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“Legal and Institutional Frameworks for Growth and Stability in Korea:  
The Role of Law and Legal System for Integrating and Protecting the Status and Rights  
pertaining to Voting Rights of Non-Citizens in Korea’s Diversifying Society”

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**Legal and Institutional Frameworks for Growth and Stability in Korea:  
The Role of Law and Legal System for Integrating and Protecting the Status and Rights  
pertaining to Voting Rights of Non-Citizens in Korea’s Diversifying Society**

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[Abstract]

While Korea has achieved economic growth and political and social development particularly since the late twentieth century, challenges and changes in its socio-economic conditions and environment face stagnating growth potential simultaneously with widening gaps among individuals and regions in terms of earnings and assets as well as other available resources in political, social and cultural aspects. Facing such phenomena also with extremely low birth rate and rapidly aging population, Korea has proactively opened up its borders particularly for labor forces and marriage-based immigration. Currently, approximately 2 million non-citizen individuals stay, reside and work in Korea, while the entire population of the nation is approximately 51 million. Partly due to its heightened military tension with North Korea and its strategic geographical location, Korea’s interactions with overseas have been subjected to strong and tight government control under the doctrine of national sovereignty with rigid dichotomy between citizen and non-citizen. As such, large-scale migration into Korea has been only a recent phenomenon since 1980s, while Korea opened up its border particularly for labor market and marriage facing aging of the population with extremely low birth rate as well as globalization. The growth of non-citizen population has contributed to the sustenance of industrial and economic growth and to cultural, political and social diversity in Korea encouraging and demanding responsiveness and non-discrimination in Korea’s political process and law. Yet, at the same time, Korea experiences polarization and inequality in protection of status and rights of individuals and also in allocation of resources in the community.

Notwithstanding the relevant constitutional law provision and the enactment of general laws in 2007 and 2008, the legal status and rights of non-citizens in Korea’s law and legal system are not protected in comprehensive, systematic or coherent manner, with many special statutes, executive orders and decrees regulating relevant matters in overlapping and sometimes even contradicting ways, thus failing to effectively or substantively protect rights of non-citizens. In this context and vein, this paper analyzes the role of law and legal system in institutionally integrating and protecting the status and rights of non-citizens in Korea from law and development perspective, to argue that the law and legal system of Korea should serve as the legal and institutional frameworks not just for further growth but also for integration and sustainability while the Korean society is rapidly diversifying in ethnicity and culture, on the premises that individuals, as the holders of human rights, should not shed basic rights when crossing national borders and that the integration will eventually serve to further protect the rights of all in the community and beyond regardless of citizenship status. This paper analyzes first the status of non-citizens in Korea as the holders of basic human and constitutional rights, and the law and legal system of Korea pertaining to the constitutional and statutory status of non-citizens and relevant applicable judicial review standards particularly in the areas of constitutional law, labor and social welfare law and immigration and refugee law. Then this paper discusses the voting rights of non-citizens as the gateway right to other civil rights in the Korean law and legal system and also to meaningful integration into the community. In the last part, this paper suggests legislative reform and revisions, for more substantive protection and implementation of rights of non-citizens for sustainable integration and matured development of Korean society. as more integrated and consistent legal and institutional frameworks for protection of rights for all regardless of citizenship, in Korea and internationally.

## I. Introduction

This paper analyzes the rule of law and the role of law in protecting human rights and promoting integrity for non-citizens in Korea, and in the larger context. In this vein, the law and legal system of Korea will be analyzed from the perspective of protection and implementation of rights of non-citizens, starting from the constitutional and legal status of non-citizens in the Korea’s jurisprudence with the constitutional and statutory grounds therefor and the judicial review standards applicable thereto, both in substantive and procedural law, particularly in the areas of constitutional law, administrative law, labor and social welfare law and refugee law; then certain suggestions will be made for statutory and administrative reform measures for more substantive protection of human rights of non-citizens in Korea. As of 2020, approximately two million non-citizen individuals stay, reside and work in Korea, while the entire population of the nation is approximately fifty-one million.<sup>1</sup> Partly due to its strategic geographical location, Korea has been an active party to the political, anthropological and cultural interactions and influences throughout its history with much influence from such exchanges in its socio-politics and culture in both public and private domains. However, at the same time, due to its geographic location and heightened military tension with North Korea in more recent history, Korea’s interactions with overseas have almost exclusively been subjected to the close control by the government under the theory of national sovereignty, with entrenched citizen and non-citizen dichotomy.

As such, large-scale migration into Korea is a relatively recent phenomenon since 1980s.<sup>2</sup> However, facing internationalization and integration into the globalized world, also with the extremely low domestic population growth rate and the rapid aging of the population,<sup>3</sup> Korea opened up its border particularly for labor market and marriage; the non-citizen population in Korea soon reached 1.07 million in 2007, and, 2 million in 2016.<sup>4</sup> The Ministry of Justice of Korea expects that non-citizen population in Korea will reach 3 million or 5.8% of the total population by 2021. The growth of non-citizen population in Korea has considerably cured the low birth rate and the aging of the population in Korea, thereby contributing to the sustenance of the industrial and economic growth. The ethnic and cultural diversification of population has contributed to the inclusiveness and responsiveness of the political process and law of the nation, demanding in turn the responsiveness and changes in law and legal system for prevention of discrimination for equal protection of law, in the larger context of integration into harmonized community.

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<sup>1</sup> Refer to the statistics of the Ministry of Justice of Korea at [https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=2756](https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=2756); and refer also to other government statistics at [https://kostat.go.kr/portal/korea/kor\\_nw/1/1/index.board?bmode=read&aSeq=386890](https://kostat.go.kr/portal/korea/kor_nw/1/1/index.board?bmode=read&aSeq=386890), and at [https://kostat.go.kr/portal/korea/kor\\_nw/1/2/3/index.board?bmode=read&bSeq=&aSeq=385962&pageNo=1&rowNum=10&navCount=10&currPg=&searchInfo=&sTarget=title&sTxt=](https://kostat.go.kr/portal/korea/kor_nw/1/2/3/index.board?bmode=read&bSeq=&aSeq=385962&pageNo=1&rowNum=10&navCount=10&currPg=&searchInfo=&sTarget=title&sTxt=).

<sup>2</sup> See statistics at [https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=2756](https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=2756).

<sup>3</sup> See statistics produced and posted by the Korean government on these accounts at [https://kostat.go.kr/portal/korea/kor\\_nw/1/2/3/index.board?bmode=read&bSeq=&aSeq=387057&pageNo=1&rowNum=10&navCount=10&currPg=&searchInfo=&sTarget=title&sTxt=](https://kostat.go.kr/portal/korea/kor_nw/1/2/3/index.board?bmode=read&bSeq=&aSeq=387057&pageNo=1&rowNum=10&navCount=10&currPg=&searchInfo=&sTarget=title&sTxt=).

<sup>4</sup> See statistics at [https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx\\_cd=2756](https://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=2756).

The status of non-citizens as the holders of rights for basic human and constitutional rights such as family right, privacy, freedom of expression, accessibility to justice system premised on the right to assistance of counsel, applicability and eligibility for labor standard and social welfare, due process in immigration and refugee law and relevant administrative and judicial processes, and possibility of exercising voting rights at certain local elections is a crucial indicator of how substantively the rights of non-citizens are protected. This paper analyzes the legal status and rights protection of and for non-citizens in Korea, first in Korea’s law and legal system in general, and then moves on to specifically address the issues pertaining to the voting rights of non-citizens in Korea particularly in local public elections. Based upon analysis of the relevant law and the implementation thereof with relevant statistics, this paper will suggest legislative reform measures and more consistent and encompassing administrative practices and judicial review, departing from the rigid dichotomy between citizen and non-citizen status in the past, towards more inclusive and legitimate representation of the constituents in governance and more responsive, responsible and participatory integration of the community.

## II. Legal Status of Non-Citizens and the Rights Protection for Non-Citizens in the Korean Legal System

### 1. Context of Discussing Legal Status and Rights Protection of Non-Citizens in Korea

Recently, Korea has witnessed unprecedented low birth rate and rapid aging of the population, while experiencing active multi-directional movement and migration of population with economic and cultural exchanges both in public and private sectors. With such trend, the non-citizen population staying in Korea, visiting, working and residing, has incrementally increased, both in terms of number and proportion. Such increase in number and proportion of non-citizen population in Korea functions to secure the potential and resources for growth by resolving the issues stemming from the shortage in working age and economically active population and the aging of population in Korea. At the same time, the increase of non-citizen population in Korea has promoted and contributed to the cultural diversity and political pluralism. In such context, the policy and the law of Korea should be ready to support and implement the respect for diversity and the equality and nondiscrimination throughout politics, culture and all other aspects of community life, from the perspectives of human rights protection and integrity of the legal system. Such effort should be made based upon coherent understanding as to both domestic and international laws at the juncture of universal human rights and national sovereignty.

The position taken by the domestic positive law as an entirety towards the legal status and the rights of non-citizens has changed over time, since the establishment of the concepts of nation and nationality. The relevant concepts and systems also differ from nation to nation. The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 does only have a declaratory effect and not a binding effect, yet, subsequently, has positively contributed to the stability and the improvement of the legal status of non-citizens in respective nations including Korea through, particularly, the declaration of prohibition of discrimination due to nationality under its Article 2, Section 1. The International Covenant on

Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted in 1966 that came into effect in 1976 became effective in Korea in 1990, and, as such, have enhanced the legal status of non-citizens in Korea from nondiscriminatory perspectives and standards, although they do not directly guarantee the equal status for non-citizens in every term beyond those areas of rights specifically indicated in respective provisions. Further, the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the United Nations General Assembly in 1965 that came into effect in 1969 became effective in Korea in 1979, which expressly indicates the prohibited grounds for discrimination between citizens and non-citizens. More recently, such declarations and resolutions adopted through international efforts have contributed to more clearly defining the relevant issues and the tasks to be done by their signatories by, for examples, providing the definition of non-citizen and clarifying the basic elements in human rights protection for non-citizens. The efforts made by the European Union in this regard also have shed lights to non-member states as well in terms of the legal status and the rights protection of and for non-citizens. Yet, there is no established uniform law or legal system concerning the legal status of non-citizens in international law.

The Constitution of the Republic of Korea provides in this regard that “[t]he status of aliens shall be guaranteed as prescribed by international law and treaties” in Article 6(2). Yet, as there is no such established uniform law concerning the legal status of non-citizens in international law, in order to understand the legal status of and the rights that may be exercised and protected for non-citizens in Korea, the relevant laws and policies with the applicable judicial and adjudicatory decisions of Korea should be systematically analyzed. The law and the policies on non-citizen status and rights in Korea have evolved to a considerable extent in terms of their structure and content, as they have reacted to diverse and changing elements affecting their directions in the context of policy environment at the juncture of the concepts of universal human rights and national sovereignty, incrementally yet consistently towards maturing pluralistic democracy encompassing political and cultural diversity. The laws of Korea relevant to the policies on non-citizen status and rights are structured upon the Immigration Control Act,<sup>5</sup> the Nationality Act,<sup>6</sup> the Framework Act on Treatment of Foreigners Residing in the Republic of Korea enacted in 2007,<sup>7</sup> the Multicultural Families Support Act enacted in 2008,<sup>8</sup> and the Refugee Act<sup>9</sup> and the corresponding administrative orders, rules, etc., and, such other laws as the Public Official Election Act,<sup>10</sup> the Local Autonomy Act<sup>11</sup> and the Local Residents Referendum Act<sup>12</sup> and the corresponding executive orders and rules also provide relevant matters. Such laws should be coherently and consistently structured for the protection of human rights, both as matters of the constitutional and human rights law and the legislation and statutory interpretation.

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<sup>5</sup> Act No. 17365, as most recently revised June 9, 2020 effective December 10, 2020.

<sup>6</sup> Act No. 16851, as most recently revised December 31, 2019 effective January 1, 2020.

<sup>7</sup> Currently Act No. 14974, as most recently revised and effective October 31, 2017.

<sup>8</sup> Currently Act No. 17281, as most recently revised and effective May 19, 2020.

<sup>9</sup> Act No. 14408, as most recently revised and effective December 20, 2016.

<sup>10</sup> Act No. 17813, as most recently revised and effective December 29, 2020.

<sup>11</sup> Act No. 16057, as most recently revised December 24, 2018 effective December 25, 2019.

<sup>12</sup> Act No. 16883, as most recently revised and effective January 29, 2020.

## 2. Legal Status of Non-Citizens in Korea as Indicated and Established in the Provisions of the Korean Constitution and the Decisions of the Korean Constitutional Court

The issue of legal status of non-citizens pertains to both quantitative and qualitative dimensions, as it has to do with to what extent and how far in substantive terms the status and the rights of non-citizens should be guaranteed and may be implemented. In order to analyze such issue, the discussion on the definition of non-citizens in this regard should precede. The Declaration On The Human Rights Of Individuals Who Are Not Nationals Of The Country In Which They Live, which was adopted in 1985 by the United Nations General Assembly defines a non-citizen as such individual who is not a national of the country where such individual lives. Pursuant to the Korean law, a non-citizen is an individual who does not have Korean nationality or citizenship, and such definition encompasses an individual with non-Korean nationality and an individual with no nationality. The Korean law in the entirety has acknowledged the egalitarian and the reciprocal theory and standards of public and private international laws, and has taken the position that, as a matter of principle, the same legal status and rights are guaranteed for non-citizens as applicable to the Korean nationals across jurisdiction. The Constitution of the Republic of Korea acknowledges that the international law should function as the standard and scrutiny for the extent and the degree of protection of legal status and rights of non-citizens, as it provides in Article 6(2) that “[t]he status of [non-citizens] shall be guaranteed as prescribed by international law and treaties.”

Such provision of the Korean Constitution, that is, Article 6(2) of the Constitution of the Republic of Korea, succeeded Article 7 of the inaugural constitution, i.e., the Constitution of the First Republic of Korea of 1948, which in turn had been influenced by Article 10(2) of the 1948 Italian Constitution. Such Article 10(2) of the 1948 Italian Constitution provided that the legal status of non-citizens should be guaranteed pursuant to international law and treaties, by way of and in the form of the statute. The minutes recording the process of drafting the inaugural 1948 Constitution of Korea indicate that, one of the major drafters of the 1948 Korean Constitution, Dr. Yoo Jin-Oh, intended to title the chapter for the fundamental rights to be the rights and obligations of the people, so that such fundamental rights guaranteed by the Korean Constitution should be applicable to both citizens and non-citizens. The Constitution Committee of 1948 established within the inaugural National Assembly of the Republic of Korea for the drafting of the inaugural constitution chose otherwise to title the chapter to read the rights and obligations of the Korean nationals. As such, Dr. Yoo then persuaded the Committee and the National Assembly to insert the last part of Article 7 of the 1948 Constitution, in order to assure that fundamental rights should be guaranteed for non-citizens, at least as a matter of principle. As such, the legal status of non-citizens in the Korean law and legal system are guaranteed to the extent and under the standards as determined by the international law and treaties pursuant to the applicable provision of the Constitution, and not automatically as the abstract concept of rights of human being. This mandates that the Korean law and legal system should protect the legal status and rights of non-citizens to the same extent and degree as applicable to the Korean nationals to the extent and under the standards as determined and protected by the international law and treaties, per Article 6(2) of the Constitution of the Republic of Korea, which also applies to the judicial court and the Constitutional Court of Korea.

Some of the early decisions of the Korean Constitutional Court have integrally established the position of the Korean Constitutional Court on the issue of whether a non-citizen may assert and implement the fundamental right and, if positive, which fundamental rights to which extent. The initial decision of the Korean Constitutional Court on this issue rendered in 1994<sup>13</sup> declared that, among fundamental rights guaranteed by the Korean Constitution, those fundamental rights that in their nature are to be guaranteed for any human being and not those confined in their nature to the individuals with the Korean nationality should be protected for non-citizens. Subsequently, in the 2001 decision,<sup>14</sup> the Korean Constitutional Court decided that, the right to pursue happiness and human dignity as the fundamental rights should be guaranteed for the non-citizens as well as the Korean nationals, whereas the equal protection should be guaranteed for the non-citizens subject to the limitation under reciprocity or by the nature of specific right, as applied to, for example, the right to vote and participate in politics.

Further, in the 2007 decision,<sup>15</sup> in the case particularly concerning the equal protection and the right to choose vocation on the part of a non-citizen, the Korean Constitutional Court reiterated that the fundamental rights guaranteed by the Korean Constitution may be exercised by the non-citizens should such fundamental rights be of the nature of the universally applicable rights for every human being beyond that for the individuals with the Korean nationality. Under the currently established law derived from the decisions of the Constitutional Court in Korea, conventional rights to freedom may be exercised by non-citizens as a matter of principle, with certain partial limitations applicable in the cases of, for examples, the right to choose residence, the right to travel and the freedom of expression in particular contexts; the social rights and the right to vote and participate in politics at the national level as opposed to local government level are not exercisable by non-citizens as a matter of principle; and the right to request certain government actions as the means to implement other fundamental rights are to be guaranteed to non-citizens, as a matter of principle. The Korean Constitutional Court has established the position that, if and when a non-citizen individual stands in the position that is similar to a Korean national in the sense that such an individual is situated in opposition to the state or public authority, then such a non-citizen may be guaranteed and exercise certain fundamental rights, should such fundamental rights bear the nature of the universally applicable rights of any human being.

### 3. Structure of Law pertaining to the Legal Status and Rights of Non-Citizens in Korea from the Perspectives of Human Rights Protection and Legal Coherency, and the Voting Rights as the Gateway Right to other Civil Rights

Article 6(2) of the Constitution of the Republic of Korea provides that “[t]he status of [non-citizens] shall be guaranteed as prescribed by international law and treaties.” The law and legal system of Korea concerning the legal status and rights of non-citizens are, from normative approach, structured upon two of the statutes, i.e., the Framework Act on Treatment of Foreigners Residing in the Republic of Korea enacted in 2007<sup>16</sup> and the Multicultural Families

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<sup>13</sup> Korean Constitutional Court Decision 93Hun-Ma120 (December 29, 1994).

<sup>14</sup> Korean Constitutional Court Decision 99Hun-Ma494 (November 29, 2001).

<sup>15</sup> Korean Constitutional Court Decision 2004Hun-Ma670 (August 30, 2007).

<sup>16</sup> Currently Act No. 14974, as most recently revised and effective October 31, 2017.

Support Act enacted in 2008,<sup>17</sup> while, from practical approach, numerous other statutes or certain provisions thereof respectively regulate the legal status and rights of non-citizens pertaining to the immigration, naturalization, nationality, procedures applicable to refugees and defectors from North Korea, voting rights in local elections and referendum and so on, with many such statutes having been enacted particularly since 2000. Such statutes include the Refugee Act,<sup>18</sup> the Public Official Election Act,<sup>19</sup> the Local Autonomy Act,<sup>20</sup> and the Local Residents Referendum Act,<sup>21</sup> as implemented through relevant executive orders and rules issued by independent constitutional institutions such as the Supreme Court and National Assembly, etc.

Notwithstanding the enactment and implementation of the Framework Act on Treatment of Foreigners Residing in the Republic of Korea<sup>22</sup> in 2007 intended as the comprehensive general law, the legal status, rights and obligations of non-citizens in the system of law of Korea in its entirety are not provided in the comprehensive, systematic and coherent manner, with many statutes and decrees regulating different yet relevant matters in overlapping and sometimes even contradicting ways. There are many special statutes with most, if not all, of the provisions declaring abstract principles or recommending certain programs for national or local government. The provisions providing for substantive rights and obligations applicable to non-citizens are rare, while most of the provisions adopt a narrow and limited definition of non-citizen for their applicability. An integrated system for the implementation of policies and laws concerning non-citizen status and rights should be structured, with many relevant individual statutes to be concerted in light of the shared legislative goal of protecting human rights. Currently, such individual statutes exist particularly in the form of segmented special acts, applicable in the respective areas of, for examples, nationality, immigration, voting rights, social welfare, economic and commercial activities and taxes.

As such, in the entirety, the laws concerning the legal status and rights of non-citizens in Korea lack comprehensiveness, consistency, coherence and legislative conformity, mandating certain legislative reforms and changes to add both purview and clarity of definition of non-citizens eligible for applicability of relevant laws including those intended to function as general umbrella statutes, to specifically address the issues concerning illegal immigrants, refugees and those applying for refugee status, North Korean defects, and the multicultural families with no family member with Korean nationality, particularly for labor rights and social welfare eligibility, and to provide legal and administrative remedies under due process and consistent review standard that are actually available. The right to vote is to be specifically addressed and analyzed in this vein, as the voting right as the right to participate in community governance serves as the premise of and gateway to the protection of most, if not all, of other fundamental rights and the recognition and guarantee of the legal status of non-citizens as the members of the community.

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<sup>17</sup> Currently Act No. 17281, as most recently revised and effective May 19, 2020.

<sup>18</sup> Act No. 14408, as most recently revised and effective December 20, 2016.

<sup>19</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>20</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>21</sup> Act No. 16883, as revised and effective January 29, 2020.

<sup>22</sup> Currently Act No. 14974, as most recently revised and effective October 31, 2017.



### III. Voting Rights of Non-Citizens in Korea at the National and Local Public Elections from the Constitutional Perspectives

The Constitution of the Republic of Korea provides in its Article 6(2) that “[t]he status of [non-citizens] shall be guaranteed as prescribed by international law and treaties”. The laws at the statutory level and below pertaining to the status and the right of non-citizens, however, are not comprehensively or consistently established. To wit, in the ongoing constitutional revision discussion, some argue for the revision of certain fundamental rights provisions in order to have those applicable to all individuals including non-citizens, beyond those with Korean nationality.<sup>23</sup> At the statutory level, the Public Official Election Act by way of 2005 revision<sup>24</sup> provided for the first time the right to vote in local elections for non-citizens “aged 19<sup>25</sup> or older” for whom “3 years lapse[d] from the date on which they obtain[ed] their permanent stay statuses pursuant to the provisions of Article 10 of the Immigration Control Act” if also “entered in the foreigner registration records of the relevant local government pursuant to the provisions of Article 34 of the Immigration Control Act as of the date on which the electoral register provided for in the provisions of Article 37(1) [was] complied.”

In the first local election held under such revised Public Official Election Act in 2006, approximately 6,700 non-citizens were provided with the right to vote in local elections. Through multiple revisions, the Public Official Election Act of Korea has maintained this stance of providing voting right for non-citizens of age 18 or more who have resided as registered for or over 3 years by the date of election in the local election district after having obtained permanent resident status.<sup>26</sup> The right to vote serves as the initial step for the protection of legal status and right as the members of the community who may participate in political process for governance in a representative democracy, and, as such, bears particular significance in the protection of fundamental rights and in the community life as a whole. The following part will analyze the revision process and the actual implementation of the above public election statute in Korea from this perspective, then will make suggestions for reform and changes in the relevant policy, law and practice.

The issue of voting right of non-citizens in Korea had long been at the core of diplomatic and legal discussion and debate as related to the issue of right to vote on the part of the Korean nationals overseas, particularly in Japan, prior to the statutory revision in 2005 providing the right to vote for non-citizens in Korea in local elections. Particularly, those with Korean citizenship residing in Japan has consistently demanded voting right since 1990s.<sup>27</sup> The official visit of then Korean President Kim Dae-jung to Japan in 1998 triggered the discussions and efforts in both Korean and Japan to statutorily provide voting right in local elections for

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<sup>23</sup> E.g., the constitutional revision bill submitted to National Assembly in March 2018 by President Moon. Such bill was aborted in the subsequent National Assembly procedure, yet discussions to the same effect are currently going on.

<sup>24</sup> Act No. 7681, revised and effective August 4, 2005. Currently, Act No. 17813, revised and effective December 29, 2020.

<sup>25</sup> As of January 14, 2020, the voting age in Korea is 18 and above, pursuant to the revision of Article 15 of the Public Official Election Act (Act No. 16864, revised and effective January 14, 2020; currently Act No. 17813, revised and effective December 29, 2020).

<sup>26</sup> Article 15(2)(iii) of the Public Official Election Act (Act No. 17813, revised and effective December 29, 2020).

<sup>27</sup> Chung, Sang-Ki, “Local Suffrage and Legal Protection of Resident Foreigners”, *Law of Science & Technology Review* Vol. 24, No. 1 (Hannam University Institute for Law of Science & Technology, 2018) p. 223.

non-citizens in respective nations, under the principle of reciprocity. The statutory revision of the Public Official Election Act of Korea in 2005<sup>28</sup> was the outcome of long-term effort thereby expedited<sup>29</sup> since late 1990s.

Since the 2005 revision of the Public Official Election Act (Act No. 7681) or the local election held in 2006, the Public Official Election Act of Korea has provided the right to vote for non-citizens of age 18 or more who have resided as registered for or over 3 years by the date of election in the local election district after having obtained permanent resident status,<sup>30</sup> in the local elections to elect the chief executive officer of the local government and the members of the local council. Also, at the local government level, non-citizens in Korea have the right to request the enactment, revision and revocation of local ordinances,<sup>31</sup> the right to vote at local referendum,<sup>32</sup> and the right to vote at local recall vote,<sup>33</sup> as the residents of pertinent autonomous local government unit. Such provision for non-citizens of voting and participatory right in various local elections in Korea is the very first instance in Asia and a rare example across the global community with certain exceptions in Europe.<sup>34</sup> These series of statutory revisions and enactments have collectively enlarged the right to vote and right to participate of non-citizen individuals in Korea with far-reaching ramifications in other areas of law as well as larger political, social and cultural aspects of community life.

Korea enacted two of the statutes to serve as the statutes with general applicability<sup>35</sup> for comprehensive and consistent structure and system of relevant laws concerning status and right protection of non-citizens residing in Korea and families of multicultural heritage, and has

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<sup>28</sup> See *supra* note 24 and accompanying text.

<sup>29</sup> Such provision of voting right for non-citizens have not yet been either legislated or otherwise being implemented in Japan as yet. The Supreme Court of Japan in its February 28, 1995 decision held that the term “residents” in the Japanese Constitution should be interpreted as those with Japanese nationality thus those with no Japanese citizenship residing in Japan are not endowed with voting right in local elections as of constitutional right; yet it may be possible or should not be prohibited to provide voting right for non-citizens in local elections by way of or in the form of a statute, in light of the purpose and meaning of local autonomy in a democratic society to institutionally guarantee a political form based on the will of the local residents. Such decision of the Japanese Supreme Court provided a momentum in Japan for activated discussions for voting right of non-citizens in local elections, although non-citizens in Japan has not been granted with voting right in local elections yet, as of December 2020.

<sup>30</sup> Article 15(2)(iii) of the Public Official Election Act (Act No. 17813, revised and effective December 29, 2020).

<sup>31</sup> Article 15(1)(iii) of the Local Autonomy Act (Act No. 16057, as revised December 24, 2018 effective December 25, 2019).

<sup>32</sup> Article 5(1)(ii) of the Local Resident Referendum Act (Act No. 16883, as revised and effective January 29, 2020).

<sup>33</sup> Article 3(1)(ii) of the Local Public Official Recall Act (Act No. 17386, as revised and effective June 9, 2020).

<sup>34</sup> In Europe, certain European nations bestowed voting right upon non-citizens in local elections even prior to the Maastricht Treaty that came into effect in 1993. Such nations include the U.K.(for those from the Commonwealth), Ireland, Denmark, Sweden, Norway, the Netherlands, Swiss, Spain (under reciprocity) and Portugal (for those sharing the language). Other nations limited voting right in local elections to citizens. Such nations include Germany, France, Italy, Belgium and Luxembourg. The Maastricht Treaty reads that “every person holding the nationality of a Member State shall be a citizen of the [European] Union”. This common and parallel citizenship accords the Member State migrants political rights for the first time, as well as the civil right to take residence and employment. In a new EU country of residence, Member-State nationals have the right to vote, and to stand, in both local and European elections. Yet, in Europe, it is still rare to see bestowing of voting right to non-citizens from non-Member State, or a third nation. Ireland, Luxembourg, the Netherlands, Sweden, Poland and Slovakia acknowledges voting right of non-citizens from non-Member State in local elections, and Portugal and Spain bestows such voting right in local elections to a limited extent under reciprocity.

<sup>35</sup> The Framework Act on Treatment of Foreigners Residing in the Republic of Korea (Act No. 14974, as most recently revised and effective October 31, 2017) and the Multicultural Families Support Act (Act No. 17281, as most recently revised and effective May 19, 2020).

specifically provided voting right in local elections through various relevant statutes for non-citizens under certain required qualifications and conditions for more active participation in community life and governance at the local government level. Yet, certain statutory revisions are duly requested for further protection of legal status and rights of non-citizens in Korea, which will in turn contribute to enhanced administrative and judicial practices and rules in the same direction. In the following part, this paper focuses on suggestions for statutory reform and changes for further protection of rights and enhancement of legal status of non-citizens in Korea based upon the analysis, respectively and collectively, of the currently existing statutes.

As to the issue of whether citizenship is required for the right to vote to be exercised in public elections at the national level, the Constitution of the Republic of Korea in Article 24 provides that “[a]ll citizens shall have the right to vote under the conditions as prescribed by [the relevant statute],” and in Articles 41(1) and 67(1) respectively that “[t]he National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens” and “[t]he President shall be elected by universal, equal, direct and secret ballot by the citizens,” thereby stating in express language that the right to vote in public elections at national level to elect the President and the members of National Assembly belongs to the Korean citizens. As to citizenship, the Korean Constitution in Article 2(1) that “[n]ationality in the Republic of Korea shall be prescribed by [statute],” and, thereunder, the Nationality Act<sup>36</sup> of Korea prescribes the requirements and conditions for the Korean citizenship. In this structure of law as a whole, a Korean citizen is defined to be an individual with the citizenship under the Nationality Act,<sup>37</sup> and the right to vote at public election to elect the President and the members of National Assembly is exclusively vested in the bearer of the Korean citizenship.

As to the citizenship requirement in public elections at the local level, the Constitution of the Republic of Korea does not have express provisions applicable thereto as in the case of public elections at the national level. The Korean Constitution, on local autonomy system, provides in Article 118(2) that “[t]he organization and powers of local councils, and the election of members, election procedures for heads of local governments, and other matters pertaining to the organization and operation of local governments shall be determined by [statute].” The Local Autonomy Act<sup>38</sup> thereunder in Article 29 provides that “[n]ecessary matters concerning local elections excluding those as prescribed by this Act shall be separately prescribed by other [statutes],” and the Public Official Election Act<sup>39</sup> in turn prescribes thereunder specific matters as to the local elections to elect the chief executive officer of the local government and the members of local council. In such structure of law, a position may be derived through structural interpretation that non-citizens may be granted and exercise voting right in local elections should the relevant statute prescribe as such. The Public Official Election Act<sup>40</sup> of Korea provides for non-citizens in Korea aged 18 or older the right to vote in local elections to elect the members of local council and the chief executive officer of the local government, upon passage of three or more years with the permanent resident status as registered as residents in the relevant local government unit (Article 15(2)(iii) of the Act), and also allows non-citizens to participate in electoral campaign activities in the relevant local election (Article 60(1)(i) of

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<sup>36</sup> Act No. 16851, as most recently revised December 31, 2019 effective January 1, 2020.

<sup>37</sup> Ibid.

<sup>38</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>39</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>40</sup> Act No. 17813, revised and effective December 29, 2020.

the Act). Further, under certain conditions, non-citizens in Korea may vote at local referendum (Article 14 of the Local Autonomy Act<sup>41</sup> and Articles 1, 2 and 5(1)(ii) of the Local Resident Referendum Act<sup>42</sup>), request to enact, revise or revoke certain local ordinance (Article 15 of the Local Autonomy Act<sup>43</sup>) and vote to recall elected local public officials (Article 20 of the Local Autonomy Act<sup>44</sup> and Article 3(1)(ii) of the Local Public Official Recall Act<sup>45</sup>).

#### IV. Suggestions for Statutory Revisions of the Laws concerning Non-Citizen Status and Rights in Korea, from the Perspectives of Human Rights Protection and Legislative Conformity

Article 6(2) of the Constitution of the Republic of Korea provides that “[t]he status of [non-citizens] shall be guaranteed as prescribed by international law and treaties.” The law and legal system of Korea concerning the legal status and rights of non-citizens are, from normative approach, structured upon two of the statutes, i.e., the Framework Act on Treatment of Foreigners Residing in the Republic of Korea enacted in 2007 (Act No. 14974) and the Multicultural Families Support Act enacted in 2008 (Act No. 15204), while, from practical approach, numerous other statutes or certain provisions thereof respectively regulate the legal status and rights of non-citizens pertaining to the immigration, naturalization, nationality, procedures applicable to refugees and defectors from North Korea, voting rights in local elections and referendum and so on, with many such statutes having been enacted particularly since 2000. Notwithstanding the enactment and implementation of the Framework Act on Treatment of Foreigners Residing in the Republic of Korea in 2007 intended as the comprehensive general law, the legal status, rights and obligations of non-citizens in the system of law of Korea in its entirety are not provided in the comprehensive, systematic and coherent manner, with many statutes and decrees regulating different yet relevant matters in overlapping and sometimes even contradicting ways.

Many provisions of the general laws adopt declaratory statement and non-binding discretionary language that in turn invite not unambiguous interpretations. Also, there are many special statutes with most of their provisions declaring abstract principles or recommending certain programs for national or local governments. As such, the provisions providing for substantive rights and obligations applicable to non-citizens are rare, while most of the provisions adopt a narrow and limited definition of non-citizen for their applicability. Korea lacks an integrated system for the implementation of policies and laws concerning non-citizen status and rights, with many individual statutes, particularly in the form of special acts, applicable in the respective areas of, for examples, nationality, immigration, voting rights, social welfare, economic and commercial activities and taxes. As such, in the entirety, the laws concerning the legal status and rights of non-citizens in Korea lack comprehensiveness, consistency, coherence and legislative conformity.

This leads to discretionary, if not arbitrary, interpretation on the part of the administrative authorities and sometimes inconsistent application of review standards on the part of judicial court. Thus, such structure of law of Korea concerning legal status and rights of

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<sup>41</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>42</sup> Act No. 16883, as revised and effective January 29, 2020.

<sup>43</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>44</sup> Ibid.

<sup>45</sup> Act No. 17386, as revised and effective June 9, 2020.

non-citizens adopting declaratory and open with sometimes contradicting languages may be restructured with certain statutory revisions, for more substantive protection of human rights of the individuals concerned and the legislative conformity and coherence. The individual statutes and decrees should be integrated into and under the general law that comprehensively, inclusively and broadly defines non-citizen and multicultural family, so that the rights protection for non-citizens and their family members will be expanded in a systematically consistent and coherent manner. While many different statutes currently define their objects of application narrowly and unequivocally by deploying such diverse concepts as foreigners, immigrants, members of multicultural family, refugees, non-citizen compatriots, North Korean defectors, for more substantive protection of legal status and rights of non-citizens, the general law should adopt a comprehensive concept of non-citizen in an integrated way to include all non-citizens, particularly including the minors who are not Korean citizens, and the minor and other family members of non-citizens.

Further, as the intended goal of the laws concerning legal status and rights of non-citizens is to protect human rights, the relevant laws as a whole should address the issues of illegal immigrants who are approximately 10% of the non-citizen individuals residing in Korea and also of those who either intend to apply or have applied for refugee status in Korea as a human right issue, so that such issues are discussed and integrated into the entire legal system and also individual statutes as part of definition of non-citizens and in terms of eligibility of entitlement and benefits, remedial measures, and the ensuing administrative and judicial execution and judgment, in a consistent way.<sup>46</sup> Whereas, for example, the definition of a family of multicultural heritage focused on immigration for marriage in the past, it should more expansively include those families not including a Korean national but non-citizen workers and students, and North Korean defectors. These statutory revision efforts will increase the applicability and normative effect of the relevant laws. In this vein, in light of Article 6(2) of the Korean Constitution, it is desirable to adopt the concepts officially used by the international organizations including the United Nations such as non-citizens or immigrants.

Such multiple special acts pertaining to the legal status and rights protection of non-citizens in Korea should be integrated into the general law to a reasonable extent, and the provisions declaring principles or laying out program recommendations should be revised to provide substantive rights and obligations with specific procedures for legal remedies set forth for the implementation of norms and rights. An integrated management and operation system should be established for consistent and effective implementation of laws concerning non-citizen rights through coordinated and functional cooperation between and among various departments of national and local governments. Excessive overlap of authorities and tasks result in incomplete remedies as well as inefficiency in budget and administration while also disturbing enactment and implementation of pertinent legislation; thus, such overlap and contradiction should be removed. In the long term, an integrated and comprehensive general law that may resolve the existing shortcomings, including redundancy and contradiction, of the

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<sup>46</sup> In this vein, the Korean government may take into consideration the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families that came into effect on July 1, 2003, which the South Korean government has yet to ratify. In its Article 70, the Convention provides that “States Parties shall take measures not less [favorable] than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.”

Framework Act on Treatment of Foreigners Residing in the Republic of Korea and the Multicultural Families Support Act should be enacted.

As to the voting right of non-citizens in local elections, as indicated in III., the Korean Constitution and the relevant statutes of the Public Official Election Act<sup>47</sup> and the Local Autonomy Act<sup>48</sup> may be interpreted structurally to permit pertinent statutes to provide the right to vote for non-citizens in local elections. The Public Official Election Act<sup>49</sup> of Korea does indeed provide non-citizens residing in Korea with right to vote in local elections under certain conditions. Yet, the Local Autonomy Act<sup>50</sup> prescribes in Article 13(2) the right to participate in local elections as the right of the local residents who are Korean citizens, while the Act in Article 12 does not require citizenship in order to be resident for the purpose of the Act by providing therein that “[p]ersons who have domicile within the jurisdiction of a local government shall be residents of such local government.” This might collide with the Public Official Election Act’s<sup>51</sup> bestowing of voting right upon non-citizens residing in Korea in local elections under the structure of Korea’s Constitution, Local Autonomy Act<sup>52</sup> and Public Official Election Act<sup>53</sup>. A statutory revision is due, for consistency of law and the structural conformity among relevant laws. Along with such legislative revisions, relevant policies and laws should gradually expand voting right to include those with lawful residence status and intention for long-term residency, for voting right serves as the premise for participation in community decision-making and for integration into community life and governance. As such, the right to vote of non-citizens should be analyzed and institutionalized in light of the Constitution, the doctrine of reciprocity, and all relevant domestic and international laws and treaties so that the rights and the obligations bestowed and imposed should be balanced<sup>54</sup> for consistency and ultimately from the perspective of human rights protection.

The purpose, standard and effect of distinction between citizen and non-citizen should be presented with available remedies as clearly as possible with legitimacy and justification, based upon the accurate analysis of the relevant statistics and conditions, in light of human rights protection and legislative conformity and coherence, throughout the structure of law concerning the legal status and rights of non-citizens as a whole. In this process, a continued effort to discuss and share agreeable purpose of policy and laws concerning the legal status and rights of non-citizens in the Korean society and beyond based upon pluralistic understanding of and respect for diversity does and will serve as the starting point and the methodology for further enhanced and more substantive protection of human rights for all.

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<sup>47</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>48</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>49</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>50</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>51</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>52</sup> Act No. 16057, as revised December 24, 2018 effective December 25, 2019.

<sup>53</sup> Act No. 17813, revised and effective December 29, 2020.

<sup>54</sup> In the Korean context, from this perspective, a thorough analysis of the participatory and socio-economic rights bestowed upon non-citizens and the tax obligations and liabilities imposed on non-citizens is due.