
The Concept of “Public Interest” Demonstrated in Korean Court Precedents*

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Abstract

The concept of public interest is functioning as a topos in Korean public law discussions. However, no established definition of the term is presented in any books or papers on administrative law. An attempt to define a concrete and specified concept of public interest may turn out to be in vain because of the incommensurability of its value. In such case, the best way to get closer to the substance of the concept will be to search for the many and diverse ways the term public interest is used in real court precedents. This is because the court rulings are the result of many efforts to reach the best balancing point of conflicting interests. In Korean court precedents, many diverse explanations on public interest have been presented. For instance, the public interest has been illustrated as ‘the interest of many and unspecified persons’, ‘general social welfare’, ‘environmental interest’, ‘the well functioning of state run organizations’, ‘interests related to traffic and transportation’, ‘interest related to education’, ‘the moral interest of our society’, and ‘interests related to basic human rights’.

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I. Introduction

The Idea of “Public interest” is the main theme in public law deliberations. In many constitutional and administrative cases, the concept of public interest is used as a criterion to decide whether a certain agency action is illegal or inappropriate. However, it is not easy to define the exact meaning of public interest. Public interest can be defined in many different ways. Some scholars argue that the concept of public interest does not exist in political arena,¹⁾ while there are others who view that if each member of our society does his or her own best to maximize their own interest, then the best interest of our society would be accomplished as well.²⁾ Furthermore, there are still others who argue that we have a transcendental conception of public interest which should become the main object of public law.³⁾ There are many other views in between these different concepts of public interest.

In fact, the problems associated with defining ‘public interest’ are among the crucial problems of politics. According to Flathman’s explanation, determining justifiable governmental policy in the face of conflict and diversity is central to the political order; it is a problem which is never solved in any final sense but which we are constantly trying to solve. The frequently discussed difficulties with the concept are difficulties with morals and politics. We are free to abandon the *concept*, but if

1) “The nature or character or essence of the concept (public interest) excludes the possibility of its having any trans-subjective content. Some commentators urge political scientists not to attempt to determine ‘what is in the public interest’ ; indeed, they argue that political scientists should banish the concept from their analytic vocabularies”, RICHARD E. FLATHMAN, *THE PUBLIC INTEREST — AN ESSAY CONCERNING THE NORMATIVE DISCOURSE OF POLITICS* 9 (John Wiley & Sons, Inc. 1966).

2) The Public Choice theorists might be categorized in this group. Public choice theory is based upon the assumption that behavior in the political arena is, in its essence, no different from behavior in the market, the individual acting in both contexts rationally to maximize his or her utility (OGUS, *REGULATION* 59). *Homo Economicus* who inhabits the ordinary market-place also inhabits the political arena and behaves in much the same way. operating so as to maximize his own individual preferences (CRAIG, *PUBLIC LAW AND DEMOCRACY* 80). Thus public choice theorists assume that general welfare will be maximized by the exercise of individual choices, with regulatory intervention demanded for the most part only where examples of ‘market failure’ require to be corrected in order to ensure the ‘proper’ operation of the market. [MIKE FEINTUCK, ‘THE PUBLIC INTEREST’ IN *REGULATION* 8 (Oxford University Press 2004)]

3) I find that this view is generally taken by students who have just entered the law college. What is surprising is that we find many books and papers on administrative law based on this assumption of public interest. However, to my dismay, most of these papers fail to search and define the exact meaning of the transcendental conception of public interest.

we do so we will simply have to wrestle with the *problem* under some other headings.⁴⁾

In this regard, although difficult, it is important to find the best definition of public interest. In this paper, I will search for the meaning of public interest in the Korean court precedents. In many cases, the final decision on the meaning and scope of public interest is determined by the courts. Therefore, I believe it is worthwhile to review actual cases in which the concept of public interest has been introduced and defined. Such exercise will enable us to review the common components of the term public interest being used in different contexts. Through the review of relevant court precedents we may establish the exact meaning of public interest and also search for the proper position of public interest in public law.⁵⁾

II. The Functions and Limitations of the Concept of Public Interest in Public Law

The meaning and role of public interest in public law have not been satisfactorily discussed and demonstrated until recently. Rather, public interest has been functioning as a social and national axiom to direct discussion on public law, not as an object of demonstration.⁶⁾ In fact, the term 'public interest' is used as a topos of public law in Korea.⁷⁾ Many constitutional and administrative decisions use the term as a criterion to determine the legitimacy of public intervention into private sector. As such, the usual flow of reasoning is as follows; if it is determined that there exists sufficient public interest for public intervention, then that intervention is legitimized even though some sacrifice of private right is accompanied during the public procedure.

4) FLATHMAN, *supra* note 1, at 13.

5) Brian Barry, in *The Use and Abuse of 'The Public Interest'*, announced his intention to survey usage of the term in his study. "The only really satisfactory way of approaching 'the public interest,'" he wrote, "would be to take a great number of examples of actual uses — from court cases, newspapers, books, speeches, and conversations — and see what could be made of them.", recited from VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTEREST* 3 (Basic Books Inc. Publishers 1970).

6) CHOI, SONG-WHA, *PUBLIC INTEREST AS A LEGAL PROBLEM — AN ANALYTICAL STUDY IN PUBLIC LAW*, Preface v (Seoul National University Press 2002).

7) *Id.* 161.

However, there is some danger in abusing the term in public law. Due to the vagueness of the term, it can be used as a tool to enforce the interest of the strong in our society. This can be termed as the ‘legitimation function’ of the concept of public interest.

In Feintuck’s term, the concept of public interest’s function as a means of legitimating intervention into private activity, in the absence of a strong value base which includes democratic expectations such as equality of citizenship, can be all too easily subverted to the cause of, or undermined by, dominant economic interest groups. This results in its serving simply as a force for conservatism, maintaining the existing power inequalities.⁸⁾

In this context, we can think of the second potential function of the concept of public interest. That is the ‘function as contested arena’ to form a part of the deliberative context, which we are entitled to expect to find at the heart of a liberal-democratic system.⁹⁾ This function seems to fit with a vision of the concept as an empty vessel free from inherent values. However, this function will also be undermined in assessing the public interest that may amount to no more than an exercise of head-counting. Simply adding up the sum of individual interests, in the absence of consideration of the guiding principles, does not further meaningful deliberation or debate.¹⁰⁾

The third function of the concept of public interest can be the ‘democracy serving function’ and it is in essence what seems to be lacking in terms of the ‘legitimation’ and ‘contested arena’ approaches. Much of the literature of political science implies a close linkage between ‘the public interest’, and certain collective values and notions of general welfare within society.¹¹⁾ In modern society, the collective value and notion of general welfare tend to be related to liberal-democratic principles.

8) FEINTUCK, *supra* note 2, at 28.

9) *Id.* at 28

10) *Id.*

11) *Id.* at 29.

III. How to understand the concept of public interest

1. Three different types of understanding of public interest

What is most important in understanding public interest is whose interest we should regard as public interest. In this point, Virginia Held's explanation can be helpful.

According to her categorization, we can think of three kinds of public interest theories. Those are Preponderance Theory, The Public interest as Common interest, and Unitary Conceptions.¹²⁾

First of all, according to the Preponderance Theory, public interest is the predominating interest in the community, though that interest may not be the interest of all the participants in the community. That preponderance may be predominance of force (Hobbes), or predominance of opinion (Hume), or predominance of utility or preference of members (Bentham).¹³⁾

This theory is evaluated as the most influential theory on public interest in Anglo-American tradition. Especially, Bentham's utility argumentation is the foundation of modern economic Cost-Benefit Analysis.

Second, Common interest Theory provides that only the common interest of all the members in the society can be called public interest. According to this theory, the conflict of public interest and private interest cannot happen. The General Will of Rousseau or Pareto Optimality can be explained under this category of public interest. This theory, however, cannot be generally supported in that it demands the unanimity of the whole members in community, which cannot be attained in this modern complex society.

Third, Unitary Conceptions of public interest assert a frank normative position for the public interest. It expects that claims concerning it can generally be as valid as moral claims, which they see as capable of judging in terms of a unitary, coherent system of values.¹⁴⁾ Held explains that according to the theories in this group, the

12) HELD, *supra* note 5, at 49-162.

13) Kim, Yoo Hwan, *The Anglo-American Concept of Public interest and Its Legal Argumentation : Paradigm Shift and Confrontation of Administrative Law*, SEoul LAW JOURNAL 55 (The Law Research Institute Seoul National University 2006. 9.).

14) HELD, *supra* note 5, at 135.

public interest is a moral concept. There is a unitary scheme of moral judgement, which should guide every individual at a given time and place, although these individuals may be unaware of it.¹⁵⁾

Besides Held's categorization, there is a range of arguments and models, some more influential than others, which seek to pursue more explicitly, and more directly, public interest objectives. In truth, lawyers can be seen as having contributed surprisingly little to the development of such models, despite the concept being used routinely in legal arguments. It has been political scientists and economists who have made the major contributions.¹⁶⁾

2. By whom and by what procedure is public interest defined?

If we accept that there exists a concept of public interest in our society, then the next question is by whom and by what procedure can public interest be defined.

'A convenient cover for ignorance' which 'saves us from asking difficult questions,'¹⁷⁾ is how Maitland described the concept of 'the crown' in British constitutional discourse: it may be that the concept of 'the public interest' can be viewed in much the same way.¹⁸⁾

If we understand public interest as the common goal our society should strive to accomplish, then in modern society the content of the goal has to be decided by a democratic procedure. People's will should be reflected in deciding the contents of public interest. Modern society is so complex that every individual cannot directly participate in the process of deciding what public interest is. For this reason we need a system of delegation of power. People delegate their right to their delegates in order to participate in the deciding procedure. This delegation happens by means of voting. In an ideal model, the delegation process is perfect and no failure of delegation happens. However, in reality, this is not the case. Every delegation tends to fail, in that the delegates do not behave totally in accordance with the will of their delegators. In many cases, the delegates give priority to their own interest than the

15) *Id.* at 135.

16) FEINTUCK, *supra* note 2, at 9-10.

17) Maitland, F.W., *The Constitutional History of England*, 418 (Cambridge University Press 1908), recited from FEINTUCK, *supra* note 2, at 3.

18) *Id.* at 3.

interest of people who have delegated their power. This problem is called "Principal-Agent Problem". There are many studies accumulated on this subject. The conception of "Check and Balance" is one of them.

In principle, the contents of public interest on which people gave their assent of delegation should be determined by the Congress or the President.

However, in many cases, the Congress and the President fail to make determination on issues related to public interest. Thus, many of these cases end up going to the court.

IV. The Court and Public interest

As explained above, many cases on public interest are decided by the court. However, in general and especially in Korea, judges do not have any direct delegation from people. In Korea, judges are usually appointed among those who did well at the National Judicial Examination and the Judicial Research and Training Institute.¹⁹⁾ They are, in general, quite bright, diligent, sincere, and honest, but there is no guarantee that they will be also good at deciding what is necessary for the nation and the people at that time.

Nevertheless, in many cases the decision on public interest is made by judges.

In the United States, the public interest decision of the Supreme Court is made by the constitutional review's process of actions of the other branches of government, federal and state. Moreover, this power of constitutional review makes the Supreme Court of the United States the most extraordinarily powerful court of law the world has ever known.²⁰⁾

As we all know very well, this power of constitutional review cannot be found anywhere in the Constitution. This power was accepted as the Supreme Court's power by *Marbury v. Madison* case²¹⁾ in 1803.

The most dramatic case on the issue of determining public interest was *Brown v.*

19) In order to become a judge in Korea, one has to first pass the National Judicial Examination and complete a two year mandatory training course at the Judicial Research and Training Institute under the Supreme Court.

20) ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH — THE SUPREME COURT AT THE BAR OF POLITICS* I (2nd ed. Yale University Press 1986).

21) 5 U.S. 137 (1803).

Board of Education case²²⁾ in 1954.

This case involved the *School Segregation Case* raised by five individual Negro children praying that they be admitted to previously all-white schools, from which the local authorities had excluded them on the ground that they were Negroes and must attend schools reserved solely for Negroes. The issue was whether separate schools for the two races are permissible in principle. The Supreme Court decided that this is impermissible and that Negro children must have full entry to a common public-school system, free of restrictions or classification based on race.²³⁾

In this case, the Court's decision was related to the public interest on the problem of race discrimination. This was such a delicate and sensitive issue at the time in the United States that even the political branches did not dare to address. Also, even after the decision, no immediate decree eliminating the segregation rule came out from the political branches.

Recently, more and more cases on public interest are raised at the courts in Korea. In the past, not many cases on big issues related to public interest were decided by the judiciary. Many cases were decided in political arena, sometimes in a legitimate manner, while in some cases, in an illegitimate and unofficial manner. However, as Korea heads towards a more democratic society, many unofficial resolutions of such disputes are on the decrease. Instead, these cases are being brought to the courts.

The impeachment case of the incumbent President Noh in 2004,²⁴⁾ the movement of the capital city case,²⁵⁾ and the *Sae Man Guem* land reclamation case²⁶⁾ may be the most striking examples of this trend.

However, as I pointed out above, this is not such a simple matter. The judges in Korea are appointed by the Chief Justice and as such, there is no process of delegation of power from the people in general. It is unclear on what legitimacy and to what scope can a court use the power to decide on the issues of public interest in our society.

I believe this is one of the most important issues in modern jurisprudence which has ignited many heated discussions and resulted in diverse views. Rather than

22) 347 U.S. 483 (1954).

23) BICKEL, *supra* note 20, at 245.

24) Decision of May 14, 2004, 2004 *Heon Ma* 1 (Korean Constitutional Court).

25) Decision of Oct. 21, 2004, 2004 *Heon Ma* 554 · 566 (Korean Constitutional Court).

26) Decision of Mar. 16, 2006, 2006 *Du* 330 (Korean Supreme Court).

discussing such broad issues in this paper, which is mainly focused on public interest reviewed by the Korean courts, I will leave this subject for my later study.

In this paper, I will set it my objective to screen many and diverse descriptions of public interest outlined in judicial cases. As Brian Barry said, to screen many examples of actual uses of the term "public interest" will be very helpful to get a satisfactory understanding of "The Public Interest".

V. Public interest presented in Korean Court Cases

1. Cases in which "the interest of many and unspecified persons" or "general social welfare" is regarded as public interest

① Decision of May 23, 1989, 88 *Nu* 4034 (Korean Supreme Court)

In this case, the Court ruled that the "public interest" in Water Industry Act 20 ① 3. means not only the interest related to ship sailing or anchoring, but also the general interests of many and unspecified persons.

② Decision of July 4, 2000, 98 *Du* 9301 (Korean Supreme Court)

In this case, the issue was whether the plaintiff was an organization for public interest. The Court ruled that an organization for public interest is a kind of organization which aims at heightening general social welfare, and the plaintiff, which was delegated the service of managing municipal parking lot from a municipal city, fell under the category of the organizations for public interest.

2. Cases in which environmental interest is described as public interest

① Decision of Dec. 9, 2004, 2003 *Du* 12073 (Korean Supreme Court); Decision of Mar. 28, 2003, 2002 *Du* 12113 (Korean Supreme Court); Decision of July 7, 2000, 99 *Du* 66 (Korean Supreme Court); Decision of Oct. 25, 2002, 2002 *Du* 6651 (Korean Supreme Court); Decision of Nov. 30, 2001, 2001 *Du* 5866 (Korean Supreme Court); Decision of Dec. 22, 1995, 95 *Nu* 3831 (Korean Supreme Court); Decision of Sep. 15, 1995, 95 *Nu* 6113 (Korean Supreme Court)

In these cases, the Court ruled that in deciding whether a certain agency action is illegal or not, the maintenance of land or nature and the preservation of environment

should be considered as an essential element of public interest.

② Decision of Sep. 28, 2001, 2000 *Du* 8684 (Korean Supreme Court)

In this case, the issue was whether the agency decision not to allow the change of land usage near the ‘North-Han mountain’ national park was justified, and the Court ruled that the preservation of city environment should be considered an important factor of public interest.

③ Decision of Apr. 29, 1994, 93 *Nu* 11968 (Korean Supreme Court)

In this case, the issue was whether the agency decision not to allow the use of the plaintiff’s new building, due to the fact that the building permit for the new building was mistakenly given by the defendant, was appropriate or not.

The Court decided as follows. The public interest, which the defendant agency tries to guard by the agency action disputed in this case, is the interest of preventing the inordinate expansion of city and maintaining the natural environment surrounding the city. However, the public interest in this case cannot be evaluated as more important than the plaintiff’s private interest that was violated by the agency decision not to allow the use of already built new building. Therefore, the agency decision not to allow the use of the plaintiff’s new building is illegal, and therefore, should be cancelled.

④ Decision of Apr. 25, 2000, 98 *Du* 6555 (Korean Supreme Court)

In this case, the issue was whether the agency decision not to allow the change of mining plan was appropriate or not.

The Court ruled as follows.

The maintenance of land and nature and the purity of water source should be considered as important factors pertaining to public interest.

Since the area planned for mining was located in the vicinity of a national park, the Court ruled that there was a danger of destructing the natural scenery and polluting the drinking water around the national park area. Therefore, the agency’s decision not to allow the change of the mining plan was appropriate in view of public interest.

⑤ Decision of June 24, 1994, 94 *Nu* 1289 (Korean Supreme Court)

In this case, the Court ruled as follows.

First, the Court determined agency's decision to permit the building of a small factory under the Small and Medium Enterprise Support Act, which was enacted to assist the commencement of small and medium enterprises is a discretionary decision of the agency.

Second, in deciding whether to grant the permission, the agency should consider public interest related to the new enterprise and private interest of the applicant.

Considering all the relevant factors of public interest and private interest in this case, the agency's decision to reject the application for paper producing factory in Jeju island was considered to be appropriate. Since it was accepted that the palpable danger of water and air pollution from the factory was so serious the Court determined that the public interest to prevent such pollution should be given more weight than the applicant's private interest impaired by the rejection.

In this case, it is notable that the Court decided that the interest to be free from water and air pollution from the factory is an important factor of public interest.

⑥ Decision of May 27, 1993, 92 *Nu* 19477 (Korean Supreme Court)

In this case, the issues were as follows.

First, the concern is whether the agency's decision to permit mining in a specific area is a discretionary decision or not.

Second, the matter is if the agency has such discretion, then what factors the agency should consider in making its decision.

With respect to the above issues, the Court ruled as follows.

First, the agency's decision to permit mining is a limited discretionary measure of the agency. On one hand, the agency has the discretion not to grant permit after considering the public interest which is infringed upon by the mining. On the other hand, the agency is required to provide a reasonable explanation as to why the application has been rejected without capricious and arbitrary basis.

Second, the Court determined that the agency's decision not to permit mining in consideration of the danger in polluting the air and the natural environment is both appropriate and legitimate.

It is notable that the Court considered factors concerning water pollution and impairment of natural scenery important in determining public interest.

⑦ Decision of Mar. 24, 2000, 97 *Nu* 12532 (Korean Supreme Court)

The issue in this case was whether the agency's decision not to allow the change

of usage and size of a restaurant was legal or not.

The Court ruled as follows.

The business license for an ordinary restaurant is just a removal of general prohibition, and therefore, the business license should be granted if the applicant fulfills all the requirements stipulated by the statute.

In this regard, the public interest of maintaining clean air in an underground shopping area, which is not required by law, cannot be the reason to refuse the business license for changing the usage and size of the restaurant.

3. Cases in which the interest of state-run organizations and the protection of the well-functioning of the organizations are regarded as public interest

① Decision of Nov. 18, 2004, 2002 *Du* 5771 (Korean Supreme Court)

In this case, the issue was determining the range of value added tax exemption. The Court ruled that in deciding such range, public interest of maintaining the order in collecting the tax check and the interest of taxpayer to receive tax exemption should be balanced.

② Decision of Oct. 27, 2004, 2003 *Du* 1165 (Korean Supreme Court)

The issue in this case was whether the statute, which required oligopoly shareholders to pay secondary tax duty, was constitutional or not.

The Court ruled as follows.

The purpose of the secondary tax duty on oligopoly shareholders is to realize the principle of substantial taxation. By taxing the oligopoly shareholder who is in substance in the same position as the main taxpayer, the fairness in taxation and the public interest of tax collection can be obtained. Therefore, the statute is in compliance with Article 23 of the Constitution which declares the protection and also the limitation of property right.

③ Decision of Apr. 27, 2004, 2002 *Do* 315 (Korean Supreme Court)

In this case, the issue was whether an election campaign, which was solely aimed at preventing a specific candidate from winning the election, was allowed or not.

The Court ruled as follows.

An election campaign, the sole aim of which was to make a specific candidate lose the election, should be treated in the same way as the election campaign of a

specific candidate. Therefore it should be done under the restrictions ordained in the election law.

The freedom of election campaign can sometimes be limited for the public interest of protecting fairness in election.

Therefore, in this case, the acts of the accused, which violated the restrictions provided in the election law, cannot be justified under the name of legitimate self-defense or emergency evacuation in law.

④ Decision of Sep. 30, 1997, 97 *Do* 1230 (Korean Supreme Court)

In this criminal case, the issue was whether a nude picture of a defendant taken under her consent could be used as evidence against the defendant.

The Court ruled that the picture could be used as evidence for the trial. The reason for this was that the judiciary can choose under its own discretion whether to accept a certain piece of evidence in the trial, after balancing the private interest of the defendant and the public interest of maintaining an effective criminal procedure and finding truth in the criminal proceedings.

Although the picture was taken by a third party who had the intention of extorting the defendant in this case, the Court ruled that this did not change the fact that the picture was taken with the consent of the defendant and thus, the picture could be presented as evidence against the defendant.

⑤ Decision of Mar. 14, 1997, 95 *Nu* 17625 (Korean Supreme Court)

In this case, the issue was the legitimacy of an administrative measure to shorten the retirement age of a head of a village who came to the office before the new work period ceiling system was adopted.

The Court ruled as follows.

The belief and expectation of local officials that they will be able to work until their retirement age can be restricted by the public interest of necessity in organizing administrative system and saving the national budget.

The purpose of the work period ceiling system is to protect the integrity of public officers, enlarge the chances of public participation, pursue the democratization of bureaucracy, and complement the shortcomings of the public officers system.

Considering the purposes of the work period ceiling system, it is legitimate to shorten the retirement age for the head of a village despite his expectations.

⑥ Decision of Dec. 21, 1993, 93 *Nu* 16796 (Korean Supreme Court)

In this case, the issue was the legitimacy of the agency action to cancel the plaintiff's license for real estate agent for violating the Real Estate Agent Act which prohibits the opening of two offices.

The Court ruled as follows.

The decision whether to cancel the plaintiff's license in this case is the discretionary decision of the agency.

Also, whether a certain discretionary agency action is legal or not should be determined after balancing the public interest sought by the agency action and the private interest which would be damaged by the effect of such agency action.

In this case, considering the totality of circumstances as to why the plaintiff had opened two offices, the cancellation of the license, which is the most severe measure the agency can impose, is too harsh for the plaintiff. Therefore, the cancellation is beyond the discretionary power of the agency.

Therefore, the agency's decision to cancel the plaintiff's license should be overturned.

⑦ Decision of June 29, 1995, 94 *Nu* 11354, 94 *Nu* 11361 (Korean Supreme Court)

In this case, the Court ruled that to neglect and leave a building, which was built without proper authorization, would be against the public interest. The reason for this was that allowing illegal buildings to be used could incapacitate the agency's authority to control illegal buildings.

4. Cases in which the interest related to traffic and transportation is regarded as public interest

① Decision of June 28, 2002, 2001 *Du* 10028 (Korean Supreme Court)

In this case, the Court ruled as follows.

The agency's decision to grant a business license for a local bus operation is a discretionary decision. However, the agency's decision should be made after considering all the relevant factors, such as the demand for the bus service in the area, the applicant's capacity for transportation, and the present state of bus service, etc.

In this case, the agency gave limited business license to the plaintiff who applied

for the local bus business license in a certain area, in which the municipal bus service was already provided.

The Court ruled that the agency decision did not go beyond the discretionary power given to the agency considering the overlapping bus routes and the public interest of removing the inconvenience of people in the area.

② Decision of May 31, 2002, 2002 *Da* 9202 (Korean Supreme Court)

In this case, the Court explained that the right to pass across the neighboring land was a right specially granted for the public interest in harmonizing the land usage for enclosed land and neighboring land. The Court also found that the scope of the right should be determined after considering the shapes and locations of neighboring lands and the relevant interests of land owners.

③ Decision of Mar. 11, 1997, 96 *Nu* 15176 (Korean Supreme Court)

In this case, the plaintiff had two kinds of driver's licenses and was arrested while drunk driving. The agency cancelled both of the driver's licenses. The plaintiff complained that cancelling both the licenses was beyond the agency's discretion.

The Court ruled that the agency action to cancel both the licenses was appropriate and necessary for the public interest, in that if both the licenses were not cancelled, the plaintiff could still drive in spite of the violation, which would in fact result in receiving no sanction at all.

5. Cases in which the interest related to education is regarded as public interest

① Decision of Dec. 26, 2003, 2003 *Do* 5980 (Korean Supreme Court)

Under the Youth Protection Act, lodging facilities are prohibited from allowing young boys and girls to stay together in the same room and in case of violation, a criminal sanction is imposed on the owner of the lodging facilities. In this case, in which the defendant, an owner of such lodging facility, contested the criminal sanction, the Court ruled that in balancing the public interest of protecting young boys and girls to grow up as healthy adults and the private interest of the lodging facilities owners and the privacy of the youth, the value of the public interest outweighs that of private interest. Therefore, the prohibition has its foundation of legitimacy.

6. *Cases in which the moral interest in society was treated as public interest*

① Decision of June 23, 1992, 92 *Nu* 2851 (Korean Supreme Court)

The issue in this case was whether the agency action, which ordered two months business suspension to a motel for procuration was appropriate or not. The Court ruled that there should be balancing between the two interests related to this case. One is the public interest of maintaining good social order on sexual morality, while the other is the interest of lodgers who cannot use the motel during the suspension. After balancing the two interests in this case, the Court decided that two months business suspension was too harsh for the owner of the motel and inflicted too much inconvenience for the lodgers, and thus, the agency decision should be cancelled.

7. *Cases in which the economic interest of our society on the whole is treated as public interest*

① Decision of Dec. 18, 2003, 98 *Da* 43601 (Korean Supreme Court)

In this case, the issue was whether an owner of a newly built building is granted superficies on the estate by operation of law in case both the estate and the building were subject to the same ownership and common mortgage, but the ownership of both the building and the estate changed during the process of mortgage execution, resulting in different ownership.

The Court ruled that superficies by the operation of law is in principle accepted for the purpose of preventing the social loss which can happen, if the building becomes subject to demolition when the ownership of building and estate is separated during the process of mortgage execution. In such case, the interest of preventing the social loss is public interest.

However, in this case, the mortgage holder made the mortgage contract expecting that he would have the whole value of the building and estate as his security. In this situation, if the superficies is allowed for the owner of the new building, the private interest of the mortgage holder is violated unexpectedly. This private interest of the mortgage holder cannot be under-weighed, compared to the public interest described above. Therefore, the owner of the new building cannot have the superficies on the estate by operation of law.

② Decision of Mar. 23, 2001, 99 *Du* 10599, (Korean Supreme Court)

In this case, the Court ruled that when the financial standing or state of the management of a credit union is so bad that there is a serious risk to public interest, then the Ministry of Finance and Economy can cancel the business license of the credit union.

8. Cases in which the interest related to basic human rights is regarded as public interest

① Decision of Aug. 20, 2004, 2003 *Du* 8302 (Korean Supreme Court)

In this case, the issue was determining the scope of disclosure of information of a government agency. The Court ruled that the scope and range should be determined after balancing the private interest of privacy and the public interest of protecting people's right-to-know, people's participation in the national affair, and the transparency of national administration.

② Decision of Sep. 28, 2001, 99 *Du* 8565 (Korean Supreme Court)

In this case, the Court ruled that the purpose of the Cultural Properties Protection Act is to protect the public interest of citizens to enjoy cultural assets.

③ Decision of Sep. 4, 1998, 97 *Nu* 19588 (Korean Supreme Court)

In this case, the issue was whether people living in the vicinity of a land designated to become a nuclear power plant had the standing to complain against the administrative measures to permit the construction of the nuclear power plant. The Nuclear Energy Act requires the constructor of a nuclear power plant to prevent any life and health risks during the construction.

The Court ruled that the law's purpose is not only to protect the interest of the people in general, but also to protect the life and health interest of the people living in the vicinity of the nuclear power plant. Thus, in this case, the people living close by the area designated to become a nuclear power plant had the standing to contest the administrative action.

9. Cases in which the interest related to specific business activity is treated as public interest

① Decision of Feb. 20, 2003, 2001 *Du* 5347 (Korean Supreme Court)

The Court ruled that medical practice is subject to many restrictions because it has the properties of contributing to public interest.

② Decision of Dec. 24, 1991, 91 *Du* 3284 (Korean Supreme Court)

In this case, the Court ruled as follows.

An oriental doctor is a medical practitioner whose missions are to promote national health and maintain healthy life of people. These missions are seriously correlated with the public interest of people. Due to the significance of the missions, the plaintiff's cheating in the qualification examination constitutes a sufficient ground for cancelling the plaintiff's oriental doctor qualification.

③ Decision of Mar. 9, 1999, 98 *Du* 19339 (Korean Supreme Court)

In this case, the issue was how severely a public health doctor should be sanctioned, if he engaged in a profit-making job in violation of law while serving as a public health doctor as part of performing his military service.

The Court ruled as follows.

Considering the purpose of public health doctor system, it is important in view of public interest to prevent public health doctors from engaging themselves in additional profit-making jobs other than serving the public health service. Therefore, the administrative measure sanctioning the public health doctor, who violated such prohibition, is just and appropriate.

④ Decision of Feb. 28, 1995, 94 *Nu* 7713 (Korean Supreme Court)

In this case, the Court gave decision on public interest as follows.

The military duty is a constitutional duty imposed on all people to protect our nation. In levying the military duty, the agency should take good care of public interest not only to maintain fairness, but also to prevent evasion of such duty.

VI. Conclusion

The debate on the concept of public interest will continue as long as people live together in a society and make collective decisions. However, the task of establishing the concept of public interest cannot be abandoned just because of its incommensurability. That is because, as long as people constitute a society, most public decisions will be made under the name of public interest. Sometimes the concept of public interest will function as a mechanism to liberate people, and some other times as a yoke. That is the reason why lawyers, as well as political scholars, should endeavor to establish the concrete concept of public interest and refine the system in determining public interest in society.

In this paper, I tried to briefly screen many and diverse instances where the concept of public interest was dealt with in Korean court precedents.

As I surmised in the beginning of this paper, the brief review of the court cases shows that the concept of public interest has been used in a diverse way, and as such, it is difficult to find consistency or unitary meaning of public interest recognized by the courts. In other words, it seems that the courts have used the concept of public interest to represent a certain type of interest that should be protected in individual cases rather than trying to define the general meaning of public interest that applies in all cases.

However, I do not think that my endeavor to screen these diverse court cases is totally without merit. After all, the concept of public interest will be used as a criterion to decide the legitimacy of agency actions in administrative cases. Moreover, the real and concrete meaning of public interest will be imbued during the process of trial and will be finalized in the form of judicial decisions. In this regard, the endeavor to review the concept of public interest in court decisions is in itself meaningful and to some extent, necessary.

KEY WORD: Public interest, public law, administrative law, delegation, separation of powers, Korean court precedents, collective decision