

THE STATE, THE ECONOMY AND THE CONSTITUTION IN KOREA

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SUMMARY: I. Introduction. II. Overview of the Korean Constitution. III. Overview of the Constitutional Regime of Property rights. IV. Overview of the Constitutional Regime of Economic Order. V. Overview of Major Constitutional Cases Relating to Property Rights and Economic Order since 1987 with Special Reference to Land Use Regulation. VI. Concluding Remarks. VII. Bibliography.

I. INTRODUCTION

Property rights and the economy are now main issues among legal scholars, economists and other social scientists as the world becomes globalized more and more. Globalization means, among others, that capital and commodities flow and move freely beyond national borders and thus borderlines between States become blurred at least in terms of the economy. This global trend has a great impact on the domestic economic order and the constitutional status of property rights in almost all countries in the world. The growing economic interdependence in global level di-

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minishes not only the autonomy of national economy but also that of legal system governing national economy in each country. What is going hand in hand with the attenuation of economic sovereignty is the collapse of welfare State dominant until the mid 20th century. At the same time, more attention, legal as well as economic, is given to property rights which under the flagship of welfare state has been relatively ignored by national legal system compared to civil liberties such as freedoms of expression, religion, conscience and privacy.

Underlying this ongoing trend is the ideal of neo-liberalism. To be schematic, it means an ideology that market should be free as much as possible and as a corollary state intervention in the economy should be avoided as possible as it can. However, a free market system is not meant to require necessarily a weak state. The state is requested to withdraw from the market but is supposed to be strong in enforcing law because law and order in society is crucial to protect economic interests gained at free market and to maintain the stability of the economic system itself. In other words, neo-liberalism does not necessarily mean a resurrection of a night-watchman concept of state. Even in the United States of America with one of the most liberal economic regimes in contemporary world, more time would be required for the very idea of regulatory or activist state to come to the end. It is beyond imagination that the state is no longer involved in the enlarged public spheres since the late 19th century such as education, public health and social security.

However, it would be safe to identify two major changes. Firstly, no longer the double standard of constitutional rights which requires different review of governmental actions corresponding to the nature of rights, property rights would be given more protection in the neo-liberalist state than in the welfare state. Secondly, it is remarkable to see the retreat of the state in economic planning, regulation and promotion across the globe. In particular, under the World Trade Organization system leading globalization, member states are ordered not to involve any action affecting free trade in comprehensive fields of the economy.

In this report, we aim to observe that such changes can be found in Korea by analyzing the constitutional regime concerning property rights and the economy in Korea and, facing the irreversible tide of globalization, its recent development in constitutional cases.

The report consists of five sections exclusive of introduction. The first main section tries to introduce the outline of the Korean Constitution focusing upon its structure and general principle of rights protection. The second provides an overview of constitutional regime of property rights. The third devotes to constitutional arrangements concerning economic order. The fourth tries to introduce and analyze major cases concerning property rights and economic order with special reference to land property. The final section tries to evaluate main observations in the previous sections in terms of legal change in the era of globalization rather than merely summarizing them.

II. OVERVIEW OF THE KOREAN CONSTITUTION

1. *Outline of the Constitution*

The Constitution of the Republic of Korea was first made in 1948 and finally revised in 1987. It pursues a constitutional democracy by guaranteeing inalienable basic human rights and democratic political institutions. It consists of preamble, ten main parts and addendum. Preamble declares the subject, purposes, and process of the constitution-making. The first main part contains general provisions representing basic principles and institutions together with basic elements of the state as a nation-state. The second part declares basic human rights and duties of the people. The ensuing four parts state the basic structure of government. Government consists of the National Assembly, the Administration headed by president, the Courts and the Constitutional Court. Part 7 and 8 are allocated to election management and local autonomy respectively. Part 9 is concerned with the economy while part 10 provides processes of constitutional revision.

For our concern, what is notable is part 9 which declares basic principles of economic order and the relationship between the state and the economy. More explanation about this part will follow in section IV of this paper.

2. *Outline of Constitutional Rights Protection System*

The Korean Constitution contains a Bill of Rights article 10 declares that every individual has human dignity and values, the right to pursuit of

happiness and the state is subject to constitutional obligation to protect such unalterable basic human rights. The ensuing articles enumerate specific basic human rights such as equality, civil, political, social, economic and cultural rights from article 11 to article 36. However, this list of rights and freedoms is not construed to be exhaustive. Article 37,1 states that “freedoms and rights of citizens shall not be neglected or denied on the grounds that they are not enumerated in the Constitution”. This open-ended provision is a constitutional basis of non-enumerated rights together with article 10 construed to be a prototype of all natural rights.

What is unique in the rights protection system in the Korean Constitution is a general restriction provision whereby the rights and freedoms may be restricted though only when four constitutional conditions met all together. Firstly, restrictions should have purposes categorized into three groups: protection of national security, maintenance of law and order, and promotion of public welfare. Secondly, such restrictions should be prescribed by the Act of the National Assembly. Thirdly, legislative restrictions should meet the principle of proportionality or prohibition of excessive restriction, emanated not only from the general constitutional principle of the rule of law or *Rechtsstaat* but also from the ‘necessary clause’ of article 37,2 providing that “freedoms and rights of citizens may be restricted... only when *necessary* for national security, maintenance of law and order, and promotion of public welfare”. The Constitutional Court of Korea (hereafter KCC) specifies this principle into four derivative rules: a) restrictions may be imposed only when it is proved to have legitimate concrete objectives (legitimacy of objectives); b) the means of restriction should be appropriate to achieve the designated objective (appropriateness of the means); c) the means should be the least drastic among various equally effective options (the least drastic means); d) the importance of public interest obtained by such restrictions should be equal or more than the degree of infringement caused thereby (proportionality of competing interests).¹ Fourthly, even when all other conditions were to be met, the essence of any freedom or right should not be

¹ E. g., 1 KCCR 374, 88 Hun-ka 13, December 22, 1989.

encroached. According to KCC, the essence of freedom or right means that if it is restricted, the freedom or right itself becomes meaningless.²

When peoples' constitutional rights were infringed by the State, they are entitled to bring the cases before the ordinary courts in ordinary judicial procedures such as civil, administrative proceedings in principle. If there is no effective way for redress in the ordinary procedures, they may go directly to KCC in the constitutional complaints procedure.³ As far as protection of constitutional rights are concerned, KCC is the most important institution because, as a final arbiter of the Constitution, has the power of constitutional review of legislation violating peoples' constitutional rights.

III. OVERVIEW OF THE CONSTITUTIONAL REGIME OF PROPERTY RIGHTS

1. *Recognition of a General Right of Property*

The Korean Constitution recognizes expressly a general right of property. Article 23,1 states that "the right of property of all citizens shall be guaranteed". KCC regards this provision not only as a constitutional safeguard through which individual's civil liberties becomes realistic but also as one constitutional evidence that Korea pursues a capitalist free market economy.⁴ According to KCC, property should meet at least two requirements to be protected by the Constitution. Firstly, it should be formulated by the owner's own efforts. For example, entitlement given by the state without reference to the beneficiary's own efforts is in principle out of the scope of property safeguarded by the Constitution. Secondly, the concerned property can be used and disposed for the right holder's private interest and with his or her own capacity.⁵

² 8-1 KCCR 34, 93 Hun-ba 5 etcetera, January 25, 1996.

³ Under article 111 of the Constitution, the Court has jurisdiction in five areas: a) constitutional review of statutes upon request, b) impeachment, c) dissolution of political parties, d) competence disputes and e) constitutional complaint.

⁴ 1 KCCR 367, 88 Hun-ka 13, December 22, 1989.

⁵ *E. g.*, 11-1 KCCR 462, 96 Hun-ba 55, April 29, 1999; 12-1 KCCR 947, 99 Hun-ba 289, June 29, 2000.

2. *Wide Legislative Discretion in Restricting Property Rights*

However, it is notable that the constitutional recognition of property right is made in a different form and substance from that of other civil liberties. While the latter is guaranteed without separate conditions attached to their contents, limitations and exercise, the former is paid special attention by the Constitution makers. Legislature is construed to be able to wield wider discretion in determining the contents and limitations of property rights than other freedoms because, unlike other liberties, the second paragraph of article 23,1 provides that the contents and limitations of property rights shall be determined by statutes of the National Assembly. KCC confirms this interpretation by differentiating the nature of legislature's role in specifying the open-ended contents of property rights from that in restricting the given contents of other freedoms, though it stresses that the very difference cannot be used to defy private property rights *per se*.⁶

3. *Requirement of Conformity to the Public Welfare*

Moreover, article 23,2 imposes additional obligation, which is not found in provisions for other constitutional rights, on the holder of property rights by providing that "the exercise of property right shall conform to the public welfare".⁷ KCC holds that this constitutional requirement of conformity to the public welfare or social responsibility in the exercise of property rights may allow legislature to limit owner's use of property even without just compensation unless the limitation forces the owner to endure unreasonable sacrifice.⁸

In case of unreasonable limitation on private property causing owner's unusual burden, compensation should be accompanied to it on the ground of the prohibition of excessive restriction principle or proportionality principle based upon article 37,2 of the Constitution. According to KCC, the nature of compensation in this regard is different from just compen-

⁶ 5-2 KCCR 44, 92 Hun-ba 20, July 29, 1993.

⁷ Generally speaking, this provision succeeds article 15, 2 of 1948 Constitution which in turn benchmarked article 153, 3 of Weimar Constitution 1919.

⁸ 9 10-2 KCCR 927, 89 Hun-ma 214 etcetera, December 24, 1998.

sation required for expropriation or takings for public necessity by article 23,3. While the latter requires a full, pecuniary compensation, the former does not. KCC holds that compensation based upon article 23,1 and 2 should not be confined to pecuniary compensation so that legislature may wield wide discretion in determining in what form of compensation is desirable. For example, if the governing law resulting in excessive restriction provides owners with the specific right to repurchase the relevant property, it would meet the requirement of compensation. Furthermore, KCC rules that compensation does not have to reach the full market value of the actual loss.

4. Conditions of Expropriation and Public Use of Private Property

As mentioned in the previous section, expropriation or takings of private property for public necessity should be accompanied by just compensation and required to be justified by statute. KCC's jurisprudence in this regard is that just compensation means the full value of loss which is not determined purely by market price but by objective economic value. Therefore, incidentally increased market value such as development value driven by speculation in land market cannot be regarded as a standard against which just compensation is evaluated.⁹

5. Other Constitutional Provisions Relating to Property Rights

Article 13, 2 of the Korean Constitution provides that no person shall be deprived of property rights by means of retroactive legislation. Generally speaking, this provision is to confirm the principle of the rule of law in general and the protection of expectation interests rule in particular, both of which are construed to be enshrined in article 37,2 of the Constitution.

However, it should be borne in mind that retroactive deprivation of private property is, unlike that of criminal retroactive punishment, allowed in certain exceptional conditions. KCC suggests three instances: a) when people's expectation interests is very little because retroactive legislation was being expected or because the legal system was so uncertain and chaotic as to inspire very little confidence in it; b) when the con-

⁹ E. g., 10-2 KCCR 927, 956-957, 89 Hun-ma 214 etcetera, December 24, 1998.

cerned party's loss due to retroactive application is none or very little; c) when the compelling public interest overrides the mandate of protection of expectation interest.¹⁰ Also, the Korean Constitution has a special provision designated to protect the rights of authors, inventors, scientists, engineers and artists. Article 22,2. This is interpreted to promote cultural and scientific activities by protecting intellectual properties.

In addition, part IX of the Constitution titled economy contains principles and specific regulations which affect the possession and exercise of property rights. This will be dealt with in the following separate section.

IV. OVERVIEW OF THE CONSTITUTIONAL REGIME OF ECONOMIC ORDER

One feature of the Korean Constitution is that there are specific provisions about the economy. Part 9 consisting of seven articles sets force basic principles of the relationship between the state and the economy and basic institutions the Constitution-makers think important to pursue and implement those principles.

1. *Basic Principles of Economic Order*

Article 119,1 of the Korean Constitution states that “the economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs”. Together with the recognition of property as a basic constitutional right, this provision is construed to make it clear that Korean economic order is a capitalist economy.

However, it might be too hasty to anticipate that the Korean Economy is a pure *laissez-faire* economic order because a competing principle, *i. e.*, the principle of democratization of economy allowing the state's wide intervention in the economy is ensued in article 119,2 providing that:

the State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure

¹⁰ 8-1 KCCR 88, 96 Hun-ka 2 etcetera, February 16, 1996.

proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

KCC confirms this construction in a number of cases by saying that although the basis of economic order is free-market-centered order respecting private property rights and free competition, the state may intervene in the economy to eliminate social problems stemmed from free market and to pursue social welfare and justice.¹¹

As a consequence, Korean economy can be regarded as a kind of mixed-economy or a “social market economy” in the sense that market can be regulated to promote social welfare. However, it is not meant that the state can intervene in the economy whenever it wishes. KCC develops the principle of subsidiarity in that the state’s intervention in private spheres including the economy should be implemented only when it is necessary to complement self-determination on the part of individuals and enterprises.¹² KCC also reiterates in a number of cases that even when the state’s intervention is required, it should be limited to the degree and level restricted by the proportionality rule stemmed from the rule of law principle.¹³

2. Democratization of the Economy Pluralist Economic Order

As mentioned above, democratization of the economy is declared as a counter-balancing principle to the free-market economy in the Korean Constitution. To implement this principle, the Korean Constitution is construed to arrange a pluralist economic order by promoting organization and management of socio-economic self-help groups such as cooperative societies for farmers and fishermen, federation of small and medium business and consumers’ cooperative association. Article 123,5 and article 124. The organization and activities of trade unions, the most important interest groups in a capitalist economy, are not mentioned in this part of the Constitution but more strongly protected by workers’ consti-

¹¹ E. g., 10-1 KCCR 533,534, 96 Hun-ka 4 etcetera, May 28, 1998.

¹² E. g., 1 KCCR 377, 88 Hun-ka 13, December 22, 1989.

¹³ E. g., 7-2 KCCR 544, 94 Hun-ka 2, November 30, 1995.

tutional rights of association, collective bargaining and collective action in article 33 of the Constitution.

Furthermore, the Constitution has the state establish and implement plans to comprehensively develop and support agriculture and fisheries, and small and medium enterprises (article 123, 1 and 3). In particular, the state is obliged to make efforts to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems (article 123, 4).

Balanced development of national economy is not confined to the dimension of functional industrial division but also required in the dimension of regional division. Therefore, the Constitution imposes constitutional duty on the state to foster regional economies to ensure the balanced development of all regions (article 123, 2). KCC confirms this construction in Local Soju Compulsory Purchase System case. The Court ruled that while the primary aim of regional economic development stated in article 123 is the reduction of economic disparity among regions, there is no concrete regional disparity calling for such adjustment under the Liquor Tax Act seeking to maintain one soju maker in every province.¹⁴

3. State's Preemption of Natural Resources and Natural Powers

Article 120 of the Constitution represents the principle of socialization of natural resources and natural powers. The state secures a preemptive power to grant licenses to exploit, develop or utilize minerals and all other important underground resources, marine resources, water power, and natural powers available for economic use for a limited period of time under the conditions as prescribed by the Act of the National Assembly (article 120, 1). In this regard, the state should establish a plan for the balanced development and utilization of natural resources and land (article 120, 2).

4. Land Regulation

Land is very important in the economy and welfare of the people because it is the basis for their daily lives, in particular economic activ-

¹⁴ 8-2 KCCR 680, 96 Hun-ka 18, December 26, 1996.

ities. Its efficient and balanced utilization is more crucial in Korea than other countries because of high population density, traditional preference for land ownership and as a corollary the severe land speculation.

Article 122 states that the state may impose, under the conditions as prescribed by the Act of the National Assembly, restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of the land of the nation. Together with the State's duty to make a plan for land use, this provision endows the State with a wide discretion to regulate land use. There are a number of statutes for regulating land use. They include the Basic Law of National Land, the National Land Planning and Use Act and the Restitution of Development Gains Act.

5. Nationalization of Private Enterprises

Under the Korean Constitution, private enterprises, in principle, should not be nationalized nor transferred to ownership by a local government. However, under special conditions stated in the Constitution, there is an exception to this principle. Article 126 provides that urgent necessities of national defense or the national economy confirmed by the Act of the National Assembly may justify nationalization of or similar state intervention in private enterprises.

6. Other Economic Arrangements

Korea is a developing country based upon export-driven economy in which foreign trade is crucial to the national economy. Reflecting this circumstance, the Constitution expresses the state's power to regulate foreign trade and its obligation to promote it (article 125). However, this constitutional power becomes nominal in reality as far as the WTO system is concerned.

Another interesting provision is Article 121,1, which declares that Tenant farming shall be prohibited and the state is obliged to promote the agricultural land-to-the-tillers principle. However, the leasing of agricultural land and the consignment management of agricultural land to increase agricultural productivity and to ensure the rational utilization of agricultural land or due to unavoidable circumstances, shall be recognized under the conditions as prescribed by the Act of the National Assembly. This reflects the historical need for the eradication of feudal legacy in the past.

In addition, the state is supposed to strive to provide social and institutional infrastructure necessary for stable economic development, for example, the implementation of policies to develop science and technology, information and human resources and encouraging innovation, the establishment of a system of national standards and relevant national advisory organizations.

V. OVERVIEW OF MAJOR CONSTITUTIONAL CASES RELATING TO PROPERTY RIGHTS AND ECONOMIC ORDER SINCE 1987 WITH SPECIAL REFERENCE TO LAND USE REGULATION

The history of modern Korea has shown that the core components of constitutionalism, that is, the protection of human rights, popular sovereignty and the separation of powers, have never properly put into practice. The provisions of Korean Constitutions since the First Republic were “nominal” one in a German constitutionalist Lowenstein’s term as they were ignored by authoritarian regimes. However, Korean people’s consistent struggle for democracy encountered a watershed in People’s Uprising of June 1987 which resulted in the 9th revision of the Korean Constitution. Under this new Constitution, the peaceful transfer of power took place in four consecutive presidential elections. Under the new Constitution, Korean people are accelerating constitutional democracy not only in principle but also in practice. The most remarkable achievement is the establishment of the new Constitutional Court and its success in leveling up the protection of human rights in Korea.

In this section, we will introduce some leading cases relating to land use regulation at the centre of the constitutional and legal regime of property rights and economic order. They are important to understand how to concretize in constitutional adjudication open-ended clauses of the Korean Constitution concerning property and the economy.

1. *Land Transaction Licensing Case*¹⁵

In 1982, the National Assembly enacted the National Land Use and Regulation Act¹⁶ to cope with rapid increase of reality price and land speculation

¹⁵ 1 KCCR 357, 88 Hun-ka 13, December 22, 1989.

¹⁶ Act number 3642, December 31, 1982; hereafter, NLURA.

causing serious social strains. High population density and the people's greed for land have been main reasons of instability of realty price over the decades in Korea. One controversial provision is article 21,3 (1) introducing a kind of land transaction licensing in designated regulatory zones by stating that a person wishing to make real estate contracts concerning a land located in regulated zones must receive advance permission of local governments. Furthermore, article 31,2 of NLURA stipulated that those violating article 21,3 (1) may be subject to a fine less than 5 million wons or 2 years or less imprisonment.

The claimant was charged with selling real property within a regulated zone without the necessary approval and was sentenced with 1 year imprisonment at a District Court. In the course of trial, he raised a challenge to the constitutionality of the statute and the question was referred to KCC.

KCC was sharply divided. On the one hand, the five justice majority opinion upheld the constitutionality of article 21,3 (1). On the other, another combination of five justices found article 31,2 unconstitutional. However, according to the strict quorum, that is, six justices' agreement, required for unconstitutionality decisions in article 113,1 of the Constitution, both provisions were consequently declared constitutional.

Regarding article 21,3 (1), there raised three main issues: a) whether the said provision violates the prohibition of infringement on the essential content of property right; b) whether it violates the principle of subsidiarity or private autonomy rule in the private sphere; and c) whether it violates the prohibition of excessive restriction or proportionality principle.

The reasoning of five justices, Cho Kyu-kwang, Yi Sung-ryul, Byun Jung-soo, Kim Yang-kyun and Lee Shi-yoon, for respective issues is as follows. As far as the first issue is concerned, the challenged provision does not violate the essential content of property right. Considering all the facts, what NLURA does intend to regulate is not all real estate property, instead it limits to lands in certain areas prone to speculation and sudden increase in land price. The term of regulation is less than 5 years and the right to dispose the property is not completely banned since even the regulated land can be approved for sales as long as the purpose, size and price of sales do not violate the regulation. In addition, there is a method to challenge the authority's disapproval of contract, the land transaction licensing system cannot be seen as a negation of the private property system but a kind of restriction. This kind of restriction on land transaction

is really unavoidable because of unique characteristics of land. Land cannot be manufactured but a necessary basis of life that benefited not only the owners but also all other people for the good. Without this kind of restriction, prevention of land speculation cannot be effective. Therefore, land transaction licensing is a form of limitation of property rights recognized by the Constitution and cannot be an infringement of the essential content of property right.

On the second question whether the transaction licensing violates the principle of subsidiarity, the answer is in the negative. Although it is true that self-regulation in the private sphere comes first and the state intervention may be endured only if it is necessary to supplement self-regulation in certain exceptional circumstances, the principle of subsidiarity does not guarantee absolutely unconditional freedom in the economy. In the case of land speculation as a social harm, private autonomy rule is not enough to challenge state regulation on land transaction. Furthermore, land transaction licensing coping with the failure of self-regulation in land market is compatible with the economic order of the Constitution since article 119,2 of the Constitution makes it clear that the national economy should pursue a democratic welfare state where state can regulate market mechanism to safeguard humane living conditions of the people.

Finally, they opined that land transaction licensing does not violate the prohibition of excessive legislative regulation. This issue must be carefully examined comprehensively considering relativity of land ownership, social liability of exercising ownership, problematic industrial and economical issues intertwined with the land shortage, seriousness of housing shortage, condition of real estate sales, degree of speculation sales and so on. Moreover, in case there is no clear evidence that transaction licensing does not fit in with the purpose of land use regulation or there is a less restrictive way to satisfy the demand for minimum infringement, it cannot be said that the regulation violates the principles of proportionality or prohibition of excess regulation.

The remaining four justices, Han Byung-chae, Choi Kwang-ryool, Kim Moon-hee and Kim Jin-woo dissented from the reasoning and opinions of the majority. They argued that land transaction licensing system is such an abstract policy that the system itself cannot be evaluated in terms of constitutionality but it should be evaluated together with ancillary devices enumerated in the ensuing provisions of the same Act. For them, the right to request the state to purchase the land subject to regula-

tion, which is provided as a compensation for regulation is not enough to meet the constitutional requirement of just compensation.

The constitutionality of article 31,2, unlike the case of article 21,3 (1) of NLURA, was suspected by five justices out of nine though the number failed to meet the required quorum of six justices for unconstitutionality decision. The reasoning of four justices upholding the provision is based upon legislature's arguably wide discretion in choosing effective form of penal sanctions. They opined that if legislature feels that fiscal sanction like fine is not enough to cope with land speculation, it may choose imprisonment as an alternative. However, four justices, who dissented from the opinion of the five majority upholding land transaction licensing system, opined that the penal provision based upon licensing system is unconstitutional as the system itself is unconstitutional. One justice concurred with this unconstitutionality opinion on the ground that although, in principle, land transaction licensing itself is not unconstitutional, the specific system introduced by article 21,3 (1) of NLURA is deficit of just compensation required by article 23,3 of the Constitution and therefore imprisonment matching for regulation in such a deficit system is too severe to meet proportionality principle.

This case has three constitutional implications by and large. Firstly, it recognized for the first time the public nature of the land ownership. The Court supported legislative initiative to see land as a public property in the sense that land ownership should be exercised in harmony with social welfare. Secondly, it identified the basic nature of national economy with a democratic welfare state by the token of article 119, 2 of the Constitution which mentions the possibility of democratization of the economy by the state. Thirdly, this case began to discuss the need for clarifying what kind of compensation should be constitutionally required in the course of regulation on land use.

2. *Urban Planning Zones Case*¹⁷

In 1998, KCC delivered another leading case concerning property rights by clarifying the relationship between article 23,1 and 2 and article

¹⁷ 10-2 KCCR 927, 89 Hun-ma 214 etcetera, December 24, 1998.

23,3 of the Constitution or the nature and scope of social responsibility of property holders.

Article 21 of the Urban Planning Act¹⁸ endows the Minister of Construction and Transportation with the power to make urban planning whereby he is able to designate regulated zones where change in use or construction activities are to be restricted.

The claimants challenged this provision on three grounds by and large. Firstly, the objectives stipulated in the provision such as “to prevent disorderly proliferation of urban areas” and “to secure sound living environment by preserving natural environments adjacent to urban areas” are too vague as well as broad to regulate land use. Secondly, the restriction that only what the concerned Minister permits in decrees or accompanying ordinances can be carried out in the regulated zones is too comprehensive to avoid being made void on the ground that it violates the essential content of the rights. Thirdly, no just compensation required by article 23,3 of the Constitution was accompanied to restrictions.

The seven justice majority declared that the concerned provision is not compatible with the Constitution but its effect will last until a new law with reasonable compensation scheme is enacted. While one remaining justice concurred with the majority in that the provision is unconstitutional but dissent from the form of decision, the last justice upheld the provision. The decision of incompatibility to the Constitution is a modified form of unconstitutionality decision developed as a common law rule by KCC for the purpose of avoiding undesirable outcomes of immediate invalidation of the concerned provision.

The main reason of the incompatibility decision was that the concerned provision failed to equip with reasonable compensation necessary for restriction on land use on the basis of the principle of proportionality or prohibition of excessive restriction. The Court ruled out other arguments of claimants. It should be borne in mind that in this case the basis of the required compensation is not just compensation clause of article 23,3 of the Constitution. The Court differentiates restriction based upon the social responsibility of landowner in exercising his right to land use, for which just compensation is not required, from that upon public necessity subject to just compensation. The Court opined that urban zoning itself is constitutional as the legislature has a wide discretion in deter-

¹⁸ Act number 2435, revised in December 30, 1972; hereafter UPA.

mining the content and limitation of property rights and landowners should stand such a legislative restriction for public welfare but zoning without reasonable compensation proportional to special sacrifices beyond endurable degree is unconstitutional. In other words, the Court divides restriction on land to three categories: a) first category that no compensation is required because restriction is within social responsibility of landowners; b) second category that reasonable compensation is required because restriction is beyond social responsibility but does not belong to the category of takings required for public necessity, which, as a corollary, needs just compensation; and c) third category that just compensation is required as restriction is beyond social responsibility and obtain the characteristics of takings for public necessity. As explained in Section III-C, KCC differentiates reasonable compensation from just compensation in terms for the level and kinds of compensation. While the latter, in principle, requires a full, pecuniary compensation to meet the requirements of the Constitution, the former is subject to the legislature's wider discretion in determining the level and kind of compensation.

Two specific categories are recognized as those required reasonable compensation. The first example is bare land in the sense that it is not used at the moment of zoning. In this case, as soon as regulated zone is designated, too harsh burden is imposed on landowners because, in reality, no change is allowed even for the use permitted before zoning so that there be no way to utilize the land. The second category is the cases in which land utilization for the original use is no longer possible due to the change of circumstances surrounding the land. For example, it would be too harsh for landowner to endure the circumstance when land in regulated zone used for agricultural purpose cannot be used for other purpose even though urbanization or pollution of agricultural water makes the agricultural use of land impossible.

Justice Lee Young-mo dissented, arguing that the urban zoning merely reflects social responsibility inherent in landowners' property right, and the harm it causes the owner outweighs contributions to the public interest such as the public's right to environment.

The jurisprudence of KCC on the restriction on land use was reconfirmed in a 1999 case where it applies the same three-tier analysis of land use regulation.¹⁹ The case is about the land which has not been developed for more

¹⁹ 11-2 KCCR 383, 97 Hun-ba 26, October 21, 1999.

than ten years while designated for urban planning sites for school premises. Article 4 of the Urban Planning Act brought before KCC in this case bans all changes in use or constructions except on permits and yet does not provide for any compensation for land use regulation. The Court found the concerned provision nonconforming to the Constitution while holding it temporary applicable until its revision on the ground that an uncompensated exclusion of private use for more than ten years is an excessive restriction on the constitutional right to property that cannot be justified by any accomplishment of public interest. In this case, the legislature is urged to set up a compensatory provision that compensates the loss from the point where the use restriction becomes beyond social responsibility of landowners. In doing so, the Court says, the legislature can choose from monetary compensation, release from the urban planning designation, and request for a public purchase or public taking.

The KCC's three-tier analysis of land use regulation paved the way for strengthening landowners' property rights which have been ignored during the period of industrialization. Since 1998, a comprehensive revision of the undeveloped urban planning sites across the country has been made unavoidable. Before 1998, the state's initiatives to regulate private properties could take place without serious consideration of financial burden. Now, the state is expected to conduct a thorough feasibility study and prepare a compensation scheme before proceeding with an urban development plan. However, it is concerned that the state with financial difficulty in relation to the required compensation will prefer releasing the sites from designation, dissipating the sites for public development and thereby undermining urban development plans.

3. *Land Excess-Profits Tax Act*²⁰ *Case*²¹

In 1989, ensuing land transaction licensing scheme, the National Assembly enacted a series of realty transaction regulation policies, that is, the so-called "three reform acts for fulfilling the public nature of land" to cease a vicious cycle of land price increases and speculation worsening social inequality in wealth. They are the Land Excess-Profits Tax Act, the Restitution of Development Gains Act, and the Ceilings on the Own-

²⁰ The translation of the term 'Land Excess-Profits' focused on the fact that what is taxed is the increase in the value of the land.

²¹ 6-2 KCCR 64, 92 Hun-ba 49, etcetera, July 29, 1994.

ership of Housing Sites Act. All of them have been brought before KCC for constitutional review. What KCC first delivered its opinion among them is the Land Excess-Profits Tax Act (LEPTA).

In 1994, KCC found essential provisions of LEPTA violating the claimants' rights to property and the principle of statutory taxation. Then, the Court declared that the entire statute is incompatible with the Constitution because without such unconstitutional provisions, the statute could not accomplish its legislative ends.

Article 8, 1 of the Land Excess-Profits Tax Act (revised by Act number 4563, June 11, 1993) identifies lands annexed to unlicensed buildings (iv), rental properties (xiii), etcetera as the objects of taxation while Section 10 describes the method of calculating the tax. Article 11 prescribes the standard for deducing a tax basis from unrealized gains and for assigning the standard market land prices needed for such assessment. Article 12 stipulates a 50% uniform rate for the land excess-profits tax, and article 22 authorizes the in-kind payment of the tax upon request from the taxpayer.

The Court refused to invalidate taxation on unrealized gains on the ground that whether taxation on capital should be limited to realized incomes or not is a matter of legislative policy that should be adjusted according to the purpose of the tax, the characteristics of the taxed incomes, and the technical problems in taxation. However, the Court made it clear that despite its constitutionality in principle, taxation on unrealized gains can avoid the problem of unconstitutionality only when its exact calculation is carried out in a fair manner conforming to the constitutional spirit in this regard.

Given that, the Court found some provisions of the concerned statute unconstitutional on four counts by and large. Firstly, it is problematic that in the case of long-term ownership of the land, there are no provisions that take price fluctuations over the entire period of ownership into account. For example, when a piece of land goes through the repeating cycle of appreciation and depreciation over a long period of time, there is a unreasonable inevitability of forcing landowners to pay the land excess-profit tax for the period of taxation even if there is no increase in comparison to the price at the enactment of the statute. This is a case where the principal itself is encroached by the land excess-profit tax, contravening its nature as income tax and as a corollary the right to private property in article 23 of the Constitution.

Secondly, the uniform rate of 50% in article 12, when applied to the unrealized gains that are by nature difficult to be measured objectively, is so high that it may constitute tax on artificial gains and again engulf the principal, violating right to property. Also, land excess-profits tax is an income tax that must be geared toward vertical equality in taxation and achieving substantive equality among people at different income levels. Given that, subjecting it to a uniform rate impedes substantive equality among taxpayers at different income levels. This problem can be worsen because although land excess-profits tax has a feature of prepayment on transfer profit tax, it is imposed, unlike transfer profit tax, by a uniform rate.

Thirdly, concerning article 8,1 (xiii) which includes all rental lands as unused land liable for the land excess-profit tax, while exempts such lands “designated by presidential decrees” without specifying what or how large they may be. This means that administrative authority has a full discretion in determining who should be liable for land excess-profits tax without any control whatsoever from the legislature, conflicting with the principle of statutory taxation in article 59 of the Constitution. Moreover, treating the land owner unfairly just for a reason that the land is not used compared to other land owners is discriminating the land renters without constitutional basis. The provision is also incompatible with the Constitutional economic order (article 119 (1)) respecting individuals’ and business’s economic freedom and creativity since it hinders effective utilization of land through free sharing of capital between the lessees and the renters.

Fourthly, article 26,1 and 4 deducting only a portion of the land excess-profit tax from the transfer profit tax also violates the rule of taxation on real worth, derived from the constitutional principle of statutory taxation. In some sense, the land excess-profit tax is by nature a prepayment of the transfer profit tax since both completely overlap in the objects of taxation and have similar purposes. Therefore, the provision failing to exempt the entire amount of the land excess-profit tax from the transfer profit tax is incompatible with the constitutional spirit of the rule of law and its derivative principle of statutory taxation.

This case produces ambivalent evaluations. On the one hand, it is argued that the decision emphasized people’s property right and the principle of statutory taxation that might have been neglected in favor of the legislative purpose, namely, the public nature of land. On the other, it is criticized that the Court focused on protecting the property rights of the

privileged class while neglecting the substantive equality and the balanced growth of all people.

After the decision, the National Assembly amended LEFTA through the Act number 4807 on December 22, 1994, reflecting the Constitutional Court's recommendation to strengthen the protection of the people's property right, to provide a supplementary regulation for the times of land depreciation by introducing the extra progressive profit rate system for fair taxation, to exempt the land excess-profit tax from the transfer profit tax if transfer was made within a certain period, to reduce the cost of tax collection, and to minimize the possibility of dispute by terminating the nationwide taxation when the land price is stable but instead tax only on the regions with land appreciation.²²

4. *Restitution of Development Gains Act Case*²³

The Restitution of Development Gains Act is the second law reviewed by KCC. In this case, the system itself introduced by the law was found constitutional though part of the statute was declared unconstitutional.

The principle used in this case by the Court as a basis of unconstitutionality decision is the prohibition of blanket delegation construed to be derived from articles 75 of the Constitution. The Court said that to delegate the time and manner of evaluation of tax standard for unrealized profits to the presidential decrees contravenes the prohibition of blanket or broad delegation. Citing the Land Excess-Profits case in 1994, the Court also found the concerned provision violated the property rights of those imposed development gains impost.

The Court's jurisprudence in this case which, unlike other two reform acts, refused to strike down the restitution of development gains scheme has been reconfirmed in ensuing cases.²⁴

²² For more explanation of the aftermath of this case, see KCC, *The First Ten Years of the Korean Constitutional Court*, 2001, pp. 214-216.

²³ 10-2 KCCR 771, 95 Hun-ba 35, June 25, 1998.

²⁴ *E. g.*, 14-1 KCCR 442, 99 Hun-ba 41, May 30, 2002; 13-1 KCCR 212, 98 Hun-ba 19, February 22, 2001.

5. Residential Property Ownership Ceiling Case²⁵

The third among the so-called land reform acts taken on board by KCC is the Ceilings on the Ownership of Housing Sites Act (hereafter COHSA). The essence of COHSA can be summarized in three-fold: a) each household's house sites ownership is capped and corporations' house sites ownership is prohibited; b) those owned such restricted housing sites should be subject to the obligations of selling or development; and c) those who failed to carry out such obligations should be imposed fee or impost.

In this case, KCC struck down COHSA as a whole on the ground that the essential provisions of COHSA violates the equal protection of law and infringes upon expectation interests and property rights of the concerned claimants.

Regarding ownership ceiling or prohibition, the eight justice majority for the Court opined that setting the ceiling on ownership too low with no exception, regardless of the purposes or functions of ownership, is excessive restriction on property rights because, among others, housing is a material foundation for realization of human dignity and values and the right to pursuit of happiness. The Court also pointed out that failing to distinguish speculative ownership from genuinely residential ownership by extending the same uniform ceiling even to those who acquired the excess land before the enactment of the Act contravenes people's confidence in law and the equal protection of law.

As far as imposition of selling or development duty on owners of housing sites, the Court recognized the necessity and constitutionality of the system itself, whether it applies to those who acquired the sites before its enactment or after. However, applying the same conditions regardless of the time of obtaining housing sites contravenes the proportionality principle. For example, five years as the period designated for selling or development would be too short for those who had acquired the excess land before the enactment unknowingly. Such indiscrimination is also incompatible with the principle of equality.

Concerning fee or impost scheme, the Court ruled that the introduction of such scheme itself is constitutional but the rate should be set at such reasonable a level that the possibility of private utilization and dis-

²⁵ 11-1 KCCR 289, 94 Hun-ba 37, April 29, 1999.

posal be guaranteed. The Court found in this case that the fees which can accumulate to 100% of the total value of the levied land after ten years is equivalent to allowing confiscation of the land in a short period of time and thus violates the proportionality principle.

The actual influence of this case was not very significant at the time of decision because it was delivered half a year after the statute was repealed and six years after the complaint was filed before the Court. Those who had not challenged the assessment of the fees could not benefit from this decision. Also, financial crisis in late 1980s reduced the danger of land speculation significantly. However, its constitutional implication should not be neglected, in particular at the present moment when due to resurrection of land speculation control of realty prices is at the centre of Korean people's public agenda. The Court's jurisprudence in the housing sites ceiling case stressing the necessity of protecting expectation interests and property rights of landowners gets rid of one option from the consideration of the legislature and government.

VI. CONCLUDING REMARKS

What we observed in the main sections above can be summarized in four propositions.

Firstly, the Korean Constitution having enumerated provisions regarding the relationship between the state and the economy pursues a mixed economy by reconciling liberal market economy with ideals of a democratic welfare state.

Secondly, the constitutional regime of property features property holders' social responsibility in the exercise of property rights and legislature's wide discretion in determining the content and limitation of property rights.

Thirdly, we can observe that the Constitutional Court of Korea plays an important role in establishing such construction of the concerned constitutional provisions especially since 1988 when it was established.

Fourthly, in recent cases concerning the limit of social responsibility on the part of property owners, especially landowners, the Court seems to move the pendulum to the side of landowners by strengthening conditions for property use regulation. In particular, in cases where the essential policy devices of reform laws strengthening land use regulation were

reviewed, the Court put inroads to them by elaborating and applying various constitutional principles and rules which have been usually used to protect civil liberties. They include the prohibition of excessive legislative restriction or proportionality principle, the principle of expectation interests or confidence in law, the prohibition of blanket delegation and the rule of clarity in statutory expression.

With some reservations, these schematic observations, especially the fourth, would justify our argument that Korean constitutional regimes of property and economic order confirm two features of globalization at the domestic level, which were identified in the introduction of this report: a) no longer the double standard of constitutional rights which requires different review of governmental actions corresponding to the nature of rights, property rights would be given more protection in the neo-liberalist state than in the welfare state; b) the state tends to retreat from economic planning, regulation and promotion partly due to the judicial power's conservative stance defying state's wide intervention in economic affairs.

Without a radical reformation of the Court in the near future, an active and conservative stance of the Constitutional Court *vis-à-vis* social reform initiatives of the legislature and government would continue in Korea for a considerable period. For one thing, the Court's elaboration of constitutional principles and rules for the protection of people's freedoms and rights in the course of democratization provides those with vested rights with a very strong device of the rule of law or constitutionalism to the extent that social democratic ideals allowing the state's intervention in the economy can be effectively contained.

What is unclear in this stage is the answer to a newly rising fundamental question, is this development a step forward towards what Francis Fukuyama called "the end of history" or two steps backward towards the end of "humane society"?

VII. BIBLIOGRAPHY

1. *Materials in English*

AHN, Kyong-Whan, "The Influence of American Constitutionalism on South Korea", *Southern Illinois University Law Journal*, num. 22, 1997.

- FUKUYAMA, Francis, *The End of History and the Last Man*, England, Penguin, 1993.
- GAMBLE, Andrew, *The free economy and the strong state: the politics of Thatcherism*, Hampshire, Palgrave Macmillan, 1988.
- KIM, Jongcheol, "Some Problems with the Korean Constitutional Adjudication System", *Journal of Korean Law*, vol.1, num. 2, 2001.
- KOREAN CONSTITUTIONAL COURT, *The First Ten Years of the Korean Constitutional Court (1988-1998)*, Seoul, The Constitutional Court, 2001.
- , *A Brief Look at the Constitutional Justice in Korea*, 1999.

2. Materials in Korean²⁶

- CHEON, Kwang-seok, *Korean Constitutional Law*, 2005.
- CHUNG, Soon-hoon, *Constitutional Law and the Economy*, 1993.
- CHUNG, Tae-ho, "Hermeneutics of article 23,2 of the Constitution", *Public Land Law Review*, 25, 2005.
- HAN, Soo-ung, "Constitutional Problems with Laws which Concretize the Content of Property", *Justice*, 32-2, 1999.
- JUNG, Yon-ju, *Studies on Constitutional Cases*, 2001.
- KANG, Tae-soo, "A Study on the Structure of Property based on Trennungstheorie and its Critics", *Constitutional Law*, 10-2, 2004.
- KIM, Jongcheol, "Constitutional Implications and Limits of the Judicialization of Politics —with reference to judicial activism in the early years of Roh Moo-hyun Government—", *Public Law*, 33-3, 2005.
- , "From the Bureaucratic State to the Contracting State?: Evaluating Kim Dae Jung Administration's Government Reinvention Policy", *Korean Journal of Law and Society*, 20, 2001.
- KIM, Kwang-soo, "The Structure of the Protection of Property and Social Responsibility", *Public Law*, 28-3, 2000.
- KIM, Moon-hyun, *Social and Economic Order and Property*, 2001.
- KIM, Tschol-su, *Constitutional Law*, 2005.
- KIM, Sung-soo, "An Analysis of Constitutional Cases on the Economic Order and the Protection of Property", *Public Law*, 33 (4), 2005.
- KOREAN CONSTITUTIONAL COURT, *Briefs of the Constitutional Cases of the Constitutional Court*, Seoul, The Constitutional Court, 1999.

²⁶ Names and titles translated in English by the authors. The translation of names and titles may be different from what original authors use.

- KWON, Youngsol, “The State and the Economy”, *Public Law*, 16, 1986.
- KWON, Young-sung, *Constitutional Law: a Textbook*, 2005.
- LEE, Myung-Ung, “The Structure of article 23 of the Korean Constitution”, *Constitutional Law Review*, 11, 2000.
- LEE, Sang-young, “A Critical Analysis of the Unconstitutionality Decision of the Ceiling on Housing Sites Act with Reference to the Concept of «the Public Nature of Land»”, *Democratic Legal Studies*, 16, 1999.
- SUNG, Nak-In, *Constitutional Law*, 2005.