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Unreasonable Distinctions: A Comparative Analysis of the Definitional Framework of Korea's New Anti-Age Discrimination Law

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Abstract

Korea has recently enacted legislation that strengthens existing prohibitions on age discrimination by providing stiff penalties for violation. The core of any legislation lies in its definitional framework since it is through this framework that liability is ultimately established. This article examines and evaluates the scope and definitional language of the new Korean legislation through a comparative analysis of related provisions in the anti-age discrimination statutes of the US and UK. These jurisdictions are selected for comparison because they represent both a long-standing statutory regime and one that has been more recently established. The analysis reveals critical weaknesses in the structural and definitional aspects of the Korean legislation that may render determinations of liability ambiguous and therefore unreliable. Specifically, ambiguities in the scope of application due to faulty construction, reliance on a minimalist definition that appears to merely prohibit "unreasonable distinctions," and a confusion in the possible exceptions to discrimination raise concerns as to whether the new penalties will have any significant impact on reducing age discrimination in the Korean workplace since the prospects for ultimately reaching those penalties are doubtful.

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I. Introduction

Korea has recently strengthened its prohibitions on age discrimination in employment under newly formulated legislation.[1] As of March 2009, employers using age as a factor in recruitment and hiring without justification face a fine of up to KRW 5,000,000 (US$ 4,300) and up to KRW 30,000,000 (US$ 26,000) for failure to comply with a redress order issued by the Ministry of Labor.[2] From January 2010, the prohibition extended to pay and benefits, education and training, placement, transfer and promotion, and retirement and dismissal.[3]

This article evaluates the potential for success of the new legislation based on a comparative analysis of the definitional framework of the statute. The Korean framework is compared with the definitional frameworks found in the anti-age discrimination statutes of the US and UK. These jurisdictions were selected for comparison because they represent, respectively, a statutory anti-age discrimination regime that was established over 40 years ago and one that has been recently put in place. This provides an opportunity to view the Korean legislation in light of what has proven to be significant considerations in the application and interpretation of an ant-age discrimination statute over time and what has been recently accomplished elsewhere after careful thought and deliberation.[4] In addition, the UK and US statutes were crafted

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1) Goyongsang Yeollyeongchabyeolgeumji Mit Golyeongjagoyongchokjine Gwanhan Beopryul [Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for the Aged], Act No. 4487, Dec. 31, 1991; as amended through Act No. 9997, Feb. 4, 2010)[hereinafter Age Discrimination Act or the Act].

2) *Id.* arts. 4-4(1), 23-3(2) and 24(1), respectively. All translations of the Act and other source materials in this Article are those of the author unless otherwise indicated. A government produced English translation is available through the Ministry of Government Legislation (MOLEG) at www.law.go.kr. However, the official source of English translations for Korean laws is the Korea Legislation Research Institute (KLRI)(www.klri.re.kr). Translations of Korean statutes are available from KLRI at a fee. The translations of statutory materials rendered here are intended to correct misused terms and awkward phrasings while remaining as close to the available translation as possible to avoid unwarranted confusion.

3) Age Discrimination Act, art. 4-4(1).

4) For a general discussion on the purposes of comparative analysis related to "learning between legal systems" and the selection of comparator jurisdictions, see Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences? in* The Oxford Handbook of Comparative

under very different circumstances. Similar to developments in Korea, age discrimination legislation in the UK embodies a recent response to the contemporary context of aging societies.[5] The US legislation, on the other hand, was born out of the civil rights movement of the 1960s.[6] Contrasting statutes of such divergent backgrounds allows for the identification of factors essential to the establishment of a reliable anti-age discrimination regime regardless of the historical impetus.[7]

The analysis proceeds by examining three main areas related to the definitional aspects of age-based employment discrimination. Following an overview of age discrimination in the Korean context in Part I, Part II examines the scope of each of the three statutes considered as it relates to the age of the persons protected. This comparison reveals a potential ambiguity in the stated purposes of the Korean statute that may lead to problems in determining who is protected under the Act. Part III examines the definition of direct age-based discrimination as it appears in each of the statutes and the possible justifications permitted. The analysis points to the existence of definitional problems in the Korean statute that are likely to cause difficulties in determining when age discrimination has occurred under the statute and when an exception may apply. This potential for problems in the application of the prohibition as stated is illustrated in Part IV by a review of a number of representative age-discrimination cases handled by the National Human Rights Commission of Korea (NHRCK). Finally, Part IV makes a number of suggestions for strengthening the legislation.

LAW 383, 407-11, 417-18 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

5) For global aging trends, including Europe and Northeast Asia, see U.N. Dep't of Econ. & Soc. Affairs, *World Population Ageing: 1950-2050*, U.N. Doc. ST/ESA/SER.A/207 (2002), *available at* http://www.un.org/esa/population/publications/worldageing19502050/. For statistics on ageing in the UK, see Office for National Statistics, *Ageing*, http://www.statistics.gov.uk. For aging trends in Asia, see DAVID R. PHILLIPS, AGEING IN THE ASIA-PACIFIC REGION: ISSUES, POLICIES, AND FUTURE TRENDS (2000); International Labor Organization, *Ageing in Asia: The growing need for social protection* (1997), *available at* http://www.ilo.org/public/english/region/asro/bangkok/paper/ageing.htm#sum.

6) For a brief discussion of this history, see GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 4-10, 207 (2d ed. 2007) [hereinafter RUTHERGLEN].

7) For a discussion on the debate over the role of legal history in comparative law studies, see James Gordley, *Comparative Law and Legal History*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 4, at 753.

II. Age Discrimination in the Korean Context

Evidence of pervasive age-based discrimination in Korea is not difficult to find. In terms of age discrimination in employment, one need only look to the job classifieds to view the proverbial tip of the iceberg. A study by the Korea Labor Institute that monitored age limitations in advertising over a period of one-month found that 55% of job advertisements required a specific age for interested applicants; advertisements for secretarial positions sought women under the age of 23; and practically all advertisements included some sort of "upper age limit."[8] In terms of age bias in the larger society, a study supported by the NHRCK found the experience of perceived age-discrimination by older citizens to be significant. In a survey conducted as part of the study, an overall 35-40% of 900 respondents said they had experienced some form of prejudicial treatment, including insensitive or offensive remarks, assumptions about sight and hearing, not having ailments taken seriously, words and actions not being trusted, not being asked to do certain tasks due to assumptions about inability to do them, opinions being ignored, and sensing the discomfort of others when entering a restaurant.[9] Finally, as an example of the unabashed use of age as a determining factor in the allocation of social benefits seemingly unrelated to age, Korean immigration authorities have recently announced a new "point system for granting residency status" to foreigners.[10] In the point system, age is one of four weighted categories for which points are assigned to residency applicants for a total of 90 points. At a weight of 25 points, age is second only to "academic career" (35 points), winning out against "Korean proficiency" (20 points) and "current income"

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8) Ji-Yeon Jung, *Chaeyongsi yeollyeongjehanui siltaewa munjaejeom* [*Factual Conditions and Problems Related to Age Limitations in Hiring*], Hanguknodongyeonguwon [Korea Labor Institute] (2002).

9) *See* Young Hee Won et al., No-in Daehan Sahwoe Chabyeol Siltaejosa: Gae-injuk Mit Jedojuk Chabyeol Gyeonghumeul Wungsimeulo [Survey on Social Discrimination Against Older Persons: Focus on Individual and Systematic Experiences of Discrimination (Report prepared for the National Human Rights Commission of Korea (NHRCK)] 123 (2006).

10) Ministry of Justice, Point System for Granting Residency Status (F2) (April 14, 2010), *available at* http://www.immigration.go.kr/indeximmeng.html.

(10 points).[11] In figuring the points to be allotted to the age category, 30-34 year olds come in at the highest value with the full score of 25 points while 45-50 year olds and those 51 and older are given a mere 8 and 5 points respectively.[12]

Prohibitions on age-discrimination have existed under Korean law for some time.[13] However, the existing prohibitions are incidental to the broader legislation in which they appear and the particular legislation in which the prohibition is found lacks enforceability procedures or penalties that are specifically attached to the relevant provision.[14] Although the act establishing the National Human Rights Commission of Korea (NHRCK) provides a petition and investigation procedure for discrimination complaints, including age-based discrimination, the decisions of the NHRCK are non-binding and therefore unenforceable.[15] Finally, at the Constitutional level, Articles 10 and 11 of the Korean Constitution provide for dignity and equality protections.[16] However, no complaints for age discrimination have been brought under these provisions outside of the non-enforceable complaints filed with the

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11) *Id.* at 3.

12) *Id.*

13) *See*, *e.g.*, GOYONGJUNGCHAEKGIBONBEOP [FRAMEWORK ACT ON EMPLOYMENT POLICY], Act No. 4643, Dec. 27, 1993, as amended by Act No. 7045, Dec. 31, 2003), art. 19 (This act has been wholly amended by Act. 9792, Nov. 9, 2009, effective Jan. 1, 2010; prohibition on age discrimination under the wholly amended Act appears in article 7; no fines for violation under the wholly amended Act); GUKGA-INKWONWEWONHOEBEOP [NATIONAL HUMAN RIGHTS COMMISSION ACT], Act No. 6481, May 24, 2000, as amended through Act No. 9402, Feb. 3, 2009, art. 2(4) [hereinafter "NHRCK ACT"]; EUNGEUPUILYOE GWANHAN BUMNYUL [EMERGENCY MEDICAL SERVICES ACT], Act No. 4730, Jan. 7, 1994, as amended by Act No. 6147, Jan. 12, 2000, art. 3. GOLYEONGJA GOYONGCHOKJINBEOP [EMPLOYMENT PROMOTION FOR THE AGED ACT], Act No. 4487, Dec. 31, 1991, as amended by Act No. 8116, Dec. 28, 2006, effective June 29, 2007, art. 4-2 (superseded by AGE DISCRIMINATION ACT, Mar. 21, 2008).

14) WON, *supra* note 9, at 123.

15) Where the NHRCK finds a rights violation under its mandate, it is authorized to make only recommendations for remedial steps or rectifications of relevant statutes, institutions, policies or practices. NHRCK ACT, art. 44.

16) DAEHANMINGUK HUNBEOP [CONSTITUTION OF THE REPUBLIC OF KOREA], arts. 10 and 11(1). Article 10 provides:"All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." Article 11(1) provides: "All citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status."

NHRCK. This is likely due to the fact that Article 11 lists only sex, religion, and social status as prohibited grounds of discrimination. The new Age Discrimination Act is evidently aimed at improving these shortcomings in the existing law through the enactment of purpose dedicated statutory provisions with associated procedures and stiff penalties for violation.

Korea is not alone in combating age-based employment discrimination. Since 2000, a number of Asia-Pacific and European countries have enacted or improved similar legislation. In the Asia-Pacific region, Australia's Age Discrimination Act 2004 includes prohibitions on direct and indirect age-based discrimination in employment.[17] In 2007, Taiwan amended Article 5 of the Employment Services Act (ESA) to include age as a prohibited ground of discrimination in employment.[18] Violations of the ESA carry a penalty ranging from NT$300,000 to NT$1,500,000 (US $9000 to $46,000).[19] Although New Zealand has had a prohibition on employment-based age discrimination since the enactment of the Human Rights Act 1993,[20] prohibitions on mandatory retirement were extended to the public sector in 2002.[21] In 2007, Japan passed its first mandatory prohibitions on age discrimination in employment, outlawing discrimination on the basis of age in the recruitment

17) AGE DISCRIMINATION ACT 2004, Act No. 68 (Austl.) as amended through Act No. 70 of 2009, Part 4, Div. 2, s 18. The areas in which age discrimination is prohibited under the Act include work, education, accommodation, services, access to premises, and laws or programs. Age Discrimination Act 2004, Part 4, Divisions 1-3. For an overview of the Act, see Australian Human Rights Commission, *All about age discrimination*, *available at* http://www.hreoc.gov.au/pdf/age/all_about_age_discrimination.pdf. *See also* Belinda Smith, *Australian Anti-discrimination Laws: Framework, Development and Issues, in* ROGER BLANPAIN, ED., NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW 115, 136-138 (2008); Patricia Eastel et al., *Too Many Candles on the Birthday Cake: Age Discrimination, Work and the Law*, 7 QUEENSLAND U. TECH. L. & JUST. J. 93 (2007).

18) EMPLOYMENT SERVICES ACT, May 8, 1992, as amended through Aug. 6, 2008, art. 5 ("For the purpose of ensuring national's equal opportunity in employment, Employer is prohibited from discriminating against any Job Applicant or Employee on the basis of race, class, language, thought, religion, political party, place of origin, place of birth, gender, gender orientation, age, marital status, appearance, facial features, disability, or past membership in any labor union; …) (Taiwan).

19) *Id.* art. 65.

20) HUMAN RIGHTS ACT 1993, Public Act No. 82, Aug. 10, 1993 (New Zealand); as amended through Aug. 1, 2008, arts. 21 & 22.

21) *See* Judy McGregor, *Employment of Older Workers: Retirement Commissioner's 2007 Review of Retirement Income Policy* (New Zealand Human Rights Commission 2007), *available at* http://www.neon.org.nz/eeoissues/age/.

and hiring process.[22] This development follows a 2004 revision to the Act Concerning Stabilization of Employment of Older Persons that made it obligatory for employers to explain their reasons for imposing age limits on applicants.[23] In Europe, developments in age discrimination law are the result of implementation efforts related to the EU's Employment Equality Directive of 2000.[24] The Directive is aimed at prohibiting discrimination in employment and includes age as one of the prohibited grounds.[25] The adoption of the Directive is expected to make various aspects of age discrimination unlawful in at least 25 European countries.[26] In the UK, anti-age discrimination legislation was adopted in the form of the Employment Equality (Age) Regulations 2006.[27]

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22) EMPLOYMENT MEASURE ACT, Act No. 132, July 21, 1966, as amended (October 2007) (Japan), art. 10. *See* Ryoko Sakuraba, *The Amendment of the Employment Measure Act: Japanese Anti-Age Discrimination Law*, 6(2) JAPAN LAB. REV., 56, 56 (2009), *available at* The Japan Institute for Labour Policy and Training, http://www.jil.go.jp/english/JLR.htm.

23) ACT CONCERNING STABILIZATION OF EMPLOYMENT OF OLDER PERSONS, Act No. 68, May 25, 1971, amended by Act No. 103, Jun. 11, 2004, art. 18-2 (Japan). *See* Ryoko Sakuraba, *Employment Discrimination Law in Japan: Human Rights or Employment Policy?*, in NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW, *supra* note 17, at 234, 252; For a discussion of this amendment and its effect on the employment of older workers in Japan, see Noboru Yamashita, *Act Concerning Stabilization of Employment of Older Persons*, 4(3) JAPAN LAB. REV. 71 (2007); Makoto Fujimoto, *Employment of Older People after the Amendment of the Act Concerning Stabilization of Employment of Older Persons: Current State of Affairs and Challenges*, 5(2) JAPAN LAB. REV. 59 (2008).

24) Council Directive 2000/78/EC of Nov. 27, 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16 [hereinafter Directive]. The basis for the Directive lies in Article 13 of the EC Treaty ("the Council … may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual discrimination.") For a discussion of the Directive as it relates to age discrimination, see MALCOLM SARGEANT, AGE DISCRIMINATION IN EMPLOYMENT 53-77 (2006); Tom Osborne, *Will the European Union Directive on Equal Treatment Fulfill Its Purpose of Combating Age Discrimination in Employment?*, 38 INT'L LAW. 867 (2004).

25) Directive, art. 1. The other grounds enumerated in the Directive are religion and belief, disability, and sexual orientation. Discrimination in employment based on race and gender are the subject of separate EU directives.

26) SARGEANT, *supra* note 24, at 22.

27) Employment Equality (Age) Regulations (S.I. 2006/1031, effective Oct. 1, 2006) [hereinafter Age Regulations or the Regulations] (U.K.). For a history of the development of this law in the UK, see SARGEANT, *supra* note 24, at 23-44; IAN SMITH & GARETH THOMAS, EMPLOYMENT LAW 362 (9th ed. 2007). For an overview of recent developments in UK employment discrimination law, see Catherine Barnard, *New Developments in Employment Discrimination Law: The United Kingdom Report, in* NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW, *supra* note

These developments have occurred largely in response to the pressing phenomenon of aging societies which is taking place around the globe. A 2007 UN report describes the ageing of the world's population as "a process that is without parallel in the history of humanity."[28] In 1950, the proportion of the world's population aged over 60 stood at 8%. By 2007, the figure had risen to 11% and it is now projected to rise to 22% by 2050.[29] The number of older persons (aged 60 years or over) is expected to exceed the number of children (age 15 and under) for the first time globally in 2047.[30] According to the report, this process is pervasive, profound and enduring. It is pervasive because it is impacting nearly all the countries of the world; profound because it has major consequences and implications for all facets of human life; and enduring because it represents a consistent trend based on increasing longevity and declining birthrates recorded since the 1950s.[31] Governments have responded to the challenges raised by aging societies with various policies aimed at promoting the welfare of the aging and elderly.[32] These policies include improved welfare and economic support policies, as well as health, housing and community participation policies. They also include policies aimed at improving employment outcomes for older workers. For obvious reasons, anti-age discrimination legislation is a critical link in such employment promotion policies.

For Korea, the problems raised by an aging society are both urgent and deeply imbedded in the socio-cultural framework of Korean society. They are urgent because Korea is among those countries of the world that are facing a rapidly aging society. According to a 2004 OECD report,[33] Korea currently

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17, at 39.

28) UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, "WORLD POPULATION AGEING 2007" (2007), at xxvi.

29) *Id.*

30) *Id.*

31) *Id.*

32) For example, in Europe, the European Commission has pinpointed ageing as one of six common challenges to sustainable development. SANDRA FREDMAN AND SARAH SPENCER, EDS., AGE AS AN EQUALITY ISSUE 1 (2003). In Japan, "promoting the employment of older persons has become an important political and economic concern …." Sakuraba, *supra* note 23, at 249. For an overview of aging policies in Singapore, see Locknie Hsu, *The Law and the Elderly in Singapore: The Law on Income and Maintenance for the Elderly*, SING. J. LEGAL STUD. 398 (2003).

33) Organization for Economic Co-operation and Development, AGEING AND EMPLOYMENT

has one of the youngest populations out of all OECD countries. However, by 2050 it will have one of the oldest, just behind Japan, Italy, and Greece.[34] The report projects that by the middle of the century more than one-third of the population will be over the age of 65 and approximately half of all workers will be aged 50 and over.[35] Korean employers, however, are known to rarely retain older workers beyond a certain age, usually as low as 55.[36] The implications are obvious and alarming. Without a change in employer attitudes and practices regarding age and employment, over half of the workforce in Korea will be unemployed at the middle of the century.

However, employer attitudes may prove especially difficult to change in the Korean context due to deeply embedded socio-cultural mores regarding age in Korean society. This is because the problems associated with the employment of older workers are not necessarily a symptom of nefarious prejudice or irrational ill-will toward the aged. Rather, attitudes toward the aged in employment are profoundly entwined with a deeply imbedded social ethic related to age in Korean society as a whole. It is well-documented that Korean social mores have been deeply influenced by traditional Confucian values and that this influence continues today.[37] As such, Korean social relationships, including work and professional relationships,[38] are highly sensitized to differentials in age. Deference to those who are older than oneself is a highly prized and often preciously held value that is expressed in practically all social interactions.[39] This includes uses of varying linguistic

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POLICIES: KOREA (2004).

34) *Id.* at 9.

35) *Id.*

36) *See id.* at 12.

37) *See*, *e.g.*, Jaehyuck Lee, *Rational Rendering of Confucian Relationships in Contemporary Korea*, 43(2) KOR. J. 257 (2003) (discussing Confucian authority relations in contemporary Korea and the identification of age-hierarchy differentials), *available at* http://www.ekoreajournal.net; Kyu-taik Sung, *Elder respect: Exploration of Ideals and Forms in East Asia*, 15 J. AGING STUD. 13 (2001) (identifying 14 forms of elder respect ranging from care respect to ancestor respect; traditional Confucian teachings associated with respect for parents and elders reviewed; changing expressions of elder respect and its continuing influence discussed); Seong Hwan Cha, *Myth and Reality in the Discourse of Confucian Capitalism in Korea*, 43(3) ASIAN SURVEY 485 (2003) (analyzing assumptions about the relationships between Confucianism and capitalism in Korea).

38) *See* Lilian Miles, *The Significance of Cultural Norms in the Evolution of Korean HRM Practices*, 50(1) INT'L J. LAW & MGMT. 33, 34-35 (2008).

39) Kyu-taik Sung, *Measures and Dimensions of Filial Piety in Korea*, 35(2) THE GERONTOLOGIST

registers regarding forms of address, greetings and partings, vocabulary selection and uses of various sentence endings, and includes a multitude of behaviors, from something as simple as seating arrangements and who eats first at a restaurant, to more complex and subtle considerations, such as who should take on the particular burdens raised by a given set of circumstances with the default position being that the younger person should carry the burden where possible. It is a telling sign of the importance of age considerations to social interactions that when people meet for the first time in Korea, one of the first questions often asked is in relation to one's age. These considerations are so pervasive in Korean social interactions that it is often heard in informal discussions that it is impossible for people of more than a 3-year difference in age to be "friends."

With such deference to age, it seems strange at first glance that age discrimination should be a problem for East Asian societies. After all, if a person's age is so highly respected how could it be acceptable to use it as the very basis for turning him or her out on the street or for refusing to promote or train when the older worker desires such opportunities? But it is this deep set nature of deference to age that may itself contribute to the trouble over age discrimination issues in Korean workplace settings. Work is by nature a hierarchical enterprise. Even in the most progressive work arrangements somebody is ultimately in charge. Although positions of authority in any given workplace may often correlate with age, this is not always the case. Probably wherever you are in the world, where a younger person is in a position of authority over someone older there is going to be a certain level of discomfort for both parties. In Korean society, however, due to the deeply ingrained and pervasive expectations regarding acceptable social behaviors and age, even a slight divergence in the hierarchies of age and authority are bound to create social confusion and awkward, if not unbearable, choices between deference to age and the exercise of one's authority.

Add to this the traditional *deference* to authority in Confucian societies[40)]

240 (1995) (examining measures of affection, repayment, family harmony, respect, obligation, and sacrifice); Kyu-taik Sung, *A New Look at Filial Piety: Ideals and Practices of Family-Centered Parent Care in Korea*, 30(5) THE GERONTOLOGIST 610 (1990) (examining motives for filial piety, kinds of emphases given in filial duties, and sacrifices endured for parents).

40) *See generally*, Lee, *supra* note 37.

and one can see the nature of the deeply inherent conflicts raised by an aging workforce in a Confucian-based society. How does a younger person with authority observe the proper deference to age in a workplace setting that includes older subordinates? If one does not show the proper deference, one will be vilified by co-workers and other subordinates. Yet if one does not insist upon and exercise one's authority, one will gain little respect from the same co-workers (including, and especially, upper management) and subordinates. For the older worker's part, how does one of many years respond to an authoritative direction from one who is younger? Korean age-based social mores do not encompass only rules of deference to be observed by the young. They also include expected behaviors and responsibilities for the older. If one who is older does not observe these expectations, one's status and identity as an older member of society is confused. At the same time, if one does not properly respond to authority in a Confucian-based society, at least for the purpose of maintaining social appearances, one may be vilified as a "troublemaker." It is this unified and highly sensitive confluence of age and authority in Confucian-based societies,[41] a confluence that is relied upon by both young and old for normalized social relations, that creates the unique and seemingly insurmountable[42] problems in Korean society when it comes to issues related to age and the workplace.

Given the urgency raised by Korea's rapidly aging society and its deeply-imbedded norms regarding age, if Korea intends to address the very real problem of an unemployed aging workforce, it is imperative that any employment-based age discrimination legislation be robust and reliable. A key factor contributing to the strength of any legislation is the clarity of the definitional elements upon which findings of violations are based. Similar to

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41) *See id*. at 265 ("A particular emphasis lies on the proper form of practice based on age and seniority differences between interacting agents. Roughly, most relationships dictated by Confucian authority relations are based on people's ages. This is not to say that the age differential *per se* is the one deciding factor in Korean people's lives, though it matters relatively more than in other countries. But in many cases, and especially in everyday life, a majority of the important criteria of power and prestige, or of "social distinction" … are closely related to the age differentials; seniority based authority is the best example).

42) *See* Alan Strudler, *Confucian Skepticism About Workplace Rights*, 18(1) BUS. ETHICS QUART. 67 (2008) (arguing that Confucian skepticism toward the concept of rights is more formidable than Western liberal scholars have recognized).

other forms of workplace discrimination, determining instances of age discrimination and the applicability of prescribed exceptions can be a complex task since it is highly fact intensive and the employer's economic concerns in running a business will continue to raise potentially viable defenses. Given these complexities, and the economic concerns of all stakeholders, legislation attempting to meet the problem of age discrimination more forcefully through the imposition of stiffer fines must have a sound foundation on which to find or deny instances of discrimination. Without a reliable definitional framework, stiff penalties are meaningless. As the comparative analysis undertaken here reveals, the Korean legislation may be seriously lacking in this regard.[43)]

III. Scope of Protection

An immediately apparent divergence in the age discrimination law of the three jurisdictions lies in their scope of protection in terms of the relative age of the complaining party. The UK legislation protects both older and younger workers, while the US legislation specifically protects only older workers. Viewing the Korean legislation on this point, it appears to be similar to the UK legislation in that it apparently protects both older and younger workers alike, but the structure, content and purposes of the broader legislation in which the prohibition appears suggests that it is aimed at protecting older workers. This introduces an ambiguity into the statute.

1. Scope in the UK and US Legislation

The scope of the UK legislation is clearly the broadest of the three. The Regulations do not set a specific age at which the prohibition is triggered.

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43) For a further discussion of aging trends and policies in Korea, see generally Sung-jae Choi, *Ageing Society Issues in Korea*, 3(1) Asian Soc. Work and Pol. Rev. 63 (2009); Keisuke Nakashima, et al., contrs. Hyejin Kwon and Jeehoon Park, The Aging of Korea: Demographics and Retirement Policy in the Land of the Morning Calm (Center for International and Strategic Studies 2007), *available at* http://csis.org/publication/aging-korea; Organization for Economic Co-operation and Development, Ageing and Employment Policies: Korea (2004) (Korea experiencing rapidly aging society); Sung-jae Choi, *Ageing in Korea: Issues and Policies*, in David R. Phillips, Ageing in the Asia-Pacific Region: Issues, Policies, and Future Trends 223-242 (2000).

Rather, the legislation provides that age discrimination occurs in any circumstance where age is the determining factor.[44] In this sense, the UK Regulations do not in fact have a scope of application that is based on the age of the injured party. Instead, the Regulations apply to workers of all ages. The UK Regulations therefore protect both young and old from unfair age discrimination in employment.[45]

This is quite different from the US legislation.[46] The ADEA applies only to individuals aged 40 and above.[47] The inclusion of this applicability threshold is explained by the history of the legislation itself. Although it was proposed that age should be included as a prohibited ground of discrimination in the drafting of the Civil Rights Act of 1964, the proposal was voted down due to a lack of agreement as to the seriousness of the problem.[48] Nonetheless, the final version of the legislation called for a study by the US Secretary of Labor to examine the prevailing employment opportunities of older workers.[49] The study found that considerable discrimination was occurring in the hiring of these workers[50] and enactment of the ADEA soon followed. The result is a prohibition on age discrimination that is aimed at protecting older workers by limiting the prohibition to a certain age group rather than providing a general prohibition on all forms of discrimination that use age as a factor.[51] Thus, in terms of scope, the US legislation is not only more narrow than the UK legislation in its application but it is qualitatively different in that it is intended to protect older rather than younger workers.

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44) Age Regulations, reg. 3(1)(a).

45) SARGEANT, *supra* note 24, at 1.

46) Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202. 29 U.S.C.A. §§ 621, et. seq. [hereinafter ADEA].

47) ADEA, 29 U.S.C. § 631(a).

48) *See* Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where it's Been, Where it is Today, Where it's Going*, 31 U. RICH. L. REV. 579, 580 (1997).

49) Civil Rights Act of 1964, Pub. L. No. 88-352, S 715, 78 Stat. 287, 316.

50) SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, 5 (1965).

51) This reading of the ADEA was affirmed as recently as 2004 in *General Dynamic Land Systems, Inc. v. Cline*, 540 US 581, 595 (2004) (ADEA's prohibition against discrimination "because of … age" targets discrimination against the relatively old, not the relatively young).

2. Scope of the Korean Legislation

Viewing the Korean legislation in light of the foregoing, it becomes apparent that a structural inconsistency in the Korean legislation may exist. In one sense, the purposes of the Korean Act appear similar to the ADEA's protection of older workers. Similarities to the ADEA can be seen in the construction of the Act as a whole. The Korean Act is actually a combination of the newly formulated prohibition on employment-based age discrimination, with supporting provisions, and the former Employment Promotion for the Aged Act (hereinafter EPAA).[52] In spite of these changes, the title of the newly formulated Act suggests that its overall aim remains the support of older workers since it retains word-for-word the "employment promotion for the aged" language from the title of the former statute.[53]

In addition, Article 1 of the Act linguistically links the prohibition on age discrimination contained in the Act with employment promotion for older workers. Article 1 explains that the purpose of the Act is to prohibit age discrimination in employment and support the employment stability of aged persons.[54] Article 2 then defines the term "aged persons," as well as the term "semi-aged persons," as "persons whose age is equal to or above the age determined by Presidential Decree . . . ."[55] The presidential decree in question sets these ages at 55 and 50-55, respectively.[56]

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52) GOLYEONGJA GOYONGCHOKJINBEOP [EMPLOYMENT PROMOTION FOR THE AGED ACT] [hereinafter EPPA], Act No. 4487, Dec. 31, 1991, as amended by Act No. 8116, Dec. 28, 2006, effective Jun. 29, 2007, art. 4-2 (superseded by AGE DISCRIMINATION ACT, Mar. 21, 2008).

53) The previous title was "Golyeongja goyongchokjinbeop [Employment Promotion for the Aged Act]" while the new title reads "Goyongsang yeollyeongchabyeolgeumji mit golyeongjagoyongchokjine gwanhan beopryul [Act on the Prohibition of Age Discrimination in Employment and Employment Promotion for the Aged]."

54) AGE DISCRIMINATION ACT, art. 1.

55) *Id.* art. 2, nos. 1, 2. In Korean Law, the term "Presidential Decree" refers to the executive branch regulations necessary for the implementation of the legislative act in question. It is quite regular for the legislative branch in Korea to delegate much of its lawmaking authority to the executive branch on matters of definition and application.

56) GOYONGSANG YEOLLYEONGCHABYEOLGEUMJI MIT GOLYEONGJAGOYONGCHOKJINE GWANHAN BUMNYUL SIHAENGNYEONG [ENFORCEMENT DECREE FOR THE ACT ON THE PROHIBITION OF AGE DISCRIMINATION IN EMPLOYMENT AND THE PROMOTION OF EMPLOYMENT OF OLDER PERSONS] (Presidential Decree No. 21230, Dec. 31, 2008, effective Mar. 22, 2009), art. 2, paras. 1, 2.

Provisions on the responsibilities of government and business regarding the employment of the aged, and a related exception to age discrimination, also suggest that the purpose of the age discrimination prohibition contained in the Act is intended to protect older workers. First, Articles 3 and 4 of the Act follow a linguistic pattern similar to Article 1 in describing the responsibilities and obligations of government and business, respectively, to formulate and implement policies aimed at eradicating age discrimination and promoting the employment of older workers. Next, Article 4 ("Employer's Obligation") requires the employer to "make efforts to … provide employment opportunities to the aged suited to their abilities …," and according to an exception to age discrimination contained in Article 4-5, support measures implemented *under the Act* that are aimed at maintaining or promoting the employment of a specific age group are not considered age discrimination.[57] Since Article 4 sets down a very generalized requirement that the employer make efforts to provide employment opportunities to the aged, practically any action taken by an employer that is favorable to a relatively older worker may be viewed as a support measure implemented *under the Act*. Hence, in any situation where a relatively younger worker claims she was discriminated against in favor of an older worker, it is possible for the employer to rely upon the exception in Article 4-5. This would appear to make the statute one that effectively and ultimately protects older workers over younger workers.

Taken together, the foregoing points suggest that the anti-age discrimination language in the Act is intended to protect older workers as a group, as in the US ADEA, rather than both older and younger workers alike, as in the UK Regulations. However, this reading is problematic because the terms "aged persons" and "semi-aged persons" themselves do not actually appear in the provision setting out the prohibition on age discrimination.[58] Rather, that provision simply indicates that discrimination on the basis of age absent reasonable grounds is unlawful.[59] The absence of these terms appears to be intentional as the previous formulation of the provision under the EPAA included the terms.[60] Reading the Act further confirms that the terms "aged

57) AGE DISCRIMINATION ACT, art. 4-5, no. 4.
58) *See id*. art. 4-4.
59) *Id.*
60) EPPA, art. 4-2.

persons" and "semi-aged persons" appear only in the portions of the Act focusing on employment promotion of older workers. There is also no provision in either the Act or the attendant administrative regulations[61] that supplies an age limit above which the prohibition is triggered. With this in mind, it could be argued that the anti-discrimination language in the Act is in fact *not* intended to protect any particular age group, but rather to outlaw any discrimination in employment that uses age as a factor. This formulation would make the age discrimination prohibition in the Korean Act similar to the UK formulation, providing protections for both younger and older workers alike.

If that is indeed the case then we are left with an Act that theoretically contains two qualitatively different approaches to age discrimination. On the one hand, the Act appears to be aimed at protecting older workers from age discrimination, yet on the other it appears to protect all workers, young or old, from discrimination on the basis of age. Ultimately, this confusion is a result of the way in which the legislation was constructed. As indicated above, the Act is a combination of the former EPAA and a newly formulated prohibition on age discrimination in employment. A close comparison of the former EPAA and the current legislation reveals that the anti-age discrimination language in various provisions was simply grafted onto the language of the already existing employment promotion legislation.[62] This method of legislating may be the ultimate cause of the new legislation's structural inconsistencies.

Thus, by contrasting the scope of application of the Korean legislation with that of the US and UK legislation ultimate structural ambiguity in the scope of the Korean legislation is revealed. While the Act taken as a whole appears to be aimed at the promotion of older workers, the age discrimination prohibition

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61) Enforcement Decree for the Act on the Prohibition of Age Discrimination in Employment and the Promotion of Employment of Older Persons; Goyongsang Yeollyeongchabyeolgeumji Mit Golyeongjagoyongchokjine Gwanhan Bumnyul Sihaengngyuchik [Administrative Rules for the Act on the Prohibition of Age Discrimination in Employment and the Promotion of Employment of Older Persons] (Ministry of Labor Regulation No. 314, Dec. 31, 2008, effective Mar. 22, 2009).

62) This fact is readily apparent in the English translation available from the Ministry of Legislation (as of November 2009). In places, one can easily distinguish the newly added language from the pre-existing language since the character font utilized for the new portions are different from the old.

itself appears to protect both older and younger workers alike. This will certainly lead to problems of interpretation especially where a younger complainant raises a claim based on an employment decision in which an older worker was favored. It may be argued that the removal of the "aged" and "semi-aged" terms was specifically intended to remove any statutorily defined limitation on the prohibition, thereby leaving open the availability of age discrimination claims for persons younger than some age limit fixed by presidential decree, while the overall purpose of the legislation itself remains the promotion of older workers. But this means that at best the true purposes of the statute would be founded upon judicial interpretation, rather than the expressly stated terms of the statute. While this circumstance is to be expected for the finer points of interpretation of any statute, it is difficult to justify such an ambiguity at the very core of the statute's purposes and application.

IV. Defining Direct Discrimination

A comparison of the provisions setting forth the prohibition on direct discrimination[63] in each of the statutes, and relevant exceptions to liability, reveals another potential pitfall for the Korean legislation. The differences among the three statutes are related to the way in which the prohibiting language, definitions of discrimination (explicit or implicit), and relevant exceptions are detailed and combined in the statutes as written. The following analysis first looks at the definitional aspects found in the UK and US statutes in order to draw out a framework of commonalities that may be used to examine the Korean legislation. The Korean legislation is then examined in light of this framework. The principle finding is that the Korean legislation fails to prohibit anything beyond "unreasonable distinctions" based on age.

63) Similar to the UK legislation and the US legislation (as interpreted by the US Supreme Court), the Korean legislation provides for indirect discrimination. *See* AGE DISCRIMINATION ACT, art. 4-4(2). This article examines the provisions related to direct discrimination only.

1. UK and US Definitional Framework

1) Definitional Elements in the UK Age Regulations

It is best to begin with the UK Regulations because they are the most detailed among the three jurisdictions examined here in terms of prohibition, definition and exception. The Regulations accomplish their purpose by combining an explicitly stated definition of age discrimination with a separately stated general prohibition on discrimination in employment. This approach greatly increases the level of clarity inherent in the legislation.

Regulation 3 of the UK legislation provides an explicitly stated definition of what it means to discriminate under the statute. This definition constitutes what is ultimately a two-part test for establishing a claim of direct discrimination. The first part sets out a standard for establishing direct discrimination, while the second part makes a justification for direct discrimination an integral part of the overall definition itself.[64] In the first part, the provision stipulates that for purposes of the Regulations person A discriminates against person B if on grounds of B's age, A treats B less favorably than he treats or would treat other persons.[65] It is important to take note of a number of key elements in this language, the significance of which will become apparent when viewing the definitional elements provided under the US and Korean legislation.

First, it is clear that the word "discriminates" is actually being defined, rather than simply stated and prohibited, since we are told that "person A discriminates against … person B *if* [a certain condition occurs]." This indicates that the term "discriminates" will be given content beyond the closely associated but neutral terms "differentiation" or "distinction." The significance of this point has particular import for analyzing the Korean legislation, as the Korean legislation appears to add nothing beyond the word

64) Age Regulations, reg. 3(1)(a) ("[Regulation] 3. (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if— (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, … and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim").

65) *Id.*

"distinction." Second, the use of the word "against" alerts us to the fact that a discriminatory act is one that is antithetical to the interests of the effected party. This may seem obvious but, as above, its appearance contributes to the sense of the word "discriminate" being something more than "distinction." Third, the language stipulates that a discriminatory act is made so by treatment that is "less favorable" to one party as compared to another. This element means that under the UK legislation a determination of whether an instance of discrimination has occurred requires that the interests of one party be *compared* to the interests of another. This is fundamentally different from the US legislation. Finally, "on the grounds of B's age" makes it clear that B's age is the reason for the unfavorable treatment he has received. While this point may also seem obvious, it is important to highlight the language because it makes clear that it is not simply an age-based policy that raises the possibility of age discrimination but rather an individualized harm associated with B's age.

The second part of Regulation 3 makes the absence of a justification for the discriminatory act an integral element of the definition for "discriminates." The language of the provision expressly stipulates that A discriminates against B if A commits the act described in the first part *and* A cannot show the treatment to be "a proportionate means of achieving a legitimate aim."[66] Thus, if A can show that age discrimination in the first part constitutes "a proportionate means of achieving a legitimate aim" than under the regulation, A has *not discriminated* against B.[67] This of course introduces an inherent confusion into the legislation. Although this term is referred to as an "objective justification" to age discrimination, it is not a justification in the strictest sense under the language of the provision. This is because under the

66) Age Regulations, reg. 3(1)(a). Commentators have described this language as an "objective justification" test. *See, e.g.*, Malcolm Sargeant, *The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment*, 35 INDUS. L. J. 209, 219 (2006). For a discussion of the justification contained in Regulation 3, see Jonathan Swift, *Justifying Age Discrimination*, 35(3) INDUS. L. J. 228 (2006).

67) For recent cases interpreting this language, see Loxley v BAE Systems (Munitions & Ordnance) Limited, [2008] ICR 1348; [2008] IRLR 853 (EAT); MacCulloch v Imperial Chemical Industries plc, [2008] ICR 1334; [2008] IRLR 846 (EAT); Rolls-Royce plc v Unite the Union, [2009] IRLR 49 (QB). For an analysis of foregoing cases, see Notes, *Age Discrimination and Redundancy*, 38(1) INDUS. L. J. 113 (2009).

statute if the test is satisfied then the result is "no discrimination found," rather than a "justification for discrimination found." Commentators have noted that this represents a critical divergence from other areas of discrimination law in the UK,[68] and the provision itself was challenged in a case brought before the European Court of Justice on the grounds that the regulation ultimately permits age discrimination and thereby violates the relevant EU Directive.[69]

The confusion in Reglation 3 arises because the language can lead to two antithetical outcomes from within the same definitional provision. An act satisfying the first part of the definition would clearly be an act of age discrimination in its own right since it would be more than a simple distinction based on age, i.e., it would be a distinction based on age that results in less favorable treatment of one person relative to another. However, satisfying the import of the second part would mean *no discrimination has occurred* under the statute. Under this arrangement, an interpreting body is sure to find itself in the unhappy position of explaining to a losing plaintiff how it is that age discrimination found under the first part is in fact *not* discrimination due to the second part. As we shall see in the analysis of the relevant Korean provision, the definitional element under the Korean Act suffers from a similar difficulty.

Following the two-part definition of age-based discrimination set out in Regulation 3, Regulation 7 of the UK legislation sets out the statute's prohibition on discrimination in employment practices. Discrimination in recruitment and hiring is covered by Regulation 7(1). The provision makes it unlawful for an employer to discriminate against a person in the arrangements she makes for determining to whom employment will be

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68) *See* Notes, *supra* note 67, at 219-220.

69) Case C-388/07 R *(The Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373 (ECJ). Plaintiffs in the case, popularly known as the *Heyday* case, claimed that exemptions in the UK Regulations do not comply with Council Directive 2000/78/EC, including the objective justification defense to direct discrimination found in Regulation 3. The Court decided that the Directive in fact permits a *general* defense to direct discrimination, permitting defenses to unspecified and unforeseen circumstances in the form of social policy measures. For a discussion of this development, see Michael Connolly, *Forced Retirement, Age Discrimination and the Heyday Case*, 38(2) INDUS. L. J. 233 (2009).

offered, the terms on which employment will be offered, or by refusing to offer, or deliberately not offering, employment.[70] This is followed by a prohibition on discrimination in other areas of employment in Regulation 7(2). Discrimination in terms of the employment afforded, opportunities for promotion, transfer, training, or any other benefits afforded, refusal or deliberate failure to afford such opportunities, dismissal, or any other detriment, is prohibited.[71]

Thus, in the UK Regulations an explicit, though arguably flawed, definition of what constitutes "discrimination" is provided and stated separately from the prohibition on such discrimination. This method of combining an explicit definition of what is meant by age discrimination with a separately stated prohibition makes the UK legislation unique among the three pieces of legislation examined.

2) Definitional Elements in the US ADEA

(1) Implied Definition

Similar to the UK Regulations, the US ADEA combines definitional elements with its prohibition on age discrimination.[72] However, these definitional elements are *implicit* in the prohibiting language itself, rather than stated separately and explicitly as in the UK Regulations. Also, the use of a threshold age to define the statute's scope of protection provides an inferred functional definition that is consistent with the structure and purpose of the statute.

Section 623(a)(1) provides the prohibiting language. The provision makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[73] In this language, we can find definitional elements that are similar to the UK Regulations. First, we note that an explicit definition

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70) Age Regulations, reg. 7(1).

71) *Id.* reg. 7(2).

72) For a general comparison between UK and US age discrimination law, see Jeffrey A. Mello, *Age-Related Employment Discrimination: A Transatlantic Comparison of the United States and the United Kingdom*, 16(1) INT'L HR J. 4 (2007).

73) ADEA, 29 U.S.C. § 623(a).

is not provided since there is no conditional statement concerning the meaning of "discrimination" similar to that identified in the UK Regulations. Nonetheless, we are alerted to the fact that "discrimination" has a meaning beyond a simple "differentiation" or "distinction" by language appearing elsewhere in the provision. This arises from use of the phrase "… or *otherwise* discriminates"[74] following a list of negative employment decisions. The implication is that age discrimination is more than a simple distinction based on age, but rather a distinction that has a negative outcome.

Second, despite the absence of an explicitly stated definition, use of the word "against" implies that the action taken is antithetical to the interests of the affected person, as in the UK provision. This also provides a further indication that "discriminate" as used in the statute means more than simple distinction. Third, the use of the words "fail or refuse to hire or to discharge" implies that the idea of discrimination here used is associated with negative consequences, similar to the idea of "less favorable" in the UK definition. It should be noted, however, that this element in the ADEA represents a significant point of divergence from the UK Regulations. Unlike the UK Regulations, the ADEA does not include a comparative element. This is explained by the fact that the statute as a whole takes an "age-threshold" approach. By setting an age-threshold, age discrimination does not occur on a comparative age basis in the strictest sense. Rather it occurs in relation to a fixed age. The sense of the US legislation therefore is that the consequences of discrimination are "*non*-favorable," in absolute terms, rather than the comparative sense of "less favorable" as in the UK legislation.

Finally, the obviously requisite element "because of such individual's age" is practically identical to the UK provision, especially since it includes a reference to the *individual's* age. Similar to the UK provision, this alerts us to the fact that the content of direct discrimination is founded upon a negative reaction to the individual's age rather than an objective policy that merely makes a distinction based on age.[75] Thus, the definitional elements in the

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74) *Id.* (emphasis added)

75) On the significance of this point, see City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (Interpreting Title VII, the Court explained, "The question ... is whether the existence or non-existence of 'discrimination' is to be determined by class characteristics or individual characteristics. ... The statute's focus on the individual is

provision as written are largely similar to those provided in the UK Regulations. The only significant difference is in the use of a comparative element in the UK Regulations versus the use of an absolute threshold element in the US legislation.

(2) Functional Definition

The presence of that threshold element is the basis for a further definitional quality that distinguishes the US legislation from that of the UK and Korea. This quality is inferred from the structure of the legislation in that the combination of a threshold age with the prohibition itself provides a *functional definition* of age discrimination. As indicated above, the ADEA applies to persons aged 40 and above. As such, discriminatory employment practices (as implicitly defined in the prohibitive language of the statute) based on age only constitute age discrimination when they are committed against persons within the defined age group. Stated in its most basic form, owing to the combination of prohibiting language and a specified age threshold, age discrimination in employment is effectively defined under the ADEA as employment discrimination that is committed against anyone 40 years old or older.

Of course, this functional definition requires a further refinement since it does not address the situation in which the person subject to discriminatory treatment and the person thereby favored are both members of the protected class (i.e., they are both aged 40 or above). This situation places us back into a pure comparative age context, similar to that anticipated by the UK legislation, since there is no threshold age by which to distinguish the favored from the unfavored. Courts addressing this problem early on held that in such situations the ADEA does not apply since the person favored by the age distinction (i.e., the younger person) is not outside the protected class. The Supreme Court reversed this trend, however, holding that a plaintiff does not have to show that the person favored is less than forty years of age.[76] Thus, where both parties are members of the protected class, it would seem the functional definition does not apply. Instead, we would turn to the substantive

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unambiguous. … Even a generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply").

76) O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) (plaintiff is not required to show that she was adversely effected in favor of someone younger than forty).

definition implicit in the prohibiting language referred to above in order to determine if age discrimination had occurred between two persons who are both members of the protected class.

This is reminiscent of the UK legislation where age discrimination is defined as any less favorable employment decision taken against a member of one age group in favor of a member of another age group with *any* age providing the necessary dividing line between those groups. In this framework, it does not matter whether the individual favored is younger or older—any favoritism of one individual over another on the basis of age contributes to a finding of age discrimination. In spite of this apparent similarity, however, even in the purely comparative scenario (as opposed to the protected class scenario) US case law reads the ADEA as protecting older workers over younger. That is, even where both parties are members of the protected class, and are thus distinguishable only by their comparative age difference, there remains an emphasis on the protection of older workers over and against younger workers. In *General Dynamics Land Systems, Inc. v. Cline*,[77] the Supreme Court denied a claim of age discrimination founded on adverse treatment due to the plaintiff workers being "too young" in spite of their membership in the protected class (over the age of forty). Deeming the ADEA textually ambiguous as to whether its protection was limited to persons of older age, the Court relied on the legislative history of the statute which suggested that Congress intended only to protect older workers.[78] Thus, even where it seems that a substantive comparative definition would apply, the ADEA calls for a functional definition that emphasizes the protection of older workers.

This point is further illustrated by the "prima facie" definition of age discrimination under US case law. The elements commonly used for establishing a prima facie age discrimination case follow the *McDonnell Douglas*[79] model developed in other discrimination claims under Title VII

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77) 540 U.S. 581 (2004).

78) *See* Lewis, Harold S. Jr., & Elizabeth J. Norman, Employment Discrimination Law and Practice 428 (2d ed. 2004).

79) 411 U.S. 792 (1973). *McDonnell Douglas* is the seminal case for discrimination proofs in the US. Applying *McDonnell Douglas* to ADEA cases has not been without controversy. Nonetheless, the Supreme court confirmed the applicability of *McDonnell Douglas* to ADEA

jurisprudence.[80] Using that approach, a plaintiff claiming age-based employment discrimination is commonly required to show that she: (a) is aged forty or over; (b) was not hired, was discharged, or was otherwise adversely affected by the employer's decision; (c) was qualified for the position; and (d) was ultimately replaced by a person *sufficiently younger* to permit an inference of age discrimination.[81] Thus, even where age is a non-fixed comparative dividing line between members of favored and unfavored groups, the ADEA only prohibits unfavorable treatment against the *older* group.

In spite of this fundamental difference between the UK and US legislation, the law of the two jurisdictions nonetheless share an important feature in their legislative architectures. In both, the prohibitive language is clearly combined with some form of a defining element. In the UK case, a substantive definition is explicitly provided by the statute. In the US case, substantive definitional elements are implicit in the prohibiting language itself and a functional definition is inferred from the age-threshold provision of the statute. As such, though the UK legislation protects both young and old alike, a careful definition of age discrimination is spelled out in order to make it clear that age discrimination occurs under the Regulations when a person treats another person unfavorably on the basis of age relative to others. The US legislation does not include an explicit definition but the prohibiting language implies that age discrimination in employment occurs when a person suffers negative consequences on the basis of his age, and the comparative enquiry is limited by the age-threshold element which ultimately imposes a definition of age discrimination that is aimed at protecting older rather than younger workers. Finally, it should be noted that unlike the UK definition, the US legislation does not include the purpose of the discrimination challenged (i.e. an "objective justification") as an *integral* element of the definition of age discrimination. Exceptions to age discrimination under the ADEA appear elsewhere in the statute.

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cases in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

80) *See* RUTHERGLEN, *supra* note 6, at 207. Title VII is the basis of most US civil rights litigation.

81) *See* WOLKINSON, BENJAMIN, EMPLOYMENT LAW 128 (2d ed. 2008) (citing, for example, *Bruno v. W. B. Saunders Co.*, 48 FEP 1613 (1988), aff. 50 FEP 898, 882 F.2d 760 (1989)(emphasis added)).

2. The Search for Definitional Elements in the Korean Legislation

1) Korean Definitional Elements in Light of the UK/US Definitional Framework

Viewing the Korean Age Discrimination Act in light of the foregoing, it becomes immediately apparent that the Korean legislation suffers from serious definitional ambiguities. While a definitional element, express or implied, can be easily found in both the UK and US legislation, it is difficult to determine where, or in what manner, such an element exists in the Korean legislation. The substantive prohibition in the Korean Act is found in Article 4-4(1):

> **Article 4-4** (Prohibition on Age Discrimination in Recruitment and Hiring, etc.)
>
> (1) An employer shall not discriminate against a worker, or a person intending to become a worker, on the basis of age, absent reasonable grounds, in the areas listed in each of the following subparagraphs:
>
> 1. Recruitment and hiring;
> 2. Provision of wages, or other valuables apart from wages, and benefits;
> 3. Education and training;
> 4. Placement, transfer, and promotion; and
> 5. Retirement and dismissal.[82)]

Reading the plain language, we can see that the provision states the prohibition but it does not include an explicit definition of what it means to "discriminate," nor is there a separate provision elsewhere in the Act that supplies such a definition. Neither is there a threshold age of application similar to that of the US legislation which might provide a limiting element by which a functional definition may be inferred. Furthermore, there are no

82) AGE DISCRIMINATION ACT, art. 4-4(1) (no. 1 effective Mar. 21, 2009; nos. 2 to 5 effective Jan, 1, 2010).

definitional criteria available, explicit or implicit, in the Act's enforcement decree[83] or the regulations of the Ministry of Labor that are associated with the Act.[84] Thus, the only possibility for a definitional element existing somewhere in the Act is if there is an implicit definition in the prohibiting language of Article 4-4 itself, as in the US legislation.

In order to determine whether such an implicit definition is to be found, it is useful to compare the elements in the provision to the elements in the UK and US provisions identified above. A consolidation of those elements provides a framework against which we may contrast the Korean provision. This framework asks whether: (1) the provision contains any language suggesting that an implied definition may be present; (2) the proscribed act is one that is "against" the interests of an effected party; (3) a sense of adverse consequence is present, and (4) the requisite "age as a deciding factor" is expressed through some reference to an *individualized* harm.

Regarding the first test, we are looking for some indication that the word "discriminate" will mean more than "differentiation" or "distinction." It appears that there is no language that would signal the presence of such a meaning. In the US legislation, this sense was conveyed by the attachment of negative employment consequences to the phrase "… or *otherwise* discriminates," the word "otherwise" implying that the preceding language is part of what it means to discriminate. No such construction appears in the Korean provision. This is not to say that the same construction *must* appear, but rather, if we are to find an implicit definition in the language as written, then *some* term is required that would signal the presence of such a definition. No such term or other signal can be found.

Second, the word "against" appears in the Korean provision as in the UK and US provisions indicating that whatever the term "discriminate" may mean, its effect is antithetical to the interests of the party affected. This seems a simple and obvious requirement but, as discussed shortly, the notion of "against" is actually nowhere to be found in the original. The presence of the word "against" merely follows on the choice of the word "discriminate" to

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83) Enforcement Decree for the Act on the Prohibition of Age Discrimination in Employment and the PRomotion of Employment of Older Persons.

84) Administrative Rules for the Act on the Prohibition of Age Discrimination in Employment and the Promotion of Employment of Older Persons.

translate into English the operative word of the provision. The terms in the original do not appear as such. Third, as to whether a sense of adverse consequence is present similar to the negative employment consequences or "less favorable" treatment language in the US and UK legislation, again, no such language is found.

Finally, the requisite "age as a deciding factor" necessary for any age discrimination prohibition is obviously present, but it does not explicitly refer to the *injured party's* age. Rather, it simply refers to discrimination "on the basis of age." This is significant because we are trying to determine if a definition of discrimination is implicitly provided in the prohibiting language. As indicated above, discrimination refers to a negative outcome due to an *individual's* age. This is because discrimination in the employment context is necessarily an individualized harm since it is an act of differentiating among individuals in relation to the distribution of employment goods (i.e., only one individual can fill one position, receive one portion of the wages available, etc.). The language as it appears in the original appears only to capture an act or policy of distinction based on age, rather than one that is discriminatory in the invidious sense of that word. Thus, it would appear that in addition to having no explicit definition of discrimination, the language of the Korean provision also has no implicit definition of what it means to discriminate under the Act.

Regarding the use of the word "against," a closer examination of the presence of this word in the translation sheds an important additional light on the nature of the Korean original. For the non-reader of Korean, a bare-bones translation of the operative portion is provided:

> "It is prohibited for employers to differentiate workers or prospective workers by reason of age without a logical reason in the areas of the following subparagraphs: …."[85)]

From this we can see that there is no single stand-alone word that carries the meaning of "against" that would make the word necessary to the

85) The redundant use of the word "reason" here is intentional as it reflects the exact word choice of the original.

translation. The word "against" only becomes necessary if the key operative word (*chabyeol*) is translated in this particular provision as "discriminate." Translating the word as "discriminate" however is not at all required. Instead, rendering the word as "differentiation" or "distinction" is actually closer to the word's basic meaning and usage. In fact, the exact term appears in many other pieces of legislation that have little to do with "discrimination" of the invidious distinction sort that is the subject of the legislation under consideration here.[86] Furthermore, in discussions of "discrimination" law in Korea, the term is used interchangeably both as a single-word identifier of a discriminatory act and as part of the very definition of "discrimination" itself.[87]

It is this last point that leads to much confusion in the discrimination debate in Korea. In too many places the identical term is used to define the term itself—which inevitably leads to circular reasoning. Were statements that are often found in these debates rendered in English, they would read something similar to the following: "In defining discrimination (*chabyeol*), we must remember that discrimination (*chabyeol*) is discrimination (*chabyeol*) without a justifiable reason." Of course, a proper definitional statement would read: "In defining discrimination (*chabyeol*), we must remember that discrimination (*chabyeol*) is a *differentiation/distinction* ([*some other term*]) without a justifiable reason."[88] On the significance of this point, it may be helpful to review the definition of discrimination found in the ILO Discrimination (Employment and Occupation) Convention. Article 1 of that convention begins:

> 1. For the purpose of this Convention the term *discrimination* includes—

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86) For a discussion of the difference between mere distinction and invidious distinction, see SANDRA FREDMAN, DISCRIMINATION LAW 66-67 (2002). For a collection of all legislation containing the term *chabyeol* in table form, including the relevant provisions and language, see ZOONIL YI, CHABYEOLGEUMJIBEOP [ANTI-DISCRIMINATION LAW] 171-176 (2007).

87) See, for example, the use of *chabyeol* in YI, *supra* note 86, at 57 ("'*chabyeol*' treatment" translated as "'*different*' treatment" rather than "'*discriminatory*' treatment" despite being used elsewhere to describe a discriminatory act translated word-to-word as "*discrimination*").

88) Alternatively, a properly constructed statement would read: "In defining discrimination ([*some other term*]), we must remember that discrimination ([*some other term*]) is a *differentiation/distinction* (*chabyeol*) without a justifiable reason."

> (a) any *distinction*, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[89)]

The idea that "discrimination" encompasses something more than mere distinction is obvious in the ILO convention. In the Korean original, there is no indication that the operative word *chabyeol* means anything more than distinction or differentiation.

Thus, coming back to our original purpose, by changing the translated term from *discriminate* to *differentiate* in the bare-bones translation above so as to remove the potential interference of the word "against," it becomes apparent that there is in fact no implicit definition of "discriminate" in the original Korean reminiscent of the UK/US framework drawn out above. Rather, the language appears to be merely a prohibition on making distinctions based on age that are unreasonable. Ultimately, the provision appears to be mere prohibitory language absent a definition.

2) Implicit definition different from the US definitional elements?

The above conclusion does not entirely rule out the existence of an implicit definition in the prohibiting language, however, since our analysis was based on a framework derived from the UK and US legislation. It simply means that if an implicit definition is to be found it is not present in a form similar to that of the US example. Having found that both the UK and US legislation combine prohibitive and explicit or implicit definitional elements to achieve their purposes, we are obliged to ask whether the Korean legislation does the same, though perhaps by other means.

The inclusion of the qualifying phrase "absent reasonable grounds" in the wording of the prohibition presents a candidate for the presence of such an implicit definition. That is, since the provision states that "[a]n employer shall not discriminate against a worker … on the basis of age absent reasonable

89) Convention concerning Discrimination in Respect of Employment and Occupation (ILC No. 111), adopted at Geneva on 25 June 1958 (entry into force 15 June 1960)(emphasis in part 1 in the original; emphasis in part (a) added); ratified by Korea 04 December 1998.

grounds," it may be argued that the provision implies that "age discrimination" is "discrimination against a worker on the basis of age where there is no reasonable justification." As above, this may be seen more clearly by use of the bare-bones translation. In that phrasing, to discriminate on the basis of age would mean to "differentiate workers … by reason of age without a logical reason." This sounds like the basic concept of discrimination. As noted above, discrimination does not refer to just any kind of distinction. Rather, it refers to invidious distinctions, i.e., distinctions that do not have a legitimate or acceptable justification.[90] Thus, it would appear that "differentiation of workers by reason of age without a logical reason," could serve as an implied definition of age discrimination present in the prohibiting language.[91]

However, relying on this language as an implicit definition raises significant problems. First, it has the potential of leading to circular reasoning where the analyst takes *chabyeol* to be "discrimination" in its negative sense. If under that usage age discrimination under the Act is thus defined as "discrimination on the basis of age that is lacking a reasonable justification" then we are left with the following results: (1) "age discrimination which is not reasonably justified is age discrimination," or (2) "age discrimination that is reasonably justified is not age discrimination." Clearly, neither of these outcomes makes sense. A case handler attempting to determine if age discrimination had in fact occurred will get caught in endless loops attempting to apply such a definition. The problem with viewing this entire phrase as an implied definition is that there is no measure by which to first determine if some *discriminatory act* based on age has occurred, since the confirmation or denial of such an act is dependent on whether it was reasonable.

Second, even taking the bare-bones translation, whereby we assume that the case handler reads the word *chabyeol* as the neutral term "differentiation/

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90) *See* FREDMAN, *supra* note 86, at 66-67 (not every distinction is discriminatory, rather detriment on the basis of illegitimate or unacceptable distinctions constitutes discrimination).

91) Indeed some commentators have referred to similar formulations under other anti-discrimination statutes as the relevant statute's "definition" of discrimination. *See, e.g.*, Sung-Wook Lee, *New Developments in Employment Discrimination in Korea*, *in* NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW, *supra* note 17, at 147, 154. For a general formulation of "discrimination" along similar lines, see YI, *supra* note 86, at 57 (discrimination is distinction absent a reasonable justification).

distinction" rather than the negatively charged "discrimination," we are left with age discrimination defined as a "distinction on the basis of age that is lacking a reasonable justification." This appears to be a viable candidate for an implicit definition of age discrimination since its captures something more than mere distinction. That is, a violation of the statute would be made on the basis of an "unreasonable distinction." However, the problem with this reading is that we are then left with nothing in the definition that indicates a detrimental or otherwise *invidious* distinction. This is due to the simple fact that "unreasonableness" in itself does not capture unfavorable or invidious treatment. Hence, though we may be left with a definition of *what is prohibited*, i.e., "unreasonable distinctions based on age," under this reading we are also left wondering where is the definition of *discrimination*.

Thus, under the statute as written, if *chabyeol* is read in its negative "discrimination" sense, the inclusion of "absent reasonable grounds" as a factor to be included in an implicit definition leaves us with circular reasoning, yet if *chabyeol* is taken in its neutral "distinction" sense, the inclusion of "absent reasonable grounds" in the implicit definition leaves us with a definition that has no sense of discrimination as *invidious* distinction.

3) "Absent reasonable grounds" as an exception to discrimination

Rather than taking the phrase "absent reasonable grounds" to be an implied definitional element, it may make more sense to view it as an *exception to liability*. In such a reading, where it can be found that reasonable grounds exist for a distinction based on age, the party making the distinction would escape liability for the act prohibited by the statute, i.e. unreasonable distinction, but there would be no ambiguity in determining whether the act prohibited by the statute had occurred (i.e., an age-based distinction). This seems to make sense because it would mean that a case handler in applying the provision would first determine if a distinction based on age had occurred. Of course, the handler would not have much of a definition to rely on, since the only effective definitional language left would be, depending on the reading of *chabyeol*, (1) "discrimination based on age," with no attendant definition of "discrimination," or (2) "a distinction based on age," which is obvious and adds no content. In either case, where discrimination/distinction based on age is found, then it may be concluded, plain and simple, that a *prima facie* case of the act prohibited by the statute has occurred.

Next, to determine if the defending party is liable under the provision, a determination would be made as to whether reasonable grounds exist for committing the act. The significance of this reading lies in separating the identification of an age-based discriminatory/differentiating act and an assessment of the reasonableness of the act, rather than conflating the reasonableness with the very definition of the prohibited act itself. This may be an especially desirable solution in light of the difficulties highlighted above regarding the interchangeable use of the word *chabyeol* and the potential difficulties thereby experienced by case handlers. If it can first be agreed that *chabyeol* is to be taken in its simple "distinction" sense, by separating the reasonableness analysis from the definitional analysis, the handler is left with answering first the simple question of whether a distinction (*chabyeol* in its differentiation sense) has occurred. Next, in examining if a reasonable ground exists, the analyst determines if the defending party is liable for a violation under the statute (*chabyeol* in its discrimination sense). If the defending party can state a reasonable ground for the distinction then the party escapes liability. Of course, this does not solve the problem of what makes the act invidious. It is simply an evaluation of whether the potentially offending act was reasonable and therefore not prohibited.

Nonetheless, taking the "absent reasonable grounds" language in Article 4-4 to be an exception to liability rather than a definitional element, presents a new complication when read in the light of the "exceptions" provision that follows Article 4-4. Article 4-5 sets out four scenarios that "shall not be considered age discrimination under Article 4-4:"

1. Where a specific age limit is inevitably required in light of the characteristics of the job duties involved;
2. Where there is a reasonable gradation in wages, or other valuables apart from wages, and benefits, in consideration of a difference in periods of continuous service;
3. Where in accordance with this Act, or other laws, a retirement age is fixed by employment contract, work rules, collective agreement, etc.; or
4. Where under this Act, or other laws, support measures are implemented to maintain or promote the employment of a specific age group.[92)]

If the language "absent reasonable grounds" in Article 4-4 is taken to be the basis for an exception to liability, then the presence of the exceptions listed in Article 4-5 above would need to be reconciled with that reading. A possible solution may be that the exception to liability in Article 4-4 constitutes a generalized statement on the availability of an exception based on a test for reasonableness, while the exceptions in Article 4-5 provide a fixed set of exceptions explicitly authorized by the legislature.

A last point regarding Article 4-5 exceptions brings us back to the main point regarding definitional ambiguity in the Act. The language of Article 4-5 stipulates that where any of the four listed circumstances exist, it "shall not be considered age discrimination."[93] Thus, the language clearly states, both in the original and in the translation, that where the described circumstances exist the act committed *is not age discrimination*. This is a definitional statement since it is referring to what is and what is not age discrimination. Yet the article itself carries the express heading "*Exceptions* to Age Discrimination."[94] This language sets up another confusion between definition and exception and the hapless analyst is thrown again into a loop whereby "age discrimination under the following subparagraphs is not age discrimination." As noted above, this is similar to the difficulties raised by the definitional language of the UK Regulations.

Viewing these concerns in light of the UK and US legislation illustrates the above point. Under the UK Regulations, an exception for 'genuine occupational requirement,' similar to Article 4-5, no. 1, of the Korean Act (above), is set out in regulation 8. The provision states "in relation to discrimination falling within regulation 3 (discrimination on grounds of age) … [regulation 7(prohibition of discrimination)] *shall not apply* to [various employment practices] where [the employment,] having regard to the nature of the employment or the context in which it is carried out … possess[es] a characteristic related to age [that] is a genuine and determining occupational requirement."[95] Thus, the regulation does not say that the application of a

92) AGE DISCRIMINATION ACT, art. 4-5.

93) "Discrimination" here comes from *chabyeol* in its "discriminatory act" sense.

94) AGE DISCRIMINATION ACT, art. 4-5 (emphasis added).

95) Age Regulations, reg. 8 (emphasis added).

genuine occupational requirement is "not age discrimination" as in the Korean provision. Rather, simply stated, that regulation states that for age discrimination which constitutes a genuine occupational requirement, the *prohibition* on age discrimination *does not apply*.

The US legislation is similarly worded on this point. The ADEA states that "[i]t *shall not be unlawful* for an employer … to take any action *otherwise prohibited* under subsections (a), (b), (c), or (e) [age discrimination prohibited] of this section where age is a bona fide occupational qualification …."[96] Again, the provision does not say that the use of an age-based occupational qualification is "not age discrimination." Rather, it stipulates that age discrimination where age is a bona fide occupational qualification *is not unlawful*. This is quite different from the definitional quality of the language in the Korean provision. Thus, in both the UK and US legislation, an age-based "occupational qualification" is an *exception* to liability, it is not an element that places the distinction within or outside the *definition* of age discrimination.

Thus, as to whether an implicit definition of age discrimination exists in the prohibiting language of Article 4-4 of the Korean Act, the answer turns on whether the phrase "absent reasonable grounds" constitutes a definitional element or an available exception to liability. If it is an exception to liability, then no implicit definition is to be found beyond "distinction based on age." If it is in fact taken to be a definitional element than it creates a definitional ambiguity that results in redundancy and circular reasoning.

It may be argued that the Korean legislation should not be faulted for this aspect of its provisions since the UK legislation takes a similar approach by including in its definitional provision a second requirement that the discriminatory act is shown to not be "a proportionate means of achieving a legitimate aim." However, regarding that view, a few points should be considered. First, as indicated above, the combination of an exception-like quality with the definition of "discriminates" is not without its potential problems. Similar to the Korean legislation, under the UK legislation there is a potential for outcomes of the "age discrimination is not discrimination" sort. Second, the UK legislation contains an explicit detailed definition of the discriminatory act apart from the exception-like language. This adds to the

96) ADEA, § 623(f)(1)(emphasis added).

definitional clarity of the Regulations. Third, the definition and the exception-like language are formally separated making it clear that there is a two-step process involved. Finally, the language itself is more specifically defined. The phrase "a proportionate means of achieving a legitimate aim" gives the handler quite a bit more to work with than "reasonable grounds," especially since the term "legitimate" is included. This is reminiscent of the "illegitimate" reasons language of invidious discrimination, i.e., it is not only "reasonable" grounds that are acceptable, but *legitimate* reasonable grounds.

In summary, the UK Regulations contain an explicitly stated definition of discrimination that includes a justification as an integral part of the definition. This definition is stated separately from the prohibiting language, which appears in a subsequent provision. In the US legislation, the definition and prohibition are not separately stated and there is no explicit definition of discrimination. However, the prohibitive language itself implicitly defines discrimination and a functional definition is inferred from the statute's limited applicability to workers aged 40 and above. Exceptions and justifications are stated separately from the prohibiting language. In the Korean Act, there is no explicit definition of what constitutes discrimination and it is unclear whether a reference to "unreasonable distinctions" based on age constitutes an implicit definition or is the basis for an exception to liability. It is also not clear whether exceptions stated separately are indeed exceptions or whether they are an implicit part of the definition of age discrimination itself. These ambiguities raise potential pitfalls in the application and interpretation of the statute which may ultimately render the statute ineffective in addressing the urgent and deep-set problem of age discrimination in Korean society. A review of age discrimination cases handled by the NHRCK illustrates the potential for such difficulties.

V. Age Discrimination Cases Handled by the NHRCK

The National Human Rights Commission of Korea (hereinafter NHRCK or "the Commission") has handled age discrimination complaints under its own mandate since its establishment in 2001.[97] As mentioned earlier, this is

97) NHRCK ACT. art. 2(4) sets out 19 grounds, including age, on which discrimination

because prior to the enactment of the new age discrimination provisions no legislation other than the NHRCK Act offered a procedure for bringing an age discrimination complaint. Under the new provisions, the NHRCK has become the administrative body of first instance for discrimination complaints brought under the Age Discrimination Act.[98] Upon a finding of age discrimination and the issuance of any recommendations or remedial measures, the NHRCK is required to forward a report of such to the Ministry of Labor.[99] Where an employer fails to comply with any of the recommendations or remedial orders issued by the NHRCK, a complaint may be taken to the Ministry of Labor for enforcement procedures, including the imposition of fines.[100] Since the NHRCK is therefore the effective gatekeeper for complaints brought under the new provisions, it makes sense to examine the Commission's history in handling such cases in order to get some sense of how the language in the new provisions may be applied over time. These cases provide a highly informative view of the potential difficulties raised by the definitional aspects of the new age discrimination provisions. This is because the prohibiting language pertaining to discrimination under the NHRCK Act that has been applied to all cases handled by the Commission since 2001 relies on the same "unreasonable distinctions" language that is now found in the new age discrimination provisions.

The NHRCK prepared a summary of these cases as part of an internal review carried out in preparation for its role as the administrative body of first

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complaints may be filed with the Commission.

98) AGE DISCRIMINATION ACT, art. 4-6(1)("A person who suffered from age discrimination as a result of a violation of the age discrimination prohibition in Article 4-4 (hereinafter referred to as a "victim") may file a petition with the National Human Rights Commission in accordance with Article 30 of the National Human Rights Commission Act.")

99) *Id.*, art. 4-6(2)("After investigating a petition in paragraph (1), where a determination of age discrimination is made and a recommendation for remedy, etc. is made to the head of the concerned institution, organization or inspection agency, the National Human Rights Commission shall notify the Minister of Labor of such including the details of the remedy recommended").

100) *Id.*, art. 4-7. The Ministry of Labor may also take up enforcement procedures on the case under its own discretion ("The Minister of Labor may issue a redress order independently or upon the victim's request if an employer in receipt of a recommendation from the National Human Rights Commission, including a remedial order, etc., pursuant to Article 4-6(2) fails to comply with such recommendation without any legitimate grounds ….").

instance under the age discrimination provisions of the Act. The resulting report covers all age discrimination cases handled by the Commission since its establishment in 2001 through December 2008.[101)]

In the seven years covered by the report, the Commission received a total of 433 petitions claiming discrimination on the basis of age.[102)] Of these, 76 cases resulted in a finding of employment-based age discrimination, while 306 cases were dismissed.[103)] The majority of cases in which a finding of age discrimination in employment was found involved the recruitment and hiring process (46 and 23 respectively).[104)] Of the 46 cases involving recruitment, the greater part involved age limits on applicant eligibility for recruitment exams and these types of cases accordingly make up the representative cases presented in the Report.

The Report shows case handlers struggling in these cases to develop a standard by which to determine if an instance of age discrimination had in fact occurred. Specifically, the cases show noticeable difficulties arising in determining what should constitute a "reasonable ground" for age-based distinctions in the workplace.

The Report explains that the evolution of the Commission's reasoning in age discrimination cases can be roughly divided into four periods. The first period, from the beginning of 2002 to the latter half of 2006, is characterized by a reliance on Article 11(1) of the Constitution[105)] and Article 2(4) of the NHRCK Act.[106)] In these decisions, the prevailing approach was on examining

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101) National Human Rights Commission of Korea, *Yeollyeongchbyeolgeumjibeop sihaenge ttareun na-i chabyeol sageon gyeoljeong bunseok bogo* [*Report on Analysis of Age Discrimination Cases Pursuant to the Implementation of the Age Discrimination Act*] (March 10, 2009) (hereinafter "NHRCK Report" or Report)(on file with author). The NHRCK has given its considered approval for the inclusion of the report's findings in this research. However, the use of party names and identifying factual circumstances may be restricted in certain instances.

102) *Id.* at 5.

103) *Id.* (eight cases were terminated by mutual agreement, one was settled through conciliation, one was an official investigation that was terminated, and 23 cases were still under investigation at the time of the report's preparation).

104) *Id.* at 6. (the remaining number of cases includes a single case each in the areas of education, promotion, retirement age, and resignation).

105) CONSTITUTION OF THE REPUBLIC OF KOREA, art.11(1).

106) NHRCK ACT, art 2(4) ("The term "discriminatory act of violating the right of equality" means an act which falls under any of the following items, absent reasonable grounds, on the

the reasonableness of the age limitation itself and the justifiability of the reason for the age limitation as presented by the defending party.[107] The second period, starting with an "important" NHRCK decision of September 2006[108] and continuing to May 2007, is characterized by an express supplemental reliance on foreign and international laws and norms. These decisions show an emphasis on attempting to determine whether an age limitation concerned a "genuine occupational qualification," as a concept borrowed from foreign legal sources, for the job in question and whether the defending party's proffered reason for the limitation was thereby justifiable.[109]

The third period, June 2007 to February 2008, is characterized by a continued use of the term "genuine occupational qualification" but without concrete reference to external laws and standards. The focus of the Commission's reasoning in this period shows a trending toward more reliance on determinations of "reasonableness" and most cases do not refer to the term "genuine occupational qualification."[110] Finally, from March 2008 to the end of the reporting period not only does the Commission's reasoning make no explicit reference to external standards but there are also no longer references to the term "genuine occupational qualification." Instead, the associated determinative factors and rationales are subsumed under a single standard for determining reasonableness.[111]

The Report provides a number of representative cases from each of the

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basis of sex, religion, disability, age, social status, region of origin (referring to place of birth, registration basis, principal area of residence before the full adult age, etc.), state of origin, nation of origin, physical condition such as features, marital status, such as being single, separated, divorced, bereaved, remarried, married de facto, whether pregnant or having given birth, family form or family surroundings, race, skin color, thought or political opinion, record of crime for which in order of punishment has been extinguished, sexual inclination, academic career, medical history, etc. . . . : (a) An act of favorably treating, excluding, discriminating against or unfavorably treating a particular person regarding the employment (including recruitment, appointment, training, posting, promotion, payment of wage and any other money or supplying commodity, financing, age limit, retirement, dismissal, etc.); . . .")

107) NHRCK Report, *supra* note 101, at 23, 25.

108) Decision of Sept. 11, 2006, *06JikCha16* (NHRCK).

109) NHRCK Report, *supra* note 101, at 23.

110) *Id.*

111) *Id.*

periods covered. A review of these cases illustrates the Commission's struggle with a definition of discrimination based solely on a standard of "unreasonable distinction." The following sections examine the emerging standard in each of the periods delineated in the Report and the associated representative case.

1. First Period: Formulation of the "Absent Reasonable Grounds" Standard

In the first period, we can see the formulation of a basic reasonableness standard for examining age discrimination cases. The representative case from this period shows the formulation of a standard that is based entirely on a reasonableness determination.[112] The case involved a complaint regarding an age limitation on eligibility to sit for the annual "Limited Competitive Special Appointment Exam" required for employment as a Level 9 Regional Civil Servant.[113] The challenged limitation required examinees intending to sit for the exam to be within an age range of 18 to 28 years old for the 2005 calendar year.[114] In 2004, the government employer had temporarily raised the upper age limit to 40 for various reasons, but in 2005 the upper age limit was returned to 28. The age of the petitioner is not provided in the case report but the petitioner argued that the limitation was an unjustified burden on potential applicants over the age of 29.[115] The government employer argued that the raising of the upper age limit was only a temporary measure and the limitation of eligible applicants to those who are less than 28 years of age was necessary to promote the development of administrative specialists after the early selection of superior talent and to maintain the stable development of the civil service.[116]

In order to arrive at a standard for examining the complaint, the case pulls together Articles 10 and 11 of the Korean Constitution, Article 4 of the former EPAA prohibiting age discrimination against aged and semi-aged persons in recruitment and hiring (in force at the time though absent any enforceability

112) Decision of Oct. 18, 2005, *05JinCha62* (NHRCK).
113) *Id.* at 1.
114) *Id.*
115) *Id.* at 2.
116) *Id.* at 2.

provisions),[117] and Article 2(4) of the NHRCK Act prohibiting both favorable and unfavorable treatment in recruitment and hiring on the basis of age (among 19 other classifications) "absent reasonable grounds."[118] The decision draws upon these various sources of law and asserts that the provisions taken together confirm that "discrimination (*chabyeol*) on the basis of age absent reasonable grounds is prohibited."[119] Applying the standard to the case, the Commission examined whether "a particular age is a necessary condition to the performance of work duties related to [the employer listed jobs in] computers, library management, electrics, civil engineering, construction, maintenance and repair, and food sanitation."[120] The Commission reasoned that since the employer had temporarily changed the age limit to 40 and then back to 28, age could not be a necessary condition to the performance of the work.[121] Also, since other provinces had varying age limits for the same work, age could not be a necessary condition.[122] Based on these findings, the Commission determined that the challenged age limitation constituted "an interference in the petitioner's equality rights absent reasonable grounds."[123]

As indicated above, the standard formulated in the above case, and similar cases from the period, is the exact formulation that now appears in the prohibiting language of Art 4-4 of the Act. In the above case, the application of the standard was rather straightforward given the employer's vacillation between age limitations and the seemingly arbitrary differences in age limitations applied to the same job categories in other provinces. However, even here we can see the Commission applying something akin to a "business

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117) As indicated above, "aged" and "semi-aged" are defined by Presidential Decree as 55 and 50 years of age respectively. ENFORCEMENT DECREE FOR THE ACT ON THE PROHIBITION OF AGE DISCRIMINATION IN EMPLOYMENT AND THE PROMOTION OF EMPLOYMENT OF OLDER PERSONS art. 2, paras. 1, 2.

118) *05JinCha62*, *supra* note 112, at 5. It is worth noting here that the term "unfavorable treatment" appears in the provision defining "discriminatory act" under the NHRCK ACT. NHRCK ACT, art. 2(4), *supra* note 106. The significance of this point is taken up below in Part IV (Recommendations).

119) *Id.* at 5. *See also* NHRCK Report, *supra* note 101, at 25.

120) *05JinCha62*, *supra* note 112.

121) *Id.*

122) *Id.*

123) *Id.* at 6.

necessity" rule as a form of a reasonableness test.[124] The Commission's struggle with the basic formulation above in the succeeding periods covered by the report shows the difficulty of attempting to apply such a minimalist rule to more complex and subtle justifications.

2. *Second Period: Genuine Occupational Qualification as a Method for Assessing Reasonableness*

In the second period, we can see case handlers attempting to flesh out the above formulation. Here, since the formulation turns on the phrase "absent reasonable grounds," the focus turns to a search for a standard or method by which to better evaluate the "reasonableness" of the challenged age limitation. Apparently unable to find such a standard in domestic sources, case handlers began to look to non-domestic sources.[125] The representative case from this period shows a continued reliance on Article 2(4) of the NHRCK Act (since it is the source of the "absent reasonable grounds" language), followed by an expansion into foreign sources of law that contain references to defenses based on "occupational requirements."[126] The available facts from this case are limited since it is not publically available. However, since it is presented as a representative case in the Report it is important to present the case here since it represents an indication of the evolution in methods used to determine reasonableness.

From the case title provided in the Report, the case appears to concern once again age limitations on competitive hiring examinations for Level 9 civil servants.[127] The focus of the analysis in this case centers on the justifiability of the defending party's stated reasons for the challenged limitation. Since we do

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124) For a discussion of the business necessity rule in relation to the US ADEA, see generally Note, *The Cost of Growing of Old: Business Necessity and the Age Discrimination in Employment Act*, 88(3) YALE L. J. 565 (1979); Notes, *The Cost Defense in the Age Discrimination in Employment Act*, 1982(3) DUKE L. J. 580 (1982).

125) *See id.* at 23. The international and foreign sources cited are EU Directive 2000/78/EC, the US ADEA, art. 4(1) and similar provisions, the Employment Equality Act of Ireland, the Age Discrimination Act of Australia, and the Canadian Human Rights Act. *See* NHRCK Report, *supra* note 101, at 26.

126) Decision *05JikCha16* (NHRCK) (date not provided in the Report).

127) NHRCK Report, *supra* note 101, at 26.

not have the facts of the case, it is difficult to assess the Commission's reasoning in relation to the employer's proffered justifications. Nonetheless, the rule that is ultimately stated in the case is a telling sign of the confusion that results in viewing "absent reasonable grounds" as a definitional element. The case states: "To determine whether at the time of hiring of civil servants the exclusion of persons of a fixed age *constitutes age discrimination*, we must examine whether the standardized age concerns a genuine occupational qualification and the appropriateness of the [defending party's] stated purpose for setting an applicant age limit."[128] This is noteworthy because it makes the presence or absence of a genuine occupational qualification an element for determining whether age discrimination *occurred*. Thus, we can see that where a definition includes "reasonableness" as a factor, the establishment of an instance of age discrimination becomes dependent on the justification. The problem of circular reasoning has been addressed above.[129]

3. *Third Period: Conflating Genuine Occupational Qualification with Reasonableness*

In the third period, we can see the concrete result of the confusion that arises when "reasonableness" as a definitional element begins to subsume the concept of justification. The representative case provided in the Report illustrates this point.[130] Similar to the previous representative cases, the facts involve a competitive civil service exam for 8th and 9th level civil servants intending to work in the courts.[131] Eligibility to sit for the exam was limited to applicants 28 years of age or younger.[132] The employer defended the age limit with the following explanation: "[M]ore than considering any necessary

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128) *05JikCha16*, *supra* note 126. *See* NHRCK Report, *supra* note 101, at 27.

129) It should be mentioned that the wording of the EU Directive appears to make a similar definitional use of the exception of occupational requirements when it states that reliance on a genuine and determining occupational requirement "shall not constitute discrimination." However, it is important to note that the language refers to "characteristics related to any of the grounds *referred to* in Article 1," not the grounds themselves. EU Directive 2000/78/EC, art. 4(1) (emphasis added).

130) Decision of Feb. 18, 2008, *07JinCha1002* (NHRCK).

131) *Id.* at 1.

132) *Id.*

relationship between age and the job duties concerned, a limitation on age is needed for the purposes of securing superior human resources through strengthened competition and for the promotion of stable and organized work affairs in light of the fixed employment of civil servants and pensions."[133] In examining the case, the Commission makes an effort to avoid explicit citations to foreign and international standards. Nonetheless, a reliance on the relevant principles earlier borrowed from those sources remains. Describing the applicable standards for the case, the Commission attempts to provide an interpretation of what is meant by a "genuine occupational qualification," presumably for the purpose of accommodating the concept into its own jurisprudence rather than having to cite foreign sources. Similar to previous decisions, the case starts by citing the guarantee of equality before the law provided by Article 11 of the Constitution and then turns to Article 2(4) of the NHRCK Act, explicitly referring to the language of the provision and explaining that the article "makes the preference, exclusion, classification or unfavorable treatment of a specific person related to employment, including recruitment and hiring, by reason of age absent reasonable grounds a discriminatory act that interferes in the right to equality."[134] The decision then explains that the NHRCK Act nonetheless makes the above preferences, etc., not discriminatory when used to eradicate existing discrimination.[135] Following on this point directly, using the connector "furthermore," the case then goes on to provide a broad description of apparently standardized circumstances that "do not concern age discrimination." The use of the word "furthermore" confirms that these circumstances are intended to fall within a category similar to that of the preceding statutorily excluded circumstance, thereby *not constituting discrimination*. The Commission explains that a circumstance is not discriminatory "where, in considering the character and operational circumstances of the entity, a fixed or specified age is necessarily required for the successful operation of the entity, and there exists no alternative means," and as such "it is thereby not possible or it is unrealistic to

133) *Id.* at 6.

134) *Id. See* NHRCK Report, *supra* note 101, at 25.

135) This is a reference to a *proviso* in Article 2(4) of the NHRCK Act whereby positive discrimination (or affirmative action according to US terminology) is made permissible.

make an evaluation of the specified characteristic on an individual basis."[136]

The example situations provided as illustrations of the posited standard begin with a reference to the classic example of a genuine occupational qualification set in the context of age. This is where an age limit is fixed in the selection of a theater or movie actor because the role requires a specific age. "Like" situations are then described as those where "there exists concrete evidence worthy of reliance regarding a direct relationship between the normal operation of the entity and the specified age limit."[137] The examples then proceed to situations involving a reliance on an age limit that is related to the circumstances of employment. These are situations where "requiring an upper age limit that is the lowest possible age at the time of hiring, taking into account a fixed reasonable period before reaching retirement age or the time and money necessary for training persons above a specified age to a level where they can perform their job duties effectively," or where "the burden of providing to persons above a fixed age the conveniences necessary to performing their job duties effectively is excessive by commonly accepted social concepts."[138] Following these examples, the broad standard and the example situations are summed together as circumstances in which "*reasonable grounds [for the age limitation in question] exist such that [the situation] does not concern an act of discrimination*." This part of the analysis then finishes by stating that in the preceding circumstances age can be recognized as a "genuine occupational qualification" related to the concerned entity.[139]

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136) *07JinCha1002*, *supra* note 130. This construction appears to be borrowed from a series of foundational cases under US law construing the "bona fide occupational qualification" (BFOQ) defense to direct discrimination claims. *See* Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971)(job qualification or employee trait for which the employer's practice or policy screens must be closely related to the "essence" of the business); Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969)(employer's evidence must demonstrate that "all or substantially all" members of the excluded group lack the required trait and would therefore be unable to adequately perform the function critical to the business); Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985)(employer can prevail by showing that it would be highly impracticable to determine by individualized testing which members of the excluded class lack the critical ability to perform the trait essential to the business). The ADEA contains a BFOQ defense similar to that under Title VII and the US Supreme Court has construed the provisions virtually identically. *See, e.g.*, *Criswell*, 472 U.S. 400 (1985).

137) NHRCK Report, *supra* note 101, at 28.

138) *Id.*

139) *Id.*

Although the Commission ultimately finds in favor of the petitioner, this last point is troubling because it appears to conflate reasonableness with "genuine occupational qualification." Strictly speaking, genuine occupational qualification determinations are not reasonableness tests. Rather, they are an identification of factors associated with the prohibited grounds that are so closely related to the work that the work simply cannot be accomplished by someone who does not fulfill the otherwise prohibited limitation.[140] As such, they are more akin to a determination of impossibility based on the essence of the work, rather than a "reasonableness" test. That is, where a genuine occupational qualification is identified, there is no "reasonableness" enquiry—the excluded party simply *cannot do the job as defined*.

A good example to illustrate the difference between a reasonable test and a genuine occupational qualification determination comes from the very examples provided in the case itself. Limitations on age due to considerations of "time before retirement" is not a consideration that goes to the performance of the job itself, since somebody of the same age already hired who is now approaching the retirement age can perform the job. Their suitability or non-suitability for the work is not dependant on the essence of the work. While an age requirement geared to "time before retirement" might satisfy a "reasonable factor other than age" test, it is not a "genuine occupational qualification."

The reason such a conflation of standards is problematic is because expansive interpretations of a genuine occupational qualification standard can ultimately eliminate the protection against direct discrimination.[141] Interpretations that go beyond the strict sense of the defense head down the proverbial "slippery slope" where any job qualification reasonably based on age argued by the employer can become a "genuine occupational qualification" because it is shown to relate to the larger context of the job itself in the overall

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140) This point may be underscored by referring to the construction of the UK and US legislation where genuine occupational qualification tests and reasonableness tests are separate items. In the UK case, the final sentence of Regulation 3(1) sets forth an objective justification test ("proportionate means of achieving a legitimate aim") as an out for the employer, while Regulation 8 sets forth an exception for a "genuine occupational requirement." In the US case, section 623(f)(1) provides for a "bona fide occupational qualification" as a separate exception from "reasonable factors other than age."

141) *See* Lewis, *supra* note 78, at 175.

scheme of the business (*e.g.*, concerns regarding time left before retirement). Taken to its extreme, such a standard would allow an employer to simply argue that the purpose of his business is to make a profit and accommodating older workers is a burden on those profits. This is not to say that such a defense might not satisfy a reasonableness test (though such an interpretation would unlikely succeed due to the policy considerations inherent in the enactment of the law itself), but where a genuine occupational qualification exists as a statutory defense and the defense is interpreted broadly, the deciding entity need not get to the reasonableness test to find out. If the above scenario is wrongly identified as a genuine occupational qualification, the reasonableness test is ignored, the proffered defense is identified as a genuine occupational qualification, and any burden to the employer arising in relation to the protected classification becomes an absolute defense to the discrimination charged.

The NHRCK Report illustrates that the eventuality of this approach is not an unrealistic concern. In the 2006-2007 period, where the Commission first explored the use of genuine occupational qualification determinations, a 3-step process was expressly followed. First, the relevant rule is cited (the "absent reasonable grounds" rule above). Second, a determination of whether a genuine occupational qualification exists is performed. Third, an examination is made as to whether a reasonable ground or justifiable purpose existed.[142] Thus, the genuine occupational qualification examination is taken before the reasonableness examination. The reasoning behind this was that because the genuine occupational qualification is used as a *defense* in the foreign legal systems from which it was borrowed, it should be examined first.[143] That is, once a genuine occupational qualification is identified, the defending party has established a valid defense and there is no need to go into a more complicated reasonableness evaluation. Since a genuine occupational qualification is made a part of the definition by including it in the broader concept of reasonableness, where a genuine occupational qualification is found it is concluded that discrimination did not occur.

While this step-by-step process may have some procedural logic, it is

142) NHRCK Report, *supra* note 101, at 20.

143) *Id.* at 22.

acutely susceptible to derailment. Where a defense that sounds rationally related to the work in question is mistakenly identified as a genuine occupational qualification, as a result of not relying on a strict reading of that defense, a proffered explanation for an express age limitation may pass as a defense under the genuine occupational qualification though it would not survive a reasonableness test. Again, this is because the genuine occupational qualification is not a reasonable test. Rather, it is an identification test. That is, it is a test that looks to *identify* a close association between the age limitation and the character of the job. Where the scope of "close" is opened up, the identification of practically any association between the age limitation and the employer's objectives becomes more and more likely. If all that the investigator is looking for is the association, then once it is found, the case can be closed without looking at the reasonableness of the association. For this reason, it is important that an application of the genuine occupational qualification determination based on the closeness of the association between the age limit and the character of the job itself remains *strict*. This distinction is especially critical under the new age discrimination provisions since the Act has made a genuine occupational qualification an explicitly stated statutory exception to the prohibition on age discrimination.[144)]

4. Fourth Period: Genuine Occupational Qualification by Another Name

In the fourth and final period covered by the Report, it appears that the use of the term "genuine occupational qualification" was in fact not without controversy and the Commission is seen to move away from an explicit reference to the term. The Report itself recommends that the term not be used and instead all case evaluations should be based on a reference to determinations of reasonableness.[145)] The representative case provided in the Report concerns an age limitation on the hiring of 9th and 7th level civil servants at the National Intelligence Agency (NIS) based on a competitive examination open to the public.[146)] Eligible applicants were limited to 24 and 26 years of age

144) Art. 4-5, no 1.

145) NHRCK Report, *supra* note 101, at 22.

146) Decisions of Apr. 28, 2008, *07JinCha1057* & *08JinCha254* (combined cases) (NHRCK).

respectively.[147] The NIS argued that the agency is "different from other national administrative agencies in that the ability to recruit trained human resources from outside the agency is limited, such that at least one year of training and practical experience is needed after hiring before a new recruit can become a specialist," and that "due to the unique organizational management demands of the NIS, such as its strict command structure and hierarchical relationships, an age limit is unavoidable."[148] It also argued that the 24 and 26 year age limits on 9th and 7th level recruits exist "in accordance with this unique nature of the NIS" and "to guarantee the continuity and the ability to carry out job duties quickly."[149]

In handling the case, the Commission makes no explicit reference to "genuine occupational qualification." Instead the case provides a non-exhaustive list of circumstances that must be shown "in order to establish that an age limitation … *is reasonable*."[150] The listed circumstances are similar to those provided in the representative case from the previous period, some of them identically stated. Upon first reading, this appears to be a move in the right direction. However, included in the list, in fact occupying first position, is a description of circumstances that look very much like a genuine occupational qualification test. The test refers to a "consideration of the characteristics and circumstances of the job duties" which thereby make it impossible or unrealistic for the employer to assess on an individual basis whether a job applicant "is able to perform the essential job duties safely and efficiently."[151] Applying this standard to the NIS's proffered justifications, the Commission reasons that "not only do concerns over the demands of a strict hierarchy and a system of rapid instruction not go to the essential core of the relevant job duties but it is difficult to see how a ranking hierarchy based on age is specifically required to establish such hierarchies."[152] In the end, the Commission finds in favor of the petitioner and recommends that the NIS alter its rules pertaining to age limitations in recruiting.

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147) *Id.* at 1.
148) *Id.* at 2.
149) *Id.*
150) *Id.* at 4. *See* NHRCK Report, *supra* note 101, at 29.
151) *07JinCha1057* & *08JinCha254*, *supra* note 146, at 4.
152) *Id.* at 5.

Although the case represents a positive outcome for the petitioner, it raises concerns about the establishment of a clear standard by which to determine instances of age discrimination and to judge employer justifications. Though the test is not named as such in the case, the Commission's use of the above standard presents the same risks of misuse of notions of genuine occupational qualification in terms of adherence to a strict interpretation. Only now, because it is framed as a "reasonableness" test, the risk is even greater. This is because it is much easier for an employer to establish an association between age and "essential job duties" when the association is required only to be reasonable as opposed to "genuine." In the preceding case, the Commission was right in identifying the difference between core job duties and hierarchical concerns. But this identification was not in fact based upon a reasonableness test. Rather, it was based on a notion of genuine occupational qualification. As discussed above, a genuine qualification test requires an association between the *identity* of the work and age but a reasonableness test, though perhaps more complex in its examination, merely requires a rational association. This opens the door to all sorts of stereotypes about the abilities and character traits of older workers. The language itself as presented in the case raises this risk. One of the major areas of age stereotyping is in assumptions about safety and efficiency. While there are certainly situations in which these considerations may be legitimate if *strictly interpreted*, where the test is merely whether the consideration is reasonably related to job functions all sorts of assumptions about the thought processes, "modern" skills, frailty, endurance, etc., of older workers may be considered "reasonable."[153] This of course would defeat the entire purpose of the age discrimination legislation.

The cases covered in the foregoing examination demonstrate the problems that can arise through the use of a prohibition on discrimination that contains no explicit or implied definitional aspects other than the possibly definitional concept of "unreasonable distinction." The purpose of this examination is not intended as a critique of the NHRCK's treatment of these cases. Rather, it is quite the opposite. It is to demonstrate the difficulties raised when the

153) For a discussion of stereotypes associated with age, see Sandra Fredman, *The Age of Equality, in* AGE AS AN EQUALITY ISSUE: LEGAL AND POLICY PERSPECTIVES 21, 21-24 (2003); SARGEANT, *supra* note 24, at 6-8. For stereotyping and prejudicial treatment experienced by older persons in Korean society, see WON, *supra* note 9, at 61-65.

legislature provides ambiguous and minimalist language in crafting a prohibition on age discrimination. The prohibiting language of the Korean Age Discrimination Act offers nothing more than a prohibition on age distinctions in the workplace that are "absent reasonable grounds." As the results of the NHRCK report indicate, this offers little guidance to those charged with determining if an instance of age discrimination has occurred. This deficiency in the definitional aspects of the legislation translates into a weak and ultimately unreliable prohibition on age discrimination in the workplace.

VI. Recommendations

The comparative analysis undertaken in this study suggests that the Korean Age Discrimination Act suffers from critical ambiguities in terms of who the legislation is intended to protect and the standards by which instances of age discrimination are to be identified and evaluated. The existence of these ambiguities raises concern for the statute's ultimate success in the face of urgent and deep-set challenges regarding age and employment in Korean society. As such, the following improvements to the statute may be desirable.

First, the scope of application of the Act in regard to whom the prohibition on age discrimination is intended to protect should be clarified or corrected. As indicated above, the statute appears to have two qualitatively different approaches to age discrimination. Taken as a whole, it appears to be aimed at the promotion and protection of older workers, yet a comparison with similar definitional qualities contained in the UK legislation suggests that the prohibiting language itself may be interpreted to protect both younger and older workers alike. This is problematic because it ultimately constitutes a lack of congruence between function and substance. The function of the overall statute appears to be the promotion of employment for older workers while the substance of the anti-age discrimination language appears to protect younger workers as well. Where the complaining party is an older person, this should not present a problem. However, where a younger person complains of favorable treatment afforded to an older person, problems of interpretation will certainly arise. This is because Article 4-4 prohibits *any* discrimination on

the basis of age, yet Article 4 requires employers to promote the interests of older workers. While it appears that Article 4-5, no. 4, is intended to address this eventuality by making the promotion of older workers under the Act an exception to age discrimination, the employer's obligation under Article 4 is so broad that the two provisions taken in combination ultimately wipe out any protection for the younger worker.

Is this the ultimate goal of the statute? If so, at the very least a statutory clarification would be helpful since the core of the prohibition itself suggests otherwise. On the other hand, if the substantive approach found in the prohibiting language, similar to that found in the UK legislation, is intended, such that the protection applies to any discrimination on the basis of age, it may be desirable to reverse the grafting approach taken in the construction of the current legislation and separate out the age discrimination portion for purposes of creating a stand-alone statute. This solution would not only retain the more comprehensive prohibition but it may also offer an opportunity to revisit the problems raised by the definitional elements as well.

Second, an express definition of age discrimination should be added to the statute. The inclusion of such a definition would make it clear that what is being prohibited is invidious discrimination rather than mere "unreasonable distinction." Ideally, this definition would appear separately from the prohibiting language so as to eliminate confusion over prohibition and definition. The UK legislation provides a good model for this approach. The fact that other Korean legislation includes language regarding "unfavorable" treatment means that this would not be asking too much. The NHRCK Act provides a model for such language (though it is not as fully developed as the UK age discrimination regulations).

Of course, it may be argued that the addition of this language is not necessary since the NHCRK is the gatekeeper under the Act and, presumably, when dealing with an age claim under the Act, the Commission will simply borrow from its own mandate for a sense of what constitutes a discriminatory act, as it has done in the past. However, there are two problems with this argument. First, the Commission has had this definitional element available since its establishment. Yet, as we have seen, the Commission has nonetheless struggled with establishing a standard for determining instances of age discrimination. Second, and more importantly, although the NHRCK is the gatekeeper under the Act, it is not the enforcer. It can only make recom-

mendations for correction. As described above, if an employer fails to comply, the complaining party may take the NHRCK's determination to the Ministry of Labor (MOL) to request an enforcement action, or the MOL can take up an enforcement action on its own accord. In either case, action by the MOL is discretionary. In reaching a decision to take enforcement action, the MOL will presumably make its own assessment of the case. In making that assessment it is obviously not subject to the mandate of the NHRCK. Rather, it will merely have the Age Discrimination Act before it. For this reason alone, it is desirable to introduce an explicit definition into the Act itself.

A third suggestion is in regard to the phrase "absent reasonable grounds." This phrase should be removed from the prohibiting/definitional language. This will avoid confusion over what constitutes an act of age discrimination and what constitutes an exception to liability for discrimination. Ideally, this kind of language should appear under a separate provision for exceptions. The US legislation may provide a model for this. As noted above, the provision that sets out the exception to liability based on a "bona fide occupational qualification" under the ADEA includes an exception for "reasonable factors other than age."[154] This language would capture some of the circumstances identified as "reasonable" in the NHRCK cases above. It would also be a simple operation in terms of drafting since it could simply be added to the list of exceptions contained in Article 4-5 of the Act.

If on the other hand it is desired to retain "absent reasonable grounds" as part of the definition of age discrimination, it should at least be separated from the main definitional or prohibiting language. This would be similar to the UK legislation's inclusion of an "objective justification" test as a second part of its definitional language. Although this retains an element of confusion over the identification of a discriminatory act and the establishment of a justification for the act, it nonetheless separates the enquiry into a two-part analysis, thereby aiding the practical application of the statute. In this regard, it would also be desirable to refine the test by providing a more specific standard of evaluation than "absent reasonable grounds." The UK's "proportionate means of achieving a legitimate aim" may provide a model for this.[155]

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154) ADEA §623(f)(1).

155) Age Regulations, reg. 3(1)(a).

Fourth, the language in Article 4-5 indicating that the listed circumstances "do not constitute age discrimination" should be altered to indicate that if the listed circumstances exist, the prohibition *does not apply*. As above, this would help to eliminate confusion over identifying age discrimination and evaluating exceptions to liability. Where an exception is found it should be clear that the exception does not mean that age discrimination has not occurred. On this point it may be argued that such an alteration is unimportant since the outcome is ultimately the same—where an exception is found, determinations of "not discrimination" or "discrimination but exempt" both lead to non-liability. However, the difference lies in the process. Where definition and exception are blurred, it is easy to fall into circular reasoning and interpretive regimes wherein the "exception becomes the rule." That is, practically any rational relationship between the age distinction and the employer's purposes can result in a finding of non-discrimination. Changing the problematic language above would also make it clear when an instance of age discrimination has in fact occurred and when the employer is then required to convince the decision maker why the employer should be allowed to rely on such discrimination.

Finally, Article 4-5 contains an exception that is akin to the "genuine occupational qualification" found in other jurisdictions.[156] As noted above, where such exemptions from liability are permitted, broad readings can ultimately lead to the virtual elimination of the prohibition. As such, it would be desirable to add to the language of this particular exception some indication that the exception is to be strictly interpreted.

VII. Conclusion

Like many countries around the world, Korea appears to be making a focused effort to confront the challenges raised by an aging society. The new legislation analyzed here strengthens prohibitions on age-based discrimination in the workplace by imposing stiff penalties on violators. These efforts are certainly valuable since they reflect the true urgency of the problem.

156) Age Discrimination Act, art. 4-5, no. 1.

However, from a comparative perspective, the construction of the legislation itself and the minimalist approach taken in its definitional elements raises ambiguities in its application. In fact, the legislation in its current form appears to be something less than a true prohibition on age-based discrimination. It appears instead to be merely a prohibition on "unreasonable distinctions" based on age. While this may reflect the general idea behind concepts of discrimination, it is too loosely drawn in its statutory form to capture the invidious discrimination that involves individualized unfavorable treatment. This is problematic because it opens the door for employer defenses on practically any ground that has a semblance of reason, including the typical claim of the potential for additional economic burdens associated with engaging older workers.

The lack of clarity in the statute's construction combined with its minimalist definition of discrimination is sure to lead to confusion in practice both for case handlers and employers. Of greater concern, however, is that the ambiguities inherent in the statute will discourage victims of age discrimination from filing complaints in the first place. While there is sure to be an immediate increase in case filings due to the addition of enforcement procedures, we would still be left with the question of how many thousands of victims of a highly pervasive problem will be reluctant to come forward with complaints. This is because where the possibility of a positive outcome is highly unpredictable, the fear of a retaliatory loss of employment, or even future employment, becomes too great. Though the statute provides for retaliation claims,[157] where the very definition of discrimination under the statute is not clear, how many will risk the reliability of a retaliation provision?

If Korea is sincere in its efforts to enable a rapidly aging population to secure and retain stable employment, it needs to clarify the scope of the statute and rethink its minimalist approach to the statute's definitional aspects. In its current form, the statute represents a legislative regime that is far too weak in

157) AGE DISCRIMINATION ACT, art. 4-9 ("An employer shall not subject a worker to disadvantageous treatment, such as dismissal, transfer, disciplinary action, etc., on the ground that the worker has filed a petition submitted materials, given answer or testimony, filed a lawsuit, made a report, etc."); art. 23-3(1) ("An employer who subjects a worker to disadvantageous treatment … in violation of Article 4-9, shall be punished by imprisonment for not more than two years or by a fine not exceeding ten million won [US$ 8,700]").

the face of the urgent and deep-set challenges raised by a rapidly aging, Confucian-based society.[158] Without a reliable definitional framework, even the most stringent penalties will add little to the elimination of age discrimination in the workplace since it is unlikely that those penalties will ever be reached.

KEY WORDS: age discrimination, workplace discrimination, Asia, age discrimination, Korea, ageism, comparative employment discrimination law

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158) A review of recent articles in the Korean press highlights this point. *See, e.g.*, Jun Mo Mun, *No Age Limitations? Job Line Still Has A Cut-off*, HANGOOK ILBO [KOREA DAILY], Sept. 27, 2009, *available at* http://news.hankooki.com/lpage/society/200909/h2009092724100219 50.htm (Though new Age Discrimination Law in force, many companies not following new law; obstacles remain for particularly "old" job seekers); Jung Hwan Im, *One Month After Moving ... Cheonan City Labor Department Can't Find Its Place*, DAEJEON ILBO [DAEJEON DAILY], Sept. 7, 2009, *available at* http://www.daejonilbo.com/news/newsitem.asp?pk_no=840801 (New law in force, but inspectors at the Cheonan Labor Department still "do not quite understand the new law"); Yeonjoo Jung, *"Age Discrimination" In Hiring Same As Before*, HELEOLDEU GYEONGJE [HERALD ECONOMY], Aug. 5, 2009, *available at* http://www.heraldbiz.com/SITE/data/html_dir/2009/08/05/200908050032.asp (43.2% of Job seekers feel there is still discrimination based on age regardless of the new law; more support to prevent age discrimination needed); *75.8% of Businesses Say "Age is Reflected In Our Assessment Policies Even Though Age Discrimination Law Is In Effect,"* CHOSUN ILBO [CHOSUN DAILY], April 15, 2009, *available at* http://press.chosun.com/newsRead.php?md=A01&tm=1&no=39922e6&cat=100&cat1=103 (For various reasons, many companies planning to reflect age in employment regardless of new Age Discrimination Law).