

South Korean experience and US constitutional jurisprudence on viewpoint discrimination in university funding

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A personal anecdote

- 2008-10: was active and vocal on freedom of speech when the then conservative government was using criminal defamation to put down critiques of and protests against Korea's agricultural trade policy
 - Journalists exposing the Mad Cow Disease risk of US beef indicted for defamation of SKG officials: "defamed who?"
 - Garrison v Louisiana (SCOTUS same day as NY Times v Sullivan which cites Leflar study on use of criminal defamation against political opponents) + numerous UN IHR literature on criminal defamation
 - Later journalists acquitted of all charges Later regimes: criminal defamation much less frequently used for political purposes. Even 2025 anti-disinformation bill – civil not criminal.
 - Back in 2010:
 - Chief Prosecutor to my Dean: "We keep a file on KS Park and what he says to the public through media interviews"
 - Minister of Justice to my Dean: "Is there any way to fire KS Park from the school?"
- Shows the willingness to commandeer public power for political control of the public and even the academia

A short history of South Korea & "autonomy of universities" provision in Constitution

- 1945 de-colonization upon end of World War II
- By 1940s, most of the independence fighters were on the left and allied with China fighting Japan.
- US Military Occupation cf. USSR occupation of North Korea
- 1948 establishment of **anti-communist** South Korean government
- President Syngman Rhee – corruption & poverty & oppression of the left majority & protection of Japanese collaborators who ended up constituting the social elites & election rigging
- 1960 – April 19 (**student**) Democratization Movement (**begun from Korea University on April 18**) – regime overthrown → 1962 Constitution : “political neutrality of government employees”
- 1961 – May 16 coup de tat by **General Park** followed by creation of K-CIA and 19 years of dictatorship until 1979 assassination of Park
- 1979 December 12 coup followed by 1980 May 18 Kwangju massacre to put down **student-led demonstrations** → **General Chun**’s regime until 1987 Democratization
- Police monitoring of **campus activism**: on-campus command post (withdrawn in 1983 but entry frequent), plain clothes agents on campus
- 1987 Democratization: removal of the coup group from the country’s presidency and **the new Constitution**: “**independence, professionalism and political impartiality of education and autonomy of colleges**”
- All university presidents: previously indirectly elected (i.e. appointed by Ministry of Education or owners) → directly elected by faculty, employees, and students

US Rule on funding – Basics

- Viewpoint discrimination: worse than content regulation – not allowed even in limited public forums, i.e., theaters, festivals, conferences (*Perry Education Assoc v Perry Educators Assoc*, 1983, email server; *Rosenberger v University of Virginia*, 1995, religious student group printing cost)
- Exception: Government can support or fund its own views itself or through employees/contractors subject to *Pickering-Connick* balancing test and on funding (*Rust v Sullivan*, 1991, banning family planning clinics from giving out abortion-related information)
- Exception to Exception: Gov cannot discriminate for speech outside the purpose of the funding (*USAID v Open Society*, 2013, *anti-prostitution mandate on AIDS funding*)
- But who decides the purpose of the funding? What if viewpoint is made part of the funding criteria (e.g., Trump EO “DEI or no funding, 2015 NY Governor EO: “do not criticize Israel or lose funding”)?

Case 1: government fund weaponizing against universities – direct election of presidents

- Remember the role of students in democratization and “autonomy of colleges” in the new 1987 constitution.
- Since 1987, after presidencies of 1 former coup leader, 2 democracy fighters, and 1 human rights lawyer, a former construction company CEO LEE Myung-Bak takes presidency in 2008 - neo-liberalism everywhere.
- 2010-2012 Ministry of Education directive : “Government funding available only for universities indirectly electing presidents (i.e., elected by owners)”
- 38 public universities + 138 private universities
- Risk of government control + owner control
- 2014 Busan (public) University professor committing a suicide during a 210-day-long protest against “indirect election” directive
- Directive suspended: 22 public/99 private universities indirect (current)
- **Under US rule? – retaliation for expression beyond funding purpose**

Case 2: 2010 Ministry of Finance rules

- 2008-9 : Massive demonstrations against conservative SKG's agricultural trade policies
- Many CSOs convening the protest at night, violating the night protest ban, and assembling upon a denied permit, also violating the general assembly law → Thousands of CSOs in violation of assembly law
- 2010 Ministry of Finance Rule issued: “no subsidy for CSOs in violation of assembly law or convening *illegal* assemblies”
- CAVEAT: No rule about CSOs committing other illegal conduct
- Many progressive organizations lost gov't funding
 - Seoul Mayor cutting welfare support for disabled demonstrating for more support!
- **Under US rule – retaliation for expression beyond funding purpose**

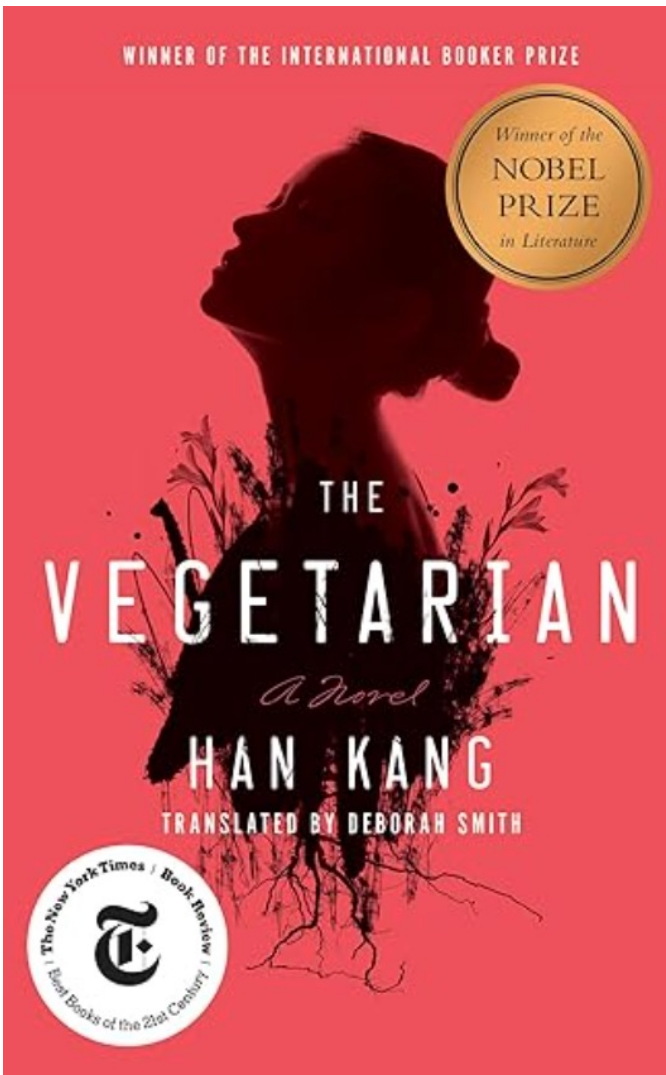
Litigation on Ministry of Finance Rules

- SARANGBANG Group for Human Rights' annual Seoul Human Rights Film Festival and Indi-Forum, funding cut immediately
 - Court (2010): “no evidence that \$ was cut for joining protests”
- Women Workers' Association, “Women Workers' Human Rights Story” publication, 3 yr contract discontinued in early 2009
 - Court (2010): “it is against **people's legal sentiment** to use tax dollars to support CSOs engaged in illegal protests”; “CSO subsidy law is for promoting democracy and public interest activities, so not suitable for funding CSOs engaged in illegal protests.”

CAVEAT: Constitutional Court (2009): the night assembly ban is unconstitutional but apparently **collateral bar on the Ministry Rules**

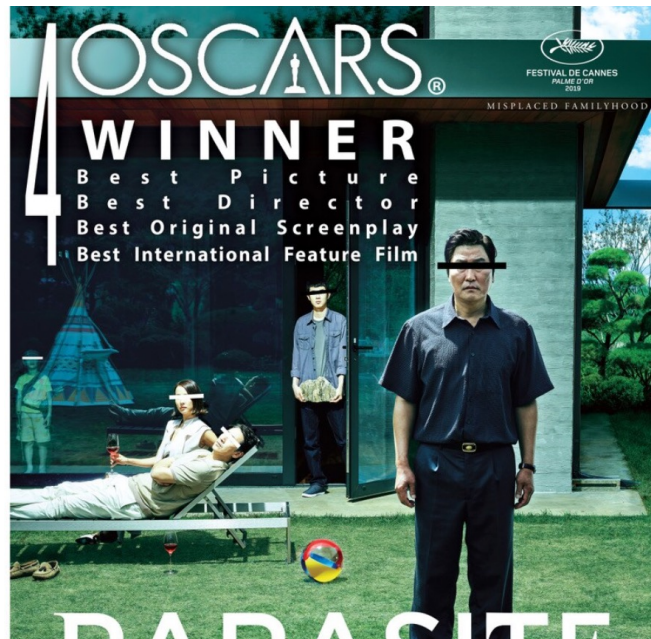
Case 3: 2010 Textbook accreditation/military book banning

- Not funding but using limited public forum (e.g., books allowed in classrooms or soldiers' quarters)
 - “viewpoint discrimination” in textbook accreditation (2011) : Education Ministry requiring accreditation committee to censor middle school history textbooks – cert not granted
 - “viewpoint discrimination” in military book banning (2012) — ***Bad Samaritans*** of award-winning **Chang Ha-Joon**, a Cambridge Univ Prof, already recommended for public school libraries by Ministry of Education, and Edward Carr’s ***What Is History?*** – recognized soldiers’ right to access diverse books but. . . . constitutional for ‘books hurting military readiness’ → one of the most criticized constitutional court decision
- **Viewpoint discrimination ban in limited public forum *Tinker (armband)*-*Pico (library book)*-*Barnett (flag salute)* cases gaining traction in public discourse**



Case 4: 2014 Ministry of Culture artists blacklisting

- KCIA list of about 6,400 “left-wing” artists, including Bong Joon-Ho of the Oscar+Palme d’or winning *Parasite*, Park Chan-Wook of the Grand Prix winning *Old Boy*, and the Nobel Literature Prize Winner *Han Gang*, all for signing petitions supporting the progressive, political opposition
- Various subsidies, grants, and awards discontinued for the listed artists



Jan 2020 Supreme Court Decision

- Abuse of official power to coerce others to do gratuitous things or prohibit the same from exercising their rights (Criminal Code 123)
 - Cf. use of violence or threat to coerce others to do gratuitous things or prohibit the same from exercising their rights (Criminal Code 324)
 - “Official Power” – supervisory/budgetary/personnel powers over the Korea Film Council, Korea Arts Council and Korea Publication Industry Promotion Agency
 - “Abuse” – **infringed upon independence of the committee members of the three agencies, guaranteed in the enabling laws and the Constitution (Can we apply the same to college funders? But No statutes)**
 - “Coerced others to do gratuitous things” – made the committee staff change the meeting agenda/candidate lists to jawbone the committees into excluding the “left-wing” artists (statutory requirement to make it a crime)
- President, staff, and cultural minister convicted of CC123 for generating the artists blacklist and penalizing the on-list artists in subsidy distributions

Minority opinion

- “Laws guaranteeing independence of the agency commissioners are too vague to justify criminal defamation. **Nothing in the law prohibits the agency commissioners from making value judgments.**”
- “US Supreme Court also ruled that selective distribution of subsidy based on the government’s value judgment does not violate the First Amendment” [Rust v. Sullivan(1991)]

What carried Maj or minority: the statutes protecting independence of the arts funding committees and the undercurrent of **German principle of statutory reservation against executive actions**

“Autonomy of Colleges” under SK Constitution

- On top of “independence, professionalism, and political neutrality of education”, “political neutrality of govt employees”
- Possibility of constitutional jurisprudence banning “viewpoint discrimination” in college funding? Slim (L&S sense, not legal sense)
 - Government funding on colleges
 - South Korea (2022) – 12 billion USD (R&D, operation, student aid)
 - US (2024) – 180 billion USD (R&D, student aid)
 - Humanities funding – very small compared to STEM funding
- abuse of official power (statutory) jurisprudence will continue. Is this good? Vulnerable to statutory amendment?

Redux on US law on current cases:

- What if viewpoint is made part of the funding criteria? Either by statute or EO?
- Title VI and IX violations – considered “within” the funding purpose. How about anti-semitism? Or leniency to anti-Israeli protests violating school rules? How about supporting DEI?
- Harvard v DHHS PI: anti-semitism was not the real reason. Shutting down DEI is an unconstitutional condition probably because DEI is **expressive association** or not “within the funding purpose” → Will it withstand SCOTUS? Do we need to develop the *Rust v Sullivan* exception for government’s university funding (**as opposed to university**)?
- Back to viewpoint discrimination – good for **limited public forum** because of element of **deceit - Korean experience of progressing from viewpoint discrimination to gov’ defunding of “left-wing” artists**
- Pushback 1: “Universities themselves need to do viewpoint discrimination (David Rabban)” **but government university funders cannot.**
- Pushback 2: “Public universities are caught by Pickering-Connick-Garcetti rule b/c they are not just fund recipients but employees (Robert Post)” but if we conceptualize academic freedom from scratch or *Sweezy v New Hampshire* (1959, investigation into Marxist faculty) or *Tinker-Barnett-Hazelwood*, would it not apply to university employee hiring/firing?
- Must the state be politically neutral? – **Rawls(reflective equilibrium), Dworkin(law as integrity), and even Nozick on Ethical Neutrality**