Who Are The First Koreans?
The First Korean Nationality Law (1948) And Its Limits

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Abstract

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Abstract

This article deals with the First Korean Nationality Act which was spurred by the US Army Military Government in Korea (USAMGIK) and enacted by the first Korean Congress. Although there seemed to be a debate on the Nationality Act before Korea was colonized by Japan, the boundary of "Korean" citizenship was cultural and self-evident. The family registry (*hojŏk*) was a critical criteria to determine who was a Korean, though not identical with a Korean nationality. The colonial government accepted this definition, so the fact that the first Nationality Act inherited this tradition is not so surprising.

However, the ambiguity over the first Korean who bestowed nationality upon descendants became problematic when the post-Cold War Korean ethnics returned, especially the ones from China returning to Korea. Later, Korean-Chinese *in toto* became foreigners, according to Korean Court decisions, because they became Chinese citizens after the People's Republic of China was established in October 1949. Thus, the first Nationality Act shows a thorny issue of what the boundary of Korean nationality is.

Key words: Korean Nationality Act (*Kukjŏkpŏp*), First Korean, US Army Military Government in Korea (USAMGIK), Korean-Chinese, Family Registry (*Hojŏk*)

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Every country had to face globalization while newly defining its nationality. With a newly enacted nationality law in early 2011, the Korean government, as some countries do, *de facto* permitted dual citizenship to ethnic Koreans living abroad, a law that once only pertains to those who are over 65 years of age.[1] There are almost six million ethnic Koreans abroad with different nationalities and with differing cultural affinities to Korea, such that the effect of the revised law has different responses in different regions.

Although the revised nationality law supports limited dual citizenship, it has been met with diverse attitudes from overseas ethnic Koreans. While Korean-Americans show enthusiasm for the law because it permits old Korean ethnic groups to stay in Korea as Korean citizens with the caveat that they have to declare that they will not exert their US citizenship in Korea, the Korean-Chinese express some lukewarm feelings or even enmity towards the law. The latter response is due to the fact that the US permits dual citizenship and China does not, meaning that Korean-Chinese cannot obtain Korean nationality. The more fundamental difference is that Korean-Chinese are originally considered to be foreigners to the Korean government.

The law seems to be neutral at face value. However, it has a discriminatory effect when applying the law to different regions. Moreover, through the legislative intents of this law, it is easy to ascertain that the fundamental purpose of the revised law is to give Korean nationality to some, not all, ethnic Koreans abroad—particularly Korean-Americans—in the name of state competitiveness with other countries.[2] Critical is the point that the law assumes that Korean-Americans are former Koreans, while Korean-Chinese are not.

The above-mentioned law shows the complexity of nationality and the dual citizenship issues in Korea. The nationality law delineates the boundary and decides who belongs to a state regardless of culture or ethnic background. The issue of "who are Koreans" is a good window through which to see the law and society in contemporary Korea.

The Korean Nationality Law and its limits date back to 1948, when the Republic of Korea was born—those limitations are the law's man-oriented nature and the obscure definition of the first Koreans in 1948. Although the man-oriented character underwent dramatic changes in 1997 in terms of gender equality, there is no clear-cut solution for the latter issue.[3] The reason comes from the obscure features regarding how to define the first Koreans in December 1948 when the Nationality Law had been passed. The issue relates to whether Chinese or Russian nationals with

ethnic Korean background would be accepted as among the first Koreans.
I have several motives in this article. First, I intend to clarify the current tension in the Nationality Law. To do so, it is necessary to trace the historical background of the first nationality law which was promulgated just after the Republic of Korea was established. Although there is sound scholarship on the legal interpretation of the current law[4], there is little scholarship on the first Nationality Law, especially in English. Existing literature acknowledges the lack of definition in the first nationality law and tries to provide alternatives to current limits.[5]

Second, I will analyse the features of the first Korean Nationality Law. Although the 1998 revision changed a lot of patrilineal elements in naturalization and the 2011 revision permitted dual citizenship, the revised law still retains ambiguity about the first Koreans. Therefore, to clarify the unique points of the law, I will trace the legislature's intent through the first Korean Congress records.

Last but not least, while reflecting on the first Korean Nationality Law, I will address the issue of how to interpret the current discriminatory effects of the Nationality Law, particularly regarding the Korean-Chinese. In addition, I want to provide a normative but tentative answer to this thorny issue, dealing with the Korean Constitution and the Supreme Court cases.

Road to the First Nationality Issue

During the Chosŏn dynasty (1392–1910, renamed as Empire of Korea in 1897), there was not a clear standard by which to define Koreans, because Koreans were too self-evident with separate boundary and quite homogeneous culture, let alone language.[6] In the early Chosŏn dynasty, the state used the term *kukjŏk* (national registry) for national registry, not for nationality.[7] It is not clear whether or not the term had specific guarantee for a national of the Korean dynasty. Thus, *kukjŏk* and *hojŏk* (family registry) were interchangeable. It seems that there was no formal nationality law because Koreans were customarily or ethnically distinct from Chinese and Japanese in terms of the national record and family registry.

The modern concept of a nationality has developed from the late nineteenth century when Korea had to embrace international society as most countries did, starting from the French Revolution in the late eighteenth century.[8] Due to some Koreans who were involved in the *coup d'état* in 1884, and their escape to other countries resulting in those with different nationalities enjoying extraterritoriality, the Empire of Korea (1897–1910) retained *de facto* the dual citizenship system. According to Yi Yin, who was a prominent member of the Korean Lawyer's Association in 1931, the old Korean government probably did permit dual citizenship to those like Philip Jason (Sŏ Chep'il) and other Koreans who went to Japan because they were persona non grata to the Korean government.[9]

When Japan annexed the Korean peninsula in 1910, it had already passed its own Nationality Law in 1899 but decided not to apply it to Korea. Thus Koreans could not change their nationality.[10] The reason was related to the Japanese fear that the Koreans in Manchuria were involved in the Korean Independence Movement as Chinese nationals. Thus, with the pretext of appreciation of the old law despite Japanese colonial rule, the Japanese government did not consider Japanese Nationality Law relevant to the acquisition of a different nationality and consequent desertion of Japanese nationality. The Governor General in colonial Korea only applied old Korean law to Korean nationals when he dealt with the Koreans in Manchuria.[11] Thus, Korean ethnic people were Japanese nationals.

This had great impact on the Korean diaspora community in China. During the colonial period, China permitted only Chinese nationals to own land; thus Korean residents wanted eagerly to get Chinese citizenship and obtain Chinese nationality. However, despite diligent movement on the part of diaspora community, Japan did not permit Manchurian Koreans to escape from Japanese nationality. When Manchukuo (Manchu state) was established in 1932 following the Japanese invasion of Manchuria in the previous year, a distinct nationality law was incessantly discussed up to the demise of the state in 1945, though without concrete results.[12]

In Hawaii and within the US mainland, the Japanese government even argued that it had jurisdiction over Korean residents. However, partially due to the Korean American Association's efforts in the US, the US decided not to accede to this Japanese logic and Koreans were not under Japanese jurisdiction.[13] When Korea was liberated from Japanese yoke in August 1945, Korean ethnic groups retained several types of citizenships in each hosting country regardless of Japanese policy.

At the end of World War II, Japan accepted the Potsdam Declaration, which limited Japanese territorial boundary to the four major islands comprising of Japan proper and its adjacent islands. Japanese sovereignty over Korea ended and Koreans were no longer Japanese nationals. In the southern part of the Korean peninsula, the United States Army Military Government in Korea (hereinafter USAMGIK) was the sole sovereignty until the Republic of Korea was born in August 1948. In addition to the Japanese government property in Korea, even the Japanese private property in Korea was vested in occupying authorities.

The first juncture for the Nationality Law was related to the USAMGIK's decision regarding Japanese property, for "who was not Japanese" became a critical question in deciding the property's beholders. On December 6, 1945, the USAMGIK passed Ordinance 33 to vest all the Japanese property as of August 9, 1945 into the military government.[14] It is ironic that the

USAMGIK only started showing interest in differentiating Korean and Japanese legally due to the vested property issue.

At the time of the Korean liberation, Japanese property comprised over 80% of Korean wealth, so this policy was crucial in securing the property foundation for a later Korea. At least in the first stage of military occupation of Japan and Korea, the US government assumed that the Japanese property would be a foundation for compensation for the US's occupation of Japan.[15]

Through Ordinance 33, the USAMGIK set the time for the decision for Japanese property on August 9, 1945 with other conditions:

> Section II. The title to all gold, silver, platinum, currency, securities, accounts in financial institutions, credits, valuable papers, and any other property located within the jurisdiction of this Command, of any type and description, and the proceeds thereof, owned or controlled, directly or indirectly, in whole or part, on or since *9 August 1945*, by the Government of Japan, or any agency thereof, or by any of *its nationals*, corporations, societies, associations, or any other organization of such government or incorporated or regulated by it is hereby vested in the Military Government of Korea as of 25 September 1945, and all such property is owned by the Military Government of Korea.[16] [Emphasis added]

August 9 was the date that Japan decided to accept the Potsdam Declaration and acknowledged its defeat in World War II.

Another important step that the USAMGIK took was to "maintain legal order and preserve legal continuity" by Ordinance 21 on November 2, 1945. It declared that

> until further ordered and exert as preciously repealed or abolished, all laws which were in force, regulations orders, notices or other documents issued by any former government of Korea having the force of law on 9 August 1945, will continue in full force and effect until repealed by express order of the Military Government of Korea.[17]

If USAMGIK did not introduce any new law in terms of the Korean Nationality Act, previous colonial rule would rule over this area, for those who were Korean were determined by Korean family registries.[18]

Just after these two important laws, there arose a critical issue to define who is a "national of Japan" and, as a corollary, who is "Korean". The Opinions Bureau at the Department of Justice in the USMAGIK, the authoritative interpreter of what the Korean law was, suggested that "Korea being still a state in the making, it became necessary to devise a test and definition of Korean nationality as far as questions of vesting were to be solved."[19]
The Property Custodian which managed all the vested property was puzzled as to the definition

of a "national of Japan" in relation to "Japanese owned property" because there were so many complicated cases such as Korean-Japanese couples or ethnically jointed companies. In solving this thorny question, first and foremost, the Opinions Bureau brought a new definition of Korean under the Japanese legal system. Since ethnic Koreans did not enjoy full political and civil rights under the laws of Japan, a Korean was a Japanese national and not "a citizen of the country to which he owes allegiance."[20] Therefore, the dividing line between Korean and Japanese is whether a person was "in possession of full civil and political rights" under the laws of imperial Japan.[21]

The civil and political rights test was appropriate in deciding whether one is a Korean in the case of common Koreans who married ethnic Koreans. However, during the colonial period, there were many inter-ethnic or inter-racial marriages between Koreans and Japanese. What nationality did a Korean woman have if she married a Japanese man, or what nationality did a Korean man have if he married a Western woman? All of these questions needed another test.

Following a civil/political rights-based nationality test, Koreans in Korea were not Japanese nationals. Another issue was how to define the Korean nationality boundary. The USAMGIK interpreted that since Koreans formed a "separate nationality of their own," the test was whether a person "belongs to a Korean 'house' and are recorded in a Korean family registry."[22] As Ordinance 21 indicates, all laws which were in force were valid until later repealed or abolished. In the case of the Korean family law, the "custom" which was incorporated in clauses 10–12 in the Korean Civil Law code was still valid under USAMGIK, with minor changes.

The Korean family registry at the time of the Korean liberation was a patrilineal system such that only man blood lines were recorded. This system was historically constructed mainly during the colonial period and had origins in the Chosŏn dynasty.[23] Therefore, an ethnic Korean who was married to a Japanese man became a member of a Japanese "house" with registration under a Japanese family registry.[24] This principle also applied to a Japanese feman who married a Korean man who was registered in the man's "house" and forfeited her privileged status as a Japanese.[25]

Other than the vested property issue and the related question of nationality, as the USAMGIK ran post-war South Korea, there arose other thorny issues related to the definition of nationality, such as in the case of a child born out of wedlock between a Korean feman and an American GI, or, a Korean man who married a German woman but did not register his bride in the Korean family registry.[26]

Another related and equally thorny issue was how to define Korean residents in Japan in terms

of nationality. In regards to Korean residents, there were two incompatible interpretations: the USAMGIK Liaison Office in Tokyo argued that since Korea was a liberated country, "any assumption that Koreans are Japanese nationals is not supportable." However, Legal Section, Supreme Commander for Allied Powers (SCAP) stationed in Japan held that Koreans were Japanese nationals until a peace treaty between Japan and other powers was concluded.[27]

In September 1947, the USAMGIK witnessed the failure of the second US-USSR Joint Commission, which was designed to prepare for trusteeship execution and consequent Korean independence. The US government had already decided to deliver post-war Korean issues to the United Nations so that South Korea could see independence in the offing. For various reasons, the USAMGIK had to define who was a Korean.

The USAMGIK asked the Interim Legislative Assembly (ILA) to make some tentative laws or *chorye* regarding Korean Nationality. The USAMGIK established the ILA in December 1946 as part of the "Koreanization" process of running an occupied territory, in order to secure a more politically broad support bastion after alarm at the extreme right wing movement and the dissolution of the First US-Soviet Joint Commission. Because the ILA was basically conservative due to the fact that half of its members were designated by the USAMGIK, the ILA did not hold any legislative power, but rather an advisory one. In a letter to the ILA for urgent need to enact the law, C. G. Helmick, then the Acting Military Governor, said that the administrative authorities needed more minute criteria to decide Korean citizenship, although the previous standard based upon family registry had produced good results in deciding a Korean national.[28]

The ILA members noticed a difference between Koreans who voluntarily entered the Japanese *hojŏk* (family registry) system and Koreans who voluntarily or involuntarily registered themselves as Chinese and UK nationals. However, the ILA members assumed that the pure national lineage was only preserved with the patrilineal lineage, so they considered a Korean feman married to a foreigner to be a foreigner while a foreign feman married to a Korean man was recognized as a Korean. The interim ordinance became the base upon which the first nationality law was enacted with some revisions under the First Korean Congress.
In addition to the gender issues, it is noteworthy that the ILA and the first legislative members commonly argued that the "Chosŏn" people automatically became Korean nationals only with some exceptions, while foreign naturalization was to be limited. They assumed that there would be rare cases of naturalization as Koreans, besides through the marriage processes. This ethnic Korean-centered approach still lingers in the current nationality law.

Following this direction, *Kukjŏk e kwanhan imsi chorye* (Tentative Nationality Act Law) was promulgated on May 11, 1948.[29] The law had been valid until the time when the Nationality Act

was passed because the law stipulated that a new law under an independent government would replace this law.[30] In the Act, the strange thing is that there was no definition of a "Chosŏnin" (Korean). Rather, it seemed that it was prior given or was self-evident. This is also the same in the first Nationality Law.[31] Who are the "Chosŏn" people is also a thorny question to answer, a topic that I will deal with below.

In the tentative Act, the legislature members did not debate much about who the first Koreans were according to the law. Rather, they assumed that Koreans were ethnically homogenous with easily discernible characters. Thus, the issue was how to differentiate people who voluntarily entered the Japanese registry and people who did not. Whether a person preserved Chinese nationality, which was involuntarily achieved for their livelihood, was not an issue.[32] Perhaps it can be argued that family registry was still a valid standard to decide whether a person was a Korean national, such that the discussion about the definition of who was the first Korean was needless.

The Limitations of Defining "Original Koreans"

Although the USAMGIK and ILA's definition of Korean nationality was a good source to refer to, only the Nationality Act in the first Parliament was binding and valid in the new republic. When the first Parliament was opened, the Department of Justice was very swift in devising a draft for the Nationality Act.

Yi Yin, Minister of the Department of Justice, introduced the background of the law before Korean legislators in the first Parliamentary session. First and foremost, according to him, the man-blood line, the patrilineal or paternal line, should be an underpinning principle of the Act. That is *jus sanguinis* based upon man bloodline. Thus, even if a foreign feman married a Korean, she was supposed to obtain Korean nationality instantly by nature.[33] Second, Yi Yin argued that the Act tried to avoid dual citizenship or persons without nationality. The principle represented the Convention on Certain Questions relating to the Conflict of National Laws (1930) [Hague Convention].[34] Third, as a complement to the *jus sanguinis*, partial *jus soli* applied in some cases such as to orphans. Fourth, family registry and nationality were intimately related in deciding nationality.[35] As for the fourth point, even today, the family record (*kajok kwangye tŭngrokpu*) which was introduced in 2008 in replacement of family registry, reveals a presumptive power in deciding nationality.

As for the first Koreans, Yi Yin introduced a highly controversial issue from the contemporary perspective in national continuity. He argued that on the Korean peninsula there had been a state with the March First Movement and the subsequent Korean Provisional Government in Shanghai in 1919.[36] He said more explicitly that, "the Republic of Korea existed even before

August 1945. Therefore, we have to stick to the Republic of Korea (proclaimed by the Provisional Government)." The implication of this statement is that Korean nationality is able to date back at least until April 12, 1919, when the Provisional Government was established. Also, it was widely accepted that the Republic of Korea established de facto in August 15, 1945, when they inherited the Korean Provisional Government in Shanghai.[37]

There were many debates about the law in the Legislature. However, it is a mystery that there is no definition of those who are entitled to be a Korean at the time of the first Nationality Law making. This might be related to the fact that was no person would deny the Republic of Korea as a pre-existing entity before 1945, probably up to 1919, when the Korean Provisional Government was born in Shanghai, China. Maybe to all the members, the definition of Korean seems self-evident based upon the family registry system and the man lineage.[38]

As I have indicated above, the definition of the Korean who automatically becomes a Korean national is not clear. In order to verify Korean nationality besides blood, it would be better to refer to other models that stressed naturalization. Japan had a similar problem in terms of man-lineage up until the 1985 Nationality Law revision.[39] However, Japan did not have the same problems as Korea in terms of definition of a Korean at the time of the passage of the first nationality law due to pre-existing legislature, the 1899 Nationality Act.

In the United States, citizenship was not well defined at the time of the Constitutional making. It was rather the socially constructed concept which developed in history. In the preamble, to the Constitution starts with "We the people of the United States," such that the legal definition of the "the people of the United States" is not provided.[40] The Constitution defines naturalization as inherent in Congressional discretion, as Congress outlines its task "To establish a uniform Rule of Naturalization."[41]

This is understandable because the population in 1790, the year that the census was first introduced, was with only 3,227,000 people. More than 75 percent were of British origin and most people were descendants of the 16th and 17th century arrivals.[42] It seems that the Founding Fathers did not pay much attention to the first American definition because of the sparse population in the vast lands. Who was American was self-evident.

Indeed, policy makers were lenient so as to secure more Americans such that the first naturalization law, "An act to Establish a Uniform Rule of Naturalization" (1 Stat. 103), required only a two-year residency and renunciation of allegiance to one's former country. From the contemporary perspective, the required duration shows "an extremely liberal or generous policy."[43] The states were main responsibility for the actual processing of immigrants. Under

these circumstances, it was almost redundant to legally define the "people of the United States."

However, as it is well known, African Americans had not been full-fledged citizens until the Civil War. In apportioned numbers of Representatives, the Constitution divided "free Persons" and "all other Persons;" the latter was equal to three-fifths of the former. The category "all other Persons" indicates African Americans with euphemism.[44] Even before the Civil War, although some African Americans were "free" and "persons" at the time of the Constitution's adoption, in reality African Americans had been considered to be "property" rather than a person.[45]

After the Civil War, the Fourteenth Amendment was passed in 1866. It stated "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[46] At last, the definition of citizen and consequent equal protection was *de jure* secured in the Constitution.[47] However, how to secure real due process remained debatable until the early twenty-first century. Racial discrimination is now prohibited in the due process clause in the U. S. Const. Amend. XIV, § 1. However, racial blindness prevents some "Native" Americans, who aspire to apply for "Native American" status, to be recognized as such. A legal remedy should be determined to help politically and socially oppressed people to secure a fair playing field in society.[48] Thus, the definition of the first Korean may be not formed based upon blood, as is the case for Korean-Chinese who may be categorized as politically and socially marginalized people in Korea.

In the Korean Nationality Law, the issue of how to define the first Koreans was more complicated because of the "mono-ethnic" reality at the time of Korean Constitution making. However, the issue is not resolved. For example, in the case of Korean residents in Sakhalin, it is not clear how to prove their nationality because it is difficult to do so without a family registry dating back to 1919. Indeed, the date may need to go back further, to 1905, when Korea became a Japanese protectorate, as many Koreans started going abroad at this time in order to evade Japanese control. In such cases, it is not so easy to determine Korean nationality.

The Korean government still has not determined a new standard by which to treat ethnic Koreans abroad, whether they are former Koreans or foreigners. The former standard has led to unconstitutional decision-making.[49] In the case of the Act on the Immigration and Legal Status of Overseas Koreans, there is still tension regarding how the Korean government equally treat the ethnic Koreans who have moved to other countries.[50]

The Current Nationality Act

With globalization in full swing in Korea and pressure from the international norms starting in the 1990s, the Korean government decided to change its Nationality law from its man lineage

principle to a "gender-equal" one in 1997. It permitted maternal descendants to inherit their mother's nationality, if she married a foreigner and retained Korean nationality. The Constitutional Court was also decisive in bringing this reform to Korean society.[51] Gender is now much less part of the standard of determining nationality.
In addition to the gender-equality issue, a revised Korean Nationality Law also permits "dual citizenship," mostly to Korean-Americans. If Korean-Americans who were naturalized into US citizenship and are over 65 years of age, then they would be able to apply for Korean citizenship only if they decide to come back to Korea. The law uses a de facto utilitarian approach to the dual citizenship issue.[52]

On the contrary, Korean-Chinese are not entitled to apply for this category because they are not Koreans under the Korean Nationality Law, as they themselves or their descendants became Chinese citizens after October 10, 1949. Thus, when the first Korean Nationality Law was passed, they were excluded from the category of Korean nationals. This also applies to Korean-Russians who became Soviet citizens in the 1930s. Only the Korean ethnic groups that went to Sakhalin during World War II are able to apply for the nationality reinstatement (*kukjŏk p'anjŏng*).[53] This is related to the Overseas Korean Act (*chaeoe tongp'o pŏp*) (OKA) and its implications for each Korean diaspora group.

Amid the great need of foreign investment just after Korea received the International Monetary Fund (IMF) guideline, the OKA took effect on December 3, 1999. The Korean government, at the time, sought to support Overseas Koreans, especially the Korean ethnic groups in the US.[54] This controversial point is relevant to Article 2.2, which says that:

> A person prescribed by Presidential Decree from among those who, having held the nationality of the Republic of Korea (including those who had emigrated abroad before the Government of the Republic of Korea was established) or as their lineal descendants, have acquired the nationality of a foreign country (hereinafter referred to as a "foreign nationality Korean").[55]

The point at issue is "those who, having the nationality of the Republic of Korea." The Execution Ordinance of the Law has two definitions in Article 3: 1. People who lost their nationality because emigration abroad before the Government of the Republic of Korea was established, and their descendants. 2. People who emigrated to other countries and ascertained their nationality as of the Republic of Korea before their nationality changed, and their descendants. (Translation by author). Under the Act and its Execution Regulation, the Korean ethnic groups in China were excluded because Korean-Chinese were not able to ascertain their Korean nationality before their change of nationality.[56] The court struck down the clause as unconstitutional because the law arbitrarily divided the line on the establishment of the Republic of Korea in applying the law to those who are beneficiaries. Thus, the Court declared that the

Act was against equal protection of Korean ethnic groups.[57]

Even though the Overseas Korean Act is not related to the Nationality Act, the problem still remains due to the ambiguous character of the first Koreans before the establishment of the Republic of Korea, which, for instance, discriminates against Korean-Chinese and Korean-Russians.

Although the Overseas Korean Act was devised to incorporate Korean-Chinese and other Korean ethnic groups, Korean law still did not accept Korean-Chinese as first Koreans because they lost their Korean nationality after they became Chinese citizens on October 1, 1949.[58] Thus, people who were born in Korea during the colonial period, moved to Manchuria, and then came back to Korea after the 1990s, sometimes became illegal aliens. They brought their cases to the Constitutional Court.[59] One of the issues was whether the Constitution would delegate the Korean government to conclude a treaty with China to resolve the Korean-Chinese nationality.[60]

The Court's majority opinion noted that the Constitution should not delegate the duty because said individuals were not dual citizens and, even if they were, the treaty with China requires highly sensitive political questions to be asked.[61] The minority opinion produced by Cho Tae-Hyŏn is that the first Koreans were ethnic Koreans who were registered by the Family Registry Law (*hojŏkpŏp*).[62] Thus, one should be more cautious not to declare all Korean-Chinese as aliens. His opinion is that the Department of Justice should differentiate dual citizenship holders; Chinese nationals who lost Korean nationality, and Chinese nationals.[63]

Korean-Chinese had to submit tax returns and income documents to the Korean government to obtain Korean Overseas status (F-4). Korean-Chinese who applied for this change of visa argued that the ordinance to supply the documents is against the principle that important rights should not be delegated to lower laws.[64] The Court argued that the delegation is not prohibited because the delegation is about the law regarding foreigners. The delegation is about the social policy regarding the "social, economic relations and diplomatic relations."[65] The issue is in fact related to those who are the first Koreans.

As I indicated before, the debates of the Nationality Law and its application to each Korean diaspora group is related to the definition of those who were the first Koreans. The most troublesome issue is in how to apply the Korean Nationality Law to those who were born in other countries before August 1945. As has been shown, Korean-Chinese and Korean- Russians were strictly excluded from the category of first Korean nationals. Thus, Korean society should now address whether the first Koreans should include these Korean ethnics.
This is in contrast with a Korean Supreme Court decision to recognize a North Korean residents

who fled to Korea from China as a Korean.[66] A marriage between a Korean-Chinese and a Korean should follow the Korean domestic laws so that even if the marriage is valid, the Korean government has the discretion to review whether the marriage has other purposes, such as for obtaining employment in Korea, a purpose that is not valid under Korean family law.[67] The Korean Supreme Court says that if a person voluntarily accepts the host country's nationality, he or she will automatically lose their Korean nationality.[68] The Court even avers that the Minister of Justice has the discretion to decide whether a person would be able to obtain Korean nationality.[69]

Although the Korean government is sensitive to the Chinese government's response to dual citizenship, the Korean government needs to set up a standard to reinstall Korean-Chinese as a Korean national or had better consult this thorny issue with the Chinese government. In addition, they must limit the time of discussion regarding this issue because the surviving ethnic Koreans in China and Russia are growing very old. Without sincere discussion between Korea and China, many people may think that the Korean government only thinks about economic issues, which is embedded in racism.

Conclusion

When the first Korean Parliament passed the first Nationality Act in December 1948, the definition of a Korean who bestowed nationality upon his descendants seemed to be self-evident because of the extent of the family registry. However, in lieu of the first Constitution and the first Minister of Justice, Yi Yin's remark on the legislative intent, the first Korean was able to date back to the verifiable Korean registry at least up to 1922 when the family registry law was enacted under the colonial Japanese law. Therefore, if an ethnic Korean from another country later tries to change their nationality, the person had to show that they or one of their parent's side had some verifiable document that dates back to at least the early 1920s.

There are still remains of unsolved issues. What about a person who fled to China just before or after 1910 when Japan annexed Korea? What about the case in which they obtained Chinese nationality as some Korean nationalists did, and their descendants who stayed in China after Korea was liberated from Japan for various reasons? With several ethnic diaspora Koreans having difficulty in returning to Korea due to the national division and the Korean War, the first Korean Nationality Law has a detrimental impact on them as was shown after the Korean-Chinese normalization treaty of 1992. At the end of the 1980s and early 1990s, the Korean government tried to reinstate members of some Korean ethnic groups who were born during the colonial period and stayed in mostly China, by paying tribute to their contribution to the Korean independence. However, later the Korean government shut the door for reinstallation of their Korean nationality in fear of diplomatic conflict with China, arguing that they became Chinese

nationals after the People's Republic of China was proclaimed in October 1949. This is because the First Nationality Act of 1948 is not clear on who the first Koreans are.

If someone has difficulty in proving their connection to Korea, we therefore need to think about some other guidelines. Thus, I argue that at least the Japanese Annexation of Korean (1910) would be a critical juncture from which point we can think about reinstalling ethnic Koreans as Korean nationals. As the Korean-Chinese case shows, an issue of the definition of citizenship, including ethnic overseas Koreans is still lingering not only in contemporary Korea, but also on the whole of East Asia, particularly China

Appendix I

[Korean] Nationality Act [1–4 articles][70]

Wholly Amended by Act No. 5431. Dec. 13, 1997
Amended by Act No. 6523, Dec. 19, 2001
Act No. 7075, Jan. 20, 2004
Act No. 7499, May 24, 2005
Act No. 7435, May 14, 2007
Act No. 8892, Mar. 14, 2008
Act No. 10275, May 4, 2010

Article 1 (Purpose)

The purpose of the Act is to prescribe requirements to become a national of the Republic of Korea

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]

Article 2 (Attainment of Nationality by Birth)

A person falling under any of the following subparagraph shall be a national of the Republic of Korea at birth:

A person whose father or mother is a national of the Republic of Korea at the time of the person's birth;

A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth;

A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality.

An abandoned child found in the Republic of Korea shall be recognized as born in the Republic of Korea.

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]

Article 3 (Attainment of Nationality by Acknowledgement)

Where a person who is not a national of the Republic of Korea (hereinafter referred to as "foreigner") is acknowledged by his/her father or mother who is a national of the Republic of Korea, and meets each requirement of the following subparagraphs, the person may attain the nationality of the Republic of Korea upon reporting to the Minister of Justice.

The foreigner is to be a minor under the Civil Act of the Republic of Korea;

At the time of the foreigner's birth, his/her father or mother was to be a national of the Republic of Korea.

A person who makes a report under paragraph (1) shall attain the nationality of the Republic of

Korea at the time of reporting.

Procedures for reporting under paragraph (1) and other necessary matters shall be determined by President Decree.

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]

Article 4 (Attainment of Nationality through Naturalization)

A foreigner who has never attained the nationality of the Republic of Korea may attain the nationality of the Republic of Korea by obtaining permission for naturalization from the Minister of Justice.

In receipt of an application for naturalization, the Minister of Justice shall determine whether a foreigner meets the requirement for naturalization under Article 5 through 7 and then allow naturalization only to a person who meets such requirements.

A foreigner who obtains permission for naturalization under paragraph (1) shall attain the nationality of the Republic of Korea at the time the Minister of Justice grants such permission.

Necessity matters for application procedures, the screening thereof, etc. under paragraphs (1) and (2) shall be determined by Presidential Decree.

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]

Appendix II

Act on the Immigration and Legal Status of Overseas Koreans[71]

Article 1 (Purpose)
The purpose of this Act is to ensure overseas Koreans the entry into and departure from the Republic of Korea and the legal status therein.
[This Article Wholly Amended by Act No. 8896, Mar. 14, 2008]

Article 2 (Definitions)
The term "overseas Korean" in this Act means a person who falls under any of the following subparagraphs:

1. A national of the Republic of Korea who has acquired the right of permanent residence in a foreign country or is residing in a foreign country with a view to living there permanently (hereinafter referred to as a "Korean national residing abroad"); and
2. A person prescribed by Presidential Decree from among those who, having held the nationality of the Republic of Korea (including those who had emigrated abroad before the Government of the Republic of Korea was established) or as their lineal descendants, have acquired the nationality of a foreign country (hereinafter referred to as a "foreign nationality Korean").

[This Article Wholly Amended by Act No. 8896, Mar. 14, 2008]

Article 3 (Scope Of Application)
This Act shall apply with respect to the entry into and departure from the Republic of Korea and the legal status therein of Korean nationals residing abroad and foreign nationality Koreans who have the qualification for sojourn as overseas Korean (hereinafter referred to as the "qualification for sojourn as overseas Korean") from among the qualifications for sojourn under Article 10 of the Immigration Control Act.
[This Article Wholly Amended by Act No. 8896, Mar. 14, 2008]

Article 4 (Duty Of Government)
The Government shall give necessary support to overseas Korean lest he/she should suffer unfair regulation or treatment in the Republic of Korea.
[This Article wholly Amended by Act No. 8896, mar. 14, 2008]

Article 5 (Grant of Qualification for sojourn as Overseas Korean)
The Minister of Justice may grant qualification for sojourn as overseas Korean to a foreign nationality Korean who intends to engage himself/herself in activities in the Republic of Korea

based on his/her application thereto.

1. Where a foreign nationality Korean has a reason falling under any of the following subparagraphs, the Minister of Justice shall not grant him/her qualification for sojourn as overseas Korean under paragraph (1): Provided, That when a foreign nationality Koran falling under subparagraph 1 or 2 has become 38 years old, the same shall not apply: <Amended by Act No. 10275, May. 4, 2010; Act No. 10543, Apr. 5, 2011>
2. Where a male who became a multiple national as he was born in a foreign country and acquired a foreign nationality while his lineal ascendants stayed in a foreign country without any purpose of permanent residence in a foreign country, and became a foreigner with a view to evading military service by renouncing the nationality of the Republic of Korea before January 1 of the year when he becomes 18 years old according to obligation of nationality selection of a dual national under the former provisions of Article 12 prior to enforcement of Act No. 7499, the amended Nationality Act;
3. Where a male of the Republic of Korea became a foreigner with a view to evading military service by acquiring a foreign nationality and by losing the nationality of the Republic of Korea; and
4. Where it is apprehensive that he may impair the interests of the Republic of Korea, such as national security, maintenance of public order, public welfare and diplomatic relations of the Republic of Korea.
5. When the Minister of Justice grants a foreign nationality Korean qualification for sojourn as overseas Korean under paragraphs (1) and (2), he/she shall consult with the Minister of Foreign Affairs as prescribed by Presidential Decree. <Amended by Act No. 11690, Mar. 23, 2013>
6. The requirements for acquisition of qualification for sojourn as overseas Korean and the scope of activities of a person who has acquired such qualification shall be prescribed by Presidential Decree.

[This Article Wholly Amended by Act No. 8896, Mar. 14, 2008]

Notes

[1] Article 10, Korean Nationality Act (2011), *available at* http://www.law.go.kr/lsEfInfoP.do?lsiSeq=104818#0000 (last access on December 31, 2014); English translation is *available at* http://elaw.klri.re.kr/kor_service/lawView.do?hseq=18840&lang=ENG (last access on December 31, 2014).

[2] Tonghyŏn Sŏk, *Kukjŏkpŏp* [Nationality law] (Seoul: Pŏpmunsa, 2011), p. 81.

[3] Article 2(1), Korean Nationality Act (effective in 1998) contained a new word "mother" as "A person whose father or mother is a national of the Republic of Korea at the time of his or her birth." The law is *available at* http://elaw.klri.re.kr/kor_service/lawView.do?hseq=727&lang=ENG (last access on December 31, 2014).

[4] *See e.g.* Sŏk, *Kukjŏkpŏp*.

[5] Yŏng-Don Noh, "Urinara kukjŏkpŏp ŭi myŏtkaji munche e kwanhan Koch'al" [Study on Several Issues on Korean Nationality Act], *Kukchepŏp hakhoe nonch'ong* [Society of International Law Review] 41/2 ("we need a legislative step [to change the lack of definition of first Koreans]," p. 56); In Sŏp Han, "Uri kukjŏkpŏp sang ch'oe ch'o kukmin hwakchŏng e kwanhan kŏmto" [A Review of the Delineating Standard of the Fist Korean under the Korean Nationality Act], *Kukchepŏp hakhoe nonch'ong* [Society of International Law Review] 43/2 ("when we take jus sanguine nationality act, it is not possible to adopt a perfect procedure [of recognizing the first Koreans]. Thus the administrative procedure is sufficient to solve this issue," pp. 247-248); Sŏk, *Kukjŏkpŏp*, pp. 308-331 ("if we properly manage the nationality reinstatement system, then we are able to solve several problems from the first nationality act without definition of the first Korean nationals"). Thus, it seems that majority opinion about the definition of the first Koreans is that the court administration suffice to reinstate or evaluate one's nationality. The problem is that this practical solution is not consistent in this issue, whether the court accepts 1919 Korean Provisional Government or 1909 *Minjŏk pŏp* [People's Registration Law] during the Empire of Korea in evaluating one's Korean nationality.

[6] Romanizing Korean words, I will follow the McCune-Reischauer System.

[7] *See e.g.* "P'yŏkdong saram Pakjŏng i saettang ŭl palgyŏn haet ssum ŭl malhada"[Pakjŏng from P'yŏkdong said that he found a new territory] in *Chosŏn wangjo sillok* [Dynastic records of Chosŏn] (January 10, 1443); *see also*, an article in *Ibid*. (April 29, 1753).

[8] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992), pp. 10-17.

[9] Yi Yin, "Chosŏnin ŭi kukjŏk munje" [Korean nationality issue] in *Pyŏlkŏnkon* (Sep. 1, 1930), *available at* http://db.history.go.kr/front2010/srchservice (last access on May 7, 2012).

[10] This does not mean that Koreans were not be considered to be Japanese during colonial period. Rather Koreans lacked civil liberty under Japanese rule. *See* |Edward I-te Chen, "The Attempt to Integrate the Empire: Legal Perspectives," in *The Japanese Colonial Empire 1895-1945* (Edited by Raymon H. Myers and Mark R. Peattie)(Princeton, NJ: Princeton University Press, 1984), pp. 244-246.

[11] Yi Yin, "Chosŏnin ŭi kukjŏk munje."

[12] Mariko Asano Tamanoi, "Knowledge, Power, and racial Classification: The 'Japanese' in 'Manchuria', " *The Journal of Asian Studies* 59/2 (2000), pp. 255-256.

[13] Bruce Cumings, *Korea's Place in the Sun* (NY: W.W. Norton, 2005), p. 454.

[14] United States Army Forces in Korea, *Selected Legal Opinions of the Department of Justice, United States Army Military Government in Korea.* (Compilation prepared by the Department of Justice Headquarters, United States Army Military Government in Korea, 1948), Vols. 1-2 (Reprinted by Hallym University, 1997)[hereinafter *Selected Legal Opinions*], Forward.

[15] There seemed different opinions on this issue between US occupation authorities of Japan and Korea. *See* Opinion # 1269, "Status of Koreans in Japan. Effect of Cairo Agreement and Potsdam Declaration"(October 22, 1947), in *Selected Legal Opinions II*, p. 376.

[16] Headquarters, United States Army Forces in Korea, Ordinance 33, "Vesting Title to Japanese Property within Korea," in US Army Military Government in Korea, *Mikunjŏng Pŏpryŏng Ch'ongram: Yŏngmunp'an* [Comprehensive compilation of US Army Military Government Law: English version] (Han'guk pŏpje yŏn'guhoe, 1971)[Hereinafter *US Military Government Law Collection*], p. 95.

[17] *Ibid.*

[18] *See* footnote 22 with accompanying texts.

[19] *US Military Government Law Collection*, p. 95. The Opinions Bureau provided judicial review and legal interpretation to the USAMGIK, so that here I will use the Bureau's opinion as the USAMGIK's opinion.

[20] It is interesting whether the US legal advisors had in mind the fact that African American was a US national, but not citizen in the case of "freed blacks" in Dred Scott case before the Civil War. *See* III-A below.

[21] Opinion # 67, "Ordinance #33. Definition of "National of Japan," and "corporation of Japan or regulated by it"" (April 25, 1946), in *Selected Legal Opinions I*, p. 13.

[22] Ordinance # 73, "Descent and distributions, Korea, Laws of,"(March 28, 1946), in *Selected Legal Opinions I*, at 16 (in re inheritance of a German woman, married to a Korean, who dies intestate, with one surviving daughter, age 8 years, the Bureau opinioned that succession is governed by Korean "custom" law).

[23] Hyun-ah Yang, "A Journey of Family Law Reform in Korea: Tradition, Equality, and Social Change," *Journal of Korean Law* 8(Dec. 2008), p. 79.

[24] Ordinance # 178, "Vesting-Effect of Ordinance # 33 on Property of Korean Women, Married to Japanese Before but Subsequently Divorced," (April 25, 1946), in *Selected Legal Opinions I*, p. 36 ("a Japanese wife, even if she was divorced after August 9, 1945 was not entitled to her husband property because she was a Japanese national on August 9, 1945").

[25] Ordinance # 332, "Nationality of Japanese wives married to Korean Having Permanent residence in Korea," (May 13, 1946), in *Selected Legal Opinions I*, p. 83.

[26] Ordinance # 851, "Nationality of Child Born Out of Wedlock Jurisdiction Over Children of American Military Persons," (January 17, 1947), in *Selected Legal Opinions II*, p. 237; # Opinion 923, "Nationality of Alien Women Married to Koreans," (March 25, 1947), in *Ibid.*, p. 261.

[27] Opinion # 1269, "Status of Koreans in Japan. Effect of Cairo Agreement and Potsdam Declaration," (October 22, 1947), in *Selected Legal Opinions II*, p. 376. From the perspective of Opinions Bureau, the SCAP's position was that "from the standpoint of international law Japan can be required to pay Korean occupation costs only as long as Korea remains, legally, a part of Japan." It was because of occupation costs issue. This topic is outside this paper.

[28] Korean Assembly, *Namchosŏn Kwado ipbŏp ŭiwŏn Sokkirok* [South Chosŏn Interim Legislative Assembly records] Vol. 5, No. 201 (Jan. 27, 1948) [hereinafter *Ipbŏp ŭiwŏn Sokkirok*].

[29] For the 6 article Act, *see Ibid.*, p. 55.

[30] For the brief history of the tentative Nationality Act, *see* Sŏk, *Kukjŏkpŏp*, pp. 55-56.

[31] In order for clarity, the original intent should be carefully studied. However, researchers did not pay careful attention to the historical records.

[32] *Ipbŏp ŭiwŏn Sokkirok*, No. 208 (February 17, 1948) and No. 216 (March 19, 1948).

[33] This law was valid until 1997 when marriage fraud between Korean-Chinese and Koreans became an issue. Sŏk, *Kukjŏkpŏp*, p. 177.

[34] *Ibid.*, p. 31.

[35] All four points, *see* Korean Assembly, 2 *Chehŏn kukhoe Sokkirok* [Constitution-Making Congress Records], No. 118 (December 1, 1948)[hereinafter *Kukhoe Sokkirok*], p. 1144.

[36] *Ibid*.

[37] Some parliament member argued that Chosŏn, Taehan Empire, and Taehan Republic is all should be included in the Republic of Korea. *Kukhoe Sokkirok* (December 2, 1948), p. 1158. It is not clear how much his idea was accepted. I think Yi In's explanation was more corresponding to the First Constitution.

[38] For example, *see* Opinion # 332, "Nationality of Japanese wives married to Korean Having permanent residence in Korea [*sic*]" (May 13, 1946), in *Selected Legal Opinions I*, pp. 83-84.

[39] *See* Mie Murazumi, "Japan's Laws on Dual Nationality in the Context of a Globalized World," *Pacific Rim Law & Policy Journal* 9 (2000).

[40] U. S. Const. Preamble.

[41] U. S. Art. I, § 8, cl. 4.

[42] Michael C. Lemay, *Guarding the Gates: Immigration and National Security* (Westport, Conn.: Praeger Security International, 2006), p. 17.

[43] *Ibid*., p. 38. In 1795, the required residency was extended to five years. In fear of French "radicals" naturalization and their instigation of turmoil in the US, the Congress amended the 1795 requiring the residential year to be extended to fourteen years (infamous "Alien and Sedition Acts"). In 1802, the residential requirement returned to five years. *Ibid*.

[44] U. S. Const. Art. I, § 2, cl. 3.

[45] *Dred Scott* 60 U.S. 393 (1857); for the detailed analysis of this case, *see e.g.* Peter Irons, *A People's History of the Supreme Court: the Men and Women Whose Cases and Decisions Have Shaped Our Constitution* (London: Penguin Books, 2006), pp. 168-176.

[46] U. S. Const. Amend. XIV, § 1.

[47] Currently the US Nationality Law is codified as 8 USCA §1481(a).

[48] Native Hawaiians, the largest unrecognized indigenous people, are exemplary group for this because they are not legally "Native Americans." *See* Alex Zen, "Defining a Hawaiian: The Limitations of Race and Blood Quantum Laws" (2nd Year Seminar Paper submitted to University of Hawai'i Law School, 2010).

[49] Korean Constitutional Court, November 29, 2001, 99hŏnma494 (The law seemingly discriminated Korean-Chinese because the legal protection for Korean overseas only applied to a person who went abroad after the Republic of Korea was established). There is also tension surrounding the law in regards to how to deal with Korean-Americans.

[50] Art. 2-2.

[51] August 31, 2000. 97hŏnga12 (Constitutional Court decision), *P'anryejip* 12/2 [Cases], p. 167, available at http://search.ccourt.go.kr/ths/pr/selectThsPr0101List.do (last accessed on December 30, 2014).

[52] Revised Korean Nationality Law (2011)

[53] Regarding evaluation of Korean nationality towards Sahkalin ethnic Koreans, *see* Chulwoo Lee, "How Can You Say You're Korean? Law, Governmentality and National Membership in South Korea," *Citizenship Studies* 16/1(2012), pp. 89-92.

[54] Jung-Sun Park and Paul Y. Chang, "Contention in the Construction of a Global Korean Community: the Case of the Overseas Korean Act," *Journal of Korean Studies* 10/1 (Fall 2005).

[55] "Act on the Immigration and Legal Status of Overseas Koreans" (Act No. 6015).

[56] Although this law applies to Korean-Chinese, it also applies to Korean-Russians (*Koryŏin*).

[57] November 29, 2001. 99hŏnma494 (Constitutional Court decision), *P'anryejip* [Cases] 13/2, available at http://search.ccourt.go.kr/ths/pr/selectThsPr0101List.do (last accessed on December 30. 2014).

[58] The above case, 99hŏnma494 does assume that Korean-Chinese are "foreigners" in *Id.*, p. 720.

[59] March 30, 2006. 2003hŏnma806 (Constitutional Court Decision), *P'anryejip* [Cases] 18/1, available at http://search.ccourt.go.kr/ths/pr/selectThsPr0101List.do (last accessed on December 30. 2014).

[60] *Ibid.*, p. 385. The second and minor issue is whether the ordinance of the Department of Justice that discriminated Korean-Chinese in applying for the nationality recovery procedure is unconstitutional. The ordinance was invalid so that the issue is moot.

[61] *Ibid.*, p. 393.

[62] *Ibid.*, pp. 395-396.

[63] *Ibid.*, p. 398.

[64] April 24, 2014, 2012hŏnba412, *P'anryejip* [Cases] 21/1, available at http://search.ccourt.go.kr/ths/pr/selectThsPr0101List.do (last accessed on December 30, 2014).

[65] *Ibid.*, p. 8.

[66] Korean Supreme Court, November 12, 1996, 96nu1221. Korean Supreme Court cases are available at http://glaw.scourt.go.kr/wsjo/intesrch/sjo022.do (last accessed on October 24, 2014) (I will omit the website below for Korean Supreme Court cases).

[67] Korean Supreme Court, November 22, 1996, 96do2049.

[68] Korean Supreme Court, December 24, 1999, 99do3354. In the case of a person who was born in the US, however, he still retains a Korean national even if his father obtained the US citizenship. He had to complete military service before he reports to Korean government and loses his Korean nationality. *See* Korean Supreme Court, May 30, 2003, 2002du9797.

[69] Korean Supreme Court, July 15, 2010, 2009du19069 ("Considering the format, language, and contents in a document of nationalization permission, although an applicant for naturalization meets all the requirement of naturalization, Minister of Justice has a discretion").

[70] The whole Act has 22 articles and 8 addenda. From Article 5, the Act has various requirements for different types of naturalization. The whole text is *available at* http://elaw.klri.re.kr (last accessed on May 5, 2012).

[71] The whole Act has 17 articles. The whole text is *available at* http://elaw.klri.re.kr (last accessed on June 14, 2014).