Study on the Unconstitutionality of Sports Toto in Korea under the Right of Mental Health

Sang Back Nam¹, Gun Hee Lee²*, Taerin Chung³, Bum Young Park¹ and Duk Hwan Choi⁴

¹Division of Sport and Well-being, Hanyang University, 55 Hanyangdae-hak-ro, Sangrok-gu, Ansan, Gyeonggi-do – 15588, Korea; nsb300@gmail.com, hyby68@hanyang.ac.kr

²Department of Sports and Health Management, Catholic Kwandong University, 579 Bumil-ro 24, Kangreong-si – 25601, Korea; leegh@cku.ac.kr

³Department of Sports and Leisure, Yonsei University, 50 Yonsei-roseo-daemun-gu, Seoul – 03722, Korea; raytonchng@gmail.com

⁴Department of Physical Education, Woosuk University, 443 Samrae-ro, Samrae-eup, Wanju-gun, Jeonrakuk-do – 55338, Korea; cdh0415@woosuk.ac.kr

Keywords: Korea Constitution, Mental Health, Sports Toto, Sports Promotion Act, The Right of Mental Health

Abstract

Objectives: We examined the mutual relationship between the Sports Promotion Act and the Enforcement Decree of the Sports Promotion Act to understand the unconstitutionality of Sport Toto in Korea. Methods/Statistical Analysis: To prove the unconstitutionality of Sports Toto, a precise understanding of its applicable Act is needed, which requires a fundamental in advance. As Sports Toto is based on the Sports Promotion Act, Article 1 of the Sports Promotion Act which the right to health, the access right to health, and the right to healthcare is based on and the chapter 4 on which Sports Toto is based on were analyzed. Findings: The results of analyzing the Sport Promotion Acts revealed that taking the social implications of Sports Toto into account, Korean people's right to health, access right to health, and right to healthcare are infringed considerably by carrying forward Sports Toto itself. Regarding the relationship between the rationality of Sports Toto's existence and the Constitution of the Republic of Korea in terms of unconstitutionality, various precedents related to this issue are required. Also, nothing is mentioned about people's right to health either in Article 24~32 of the Sports Promotion Act or in Article 26~40 of the Enforcement Decree of the Sports Promotion Act which still suggests the possibility of the unconstitutionality over the relevant articles. Improvements/Applications: By diversifying and institutionalizing existing countermeasures against the social side effects, Sports Toto must take responsibility for people's mental health, and regarding this, there is still a lot to discuss.

1. Introduction

“Nobody compelled people to buy OO.”

This is a line of a South Korean movie which was a big hit in the nation. In the movie, a villain who manipulated the stock price against the public refuted the accusation from the hero who criticized the villain's morality by saying this line. The issue here is that the villain's behavior is morally wrong but totally legitimate (of course, there are sentencing provisions relating to stock manipulation, but if it does not go beyond limits on punishment). The plot of this movie was deployed by the illegal acts of some individuals who have the ability to manipulate stocks. If such illegal acts had been done by the government or government organizations that exercise a significant influence on the nation, how one could understand? In fact, this is a quite difficult question. However, this research found one possible answer in sports promotion lotteries (hereafter, Sports Toto) which is issued by the South Korean government targeting its own people. Why
do nations have to take responsibility for healthcare for their citizens? In the past, a country's national strength was determined by simply comparing the number of its citizens and its quantitative scale. In modern society, a country is assessed in all areas including its social, cultural, economic, and scientific worth. Based on this assessment, comprehensive indicators are used to decide a country's national strength. Countries with the great number of the citizens who are healthier and live longer are likely to be more powerful. In other words, making the nation healthy and sustaining it as well as proposing and operating a system for this can be top priorities in national policy that a country must implement and continue to develop regardless of time and place. That is the first reason why this study is needed. Thus, the right to health of South Korean citizens is to be protected by the government of the Republic of Korea and in particularly the right to mental health must be noted. The 2012 Seoul Mental Health Center report said that 31.7 out of 100,000 South Korean citizens committed suicide in 2011. According to the data analysis of health insurance payments from 2007 to 2011, depression patients were reported to have increased from about 471,000 in 2007 to about 531,000 in 2011. The mental health of the nation is deteriorating noticeably day by day. Nevertheless, there is a lack of research that could have a substantially positive impact on the mental health of the nation and no proposal for effective policies based on such research. That is the second reason why this study is needed. The result of the 2012 Seoul Mental Health Center report shows the current poor state of the policy relating to the mental health in the country. In the perspective of the right to health of the nation that the government must comply with and protect, it can be said that Sports Toto has a significant issue. Sports Toto has caused very different forms of social issues. Sports betting have existed in the nation since the Sports Promotion Act got revised in 2000. Cycle racing and horse racing, which were separated, are integrated into one after revision and the scale has become even bigger. Purpose of this study was to analyze the Sports Promotion Act that is applicable to Act of Sports Toto and the Enforcement Decree of the Sports Promotion Act. In addition, the right to mental health of the nation, one of the basic obligations for a country is to be analyzed based on the Constitution of the Republic of Korea. By doing so, the ultimate purpose of this study is to determine whether the Sports Promotion Act, the basis of the establishment and operation of Sports Toto, is unconstitutional and propose ways to compensate contradictions there.

2. Literature Review

2.1 Origin of Mental Health

The right to mental health and physical health contained in the subordinate concept for the pursuit of happiness that is guaranteed in Article 10 of the Constitution of the Republic of Korea forms the subordinate concept for the right to health. That means good environments and fundamental rights must be ensured for any Korean citizens so that they can be physically and mentally healthy. The basic concept of the right to mental health is found in Article 2 (freedom from discrimination) and Article 25 (right to adequate living standard) of The Universal Declaration of Human Rights. There is controversy over derivation of social consensus and legislation regarding whether the right to health and the access right to health, which is the super ordinate concept for the right to mental health, must be applied to all social classes or specific social classes. However, Article 12 of the International Covenant on Economic, Social and Cultural Rights says that “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” This article also includes all the steps to be taken by any nation to the present Covenant to achieve the full realization of this right. Here, the right to mental health is clearly present and there are no disagreements about it.

2.2 Sports Lottery in the Republic of Korea

Sports Toto supported by the South Korean government (suggested by Korea Sports Promotion Foundation and approved by the Ministry of Culture, Sports and Tourism in 2000) is a public service which began to raise funds for holding the 2002 World Cup as a near term goal and promoting sports for all in the long run. The Sports Toto business, started with the names of “Soccer Toto” and “Basketball Toto” in 2001, is limited to football, basketball, volleyball, golf, and wrestling as well as sports designated by the Minister of Culture, Sports and Tourism according to Article 29 Section 1 of the Enforcement Decree of the Sports Promotion Act. Issuance of the overseas sports (Section 3) also became available. It can be said that the Sports Toto business in the nation has been growing way
faster than any other businesses. In this context, reported that total revenue of Sports Toto in 2011 increased more than 13 times compared to 2004, which shows Sports Toto has been noticeably growing and regarded as an important area in the sports industry in the nation.

### 2.3 The Sports Toto Business and Mental Health

Sports Toto, started to raise funds for sports promotion in South Korea, is a lottery business using content of various sports home and abroad. According to Article 33 of the Enforcement Decree of the Sports Promotion Act, Sports Toto is divided into Toto and Proto. Toto provides payouts (50 percent of sale amount of bets) according to actual game results matching a betting prediction and stakes invested by players become a pool to be divided into winners (Pari-mutuels). Proto's payout (50 ～ 70 percent of sale amount of bets) is calculated by multiplying betting amounts with a pre-disclosed payout ratio and players can select sports game events they want to bet (Fixed Odds). Payouts are limited despite the fact that Sports Toto is a lottery business. That is to minimize Sports Toto's speculative nature. In other words, it can be said that Sports Toto has gambling nature which can have a significant impact on the mental health of South Korean citizens and reported that consumers' psychological choice has a deep relationship with the process of being addicted. In particular, Derevensky, Sklar, Alissa reported that gambling advertisements could play a significant role in viewers' becoming addicted to gambling regardless of its content. This shows that sports betting has a close relationship with gambling, which this study seriously focuses on. The Sports Toto business not only affects the mental health of the nation directly but also causes game result manipulation and the bankruptcy of family, which can be indirect damage. An addict to sports betting may manipulate game results based on his or her experience in a lower chance of winning or stop economic activity. Here, it will not be difficult to understand that there is a close correlation between the Sports Toto business and the mental health.

| Article | Sports Promotion Act (Chapter 4) | Enforcement Decree of the National Sports Promotion Act (Chapter 7) |
|---------|---------------------------------|---------------------------------------------------------------|
| 24      | Business of Sports Toto issuance | Not applicable                                                |
| 25      | Contracting out of Sports Toto   |                                                               |
| 26      | Prohibition of similar conduct   | Types of Sports Toto                                           |
| 27      | Payouts                         | Review of Sports Toto issuance                                 |
| 28      | Operating expenses for contracting out | Sports Toto issuance                                      |
| 29      | Use of proceeds                 | Target sports for Sports Toto issuance                        |
| 30      | Limitation on buying Sports Toto | Approval of contracting out the Sports Toto business            |
| 31      | Approval and supervision of the business plan | Requirements of contractors                                 |
| 32      | Invalidity of Sports Toto sale   | Scope of contracting out                                      |
| 33      | Not applicable                   | Payouts                                                       |
| 34      |                                 | Operating expenses for contracting out                        |
| 35      |                                 | Allocation percentage of the proceeds                         |
| 36      |                                 | Submission of the business plan from the organizer            |
| 37      |                                 | Scope of those who are restricted to buy Sports Toto           |
| 38      |                                 | Approval and supervision of the business plan                 |
| 39      |                                 | Invalidity of Sports Toto sale                                 |
| 40      |                                 | Exception of Sports Toto hits                                 |

Note: National Law Data Center (http://www.law.go.kr, Korea Ministry of Government Legislation)
3. Analysis of the Applicable Act of Sports Toto

To prove the unconstitutionality of Sports Toto, a precise understanding of its applicable Act is needed, which requires a fundamental and accurate interpretation in advance. As Sports Toto is based on the Sports Promotion Act, Article 1 of the Sports Promotion Act which the right to health, the access right to health, and the right to healthcare is based on and the chapter 4, issuance of sports promotion lotteries, (Article 24, 25, 26, 27, 28, 29, 30, 31, and 32) which Sports Toto is based on were analyzed. The results are as follows Table 1.

3.1 The Sports Promotion Act Article 1

Article 1 of the Sports Promotion Act, enacted and promulgated on September 17, 1962 (Law No. 1146), says that the law is to improve the health of the nation by promoting sports for all and make the nation enjoy pleasant lives by cultivating a sound mind and further aims to contribute to the national prestige through sports. When Article 1 of the Sports Promotion Act is closely looked at, three things are found. Firstly, the historical background when the Sports Promotion Act was enacted can be considered to figure out what underlying meaning Article 1 of the Sports Promotion Act has. In a study, the Sports Promotion Act was criticized for being hastily enacted in 1962 when the military government with a policy of elite sports training was aimed at participating in the 18th Tokyo Summer Olympics (1964) and various international sports competitions. This is in line with what this study argues. Secondly, this simply imitated 1960s Act without considering the nation’s sports environment is still the basis for the modern sports industry in South Korea, which is completely different from that of 1960s. The economic and political situation of the nation in the 1960s was not good to express a desire to stay healthy. That means circumstances did not allow the Korean people to be interested in leading healthy lives in the early 1960s. It can be also said that the Sports Promotion Act was hastily enacted and used to achieve short-term political goals set by the government without consideration for the political, social, economic, cultural and even the sports sectors. Lastly, Article 1 of the Sports Promotion Act is still one of the bases to ensure the fundamental rights of South Korean citizens despite this criticism from society. In another dimension, the South Korean government itself clearly defines its duty to the right to health, the access right to health, and the right to healthcare guaranteed by the Constitution saying the South Korean government must do their duty to make the nation physically and mentally healthy and enjoy pleasant lives and is never free from this duty. It can be said that the government accurately defines an obligation with respect to the right to health of their citizens. 3.2 Sports Promotion Act Article 24 ~ 32 and the Enforcement Decree of the Sports Promotion Act Article 26 ~ 40. Sports Toto related regulations are defined at the chapter 4 (Sports Toto issuance) of the Sports Promotion Act and chapter 7 (Sports Toto issuance) of the Enforcement Decree of the Sports Promotion Act. Details are given in Table 1. Analysis of the chapter 4 of the Sports Promotion Act and chapter 7 of the Enforcement Decree of the Sports Promotion Act shows a legal relation. Article 24 Section 1 of the Sports Promotion Act says that the Seoul Olympic Sports Promotion Foundation can do Sports Toto issuance business to raise funds for promoting sports for all and elite sports. That means the Seoul Olympic Sports Promotion Foundation (hereafter the Korea Sports Promotion Foundation) is legally authorized as a corporation. In other words, the South Korean government enacted and promulgated Article 24 Section 1 to legalize the Sports Toto business. Accordingly, it is determined that Article 24 Section 1 plays a role as a legal basis for the entire Sports Toto business. Article 26 Section 1 of the Enforcement Decree of the Sports Promotion Act also says that the types of Sports Toto in accordance with Article 24 Section 1 of the Sports Promotion Act are classified as the following subparagraphs depending on the voting method. Therefore, it is said that the role of Article 24 Section 1 of the Sports Promotion Act is clearly defined Table 1. Figure 1 shows the overall situation. The other sections of Article 24 including Section 2 define details about what the Korea Sports Promotion Foundation, given the legal capacity to do business by Article 24 Section 1, can do as a legitimate provider. The Enforcement Decree of the Sports Promotion Act also provides details for legalized business activities based on Article 24 Section 1 of the Sports Promotion Act presented in its Article 26 Section 1. Then, what is the basis of Article 24 Section 1 of the Sports Promotion Act? There has been a controversy over the relationship between the Sports Promotion Act enacted to raise funds for promoting sports in the nation and the right to health, the access right to health and the right to healthcare defined in the Constitution of the Republic of Korea. That is because of social side effects
and gambling issues caused by Sports Toto. The purpose of this section is to discuss the relationship between the Sports Promotion Act, the Sports Toto business, and the Constitution of the Republic of Korea.

4. Conclusion on the Unconstitutionality of Sports Toto

The following implications can be found by looking at the legal relation among Sports Toto, the Sports Promotion Act and the Enforcement Decree of the Sports Promotion Act, and basic rights guaranteed by the Constitution. First, Sports Toto attained its legitimate ground through the Sports Promotion Act and the Enforcement Decree of the Sports Promotion Act and the Korean government is entrusted with the full controlling power. Nevertheless, it does not seem that the feature of Sports Toto’s speculation does not exist, but rather it just appears that the speculation is covered with procedural legitimacy and legality. This can be understood that the various side effects caused by Sports Toto, including addicts and game result manipulation etc. are playing as objective evidences for the problems. Second, although Sports Toto secured its legal grounds such as legitimacy and legality by enacting special laws despite possible violations on people’s right to health, access right to health and right to healthcare, considering state’s fundamental duty to protect people’s right to health, it is right to raise a question whether the South Korean government fulfilled its fundamental duty over people’s health. In addition, it is not persuasive to raise funds at the expense of people’s mental health to achieve the existing goal, building a sound Korea. Third, considering the goal, it is not that convincing that The Sports Promotion Act and the Enforcement Decree of the Sports Promotion Act were established to raise sports promotion funds since there are possible violations on people’s basic rights. In conclusion, it is pretty understandable that people’s mental health was damaged by Sports Toto. Although “nobody compelled people to buy a Sports Toto,” they were exposed to an environment where they have no choice but to buy one. Besides, due to this, they got stress and their mental health was harmed by the national project. Of course, it is understandable that the emergence of social instability due to social side effects is a part of the damage by Sports Toto. Therefore, by taking a look at Article 24–32 of the Sports Promotion Act and Article 26–40 of the Enforcement Decree of the Sports Promotion Act which are the fundamental laws for Sports Toto in Korea and Article 10 and 35 of the Constitution, the supreme law of the Republic of Korea which guarantees peoples’ right to a healthy life, it can be concluded that Sports Toto violates Korean people’s right to pursue their happiness and right to health.

5. Conclusion

This study has focused on whether Sports Toto is unconstitutional or not by analyzing the mutual relationship between the Sports Promotion Act and the Enforcement Decree of the Sports Promotion Act which are the base rules for Sports Toto and the right to health under the Constitution, which conflict with each other. Although Sports Toto was designed to promote sports for all and raise funds for it, problems triggered by it are getting worse causing various forms of social side effects on people’s fundamental living, including sports gambling addicts and game result manipulation. Even though Sports Toto Co., Ltd. operates various public projects and treating programs to deal with the side effects, it is difficult to say that the effect is tangible. This study found that taking the social implications of Sports Toto into account, Korean people’s right to health, access right to health, and right to healthcare are infringed considerably by carrying forward Sports Toto itself. Consequently, these findings suggest that the chances are that there is unconstitutionality in a bigger category. This is because that even though the ground rules secured their legitimacy and constitutionality, if the result of the project violated people’s basic rights in any ways, it is right to say that this goes against the Constitution, the supreme law of the Republic of Korea. Then, although a new question arises if it is possible to take it back citing Article 24–32 of the Sports Promotion Act and Article 26–40 of the Enforcement Decree of the
Sports Promotion Act, it can be too rash to answer simply to this question, with either just \( \text{yes} \) or \( \text{no} \)? However, regarding the relationship between the rationality of Sports Toto’s existence and the Constitution of the Republic of Korea in terms of unconstitutionality, various precedents related to this issue are required. In addition, the fact that nothing is mentioned about people’s right to health either in Article 24~32 of the Sports Promotion Act or in Article 26~40 of the Enforcement Decree of the Sports Promotion Act still suggests the possibility of the unconstitutionality over the relevant articles. Further, by diversifying and institutionalizing existing countermeasures against the social side effects, Sports Toto must take responsibility for people’s mental health, and regarding this, there is still a lot to discuss.

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