

# Constitutional Protection of Property Rights in South Korea

SUZUKI Yasushi, Md. Dulal Miah<sup>1</sup>

## Abstract

In a democratic society the court has special rule to play not only in interpreting the law but also bears the responsibility to ensure the rule of law. How efficiently courts will perform their duties depends largely on the degree of independence the judicial system possesses. The degree of judicial independence can roughly be determined, though not completely, by how judicial review is conducted. Such review keeps governmental activities within the bounds of law and restricts government grabbing hands from whimsical expropriation of private property. In this paper we analyze such constitutional review before and after the establishment of the Constitutional Court. The analysis shows that in the democratic regimes, the court has been bestowed with adequate discretion to decide unconstitutionality of certain provisions that attenuate private property at the excuse of public welfare.

Keywords: Property rights, constitutional court, South Korea, constitutional review, Eminent domain, regulatory takings

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<sup>1</sup> SUZUKI Yasushi is a Professor of finance at Ritsumeikan Asia Pacific University, Japan. email: [szkya@apu.ac.jp](mailto:szkya@apu.ac.jp)

Md. Dulal Miah is a PhD candidate in Asia Pacific Studies at Ritsumeikan Asia Pacific University, Japan. email: [dulal73@yahoo.com](mailto:dulal73@yahoo.com)

## 1. Introduction

The foundation of property right is so inherently related to economics that the definition of economics can be replaced roughly by the definition of property rights. Economics is the study of human behavior over scarce resources. Scarcity of resources is also the key to an analysis of property rights. Economics deals with the issue of how to satisfy human unlimited demand with limited resources so that social utility is maximized. Property right is a way to assign rights over limited resources so as to social benefits are maximized. Thus, the study of economics is indeed, the study of property rights. Alchian argues “[i]n essence, economics is the study of property rights over resources... The allocation of scarce resources in a society is the assignment of rights to uses of resources...for the question of economics, or of how prices should be determined, is the question of how property rights should be defined and exchanged, and on what terms”(1967:2-3). This implies that as long as resources are scarce, the question of ‘who owns what’ or of ‘how property rights are assigned and enforced’ affects peoples’ choice of savings, investment, innovation, and thereby economic consequence of a country.

Private property is one of the fundamental principles of capitalism. However, capitalism has triumphed only in the west and failed everywhere else because legal structures of property rights give west the tools to save and invest surplus in a productive way. Secure property rights require credible commitment from the rulers so that they are refrained from using coercive power and arbitrary seizure of subjects’ property. North and Weingast (1989) provide evidence showing that during England’s “Glorious Revolution” parliament was invented to tie up the grabbing hand of the King who whimsically changed rules of the game in such a way that benefited him most. An independent court was instituted that could credibly punish both Parliament and the King for violating the security of private property. This institution made it more difficult for the state to expropriate wealth. From this perspective North and Weingast (1989) contend that for economic growth the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them.

Credible commitment is not simply an exogenous factor but rather it is the consequence of the stability of the individual expectations about future government actions. These expectations of future government behavior are themselves shaped by the existing structure and behavior of government as well as government expectations about the future behavior of economic actors (Diermeier et al, 1997). North and Weingast (1989) theorize that credible commitment for a ruler can be derived from two sources: self-enforcing mechanisms or ‘responsible behavior’ by which the ruler will obey a set of rules with their consistency of enforcement and second, constitutional restriction. However, self-restraining assumption is cancelled out by the supposition that individuals are rational and self-maximizing agents (a basic assumption of Arrow-Debreu General Equilibrium Model). Thus, the determinant that is more pragmatic is that the ruler will be constrained to obey a set of rules such as constitutional restriction that “must be self-enforcing...to establish a credible commitment by the state to abide by them” (North and Weingast, 1989: 808). This implies that constitutions provide various safeguards to protect individual from state’s abrupt interference on private property.

The constitution of Korea provides provisions for protection of private property.

Article 23 of the 1987 constitution states that (1) the right to property of all citizens is guaranteed. Its contents and limitations are determined by law (2) the exercise of property rights shall conform to the public welfare (3) Expropriation, use, or restriction of private property from public necessity and compensation therefore are governed by law. However, in such a case, just compensation must be paid.

State should protect private property as part of its constitutional duty. However, private property can be attenuated at the excuse of “public welfare” and “public necessity” even though the criteria for them must be set by the law of the land. In this sense, “private property” and “public use” are always in contradiction due to the vagueness of the definition of in the latter case. A widely debated US lawsuit can be cited in this regards. In the case of *Poletown Neighborhood Council v. City of Detroit*,<sup>2</sup> the Detroit Economic Development Corporation transferred the tract of land belonged to low-income Polish neighborhood comprising of private homes, churches, and businesses to General Motors for use in an assembly plant. The neighborhood association and several residents in the affected area brought a lawsuit challenging the constitutionality of using the power of eminent domain to condemn private property to boost the economy. The residents argued that the taking was for private use instead of public use. Surprisingly, the Michigan court argued that the legislature was better suited to decide whether the use of eminent domain met a public need.<sup>3</sup> The decision was hugely criticized on the plea that it enabled government to seize private property for the benefit of private corporations instead of for “public use” as the text of the US Constitution required (Sandefur, 2005).

The question is whether legislators should be given the discretion to interpret such term as “public needs” or “social welfare”. If so, private property is prone to be expropriated by the regulatory bodies through enacting various laws. In this circumstance, the court has an important role to play not only in interpreting the law but also bears the responsibility to ensure the rule of law is established. How efficiently court will perform this duties depends largely on the degree of judicial independence. It is likely that property rights will be protected from legislator’s arbitrary expropriation if the judicial system possesses a greater degree of independence. This paper aims at contributing to this proposition in the context of Korea. It argues that in the pre-democratic Korea, private property was not duly respected which can be attributed *inter alia* to the lack of judicial independence. However, in the democratic regimes, the Constitutional Court which was revived in 1987 works as a safeguard towards private property. In this regard, we describe succinctly the judicial independence in the pre-democratic era and enumerate some legal cases to show how private property was treated in the dictatorial regimes. We then, illustrate some legal lawsuits related to property rights filed for the constitutional amendments to the Constitutional Court.

## **2. Judicial independence and constitutional review in the pre-1987 period**

Korea has traditionally been described as reflecting a Confucian tradition adapted at the outset of the Yi dynasty (1392-1910). This has influenced the modern legal system of Korea in Several ways. However, the history of modern Korea started with the

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<sup>2</sup> *Poletown Neighborhood Council v. City of Detroit* 304 N.W. 2d 455 (Mich. 1981)

<sup>3</sup> See also another US case *Kelo v. City of New London*, 545 US. 469 (2005)

colonization of the peninsula by Japan. Because of its strategic importance to Japan, colonial leaders were very prompt to create Korea a strong colony for its security reasons. Japan transplanted its government, including its court system shattering Korean old establishments intending to create a strong, centrally controlled empire within the legal framework of the Meiji Constitution and governed from Tokyo (Ginsburg, 2001a). The delegation of authority to the colonial government at the later stage was not intended to result in a self-governing colony but rather to replace colonial rules gradually by the laws and regulations of the metropolis. The ultimate design was to replace all colonial laws with Japanese laws and to eliminate any distinction between them (Lee Chulwoo, 2001). As a result, after the independence of Korea, the legal system of the land reflected many of its characteristics conforming to Japan at that time.

Even though Korea became independent from Japan in 1945, it was not until 1948 when the country was presented with a constitution. By an election in 1948, the Korean Constitutional National Assembly (designed to enact the first constitution) chaired by Syngman Rhee was established. The assembly adopted the presidential and unicameral system in the constitution of the first republic. The constitution was the first in Korean history to set down liberal democratic values and fundamental human rights. It consisted of provisions for the protection of human rights and freedoms, balance of power, a unicameral legislative system, a presidential system of government, and a controlled economy. The first constitution authorized a constitution committee to review a statute "whenever the decision of the case depends on the determination of the constitutionality of the law." Only the courts were allowed to request judicial review by the Constitutional Committee. However, the jurisdiction of the committee was limited to legislation, while courts had the power to rule on administrative order and regulations. The committee comprised the vice president, five Supreme Court justices, and five lawmakers. Two third majorities were required in order to make a constitutional review. Korea has had a six republic and the constitution had undergone different review by one way or the other.

In the first republic (1948-60), the Constitutional Committee reviewed only seven cases. But the Committee contributed to further individual right by declaring two laws unconstitutional - the Agricultural Land Reform Act, and the Special Decree for Criminal Punishment under Emergency (Yoon Dae-Kyu, 1989). As can be seen from the small number of cases reviewed, the Constitutional Committee's performance was not as active as it could be. The composition of the committee represented three branches of the state in the interest of fairness and impartiality. Despite, ten out of total eleven members to constitute the Committee were from the judiciary and the legislature, it did not prove to be effective for upholding the constituent's constitutional rights due to the Committee's lenience towards the president. The president asked for the committee to review the constitution as and when required by his own will. For instance, just one year after the adoption of the constitution, Syngman Rhee the president of the assembly, initiated a change of the presidential election system in order to circumvent a possibly majority of the opposition party (Korean Democratic Party); but the proposal was unsuccessful (Lee Han-Key, 1974) at this occasion.

However, it was successful in a later period which can be attributed to the fact that political activity of the opposition party was seriously undermined at that time by the execution of Martial Law and thereby completed the first amendment of the constitution. The second amendment of the constitution accomplished when Liberal Party supporting

Syngman Rhee secured majority in the national assembly in an election in 1954. Significant changes brought by the second amendment were provisions for a referendum, a pure presidential pattern of government, and most importantly suspension of the constitutional ban on holding office for more than two terms. This amendment of the presidential term facilitated Rhee to become the president of Korea for the third time in a row. However, the regime did not last long because the manipulation of election provoked student revolt in 1960 which ended the era of Syngman Rhee.

After a short interim government, the Democratic Party (successor of Korean Democratic Party) assumed power to begin the second republic (1960-61). Responding to the expectation of general people, the National Assembly initiated the third amendment of the constitution instituting a parliamentary system of government instead of presidential system in 1960. The constitution in the second republic was designed to prevent abuse of political power and protect civil liberties to a greater extent than that of the first Republic. Constitutional Court replaced the previous Constitutional Committee system to review the constitutionality of the statute, final interpretation of the constitution, dissolution of the political party, and impeachment etc. The Constitutional Court was consisted of nine judges; the president, the Supreme Court, and the senate of the National Assembly were to appoint three judges each. Since the Constitutional Committee was composed of judges, it was assumed to be judicial rather than political. Thus, the Constitution prohibited the judges from joining political parties or from participating in political activities. The constitutional court was believed to be an attempt to eliminate the political problems that had undermined the operation of the Constitutional Committee under the first republic.

Having decided the third amendment, the National Assembly decided its own dissolution to make way for new bicameral legislative body under the newly amended constitution. The next election under the reformed constitution was followed by the win of the Democratic Party with more than two thirds majority in both houses. At this stage, the government faced intense pressure from the mass population to make another amendment in the constitution. As a result, the fourth amendment was executed to provide the legal basis for punishing those who had committed electoral fraud in the past regimes. The aim was clearly people-oriented. But the Constitution Court could not function because of a military *coup d'etat* that ended civil government in 1961.

Under the revolutionary government led by Park Chung-Hee, the constitution of the second republic remained almost inactive for two years (Lee Han-Key, 1974). The military government proposed the fifth amendment and adopted by the national referendum in 1962. The main features of the amendment were return to the presidential system of government, requirement of a national referendum as a necessary condition for constitutional amendments, and also the introduction of modern political party system. Park was president already for two terms. Thus, in order for him to become president for another term, amendment in the constitution was required. As such, the sixth amendment was adopted allowing a third term for presidency and the concurrent holding of cabinet office with membership of the national assembly. In 1971, President Park was elected as president for the third time.

According to the new constitution of third republic (1972-80), the Supreme Court was given the final authority to review the constitutionality of the statute and also other governmental actions. In order to preserve judicial independence special care was taken to preserve the procedures of appointing judges. The constitution provided president the

right to appoint the chief judge with the consent of national assembly upon recommendation of the Justice Recommendation Council. The Justice Recommendation Council shall be comprised of four judges, two lawyers, one professor of law appointed by the president, the Ministry of Justice, and the Prosecutor General (Yoon Dae-Kyu, 1989). This was a development that served the purpose of demonstrating that the court was able to significantly exert its power to curb state's repression. As more review cases were brought before the courts during the time of third republic it was believed that the courts were significantly capable of exercising restraint on government. However, several court decisions heightened the tension between the judiciary and the legislature at the end of the third republic. For example, in 1970, the Supreme Court upheld a lower court decision which prevented the government from withholding compensation to military personnel who sustained injuries on duty. This was controversial because, as a military state, compensation to active servicemen for injuries sustained in training or war could impose a severe cost on the state budget. At the same time, the Court struck down an amendment that had attempted to raise the voting threshold for the Supreme Court to declare a law unconstitutional. President Park Chung-Hee was furious by this decision as well as the audacity shown by the Court in resisting political interference (Ginsburg, 2001b).

The result of this contradiction on the one hand and his (Park) very narrow victory amidst a huge outcry of vote buying in 1971 election on the other seriously threatened the future of Park as president. In order to regain the strength, Park initiated the *Yushin* (revitalizing) reform in 1972, changing the constitution to allow Park indefinite time in the presidency. Moreover, the Supreme Court was deprived of the final authority of the review of constitutional statute. Instead, the Constitutional Committee was revived powering it with three main functions (I) the constitutionality of the statute upon the request of the court (II) Impeachment, and (III) Dissolution of a political party. The Constitutional Committee was composed of nine members selected three each by the President, National Assembly, and the Chief Justice (Yoon Dae-Kyu, 1989). Since Chief Justice was appointed by the president, the majority of the constitutional committee members were apparently in the control of president.

The president was further empowered to dissolve the national assembly and to appoint and dismiss judges and can take emergency measures in the question of national emergency and threat of national security. This undoubtedly, was the result of enormous concentration of power to the president and hampered power sharing among the three branches of the state: legislative, judiciary and executives. Sohn Hak-Kyu (1989:46) argues in this regard

The Constitution concentrated power heavily in the hands of the president. The president was 'constitutionally the national leader' situated 'above the three branches of executive, legislative, and judiciary'. The Constitution was thus 'an attempt to vest most government power in the president, and to divide the remaining elements and functions among the executive, legislative and judicial branches.

Constitutional review was not going smoothly in the existing system. When the constitutionality of the statute was required by a trial court, the trial court would request a decision through Supreme Court to the Constitutional Committee. When the Supreme Court received and forwarded a request to the committee, it would attach its own opinion on it. In the case that the Supreme Court holds a request for review unnecessary,

the court would not forward the request to the committee. This implies that the review of constitutionality of the statute, impeachment of the president was illicitly rested on the Supreme Court. The Constitutional Committee did not make any single decision on constitutionality during the entire fourth republic even though there were 19 requests for constitutional review addressed to the Supreme Court but not a single case reached to the Constitutional Committee because the Supreme Court held all the statutes involved to be constitutional (Yoon Dae-Kyu, 1989). The constitution of the fifth republic (1980-87) provided for judicial review similar to that under the Fourth Republic, with only difference being residing the conditions governing requests for review while the Constitutional Committee remained almost unchanged. As a result, during the entire fifth republic the Committee reviewed no statute at all.

This shows that the judicial independence was fairly undermined by the continuous political interventions during the pre-democratic regime. Constitutional review took place only in the case the rulers can benefits from such review. In the case where the review threatened the ruling party, the revision was averted through executive's intervention or other institutional change. Moreover, it had been very difficult to challenge government decisions involving expropriation or utilization of private property through a legal process (Kim and Kim, 2002). In such a circumstance, private property was very much vulnerable to the rulers' arbitrary decisions. The following cases provide evidence to this proposition.

#### *The Chosun Railroad Stock Case*

Even though there were provisions to provide just compensation in the case of regulatory takings or eminent domain. However, there are cases where government escaped such responsibility simply because there was no such legal provision. The *Chosun Railroad Stock Case* is a case in point.<sup>4</sup> Chosun Railroad Company was one of the leading private railroad companies of the country. Soon after Korea gained freedom from Japanese occupation, the US backed military government undertook the responsibility to rule the country in 1945. As part of the basic infrastructural development, the then government issued an order aiming at expropriating properties of all private railroad companies, including those of the Chosun Railroads. However, the government offered a reasonable compensation plan to those private railroad companies affected by the decision.

Daehan Credit Union Federation, the owner of 67,166 shares of the stocks of Chosun Railroads requested compensation accordingly. However, before the compensation was finally processed, the related documents were lost during the Korean War in 1950-1953. In February, 1961, the Minister of Transportation of the Korean government publicly requested registration of all shareholders of the expropriated private railroad companies. The successor to Daehan Credit Union Federation, the National Agricultural Cooperative Federation (NACF) completed the registration. In October of the same year the NACF then transferred 59,176 shares of stocks and related compensation right to a third party. However, the Order was abolished by the *Act on Repealing the Unification of Korean Chosun Railroads* and the compensation package also terminated accordingly. The third party then sued in the Supreme Court in

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<sup>4</sup> Korean Constitution Court Report 395, 89Hun-Ma2, December 29, 1994

December 1961 against the repeal and requested to establish his right to be rewarded the planned compensation. The plaintiff won the suit successfully.

However, the complexity emerged when the government found no legal basis for calculation and payment of compensation. Based on this reason the government turned down the request for compensation and there was no further remedy available for the plaintiffs to seek for. However, such treatment was not considered unconditional in the sense that absence of provision for compensation is interpreted as compensation not necessary (Kim and Kim, 2002).

After several decades since then the plaintiff filed a constitutional complain (after the Constitutional Court was revived) in January 1989 challenging the legislative omission to enact the necessary laws providing compensation for the expropriation of the private railroads, the administrative omission to calculate and pay the compensation, and constitutionality of the Repeal Act itself. The court opined that it was unconstitutional for the legislature not to specify by law the process of calculating compensating for the expropriation of Chosun Railroads along with others whose rights to compensation were confirmed by law. The expropriation of private railroads under the US military government was taken place offering sufficient compensation to the affected parties. Therefore, the fact did not violate the right to property provision. The compensation package remained valid until it was repealed by formulating another law, Act on Repealing the Unification of Korean *Chosun* Railroads. As a result it was constitutional duty of the legislators to formulate the way of calculating and arranging necessary payment for compensation since the right of the plaintiff to be compensated was affirmed by the court before the new law came into being. On the other hand, court could not review the law for unconstitutionality on the ground that such legislation violates property rights guaranteed by the constitution.

### *The Kukje Group case*

Political leaders in the dictatorial regime were keen to survive holding power which required social endorsement on the one hand and a stable financial backing on the other. They tried to achieve these goals by helping a capitalist class to emerge that will assume leading role for undertaking necessary investment as well as provide funds to political leaders (Kang, 2002a). Towards this, the regimes were too much mindful to assign and enforce property rights to selective groups who were the providers of finance to the dictatorial rulers. With few exceptions, those who were not lenient towards their financial demand were not comfortable in protecting their property. For instance, Kukje group were led to bankruptcy because of not paying attention to the government demand.<sup>5</sup> In 1985 the Kukje Group, which was led by the flagship company, Kukje Trading Inc., was dissolved. At the point of its dissolution, Kukje group, with 38,000 employees, was the seventh-largest *Chaebol* in Korea. Like other *Chaebol* it was highly leveraged with significant loans from the government (Kang, 1995). Kukje's bankruptcy was a tale of more political biasness or repression against those who refused to cooperate with the demand of dictator.

In the mid February of 1985, the president of Cheil Bank announced that Kukje would be bankrupted and it would be managed by a consortium of four banks, Cheil

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<sup>5</sup> Korean Constitutional Court Reports 87, 89Hun-Ma31, July 29, 1993



Bank, Korea Development Bank, Chohung Bank, and the Bank of Seoul and Trust Company. The president of Cheil Bank further reasoned that Kukje would be disband because of its inefficient management, high portion of debt finance, and nepotism in the management of the company (Kim Eun-Mee, 1997). If those were the reasons, then other *Chaebols* had to be worried because the alleged causes attributed to Kukje's bankruptcy were not absent in other *Chaebols* as well. When the tension grew at an alarming rate, the Minister of Finance announced in a news conference that there will be no further adjustment after Kukje. This announcement eased the tension but also strengthened the suspicion that Kukje might have become the harsh target of severe anger of the state. It is reported afterwards that Kukje's president, Yang Chung-mo, had seriously offended President Chun Doo-hwan by refusing to contribute significant sums to quasi-governmental organizations such as the Ilhae Foundation and the New Village Movement, initiated by Park Chung Hee. Such a refusal was unacceptable at least and intolerable to the dictatorial rulers as shown by the history of Korean pre-democratic politics. Consequently, the state refused to extend any further loan to Kukje and to honor Kukje's previously written checks. Moreover, the primary lender of Kukje Group, Korea First Bank, announced its plan to dissolve the Group. After a series of subsequent actions Kukje became unable to service its debt and was declared bankrupt.

Kukje Group's dissolution has been popularly spoken as an example of Korean money politics and state's strong control on the business groups even big Chaebol (Kang, 2002b). Believing so, the founder of the Kukje Group filed a constitutional complaint in 1989 for infringing its rights and further demanding the nullification of the Minister of Finance's orders regarding (I) the dissolution of Kukje Group (II) the instruction to Korea First Bank to prepare for the dissolution by taking control of the finance of the Group's member companies. The Constitutional Court argued that the way in which government exercised power aiming to dissolve Kukje Group was *de facto* exercise of power and violated equality and freedom of entrepreneurship. The court further viewed that

State's active, patriarchal intervention into management of a private business...does not show respect for economic freedom and creativity of enterprises. The government's exercise of governmental power intervening in the management of a private enterprise and forcefully turning its control over to a third party without any statutory basis violates freedom of individual enterprise and the rule against intervening into management. No matter how well intended, restrictions on individual's rights and imposition of responsibility must be based on predictable statutes.

This shows that in the dictatorial regime the protection of private property was vulnerable to government expropriation and because the legal system was controlled by the government, people rarely used the legal system to seek redress. However, the sceneries have changed much after Korea evolved to democratic system in 1987. One of the most important constitutional amendments adopted in 1987 was the reestablishment of the Constitutional Court adopted initially in 1960. The Court was composed of nine adjudicators qualified to be judge and shall be appointed by the president among which three shall be selected from among person nominated by the National Assembly, and three by the Chief Justice. The Court was bestowed with the power to decide concerning the questions of the unconstitutionality of the laws upon request by the courts, impeachment, dissolution of the political parties, competence dispute between state

organs etc.

### **3. Constitutional review in the democratic regimes**

Reform of the legal system have both reflected and contributed to the change of Korea after the revival of the Constitutional Court in 1988. This is due to the fact that after enacting the new constitution and reviving the Constitutional Court with more freedom and adequate leeway to decide facts independently than it had enjoyed in its existence in the past regimes, protection of private property bestowed by the constitution to citizens was much stronger. The Constitutional Court therefore, could decide whether any provision of any specific act goes against the enjoyment of private property to a greater extent. In cases the court found any act contradictory to the constitution in relation to enjoyment of private property, it was on the opinion to strike down the provision of the Act declaring unconstitutional or other such opinions deemed fit even sometimes the opinion goes against the government's interest. Consequently, some provisions of certain act which were in contradiction with the notion of private property and survived before the re-birth of the Constitutional Court were struck down by the court providing people with the assurance of the rule of law.

Greater judicial independence was accompanied by the strong legal system and therefore, Koreans are now more likely to resort to legal system for resolving disputes and seek redress compared to the pre-1987 period. This is reflected from the fact that since its inception in 1988, the Court, as of December 31, 2007, received 15,716 cases and decided 14,789 cases. In 773 cases, in particular, the Court held statutes or governmental actions unconstitutional. All this provided, no one can deny that the Korean Constitutional Court has brought about changes in society by rendering important decisions. Among them 17 cases were under a broader head of cases concerning "economic and property rights and taxation" for the first ten years (1988-98) whereas in the next 6 years (1998-2004) the Court issued decision for 27 cases in the same categories. In the following sections we discuss how the Constitutional Court of Korea deals with laws and regulations that attenuate private property. One of the widely disused phenomena still remains as a tool to infringement is 'public interest'. In the following subsection we focus on how the Court maintains balance between the supremacy of private property and greater provision for public goods.

#### *Private property vs. public welfare*

As we have mentioned earlier that protection of private property and increase in public utility are in contradiction in reality. For example, government might want to preserve healthy habitat in a specific area and thus imposes restrictions so that building and other such constructions on private land in that specific zone cannot exceed certain height. Obviously, some owners owning land in that restricted area are likely to undertake constructions beyond the permissible limit and thus, the restriction attenuates property rights. Despite this fact, the state imposes such restrictions by formulating new special laws or act as zoning, urban planning act, and wetland preservation act, for example, in order to increase the long-term welfare of the society. If new special act or other such special order (presidential decree) attenuates private property rights it is termed as regulatory takings. State is empowered by the constitution for regulatory takings for

public purpose. Article 23 (3) of the Korean Constitution states that expropriation, utilization, and restriction of private property rights for the sake of public interest shall be made according to law and 'just' compensation shall be made for such actions.

However, it is not unusual that just compensation are not always offered due to various reasons or sometimes the attenuation of private property is so much so that owners enjoy only *de jure* right not *de facto*. In this circumstance, parties affected by certain provision of a special act can challenge the act in the Constitutional Court on the plea that it abrogates their right bestowed by the constitutions. Urban Planning Act which was enacted in 1962 is a case in point. The purpose of the said Act was to regulate creation and improvement of a city as well as healthy growth of a city and public welfare. Article 21 of the Act empowered the Minister of Construction and Transportation to designate an area in which urban growth is restricted in order to prevent disorderly urban expansion, preserve the natural surroundings, and obtain a healthy living space for the citizens. Moreover, inside such a designated area there shall not be any construction or structure erected, any change in the quality and form of the ground, any subdividing, or any urban planning activity. However, the Act did not have any compensation clause on it in the case if any party is seriously affected by the Act.

When Plaintiffs Bae Ok-sup, Kim Sung-bok, and Kim Young-soo constructed buildings in 1980 on a development-restricted zone, they were ordered to demolish the constructions. Consequently, they sought injunction against the administrative order and further requested to review article 21 of the Urban Planning Act. But the court denied their request.<sup>6</sup> The court argued that any exercise of the right to property be consistent with public welfare and is a general restriction that falls within the scope of the restriction inherent in the right to property itself. It is imposed on all uniformly and is not a special sacrifice on some people. Therefore, it does not necessarily be subject to a condition of loss compensation. Subsequently, they appealed to the Supreme Court against the decision where they were also rejected. The Supreme Court viewed that

Even though the provisions of the said Act do substantially restrict the landowners' property rights inside the development-restricted zone and do cause special harms in comparison to other property owners, the restriction is limitedly applied only in order to prevent disorderly urban expansion, preserve the natural surroundings, and obtain a healthy living space for the citizens etc. Therefore, it is a reasonable restriction consistent with public welfare, and the property owners' loss is an unavoidable consequence to be endured for the sake of public welfare.

Subsequently, they filed constitutional complaint challenging the constitutionality of the Article 21 of the Urban Planning Act. The Constitutional Court in majority opinion ruled that the said article is in principle constitutional. However, it becomes possibly unconstitutional when it imposes a cruel burden exceeding the scope of social restriction on the landowner without any compensation provision. Until the legislature cures the unconstitutional statute of law by making a compensation statute, the above provision formally valid on a decision of nonconformity. The administrative agencies should not designate a new development-restricted zone until the legislature enacts the compensation statute.

The reason, i.e. public interest, based on which High Court and Supreme Court

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<sup>6</sup> KCCR 927, 89Hun-Ma214, etc., December 24, 1998

denied the injunction against the demolishing order was considered from a different angle by the Constitutional Court. In general, the provision may affect all property owners inside the restricted zone but the degree of loss may vary. The development-restricted zone designation may make it impossible to use the land as it was used previously or may not leave any feasible use, effectively eliminating all venues. For instance, two regulations in which one prohibits a new construction completely and the other puts limit on the height of construction are not equal in terms of loss suffered by owners. Obviously, the former suffers more than the latter. Such a blanket prohibition obviously exceeds the limit of the social restriction that the landowner should accept. Because of development restriction, the land price of the designated area may decrease or if increases may not be as fast as it is in the non-restricted zone. This loss to the landowners is sufficient to justify the social responsibility. The Constitutional Court took this matter into account. As a result, the Court viewed that when the issue of public interest imposes cruel burden on some groups in terms of exercising his private property rights, unless the statute provides some mechanisms to offset opportunity loss due to restriction in use of property, the provision violates the basic rights provided by other provision of the constitution. From this vantage point, the court opined that on the issue of public interest the statute must not deny the essential content of the right to property, namely, the right to use, profit from, and dispose of the land. If any burden is imposed on the landowners regarding the original use of land, statute must provide some offsetting mechanism to alleviate cruel burden otherwise the said provision is unconstitutional.

When a court assumes that development restriction restrains prices of land located in the restricted zone that justifies responsibility on the part of a private owner to the society, the court is in full agreement that private owners possess the sole right to enjoy benefits from price rise. Since healthy living environment that the aforementioned act intended to attain is for those who are living in that designated area, they have to sacrifice something. However, the sacrifice may not be proportional to the enjoyment of benefit by all owners because the benefit (healthy living environment) is public goods in nature. Thus, it is the duty of the state to bring as much equality as possible. As a result, the Constitutional Court did not declare the provision unconstitutional since it generates social utility but asked the state for compensation arrangement for those who are harshly treated by the current provisions so that a more efficient trade-off between cost (attenuation of right) and benefit (better living environment) is attained.

The term 'proportionality' remained implied in the current case. However, the Court explicitly mentioned it in another case related to the same Act. For example, Article 4 of the Urban Planning Act limits any change in use or construction activities on the designated urban planning sites. Despite it bans all changes in use or constructions, the provision does not provide any arrangement for compensation for the limitation on the property rights. The plaintiffs who were landowners of a city complaint that their properties were designated for school sites in 1982 but were never developed for such purpose for more than ten years. They filed a suit claiming property loss from the state in the Seoul District Court where their petition was denied. Subsequently, they filed a constitutional complaint in the constitutional court.<sup>7</sup> The court was on the view that development of a private property for certain designated purpose by the state is legal

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<sup>7</sup> Korean Constitutional Court Report 383, 97Hun-Ba26, October 21, 1999

only as long as state is ready to pay them compensation due to the forgone of monetary and other benefits of the private entities. Otherwise, it is equivalent to government takings. The Court thus, stated-

The statute here is unconstitutional because it overly infringes upon the landowners' property right in violation of the principle of proportionality. ...important public interest aimed at by the statute cannot justify the uncompensated ban on the preexisting use or the complete exclusion of private use. In revising the provision consistently with the principle of proportionality, the legislature must set up a compensatory provision that diffuses the cruel burden on the landowners.

This logically implies that provisions of any act that restrict any right of private property without providing reciprocal direct benefits are in contradiction to the constitution. This is exactly what the happened to the case of Land Excess-Profits Tax Act.<sup>8</sup>

Korean economic growth in the late 1970s and early 1980s led to the insurgence of land price increase and thus the inequality between the rich and the poor became severe given the limited land available for a large number of Korean populations. In order to restraint the galloping increase of land price due mainly to the speculation, Land Excess-Profit Act came into being.<sup>9</sup> The simple idea of the Act was that any increase in price of certain class of lands compared to the price of standard tract of public land located in that area should be taxed at 50 percent uniform rate which the land owner should pay in kind upon request.

Several complainants whose properties were classified as taxable and charged land excess-profit tax accordingly by the tax office filed for judicial review of administrative action at the Seoul High Court, demanding nullification of the tax. They also requested constitutional review of some Article of the Act that deprived people realizing their rights on property. However, the High Court denied the revision and the plaintiffs filed a constitutional complaint. The Court argued that the Act violates the Constitution in several respects especially private property rights entrusted by the Article 23 of the constitutions but pointed out that entitling the article unconstitutional as a whole will create a vacuum in the tax collection of the country and therefore, issued a decision of nonconformity to the Constitution. The court in this regard argued

...the structural lack of preparedness in the tax calculation apparatus is likely to lead to taxation on the prices themselves (the principle) not the gains on them, and thereby violate the property right of the people protected by the Constitution.

In the case of Urban Planning Act, we have noticed that there involved a reciprocal relationship in the sense that benefits derived from restricting property rights are offered to those who suffer from this restriction. But, in the present case, there is absence of such reciprocal relationship between benefits and sacrifice. If the purpose of the provision is to reduce the gap between the rich and the poor, it is unlikely that such a provision can attain the intended purpose. This is because a uniform rate irrespective of the amount of land holding can just reduce the wealth both from the rich and the poor, not that the rich is compensating the poor. In this sense, the purpose of the act does not

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<sup>8</sup> Korean Constitutional Court Report 64, 92Hun-Ba49, etc., July 29, 1994

<sup>9</sup> Land Excess-Profit tax means taxing on land value that has increased

confer any clear public good facilities to the people and thereby, does not provide any logic to take away a portion of the income derived from private property. From this perspective the court argued that the Act needs to be amended because some provisions of the Act violate the Constitution while others do not conform to the Constitution. The National Assembly amended the Act in December 1994.

The term 'proportionality' is widely emphasized and carefully scrutinized by the Constitutional Court of Korea for the question of public welfare. For instance, the Court in the majority opinion struck down a provision of Land Ownership Ceiling Act. The contents of the ceiling of residential land ownership were that an individual cannot own any residential property above the limit established for each type of household (660 m<sup>2</sup> in Seoul). A corporation, on the other hand cannot own any residential property. Violation of those rules either by individuals or corporations through acquiring land in excess of the ceiling bar before or after the enactment of the Act, must dispose of, use, or develop the excess property within a certain period, or pay a fee otherwise. Almost sixty seven cases were filed in which the excess residential property owners sought cancellation of the assessment of excess residential property ownership fees and requested constitutional review of the Act. When they were denied the cancellation of charged fees by the presiding court, they filed a constitutional complaint with the Court requesting to declare the Act unconstitutional.<sup>10</sup>

The Constitutional Court in a majority decision struck down the provision on the ground that the purpose to bring equality and to restraint land accumulation for speculative purpose is discriminatory. Under the current circumstance as provisions of the Act imply, is not effective to segregate land required for habitat use and land acquired for speculation purpose. Within the limit imposed by the ceiling, some may acquire land for speculative purpose and some may need more land than the ceiling permits merely for living purpose. Thus, imposing a blanket ceiling for all regardless of their real needs penalize owners disproportionately. The Court further viewed that the majority opinion grounded on the argument that the right to property protects material and economic conditions for one to shape his or her life according to his or her values and capacities. It is a material foundation for realization of freedom. Therefore, setting aside the ceiling on ownership is equivalent not only to restraint peoples' right to property but also equivalent to excessive limitation on the scope of one's exercise of freedom. As a result, it is a violation of the constitutional right to property. Since abolition of those provisions is equivalent to invalidate the entire Act, the court declared it unconstitutional.

#### *Cases relating to arbitrary assessment*

It is worth noting that in the above cases both the nature and the magnitudes of restrictions were clearly defined by the specific regulations. However, the court was prompt to eliminate such restrictions in the case where legislatures have failed to show any reciprocal relation between the costs of any regulation and the derived benefits. Moreover, if any regulations imposes disproportional penalty to different entities, the court asked for compensation arrangement for parties seriously harmed. Another important issue with which the court was concerned is the 'arbitrary judgment' or

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<sup>10</sup> Korean Constitutional Court Report 289, 94Hun-Ba37, April 29, 1999

‘arbitrary assessment’. Or in other words where the restriction on property rights was imposed by any provisions of a law but the magnitude of the effects were assessed by some arbitrary assessment such as ‘presidential decree’ without specific statutory base or provision of the constitutions or other valid law in force, Constitutional Court was apt to instantly declare that provisions either unconstitutional or nonconformity with the constitutions.

This means that where such discretionary power was belonged to politically affiliated figures or organizations, private property rights may be least respected when such problem arises. For example, upon complained by a party whose property was subject to enhanced taxes, the Court invalidated the Local Tax Act provisions that imposed enhanced property taxes on "high class entertainment facilities" and enhanced land taxes on "land used for luxurious purposes".<sup>11</sup> The court invalidated Local Tax Act provision on the ground that the purposes of the Act do not permit reasonable and objective prediction of the extensions of such concepts as "high class entertainment facilities" or "luxurious properties". There is a danger of arbitrary interpretation and administration of the provisions by the administrative body imposing taxes. Furthermore, leaving their extensions undefined to 'presidential decrees' means to say that the enhanced taxation depends on administrative whim rather than regulated by any law.

Exactly for similar reasons the court declared Article 36(1) of the Korean Broadcasting System Act nonconformity to the constitution. The Act allowed the board of the Korean Broadcasting System (KBS) to set aside the amount of the broadcast receipt fee without any resolution or intervention of the National Assembly but merely by obtaining the approval of the Minister of Public Information. The petitioner, who was charged fees under this Act, sought cancellation of such fees in the lower court and requested constitutional review. He was denied and thus filed constitutional complain. The court entitled the article as nonconformity to the constitutions because the amount that must be determined by legislature is determined entirely by the KBS and the government. The court emphasized that what is to be charged on property owners should be predictable in the light of current laws and regulations. Anything left on arbitrary judgment is vulnerable to property rights infringement by those who are in the position to decide the magnitude of the tax or fees. From this perspective the court found the said provision nonconformity to the Constitution.

This decision shows that in view of the law, state and private entities are equal. Because of superior status, government should not be entitled to enjoy immunity from certain provision while the owner of private property suffers. This was indeed, the view of the court when it issued the first decision of unconstitutionality since the inception of Constitution Court. The decision was issued in December 1988 relating to the validity of Article 6 (1) of the Act on Special Cases concerning Expedition, etc. of Legal Proceedings.<sup>12</sup> Article 6 (1) of the Act states that all judgments on property rights in favor of plaintiff should also accompanied by an order of provisional execution (immediate enforceable) regardless of the party's request. The said article further provides that while the state is defendant in a property rights claim and the verdict goes against it "an order of provisional execution cannot be granted." This means that the Act

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<sup>11</sup> KCCR 158, 98Hun-Ka11, etc.,(consolidated), March 25, 1999]

<sup>12</sup> Korean Constitutional Court Report, 88Hun-Ka7, January 25, 1989

bestows state a superior legal status of being immune from provisional execution. As a result, it is not possible for private individual, who wins a suit against the state related to execute the judgment provisionally against the defendant.

The claim for constitutional review on the said Act was brought into Seoul District Court by a plaintiff who sued against the state to recover his deposit. After review, the Constitutional Court struck down the proviso of Article 6 (1) of the Act on the plea that the principle of equality cannot be ensured with the existence of this provision. The court thus argued

Since the principle of equality rightly applies to ‘the property rights of the people’ guaranteed by Article 23 of the Constitution, no party should be discriminated based on his identity in civil proceedings on private rights such as property rights. Even the state should not be favored without reasonable basis.

The court observed that an order of provisional execution allows enforcement of rights but arranging such an enforcement mechanism only in favor of state does not justify equal protection of rights. While the article mandates granting an order of provisional execution considering welfare benefits of the state the same act prohibits private entity to enjoy the same opportunity and thus reduces social welfare.

In a similar case, the plaintiff challenged the constitutionality of the Prescriptive Acquisition of Miscellaneous Property prescribed in Article 5 (2) of the State Properties Act.<sup>13</sup> The mentioned article exempted ‘miscellaneous state-owned properties’ from prescriptive acquisitions.<sup>14</sup> The claimant of the above suit was occupying and managing a tract of forest since 1961. However, the state recorded the ownership and title of the said property on its own in 1987 for preservation. The claimant sued against the state demanding the cancellation of the recording on the basis of time bar. However, time bar was irrelevant for ‘miscellaneous property’ under which class the forest was categorized. Thus, as long as this provision of the act remains in force, the claim for time bar acquisition is not valid. As such, the claimant requested a constitutional review of Article 5 (2) of the State Properties Act, challenging its inclusion of miscellaneous properties as being violation of right to property.

Majority opinion of justice expressed the decision to struck down Article 5 (2) time bar exemption for miscellaneous properties after ascertaining the nature of transactions on miscellaneous properties. The court emphasized on the fact that miscellaneous property is subject to purchase, lease, and other private transactions governed by general principles of private economic order in accordance with its economic value. The state has the authority to engage in sales, lease, lend or other transaction deemed fit with other private entities. The similar function also can be carried out by a private entity. Thus, the law that governs the transaction of private entity should also cover the transaction of the state because the state is in principle subject to private law. In the case

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<sup>13</sup> Korean Constitutional Court Report 202, 89 Hun-ka 97, May 13, 1991

<sup>14</sup> Prescriptive acquisition means the right to acquire the ownership through ‘adverse possession’. One of the important element of adverse possession is ‘acquisition by time bar’ meaning that when a specific possessor of state property possesses it for a certain period of time, the ownership of the property will be transferred to the possessor upon the court’s decision



of miscellaneous property, the state has rights as a corporation in equal legal relations with private persons in which its action and the changes in rights are given effects. Therefore, just as the state may acquire a private person's property by operation of time bar, the private person must be able to do the same to the state. The decision of this suit ensured not only the rights on property but also that it effectively restrained favoritism of the state vis-à-vis private entity. The court further opined

#### **4. Conclusion**

Eminent domain or regulatory takings are still widely debated issues even in the developed economies in the question of protecting private property. The primary source of the debate stems from the relative vagueness of the concept of “public welfare” or “social justice” upon which excuses regulatory takings and eminent domain are justified. Moreover, the clause “just compensation” is also controversial because there are various conditions to be considered while determining the amount of “just compensation” and some of them deepens on assessors’ discretion who are usually the legislators. As a consequence, regulatory takings and eminent domain have been one of the effective tools for government to expropriate private property. However, in order to lessen the burden of “social justice” to property holders as well as to avert regulator’s predatory behavior, judicial independence is essential so that enactment of any regulations or laws by the legislators that attenuate private property can be challenged for review. Where the judicial system enjoys greater degree of independence, constitutional review can be performed to uphold the spirit of private property guaranteed by the constitution. We have attempted to argue this point in the context of Korea.

In the pre-democratic era, private property was not duly respected. Attenuation of private property was taken place by various regulatory mechanisms. Moreover, there was no legal provision to offer compensation for some regulatory takings (Chosun Railroad Stock Case). In the case the party affected by any regulations resorted to the court, the court argued that the practice of not offering compensation was not contrary to the constitution due to the fact that there was no specific legislation that detailed out the procedures of determining the amount compensation. Such a treatment from the court was not surprising given the level of judicial independence in the pre-democratic Korea and it contributed to discourage people to resort to court for protection of private property. Not only that the review process was complex but also very few of the cases request for constitutional review by the trial court had been sent by the Supreme Court to the Constitutional Committee for review. Moreover, through the *Yushin* reform, judicial power had been taken away finally.

The scenario has changed after the establishment of the constitutional court. The court carries out the duty as a protector of private property. It has now adequate leeway to decide the level of sacrifice property owners should make for the public welfare. Analysis of cases shows that the court carefully considers the proportionality to balance between private property and public welfare. Moreover, the Constitutional Court views both the state authority and private entity equally so that superior position of the state does not pose any threats to the private property. These conditions are indeed, the key to protect private property and for so doing the judicial system requires sufficient degree of independence as the Constitutional Court Korean shows.

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