

The Judicial Reform in Political Context

- Korean Experience -

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1. Introduction

This paper presents the trends of judicial reforms and its meanings in

the political and economical context in modern Korean history from 1945 till now. It also tries to analyze their causes and effects from various perspectives.

Korea has experienced one of the most rapid economic developments since 1960s. History of Korean economy can be roughly classified into 5 stages by 10-year term: (1) premature stage (1945-1960), (2) light industry stage (1960s) (3) heavy industry stage (1970s), (4) restructuring stage (1980s) and (5) beginning of post-industrial stage (1990s). Rapid development of economy in (2)-(4) eras has resulted in dissolution of traditional community life and radical changes in the ways of life, which had produced new types of disputes and replaced traditional dispute resolution systems with modern-style litigations.

Korean politics constitutes other aspects of dramatic changes. The long-lasting military authoritarianism based on May 16 coup d'Etat of 1961 has been ended at last by the People's Power in 1987, and the first civilian regime was established by people's direct election according to new Constitution. When Mr. Kim, Daejung, a candidate from opposition party, was elected to the President in 1997, the Korean people had witnessed, for the first time, a peaceful turnover of political power since the liberation from Japanese colonial ruling. These processes of political democratization should be mentioned to explain some changes in the conception of judicial system from oppressive state apparatus to a kind of legal service providing system of the legal professions.

The judicial system has continuously changed its character along with the nature of the regimes. Sometimes it was overtly subordinated to the political power groups when the regime was authoritarian.¹⁾ When the process of democratization has been carried out to some extent, it is tactically controlled by the law bureaucrats of the Supreme Court. The main purpose of the paper is concentrated on analyzing such character of Korean judicial system and explaining how to overcome it. But, before such analysis and explanation, it may be good to briefly describe Korean political and

1) A former Chief Justice Lee, Y.S. expressed this situation as "the days of disgrace and repentance" when he retired from that office, Dongailbo (The Daily donga), 1992.10.31, p.9

economical history.

2. Short History of Korean Politics

Until mid-80's, the Korean civil society had long been built, and suppressed by the state of Korea, which has been a kind of over-developed state. As the growth of civil society had been led and controlled by this strong state before and after Japanese colonial regime, Koreans could not have gotten any efficient system of checking and restraining the state. The state had been a unique omnipotent ruling entity in the entire society, which nothing could override. The traditional patriarchal culture of Confucian ruling system had reinforced this regime with strong state and weak civil society. (Lim, 397-80)

The authoritarian and bureaucratic character of Korean state had been established in this context.²⁾ The state was authoritarian one in the meaning that the state had, at least in its internal power relationship, almost absolute autonomy from any other part of that country, and could set its own state-goals up to execute them by itself, as well as can organize and mobilize all the man-powers and materials in that society. That state was totally isolated from the civil society, and occupied by a small power-group, which had made the state its private property. That ruling group identified itself with the state. It had used various tools such as legal, institutional and actual coercive apparatuses, to repress and control the political and/or economic objection groups. It had enacted the National Security Act in order to label the political dissenters as insurgents or rebels, whereas it had punished labor leaders as communist partisans. The civil society could have any power to resist this state's coercive forces, and had only been subordinated to it and mobilized to its demand.

2) For details on whether this model can be applied to the state of Korea, Im, Hyuk-Baek, "The Rise of Bureaucratic-Authoritarianism in South Korea," *World Politics*, vol.39, no.2, 1987.

Such authoritarian ruling system consisted of three factors: closed and selective political process, de-politicalization of social issues, and reinforcement of ruling system of bureaucrats. The state was the 'one' who could make, interpret and execute the laws imposed onto the civil society. The economic sector, which was also subordinate to the state and could make profits with subsidies or special favors given by the state, was, in almost every time-span of Korean modern history, a kind of complicity to the state in suppressing the people and civil society. They, i.e. the state and the economic sector had, in union, constitute a very strong system of bureaucracy with aid of so rigid dogmatic jurisprudence, which had been structured after 'Japanese-German' legal system. All the legal narratives had been occupied by them, and the substance of legal rules had been decided by them according to the ruling ideology of anti-communism and ideology of rapid economic growth.

The turning point was made in mid 1980's: as the president Chon, D. H. tried to make his military colleague Roh, T. W. succeed the presidency and refused people's demand for constitutional reform with direct election system of the president, chains of people's demonstration and protest were so heated that they could get new Constitution and new system of presidential election in 1987. The civil society could, for the first time in Korean history, witness itself as politically identifiable entity with its own autonomous power. It was different from the other cases emerged before in that the main force of the movement was not the students nor the intellectuals as in the April 19 revolution of 1960, and in the student and/or labor Movements in 1970's and 1980's, but the middle class high color laborer-at that time it was called "Necktie Coup"-, which had been so dramatically increased during the era of rapid economic growth of early 80's. The irresistible trends toward democratization in Korean political system was, thereafter, backed up by such part of population.

The new era of rule of law in Korea opened at that time, when new Constitution was enacted and executed to get the Constitutional Court with substantial power of invalidating the statutes of the National Assembly on the ground of unconstitutionality. Such power of judicial review has brought

big impact on the political system as well as the legal system in Korea. Because the procedure of the constitutional petition is opened to all the people, anyone can challenge any policy which is contained in statutes, and can make his/her own opinion discussed and tried in that judicially formatted agendas against ruling political groups. Authoritative characters of statutes as symbols of coercive powers of the state have gradually been erased with such practices.³⁾

That means the civil society has found another route for participating to the political policy making processes. So many constitutional petitions have been made by NGO's or human rights activists against existing laws such as the National Security Act, the Social Security Act, Labor Acts with restrictions of labor rights, Protection of Military Secret Act, and so on, all of which have been enacted and executed as tools of coercion for the authoritarian regime against people's protests of democratization and liberalization.

Rapid changes in conceptions of law and lawyers have occurred in such context. Step by step, the conception of rule of law that had been pre-occupied by the bureaucrats-esp. law bureaucrats- and manipulated by the coercive institutions such as public prosecutor's offices, KCIA, and/or the Defense Security Office, has been transformed to more democratic and more human-rights oriented one. Law and legal system could not be tools of authoritarian ruling any more. They should be tools for democratization and protection of human rights, which check activities of the state and let people's demand flow into the political and administrative process of policy making: They should be the representatives of people's demands on law and justice.

3. Military Regimes and Bureaucratization of Judiciary

3) The symbolic case is witnessed in 1995, when, for the first time, assemblymen began to talk about constitutionality of a bill, which would restrict the market share of one brand of distilled liquor ("Soju") in one province. That bill was, though, enacted in 1995, and declared unconstitutional in Dec. 1996 (Hunjae, Decision, 1996.12.26. 96 Hunga 18)

3.1. Modernization of Judiciary in 1960's: A short trial of Americanization

There have been lots of debates and trials for judicial reform, which can be grouped into two categories in the lights of their orientation—bureaucratization or democratization, and the second one began from the formation of civilian government of 1990's.

The initial formation of Korean judicial system was dominated by the Japanese colonial regime, which had survived the passion of liberation in 1945 and the crisis of the Korean war 1950–1953, with only partial revisions and/or supplements according to temporal needs.

The first major change of that system was witnessed in 1962, when Dr. Paul K. Ryu (Ryu, Kichon), the former president of the Seoul National University, had introduced a kind of American style of graduate law school("Sabup-daehakwon")⁴⁾ to educate and train the passers of the Bar Exam to make law bureaucrats. Dr. Ryu wanted to combine practical skills and academic knowledge by dual system that professors taught academic theories on law and attorneys practical skills. This is the first step toward americanization of legal system, and partial execution of bureaucratization plan of new military regime, which wanted to get new grounds for legitimization of its ruling with guises of rationality and legality.⁵⁾

Contrary to the former regimes, that military regime tried to cover up its lack of legitimacy by the means of bureaucracy, which was based on instrumental rationality without resorting to evaluation of ultimate ends. The slogan of "Modernization" was equivalent to the rapid economic growth and total mobilization system of national resources under leadership of highly centralized political power. Stratified and systemized structure of administration could make operation of the regime more efficient, more rational, and more legitimate appearance. In 1960's, there had been so much

4) This was established only in Seoul National University and from April 1962 to December 1970, the School had produced the 14th group of graduates (508 graduates), until it was abolished and replaced with the Judicial Research and Training Institute

5) Dr. Ryu's intent might be similar with that of professor Landell at Harvard University, who had tried to find more scientific theories of law and to teach them in law school.

inflow of americanized system of social management: economics, business management, public administration were new objects of academic interests in university, and most of them were introduced and pursued not only by the scholars and officeholders who had studied in U. S. but also by the high-ranking public officials for reconstructing the system of business.

The graduate law school system can be understood in such atmosphere. Modernization was the other expression of americanization, which could provide lots of chances for 'renovations' of existing systems of abuses and inefficiency.⁶⁾ Making 'Manuals' of nearly all of the businesses of the regime was the best way of that object,⁷⁾ and the judiciary could not be exceptional: the system of law school had to serve to this.

The regime did not seem to want professional lawyers in american type, but to make more efficient and more bureaucratized judiciary. It had used legal system as means of formalizing and legitimizing authoritarian rulings and/or facilitating economic development powerfully driven by state. Lawyers, whether they were in public office or in their own office, were not representatives of legal justice, but faithful executor of bureaucratically enacted statutes and rules. For these purpose, there must be a new paradigm and scheme in training lawyers, and the School was one of the most efficient tools to depart from long established training system of apprentice and set up more 'modernized or westernized system with new orientation toward instrumental rationality, i.e. the other side of formalistic legal dogmatic, which could be well trained by legal scholars in the School.

All of the students were to be taught and trained to unified and uniform theory and practice in law. Even though they could be in touch with academic research,⁸⁾ scientism of german kind, which prevailed in korean legal society, had made it of no use. The legal positivism with generalized,

6) This renovation, in turn, could provide enormous numbers of chances to rearrange the political and administrative system for serving the ruling group's interests. It would be used to purge the political enemies or his followers.

7) The Civil Code was enacted in 1960, which made a conclusion of long way of nation-building from 1948. Systemization and legalization of state's operation might be the next step, even though it was mixed and mingled with the process of power seizing of new military regime.

8) The graduate could get Master of Law Degree when he/she presented a thesis and passed the oral test process.

unified, and uniform way of legal reasoning could only be allowed and taught and trained to students, who would all be judges and public prosecutors.

3.2. Bureaucratization in 1970's: Colonization of the judiciary by political power

The change in 1972 showed typical example of such bureaucratization of lawyers. The 4th Republic, the most authoritarian regime in Korean modern history, had intensified above mentioned trend. After revising the Constitution to extend his term for another 4 years, president Park's regime had separated academic education needed for lawyers and bureaucratic training, for which it established, in 1972, the Judicial Research and Training Institute(("Sabup-yeonsuwon": hereafter "JRTI")⁹⁾ with 2 years training program for passers of the bar-exam.¹⁰⁾ Because this JRTI was established and managed by the judiciary, i.e., the Supreme Court composed of law bureaucrats, it had made considerably different structure in training and controlling lawyers from the former system. Another revision of the Constitution which is called the Constitution for Revitalizing Reform ("Yoosin Hunbup") of 1972 had accelerated subordination of the judiciary to the executive with seriously limited power in deciding cases.

This change can be explained by two ways. Firstly, Park's regime wanted to mobilize legal rules to enforce its political power. Secondly, Korean economic situation had made this change inevitable. In this era, Korean economic system had started to change from that of light industry to that of heavy industry, esp. steel, chemicals, shipbuilding, automobile, and so on, which were transplanted from post-industrialized countries. To accomplish this change more effectively, it was inevitable to control judiciary in labor cases, and criminal cases with political implications, which had made the

9) This institute was opened in Jan. 1971 with 81 students. For detail on this Institute, http://jrti.scourt.go.kr/english/about_jrti.asp?flag=0

10) Actually it could hardly be translated into "Bar"-exam, because absolute numbers of the passers of it would become law bureaucrats-judges or prosecutors until mid-90's.

judiciary one of divisions of police state.

The first one to mention was the change in faculty; the JTRI filled the faculties with judges and prosecutors instead of academic scholars as in the graduate law school. The whole process of training lawyers was solely seized by the state. The actual "Sunhyuljuui (doctrine of purebloodedness)" of the judiciary has been established from this time: Only a "purified and uncontaminated" person could be a judge or prosecutor, because, if a person had experienced any life other than that of law bureaucrat, he/she might be so mundane not to make a "good decision," which faithfully follow the precedents of the Supreme Court. This constituted one of reasons why no one except the lawyers should be excluded from the process of training the lawyers. Only Lawyers could make another lawyer, while the civil society should be judged by those lawyers.

The second one was formation of inner circles in training stage. The score that a graduate had acquired in the JTRI was an integral factor in his/her promotion toward higher rank in Judiciary or Public Prosecutor's Office. It can be said that, at the time of graduation of the JTRI, a graduate's whole career as a judge or prosecutor was almost predetermined with his/her graduation standing(plus his/her score of the bar-exam). It means that the inner circle or power group of the judiciary was made so early such as in training stage. Pool of future leaders of the judiciary, for example, was secured with such students closely picked up as "honor" students in the JTRI, who were cultivated to be a judge in Seoul District Court,¹¹⁾ and could have priority to be promoted to upper position.

The stratum of judges in Korea was as following; associate judge in district court - associate judge in appellate court - single judge in district court - chief judge in district court - chief judge in appellate court - Justice - Chief Justice. The merit rating of judges and decision of promotion to upper position was totally administered and controlled by the Bureau of Court Administration (hereinafter "BCA") in the Supreme Court, which was, in turn, controlled substantially by the president. But it was

11) Korean people call it "Kyungpan"(judge who is appointed to the courts in Seoul Metropolitan Area) with contrast to "Hyangpan"(judge who is appointed to the other courts)

hardly possible for any judge to be promoted to chief judge in both courts without any career in the BCA. A career of the Judicial Research Officers in the Supreme Court had played a decisive role in promoting to chief judge in district court, while career in the BCA in promoting to chief judge in appellate court. Both means that the higher positions of judiciary was substantially occupied not by independent judges, but by bureaucratically trained and oriented court officials in the disguise of the title of "judge." Even the justices were selected and appointed from that kind of judges. In short, full system of controlling judges by highly centralized organ was completed with this JTRI, which substantially detached from the civil society.

Why had the ruling group tried to seize and occupy the judiciary in the form of bureaucratization through JTRI? Some political troubles caused by the judiciary in 1960's can explain it. Contrary to the attempt to seizure the judiciary, judges would tactically resisted against the regime. Instead of their relatively weak position in relation with the political power that the military regime had exercised, they could enjoy their own share of power behind the words of law. Legalization had served not only to the interests of the ruling group, but also to the interest of the law bureaucrats. And the judiciary finally resisted to the will of the president by deciding two statutes—the State Tort Liability Act of 1971 and the Judiciary Act of 1970—unconstitutional and void in 1971, which was followed by a series of decisions that invalidated substantial numbers of measures to oppress civil society in preparing the presidential election of May 1971.

The Ruling group had took two reactions against the judiciary: the one is related with so called the first judicial upheaval,¹²⁾ and the other is establishment of the JTRI mentioned above. The former one, which had made a decisive impact to the independency of the judiciary, was caused by arresting two judges and one court official on accusation of violating the Anti-Communism Act and bribery. On hearing that news, 39 judges in the Seoul Criminal District Court protested to this arrest by handing in their

12) upheavalFor details, Hunhwan, Lee, "The Judicial Upheaval of 1971 in the Histroy of Korean Judiciary," Bupkwasahwi(Law and Society), vol. 15, 1997.

resignation, and all the judges of Seoul Civil District Court issued a statement against that measures listing attempts of the government to infringe independency of the judiciary. After 3 months struggles against the ruling group, the case was finally closed by orders of the president Park to let them free, with a deathblow to Korea's judicial system of independency. And the JRTI was born in such atmosphere!

3.3. Radical Growth of Economy and Emergence of Bar Society in 1980's

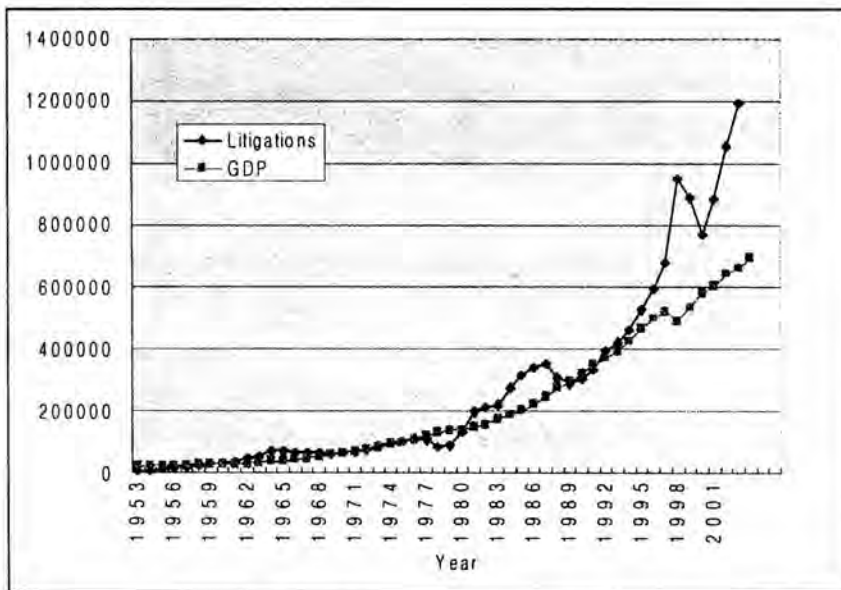
For those two decades from 1962 to 1972 and from 1972 to 1982, there was not so radical change in litigation. Despite of rapid growth of economy, and despite of so much close relationship between economy and litigiousness in Korea,¹³⁾ there was shown so much stability in increase of litigations. For the first decade, nominal GDP was raised up to nearly 12 times (from \$352.4 to \$4217.9¹⁴⁾), while numbers of civil litigation in 1st resort was increased only 1.5 times (from 40,660 cases to 67,393 cases). Such trend was nearly same as the later decade from 1972 to 1982. In this era, nominal GDP was raised up to nearly 13 times (from \$4217.9 to \$55,721.7), which was similar to that of the former era, whereas numbers of civil litigation in 1st resort was increased as much as 3 times (from 467,393 cases to 197,945 cases). But as the graph belows shows, such radical increase was recorded in early 80's, when the president Park has been assassinated and new military regime has been established. If these terms are excluded from consideration, the change in number of litigation was raised up to only 1.2 times (79,328 cases in 1979).

This trend may provide some clues to explain how the judicial reform could be discussed without any change in the nature of the judiciary as a coercive state apparatus. From the beginning of 1980's, economical structure had experienced so huge changes. New military regime of

13) Pearson's coefficient of correlation between real GDP and the amount of civil litigations is 0.96.

14) in billion won(same hereinafter)

President Chun, Park's successor, had tried to re-adjust economic structure with strong state apparatuses and to incorporate Korean economy into world market.¹⁵⁾ It had reorganized the industry by the policy of rationalization and restructuring the industry, esp. heavy and chemical industry in order to get rid of inefficiency caused overinvestment in 1970's. The result was concentration of capitals into a few entrepreneurs called as "Jaebul(conglomerate)", which would slowly enter into some rivalry with the power of state.



<Graph 1> Trends of Civil Litigations and Real GDP, 1953-2003¹⁶⁾

The radical rise of the number of litigation from 1979(79,328 cases) to 1987(335,263 cases)¹⁷⁾ can be explained from this fact. Expansion of

15) During this era from 1979 to 1987, amount of export had raised 3 times(from 15,055.5 to 47,280.9 million U.S \$), and that of import 2 times(from 20,338.6 to 41,019.8 million U.S \$) For details, National Statistical Office, Major Statistics of Korean Economy, Seoul: National Statistical Office, 1995, p.233.

16) The Graphs in this paper are quoted from: Han, S. H., and Kim, D. H., "Litigation in Korea: Trends and Analysis," Unpublished paper, 2005

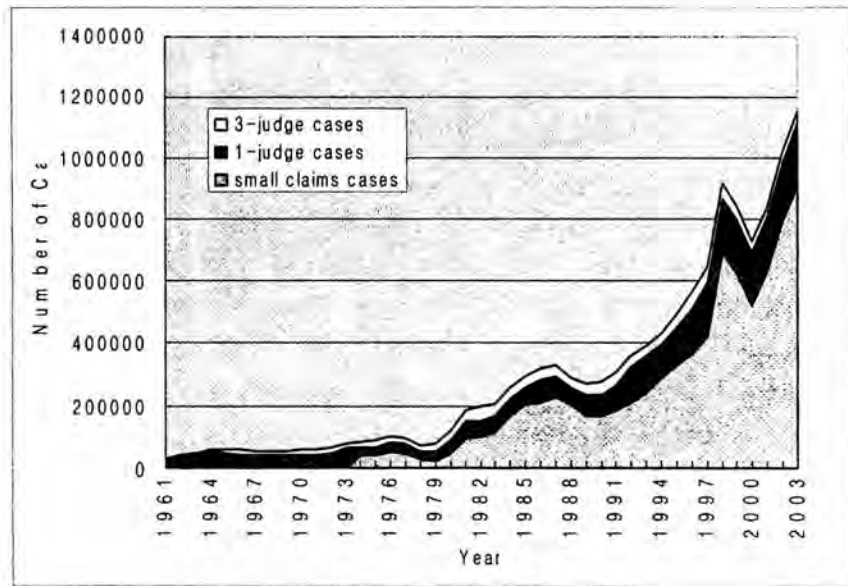
17) The GDP was risen to about 3 times(from 31,731.9 to 115,164.3 billion Won) in same

economy and radical urbanization would weaken the traditional conflict management system of "multiplex relationships" in Korean society,¹⁸⁾ which consists of multiple ties between one and other people, had worked as so much efficient barriers in filing law suits, because any law suit might cause immediate and permanent termination of personal relationships with the other person. For this decade, radical growth in economy and in industrialization had been processed, and had caused dissolution of rural communities with traditional multiples relationships, and rapid urbanization without any binding personal ties, the case was so different: litigation has been one of the most frequently taken methods for resolving any disputes.

Home economy had been another factor that incurred debates for judicial reform. In 1984, 168,492 small claim cases were filed (45% more than that of 1983) as <graph 2> shows. In the beginning of 1980s, household economy has been radically incorporated into capitalist market economy with the adoption of new financing systems: lease, factoring, credit card, and so on. People of middle and lower classes with such credits became active consumers purchasing goods and services according to their desires. Most of small claims cases were used as effective and efficient tools to urge them to pay their debt as they are in these days.

period.

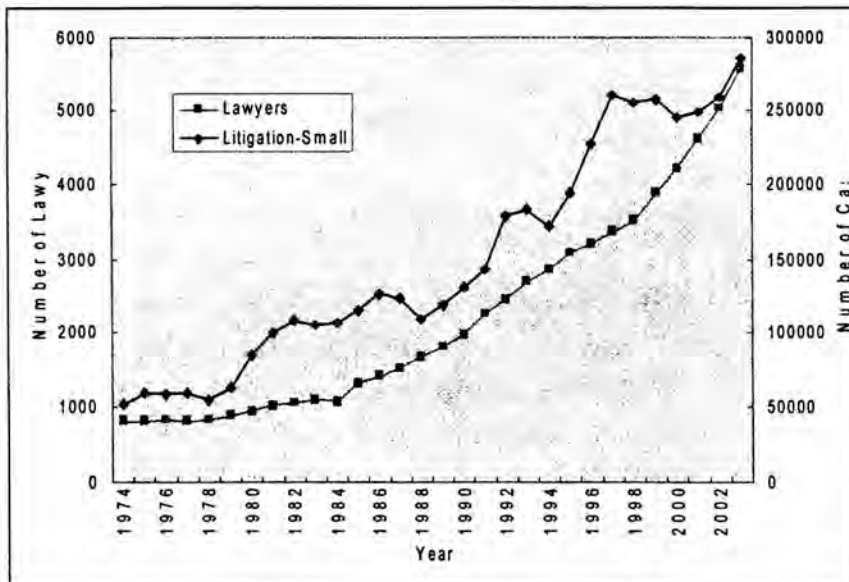
- 18) For the concept of multiplex relationships, see Max Gluckman, "Concepts in the Comparative Study of Tribal Law," Lauder Nader (ed.), *Law in Culture and Society*, Berkeley: University of California Press, 1969, pp. 349-373; Donald Black, *The Behavior of Law*, New York: Academic Press, 1976, pp. 41-48 Robert Kidder, *Connecting Law and Society: An Introduction to Research and Theory*, Engliwood Cliffs, New Jersey: Prentice-Hall, 1983, pp. 70-72.



<Graph 2> Weight of Small Claims cases in Civil Litigations, 1961-2003

The results of such changes in economical and civil sectors, was that the judiciary, which had been only a subordinator to the political system could have its own source of authority. It could have its own powers to handle the disputes arisen in civil society without trying to read the minds of the regime. The more civil society would be dependent on the judiciary in dispute-resolution, the more powers could it take.

Major charges in this era were two: expansion of lawyers, and the system of Law Corporation with limited liabilities (hereinafter "law firm") of the partner attorney. The number of passers to bar-exam had been enlarged from 160 to 300 (this number had lasted until 1996) in 1981, with which nearly 100 new lawyers could enter into law market every year without any career of judge or public prosecutor, and which had made the number of lawyers doubled in 1991 (2258 lawyers). From that time, the number of lawyers has had close relationship with the number of litigations as shown below.



<Graph 3> Lawyers and Litigations(Excluding Small Claims), 1974-2003

Lawyer's anxiety that it would be turned to their loss in legal service market, had rapidly risen. This was the main force that made the Department of Justice establish the Committee for Advancement of Legal Occupation and Capacity and propose some policy alternatives for maintaining vest interests of existing lawyers. This committee discussed on specialization and internationalization of legal services: for the former purpose, it considered extending legal education term in university to 5 years, and for the latter purpose the needs for large and well organized law firm with some expert lawyers in international trade and commerce. Even though such an attempt was of symbolic meaning and left no significant progress in providing legal services except advents of larger law corporations,¹⁹⁾ such trials had deep influence in Korean history of the judiciary: Even the lawyers who had monopoly power in providing legal

19) According to The Attorneys-at-Law Act as amended in 1982, more than 4 partner-lawyers with unlimited liability could establish a law corporation, and 3 law corporations opened in 1983. In 2002, there were 237 corporations in Korea (136 in Seoul).

services, should pay attention to trends of demands for legal services. In other words, there could be a market of legal service, in which they should compete with each other to survive.

The relative autonomy of the judiciary came from such changes. Korean lawyer's society had never felt any crisis in maintaining their monopoly power in the market even till then. What they had worried about is people's attack to their *raison d'être*. Even though the lawyers including judges and public prosecutors paid only lip service to the legal service markets, they had to pretend that they were not so indifferent to the change of demands in those markets. They had to defend themselves from the people's attack on their subordination to the political power, by showing their *raison d'être* at least in providing legal services with which the economic and social order could be maintained. They should not be administrators, but 'lawyers' at least in dealing with non-political matters, where the principle of rule of law was translated into the dogmatic interpretation and application of statutory laws: They should be law bureaucrats, who independently work their businesses according to their own evaluations, even though they were so weak to the order of the power group.

4. Democratization and Judicial Reform (1990's - present)

4.1. Overview

Since 1987, Korea has faced new trends of change: the democratization and post-industrialization. With these, the system of judiciary and lawyers society has been attacked not only by citizens, but also their insider members-lawyers. Lawyers have shown dual attitudes to those attacks, because they were law "bureaucrats." On the one hand, they wanted to protect their own powers and interests against outsider's attacks. On the other hand, they wanted to keep their independency from the political

powers when the authoritarian regime had to collapse away by the people's power. In short, they were demanders of judicial reform as well as obstructers against judicial reform.

June 1987 is remembered a symbolic month for Korean democracy, when about 5 million people rallied against military regime of president Chon shouting "Direct election of the President" and "Democratization". When president Chon had to surrender himself under such tides of national protests and let the Korean people make revised Constitution with the presidential system with single 5 years term directly elected by the people, the long way to democratization of Korean politics and society could just begin: the "Necktie Coup" became to actively participate into political processes and play substantial roles in policy-makings, and the workers have started to organize themselves into more than 1,000 unions in just 3 months after that June.

In such rapidly changing situation, however, the Korean economy has played role of safety-valve to absorb the shock of political unsettledness.²⁰⁾ Unexpected growth of economy and prosperity in everyday lives during the 1987-1989²¹⁾ has played salient role in making the democratization initiated by the people, more sustainable and expansive. It had erased the economic growth ideology, which had offered major bases to the authoritarian regimes. Even the dominant ideology of anti-communism which had stressed the threat of invasion of the North Korea, could not be valid any more to be changed into one of ideology of the conservatives competing with that of radicals and/or liberals.²²⁾

Two major progress in the Constitution of 1987 was possible in those situation: the one is limitation of the term of the presidency with which

20) From this time, the capital would seek to extend its power of influence over political sector. For example, the Hyundai Group was openly confronted with the Roh's regime, and in 1992, Jung, Juyoung, the owner of that group ran for the presidential election as head of the Nationalist Party. For detailed analysis on the relationship between the politics and economy in 1990's, Son, Hochol, Jeonhwankiui HankukJungchi(Korean Politics in Transition), Seoul: Chanjakkwabipyungsa, 1993, pp.159-174.

21) It also dropped the rate of litigation as the graph 1 showed above.

22) For details, Choi, Jangjip, Hankuk Minjuuuiui Iron(Theories on Korean Democracy), Seoul: Hangilsa, 1993, pp.199-223.

korean people could have 4 presidents democratically and directly elected by the people, and the other is the system of judicial review done by the Constitutional Court, in which, by this time, 11,283 cases has been filed and 655 cases has been decided all or partly for the petitioners.

4.2. Lawyer as Resistant

The second judicial upheaval could take place under such circumstances. In June 1988, some young judges in Seoul Civil District Court, who had witnessed student movement in 1970's when they were students, initiated a signature-seeking campaign, which requested the Chief Justice Mr. Kim Youngchol to resign because of his inability and failure in keeping independency of the Judiciary. Total of 430 judges had participated to this campaign, and the Chief Justice had to quit his job: those are all, but this has made so many traces in subsequent history of the Judiciary. The judges with their own orientation toward democratization of the judiciary has organized themselves to a small group named as "Uribup Yeonguhoi (Study Group for Our Law)", which has accumulated and posed requests of judicial reform in the judiciary, and has functioned to impose substantial influences on the administration of the court by this time.²³⁾

In 1986, some lawyers who had actively defended political offenders and offered support for the democratization movement gathered together, with a case of worker's strike as a momentum. They constituted 'Jeongbuphoe (Lawyers for Legal Justice)'. As the democratization movement has achieved its goal, the group has been transformed to 'MINBYUN-Lawyers for a Democratic Society,'²⁴⁾ in May 1988 to cope with the socio-political changes and to facilitate the ongoing participations of lawyers in the democratization movement.²⁵⁾

23) The former Minister of Justice, Ms. Kang(2003-2004) was, for example, the member of this small group. At the time of April 2003, more than 100 judges from total of 1751 judges were the members.

24) <http://minbyun.jinbo.net/minbyun/index.htm>

25) The members of this Minbyun take several significant positions in this regime led by the president Roh, who had membership of this society.

The third judicial upheaval of 1993 was possible with those resistant. Even though the Korean people had acquired more democratized legal system in 1987, the authoritarian character of regime, which was the successor of the Chon's, could hardly be reformed and removed. Contrary to the politically and democratically activated people, the judiciary was still caught in authoritarian one. The consequence of such dissociation was people's ultimate distrust of the judiciary. In June 1993, 28 judges in Seoul Civil District Court, most of whom were the members of the Study Group, handed in a letter titled as "Our Opinion on Judicial Reform" to the Chief Justice. It said:

Judges, till now, used to remain silent when they should say something in decisions. Judges, till now, used to say something that they should not in decisions. And judges used to hide themselves behind the decisions.

They urged the Chief Justice to reform the system of personal management of judges which was controlled solely by the Chief Justice, bureaucratic hierarchy system of judges, and lack of judge's participation into policy-making processes in judicial affairs. Besides, they required all the judiciary of purgation of the past, which meant to investigate high-ranking judges and/or Justices who were responsible of the past. 5 days later, the Korean Bar Association, and the Minbyun declared to support those opinions.

4.3. Agendas for Judicial Reform: 1993-1995

That movement has resulted in totally different type of demands for judicial reform from those in authoritarian rules. The latter ones were motivated by the aim of capturing the judiciary under direct control of the political power groups. So they were mainly concentrated on how to manage the whole judicial system including the public prosecutors. The former, whereas, was initiated by the people's demand for democratization of whole polity, which would provide some explanations to the question of

why the demands for judicial reform has been treated as a kind of social movement. Judicial reform has been an indicator which has showed degree of transformation of polity and society from authoritarian to more democratized one, because it has been the judges, public prosecutors and lawyers who have directly oppressed civil society and infringed human rights of the people, who has disturbed democratization by arresting and isolating political dissenters, and who has oppressed people's demand for legal justices by monopolizing legal service market to make their own fortunes.

So it was natural that a tide of demands for judicial reform has hit the entire society when the first civilian government of the president Kim, Y. S. established in 1993. When demands for democratization of the political processes and for purgation of past unlawfulness and corruptions were so high in the hearts of all the people, there was no exception for the judiciary and lawyer's society. The starting point was, of course, the third upheaval mentioned above. But, the movement for judicial reform in 1994 took a form of popular movement. The year of 1994 was noteworthy because it was the year when the People's Solidarity for Participatory Democracy,²⁶⁾ the biggest NGO in Korea, was established. This has organized the Judiciary Watch as its subdivision to oversee and check the judiciary, and the Watch could play integrating roles to aggregate various powers for judicial reform such as the Minbyun, law professors, journalists and the other NGO's. With active participation of so much various groups and citizens, the movement could easily reach to the mass and win so great popularity. Series of seminars on judicial reform were held, and lots of statement and opinions were issued, which was, in turn, reported by the mass media.

The main issues in these demands can be roughly grouped as such: firstly to maximize the quality and quantity of legal service supplied to the people, secondly to secure political neutrality and fairness of judicial system including public prosecutors system, and thirdly to raise public confidence to and efficiency of the judicial system. For these purpose, some action

26) <http://eng.peoplepower21.org/>

programs were posed such as abolition of career system of judges and public prosecutors, adoption of the jury system, institutionalization of council of judges, increase of numbers of lawyers, improvement of legal education system, specialization of legal professions, and so on, among which the most decisive one was the change in the conception of lawyer: They have tried to re-conceptualize lawyer not as "law bureaucrat" but as "legal service provider", who should represent the client's interests according to law rather than the "public goods" determined by law bureaucrats. The slogan "practices of legal affairs are services too" was a rhetoric for these demands.

Among them, the idea of Law School system of american style has attracted special public attentions of the public. Though the details of the idea differed each other so much, it was introduced as a system that could train specialized lawyers in various areas of lawyering and that could improve existing bar-exam system, which required too much times and costs for the applicants to pass it. The lawyers of all areas fiercely objected to this idea, on ostensible ground that korean legal system differed from that of U.S, and on real ground that it would infringe their existing interests that came from their status of monopoly.

The President's Commission on Globalization, which was established in 1995 to lead and coordinate plans and practices for political and societal reformation, had played so many roles in managing the movement. The Committee sometimes led and drove this movement and sometimes worked as mediator between demanding people and resisting high-ranking offices in both judiciary and public prosecutor's office. Finally in April, 1995, it could reach to some compromises with the Supreme Court for judicial reform.²⁷⁾ What are to be noted among those compromises are: ①to increase number of new entry into JRTI from 300 to 800 by 1999, ②to establish "Committee on Legal Education System" to make rational and effective alternatives to present system of legal education and training, ③to improve

27) They made a joint-committee titled as the Commission for Judicial System Development and Segyehwa(Globalizaion), and announced mutually agreed plans for improving legal services, practices and system "to enhance international competitiveness", none of which has been proved effective till now.

the system of lawyer's professional ethics and liability, and ④to open the pools for appointment of judges or prosecutors to attorney-at-laws with career.

At the end of 1995, the passion for judicial reform has substantially vanished only with such minor achievements. Judicial reform was not so big issue to be pursued on long-term struggles: judicial reform was just judicial and there were lots of other social issues. But the agendas set in the movement of 1995 has been regarded as the archetype of judicial reform in subsequent cases, and were repeated in 1999.

4.4. Hollow Shout for Judicial Reform in 1999

Demands for judicial reform has been periodically repeated in 5 year terms, because the term of the president is 5 year and newly elected president wants to display his/her moral cleanliness by performing some reformation of existing systems and judicial system has been the most visible and vulnerable one for his intent to appeal to the people.

The government of the president Kim, D. J., the first president from the opposite party, was not exception. On the one hand, that government had tried to reform the system of public prosecutors, because it thought no democratization should be completed without purging away the coercive characters of the prosecutors inherited from Japanese colonial rulings. Shortly after his inauguration, the president Kim organized civil committees for management consultation of governmental agencies, and let them inspect and audit every governmental departments, from which the Department of Justice and the Supreme Public Prosecutor's Office were not exempted. In 1998, one team had made a critical report with suggestion that the overlapping between these two agencies in their personnel and organizational functions be urgently removed, that there be set up check and balance relationship between them, and system of the High Public Prosecutor's, which had not played any significant functions offices, be abolished. Such proposals were so complicated, but one thing was evident: reformation and restructuring of those systems was inevitable. The public

prosecutors, whether they were high-ranker or not, were vehemently opposed and resisted against those programs of reform.

But the scandals of corruption and connection, in which the wife of the Minister of Justice had been involved, was exposed in 1999, the public prosecutors could not stand indignation of the people against them. Confronted with public ire and demands for clean-up and reform, they had to find an exit or by-pass to survive.

On the other hand, the Minister of Education, Lee, Haechan, established the Presidential Commission for the New Education Community with aim of restructuring and globalizing the education system, esp., high education system. This commission reported, in 1999, to the President that system of graduate professional schools can provide the best way to improve the effectiveness of high education, and to get rid of side ill effects caused by academic sectionalism. At this point, this committee had revived the idea of law school, which had been discussed in the movement of 1995.

Lawyers in that time felt that their sectional interests were seriously challenged by those two reports. Led by the Minister of Justice, Park, Sangchon, they tried to block those demands of reform. They had persuaded the president to establish new committee for judicial reform; the Presidential Committee for Advancement of Judicial Reform (May 1999-Dec. 1999), which was consist of two members from the Judiciary, two from the Prosecutor's Office, three from Bar Association(including the chairman), three from College of Law (one of them was former prosecutor), and five from civilian sector.

However, this committee's main target was not advancing the process of judicial reform only but blocking it. Though this committee made a huge volume of report, most of which were revival of the items of the movement of 1995, few parts of it had been performed: no law school, no renovation of law enforcement system, no improvement in legal service. The almost unique change was executing office of the Bar Exam: from the ministry of Government Administration and Home Affairs to that of Justice. And Nothing!

Even though this case of judicial reform had been triggered by political

consideration, compared with the former process of Judicial Reform which was led by civilian sector, the whole process of that "reform" was controlled by the law bureaucrats, who wanted to nullify the people's demands for judicial reform. The law bureaucrats could get salient success in depending their status quo by discouraging the president who was in need of corporation of state apparatuses to overcome the limitation of the minority government.

4.5. The "Judicial" Judicial Reform in the "Participatory" Government: 2004-present

Exactly after 5 years from the former debates for judicial reform, new situation has been installed in political world. In 2003, a former attorney-at-law and Assemblyman, Roh, M. H. has taken office as president, whose major slogan in electoral campaign was reform including judicial reform. When he inaugurated, he appointed to the minister of Justice an attorney-at-law and 46 years old lady, Ms. Kang K. S, who had no career in prosecutor's office and the Ministry of Justice. Such was an extraordinary measure that no lawyer could even dream in Korean law society. Even young prosecutors gathered to convene, and had fiercely resisted against her and the president. On March 9, the President accepted the battle with conducting open forum with representatives of young prosecutors, and declared that he would not abandon his project to reform and clean up the system of public prosecutors at any costs.

On the other hand, in August 2003, young judges had made the fourth judicial upheaval. 26 judges led by some members of the Study Group for Our Law had handed in a petition to the Chief Justice. They required that the career system of judges be thoroughly maintained so that judges could be independent from the Chief Justice or power group in judiciary who held real powers to pick elite judges and to promote them as chief judges of the Appellate Court. This news was, in the twinkling of an eye, circulated through the intranet called "CourtNet". A few days later, 56 judges who were representatives of each district court gathered in the Supreme Court:

The first convention of the judges was held, in Korean history, to discuss how to reform the judicial system. They required, under joint signature of 159 judges, that the Chief Justice improve the procedure of appointment of the Justice, which had solely delegated to the Chief Justice. But the Chief Justice refused and a few judges resigned on protest against the Chief Justice.

The Judiciary Reform Committee composed of 21 members, was one of the product of such conflicts. The Chief Justice who had to find some exits and the President who needed open agendas for his electoral pledge of judicial reform, has agreed to install this Committee to review overall system of Korean judiciary, public prosecutor's office, lawyer system, and legal education system, and to reform them in five areas as such: organization and function of the supreme court, judge appointment system, legal education and qualification of lawyer, public participation in the judicial process, and legal services, and the criminal procedure system. In Dec. 2004, it came to end with heavy volume of proposals to the Chief Justice and the President, to which the law school plan and proposals for revising the Criminal Procedure Act were included in somewhat rough description. In Jan. 2005, it was succeeded by the Presidential Committee for Judicial Reform(hereinafter "the Committee"), which is an advisory committee to make action programs of the proposals that the former Committee of 2003 has made, and big troubles came out when the Committee began to work.

The first products of the Committee were draft bills of the Law School Act and the Revision Act of Criminal Procedure, all of which has invited vehement objections from concerning parties in law society. The draft bill of the Law School Act is to establish several graduate law schools and to qualify only the graduates to take bar-exam. According to this bill, the JTTRI should abandon its function of training new lawyers. Such system has already been agreed by all the participants to the Committee of 2003, whereas the root of conflict-how many entries to those law schools will be permitted- has, at least ostensibly, been undecided. The Committee tacitly restricts the number to 1,200, which means only 6~8 law schools can be "licensed" by the accreditation committee dominated by practicing lawyers,

judges, and prosecutors. It is so natural that universities which want to have law school in their campus would not accept such restriction. The Korean Bar Association has rejected the bill, too, because it believes that the law school system will actually cause increase of numbers of lawyers in the long run, which will invite keen competition in law market.

The draft bill on the Criminal Procedure has met with strong objection of public prosecutors.²⁸⁾ This draft tries to make a triadic structure in criminal procedure. According to present system, a prosecutor has nearly same power as presiding judge in criminal procedure. An interrogatory protocol of the accused written by prosecutor shall be admitted as valid evidence even though that accused denies its contents in the trial. Awfully low rate of judgment of acquittal in Korea (0.17% of all criminal cases in 2004) can be partly explained by such preferred position endowed to the prosecutor. The draft bill denies such privilege of the prosecutor: when the accused denies the contents of the protocol, it should not be presented in the trial as evidence any more. The ostensible responses of the prosecutors to such measure are "absurd!" and "how can prove suspects guilty and punish them?" But in reality, such measure seems to have deeply hurt their self-esteem. They passed bar-exam as ever judges did, they studied and were trained in the JTRI as ever judges, and they had recorded excellent scores on graduation as ever judges did, and then, why should they say "Your Honor" to those judges? They gathered again, as in 2003, to protest against this draft.

The problem lies not in such dissents or conflicts, but rather in the way that the Committee does its business. Even though the Committee is organized and operated under the slogan of "reform" which it shares with the "Participatory Government," it works in corporatist give-and-take mode. The concession in the draft bill of Criminal Procedure is good example: By adding a clause titled as "Contradicting Statement" the protocol can be

28) When analyse the processes of judicial reform in recent days, one can find one interesting thing: the reformist used to refer to the system of U.S, while the anti-reformist used to say about German legal system, from which Koreans has received its legal system. In this case, the prosecutors tries to find their rationales for those objection in the hypothesis that Korean legal system be, in its nature, different from that of U.S.

virtually admitted as valid evidence. It is just a result of compromise between the Committee and the prosecutors.

The limit of current movements for judicial reform can be seen at this point. The Government of the President Roh is the weakest one in Korean modern history. Though it has found its major constituency in the general public and had gained overwhelming supports of the public, its base of power has been so weak as not to win the dominant power groups. When the president appointed the Minister of Justice a young female lawyer and let her reform the Ministry and the Public Prosecutor's Office, he and she had met so much resistance not only from the prosecutors but also from the opposite party and conservative journalism. When the government tried to move the City of Capital from Seoul to Chungnam Province, the Constitutional Court held the statute for such move unconstitutional and void. Even he was once impeached by the coalition of conservative parties.

Nevertheless, the working group in his government, which consists mainly of members of the Minbyun, former members of the Uribeup Study Group, and so called 386 generation who were leaders of student and labor movement in 1980's, would hesitate to open the policy making process to other intellectuals or experts, who, they think, lack "the will of reform." This explains why so much people agree with them in general principles of reformation, but they used to disagree to the details posed by that group. In such situation where this government or the Committee lacks substantially the support of the public or law community, whereas the demands of judicial reform is so high in the populace, it cannot help pursue any compromise based on give-and-take strategy to display some achievements of judicial reform to the populace.

5. Conclusion

Korean Judicial system in its modern conception was established by the Court Organization Act of 1895 in the Imperial Chosun ("DaehanJekuk"), and

has been operated for more than a century. But, when we remove the era of Japanese Colonial ruling (1910-1945), the current system of judiciary and law society has developed for only 60 years, during which we Koreans had experienced so much various practices of that judicial system. When the military regime preferred direct execution of physical coercions with aid of the police, KCIA, military forces and so on, the judiciary would resist against that, but it had mainly remained silent behind the robs. When the authoritarian ruling of the military regime resigned, and the government of the president Roh was in ruling from 1987, the judiciary - esp. its part of the public prosecutors - took the place of such coercive state apparatus. It had concealed the coercive nature of the regime under the guise of law and Rechtsstaat.²⁹⁾ The great power and authority of the public prosecutor's has been made in that era.

The people's demands for judicial reform could be possible only when the civilian government was established: in this meaning, we Koreans, at present, have second chance for judicial reform. The situation is, however, so different from the first one of 1995, when judicial reform was driven by relatively strong government with very strong support of general public. The agenda of judicial reform was shared with all the populace with aid of journalism and strong drive of the government in 1995, whereas the system of judicial reform in 2005 was besieged and captured by the inner-circle consisted of elite-lawyers from the Supreme Court(esp., the BCA) and/or the Minbyun. The NGO's in 1995 actively participated and led the movement representing the will of the people and concretized people's demand into more detailed alternatives, whereas the NGO's now can not decide how to act, because they agreed to the principles but objected in details.³⁰⁾

After the president Roh's government of 1988, which had actively absorbed lawyers into political and governmental sphere, the lawyers has

29) For details, Han, Sang-Hie, Sikukkwanyun pupryungui sabupkyulchonge daehan siljungguk yeonku (Positivist Analysis of Judicial Decisions on the Affairs of National Security), Seoul: Kukkaingwonwihonhoi(National Human Rights Commission), 2002.

30) One NGO shares its active members, who have specialty in judicial affairs, with the Committee, which makes it so hard for that NGO to criticize the Committee's actions because the NGO cannot get independent and objective knowledge and criteria for evaluating the actions.

constituted salient power groups in Korean politics. The Minbyun, and Hunbyun(Constitution Law Advocates)³¹⁾ are examples of positively politicalized groups in the society of the bar. The judiciary and the public prosecutors have become independent agency with its own powers as the politics is democratized: They are independent not only from the state or the political ruling group, but also from the control of general public. When the nature of the regime was authoritarian, the judicial system worked as subordinate coercion apparatus of the regime. The entire processes of judicial reform was/is concentrated on these characteristics of the system: sometimes reform for more efficiency, the other times reform for erasing such characteristics. So many parts of those trials for reform were unsuccessful esp. when it targeted to the latter purpose. The system cannot, however, be free from the huge stream of democratization: in the long run, it has acquired considerable degree of independency, transparency, and even efficiency.

Even though the reform progresses a little slowly when it meets temporal objections, no one can reverse overall trends of reformation: people can participate in judicial decision making processes, much more lawyers will be qualified to practice in law markets competing each other, the system of legal education can provide with more enhanced competitiveness in legal service, and human rights will be more actively and effectively protected as the reform of criminal procedures goes on. The future of Korean judicial system is not so pessimistic because we Koreans know well that the democratization in such a post-industrialized society can be made only when the judicial system and lawyers society is democratized.³²⁾

31) <http://www.law717.org/>

32) In spite of such optimistic perspectives, there are still so pessimistic visions on the future of Korean legal system. Some scholars and NGO's are a little nervous about lawyers-industries adherence. According to one research, the Samsung has hired 15 lawyers with high-rank career in the court or the public prosecutors office from 2000. In present, 95 ex-judges or ex-prosecutors are appointed as director by major enterprises. They are trying to make institutionalize the system that guarantees independency of the lawyers from such economical powers.