

# The Doctrine on the Restriction of the Landowner's Exclusive Right to Use and Profit: An Analysis of the Supreme Court *en banc* Decision 2016Da264556 (Jan. 24, 2019)\*

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## I. Overview of the Decision

### 1. Facts

The Plaintiff in the case inherited Land X from his deceased father A on May 29, 1995. A storm drain that carried wastewater from nearby houses was buried underground on a part of Land X (hereinafter “the disputed land”). Above this ground was House Y, which was owned by A. After inheriting the land, the Plaintiff demolished House Y, making the land completely empty. The Plaintiff then filed a lawsuit against the Defendant (local government), who is responsible for managing the storm drain under the disputed Land, seeking the removal of the storm drain and restitution for unjust enrichment equivalent to the underground rent of the land. The Defendant argued that A abandoned his exclusive right as an owner to use and profit from the Land by voluntarily providing the land to install the

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storm drain in the interest of the public, and that the Plaintiff, as the successor to A, inherited the land with the same restriction.

## *2. Progress of the Case*

The court of first instance accepted the Plaintiff's claim under the reasoning that there were insufficient grounds to show that A had abandoned his exclusive rights to use and profit.<sup>1)</sup> The second instance court, however, dismissed the case, acknowledging the abandonment of the exclusive right to use and profit, on the grounds that A had proactively agreed to the installation of the storm drain and possibly used the storm drain for his own interest. The court also observed that the Plaintiff had not claimed the removal of the storm drain or restitution for unjust enrichment until the Plaintiff demolished House Y.<sup>2)</sup> The Plaintiff appealed and argued that the storm drain buried underneath the disputed land is part of the public sewage treatment plant under the Sewerage Act, which provides grounds for expropriation and compensation in the case that private land is used for public interest. Therefore, the Plaintiff argued that the doctrine of abandoning the exclusive right to use and profit cannot be applied since this argument runs the risk of circumventing the expropriation system. The Plaintiff further argued that the abandonment of the exclusive right to use and profit cannot be acknowledged based on the circumstances of the case as a matter of fact.

## *3. Holding of the Decision*

The Supreme Court dismissed the appeal. Reaffirming the doctrine of the abandonment of the exclusive right to use and profit, the Supreme Court noted that A voluntarily allowed the installation of the storm drain for his own convenience as well as that of other nearby houses, and that there is a public interest in restricting A's exclusive right to use and profit based on the revealed facts. The main holding regarding the doctrine in the decision is as follows:

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1) Suwon District Court [Suwon Dist. Ct.] 2013Gadan53256, Nov. 12, 2014, (S. Kor.).

2) Suwon District Court [Suwon Dist. Ct.] 2014Na46157, Oct. 12, 2016 (S. Kor.).

The Supreme Court has for a long time been developing the legal doctrine regarding the restriction to the exclusive right to use and profit, and it still recognizes the validity of this restriction. However, to judge whether a land owner should be restricted in exercising his exclusive right to use and profit, one must consider the balance between the ownership of the land and the public interest. Even when the owner's exclusive right to use and profit is restricted, the exclusive right to use and profit may be granted to a transferee under special circumstances. In addition, even when the exercise of use and profit is restricted, the doctrine of change of circumstances may be applied in cases where the requirements are met, thereby allowing landowners the exclusive right to use and profit.

However, in this case, the owner's permanent and in-rem abandonment of the right to use and profit runs counter to the *numerus clausus* principle and is therefore not allowable. Restrictions to the landowner's exclusive right to use and profit apply only to the extent to which such restrictions are incompatible with public usage of the land. The landowner still retains such right as long as it does not interfere with such public usage. This doctrine also applies when a landowner provides land for purposes other than roads. In addition, unless otherwise stated, it is proper to interpret the law such that restrictions to the landowner's exclusive right to use and profit apply to the underground part of the land as well.

In opposition to the above ruling, two Supreme Court Justices expressed dissenting opinions.<sup>3)</sup> Justice Hee Dae Jo opined that the doctrine is not coherent with the current legal doctrinal system and therefore should be discarded. Justice Jae Hyung Kim opined that all precedents should be discarded unless the abandonment of the exclusive right to use and profit is believed to have a contractual nature.<sup>4)</sup>

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3) Supreme Court Justices Soon-il Kwon, Sang-ok Park and You-sook Min wrote the concurring opinion to the majority opinion.

4) Supreme Court Justice Jae-hyung Kim wrote the concurring opinion to the dissenting opinion.

## II. Doctrine of Abandoning the Exclusive Right to Use and Profit

The doctrine of abandoning the exclusive right to use and profit is indeed a peculiar one.<sup>5)</sup> No articles in the Korean Civil Code support such a doctrine, nor does any academic theory. Furthermore, it is difficult to find similar doctrines at an international level. Very few Korean civil law doctrines lack any foundation in comparative law. Indeed, this doctrine may be viewed as a creative, original Korean legal doctrine formed by an accumulation of judicial precedents.<sup>6)</sup> This intriguing doctrine has been applied in situations where private land is used as a de facto road, mostly to rule against claims based on the landowner's rights, including the right to seek compensation for unjust enrichment vis-à-vis local governments that possess and maintain such land as part of a public road. In general, public roads are considered public goods. However, the land used as a de facto road may be owned by a private person or entity. Tension arises from this conflict between economic substance and legal forms, especially when a landowner who initially made their land available for common use then attempts to exercise their right and contravene this usage by arguing that the land is privately owned.

The Supreme Court has often ruled against landowners' unjust enrichment claims by denying the possession of local governments.<sup>7)</sup> Denial of possession could easily be used as grounds for denying an unjust enrichment claim, since it would be unnatural to acknowledge unjust enrichment due to the land without possession of the land. Another logic emerged wherein the unjust enrichment claim was dismissed by denying

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5) The decision at hand uses the terms "abandoning the exclusive right to use and profit" and "limiting the exclusive right to use and profit." However, since the term "abandonment" has heretofore been used overwhelmingly more frequently in similar cases, this article will henceforth refer to the legal principle of abandoning the exclusive right to use and profit.

6) However, it also applies when the landowner provides the land for purposes other than roads, *see* Supreme Court [S. Ct.] 2015Da238185, Mar. 3, 2017 (S. Kor.).

7) Supreme Court [S. Ct.] 75Da997, Dec. 9, 1975 (S. Kor.); Supreme Court [S. Ct.], 84Daka689, Feb. 11, 1986 (S. Kor.); Supreme Court [S. Ct.], 87Daka1470, Oct. 13, 1987 (S. Kor.); Supreme Court [S. Ct.], 90Da7166, Feb. 8, 1991(S. Kor.).

one of the key conditions to file for the return of unjust enrichment: loss. Following the Supreme Court Decisions 73Da401 (Aug. 21, 1973) and 73Da 399 (May 28, 1974) to this effect,<sup>8)</sup> precedents have accumulated continuously since the 1980s, leading to the current legal doctrine.<sup>9)</sup> The key component of this doctrine is that if a landowner abandoned or lost otherwise his exclusive right to use and profit by voluntarily permitting other residents to pass through the land or at least voluntarily tolerating such public usage, it is hard to argue that the landowner suffered any loss from this usage. The landowner therefore cannot request restitution of unjust enrichment against local governments in case they possess and maintain the land as a public road. This doctrine has been applied not only to monetary claims, including the claim for restitution of unjust enrichment, but also to claims based on ownership, including claims for land clearance.<sup>10)</sup>

However, the doctrine of abandoning the exclusive right to use and profit has frequently been criticized for going against the principle of *numerus clausus* and its related principle, the principle of publicity.<sup>11)</sup> According to the Civil Code, ownership without the right to use or profit can no longer be considered the right to ownership, since the right to use or profit is an essential element of ownership. No customary law acknowledges such a form of ownership. Therefore, the acknowledgement of this right runs counter to the *numerus clausus* principle stated in Art. 185 of the Civil Code. Furthermore, the right to ownership without the right to

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8) Kyeong-hwan Seo, *Baetajeok Sayong Suikgwon Pogi Beomni-ui Munjejeom-gwa geu Daeaneuroseoui Tonghaengjiyeokgwon* [Problems with the Waiver of the Exclusive Right to Use and Profit and Right to Passage Easement as an Alternative], 54 S. Ct. L. R. 476, 481 (2012) (In Korean).

9) The decision at hand mentioned Supreme Court [S. Ct.], 85Daka421, Aug. 13, 1985 (S. Kor.); Supreme Court [S. Ct.], 88Daka16997, July 11, 1989 (S. Kor.); Supreme Court [S. Ct.], 88Daka16997, July 11, 1989 (S. Kor.); Supreme Court [S. Ct.], 90Da7166, Feb. 8, 1991 (S. Kor.); and Supreme Court [S. Ct.], 93Da2315, May 14, 1993 (S. Kor.)

10) Supreme Court [S. Ct.], 2010Da84703, May 26, 2011 (S. Kor.); Supreme Court [S. Ct.], 2011Da63055, Nov. 14, 2013 (S. Kor.).

11) For more details on these criticisms, see Young-joon Kwon, *Baetajeok Sayongsuikgwon Pogi Beomni Gwanhan Bipanjeok Geomto* [Using Private Land as a *de facto* Road: Critical Analysis of the Korean Supreme Court Decisions on Unjust Enrichment Claims], 47 No. 4 SEoul L.J. 304, 305 (2006) (In Korean). Supreme Court [S. Ct.], 90Da7166, Feb. 8, 1991 (S. Kor.) acknowledges the same issue.

use or profit cannot be publicly registered, which means that this right contravenes the principle of publicity. In terms of legal policies, this doctrine could be exploited to excessively limit citizens' property rights. In order to expropriate or use private land for public purposes, proper steps must be taken, in accordance with the terms outlined in Art. 23 para. 3 of the Constitution and the Act on the Acquisition of and Compensation for Land, etc., for Public Works Projects.<sup>12)</sup> If the landowner is not properly compensated, any unjust enrichments obtained from the use of and profit from the land must be restituted. However, denying restitution for unjust enrichment on the grounds that the exclusive right to use and profit was abandoned creates a risk of de facto public use without fair compensation. In the present case, there is also the question of whether the exclusive right to use and profit was in fact abandoned. In many previous cases, during intensive government-led development, landowners would passively permit the public use of their land by failing to raise any objections, rather than by actively expressing their intention to abandon their exclusive rights. Accordingly, assuming the landowner's abandonment of the exclusive right to use and profit from the owner's silence may be an unreasonable assumption of intent and may even be abused in the name of judicial discretion by construing the landowner's implied intent.

In light of these criticisms, the Supreme Court has recently changed its stance to resolve this problem. In the Supreme Court Decision 2009Da228 (March 26, 2009), the Court ruled that "if key components of the rights of ownership, such as the right to use and profit, could be validly relinquished in general by the owner, then this would generate a new form of ownership unknown to civil law, in which the owner only retains the right to disposition. Such a new form of ownership would significantly undermine the current system of real rights, which is based on a definition of ownership comprising comprehensive control over the object." The Supreme Court thus clarified that it is invalid to argue that an owner has abandoned the exclusive right to use and profit in the context of real rights.

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12) The current law allows the builder of a private road to collect tolls from users of such road (Article 10 of Private Road Act), while a de facto private road is also subject to compensation (see Article 26 of Enforcement Rule of the Act on Acquisition of and Compensation for Land, etc. for Public Works Projects).

As this decision was the first to expressly point out the doctrinal problem concerning relinquishment of the exclusive right to use and profit, it marked the beginning of a change in subsequent decisions.<sup>13)</sup> The Supreme Court held in later decisions that abandonment of the exclusive right to use and profit are only valid in the context of law in personam.<sup>14)</sup> Moreover, the Supreme Court Decision 2012Da54133 (Aug. 22, 2013) held that these abandoned exclusive rights to use and profit may be restored “if the objective circumstances that were the grounds for the abandonment have significantly changed, such as significant changes to the use of the land.” If the exclusive right to use and profit could be abandoned in the context of real rights, then it would be hard to explain how these abandoned rights could be restored due to a change in circumstances. Therefore, this decision is also based on the premise that the abandonment of the exclusive right to use and profit does not apply in the context of real rights. By excluding real rights from this context, the Supreme Court intended to circumvent the barrier between the doctrine of the abandonment of the exclusive right to use and profit and the key principles of real rights law.

This change in the Supreme Court's case law seems to result from reflections on scholarly criticisms. However, even if the abandonment of the exclusive right to use and profit is restricted to the context of law in personam, the doctrine still poses several problems. The Supreme Court has also ruled that the abandonment of the exclusive right to use and profit impacts transferees.<sup>15)</sup> However, if such an abandonment only applies in

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13) Young-joon Kwon, *Sashilsang Dororo Yiyongduineun Sayuji Soyukwonui Munje [The Problem of Ownership of Private Land Used as a de facto Road]*, 21 PROBLEMS OF CIVIL PROCEDURE BOOK 338 (1st ed. 2012) (In Korean).

14) Supreme Court [S. Ct.], 2007Da83649, July 9, 2009 (S. Kor.); Supreme Court [S. Ct.], 2010Da81049, June 28, 2012 (S. Kor.); Supreme Court [S. Ct.], 2012Da54133, Aug. 22, 2013 (S. Kor.); Supreme Court [S. Ct.], 2017Da211528, 211535, June 19, 2017 (S. Kor.); Supreme Court [S. Ct.], 2017Du50843, Oct. 26, 2017 (S. Kor.).

15) Supreme Court [S. Ct.], 92Da15970, July 24, 1992 (S. Kor.). This decision held that if the transferee “was aware of” the circumstances of the abandonment of the exclusive right to use and profit, he or she could not request restitution for unjust enrichment. However, in subsequent decisions, such as Supreme Court [S. Ct.], 94Da20013, Sept. 30, 1994 (S. Kor.); Supreme Court [S. Ct.], 99Da11557, May 11, 1999 (S. Kor.); Supreme Court [S. Ct.], 2006Da32552, Feb. 22, 2007 (S. Kor.); Supreme Court [S. Ct.], 2010Da84703, May 26, 2011 (S. Kor.); Supreme Court [S. Ct.], 2012Da26411, July 12, 2012 (S. Kor.); and Supreme Court [S. Ct.], 2011Da63055, Nov. 14, 2013 (S. Kor.), the Supreme Court denied the request for restitution for

personam, it is difficult to explain why such an in personam abandonment can then impact a third party, the transferee of the land.<sup>16)</sup> Furthermore, it is also unclear to whom the intention to abandon the exclusive right was expressed.<sup>17)</sup> If the other party to whom such a declaration of intention is directed is the general public or the local government, then it is also unclear how, in practice, this declaration of intention could be made to both parties. Overall, despite its efforts to justify its stance in the face of criticisms of the doctrine of the exclusive right to use and profit, the Supreme Court has failed to provide a coherent justification.

### III. Analysis of the Decision

The decision at hand attempted to resolve the doctrinal dispute described above concerning the abandonment of the exclusive right to use and profit. In its deliberation, the Supreme Court seriously examined the appropriateness of the existing doctrine. However, all but two Justices

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unjust enrichment on the grounds that “unless there are particular circumstances stating otherwise, it is reasonable to conclude that the transferee acquired the ownership of land while tolerating or at least with knowledge of the circumstances restricting the right to use and profit.” In other words, in determining the effect of abandonment, the Supreme Court changed its stance from evaluating whether the successor was aware of the circumstances of the abandonment to assuming that he or she was aware of those circumstances at the time of the transfer.

16) Young-joon Kwon, *supra* note 11, at 332-333; Seong-uk Chang, Hyun-suk Lee, *Baetajuk Sayong · Suikkwon Pogi Beomnie Gwanhan Bipan [Criticisms on the Jurisprudence on the Relinquishment of the Exclusive Right to Use and Profit]*, 41 *ILKAM L. R.*, 176 (2018) (In Korean); Hyung-woo Yang, *Tojisoyujaeui Dokjumjeok · Baetajjeok-in Sayong · Suikkwon Haengsaeeui Jaehan—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.) [*Restrictions on the Landowner’s Monopolistic, Exclusive Right to Use and Profit—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.)], 20-2 *HONGIK L. R.* 541, 542 (2019) (In Korean); Sung-jin Lee, *Tojisoyujauui Baetajjeok Sayongsuikkwon Pogi—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.) [*The Landowner’s Relinquishment of the Exclusive Right to Use and Profit—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.)], 35-1 *LAND L. R.* 220 (2019) (In Korean).

17) Young-joon Kwon, *supra* note 11, at 321; Seong-uk Chang, Hyun-suk Lee, *supra* note 16, at 176; Hyung-woo Yang, *supra* note 16, at 533; Sang-heon Kim, *Baetajjeok Sayong · Suik Pogi Beomni-ui Tadangseong Yeobuleul Jaelonhamieo—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.)—[*Reconsidering the Validity of the Jurisprudence on the Landowner’s Relinquishment of Exclusive Right to Use and Profit—Supreme Court [S. Ct.]*, 2016Da264556, Jan. 24, 2019 (S. Kor.)], 36-1 *PROPERTY RIGHT L. R.* 19, 20 (2019) (In Korean).



decided that this doctrine should be maintained. The decision at hand notably used, presumably with intention, the concept of “restriction” in lieu of the concept of “abandonment” of exclusive rights. Moreover, by leaving open the possibility that the effects of such a restriction may not extend to transferees, the decision at hand stepped back from previous case law, which indicated that a landowner’s abandonment would always extend to the transferee of the land.

In retrospect, the Supreme Court has continuously confronted doctrinal challenges and has changed this doctrine to a certain extent. Given its flexibility and long-standing history, it is understandable that the Supreme Court chose to adhere to the doctrine, which had served the useful purpose of restricting the re-privatization of a de facto public road, rather than abrogating the doctrine entirely and discarding numerous decisions based on it. Moreover, it is true that, in some cases, this doctrine has provided judges with a doctrinal tool to justify equitable outcomes. Eliminating this doctrinal tool entirely could prevent judges from reaching such outcomes. This line of argument is reiterated in the following complementary view to the majority opinion, written by Justices Soon Il Kwon, Sang Ok Park, and You Sook Min.

The doctrine established by previous Supreme Court decisions on the abandonment of the exclusive right to use and profit is neither directly based on statutory law nor derived from the abstract legal theories of academia. Rather, it has developed out of the practical need to provide specific equitable outcomes in relationships between landowners and stakeholders. The doctrine established by the Supreme Court has functioned for a long time as an important criterion for restricting the exercise of landowners’ rights because it has ensured equitable outcomes in multiple cases, and also because the conclusions thereby reached were in accordance with the general public’s sense of justice. In other words, this doctrine has appropriately evaluated the interests of stakeholders in cases where the landowner has agreed to restrict his or her right to use and profit by providing his or her land for public use.

The doctrine on the abandonment of the exclusive right to use and profit has been changed to soften its harsh approach to the right to ownership. That is, the Supreme Court has gradually shifted its stance on the concept of justice by considering the relationship between practice and doctrine. However, the dissenting opinion written by Supreme Court Justice Hee Dae Jo points out that doctrinal limitations should not be neglected for the sake of practical needs; in fact, the opinion goes so far as to argue for a complete abrogation of existing case law:

While recent Supreme Court decisions have recognized the problem in the doctrine regarding the abandonment of the exclusive right to use and profit and have started to restrict the scope of its application, such attempts do not resolve the fundamental problem but rather lead to inequity and confusion in the application of the law. Instead, it is time to boldly abrogate this case law, which has no legal basis and is not in accordance with civil law or the Constitution.

As pointed out by Supreme Court Justice Jae Hyung Kim in this dissenting opinion, although it is the task of the Supreme Court to clarify which parts of the case law should be abrogated or maintained instead of simply covering up the inconsistencies within this case law, the majority opinion is ambiguous on this matter.

Two strands of case law concern the abandonment of the exclusive right to use and profit. Case law such as Supreme Court Decision 88DaKa16997 established the “abandonment of rights” as the legal requirement for restricting a landowner’s exercise of rights. On the other hand, case law such as Supreme Court Decision 2009Da228 deny the universal, permanent effect of such an abandonment and establish a new doctrine that only acknowledges the in personam effect of such an abandonment, rather than specifying or limiting the application or scope of the doctrine. These two conflicting strands of case law coexist to this day. The Supreme Court, which has the highest authority to interpret the law, should not make the self-contradictory claim that “although it has been using the term ‘abandonment,’ it did not in fact mean abandonment.” Since the Supreme Court’s full-bench decision addresses this issue, the Court should clearly

declare which one of these incompatible precedents it will retain.

The majority opinion's position that there is no need to discard the existing doctrine entirely is reasonable, as gradual and flexible self-transformation or de facto shifts in precedents may eventually reconcile this contradiction, even if the doctrine is not completely discarded. Contradictions in existing precedents do not necessarily mean that it is necessary to change precedents every time such a contradiction arises. However, it is necessary to overturn a precedent when that precedent's continuous self-transformation reaches its own limits, making it impossible for the precedent to resolve its own inherent problems. Although the doctrine on the abandonment of the exclusive right to use and profit has thus far been maintained via such shifts, it still fails to resolve the problem of excessive restrictions to restitution claims and the problem of unjustifiably restricting the rights of the transferee of a piece of land. Therefore, these problems should be considered again to determine whether they can be addressed via alternative methods. This is a better solution than continuing to adhere to the existing doctrine.

I hold the position that the existing doctrine has inherent doctrinal limits despite prior changes to the doctrine. In my view, the principle of good faith should play a primary role and should be supported by secondary and fragmentary legal concepts such as contracts, waivers of ownership, or the implied right of easement of access.<sup>18)</sup> From a doctrinal perspective, the doctrine on the abandonment of the exclusive right to use and profit is not an independent and separate legal doctrine in itself; rather, it arises from principle of good faith.<sup>19)</sup> Supreme Court Decision 2012Da54133 (Aug. 22,

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18) For details on solubility based on theories of the implied right of way easement, see Min-jung Kim, *Sasilsang Dororo Sayongdoeneun Tojie Daehan Soyujaeui Baetajeok Sayong · Suikgwoneui Pogiran Mueosigo, Tojiui Teukjeong Seunggyein Egeneun Eotteon Hyoryeogi Issneunga* [What Relinquishment of the Exclusive Right to Use and Profit from Land That is Used As a de facto Road Is and Its Effect on the Limited Successor of the Land], JAEPANSILMUYEONGU (GWANGJU JIBANG BEOBWON) (2011) [STUDY ON COURT PRACTICE] 82; KYEONG-HWAN SEO, *supra* note 8, at 506-510.

19) Mun-gwan Kim, *Baetajeok Sayong · Suikgwoni Pogidoen Tojireul Je Sam Jaga Jeomyu Haneun Gyeongju, Toji Soyujau Banghae Baeje mit Budang Ideuk Banhwan Cheongju* [The Landowner's Claim for Obstruction Removal and for Restitution for Unjust Enrichment in the Case of a Third Party Occupying the Land to Which the Exclusive Right to Use and Profit Has Been Relinquished], 14 PALLYE YEONGU (BUSAN PALLYE YEONGUHOE) [STUDY ON JUDICIAL PRECEDENTS] 110, 111; Young-joon Kwon, *supra* note 11, at 334; Jun-kwoo Ryu, *Jongjeon Soyujaga Dokjeomjeok*

2013), addresses the recovery of the abandoned exclusive right to use and profit due to a change of circumstances. This decision explicitly reveals the link between this doctrine and the principle of good faith. It states that “the principle of good faith, including promissory estoppel and protection of confidence,” is the basis for the doctrine of the abandonment of the exclusive right to use and profit.<sup>20)</sup> The principle of good faith encompasses several concrete subprinciples,<sup>21)</sup> and the above doctrine can be understood as one of these subprinciples.

This means that restitution claims should be more readily allowed. If the existing doctrine is applied, the restitution claim in the present case is likely to be rejected. This is because the so-called voluntary requirement and the utility requirement are both satisfied<sup>22)</sup> and because there have been no significant changes to the objective circumstances. On the other hand, if the principle of good faith is applied in this case, the landowner’s restitution claim is likely to be accepted, since the fact that the owner initially refrained from exercising his rights and later changed his mind does not necessarily violate promissory estoppel. Furthermore, it is difficult for local governments to argue that there is a legitimate normative expectation that the owner or his or her transferees or successors will never exercise their rights in the future. This is because owners have the freedom

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*Baetajeok Sayong · Suikgwoneul Pogihan Tojiui Soyugwoneul Teukjeongseunggyehan Jaga Wi Tojireul Dororo Sayong · Jeomyuhago Inneun Jibangjachidanchereul Sangdaero Indo Ttoneun Budangideukbanhwaneul Guhal su Inneunji Yeobu [Whether a Limited Successor of the Ownership of Land that a Former Owner Has Relinquished Monopolistic Exclusive Right to Use and Profit Can Claim Delivery or Restitution for Unjust Enrichment], JAEPANGWA PALLYE (DAEGU PALLYE YEONGUHOE) (2013) [TRIALS AND PRECEDENTS] 169, 173.*

20) For details, see Soon-ho Kwon, *Ilban Gongjungui Tonghaenge Jegongdoen Tojie Gwanhan Baetajeok Sayong · Suikgwon Haengsa Jehangwa Sinuiseongsirui Wonchik [Restrictions on the Exclusive Right to Use and Profit from Land that has been Provided for the Passage of the General Public and the Principle of Good Faith]*, 97 ha TAEBOBWON PALLYE HAESOL [COMMENTARIES ON THE SUPREME COURT DECISIONS] 72; Young-joon Kwon, *Semilhan Jeonguireul Hyanghan Yeojeong—Bakbyeongdae Daebeopgwani Minsapangyeol Bunseok [The Road to Precise Justice—an Analysis of the Civil Judgments of Supreme Court Justice Byeong Dae Park]*, PARK BYEONG DAE DAEBEOPGWAN TOEIMGINYEOM NONMUNJIP [COLLECTION OF ESSAYS COMMEMORATING THE RETIREMENT OF THE SUPREME COURT JUSTICE BYEONG DAE PARK] 69, 70.

21) Such subprinciples include venire contra factum proprium, promissory estoppel, change of circumstances, etc.

22) For details on the voluntary requirement and the utility requirement, see Young-joon Kwon, *supra* note 11, at 316-317.

to change their minds within the scope of the law, and local governments are obliged to pay legitimate legal compensation for the restriction of private land ownership for public purposes. Furthermore, it shall be taken into account that claims for the payment of money, such as the claim for unjust enrichment in this case, are rarely rejected for violating the principle of good faith.

Likewise, allowing restitution claims does not significantly harm the public interest, as it does not interfere with the general public's use of the land but only obligates local governments to compensate the owner. Of course, if the restitution of unjust enrichment increases, the financial burden of the local government will increase as well, and this may indirectly harm public interest. However, in principle, a financial burden cannot be the reason for prohibiting one from exercising his or her rights, just as the lack of funds defense cannot hold in cases involving loans. In addition, the extinctive prescription for restitution claims against local governments is five years (Local Finance Act Art. 82). Thus, in practice, only restitution claims for possession and use within the previous five years can be exercised. In addition, the amount obtained for unjust enrichment is calculated with a consideration of actual limitations to the use of the land; that is, the current status of the road.<sup>23)</sup> Such calculations also apply to transferees claiming restitution for unjust enrichment after purchasing a piece of land at a low price.<sup>24)</sup> Therefore, the actual amount of compensation paid by local governments is bound to be limited to a reasonable scope, which means that the financial burden on local governments cannot be too onerous.

Meanwhile, exercising claims for real rights is very different from exercising claims for restitution for unjust enrichment. First of all, there may be no reason to exercise claims for real rights if public compensation or restitution for unjust enrichment can be made. In addition, unlike granting

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23) Supreme Court [S. Ct.], 95Da39946, Nov. 24, 1995 (S. Kor.); Supreme Court [S. Ct.], 98Da56232, Apr. 27, 1999 (S. Kor.); Supreme Court [S. Ct.], 2004Da7286, Sept. 24, 2004 (S. Kor.), etc.

24) Even though the investment strategy of raising a lawsuit after purchasing land at a cheap price can temporarily yield high profits, eventually, it will become impossible to purchase the land cheaply once the rule legally approving restitution claims is established, as the possibility of such strategies will be reflected preemptively in the land price.

restitution, granting injunctions based on real rights can severely harm the public interest, as it can harm the passage of the general public or the convenience of nearby residents. As for the principle of the prohibition of abuse of rights, which is a subprinciple of the principle of good faith, many precedents have a strict subjective requirement: rights are abused when they are exercised solely to inflict pain and damage on the other party.<sup>25)</sup> These precedents may make it difficult to restrict claims for real rights based on the principle of good faith.<sup>26)</sup> However, the tendency of precedents to establish strict subjective requirements is decreasing. One precedent states that subjective requirements can be confirmed by objective circumstances,<sup>27)</sup> and precedents do not require subjective requirements in certain areas, such as trademark rights<sup>28)</sup> or the right of offset.<sup>29)</sup> Even in theory, it is not reasonable to hold to strict subjective requirements.<sup>30)</sup> Thus,

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25) Supreme Court [S. Ct.], 4294Minsang934, Mar. 8, 1962 (S. Kor.); Supreme Court [S. Ct.], 85Daka2307, July 22, 1986 (S. Kor.); Supreme Court [S. Ct.], 2012Da17479, Mar. 20, 2015 (S. Kor.); Supreme Court [S. Ct.], 2017Da5310, July 11, 2017 (S. Kor.), etc.

26) For details on views opposing the resolution of the abandonment of the exclusive right to use and profit problem on the basis of the principle of good faith, see Hyung-woo Yang, *Limits*, *supra* note 16, at 531.

27) Supreme Court [S. Ct.], 97Da42823, June 26, 1998 (S. Kor.); Supreme Court [S. Ct.], 99Da23802, Aug. 24, 1999 (S. Kor.); Supreme Court [S. Ct.], 2004Da71522, 71539, Mar. 24, 2005 (S. Kor.); Supreme Court [S. Ct.], 2017Da5310, July 11, 2017 (S. Kor.).

28) Supreme Court [S. Ct.], 2005Da67223, Jan. 25, 2007 (S. Kor.); Supreme Court [S. Ct.], 2012Da6059, Aug. 20, 2014 (S. Kor.); Supreme Court [S. Ct.], 2006Da40461, 40478, July 24, 2008 (S. Kor.). However, some Supreme Court judgments express dissenting views, such as Supreme Court [S. Ct.], 89Daka2988, Apr. 24, 1989 (S. Kor.); and Supreme Court [S. Ct.], 97Da36262, May 22, 1998 (S. Kor.).

29) Supreme Court [S. Ct.], 2002Da59481, Apr. 11, 2003 (S. Kor.).

30) For details on the majority opinion asserting that there are no subjective requirements for prohibiting the abuse of rights, see YOON-JIK GWAK & JAE-HYUNG KIM, *MINBEOBCHONGCHIK [THE GENERAL PROVISIONS OF THE CIVIL ACT]* 86 (9th ed. 2013); JIN-SOO YOON, *MINBEOBNONGO [ASSERTIONS ON THE CIVIL LAW]* 109, 110 (1st ed. 2007); YOON-JIK GWAK, *MINBEOBJUHAE (I) [FOOTNOTES ON THE CIVIL LAW (I)]* 192, 193 (1st ed. 1992); YOUNG-DAM KIM, *JUSEOKMINBEOB CHONGCHIK (I) [FOOTNOTES ON THE GENERAL PROVISIONS OF THE CIVIL LAW (I)]* 230 (4th ed. 2010); YOUNG-DEOK KIM, *JUSEOKMINBEOB CHONGCHIK (I) [FOOTNOTES ON THE GENERAL PROVISIONS OF THE CIVIL LAW (I)]* 198 (5th ed. 2019). For details on the minority opinion asserting that subjective requirements are required, see Dong-hyung Lee, *Gwonrinamyonge Isseoseo Jugwanjeok Yogeonui Piryoseong [The Need for Subjective Requirements for the Abuse of Rights]*, 107 *JEOSEUTISEU [JUSTICE]* 33; Cheon-soo Kim, *Gwonrinamyonggwa Gwonrihaengsang Sinuichik [The Principle of Good Faith upon the Abuse of Rights and the Exercise of Rights]*, 22 *MINSAPALLYEYONGU [STUDIES ON CIVIL*

claims for real rights are significantly more likely to violate the principle of good faith than claims for restitution for unjust enrichment. In short, it is reasonable to establish relatively strict restrictions on claims for real rights while broadly allowing claims for the payment of money. In this way, the value of ownership (*Bestandschutz*) is guaranteed instead of the existence of ownership,<sup>31)</sup> and property rule is prioritized over liability rule.<sup>32)</sup>

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CASES] 40; WON-LIM Ji, MINBEOGANGUI [A LECTURE ON CIVIL LAW] 49 (15th ed. 2017).

31) For details on guaranteeing the value and existence of ownership, see YOUNG-JOON LEE, MULGWONBEOP [THE LAW OF REAL RIGHTS] 417, 418 (2nd ed. 2017).

32) For details on property rule and liability rule, see Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. R. 1089 (1972).

