, Stephen and Mark J. Miller. “Migrants and Minorities in the Labour Force.” In *The Age of Migration: International Population Movements in the Modern World*. (London: Palgrave MacMillan, 2009), 222.

⁴² Hendrix. Cullen S. “Agriculture in the NAFTA Renegotiation.” In “Power, Food and Agriculture: Implications for Farmers, Consumers and Communities.” Hendrickson, Mary, Philip Howard, and Douglas Constance, eds. (2017), 101.

transformation which caused emigration push-factors.⁴³ Worldwide, foreign migration was a necessary extension of industrialization which pulled rural populations into factory work and away from agriculture. Additionally, “in many countries, structural adjustment conditions included the termination of government subsidies or food price supports that also indirectly supported employment in agriculture, food processing and distribution.”⁴⁴ In sum, so-called “sending countries” have undergone economic restructuring that limited opportunities for their own people while providing the conditions for emigration to “receiving” states.

Rights deficits for migrants generally, as well as in certain work sectors, have been intentionally produced by certain laws, as opposed to being mere oversights or omissions. Taran and Geronimi argue that a lack of rights for migrants is essential to ensuring depressed wages in low-skilled industries:

Given that, at least initially, immigrant workers won’t challenge the relation between salary and the social status attached to specific occupations, contracting migrant workers avoids the economic risks – particularly structural inflation – that national workers induce when they demand salary increases.⁴⁵

Thus, it is in states’ economic interest, at least in theory, to deprive migrants of their right to effective collective bargaining. At the same time, working conditions for those specific occupations are not able to improve, meaning that local workers cannot benefit from the pressure that unions can inflict on businesses to change their practices. The result is a loss of rights for all workers.

⁴³ Castles, Stephen and Mark J. Miller. “Migrants and Minorities in the Labour Force,” 234

⁴⁴ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 3.

⁴⁵ Ibid., 5-6

Taran and Geronimi argue that migrants lacking labor rights constitute an exploitable workforce whose very nature make them tools for gaining a competitive economic edge “at the expense of formal protections of decent work standards and protection of basic human rights conditions.”⁴⁶

Castles and Miller argue that postindustrial societies today divide labor along race, sex, and ethnicity, creating more conditions for the exploitation of migrant workers.⁴⁷ Key to understanding this is the proliferation of subcontracting, which strips workers of many labor law protections, temporary work, which gives more employment control to employers and diminishes attempts at collective action, and casualization, which allows informal, deregulated subcontracted work.⁴⁸ Importantly, the people who take the last kind of work are usually young women migrants who are most vulnerable to human trafficking.⁴⁹ What Castles and Miller show is that rights abuses of low-skilled migrant workers are not mere anomalies, but are “an integral aspect of all advanced economies today.”⁵⁰

Governments generally tie visas status to a migrant’s employer in 3-D industries,⁵¹ resulting in a rights deficit for workers. Additionally, irregular migrants are usually employed in sectors without minimum guarantees of health and safety, causing national workers to eschew such work, in turn fueling the demand for more irregular workers.⁵² They are “preferred employees due to their vulnerability and their inability to protest, denounce or call in regulatory inspection.”⁵³ Judy Fudge summarized the sociological literature which has described the situation of migrant workers who

⁴⁶ Ibid.

⁴⁷ Castles, Stephen and Mark J. Miller. “Migrants and Minorities in the Labour Force,” 234.

⁴⁸ Ibid., 235.

⁴⁹ Ibid., 237

⁵⁰ Ibid., 244

⁵¹ 3-D industries include any “dirty, dangerous, and demanding” fields of work, for example, manufacturing, fishery, agriculture, and forestry.

⁵² Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 1.

⁵³ Ibid., 11.

are free to move across borders but not to change employers as “unfree labor.”⁵⁴ In addition, Fudge questions whether international human rights law can address the challenge of migrants’ lowered social position due to their lack of citizenship status, finding that human rights law is inadequate to overcome the unequal treatment of migrant workers because the standards for national workers can be low and because state sovereignty is still the most immediate force governing migrant rights.⁵⁵ In addition, the fear of deportation is one reason why irregular migrants fear claiming their existing legal rights, while the lack of family reunification possibilities in their host countries ensures that workers remain temporary individuals rather than growing communities.

Nedžad Mešić summarizes the key features of precarious migrant labor, such as the fact that atypical employment relations are set within immigration law, tying migration status to certain employers, self-employment, and fixed-term contracts.⁵⁶ Mešić also argues that EU anti-discrimination directives which tend to be “reductionist” and further exacerbate racial divisions in employment,⁵⁷ without providing adequate legal mechanisms for seasonal migrant workers to exercise rights claims.⁵⁸ There are trade unions and organizations who are working to counterbalance such realities, and they will be overviewed in Chapter 4.

In the United States, undocumented migrants tend to be concentrated in farming occupations, with 26% of all irregular migrants engaged in this form of labor.⁵⁹ Mexican migrants tend to have longer undocumented stays than other nationalities, even though 66% of the total undocumented

⁵⁴ Fudge, Judy. *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 *Comp. Lab. L. & Pol’y J.* 95, 132 (2012), 95.

⁵⁵ *Ibid.*, at 132.

⁵⁶ Mešić, Nedžad. “Negotiating Solidarity: Collective Actions for Precarious Migrant Workers’ Rights in Sweden.” (*Linköping Studies in Arts and Science*, 2017), 18.

⁵⁷ *Ibid.*, at 30

⁵⁸ *Ibid.*, at 32

⁵⁹ Krogstad, Jens Manuel, Jeffrey S. Passel, and D’vera Cohn. “5 Facts about Illegal Immigration in the U.S.” *Pew Research Center*. 27 April 2017.

population have lived in the US for more than 10 years.⁶⁰[AS1] [This[CKL2] indicates that despite long stays, even while working, immigrants find it difficult to obtain citizenship.

This is true as well in the Korean case. Immigration laws aimed at preventing the conditions of long-term residency construct short-term stays for low-skilled migrant workers. After a total maximum period of 9 years and 8 months,⁶¹ low-skilled migrant workers are forced out of the country or risk facing irregularity. This contrasts with E-2 visa holders (English teachers) for example, who can renew their visas indefinitely until they meet requirements for permanent residency. This creates a tiered system granting more privileges to certain classes of workers than others, or what Nicola Piper describes as “polarized,” between lower skilled and higher skilled workers, as well as “stratified” in terms of “gender, ethnicity, legal status, skill level and mode of entry or exit.”⁶² Unequal treatment of migrants of various skill levels exists across the world, with the assumption being that higher skilled workers are more valuable for national economies, but additionally, the gendered and racialized aspects of the value of migrant workers is problematic.

1.3 Migrant Women in Agriculture

The story of the agricultural industry in many parts of the world has long been one of migration and gendered labor. In eighteenth century Denmark and Germany, all-women teams of Polish migrants harvested sugar beets and potatoes; they also harvested flowers and strawberries in

⁶⁰ Ibid.

⁶¹ After an initial 3-year period, low-skilled migrant workers can renew for another 1 year and 10 months, just below the 5-year threshold for applying for permanent residency. Under certain conditions, workers can return to work in Korea after a 3-month wait and are able to work for another 4 years and 10 months. The details are discussed in Chapter 3.

⁶² Piper, Nicola. “Feminisation of Migration and the Social Dimensions of Development: the Asian case.” (*Third World Quarterly*, Vol. 29(7), 2008), 1288.

France.⁶³ Still, hundreds of thousands of Polish farmhands migrate to Germany for seasonal agricultural work each year on 90-day contracts.⁶⁴ The seasonal rotation of much of Germany's migrant agricultural worker population means that it is both highly flexible and that any problems that arise between workers and employer are likely to be viewed as temporary and localized to individual cases, rather than seen as long-term issues in need of amendment. According to research for EU policy-making, In Germany, women in seasonal work in agriculture represent a population with a high concentration of irregularity.⁶⁵

For centuries, Germany relied on “dutiful farm daughters” to support agriculture, which ran into difficult times as women sought higher-paying factory work with more labor rights.⁶⁶ As in societies from Southeast Asia and other Global South countries [today][AS3], the roles of worker and domestic hand was blurred for young women on farms in early 1920s Germany⁶⁷ and the state maintained loose labor standards that benefited farm owners.⁶⁸ The German state in 1918 created a Reich Office for Economic Demobilization to help the German economy transition after the First World War.⁶⁹ Local demobilization committees were set up to create labor market policies to re-establish the agricultural sector, for example, including by prohibiting the hire of former agricultural workers (from before the war) in non-agricultural job positions.⁷⁰ In 1919, young

⁶³ Moch, Leslie Page. “Moving Europeans: Historical Migration Practices in Western Europe.” In *The Cambridge Survey of World Migration*. Robin Cohen (Ed.). (Cambridge: Cambridge University Press, 1995), 128.

⁶⁴ Heiner, Dribbusch. “German and Polish Unions Cooperate over Seasonal Workers in Agriculture.” Eurofound. 7 October 2003.

⁶⁵ Trimikliniotis, Nicos and Mihaela Fulas-Souroulla. “Migrant Women in Informal Sectors of the Economy.” In *Integration of Female Immigrants in Labour Market and Society: A Comparative Analysis*. Maria Kontos (Ed.), (Frankfurt, 2009), 24.

⁶⁶ Jones, Elizabeth B. “A New Stage of Life? Young Farm Women’s Changing Expectations and Aspirations about Work in Weimar Saxony.” (*German History* 19(4), 2001), 550-551.

⁶⁷ Ibid., 551.

⁶⁸ Ibid., 556.

⁶⁹ Wunderlich, Frieda. *Farm Labor in Germany 1810-1945*. (Princeton: Princeton UP, 1961), 56.

⁷⁰ Ibid., 58.

women in Weimar Germany were legally forced by the state to stay with their agricultural employers or go through a local demobilization committee with their request.⁷¹ The demobilization committees' restrictions expired in 1922 as national workers expressed resentment and resisted such policies.⁷²

Like these market controls, national and international laws around the world legally restrict migrant workers' job transfers. This means that after receiving a work visa under one employer, migrant workers must continue working with the same employer or face legal hurdles and requirements to change their workplaces. Young women in industrializing Germany were blamed for weakening the agricultural industry by fleeing farm work, and their migration to factory towns developed over time into large-scale labor shortages filled by migrant workers with weaker rights claims than nationals.

Despite agricultural workers being among the most necessary workers in the United States economy by the very fact that they produce food for the basic sustenance of people in the U.S. and elsewhere, they are also one of the most exploited groups. Official data for the number of women agricultural workers in the U.S. shows an increase from 21% in 1999 to 28% in 2014, with the official number of unauthorized workers standing at 47%.⁷³ The numbers indicate a population that is increasingly female, uneducated, facing language barriers, and stuck in a low-paying industry from a young age.⁷⁴

⁷¹ Jones, Elizabeth B. "A New Stage of Life," 556.

⁷² Wunderlich, Frieda. *Farm Labor in Germany, 1810-1945*, 56.

⁷³ United States Department of Labor. "Appendix C: Index of Percentages and Means for Key Variables," In Findings from the National Agricultural Workers Survey (NAWS) 2013-14. (2016), 53. Available at: https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf

⁷⁴ Ibid., 54-56.

A survey of 150 Mexican farmworker women showed that “Eighty percent of respondents experienced some form of sexual harassment.”⁷⁵ The imbalance of power in working relationships that women faced were caused by the fact that over 92% of supervisory roles were held by men.⁷⁶ While it is not surprising that men hold the majority of positions, given that overall men make up over 70% of all agricultural workers,⁷⁷ it still reflects a lack of equal treatment of men and women in the agricultural industry.

The story of industrialization in Korea followed typical global patterns of developed countries, with young women internal migrants deserting rural areas for the economic promise of factory work. The garment factory workforce, which was 80-90% female,⁷⁸ experienced wage uncertainty through the secrecy of garment pricing and the power of immediate supervisors to distribute wages.⁷⁹ Disregarding the Korean Labour Standards Law was easy for factory owners, who saw themselves as part of a ruling class and their employees as “the equivalent of serfs or tenant farmers.”⁸⁰ In the 1970s, men took virtually all positions of leadership and power in the factories, and young girls who resisted the hierarchy were divided, shamed, and intimidated. The majority came from the countryside and had no other choice but to take up residence in a company dormitory, where “protection equated with control, and welfare with exploitation,”⁸¹ as they were pushed to work overtime without advance notice due to their close proximity to work.

⁷⁵ Morales Waugh, Irma. “Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women.” (*Violence Against Women* 16(3), 2010), 241.

⁷⁶ Ibid., 252.

⁷⁷ Ibid., 239.

⁷⁸ Chun, Soonok. *They are not Machines: Korean Women Workers and their Fight for Democratic Trade Unionism in the 1970s*. (Aldershot: Ashgate, 2003), 80.

⁷⁹ Ibid, 86.

⁸⁰ Ibid., 87.

⁸¹ Ibid., 91.

Today, some migrant workers live in the very same metal container housing in poorer areas of Seoul that former factory workers inhabited.⁸² Once a labor-exporting country, especially during the dictatorships of the 1960s and 70s, Korea transformed into a labor-importing country after the Seoul Olympics and democratization of its politics.⁸³ When this transformation occurred, Korean companies offshored their sites of production and employed migrant workers from China and less economically developed regions of Asia, making migrant workers the new lower-class of workers.⁸⁴

The number of international migrants has skyrocketed since 1990, from less than 50,000⁸⁵ to over 1.4 million aged 15 or older in 2016.⁸⁶ According to the 2016 Korea Foreigner Labour Force Survey, 15,000 foreign females were employed in agriculture, forestry, and fisheries in Korea (comprising 30.6% of the total workers in those industries).⁸⁷ There is a growing population of migrant working women in Korea, whose numbers rose by 4% between 2015 and 2016, compared to a 1.9% growth rate for foreign males.⁸⁸ The numbers indicate that women migrants are catching up to men in paid employment, producing increased attention to their specific needs.⁸⁹ In addition, Koreans are beginning to face the multi-ethnic realities[AS4] of a state that relies on migrant labor and

⁸² Lee, Jin-kyung. "Migrant and Immigrant Labor: Redefining Korean Identity." In *Service Economies: Militarism, Sex Work, and Migrant Labor in South Korea*. (Minneapolis: University of Minnesota Press, 2010), 198.

⁸³ Ibid., 185.

⁸⁴ Ibid., 186

⁸⁵ United Nations, DESA-Population Division and UNICEF. *Migration Profiles - Common Set of Indicators*. Republic of Korea, 2014. Available at: <https://esa.un.org/MigGMGProfiles/indicators/files/Korea.pdf>

⁸⁶ Statistics Korea. 2016 Korea Foreigner Labour Force Survey, (2016), 1. Available at <http://kostat.go.kr/portal/eng/pressReleases/5/3/index.board>

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ The National Human Rights Commission of Korea has also made migrant women's rights priority, holding a panel discussion in June of 2017 to discuss those in the manufacturing sector and marriage migrants. See: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&searchselect=boardtitle&searchword=female%20migrant%20workers&pagesize=10&boardtypeid=7003&boardid=7601348>

migrant marriages between Southeast Asian women and Korean farmers to sustain its current population and economy.

Conclusion

Specific human rights claims emerge for those affected by global structural changes in economics and migration. Specific aspects of globalization need to be resisted by nationals and migrants alike if their quality of life is to be improved. Specific attention should be paid to vulnerable groups in the labor market. Increasing privatization, high barriers to legal immigration pushing migrants into irregularity, as well as lack of protective rights and lack of enforcement frame the overarching debate on the rights of women migrant workers in agriculture. According to Margaret Satterthwaite, this “sets the scene for abuse of those already disadvantaged through systems of discrimination and marginalization that operate along axes of gender, race, poverty and position within the global economic order.”⁹⁰ However, Satterthwaite remains optimistic that migrant women can become empowered to change their situations as new opportunities emerge for them.

While global and local economic changes have led to gendered injustice, human rights norms offer the potential of solidarity between nationals and nonnationals in a connected global community. “[T]he negative impacts of globalization cannot be corrected by any one state, but must instead be addressed by all states as they uphold their responsibilities to respect, protect, and fulfill human rights.”⁹¹ This opens the potential for states to lead by example and for others to prod those with the worst conditions forward into conditions of respect for all workers.

⁹⁰ Satterthwaite, Margaret L. "Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers." *Yale Human Rights & Development Law Journal* 8, (January 1, 2005): 8.

⁹¹ Satterthwaite, Margaret L. "Crossing Borders," 13.

Chapter 2 International Law

This chapter analyzes international and regional treaties that apply to women migrant workers, starting with core United Nations (UN) human rights treaties and followed by International Labor Organization (ILO) conventions, along with their status in each of the three jurisdictions covered in this thesis. Finally, a review of regional treaties will be conducted. This chapter will delineate the international standards each jurisdiction is responsible for, setting the stage for the next chapter on domestic law alignment with international standards.

2.1 International Human Rights Treaties

2.1.1 The Universal Declaration of Human Rights

Forming the foundation of international human rights law, the Universal Declaration of Human Rights (UDHR) was adopted in 1948. The US voted in favor of its adoption, and Germany and Korea did not participate in the vote at the time, though this does not affect whether the latter two countries are bound by the Declaration.

The UDHR has become customary law, not only binding on states that have ratified it but on all states due to “juridical consensus resulting from its invocation as law on countless occasions since 1948 both within and outside the United Nations.”⁹² The Declaration provides generous rights provisions that are binding on all states due to being generally accepted in practice. It also enumerates rights which appear in other human rights legal documents, providing generally accepted principles that apply to all human beings.

⁹² Humphrey, John P. "The Implementation of International Human Rights Law," (*New York Law School Law Review* 24(1), 1978), 33.

The preamble of the UDHR, setting forth the aims and intentions of the Declaration, calls for the enjoyment of civil, psychological, and economic freedoms appealing to a universal belief in the equality of all people. It recognizes the desire “to promote social progress and better standards of life”⁹³ including greater respect among people and domestic and international government action to ensure rights and freedoms.

The UDHR has provided the basis of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, both of which entered into force in 1976 to create the “International Bill of Human Rights.”⁹⁴ States are expected to create systems conducive to the well-being of all, and for this reason it provides high legal and ethical expectations for states concerning women migrant workers.

In what would address the forms of “unfree labor” which characterize much of low-skilled migrant work, Articles 3 and 4 cover “the right to life, liberty and security of person” and the abolition of slavery and servitude. “Security of person” as freedom from violence entails positive obligations on the state to provide safe homes and workplaces free of abuse and coercion. States should ensure that migrants, including those in irregular situations, are provided safe conditions.

When violations do occur, Article 8 stipulates that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” When migrant workers face legal difficulties, they have the right to access the court system and understand in their own languages what the issues are. In addition, states should ensure access to courts free of discrimination.

⁹³ UN General Assembly, “Universal Declaration of Human Rights,” 217 (III) A (Paris, 1948).

⁹⁴ OHCHR. “Fact Sheet No.2 (Rev.1), The International Bill of Human Rights.”

Specifically related to work-related issues, the UDHR offers several protections: Article 20 contains “the right to freedom of peaceful assembly and association,” Article 23 covers “the free choice of employment” with “just and favourable conditions” and guarantees that “[e]veryone, without any discrimination, has the right to equal pay for equal work” and to “just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity.” Joining and forming trade unions are also protected for everyone. Article 24 includes “the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.” In addition, Article 25 entitles mothers to “special care and assistance.” This implies the right to maternity and nursing protections. Article 22 recognizes the value of all people within a society and their entitlement to social security, limited by the resource constraints of each state.

In other words, the world’s most advanced economies have a responsibility to ensure that the means by which they acquire their wealth respects the dignity of those who create it. The three jurisdictions covered in this thesis represent some of the largest economies today. If any states would have an obligation to follow these international standards, it would be these.

2.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) has been ratified by the US, Germany, and Korea and expounds upon the civil and political rights contained in the UDHR, providing specific provisions which ensure the equal treatment of migrant workers. Despite formal ratification, states do not comply with every norm contained in the UN treaty.

For example, Article 8 prohibits “forced or compulsory labour” except in cases of lawful detention.⁹⁵ The “inability to fulfil a contractual obligation” cannot be used as a ground for

⁹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

imprisonment. The practice of detaining migrant workers who break contracts with their employers to look for other work does not conform with this human rights principle, since tying a visa to some particular employer forces workers to choose between irregular status or potentially working for an abusive boss. Yet, this remains common practice in many states.

Similarly, although Article 22 guarantees the right to freedom of association, including trade union formation and association, the US prohibits the formation of unions in certain industries, including agriculture and domestic work. While legal restriction of association is not outright prohibited by the ICCPR, such curtailment of rights must pass the test laid out in the second section of the article. Limitations must be “prescribed by law” and “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” The second element of the test is problematic for the US National Labor Relations Act (NLRA), which will be discussed in the next chapter of this thesis.

When people with families move overseas for work, many do so for the sake of their children, parents, siblings, or spouses. Article 23 of the ICCPR protects families within society and under the role of the state. Yet, the denial of family relocation for migrant workers in labor importing countries appears to violate this norm. According to Article 26, “all persons,” hence citizens and non-citizens, are equal in the eyes of the law and are protected from discrimination on any ground. Therefore, not only families of legal citizens under each jurisdiction are entitled to rights, but so too are new entrants within their borders. The state has a positive duty to ensure “equal and effective protection against discrimination” in Article 26; as economically or politically inconvenient as it is to treat work migrants as fully human, they are entitled to such treatment

under international law. Furthermore, states have already consented to these binding obligations, eliminating an argument that claims state sovereignty is disrespected by such norms.

The Human Rights Committee (HRC), which monitors the implementation of the ICCPR, requests information from states on the implementation of the treaty. State reports cover each article of the treaty and the state compliance with each one. For example, the US submitted its report on implementation of the ICCPR stating in its compliance with Article 22 that “[i]n 2010, unionization rates were relatively low in agriculture and related industries (1.6 percent).”⁹⁶ Despite the fact that this represented the lowest rate of any employment sector, the government did not clarify the reason for this.

The HRC responded by requesting the US to “[p]lease clarify why agricultural and domestic workers and independent contractors are excluded from the right to organize themselves in trade unions by the National Labor Relations Act” and to “provide information on steps taken to ensure that the right to freedom of association is available to these categories of workers.”⁹⁷ Despite decades of noncompliance with Article 22, the US was simply asked again for more information and clarification on its ICCPR obligations, illustrating that the HRC lacks strong enforcement power. Pressure and persuasion are the rather soft tools by which human rights law becomes practice.

2.1.3 The International Covenant on Economic, Social and Cultural Rights

⁹⁶ UN Human Rights Committee. “Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report, United States of America.” 30 December 2011. CCPR/C/USA/Q/4 (22 May 2012), para. 389(b).

⁹⁷ UN Human Rights Committee. “List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr. 1), adopted by the Committee at its 107th session (11–28 March 2013)” CCPR/C/USA/Q/4 (29 April 2013), para. 23.

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses freedom from hunger, which requires states to take measures to “improve methods of production, conservation and distribution of food” by supporting research, information on nutrition, and “by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”⁹⁸ Since the provisions in the convention must be viewed as a harmonized whole, the balancing of human rights concerns should go hand-in-hand with food production systems.

The preamble for the ICESCR also stresses the “inherent dignity and of the equal and inalienable rights of all members of the human family,” and “the ideal of free human beings” to enjoy “freedom from fear and want” and calls for the creation of conditions which facilitate “economic, social and cultural rights” tied with “civil and political rights” for “everyone.” Article 2 provides some leeway for developing countries to “determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals” and states can decide “with due regard to human rights and their national economy.”

The three states included in this thesis are all economically developed nations; their non-compliance with the Covenant would be unacceptable. The US has signed but not ratified the ICESCR, while Germany and Korea have ratified the Covenant. Despite this, ratification of the ICCPR requires that the US complies with obligations related to “obstacles to the access of undocumented migrants to health services and higher education institutions, and to federal and state programmes addressing such obstacles,”⁹⁹ among other civil rights of migrants.

⁹⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

⁹⁹ UN Human Rights Committee. “List of issues in relation to the fourth periodic report of the United States of America,” para. 7.

Additionally, Article 4 proscribes legal limitations on rights unless “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Thus, Article 11 on food production should be compatible with Article 6, “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” and the state’s duty to “take appropriate steps to safeguard this right.” The development of agriculture should go together with the freedom for workers to choose their employers.

Article 7 covers working conditions, delineated as fair wages, equal pay for equal work among men and women, a “decent living,” safety and health, equal opportunity for promotions, and “rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.” The unfortunate reality is that many farmworkers do not experience these conditions.

Article 10 calls for the “widest possible protection and assistance” for families, especially dependent children. Importantly, the article also includes the right to maternity protections: “working mothers should be accorded paid leave or leave with adequate social security benefits.” If the US were a party to this convention, it would be violating it. Korea, even as a State Party to the convention, explicitly legally prohibits migrant women from enjoying this right and will be discussed in the next chapter.

Article 12, “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” including “environmental and industrial hygiene.” States have a positive duty to create “conditions which would assure to all medical service and medical attention in the event of sickness.” States should prepare to handle the burden of healthcare services for migrants regardless of legal status.

2.1.4 The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) entered into force in 1969 and aimed specifically to tackle race, color, and ethnic origin discrimination, requiring both positive and negative obligations from governments. It has been ratified by all three jurisdictions in this thesis, although the US has not accepted the individual complaints procedure while Germany and Korea have.

Article 2 requires states party to the Convention not only to eliminate racial discrimination, but also to promote “understanding among all races,” entailing negative duties to avoid sponsoring, defending, or promoting racial discrimination, as well as positive duties to amend or rescind discriminatory laws, take social positions promoting respect for different races, and to take measures to rectify past disadvantages.

The Convention also states that it “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Satterthwaite analyzes the role of this article in the Committee recommendations, finding that it still advocates for the improvement of the rights of non-citizens.

Not only does CERD prohibit alien status discrimination, but “racism, ethnic discrimination, and xenophobia.” Also, “although CERD is silent with respect to sex discrimination, it has been interpreted to include prohibitions on gender-specific and gender differential forms of racial discrimination, making it a very useful tool for women migrant workers.”¹⁰⁰ The Committee on the Elimination of Racial Discrimination General Recommendation No. 25 (2000) on gender-

¹⁰⁰ Satterthwaite, Margaret L. “Crossing Borders,” 20.

related dimensions of racial discrimination¹⁰¹ thus complements The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The Committee on the Elimination of Racial Discrimination acknowledged that specific “forms of racial discrimination may be directed towards women specifically because of their gender” including “abuse of women workers in the informal sector.”¹⁰² CERD provides legal and normative tools, and its Committee, “when examining forms of racial discrimination, intends to enhance its efforts to integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language.”¹⁰³ Thus even states such as the US, which have not yet ratified CEDAW, still have obligations related to racial discrimination of migrant women via CERD obligations.

2.1.5 The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into force in 1981.¹⁰⁴ The US has signed but not ratified the treaty, while Germany and Korea have both ratified the treaty and accepted the individual complaints procedure.

The preamble of CEDAW links economic and gender discrimination: “in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.” It also links the struggles against colonialism with gender equality, referencing “the establishment of the new international economic order based on equity and justice.”

¹⁰¹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 25, Gender Related Dimensions of Racial Discrimination*, Fifty-sixth session, 2000, Annex V, 152.

¹⁰² Ibid., para. 2

¹⁰³ Ibid, para. 4

¹⁰⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979

CEDAW's provisions make no exceptions for states permitting to discriminate on the basis of citizenship. In fact, this is one reason why the Convention holds so much promise for women migrant workers: it provides a "guarantee of substantive equality" and an "obligation" is "impose[d] on States to eliminate discrimination by non-State actors within its jurisdiction."¹⁰⁵

Satterthwaite describes the substantive equality model under CEDAW as having "important protective implications for women migrant workers. In effect, whenever a pattern can be found in which a certain law or policy has a disproportionately negative impact on migrant women, discrimination is present and the state must take active steps to ensure women their equal rights."¹⁰⁶ If it can be proven that women are disproportionately impacted by the policy of tying women to their employers because of the increased likelihood of sexual abuse and harassment, states are therefore required to amend such laws to prevent abuses by private actors.

Article 11 guaranteeing the "right to free choice of profession and employment" implies the ability to change employer. CEDAW's labor-related provisions also include "the safeguarding of the function of reproduction" and prohibit "dismissal on the grounds of pregnancy."

General Recommendation No. 26 (2008) on women migrant workers states that the Convention "protects all women, including migrant women, against sex- and gender-based discrimination. While migration presents new opportunities for women and may be a means for their economic empowerment through wider participation, it may also place their human rights and security at

¹⁰⁵ Hainsfurther, Jennifer S. "A Rights-based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers." (*American University International Law Review* 24(5), 2009), 862.

¹⁰⁶ Satterthwaite, Margaret L. "Crossing Borders," 21.

risk.”¹⁰⁷ This statement recognizes both the importance and the risks associated with migration as women increasingly go abroad to earn money for themselves and their families.

The Recommendation also addresses farm-specific human rights abuses related to accommodation: “in female-dominated occupations such as factory, farm or domestic work, living conditions may be poor and overcrowded.”¹⁰⁸ The Recommendation also stated that “[s]exual harassment of women migrant workers ... on farms or in the industrial sector, is a problem worldwide.”¹⁰⁹ This highlights that particular industries put women at special risk and require special attention.

Furthermore, the Recommendation acknowledges that governments need to remove structural barriers to women migrants’ access to justice, including “mechanisms to protect the women against reprisals by recruiters, employers or former spouses,”¹¹⁰ education on contracts in countries of origin, and other positive obligations on countries of origin to ensure that women have access to legal avenues and just contracts. Such an approach recognizes the importance of human rights mainstreaming throughout the entire process of migration from sending, to working, and finally to reintegration into home states when or if women migrants return. This mainstreaming can occur in the UN through the “UN Development Group’s (UNDG) human rights mainstreaming mechanism,” which “creates a unique opportunity to integrate the work and outcome of treaty bodies into the work of major UN agencies,” leading to “a coherent application of treaty body outputs into the programs of UN partners at the national level.”¹¹¹ Coordinated efforts by UN

¹⁰⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R, para. 2

¹⁰⁸ *Ibid.*, para 17.

¹⁰⁹ *Ibid.*, para. 20

¹¹⁰ *Ibid.*, at para 24 (i)

¹¹¹ Rodley, Nigel. "Duplication and Divergence in the Work of the United Nations Human Rights Treaty Bodies: A Perspective from a Treaty Body Member," *American Society of International Law Proceedings* 105 (2011): 517.

agencies may hold the promise of creating a coherent migration system, at least in guaranteeing the most basic of human rights.

The United States has signed but not ratified CEDAW, despite several attempts by lawmakers to push the issue to a vote.¹¹² With the number and content of the “Reservations, Understandings, and Declarations” that the US has outlined, scholars have questioned whether ratification would even be desirable.¹¹³ Besides, the CERD Committee has outlined the importance of combatting racial discrimination for women, meaning minority women are included in anti-discrimination provisions in CERD, which the US has ratified.¹¹⁴

Korea currently only has one CEDAW reservation still in effect, Article 16 (1)(g), meant to “eliminate discrimination against women in all matters relating to marriage and family relations,” covering “[t]he same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.” Article 16 has the most reservations of any CEDAW article.¹¹⁵ Korea’s CEDAW reservation directly relates to migrant women who work in agriculture by marriage, though their contribution to the economy is difficult to calculate: The National Human Rights Commission of South Korea Annual Report 2015 criticized The Ministry of Gender Equality and Family CEDAW report for “not hav[ing] enough statistics on female employment and other categories related to women in most vulnerable groups of society.”¹¹⁶ This tension

¹¹² Womack, Malia Lee. "The United States' Engagement with International Law: An Analysis of the Social Complexities that Crystallized its Stance on Racial and Gender Rights." (*La Camera Blu*. 0(11), 2015), 2.

¹¹³ Piccard, Ann M. "U.S. Ratification of CEDAW: From Bad to Worse?." (*Law And Inequality* 28, January 1, 2010), 159.

¹¹⁴ UN Committee on the Elimination of Racial Discrimination, *Reports submitted by States parties under article 9 of the Convention. Seventh to ninth periodic reports of States parties due in 2011. United States of America*, 3 October 2013. CERD/C/USA/7-9, para. 19

¹¹⁵ Freeman, Marsha in Keller, Linda M. "The Impact of State Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women." (*MICH. ST. L. REV.* 309, 2014), 314.

¹¹⁶The National Human Rights Commission of South Korea Annual Report 2015. (2015), 42.

reveals the need for continued internal pressure within states to ensure the fulfillment of human rights obligations for women in all sectors of agriculture.

2.1.6 The International Covenant on the Protection of the Rights of Migrant Workers and Members of their Families

The International Covenant on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW) underwent a decade of drafting from 1980 to 1990, indicating a contentious negotiation process. It went into force in 2003. The Covenant was not without an antecedent: “ILO experts participated actively in the drafting of the 1990 UN Convention. The content of ILO Conventions 97 and 143 formed the basis for drafting the UN Convention.”¹¹⁷ The ICRMW is the least-ratified of the 9 UN core treaties,¹¹⁸ which also includes the ICCPR, ICESCR, CERD, CEDAW, CAT (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984), CRC (Convention on the Rights of the Child, 1989), CPED (International Convention for the Protection of All Persons from Enforced Disappearance, 2006), and CRPD (Convention on the Rights of Persons with Disabilities, 2006).¹¹⁹

While widespread ratification still remains unlikely, there are other methods of achieving the goals set forth in the ICRMW. It can be used as a standard-setting tool for new legislation, even if it does not have the same weight as a binding treaty or customary international law. For example, in the 2007 EU General Framework Directive for 2007, the Convention helped provide standards for

¹¹⁷ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 15.

¹¹⁸ This has led to some scholars describing it as “a poor relation in the family of core human rights treaties.” Grange, Mariette and D’Auchamp, Marie. “Role of civil society in campaigning for and using the ICRMW” in *Migration and human rights. The United Nations Convention on Migrant Workers’ Rights*. Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski (eds). (Cambridge University Press and Unesco Publishing, 2009), 81.

¹¹⁹ OHCHR. “The Core International Human Rights Instruments and their monitoring bodies.” <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

non-EU migrant workers' right[AS5][AS6]s.¹²⁰ Taran and Geronimi optimistically argue that current migration instruments can serve as “a universal guide for national policy and practice;”¹²¹ however, Satterthwaite “cautions that its specialized nature might be perceived as a limitation on the obligations that states owe to women migrants”¹²² because of its lack of specific terms applying to women. For example, the Convention fails to mention pregnancy, nursing, or maternity protections. Euan MacDonald and Ryszard Cholewinski found three main reasons why EU[AS7] states were hesitant to ratify the Convention, including that the Convention is “superfluous” in light of other international obligations, that domestic laws already guarantee such rights¹²³, and that it gives irregular migrants too many rights.¹²⁴ The Steering Committee for the ratification of the ICRMW has so far been unsuccessful in producing persuasive counterarguments to these common state claims.

While the Korean government expressed willingness to ratify the ICRMW in 2006, it still has not done so.¹²⁵ The Special Rapporteur on the Human Rights of Migrants cited xenophobia, especially with regards to family reunification, as stumbling blocks to the government's proposed intention; however, “the Government is also looking for alternative plans to promote the social integration of migrant workers in Korea and enhance their legal and protection framework,”¹²⁶ indicating that the goals of the ICRMW may be achieved through other means.

¹²⁰ MacDonald, Euan and Ryszard Cholewinski. *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families:EU/EEA Perspectives* (UNESCO, 2007), 15.

¹²¹ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 16.

¹²² Satterthwaite, Margaret L. “Crossing Borders,” 1.

¹²³ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Germany*, 8 July 2013, A/HRC/24/9, para. 50.

¹²⁴ MacDonald, Euan and Ryszard Cholewinski. *The Migrant Workers Convention in Europe*,” 13.

¹²⁵ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants Mission to the Republic of Korea*, 14 March 2007 A/HRC/4/24/Add.2., para. 50.

¹²⁶ Ibid., para. 51.

As for the US, political trends after the 2016 election point toward more rights and movement restrictions for migrants rather than less, so the ICRMW faces large barriers to ratification there.

[AS8]2.2 International Labour Organisation Conventions and Recommendations

2.2.1 Migration for Employment Convention No. 97 (1949)

The Migration for Employment Convention No. 97 (1949) gives positive obligations to states to facilitate the migration journey of migrants, as well as negative obligations such as refraining from anti-migrant propaganda. It applies “without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals” provisions relating to remuneration and benefits, housing, access to justice, and taxes. The convention has been ratified by Germany, though not the US or Korea.

Importantly for migrant women, the Convention stipulates that member states may not discriminate against migrant workers in social security benefits, including maternity and family responsibilities.¹²⁷ These provide international standards with which women migrant workers can claim rights.

The Migration for Employment Recommendation No. 86 (1949) offers additional protection against labor violations by calling for worksite inspections in states with significant migrant populations that ensure decent conditions for workers. The Recommendation emphasizes the principle of equal treatment and opportunity “without discrimination in respect of nationality, race, religion or sex” in remuneration, trade union participation, and some social issues.¹²⁸ However, for migrant workers demanding the free change of workplaces, the Recommendation allows

¹²⁷ ILO Migration for Employment Convention No. 97 (1949) Article 6(1)(b)

¹²⁸ ILO Migration for Employment Recommendation (Revised), 1949 (No. 86), Article 17

restrictions on their employment: Restrictions on the employment of migrants should “cease to be applied to migrants who have regularly resided in the country for a period, the length of which should not, as a rule, exceed five years.”¹²⁹

Seasonal migration policies limit the possibility of this occurring, with some states allowing migrant workers to remain in their borders for just under 5 years, so they can be returned to their home countries and brought back after a few months to work longer, thus creating loopholes in this norm. In addition, “given that ILO Recommendations are not binding on States, these rights should be determined in accord with national legislation and the principle of equality of treatment regarding labour rights.”¹³⁰ Thus, this Recommendation, despite not meeting very high standards in terms of migrant worker demands, requires domestic-level implementation by states anyway, indicating the need for strong grassroots participation in forming labor demands and changing national-level legislation.

2.2.2 Migrant Workers Convention No. 143 (1975)

Drafted several decades after the Migration for Employment Convention No. 97 (1949), the ILO Migrant Workers Convention No. 143 (1975) guarantees somewhat more generous rights for migrant workers than the older convention; however, it still allows limits on migrant workers who wish to change workplaces.

Article 14(a) states that a Member (state) may

make the free choice of employment... subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period

¹²⁹ Ibid., V 16(2).

¹³⁰ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 14.

not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract

The language of the Article, while more lenient than Convention No. 97, still makes clear divisions between the rights of nationals, with the free choice of employment, and non-nationals who must allow restrictions on their choice of workplace if they choose to work abroad. This pardons states that tie migrant workers to their contracts, despite evidence that this practice leads to forced labor conditions

On a positive note, Article 8 of Convention No. 143 guarantees that loss of employment does not automatically lead to a worker becoming irregular, provided that they had originally entered on a valid work visa. This allows migrants to find new work and makes it easier for workers who need to settle legal disputes, such as wage theft, not to worry about falling into irregular situations while seeking legal remedies.

Article 13 calls on states to “facilitate the reunification of the families of all migrant workers legally residing in its territory,” including children, parents, and spouses. However, this is often a privilege often given to high-skilled workers or permanent residents.

Migrant Workers Recommendation No. 151 (1975) calls for a “framework of a coherent policy on international migration for employment” based on the socio-economic needs of both sending and receiving countries and their impacts on migrants and communities. It calls for “effective equality of opportunity and treatment with nationals” with regards to pay, social security, benefits, and union participation.¹³¹ Family reunification should be facilitated by both sending and receiving

¹³¹ Migrant Workers Recommendation No. 151 (1975), para. 2.

states, and social services are required to educate employers on the situations and problems of migrant workers.¹³² In case of unfair dismissal, migrants have the right to compensation and adequate time to find reemployment. The Recommendation is notable for its recognition that states have a responsibility to educate employers on rights norms, involving private actors in labor rights obligations.

2.3 Regional Human Rights Protections

2.3.1 The European Social Charter

Across Europe, migrant worker rights are included in the European Social Charter (ESC). According to the travaux préparatoires of the ESC, it was created as a “logical continuation of the work of the Council of Europe with regard to human rights,” a social and economic rights companion to the European Convention on Human Rights, which includes mainly political and civil rights.¹³³ The ILO was involved in the drafting of the Charter, providing guidance on labor rights while ensuring that ILO Conventions and the Charter did not cover the exact same norms.¹³⁴ The Charter was meant to “state the aims and principles of European social policy and the importance of collaboration between Members States in the social field.”¹³⁵ Thus it was with the common goal of social cohesion that the Charter was drafted and Member States of the Council of Europe agreed to implement it.

Two versions of the ESC are currently in force, the 1961 ESC, which Germany ratified, and the 1996 Revised ESC. The Charters contain no difference between them in terms of the provisions

¹³² Ibid., para. 24(e).

¹³³ Council of Europe. European Social Charter Collected (provisional) Edition of the “Travaux Préparatoires.” Volume I. (Strausbourg, 1953-1954), 11.

¹³⁴ Council of Europe. European Social Charter Collected (provisional) Edition of the “Travaux Préparatoires.” Volume V. (Strausbourg, 1957), 54.

¹³⁵ Ibid.

for migrant workers. Member States must adopt key provisions, including Article 19. This Article concerns the “[r]ight of migrant workers and their families to protection and assistance” and includes the obligation to provide assistance and information, creates the duty to cooperate with social services of emigration and immigration states, labor rights, accommodation, family reunion, guidelines on deportation, and other civil rights.

Giuseppe Palmisano, President of the European Committee of Social Rights (ECSR), described the Charter as more effective “than any other international (and European) normative instrument” in “tak[ing] care of the essential social needs of individuals in their daily lives.”¹³⁶ This is due to the Charter’s role in ensuring that “States [provide] themselves with an advanced and efficient public welfare system, and [guarantee] social justice.”¹³⁷ To this end, austerity measures cutting social services have been lowering rights fulfillment during the economic crisis of 2008.¹³⁸

Article 25 of the 1961 Charter established the ECSR, which determines Member State conformity with the Charters and the 1988 Additional Protocol through reports submitted by States every 2 years and the collective complaints procedure, “which allows certain national and international organisations to lodge complaints against States party that have agreed to be bound by this procedure”¹³⁹ Germany is not a party to the collective complaints procedure, but its reports contain enough information on their own for the ECSR to find fault with its conformity to the Charter. The president of the ECSR described it as “the quasi-judicial monitoring body of the Charter,”¹⁴⁰ providing important guidance on conformity to its provisions based on its previous conclusions.

¹³⁶ Council of Europe. European Committee of Social Rights Activity Report 2015, 142.

¹³⁷ Ibid.

¹³⁸ Ibid., 144.

¹³⁹ Ibid., 11.

¹⁴⁰ Ibid.

The impact of the Charter has been felt Europe-wide and still maintains its relevance, as evidenced in part by the recent European Pillar of Social Rights, proclaimed on 17 November 2017.¹⁴¹ Article 19 has also influenced the Charter of Fundamental Rights of the European Union and is supported by parallel judgments by the European Court of Human Rights, though it has yet to be referred to in national judgments.¹⁴²

Recently, the Court of Justice of the European Union ruled in *Laval* that posted workers, who are distinguished from migrant workers generally by their short-term contracts, should be treated as having the same labor rights to collective bargaining as their longer-term counterparts.¹⁴³ Even though posted workers do not intend to stay permanently in their host countries, the Court ruled that Article 19 applies to them, including “treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining.”¹⁴⁴ While posted workers enjoy such rights, protection for migrant workers still needs bolstering.

Giuseppe Palmisano recognized the shortcomings in the Social Charter, as it “does not oblige the states to apply and respect the social rights of people who are nationals of a country that is not a party to the Social Charter.”¹⁴⁵ Thus, migrants from outside Europe still face inequalities when compared with posted workers from within Europe. Applying the same rights to migrants as to European posted workers would ensure a more cohesive Europe as social issues concerning

¹⁴¹ European Commission. European Pillar of Social Rights. Booklet. 16 November 2017.

¹⁴² Clauwaert, Stefan. “Article 19§4: The rights of migrant workers and their families to protection and assistance”, in Bruun, N., Lörcher, K. Schömann, I. and Clauwaert, S. (eds.) *The European Social Charter and the employment relation*, Oxford: Hart Publishing, 2016, 334.

¹⁴³ Court of Justice of the European Union, Decision on the merits of 03.07.2013 in *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Collective Complaint No 85/2012.

¹⁴⁴ *Laval*, para. 134.

¹⁴⁵ Council of Europe. European Committee of Social Rights Activity Report 2016, 114.

migrants need to be addressed with the recent influx of migration over the last couple of years. Extending the full range of social and economic rights to migrants would reduce inequality in the future.

2.3.2 The Inter-American System

Although the US has been party to court cases in the Inter-American system, it does not consider the judgments of the regional human rights court to be binding: “The United States is one of the strongest supporters of the Inter-American human rights system, and is the largest donor country to the Inter-American Commission on Human Rights. We actively participate in IACHR hearings and afford due consideration to the IACHR’s recommendations.”¹⁴⁶ In other words, while several cases have found fault with practices in the US, the reality is that it enjoys exceptionalism in being able to skirt the ramifications of judgments against it.

2.3.3 An Asian Human Rights Body?

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was set up in 2009, comprised only of the ten Association of Southeast Asian Nations (ASEAN) member states. Korea is not a full member of the Association for Southeast Asian Nations (ASEAN), only acting as a “plus three” country with limited membership privileges. There is no Asian court of human rights yet, and NGOs have criticized the AICHR for the secrecy with which it is drafting a non-binding ASEAN Declaration on human rights.¹⁴⁷ So, it is questionable whether a regional body would even be desirable in Asian given how it is forming.

¹⁴⁶ UN Human Rights Council. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: United States of America*, A/HRC/WG.6/22/USA/1 (Feb. 13, 2015), para. 117.

¹⁴⁷ European Parliament. *Development of the Asian Human Rights Mechanism*. 2012, 11.

An alternate to the regional human rights body emerges with the The Asia Pacific Forum of National Human Rights Institutions (APF), which has included the National Human Rights Commission of Korea (NHRCK) as a “full member” since 2002.¹⁴⁸ While this is not a regional body, it is a coalition of national human rights institutions which helps advise and inform one another, representing regional cooperation if not a binding regional accountability mechanism.

Conclusion

The interconnected nature of the legal documents used in this chapter indicate a cohesive body of regional and international law that has aimed to build protections for migrants from the very beginning through the UDHR. The ICCPR and ICESCR contain non-discrimination clauses which mean that regardless of sex, national origin, or other factors, civil, political, social, and economic rights should be enjoyed equally by nationals and migrants. UN treaties CERD and CEDAW have interconnected racial and gender protections, and both provide rights coverage for migrants. The ICRMW spells out specific rights claims for migrants. Thus, while ratification of human rights instruments may be spotty, signing onto at least one of the treaties creates obligations for states on many of the issues facing women migrant workers.

ILO Conventions, which have also been used in drafting the ESC, sanction some state limitations on migrant rights, particularly in the timeframes given to migrants to settle and change employers. This creates international standards which allow restrictions on the free choice of employment of migrant workers, and is problematic in the sense that ILO standards are at odds with Article 6 of ICESCR.

¹⁴⁸ Asia Pacific Forum website. “Korea.”

If migrant workers look to regional bodies for rights-protecting norms, the European system offers coverage while the Asia and the US remain outside the jurisdiction of binding regional instruments. Further assessment needs to be done to determine whether joining such systems would be effective, or whether energy would be best spent on continuing to ratify and enforce international agreements.

Chapter 3 Legal Constructions of Precariousness

This chapter is broken down into three major legal fields, corresponding to three non-comprehensive aspects of the identities of migrant working women: as low-skilled migrants, they face hurdles in immigration law to the enjoyment of their rights to; as workers, they experience hardships with their working conditions; and as women they often endure gender-based discrimination. Each subsection of this chapter addresses the question of how each of these fields of law operate to protect or disadvantage this population.

3.1 Labor Laws

Low-skilled migrant workers in agriculture frequently face poor working conditions, not only because of low wages, but also long working hours, lack of pregnancy, maternity, and nursing protections, and forced labor conditions, which will be discussed in the next section. The barriers to accessing justice help wage theft and forced labor because employers may assume that workers will not go through the hassle of reporting workplace violations if authorities favor national employers and also because workers are less likely to report abuses if they assume they will not be able to win their case or they are irregular and fear deportation.

Korea's case shows an extreme example of the legal construction of occupational discrimination and additional burdens on women agricultural workers. The Ministry of Labor's Labor Standards Act, Article 63 states, "The provisions pertaining to work hours, recess and holidays... shall not apply to a worker" involved in agricultural work.¹⁴⁹ This means that agricultural workers are not protected from overtime work of more than 40 hours a week or 8 hours a day, breaks are not guaranteed, nor paid holidays, maternity, or sick leave. Chapter V, which Article 63 explicitly

¹⁴⁹ Act No. 11270, Feb. 1, 2012.

exempts, is titled "Women and Minors." Legal protections that women agricultural workers are exempted from include limitations on working hours for pregnant and nursing women, night and holiday work, limits on work after childbirth, maternity leave, and time off in the case of miscarriage or stillbirth. In addition, two thirty-minute breaks twice a day are not guaranteed to women in agriculture.¹⁵⁰ The final picture in Korea's law is clear: women in agriculture had better not be mothers or get pregnant. Additionally, there are low standards for both national and migrant workers in agriculture, creating a situation wherein demanding equal treatment of national and migrant workers would be ineffective at improving migrant rights. Rather, standards for all workers have to rise.

While agricultural work is characterized by its seasonal nature – similarly to some other sectors of economy, such as the tourism or construction industries that require short, intense working seasons, the seasonal employment of migrants does not justify the extreme lack of protections for women's rights. The regulation of immigrant labor has resulted in temporary migration patterns that have a disproportionate impact on sectors with high concentrations of migrants, making legal change a tall political order.

For example, turning to the case of the US, agricultural worker exclusion from the definition of "employee" has been on the books for nearly eighty years, creating myriad problems for labor rights claims. At the time of the National Labor Relations Act (NLRA)'s proposal in 1934, agricultural workers were included in its legal provisions, yet they were purposefully excluded by the time the bill was passed.¹⁵¹ During hearings, the only reason given for this change was "administrative." Maurice Jourdan identifies three possible reasons for this arbitrary exclusion:

¹⁵⁰ Ibid.

¹⁵¹ Maurice Jourdan, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 *Hastings L.J.* 384, 397 (1968). 384.

the farm labor population consisted mostly of migrants who held no voting power and were thus unable to place political pressure on Congress, the disorganization of farmworkers due to intimidation, arrests, and murders, and most importantly, the influence of the Farm Bloc.¹⁵² The Farm Bloc consisted of members of Congress from states with large farming industries and combined forces with the American Farm Bureau Federation (AFBF) to pass bills favorable to US farmers.¹⁵³ New Deal legislation reveals the extent of this influence: “farm workers were systematically excluded from each and every act which would have afforded them needed benefits, but which also would have created an added burden on their employers.”¹⁵⁴ Such legislation included the Agricultural Adjustment Act, the Social Security Act, and the Fair Labor Standards Act (FLSA).¹⁵⁵ The Farm Bloc held potent political power to help keep labor costs low for farmers at the detriment of agricultural workers.

A key case for agricultural workers is *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (2002), which held that undocumented workers were not entitled to back pay under the NLRA.¹⁵⁶ Human Rights Watch also reported that “existing minimum wage and workplace safety protections, found respectively in the FLSA and the Occupational Safety and Health Act (OSHA), are severely under-enforced, contributing to the poor working conditions in Florida’s agricultural sector.”¹⁵⁷ In other words, not only legal agricultural workers but also irregular migrant workers lack strong labor law protections in the US. Therefore, it can be easy to imagine the distrust with which agricultural workers view the systems in the US.

¹⁵² Ibid., 385-6.

¹⁵³ American Farm Bureau Federation website. “History.” <https://www.fb.org/about/history>

¹⁵⁴ Jourdane, 386.

¹⁵⁵ Ibid.

¹⁵⁶ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* 535 U.S. 137 (2002)

¹⁵⁷ Human Rights Watch website. “Human Rights of Florida’s Farm Workers are under Serious Threat” March 1, 2005.

In contrast to the US and Korea, Germany is regulated by regional systems of protection for workers. Germany has adopted several EU Directives which apply to agricultural workers, including the The Act to Improve the Fight Against Human Trafficking,¹⁵⁸ adopted in late 2016 and integrating EU Directive 2011/36/EU of 5 April 2011 “on preventing and combating trafficking in human beings and protecting its victims.”¹⁵⁹ Directive 2011/36/EU mentions agriculture as a specific sector of concern for human trafficking and acknowledges the gendered purposes for which people are trafficked.¹⁶⁰ The incorporation of European Parliament directives into domestic law allows for the development of high standards into current legal practice and harmonizes EU member states into a common practice.

By contrast, the US submitted a report to the UN Human Rights Council detailing cases of approximately 500 agricultural workers who had been brokered in from Thailand. According to the report, the government “obtained significant relief (including \$3.6 million and injunctive relief)” and “one employer offered some of the workers full-time employment, including profit-sharing and retirement benefits.”¹⁶¹ Such an outcome can only point to the wide discretion given to agricultural employers in determining work benefits and the lack of strong legal standards to remedy such abuses.

3.2 Immigration Policies

3.2.1 Work Visas

¹⁵⁸ “Act to improve the fight against Human Trafficking and to amend the Federal Central Register Law as well as the Eighth Book of the Social Code.” Gesetz zur Verbesserung der Bekämpfung des Menschenhandels und zur Änderung des Bundeszentralregistergesetzes sowie des Achten Buches Sozialgesetzbuch. Bundesgesetzblatt Teil I, 2016-10-14, vol. 48, pp. 2226-2230.

¹⁵⁹ EU Directive 2011/36/EU of 5 April 2011 of the European Parliament and the Council of the European Union.

¹⁶⁰ Ibid., (3).

¹⁶¹ UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: United States of America, A/HRC/WG.6/22/USA/1 (Feb. 13, 2015), para. 78.

One aspect of the precarious situation facing low-skilled migrant working women relates to their immigration status and the flexibility of the stays in their host countries, which use them as a form of temporary labor to the detriment of their human rights, yet at the benefit of the host national economy. Seeking higher salaries than their home countries can offer, low-skilled women migrants often accept limitations on their ability to move between workplaces and their right to family reunification.

Those looking to find absolute protection for migrant rights under international standards would be disappointed to find that they are qualified by state practice. According to the ILO Migrant Workers Convention, No. 143 (1975), states party to the Convention enjoy discretion in terms of their immigration policies. For instance, Article 10 states, that migrant rights are subject to “national conditions and practice” and that migrants must reside “lawfully” within a territory in order to enjoy “equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms.” The Convention lays out migrant rights while at the same time giving discretion to states to determine specific rights for legally residing or irregular workers.

In addition, state definitions of “migrant worker” differ domestically and internationally. For agricultural workers finding employment in the US, under the H-2A visa workers must be temporary and have “no intention of abandoning” their country of residence.¹⁶² They are considered “nonimmigrant” workers under US law: under the US Immigration and Nationality Act (INA), an “immigrant” excludes those “performing skilled or unskilled labor.”¹⁶³ However, for the purposes of UN human rights standards, migrant worker “refers to a person who is to be engaged,

¹⁶² 8 U.S. Code § 1101(a)(15)(H)(ii)(a).

¹⁶³ *Ibid.*, (a)(15)(B).

is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”¹⁶⁴ Thus, H-2A visa holders fall under the category of “migrant worker” under the broader definition set forth by the UN, though not under US legal definitions.

The Immigration and Nationality Act, which defines the conditions under which H-2A visa recipients may be admitted, was amended in 1965, replacing the previous system from the 1920s which stipulated quotas based on national origin, amounting to racial preference for European migrants.¹⁶⁵ The current act instead privileges highly educated and high-skilled migrants, as well as blood relationships.¹⁶⁶ The roots of the US immigration system have thus evolved from a freely admitting country, to one with racial bias in migrant quotas, to the current system of using education, skillset, and family backgrounds to determine immigration eligibility.

Many agricultural workers come to the US on the H-2A visa. It can be renewed in yearly cycles for up to three years, at which point the visa holder must leave the country for 3 months before returning for work.¹⁶⁷ Family reunification is allowed: “An H-2A worker’s spouse and unmarried children under 21 years of age may seek admission in H-4 nonimmigrant classification,” though they are not eligible for employment.¹⁶⁸ Employers must request the H-2A visa on behalf of the worker. The model follows a typical pattern of worker vulnerability tying their visa to their employer.

This causes the problem of forced labor conditions in their workplaces. According to the ILO Forced Labour Convention No. 29 (1930), “the term *forced or compulsory labour* shall mean all

¹⁶⁴ ICRMW Article 2(1).

¹⁶⁵ Bennett, Marion T. "The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965." *The Annals Of The American Academy Of Political And Social Science* (1966): 127.

¹⁶⁶ *Ibid.*, 129.

¹⁶⁷ U.S. Citizenship and Immigrations Services website. “H-2A Temporary Agricultural Workers.”

¹⁶⁸ *Ibid.*

work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁶⁹ Often, women migrant workers face the dilemma of either reporting workplace harassment and possible retaliatory firing, or of enduring the harassment. Due to the requirement that migrant workers receive permission from their employer to change to a new employer, women migrant workers face the challenge of approaching bosses who may have sexually harassed or assaulted them to ask for a change in employer.

As previously mentioned¹⁷⁰, Germany hires hundreds of thousands of seasonal workers from Poland each year to work in agriculture on short-term contracts of 90 days. Contrary to the Korean and US system where migrant workers may stay three or more years, the German legislation allows for shorter stays. Bilateral agreements are made between sending states and Germany and residence permits offering the possibility for seasonal work in agriculture are issued.¹⁷¹ The system reflects the need for workers outside the EU to fill labor shortages.

Very short stays are thus part and parcel of the agricultural industry in Germany. In the case of deportation, the European Committee of Social Rights (ECSR) concluded that Germany needed to guarantee that family members of non-EEA (European Economic Area) migrant workers would not be expelled, “particularly in the event that the migrant worker is expelled.”¹⁷² The ECSR emphasized that EU citizens and third-country nationals (originating from outside the EU) be treated the same in regards to family reunification, pushing Germany to make such a pledge. This indicates that a regional system at least forces states within the Council of Europe to respond to

¹⁶⁹ International Labour Organization (ILO), *Forced Labour Convention*, C29, 28 June 1930, C29, Article 2.

¹⁷⁰ Footnote 62

¹⁷¹ EU Immigration Portal website. “What do I need before leaving?”

¹⁷² European Committee of Social Rights. *European Social Charter Conclusions XX-4 2015*, (2016), 88.

such criticisms in their visa policies, rather than the US case, which has no effective regional accountability mechanism.

The ECSR also found that Germany was not in conformity with Article 19§6, the “right of migrant workers and their families to protection and assistance” and paragraph 6 on family reunion.¹⁷³ The ECSR recommended that Germany comply with the age limit of 21 years old for the age cut-off for migrant workers’ children rather than 16 and it criticized the lack of rights for spouses of second-generation immigrants to family reunion.¹⁷⁴ The Committee also recommended that Germany conform with the Charter in ensuring that deportations only occurred in situations of serious criminal activity or the migrant in question could be considered a threat to national security or public order or morals. “Such expulsion orders must be proportionate, taking into account all aspects of the non-nationals’ behaviour as well as the circumstances and the length of time of his/her presence in the territory of the State.”¹⁷⁵ The regional accountability mechanisms in place over Germany prove that international human rights accountability mechanisms may help push states to amend their laws more favorably for migrant workers.

For migrant workers in Korea on the E-9 visa for low-skilled work, including in agriculture, questionable labor issues emerge under domestic law in Article 25 of the 2003 “Act on the Employment, etc. of Foreign Workers,” which states that a “foreign worker may apply to the head of an Employment Security Agency for a transfer to other businesses or work places”

¹⁷³ European Committee of Social Rights. European Social Charter Conclusions XV-1 - Germany - Article 19-6 XV-1/def/DEU/19/6/EN 30/11/2001.

¹⁷⁴ Ibid.

¹⁷⁵ European Committee of Social Rights. Conclusions 2015, General introduction, statement of interpretation on Article 19§8.

only under certain conditions prescribed by the Ordinance of the Ministry of Labor.¹⁷⁶ The conditions include cancellation of a contract, rejection of contract renewal, business closure not attributable to the worker, the cancellation of a permit or other conditions, working conditions that do not match the contract, and unfair treatment by the employer.¹⁷⁷ Foreign workers have three months to find a new employer or face deportation, may not change jobs more than three times during their first three years, or twice during a possible twenty-two month visa extension.¹⁷⁸ In practice, employers are put in a position of power of the regularity/irregularity of their employees by deciding whether to give a letter of release to an employee who wishes to change workplaces. Tellingly, throughout Korea's modern democratic era, business owners have exerted more sway over migrant labor policies than the numerous migrant rights NGOs have, echoing the Farm Bloc in the US.¹⁷⁹ It also resembles the US system in that E-9 visa holders may renew their contracts for years at a time, yet are still not considered eligible for settlement rights.

On the other hand, the Korean system differs from both the German and US temporary work visas in that family members may only enter the country on tourist visas. There is no effective right to family reunification in this case, despite the fact that some E-9 visa holders may renew their contracts for periods totaling nearly ten years in length.

The Special Rapporteur on the human rights of migrants, François Crépeau, recommended that five years of temporary visa ownership be considered a "reasonable" length of time for migrants

¹⁷⁶ Act on Foreign Workers' Employment, etc. Act No. 6967, Amended 9 October, 2009. Article 25(1) <http://www.moleg.go.kr/english/korLawEng?pstSeq=52958>

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., Article 25(4)

¹⁷⁹ Kim, Nora Hui-Jung. "Korean Immigration Policy Changes and the Political Liberals' Dilemma." *The International Migration Review*, (2008), 576-596.

to qualify for permanent residence.¹⁸⁰ Moreover, “[f]amily reunification should be available to all permanent residents, as well as to all temporary migrant workers who effectively spend more than one year in [a given country].”¹⁸¹ Despite the sacrifices workers make to be able to provide money for their families, they are denied the right to have their families live with them in Korea.

The Korean Ministry of Employment and Labor tries to prevent job changes, laying responsibility mostly on workers when they decide to change worksites, indicated by the government’s promise to educate foreign workers on the “merits of working for a long period of time.”¹⁸² Such an approach blames migrant workers for their own difficulties, blaming their lack of responsibility rather than faulting the contracts they were tied to. The National Human Rights Commission of Korea (NHRCK) gave specific recommendations for remedies human right abuses faced by agricultural workers, including amending Article 63 of the Labor Standards Act so “that during the off-season, migrant workers should be given permission to change their workplaces through voluntary agreement with the owners of the workplaces.”¹⁸³ The NHRCK recommendation would give more freedom to workers while creating more flexibility for employers. In addition, the newly elected administration has ordered the NHRCK regularly reports directly to the president’s office,¹⁸⁴ indicating the promise of including human rights considerations at the top of government.

As more migrants reach the maximum period of stay allowed in Korea, the government promised to increase “crackdowns and sanctions against employers illegally using foreign workers to ensure

¹⁸⁰ UN Human Rights Council. *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 24 April 2017, A/HRC/35/25/Add.3. para. 54.

¹⁸¹ *Ibid.*, para 49

¹⁸² Ministry of Employment and Labor website. News: “SMEs are enabled to employ foreign work force stably.” 15 December, 2009.

¹⁸³ The National Human Rights Commission of Korea. Annual Report 2013. (2014), 58.

¹⁸⁴ Bae, Hyun-jung. “President Moon orders government to bolster human rights watchdog.” 25 May, 2017. <http://www.koreaherald.com>.

such re-entrants' smooth return to their home countries" "to prevent the illegal overstay of foreign workers received under the employment permit system."¹⁸⁵ Korean government policy does not seem concerned with the proportionality of deportation compared with the length of stay or migrants' ties to their communities, in contrast to the recommendations set forth by the ECSR for Germany. A regional accountability mechanism in the future may push the Korean government to change its policies more quickly.

3.2.2 Nonimmigrant Visas

This subsection covers the possibility for migrant workers to report their crimes to authorities and to receive protection from deportation for doing so. Immigration rules tying women workers to their employers has been found to directly cause situations of prolonged sexual harassment and abuse.¹⁸⁶

In the US, in order to curb this, the U visa was passed into law in 2000 in the Violence Against Women Act (VAWA). The text of the U Visa states that an alien applying for the U visa must have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," been "helpful" to the authorities in "investigating or prosecuting criminal activity" that took place in the US, its territories, or possessions.¹⁸⁷ Testifying, reporting crimes, and disclosing information are some of the ways in which a victim can prove to be "helpful" to an officer.¹⁸⁸ A national survey found that over 75% (76.3%) of the U visa cases being filed nationally were based

¹⁸⁵ Ministry of Employment and Labor website. "Employment Policy: Government decides to bring in 56,000 foreign workers in 2017," 3.

¹⁸⁶ See footnote 5

¹⁸⁷ 8 U.S. Code § 1101 (a)(15)(U)

¹⁸⁸ Ibid.

on the following criminal activities: domestic violence, sexual assault, or human trafficking.”¹⁸⁹

This indicates the need for coordinated responses to the multiple dangers faced by migrant women.

In *Cazorla, et. al v. Koch Foods*, 14 mostly illiterate and undocumented Hispanic poultry factory workers brought a claim against Koch Foods for sexual harassment and assault. The company demanded to know the names of the women who had filed for U visas, and the Fifth Circuit Court ruled that the workers were only protected from their employer finding out their identities during the liability phase.”¹⁹⁰ Should U visa cases against employers fail, migrant workers are vulnerable to retaliation.

If the US is an imperfect example of remedying rights abuses, Korea stands to benefit from at least partially following their lead. According to the 2013 Survey on the Living Conditions of and Sexual Harassment and Sexual Violence against Migrant Workers, quoted in the Korean NGO submission to the UN Human Rights Committee, only 20.5% of migrant workers reported their cases to supervisors or coworkers, and 56.4% did not report their cases at all, whereas 40.0% of male migrant workers did not file reports, 68.2% of female migrant workers did not do so.¹⁹¹ Meanwhile, the reasons for not filing reports were in the order of fear of reporting irregular status (47.4%), concerns of unemployment (36.8%), embarrassment and shame (31.6%), difficulty in communication (21.1%), lack of information (15.8%), and fear of retaliation (5.3%).¹⁹²

¹⁸⁹ Orloff, Leslye E. and Feldman, Paige E. “National Survey on Types of Criminal Activities Experienced by U-Visa Recipients” Immigrant Women Program, Legal Momentum. (29 November, 2011), 2.

¹⁹⁰ *Cazorla, et. al v. Koch Foods*, 838 F.3d 540 (5th Cir. 2016), p.564.

¹⁹¹ NGO Response to the List of Issues Concerns and Recommendations on the Republic of Korea NGO Submission to The UN Human Rights Committee 115th Session, 19 October 2015 – 6 November 2015. Submitted by South Korean Human Rights Organizations Network (83 NGOs).

¹⁹² Ibid.

Current Korean immigration policies hinder crime reporting. If a worker is irregular, she may decide to continue suffering abuse for fear of deportation. Unlike the US, Korea does not a specific visa for abused workers; however, they can file for a “miscellaneous” G-1 visa for one-year periods.¹⁹³ This means there is a lack of recognition for the special needs of sexual harassment and assault survivors.

The situation in Europe is different in that regard. European Parliament Directives create an interconnected framework of regional and international law. Directive 2004/81/EC of 29 April 2004,¹⁹⁴ grants residence permits to third-country national victim/survivors of trafficking and sexual assault and allows a stay of up to 6 months and access to the labor market.

Across the globe, the legal avenues for escaping abusive working environments differs across various regions. Despite the “universality” of human rights, there still remains a patchwork of protections for migrant working women.

3.3 Anti-Discrimination Law

Anti-discrimination law is relevant for this chapter because of the current understandings that have evolved over time to place sexual harassment within the scope of anti-discrimination legal protections. Since sexual harassment is one of the most common claims of agricultural working women, it is the main focus of this subsection.

¹⁹³ UNHCR. “Refugee Status Determination Procedures in Korea.” Handbook for Recognized Refugees, Humanitarian Status Holders, and Refugee Status Applicants. (2013), 8.

¹⁹⁴ Council Directive 2004/81/EC of 29 April 2004 “On the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.”

In the first successful legal case in the US that brought sexual harassment under the scope of anti-discrimination law, in *Meritor Savings Bank, FSB v. Vinson et al*, the US Supreme Court ruled that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII” of the 1964 Civil Rights Act.¹⁹⁵ The case created the legal basis in the US to claim that sexual harassment, included under the protected ground of “sex,” could form the basis for employment discrimination.¹⁹⁶

The ruling in *Vinson* also applies to women migrant agricultural workers, though in practice the law has not helped. Christa Conry argues that “Title VII fails female farmworkers” and advocates for a “proposed amendment to the legislation meant to safeguard this group of laborers.”¹⁹⁷ This failure was illustrated in the example of *EEOC v. Evans Fruit Co.*, wherein 14 women had brought sexual harassment claims against their employer, Evans Fruit Company, but a jury of 7 men and 2 women sided with the fruit company because of a lack of evidence that the plaintiffs had reported the harassment to their supervisors.¹⁹⁸ Bringing successful Title VII claims are difficult for agricultural workers as the law stands because they are often afraid to report their harassment to trigger employer liability. Conry analyzes Title VII as having a white female standard, but unfortunately, the Federal Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) uses the male farmworker as the standard by failing to mention sexual harassment.¹⁹⁹ Also, there is no requirement in the law to house male and female migrant agricultural workers separately, just that they meet health and safety requirements.²⁰⁰ Conry calls for a change in Title VII’s rules

¹⁹⁵ *Meritor Savings Bank, FSB v. Vinson et al.* 477 U.S. 57 (1986) p. 73.

¹⁹⁶ *Ibid.*, p. 63

¹⁹⁷ Conry, Christa. “Forbidden Fruit: Sexual Victimization of Migrant Workers in America's Farmlands,” 26 *Hastings Women's L. R.* (2015), p.124.

¹⁹⁸ *Ibid.*, p.135-6

¹⁹⁹ *Ibid.*, p.139

²⁰⁰ Safety and Health of Housing. 29 U.S. Code § 1823 (a).

so that they can more aptly fit to the situation at hand. Instead of using a “reasonable person” standard to determine whether a sexual harassment victim acted in their full capacity, a “reasonable undocumented, immigrant woman” standard should apply.²⁰¹ Before justice can be attained, the US legal system needs to be able to fit the situations of more people under its jurisdiction.

For migrant workers in Germany, there exists a similar situation wherein laws on the books do not do enough in practice to protect their right to be free of discrimination. German civil law prohibits discrimination in the General Equal Treatment Act, but German lawmakers need to bring current legal practice into conformity with them, according to the European Committee of Social Rights: “the situation in Germany is not in conformity with Article 19§4 of the 1961 Charter on the ground that it has not been established that adequate practical measures have been taken to eliminate all discrimination concerning remuneration and other employment and working conditions.”²⁰² Furthermore, the Committee’s conclusions state that Germany did not provide the requested information on migrants or people with immigrant backgrounds. Germany failed to prove that it took “adequate practical steps to eliminate all legal and de facto discrimination concerning remuneration and other employment and working conditions, including in-service training and promotion, and the state lacked proof of “sufficient effective monitoring procedures or bodies to collect information, for example disaggregated data on remuneration or information on cases in employment tribunals,” leading the Committee request “whether vocational training with a view to improving the skills of workers and their opportunities is available in Germany on the same

²⁰¹ Conry, Christa. “Forbidden Fruit”, 142.

²⁰² European Committee of Social Rights. European Social Charter Conclusions XX-4 (2015). 2016, 85-86. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805939f3>

basis for migrants and nationals.”²⁰³ Thanks to the regional accountability system in the Council of Europe, its member states are pressured externally to bolster its human rights positions.

Concerning anti-discrimination, the Korean constitution, last revised in 1987 after the June Democracy Movement, contains a short list of possible grounds of discrimination, but the Constitutional Court has ruled in favor of some migrant rights nonetheless. Article 10 of the constitution states that “All citizens shall be assured of human worth and dignity and have the right to pursue happiness,” not mentioning foreigners. The next sentence places a duty on the state “to confirm and guarantee the fundamental and inviolable human rights of individuals.” Article 11 prohibits “discrimination in political, economic, social or cultural life on account of sex, religion or social status,” which has opened the door to migrants’ rights recognition.

The Korean Framework Act on Women’s Development states, “The State, local governments and entrepreneurs shall take proper measures for the arrangement of equal working conditions such as prevention of sexual harassment, etc.”²⁰⁴ Thus, women migrants are covered in theory under non-discrimination law in Korea. However, although agricultural workers can stay for years in Korea, maternity and nursing protections are sorely lacking. The Korean Framework Act on Women’s Development states that both public and private actors “shall provide special care to women during their pregnancy, childbearing and lactation and protect them from any disadvantage for those reasons.”²⁰⁵ In addition, Article 22(3) states: “The State and local governments shall strive to increase the welfare of aged women and women dwelling in fishing and agrarian villages.” The

²⁰³ Ibid., 85

²⁰⁴ The Korean Framework Act on Women’s Development [Enforcement Date 29. Jan, 2001.] [Act No.6400, Article 17(3).

²⁰⁵ Ibid., Article 18(2).

enforcement measures taken for this legislation should ensure that migrants are afforded the same legal protections. However, according to the interview conducted for this thesis, pregn

All of the jurisdictions in this thesis have room for improvement when it comes to protection for sexual harassment. Germany has been criticized for its lack of adequate implementation of the European Social Charter.

Conclusion[AS9]

Domestic immigration policies in receiving states guarantee that migrant workers remain a temporary, flexible labor pool for the host economy with limited family reunification rights. The free choice of labor is restricted, meaning that workers must face legal barriers in order to change jobs. For women in agriculture in particular, this may mean continued work with an employer or coworkers who harasses them in the fields or factory, a petition to the government for a special protective visa allowing them to find other work, or the possibility of irregularity by finding unsanctioned work elsewhere.

Social and economic vulnerabilities combine with limited civil and political rights in the US to form multiple disadvantages against migrant women in agriculture. De facto discrimination in Korea erects roadblocks to accessing justice. In Germany, limited migration avenues create the conditions for increased irregular employment. In all countries, language barriers and isolated environments need to be overcome.

All countries should change visa regulations to prevent and remedy human rights abuses experienced by low-skilled migrant workers by allowing more choice in their employment situations.

Chapter 4 will cover union, NGO, and civil society organization (CSO) responses to these gaps and feature the agency of migrant women agricultural workers by their participation in social movements.

Chapter 4 Mobilizing for Change

As shown in Chapter 3, many gaps in civil, labor, and anti-discrimination law have been constructed by lawmakers in the three jurisdictions in this thesis. This chapter examines the reality on the ground for those who are acting to change the laws or supplement rights protections in other ways, at times acting outside the human rights framework. Trade union activities, non-governmental organizations' (NGO) work at the international and local levels, responsibilities of sending states, and grassroots movements' activities will be covered.

4.1 Trade Unions

On the ground, organizations working toward better conditions for migrants include workers' unions. In each jurisdiction, there is a different history concerning migrant participation in unions. Germany has a comparatively long history of protection for the right to association, whereas Korea is more recent and the US still needs more development in this area.

4.1.1 Legal Foundations

The Basic Law for the Federal Republic of Germany on freedom of association guarantees that “every individual” and “every occupation or profession” has the “right to form associations to safeguard and improve working and economic conditions” and that this right may not be limited, even in the case of national security threats.²⁰⁶ Such strong guarantees for the right to form unions led to the formation of the first European-level migrant rights union, The European Migrant

²⁰⁶ Article 9(3)

Workers Union (EVW) with the support of Germany's Trade Union for Building, Forestry, Agriculture and the Environment²⁰⁷ (IG BAU) in 2004.²⁰⁸

EVW was officially registered under German law to support all migrant workers with legal and language issues, to ensure payment of wages, to lobby in support of migrant workers, and to improve working conditions and wages, including for undocumented migrants.²⁰⁹ The power of union organizing is illustrated in these many issues. Solidarity with national workers helps create a link to powerful lobbying opportunities denied migrants normally because of their transitory stay and lack of citizenship.

Germany's situation is also improved by regional trade unions. The European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) demands "fixed regulations ensuring that a seasonal worker receives his wage" and argues that "the high flexibility demands made on seasonal workers must not be reflected in a flexible styling of their employment contracts."²¹⁰ Such demands are reflected in the foundation of the European Migrant Workers' Union²¹¹ (EVW) in Germany. Thus, at the regional and national level, migrants have loud voices advocating for their rights. This indicates a greater possibility for women migrants also to have their issues heard, provided they are included in the union activities and messaging.

While Germany's case provides an example of strong protections for migrants' right to form trade unions, in Korea this has developed over time. The Korean constitution states in Article 33 that

²⁰⁷ In German, Industriegewerkschaft Bauen-Agrar-Umwelt.

²⁰⁸ Dribbusch, Heiner. "European Migrant Workers Union founded." September 21, 2004. <https://www.eurofound.europa.eu>

²⁰⁹ Ibid.

²¹⁰ EFFAT. "The Effects of Climate Change on the Situation of Workers and Others Employed in European Farming," (2014), 26.

²¹¹ In German, Europäischer Verband der Wanderarbeiter.

“[t]o enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action.” This was codified into legislation in the Trade Union and Labor Relations Adjustment Act, which defines “worker” as “a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job.”²¹² In 2015, the Korean Supreme Court ruled that undocumented workers should be considered “workers” under the legislation.²¹³ Because such workers provide “labor to another party based on a subordinate relationship” and receive wages and other benefits; the court ruled that “employment eligibility” is not a requirement to be considered a worker.²¹⁴ Because agricultural work is a type of work with so many undocumented workers, this ruling provides a good remedy for employer abuses; however, the issue of deportation after claiming lost wages is a separate issue which may affect undocumented workers from exercising this right.

The first legally recognized Migrants’ Trade Union received permission from the government a few months after the Korean Supreme Court ruling in the summer of 2015, and was established only after it agreed to remove the “political” aims of abolishing the Employer Permit System (EPS) and achieving legalization for all undocumented migrant workers.²¹⁵ The Migrants’ Trade Union (MTU) is affiliated with the Korean Confederation of Trade Unions (KCTU), a Korean workers’ union. This indicates, as in the German case, a coalition between national and migrant workers.

²¹² Trade Union and Labor Relations Adjustment Act. Act No. 5310. 13 March 1997. Article 2(1).

²¹³ Supreme Court en banc Decision 2007Du4995. Decided June 25, 2015 (Revocation of Disposition on Return of Labor Union Establishment Report)

²¹⁴ Ibid.

²¹⁵ Ock, Hyun-ju. “Korea authorizes first migrant workers’ union.” Aug. 20, 2015. Korea Herald.

In the US, while freedom of association is not explicitly protected, having been gathered from the right to freedom of speech and Due Process under the First and Fourteenth Amendments,²¹⁶ certain groups are precluded from enjoying this right. Agricultural workers, defined in the Fair Labor Standards Act (FLSA), are excluded in the National Labor Relations Act (NLRA), in effect denying them the right to form unions. Under the definition of “employee,” the NLRA excludes “agricultural laborers,”²¹⁷ domestic workers, individual contractors, and others,²¹⁸ resulting in legal privileges for employers, including that they cannot be accused of unfair labor practices for failing to recognize the labor union demands of their workers.²¹⁹ Although the NLRA was drafted with the intent to limit the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers,”²²⁰ the legislation also allowed those inequalities to remain for specific kinds of workers. The Act was meant to “reduce industrial strife and unrest”²²¹ by ensuring freedom of association and collective bargaining to employees, in addition to ensuring the public interest in the free flow of commerce; however, the exclusion of agricultural workers and other types of workers appears arbitrary, and thus unjustified in light of its purpose.

Subsequent U.S. Supreme Court rulings have not granted agricultural workers greater legal recognition. For example, in *Bayside Enterprises, Inc., et al v. National Labor Relations Board* (1977), the Court found in a dispute regarding poultry delivery drivers that “appropriate weight ...

²¹⁶ Or, as phrased in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, p. 460 (1958), freedom of association exists between the “close nexus between the freedoms of speech and assembly.”

²¹⁷ 29 U. S. C. § 203(f). The Fair Labor Standards Act includes “farming in all its branches,” including poultry and livestock growers.

²¹⁸ 29 U.S.C. § 152(3) (1978).t

²¹⁹ 29 U.S.C. § 158 (1974).

²²⁰ 29 U.S.C. § 151 (1954).

²²¹ Ibid.

must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying text patterns requires enforcement of the Board's order.”²²² This ruling essentially gave wide discretion to the National Labor Relations Board (NLRB)²²³ to determine the definition of “employee,” and indicated that the U.S. Supreme Court would choose not to interfere with Congress’s intent in fashioning the details of its labor laws.

Compared to Germany and Korea, which legalized trade unions for all workers and whose national trade unions stand in solidarity with undocumented workers seeking back pay, the US legal situation leaves agricultural workers legally vulnerable to economic exploitation and increases the precarious nature of their work.

4.1.2 Trade Union Activism

While the previous section has established that migrant workers’ unions have legally existed the longest in Germany, were recently legalized in Korea, and that agricultural workers lack association rights in the US, the situation on the ground for the workers appears similar based on the research. At the same time, the importance of trade union activism in favor of migrant rights is crucial: “exclusion and disassociation from foreign workers simply facilitates situations in which migrants are exploited to the detriment of upholding decent work condition.”²²⁴ The support of mainstream trade unions advocating for migrant workers is crucial to provide momentum for changes in public perception and legislation reform.

²²² *Bayside Enterprises, Inc., et al v. National Labor Relations Board* 429 U.S. 298 (1977), para. 304.

²²³ “The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.” From NLRB website. “What we do.” <https://www.nlr.gov/what-we-do>

²²⁴ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 16.

Migrant groups' collaboration with local unions is key, since even as migrants are the "emblem of the precariat,"²²⁵ their working conditions are spread to local workers as well. Local unions can do well to recognize the manipulation of the state in labeling some migrants as "good" and others as "bad" as a means of border control.²²⁶ Crucially, migrants stand up for the "right to have rights" when they echo the need for the same legal protections that national citizens enjoy.²²⁷

Despite long-standing cooperation between the German Trade Union for Building, Forestry, Agriculture and the Environment (IG BAU) and trade unions representing migrant workers in agriculture, the seasonal employees who work in Germany still endure sub-par working conditions.²²⁸ Since the 1990s, IG BAU and a Polish agricultural trade union, ZZPR,²²⁹ both members of the European Federation of Trade Unions in Food, Agriculture, Tourism and Allied Branches (EFFAT),²³⁰ have been making educational leaflets for Polish workers on contracts and working standards.²³¹ Education on rights is one thing, employers' compliance with standards and government action to prevent labor abuses another.

In 2017, IG BAU and the European Migrant Workers' Union (EVW) were still reaching out to European agricultural workers in asparagus fields in Germany, spreading needed information on rights related to housing conditions, access to warm water, sanitation, and wage laws.²³² Workers

²²⁵ Jørgensen, Martin Bak. "Precariat – What it Is and Isn't – Towards an Understanding of What it Does." *Critical Sociology (Sage Publications, Ltd.)* 42, no. 7/8 (November 2016), 965.

²²⁶ Ibid., 963.

²²⁷ Ibid., 965.

²²⁸ Dribbusch, Heiner. "German and Polish unions cooperate over seasonal workers in agriculture" Eurofound. 7 October 2003.

²²⁹ In Polish, Związek Zawodowy Pracowników Rolnictwa w Rzeczypospolitej Polskiej.

²³⁰ According to their website, "EFFAT defends the interests of more than 22 million workers towards the European Institutions, European employers' associations and transnational companies" From EFFAT website. Home page. [accessed 30 November 2017] <http://www.effat.org/en>

²³¹ Dribbusch, Heiner. "German and Polish unions cooperate over seasonal workers in agriculture."

²³² IG BAU website. Wer arbeitet hat auch Rechte. <Who works also has rights.> 29 May 2017. translated from German. http://www.igbau.de/Wer_arbeitet_hat_auch_Rechte.html

appear to routinely face these issues despite the organized efforts of the German and migrant trade unions.

Aiming to tackle the root causes of this phenomenon, the EFFAT Work Program 2015-19 tackles the concept human rights abuses of agricultural workers through the framework of precarious work, identifying links between the recent financial crisis in Europe to a fragmented labor market with less regulation and the burgeoning of new forms of workplace discrimination.²³³ The Program takes into account migration, gender, and age discrimination issues. EFFAT recommending using “collective bargaining in all sectors and enterprises as an instrument to improve both wages and working and employment conditions for precarious employees, as well as to ensure equal treatment.”²³⁴ It acts as the European regional organization of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, and Tobacco and Allied Workers’ Associations (IUF).

The IUF provides an example of transnational union partnership and solidarity among different sectors involved in food service and production.²³⁵ With offices and cooperation on five continents, the union aims to provide a counterbalance to the global reach of transnational corporations by promoting the values of human rights, labor rights, and democracy.²³⁶ Thus, IUF exemplifies the use of human rights standards in addressing the global processes involved in migrant labor exploitation.

²³³ Wiedenhofer, Harald. “Preface.” March 2014. In EFFAT Work Program 2015-19 “Together for decent work and fair pay from farm to fork” 4th EFFAT Congress, (20-21 November 2014), 2.

²³⁴ EFFAT. “EFFAT Charter on Precarious Work.” Adopted by the 3rd EFFAT Congress, 20-21 October 2009 in Berlin.

²³⁵ IUF website. “The IUF - building global solidarity” 16 February 2017.

²³⁶ Ibid.

During the 2015 May 1st demonstrations commemorating the 25th anniversary of the ICRMW,²³⁷ the Korean Confederation of Trade Unions (KCTU), with various migrant groups, organized a rally in the capital center.²³⁸ The alliance between the domestic labor organization and its support for legalization of the migrant trade union was visually and symbolically important to combat the rhetoric that immigrants “take jobs away” from national citizens.

However, not only does South Korea, a receiving country for migrants, neglect many of the human rights of migrant workers, but it does the same to nationals. The Korean leader of the KCTU was jailed six months after the May Day rally for organizing several peaceful anti-government protests.²³⁹ This illustrates that treaty standards which guarantee migrants the same rights as nationals fall short of providing protections in countries where nationals’ labor rights are not respected in the first place.

Taran and Geronimi have also noted the success of mainstream trade unions in mobilizing migrant workers around the world: “National confederations in Argentina, Belgium, Canada, France, Germany, Ireland, Italy, Korea, Portugal, Spain, the UK and the USA – among others – have full-time national staff for migrant worker organizing and anti-discrimination issues.”²⁴⁰ The unions advocate for policy changes and align with like-minded movements; for example, the KCTU “cosponsors with church and other organizations the Joint Committee for Migrants in Korea” and provides translated materials and services for the diverse population of migrant workers in Korea.²⁴¹ While there appears to be no lack of solidarity for migrant workers in agriculture, the

²³⁷ Migrant Forum in Asia website. “Mobilizations for International Workers Day 2015.” Cmw25.org.

²³⁸ Ibid.

²³⁹ Amnesty International website. “South Korea: Five year sentence against union leader a chilling blow to peaceful protest.”

²⁴⁰ Taran, Patrick A. & Eduardo Geronimi, “Globalization, Labor and Migration,” 20.

²⁴¹ Ibid.

general public generally remains unaware of their labor and human rights demands, indicating the need for media campaigns and outreach by civil society organizations (CSOs) and NGOs.

Trade unionism representing the interests of low-paid immigrant workers in low-skilled fields developed in the late 1980s in the US.²⁴² Mainstream American unions were not always in support of this group of workers: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) was not immediately supportive of immigrants' rights, but reversed its position. According to Milkman, migrant workers in the U.S. have contributed energy and passion to the mainstream labor movement, employing strategies from their home countries as well as new strategies to combat precarious working conditions.²⁴³ Over time, migrants have become more included in labor movements, but are still criticized for a lack of inclusion of women and their specific rights claims. This will be discussed further below.

4.2 INGOs, NGOs, and CSOs

Due to the transnational nature of migrant work, attaining justice in the case of worker abuses can be difficult. The difficulty of this is illustrated in the process foreign nationals must go through in order to gain a remedy.

One organization working to end this is the Global Workers Justice Alliance. According to their 2015 report, a legal advocate was able to receive backpay for a rural-dwelling Mexican client whose employer in the US had withheld pay.²⁴⁴ The legal action program, titled the "Global Workers Defender Network," includes human rights organizations in various Central and South American states. They accomplish their work by "team[ing] up with U.S. and Canadian lawyers

²⁴² Milkman, Ruth. "Immigrant Workers, Precarious Work, and the US Labor Movement." *Globalizations*. 8, no. 3 (June 2011), 363.

²⁴³ Ibid.

²⁴⁴ Global Workers Justice Alliance. "2015 Year-in-review."

to make justice across borders a reality for transnational migrants.” While success stories are important to highlight, not every migrant worker can see justice.

In many cases, Cathleen Caron, Executive Director of the Global Workers Justice Alliance, argued that despite the availability of legal aid services to migrant workers, the legal process of bringing a claim forward takes years and requires litigants to be present throughout various stages of a case.²⁴⁵ Even if migrant workers win their cases, they may never see money from settlements or damages awarded because they have left the country or they can no longer be found.²⁴⁶ Rights without access to them is a major concern for all migrant workers.

Barriers to justice are erected in many states throughout the world. Whereas legal aid networks have been established in America, in Korea there is still work to be done. According to Amnesty International’s report “Bitter Harvest,”²⁴⁷ the number of migrant workers who can obtain a remedy for abusive employers in Korea remains low, as seen by the number of cases that have been brought to the labor authorities compared to the number of cases that have found violations of the employer/worker relationship. Specific court cases on these topics are difficult to find, but as Amnesty International found after surveying 28 migrant workers, “none received adequate assistance from the officials in these offices when seeking to remedy a work-related problem. In the majority of cases, the migrants were actively discouraged from taking the issue forward.”²⁴⁸ In total, 23 of the 28 workers surveyed in the interview had tried to find legal assistance and could not. They faced administrative and structural difficulties: “migrant workers

²⁴⁵ Caron, Cathleen. “Global Workers Require Global Justice: The Portability of Justice Challenge for Migrants in the USA.” The Committee on Migrant Workers Day of General Discussion. Oct. 30, 2005. Pg 2.

²⁴⁶ Ibid., pg. 3

²⁴⁷ Amnesty International. *Bitter Harvest. Exploitation and forced labour of migrant agricultural workers in South Korea*, October 2014, 8. Also at footnote 8.

²⁴⁸ Ibid., 8.

are routinely told by job centre staff that they must continue working at the place of employment while their complaint is being investigated, thereby exposing them to further abuse at the hands of their employer.”²⁴⁹ This is certain to have a chilling effect on those who would like to report abuses, but know that their complaints will likely fall on deaf ears. While the number of people interviewed in the report is not large enough to draw overarching conclusions,²⁵⁰ rights claims by the Migrant Trade Union in Korea (MTU) advocates for changing the law to allow workers to receive all pay, including severance bonuses, before returning to their countries of origin, to avoid the hurdles involved in trying to get paid while abroad.

In Asia, the lack of a pan-Asian human rights body has pushed migrant rights organizations into action. Migrant Forum in Asia, civil society organizations, trade unions, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and the International Labour Organization²⁵¹ spearheaded the campaign for the ratification for the ICRMW, which also links related campaigns for states to ratify various ILO conventions and protocols related to migrant work.²⁵² Thus, the goal is to provide various forms of protections for migrant workers in a wholistic, far-reaching manner, not just to campaign for the UN treaty. This strategy included a broad coalition of actors, but the message may have suffered from the organizations and their audiences having too many interests and goals at once.

For the most part, labor-importing countries have not ratified many treaties protecting migrant rights. Battistella argues that “NGO pressure can be quite effective” in “sending” states due to

²⁴⁹ Ibid., 7.

²⁵⁰ See data for numbers of women in migrant agricultural work in Korea in footnote 86.

²⁵¹ Migrant Forum in Asia website. “About.”

²⁵² Migrant Forum in Asia website. “Step It Up: Dignity, Rights, Development.”

existing public support for friends and relatives who migrate.²⁵³ In contrast, civil society organizations in “receiving” countries have a more difficult time rallying popular support for migrant rights. States risk populist backlash, both through public demonstrations and online, when applying human rights to migrants, especially irregular ones.

Battistella further argues that labor “flexibility derives from a protection deficit...Until the number of migrants (and their negotiators – governments, recruiters and brokers) willing to accept inferior conditions remains larger than the demand for workers, it will be difficult to bring governments and employers to the Convention table.”²⁵⁴ Thus, competition among migrants willing to make big concessions on their rights in exchange for economic gain adds to the difficulty in achieving ICRMW ratification. Many low-skilled workers hold the view that “any job is better than no job” and would need considerably more opportunities and support to avoid taking exploitative work. The campaign’s attention could be more focused on addressing these issues and partnering with law-abiding, rights-respecting businesses so that they do not feel that they are at a competitive disadvantage if they fully pay and respect migrant rights.

In the US, NGOs called ‘worker centers’ spearhead the mobilization of precarious workers in ways that traditional trade unions cannot.²⁵⁵ These involve both workplace advocacy and organizing campaigns, legal aid, as well as social programs geared toward education and housing.²⁵⁶ They fill

²⁵³ Battistella, Graziano. “Migration and human rights: the uneasy but essential relationship.” In *Migration and human rights. The United Nations Convention on Migrant Workers’ Rights*. Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski (eds). 2009. (Cambridge University Press and Unesco Publishing), 60.

²⁵⁴ Ibid.

²⁵⁵ Milkman, Ruth. “Immigrant Workers, Precarious Work, and the US Labor Movement,” 363.

²⁵⁶ Ibid.

a role that unions are ill-equipped to handle, such as garnering public support for migrants by issuing press releases and sharing individual migrants' stories.²⁵⁷

According to the US National Report, the state has “increased outreach to foreign workers, including agricultural workers, regarding their rights and how to pursue them, often by working cooperatively with NGOs and foreign governments.”²⁵⁸ The US cited “Consular Partnership agreements with a number of countries to provide information on U.S. labor and employment laws.”²⁵⁹ If receiving states cooperate with sending states on migrant rights education through NGOs, some of the exploitation and powerlessness felt by this vulnerable population can be alleviated.

In Europe, the *European Network of Migrant Women*, a “young migrant-women led platform of NGOs” focuses on “economic empowerment, anti-discrimination & access to justice and combatting Violence against Women and Girls.”²⁶⁰ In Germany, the NGO studied how businesses can better integrate migrant workers,²⁶¹ indicating the need for the private sector to play a key role in promoting the rights of women migrant workers. Social movements have played a key role in this as well, which will be discussed next.

4.3 Movements

In Europe and Germany, broad-based social movements are advocating for changes in precarious work practices. Martin Bak Jørgensen uses two cases, Lampedusa in Hamburg, Germany (2013–

²⁵⁷ Milkman, Ruth. “Immigrant Workers, Precarious Work, and the US Labor Movement,” 367.

²⁵⁸ UN Human Rights Council. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: United States of America*, A/HRC/WG.6/22/USA/1 (Feb. 13, 2015), para. 82.

²⁵⁹ Ibid.

²⁶⁰ European Network of Migrant Women website. “Who we are.”

²⁶¹ European Network of Migrant Women website., “STUDY VISIT: EU Thematic Network on Migrants in North Rhine Westphalia.”

2015) and the “Freedom Not Frontex” solidarity march across Europe (2014 and onwards) to show how migrants have incorporated the language of precarity into their protests for more rights recognition.²⁶² He argues that migrants broaden the meaning of democracy and citizenship through their participation in assembly and association. Meanwhile, he asserts that this contributes to the existing research which contradicts the assumption that migrants are victims[AS10]. While current capitalist practices demand a cheap, vulnerable workforce, creating precarious work and immigration, it also produces worker identification with certain classes and thus serves as a catalyst for mobilizing precarious workers. However, it is unclear what role women are playing in these movements.

According to Jin-kyung Lee, changes in migrant rights recognition in Korea needed the participation of business owners, meaning a more male-centered approach. The Japanese-style Industrial Trainee System was changed to the Employment Permit System (EPS) in 2003 after small to medium sized business owners (about half in total) joined migrant workers and activists in pressuring for change.²⁶³ Though working conditions did not change much under the new system, the state did legalize some irregular migrants with the new legislation. Still, many remain undocumented and thus fear bringing complaints about unpaid wages and other injustices, especially since nondiscrimination laws are not enforced by the state[AS11], reflecting an earlier era when black letter law on labor protection was largely ignored to favor capital accumulation.²⁶⁴ This led to the worst self-reported working conditions for migrant workers out of 11 Asian countries surveyed in the late 1990s.²⁶⁵ The many safety accidents and rights abuses suffered by migrants

²⁶² Jørgensen, Martin Bak. "Precariat – What it Is and Isn't" 959.

²⁶³ Lee, Jin-kyung. "Migrant and Immigrant Labor: Redefining Korean Identity," 190.

²⁶⁴ Ibid., 191-192.

²⁶⁵ Ibid., 195.

has not been met with inaction; migrant protests often take the form of Korean labor activism from the 1970s and 80s[AS12], and just as Koreans rail against Japanese and American colonialism, so does the migrant rights movement rail against the “subempire” of Korea.²⁶⁶ Migrant protests in Korea have sought to harness the power of shame by forcing Koreans to face what Lee describes as anti-Korean sentiments akin to anti-Japanese feelings held by Koreans.

Not only do gendered differences matter, but different work sectors have different histories of activism from which to draw from. Hae Yeon Choo’s ethnographic work in South Korea examines “the shadow of working men,” by which she means the historic social movements and human networks available mainly to men, and which women, through close relationships with colleagues, secondarily benefit.²⁶⁷ Hostesses are more likely to be framed as victims in public debates, particularly due to the history of sex slavery between Korea and Japan, whereas factory workers are likely to stir empathy in the Korean public due to the past struggles of Korean factory workers in the 1960s and 70s.²⁶⁸ Female agricultural workers remain invisible to Korean society as nationals mainly focus on the plight of an aging and declining native male farming population. Although women migrant agricultural workers’ cases were difficult to locate, Choo describes the situation of a female Filipina factory worker who successfully sued a former employer for unpaid wages and participated in demonstrations despite being in an irregular situation.²⁶⁹ Women in Korea generally have been relatively ignored compared to their male counterparts; for migrant women, the isolation is even more severe, and the possibilities of networking limited.

²⁶⁶ Ibid., 204

²⁶⁷ Choo, Hae. "In the Shadow of Working Men: Gendered Labor and Migrant Rights in South Korea." *Qualitative Sociology* 39, no. 4 (December 2016), 354.

²⁶⁸ Ibid., 369.

²⁶⁹ Ibid., 354.

Although migrant working women may find that their needs are not fully advocated for by unions, their participation in social movements has been a key driving force in changing their rights situations. For women in the US, established structures advocating for labor rights did not always meet their needs. Milkman and Terriquez found through interviews with female social movement leaders that, contrary to the male-dominated United Farm Workers and Chicano movements of the 1960s and 70s, present-day social movements are commonly led by women because while access to power in unions was limited, social movements provided more opportunities for newcomers.²⁷⁰ Worker centers also empower undocumented workers to exercise “non-citizenship citizenship,” through participation in public hearings, protests, and contact with lawmakers.²⁷¹

One campaign making a difference in the US is the “Harvest without Violence” campaign representing the nationalization of the local workers’ movement in Immokalee, Florida, which spread to Ohio and New York.²⁷² Farmworker women from the Coalition of Immokalee Workers (CIW) use grassroots organizing tactics to raise awareness of “social responsibility, human trafficking, and gender-based violence at work,” forming a “national consumer network since 2000.”²⁷³ Their tactics include rolling fasts across universities (The Ohio State University to the University of Michigan) and awareness-raising campaigns demonstrating the solidarity of academics,²⁷⁴ a documentary on the necessity of solidarity throughout all parts of the food chain,²⁷⁵ and the support of faith-based organizations.

²⁷⁰ Milkman, Ruth and Veronica Terriquez. “‘We Are the Ones Who Are Out in Front’: Women’s Leadership in the Immigrant Rights Movement” *Feminist Studies* 38, no. 3. (Fall 2012), 738.

²⁷¹ Milkman, Ruth. “Immigrant Workers, Precarious Work, and the US Labor Movement,” 368.

²⁷² CIW website. “ANNOUNCING: Farmworker women launch “Harvest without Violence” campaign to end sexual violence in Wendy’s supply chain!” 27 September, 2017.

²⁷³ CIW website. “About CIW.”

²⁷⁴ Boycott Wendy’s website. “Take action.”

²⁷⁵ Food Chains website. Home page.

One of their main accomplishments has been the Fair Food Program (FFP). The program is “a unique partnership among farmers, farmworkers, and retail food companies that ensures humane wages and working conditions for the workers who pick fruits and vegetables on participating farms.”²⁷⁶ In addition, it educates consumers on companies that use food grown under inhumane working conditions so that consumers can exercise the power of choice in determining where to buy their food. The FFP demonstrates that some farmers *want* to establish fair practices on their farms. When farmers and workers can agree to work together and companies receive social pressure to provide fairly produced food, the anxiety surrounding farmers losing their buyers is lessened, and the system becomes less precarious and transparent as workers’ organizations hold their employers to account.²⁷⁷ In this way, democratic movements are able to exert bottom-up pressure on business ventures to stabilize some of the economic and social precarity faced by farmworkers. FFP is a model for successful implementation of worker agency.

Not only within the US, but also internationally, the Fair Food Program standards need to be implemented. In addition, overseas branches of US companies need to be held to account by the general public within those countries. Drumming up public support for ethically grown food is key to addressing the global processes involved in creating precarious working and immigration conditions for women migrant agricultural workers around the world. Supporting the agency of those affected by human rights abuses to effect change is key to them realizing their human rights.

²⁷⁶ Fair Food Program website. Home page.

²⁷⁷ CIW website. “Worker-driven Social Responsibility (WSR): A new idea for a new century.” 16 June 2014.

Conclusion

Their labor is at once necessary and precarious, satisfying the economic goals of receiving states to supply cheap, temporary labor to agricultural businesses to meet the demand for labor in a market that demands affordable food products. Women migrant agricultural workers' issues remain relevant as food production still requires manual labor, women's physical dexterity, and willingness to comply with employer demands. By tying migrant workers to their employers through visa systems, state policies ensure that employers wield power over their employees' migration status. Not only do they face the human rights abuses of their male counterparts with limited association rights and barriers to accessing remedies for rights abuses, but they face gender-based discrimination as well.

In countries around the world, explicit exemptions in labor laws targeting agricultural workers benefit agricultural companies while stripping workers of rights. In addition, for states that may want to limit reliance on migrant labor, analyzing the flaws in current labor law can highlight ways to improve labor practices which do not drag down the rights of national workers.

Current rights abuses in the face of so many existing norms at both the international and domestic levels illustrate the need for coordinated action by civil society organizers on the ground to address the reality of agricultural laborers' needs. Furthermore, fostering a public that is informed and concerned about the conditions in which their food is produced must go beyond legal solutions.

As Butler argues, we who share the earth, by our "exposure to precarity... understand a global obligation imposed upon us to find political and economic forms that minimize precarity and establish economic political equality."²⁷⁸ Human rights, as an ethical call and as a legal framework,

²⁷⁸ Butler, Judith. "Precarious Life, Vulnerability, and the Ethics of Cohabitation," 150.

needs higher standards and more effective implementation to meet the challenge of addressing the social and economic factors comprising precarity. The entire human family need to fulfill the promise in the Universal Declaration of Human Rights that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Everyone must heed the call to support ethically grown food in order to raise human rights standards for all.

Recommendations

For governments generally:

- Ratify and implement the ILO conventions related to migrant women agricultural workers, including Convention No. 129: Labour Inspection in Agriculture, 1969, Convention No. 111: Discrimination (Employment and Occupation) Convention, 1958, and Convention No. 184: Safety and Health in Agriculture Convention, 2001.
- Labor ministries should design standard employment contracts which are both flexible enough to do justice to the special features of the agricultural sector and provide sufficient social security and benefits.
- Ensure proper budgets for inspections of 3-D industry workplaces.
- Reduce the numbers of migrants in irregular situations by providing them enough time to find employment between work contracts.
- Keep accurate data on migrant workers within their jurisdictions, including data disaggregated by various demographics, including gender.
- Remove procedural obstacles that prevent the efficient investigation of crimes by employers against their foreign employees.

- National Human Rights Commissions should provide guidance and training for law enforcement and the justice system to implement human rights-based labor and immigration laws.

For sending countries:

- Provide educational programs, safety training, and legal assistance to workers before and after migration.
- Lead by example by providing fair treatment of agricultural workers within their own jurisdictions.
- Suspend visa agreements with receiving states lacking sufficient rights protections for migrant workers to send the message that their nationals are not mere economic tools to fill labor shortage gaps and to prevent the self-exploitation of their citizens.

For organizations (INGOs, NGOs and CSOs):

- Ensure proper rights training and awareness of legal avenues available to workers, cooperating with employers' and trade union associations.
- Educate agricultural employers on labor rights standards
- Step up awareness campaigns on the situations of low-skilled migrant workers through public demonstrations, protests, letter writing, lobbying, use of media and the internet, and legal action so that public support can bolster the efforts of migrants to change current labor and immigration policies.
- Issue press releases to the media on the results of roundtables concerning migrant women in low-skilled industries with the relevant government ministries.
- Promote the businesses of growers with proven fair labor practices.
- Increase pressure on stores and restaurants that continue to sell food grown unethically.

- Religious groups should continue to be involved in advocacy for migrant rights, uniting various political factions under the same umbrella in a united front against unfair laws and practices.

For researchers:

- Employ methodologies to capture the experiences of non-gender conforming populations in future studies on migrant workers in agriculture.
- Establish clear links between structural adjustment policies and human rights situations of workers
- Investigate effective ways of training employers and changing workplace practices.

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Annex

Interview, August 27th, 2017

Interview with Ahn, Young Gyu and Lee, Kiho of the Uijeongbu Support Center for Foreign Workers and “Leanne,” a female Cambodian worker at a mushroom farm located in Yangpyeong, South Korea. Interpreted by Hwang, Jeong Eun.

First I spoke with Mr. Ahn, the Education and Cultural Team Leader at the state-funded Uijeongbu Support Center for Foreign Workers, about the demographics of the people who use the center. He said it was about 90% male factory workers from the Asian countries with which South Korea has signed E-9 visa agreements. He said most of the women who use the center work in agriculture. I asked why farm owners wanted to hire women specifically, and he answered that men simply avoid agriculture jobs because factory work is higher-paying, not that there was any specific reason for employers to higher females. Later in the interview, he said he thinks there is a lot of sexual harassment and assault taking place, but not enough facilities to handle them. However, on a positive note, contracts have been changing over the years to allow more days off. Mr. Lee also added that in October 2016 the Labor Ministry released guidelines for contracts in the agricultural sector to include rest days and breaks.

I then spoke with “Leanne,” who has worked at a mushroom farm for 1 year. She was lucky enough to have the Sunday off; two other female migrant agricultural workers interested in the interview had to work that day and could not attend. Leanne said she has been happy in Korea since she can earn more money than in Cambodia. Despite having a child whom she cannot bring into Korea, she stated that she plans to stay 4 years and 8 months, nearly the full amount of time that E-9 visa holders can stay in Korea. She stated that there were 9 women and 7 men at her workplace, with 6

of the women of Cambodian nationality and the remaining 3 from Thailand. She said that there were undocumented workers on the farm as well.

When asked whether she felt men and women were treated differently at her workplace, she said no, since men and women worked equally hard and experienced the same conditions. She said that meals and housing were deducted from their wages, that they occasionally faced non-payment, delayed payment, or reduced payment (one time her pay was short 30,000 won or about 27 USD). When asked what she thought should change about the Korean government's visa system, she said she hoped that she could work fewer hours and that she could bring her child into the country.

Finally, Mr. Lee, a legal representative of migrant workers and the counseling team Deputy General Manager of the support center, answered my questions concerning workers' conditions and the law. He said that employers sometimes fire pregnant workers. Agricultural workers are not guaranteed the same healthcare and insurance coverage afforded to workers in other sectors. One of the reasons for this, he said, is that most agricultural employers do not register as a business, thus circumventing the requirement that employers should pay for healthcare. Rather, employers request workers from local governments, who in turn expect election votes and pass local laws that favor farm owners.

Legal protections for agricultural sector workers have not advanced since 1953, he said. In addition, business leaders have made the argument that inherent to the agriculture business are cycles of busy and non-busy seasons, so limitations on working hours would be unfair when growers need pickers during peak seasons.

I asked Mr. Lee whether he thought EPS should be changed to a WPS, or a workers' permit system, to which he replied that it would be better to reform the EPS than to implement a WPS, since states

such as Singapore and Germany, which implemented a WPS, stipulate certain periods of time during which workers cannot transfer to different employers. He said ILO standards also allow a 2-year period during which transfers may be blocked. In a WPS, visas are issued from the government and not tied to an employer, yet states still limit transfers.

Finally, he praised the points system with which employers are graded by the state but said inspections are neither thorough nor frequent enough to find fault with all employers who break the law. Government resources are stretched thin in the area of immigration law enforcement.