

Freedom of Private Secondary Schools in Korea: a forgotten Myth?

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I. Introduction

Koreans have established and run private schools so that young generations educated and enlightened in those schools were, since Japanese colonial occupation, believed to be able to contribute to the independence of Korea from Japan, and, as of independence from Japan, to nation development. Such an educational enthusiasm initiated from private sectors has certainly been major locomotive to Korean economic success even though Korean War in 1950s totally destroyed all the country. As Korean economy has grown, central government and local authorities have established and run national and public schools in order to substitute private schools and meet educational demands from parents, to the extent that private schools at the level of secondary education has gradually decreased. That being said, the proportion of private schools still accounts for more than 20% of lower secondary schools and for more than 40% of upper secondary schools, as is shown below.

[Private Secondary Schools (2008)], reconstructed from the Education Statistics

Distinction	Number of Schools		Number of Pupils		Number of Teachers	
	Total	Private (%)	Total	Private (%)	Total	Private (%)
Total	5,267	1,592 (30.2)	3,946,589	1,257,905 (31.9)	231,606	73,308 (32.1)
Lower Secondary	3,077	650 (21.1)	2,038,611	371,403 (18.2)	108,700	19,710 (18.1)
Upper Secondary	2,190	941 (43.0)	1,906,978	886,502 (46.5)	122,906	54,598 (44.4)

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Probably reflecting such a long history and considerable number of private schools, regarding the freedom of private schools the Korean Constitutional Court¹ as always rules as follows: “since a private school is established by a private individual or private school foundation with his/her or its own property and willingness for the purpose of realizing individual educational aims and goals, it is indispensable to guarantee the freedom of the establishment and independent running of a private schools to the extent that it cannot be relinquished for anything else. Even though the freedom of private schools itself is not explicitly prescribed in the Korean Constitution unlike German Basic Act Article 7, the freedom of such an establisher of the private school to independently run the school is therefore a fundamental right guaranteed by Article 10 of the Korean Constitution² as a right of all citizens to the freedom of general activities, which is an expression of the right to pursue happiness guaranteed by that Article, Article

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1 The Korean Constitutional Court, 99hunba63 decided on 18th January 2001.

2 Article 10 provides that “[A]ll citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”

31³ (1), which provides for equal rights of all citizens to education corresponding to their abilities, and Article 31 (4), which provides for independence, professionalism and political impartiality of education.” This paper however arguably holds that despite repeatedly expressed rulings of Korean Constitutional Court, essential contents of the freedom of private schools have been oppressed to the extent that Article 37⁴ (2) is violated. Taking it into account that the freedom of private schools essentially consists of the freedom of parents to send their children to private schools, the freedom of private schools to select pupils in accordance with their educational purposes and distinctiveness, the freedom of private schools to pursue their own distinctive educational purposes, and the freedom of private schools to select their own staffs in accordance with their own educational purposes,⁵ we can come to a conclusion that the freedom of private schools in Korea is not only restricted so as to realize public interests worthy of protection, but the very essence of such freedoms is denied for the purpose of pursuing uncertain educational policies set by educational authorities in that most parents are denied the right to send their children to private schools, whereas most private schools are denied the right to select pupils, and furthermore the right of denominational private schools to set and practice religion classes within their schools is not respected: in other words, pupils at denominational private schools have the right to attend denominational schools with refusing religion classes.

II. Substantial Infringement of the Freedom of Private Schools

A. Denial of parental rights to choose among schools and Denial of the freedom of private schools to select pupils

1. Article 7 of the Korean Education Act, which was promulgated in 1949 just after Korean independence of Japanese colonial occupation, provided that all pupils graduating from any equivalent schools established in accordance with the Education Act and its Regulation,⁶ irrespective of national schools, public schools or private schools, have the same qualification. Those times, parents enjoyed the freedom to choose among schools and send children to a private school, whereas private schools enjoyed the freedom to select pupils according to criteria set by themselves in accordance with relevant statutes. In early 1970s, when military dictatorship governed Korea, the government denied such freedoms at the level of lower secondary education so as to standardize and equalize all the lower secondary schools,⁷ with starting and spreading from megalopolis such as Seoul and Pusan to cities. In mid-1970s, the government widened such a policy to the upper secondary education. At present, Articles 43(2) and 47(2) of the Korean Primary and Secondary Education Act provide that the way and method to admit pupils into a secondary school shall be determined by the Regulation of that Act, as result of which in most cities, the freedom of parents to choose among schools and

- 3 Article 31 provides as follows. (1) All citizens shall have an equal right to receive an education corresponding to their abilities.
 (2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.
 (3) Compulsory education shall be free of charge.
 (4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by Act.
 (5) The State shall promote lifelong education.
 (6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.
- 4 Article 37 provides as follows. (1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.
 (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. [출처] 작성자
- 5 Regarding the concept of the freedom of private schools from comparative perspectives, see Charles Glenn/Jan De Groof, *Finding the Right Balance*, vol. 1, Lemma(2002), pp. 577; regarding German concept of the freedom of private schools, see Avenarius/Füssel, *Schulrecht*, 8.Aufl., Carl Link (2010), pp. 295.
- 6 Article 83 of that Act provides that the school established by a private foundation or private individual is private school, which is subject to the control of the educational authority (Article 84).
- 7 It is called the policy of equalization of schools, whose means is to allocate pupils by lots to schools, irrespective of public schools or private schools.

the freedom of private schools to select pupils are denied. In other words, pupils are allocated by lots to secondary schools within neighboring districts unless few schools as special purposed schools are exceptionally exempt from compulsory allocation of pupils. Such a policy applies to private schools without exceptions.

2. On the other hand, in 1984 the military dictatorial regime, which seized power by killing more than thousand citizens, extended the principle of compulsory education to the lower secondary education with gradually applying it nationwide. At the same time, Article 12 (3) of the Korean Primary and Secondary Education Act⁸ provides for the power of educational authorities to compulsorily allocate pupils to private schools. One can say that the freedom of private schools is therefore as a principle denied for the compulsory education in Korea. At the time of writing this paper, Korean presidential candidates are considering the extension of compulsory education to upper secondary education, which is worth welcoming. Then, the freedom of private schools to select pupils is likely to be abolished by law (Article 12 (3) of the abovementioned Act) unless the government exceptionally allows such a freedom to special purposed schools.⁹
3. In 1995, when military regime already ceased to govern and Korea began to be democratized, the policy of compulsory allocation of pupils to upper secondary schools, irrespective of public or private schools, was dealt with in the Korean Constitutional Court. Some parents argued that such a regulation infringes parental fundamental right guaranteed by the Korean Constitution. The Constitutional Court declined such a claim, holding that “As shown in the parental responsibility to care for and educate their minor children (Article 913 of the Korean Civil Code), parents are entitled to educate minor children who attend primary and secondary schools, as a result of which their right to choose among schools shall be acknowledged, which is for the purpose of effectively securing children’s right to education, which is in turn provided for in Article 31 (1) of the Korean Constitution..... Considering that the regulation at issue, which allocates pupils to secondary schools by lots within neighboring districts, is one of measures the purpose of which is to prevent harmful side effects arising from excessive competition for entrance to schools, considering that educational environment is not disparate between urban and rural districts, considering that there are considerable measures prepared for so as to resolve problems arising from uniform operation of entrance policy, considering that it is either doubtful that there is the best way that the legislative aim of preventing excessive competition can be achieved with least restriction of parental right to choose schools, or it is not easy to find such a way, we think that under such circumstances, it is legitimate to choose a legislative mean of denying parental right to choose among schools; therefore, the regulation at issue does not infringe parental right to choose schools where their children are to be educated.”¹⁰

This ruling applies not only to public schools but also to private schools. The plenary session of the Korean Supreme Court in 2010 applied such a logic to private schools: “the introduction by the Constitution of public education system, educational environment of Korean upper secondary schools, policy aim of standardize and equalize upper secondary schools to prevent excessive competition for entrance examination, and the restriction of fundamental rights arising from such a policy taken into

8 Article 12 (Compulsory Education) provides as follows. (1) The state should provide compulsory education in accordance with Article 8(1) of “the Framework of Education Act”, and take necessary measures such as securing facilities for it.

1. The local authority should establish and run primary, secondary public schools and special purposed public schools for primary and secondary education sufficient enough to school all the pupils subject to the compulsory education within its own jurisdiction.

2. In the case where a local authority suffers difficulties in schooling all the pupils within its own jurisdiction into primary, secondary public schools and special purposed schools, such a local authority may either establish and run public schools in conjunction with neighboring local authorities, or delegate the competence to school pupils under compulsory education either to public primary, secondary or special schools established and run by neighboring authorities or to private primary, secondary or special schools.

3. Schools which provide pupils with compulsory education may not take any tuition fees from pupils or their parents, irrespective of whether private or public schools provide it.

9 Very exceptionally, lower secondary private schools may be privileged to select pupils.

10 The Korean Constitutional Court, 91hunma204 decided on 23rd February 1995.

account, compulsory allocation of pupils to upper secondary schools pursuant to the policy of leveling upper secondary schools restricts fundamental rights of not only pupils but also private schools, guaranteed by the Constitution, but not to the extent that the essential contents of such fundamental rights are infringed; it means that such a policy is not unconstitutional.¹¹

The logic of the Constitutional Court and the Supreme Court is difficult to understand, because the essence of the freedom of private schools means the right of parents to send their children to private schools, the right of private schools to select pupils, and the freedom of private schools to educate pupils in accordance with their own educational methodology or religious way. One can say that the essence of the freedom of private schools is infringed if such rights are denied, but not restricted.

5. Article 37 (2) provides that the freedoms and rights of citizens may be restricted by law 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. The rulings by both the Korean Constitutional Court and Supreme Court seem not to respect this provision. What is more serious is that the policy aim of preventing harmful side effects has little to do with the so-called 'equalization of schools' policy, which is evidenced by educational statistics according to which despite the 'equalization of schools' policy, more than 18 billion dollars are spent for private tutoring, the purpose of which is to prepare for entrance examination to a few good schools, each parent spends nearly twice annual tuition fees of upper secondary schools. Problem is that good schools to which parents want to send their children are few, leading parents preparing their children for entrance examination. It is very difficult to understand why the Constitutional Court puts the burden of proof on parents who seek and recover their infringed fundamental rights, rather than the government which infringes essential aspect of parental rights. In other words, the government has to evidence that without depriving private schools of their freedom, it is impossible to reduce side effects of competition. Unless the onus of proof is on the government, the government could easily and, sometimes, leniently deprive citizens of their fundamental rights.

B. Denial of Distinctiveness of Private Schools

1. Even each public school should be recommended to have its own distinctiveness, not to mention the distinctiveness of private schools. In this respect, the Korean Constitutional Court held that "the state intervention into and oversight over school education is even greater than any other area in that school education is most fundamental basis for national prosperity and locomotive for the development of the society, and therefore attracts social concerns and attention and influences the state and society. The state guidance and control is rather necessary so as to realize systematic education on the basis of strong finance backup, and education cannot be delegated only to individual responsibility. Private schools are different from public schools only in terms of who establishes a school, but cannot be different from public schools in terms of staffs, curriculum, and textbooks available to pupils. From the perspective of the individual and national importance and influence of education, there cannot be any difference between private schools and public schools."¹² What the Constitutional Court means by acknowledging the freedom of private schools guaranteed by the Constitution is that private individuals are entitled to establish a private school, and only to such an extent. Any other freedom of private schools cannot be acknowledged by the Korean Constitutional Court, which means that in Korea, the freedom of schools is substantially denied. Such an opinion may reflect current situation that the government monopolizes primary and secondary education to the extent of very detailed ways and process of education.
2. The truth that in Korea the freedom of private schools is denied is well demonstrated in the case where any denominational school sets religion classes for pupils. Such a case was, in 2010, dealt with in the Korean Supreme Court. The fact is like this: the claimant pupil was allocated to the defendant denominational private school where it used to provide pupils with Christian classes; the

11 The plenary session of the Korean Supreme Court, 2008da38288 decided on 22nd April 2010.

12 The Korean Constitutional Court, 99hunba63 decided on 18th January 2001.

claimant refused to attend the religion class at issue; the defendant school persuaded the claimant pupil to move to other schools unless the claimant pupil was willing to attend the religion class, but in vain, because the claimant pupil required the defendant school to provide an alternative class instead of attending the religion class. The defendant school eventually decided disciplinary punishment, the expulsion of that pupil from the school. In some years, the claimant pupil claimed damages on the basis of torts against both the defendant school and a local educational authority which compulsorily allocated the claimant to the defendant school, but which did not prevent the defendant school expelling the claimant.

The plenary session of the Korean Supreme Court decided in favor of the claimant against the defendant school, but declined the claim against the local educational authority, ruling that “considering the ‘equalization of schools’ policy of upper secondary education, the public interests of education and private school, and limits of the right of a denominational private school to religion and operation of the school compared with the fundamental rights of pupils and any other constitutional values, considering that losses caused to pupils by providing pupils with religion classes is not negligible, even though it is not to be overlooked that religion education in denominational schools is necessary and has positive functions, and considering that remedies for losses caused to pupils by religion classes are difficult to get, whereas a denominational school may enjoy the right to religion and to operation of the school within restricted scope, any denominational school may enjoy the right to religion with taking appropriate measures to take into consideration the right of pupils to religion and education as long as such a denominational school in any case enters into the public education system, even though a denominational school has the right to religious education and to operation of the school unlike public schools.”

The claim against the local educational authority is declined because it did not violate the duty of care of preventing disciplinary punishment of expulsion by exerting controlling power against that school; such a ruling presupposes the power of local educational authorities to intervene into individual schools’ affairs.

3. Admitting that compulsory allocation of pupils to private schools without taking individual pupils intent into account is unavoidable in real life in Korea, such a decision of the Supreme Court is very difficult to follow. It is inevitable for pupils who are unwilling to follow disciplinary rules and school aims and purpose to be allocated to the very school which they do not want to attend, because parental right to choose among schools and the right of private schools to select pupils are denied. Then, the least restraint on the right of private schools even under such a harsh educational environment in disfavor of private schools would be to take appropriate measures in order to transfer such pupils to other schools. However, the decision of the Supreme Court inevitably results in total preemption of the remaining last drop of the freedom of private schools

III. Are public interests realized or likely to be realized by oppressing the freedom of private schools?

The denial of the freedom of private schools goes paired with the so-called ‘equalization of schools’ policy. Is the policy then successful? No. It cannot be successful in Korea. Korean parents have long since been keen to educate their children in a good educational environment, which reflects their experience that Korea has achieved astonishing economic growth without any sufficient natural resources except excellent human resources. Korean government has as well been keen to secure excellence of education. It means that there are few good schools at the level of even secondary education as well as at the level of higher education. It would be very natural for parents to send their children to such a good few schools, leading increasingly excessive competition for entrance. The ‘equalization of schools’ policy aims at oppressing such a natural desire of parents; ironically, the higher parents’ social status is, such as higher public officers, who advocate the equalization policy, the more eager they are to send their children to good few schools with success. Interestingly, more than ten of thousand minors go abroad

every year with one parent whereas another parent remains in Korea to finance study. Shockingly, teachers in most schools except good few schools experience difficulty in teaching pupils because pupils prefer private tutoring to schooling. Schools are places where pupils make friends and take rest rather than teaching and studying. Parents pay much more fees to private tutoring than to school fees; total expenditure of private tutoring for the preparation of entrance examination amounts to more than 18 billion US dollars. It is the undeniable result of the equalization policy, which has been invoked to justify the substantial denial of the freedom of private schools.

On the other hand, the equalization policy cannot be maintained under the democratic regime unless private schools are sufficiently weakened. In other words, the equalization policy can continue to go paired with the oppression of the freedom of private schools. Unlike the military dictatorial regime, democratic governments justify the oppression of the freedom of private schools by strengthening and propagating some distorted concepts about private schools. The most popular way is like this: a private school foundation is privileged to establish a private school; it therefore has to finance the operation of the school; nevertheless, most private schools have been subsidized from local governments; state subsidy can therefore justify the treatment of private schools in the same way as towards public schools, meaning that private schools like public schools must cooperate to the equalization policy. Such an advertisement seems to fall short of ensuring educational authorities so that they take one more step: the new law provides that private school foundations have to contribute to the payment of salaries of teachers and staffs, at least to the extent of paying pension contributions due to employers; otherwise the education authorities may levy some disadvantageous measures on such private schools.¹³

Approximately speaking, less than 20% of secondary private schools are probably able to fulfill such a requirement. The reason is that tuition fees paid by parents to private schools is not different from those to public schools, meaning that the education authorities regulate and control tuition fees of both private schools and public schools, whereas lower secondary private schools cannot levy tuition fees on parents. It means that expenditures on public education at private schools are less than those at public schools. What is more serious is that local education authorities give priority to public schools regarding subsidy, resulting in discriminating pupils at private schools against those at public schools.

IV. Conclusion

The oppression of the freedom of private schools is reminiscence of military dictatorial regime, which is not yet fully recognized. Many people seemingly tend to think that the military regime only lacks democratic justification in terms of political freedom, whereas other social policies do not matter, because during dictatorship Korea had achieved astonishing economic growth. In other words, many people tend to pay less attention to freedom and liberty regarding daily civil lives. Some Koreans might be satisfied and might not care even if the freedom of private schools is deprived of. On the other hand, others may, however, suffer the lack of the freedom of private schools. Denominational private schools, private schools with their own educational direction and methodology, intellectuals who strive for diversity among societies, and parents who want to educate their children in the social environment of respecting diversities belong to the latter group. How does the state, even though it is supported by the majority of population, justify the oppression and deprivation of their fundamental right to freedom of private schools, even if they are weaker in terms of political influence? It is rather the right time to rescue private schools from the long and dark tunnel entrenched by the military dictatorial regime and to restore to private schools at least the legal position in which they were before military dictatorship came in. Unfortunately, there seems to remain the last resort of appealing international concern and awareness, assistance, and cooperation, because resort to Korean Constitutional Court and Supreme Court have been exhausted and Koreans do not have any international tribunal equivalent to European Court of Human Rights.

13 Article 47 of the Private School Teachers and Staffs Pension Act.