

# The Issues and Tasks of the Guarantee of the Property Rights in the Korean Constitution - Especially, Centered on the Land Property Right-

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**ABSTRACT--** *Regard to the guarantee of the property rights, in relation to the land property right, this writing intends to deal with them by being centered on the Constitutional, controversial issues and tasks. There are two problems in this research first, how is the Normative Details Related To The Land Property Right In Terms Of The Korean Constitution? and the second is how the task, in the case of an amendment of the Constitution, the direction for the amendment of the regulation related to the land property right? This is a doctrinal research that using legal statue approach. This research conclude that with regard to the amendment of the Constitution in the future, although it will be fine to leave Article 23, which has been guaranteeing the land property right through the guarantee of the property right, with regard to the proceeding with the amendment, it shall be said that there is a need to delete Clause 2 or amend the latter part of Clause 1 and Clause 2 by organizing them as on provision. Furthermore, I shall say that, regarding the current provision in which the land has been included in the meaning of the national territory, there is a need to think about the canonization, too, by using the term of the land in the specific case.*

**Keywords:** *guarantee, property rights, Korean constitution*

## I. INTRODUCTION

Today, the guarantee of the property rights as the basic rights in the Constitution of the modern country means the guarantee that is bound by the value decision of the Constitution for the maintenance and the continued existence of the community and not the absolute guarantee of the inviolability that is based on the modern, individualistic and liberalistic thoughts. Regarding the property rights that are guaranteed by the Constitution, by being based on the increase of the population that has been faced by the modern society, the self-awareness regarding the environmental protection- which is the foundation of the survival of the human beings, the materialization of the social, market economy, the protection of the neighboring right, etc., the restriction that has been strengthened more compared to the other basic rights has been applied. In Article 23 of the Korean Constitution, it has been regulating regarding the guarantee of the property rights as the basic rights. It guarantees the private usefulness and the free right to dispose regarding the properties to the person who has the right to the properties (The first part of Clause 1). In contrast, by making the details and the limitations of the property rights decided, it gets restricted wide-rangingly according to the legislative formation right of the

legislator (The latter part of Clause 1). To a person having the property right, with regard to the exercise, the duty of the public welfare suitability is imposed (Clause 2). And it has been materialized with the 4-phase structure that permits (Clause 3) the public-use intrusion according to the public need. Through such a regulation of the guarantee of the property rights, the Constitution has been solving the problems of the conflicts that are raised in the opposing relationship between the free profits of the individual person having the property rights and the joint profits of the social community. In the same way as the other basic rights, the guarantee of the right to the properties, too, as a basic right, is an indispensable, basic right that has the universally feasible value for the survival of the mankind. Accordingly, in case the restriction on the property right that is applied to a person having the right to the properties for the common profit of the social community deprives the free disposition regarding the objects of the properties, not only does it violate the value decision of the Constitution, but, also, because it encroaches upon the essential details of the property right, it is not permitted. Regarding the classification, the property rights are classified into the ordinary property right, the land property right, the intellectual property right, etc. Especially, in the case of the land property right, differently from the other property rights, more restriction is imposed. This is because, regarding the land property right, there are a lot of the cases in which the opposing relationship between the private profit of the individual person having the property right and the public profit for the social community is caused. In terms of the Constitution, the regulation guaranteeing the property rights becomes a normative basis that solves such problems of the oppositions. Because, regarding the land, just because the demand increases, the supply cannot be increased, the principle of the market economy cannot be applied just the way it is. And, because it possesses the special characteristics, including the fixability, the adjacency, the original productivity, the environmentality, the adjustment of the use of the real estate, the sociality, the publicness, the territoriality, etc., although it brings the big profit to the owner, the user gets around to paying the price for the high cost. With regard to the guarantee of the property rights, in relation to the land property right, this writing intends to deal with them by being centered on the Constitutional, controversial issues and tasks.

## II. A CONTROVERSIAL ISSUE: THE NORMATIVE DETAILS RELATED TO THE LAND PROPERTY RIGHT IN TERMS OF THE KOREAN CONSTITUTION.

### A. *The guarantee of the property rights (The first part of Clause 1, Article 23 of the Constitution) and the land property right.*

Although, in the guarantee of the basic right in the Constitution, it has not been separately regulating regarding the land or the land property right, it has been guaranteeing the land property right according to the first part of Clause 1, Article 23, which regulates that 'The property rights are guaranteed. Regarding Clause 1, Article 23 of the Constitution, which is related to the guarantee of the property rights, it guarantees the private ownership of the production means to each citizen, and, at the same time, it has been guaranteeing the private usefulness and the disposal authority as the subjective rights regarding the objects of the property rights that become the material basis. Regarding the meaning of 'It is guaranteed', as a thing that exclusively guarantees the freedom of the person having the right to a property, it refers to the guarantee of the private use and the private disposal by the owner regarding the property by having the guarantee of the private-ownership properties system as the premise first. Hence, regarding the owner of a property or a person having the property right, whether it be a movable asset or a real estate, with regard to the property right, he or she gets around to possessing the freedom with regard to the ownership, the use, and the disposal. Regarding the property right that is guaranteed according to Clause 1, Article 23 of the Constitution, as a thing that says, "All of the benefits and protections of the law in terms of the property value that had been formed according to the social, common ideas' in this way, it can be divided into, first, the ordinary property right, second, the intellectual property right, and, third, the land property right with regard to the classification. Although the land property right pertains to one kind of the general property right, it gets distinguished by the point that the weighted regulation has been imposed compared to the ordinary property right. Regarding the land, ever since the guarantee of the property right, it has been functioning as the most important object of the property right in whatever the era. As a property right regarding the land, the land property right is a concept that includes the land ownership right in terms of the Civil Law. With regard to the protection range, it reaches not only the index of the land, of course, but, also, the above-ground and the underground, too, within a certain range. Regarding the guarantee of the property right in the Constitution, it is a thing that has been guaranteeing the freedom in the domain of the property right to the subject of the fundamental right through the rule and the use regarding the property right and the approval and the protection of the right to dispose. If this is considered, although, regarding the land ownership right that has the private profit as the premise, it means the right of being able to use, being able to make the profit with, and being able to

dispose of the land that is a possession with the exclusive and comprehensive ruling right, the land gets around to receiving the social and public binding that has been aggravated compared to the ordinary property right. As a property right that is guaranteed in the Constitution, according to whether the right of the owner shall come first or whether the right of the user shall come first, on the one hand, the land property right appears as a guarantee of the property right and, on the other hand, it gets around to appearing as a regulation and a restriction regarding the property right. With regard to such a point, regarding the land property right, it can be said that there is the distinct feature with regard to the point that there is the case of the guarantee as a relative right with the policy judgment of what right will be guaranteed first between the guarantee of the exclusive right of the owner and, at the same time, the guarantee of the right of the user as the premise compared to the ordinary property right of the absolute guarantee that has the preferential guarantee of the exclusive right of the owner as the premise. As a result, although the social binding of the property right is a basis for the restriction on the land property right, it, also, acts as a limitation of the restriction.

### B. *The reserving of the property right restrictive law (The latter part of Clause 1, Article 23 of the Constitution) and the land property right.*

Regarding the latter part of Clause 1, Article 23, of the Constitution, by regulating that 'The content and the limitation shall be decided in a law', it has been entrusting the specific details of the property right as the task of a person having the right to legislate instead of being decided by the Constitution, itself. Regarding the property right, the person having the right to legislate must either definitely decide the content or set up a limitation within the range of the fundamental value decision of the Constitution. By giving the authority regarding the content decision and the setting up of the limit to a person having the right to legislate, the Constitution enables the materialization of the profit of the individual person having the right to a property and the public profit as the same values according to the social relevance and the function that are possessed by the property right. Although, regarding the guarantee of the property right as a Constitutional norm, too, in the same way as the other, basic right norms, it is a thing of which the defense right function does not get infringed upon without being according to the basic right reservation of the law, if the scale of the restriction on the property right by the governmental power does not go beyond the content as a legal reservation regarding the property right and the range of the internal restriction of the limit setup, the restriction on the defense right becomes possible. Or, in other words, it is possible for a legislator to reduce the range of the property right that presently exists through an ordinary or abstract regulation of the law. The property right restrictive, legal reservation related to the land property right is related to Article 119, Article

120, and Article 122 of the Constitution. Or, in other words, in Article 122 of the Constitution, it has been regulating that 'Regarding the country, for the efficient and balanced use, development, and preservation of the national territory that becomes the base for the production and the life of all of the citizens, according to the decision in the law, the needed restriction and duty regarding it can be imposed.' It becomes the basis for the drawing of the public concept of the land ownership. Regarding the laws for materializing the public concept of the land ownership, there are the Basic National Territory Act, the Law Related to the Redemption of the Development Profits, the Special Law on Land Management and Balanced Regional Development, the Law Related to the Planning and Use of the National Territory, the Urban Development Business Act, etc. The public concept of the land ownership has the change of the idea regarding the land property right from the land ownership for the ownership to the land ownership for the use as the ideological foundation. Thereby, it means the public law regulation for the human beings to enable the most efficient use of the land, which becomes the basis for the life and the production activities, or, in other words, the aggravated binding regarding the land property right caused by the special characteristics of the land. It is in this regard that, even if the restriction of the land property right according to these laws is imposed, if the encroachment with the essential detail does not take place, it shall be said that it is not unconstitutional.

*C. The social bind of the property right (Clause 2, Article 23 of the Constitution) and the land property right.*

By regulating that 'The exercise of the property right must be suitable to the public welfare', Clause 2, Article 23 of the Constitution has been preparing a basis of the social restriction related to the exercise of the property right. Such a regulation is the introduction of the social thought of the law-governed country that considers the profits of the entire society regarding the profits of each individual into the Constitution. The Constitutional regulation of the social binding of the property right is a conversion from the concept of the liberalistic and individualistic property right. And, with regard to the society and the country, as an expression of the duties regarding the society and the other constituent members of the constituent member of the society and the responsibility of the society regarding the constituent members of the society, it is one realized form of the social and national principle. By judging that 'The stipulation of the social duty of the exercise of the property right in the Constitution, itself, is a guarantee within the range of the guarantee of the privately-owned property system not scattering the harmony and the balance with the community life, in which one must live together with the other people,' the Constitutional Court has been making the Constitutional, normative power of the social binding of the property right clear and distinct. And, also, by saying, "This minimizes the negative, social effect of the conflicts between the classes and the

concentration of the economic power which are caused by the abuse and misuse of the property right. And, at the same time, it is caused by the fundamental purpose for rationally guaranteeing the property right that is guaranteed in the Constitution," it has been emphasizing the social binding of the property right which means the minimal self-sacrifice and yielding for the maintenance and the continued existence of the privately-owned properties system. Regarding the standard scale that decides the social binding of the property right, it is the social relevance and the social function that are possessed by the property object in a specific case. Or, in other words, it is that, in the case in which the property object that is owned by an individual has a direct or indirect meaning regarding not only the survival of the individual, but, also, the survivals and the lives of the other people, the social evaluation regarding the property right must become different. The social relevance of the property right is limited. And for the property objects that possess the scarcity and the social community, regarding the property objects that possess the important functions, it possesses bigger Constitutional meaning. In the case of the former, the thing that pertains is the social binding regarding the land property right. Or, in other words, the important, Constitutional, grounded theory that justifies the restriction of the land property right is the social binding of the property right. Regarding the Constitutional Court, too, by judging, 'As the property right regarding the land is the right of owning a specific part of a continuous space and the others of the like, the value of the land that becomes the object gets decided according to the overall, social conditions of the region in which the land is located, and it has the special characteristic of there being no choice but for the restriction that restricts the harmonized use of the other land in the neighborhood to follow. But, regarding the land, in principle, the production and the substitution are impossible, the supply has been restricted, and the usable land area of our country has been absolutely insufficient compared to the population. In contrast, as all of the citizens have been depending on the rational use of the land as the base for the production and the life, with regard to the social function and the aspect of the citizens' economy, as it is not a thing with the property of being able to be dealt with in the same way as the other property rights, the profit of the community must be accomplished more strongly,' it has been giving the wide-ranging legislation formation right regarding the land property right.

*D. The public use encroachments (Clause 3, Article 23 of the Constitution) and the land property right.*

In Clause 3, Article 23 of the Constitution, it has been regulating, "The acceptance, the use, or the restriction of the property right according to the public need and the compensation regarding it shall be done through a law. Except, the just compensation must be paid." Or, in other words, in the case of a public use infringement according to a public need, the public use,

infringement, legal principle that must be according to the law, without fail, and the principle of the just compensation regarding which there must be the just compensation have been regulated. Regarding the public use infringement, as a thing that partially or completely deprives the specific, subjective, and legal status according to the guarantee of the property right in the Constitution and as a thing that infringes upon the free guaranteeing function of the property right, it is possible only by satisfying the strict permission conditions (Zulässigkeitsvoraussetzung). As such permission conditions, the three kinds, including the public need, the grounds of the law, and the just compensation, have been regulated. Regarding the public use infringement, it gets justified only in the case in which a definitely decided, public task has been linked to the property right, which becomes the object. As a public task, the public need, ultimately, becomes specific by a person having the right to the legislation who reflects the demands of the era. As the public use infringement is a national tool that compulsively permits the infringement upon the property right, the exercise of the superior, governmental power gets justified according to only the law with the formal meaning that was enacted by the National Assembly, without fail. The law that becomes the basis for the public use infringement must be regulating subject for the compensation resulting from the infringement and the standard and the method of the compensation at the same time. Such an infringement upon the property right and the structure of the compensation according to the same law is called the "indivisibility provision" (Junktim-Klausel). In the law that restricts the property right, putting a matter related to the compensation together has the meaning of guaranteeing the continued existence and the value of the property right from the special, structural features of the property right guarantee which has the most restriction possibility according to the demand by the public welfare. The compensation according to the regulation in the law must be the just compensation according to the regulation in Clause 3, Article 23 of the Constitution. In the Constitutional complaint judgment regarding whether or not Clause 2, Article 46 of the Land Expropriation Act is unconstitutional, the Constitutional Court has been declaring that the just compensation as a compensation regarding the public use encroachment means the complete compensation. However, with regard to the actual application, because the decision regarding the compensation is made by considering the various factors, including the general, legal profit decisions that compare the public profit that is accomplished through the equality regulations, the society-national principle, and the public-use infringements in the Constitution with the private profits that had been infringed upon and the others of the like, the complete compensation according to the market transaction price not being materialized is a general thing.

### *III. The task: In the case of an amendment of the Constitution, the direction for the amendment of the regulation related to the land property right.*

#### *A. The organization of the pre-existent discussion.*

Regarding the Constitution, from the moment of the enactment or the amendment, the need for an amendment for a better Constitution gets raised. Our current Constitution is the Constitution according to the 9th amendment in the year 1987. Regarding our Constitution, too, without any exception, the need for an amendment has gotten around to coexisting. And, at last, the discussion regarding an amendment on the National Assembly level had taken place in the year 2009. And the publication of the written report on the results was reached. Especially, an amendment opinion regarding the property right was presented. If I were to summarize the contents, they are as in the following. First, it is the opinion that 'The exercise of the property right must be suitable for the public welfare' in Article 23 of the Constitution must be amended to 'The exercise of the property right must be made to be suitable to the public need and for the public welfare.' In this way, there had been the opposing opinion that, in the case of adding the public need to the pre-existent regulation, the exercise of the ownership right or the exercise of the property right in the liberal, market economy can be contracted. Second, with regard to the exercise of the property right, the duty of making it suitable for the public welfare is the internal limitation of the exercise of the property right. And, as the freedom and the rights of the citizens can be limited by a law in case it is necessary for the public welfare, the opinion is that the deletion is needed. The reason was that, due to the abstractness of the concept of the public welfare, the specific opinion and details can become a problem. Third, it is the opinion that the current regulation should be maintained without any amendment. With regard to the exercise of the property right, because of the point that there is a legislation case in a foreign country that makes it suitable to, or contribute to, the public welfare and that there is a need, too, to regulate Constitutionally, it is that the maintenance just the way it is currently is desirable. Fourth, it is the opinion that there is a need to expand the limitation regarding the property right according to the publicness. Even if the capitalistic market economy has been adopted, as, regarding the domains of the land, the medical treatment, the education, etc., there is the need to give the publicness, it is that there is a need to newly regulated with 'The ownership or the disposal of the land, the house, the natural resources, or the other, public goods can be restricted through a law so that it is suitable for the public welfare' in Article 23.

#### *B. The implications of the Constitutions of each country in the world with regard to the amendment of the Constitution.*

Regarding the regulation methods in relation to the guarantee of the land property right in the Constitutions of each country in the world, firstly, it is the case in which it has been regulated with the guarantee of the property right. Secondly, it is the case in which the social binding of the guarantee of the property right and the property right have been regulated at the same time. Thirdly, it is the case in which the land use and plan have been regulated. In the case of the first, regarding the land property right, while having the absolute guarantee in the modern, constitutionalistic Constitution as a premise, it is the method of imposing the restriction according to the special characteristics that are possessed by the land. And, in the case of the second, it is the method in which the relative importance of the restriction on the exercise of the property right has been strengthened rather than the guarantee of the property right. And, in the case of the third, regarding the land property right, while guaranteeing the private usefulness and the disposal authority of each and every individual, who are the citizens, as a basic right, it is the method which enables the imposition of a restriction for the use and the plan regarding the land as the national territory. In this way, differently from the other right of freedom that is guaranteed in the Constitution and the other general property right, the land property right has been taking the method in which the stronger restriction is imposed. This is due to the special characteristics of the fixability and the limitedness that are possessed by the land. Regarding the fixability and the limitedness of the land, it would not have been a problem with regard to the modern, constitutionalistic Constitution. And, with such a problem beginning to be carved in relief as a problem of the modern, society-national Constitution, the term of 'the land' got around to appearing in the Constitution and not the land that is included in the property right. Today, the reason why a stronger restriction has been imposed regarding the land in a modern country is because the special characteristics of the land have been carved in relief more gradually. According to the expansion of the population and the increase of the demand for land, such attendance will be amplified gradually more. As a result, with regard to an amendment of the Constitution, there is a need to reflect such a tendency.

Regarding the controversial issues in relation to the land property right with regard to an amendment of the Constitution in the future, they are the following: Firstly, the problem of whether the land will be regulated at the same time as the property right; Secondly, the problem of whether the duty of the suitability to the public welfare of the exercise of the property right will be abolished; Thirdly, it is the problem of whether the national territory will be specified as a land with regard to the use of, and the plan for, the national territory; Etc. In the case of the first, Clause 1, Article 23 of the Constitution says that there is no need to amend 'The property right of all of the citizens is guaranteed.' Secondly, it can be said that, regarding the amendment of Clause 2, Article 23, which regulated that 'The exercise of the property right must be suitable for the public welfare',

there is a need to consider it. This regulation is a regulation that has nearly the same meaning as the regulation that says, 'The property right is accompanied by the duty. The exercise must contribute to the public welfare at the same time', in Clause 2, Article 14 of the Basic Law of Germany, which was from Article 153 of the Weimar Constitution in the year 1919. The social bindingness of the property right means the imposition of the restriction that does not have a compensation to an owner of the land for the materialization of the public welfare. With regard to the public use acceptance for the materialization of the public welfare while being the same restriction, compared to the case that compensates, although only the extent and the effect of the restriction are different, it is the point of whether there is a need to distinguish it by making it into a Constitutional regulation. In the former part of Clause 1 of Article 23 of our Constitution, it has been regulating that, 'The property right of all of the citizens is guaranteed.' By saying, 'The content and the limitation are decided through a law' in the latter part, it has been imposing the restriction. Again, according to Clause 2, by regulating the social bindingness in this way, if we take a look at the regulation form of the guarantee of the property right, even if the public use acceptance is excluded, the two restrictions have been imposed. As a result, it can be said that there is a need to make the meaning and the content of the canon clear and definite either by deleting the latter part of Clause 1 or by amending the regulation in Clause 2. It can be said that, in this case, there is a need to refer to Article 29 of the Japanese Constitution, which imposed the guarantee of the property right in Clause 1 and the duty of the public welfare in the content of the property right in Clause 2. Thirdly, it shall be said that, by separating the land in the acceptance of the property right of the provision of the public use acceptance in Clause 3, Article 23 of the Constitution, there is a need to specify into the land acceptance or to amend to a complete guarantee and not the just compensation with regard to the compensation. It shall be said that, in this case, there is a need to refer to the Netherlands Constitution Article 14, which has been regulating the land acceptance and the complete compensation. Of course, such a reference is merely a reference. There is no need to regulate by quoting such a provision just the way it is. Except, in the Constitutions of such countries, the regulation of the land, the complete compensation, etc. can become an implication with regard to the point that it contains the background of the era and the social, pending issues that the society faces.

#### *V. The closing remarks.*

In the regulations of the Korean Constitution, there is no term of 'the land property right'. As a basic right that is enjoyed by each and every individual, who are the citizens, the land property right has been guaranteed by being included in the property right. And it has been included in the national territory with regard to

the national aspects. Article 23 of the Constitution, which guarantees the property right as a basic right, makes the guarantee of the property right in the former part of Clause 1 and the content and the limitation of the latter part of Clause 1 decided through the law. And it has the imposition of the duty of the public welfare suitability of the exercise of the property right in Clause 2 and the canonical structure that permits the public use infringement according to the public need in Clause 3. With regard to the guarantee of the property right, if we take a look at the canonical form only, it has the form in which there are the more restrictions than the guarantees. In addition, regarding the land, which becomes the core of the property right, it has not been regulating at all. Regarding the reason why the land is not regulated in the Constitution, it is conjectured that it had been thought about the sensitive problem of whether the land shall be a national ownership and the possibility of the guarantee with the abstract expression, too, of the property right, which is a special characteristic of the Constitutional regulations. In the Constitution, the method of the property regulation had been different according to how the idea regarding the land had been in the era. With regard to the regulation of the guarantee of the property right in the Constitution, in relation to the thing that had been regulated as the absolute guarantee by being based on the modern thoughts of the liberalism and the individualism, a lot of the restrictions had been imposed on the guarantee of the property right for materializing the aim to become a welfare country as it is in the modern, social-national Constitution. Regarding the property right restriction, in the wider meaning, it had been the restriction on the land property right. Without directly regulating the land in the Constitution, by regulating the guarantee of the property right, as long as the method that guarantees the land property right has been taken, it cannot be regulated as a restriction of the land property right. And, through the regulation of the property right restriction, the land property right got around to being restricted. Or, in other words, the norms get around to being realized in the order of the guarantee of the property right -> the guarantee of the land property right -> the restriction on the property right -> the restriction on the land property right. Regarding our Constitution, while the canons are made to be materialized through such a method, the land property right has been imposing the even more aggravated restriction compared to the other, ordinary property rights.

Like in the Korean Constitution, the case in which the property right restriction has been imposed on two or more provisions in the guarantee of the property right of one provision is the Basic Law of Germany. Regarding the Basic Law of Germany, it is a regulation that received Article 153 of the Weimar Constitution of the year 1919, which regulated the social, basic right for the very first time for overcoming the absolute poverty after the World War I just the way it is. Our Constitution, which was enacted in the year 1948, is 1 year quicker than the Basic Law of Germany, which was enacted in the year 1949, with regard to the enactment.

Despite this, the reason why there is the similarity with the regulation in the Basic Law of Germany is because, with regard to the enactment of our Constitution, the Weimar Constitution had been taken as one model. Because of such a reason, in Article 23 of our Constitution, in the same way as the Basic Law of Germany, the personality of the restriction on the property right has been regulated as a canon of which the personality is stronger. With regard to the amendment of the Constitution in the future, although it will be fine to leave Article 23, which has been guaranteeing the land property right through the guarantee of the property right, with regard to the proceeding with the amendment, it shall be said that there is a need to delete Clause 2 or amend the latter part of Clause 1 and Clause 2 by organizing them as on provision. Furthermore, I shall say that, regarding the current provision in which the land has been included in the meaning of the national territory, there is a need to think about the canonization, too, by using the term of the land in the specific case.

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