

# HIV/AIDS Tests as a Proxy for Racial Discrimination?

## A Preliminary Investigation of South Korea's Policy of Mandatory In-Country HIV/AIDS Tests for its Foreign English Teachers

*Benjamin K. Wagner\* and Matthew VanVolkenburg\*\**

### Abstract

*Over the past five years South Korea has enthusiastically recruited tens of thousands of foreign English teachers as part of its globalization efforts. Demanding parents and government promises of "a native speaker in every school" have seen the number of foreign teachers in public schools more than triple in that time. During the same period, however, there have been several notable incidents of xenophobia and discriminatory animus. Increased social contact, especially between foreign English teachers and Korean women, has triggered traditional fears of cultural contamination and miscegenation. The resulting hostility and suspicion, in their most extreme forms, have been expressed through the metaphor of AIDS. An influential citizens' group has claimed that foreign teachers are infecting Koreans with HIV. Concomitantly, the South Korean government has instituted discriminatory HIV restrictions for foreign teachers that it claims are necessary to "ease the anxiety of citizens" and "assure the parents" of schoolchildren being taught by non-Koreans. The HIV restrictions against foreign teachers are both the most recent as well as the final remaining HIV restrictions against foreigners in South Korea, which has a history of HIV restrictions against foreigners dating back to the late 1980s. This Article traces the origins of the mandatory in-country HIV/AIDS tests for foreign teachers within this genealogy of restrictions and attempts to explain why the current measures were introduced and why they have remained in place even after all other HIV restrictions against foreigners have been removed.*

KEY WORDS: Korea, blood nationalism, HIV/AIDS, HIV travel restrictions, HIV/AIDS-related stigma, racial discrimination, human rights, international law, foreigners, miscegenation

*Manuscript received: Air. 30, 2012; review completed: Jun. 16, 2012; accepted: Jun. 18, 2012.*

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\* Assistant Professor, Kyung Hee University Law School. The author gratefully acknowledges the financial assistance from the Kyung Hee University Research Fund. The author can be reached at ben.k.wagner@gmail.com

\*\* Native Speaking Assistant English Teacher, Seoul Metropolitan Office of Education. The author can be reached at mattvanv@yahoo.com

## I. Introduction

There are some 23,000 ethnic non-Koreans working as English teachers in the Republic of Korea (“ROK,” “South Korea,” or “Korea”).<sup>1)</sup> Half of them are American and nearly a fifth are Canadian.<sup>2)</sup> Many have lived in Korea for years and have established significant contacts; others have married Korean nationals and have families in the country. Yet despite, or rather because of, their close connections with the nation and its people, the government has targeted these foreign teachers as threats to Korean society and has instituted mandatory in-country HIV tests, as well as tests for illicit drugs, that Korean citizen teachers are exempt from and even ethnic Korean non-citizen teachers are able to avoid.<sup>3)</sup> This Article attempts to explain why these discriminatory requirements were introduced and why they have remained in place.

The HIV and drug test requirements for foreign teachers were first

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1) See *Monthly Bulletin of Statistics*, Foreign Policy Division, Korea Immigration Service, Ministry of Justice, Feb. 2012, available at [http://immigration.go.kr/HP/COM/bbs\\_003/ListShowData.do?strNbodCd=noti0097&strWrtNo=93&strAnsNo=A&strOrgGbnCd=104000&strRtnURL=IMM\\_6070&strAllOrgYn=N&strThisPage=1&strFilePath=](http://immigration.go.kr/HP/COM/bbs_003/ListShowData.do?strNbodCd=noti0097&strWrtNo=93&strAnsNo=A&strOrgGbnCd=104000&strRtnURL=IMM_6070&strAllOrgYn=N&strThisPage=1&strFilePath=)

2) *Id.* As of Feb. 2012, out of 23,545 E-2 visa holders, there were 12,163 Americans, 4,139 Canadians, 2,623 British, 646 Irish, 1,673 South Africans, 571 New Zealanders and 455 Australians teaching English on E-2 visas. 1,072 instructors from Asian speaking countries such as Japan and China were also teaching on the visa.

3) See e.g. Kang Shin-who, *Foreign Teachers Say Visa-Rule Biased*, THE KOREA TIMES, Oct. 5, 2008, available at [http://www.koreatimes.co.kr/www/news/nation/2008/10/117\\_32169.html](http://www.koreatimes.co.kr/www/news/nation/2008/10/117_32169.html) (reporting on reactions to the Ministry of Justice’s decision to exclude foreign teachers with Korean ethnicity from HIV/AIDS and drug test requirements as well as criminal background check requirements). See also Lee Yeong-pung, ‘*Mayak gwallyeon’ eohagwon woneomin gangsa gwalli gumeong* [Loophole in the management of ‘drug related’ issues with language hagwon native speaking instructors], KBS NEWS, March 15, 2012, available at <http://news.kbs.co.kr/society/2012/03/15/2450847.html> (discussing ethnic Korean non-citizens’ ability to avoid drug tests). Korean-American Jason Lim, a frequent Korea Times contributor and former recruiter of English teachers for Korea, presents a critical analysis of the differential treatment. Lim calls the rule “unjustifiable,” stating that it “discriminates based on ethnic origin . . . [by] assum[ing] that a Korean-American English teacher is less of a threat to a Korean child than a white-American English teacher just because his or her parents happened to be Korean.” See Jason Lim, Editorial, *Illusion About Protection*, THE KOREA TIMES, Feb. 16, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2011/07/352\\_39640.html](http://www.koreatimes.co.kr/www/news/nation/2011/07/352_39640.html)

established as emergency measures in 2007 by the Ministry of Justice (“MOJ”), which claimed they were necessary in order to “ease the anxiety of the citizens.”<sup>4)</sup> Part II of this Article examines the background and context of the implementation of these requirements and argues that they were introduced during a period of media hysteria and moral panic which reached a dramatic climax with the high profile arrest of Christopher Paul Neil, a pedophile wanted by Interpol who had taught English in Korea. Part II also examines the role of a civil society group called the “Citizens’ Group for Upright English Education.” This group was very influential during this period and succeeded in courting public opinion against foreign English teachers by contributing to highly sensationalized media reportage replete with lurid tales of perversion, sex crimes, drug use and AIDS. This group was also successfully able to influence national policy by petitioning the government for measures against foreign teachers, including mandatory HIV and drug tests.

Part III examines the ROK’s international commitments to eliminate discrimination and stigma based on actual or presumed HIV status and examines how and why the ROK has failed to honor these commitments. Part III argues that increased interracial social contacts, especially between foreign English teachers and Korean women, have triggered traditional fears of cultural contamination and miscegenation as well as hostility towards both groups. In attempting to understand the basis for this reaction, Part III examines the ROK’s earliest efforts to impose HIV restrictions on foreigners during the late 1980s through public protest and legal reform, and traces the origins of the most recent efforts to impose HIV restrictions on foreign teachers within this genealogy of restrictions.

South Korea’s policy of HIV restrictions on residence and employment for foreign teachers living and working in the country is an important legal issue worthy of scholarly attention. As of 2010, foreign teachers are the only foreign workers in Korea officially subject to mandatory HIV testing. South

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4) Woneomin hoehwajido (E-2) sajeungjedo gaeseon annae, beommubu [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, available at <http://www.scribd.com/doc/25468071/Information-on-the-new-system-to-improve-the-Native-Speaker-Conversation-Instructor-E-2-Visa-Nov-2007-Ministry-of-Justice>

Korea's HIV restrictions for foreign teachers are among the most extreme form of HIV restrictions in the world. In addition to in-country HIV testing which is required by the MOJ as a component of alien residency registration process, foreign teachers employed by the Ministry of Education ("MOE") are required to undergo additional HIV testing that must be repeated annually as a condition of their employment.<sup>5)</sup> Of the forty-nine countries in the world that continue to have some form of HIV-related restrictions in place for foreigners<sup>6)</sup> only about six have restrictions so extreme as requiring *in-country testing* for foreign workers that must be *repeated on a regular basis*, and nowhere are teachers subject to such restrictions.<sup>7)</sup> Indeed, the ROK's extreme position toward its foreign teacher population has attracted the attention of UN Secretary-General Ban Ki-moon who has urged the ROK to eliminate its HIV restrictions on foreign teachers.<sup>8)</sup>

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5) *Id.* The HIV tests for the Ministry of Justice were originally required by way of a form included in the policy memo. After a year and a half in effect, this policy memo became included as an attachment to an immigration control act enforcement regulation in April 2009. See Churipgukgwallibeop sihaenggyuchik [Enforcement Rules on the Immigration Control Act], Ministry of Justice Decree art. 76 paragraph 1, attachment 5, Apr. 3, 2009, as amended, Apr. 3, 2009. The HIV retests for the Ministry of Education are required without appealing to any particular legal basis. For additional information on repeat testing by the Ministry of Education see Ben Wagner, Editorial, *Expats and HIV: Stop the Stigma*, THE KOREA HERALD, Dec. 4, 2009, available at <http://www.koreaherald.com/lifestyle/Detail.jsp?newsMLId=20091204000005>

6) UNAIDS, *HIV-related Restrictions on Entry, Stay and Residence*, UNAIDS Human Rights and Law Team, Jun. 2011, available at [http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20110620\\_CountryList\\_TravelRestrictions\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20110620_CountryList_TravelRestrictions_en.pdf)

7) The Republic of Korea belongs in a sub-category of the list of 49 countries with HIV restrictions for foreigners, which includes only about six other countries with the most restrictive forms of HIV in the world (Belarus, Cuba, Malaysia, the Republic of Moldova, Mongolia, and the Turks and Caicos Islands). The Joint United Nations Programme on HIV/AIDS ("UNAIDS") reports that these include "countries that implement HIV controls on a regular basis for foreigners already in the country" and "require an HIV test to be taken annually, or whenever the work or residence permits need to get extended." "The Global Database on HIV-related Travel Restrictions indicates that six countries have mandatory HIV testing that must be repeated on a regular basis; however, other countries may have such a requirement." The Republic of Korea is another country with such a requirement. See *Mapping of Restrictions on the Entry, Stay and Residence of People Living with HIV*, UNAIDS, Jun. 2009, p. 10, available at [http://data.unaids.org/pub/Report/2009/jc1727\\_mapping\\_en.pdf](http://data.unaids.org/pub/Report/2009/jc1727_mapping_en.pdf)

8) *UN Chief asks SKorea to Lift HIV Test Requirement*, CHINA DAILY, Nov. 16, 2010, available at

While a sustained analysis of the mandatory drug testing requirements for foreign teachers is beyond the scope of this Article, it should be noted that foreign teachers are subject to a battery of mandatory tests for illicit drugs that their Korean counterparts are not required to undergo.<sup>9)</sup> Moreover, like the repeat HIV tests, foreign teachers employed by the MOE are required to submit to re-tests for drugs each year as a condition of employment. From a global perspective, laws requiring drug tests for workers in *safety sensitive positions* (such as train operators) are generally accepted as a rational means for states to promote their legitimate interests in public safety. The ROK is no exception and it has drug testing laws for its citizen workers in such positions.<sup>10)</sup> The practice of drug testing teachers, however, is held in nearly universal disfavor and the ROK does not subject its citizen teachers to drug tests. The United States is a rare example of a nation where courts in the minority of jurisdictions have upheld government-backed drug tests for public school teachers<sup>11)</sup> and it bears witness to the intense controversy surrounding the issue.<sup>12)</sup> Yet even in

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[http://www.chinadaily.com.cn/world/2010-11/16/content\\_11558531.htm](http://www.chinadaily.com.cn/world/2010-11/16/content_11558531.htm) (reporting that “UN Secretary-General Ban Ki-moon is urging South Korea to scrap a requirement that foreign teachers take an HIV test”). See also Max de Lotbinière, *South Korea Urged to End HIV tests for Foreign Teachers*, GUARDIAN WEEKLY, Jan. 11, 2011, available at <http://www.guardian.co.uk/education/2011/jan/11/tefl>

9) Woneomin hoehwajido (E-2) sajeungjedo gaeseon annae, beommubu [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, *supra* note 4. The drug tests for the Ministry of Justice were originally required by way of a form included in the policy memo. After a year and a half in effect, this policy memo became included as an attachment to an immigration control act enforcement regulation in April 2009. See Churipgukgwallibeop sihaenggyuchik [Enforcement Rules on the Immigration Control Act], Ministry of Justice Decree art. 76 paragraph 1, attachment 5, Apr. 3, 2009, as amended, *supra* note 5.

10) See e.g. Railroad Safety Act, Public Law No. 7245, Oct. 22, 2004, last amended by Public Law No. 7796, Dec. 29, 2005 (S. Kor.).

11) See e.g. *Knox County Education Association v. Knox County Board of Education*, 158 F. 3d 361, 377 (6th Cir. 1998) (upholding mandatory drug tests for public school teachers), but see *United Teachers of New Orleans v. Orleans Parish School Bd.*, 142 F.3d 853 (5th Cir. 1998) (striking down mandatory drug tests for public school teachers as a “kind of immolation of privacy and human dignity in symbolic opposition to drug use”), see also *American Federation of Teachers-West Virginia, AFL-CIO v. Kanawha County Board of Education*, 592 F.Supp.2d 883 (S.D.W.Va., 2009) (striking down mandatory tests for public school teachers and rejecting the reasoning in *Knox*).

12) See e.g. John Cloud, *Should School Districts Drug-Test Teachers?*, TIME MAGAZINE, Feb. 05,

jurisdictions where drug tests for teachers in the U.S. have been allowed, any attempt by state governments to test *only the foreign teachers* in its schools, or to allow exemptions for non-citizens of a particular ethnicity, would likely run afoul of anti-discrimination laws.<sup>13)</sup>

Part IV argues that the HIV restrictions for foreign teachers can best be understood as the result of blood-based ethnic nationalism (“blood nationalism”). Part IV also examines the HIV restrictions’ role in harnessing AID-related stigma as a vehicle for racial discrimination and animus which, as will be explained, is especially problematic considering the ROK’s international commitments to eliminate all forms of racial discrimination.

Part V concludes by briefly examining the legal challenges brought by foreign teachers against mandatory in-country HIV and drug testing.

Part of the inspiration for this Article comes from an investigation into discrimination against non-citizens conducted by the Committee on the Elimination of Racial Discrimination (“CERD”) in 1999. The CERD monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).<sup>14)</sup> The ROK has been a party to the ICERD since 1978 and has declared that the treaty “has the same authority of domestic law and does not necessitate additional legislation.”<sup>15)</sup> The ROK is also a party to the ICERD’s optional

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2009, available <http://www.time.com/time/magazine/article/0,9171,1879197,00.html#ixzz1rAQkLBkY>

13) It should be noted, however, that the United States is by no means immune to xenophobic legislation regarding foreign teachers. In *Ambach v. Norwick*, 441 U.S. 68 (1979), the U.S. Supreme Court upheld against equal protection challenge a New York statute banning non-citizen teachers from public school positions, even as foreign language teachers. In a vigorous dissent, Justice Blackmun (joined by Justices Brennan, Marshall, and Stevens) said the New York statute had its “origin in the frantic and over-reactive days of the First World War when attitudes of parochialism and *fear of the foreigner* were the order of the day.” *Id.* at 82 (Emphasis added). New York no longer enforces the ban. See generally Sam Dillon, *Schools Look Abroad for Teachers*, N.Y. TIMES, Sept. 14, 2009, available at <http://www.nytimes.com/2009/09/15/education/5teach.html>

14) International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “ICERD”), Dec. 21, 1965, 660 U.N.T.S. 195 (entry into force Jan. 4, 1969), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en). The Republic of Korea ratified the treaty on Dec. 5, 1978 and has made no reservations, declarations or understandings.

15) UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: State Party Report* (hereinafter “ROK CERD Report

Article 14 individual complaint procedure, which recognizes the CERD's competence to act as a quasi-judicial body.<sup>16)</sup> While there are 175 state parties to the ICERD, South Korea is one of only 54 that recognize the competence of the CERD to receive and consider individual complaints.<sup>17)</sup> In 1999, the CERD published an opinion dealing with one such complaint that helped to clarify state parties' responsibilities under the treaty with regard to non-citizens<sup>18)</sup> — a process the CERD would continue in 2002 with its general recommendation on “discrimination against non-citizens.”<sup>19)</sup> In its opinion, the CERD investigated a policy that on its face was discriminatory against non-citizens and explained that the scrutiny demanded by treaty required “a proper investigation into the real reasons behind the . . . policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.”<sup>20)</sup> This Article attempts a similar investigation by inquiring into the real reasons behind mandatory in-country HIV tests for foreign teachers living and working in Korea and asking whether they act as a proxy for racial discrimination.

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2003”), Republic of Korea, CERD/C/426/Add.2, Jan. 17, 2003, p. 4, para. 10, available at <http://www.unhcr.org/refworld/docid/3f24767b4.html> See also UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Addendum to the Fourteenth Periodic Reports of State Parties Due in 2006* (hereinafter “ROK CERD Report 2006”), Republic of Korea, CERD/C/KOR/14, Aug. 18, 2006, p. 4, para. 10, available at <http://www.unhcr.org/refworld/docid/45c30ba10.html>

16) ICERD, *supra* note 14.

17) *See Id.*

18) *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997, UN Committee on the Elimination of Racial Discrimination (CERD), Apr. 6, 1999, available at <http://www.unhcr.org/refworld/docid/3f588f02a.html>

19) UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation on Discrimination Against Non Citizens, Oct. 1, 2002, available at <http://www.unhcr.org/refworld/docid/45139e084.html>

20) *Ziad Ben Ahmed Habassi v. Denmark*, *supra* note 18 at para. 2.3.

## II. From Bad Press to Bad Policy: Moral Panic over Foreign English Teachers

On October 28, 2007 the Korean government first gave notice of a new policy for foreign teachers in a widely circulated press release entitled “Illegal native speaker conversation instructors will no longer be tolerated.”<sup>21)</sup> The Korean word for “native speaker” is *woneomin* and while it properly signifies a “native speaker” of any language the term is closely associated with white non-Korean English teachers from the U.S. and Canada.<sup>22)</sup> The government’s press announcement was quickly followed by policy memoranda from the MOJ (in Korean<sup>23)</sup> and English<sup>24)</sup> which called for a “crackdown” on “native speakers” living and working in Korea because of “serious social problems arising from foreign language instructors employed in Korea who are breaking the law.”<sup>25)</sup> The MOJ declared that foreign teachers working on “E-2 native speaking conversation instructor visas” would have to undergo medical tests for HIV and drugs “at designated hospitals inside Korea,”<sup>26)</sup> while immigration authorities stated that “[t]hose that are found to have drug intake, [or] AIDS . . . will have

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21) *Bulbeop bwoneomin hoehwagangsa deo isang seol got eopda* [Illegal native speaker conversation instructors will no longer be tolerated], Ministry of Justice, Oct. 28, 2007, available at <http://www.newswire.co.kr/newsRead.php?no=292742&lmv=A02>: This news link seems to have been eliminated. Requires update.

22) See generally Lisa Schroeder, *Racial Preference for White English Teachers Prevalent in Korea*, YONHAP NEWS, Apr. 15, 2011, [http://english.yonhapnews.co.kr/n\\_feature/2011/04/04/99/4901000000\\_AEN20110404002300315F.HTML](http://english.yonhapnews.co.kr/n_feature/2011/04/04/99/4901000000_AEN20110404002300315F.HTML) See also Teke Wiggan, *South Korea’s Complicated Embrace of Gyopo*, L.A. TIMES, Feb. 14, 2010, available at <http://articles.latimes.com/2010/feb/14/world/la-fg-korea-return14-2010feb14>

23) *Woneomin hoehwajido (E-2) sajeungjedo gaeseon annae, beommubu* [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, *supra* note 4.

24) *New Changes on the E2 Teaching Visa Holders in Korea*, Residence Policy Division, Korea Immigration Service, Ministry of Justice, Dec. 10, 2007, available at <http://www.scribd.com/doc/25467632/New-Changes-on-the-E2-Teaching-Visa-Holders-in-Korea-December-10-2007-Ministry-of-Ju-stice>.

25) *Woneomin hoehwajido (E-2) sajeungjedo gaeseon annae, beommubu* [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, *supra* note 4.

26) *Id.*

their stay cancelled and be deported.”<sup>27)</sup>

In describing the “[s]erious social outcry” over foreign teachers in Korea, the MOJ cited to general “[n]ews media coverage about those unqualified E-2 teaching visa holders” who “were caught for fraudulent diplomas, drugs, sexual offenses, etc.”<sup>28)</sup> The MOJ also makes specific mention of a news report on the arrest of “Christopher Paul Neil, the serial child sex offender by KBS on Oct. 17th, 2007,”<sup>29)</sup> which was broadcast only eleven days before the new measures were announced.

Neil was captured in Thailand and arrested for the sexual abuse of Thai children after an international manhunt led by Interpol.<sup>30)</sup> Although Neil’s offenses had occurred outside of Korea and there were no Korean victims,<sup>31)</sup> local interest was high as Interpol had identified Neil as an English teacher working in Korea just prior to his arrest.<sup>32)</sup> Neil was not HIV positive or involved with drugs; Neil was also not an E-2 visa

27) See *Foreign Language teaching (E-2) >Revision of Foreign Language Instructor (E-2) visa issuance requirements >Required submission of self-health statement*, Ministry of Justice, available at [http://www.hikorea.go.kr/pt/InfoDetailR\\_en.pt?categoryId=2&parentId=382&catSeq=385&showMenuId=374&visaId=E2](http://www.hikorea.go.kr/pt/InfoDetailR_en.pt?categoryId=2&parentId=382&catSeq=385&showMenuId=374&visaId=E2) (last accessed Apr. 4, 2009). The Ministry of Justice announced on Aug. 17, 2010 that it would no longer conduct automatic deportations for HIV status. See *Conversation Teacher (E-2) Related System Improvement Notice*, Ministry of Justice, Aug. 17, 2010, available at <http://www.scribd.com/doc/35229119/HIV-status-not-a-bar-to-obtaining-an-E-2-visa-in-Korea> See also Michael Solis, *Korea Maintains Mandatory HIV Testing Despite Lifting Travel Ban*, HUFFINGTON POST, Jan. 31, 2010, available at [http://www.huffingtonpost.com/michael-solis/korea-maintains-mandatory\\_b\\_443724.html](http://www.huffingtonpost.com/michael-solis/korea-maintains-mandatory_b_443724.html) (reporting that while the ROK has pledged not to deport non-citizens for HIV status, “the Ministry of Justice [has] retain[ed] its right to assess whether or not foreigners living with HIV pose a ‘health risk,’ [and therefore testing for foreign teachers will continue and] such people may still be subjected to threats of job loss, deportation and lack of treatment.”)

28) *New Changes on the E2 Teaching Visa Holders in Korea*, Residence Policy Division, Korea Immigration Service, Ministry of Justice, Dec. 10, 2007, *supra* note 24.

29) *Id.*

30) For more information see *Christopher Paul Neil*, Wikipedia, [http://en.wikipedia.org/wiki/Christopher\\_Paul\\_Neil](http://en.wikipedia.org/wiki/Christopher_Paul_Neil)

31) See generally *Details Emerge In Pedophile Suspect’s Past*, CBS NEWS, Feb. 11, 2009, available at <http://www.cbsnews.com/stories/2007/10/17/world/main3377885.shtml>

32) See e.g. *International Paedophile Caught after INTERPOL’s Global Manhunt is Convicted and Sentenced for Second Time by Thai Court*, Interpol, Nov. 25, 2008, available at <http://www.interpol.int/News-and-media/News-media-releases/2008/N20081125> (“INTERPOL received more than 300 tips from the public in response to the appeal, with five people naming Neil – then teaching young students English in the Republic of Korea – as a potential match.”)

holder.<sup>33)</sup> Many foreign teachers assumed, however, that Neil's arrest was nonetheless directly responsible for the introduction of the new measures for E-2 visa holders.<sup>34)</sup> The government tried to distance itself from this assumption and, in fact, it was only partially correct. That is to say, Neil's notorious status as an "illegal native speaker" and the moral panic it had provoked had indeed served as the opportunity to introduce the measures; however, pressure had been mounting to do something about "native speaking" English teachers who, as will be explained, were increasingly perceived as morally problematic.

In November 2007, an MOJ official told the press that while "the recent case of Christopher Paul Neil could be said to have brought the issue to the surface . . . [w]e have been drawing up the new regulations for some time."<sup>35)</sup> The official then went on to state that "[d]rug use and other criminal activities carried out by foreign English teachers have been a social issue for some time, and have built up to dangerous levels in recent years."<sup>36)</sup> At the time of Neil's arrest there were several conclusory statements from officials sources such as this one which were made without providing any objective data or evidence (capable of explaining, for instance, what was meant by "dangerous levels" of criminal activity) and that implied that Korean society was suddenly under threat because of drug crimes and sexual offenses by "native speaker" English teachers. A justice ministry official claimed the new measures were necessary in order to "prevent native English teachers who disrupt social order with taking drugs [and]

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33) Personal communication, International Cooperation Team, Ministry of Justice. Neil was working on an E-7 visa, a catchall category for "specially designated activities."

34) See e.g. *School Daze for English Teachers*, ASIAN PACIFIC POST, Dec. 20, 2007, available at <http://www.asianpacificpost.com/article/school-daze-english-teachers> (quoting a foreign English teacher in Korea: "This is a knee-jerk reaction based on a pedophile, who was teaching in Korea but arrested in Thailand, who didn't even have a criminal record. . . . Sure there are some bad people out there. But why put us all into one category?"). See also James Card, *Proof of Character Demanded before Entry*, GUARDIAN WEEKLY, Dec. 14, 2007, available at <http://www.guardian.co.uk/education/2007/dec/14/tefl> (quoting a foreign English teacher in Korea: "I don't think Korea has thought this through . . . This is a reactionary move by the government that will have strong implications for the EFL community.")

35) Paul Kerry, *E-2 visa Holders to Need Medical, Criminal Checks – Starting in December 2007*, THE KOREA HERALD, Nov. 7, 2007, available at [http://www.koreaherald.co.kr/NEWKHSITE/data/html\\_dir/2007/11/07/200711070060.asp](http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2007/11/07/200711070060.asp)

36) *Id.*

committing sexual harassment.”<sup>37)</sup> A police official was quoted saying that “sex crimes committed by native speaking instructors, who are high on drugs, are disrupting society.”<sup>38)</sup> Again, however, no data was offered in support of these statements and available data showed that the overall crime rate for foreigners in Korea was substantially lower than the crime rate for Korean citizens.<sup>39)</sup> Moreover, when statistics on crimes by foreign English teachers from 2007 were finally released in 2009, the data showed that crime rates for foreign English teachers were five times less than the crime rate among Koreans and half the rate of other foreigners living in Korea.<sup>40)</sup>

News of Neil’s arrest also stirred exaggerated and distorted claims from the media with statements such as: “incidents surrounding native speaking instructors are *never-ending*.”<sup>41)</sup> Predictions were made that Korea would become “a paradise for criminals from English speaking nations” since native speakers could easily find good jobs in the country,<sup>42)</sup> and more dramatic events were predicted to soon follow since “there must be even more crimes that have yet to be revealed.”<sup>43)</sup> Throughout the media hysteria, the word “native speaker” (*woneomin*) took on a special meaning

37) James Card, *supra* note 34.

38) Cho Seong-ho, *Billaeseo daemacho jaebaehae panmae* [Selling and growing marijuana in an apartment], DAILIAN NEWS, Jan. 9, 2008, available at [http://www.dailian.co.kr/news/n\\_view.html?id=97122](http://www.dailian.co.kr/news/n_view.html?id=97122)

39) Son Jin-seok, *Oegugin beomjoeyureun natjiman geonsuneun keuge neuro* [A small increase in the number of crimes by foreigners], CHOSUN ILBO, Jul. 9, 2008 (reporting that in 2007 the Korean Institute of Criminology found that the overall “crime rate among foreigners [in Korea] was 1.4% compared with the 3.5% rate among Korean citizens.”).

40) See Matt VanVolkenburg, Editorial, *Data says it all: E-2s are law abiding*, THE KOREA HERALD, Oct. 6, 2009, available at <http://view.koreaherald.com/kh/view.php?ud=20091006000065&cpv=0> (analyzing data of foreign English teacher crime released by National Assembly Representative Lee Gun-hyeon)

41) Kim Ji-gyeong, *Adongseongchuhaeng woneomin nyeongeogyosa* [Child molesting native speaking English teacher], MBC, Oct. 17, 2007, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=115&oid=214&aid=0000051075> (Emphasis added)

42) [Saseol] *Adong seongchuhaengbeomi woneomingyosa haetdani* [[Editorial] It’s incredible that a native speaking teacher committed child molestation], SEOUL SINMUN, Oct. 18, 2007, available at <http://www.seoul.co.kr/news/newsView.php?id=20071018031013>

43) [Saseol] *Sigeupan woneomin gyosa geomjeung siseutem* ([Editorial] Native speaking teacher verification system urgently needed), JOONGANG ILBO, Oct. 18, 2007, available at <http://news.joins.com/article/aid/2007/10/18/3000882.html>

with the non-Korean group it represented now symbolizing a threat to Korean society. The media asserted that “society now knows just how deep the pitfalls of native-speaking teachers are”<sup>44)</sup> and declared that “the insecurity of school parents concerning native speaker teachers and instructors is growing by the day.”<sup>45)</sup> The nation was primed for panic as the media called on authorities to “hurry and formulate measures.”<sup>46)</sup>

These calls for action were immediately followed by the MOJ’s press release which called for “strict measures” against “native speakers” and made clear that deviants among them would “no longer be tolerated.”<sup>47)</sup> The phrase in Korean literally means “there is no place to stand” for these teachers, and the deportation measures make clear the intent is to expel them from Korean society. The MOJ’s use of the term “*illegal* native speakers” is also significant, as well as awkward, since the new measures would only apply to foreign teachers on E-2 foreign language teaching visas who were *legally* present in the territory and who, apparently, were now suspected of “illegally” harboring AIDS or drugs. Nevertheless, in channeling the public’s generalized animus toward “native speakers” into immigration crackdown measures, the MOJ was forced to decide which visa category to target and what type of sanctions to deploy. In both decisions it was guided by a citizens’ group of moral entrepreneurs who had campaigned for over two years to “expel” problematic foreign English teachers from Korea. The group had already been very effective in persuading the Korean media to give attention to its cause and, with the moral panic surrounding Neil’s arrest, the group found itself in a position to influence national policy when it was invited by the MOJ to attend a conference to plan the crackdown measures against so-called “illegal native

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44) [Saseol/10wol 18il] Woneomin gyoseupja gwallisiseutem iseoya [[Editorial] There should be a native speaking instructor management system], HANKOOK ILBO, Oct. 18, 2007, available at <http://news.hankooki.com/lpage/opinion/200710/h2007101717595376070.htm>

45) [Saseol] Sigeupan woneomin gyosa geomjeung siseutem [[Editorial] Native speaking teacher verification system urgently needed], JOONGANG ILBO, Oct. 18, 2007, *supra* note 43.

46) *Id.*

47) *Bulbeop bwoneomin hoehwagangsa deo isang seol got eopda* [Illegal native speaker conversation instructors will no longer be tolerated], Ministry of Justice, Oct. 28, 2007, *supra* note 21.

speakers.”<sup>48)</sup>

When the group first formed in 2005 it called itself “Anti-English Spectrum”; it would later call itself the “Citizens’ Movement to Expel Illegal Foreign Language Teachers,” as well as its current name, the “Citizens’ Group for Upright English Education” (hereinafter “Citizens’ Group” or “group”).<sup>49)</sup> At the time of Neil’s arrest this group had already lobbied and petitioned the government for mandatory HIV and drug tests for foreign teachers on E-2 visas. However, during its first year of campaigning, the group had provided a “definition of low-quality native speaker teachers” which described them as “those coming to Korea *without E-2 visas* for the purpose of engaging in sexual pleasures and to create trouble.”<sup>50)</sup> “E-2 visas,” the group explained, were only “issued by the immigration office to those who have a four-year university degree.”<sup>51)</sup> However, the difficulty of targeting foreigners for medical tests who were teaching English without the proper visa (most of whom were on tourist visas) soon became apparent and, by 2006, the group began lobbying for HIV<sup>52)</sup> and drug tests<sup>53)</sup>

48) See *E2 Visa sajeunghalgeummit jagyeokgeomjeunggwa gwallyeondoan munjejeommit daechaekbanganhoeui* [Conference to Plan Measures Regarding Problems Related to Verifying Qualifications and the Issuance of E-2 Visas], Ministry of Justice, Oct. 23, 2007, available at [http://2.bp.blogspot.com/\\_lxap4y0S1as/SotBiZGXO5I/AAAAAAAAAFFE/nSZDQweGJ9o/s1600-h/n-10251.jpg](http://2.bp.blogspot.com/_lxap4y0S1as/SotBiZGXO5I/AAAAAAAAAFFE/nSZDQweGJ9o/s1600-h/n-10251.jpg)

49) The names in Korean are *Anti Inggeulliswi Seupekteureom*, *Bulbeop Oegugeo Gangsa Toechul Wihan Gungminundong*, and *Olbareun Yeonge Gyooyugeul Wihan Siminmoim*, respectively.

50) From a pamphlet distributed by the group, available at [http://2.bp.blogspot.com/\\_AGxngpKLdAM/SrOgplGS0yI/AAAAAAAAAKw/sJ74CfGmB0I/s1600-h/Slide67.JPG](http://2.bp.blogspot.com/_AGxngpKLdAM/SrOgplGS0yI/AAAAAAAAAKw/sJ74CfGmB0I/s1600-h/Slide67.JPG) (“Definition of low-quality native speaker teachers: those who have come to Korea without E-2 visas for the purpose of engaging in sexual pleasures and to create trouble. What are E-2 visas? Visas that are issued by the Immigration Office to those who have a 4-year university degree from overseas and have a teaching license.”) (Emphasis added)

51) *Id.*

52) See Sin Yeon-hui, *Eijeu uihok goegugingangsa beullaengniseuteu chujeok* [Tracking blacklisted English teachers suspected of having AIDS], BREAKNEWS, Sept. 18, 2006, available at [http://www10.breaknews.com/sub\\_read.html?uid=49478&section=section3&section2=](http://www10.breaknews.com/sub_read.html?uid=49478&section=section3&section2=)

53) See Kim Jun-il, *Gangnam nyumyeongeohagwon oegugin gangsadeul ‘daemacho pati’* [‘Marijuana party’ by foreign instructors from well-known Gangnam hagwon], KYUNGHYANG SINMUN, Aug. 31, 2007, available at [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?artid=200708311955241&code=940202](http://news.khan.co.kr/kh_news/khan_art_view.html?artid=200708311955241&code=940202) (discussing the Citizens’ Group’s campaign for mandatory drug tests for foreign teachers on E-2 visas)

specifically for *E-2 visa holders*.

The Citizens' Group had originally formed on the Internet during an earlier controversy which had also resulted in a moral panic over foreign English teachers.<sup>54)</sup> In mid-January 2005, the mainstream Korean news media began to report on the sudden, spreading anger of Korean Internet users ("netizens") towards foreign English teachers because of risqué photos showing Korean women and foreign men at a "sexy costume party" at a nightclub in the Hongik University ("Hongdae") area.<sup>55)</sup> These photos were first posted at a foreign English teacher-oriented website named "English Spectrum" but were then spread throughout Korean cyberspace by Korean netizens. The news media described the photos as revealing "disconcerting scenes of foreigners and Korean women . . . intertwined with one another"<sup>56)</sup> and said the accompanying remarks contained "sexually demeaning comments about Korean women."<sup>57)</sup> With numerous sensational reports highlighting the "lewd" aspects of the photos,<sup>58)</sup> enough attention was drawn to the issue to make "foreign instructor" the third most looked-for search term that week on the popular Internet portal "Daum."<sup>59)</sup> Although the majority of those attending the party were

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54) For a comprehensive review of the incident see the *2005 English Spectrum Incident*, Gusts of Popular Feeling, <http://populargusts.blogspot.kr/2012/03/2005-english-spectrum-incident-part-1.html>

55) See e.g. Park Eun-jeong, *Hangugyeoseong biha oegugin gangsa saiteu imsi pyeswae* [Foreign instructor site that denigrated Korean women temporarily closed], MY DAILY, Jan. 12, 2005, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=117&aid=0000001830>

56) Seo Myeong-deok, *Hangugyeoseong biha oegugin bimilpati yeoreotda?* [Did the foreigners who denigrated Korean women have a secret party], SEGYE ILBO, Jan. 13, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=022&aid=0000074817>

57) Song Hae-yong & Park Seong-u, *Oegugin nyeongeogangsa saiteu, hanguk gyeoseong biha geul lollan* [Controversy over posts denigrating Korean Women at foreign English instructor site], JOONGANG ILBO, Jan. 11, 2005, available at [http://live.joinmsn.com/news/article/article.asp?total\\_id=435345](http://live.joinmsn.com/news/article/article.asp?total_id=435345)

58) Gu Min-hoe, *Oegugin-hangugyeoseong 'eumnanpati' pamun* [Stir over 'lewd party' involving foreigners and Korean women], DAILIAN NEWS, Jan. 13, 2005, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=119&aid=0000000574>

59) Lee-Kim Jun-su, *'Saramgwa ttokganne...'imyeoneo Iwi* [Just like a human... human fish at #1], MEDIA TODAY, Jan. 24, 2005, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=119&oid=006&aid=0000009246>

Korean,<sup>60</sup> the photos of Western men and Korean women had aroused the ire of Korean netizens who severely criticized both sets of participants: The “low quality,” lascivious foreign English teachers who were seen as purveyors of “vulgar foreign culture,”<sup>61</sup> and the Korean women who were publicly shamed for being seen behaving in such a way, especially with foreign men.<sup>62</sup>

In response to the English teacher forum where the photos were posted, the netizens named themselves “Anti-English Spectrum” and started their own forum, or “cafe,” at Naver.com, Korea’s largest portal site. The group claimed that their reason for forming was because foreign English teachers had “debased the image of Korean women in such a dirty and humiliating way that is enough to have soiled the country’s national brand.”<sup>63</sup> As a result, they said they felt “something beyond rage, a feeling of unendurable humiliation” and pledged to “fight against English Spectrum . . . and also against illegal, low-quality English instructors.”<sup>64</sup> The group urged other Koreans to support “a meaningful cause for our nation and society” and “join our efforts.”<sup>65</sup> Remarkably, the group was able to immediately attract some 10,000 online members (and would go on to attract more than 16,400 members).<sup>66</sup> The group was also able to generate support from public

60) Shin Ji-eun, *Invasion of Privacy Degrades Korean Women Twice Over*, CHOSUN ILBO, Jan. 24, 2005, [http://english.chosun.com/site/data/html\\_dir/2005/01/24/2005012461027.html](http://english.chosun.com/site/data/html_dir/2005/01/24/2005012461027.html) (reporting that “[s]ome 70 percent of the participants were Korean men and women, while the rest were foreign men and women.”)

61) From an Anti-English Spectrum cafe banner posted by “Peoseukindol” on Jan. 18, 2005 available at <http://2.bp.blogspot.com/-hB3K0EUthuQ/TylaV52jMkI/AAAAAAAAAH14/LQc8xHlIbfM/s1600/aes%2Bgif.jpg> (“Expel low quality instructors/vulgar foreign culture”)

62) Shin Ji-eun, *supra* note 60.

63) From a former announcement on the cafe’s front page by ‘Hayannyuseu’ titled *Bulbeop oegugeo gangsa toechul rwihan gungminundong* [Citizens’ movement to expel illegal foreign language teachers] which is archived at <http://web.archive.org/web/20100125223102/http://cafe.naver.com/englishspectrum.cafe> See also Adam Walsh, *Blurring Line Between Hate, Free Speech*, THE KOREA HERALD, Nov. 20, 2009, available at <http://www.koreaherald.com/lifestyle/Detail.jsp?newsMLId=20091120000014>

64) *Id.*

65) *Id.*

66) Number of online members as of April 2012. The group’s website is available at <http://cafe.naver.com/englishspectrum>

officials. In its first week of operation the group joined in a petition drive that called on National Assembly representatives and government ministries to “expel low quality foreign instructors.”<sup>67)</sup> In response to the petition National Assemblyman Lee Gun-hyeon told the press that “[p]roblems with foreign instructors have arisen in the past, but recently, as the number of foreign instructors has increased, so have these problems.”<sup>68)</sup> Rep. Lee called for “a thorough crackdown” on foreign teachers and said the government needed to “strengthen existing qualification screening.”<sup>69)</sup> National Assemblyman Bae Il-do was also quoted as saying that “the government lags behind in its appreciation of the change in the situation [regarding foreign teachers] and does not have rigorous qualification screening.”<sup>70)</sup> Two and a half years later these calls for immigration crackdowns and qualification screenings would be implemented with the E-2 visa policy’s HIV and drug testing measures. In the meantime, the Citizens’ Group was able to sustain interest in its cause.

The group’s successful strategy was to organize its own offline investigations of foreign English teachers in order to gather material of interest to the Korean media, although the group’s mission to “expel low quality foreign instructors” often became the subject of the resulting reports. The group conducts stakeouts of suspicious foreign English teachers by “tracking and watching”<sup>71)</sup> them, sometimes for months at a time.<sup>72)</sup> The group also solicits tips and information about suspicious

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67) Gu Min-hoe, *Bujeokgyeok goegugin gangsa “sahoe isyuhwa” hagetda* [Unfit foreign instructors should be a “social issue”], DAILIAN, Jan. 17, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=119&aid=0000000153>

68) *Id.*

69) *Id.*

70) *Id.*

71) Kang Shin-who & Park Si-soo, *Civic Group Fights Against Illegal Teachers*, THE KOREA TIMES, May 15, 2008, available at [http://www.koreatimes.co.kr/www/news/nation/2008/05/117\\_24269.html](http://www.koreatimes.co.kr/www/news/nation/2008/05/117_24269.html) (quoting the Citizens’ Group’s leader Lee/Yie Eun-woong, “Sometimes we stay up at night tracking and watching foreign nationals. We have even found some foreign teachers that take drugs then teach students at hagwons the following day,” Lee said. “We will continue to help police deport these foreign teachers.”)

72) See Yun Chang-su, *Mayak han oegugin gangsa 150ilgan jambok kkeuchi butjaba* [Foreign instructor caught for drugs after 150 day stakeout], SEOUL SINMUN, Nov. 14, 2008, available at <http://www.seoul.co.kr/news/newsView.php?id=20081114500003> (reporting on the Citizens’ Group’s leader, “To track down the locations of foreign teachers using drugs he

foreign teachers from Korean citizens<sup>73)</sup> and maintained its own toll-free telephone “Illegal Native Speaking English Teacher Hotline.”<sup>74)</sup> The group claims to coordinate its investigations with the police<sup>75)</sup> and its website displayed an award the group’s leader received from the Seoul metropolitan police department.<sup>76)</sup>

In conjunction with its investigative activities, the group has also conducted a very effective media campaign. In the years since the group formed, it has succeeded in portraying foreign English teachers as womanizers,<sup>77)</sup>

spent 150 days in bitterly cold weather, outworking the police, not going home.”)

73) See Kim Hae-gyeong, *Bullyang oegugin gangsa, ‘kkomjjangma!’ [Delinquent foreign instructors, ‘freeze!’]*, NoCUT NEWS, Nov. 16, 2009, available at <http://www.nocutnews.co.kr/show.asp?idx=1310538> (reporting that if website “members discover problem foreign instructors, they [should contact the Citizens’ Group’s leader] who then tracks the teachers with others for two to three months on average.” The Citizens’ Group’s leader further explains that “when people who suffer abuse or violence from foreigners contact the police directly their identities are exposed and they become subject to investigation [but by using the membership based website] our members can receive counseling . . . and can also report cases of abuse.”)

74) From a sticker posted at the Anti English Spectrum cafe, available at [http://1.bp.blogspot.com/\\_AGxngpKLdAM/SrNg8Y2Sx2I/AAAAAAAAACw/GNIZvL5MQC4/s1600-h/Slide9.JPG](http://1.bp.blogspot.com/_AGxngpKLdAM/SrNg8Y2Sx2I/AAAAAAAAACw/GNIZvL5MQC4/s1600-h/Slide9.JPG)

75) See *Seoduwonui SBS Jeonmangdae [Seo Du-won’s SBS viewpoint]*, SBS RADIO Interview, Jul. 9, 2010. For a translation of this interview, see *SBS Radio Interviews AES’s Lee Eun-ung, Gusts of Popular Feeling*, <http://populargusts.blogspot.com/2010/07/sbs-radio-interviews-aess-lee-eun-ung.html> (“[Interviewer, Mr. Seo Du-won:] So, of course, when it comes time to catch the unqualified native speaking teacher, you receive help from the police? [Citizens’ Group’s leader, Mr. Lee Eun-ung:] Of course. We cannot infringe on the police’s jurisdiction because we should obey social and legal norms. Our part in the arrest process and such is only to cooperate.”). See also Kang Shin-who & Park Si-soo, *supra* note 71 (quoting the Citizens’ Group leader, Mr. Yie/Lee Eun-woong: “We will continue to help police deport these foreign teachers.”)

76) See *Appreciation award presented to Mr. Yie/Lee Eun-woong by the Seoul Metropolitan Police Department* on Oct. 21, 2007, available at [http://4.bp.blogspot.com/\\_lxap4y051as/SotBi3cDI2I/AAAAAAAAAFFM/xQlezK\\_iFF0/s1600-h/%EC%82%AC%EC%A7%84\\_018.jpg](http://4.bp.blogspot.com/_lxap4y051as/SotBi3cDI2I/AAAAAAAAAFFM/xQlezK_iFF0/s1600-h/%EC%82%AC%EC%A7%84_018.jpg) See also *Bon kapeui baljachwiwa irukhaeon eopjeogeul rallyeodeurimnida (cheoeum bangmunhasinbundeulkke) [Here are our cafe’s achievements and past footprints (for the benefit of first-time visitors)]*, Anti English Spectrum Cafe, <http://cafe.naver.com/englishspectrum/5876>

77) See e.g. Choi Hui-seon, (*Eongteori oegugingangsadeul*) *Eorin haksang-dongnyo yeoseonggangs gariji anneun woneomingangsadeurui seongbeomjoe* ‘[(Fraud foreign instructors) The sex crimes of foreign instructors who do not distinguish between female coworkers and young students], CHOSUN.COM, Jun. 20, 2009, [http://news.chosun.com/site/data/html\\_dir/2009/06/30/2009063001264.html](http://news.chosun.com/site/data/html_dir/2009/06/30/2009063001264.html) (quoting the Citizens’ Group’s leader: “Foreign instructors

rapists,<sup>78)</sup> child molesters,<sup>79)</sup> drug users,<sup>80)</sup> as well as having HIV/AIDS and even “knowingly spreading AIDS.”<sup>81)</sup> The group has been a frequent contributor to reports in the mainstream and tabloid press with titles such as “Is Korea Their Paradise? Report on the Real Conditions of Blond-haired, Blue-eyed Teachers,”<sup>82)</sup> “Tracking Blacklisted English Teachers Suspected of Having AIDS,”<sup>83)</sup> “White English teacher threatens Korean woman with AIDS,”<sup>84)</sup> and “From Molestation to AIDS Threats, the Shocking Perversions of Some English Teachers: Beware the ‘Ugly White Teacher,’”<sup>85)</sup> among others. Described in the latter article as right-thinking “[c]itizens angered by the nakedly sexual talk and actions of those kinds of white foreign

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of low character frequently toss women away without compunction after attaining their goal of meeting them for money and sexual relations, so many of the women have had their lives ruined by abortion or, of course, sexually transmitted diseases.”).

78) See e.g. Yun Chang-su, *supra* note 72 (reporting that the Citizens’ Group’s leader “has many times asked schools to fire foreign teachers who have sex at knife point [and has] tracked down foreign teachers who bring sexually transmitted diseases” to Korea).

79) See Adam Walsh, *supra* note 63 (reporting on statements by the group claiming that foreign teachers “target children” and engage in “sexual molestation”).

80) See Kang Shin-who & Park Si-soo, *supra* note 71 (quoting the Citizens’ Group’s leader, Mr. Lee Eun-woong “Sometimes we stay up at night tracking and watching foreign nationals. We have even found some foreign teachers that take drugs then teach students at hagwons the following day,” Lee said. “We will continue to help police deport these foreign teachers.”). See also Yun Chang-su, *supra* note 72 (reporting on the Citizens’ Group’s leader: “To track down the locations of foreign teachers using drugs he spent 150 days in bitterly cold weather, outworking the police, not going home.”).

81) John M. Glionna, *Korea Activists Target Foreign English Teachers*, L.A. TIMES, Jan. 31, 2010, available at <http://articles.latimes.com/2010/jan/31/world/la-fg-korea-english31-2010jan31> (reporting that the group “alleged that some [foreign] teachers are knowingly spreading AIDS”). See also Adam Walsh, *supra* note 63 (reporting on statements by the group claiming that foreign teachers are “spreading AIDS in order to make their existence known.”).

82) Kim Jae-eun, *TV Program Warms Up Foreign Teacher Controversy*, CHOSUN ILBO, Feb. 21, 2005, [http://english.chosun.com/site/data/html\\_dir/2005/02/21/2005022161020.html](http://english.chosun.com/site/data/html_dir/2005/02/21/2005022161020.html)

83) Sin Yeon-hui, *supra* note 52.

84) Son Jin-suk, *Baegin nyeongeogangsa, hanguk gyeoseonge eijeu wihyeop* [White English teacher threatens Korean woman with AIDS], CHOSUN ILBO, May 28, 2007, available at [http://news.chosun.com/site/data/html\\_dir/2007/05/28/2007052800060.html](http://news.chosun.com/site/data/html_dir/2007/05/28/2007052800060.html)

85) Kim Yun-hui, *Seongchuhang-eijeu wihyeopkaji... ilbu oegugingangsa byeontaehaenggak chunggyeok; 'eogeulli baegin gangsa' josimhaseyo* [From molestation to AIDS threats - shocking perversions of some English teachers: Beware the ‘ugly white teacher’], SPORTS CHOSUN, May 27, 2006, available at [http://sports.chosun.com/news/ntype2\\_o.htm?ut=1&name=/news/life/200705/20070528/75827008.htm](http://sports.chosun.com/news/ntype2_o.htm?ut=1&name=/news/life/200705/20070528/75827008.htm)

teachers,<sup>86)</sup> the group claims to have contributed to more than ninety news articles and television programs on foreign English teachers in Korea.<sup>87)</sup>

The Citizens' Group has also attracted the attention of the international media.<sup>88)</sup> In 2009, the Minister-Counsellor of Public Affairs at the Korea Embassy in Ottawa was quoted by the Canadian press as saying that the group's "reactionary views and opinions do not represent the sentiment of Koreans toward Canadians or other foreign teachers."<sup>89)</sup> The group, however, has been very successful in shaping public opinion and indeed has succeeded in influencing national policy.

As noted above, in the days following the arrest of Christopher Paul Neil, the MOJ immigration policy team reached out to the group and invited its leader to attend "A Conference to Plan Measures Regarding Problems Related to Verifying Qualifications and the Issuance of E-2 Visas."<sup>90)</sup> The MOJ's new measures for E-2 visa holders, announced just four days after this meeting, reflected the position advocated by the group of requiring E-2 visa holders to be subject to HIV and drug tests. The MOJ's decision to exclude foreign teachers with Korean ethnicity from the HIV and drug test requirements (as well as Korean citizen teachers who were

86) *Id.*

87) See *Bon kapeui baljachwiwa irukhaeon eopjeogeul rallyeodeurimnida* (cheoeum bangmunhasinbundeulkke) [Here are our cafe's achievements and past footprints (for the benefit of first-time visitors)], Anti English Spectrum Cafe, *supra* note 76. For an English translation of the media contributions claimed by the group see *The Achievements of Anti-English Spectrum*, Gusts of Popular Feeling, <http://populargusts.blogspot.com/2009/09/achievements-of-anti-english-spectrum.html>

88) See *Foreign English Teachers Targeted in Smear Campaign*, Dec. 7, 2009, available at <http://www.canada.com/vancouver/news/westcoastnews/story.html?id=7cfde461-bcb7-419f-b5a6-7f235b4114e1> See also *Korea English Teachers*, CBC RADIO (The Current), Dec. 10, 2009, available at <http://www.cbc.ca/thecurrent/episode/2009/12/10/december-10-2009/> See also Joan Delaney, *Foreign Teachers in Korea Vilified by Anti-English Group; Group's Views Don't Represent Mainstream, Says Korean Diplomat*, EPOCH TIMES, Dec. 17, 2009, available at <http://www.theepochtimes.com/n2/content/view/26619/> See also Emily Rauhala, *South Korea: Should Foreign Teachers Be Tested for HIV?*, TIME, Dec. 24, 2010, available at <http://www.time.com/time/world/article/0,8599,2039281,00.html#ixzz1fRX0qEoz> See also Glionna, *supra* note 81.

89) See Delaney, *supra* note 88.

90) See *E2 Visa sajeungbalgeummit jagyeokgeomjeunggwa gwallyeondoan munjejeommit daechaekbanganhooui* [Conference to Plan Measures Regarding Problems Related to Verifying Qualifications and the Issuance of E-2 Visas], Ministry of Justice, Oct. 23, 2007, *supra* note 48.

already exempt), a move that the MOJ described as “reasonable discrimination” in accordance with “our authority and policy to favor ethnic Koreans,”<sup>91)</sup> also resembles the position advocated by the group, whose leader has said that ethnic Korean teachers should be able to avoid these tests since “treating brethren [*dongpo*] of the Republic of Korea like foreigners would be unreasonable.”<sup>92)</sup>

In the five years since the mandatory in-country HIV and drug test measures were put into effect, they have accomplished the group’s goal of “expelling” foreign teachers — if not literally from Korean territory, then symbolically from Korean society — by branding them with the stigma associated with AIDS and drugs. The ROK’s entanglement in this process is highly problematic and likely violates its obligations under article 2 of the ICERD, which requires state parties (a) “to engage in no act or practice of racial discrimination”; (b) “not to sponsor, defend or support racial discrimination by any persons or organizations”; and (c) “to review governmental, national and local policies [so as] to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.”<sup>93)</sup>

The CERD’s general recommendation on “discrimination against non-citizens,” which recognizes that “xenophobia against non-nationals . . . constitutes one of the main sources of contemporary racism,”<sup>94)</sup> is especially relevant to the foreign teacher issue. The recommendation states that parties to the ICERD should:

Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national

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91) Kang Shin-who, *Foreign Teachers Say Visa-Rule Biased*, The Korea Times, Oct. 5, 2008, *supra* note 3. See also e.g. Lee Yeong-pung, *Mayak gwallyeon’ eohagwon woneomin gangsa gwalli gumeong* [Loophole in the management of ‘drug related’ issues with language hagwon native speaking instructors], KBS NEWS, March 15, 2012, *supra* note 3.

92) Yun Chang-su, *Oegugin gangsa eijeu geomsaga chabyeorirago?* [Is testing foreign teachers for AIDS discriminatory?], SEUL SINMUN, Feb. 10, 2009, available at <http://www.seoul.co.kr/news/newsView.php?id=20090210500011>

93) ICERD *supra* note 14.

94) UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non Citizens, Oct. 1, 2002, preamble, *supra* note 19.

or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.<sup>95)</sup>

The unchecked cycle of stigmatization that has resulted in the ROK’s discriminatory HIV policy for foreign teachers is largely due to the ROK’s failure to abide by this recommendation. Ethnic non-Korean teachers have been targeted and stigmatized in the media and on the Internet as morally problematic and prone to criminal conduct and statements, which sometimes have been made by officials, have cast suspicion in advance on non-Korean teachers as potential child molesters, sex offenders, drug users, and as posing a threat because of AIDS.<sup>96)</sup> The media, as it is wont to do, often features sensational statements for their shock value, but with officials as spokespersons these statements gain the semblance of credibility. A notable example was provided by an officer with the Seoul police department’s foreign affairs division who was quoted saying that “American and Canadian English teachers think Korea is a land of opportunity and a perverted paradise [because] the majority of them find it easy to seduce Korean women and do drugs with them.”<sup>97)</sup>

Disturbingly, such sensational claims are not limited to the tabloid press or online news reports. Even KBS news, a government owned television network and the largest network in Korea, has featured broadcasts that are likely inappropriate in light of the ROK’s obligations under the ICERD. For example, KBS broadcast a sensationalistic report featuring contributions from the Citizens’ Group in July 2009. It was entitled “‘Out of Control

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95) *Id.* at para. 12.

96) Such comments by public officials are especially problematic, as the Committee on the Elimination Racial Discrimination has explained elsewhere. See UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, para. 29, available at <http://www.unhcr.org/refworld/docid/48abd56dd.html>

97) Cho Gi-hong, *Oegugin nyeongeogangsaege hangugeun ‘tarakcheonguk’ [Korea is a ‘Perverted Paradise’ for foreign English teachers]*, NoCUT NEWS, Sept. 5, 2007, available at [http://news.naver.com/hotissue/ranking\\_read.php?section\\_id=102&ranking\\_type=popular\\_day&office\\_id=079&article\\_id=0000185857&date=20070905&seq=1](http://news.naver.com/hotissue/ranking_read.php?section_id=102&ranking_type=popular_day&office_id=079&article_id=0000185857&date=20070905&seq=1)

Foreign English Teacher' Teaches Class while High and Commits Sexual Molestation" and claimed there were "endless sex crimes by foreign instructors" and said Korean parents were "uncomfortable about entrusting their child's education to them."<sup>98)</sup> Such reports are sometimes followed by calls for discriminatory legislative action. For instance, in October 2009, National Assemblymen Lee Gun-hyeon and Lee Joo-young each called for stricter measures against foreign English teachers. Rep. Lee Gun-hyeon said that "native speaking English instructor crime is serious" and is "causing growing anxiety among students and teachers."<sup>99)</sup> Rep. Lee Joo-young claimed that crimes by foreign teachers were even more serious if one considered "the number of undisclosed crimes" that are concealed by "schools and private language institutes try[ing] to hide the sexual crimes committed by these foreign teachers."<sup>100)</sup> In calling for even stricter measures against "native speakers" Rep. Lee Joo-young declared that "of all foreigners, foreign native speaking instructors are especially likely to be potential child molesters"<sup>101)</sup> and warned that even with the current measures in place "native speakers" still posed a threat because "AIDS test reports and drug test results . . . are easy to fake and change."<sup>102)</sup>

Not surprisingly statements such as these by politicians, ministry officials and police officers, which the CERD has warned against, have had a negative effect on the perceptions of non-Korean English teachers and

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98) 'Makganeun oegugin nyeongeogangsa' hwangak sueobe seongchuhang [Out of control foreign English teacher' teaches class while high and commits sexual molestation], KBS, Jul. 3, 2009, [http://news.kbs.co.kr/society/2009/07/03/1804152.html#//](http://news.kbs.co.kr/society/2009/07/03/1804152.html#/) (Emphasis added)

99) Kim Jong-eun, *Igunhyeon 'woneomin nyeongeogangsa beomjoe simgak'* [Lee Geun-hyeon: 'Native speaking English instructor crime is serious'], YONHAP NEWS, Sept. 24, 2009, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=001&oid=001&aid=0002881530&> See also Kang Shin-who, *Are foreign teachers crimes serious?* THE KOREA TIMES, Oct. 15, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/10/117\\_53601.html](http://www.koreatimes.co.kr/www/news/nation/2009/10/117_53601.html)

100) Choi Suk-jin, (*Gukgamisyu*) *Seongbeomjoe oegugin gangjechulguktwikongsosihyo jeongji chujin* [(National issue) Deportation of foreigners who commit sex crimes and lifting of the statute of limitations pushed], ASIA TODAY, Oct. 23, 2009, <http://www.asiatoday.co.kr/news/view.asp?seq=296093>

101) *Id.*

102) Song Hye-mi, *Beommubu 'adongseongpongyeok goegugin mugihan chubang'* [Ministry of Justice: 'Foreigners who commit sex crimes against children will be permanently expelled'], YONHAP NEWS, Oct. 22, 2009, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=001&oid=001&aid=0002933437&>

have encouraged the enactment of discriminatory measures. Inappropriate statements by educators, another group the CERD has cautioned state parties about, have also contributed to negative perceptions and encouraged discrimination. For example, Korean educators have cited to a perceived lack of moral qualifications as reason for replacing “native English speaking” instructors with Korean teachers or ethnic-Korean non-citizen English speakers from overseas. The president of Seoul National University of Education, for instance, was quoted as saying that “Korean teachers should replace native English speaking teachers as soon as possible” because “native speakers are not qualified and are often involved in sexual harassment and drugs.”<sup>103)</sup> The president of the International School of Graduate English was quoted as saying that “it would be better inviting young ethnic Koreans” since “[s]ome of the native English speakers don’t have much affection toward our children . . . and they often cause problems.”<sup>104)</sup> The head of the Incheon office of education was quoted explaining that one of the reasons Korean teachers were being substituted for “native speakers” in her district was because “some of them are not ethically qualified to treat children.”<sup>105)</sup>

The term moral panic is often used to explain public anxiety about, and official reaction to, a particular social issue or problem which, because of media hysteria, becomes much more extreme than it should be. As the name implies, a moral panic indicates that there has been a massive overreaction, and this crucial element of *disproportionality* is said to exist where “public concern is in excess of what is appropriate if concern were directly proportional to objective harm.”<sup>106)</sup> The Korean public, after several years of witnessing media coverage featuring reports about foreign English

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103) Kang Shin-who, *SNUE Takes Lead in Quest for Multi-cultural Society*, THE KOREA TIMES, Oct. 28, 2009, available at [http://www.koreatimes.co.kr/www/news/special/2011/11/181\\_54450.html](http://www.koreatimes.co.kr/www/news/special/2011/11/181_54450.html)

104) Kang Shin-who, *IGSE to Nurture Top Quality English Teachers*, THE KOREA TIMES, Apr. 22, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/04/117\\_43673.html](http://www.koreatimes.co.kr/www/news/nation/2009/04/117_43673.html)

105) Kang Shin-who, *Korean Teachers Substituting for Native Speakers in Incheon*, THE KOREA TIMES, Mar. 13, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/03/117\\_41268.html](http://www.koreatimes.co.kr/www/news/nation/2009/03/117_41268.html)

106) Erich Goode & Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* 36 (1994).

being required to undergo mandatory HIV tests in conjunction with reports describing these teachers as morally problematic and prone to criminal behavior such as those discussed above, it is perhaps not surprising that there has been so much public concern in South Korea over foreign English teachers and an alleged threat of AIDS. In 2010, the Prime Minister's Office conducted an opinion poll finding "80.7 percent of ordinary citizens" in support of mandatory HIV tests for foreign teachers.<sup>107)</sup> The Ministry of Education has cited this poll as support for its policy regarding foreign English teachers and has stated that "HIV test submissions, deportation, and re-testing should be enforced *because of concerns expressed by parents.*"<sup>108)</sup> Yet while concern is high there have been no cases of students being infected with HIV by their foreign teachers. In fact, the education ministry has stated that mandatory HIV testing "does not mean the government regards foreign teachers to be HIV positive or have the potential of transmission — *it is just intended to assure the parents.*"<sup>109)</sup> Clearly, public concern over foreign English teachers and the threat of AIDS is enormously disproportional to the potential for any objective harm — a fact that even public officials appear willing to admit. Nevertheless, instead of attempting to correct the misperception of how HIV is transmitted through educational efforts, the government has decided to give the public a false sense of security by implementing symbolic HIV tests that have no public health benefit. Unfortunately, however this move by the government only reinforces the misunderstanding of how the disease is spread, heightens the stigma and discrimination surrounding people living with HIV, and promotes the false idea that only foreigners are in danger of infection.

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107) *Work Visas Getting Easier for Teachers*, JOONGANG DAILY, Jul. 13, 2010, available at <http://korea.joongangdaily.joinsmsn.com/news/article/article.aspx?aid=2923110>

108) Adam Walsh & Jurie Hwang, *Views Differ on HIV Testing of Foreigners*, THE KOREA HERALD, Aug. 24, 2010, available at <http://www.koreaherald.com/lifestyle/Detail.jsp?newsMLId=20100824000708> (Emphasis added).

109) Bae Ji-sook, *HIV Test Rules for Foreigners to be Eased*, THE KOREA TIMES, Oct. 25, 2010, available at [http://www.koreatimes.co.kr/www/news/nation/2011/04/117\\_75193.html](http://www.koreatimes.co.kr/www/news/nation/2011/04/117_75193.html) (quoting "an official of the Ministry of Education, Science and Technology.") (Emphasis added).

### III. HIV Restrictions for Foreigners in Korea

The institutionalization of wholly symbolic discriminatory HIV restrictions obligating tens of thousands of non-Koreans living in South Korea to be tested and re-tested for AIDS each year represents a serious violation of human rights. As early as 1987 the World Health Organization (“WHO”) concluded that “no screening programme of international travellers can prevent the introduction and spread of HIV infection”<sup>110)</sup> and, in 1988, the WHO advised that such screenings would be “ineffective, impractical and wasteful.”<sup>111)</sup> The Office of the United Nations High Commissioner for Human Rights and UNAIDS have clearly stated that “States should not discriminate against people living with HIV or members of groups perceived to be at risk of infection on the basis of their actual or presumed HIV status”; and have further explained that any restrictions on rights “based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns” because HIV, although infectious, cannot be transmitted through casual contact.<sup>112)</sup> The UN Commission on Human Rights has also “[s]tress[ed] that discrimination and stigmatization are counter-productive to measures to prevent and control HIV/AIDS,” and has gone further by confirming that “discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards [including] non-discrimination provisions in international human rights texts”<sup>113)</sup> such as the International

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110) *Report of the Consultation on International Travel and HIV Infection*, Mar. 2-3, 1987, World Health Organization, Special Programme on AIDS, Geneva, 1987; WHO/SPA/GLO/87.1

111) *Statement on Screening of International Travellers for Infection with Human Immunodeficiency Virus*, World Health Organization, 1988; WHO/GPA/INF/88.3

112) Inter-Agency, *International Guidelines on HIV/AIDS and Human Rights*, Jul. 2006, HR/PUB/06/9, para. 108, 127, available at <http://www.unhcr.org/refworld/docid/4694a4a92.html>

113) UN Commission on Human Rights, *The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, Mar. 3, 1995, E/CN.4/RES/1995/44, available at <http://www.unhcr.org/refworld/docid/3b00f0ac0.html>

Covenant on Civil and Political Rights (“ICCPR”).<sup>114)</sup> The Human Rights Committee, the ICCPR’s monitoring body, has stated that while “[i]t is in principle a matter for the State to decide who it will admit to its territory,” under “considerations of non-discrimination” there are “certain circumstances [where] an alien may enjoy the protection of the Covenant even in relation to entry or residence.”<sup>115)</sup> As Kyung-wha Kang, the UN Deputy High Commissioner for Human Rights, has accurately explained it:

While travel restrictions are a question of State sovereignty, it must be pointed out that States also have obligations under international law within which sovereign rights may be exercised. In particular, under basic norms of non-discrimination, States must provide compelling reasons for any differentiation in treatment, including in restricting travel for people living with HIV. We know that there are no such compelling reasons.<sup>116)</sup>

The ROK is very familiar with its obligations under international law regarding HIV restrictions. It has, in fact, been intimately involved with the issue ever since the WHO first recommended against screening international travelers in 1988, which was the year the ROK hosted the Summer Olympics and some 250,000 foreign tourists visited the country. As will be explained, despite serious trepidations at the time, the ROK joined with the international community in rejecting compulsory HIV screenings for international travelers. Since then, along with other nations, the ROK has pledged to combat the stigma associated with HIV and to eliminate discrimination against those living with HIV or suspected of being HIV positive by becoming a party to the UN Declaration of Commitment on HIV/AIDS in

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114) International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entry into force* Mar. 23, 1976). The Republic of Korea acceded to the treaty on Apr. 10, 1990.

115) UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, Apr. 11, 1986, available at <http://www.unhcr.org/refworld/docid/45139acfc.htm>

116) Office of the High Commissioner for Human Rights, *Lifting HIV-related travel restrictions*, UN Press Release, Apr. 2008, available at <http://www.ohchr.org/EN/NEWSEVENTS/Pages/HIVTravelRestrictions.aspx>

2001 and by joining in subsequent declarations.<sup>117)</sup> In January 2010, the ROK, together with the United States, pledged to remove all HIV travel restrictions on foreigners.<sup>118)</sup> In March 2010, before the Human Rights Council, the ROK reaffirmed its commitment to remove restrictions for “foreigners living with HIV in compliance with UN recommendations” “as part of the effort to eliminate all forms of discrimination,”<sup>119)</sup> and recounted the progress it had made on its pledge; and indeed the ROK had made substantial progress by officially eliminating HIV restrictions on entry, stay and residence for all groups of non-citizens — except for its final HIV restrictions on foreign teachers which still remained.<sup>120)</sup>

The ROK’s refusal to abandon its HIV restrictions on foreign language teachers — including mandatory testing, retesting, loss of employment and the threat of deportation — represents a serious breach of its commitment to eliminate all forms of HIV-related restrictions for non-citizens.<sup>121)</sup> This breach was made all the more conspicuous when UN Secretary-General Ban Ki-moon, a South Korean national who has made the removal of the stigma and discrimination associated with AIDS a personal mission,<sup>122)</sup> was

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117) UN General Assembly, *Declaration of Commitment on HIV/AIDS*, Aug. 2, 2001, A/RES/S-26/2, available at <http://www.unhcr.org/refworld/docid/3dda1a037.html>

118) See *UN Secretary-General Applauds the Removal of Entry Restrictions Based on HIV Status by United States of America and Republic of Korea*, UNAIDS Press Release, Jan. 4, 2010, available at <http://www.unaids.org/en/resources/presscentre/featurestories/2010/january/20100104travelrestrictions>

119) Cho Hyun, *Deputy Minister for the Multilateral and Global Affairs for the Republic of Korea*, UN Human Rights Council, Thirteenth Session, High-level Segment, Mar. 2, 2010, available at <http://www.un.org/webcast/unhrc/archive.asp?go=100302>

120) See Bae Ji-sook, *supra* note 109. See also Shin Sung-sik, *HIV rule to be lifted for E-6 visa holders*, JOONGANG DAILY, Oct. 26, 2010, available at <http://joongangdaily.joins.com/article/view.asp?aid=2927564>

121) *UN Secretary-General Applauds the Removal of Entry Restrictions Based on HIV Status by United States of America and Republic of Korea*, UNAIDS Press Release, Jan. 4, 2010, *supra* note 118. See also Cho Hyun, *Deputy Minister for the Multilateral and Global Affairs for the Republic of Korea*, UN Human Rights Council, Thirteenth Session, High-level Segment, Mar. 2, 2010, *supra* note 119.

122) See *UN Urges Nations to Lift HIV Travel Ban*, AFP NEWS, Oct 31, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5jjO8WkZTKon6BE60rzWcHJErfGw> (At the U.N. General Assembly High-Level Meeting on HIV/AIDS in Jun. 2008, Secretary General Ban Ki-moon proclaimed that “[i]n the world as a whole, I call for a change in laws that uphold stigma and discrimination - including restrictions on travel for people living with

forced to amend his congratulatory message to the ROK for “ending restrictions towards people living with HIV”<sup>123)</sup> and urge his home country to eliminate this final HIV restriction on foreigners as promised.<sup>124)</sup> As a result of its failure to heed the advice of the Secretary-General and honor its commitment, South Korea has remained on the UNAIDS’s list of forty-nine countries which continue to have HIV restrictions in place.<sup>125)</sup> Indeed, because of its extreme position on foreign teachers, which includes in-country HIV tests that must be repeated on a regular basis, the ROK now ranks as one of the most restrictive countries among those with some form of HIV restrictions in place.<sup>126)</sup>

This outcome has been unexpected and the ROK is no doubt acutely aware of how untenable its position has become. During the Universal Periodic Review (“UPR”) process before the Human Rights Council in May 2008, the United Kingdom pointed out the HIV restrictions on the “E-2 Teaching Foreign Languages” visa and noted that E-2 visa holders were being forced to disclose “HIV status, and there have been reports of foreigners being deported because of their HIV status.”<sup>127)</sup> The U.K. asked: “Does the ROK Government consider this to be discrimination and, if so,

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HIV,” both because stigma “drives the virus underground, where it can spread in the dark; [and] as important, it is an affront to our common humanity.”).

123) *UN Secretary-General Applauds the Removal of Entry Restrictions Based on HIV status by United States of America and Republic of Korea*, UNAIDS Press Release, Jan. 4, 2010, *supra* note 118.

124) *UN Chief Asks S. Korea to Lift HIV Test Requirement*, *supra* note 8 (reporting that “UN Secretary-General Ban Ki-moon is urging South Korea to scrap a requirement that foreign teachers take an HIV test”). See also Max de Lotbinière, *supra* note 8.

125) UNAIDS, *HIV-related Restrictions on Entry, Stay and Residence*, UNAIDS Human Rights and Law Team, *supra* note 6. Compare the ROK’s current status on the UNAIDS list of countries with HIV restrictions still in place with the United States which jointly announced its intent to remove HIV restrictions in 2010 and now is listed as a country with no HIV-specific restrictions on entry, stay and residence.

126) See *Mapping of Restrictions on the Entry, Stay and Residence of People Living with HIV*, UNAIDS, Jun. 2009, *supra* note 7.

127) Human Rights Council, Office of the High Commissioner for Human Rights, Universal Periodic Review, *United Kingdom: Advance Written questions to States under Review (SuR)*, Session 2, May 5-19, 2008, available at [http://www.upr-info.org/IMG/pdf/Advance\\_Written\\_Questions\\_from\\_UK\\_S2.pdf](http://www.upr-info.org/IMG/pdf/Advance_Written_Questions_from_UK_S2.pdf)

what measures will it take to address this issue?"<sup>128)</sup> Instead of answering the question, however, the ROK chose instead to ignore it and has continued to do so. Nevertheless, it is necessary to understand why these final HIV restrictions for foreigners in Korea were introduced and why they have remained in place.

The answer involves the operation of what is called "symbolic stigma," where AIDS is used as a vehicle for discriminatory animus. Researchers in AIDS-related stigma distinguish between instrumental stigma and symbolic stigma. While instrumental stigma derives from fear of AIDS perceived as a communicable and lethal illness, "[s]ymbolic AIDS stigma derives its force from the association of HIV with disliked groups" and "is based on the metaphorical social meanings attached to AIDS, the people who get it, and the ways in which it is transmitted."<sup>129)</sup> Professor Sealing Cheng has explained that in Korea "HIV/AIDS gains its social meanings at the intersection of discourses about gender, sexuality and nationalism" and serves as "a metaphor of foreign contamination" as well as "a metaphor for fears of women out-of-control at times of rapid social transformations."<sup>130)</sup> The HIV restrictions for foreign teachers find their basis in both of these metaphorical social meanings. On the one hand, they are motivated by a desire to expel non-Koreans from the territory in a symbolic attempt to promote a distinct ethno-racial identity and to assert national sovereignty which, within the context of Korea's blood nationalism, amounts to a unified aim. At the same time, however, the HIV restrictions attempt to exercise control over the sexuality of Korean women by branding "native speakers" with the stigma associated with AIDS in an effort to eliminate them as potential partners. The HIV restrictions for foreign teachers were constructed as a symbolic barricade against the threat of miscegenation and as an incitement for Korean women to maintain racial and sexual "purity" for the good of the nation.

The Citizens' Group was able to persuade the government to implement

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128) *Id.* (Emphasis added).

129) Gregory M. Herek, *Thinking about AIDS and Stigma: A Psychologist's Perspective*, 30 *J.L. Med. & Ethics* 594, 595 (2002).

130) Sealing Cheng, *Popularising Purity: Gender, Sexuality and Nationalism in HIV/AIDS Prevention for South Korean Youths*, 46 *Asia Pacific Viewpoint* 7, 14 (2005).

measures that it claimed would protect Koreans against the unwanted advances of lecherous foreign English teachers; however, while philandering foreign teachers were the intended targets of the measures, the Citizens' Group was also very concerned with Korean women who, in the group's opinion, had not sufficiently rebuffed the advances of foreign teachers. The Citizens' Group's campaign to require HIV tests for foreign English teachers began to gain traction in 2006 when the group contributed to a lengthy article by a tabloid newspaper entitled "Tracking blacklisted English teachers suspected of having AIDS," which discusses the "fear of AIDS and STDs from one night stands with degenerate foreign English instructors."<sup>131)</sup>

In Korea, as Cheng explains, "[b]ecause HIV/AIDS is constructed as a moral and sexual onslaught against the Korean nation, the sexuality of Korean women becomes all the more a target of censure."<sup>132)</sup> The tabloid article describes the Citizens' Group members as being "especially concerned about the high possibility of the spread of AIDS and other STDs through promiscuous sexual relations between foreign teachers and Korean women" which, the group emphasizes, "have been going on for many years now" and have resulted in a "situation [that] is much too serious for it just to be regarded as 'their own private matter.'"<sup>133)</sup> The Citizen Groups' views are in accordance with Korean nationalist discourse which holds, as Professor Shelia Jager has explained, that "[f]emale chastity and virtue [should be considered as] not so much a private issue between couples as a public one that involved the well-being of the state."<sup>134)</sup> In the article, the Citizens' Group argues that "as a matter of survival for Korean women" "the risk of AIDS infections must be reduced by strengthening the E-2 visa rules"; further, the group states that to "exclude foreign teachers from submitting HIV-negative confirmation reports amounts to nothing more than unexcused negligence toward the spread of AIDS."<sup>135)</sup> Notably, the

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131) Sin Yeon-hui, *supra* note 52.

132) Cheng, *supra* note 130, at 17.

133) Sin Yeon-hui, *supra* note 52.

134) Shelia Miyoshi Jager, *Narratives of Nation Building in Korea: A Genealogy of Patriotism* 68 (2003).

135) Sin Yeon-hui, *supra* note 52.

group recognizes that subjecting foreign teachers to mandatory HIV testing involves the abuse of human rights, but argues that to reject mandatory HIV testing because of human rights concerns would be “prioritizing the protection of foreigners’ human rights over the protection of our own countrymen.”<sup>136)</sup> A spokesman for the group puts it this way:

[What about] our own people who are exposed to AIDS, our own daughters who might be included among them: Don’t they have human rights? . . . It is a fact that we are now exposed to more open sexual cultures and more dangerous situations, and women who have met with foreigners are crying out over their anxieties regarding AIDS.<sup>137)</sup>

The “fact” of an outside world — full of “dangerous situations” and “open sexual cultures” — imposing itself upon Korea is central to Korean nationalist discourse, as is the need for Korean women to resist these advances for the good of the nation. That the Citizens’ Group subscribed to such nationalist beliefs was made especially evident by a webpage banner on the group’s website that displayed a pantheon of male Korean nationalist heroes above text in bold red lettering which stated, “The Blood of the Ancestors Protects Our Fatherland.”<sup>138)</sup> Set aside from these ancestors was a picture of “Nongae,” the famous sixteenth century Korean courtesan (*gisaeng*) who, according to legend, had killed both herself and an invading foreign general rather than submit to his sexual desires.<sup>139)</sup> That the caption beside her image read “Dear Nongae, we miss you”<sup>140)</sup> makes clear that the

136) *Id.*

137) *Id.*

138) Sin Yeon-hui, *yeongeogangsaro don beolgo yeoja mayak ‘toepyesammaebyeong’* [Low-quality foreign teachers absorbed money, women, drugs], BREAKNEWS, Jul. 24, 2006, available at [http://www.breaknews.com/new/sub\\_read.html?uid=45945&section=section3](http://www.breaknews.com/new/sub_read.html?uid=45945&section=section3)

139) See e.g. Katharine H.S. Moon, *Prostitute Bodies and Gendered States* in Elaine H. Kim & Chungmoo Choi, *Dangerous Women: Gender and Korean Nationalism* 172 (1997) (“Numerous stories contain [the] basic theme of self-sacrifice for the family’s and country’s good, but the story of Nongae best captures the totality of woman’s sacrifice – body, chastity, and life – for the love of her country.”).

140) Sin Yeon-hui, *supra* note 138.

group felt the “women who have met with foreigners” were not sufficiently resisting their advances. Jager explains that in Korean nationalist discourse “the threat to feminine chastity [is] perceived as a threat to the integrity and ‘inner’ (racial) continuity of the nation itself.”<sup>141)</sup>

The article calls the virtue of these women into question and casts them in a negative light, describing the “serious problems . . . arising” due to “promiscuous sexual relations between foreign teachers and Korean women.”<sup>142)</sup> At the same time, however, the article portrays these women as foreign English teachers’ “sexual playthings” and victims, who are “being defenselessly exposed to AIDS.”<sup>143)</sup> The formulation here is consistent with a general tendency where, as Cheng notes, “women are simultaneously blamed for causing and spreading HIV/AIDS, and markedly vulnerable to infection.”<sup>144)</sup> The formulation is also consistent with a nationalist narrative in which Korean women fraternizing with Western men are portrayed as promiscuous and yet, as Jager explains, “[b]y allowing themselves to become appropriated by the West these women [are] simultaneously perceived as being victims.”<sup>145)</sup> Indeed, as Jager has argued, the foreigners’ “whore” as “[b]oth pitied and despised” has emerged as “the symbol of the nation’s shame as well as the rallying point for national resistance.”<sup>146)</sup>

In fact, this essential formula in fact has animated the nationalist movement to subject foreign English teachers to mandatory HIV tests which, as will be recalled, originated with the Korean women pictured with foreign men in the Hongdae club photos. The Citizens’ Group began its campaign against “illegal, low quality foreign English teachers” by shaming these women as foreigners’ whores. Shortly after the photos appeared in the press a post on the group’s website told members: “This is the chance to humiliate those crazy bitches.”<sup>147)</sup> Media reports described

141) Jager, *supra* note 134, at 73.

142) Sin Yeon-hui, *supra* note 52.

143) *See Id.*

144) Cheng, *supra* note 130, at 8.

145) Jager, *supra* note 134, at 72.

146) *See Id.* (emphasis added).

147) Gu Min-hoe, ‘*hangugyeoseong biha’ oegugin gangsa chubangundong hwaksan*[Movement to expel foreign teachers who ‘denigrated Korean women’ spreads], DALIAN, Jan. 14, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=119&aid=000>

other comments such as: “Whores, are Western bastards that good?” “The English you learn from selling yourself is body language, not real English”<sup>148)</sup> and “I hate the girls more than the Westerners who were with them.”<sup>149)</sup> These women were tracked down, threatened and severely harassed. Several were interviewed and as one explained:

The Anti English Spectrum Cafe . . . with no connection to their original purpose of criticizing low quality foreigners whatsoever, branded us as whores, *yanggongju* and pimps. . . . Because of the media’s selective reporting and the netizens’ collective madness we are suffering incredible mental anguish and one person is receiving psychiatric treatment.<sup>150)</sup>

The branding of these women as “*yanggongju*” was highly significant in sparking a nationalist movement, as this label reproduced a well-known “folk devil” of Korean society capable of provoking strong feelings of righteousness.<sup>151)</sup> *Yanggongju* is a derogatory term coined during the Korean War period that is used to refer to Korean women in U.S. military camptowns (*gijichon*) who work as sex workers, have relationships with or marry U.S. soldiers. Accordingly, the term, which literally means “Western princess,” is often translated either as “foreigners’ whore” or “G.I. bride.” The *yanggongju* were seen as “contaminating agents of acceptable Korean social behavior,”<sup>152)</sup> they were “treated as trash” and considered the “lowest

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148) Shin Ji-eun, *supra* note 60.

149) Choi Sun-young, *Web Messages Draw Koreans’ Wrath*, JOONGANG DAILY, Jan. 16, 2005, available at <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2517830>

150) Kim Deok-ryeon & Park Sang-gyu, *geudeureun urireul changnyeo yanggongju pojuro moragatda* [They branded us as prostitutes, *yanggongju* and pimps/madams], OHMYNEWS, Jan. 20, 2005, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=047&aid=0000057135>

151) Sociologist Stanley Cohen introduced the term “folk devils,” describing them as “visible reminders of what we should not be.” For more information on folk devils and their role in moral panics see Stanley Cohen, *Understanding the Role of the Mass Media in Creating Moral Panics and Folk Devils* 17 (1973).

152) Felix Moos, *Some Aspects of Korean Acculturation and Value Orientation since 1950*, Center for East Asian Studies 744, 747 (1965).

of the low” in Korean society.<sup>153)</sup> As Professor Katherine Moon explains:

The fact that they have mingled flesh and blood with foreigners (*yangnom*) in a society that has been racially and culturally homogenous for thousands of years makes them pariahs and a disgrace to themselves and their people, Korean by birth but no longer in body and spirit. Neo-Confucian moralism regarding women’s chastity and strong racist conscience among Koreans have branded these women as doubly “impure.”<sup>154)</sup>

Jager has observed that because “nationalism and sexuality are mutually reinforcing categories . . . Koreans’ attitudes toward sex, and particularly the dangerous libidinous power of ‘unrestrained’ female sexuality, [has] had a direct bearing on their view of politics.”<sup>155)</sup> This has been especially true in the case of the so-called *yanggongju* because, as Jager points out, “[t]he threat of miscegenation posed by the foreign soldier challenged the very foundations of Koreans’ self-identity as a pure and pristine people whose racial integrity has remained identifiable throughout centuries.”<sup>156)</sup> The stigmatization of the Korean women in the Hongdae club photos as *yanggongju* was one of the main reasons the foreign English teacher issue became so salient and has had so much staying power.

A 1965 study of U.S. military camptowns noted the “buffer effect” these areas were supposed to have in shielding Koreans from contamination by American culture and especially how “the Yanggongju function as a protection for the ‘nice’ women of Korea.”<sup>157)</sup> From the perspective of the Korean authorities, life inside the camptown areas was said to represent “moral disorder and a marked decline of Korean morals” and the *yanggongju* who had become acculturated to it were viewed as “contaminating agents of acceptable Korean social behavior.”<sup>158)</sup> Remarkably, forty years later, the

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153) Katherine H. S. Moon, *Sex Among Allies* 3, 46 (1997).

154) *Id.* at 3.

155) Jager, *supra* note 134, at 73.

156) *Id.* at 70.

157) Moos, *supra* note 152, at 749.

158) *Id.* at 747.

women who appeared in the Hongdae club photos were viewed in the same way, and even the Hongdae area was treated as if it had become morally contaminated like a U.S. military camptown. One of the woman present at the Hongdae club where the pictures were taken complained that “a photo of my boyfriend and I has been spread as if I just met some foreigner and he tempted me to have sex.”<sup>159)</sup> The woman blamed the Anti-English Spectrum cafe for “maliciously spread[ing]” the photo.<sup>160)</sup> Another women pictured at the club dancing with a foreigner said, “It’s true that I enjoy dancing to relieve stress, but isn’t it going overboard to treat me like a whore?”<sup>161)</sup>

Even before the photo scandal, there were complaints about the “problem” in the Hongdae area of there being “many inappropriate scenes between foreigners and Korean women in clubs,”<sup>162)</sup> and in the wake of the incident the area was reported to be “transforming into a foreigner’s ‘paradise for hunting women.’”<sup>163)</sup> Awash with “improper foreign club culture,” the Hongdae area was described as “an area hot with youthful passion that has degenerated from being mixed up with foreigners” who were more interested in “one night stands than in the music.”<sup>164)</sup> As “many women [were] coming to the clubs in search of ‘blue-eyed men,’”<sup>165)</sup> “distorted rumors” were said to be spreading overseas that Hongdae was a “street of pleasures” where foreign men “could easily approach the first girls they

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159) Seo Myeong-deok, [inteobyu]’eumnan patiro maedohadani...’ [[Interview] ‘Denounced as a lewd party...’], SEGYE ILBO, Jan. 16, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=022&aid=0000075282>

160) See *Id.*

161) Shin Ji-eun, *supra* note 60.

162) Jo Ho-jin, “migungbeomjoe simgakseong allin geose boram neukkinda” (“It feels rewarding to let people know about the seriousness of USEFK crime”), OHMYNEWS, May 19, 2004, [http://www.ohmynews.com/NWS\\_Web/View/at\\_pg.aspx?CNTN\\_CD=A0000186941](http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0000186941)

163) Kim Ji-man, [gingeupyeonjangneupoha hongdaeap, geu yongmangui haebanggu] ‘wonnaitseutaendeu’ yuhok... oegugin seongsi ([Urgent On-site report, Hongdae, haven of desire] Crowded with foreigners...the temptation of ‘one-night stands’), HERALD GYEONGJE, Aug. 5, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=016&aid=0000181069>

164) See *Id.*

165) See *Id.*

saw” and “spend the night with the girl of their choice.”<sup>166)</sup>

Seeing the familiar folk devils of the *yanggongju* and the lascivious Western male succeed in inciting a nationalist movement to expel foreigners as an AIDS threat recalls the nation’s earliest attempts to impose HIV restrictions on foreigners some twenty years earlier. These efforts culminated in public demonstrations around the time of the Olympics and ultimately found legal expression in an amendment to the AIDS Prevention Act.<sup>167)</sup>

The Act was passed in November 1987, eight months after first death of a Korean from AIDS was reported.<sup>168)</sup> The HIV restrictions for foreigners that were initially contemplated for inclusion in the Act took two approaches to AIDS prevention: exclusion from the territory and expulsion. A news article from the period entitled “Korea to expel foreigners infected by the AIDS virus” reported that “the anti-AIDS law . . . will allow the Justice Ministry to refuse the entry of AIDS-causing virus carriers and to order the departure of foreign residents carrying or suffering from the dreadful disease.”<sup>169)</sup> Nevertheless, although popular support for the legislation was strong, neither of these approaches was fully realized as will be explained below.

Attempts by activists to expel foreigners were directed at U.S. military forces in Korea (“USFK”) and their relations with so-called *yanggongju* in the camptown areas.<sup>170)</sup> Activists made clear that their attempts to “expel AIDS” from Korea were part of a larger symbolic effort to “drive out the obscene American culture which holds Korean women in contempt.”<sup>171)</sup>

166) Lee Eun-ju, *oegugine somunnan hongdaeap?... ‘hwallagui geori’ sseupsseulhan waegok (Rumors about Hongdae by Foreigners? ‘Street of pleasures’ – a bitter distortion)*, SPORTS CHOSUN, Nov. 22, 2006, available at [http://sports.chosun.com/news/ntype2\\_o.htm?ut=1&name=/news/life/200611/20061123/6bw24004.htm](http://sports.chosun.com/news/ntype2_o.htm?ut=1&name=/news/life/200611/20061123/6bw24004.htm)

167) AIDS Prevention Act. Act No. 3943 of Nov. 28, 1987, as last amended by Act No. 5840 of Feb. 8, 1999. The amendment referred to here was Act No. 4077 of Dec. 31, 1988.

168) *Suspected AIDS Victim Dies*, THE KOREA TIMES, Feb. 13, 1987, at 3.

169) *Korea to expel foreigners infected by AIDS virus*, THE KOREA TIMES, Mar. 21, 1987, at 3.

170) See e.g. *oegugindo AIDS geomsabatdorok (Foreigners should also be tested for AIDS)*, DONGA ILBO, Aug. 3, 1988, at 9.

171) Kim Sun-deok, *dosaekjapji toepyeyeonghwa AIDS deung ‘jeojil migungmunhwa chubanghaja’ (Obscene magazines, degenerate movies, AIDS: ‘Let’s expel low quality American culture’)*, DONGA ILBO, Oct. 14, 1988, at 13.

With rally cries “to expel AIDS and American pornographic prostitution culture,” demonstrators declared that “the spread of AIDS is not a problem limited to some prostitutes but is a threat to the independence of the nation.”<sup>172)</sup> These activists linked “the ravaging of Korean women by U.S. forces in Korea” with the “unfair ROK-U.S. Status of Forces Agreement” (“SOFA”), which they argued allowed USFK to act with impunity and to treat Korean females like “conquered women.”<sup>173)</sup> Politicians from the Party for Peace and Democracy backed the activists’ calls for mandatory tests for U.S. soldiers and touted SOFA revisions as a means toward the “[f]ull restoration of sovereignty and national pride.”<sup>174)</sup> As they were unable to alter SOFA, however, U.S. soldiers remained out of reach of legislators.

While attempts at expulsion were aimed at American soldiers, efforts to exclude foreigners suspected of being HIV positive were focused on the mass of foreign tourists arriving for the Olympic games,<sup>175)</sup> who many feared would spread AIDS among an estimated “one million” South Korean sex-workers.<sup>176)</sup> The concern over “American pornographic prostitution culture” was extended to include foreign tourists when it was discovered that the “obscene”<sup>177)</sup> American magazine *Hustler* had printed an article entitled “Hustler’s Olympic-goer’s guide to Korean sex.”<sup>178)</sup> The magazine was cited as cause for concern by Korean organizations that demanded compulsory HIV screenings for all foreign Olympic visitors.<sup>179)</sup>

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172) *See Id.*

173) *See Id.*

174) Lee Chang-sup, *SOFA Emerges as Major Cause of Anti-Americanism*, THE KOREA TIMES, Dec. 2, 1988, at 1.

175) *Koreans Demand AIDS Tests: Groups Want Mandatory Screening of Visitors to Olympics*, THE MILWAUKEE JOURNAL, Aug. 31, 1988, at 3A.

176) Mike Breen, *Olympics Fuel a Dream More Potent Than Fear of AIDS*, GUARDIAN, Jul. 26, 1988, at 9. (reporting on “the plight of the approximately one million women, mostly from poor backgrounds” who were working as “prostitutes [and] expecting a lucrative spin-off from the forthcoming Olympics.”).

177) Kim Sun-deok, *supra* note 171.

178) Jun Kanda, *Hustler’s Olympic-goer’s Guide to Korean Sex*, HUSTLER MAGAZINE, Oct., 1988, Vol. 15, Issue 4, at 28.

179) Park Geum-ok, *seongpongyeok deo isang chameul su eopda yeoseongdanche ‘choehuii tongcheop’* (Women’s Organizations give “final warning”: we can’t take any more sexual abuse), JOONGANG ILBO, Sept. 19, 1988, at 12. *See also* *Koreans Demand AIDS Tests: Groups Want Mandatory Screening of Visitors to Olympics*, *supra* note 175 (quoting a women’s group

More radical student demonstrators saw the article as proof that “[t]he Olympic Games are just an excuse for Americans to come to Korea and pollute our country with AIDS!”;<sup>180)</sup> these groups distributed leaflets claiming that foreign Olympic visitors would spread AIDS and asked Koreans to “Oppose Olympics which oppose Korean peoples’ health with AIDS.”<sup>181)</sup>

In the lead up to the Olympic games it was clear that the government also had public health concerns about the impending influx of foreigners and was vacillating on whether to stand with the emerging position of the international community or to seek mandatory HIV screenings for the foreign Olympic visitors. A year before the start of the games, health and social affairs minister Rhee Hai-won told the Korean press, “there will be some 300,000 tourists from all over the world coming to stay in our country for three months, but as there are no measures in place to prevent AIDS infection, there are concerns that after the Olympics a domestic outbreak of AIDS will occur.”<sup>182)</sup> In May 1987, at the fortieth World Health Assembly in Geneva, Rhee told member nations that “in some countries of the world, foreign AIDS carriers or patients are the main factors behind the spread of AIDS”; Rhee urged the WHO to adopt “strong measures” and stressed that “[t]he only way to prevent foreign AIDS carriers from spreading the disease is to examine overseas travelers before they leave their countries, especially those nations with a large number of AIDS patients.”<sup>183)</sup> Rhee proposed that overseas travelers therefore be required to carry HIV/AIDS-free health certificates.<sup>184)</sup> Rhee’s proposal, however, was not accepted and member nations instead adopted a resolution “[r]eiterating that information and education on the modes of transmission . . . are still the only measures

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spokesman: “It must be compulsory for all foreign visitors during the Olympic period to show medical certificates confirming they are free from the disease.”

180) Michael Browning, *Korean Students Fuel Anti-U.S. Sentiment*, MIAMI HERALD, Sept. 30, 1988, at 4D.

181) *Students Burn Us Flag, Reagan Effigy Over Games*, STAR-NEWS, Sept. 17, 1988, at 4A.

182) *88 gwangwangaek AIDS geomsajeung uimuhwa (AIDS certificates compulsory for Olympics tourists)*, JOONGANG ILBO, Jul. 15, 1987, at 7.

183) *ROK Urges WHO To Take Stronger Steps Against AIDS*, YONHAP NEWS, May 12, 1987.

184) *ROK Proposes Active Steps Against AIDS at WHO Confab*, THE KOREA TIMES, May 7, 1987.

available that can limit the further spread of AIDS” and endorsed the WHO’s “global strategy for the prevention and control of AIDS,” which did not include mandatory screenings for international travelers.<sup>185</sup> In July 1987, the Korean press published an article reminding readers that Rhee had pushed the WHO to “screen international travellers for the containment of the disease” earlier that year in Geneva and reported that he would again push for international screenings at a regional WHO meeting of health ministers in Australia later that month.<sup>186</sup> Yet when it was reported in the international press that South Korea would require Olympic tourists to carry “AIDS-free certificates”<sup>187</sup> Rhee quickly backed away from his earlier statements<sup>188</sup> and the ROK made no demands for screenings at the WHO sponsored meeting in Australia.<sup>189</sup>

With mandatory screenings for Olympic visitors out of reach, the government focused its efforts on discouraging sex between Koreans and foreigners. A special police force was set up to stand guard at tourist hotels throughout the city in order to prevent foreign guests from entering with Korean sex workers and even pornographic magazines were removed from hotel bookstores.<sup>190</sup> Olympic hostesses acting as interpreters and assistants for foreign delegates were warned not to have sex with them or risk contracting AIDS.<sup>191</sup> On the eve of the Olympics, the city of Seoul distributed pamphlets to “all households in the city” which warned citizens to take

185) Global Strategy on the prevention and control of AIDS, Fortieth World Health Assembly, May 15, 1987; WHA40.26.

186) *Joint Int'l Step Desirable Against AIDS: Min. Rhee*, THE KOREA TIMES, Jul. 16, 1987.

187) See e.g. *Olympic Games Tourists Must be AIDS-Free, South Korea Says*, TORONTO STAR, Jul 15, 1987, at A3. See also e.g. *Olympic Tourists Must Carry AIDS-free Bill*, MANILA STANDARD, Jul. 16, 1987.

188) See e.g. *South Korea Will Not Test Tourists for AIDS*, MIAMI NEWS, Jul. 16, 1987. See also *Aids Card Not Required For Olympics*, UNITED PRESS INTERNATIONAL, Jul. 17, 1987.

189) See WHO/Australian Inter-Regional Ministerial Meeting on AIDS, World Health Organization, Jul. 21-24, 1987; SPA/INF/87.10. See also *Asia-Pacific Countries Will Not Require AIDS Test for Tourists*, THE KOREA TIMES, Jul. 24, 1987, at 3 (reporting on the outcome of WHO Asia-Pacific inter-regional ministerial meeting in Australia).

190) Peter Hartcher, *Seoul: Look But Don't Touch*, SYDNEY MORNING HERALD, Apr. 5, 1988, at 3 (quoting the Director of the Public Health Bureau: “We need to employ measures to curb the spread of the AIDS virus to Koreans from foreigners.”)

191) *Olympic AIDS warning reported*, THE PITTSBURGH PRESS, Aug. 28, 1988, at A16.

every precaution to avoid the “horrible disease,” mentioned that the first diagnosed AIDS case in Korea was an American, and stressed the high number of AIDS cases overseas.<sup>192)</sup>

With such limited means of protecting citizens from AIDS, politicians began to act. By December 1988 the AIDS Prevention Act had already been in force for over a year but no foreigners had yet been made subject to its application. Olympic tourists had been able to avoid the legislation, U.S. soldiers were still shielded by the SOFA and a political battle was underway over which group of foreigners the Act should be able to reach in their stead. The opposition party had pushed for an amendment requiring “AIDS-free certificates” for all foreign arrivals, but settled on tests for foreigners staying for longer than three months.<sup>193)</sup> Yet since it was impossible to test all classes of long-term sojourners, a specific visa category had to be selected and the government was thus presented with what a health ministry official aptly described as “an obscene problem [of trying] to sort out ‘targeted’ foreigners.”<sup>194)</sup> A similar issue would be faced by the MOJ in 2007 when it selected the E-2 visa category in an attempt to expel “illegal native speakers” who may have been among any number of visa categories teaching English in the country, including tourist visas.

In the case of the amendment to the AIDS Prevention Act, the “targeted foreigners” eventually became those on E-6 visas, the so-called “entertainers’ visa,” an awkward visa category that includes actors, fashion models, professional athletes as well as sex workers.<sup>195)</sup> Yuko Fueki (“Yu Min”), a

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192) See *Koreans Demand AIDS Tests: Groups Want Mandatory Screening of Visitors to Olympics*, *supra* note 175.

193) Nam Yu-chol, *Korean War on AIDS Faces Rough Path: Compulsory tests on foreigners expected this May*, THE KOREA TIMES, Jan. 31, 1989.

194) See *Id.*

195) The E-6 visa holders were selected as HIV test subjects by presidential decree. Art. 8(3) of the AIDS Prevention Act, as amended, states: “Among foreigners entering the Republic of Korea, any long-term sojourner prescribed by presidential decree, shall present the Minister of Health and Social Affairs with written confirmation of a HIV-negative result . . . before entering the country,” see AIDS Prevention Act, *supra* note 167. Art. 10(2) of the presidential decree lists the “examination subjects” as “those entering the country with the goal of sojourning for 91 days or more to engage in performance entertainment, show business, sports and entertainment-related businesses or activities in order to make a profit.” Decree for the implementation of the AIDS Prevention Act, Presidential Decree No. 12471 of Jun. 18, 1988, as amended by Presidential Decrees No. 12872 of Dec. 30, 1989, No. 13934 of Jul.

well-known Japanese actress working in Korean film and television, is a notable example of an E-6 visa holder who spoke out publicly about the HIV restrictions in 2003.<sup>196</sup> As mentioned, mandatory HIV testing for E-6 holders was abandoned in 2010 and foreigners are no longer subject to restrictions under this Act.<sup>197</sup> While testing was in effect, however, the procedure set up under the AIDS Prevention Act could be said to have represented the legal expression of a popular movement that sought to *exclude* foreigners with HIV from Korea. That is, the Act made clear that HIV/AIDS-free certificates were to be issued by a “medical center *in the sending country* of the visa applicant”<sup>198</sup> and was to be presented to the Ministry of Health “*before entering the country*”<sup>199</sup> and foreigners living with HIV were thereby *excluded* from Korean territory.

The procedure for E-2 visa holders, however, which takes place independent of the AIDS Prevention Act, is very different and can properly be said to represent a popular movement to *expel* foreigners from Korea. In fact, even for newly arriving “native speakers,” the requirements dictate that E-2 visa holders must be HIV tested only “*after entering the Republic of Korea*” at “hospitals *inside Korea*,” and rather than submitting the HIV/AIDS-free certificates to the Ministry of Health, E-2 visa holders are required to submit them to the Ministry of Justice when they register for alien residency, which occurs any time up to three months after entry.<sup>200</sup>

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21, 1993, and 14446 of Dec. 23, 1994. For information on foreign sex workers on E-6 visas see generally Sealing Cheng, *Interrogating the Absence of HIV/AIDS Interventions for Migrant Sex Workers in South Korea*, 7 *Health & Hum. Rts* 193 (2004).

196) Yeon Ye-bu, Yu M Min “*hangukseo yeonyehwaldong hagi himdeune*” (Yu Min: “*Being an entertainer in Korea is hard*”), DONGA ILBO, Mar. 6, 2003, available at [http://weekly.donga.com/docs/magazine/weekly/2003/02/27/200302270500019/200302270500019\\_1.html](http://weekly.donga.com/docs/magazine/weekly/2003/02/27/200302270500019/200302270500019_1.html)

197) Shin Sung-sik, *HIV rule to be lifted for E-6 visa holders*, JOONGANG DAILY, Oct. 26, 2010, *supra* note 120.

198) AIDS Prevention Act, art. 10(3), *supra* note 167 (Emphasis added).

199) AIDS Prevention Act, art. 8(3), *supra* note 167 (Emphasis added).

200) Woneomin hoehwajido (E-2) sajeungjedo gaeseon annae, beommubu [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, *supra* note 4. The HIV tests for the Ministry of Justice were originally required by way of a form included in the policy memo. After a year and a half in effect, this policy memo became an attachment to an immigration control act enforcement regulation in April 2009. See Cchuripgukgwallibeop sihaenggyuchik [Enforcement Rules on the Immigration Control Act], Ministry of Justice Decree art. 76 paragraph 1, attachment 5, Apr. 3,

The process (which arguably is in contravention of the AIDS Prevention Act) works in a somewhat misleading manner with what appears to be questionnaire form that is entitled “E-2 Applicant’s Health Statement.”<sup>201)</sup> One of the questions asks: “Are OR were you HIV (AIDS) positive?” and provides “Yes, No” tick boxes for completion.<sup>202)</sup> Another question asks about illegal drug use. E-2 visa applicants receive their visas through Korean consulates overseas after disclosing their status on these forms and are then able to travel to Korea. Upon arrival in Korea these questionnaire forms take on a compulsory aspect since medical test results for HIV and drugs from designated hospitals in Korea must be submitted when registering alien residency with the MOJ at immigration offices.<sup>203)</sup> The bottom of the “E-2 Applicant’s Health Statement” form provides the following notice:

You MUST make Alien Registration at your District Immigration Office (OR Branch Office) within 90 days after your arrival in Korea. And, when you register, You MUST submit your Health Certificate obtained from the hospital which has been designated by the Korean Government.<sup>204)</sup>

While HIV restrictions for foreigners under the AIDS Prevention Act have been eliminated, the remaining restrictions for foreign teachers on E-2 visas demonstrate that the legacy of the ROK’s earliest attempts to impose HIV restrictions on foreigners is still very much alive. In fact, as explained above, the restrictions for foreign teachers go further than those under the AIDS Prevention Act and most resemble failed attempts to expel U.S. soldiers with mandatory HIV testing. There are several notable resemblances between the movement to impose the first HIV restrictions on foreigners and the movement that led to the final remaining restrictions. A newspaper article from the earlier period, which reflected on the group of individuals

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2009, as amended, (S. Kor) *supra* note 5 (Emphasis added).

201) *See Id*

202) *See Id.*

203) *See Id.*

204) *See Id.*

who had called for the first HIV restrictions on foreigners, offers the following noteworthy assessment:

They consist of some people in the local media, civil organizations and lawmakers who have shown quick tempers and intensified their anti-AIDS campaigns, particularly, just ahead of the Seoul Olympics last September. In fact, their voices filled with fear were loud, but lacked rational understanding of the nature of AIDS and its global aspect. Ten civil organizations held a joint anti-AIDS . . . rally-style conference [and] sharply criticized the government for not enacting a law requiring mandatory HIV anti-body tests on foreigners who they said bring the unwanted disease into the country. As a guest speaker, Park Young-sook, vice president of the Party for Peace and Democracy, promised to propose a bill which would impose mandatory AIDS tests on foreigners. And she kept her promise.<sup>205)</sup>

There are clearly similarities between the two attempts to impose mandatory HIV tests on foreigners despite the fact that they occurred twenty years apart. A remarkable contrast, however, is that while it took years of political wrangling and legislative action before the first foreigners were finally screened for HIV under the AIDS Prevention Act, the in-country test and deportation policy for foreign teachers on E-2 visas was implemented in just two months on the authority of a “policy memo” without even a law being passed. A bill that sought to establish a “legal basis”<sup>206)</sup> for the HIV and drug tests for the foreign teachers was introduced just a week after news of Christopher Paul Neil’s arrest but it failed to reach a vote before the end of the 2007 legislative session. A bill with the identical language was reintroduced in 2008. A spokesman for a National Assembly representative overseeing the legislation explained that the HIV and drug tests were intended “to ensure the safety of children taught by foreign English teachers,” adding that while “it’s good that the government is

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205) Nam Yu-chul, *AIDS Test for Foreigners Hits Snag Over who should be tested*, THE KOREA TIMES, Apr. 5, 1989.

206) See Churipgukgwallibeop Ilbugaejeongan, [Partial Revisions of the Immigration Control Act], Act. No.7642 Oct. 24, 2007.

becoming more tolerant of foreigners . . . we think that the government should prioritize the safety of our citizens."<sup>207</sup> The bill reads:

Currently, the number of foreigners working in Korea is increasing, however, a good many of them have previous convictions for drugs and sexual crimes or carry infectious diseases. As we require measures to deal with the threat they pose to our society's public order and our people's health, we herein prepare the legal basis to require that foreigners applying for an employment visa submit . . . a health certificate.<sup>208</sup>

Like the first bill, however, this bill never reached a vote as it became apparent to lawmakers that a proper "legal basis" was unnecessary since the MOJ was able to implement the HIV and drug testing on the basis of its "policy memo" alone. Challenges raised as to the ability of an immigration "policy memo," created without legislative oversight, to require such severe restrictions on the rights of foreign residents were met with an explanation from the MOJ declaring that the "policy memo has enough legal authority to implement the visa requirement as it was created by the Justice Ministry on the government's behalf."<sup>209</sup> In April 2009, the MOJ's October 2007 "policy memo" was finally included as an attachment to administrative immigration regulations and thus (after being in effect for a year and a half) achieved some semblance of legality.<sup>210</sup> Although, as foreigners residing in the ROK are under the protection of the Korean Constitution, proper statutory authority (in the form of a National Assembly Act) would very likely be required since mandatory in-country

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207) Adam Walsh & Matthew Lamers, *Korea's new rules on HIV cause confusion*, THE KOREA HERALD, Mar. 29, 2010, available at <http://www.koreaherald.com/lifestyle/Detail.jsp?newsMLId=20100112000036>

208) See Churipgukgwallibeop Ilbugaejeongan, [Partial Revisions of the Immigration Control Act], Act. No.3356 Dec. 30, 2008.

209) Kim Mi-ju, *Visa Rules for Foreign English Teachers Challenged*, JOONGANG DAILY, Feb. 5, 2009, available at <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2900646>

210) See Churipgukgwallibeop sihaenggyuchik [Enforcement Rules on the Immigration Control Act], Ministry of Justice Decree art. 76 paragraph 1, attachment 5, Apr. 3, 2009, as amended, *supra* note 5.

HIV and drug tests involve severe restrictions on basic human rights,<sup>211)</sup> moreover, the forgoing assumes, of course, that such a statute would be able to overcome the Korean Constitution's prohibition against discrimination, which seems strongly unlikely.<sup>212)</sup> Strikingly, in the case of the HIV re-tests demanded by the Ministry of Education for foreign teachers working in public schools, there are no legal regulations at all; foreign teachers are simply required by various government education offices to present medical certificates from designated Korean hospitals demonstrating HIV negative status before they are allowed to renew their one year employment contracts.<sup>213)</sup>

Leaving aside the obvious concerns over human rights abuses for a moment, it is worth remarking on how the successful implementation of E-2 visa requirements has provided clear confirmation of the government's jurisdiction to prescribe and enforce HIV restrictions for foreigners on its territory. As such, for nationalists they likely represent a significant victory for the ROK's exercise of sovereign authority over foreigners in Korea. In the late 1980s, at a time when it was asserted that US soldiers were "bringing AIDS and drug abuse"<sup>214)</sup> to Korea, the popular movement to impose mandatory HIV tests on USFK in order to "expel AIDS" and "low quality

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211) See art. 37(2), 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (Jul. 17, 1948), official consolidated translation with the latest amendment made on Oct. 29, 1987, available at <http://www.unhcr.org/refworld/docid/3ae6b4dd14.html>

212) See *Id.* Art. 11 of the Korean Constitution. *Id.* In a case dealing with the "meaning of the principle of equality" for foreigners under Art. 11 of the Korean Constitution, the Korean Constitutional Court explained that: "Everyone is entitled to the right to claim equal treatment, and the right to equality is the most basic of all basic rights. The constitutional principle of equality, however, does not require absolute equality negating any form of differential treatment whatsoever. Rather, it means relative equality forbidding discrimination in legislating and executing laws without reasonable basis. Therefore, differentiation or inequality with reasonable basis is not against the principle of equality. Whether a discrimination is grounded on a reasonable basis or not depends on whether such discrimination is a necessary and adequate means to achieve a legitimate legislative purpose, while upholding the constitutional principle for respect for human dignity." Decision of Hunbeob jaepanso[Const. Ct.], 99Hun-ma494, Nov. 29, 2001(S. Kor.). (internal citations removed).

213) Wagner, *supra* note 5.

214) Laurence Jolidan et al., *Olympics Unveil USA, Korea Spat*, USA TODAY, Sept. 30, 1988, at 1.

American culture”<sup>215)</sup> failed because “U.S soldiers under the mandate of the Status of Forces Agreement (SOFA) [were] out of the reach” of legislative efforts.<sup>216)</sup>

The popular movement that sprung up on the Internet in 2005, which would coalesce into the Citizens’ Group, similarly called for the expulsion of “low-quality foreign teachers [and] vulgar foreign culture”<sup>217)</sup> and would eventually connect foreign teachers to AIDS and drugs. Foreign teachers, however, are unlike foreign soldiers in that they are without any SOFA-like extraterritorial protections. Thus, in choosing to focus its efforts on foreign teachers, the Citizens’ Group’s movement was able to accomplish what earlier groups had failed to achieve: mandatory HIV tests and deportations targeted at a group of non-Korean men (the majority of whom were American) residing in Korea who were seen as acting with impunity and treating Korean women with contempt. There is little doubt the members of the group view such an accomplishment as significant progress<sup>218)</sup> in the “restoration of sovereignty and national pride.”<sup>219)</sup>

At the height of the Hongdae photo scandal, members of the Anti-English Spectrum cafe suggested forming an offline “Yankee counter strike force” that would target not only the “foreigners who threw the promiscuous party” but would also urge members to “[i]mmediately punish U.S. soldiers discovered in the Sinchon area who act disrespectfully toward Koreans.”<sup>220)</sup> These calls to “take direct action” and strike at the “Yankee

215) Kim Sun-deok, *supra* note 171.

216) Nam Yu-Chol, *supra* note 193.

217) From an Anti-English Spectrum cafe banner posted by “Peoseukindol,” *supra* note 61.

218) For a description of their efforts to maintain the HIV tests, see *bon kkapuei baljachwiwa irukhaeon eopjeogeul rallyeodeurimnida* (Here are our cafe’s achievements and past footprints (for the benefit of first-time visitors)), Anti English Spectrum Cafe, *supra* note 76 (“To maintain the native speaking instructor AIDS test, our group urged media who form public opinion, the MOJ, public corporations litigating for the government, the Regulatory Reform Committee affiliated with the prime ministers office, etc. that strong measures were required.”).

219) Lee Chang-sup, *supra* note 174.

220) Lee Chan-ho, ‘yangki pongnyeok tagyeokdae (?)’, *bunnohan netijeun pongnyeok daeeunghal deut* (‘Yankee counter strike force(?)’, angry netizens seem to counter with violence), NoCUT NEWS, Jan. 15, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=079&aid=0000022018>

bastards"<sup>221)</sup> were severe enough to attract the attention of the U.S. Embassy, which took note of "a strong reaction in the form of web postings threatening attacks in the vicinity of Hongik University and the Sinchon area against Americans and other foreigners who speak English" and issued a warning of "potential threats" in those areas.<sup>222)</sup> Such warnings by the U.S. Embassy had in the past referred to protests against U.S. military forces, but this warning was unique in that it extended not only to U.S. soldiers and Americans but also to "other foreigners who speak English." Through the efforts of the Citizens' Group this generalized animus toward such English speaking foreigners would become focused on so-called "native speaker" English teachers (*woneomin*) and would eventually result in specific sanctions against E-2 visa holders in the form of mandatory in-country HIV and drug tests.

#### IV. Blood Nationalism and Korean Identity

Professor Hyung-il Pai, a noted expert on Korean historiography, has explained that "race or blood" is "the pedestal on which the nation was built" as well as "the most critical factor in Korean identity formation."<sup>223)</sup> Pai has further explained that the "pure race" (*tanil minjok*) concept of "racial unity and continuity," which "forms the core of nationalist historiography," maintains that "all Koreans have successfully maintained their 'Korean-ness' by fighting off foreign invaders since the formation of the nation in prehistoric times."<sup>224)</sup> That groups such as the Citizens' Group should emerge to promote slogans like "The Blood of the Ancestors Protects Our Fatherland" and pledge to "expel" problematic foreigners is not particularly surprising given the ROK's legacy of blood nationalism. That the targeted foreigners should be English teachers is also explainable.

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221) Gu Min-hoe, *supra* note 147.

222) Joo Sang-min, *U.S. Embassy Warns Americans of Threats Near Colleges*, THE KOREA HERALD, Jan. 24, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=ec&sid1=108&oid=044&aid=0000048821>

223) Hyung Il Pai, *Constructing 'Korean' Origins: A Critical Review of Archaeology, Historiography, and Racial Myth in Korean State-formation Theories* 57 (2000).

224) *Id.* at 256 (Emphasis added).

As noted in the previous section, nationalist groups such as the Citizens' Group likely perceive a foreign kinship between English teachers, many of whom are American, and historically disliked U.S. soldiers, and see both groups as posing similar threats to racial and cultural identity especially through their relations with Korean women. Moreover, because of this perceived kinship and the lack of extraterritorial protections such as the SOFA, foreign teachers may appear as attractive targets for blood nationalists looking to impose sanctions on foreigners for past wrongs against Koreans under the theory of collective responsibility.

International law scholar Hans Kelsen has explained that "collective responsibility" exists where "individuals are responsible for a delict, not because they have committed it but because they belong to the group — family, tribe or state — to which the delinquent belongs."<sup>225</sup> While in domestic legal systems "individual responsibility" is the rule and there are only exceptional cases where collective responsibility applies (e.g. vicarious liability), at international law the principle plays a much greater role.<sup>226</sup> Kelsen locates the origins of the collective responsibility principle in the "earliest socially organized sanction" of "blood revenge" which involves the reaction of "a community based on blood relationship" to "an injury considered unjustified *and due to a member of a foreign group*."<sup>227</sup> Kelsen sees the principle as a "manifestation of collectivistic thinking and feeling"<sup>228</sup> and explains that for those in such blood-based community relationships:

[I]t is a matter of course that each member of the group is responsible for every other member. Just as a heroic deed of one member of the group calls forth satisfaction and pride from all others, so it is also deemed just that a delict of one member of [a foreign] group should be avenged on all its members. Collective responsibility is a typical element of the state of justice in which the principle of self-help still subsists. Blood revenge, that typical form

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225) HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW §I.A.6 (3d ed. 1959).

226) *See e.g.* ANTONIO CASSESE, INTERNATIONAL LAW §1.4 (2005).

227) HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 233 (1957) (Emphasis added).

228) KELSEN, *supra* note 225.

of self-help, is by no means directed against only the person who has committed the deed to be avenged, but against his whole family. It is the reaction of one group against another group.<sup>229)</sup>

The principle of collective responsibility appears to be at work with blood nationalist groups such as the Citizens' Group.<sup>230)</sup> The recourse to "self-help" remedies for perceived injustices has also been evident in calls for "direct action" to "punish U.S. soldiers" with a "Yankee counter strike force" as well as in the organized stakeouts of foreign English teachers by "tracking and watching" them. The Citizens' Group appears to see English-speaking foreign teachers and U.S. soldiers as sharing collective responsibility for perceived wrongs committed against Koreans and for contaminating areas such as Hongdae and nearby Sinchon. This is illustrated by the fact that two years after their formation, in early 2007, the group, which ostensibly is only concerned with promoting "upright English education," took credit for and celebrated its contributions to a news report which they claimed had helped convince USFK to declare the Hongdae area off limits for U.S. soldiers.<sup>231)</sup> Interestingly, the group's leader has mentioned that he developed his ability to spot problematic foreigners as a child growing up near Osan, the home of an American air base, where he encountered American GIs and learned to pick out the good guys from the bad guys."<sup>232)</sup>

A second reason for targeting foreign English teachers perhaps has to do with the symbolic value of English itself. A central feature of contemporary South Korean globalization, perhaps the central feature, has been the

229) KELSEN, *supra* note 227 at 249-50.

230) In this regard blood nationalist groups in South Korea may resemble their North Korean counterparts. Professor B.R. Myers has explained that in North Korea Americans are considered the "eternal race enemy" of the Korean people and there are frequently calls for a "blood reckoning" against them in order to extract "vengeance for America's historical crimes against the race." See B.R. MYERS, *THE CLEANEST RACE: HOW THE NORTH KOREANS SEE THEMSELVES AND WHY IT MATTERS* 150-151, 166 (2010).

231) See *bon kkapeui baljachwiwa irukhaeon eopjeogeul rallyeodeurimnida* (Here are our cafe's achievements and past footprints (for the benefit of first-time visitors)), Anti English Spectrum Cafe, *supra* note 76. For an English translation of the media contributions claimed by the group see *The Achievements of Anti-English Spectrum*, Gusts of Popular Feeling, <http://populargusts.blogspot.com/2009/09/achievements-of-anti-english-spectrum.html>

232) Glionna, *supra* note 81.

Republic's drive toward globalization through English language study. Since at least 1994 when President Kim Young Sam introduced his government's Korean-styled globalization policy (*segyehtwa*) there has been an emphasis on a critical link between English and success on the world stage that has steadily increased over the course of successive administrations.<sup>233)</sup> Indeed, on taking office in 2008 South Korea's current president declared that "English is a highly necessary tool for living in today's globalized world" and even warned Koreans that they would "be eligible for different jobs and receive different treatment based on their ability to use English."<sup>234)</sup>

By the mid-1990s, the English language boom was already beginning to attract large numbers of foreign English teachers, many of whom were American. Yet despite claims that "most foreign instructors [were] unqualified"<sup>235)</sup> and occasional arrests for drugs, the media and politicians generally paid little attention to foreign English teachers. This relative lack of interest was likely due to the fact that while much attention was paid to English language study, the purportedly essential role of so-called "native speakers" had yet to gain prominence. This would change in the coming years as "the South Korean government adopted the ideologies of English as a global language *and the native English speaker as the ideal language teacher.*"<sup>236)</sup>

By the time President Lee was in office it would be noted that all of "South Korea plays an active role in the circulation of the ideology of the native English speaker as the ideal teacher, since both the government and its citizens actively subscribe and contribute to the further circulation of the

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233) Doobo Shim & Joseph Sung-Yul Park, *The Language Politics of 'English Fever' in South Korea*, KOREA JRNAL. 136, 144 (Summer 2008) (discussing the "highly specific connection between globalization, modernization, and English [where] participation on the global stage [is] imagined as necessarily mediated by the global language of English").

234) Lee Myung-bak *Urges Participation in English-language Education Initiatives*, THE HANKYOREH, Feb. 1, 2008, available at [http://english.hani.co.kr/arti/english\\_edition/e\\_national/267073.html](http://english.hani.co.kr/arti/english_edition/e_national/267073.html)

235) Jo Chan-je, *gwaoe yeolpung (3) sesalbagiedo "eyeongeogyoyuk" (Private study craze (3), Even 3 year-olds have "English education")*, KYUNGHYANG SINMUN, Feb. 2, 1994, at 2.

236) Mihyon Jeon, *Globalization and Native English Speakers in English Programme in Korea (EPIK)*, 22 LANGUAGE, CULTURE AND CURRICULUM 231, 240 (2009) (Emphasis added).

ideology.”<sup>237)</sup> With the active approval of Korean citizens, the government embraced the “native speaker” model and set out to become “the best English-speaking country in Asia within a decade”<sup>238)</sup> by focusing on educating citizens who would be “comfortable chatting with a foreigner in English.”<sup>239)</sup> In fact, President Lee has famously been quoted as saying that his “biggest challenge in education” was supplying the nation with English native-speaking teachers, and that the needs of “demanding” Korean parents had compelled him “to import thousands of foreign teachers”<sup>240)</sup> since these parents were “insisting that Korean children have to learn English in elementary school.”<sup>241)</sup> The government has frequently used promises of placing English “native speakers in every school” as a means to inspire confidence in citizens, and government-placed “native speakers” have been promoted as the hallmark of a first-rate global education.<sup>242)</sup>

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237) *Id.* at 237.

238) Kang Hyun-kyung, *Korea Dreams of Becoming Asia's No.1 in English-Speaking*, THE KOREA TIMES, Jan. 30, 2008, available at [http://www.koreatimes.co.kr/www/news/nation/nation\\_view.asp?newsIdx=18200&categoryCode=116](http://www.koreatimes.co.kr/www/news/nation/nation_view.asp?newsIdx=18200&categoryCode=116) (quoting presidential transition team Chairwoman Lee Kyung-sook).

239) Brian Lee, *Korea's Endless Grapple with English*, THE JOONGANG DAILY, Feb. 14, 2008, available at <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2886164> (quoting aide to Lee Ju-ho, presidential secretary for education).

240) President Lee is quoted by U.S. President Barack Obama *see Remarks by the President on the "Educate to Innovate" Campaign and Science Teaching and Mentoring Awards*, Office of the Secretary, The White House, Jan. 6, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-educate-innovate-campaign-and-science-teaching-and-mentoring-awar>

241) *Remarks by the President on the "Educate to Innovate" Campaign*, South Court Auditorium, Dwight D. Eisenhower Executive Office Building, Office of the Press Secretary, The White House, Nov. 23, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-education-innovate-campaign>

242) *See e.g. seoul modeun cho · chunghakgyoe woneomin baechi (Native Speakers placed in all Seoul elementary and middle schools)*, YONHAP NEWS, Jun. 29, 2008, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=001&aid=0002151169> *See also e.g. Bucheon-si " modeun hakgyoe woneomin gyosa baechi " (In Bucheon, "Native speakers placed in all schools")*, YONHAP NEWS, Nov. 26, 2008, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=001&aid=0002381855> *See also e.g. seoul cho · jung · gogyo yeongeongyoyuk geotteoke bakkwina (How English education in Seoul's elementary, middle and high schools is changing)*, JOONGANG ILBO, Jan. 22, 2009, available at [http://live.joinsmsn.com/news/article/article.asp?total\\_id=3466837](http://live.joinsmsn.com/news/article/article.asp?total_id=3466837) (quoting the Seoul Metropolitan Office of Education: “by 2012 all [Seoul] schools will have native speaker conversation teachers.”).

At the beginning of the English language boom few could have anticipated how significant, and controversial, the role of “native speakers” would become. One exception was National Assembly Representative Kim Han-gil. In 1997, Rep. Kim was inspired to write an opinion article about foreign English teachers after being upset by the fact that a “Korean-American woman known for appearing as a nude model in the American magazine Playboy [had] returned to her homeland [and] received a warm reception.”<sup>243)</sup> After an abrupt (and prescient) segue from scandalous photos of a Korean woman to problematic foreign English teachers, Rep. Kim noted that “[t]he number of white English instructors is increasing because ‘listening and speaking’ has come into fashion when studying English.”<sup>244)</sup> Rep. Kim estimated that some 40,000 to 80,000 foreigners were teaching English illegally on tourist visas and expressed grave concerns about the moral character of these “white good-for-nothings” who were “flocking to Korea” to “make a fortune teaching private lessons.”<sup>245)</sup> Rep. Kim specifically noted that “the reason white men really like Korea is to chase after Korean women” and that “*they do not have to take AIDS or drug tests.*”<sup>246)</sup> Rep. Kim expressed concern over the role these foreign teachers could play in contaminating Korean society, explaining that while there were “lots of workers from Southeast Asia [in Korea], they have a lot less impact upon our society.”<sup>247)</sup> Rep. Kim concluded his article by stressing that:

the seriousness of the problem with unqualified white foreign English teachers is that they are personally infiltrating each home of our society’s middle class on the pretext of English conversation study. The thought that the low-quality culture of English speaking countries is penetrating the hearths [of our homes] is very serious. This is a big deal.<sup>248)</sup>

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243) Kim Han-gil, *nudeumodelgwa baeginnamjadeul (Nude model and white men)*, KOOKMIN ILBO, May 21, 1997, at 15.

244) *See Id.*

245) *See Id.*

246) *See Id.* (Emphasis added).

247) *See Id.*

248) Lee Gwang-hyeong, *mujagyeyoeyongeogangsa 7manmyeong* (Rep. Kim Han-gil reveals there are 70,000 unqualified English instructors), KOOKMIN ILBO, Jul. 10, 1997, at 30.

Rep. Kim would again try to alert the public of the “serious problem” of foreign English teachers, and even asserted that there were “unqualified foreign instructors . . . teaching children” and “elementary school students [who] are *defenseless before things like AIDS*.”<sup>249)</sup> Nevertheless, the Korean public remained largely unmoved by his calls for alarm. Ten years later, however, the MOJ would declare that “[s]erious social outcry” over foreign English teachers had forced it to rush HIV and drug tests into place in order “to ease the anxiety of the citizens.”<sup>250)</sup> The reason for this is that substantial changes had occurred in Korean society in the ensuing decade concerning both the symbolic value of English and the emerging, integral role of so-called “native speakers.”

During that time, not only had the number of foreign teachers working in private language institutes (*hagwons*) increased, but by 2007 moves were afoot to expose every student in Korea to foreign teachers by placing a “native speaker” in every public school. Three months before the MOJ crackdown, a tipping point was reached as Jeju Province was touted as the “very first in the country” to place “native speaking teachers” in all of its schools, beginning a trend which would spread throughout the country.<sup>251)</sup>

An important anthropological study on English education in Korea has found, profoundly, that “English tweaked the bounds of what it means to be a national citizen (i.e., a South Korean) in a global era”<sup>252)</sup> and has suggested that “English education . . . is a privileged site for examining the ways in which South Korea and South Koreans are living globalization.”<sup>253)</sup> This is clearly the case and much can also be learned from examining the how Koreans are “living globalization” alongside their foreign English educators.

249) *Id.* (Emphasis added).

250) Woneomin Hoehwajido (E-2) Sajeungjedo Gaeseon Annae [Information on the improvement of the native speaker conversation instructor (E-2) system], Ministry of Justice, Nov. 2007, *supra* note 4.

251) Jeong Jae-hwan, *Jeju, jeonguk choecho woneomin gyosa 100% baechi (Jeju, the first in the country with 100% native speaking teacher placement)*, NEWSIS, Aug. 30, 2007, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=003&aid=0000546340>

252) So Jin Park and Nancy Abelmann, *Class and Cosmopolitan Striving: Mothers' Management of English Education in South Korea*, 77 ANTHROPOLOGICAL QUARTERLY 645, 666 (2004).

253) *See Id.*

A comment left on one of the most popular blogs in Korea's expat community gives some indication of how intimately the mandatory in-country HIV and drug testing issue has affected some foreign English teachers:

I don't have to go into work until late as I have to do that stupid AIDS test and drugs test, my Korean co-workers just have to take the basic medical test. I think it is rather offensive that this country is going that way. I've been granted permanent residency in this country and I certainly don't have AIDS or a drug habit. . . . The only way I'd have AIDS is if my Korean wife was committing adultery (or a drug addict) and caught it off someone else. My wife and I were together a long time before we got married, and we're both loyal to each other, we've been happily married for quite a long time.<sup>254)</sup>

Similar perceptions of stigmatization are not uncommon and, as the above comment indicates, they include not only the foreigners who are subject to the discriminatory requirements but also the Koreans who share significant ties with them.

In 2005, members of the Citizens' Group collaborated with the popular SBS television program, "I Want to Know About That," to produce a particularly inflammatory report entitled: "Is Korea their Paradise? Report on the Real Conditions of Blond-haired, Blue-eyed Teachers."<sup>255)</sup> Although non-Korean teachers were the ostensible focus of the program, the shooting style blended dramatizations of foreigners as sexual predators with real life footage showing inter-racial couples walking arm-in-arm in the streets of Seoul and gave the impression that both were illicit. Over a thousand comments were left at the SBS program's website, saying things like "I'm frightened to send my children to an English academy" and "We must quickly deport all those low-quality foreign English teachers who try to

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254) Comment by "Keith" on *Departure of native English speakers sparks concerns: Dong-A Ilbo*, The Marmot's Hole, <http://www.rjkoehler.com/2012/03/20/departure-of-native-english-speakers-sparks-concerns-dong-a-ilbo/#comment-458851>

255) Kim Jae-eun, *supra* note 82.

pick up girls near Hongik University.”<sup>256</sup>) In the midst of the public outcry over the program a Korean woman with a foreign husband remarked, “Since the show aired on Saturday, I’ve been afraid to go out . . . It’s absolute nonsense that I should now look like a whore just because I live with a foreigner.”<sup>257</sup>) Yet while clearly offensive, sentiments against miscegenation have a logic of their own within the tradition of Korean blood nationalism. As Jager explains:

Given [the blood nationalist’s] highly racist reading of Korean history, it is not surprising to find that miscegenation was perceived as a significant threat to identity [and] associated with a whole host of related themes about the defense of the social body . . . The ability of the foreign male to penetrate (literally) the inner and inviolable sanctum of Korean women and to establish conjugal alliances with them was perceived as a threat not only to the viability of the family, but as an act that undermined the fundamental cohesion and identity of the Korean nation. Thus we find that those women who formed marriage alliances across racial lines were popularly perceived as being women of ‘loose’ morals: prostitutes, bar hostesses, or entertainers.<sup>258</sup>)

In the years since the SBS program aired in 2005, there has been a great deal of discussion in the media and at the government level about the need

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256) *See Id.*

257) *See Id.*

258) Jager, *supra* note 134, at 71-72. *See also, generally* Choe Sang-hun, South Koreans Struggle With Race, N.Y. TIMES, Nov. 1, 2009, *available at* <http://www.nytimes.com/2009/11/02/world/asia/02race.html?pagewanted=all> (describing “racial and sexist slurs” being hurled at interracial couples as situation “familiar . . . to many Korean women who have dated or even . . . simply traveled in the company of a foreign man.”). Notably, a report from a decade earlier describes a similar situation. *See* Nicholas Kristoff, *Seoul Journal: Casanovas, Beware! It’s Risky for Non-Koreans*, N.Y. TIMES, Feb. 2, 1998, *available at* <http://www.nytimes.com/1998/02/02/world/seoul-journal-casanovas-beware-it-s-risky-for-non-koreans.html> (reporting that “[a] Korean woman who holds hands with a Western man risks being occasionally harangued, called a ‘whore,’ or even slapped or spat upon” and noting “profound anxieties here about romances between Korean women and foreign men [which] are becoming more visible because the number of young Americans living in South Korea is growing.”).

for Korea to embrace multiculturalism as the number of foreigners living in Korea increases.<sup>259)</sup> Despite this, the sentiments against miscegenation described above linger, as seen in a recent news report by MBC entitled “*The Shocking Truth About Relationships With Foreigners*,” which depicted foreigners — western males in particular — as predators who steal from, infect with HIV, or impregnate and abandon Korean women, who are portrayed as either helpless victims or as licentious and deluded.<sup>260)</sup> The response to the video by foreigners living in Korea (especially those married to or dating Koreans) was immediate. Offended by being portrayed as predators or victims, many of the more than 8,500 people who became members of a Facebook page protesting the video uploaded photos of themselves as part of a happy multiethnic couple or family,<sup>261)</sup> and a handful held a “silent protest” outside of MBC’s headquarters.<sup>262)</sup> The deputy chief of the program, however, reportedly did not understand their anger stating that “[w]e all think the show is okay,” and added that perhaps the complaints by foreigners had arisen “because they have a guilty conscience.”<sup>263)</sup> The producer of the program also found no problems with the program, explaining the report was only intended to portray “Korean women who are out of their sense and get involved in these kinds of affairs”; and arguing that, “[w]e need to be awakened and try to change

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259) See e.g. Justice Minister Kim Kyung-han, *Korea Breaking Down Walls of Discrimination*, KOREA TIMES, Feb. 24, 2009 (“We will create an open society for all. This is one of the 100 policy goals of the Lee Myung-bak government . . . to create a mature multicultural society that respects the human rights of foreigners.”).

260) Noh Jae-hyun, *Being cool about international love*, JOONGANG DAILY, June 09, 2012, available at <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2954153> See also MBC *sesangbogi sisigakgak: chunggyeok siltaebogo, oegugingwa iseonggyoje* (*Seeing the World Moment by Moment: The Shocking truth about relationships with foreigners*), available at <http://www.youtube.com/watch?v=nsNHYYrvMrk&>

261) 253. See *Action against MBC Korea and their racist, biased “reporting,”* Facebook, May 2012, <https://www.facebook.com/groups/actionagainstmbc/> As of June 13, 2012, the group had 8,606 members.

262) 254. Kim Hui-jin, “*hangugingwa sagwineun urideul, beomjoeja animnida*” (“*We who date Koreans are not criminals*”), June 5, 2012, OHMYNEWS, [http://www.ohmynews.com/NWS\\_Web/view/at\\_pg.aspx?CNTN\\_CD=A0001740174&PAGE\\_CD=22](http://www.ohmynews.com/NWS_Web/view/at_pg.aspx?CNTN_CD=A0001740174&PAGE_CD=22)

263) Sung So-young, *The actual reality of interracial relationships*, JOONGANG DAILY, June 13, 2012, available at <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2954295>

this culture."<sup>264</sup>) In an opinion column, a Canadian living in Korea wrote, "I write this article not for myself, but for my children. I don't want someone coming up to my daughter or son in school and asking 'Does your daddy have AIDS? Or does he sleep with Korean women? Or was your mommy a prostitute?'"<sup>265</sup>)

The legacy of blood nationalism in the ROK is a pressing issue, and compulsory HIV and drugs tests for foreigners present a contemporary example of its discriminatory effects. Given the presence of this legacy, a certain amount of xenophobic sentiment is foreseeable. It is unexpected, however, that the ROK government should be so willing to appease and support xenophobia by instituting discriminatory requirements rather than working against it, especially considering the ROK's repeated pledges to eliminate discrimination against foreign nationals. Discrimination based on "foreign nationality" has been identified by the government as a "major concern" and is described as one of the "main types of discrimination in society."<sup>266</sup>) In seeking to address this concern, the ROK has confirmed that "[t]he principle of respect for human rights and the principle of equality of individuals before the law, as enshrined in the Constitution, also apply to foreigners."<sup>267</sup>) The ROK has backed up these protections by enacting laws that clearly and unambiguously prohibit discrimination against foreigners in the employment context and has guaranteed that "all labour-related laws, including the Labour Standard Act, [apply] to foreign workers and native workers equally."<sup>268</sup>) Finally, in addition to protections under the Korean Constitution's equal protection clause, which the ROK has emphasized "also appl[ies] to foreigners," article 6(2) of the Constitution

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264) 255. Evan Ramstad, *MBC Producer: What's the fuss about?*, KOREA REALTIME, June 7, 2012, <http://blogs.wsj.com/korearealtime/2012/06/07/mbc-producer-whats-the-fuss-about/>

265) Patrick M. Guilfoyle, *A Canadian's take on MBC program on foreigners*, THE KOREA HERALD, June 11, 2012, available at <http://view.koreaherald.com/kh/view.php?ud=20120611000999&cpv=0>

266) UN Human Rights Committee, *Third Periodic Report of the Republic of Korea*, CCPR/C/KOR/2005/3, Feb. 21, 2005, p. 15, para. 46, available at <http://www.unhcr.org/refworld/docid/43f2ff650.html>

267) ROK CERD Report 2003, p. 4, para. 11, *supra* note 15. See also ROK CERD Report 2006, p. 4, para. 11, *supra* note 15.

268) See also ROK CERD Report 2006, p. 12, para. 61, *supra* note 15.

states, “[t]he status of aliens shall be guaranteed as prescribed by international law and treaties.”<sup>269)</sup> In accordance with its commitments at the international level, the ROK has regularly alerted the international community of what it describes as its progress in “the promotion of mutual understanding and respect between foreigners and Korean nationals”<sup>270)</sup> and of its “good practices achieved in the fight against racism, racial discrimination, xenophobia and related intolerance.”<sup>271)</sup> Ironically, however, the ROK was touting its progress in the treatment of foreigners to the international community just at the time it was implementing race-based in-country AIDS and drugs tests at home.

In May 2008, during the UPR at the Human Rights Council when the U.K. asked about “foreigners being deported because of their HIV status”<sup>272)</sup> under the new E-2 visa policy, the ROK ignored the question and chose instead to discuss its “Inter-Ministerial Committee on Policies Regarding Foreigners”<sup>273)</sup> that was formed under the recently enacted Basic Act on the Treatment of Foreigners Residing in Korea (“Basic Act”).<sup>274)</sup> The ROK had explained earlier in 2008 that the Basic Act “sets forth obligations of the central and local governments . . . to prevent discrimination against

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269) Constitution of the Republic of Korea, Jul. 17 1948, official consolidated translation with the latest amendment made on Oct. 29, 1987, *supra* note 211.

270) UN Press Release, *Committee on Elimination of Racial Discrimination Considers Report of the Republic of Korea*, Aug. 10, 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B77E3956B335DD33C1257333004FA7CA?opendocument> (quoting the ROK representative’s discussion of the Basic Act on the Treatment of Foreigners Residing in Korea *infra* note 275).

271) Durban Review Conference Preparatory Committee Intersessional open-ended intergovernmental working group to follow up the work of the Preparatory Committee, Replies to Questionnaire on the Follow-up Measures of the Durban World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/CONF.211/PC/WG.1/CRP.1, Sept. 1, 2008, p.22, *available at* [http://www.un.org/durbanreview2009/pdf/Contributions\\_from\\_states\\_CRP.1.pdf](http://www.un.org/durbanreview2009/pdf/Contributions_from_states_CRP.1.pdf) (quoting the ROK discussion of the Basic Act on the Treatment of Foreigners Residing in Korea *infra* note 274).

272) Human Rights Council, Office of the High Commissioner for Human Rights, Universal Periodic Review, *United Kingdom: Advance Written questions to States under Review (SuR)*, Session 2, May 5-19, 2008, *supra* note 127.

273) UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of Korea*, A/HRC/8/40, A/HRC/WG.6/2/L.6, May 29, 2008, p. 4, para. 6, *available at* <http://www.unhcr.org/refworld/docid/485b96303.html>

274) Basic Act on the Treatment of Foreigners Residing in Korea (hereinafter “Basic Act”), Act No. 8442, May 17, 2007.

and protect the human rights of foreigners.”<sup>275)</sup> The role of the new inter-ministerial committee would be crucial in developing and reviewing policies regarding foreigners to make certain they were in accordance with the new Act.<sup>276)</sup> Nevertheless, despite the prominence of the Basic Act in discussions of foreigners’ human rights abroad, when it came time to formulate the E-2 visa policy the Ministry of Justice chose to completely disregard the Basic Act, which had entered into force just five months earlier, and consult with the Citizens’ Group instead of the new Inter-ministerial Committee on Policies Regarding Foreigners. The ROK has a curiously inconsistent approach to dealing with its non-citizen residents. In the abstract, the ROK has been scrupulously willing to acknowledge the rights of foreigners and to create binding obligations regarding their treatment. In reality, however, it has been hesitant to recognize these rights and disinclined to abide by its self-imposed obligations.

The E-2 visa requirements are especially problematic because of the ROK’s international commitments regarding HIV/AIDS. As discussed in Part III, the ROK has pledged to eliminate discrimination based on HIV status, both actual and presumed; and, as also noted, the non-discrimination provisions of binding human rights documents, including the ICCPR, extend to protect against such discrimination.<sup>277)</sup> Furthermore, unlike the E-6 visa procedure that took place under the AIDS Prevention Act and required confirmation of HIV negative status as a requirement for entry to the ROK, HIV tests for E-2 visa holders take place “within its territory” making them uniquely ripe for challenge.<sup>278)</sup> Nevertheless, because the

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275) UN Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Republic of Korea: Addendum: Comments by the Government of the Republic of Korea on the Concluding Observations of the Human Rights Committee*, CCPR/C/KOR/CO/3/Add.1, Feb. 29, 2008, p. 2, para. 5, available at <http://www.unhcr.org/refworld/docid/47fd8c2.html>

276) Art. 4 of the Basic Act states “When Korea legislates or amends laws and regulations on the treatment of foreigners, the legislation and amendments shall conform to the purpose of this Act,” *supra* note 274.

277) UN Commission on Human Rights, *The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, Mar. 3, 1995, E/CN.4/RES/1995/44, *supra* note 113.

278) See Art. 2(1) of the ICCPR *supra* note 114 (“Each State Party to the present Covenant

stigma associated with AIDS has been harnessed as means to express hostility toward ethnic non-Koreans, the ROK's commitments against racial discrimination are especially relevant. Indeed, symbolic AIDS stigma in Korea as a form of racial discrimination is an issue that affects other non-Korean groups besides foreign teachers.<sup>279)</sup> In 2011, for example, there was a high profile case in which a naturalized Korean citizen with non-Korean ethnicity was denied entry to a sauna in Busan because of concerns that "some foreign women in the town may have AIDS."<sup>280)</sup>

As discussed in the Parts I and II, the ROK is a party to the ICERD.<sup>281)</sup> The ROK has long acknowledged the racial discrimination against non-Koreans which occurs as part of its legacy of blood nationalism. The ROK has explained to the CERD that "[t]he principle of the 'pure-blooded' based on the Republic of Korea's pride in the nation's ethnic homogeneity, has incurred various forms of discrimination";<sup>282)</sup> and that "[t]he homogeneity of the Korean people and the relative lack of multi-ethnic experiences have been conducive to . . . prejudice against foreign cultures and people."<sup>283)</sup> The CERD has noted, however, that even in acknowledging racial discrimination the ROK tends to emphasize ethnic homogeneity without "recogniz[ing] the multi-ethnic character of contemporary Korean

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undertakes to respect and to ensure to all individuals *within its territory* and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

279) See generally Shalini Bharat, *Racism, Racial Discrimination and HIV/AIDS*, UNESCO/OHCHR Workshop To Develop Educational Material to Foster Tolerance and to Eliminate Prejudice at Paris, France, Feb. 19-20, 2002, <http://www2.ohchr.org/english/issues/racism/docs/racismaids.doc> ("Racism and racial discrimination linked to HIV status, may be categorized as 'Symbolic' stigma as the already stigmatized and marginalized racial groups are stigmatized further on account of their association with HIV.").

280) Kim Rahn, *Sauna operator advised not to discriminate against foreign residents*, THE KOREA TIMES, Jan. 17, 2012, available at [http://www.koreatimes.co.kr/www/news/nation/2012/01/117\\_103055.html](http://www.koreatimes.co.kr/www/news/nation/2012/01/117_103055.html) See also Kim Rahn, *Naturalized Korean decries refusal of entry to sauna*, THE KOREA TIMES, Oct. 13, 2011, available at [http://www.koreatimes.co.kr/www/news/nation/2011/10/117\\_96613.html](http://www.koreatimes.co.kr/www/news/nation/2011/10/117_96613.html)

281) ICERD *supra* note 14.

282) See ROK CERD Report 2006, p. 10, para. 44, *supra* note 15.

283) See ROK CERD Report 2003, p. 10, para. 44, *supra* note 15.

society.”<sup>284</sup>) The CERD has cautioned the ROK “that the emphasis placed on the ethnic homogeneity of the State party may represent an obstacle to the promotion of understanding, tolerance and friendship among the different ethnic and national groups living on its territory.”<sup>285</sup>) The CERD has also noted the ROK’s use of terminology such as “pure blood” and “mixed bloods” and has expressed concern that “the idea of racial superiority that it may entail, continues to be widespread in Korean society.”<sup>286</sup>) The CERD has stressed “that the Government had to be careful of how it described itself, because such descriptions had consequences [and presented] the dangers of creating a fixed identity.”<sup>287</sup>)

## V. Conclusion

In February 2009 members of a foreign teachers association in Korea filed some fifty individual complaints against the HIV and drug test measures with the National Human Rights Commission of Korea (“NHRCK”).<sup>288</sup>) The teachers’ complaints were supported by Human Rights Watch, which submitted an open letter “strongly urg[ing] the NHRCK to find that the existing E-2 Teaching Visa policy is discriminatory and to recommend the abolition of the policy’s HIV testing requirement.”<sup>289</sup>)

In April 2009 Andrea Vandom, an American who had worked in Korea

284) UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, South Korea*, Aug. 17 2007, para. 12, CERD/C/KOR/CO/14, available at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.KOR.CO.1.pdf>

285) *See Id.*

286) *See Id.*

287) UN Press Report, *Committee on Elimination of Racial Discrimination considers report of Republic of Korea*, Aug. 10, 2007, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B77E3956B335DD33C1257333004FA7CA?opendocument>

288) Kang Shin-who, *Foreign Teachers Fight ‘Discrimination’*, THE KOREA TIMES, Feb. 4, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/02/117\\_38955.html](http://www.koreatimes.co.kr/www/news/nation/2009/02/117_38955.html)  
Disclosure: I advocated for foreign teachers by a filing a third party complaint with the NHRCK – Benjamin Wagner.

289) Human Rights Watch, *Letter to the National Human Rights Commission of Korea*, Jun. 19, 2009, available at <http://www.hrw.org/en/news/2009/06/19/letter-national-human-rights-commission-korea>

as a university lecturer for three years prior to the introduction of the new requirements, refused to submit to the HIV and drug tests and yet was nonetheless able to successfully renew her E-2 visa.<sup>290)</sup> When this was subsequently reported in *The Korea Times*, a spokesperson for the Suwon Immigration Office claimed that Vandom had in fact submitted the required documents explaining, “[i]t is impossible for us to grant a visa in violation of the regulations.”<sup>291)</sup> The immigration office later said, however, that it had renewed Vandom’s visa by “mistake” and had asked her to submit HIV and drug test results adding that “it would deport her if she didn’t heed the request.”<sup>292)</sup> A later report stated that the “[t]he immigration office has tried to summon Vandom but to no avail.”<sup>293)</sup> In June 2009 the Korean Public Interest Lawyers’ Group (*Gong-gam*) petitioned the Constitutional Court of the Republic of Korea on behalf of Ms. Vandom. Ms. Vandom’s attorney argued that the HIV and drug test requirements had been “imposed with no reasonable grounds”<sup>294)</sup> and were “based on vague prejudice and bias that foreign English teachers have disordered sex lives and use drugs.”<sup>295)</sup>

In June 2009, the Constitutional Court challenge to the E-2 visa policy was reported with news that UN Secretary General Ban Ki Moon had advised the ROK to lift its ban on all foreigners with HIV/AIDS.<sup>296)</sup> The

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290) Kang Shin-who, *Foreign Teacher Renews Visa With No Health Checks*, THE KOREA TIMES, Apr. 27, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2011/04/116\\_42107.html](http://www.koreatimes.co.kr/www/news/nation/2011/04/116_42107.html).

291) *See Id.*

292) Kang Shin-who, *Teachers to Go to Court Over Visa Rule*, THE KOREA TIMES, Jun. 2, 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2011/04/117\\_46121.html](http://www.koreatimes.co.kr/www/news/nation/2011/04/117_46121.html)

293) Kang Shin-who, *Teachers Fight Over ‘Unfair’ Visa Rule*, THE KOREA TIMES, Jul. 2, 2009, available at <http://www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=46121>

294) *See Id.*

295) Kang Shin-who, *supra* note 292. Disclosure: I acted as foreign consul for Andrea Vandom – Benjamin Wagner.

296) *See* An Hye-ri & Heo Jin, *UN chongjangkaji naseon oegugin eijeu geomsa nollan (Even the U.N. Secretary-General gets involved in controversy over HIV testing foreigners)*, JOONGANG ILBO, Jun. 5 2009, available at [http://article.joinsmsn.com/news/article/article.asp?total\\_id=3635840&ctg=12](http://article.joinsmsn.com/news/article/article.asp?total_id=3635840&ctg=12) *See also* Kang Shin-who, *Korea Advised to Lift Ban on Foreigners With AIDS*, THE KOREA TIMES, Jun. 5 2009, available at [http://www.koreatimes.co.kr/www/news/nation/2009/06/113\\_46334.html](http://www.koreatimes.co.kr/www/news/nation/2009/06/113_46334.html) (discussing Constitutional Court case in connection with UN Sec Gen. recommendation)

same month the NHRCK told the press that it planned “to hold a public hearing<sup>297)</sup> on the [E-2 visa] issue late [June] in order to finalize an official position as early as July [2009].”<sup>298)</sup> In September 2009, it was reported that President Lee Myung-bak had informed the UN Secretary General that the ROK would remove its ban on entry for foreigners living with HIV and that HIV testing requirements for all non-citizens living and working in Korea would be abolished.<sup>299)</sup> In January 2010, the ROK announced that it would eliminate restrictions on foreigners based on HIV status,<sup>300)</sup> and in March 2010 the ROK reaffirmed its commitment before the UN Human Rights Council.<sup>301)</sup> Nevertheless, an official with the immigration office stated that the mandatory in-country HIV tests for E-2 visa holders would remain in place, adding, however, that “if the Constitutional Court rules that making foreign instructors submit documents on HIV tests is unconstitutional, we may have to scrap the requirement.”<sup>302)</sup>

Meanwhile, the NHRCK cancelled its plans for a public hearing<sup>303)</sup> and, instead of issuing any recommendations<sup>304)</sup> as promised, rejected

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297) The National Human Right Commission Act, article 23 (Hearing), paragraph 1 states: “The Commission may, if deemed necessary for the performance of its duties, require the representative of the related entity, the interested persons or other persons who possess knowledge and experience on relevant matters to present themselves and hear their statements of the relevant facts and opinions.” See National Human Rights Commission Act, Act No. 6481, May 24, 2001, as last amended by Act No. 8435, May 17, 2007.

298) See Kang Shin-who, *supra* note 292.

299) See Jeong Won-su, *AIDS gamnyeom oegugin ipgukgeumji pyejikiro (Ban on Foreign AIDS Patients to Be Lifted)*, DONGA ILBO, Sept. 3, 2009, available at <http://news.donga.com/3/20090903/8804772/1> See also Kang Shin-who, *Ban on Foreign AIDS Patients to Be Lifted*, Sept. 3, 2009, THE KOREA TIMES, available at [http://www.koreatimes.co.kr/www/news/nation/2009/12/117\\_51232.html](http://www.koreatimes.co.kr/www/news/nation/2009/12/117_51232.html)

300) See *UN Secretary-General Applauds the Removal of Entry Restrictions Based on HIV status by United States of America and Republic of Korea*, UNAIDS PRESS RELEASE, Jan. 4, 2010, *supra* note 118.

301) See also Cho Hyun, Deputy Minister for the Multilateral and Global Affairs for the Republic of Korea, UN Human Rights Council, Thirteenth Session, High-level Segment, Mar. 2, 2010, *supra* note 119.

302) See Kang Shin-who, *supra* note 292.

303) Art. 23 of the National Human Rights Commission Act provides for such hearing where “deemed necessary” *supra* note 297.

304) A NHRCK recommendation would likely be directed to the Ministry of Justice’s Korea Immigration Service under article 25 of the National Human Right Commission Act.

all complaints citing article 32(1)(7) of the National Human Rights Act.<sup>305)</sup> Complainants received identical rejection letters which read, “regarding the claim about health checks including HIV test the Commission deems it inappropriate to investigate as an individual complaint.”<sup>306)</sup>

On September 29, 2011, nearly two and a half years after the Ms. Vandom’s petition was filed with the Constitutional Court, the Court rejected her complaint for lack of standing and ripeness. The Court examined the “E-2 Applicant’s Health Statement” contained in article 76, paragraph 1, attachment 5 of the Immigration Control Act Enforcement Regulations and found that since Vandom was not an E-2 visa applicant but seeking to extend her E-2 visa she lacked standing to challenge the regulation.<sup>307)</sup> Because Vandom was residing in Korea when the HIV and drug tests were first introduced she was never required to prepare the questionnaire as a visa applicant that would become a mandatory test requirement once she arrived in Korea. Nevertheless, the MOJ had demanded that she submit test results for HIV and drugs and had threatened her publically with deportation if she refused. Clearly she had standing to challenge the constitutionality of tests that the MOJ was being demanded of her.

The Court next found that the case lacked ripeness. The Court confirmed that the Suwon Immigration Office had sent an official notice to Vandom stating that “an immigration officer had extended the petitioner’s stay by mistake and the petitioner refuses to appear even though the immigration office requested her to appear.”<sup>308)</sup> Nevertheless, the Court found that the adjudication of the case was premature because:

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The NHRCK would also likely present an opinion on the case pending before the Constitutional Court under article 28 of the National Human Rights Commission Act. *Id.*

305) Article 32(1)(7) (Rejection of Petition) of the National Human Rights Commission Act states that “[t]he Commission shall reject a petition . . . [i]n the case the Commission deems it inappropriate to investigate a petition.” *Id.*

306) Mr. Stafford Lumsden, one of the fifty complainants who received such a rejection letter, posted a copy of his NHRCK complaint rejection letter on the Internet for public access. See Human Rights Commission Responds, *Notification of decision of the complaint case (case no. 09jincha140)*, <http://stafford.squarespace.com/journal/2009/9/2/human-rights-commission-responds.html>

307) Constitutional Court of Korea (Const. Ct.), 2009Hun-ma358, Sept. 29, 2011.

308) See *See Id.*

[T]he chief of the Suwon Immigration Office . . . merely asks the petitioner to appear with her passport because the immigration office has questions about the [visa] extension, and does not mention anything about a request to submit a health examination certificate. If the petitioner had appeared [which she did not] it seems likely that the chief of the Suwon Immigration Office would have asked the petitioner to submit a health examination certificate. Therefore, the petitioner's duty to submit a health examination arises not from the request to appear, but from a separate [speculative] request [which has not yet been made].<sup>309)</sup>

The Court acknowledged that notice had also been sent to Vandom's employer, Chung-Ang University, "ask[ing] the school to advise the petitioner to submit the health certificate as the immigration office was planning to revoke her permission to stay [in the country] if she continues to fail to appear."<sup>310)</sup> The Court found, however, that "the recipient of this request is not the petitioner but rather her employer" and therefore that the issue still lacked ripeness.<sup>311)</sup> The Court appears to be engaging in mental gymnastics in order to find a lack of ripeness in this case and one wonders if a foreigner must be deported before the Court is prepared to consider the case ripe.

The standard for justiciability in a case involving mandatory drug testing for Koreans is much more reasonable. In 2006, the Court dealt with mandatory drug tests for narcotic addicted Korean prisoners which were the same type required of foreign teachers.<sup>312)</sup> In this case, the petitioner had been released from prison by the time the case came before the Court and yet while the drug testing issue was moot, the Court "recognized the existence of a justiciable interest" because "the infringing act is likely to repeat and therefore its constitutional interpretation has an important meaning."<sup>313)</sup> Clearly the same could be said about mandatory HIV and

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309) *See Id.*

310) *See Id.*

311) *See Id.*

312) Constitutional Court [Const. Ct.], 2005Hun-ma277, Jul. 27, 2006 (S. Kor.).

313) *See Id.*

drug tests for foreign teachers.

The Court's disinclination to adjudicate the controversial case is apparent. In a separate (concurring) opinion Judge Kim Jong-dae opined that Vandom's petition should be rejected because "[under] our Constitution only 'nationals' [*gungmin*] are entitled to fundamental rights."<sup>314</sup> Vandom's attorney had argued that the discriminatory HIV and drug test requirements violated the equal protection clause (article 10) of the Korean Constitution. Judge Kim went on to state that "the legal rights of foreigners falls within the range of international law and treaties," which as noted previously is in line with article 6(2) of the Korean Constitution.<sup>315</sup> Nevertheless, while Vandom's attorney had presented international law arguments against the HIV and drug tests based on the ROK's commitments under the ICCPR and the ICERD, neither Judge Kim nor any other judge took note of them. Such a result, unfortunately, is to be expected. As a leading scholar in Korean constitutional law has explained, "the Korean Constitutional Court has generally been reluctant to invoke or employ international law in general and international human rights law in particular as an adjudicatory norm or standard."<sup>316</sup>

Rejected by both Constitutional Court and the NHRCK, after substantial delays in both cases, foreign teachers have watched the discriminatory requirements become further institutionalized. The one-time HIV and drug test requirements rushed into place during a moral panic by the MOJ on the authority of a policy memo have become repeat annual requirements for "native speaker" employees of regional educational office around the country. Far from "eas[ing] the anxiety of citizens" and quelling "social outcry" as the government had claimed in 2007, discriminatory HIV and drug tests for foreign teachers have only encouraged further stigmatization which in turn has led to more discriminatory requirements.<sup>317</sup>

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314) Constitutional Court [Const. Ct.], 2009Hun-ma358, Sept. 28, 2011.

315) *See Id.*

316) Keun-Gwan Lee, *From Monadic Sovereignty to Civitas Maxima: A Critical Perspective on the (Lack of) Interfaces Between International Human Rights Law and National Constitutions in East Asia*, 5 Nat'l Taiwan U. L. Rev 155, 165 (2010) (citing In-seop Chung, *An Analysis of the Korean Constitutional Court's Jurisprudence from an International Law Perspective* (2004) (unpublished manuscript)).

317) This cycle of stigma, discrimination and human rights violations has been researched

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and is well understood. *See e.g.* UNAIDS Best Practice Collection, *HIV-related stigma, discrimination and human rights violations: case studies of successful programmes*, 2005, p. 11, available at [http://data.unaids.org/publications/irc-pub06/jc999-humrightsviol\\_en.pdf](http://data.unaids.org/publications/irc-pub06/jc999-humrightsviol_en.pdf) (“Stigma and discrimination are interrelated, reinforcing and legitimizing each other. Stigma lies at the root of discriminatory actions, leading people to engage in actions or omissions that harm or deny services or entitlements to others. Discrimination can be described as the enactment of stigma. In turn, discrimination encourages and reinforces stigma.”).

