Korean Bar Association

Alternative Report submitted to the

UN COMMITTEE ON THE ELIMIMATION OF RACIAL DISCRIMINATION(CERD)

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Contents

Contact Details:

Special Committee for International Human Rights, Korean Bar Association

- Soyeon Jeong (syjeonghr@gmail.com, +82 2 780 2824)
- Yunjeong Hwang (yhwang618@gmail.com, +82 10 9270 7303)

I. Introduction

1. This report is submitted by Korean Bar Association, the nationwide organization every lawyer is obliged to be a member. This is the first report Korean Bar Association submits to CERD as an independent organization with its UN ECOSOC status.

2. As a bar association, the Korean Bar Association aims to focus on the legal issues regarding the racial discrimination in the ROK. To be specific, (a) the issues regarding the revision bill of the Constitution suggested by the State, (b) the current Immigration Act that allows continuous violation of human rights in the detention centers, (c) the insufficient legal protection for asylum seekers, and (d) the lack of legal protection against the spread of racially-discriminative hate speech in the media.

3. It is indicated that the State's report describes certain legal measures that have been taken to eliminate the racial discrimination. The amendment of current legal texts such as the Immigration Act, and the legislation of the anti-discrimination act or criminalization of the racially discriminative hate speech and media reflections are issues that have been addressed by the civil society repeatedly. But the legal progress slow if not nonexistence. The State is even backlashing with its suggested revision of the Constitution.

II. The Discourse on the Revision of the Constitution

1. Introduction

In March 2018, the new administrative office of President Moon announced its revision bill of the Constitution. This revision was formally addressed to the Congress. Although this bill did not pass the congress this year, the Administrative office has showed a strong

will to pursue this revision within the term. While this revision shows progress in the better protection of the human rights, regarding the elimination of racial discrimination and the protection of foreigners, this revision shows the serious lack of consideration.

2. The Differentiation of Citizens and Foreigners in the Constitution

In the current Constitution, the subject of the fundamental human rights is "all citizens", not everyone or all human beings. The State's party have claimed that the phrase, "all citizens", is expanded as every human being in the legal system by the interpretation of the Constitutional Court and the fundamental human rights of non-citizens are guaranteed by the Constitution, interpretively by the ruling of the Constitutional Court[1](para 6. CERD/C/KOR/CO/15-16; para. 14-17. CERD/C/KOR/17-19). The State's party argues that "all citizens" is enough to satisfy the Article 1 of the Convention.

But the Constitution Court ruled that "foreigners can file a constitutional suit in case their rights acknowledged by the Constitution are violated", and that "those who are not the subject of the fundamental rights cannot file a constitutional suit", and that "*the foreigners who are in the similar status to the citizens* may be recognized as the subject of the fundamental rights.[2]"

This ruling plainly states that foreigners and citizens are different legal terminology in Korean domestic law, and the two terms are not regarded in the same status by the Constitution. Furthermore, it is ruled that foreigners can be acknowledged as the subject

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[1] Constitutional Court 2007. 8. 30. Case No. 2004Hun-Ma670

[2] Constitutional Court 2011. 9. 29. Case No. 2009Hun-Ma351

of rights only through the interpretation of the Constitution of the authorities, i.e. the court or the State.

While this Constitutional Court case recognized the right to file a suit to the plaintiff, and thus quoted in the preference to the State's party, this differentiation between the citizens and the foreigners clearly in act. The Constitutional Court ruled that "the freedom of occupation (Article 15[3]), which is guaranteed to all citizens, is related to the human dignity and the right to pursuit of happiness, so *can be acknowledged to the foreigners albeit limitedly*[4]". "All citizens" in the Constitution is not inclusively, but exclusively interpreted.

3. The Administrative Office Revision Bill of the Constitution

Following the impeachment of the former president and the presidential election, the current administrative office had worked on the revision of the Constitution, and the president submitted his revision bill to the congress on 26th March 2018. While the fundamental keynote is to protect the rights of the citizens, regarding the protection of all human beings reside in ROK, the revision bill showed a serious ignorance and the possible violation of the rights of non-citizens.

Unlike the current Constitution, the revision bill of the president clarifies the subject of human rights in each article.

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[3] All citizens shall enjoy freedom of occupation.

[4] Constitutional Court 2011. 9. 29. Case No. 2007Hun-Ma1083·◌2009Hun-Ma230·◌352

Subject	All human beings	All citizens
Rights	right to human dignity (Art. 10) right to pursuit happiness (Art. 11) right to be equal before the law (Art. 13, para. 1) right to personal liberty (Art. 13, para. 2) right to privacy (Art. 17, para. 1) right to the freedom of conscience (Art. 18) right to the freedom of religion (Art. 19) right to control private information (Art. 22 para. 2) right to the freedom of learning and the arts (Art. 23) right to file a petition (Art. 26) right to a court trial (Art. 28, para. 1)	right to occupation (Art. 16) right to the privacy of correspondence (Art. 17 para. 3) right to know (Art. 22, para. 1) property rights (Art. 24) right to vote (Art. 25) right to hold public office (Art. 26) right to a speedy and public trial (Art. 28, para. 3) right to education (Art. 32) right to work (Art. 33) protection against discrimination on the base of pregnancy and childcare (Art. 33, para. 5) right to a life worthy of human beings (Art. 35, para. 1) right to social security (Art. 35, para. 2) right to a healthy and stable housing (Art. 35, para. 4) right to health (Art.35, para. 5) right to a healthy and pleasant environment (Art. 38)

As shown above, the bill differentiated the subjects to the fundamental human rights. Certain rights recognized under ICERD, ICCPR, ICESCR, and CEDAW are stated as the rights of all citizens, not all human beings. For example, the right to work and the right to housing, both recognized as the fundamental human rights, are distinguished as the rights of the citizens only. If the discretion of interpretation excluded by the text of the Constitution as suggested in this bill, even the shallow acknowledgement by the Constitutional Court would be unable to be maintained.

This bill was denounced by the congress on 24th May 2018, but it was due to the political conflict between the parties. This issue of excluding non-citizens to the fundamental rights in the Constitutional level was not even properly discussed. The fact that this issue of the stated subjects of the rights was never a priority is concerning. With the hierarchy of the legal text in ROK, if this issue of the subjects of the rights go unnoticed, it would cause a serious backlash to the rights of foreigners.

The Government of the Republic of Korea should:

1. State the subjects of the rights as *all human beings* in accordance with the Convention.
2. Consider the effect the revision would have to the migrants.

III. The Administrative Detention Based on Immigration Act

1. Introduction

The first paragraph of the Article 12 of Constitution of the Republic of Korea (hereafter referred to as "ROK") provides "all citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive order or subject to involuntary labor except as provided by Act and through lawful procedures". Korean Immigration Act (hereafter referred to as the "Act") prescribes on detention of foreigners and it is required that the Act shall guarantee the Article prescribed in the Constitution above. However, there have been heated controversies over whether the Articles on detention on the Act fully and lawfully protects the liberty and security of person to the foreigners in ROK.

2. Detention in the Name of Protection

Under the Article 2-11 of the Act, interestingly, “an immigration control official’s enforcement activities taking into custody or impounding a person having reasonable grounds to be suspected of falling under persons subject to deportation under the subparagraphs of Article 46 (1) at an immigration detention unit, immigration detention center or other place designated by the Minister of Justice;” is meant to be “보호[bo-ho]” in Korean, corresponded to the word “Protection” in English.

As read above, the term defined in the Article is detention rather than protection. The term, “Protection” might confuse the readers as it is not regarded to restrict freedom of body, instead it means to prevent someone from harm or damage. Therefore, it is necessary to change the term to “detention” in order to clearly deliver what it means to the readers. For the purpose of preventing causing confusion in this report, I’d like to refer to the term, “보호” in Korean as “detention” in English.

3. The Conditions of Detention

The Act states when the foreigners may be detained in the Articles 51, 56 and 63. Reviewing the Articles 51 and 63, the Article 46 needs to be mentioned at first. The Article 46 of the Act enumerates on the “Persons Subject to Deportation”. Clarifying that the persons subject to deportation may be detained, the Article 51 prescribes the detention for investigation to decide on deportation. The Article 63 of the Act prescribes detention of the foreigners who receive deportation order and wait for being repatriated. The Article 56 of the Act states the temporary detention on the Foreigners.

4. Legal Issues of the Detention based on Immigration Act

a. Who has the authority to issue detention order?

According to the first paragraph of the Article 51 of the Act, the head of the Regional Immigration Service has authority to issue detention order. Considering that detention based on Immigration Act restricts foreigners' liberty of person, detention order shall be issued with careful considerations. It is not deniable that the issuance of the detention order is entirely granted of discretion of the head of the Regional Immigration Service. There have been arguments that warrant shall be issued when detaining foreigners in order to follow the principle of lawfulness as in the process provided in Criminal Procedure Act.

b. Who initiates the detention procedure?

The first paragraph of the Article 51of the Act prescribes that "(i)f there are reasonable grounds to suspect that an foreigner falls under any subparagraph of Article 46 (1) and the foreigner has fled or might flee, an immigration control official may detain the foreigner upon obtaining a detention order issued by the head of the Regional Immigration Service", which means that it is an immigration control official that initiates detention against foreigners. In contrast to Criminal Procedure Act prescribing that an accused shall be investigated without restraint in principle but if detention is necessary, warranty shall be issued, it is highly likely that foreigners are detained with the officials' discretion.

c. "Until the head of a Regional Immigration Service can repatriate the person"

The first paragraph of the Article 63 of the Act states that, "if it is impossible to immediately repatriate a person subject to a deportation order out of the Republic of Korea as the person has no passport or no means of transportation is available, or for any other reason, the head of a Regional Immigration Service may detain the person in any detention facility until s/he can repatriate the person". Unlike detention on Criminal Procedure Act, the Article above does not clarify when the detention ends. A foreigner must be detained without time limit and cannot but wait for the decision on the refugee status to be made

from the immigration office or the court when a foreigner applies for being recognized as refugee in detention center. Just stating the period unconditionally seriously restricts foreigner's right to liberty and security of person.

In addition, under the Article 21 of the Act, Refugee Committee has the authority to examine the objections against non-recognition refugee, and according to the Rule and Detailed Enforcement Regulations of the Act, the Committee may be convened by the Chairperson's discretion, which may be one of the factors to make it impossible for detained refugee applicants to expect when the detention is ended. Under much stress in the detention centers when waiting for the decision to be given, there have been foreigners withdrawing the application for the refugee status.

The second paragraph of the Article of the Act prescribes, "when the period during which a person subject to a deportation order is detained under paragraph (1) exceeds three months, the head of a Regional Immigration Service shall obtain prior approval from the Minister of Justice every three months thereafter". The Article of the Act enables the Immigration office to detain foreigners unlimitedly only with the prior approval from Minister of Justice. As a matter of fact, there is no external institute to check the extension of detention.

d. Filing Objection to Deportation and Detention, and Release from Detention

There are three ways to be free from detention; filing objection to the detention; filing objection to deportation; and filing release from detention. According to the Article 55 of the Act provides that the detainee may file for objection to detention. Under the Article 60 of the Act, an foreigner who receives detention order may file for objection to the order, and if the objection is acknowledged to be well-grounded, he or she shall be released. However, according to the Article, it is the Minister of Justice, as an administrative body that examines the objection, so there is no chance for the objection to be reviewed by the third party, which might result in unfavorable decision to the foreigner.

As for filing for Release from detention, the Article 65 of the Act on temporary release prescribes the requirements including paying deposit. The maximum amount of deposit is 20,000,000 KRW, which is approximately 20,000 USD. The amount of the deposit is granted of the head of the Regional Immigration Service. However, 20,000,000 KRW is not a small amount at all to the foreigners. In reality, it is almost impossible for foreigners to have a chance to be temporarily released from detention as requested to pay the deposit. Accordingly, it is needed to consider decrease the amount of the deposit.

5. Suggestion

Detention prescribed on the Act, because of its lack of the principles of lawfulness, excessiveness and disclosure, does not entirely assure the right to liberty of person to foreigners. As Korean society is getting globalized, the number of foreigners is growing and so is the number of refugee applicants. In order to fully guarantee physical freedom of foreigners, the Act shall be revised in the light of humanitarian perspective as follows.

First, before issuing detention order, it is necessary to provide the foreigners with the opportunities to speak up for themselves or to be offered legal assistance by a lawyer. Issuing the order of detention solely depends on the discretion of head of Immigration Service and an immigration control official may initiate detention under the current system. Therefore, it is natural that guaranteeing the right to defend themselves to foreigners be provided in the Act.

Second, limiting the period of detention needs to be prescribed in the Act. Detention with an indefinite period is so harsh that foreigners may give up their rights to file for refugee status for fear of the state of being detained for long period. At least, there should be stricter requirements for obtaining renewing the period of detention.

Third, Rule and Detailed Enforcement Regulations of the Act shall include that the Refugee Committee shall be convened periodically so that examination on refugee status may be more promptly proceeded and the detention of foreigners may be shortened,

Fourth, as for examination on objections to deportation and detention, the process to file for administrative suit shall be improved for the detainees. It is not likely that the head of administrative body overturns the decision of the subordinate body. However, considering separation of powers, it might not make sense that judiciary power intervenes to the administrative examination. Therefore, it would be essential to provide the Article for the Act stating legal aid for the detainee in case filing for administrative suit against the decision of Minister of Justice.

Fifth, the required amount of deposit for filing for release from detention shall be lowered. Most foreigners who are to apply for refugee status don't afford the deposit. The amount shall be adjusted, or governmental support shall be considered for the effectiveness of the system.

Lastly, it is also needed to review the reasonability of using the term "protection" in the legal text, when its meaning and effect is clearly that of a detention.

The Government of the Republic of Korea should:

1. revise the Immigration Act to provide the legal assistance to the foreigners in the procedure of the detention.
2. revise the Immigration Act to ensure the period of detention to be limited.

IV. The lack of Legal Protection for Asylum Seekers

1. The Problem of Decision to Refer to Refugee Screening Process

Article 6, Clause 3 of the current Refugee Act gives the Secretary of Justice the right to refuse to refer an asylum seeker to the screening process. Article 5 of the Enforcement Ordinance lists the reasons for such refusal. This deprives the asylum seeker of the very right to be adequately screened and calls for revision of aforementioned clauses.

However, the Refugee Act is moving towards further reducing the rights of asylum seekers, as Assemblyman Kang, Seok-Ho et. al. moved to include additional reasons for refusing the screening process apart from existing ones.

2. The Problem of Refugee Application and the Screening Procedure

There are several critical issues to be addressed in the screening procedure. The need to provide adequate interpretation and translation, the need for a rapid screening process, and the need for an adequate screening procedure had been noticed by the Committee in its previous conclusion (CERD/C/KOR/CO/15-16, para.13). The applicant is in a situation where s/he herself must prove that she is a refugee and often finds it difficult to submit hard evidence. Therefore, the initial statement may be an important piece of evidence.

However, the interviews, where one is to collect such initial statement, are not comprehensive enough. Because of this, the applicant is frequently confronted with difficulties because she does not have the basic material to prove her refugee status, even when a legal representative is assisting the applicant during the administrative litigation

phase. This is also the problem that legal experts most complain of during refugee status litigations.

3. The Low Refugee Acceptance Rate

As of the end of 2017, the refugee acceptance rate in Korea is 1.51% (121 accepted out of 9,942 applicants). This is very low compared to the refugee acceptance rate in other countries. Based on the statistics, one must question whether the refugee screening process in Korea is adequately operated.

Such statistics may cause the international society to doubt the reliability of the refugee screening process in ROK and may cause doubt on the reliability of the operation of other policies in Korea.

4. The Problem of Administrative Litigation

One may contest the refusal of refugee status through administrative litigation. However, the burden of proof is on the plaintiff, as in other regular civil lawsuits. Therefore, the refugee applicant must prove that she has "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." In most cases, however, the asylum seeker who had to make an emergency evacuation especially face great difficulty securing hard evidence, and in their cases, there is high possibility that their initial statement be used as an important piece of evidence. However, because of the problem of interview discussed above, there is not enough fact that can be proved with the initial statement. As a result, the refugee applicant faces a disadvantage in the administrative litigation as well because of the insufficient interview.

5. The Humanitarian Status Used as a Way to Reject Refugee Status

The Humanitarian Status visa(G-1) is the visa that issued to those who do not qualify as a refugee but may have reasonable basis for being acknowledged that her life or freedom of body etc. may be gravely threatened because of inhumane treatment or punishment such as torture or similar situations.

The State has granted residence for 23 applicants (14 Sep 2018) and 339 applicants (17 Oct 2018) out of 481 Yemeni asylum seekers (total 484, 3 canceled the application and left the country). However, the Humanitarian Status only grants one year of stay, and the stay is canceled or is no longer renewable if the situation in the country of habitual residence improves, or if one's criminal involvement in or outside Korea occurs or is discovered. The Humanitarian Status is precarious.

It is also questionable whether the Society Integration Program operated by the Department of Justice* for the Humanitarian Status holders is actually effective. (*This is an educational program acknowledged by the Secretary of Justice, such as the Korean language and Understanding Korean Society, which is to help the immigrants adjust to the Korean society and become a healthy, self-reliant member.) It is also highly questionable whether the educational program without financial and administrative support for everyday life would be of help for the residents to settle in Korea. It is not enough to grant the Humanitarian Status; it is necessary to guarantee financial support above a certain level to guarantee the resident's survival.

The Government of the Republic of Korea should:

1. recognize the refugee status conform to international standard.
2. revise the Refugee Act so that the Humanitarian Status holders enjoy the right to work and an adequate livelihood.

V. The Lack of Legislation Against Hate Speech

1. On the Mass Media Such as Broadcast, Newspaper and Internet News

Currently in Korea there are laws that prohibit broadcast that encourages racial discrimination, such as the Broadcast Act, Article 32, Article 33, Section 2, Clause 8; Broadcasting Regulations, Article 9, Clause 5, Article 29, Article 31; Act on Promotion of New Communications, Article 5, Clause 1.

However, the hate speech in mass media on the Yemeni asylum seekers have been broadcasted without being regulated and reproduced on an enlarged scale. This proves that the aforementioned laws and regulations do not apply effectively to mass media.

There have been instances where news outlets reported, without basis, asylum seekers' involvement in crimes committed in Cheju Island. Recently in the case of oil reservoir fire caused by a sky lantern in Goyang-shi, the media made public the nationality of the person who flew the sky lantern. These reports do not abide by the criminal report guidelines. One may also understand that the hate broadcast on refugees and asylum seekers are spreading as hate broadcast on foreigners. In spite of the laws and regulations, the government is much lacking in active enforcement of these regulations and as a result the legal control on hate broadcast is becoming powerless. The government must actively respond to the proliferation of hate speech against asylum seekers through mass media.

a. SNS Fake News

Fake news is more than simple insult. It may promote hate by disseminating false information to people and make them believe it, and then give the false impression that

the hate has reasonable grounds based on facts. In this way fake news justifies hate acts and reinforces hate, and that is why fake news is more harmful than simple insult.[5]

About the time of the Yemeni refugee situation, the Korean SNS was saturated with fake news such as "92% of sexual offences in Sweden are committed by Muslim refugees and half of the victims are children," "Afghan immigrants' sex crime rate is 79 times higher than that of Koreans," "A Syrian refugee raped a pony at a zoo."[6] Also, in relation to the criminal cases in Cheju Island, rumors suggested that Yemeni asylum seekers were involved. Rumors such as "six women went missing in a month after Cheju accepted refugees," "Cheju Island is in danger, if we don't do something the entire country will be eaten up by fake asylum seekers"[7] were rapidly circulated through SNS.

Under the current law it is possible to control such rumors in the sphere of information and communications networks, according to the Act on Promotion of Information and

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[5] Insulting hate speech against refugees and foreign ethnic groups have also reached a serious level. It is necessary to regulate such insults against certain groups. The Supreme Court of Korea, on whether insult by group marker constitutes insult towards individual members of the group, has ruled: "the so-called insult by group marker cannot be interpreted as insult towards a certain individual belonging to this group, and when the criticism by group marker is diluted as it reaches the individual member and does not reach the level of affecting the social evaluation of individual members, the principle is to regard that it does not constitute insult towards individual members, and when the criticism is not diluted and may negatively affect the individual member of the group, it may, as an exception, constitute insult. If, however, the number of members is so small that the insult may be considered as aiming at individual members, or the circumstances prove that the insult was targeting specific individual member(s) inside the group, said individual member may be considered the victim, and the criteria includes the size of the group, the nature of the group and the status of the victim inside the group."(Supreme Court Decision, 2014. 3. 27. 2011Do15631). Based on this case, it is uncertain whether hate speech involving racial discrimination or insult through SNS will be punished, even if it is indicted.

[6] Hangyere, "Esther: The Name of the Fake News Factory of LGBT Hate and Refugee Hate," reported 27 Oct 2018.

[7] *No Cut News*, Cheju Refugee Rumor Spreading… "Because of Uncritically Accepting Fake News Based on Hate," reported 16 Aug 2018.

Communications Network Utilization and Information Protection, Etc. (hereby Act on Information and Communications), Article 44[8] and Article 44, Section 2[9].

However, there are limits to preventing the circulation of fake news on SNS and/or deleting the contents solely based on the above-mentioned act. The information and communications service provider's duty is to "make efforts" so that information violating others' rights not be circulated. The article on the Request for Deletion of Information limits the information in question to that which is "purposely made public." Therefore, fake news disseminated through a closed social network media may not be considered purposely made public and therefore may not be deemed qualifiable for request for deletion. Also, the subject of the Request for Deletion of Information is limited to the person whose rights were violated. As a consequence, he information can only be deleted when the said person becomes aware of the information and explains that his/her rights

[8] Article 44 (Protection of Rights in Information and Communications Network) (1) No user may circulate any information violative of other person's rights, including invasion of privacy and defamation, through an information and communications network.

(2) Every provider of information and communications services shall make efforts to prevent any information under paragraph (1) from being circulated through the information and communications network operated and managed by it. […]

[9] Article 44-2 (Request for Deletion of Information) (1) Where information provided through an information and communications network purposely to be made public intrudes on other persons' privacy, defames other persons, or violates other persons' right otherwise, the victim of such violation may request the provider of information and communications services who managed the information to delete the information or publish a rebuttable statement (hereinafter referred to as "deletion or rebuttal"), presenting explanatory materials supporting the alleged violation. <Amended by Act No. 14080, Mar. 22, 2016>

(2) A provider of information and communications services shall, upon receiving a request for deletion or rebuttal of the information under paragraph (1), delete the information, take a temporary measure, or any other necessary measure, and shall notify the applicant and the publisher of the information immediately. In such cases, the provider of information and communications services shall make it known to users that he/she has taken necessary measures by posting a public notification on the relevant message board or in any other way. […]

have been violated. Considering the high transmissibility of fake news, it is difficult to say that such laws and regulations are effective.

Article 44, Clause 7 of the Act on Information and Communications stipulates that no one may circulate unlawful information. Article 5[10] and Article 8[11] of the Regulations on Information Communications may be considered as regulations against hate speech involving racial discrimination against refugees. However, currently these regulations are not effectively applied in controlling fake news saturating SNS. In spite of these regulations, fake news continues to be produced and distributed.

To neglect the control on hate speech that promotes baseless hatred towards asylum seekers is to neglect the responsibility of the state to control discrimination and hate. As for fake news, however, the control must not violate freedom of speech. The recent statement by Department of Justice concerning a new legal measure to punish fake news does not focus on controlling hate speech through fake news or the hate and discrimination such fake news promotes, but on controlling false and/or fabricated information and brings about concern that it may decrease free speech. The part that must be controlled is discrimination and hate speech that strengthens discrimination. Government control must not discourage freedom of speech itself.

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[10] Article 5 (Violation of International Peace and Order) No one may distribute any information violating international peace, international order and the goodwill among nations specified as follows:

1. Information violating international peace and international order concerning racial discrimination, genocide, terror etc.

[11] Article 8 (Violating Good Customs and Other Societal Order Etc) No one may distribute any information violating good customs and other societal order etc. as follows:

3. Following information that undermines social unity and societal order as specified:

E. Information contents promoting discrimination or prejudice based on gender, religion, disability, age, social status, personal background, race, region of residence, occupation without reason.

The Government of the Republic of Korea should:

1. Criminalize racial discrimination.

2. Promptly enact or revise a law to regulate the hate speech and fake news.