Court Annexed Alternative Dispute Resolution: Does the American Experience Have Implications for Korea?

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It is an honor to have been invited to Korea to speak before this distinguished audience. I am grateful to the Berkeley Club and its President, Mr. Jyung Nak Lee, for making this visit possible. I also want to acknowledge the generous help and contributions of two Boalt Hall alumni, Professor Jibong Lim and Judge Si-Cheol Kim, who have helped me immeasurably both in planning this trip and in thinking through the subject of this talk.

My talk today is a tentative exercise in comparative law. Before beginning I would like to report a family connection to Korea. In 1883, my father's great-uncle, Percival Lowell, was one of the first Americans to visit Korea and briefly served the Korean emperor as Secretary and Counselor to the Korean Mission to the United States. Lowell

* Professor of Law, School of Law (Boalt Hall), University of California at Berkeley. This lecture was delivered in substantially this form during my visit to Korea in October and November, 2000, at both Seoul National University and at the Judicial Research and Training Institute. In preparing it for publication, I have preserved it substantially as delivered, making only a few minor textual edits and adding fuller references. An different version of this paper is scheduled for publication in the Seoul Law Journal.

spent the better part of a year in Korea and developed a great admiration for its natural beauty, its architecture and its people. Upon his return he published a book about Korea. In it he sought to explain to his nineteenth century American audience the value of the study of societies other than one's own, of the comparative method, if you will. Here is what he wrote:

"We cannot truly be said to know anything apart from its relations. Unless we realize the dissimilar, we do not fully appreciate what lies at our elbow. We may see or even do a thing, day after day, and yet awake some morning to discover that we never understood it. Habit blunts the perceptions. We insensibly confuse the accidental and the unimportant with the vital and fundamental. But let us change our attitude toward the subject in question; let us see it from a slightly different point of view, and we bgin to be aware of what it really is in a way we never were conscious of before."[1)]

I stand before you today with the same enthusiasm for Korea and for the comparative enterprise that my great-great uncle once had. I hope that you will learn half us much from me as I expect to learn from you.

My topic is court-based alternative dispute resolution in civil cases.[2)] Over the past two decades, many courts in the United States have adopted court-annexed alternative dispute resolution programs. Korea has some court-annexed alternative dispute resolution as well, notably in the form of court-annexed mediation conducted pursuant to the Civil Mediation Act of 19903[3)] and there is interest in further development of such programs.[4)]

I will start with the American experience and conclude with some ideas about Korea.

First, I will describe the caseload and workload pressures that led to adoption of court-based alternative dispute resolution in the United States. I will describe the specific reforms adopted and the hopes expressed for them, which included reducing costs

1. Percival L. Lowell, Choson: Land of the Morning Calm 108 (1885).

2. The dispute-resolution devices I will be discussing are alternatives to conventional litigation ending in trial before a judge or jury, either because they are less formal (arbitration, for example) or because they aim directly at facilitating settlement of the case (mediation or conciliation, for example). They are court-annexed because they happen pursuant to court rule, court sponsorship or judicial referral. The element of court involvement distinguishes such devices from arbitration or mediation agreements reached by the parties privately and without court intervention. I exclude domestic relations cases, in which court-annexed dispute resolution is common in many societies, because they raise distinctive issues stemming from the intimate and emotional character of the marital relationship, the frequent presence of children, and the frequent need to nurture and regulate an ongoing relationship between the divorcing spouses. I also exclude criminal cases.

3. For discussion see Sang-Hyun Song, Alternative Dispute Resolution Procedures in Korea in Korean Law in the Global Economy 499 (Sang-Hyun Song, ed. 1996); Kwang-Taek Woo, A Comparison Between Court-Connected Mediation in Florida and Korea, 22 Brooklyn J. of Int'l Law 605 (1997).

4. See Chang-Soo Yang, The Judiciary in Contemporary Society: Korea, 25 Case Western Int'l L.J. 303, 311 (1993) (urging "more systematic support" for alternative dispute resolution in Korean courts).

and delays and achieving "more just" outcomes.

Second, I will summarize briefly the empirical findings concerning court-annexed alternative dispute resolution programs. Although such programs have achieved some benefits, they have largely failed to produce significant changes in litigation cost and delay. Drawing on some central findings of law and social science literature, I will try to explain these results.

Finally, I will offer tentative observations about the relevance of the American experience to the problem of court workloads and delays in Korea. Because the two systems are so different, I will avoid any prescriptive advice. Instead I will identify questions that might be worth answering and approaches that might be worth exploring as Korean judges, lawyers and law professors think about court reform.

I. American Adversarialism, The "Litigation Explosion" and the Rise of Court-Annexed Alternative Dispute Resolution

American adversary justice, as administered in the lower courts, has the following salient characteristics.

Judicial Passivity. Many cases are filed and resolved by settlement without any judicial intervention. The trier of fact has little role in the development and presentation of the case. Because judges are so passive, the net public subsidy to litigants is low.
Party Control and Autonomy. The parties have the exclusive obligation to develop the record. They are free to investigate all relevant matters. The parties have broad freedom to compete, little or no obligation to cooperate.

Sharp Separation of Pretrial and Trial Stages. There is a sharp distinction between the pretrial phase of the case, which can last for several years, and the trial, which is a staged, formal conclusion to the proceeding that typically lasts for several days.

The Strong Role of Lawyers. Because of the tribunal's limited role and because of the large role played by the parties, lawyers have a large role in civil dispute resolution, both in and out of court. The number of lawyers is large, both on a per capita basis and in proportion to the number of trial judges.

American interest in court-based alternative dispute resolution was in substantial part the result of a surge of litigation in the final third of the twentieth century. The increase occurred in both federal and state courts, but the most striking increases were in federal court, and I will limit my descriptive data to that system.[5] Between 1960 and 1990, the federal court system in the United States experienced a dramatic increase in cases filed, in a broader range of subject areas. The newer cases were more complex, more contentious, and more time-consuming. Congress authorized additional judgeships and expanded the number of non-judicial personnel working in the federal court system. But these expansions did not fully offset the increase in workload, which effectively doubled for each authorized judicial position.[6]

In a system which emphasizes limited judicial involvement and low judicial budgets, dramatic increases in workload created concern and tension. Before judges could devise a solution, however, they needed an account of the causes of the problem. One obvious reason for the increase in judicial workload was the creation, largely by the legislature, but also in some measure by the courts, of new legal rights and hence of new subjects for dispute. Beyond that, commentators thought the problem was adversarial pathology and located that pathology in litigants and their lawyers. The surge in judicial business was said to be the product of a uniquely litigious and lawyer dominated legal culture. Some disputants, the critics claimed, were self-destructive, even deluded. Other disputants were charged with disregard for the public goodfor wasting public resources on matters not worthy of judicial attention. Lawyers were seen as incompetent, or worse, disloyal, padding their fees from litigation while leading their clients down the garden path of wasteful litigation. Alternatively, lawyers were portrayed as too loyal, even servile, too readily yielding to their client's wrongful desires to pursue frivolous or harassing claims.[7]

5. For material on state court filings see Mark Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society, 31 U.C.L.A. L. Rev. 4 (1983) (hereinafter Galanter, Landscape) and Mark Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986).

6. Between 1962 and 1985, Federal court civil and criminal filings increased from 244 per authorized judgeship to 521 per authorized judgeship, before receding slightly to 476 per judgship in 1999. More important, the weighted filings per judgeship, which reflect an adjustment for the complexity and judicial effort involved in more complex cases, increased from 242 in 1962 to 476 in 1999. Larry Kramer, "The One-Eyed Are Kings" : Improving Congress's Ability to Regulate the Use of Judicial Resources, 54 Law and Contemp. Problems 73, 74 (1991).

7. An important additional theme for some forms of alternative dispute resolution was the inadequacy of litigation to do justice in the newer cases brought to court. This view took several forms. Some reflected doubt about the court's ability to get at the truth of the matter, either because of the technical nature of the issues involved or because of the inherent indeterminacy of the factual and legal issues. Others reflected a sense that the all-or-nothing remedies ordered by the court were too crude and limited to achieve a proper outcome. And a third strain emphasized the destructive effect of adversarial procedure on relationships between the

Whatever the dimensions and sources of increased judicial business, court-annexed alternative dispute resolution was not the only solution available. Courts and legislatures had available to them, and in fact pursued, several other procedural options. They included:

1. Legislatures modified rules governing jurisdiction, lawyers fees, damages, and, on occasion, even the existence of the claim itself,[8] in an effort to reduce the amount and complexity of litigation.[9]

2. Judges sought and obtained further increases in the number of judges and other judicial support personnel employed in conventional adjudication.[10]

3. Judges were instrumental in bringing about changes in court rules designed to increase penalties for filing meritless or bad faith litigation.[11]

4. There was a pronounced increase in judicial support for, and judicial deference to, private dispute resolution mechanisms, particularly arbitration pursuant to contract.[12]

5. There was a shift in the style of judging, from the passivity traditionally associated with the adversary system, to a more active style, sometimes characterized as managerial judging.[13]

Court-annexed alternative dispute resolution was complementary to these different kinds of reforms and embodied several different approaches.[14] Court-annexed arbitration

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parties and on the parties incentives to comply with the judgment. In many courts, however, these arguments were distinctly secondary.

8. An important example at the state level was the rising adoption of "no fault" schemes for automobile accident cases.

9. More controversially, judges in some courts actually lobbied for or against such changes. See Judith Resnik, Trial As Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924 (2000).

10. Id.

11. An example was the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure, which sought to impose greater obligations on parties and lawyers to determine the merit of claims prior to filing and required the application of sanctions for non-compliance. Unfortunately, the rule lost favor with the courts, in part because of the additional time and resources devoted to litigation of sanctions issues and was substantially modified in 1993 to dilute its effectiveness.

12. While in the past, courts had tended to invalidate such agreements as improper attempts to divert the proper business of the courts, during and after the litigation explosion courts increasingly upheld such agreements and appeared to view the fact that private arbitration reduced caseloads as a positive public good. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985);

13. Managerial judging involves more active involvement by the judge, typically through a series of hearings conducted over the course of the case, in setting limits on factual investigation and meaningful deadlines, in mediating disputes that arise in the course of preparing for trial, and in guiding the parties to an appropriate settlement where possible. A managerial judge functions much more like the judge in a civil law system, like those in Germany and Korea. For discussion, see Robert F. Peckham, The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Cal. L. Rev. 770 (1981); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982).

14. Not every federal or state court adopted all or even most of these reforms. In fact, in some courts, particularly in rural areas where caseload increases have not been a problem, probably none have received

essentially sought to respond to the surge of adversarial litigation by providing a traditional adjudicative outlet, but at lower cost. Thus, it involved an actual evidentiary hearing of the merits of the dispute, but with simplified procedure, before a non-judicial decision maker, typically a practicing lawyer. Where adopted, judicial arbitration was often mandatory for cases involving smaller amounts. But court-annexed arbitration, unlike arbitration pursuant to contract, was also non-binding, because of concerns that requiring parties to use the simplified procedure might violate the constitutional right to jury trial. As a consequence, parties who were dissatisfied with the outcome could insist on a de novo court or jury trial.

Other approaches focused on facilitating dispute planning and settlement with more or less intrusive forms of mediation. Some built directly on existing procedural rules. For example, judges were already authorized to include the topic of settlement in pretrial conferences with the parties and their lawyers.[15] It was only a short additional step to require or invite the parties to mediate their disputes before a judge or magistrate.[16] Similarly, judges in some complex cases used their existing authority to appoint special masters to appoint experienced lawyers capable of mediating the dispute and then required the parties to mediate.[17] Still more inventive was the summary jury trial, a procedure straddling the line between non-binding adjudication and mediation.[18] Other mediation initiatives involved innovative use of non-judicial personnel. In early neutral evaluation, parties and their lawyers are required to meet at an early stage in the case with a non-judicial evaluator expert in the type of case involved appointed by the court. Following brief presentations by the parties, the neutral provided a candid evaluation of the strengths and weaknesses of each party's case and then the parties and the evaluator sought to produce a plan for the further management of the case.

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extensive use. Conversely, in a few crowded urban districts there has been experimentation with all these, as well as with other alternatives not reviewed here. Nonetheless, these strategies describe the basic patterns of response to court crowding and delay.

15. See Federal Rule of Civil Procedure 16.

16. See Stephen McG. Bundy, The Policy in Favor of Settlement in an Adversary System, 44 Hastings L. J. 1 (1992).

17. See, e.g., Peter Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U.Chi. L. Rev. 337 (1986)..

18. In summary jury trial, the court convenes the parties before a mock jury so that the parties can present, through their lawyers, a sharply abbreviated version of their trial case, in the hope that the jury's reaction to the presentations will educate the parties about the strength of their respective cases and provide the basis for a negotiated settlement. See, e.g., Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366 (1986).

II. The Results of Court Annexed Dispute Resolution

Modest Results. The alternative dispute resolution reformers had two kinds of goals. The first was to conserve resources by reducing delays and expenditures. The driving image here was the notion that much litigation is wasteful or self-defeating. The second was to achieve "better" outcomes, as measured principally by the satisfaction of the litigants who appeared before the court. The reformers assumed that many litigants would find that alternative dispute resolution offered superior justice when compared with formal adjudication.

What then has been the outcome? While one cannot yet venture definitive opinions,[19] the evidence so far suggests that alternative dispute resolution has not achieved the reformers' ambitions for reducing cost and delay. Most studies find that court annexed alternative dispute resolution has not significantly reduced court costs, costs to litigants, or delay as measured by the time from the filing of the case to disposition. This result has recurred both in early studies of individual arbitration and mediation programs[20] and more recently in studies comparing six different federal district courts which had adopted such programs with other, similarly situated federal courts which had not.[21] Moreover, the studies suggest that litigants' and lawyers' own preferences for alternative dispute resolution are mixed. Thus, when such programs are voluntary, rather than compulsory, relatively few litigants opt to use them.

In contrast, studies suggest that fairly often alternative dispute resolution enhances party satisfaction. Participants in court-annexed arbitration, for example, report higher

19. Court-annexed alternative dispute resolution, unlike many past procedural reforms, has received serious empirical study by excellent social scientists, notably in a series of monographs by the Rand Corporation's Institute for Civil Justice. Still, caution is warranted in interpreting the results thus far. None of these reforms has been systematically implemented or studied on a nationwide basis. Moreover, most of the studies have been done when the dispute resolution programs were in their infancy, while courts were still learning how to run them. Finally, there are few, if any, studies in which there is a true experimental control population of similarly situated disputes that skip the alternative dispute resolution process. Nonetheless, there is a literature sufficient for the drawing of preliminary conclusions.

20. An outstanding survey is Robert J. McCoun, E. Allan Lind & Tom R. Tyler, Alternative Dispute Resolution in Trial and Appellate Courts, in Handbook of Psychology and Law, 95, 104-112 (D.K. Kagehiro and W.S. Laufer eds. 1992).

21. James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act 18-20 (1996).

satisfaction than those who participated instead in judicially mediated settlement conferences. The reason appears to be that in mandatory arbitration, more disputants get the opportunity to "tell their story" to a neutral.[22] Similarly, judicial mediation at settlement conferences receives very strong support from lawyers in urban districts.[23]

Why hasn't alternative dispute resolution produced the reductions in cost and delay that had been hoped for? And what is the source of the benefits that it is producing? The short answer is that the reformers' essential premises were largely mistaken. The litigation culture that reformers believed was irrational and committed to adjudication was in fact more or less rational and committed to settlement. To understand, it will help to review some of the most important empirical findings by social scientists who have tracked American disputing behavior,[24] from its inception, at the point when individuals engage in out of court activity, to its conclusion, when actual lawsuits are abandoned, settled, or resolved through adjudication.

What this research discloses is a phenomenon that has been described as the dispute resolution "pyramid." The idea of the "pyramid" captures two notions. The first is a progression from lower levels of conflict to higher, more formal and more costly levels. The second is a gradual attrition in the number of disputes, reflecting decisions to settle or abandon claims at each higher stage. The simplest form of the pyramid is reflected in Figure A. The bottom of the pyramid shows the universe of potentially litigable events. Above is the much smaller number of claims. Above that is the still smaller number of filed cases, and above that the very small number of cases resolved by some form of adjudication or by trial.

This highly schematized version of the pyramid reflects the basic features identified in the social science research:

- The universe of asserted claims is smaller than the universe of potential disputes. Many potential claims are not recognized. Even people who feel aggrieved and know of their rights often decide to "lump it," that is, to accept the outcome without complaining.

- Most disputed claims do not lead to litigation, but instead are settled or abandoned prior to any court filing. This is true even among disputes taken to lawyers.

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22. McCoun et al., supra note 20.

23. Wayne D. Brazil, Effective Approaches to Settlement: A Handbook for Judges and Lawyers (1988).

24. The most important work in this field was done in the 1970s and 1980s of the Civil Litigation Research Project of the University of Wisconsin and is brilliantly summarized in Galanter, Landscape, supra note 5.

- When litigation is filed, most cases do not consume large amounts of court time or lead to a litigated judgment. To the contrary, the majority of filed cases are resolved by default or settlement, often shortly after the case is filed and without judicial involvement. Adjudication is rare and trials are rarer.

Another important finding of this social science work is that the shape of the "disputing pyramid" differs for different kinds of disputes. Consider two common types of disputes: automobile accident cases and medical malpractice cases. Because automobile injuries are easy to recognize, most injuries lead to claims. But medical malpractice claims are hard to recognizefew injuries lead to claims. Claiming behavior is also influenced by costs, including possible damage to valued relationships. The desire to preserve valued relationships plays little role in auto accident cases, but frequently deters malpractice plaintiffs from suing their own doctor. Finally, the rate at which disputes reach court depends on the functioning of intermediate dispute resolving institutions. In America, though the rate of claiming for automobile accidents is high, the rate of litigation is not, because a well-established and active claims processing network, involving plaintiffs' lawyers and insurance companies, resolves most claims prior to any court filing.

The concept of the disputing pyramid suggests that litigation results from rational choices by litigants in light of the available information and alternatives. Toward the top of the pyramid, where parties have retained lawyers or filed suit, this process of rational choice by plaintiff and defendant has been characterized as "bargaining in the shadow of the law." [25] In this conception, decisions to settle or litigate result from a bargaining process, in which each disputant's reservation price (in the plaintiff's case, the least that it would accept, in the defendant's, the most that it would pay) is determined by its estimates of the probability of success at trial, the value of the relief to be awarded by the court, and the costs to be incurred, as well as by the disputant's tolerance for risk and delay. Settlement will not occur if there is no "settlement gap" that is, if the defendant's reservation pricethe most he would payfails to exceed the plaintiff's reservation price. When the parties costs are small relative to the stakes, the case is close, or one party has a much larger stake in the case than the opponent, there may be no common ground. Even when there is a settlement gap, settlement may not

25. See Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979); Robert Cooter, Steven Marks and Robert Mnookin, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 Journal of Legal Studies 225 (1982).

occur if bargaining fails for strategic reasons.[26]

The dispute resolution "pyramid" and the idea of "bargaining in the shadow of the law" point to an account of civil litigation very different from that suggested by the term "litigation explosion." Instead, they suggest that the basic patterns of disputing behavior make sense and that Americans do not pursue conflict lightly or for its own sake. Litigants are cost sensitive, and normally compose their claims without extended litigation.

These social science accounts remind us that the influence of reform of court procedures on litigation rates or duration is likely to be modest. Many factors that determine the persistence of litigation are largely independent of procedure: how large the stakes are, how close the factual issues are, whether there is a relationship between the disputants, whether their lawyers are diligent and can get along. Each dispute has an independent social and economic momentum.[27]

These studies suggest that a very important social condition bearing on the litigation rate is the availability of intermediate forms of conflict resolution short of litigation. I have already highlighted above the role of insurance companies in resolving routine motor vehicle disputes short of court. Other examples of institutional non-judicial intermediaries include Better Business Bureaus (for consumer disputes), corporate compliance offices or ombudspersons, and industry sponsored conciliation processes or forums. Arguably the most important mediating force in the American legal system is the legal profession. Of course it is true that lawyers function as a gateway to the formal litigation process and that access to lawyers sometimes leads to the assertion of claims. But lawyers also play a critical role in resolving conflict short of litigation, by bringing parties' excessively optimistic predictions about litigation outcomes closer together,[28] and by permitting the parties to bargain through intermediaries, reducing

26. Sometimes parties may be reluctant to bargain because of a fear of showing weakness. And even when bargaining occurs, it may not lead to settlement. The reason is that a party who has received a settlement offer which would make him better off than continued litigation may still believe that if he rejects the offered settlement the opposing party will make additional concessions and a better offer will be forthcoming. If he thinks that these additional concessions are likely to occur and are likely to be large, he may be prepared to run the risk that the opponent will not make a better offer and that a trial will ensue. Sometimes the better offer is forthcoming and the case settles. But when the better offer is not forthcoming, the case will go to trial.

27. Consistent with this view, recent studies explain the surge in complex business litigation over the past few decades on the basis of factors that have nothing to do with the character of the disputants or with changes in procedural rules. Instead, researchers have found that the increase is driven by sharp increases in stakes and by greater market competition, which has rendered long-term relationships between litigants relatively less important. As a consequence, business litigants are more willing to risk relationships in order to obtain a fair outcome in a particular transaction.

interpersonal tensions and sometimes allowing the parties to use the trust and goodwill existing between lawyers to reduce strategic barriers to settlement.[29]

Finally, this alternate account, which emphasizes the good reasons that people have for pursuing their claims, suggests that in cases which reach court and are not settled shortly after filing, there will often be some structural feature that makes it genuinely difficult to resolve,[30] such as difficulty of discerning the correct outcome on the merits, some severe disproportion in the stakes (a party who is intent on judicial vindication or on having his day in court; a party who realizes commercial advantage from delay), or severe mutual distrust that precludes or limits effective bargaining.

This different view of the disputing process also explains why court-annexed alternative dispute resolution has had such a modest effect on cases that find their way to a judicial forum. In a system where litigation costs are very high and settlement is the norm, the cases that survive the past the very early stages of litigation are likely to be the difficult ones. A population of difficult cases calls for strong measures, but American alternative dispute resolution reforms are modest. To save resources, they often use less-well trained and less prestigious non-judicial personnel and are limited in time and scope. To avoid possibly restricting litigants' constitutional rights, the procedures are non-binding. Thus, for many litigants alternative dispute resolution does not significantly change the basic calculations of advantage that drive the disputing process.

Further, when alternative dispute resolution processes do have effects, they are often offsetting or canceling. Alternative dispute resolution sessions are costly. The reformers envisioned that those costs would be offset by earlier dispositions that saved parties costs or increased party satisfaction. And the studies indicate that there are individual cases where the processes clearly has one or both of those effects. But there are other cases where the costs are not recouped. In some cases, the process is a waste because

28. Stephen McG. Bundy and Einer R. Elhauge, Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation, 79 Calif. L. Rev. 313, 365-66 (1991).

29. Ronald J. Gilson and Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Col. L. Rev. 509 (1994). Consistent with this view, several studies suggest that in some urban communities the tremendous growth in the size of the litigation bar has reduced the extent to which lawyers interact with each other and come to trust one another, and that this lack of familiarity may sometimes be an obstacle to settlement.

30. That is not to say that errors of personal or professional judgment play no role in the commencement and continuation of litigation. To the contrary, there is a growing literature identifying types of cognitive error that can infect the settlement process. See, e.g., Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution in Barriers to Conflict Resolution 26 (Arrow et al. eds. 1995).

the trajectory of the case toward ultimate trial or settlement is unaffected. These sessions increase system and private costs with no offsetting benefit. More striking, there are always some cases that would have settled prior to the alternative dispute resolution process which now continue for longer so that parties can take advantage of the new process, either to tell their story to the neutral or to receive free legal advice or free help in negotiating a settlement.

This analysis also suggests why certain alternative dispute resolution procedures might have increased party or attorney satisfaction in certain classes of cases even if there was no positive impact on cost and delay. The finding that parties who participate in court-annexed arbitration prefer having a chance to present their case to a neutral over participation in a settlement conference suggests a reaction against excessive pressure to settle, not against excessive litigation. Similarly the findings that many urban lawyers strongly value the opportunity to meet with an active and analytically sophisticated settlement judge is much more consistent with a culture in which lawyers actively seek to settle cases, not with one in which they actively seek to prolong litigation.

Can court-annexed alternative dispute resolution be developed to do a better job of eliminating costs and delays? It is possible that with more experience and fine-tuning or better training of neutrals that such programs could start to show more positive results. Alternatively, if some fraction of cases benefit from mandatory court-annexed alternative dispute resolution, programs might become more effective with more refined criteria of selection, but at present none are known.

If court-annexed alternative dispute resolution does not deal with costs and delays, should it still be retained in order to improve the overall quality of dispute resolution for those who clearly desire the kinds of benefits that it can provide? If the system fails to keep up in terms of "quality," the argument continues, people will come to see court-based dispute resolution as a form of second-class justice, and wealthier litigants will increasingly rely on privately funded dispute resolution through retained mediators and arbitrators. This argument, however, implies significant additional spending on the courts, and hence raises resource concerns similar to those that spawned alternative dispute resolution in the first instance. Moreover, in a society where retired judges, skilled lawyers and other professional neutrals are increasingly available to provide arbitration and mediation services to disputants, the argument for a state subsidy is increasingly doubtful.[31]

Ⅲ. Implications for Korea?

What then are the possible implications of this experience for Korea? I want to start with some important qualifications. First, my own knowledge of the Korean justice system is not as great as it should be. Second, there are important differences between the two systems that preclude simple comparisons. But while that means that the questions I raise must necessarily be tentative, the American experience suggests that some ideas are at least worth testing on you to see if they fit with your much better-informed sense of the problems.

Let me start with some basic similarities and differences between the two systems. First, some similarities.

Rapid Increases in Court Filings. Korea has experienced rapid growth in litigation, due in substantial part to its extraordinary economic process and the consequent urbanization of much of the population.[32]

Relatively Low Levels of Judges Per Capita. Like the United States, Korea has relatively low numbers of judges per capita, particularly as measured against traditional civil law systems.[33].

High Judicial Workloads. While the judiciary has expanded to meet the caseload increase, the numbers of cases per judge remains very high. Contributing to the problem has been an increase in more complex litigation, which often involves an extended trial. As a consequence, although Korean trial judges work exceedingly hard, delays are sometimes longer than judges would prefer.[34]

Generalist Tribunals. Like American courts, Korean courts tend to be courts of general jurisdiction with mixed caseloads and relatively little judicial specialization.

Some Court-Annexed Alternative Dispute Resolution. Recent legislation provides for increased use of court-annexed mediation, in which it is contemplated that trial judges

31. Congress's solution with respect to the Federal courts has been to duck the question of funding, and implicitly, the questions of efficacy and quality as well. The Alternative Dispute Resolution Act of 1998, 28 † 651 et seq., requires all federal courts to institute alternative dispute resolution programs but provides no funding for such programs.

32. Yang, supra note 4.

33. Yang, supra note 4, at 310.

34. Si-Cheol Kim, The Comparative Analysis on the U.S. and Korean Civil Procedure: Focusing on the Fact-Finding System (1999) (unpublished manuscript on file with the author).

will play the leading role.[35)]

There are also important procedural differences between the two systems.[36)]

Civil Law ModeMore Trials Per Filing. The Korean court system is built on a civil law model. Consistent with this civil law lineage, trials in Korea are before a judge, not before a jury. In addition, there is no sharp differentiation between pre-trial and trial. As a consequence, a much higher percentage of filed cases receive significant judicial attention and are tried to judgment.

Fewer Law Trained Persons Involved in Dispute Resolution. The number of lawyers engaged in court litigation and dispute resolution in Korea is proportionately much smaller than in the United States.[37)] While legal scriveners can assist parties in preparing litigation documents in simpler cases, and while there are plans underway to increase bar admissions, the number of fully trained lawyers capable of resolving complex disputes will remain relatively low for the foreseeable future. Many litigants will continue to appear without representation by counsel.

Given these similarities and differences, what possible significance might the American experience with court-annexed alternative dispute resolution have for Korea?

The Value of Empirical Studies. The most important point about the American experience is that it is worth seeking to measure the effects of alternative dispute resolution. Unless new procedural reforms are carefully evaluated, there is a real risk that they will degrade the system rather than improving it.

Maximizing the Potential Value of Intervention. The American experience indicates that alternative dispute resolution reform should be sensitive to the shape of the dispute "pyramid" in cases now being filed in Korean courts. As Judge Kim and others have pointed out, the increase of claims in Korea is a function of the extremely rapid development of Korea's industry and commerce, its rapid urbanization, and rising levels of personal wealth.[38)] But filing rates may also reflect the lack of intermediate non-judicial dispute resolution institutions for that type of dispute. With respect to disputes between ordinary citizens, it is quite plausible that rapid urbanization of the

35. Woo, supra note 3.

36. Without intending to imply that they are unimportant, I put aside here the potential relevance of cultural differences between the two societies, including those differences flowing from an American tradition that stresses individual autonomy and questioning of authority and a Korean tradition that historically emphasized a Confucian ideal of relationships and hierarchy. I frankly do not know enough about these differences to venture any estimate of their bearing on the questions under study.

37. Jung-Ho Ham, The Unique Characteristics of Korean Attorneys' System, 18 Dick. J. Int'l Law 171 (1999).

38. Kim, supra note 34..

population has eliminated the efficacy of intermediate dispute resolution institutions common to rural communities characterized by continuing relationships and more traditional relations of authority. With respect to business disputes, it is quite common for alternative dispute resolution mechanisms to lag behind rapid industrial growth. Additionally, the relative scarcity of lawyers in Korea and the frequency of pro se claimants and defendants in the Korean courts suggests that one of the main intermediate dispute resolution mechanismsthe settlement brought about through the realism of two negotiating lawyersmay not be as common in Korea as in other countries.

If there are some classes of litigation where intermediate dispute resolution mechanisms play little or no role, there may be opportunities for court-based alternative dispute resolution mechanisms to target those cases and to achieve good results. For in such circumstances, the pre-filing sorting and winnowing of cases which tends to reduce the payoff of court-annexed programs in the United States is less likely to have occurred. At the same time, careful thought would have to be given as to how to make such intervention effective. One would want, if possible, to limit such intervention to cases in which there was a high likelihood that intervention would make a useful difference. The American experience suggests that different classes of disputes may differ greatly in the degree to which they have already been winnowed down through out of court dispute resolution mechanisms. This in turn suggests that the question of court-annexed alternative dispute resolution might usefully be pursued in connection with proposals for more specialized tribunals.

The United States experience also suggests that close attention must be paid to the reasons why the case has come to court. The form of intervention may depend on what one concludes is preventing settlement. If the barrier is lack of realism about the merits of the case, an evaluative approach may be desirable. If the barrier is due to a party's desire to have its day in court, then the procedure should perhaps mimic adjudication. Conversely, if the barrier is strategic, the aim should be to use mediation to facilitate an exchange of realistic offers.

Costs of Court-Annexed Programs. To this outside observer, it appears that the most precious commodity in the Korean judicial system is the time of the judges. If that is so, then it is a disadvantage of the current mediation statute that it relies so heavily on judges for its implementation.[39] Most American programs seek to use other legally

39. Judge Woo makes this point very well. Woo, supra note 3, at 629.

trained personneltypically practicing lawyers in order to economize on judicial time.

Whether such an approach would work well in Korea would depend, first, on the acceptability to disputants of a non-judicial figure. That may in turn depend on the aim of the dispute resolution procedure. If the aim is to provide an authoritative view of the likely outcome or a shortened and simplified "day in court," will Korean lawyers or litigants accept anyone but a judge in the neutral role? Conversely, if aim is to broker a deal between shrewd bargainers, the parties might well do better with a non-judicial neutral.

Assuming that non-judicial neutrals can be effective, with appropriate training, are there enough attorneys or other trained professionals capable of doing the work? In America there is a large supply of law trained persons willing to work for little or no compensation. Given the smaller number of law-trained persons in Korea, could such personnel be found at acceptable cost?

Alternatives. As in America, there are other strategies to deal with problems of court crowding, costs and delays. One which has been successfully pursued in some civil law countries is to build up the extent of non-judicial mediating institutions[40] and to encourage their use by prospective litigants.[41] Any strategy of this kind must also confront the question of diffusion of legal knowledge using means other than lawyers. For the American experience, and even more so that of some civil law countries,[42] indicates that access to legal knowledge, while it may produce greater levels of claiming in the first instance, also tends to produce much higher levels of dispute resolution without litigation and lower rates of court filings. It is much cheaper for society if disputants can obtain a realistic picture of their circumstances before they go to court than to allow them to insist on being educated in those rights by a judge after a full trial.

To conclude, I would stress the themes of the talk: careful empirical study, attention to the social conditions that produce disputes and to the non-judicial institutions that can help to moderate them, realism about the tradeoffs involved in designing an alternative dispute resolution system. Obviously my application of these ideas to the Korean side

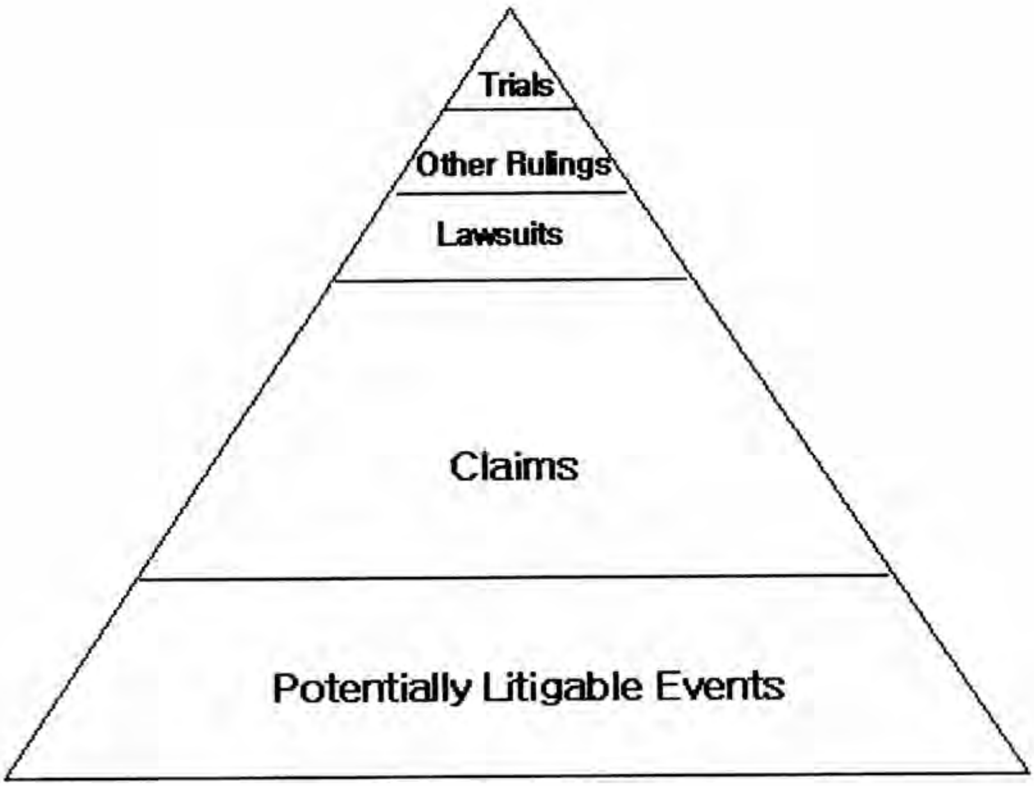
40. Such institutions might include consumer complaint bureaus, homeowner-tenant forums for landlord-tenant disputes, or arbitration forums or industry boards for business disputes.

41. See Erhard Blankenburg, The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany, 28 Law and Society Rev. 789 (1994) for a excellent description of the way that such mechanisms work in Dutch society, and a contrast with German society, where litigation rates are much higher.

42. Id. (discussing how diffusion of legal knowledge in Dutch society tends to dampen conflict).

of the comparative enterprise is just a modest beginning. Having made that beginning, I look forward to learning much more about the Korean system from each of you, in a genuinely comparative spirit. I know that such contact can only improve my understanding and argument. Thank you again for giving me this opportunity to speak to you and to learn from you.

<Figure A>



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