

Notable Supreme Court Decisions on Legal Philosophy: 2019*

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Translated by JKL Student Editors***

I. Impartiality of Broadcasting and Freedom of Expression (Supreme Court *En Banc* Decision 2015Du49474 Decided Nov. 21, 2019)

A. Summary of the Case

The plaintiff of this case, as a legal person operating a television channel specializing in viewer-produced videos, broadcast a documentary program reevaluating former Korean presidents Syngman Rhee and Chung-hee Park. Disciplinary measures were imposed on the plaintiff on the grounds that the documentary broadcast violated the duty to maintain objectivity, impartiality, and balance, as well as the duty to respect the dignity of deceased persons, under the Broadcasting Deliberation Regulation. As a response, the plaintiff filed a lawsuit seeking the revocation of each measure imposed.

The court of first instance rejected the plaintiff's claim. The original court dismissed the appeal.

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B. Judgment of the Supreme Court

The Supreme Court annulled the original decision with the intent of canceling the disciplinary measures. Under the premise that democracy cannot exist without the guarantee of free expression and lively debate, the majority opinion suggested a legal principle that when an expressive medium is influential and contributes to diversity, a relaxed standard must be applied. However, the dissenting opinion pointed out that the program in this case intentionally selected, extracted, and edited the materials and was full of vulgar and offensive expressions; it argued for the necessity of a strict standard rather than a relaxed one. Furthermore, Justice Dae-hee Jo and Justice Sang-ok Park's concurring opinion to the dissenting opinion discussed the role and responsibility of broadcasts to act for the good of the community and to reconcile and integrate the society rather than causing conflicts and division.

Justice Jaehyung Kim's concurring opinion to the majority opinion highlighted the importance of *Verfassungskonforme Auslegung* (constitutionally conforming interpretation). To protect freedom of expression, he endorsed a cautious approach when interpreting such concepts as impartiality and adjusting to a situation in which various broadcast channels had emerged. In this conception, the new situation represented a different context from what existed when the law was enacted.

Justice Sun-su Kim and Justice Sang-hwan Kim's concurring opinion to the majority opinion saw that the fundamental solution would be to tackle problems under the free market of ideas, allow wide freedom of broadcasting, and encourage active discussion. They also emphasized that to make democracy mature via understanding history correctly, one must be open to the possibility of diverse criticism.

C. Analysis and Comments

The decision at hand shows the fierce debate about what the allowable scope of freedom of expression is and what the standards in determining this scope are, especially in relation to historical issues. The majority

opinion suggested the legal principle of “relatively relaxed standards” applicable to regulations on freedom of expression. In addition, although based on the context of the Broadcasting Act, the opinion is significant in that it provides a general definition of objectivity, impartiality, and balance, as articulated in the following:

‘Objectivity’ signifies that one should not distort the truth and should treat it as accurately as possible based on provable and objective truth. ‘Impartiality’ signifies that one should not be biased when delivering diverse points of view and opinions about a social issue or a highly controversial issue where interests sharply collide. ‘Balance’ signifies not the quantitative balance that requires allotment of equivalent time and importance, but a balance which substantively provides equal opportunities considering the relevant parties or the social influence of the object, the attributes of the matter, and the characteristics of the program.

Meanwhile, the concurring opinion to the dissenting opinion underlined the role and responsibility of broadcasts in terms of the realization of public good, reconciliation, and integration. Justice Sun-su Kim and Justice Sang-hwan Kim’s concurring opinion to the majority opinion, by quoting the theory of the marketplace of ideas, expressed vigilance toward totalitarianism and stressed the importance of individual rights and freedom of expression to form and maintain democratic political order.¹⁾

In light of the characterization given above, there remain some fundamental questions over whether it is appropriate to make an analogy between freedom of expression and the economic dimension of the market. Furthermore, even if such analogy of the market is appropriate, it should be noted that the modern market economy is not simply a free market; it is a market with regulations and supplementations imposed to maintain a fair trading order and to prevent the harmful effects of monopolization. Although the advantage of the analogy of the market in the domain of

1) See Jae-Yoon Park, *Bangsongui gongjeongseonggwa beobui pogi* [Fairness of Broadcasting and Abnegation of the Law], 25(2) STUD. PUB. ADMIN. CASES 167, 167-212 (2020) (In Korean).

thoughts and expressions cannot be renounced, the effort to seek an alternative theory that implies the formation of a fair order and mediation is needed.²⁾

This controversy also has implications for issues concerning hate speech. Dworkin's theory against hate speech regulation argues that society should ensure free expression based on "equal concern and respect for all persons," not on the theory of a marketplace of ideas.³⁾ In contrast, Waldron argues that to maintain a social structure that guarantees equal status as free and equal citizens, it is necessary to publicly regulate hate speech in some way.⁴⁾ In one sense, this conflict between Dworkin and Waldron represents a reversal of the composition of discussions in the decision at hand, and it will be important to capture and theoretically polish the differences between the context of expressions about deceased historical persons and the context of expressions about social minority groups or their members.

II. Blood Relationship and Presumption of Paternity (Supreme Court *En Banc* Decision 2016Meu2510 Decided Oct. 23, 2019)

In this case, the key issue was whether paternity can still be presumed even when a wife gives birth during marriage through artificial insemination by a donor other than the husband and the child and father turn out not to be blood related. This is a crucial issue, especially because if paternity is presumed, according to Article 847 of the Civil Act, the lawsuit to deny paternity can only be filed within two years after the point when the wife or husband realizes the reason for denying paternity, whereas the

2) For the study on legitimate intervention in hate speech, See Sung Soo Hong, *Hyeomopyohyeonui haeakgwa gaeibui jeongdangseong: geumjiwa bangchireul neomeoseo* [Harm of Hate Speech and Justification of Regulation: Beyond Prohibition and Neglect], 22(3) KOR. J. LEGAL PHIL. 27, 27-64 (2019) (In Korean).

3) Seung-hyun Lee, *Hyeomopyohyeon gyujereul dulleossan Ronald Dworkin-gwa Jeremy Waldron-ui nonjaeng* [Ronald Dworkin and Jeremy Waldron's Argument on Hate Speech Regulation], 55 KOR. J. L. & SOC'Y 31, 34-39 (2017) (In Korean).

4) See JEREMY WALDRON, *THE HARM IN HATE SPEECH* (Sung Soo Hong & So Young Lee trans., 2017) (In Korean) (for specific arguments of Waldron).

right to deny paternity is not granted to either the child or the biological father.

In the case, the majority opinion ruled that the Article on presumption of paternity still applies to artificial insemination by a donor other than the husband, considering the text and purpose of the Article, the constitutional protection of marriage and the family, the welfare of the child, and the actual family relationship. A separate opinion on the majority opinion was presented, and there was no dissenting opinion on this point. Furthermore, the majority opinion stated that paternity is still presumed to a child who is not blood related to the husband, considering the basic purpose of legislation and history of the Article, the constitutional protection of marriage and the family, the right to privacy, and the balance of probabilities between specific interests regarding the legal status of the married couple and the child. On this point, Justice Soon-il Kwon, Justice Jeong-hee Rho, and Justice Sang-hwan Kim's separate opinion from the majority opinion asserted that presumption of paternity should be based on whether a parental relationship exists socially. In other words, even if a child and a father are not scientifically related according to blood, as an exception to the presumption of paternity, paternity can be presumed if parental relationship is deemed to exist socially.

Justice Jaehyung Kim's concurring opinion to the majority opinion refutes the separate opinion outlined above. This opinion claims that the court should contemplate how to interpret and apply the law even in cases not predicted by the legislators and try to avoid interpretation that goes against the text of the Article and works in an opposite direction to that of the aim and purpose of legislation.

The dissenting opinion by Justice You-suk Min supports so-called appearance theory, which was adopted in previous Supreme Court decisions. Following appearance theory, the Supreme Court has allowed exceptions to the presumption of paternity under certain conditions, such as in an absence of cohabitation. The dissenting opinion further expands the scope of exceptions to include cases in which it is apparent that the wife could not have conceived a child of her husband. Moreover, the dissenting opinion asserts that the Family Court, which examines individual cases, can promote validity in specific cases by considering various circumstances.

This case reveals how the legal perspective distinguishes between blood

relationships as a biological fact and family relationships in a normative sense. The majority opinion shows the most consistent attitude from a normative perspective, whereas the separate opinion by Justice Soon-il Kwon, Justice Jeong-hee Rho, and Justice Sang-hwan Kim tries to reflect social facts a bit more clearly in the law. The dissenting opinion by Justice You-suk Min insists on reflecting parental relationships based on actual blood relationships as accurately as possible, following the developments of such scientific technologies as genetic testing.

III. Swimming Pool Safety Accident and Hand Rule (Supreme Court Decision 2017Da14895 Decided Nov. 28, 2019)

The swimming pool in this case used only course ropes above the surface of the water to distinguish between the children's section and the adults' section, which had different depths. A six-year-old fell into the adults' section, which resulted in an anoxic brain injury. The court of first instance and the original court did not find the defendant, the manager of the swimming pool, responsible for the accident, but the Supreme Court reversed and remanded the case, holding the defendant responsible for the defect in terms of the installation and maintenance of the swimming pool.

The Supreme Court ruled that in determining whether there exists a defect in terms of installation or maintenance of any structure, such factors as the possibility of the risk being realized, graveness of the infringed legal interests and degree of damages that incur when the risk is realized in an accident, cost of precaution, and graveness of the interests being sacrificed due to precautionary measures must be comprehensively considered. The Supreme Court also noted that such legal principles correspond to both cost-benefit analysis and balance approaches in law and economics.

By referring to the so-called Hand Rule, the Supreme Court ruled that the relation between investment in precautions (B), the product of the probability of accident (P), and magnitude of harm resulting from the accident (L) can be analyzed to determine whether the possessor of a structure should be held liable for tort. According to the Hand Rule, if $P*L$ exceeds B, the possessor of a structure is deemed not to have fulfilled his or

her responsibility for precaution, considering the socially perceived danger of the structure.

There are some remaining questions regarding whether the Hand Rule can be delicately applied to these cases and whether it is justified to utilize such an approach in cases involving human lives and safety. Still, the decision at hand is noteworthy in that it explicitly mentions the law and economics approach.

