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## Study of the Protection of Undocumented Migrant Children's Right to Education in South Korea

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### ABSTRACT

This study reviewed the legislation and system concerning migrant children and would propose measures for the protection of undocumented migrant children's right to education. Recently, in Korean society, with the increase of migrants and their long-term sojourn, the number of migrant children has dramatically increased, and discussions on the education for them are actively made. However, the right to education of 'undocumented migrant children' of the migrant children is often not completely protected due to their parents' unstable legal status. As a result of an analysis of the legislation system concerning migrant children, the Enforcement Decree of the current Elementary and Secondary Education Act provides that undocumented migrant children can enter a school, regardless of their status of sojourn, and the targets of the Policy for the Education of Migrant Children of the Ministry of Education, too, include 'undocumented migrant children.' However, in most of the legislation and system, the targets of support for education are limited to the children of migrant women married to Korean men of all migrant children. In addition, essentially, since undocumented migrant children are not guaranteed the status of sojourn for the protection of the right to education, they may be subject to immediate compulsory eviction anytime, if they are cracked down, so complete protection of their right to education is not given. Based on these issues, as measures for the protection of the practical right to education of undocumented migrant children, this study suggested support for nursery phase at the level of local governments, comprehensive support for education for migrant children including undocumented ones and granting status of temporary sojourn to undocumented migrant children and fosterers. Also, this study suggested that, most importantly, it would be necessary to change the way we perceive undocumented migrant children so that we recognize them, too, as the members of our society, along with this institutional improvement.

*Keywords:* Undocumented Children, Migrant Children, Education Right, Human Rights, Multi-cultural Education.

### Introduction

Recently, interest in children with migration backgrounds is increasing in Korea. While these discussions have been focused on related to the marriage migrant women and their children so far, more macroscopic discussions are needed to include the variety of migrants and their children.

Since migrant children have various backgrounds of immigration and have specific attributes (i.e., 'minors' and 'migrants'), they should receive more protection. Especially, 'undocumented migrant children' has not received full protection, which children are subject

to receive as the fundamental rights as children, because their parents has no legal status in Korea. In most cases, because these children were born in Korea or are raised in Korea since there were very young they often have developed their identities as South Koreans in terms of the culture and language. However, they are not able to receive Korean nationality by birth since Korea takes a "Personal Principle" in the matter of granting nationality. Thus, in case of missing registering their birth, it is very hard to get an accurate data of these children through official census. (Shin, 2013)

The right of education is one of the important rights and undocumented migrant children should be guaranteed this right. The education is a fundamental right for anyone and children should receive education at any place. Moreover, it is a basic way for children to promote human dignity and pursue their happiness (Choi, 2012). Education during childhood is the one of the most important factors determining the child's future and is definitely necessary for child's development. It is desirable to have children with diverse cultural backgrounds grow up with equal opportunity of education provided and become healthy member of the society for a society as a whole to become stable and integrated as well (Park, 2015).

To guarantee the educational right of undocumented migrant children, the government amended its Enforcement Decree of the Elementary and Secondary Education Act, which allowed children without proper residential status more accessibility to the public education. However, ideal protection of educational right means not only providing the opportunities to be educated but also fully and practically assisting them in the educational process (National Human Rights Commission of Korea, 2010). Previous studies on the educational rights of the undocumented migrant children have mainly focused on guaranteeing the educational opportunities for them. Consequently, the discussions on how to assist them in the educational process are much needed.

Based on these study needs, this study will examine the definition of undocumented migrant children and how they are undocumented. Furthermore, it will examine the limitations and problems of the current associated with the undocumented migrant children. Based on this findings, this study will propose an improvement plan regarding protecting the educational rights of the undocumented migrant children.

## **Theoretical Backgrounds**

### **Definition of 'Migrant Children'**

In order to define the meaning of undocumented migrant children, the meaning of migrant children should be first examined. The 'migration' is literally defined as 'settling down and living in the new location after leaving the current location' (National Institute of Korean Language). There is no legal definition of 'migrant children' in Korean laws. However, previous studies on migrant children have defined the migrant children, regardless of their nationalities, as either the foreign-born children who live in Korea or Korea-born children who were given birth by migrant parents (Seol et al., 2003; Kim et al., 2008; Oh, 2009; Lee et al., 2009; National Human Rights Commission of Korea, 2010; Shin, 2013).

National Human Rights Commission of Korea through its research reports defined the age of a 'child' as '7 or older and younger than 18', or 'under 18'. Considering that 'child' is more broad concept which can include 'youth' in age and there is no special need to separating 'youth' from a 'child' to protect its rights, it is more proper to set the scope of the age of a 'child' at under 18 following the initiative of Convention on the Rights of the Child.

Based on the review of Convention on the Rights of the Child, Domestic Laws, and previous studies on migrant children, 'migrant child' can be comprehensively defined as 'a person under the age of 18, who is foreign-born but lives in South Korea or who is South

Korean-born but born to migrant parents’.

### **Definition of ‘Undocumented Migrant Children’**

There are certain migrant children who live in a country but not recognized or identified by the country’s regulations. ‘Undocumented child’ can be ‘undocumented’ because relevant rules and legal systems have not been set up in that country or they stay in contravention to the established regulations and laws willingly but without other choices. While there are many other terms such as ‘illegal’, ‘unauthorized’ or ‘irregular’ other than ‘undocumented’, Korean government more often use ‘illegal’ in the immigration documents and statistics reports.

However, United Nations Commission on Human Rights recommended not to use the term, ‘illegal migrant’, with claiming that it is against the initiative of the Universal Declaration of Human Rights and directly against its article 6, which states ‘No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’. Therefore, Korean human rights groups adopted and are using the term, ‘undocumented’.

### **Types of How They Became Undocumented**

Some foreign workers with temporary residence permits want to bring their children from their home country for the better educational opportunities or providing them better medical treatments in Korea. However, if they stay longer than what their temporary residency permits allow, they become ‘undocumented’ unwillingly in many cases (Seol et al., 2003).

The recent cases show that there are many different and diversified paths of becoming undocumented migrant children. Some are undocumented after their temporary residency permits were expired. Some are given birth by parents who never had legal status in Korea. Some are born to parents whose residency permits were expired and never been renewed. Alternatively, foreign underage students, whose study permits were expired, become undocumented migrant children. In some cases, if their parents’ application of status change is rejected, their children become undocumented migrant children (Seoul Metropolitan Government, 2015).

The most serious case among them is children who were given birth by parents, who has never had a legal status in Korea. Being afraid of their identity discovered and eventually being deported, most of these parents do not register their children’s birth. These children with no birth registration cannot be identified or have any nationality.

### **Problems in the Education related Legislations for Undocumented Migrant Children**

**Practical barrier to access education system.** Article 19 and 75 of Enforcement Decree of the Elementary and Secondary Education Act guarantees that even an undocumented migrant child without residency permit can access elementary and secondary education if a document can be provided and prove the child’s residency in Korea. Even though there is no specific article or clause in the Regulation for Higher Education Act regarding these children’s access to higher education such as high school or college level, instructions from Korean Ministry of Justice allow and encourage the undocumented migrant children to access high school education.

As discussed, the legal ground has been set up and is ready to provide the undocumented migrant children accessibility and an opportunity to education. However, whether the legal rights are being realized in their lives is another issue. Education for undocumented migrant children has not been stipulated as compulsory in any legislation but rather based on broad interpretation of related legislation, only being left on each principal’s

discretion. The government should notify the parents, who have a school-age child based on compulsory education regulations. However, the government does not issue any notification to parents of migrant children whether they have the legal status of residency or not. Therefore, it is solely up to the parents of migrant children to check with educational authorities whether their children are admissible or not. It makes accessibility of migrant children to public education (So, 2013).

Moreover, some migrant children are not admitted to schools because allowing an migrant child admission is within each principal's discretion according to Enforcement Decree of the Elementary and Secondary Education Act. According to the Human Rights Survey conducted by Gyeonggi Foreigner Support Center, 72.7% of the parents of migrant children have not received any notification or admission guide. Moreover, 21.7% of migrant children have been rejected from a school. Consequently, certain measures are needed to substantially improve the current education situation of undocumented migrant children.

**Insufficient educational support.** According to the 'Survey of Educational Rights of Migrant Children' conducted by National Human Rights Commission of Korea in 2011, 34.9% (65 children) of migrant children who were at preschool age stayed home. In other words, they have not received any proper education, until they can receive public education, and have been educationally neglected. The financial situation of them is largely responsible for this situation.

The clause 3, article 3 of Infant Care Act states, "infants shall be cared for without discrimination due to their or their guardians' gender, age, religion, social standing, property status, disabilities, race, place of birth, etc.", and thus any mistreatment based on residency status should be forbidden. However, in reality, Ministry of Health and Welfare is in charge of childcare support and does not provide this fund to non-citizens. Article 24 of Early Childhood Education Act and article 29 of its enforcement ordinance determine the recipient of free education. However, they do not explicitly include the undocumented migrant children. Furthermore, the early childhood education runs on official enrollment. Therefore, the undocumented immigration children, who cannot enroll themselves in official registration, tend to be excluded from free public education.

Migrant children, who have not received proper preschool education, tend to have a hard time to keep up with their schoolwork. Thirty-six point one percentage of the migrant children indicated that "difficulty in keeping up with schoolwork" was number 1 reason why they want to quit their school, according to Survey of Educational Right of Migrant Children.

Even after they entered a public education system, they are denied to after-school support program. Multicultural Families Support Act defines only the children of an migrant woman married to the man who has South Korean citizenship, as 'the member of multicultural families'. These children are supported with extra-curriculum programs or after-school programs (clause 2, article 10 of the act). The act also states "The State and local governments shall endeavor to provide support in child care and education services for preschoolers in multicultural families, and to help such children develop language skills, may provide assistance necessary for improving their linguistic proficiency, such as teaching materials and learning support in teaching Korean language" (clause 3, article 10). Since this act narrowly defines the recipient of its support as an migrant woman who is married to a South Korean citizen and their children, excluding the majority of migrant children who do not fall into this narrow category, this act faces a bitter criticism.

**Unstable residency status.** According to Survey of Educational Right of Migrant Children, 60% of migrant children who do not have a proper Visa answered yes to a question if they have felt like quitting school. Moreover, the survey indicated these children react very sensitively to the possibility of falling into immigration office's crackdown.

Immigration Control Law considers undocumented immigration children as well as undocumented adult migrants as objects of deportation. National Human Rights Commission of Korea, in 2013, advised not to deport an undocumented migrant child alone separated from his or her parents. Ministry of Justice also does not enforce its deportation measure on an undocumented immigration child until his or her semester ends.

However, when their parents are deported, their children get deported at the same time. Therefore, the undocumented migrant children tend to lead lives without much hope, in fear of immigration office's crackdown and deportation. There are certain undocumented migrant children, who were born in South Korea and raised here more than ten years. They consider themselves as South Korean but they are not considered as South Korean according to 'Immigration Control Law'.

### **Proposal for the Protection of Educational Rights of Undocumented Migrant Children Support for Preschool Age Undocumented Migrant Children.**

If at least minimum support of education can be provided to the preschool age undocumented migrant children, the more of them can receive preschool education and thus it will help the undocumented immigration children to keep up with their school works. Educational expense supports for preschool age fall into the realm of welfare. However, it can be a practical assistance for these undocumented migrant children to better adjust into the current public education system. Therefore, the government should consider extending its scope of educational support to these children in the humanitarian aspect.

If it is not possible to add relating clauses explicitly into legislations, authorities may allow these preschool age undocumented migrant children supporting educational expense in response to the recommendation made by the chief of a preschool facility. Alternatively, it can be implemented based on local government's childcare ordinance.

For instance, the human rights officer of Seoul made a decision that if an undocumented migrant child resides in Seoul, he or she should be entitled with childcare supports from the local government of Seoul as a citizen of Seoul. Moreover, it is noteworthy that Gyeonggi Province's childcare ordinance subsidizes the childcare expenses of migrant children upon the application from a childcare facility.

### **Actively Protecting the Educational Rights through Post Curriculum or After-school Program**

Since the undocumented migrants generally suffer from financial difficulties, their children are not treated fairly in the aspect of educational opportunities. Generally, there is a difference in educational opportunities due to economic status. It is well worth providing the undocumented migrant children after-school educational program, which can practically assist them to keep up with their school work as well as setting up legal framework of compulsory education for these children.

The after-school voucher program is one of the current multicultural education programs and it is well conceived as a successful policy. If these program are expanded and applied to the undocumented migrant children, it is surely helpful to improve their quality of education for them and prevent them from falling behind from their school works (Kwak, 2010)

### **Considering Humanitarian Temporary Residency Status**

The South Korean government applies a liminary protection to the person with undocumented residency status for their children's educational rights and health rights. However, with this liminary protection of the rights to 'undocumented' migrants, their

children's rights cannot be fully protected. Therefore, fundamental methods for protecting these children's rights should be developed. Consequently, granting them residency permits to children from a humanitarian point of view can be a good policy.

Humanitarian granting of residency permits is to give a residency status to a foreign national who was born in South Korea or who has lived long enough since young, in order to guarantee them with fundamental rights of education and health. Even there are certain variations in detail, many countries have implemented this practice from a humanitarian point of view.

The duration of special permit of residency can be set until the date when the child finishes his or her constitutional 'free compulsory education' or until the child reaches certain age (most likely adulthood), when he or she can decide his or her nationality with being fully aware of national identity (Choi, 2014). Allowing one of the parents of undocumented migrant children a special permit of residency would cause a controversy. Since there is a wide-spreading concern that granting undocumented migrant parent as well as undocumented migrant children a special permit of residency may promote more undocumented migrants, it is wise to reach a social agreement of the humanitarian extent how much Korean society as a whole can embrace.

### Conclusion

As immigration increases and becomes more common, some immigrants fall outside of the country's legal immigration system. How to identify these people outside of the legal system and how much to protect them have been a controversial issue based on how far governmental duty has to cover and how far humanitarian duty can be applied. However, the rights of migrant children should be fully protected regardless of their legal migration status and also should be considered the fact that they have not become undocumented migrants on their own will.

In order to protect the educational rights of children, it is important to set up a legal and institutional foundation. However, an ultimate and ideal state of protection of children's educational right can be reached when people's awareness on the importance of education also grows up in harmony with that.

Due to the amendments made to various educational legislations, which guarantee children admissions to schools regardless of their legal status of residency, undocumented migrant children have become more accessible to education. However, it is not possible to solve all the problems, which undocumented migrant children face such as practical hardship in accessing certain education, quitting school, difficulty in adapting to school, and unstable legal status simply by guaranteeing them more educational accessibility. Thus, this study made three suggestions, which is extending education support to the preschool age undocumented migrant children, extending after-school programs to these children, and finally granting special residency permit for them and one of their parent.

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