

Economic Development and Freedom of Occupation in Korean Constitution

Byun, Hae Cheol¹

¹ Professor, Law School of Hankuk University of Foreign Studies

ABSTRACT-- *The freedom of occupation, as a part of market economy order, has always faced changes in the political, economic and social environment. There have been also many changes in the traditionally accepted occupations with high economic development and social structure reform. There are two problems in this research first, how is the concept in freedom of occupation? and the second is how the limitation and harmonization of the freedom of occupation? This is research using doctrinal method which using legal statue approach. This research conclude that development of science and technology requires the sharing of all information and goods. The introduction of a new system represents a challenge to the existing order, and resistance arises.*

Keywords: *economic development, freedom, occupation, korean constitution*

I. INTRODUCTION

As human beings get usually the means of living through their own physical and/or intellectual activities, it is normal that they have to be able to decide and exercise their own activities, so-called, freedom of occupation. The freedom was not recognized in the medieval feudal class society. As a basic right, it was acquired only after the foundation of modern civil society, and even in modern society, it is not compatible, in principle, with planned economy order.¹ It means that the freedom to choose a job or an occupation is a basic human right "that is a factor of a liberal economic and social order, while at the same time it contributes to the development of a free personality by selecting the profession which is the life reward and the home of living."²

For this reason, it's not difficult to find a legal basis of freedom of occupation whether on an international order or at the individual country;

It was in the article 23 Al. 1 of Universal Declaration of Human Rights in 1948 that freedom of choosing an occupation is stipulated; "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."

In the article 15 and 16 of the Charter of Fundamental Rights of the European Union, freedom of occupation is specified in detail.³

And, many countries have guaranteed the freedom of occupation in their constitutions.⁴

In Korean Constitutions, it was by the constitutional amendment of 1962 that this freedom was firstly stipulated as a kind of constitutional rights. According to article 13, "All citizens shall enjoy freedom to choose its occupation." Article 15 of the current Korean Constitution stipulates the freedom of choosing an occupation.

However, the freedom of occupation, as a part of market economy order, has always faced changes in the political, economic and social environment. There have been also many changes in the traditionally accepted occupations with high economic development and social structure reform: disappearance and/or restructuring of traditional occupation and creation of new one. In other words, these kinds of activities are, sometimes, legally and in the different forms protected by the society, sometimes not. The question is which kind of works could be protected and/or to what extends. It is, especially, in a society in which its members can freely choose and exercise their own activities for assuring their means of living.

II. BASIC QUESTIONS ON THE FREEDOM OF OCCUPATION

At first, it is necessary to determine the concept of occupation (A). And, it is needed to determine the concrete contents of freedom of occupation (B).

A. Concept of occupation

The article 15 of Korean Constitution stipulates that

work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16 Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

⁴In Indonesian Constitution, Article 28E alinea 1 stipulates that "Every person shall be free ... to choose one's employment ..."

In Japanese Constitution, article 22 freedom to choose one's occupation
In German constitution, article 12 alinea 1, right to choose freely one's occupation

¹5-1 KCCR 365, 92Hun-Ma80, May 13, 1993.

² 1 KCCR 329, 89Hun-Ka102, Nov.20, 1989.

³Article 15 Freedom to choose an occupation and right to engage in work
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to

“All citizens shall have the freedom of choice of occupation.” What is an occupation as an object of constitutional protection? “Occupation” could be lexically defined as a person’s usual or principal work or business, especially as a means of earning a living.⁵ Korean Constitutional Court also accepted these two elements of definition in constitutional reviews; “continuity” and “means of earning a live”. In case of lack of an element, the Court did not recognize some activities or works as occupations, objects of constitutional protection. For example, leisure activities or hobby activities had not been recognized as occupations because of lack of “means of earning a live”.

However, the Court interpreting not strictly the definition, it considered the cumulative jobs and subsidiary works as an occupation because they are suitable for meeting the demand of life.⁶

In Academy Lecturer case⁷, a question is raised whether a teaching activity of university student for vacations can be considered as an occupation of academy lecturer. KCC considered that “concept indexes of an occupation are open-minded and do not need to be strictly interpreted. Regarding ‘continuity’, as long as the subject of activity is subjectively willing to carry out the income activity to some extent continuously and if it can be objectively continued, it is interpreted as satisfactory. Therefore, it will be considered to include activities during the vacation period and activities as a training worker.”

Also, another question can be raised if an occupation should not be public harmlessness. KCC has considered that the occupations include all continuous income activities to meet the basic needs of living, regardless of its kind and nature. It was confirmed in Exchange of the Game Result Case; “The exchange of the game result is the purchase of the game result from the game user and the profit is attached to the profit of the other game user. The operation of this action can be a continuous income activity meeting the basic demand of life. The occupation corresponds to the occupation guaranteed by Article 15 of the Constitution.”⁸

Exchanging activity of the game result is also considered as an occupation, an object of constitutional protection.

B. Contents of freedom of occupation

Despite of literal expression of freedom to choose an occupation in constitutional provision, it is understood as freedom of occupation, including freedom of job determination, freedom of exercising occupation, and

freedom of changing the profession.⁹ As KCC has relatively broadly recognized the freedom of choice of an occupation, it has been repeatedly recognized by the Court; “Article 15 of the Constitution stipulates that all citizens have the freedom to choose a job, but there is no doubt that these constitutional provisions do not only guarantee freedom of choice, but also guarantee the freedom of occupation itself, including freedom of exercising an occupation.”¹⁰

Besides, freedom of occupation includes freedom of business and freedom of enterprise, and in principle everyone can freely participate in competition based on the freedom of business and enterprise.¹¹

Freedom of competition is guaranteed by the freedom of the occupation as it is the result of the exercise of the freedom of the occupation by the subject of the basic rights and freedom to freely engage in business activities without interference or interference from the state in competition with other companies.

Freedom of occupation includes also freedom of accumulation of jobs. As accumulation of jobs could be prohibited only when there is a possibility of harming fairness, its prohibition in all cases is excessive restriction on freedom of choice of an occupation and unconstitutional.¹²

Is it possible not to work if we don’t like? It’s a question if one can enjoy freedom of no occupation. It is not explicitly mentioned in Korean Constitution. By interpreting constitutional provisions, we can answer to this question. At first, freedom of choice of an occupation includes, by nature and passively, one of choice of no occupation. And, the constitutional duty to work would be interpreted as an ethical one, not legal.¹³

What about freedom of choice of the place for educating the occupation? It is not also mentioned by constitutional provisions in Korea. However, it is not difficult to admit it positively. Because educating an occupation and choosing its place is a kind of premise for the freedom of occupation. In German Basic Laws, it is explicitly stipulated with the freedom of choice of an occupation and one of work place. (Article 12 Al.1)

III. LIMITATION AND HARMONIZATION OF THE FREEDOM OF OCCUPATION

A. Freedom of occupation and reform of social structure

In general, freedom of occupation could be restricted for the purpose of national security, the maintenance of law and order or for public welfare according to the article 37 Al. 2 of the Constitution.¹⁴

⁵www.dictionary.com

⁶Lee, Se Joo, “Freedom of enterprise in constitutional reviews”, Constitutional Law, Vol. 20-3(2014.9), 73.

⁷15-2 KCCR 454, 2002Hun-Ma519, Sept. 25, 2003

⁸22-1 KCCR 275, 2009Hun-Ba38, February 25, 2010

⁹5-1 KCCR 365, 92Hun-Ma80, May 13, 1993.

¹⁰8-1 KCCR 126, 94Hun-Ma13, Feb. 29, 1996.

¹¹8-2 KCCR 680, 96Hun-Ka18, Dec. 26, 1996

¹²9-1 KCCR 474, 95Hun-Ma90, April 24, 1997

¹³Sung, Nak-In, Constitutional Law, 19th Ed., 2019, p.1272.

¹⁴Article 37 al.2 The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Compared to the freedom of occupation decision and the freedom of occupation, relatively broader regulation of the freedom of occupation is possible.

Therefore, as with other basic rights, restrictions may be imposed if necessary for national security, order maintenance, or public welfare. However, the restrictions having to respect the principle of proportionality and the principle of protection of confidence, the method of restriction should be limited to law and limited to the minimum required. It is also self-evident without question (Article 37 (2) of the Constitution).

All reforms of social structure are not easy to achieve without conflict. Many reforms of social structure, led by recent Korean governments in 1990s, have been requested for the concrete realization of welfare State and the democratization of economy.¹⁵ For example, the enlargement of medical welfare asked to reform the entity of medical system: to divide medical treatment and prescription by doctor and preparation of medicine by pharmacist, to modernize traditional oriental medicine by separating it from western medicine, to integrate all national medical insurances under a unique system, etc. In this case, we can easily imagine that, changing the existing job holders activities, there are a certain tendency to resist against the reform by the concerned who challenge if it does not infringe on their freedom of occupation.

Pharmaceutical Affairs Act case¹⁶ shows very well. According to new Pharmaceutical Affairs Act, amended by Law No. 4731, January 7, 1994, oriental pharmacist is separated from pharmacist in general. It was for the purpose of enhancing the expertise of oriental medicine field. Under the new system, if all existing pharmacists want to treat oriental medicine, they have to get a new oriental pharmaceutical license. If not, they can no more treat traditional oriental medicine which they could treat without limitation before the reform.

In this case, KCC recognized the large possibility of legislation to the National Assembly for realizing the goals of the State in this field. And, they can always exercise their occupation as western medicine license holders. According to the Court, "it is impossible to reform the profession or reform the system according to the needs of the public welfare if the legislator has to adhere to the occupation that has already been formed for the guarantee of freedom of work or to keep similar occupations with different licensing requirements. Therefore, as long as the existing workers do not take measures that are contrary to the principle of excess prohibition (the principle of proportionality) in integrating similar occupations or establishing new occupations, I will have it."

In conclusion, as the medicine Act distinguishing

traditional medicine from western medicine by establishing newly a traditional medicine license is not violating the principle of excess prohibition, it is constitutional.

However, the Court asked that, even if the reforms are legitimate and the legislators have a large power to take a concrete form, it is necessary to respect the principle of protection of confidence. "If the law is amended, there will be some conflict of interest between the existing law and the law, and in this case the trust of the parties to the law must be protected."¹⁷

KCC applied repeatedly this type of judgement to the similar cases, concerned to social reforms. To make a law, it's largely up to the legislators as far as the social reforms respect the principle of protection of confidence. Regarding the principle of protection of confidence, it could be considered as being respected by allowing a transitory period for which the concerned could be supposed to adapt themselves to a new system.

B. Harmonization with other constitutional requests

Except general restrictions for the purpose of national security, the maintenance of law and order or for public welfare, freedom of occupation could be obliged to be in harmony with some constitutional requests which are stipulated explicitly by constitutional provisions: for example, preferential opportunity to work to those who have given distinguished service to the State, etc. (Art.32 Al.6)¹⁸, the balanced development of all regions (Art.123 Al.2), protection of small and medium enterprises (Al.3),¹⁹ etc.

It was a question that was raised by the governmental intervention in the liquor market. In the early 1970s, as the liquor market had been flooded with 400 soju companies nationwide, the government tried to integrate the market. As a result, the number of soju producers was increased to 10 companies in 1981. On the other hand, the government implemented the policy of ordering to purchase soju which was produced in the province where the wholesaler was located from 1976. It was in order to prevent the monopoly of so-called specific companies and balanced development of local industry.

Even though this policy had contributed to restrict competition and maintain the current status of the soju market, it was abolished in 1991 as the government decided to relax the regulations on the mainstream industry in order to improve the service to consumers and enhance the competitiveness of mainstream industries

¹⁷9-2 KCCR 651, 97Hun-Ba10, Nov. 27, 1997

¹⁸Article 32 (6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and police officers, and members of the bereaved families of military service members and police officers killed in action.

¹⁹Article 123 (2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.

(3) The State shall protect and foster small and medium enterprises.

¹⁵Byun, HaeCheol, "The Economy in Korean Constitution", Public Land Law Review Vol.43-1(2009.2), Korea Public Land Law Association, pp. 441-456.

¹⁶9-2 KCCR 651, 97Hun-Ba10, Nov. 27, 1997

through free competition. But, being re-implemented in 1995, the policy was asked to be constitutional or not by infringing on the soju dealers' freedom of occupation and soju manufacturers' freedom of competition and enterprise.

Regarding the constitutional duty of the State on the regional economic development, KCC tried to examine if the purpose of the policy would be in line with the purpose of the regional economic development and could legitimate infringement of an individual's fundamental rights.

The Court considered that, as "the purpose of the regional economic development has been primarily to reduce economic unbalances among regions", it is necessary "for justifying infringement of an individual's fundamental rights to be a concrete and reasonable reason like either an existing economic downturn in the region in question, or a disproportionate economic imbalance between regions that would occur if certain legislative measures were not taken."²⁰

However, the Liquor Tax Act, which aims to maintain a soju manufacturing enterprise uniformly at the national angle, cannot identify the specific regional differences to be corrected. Therefore, it is difficult to consider "the fostering of the local economy" as a public benefit that can justify the infringement of the basic rights, because there is no correlation between the maintenance of the sustainability of the 1 l 1 soju manufacturer and the upbringing of the local economy.

Regarding the constitutional duty of the State on the protection of small and medium-sized enterprises (SMEs), the Court confirmed that "it is aimed at supplementing, for the purpose of the public interest with the support of the state to maintain and promote the competition, the disadvantages occurred in the free competition order. However, the purchase order system cannot be considered as adequate means to realize this kind of public interest."

"Therefore, the purchase order system is an unconstitutional regulation that violates too much of the soju dealer's freedom of occupation as well as the soju manufacturer's freedom of competition and enterprise, that is, freedom of occupation and the right to self-determination derived from consumer's right of pursuit of happiness."

IV. CONCLUSION

In human beings' history, the freedom of occupation has always faced new waves of the society. Today, the development of science and technology requires the sharing of all information and goods. The introduction of a new system represents a challenge to the existing order, and resistance arises.

Recently, in Korea, there has been a serious social

conflicts between licensed taxi drivers and individual drivers sharing their cars through SNS. Sharing one's car for a fee, as a type of sharing economy, it means an appearance of new type's public transport like Uber taxi and one of a new job. It asks to share the taxi market between traditional taxi drivers and individual drivers offering their car to the public for a fee.²¹

Even though it is also a kind of constitutional requests to harmonize the two kinds of job, sharing means of transport can be advantageous for users through competition between them. And, it is doubtful whether we will be able to deny this time change. As KCC has already confirmed, it is impossible to reform the society, including the profession or the system, according to the needs of the public welfare if the legislator has to adhere to the existing order that has already been formed. Based on a certain degree of confidence protection, new changes must be actively accepted in legislation and in constitutional review, especially, in the field of freedom of occupation.

REFERENCES

- [1]. Byun, HaeCheol, "The Economy in Korean Constitution", Public Land Law Review Vol.43-1(2009.2), Korea Public Land Law Association, pp. 441-456.
- [2]. Lee, Cheol Ho, "Freedom of choice of occupation and limitation of public officials' employment", Constitutional Law, Vol. 8-3(2002.10), 179.
- [3]. Lee, DukYeon, "Freedom of Business and Constitutional Economic Order in Korea", Public Law, Vol. 29-1 (2000.10), pp. 161-180.
- [4]. Lee, Se Joo, "Freedom of enterprise in constitutional reviews", Constitutional Law, Vol. 20-3(2014.9), 73.
- [5]. Lee, Seung Woo, "Freedom of choice of occupation and license system", Sekwang Publishing, 2002.
- [6]. Song, Ki Choon, "Limitation of employment in Public Service Ethics Act", Constitutional Law, Vol. 17-3(2011.9), 209.
- [7]. Sung, Nak-In, Constitutional Law, 19th Ed., Bobmun Sa, 2019.
- [8]. www.ccourt.go.kr
- [9]. www.moleg.go.kr
- [10]. www.klri.re.kr

²⁰8-2 KCCR 680, 96Hun-Ka18, Dec. 26, 1996

²¹ According to *The Future of Jobs*, Report of World Economic Forum of 2016, 7.1 million jobs will be disappeared instead of appearance new 2 million jobs till 2020 by the 4th industrial revolution.