Article 82 The acts of the President performed in accordance with law shall be executed by written document, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83 The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, or other public or private posts prescribed by law.

Article 84 The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85 Matters pertaining to the status and courteous treatment of former Presidents shall be determined by law.

Section 2. The Executive Branch

Sub-Section 1. The Prime Minister and Members of the State Council

Article 86 (1) The Prime Minister shall be appointed by the President with the consent of the National Assembly.

(2) The Prime Minister shall assist the President and shall supervise, under order of the President, the Executive Ministries in their administration.

(3) No military personnel shall be appointed as Prime Minister unless he is retired from active service.

Article 87 (1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.

(2) The members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.

(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.

(4) No military personnel shall be appointed as a member of the State Council unless he is retired from active service.

Sub-Section 2. The State Council

Article 88 (1) The State Council shall deliberate on important policies that fall within the power of the Executive.

(2) The State Council shall be composed of the President, the Prime Minister, and members of the State Council, whose number shall be no more than thirty and no less than fifteen.

(3) The President shall be the chairman of the State Council, and the Prime Minister shall be the vice-chairman.

Article 89 The following matters shall be referred to the State Council for deliberation:

1. Basic plans for State affairs, and general policies of the Executive;
2. Declaration of war, conclusion of peace and other important matters pertaining to foreign policy;
3. Draft amendments to the Constitution, proposals for national referendums, proposed

treaties. legislative bills, and proposed Presidential Decrees;

4. Proposed budgets, closing of accounts, basic plan for disposal of State properties, contracts incurring financial obligation on the State, and other important financial matters;
5. Prompt decree, prompt financial or economic decree or measure, and proclaim and lift of martial law of President;
6. Important military matters;
7. Requests for convening an extraordinary session of the National Assembly;
8. Awarding of honors;
9. Granting of amnesty, commutation and restoration of rights;
10. Matters pertaining to the determination of jurisdiction between Executive Ministries;
11. Basic plans concerning delegation or allocation of powers within the Executive;
12. Evaluation and analysis of the administration of State affairs;
13. Formulation and coordination of important policies of each Executive Ministry;
14. Action for the dissolution of a political party;
15. Examination of petitions pertaining to executive policies submitted or referred to the Executive;
16. Appointment of the Prosecutor General, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each armed service, the presidents of national universities, ambassadors, and such other public officials and managers of important state-run enterprises as designated by law; and
17. Other matters presented by the President, the Prime Minister or a member of the State Council.

Article 90 (1) An National Senior Advisory Council composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the National Senior Advisory Council. In the absence of an immediate former President, the President shall appoint the Chairman.

(3) The organization, scope of function and other necessary matters pertaining to the National Senior Advisory Council shall be determined by law.

Atricle 91 (1) A National Security Council shall be established to advice the President on the formulation of foreign, military and domestic policies related to national security prior to deliberation by the State Council.

(2) The meetings of the National Security Council shall be presided over by the President.

(3) The organization, scope of function and other necessary matters pertaining to the National Security Council shall be determined by law.

Atricle 92 (1) An Advisory Council on Democratic and Peaceful Unification may be established to advise the President on the formulation of peaceful unification policy.

(2) The organization, scope of function and other necessary matters pertaining to the Advisory Council Democratic and Peaceful Unification shall be determined by law.

Atricle 93 (1) A National Economy Advisory Council may be established to advice the President on the formulation of important policy for the national economic development.

(2) The organization, scope of function and other necessary matters pertaining to the

National Economy Advisory Council shall be determined by law.

Sub-Section 3. The Executive Ministries

Atricle 94 Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.

Atricle 95 The Prime Minister or the head of each Executive Ministry may, under the powers delegated by law or Presidential Decree, or *ex officio,* issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

Article 96 The establishment, organization and the scope of function of each Executive Ministry shall be determined by law.

Sub-Section 4. The Board of Audit and Inspection

Article 97 The Board of Audit and Inspection shall be established under the President to audit the closing of accounts of revenues and expenditures, the accounts of the State and such organizations as prescribed by law, and to inspect the administrative functions of the executive agencies and public officials.

Article 98 (1) The Board of Audit and Inspection shall be composed of no less than five and no more than eleven commissioners, including the Chairman.

(2) The Chairman of the Board shall be appointed by the President with the consent of the National Assembly. The term of office of the Chairman shall be four years, and he may be reappointed only once.

(3) The commissioners of the Board shall be appointed by the President on the recommendation of the Chairman. The term of office of the commissioners shall be four years, and they may be reappointed only once.

Article 99 The Board of Audit and Inspection shall audit the closing of accounts of revenues and expenditures every year, and report the results to the President and the National Assembly in the following year.

Article 100 The organization and scope of functions of the Board, the qualifications of the commissioners of the Board, the range of the public officials subject to inspection and other necessary matters shall be determined by law.

CHAPTER V. THE COURTS

Article 101 (1) Judicial power shall be vested in courts composed of judges.

(2) The courts shall consist of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

(3) Qualifications for judges shall be determined by law.

Article 102 (1) Departments may be established in the Supreme Court.

(2) There shall be Supreme Court Justices at the Supreme Court. However, judges other than Supreme Court Justices may be assigned to the Supreme Court in accordance with the provisions of law.

(3) The organization of the Supreme Court and lower courts shall be determined by law.

Article 103 Judges shall judge independently according to their conscience and in

conformity with the Constitution and law.

Article 104 (1) The Chief Justice of the Supreme Court shall be appointed by the President with the consent of the National Assembly.

(2) The Supreme Court Justices shall be appointed by the President on the recommendation of the Chief Justice with the consent of the National Assembly.

(3) Judges other than the Chief Justice and the Supreme Court Justice shall be appointed by the Chief Justice with the consent of the Conference of the Supreme Court Justices.

Article 105 (1) The term of office of the Chief Justice shall be six years and he shall not be reappointed.

(2) The term of office of the Supreme Court Justices shall be six years and they may be reappointed in accordance with the provisions of law.

(3) The term of office of judges other than the Chief Justice and the Supreme Court Justices shall be ten years and they may be reappointed in accordance with the provisions of law.

(4) The retirement age of judges shall be determined by law.

Article 106 (1) No judge shall be removed from office except by impeachment or sentence of imprisonment or more severe criminal punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.

(2) In the event a judge is unable to discharge his official duties because of mental or physical impairment he may be removed from office in accordance with provisions of law.

Article 107 (1) When the constitutionality of a law is a prerequisite to a trial, the court shall request a decision of the Constitution Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or dispositions, when their constitutionality or legality is a prerequisite to a trial.

(3) Administrative adjudication may be established as a procedure prior to a judicial trial. The procedure of administrative adjudication shall be determined by law and shall be in conformity with the principles of judicial procedures.

Article 108 The Supreme Court may establish, within the scope of law, regulations pertaining to judicial proceedings and internal rules and regulations on administrative matters of the court.

Article 109 Trials and decisions of the courts shall be open to the public. However, trials may be closed to the public by court decision when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals.

Article 110 (1) Military court may be established as special courts to exercise jurisdiction over military trials.

(2) The Supreme Court shall have the final appellate jurisdiction over military court.

(3) The organization and authority of military court, and the qualifications of their judges shall be determined by law.

(4) Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by law in regard to sentinels, sentry-posts, supply of harmful food, and prisoners of war

unless a capital punishment is sentenced.

CHAPTER VI. THE CONSTITUTION COURT

Article 111 (1) The Constitution Court shall have adjudications about the following matters in charge:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Conflict of jurisdiction between State organs, between State organ and local government, or between local governments;
5. Constitutional petition provided by law.

(2) The Constitution Court shall be composed of 9 adjudicators with qualification for a judge, and they shall be appointed by the President.

(3) Among the members referred to in Paragraph 2, three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice.

(4) The Chairman of the Constitution Court shall be appointed by the President from among the members with the consent of the National Assembly.

Article 112 (1) The term of office of the judges of the Constitution Court shall be six years and they may be reappointed in accordance with the provisions of law.

(2) The judges of the Constitution Court shall not join any political party, nor shall they participate in political activities.

(3) No judge of the Constitution Court shall be expelled from office expect by impeachment or sentence of imprisonment or more severe criminal punishment.

Article 113 (1) When the Constitution Court makes a decision on the unconstitutionality of a law, impeachment, dissolution of political party or admission of constitutional petition, the concurrence of six members or more shall be required.

(2) The Constitution Court may establish, within the scope of law, regulations pertaining to adjudicational proceedings and internal rules and regulations on administrative matters of it.

(3) The organization, operation and other necessary matters of the Constitution Court shall be determined by law.

CHAPTER VII. ELECTION MANAGEMENT

Article 114 (1) Election ~~Management Committees~~ shall be established for the purpose of fair management of elections and national referendums, and dealing with affairs concerning political parties.

(2) The Central Election Management Committee shall be composed of three members appointed by the President, three members selected by the National Assembly, and three members nominated by the Chief Justice of the Supreme Court. The Chairman of the Committee shall be elected from among the members.

(3) The term of office of the members of the Committee shall be six years.

(4) The members of the Committee shall not join political parties, nor shall they participate in political activities.

(5) No member of the Committee shall be expelled from office except by impeachment or sentence of imprisonment and more severe punishment.

(6) The Central Election Management Committee may, within the limit of laws and decrees, establish regulations pertaining to the management of elections, national referendums, and matters concerning political parties, internal rules.

(7) The organization, scope of function and other necessary matters of the Election Management Committees at each level shall be determined by law.

Article 115 (1) Election Management Committees at each level may issue necessary instructions to administrative agencies concerned with respect to matters pertaining to elections such as the preparation of the rosters of voters and matters pertaing to national referendum.

(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116 (1) Election compaigns shall be conducted under the management of the Election Management Committees at each level within the limit set by law. Equal opportunity shall be guaranteed.

(2) Expenditures for elections shall not be borne by political parties or candidates, except as otherwise provided by law.

CHAPTER VIII. LOCAL AUTONOMY

Article 117 (1) Local governments shall deal with matters pertaining to the welfare of local residents, manage properties, and may establish, within the limit of laws and decrees, rules and regulations regarding local autonomy.

(2) The kinds of local governments shall be determined by law.

Article 118 (1) A local government shall have a counsil.

(2) The organization and powers of local councils, and the election of members; the methods of election for heads of local government bodies; and other matters pertaining to the organization and operation of local government bodies shall be determined by law.

CHAPTER IX. THE ECONOMY

Article 119 (1) The economic order of the Republic of Korea shall be based on the principle of respect for freedom and creative ideas of the individual and enterprise in economic affairs.

(2) The State may regulate and coordinate economic affairs for the balanced growth and stabilization of national economy, maintenance of fair distribution of income, prevention of market domination and abuse of economic power, and the democratization of economy through the coordination between economic bodies.

Article 120 (1) Licenses to exploit, develop or utilize mines and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for limited periods of time in accordance with the provisions of law.

(2) The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.

Article 121 (1) The State shall endeavor to realize the land-to-the-tillers principle with respect to agricultural land. Tenant farming shall be prohibited.

(2) Leasing of farmland and the management of farmland on consignment to increase agricultural productivity or to be originated from unavoidable circumstances, shall be recognized in accordance with the provisions of law.

Article 122 In accordance with the provisions of law, the State may impose restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of the land which is the basis of production and life of all citizens.

Article 123 (1) The State shall establish and put in force such necessary plans as comprehensive development of fishing and agrarian villages and support etc. to protect and upbring agriculture and fishery.

(2) The State shall have duty to foster local economy for balanced development of all regions.

(3) The State shall protect and foster the small and medium industries.

(4) The State shall protect the interest of farmers and fishermen by seeking after price stabilization throughout endeavoring for equilibrium of supply-demand and improvement of distribution structure.

(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in small and medium industry and shall guarantee their autonomy and development.

Article 124 The State shall, in accordance with the provisions of law, guarantee the consumer protection movement intended to encourage sound consumption activities and to urge improvement in the quality of products.

Article 125 The State shall foster foreign trade, and may regulate and coordinate it.

Article 126 Private enterprises shall not be nationalized or transferred to public ownership, nor shall their management be controlled or administered by the State, except in cases determined by law to meet urgent necessities of national defense or national economy.

Article 127 (1) The State shall endeavor to develop national economy throughout the innovation of scientific technology and the development of information and human resources.

(2) The State shall establish a national standard.

(3) The President may establish an advisory body for the purpose referred to in Paragraph 1.

CHAPTER X. AMENDMENTS TO THE CONSTITUTION

Article 128 (1) A proposal to amend the Constitution shall be proposed either by the President or by a majority of the members on the register of the National Assembly.

(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

GENERAL TABLE OF CONTENTS

VOLUME I

Budget and Accounting Act
Basic Act Concerning the Administration of Organizations in Which the Government Invests
Local Finance Act
National Property Act
National Bonds Act
Act Concerning Issuance of National Bonds Denominated in Foreign Currency
Military Service Act
Martial Law
Requisition Act
National Security Planning Agency Act
Act Concerning National Holidays
Administrative Execution by Proxy Act
Act Concerning the Appointment and Authority of Delegates Extraordinary and Plenipotentiary and of Government Representatives

III. SOCIAL LAWS

Education Act
Private School Act
Act Concerning Activities of UNESCO
National Athletics Promotion Act
Act Supporting of the Organizing Committees for the Seoul Asian Games and Olympic Games
Science and Technology Promotion Act
Atomic Energy Act
Cultural Properties Protection Act
Copyright Act
Food Sanitation Act
Environment Preservation Act
Quarantine Act
Marine Pollution Prevention Act
Medical Treatment Act
Pharmaceutical Act
Narcotics Act
Psychotropic Medicine Control Act
Labor Standard Act
Labor Union Act
Labor Dispute Mediation Act

IV. ECONOMIC LAWS

VOLUME II

V. INDUSTRIAL LAWS

Fishery Resource Protection Act
Chamber of Commerce and Industry Act
International Trade Act
Export Inspection Act
Free Export Zone Establishment Act
Military Supply Act
Industrial Standardization Act
Industrial Products Quality Control Act
Invention Protection Act
Patent Act
Utility Model Act
Design Act
Trademark Act
Unfair Competition Prevention Act
Patent Attorney Act
Traffic Safety Act
Aviation Act
Tourism Promotion Act
Maritime Transportation Industry Fostering Act
Maritime Transportation Business Act
Harbor Act
Seamen's Act
Seamen's Insurance Act
Open Ports Control Act
Marine Accidents Adjudication Act
Ship Act
Act Concerning the Tonnage Measurement of Ships
Ship Officers Act
Postal Act
Telecommunication Organic Act
Public Telecommunication Industry Act
Industrial Development Act
Computer Program Protection Act

VI. TAX LAWS

Basic National Tax Act
National Tax Collection Act

Act Concerning the Regulation of Tax Reduction and Exemption
Tax Offenses Punishment Act
Tax Offenses Punishment Procedure Act
Tax Accountants Act
Income Tax Act
Corporation Tax Act
Inheritance Tax Act
Asset Revaluation Act
Value-Added Tax Act
Special Excise Tax Act
Education Tax Act
Defense Tax Act
The Customs Act
Provisional Import Surtax Act
Special Act for Refund of Customs Levied on Raw Materials for Export
Local Tax Act
Securities Transaction Tax Act

VII. CIVIL LAWS

The Civil Code
Act Concerning Incorporation and Operation of a Public Interest Juridical Person
Factory Mortgage Act
Heavy Equipment Mortgage Act
Automobile Mortgage Act
Aircraft Mortgage Act
Real Estate Registration Act
Ship Registration Act
Interest Limitation Act
Regulation of the Maximum Rate of Interest under Article 1 Paragraph 1 of the Interest Limitation Act
Fidelity Guaranty Act
Trust Act
Residence Lease Protection Act
Deposit Act
National Compensation Act
Automobile Damage Compensation Guarantee Act
Special Act on Marriage
Special Act on Marriage Registration
Special Act on Adoption
Family Registration Act

VOLUME III

VIII. COMMERCIAL LAWS

IX. PROCEDURAL LAWS

Special Act Concerning Summary Proceedings for Civil Cases
Small Claims Trial Act
Act Concerning Costs in Civil Proceedings
Administrative Litigation Procedure Act
Act Concerning Litigation to Which the State is a Party
Act Concerning Procedure in Non-contentious Matters
Arbitration Act
Bankruptcy Act
Act Concerning Procedures in Family Matters
Family Court Procedure Act
Bailiff Act

X. CRIMINAL LAWS

The Criminal Code
Special Act Concerning Punishment of Crimes against State
Temporary Act on Fines
Minor Offense Punishment Act
Act Concerning Additional Punishment for Specified Crimes
Act Concerning Punishment of Violent Crimes
National Security Act
Act Concerning the Prevention of Flight of Domestic Properties
Act Concerning the Control of Secret Passage
Special Act Concerning the Disposition of Traffic Accidents
Special Act Concerning the Regulation of Crimes against Health
Illegal Check Control Act
Military Penal Code
Special Act concerning Crimes against Military Supply, Etc.
The Code of Criminal Procedure
Summary Proceedings Act
Criminal Compensation Act
Juvenile Act
Courts-Martial Act
Penal Administration Act
Amnesty Act
Security Observation Act
Act for the Protection of Society
Special Criminal Act Concerning Enforcement of the Executive Agreement between the Republic of Korea and the United States of America
Rules of Criminal Procedure

TABLE OF CONTENTS

VOLUME III

VIII. COMMERCIAL LAWS

IX. PROCEDURAL LAWS

X. CRIMINAL LAWS

13

1. The Growth of the Bar and the Changes in the Lawyer's Role: Korea's Dilemma
2. いかに裁判官を造り上げるべきか
3. 「統治權」の時代は既に去つた

안경환 저

Law and Technology in the Pacific Community

EDITED BY
Philip S.C. Lewis

5

The Growth of the Bar and the Changes in the Lawyer's Role: Korea's Dilemma

Kyong Whan Ahn

Westview Press
BOULDER • SAN FRANCISCO • OXFORD

5

The Growth of the Bar and the Changes in the Lawyer's Role: Korea's Dilemma

Kyong Whan Ahn

Introduction

The Korean legal community is struggling over a critical question: to increase or not to increase the number of lawyers. For the last several years no single issue has more haunted the entire Korean legal world than the optimal size of the bar. In the last fifteen years, the number of lawyers in active practice has tripled, from 811 in 1977 to 2,568 in 1993.[1] Every year approximately 150 new lawyers are expected to join the bar. Such a sharp increase in lawyers has been accompanied by many problems, some expected, others totally unexpected. This paper is an overview of the new phenomena that have accompanied the numerical growth of the Korean bar over the last fifteen years.

The next section discusses the pros and cons of the growth of the bar which have been vehemently asserted by two sharply divided proponents: the legal establishment and the academics. A further section introduces the changes in the role of lawyers in recent years. The author argues that such changes were primarily caused by the numerical expansion of the bar. Throughout the entire paper the author maintains the position that Korea critically needs a larger bar.

Too Many Lawyers?

The only practical path to becoming a licensed attorney in Korea is to pass the National Judiciary Examination[2] run by the government.[3] Successful candidates must complete a two years' training course at the Judicial Research and Training Institute (hereinafter referred to as the

"Institute") before qualifying as a lawyer (*Byun Ho Sa*).[4] This examination has been almost a myth to Koreans. It has been a symbol of opportunity, fairness and intellectual achievement. The myth was further solidified by its almost prohibitive pass rate —less than a few percent.[5]

A Copernican revolution took place in 1981. The Korean government broadened this narrow footpath to a public boulevard. Without any public hearing or equivalent open discussion, the government announced its decision to set the new yearly quota for the entering class of the Institute at 300.[6] This figure was astronomical to Korean legal society which had been so accustomed to a family-sized, exclusive monopoly on the practice of law. On the other hand, this drastic decision, although tainted by the arguable legitimacy of the deciding body,[7] was generally accepted by the public as a "democratic" measure, as it paved a way for easier access to a legal career. Ever since its inception, this democratic measure has been constantly criticized by the legal establishment, and as the fear of losing a restricted market becomes a reality, a systematic movement has been launched to reduce the quota to a "practical" number. Typical are the recommendations and declarations issued by legal institutions such as the Korean Bar Association, the Office of Judicial Administration and the Ministry of Justice.[8]

The rationales given by these institutions may be summarized as follows. First, this number simply exceeds the demand for legal services. They point to the fact that the yearly demand for judges, public prosecutors and military attorneys, for which the graduates of the Institute are qualified, is no more than 100.[9] This argument, however, does not merit serious discussion. It is based on the assumption that the Institute is a preparatory school for judges and public prosecutors. The assumption may have been justified up to 1980, for then private law practice came at the conclusion of one's legal career. The unrebutted convention and practice were that one engaged in private practice only after considerable service as a judge or public prosecutor. Under such circumstances one can agree that the judiciary examination was equivalent to an employment examination for a judge or public prosecutor, at least in the short term. However, Queen Anne is dead! For present purposes, the Institute is a training school for attorneys as well as for judges and public prosecutors. Annually at least 150 new graduates of the Institute choose (or are forced to choose) private practice as their initial legal career. Therefore, this cannot be a persuasive reason for limiting the numbers passing the bar.[10]

Their second argument concerns quality of legal service. They claim

that, as a consequence of "mass production," the quality of the bar has been so impaired that there is serious potential for malpractice.[11] To support this argument they draw attention to two recent incidents in which three young attorneys were arrested for "ambulance-chasing" in violation of the relevant statutes.[12] However, this argument is defective in two respects. First, the intellectual quality of those taking the examination recently (mostly college graduates with a law degree) is becoming ever higher. All the statistics show that at every university, with rare exceptions, the law department is the most popular and hardest to enter. Every year only the best qualified 6,000 students out of approximately 200,000 are admitted to the law departments of 65 universities.[13] The quality of law school education has been substantially improved during the last decade. For example, the total number of law faculty doubled to 677 by December, 1992.[14] Every consideration negates the claim that the best 300 law students are sub-standard. A more basic problem is the adequacy of the bar examination in assessing the quality of the prospective jurist. As one foreign observer has sarcastically but correctly pointed out, the Korean bar examination may be characterized as a system of "meritocracy of memory."[15] In Korea, an extreme emphasis on rote memorization discourages those taking the examination from building up any integrated vision of law.[16] Aside from this rather fundamental suspicion, the statistics of the bar examinations indicate that there is very little, if any, discernible difference in numerical scores among the successful 300.[17] Secondly, in Korea malpractice is more a matter of legal ethics than professional intellect. Therefore, post facto disciplinary measures, not prior numerical restraint, should be the prime remedy against malpractice.

The third argument of those in favor of reducing the quota is relevant to understanding the basic goal of legal education in universities. They define the fundamental character of Korean law schools as institutions for general education, not professional legal education,[18] and argue that for the sake of an adequate distribution of human resources, law school graduates should be encouraged to take jobs of a non-legal nature. They claim that widening the door to the bar in fact narrows students' career choices. It entices many "hopeless" examinees, who could succeed in other fields, to hold on a futile dream, thereby causing a disastrous waste of human resources.[19] This argument is equally defective. First, it is true that the Korean law school is not a professional school in the American sense. Still, it has some of the significant characteristics of a professional school. A student is required to take three years' education in law in addition to one year of education in general subjects.[20] Any law school graduate, therefore,

is most naturally expected and entitled to capitalize on their legal education in legal practice. Although diversity in employment for law graduates is to be encouraged, this does not serve as a valid reason to discourage taking the orthodox route. The argument of "false expectation" is too trivial for serious consideration. From the beginning, there have been numerous "hopeless" repeaters. The Bar examination in Korea is, as I have mentioned, almost a myth. It is the best known way of realizing the "Korean Dream." No formal schooling is required before taking the examination. In theory, any Korean may legitimately take up the challenge, and on the rare occasions when "no schoolers" do succeed, intensive media coverage dramatizes their sagas. Under such circumstances, mass production of hopeless repeaters is inevitable. If prevention of the waste of human resources is a real issue, some other direct means should be employed. The most effective would be to implement a "strikeout system", by limiting the number of times one can take the examination.

Their fourth argument has some substance. This is that the legal market is already over-supplied. As a partial justification, they emphasize the unique nature of legal practice in Korea. Traditionally much of the non-litigious legal work has been handled not by lawyers, but by so-called "quasi-lawyers."[2] The patent agent (*Byun Ri Sa*), tax agent (*Se Mu Sa*), judiciary agent (*Bop Mu Sa*, formerly called *Sa Bop Soe Sa*, literally "legal scrivener"), administrative scriveners (*Haeng Jong So Sa*), and labor agent (*No Mu Sa*) are prime examples of these. There are over 6,000 of these quasi-lawyers.[22] Further, in many companies legal matters are dealt with entirely by their in-house legal departments composed of non-lawyers. They also claim that many recent Institute graduates are unemployed or underpaid, and there is an imminent threat of serious unemployment among lawyers.[23]

While the first part of this argument has some validity, it is partly the bar's own fault. They confine themselves to the traditional types of criminal and civil cases, and neither possess the professional knowledge required in these fields nor desire to explore unaccustomed fields. In terms of both practical knowledge and accessibility, these quasi-lawyers can offer a far better service to the public.[24] In one sense, this means that lawyers feel no necessity to explore the non-traditional fields of legal practice. Most lawyers are well off with their income from civil and criminal litigation. Fees for litigations are incomparably high, and there is no reason for extra effort in return for much lower fees.

The second part of this argument depends on the level of income to which society agrees that lawyers are entitled. There is no single

reported incident of a "jobless" lawyer. Some may have trouble in being hired by a law firm, or in running their own office in Seoul. However, no lawyer is indigent. Disappointment comes mainly from the unreasonably high expectation of financial remuneration. Starting salaries at the first class law firms are disproportionately high compared with other occupations. Smaller sized firms also pay substantial salaries to their rookie associates. It is undisputed that even a novice lawyer is paid more than a director(*I Sa*) of a top-ranked company with a twenty year career.

In any case, there have always been alternative ways of working as a lawyer. Many companies would be glad to have in-house counsel, as long as their demands are not unreasonably high. For those having trouble in working in Seoul, local practice is an alternative guaranteeing high income and reputation. From the perspective of the general public, lawyers are definitely overpaid.[25]

Besides these arguments, the Ministry of Justice has raised a peculiar argument, which I take the liberty of calling the "Karl Marx argument." It claims that many "dissident lawyers" are the by-products of the desperate competition among Institute graduates, and it is therefore desirable to take preventative measures to avoid the production of these "undesirable" dissident lawyers.[26] Their reasoning is that these young civil rights lawyers are unsuccessful applicants for jobs as judges or public prosecutors. It seems to be based on the assumption that unemployment among intellectuals is the prime cause of social disturbances.[27] Whatever the justification for such an idiosyncratic attitude may be, it cannot be a persuasive reason for curtailing the legitimate exercise of the constitutional right of Institute graduates to freely choose a lawful occupation and to challenge governmental action in a lawful manner.

The proponents of the continuing growth of the bar are mostly academics. In 1984, the Korean Law College Association gave its official view in the form of a recommendation to the government.[28] In opposing the reduction of the annual quota, it went one step further. It claimed that the door to the Institute should be widened so as to allow at least 600 people to pass yearly.[29] Arguments in support of a larger bar have been presented by many academics in their individual capacities as well.[30] Their reasoning has been discussed in in the context of the opposing views above. To repeat, however, the gist can be summarized under two classifications—philosophical and practical. Their philosophical ground is democratization of the society cannot be achieved without the systematic guarantee of fair competition in legal services. Practically, they emphasize that from the consumer's point of view, all the statistics favor a larger bar.[31]

New Patterns of Practice

My argument in this section is that the increase in the size of the bar has already led to changes in the patterns of legal practice which benefit consumers and increase social justice. The changes are in the growth of law firms to serve commercial needs, the spread of local practice outside metropolitan areas and the development of non-traditional areas of practice.

Law Firms

One distinctive pattern of legal practice that has flourished since 1980 is the law firm. Until 1980, only a few "firms" existed in Korea. It was not until 1982 that the law officially recognized the "law firm" (*Bommu Bopln*) as an independent legal entity.[32] As of March, 1993, there are 37 law firms with 206 lawyers in Korea; 26 firms with 151 lawyers are concentrated in Seoul.[33] A decided majority of these firms specialize in international transactions, as did the pioneer ones in the 1970s. In most cases, the clients of these "international law firms" are limited to big companies, including foreign ones. These firms typically consist of a few partners, junior partners, and associates. The senior partners are the founders of the firm, who in most cases have licenses from both the Korean Bar and at least one jurisdiction of the United States. These founding partners have some experience in the Korean judiciary either as judges or public prosecutors. Junior partners may be regarded as the product of the expanded bar, and the associates undisputedly are. The junior partners are either promoted from among the associates after considerable years of work, or invited from outside for their potential contribution to the firm.

In the first case, they would have been given the opportunity for a foreign education and training as a part of their work. Not all the firms have junior partners. In smaller sized firms, one founding partner directly controls the associates. Associates are recruited from among the recent graduates of the Institute. Disproportionately high salaries with various fringe benefits work as an incentive for the young Institute graduates who are interested in international practice. These firms also hire a substantial number of foreign lawyers, sometimes purely for their linguistic capacity.

Until recently, students and laborers sharply criticized these international law firms for their "anti-patriotic" and "anti-populistic" activities. In a sense, such criticism may be unfair. As long as their foreign corporate clients rely on the procedures of favorable Korean laws, including labor laws, they had no alternative. The same may have been true in the case of domestic corporate clients. Anyway,

from the standpoints of the corporate clients, these law firms are valuable partners.

Only a few firms deal with purely domestic, non-commercial cases. Civil rights cases, labor cases, and small claims cases are the usual kinds of cases they handle. Commonly these are run by young lawyers sympathetic with the causes of the social underdogs. The pioneer of such firms was founded by a well known former student activist and has survived his premature death.[34]

Legal practice in the form of a firm could not have been expected to flourish without the consistent supply of young lawyers. Law firm practice is largely a product of the recent numerical growth of the Korean bar.

Local Practice

As of March 1993, 88 percent of lawyers are in active practice in the Seoul Special City and five Direct Control Cities (Pusan, Taegu, Kwangju, Taejon, Inchon).[35] The proportion of metropolitan practice becomes 94 percent if the provincial capitals are included.[36] These rates, seemingly disproportionately high enough, have remained unchanged for the last ten years. Until recently, there were many cities with courts that had no lawyers. Even today, there are a few. Although the rates of local practice have remained extremely low, there is one positive sign. The number of lawyers in local practice is increasing. Considering the fact that local population has actually been decreasing, the increase in the number of attorneys in local practice has helped considerably to remedy the decided imbalance of legal service between the metropolitan areas and the local cities. This is further supported by the sharp increase in the total number of attorneys in recent years. Having maintained the same rate of local practice, however low, does indicate that a significant change has happened in the pattern of legal practice.

Local practice guarantees financial success, even for a novice lawyer. And, it can serve as a valuable stepping stone towards national politics, the fundamental goal of many young lawyers. It may be a legitimate dream for a young attorney from that locality to become a politician. A resident lawyer is a great source of pride for many small cities, and the pride may easily turn into affection when the lawyer has local origins. There are instances where relatively young lawyers have been elected to the National Assembly after a brief period of local practice.

Recently quite a few young lawyers have set up their offices in the local cities. Without exception, they have made an economic success

within the shortest period of time. This supports the claim that there is a market in the locality, where a Korean lawyer can be assured of deeper pocket. Local practice is a definitely new phenomenon for young lawyers. In the past, it was something that they never dreamt of at the beginning of their legal career. In a sense, it was a forced choice. The choice was motivated by survival instincts and market analysis of comparative advantage. The choice, however, turned out to be right, for themselves as well as for their communities.

New Areas of Practice

The basic character of the traditional legal work of a Korean lawyer may be defined as remedial. Litigation comprises almost all the work. Preventive legal practice (roughly classified as "general practice of law" under the Attorneys' Act[37]) has been almost abandoned. Litigation for the recovery of money or involving real property are the two major types of civil litigation handled by Korean lawyers.

On the criminal side, petitions for *habeas corpus*, suspended sentence or probation are the most popular patterns of legal practice, because they guarantee the attorneys maximum income with minimum effort. This is mainly attributable to the almost hysterical fear of physical incarceration prevalent among Koreans.[38] From the sad experience when the authoritarian regimes abused their powers with every kind of violence, Koreans now accept a cardinal commandment—"Use every means to get yourself out. Forget about Money."

In recent years there have been considerable changes in the nature of the legal work handled by Korean attorneys. On the government side, the long-pursued idea of legal aid has become a reality. In 1987 the Korean Legal Aid Corporation was founded under the Legal Aid Act of 1986.[39] The Corporation, established with government funds, hires young lawyers, although only a limited number, as its full-time staff. This is something unprecedented in the history of Korea. The Corporation was the first governmental institution which ever hired lawyers for their professional capacity. Thus, although still at a primitive stage, the Corporation has paved one alternative form of legal practice for the brand-new lawyers. Until recently, it was impractical, if not impossible, for a public institution to hire a staff attorney. Salaries for civil servants were simply too low to entice someone from this privileged occupation. However its noble ideas might have appealed to young lawyers, the Corporation could not have recruited its legal staff had "young lawyers" not been available at all, as was the Korean situation before the 1980s.

During the 1980s many non-traditional areas of legal practice have been explored by young lawyers. Labor cases, consumer law cases, civil rights cases are some of the prime examples. The exploration was accelerated partly through the political democratization of Korea since 1987. Traditionally labor law had been largely a matter of academic principles. Labor laws were heavily criticized for their unrealistically high goals and standards. As economic progress made the provisions workable principles, workers' claims surged. Although occasionally their claims were expressed by more violent means, workers did not totally disregard the authority of legal institutions. Lawyers played decisive roles in keeping labor claims within the ball park of the law. The law of industrial accidents and workmen's compensation is the area where attorneys' services have conspicuously improved. This was possible owing to the dedicated efforts of a few young attorneys.

Consumer law cases had been largely neglected by the lawyers. Consumer law itself was not mature enough for the public to rely on. The economic stakes were too trivial to attract lawyers. In the recent years, some lawyers have been heavily involved in this area of law, with the support of many citizens' movement groups.

The term, "civil rights lawyer" in Korea generally indicates those lawyers who actively defend political dissidents. The name originated in the 1970s when the authoritarian government suppressed the legitimate claims of the people. Claimants for rights often ended up as political prisoners. Even the judiciary did not enjoy full independence. There were only a few lawyers who argued, instead of merely pleading for mercy, for these political defendants. There was an instance when the defending counsel of the dissident students was imprisoned for his oral defense contemptuous of the military tribunal set up under martial law. From this background, the term "civil rights lawyer" carries to Korean minds an overtone of "righteous fighter".

In May, 1988, 51 lawyers organized a group under the banner of "Lawyers' Group for the Achievement of Democratic Society" (commonly called "*Min-Byun*").[40] Led by the pioneer civil rights lawyers of the 1970s, the Group launched its systematic activities for the full "democratization" of Korea. However, their activities were not confined to litigation for specific clients. They included preventive measures aimed at educating the general public. The Group held a series of public debates, issued statements and declarations on important legal and political issues, and published much informative material.[41] This group has emerged as one of the biggest pressure groups in the modern history of Korea. As of March, 1993, it possessed

225 lawyer members.[42] Three quarters of them are recent graduates of the Institute, who chose (or were forced to choose) initial legal careers as attorneys.These young lawyers are playing an active role in raising many issues which had been resignedly regarded as belonging to the "realm of politics." At its 1992 Annual Convention, the Seoul District Bar Association elected a core member of *Min-Byun* as its new President for a two year term. This is something phenomenal in Korean history. It may be regarded as a public recognition of their past contribution to the political democratization of the nation.

This group could not have functioned as effectively as it did, had there not been an adequate supply of young lawyers.

Conclusion

Many writers have argued that traditionally Korea has been a non-litigious society. Conciliation and mediation were far more the preferred and prevalent form of settling disputes in Korea, they argue.[43] It is not the intention of the author to raise a counter argument in this paper. Suffice it to say, for present purposes, that it is no longer true. Floods of legal disputes are attacking the Korean courts and other quasi-judicial institutions.[44] Judges are constantly complaining of overwork. A great majority of the disputes are disposed of without representation by a lawyer. On the civil side, the rate of *pro se* litigation exceeds 59 percent,[45] and the records on the criminal side is even worse.[46] In cases where public defense is available, the quality of defense is notoriously poor.[47]

Even so-called "Alternative Dispute Resolution" comes within the legal monopoly of the lawyers. Korean law prohibits non-lawyers from assisting others in their legal disputes in return for monetary remuneration.[48]

Regardless of what the prime method of disputes resolution may be, litigation or other alternative means, Korea needs more lawyers. The number of disputes is skyrocketing. This trend is irreversible. No other occupation can legitimately and effectively resolve legal disputes. Only lawyers can. Korea desperately needs a bigger bar.

Notes

1. The total number of licensed lawyers in Korea has increased as follows:

Year	Number of Licensed Lawyers		
	Active Status	*Inactive Status*	*Total*
1993(Mar.)	2,568	705	3,268
1991(June)	2,212	735	2,947
1990(Dec.)	1,984	757	2,741
1988(Dec.)	1,667	779	2,445
1987(Dec.)	1,521	791	2,312
1986	1,414		
1985	1,320		
1984	1,116		
1983	1,098		
1982	1,058		
1981	1,013		
1980	940		
1979	890		
1978	832		
1977	811		

Sources: The Korean Bar Association, 1981–1993; The Judiciary Almanac (*Sa Bop Yon Gam*), 1978–1986.

It is unclear whether the statistics for 1978-86 indicate the total number of licensed lawyers or only those in active status. In this paper an assumption has been made that they indicate the latter.

There were 1,068 judges as of October 1, 1991 and 868 public prosecutors as of August 1, 1992. They are potential lawyers. Including these figures, the total number of licensed lawyers amounts to approximately 5,200: Membership Booklet, The Seoul Bar Association (1993) p. 3; Also see Choi, K.R., "Proposal For Cooperation Between the Academy and the Bar," *The Justice*, Vol. XXIII, No.2 (1990), The Korean Legal Center, pp.53-67.

For an introductory overview of the Korean judiciary and the role of the lawyers, see Song, Sang Hyun ed., *Introduction To The Law And Legal System of Korea*, Kyung Mun Sa Pub. Co., (1983); Yoon, Dae Kyu, *Law and Political Authority In South Korea*, West View Press & Kyung Nam University Press, Seoul(1990) pp.109-149.

2. The other route is serving ten years as a military advocate after passing the Military Advocates' Examination (irregularly conducted: Law Concerning the Recruitment of Military Advocates (Law No. 243, Apr. 24, 1952, as amended on December 31, 1975). The requirements for this examination are substantially the same as those of the Judiciary Examination (*Id.* Article 5). The total number of lawyers produced in this way is not big enough for separate discussion.

3. Doubts have been raised intermittently regarding the adequacy of leaving the administration of the examination under government control. The Supreme Court of Korea has recently claimed jurisdiction in bar examination administration. *Judiciary Policy* (*Sabop Joengchaek Jaryo Jip*), Vol.8, March, 1993, p.7. A similar claim has been made by the Korean Bar Association. *The Law Times(Bop Ryul Shinmun)*, February 20, 1993.

4. This examination is also a prerequisite for a judgeship or a job as public prosecutor.

5. The pass rates for the last 29 years are as follows:

Year	Number of Applicants	Numbers Passing	Pass Rates(percent)
1993	19,441	289	1.5
1992	17,131	288	1.7
1991	16,310	287	1.8
1990	15,041	298	1.9
1989	14,202	300	2.0
1988	14,245	300	2.0
1987	14,963	300	2.0
1986	14,303	300	2.0
1985	11,743	298	2.5
1984	11,600	303	2.6
1983	10,530	300	2.8
1982	9,273	300	3.2
1981	7,983	289	3.6
1980	6,658	141	2.1
1979	5,788	120	2.1
1978	5,387	100	1.9
1977	4,767	80	1.7
1976	4,498	60	1.3
1975	4,119	59	1.4
1974	4,010	60	1.4
1973	4,575	60	1.3
1972	3,507	80	2.2
1971	2,776	81	2.9
1970(Aug.)	2,786	49	1.7
1970(Feb.)	2,561	33	1.2
1969	2,486	34	1.3
1968	2,203	37	1.6
1967(Aug.)	2,005	83	4.1
1967(Feb.)	2,390	5	0.2
1966	1,947	19	0.9
1965	2,263	16	0.7
1964(Aug.)	3,493	22	0.6
1964(Feb.)	3,904	10	0.2
1963(Aug.)	2,411	45	1.8
1963(Feb.)	3,532	41	1.1

From Kosige, November editions (1970-1993). By permission.

6. The relevant provision does not set any fixed number. Instead it leaves it to the decision of the Minister of Government Administration with the advice of the Minister of Justice and the Chief of the Office of Judiciary Administration for each annual examination: Article 3, Order on the Judiciary Examination, Presidential Order 4979, May 5, 1970 as amended by Orders of December 18,1980 and March 14, 1983. Since 1990, a "tacit understanding" has been observed that the number should be between 250 and 300.

7. The decision was made by the Kugga Bowi Ipbop Hoei (Legislative Committee For the National Protection) which, on its own initiative, assumed the legislative function during the interim period following the assassination of President Park Chung Hee in October,1979. This Committee enacted 188 laws in total, whose validity was later ratified by the Constitution of 1980. Included therein was one giving birth to the Committee itself (Law No. 3260, October 28, 1980).

The most controversial law enacted this way was the National Security Act (Law No.3318, December 31, 1980) which was used primarily to suppress political criticism. For comprehensive analyses of the history of political misuse of this Act, see Park, Won Soon, *Kookga Bo An Bop* (National Security Act), Vols.I-III, YoekSa Bi-Pyong Sa (1992)

8. For examples,"Declaration on the Matter of Numerical Quota of the Judiciary Examination" by the Korean Bar Association, December 30, 1985 as reproduced in *Dae Han Byun Ho Sa Hoe Ji* (Korean Bar Periodical), January 1986, p.95: "irresponsible and arbitrary decision totally disregarding the opinions of the Minister of Justice and the Chief of the Office of Judiciary Administration "; "Opinion on the Quota of the Judiciary Examination," submitted to the Ministry of Government Administration on November 15, 1988 as reproduced in Choi, C.K.,"Proposal for the Improvement of the Judiciary Examination", *Seoul Law Journal*, Vol.XXX, Nos.1-2 (May,1989), pp. 5-34, at 14-15.; "Recommendation On the Judiciary Examination" by the Office of Judiciary Administration, November, 1987, as cited in Ahn, K.W., "Reducing the Numerical Quota of the Judiciary Examination Is An Undemocratic Measure," *Bop Ryul Shinmun* (The Law Times), December 7, 1987; "Opinion On the Judiciary Examination Quota," Recommendation to the Minister of Government Administration, by The Office of Attorney General, as cited in "Modern Society and Lawyers—A Symposium," *Inkwon Gwa Jeong-Eui* (Human Rights and Justice), Vol.XXVII (Feb. 1990), pp. 18-30 at 20. Similar statements have been repeated recently by the Office of Judiciary Administration and Ministry of Justice, respectively, *The Dong-a Ilbo*, February 23 and 26, 1993.

9. Choi, note 8 *supra*, at 16-17.

10. Ahn, note 8 *supra*.

11. The KBA Declaration, note 8, *supra*.

12. *The Dong-a Ilbo*, April 8 and 22, 1993. The Attorneys' Act, Art. 27, makes it a crime for an attorney to hire a non-lawyer for the referral of a client (Law No.3594, December 31, 1982).

13. *TongGye Yeonbo* (Annual Statistics), Ministry of Education, 1987, as cited in Choi, note 8 *supra*, at 15.

14. From Membership Booklet, The Korean Law Teachers' Association, 1993.

15. James M. West, *Education of the Legal Profession in Korea*, International Legal Studies, Korea University Press, Seoul, 1991, pp.18-31.

16. *Id.* at 21.

17. Almost half the successful 300 are concentrated within the range of one point near the "cut line" on a one hundred point scale. *Ko Si Gye*, November editions, 1984-1993.

18. The KBA Declaration, note 8 *supra*.

19. *Id.*

20. Typically, for a LL.B. degree, the student must have taken at least 100 semester units from law subjects, in addition to 40-50 units on general subjects.

21. For a general overview of the status of quasi-lawyers, see Shin,D.W. *et al.*, "Roles of Para-legals in the Changing Society," *Seoul Law Journal*, Vol.XXVIII, No. 3 & 4 (1987), pp.1-105; Jay Murphy *et al.*, *Legal Profession in Korea: The Judicial Scrivener and Others*, Korea Law Research Institute, Seoul National University (1960).

22. *Id.*

23. The KBA Declaration, note 8, *supra*.

24. Yang, S.K., "Optimal Size of the Bar," *Seoul Law Journal*, Vol. XXIX, No.1 (1988), pp. 68-79.

25. In a recent statement, the National Revenue Office enunciated a policy of ensuring that professionals such as medical doctors and lawyers pay taxes appropriate for their income. This statement was made in response to long-standing public criticism that these occupations earn more, yet pay less, than they deserve: *The Dong-a Ilbo*, April 20, 1993.

26. Recommendation by the Office of the Attorney General, note 8 *supra*.

27. McLellan,D., *Karl Marx: The Legacy*, British Broadcasting Corporation, 1983, p.18: "There are few things more dangerous than an unemployed intellectual. If the young Marx had got he really wanted [*sic*], things might have gone very differently for the world."

28. Choi, note 8 *supra*,.

29. *Id.*

30. For example, Yang, S.K., "Reformation of the Bar," *Seoul Law Journal*, Vol.XXIX, No.2 (1988), pp.1-19; Ahn, K.W.,"A Note On the Judiciary Examination," *SaBop YonSuWon HoeJi* (The Judiciary Training Institute), November 1988, pp.1-5.

31. "Proposal on the Judiciary Examination Quota," *Bophak Gyosuhoei Hoebo* (Law Professors' Association News Letter), August, 1991, pp.5-8.

32. Ch.5, The Attorneys' Act, note 12 *supra*.

33. "Current Status of the Members," Leaflet, The Seoul District Bar Association, March 1, 1993.

34. For his detailed career and activities, see "Creative Activities as A Human Rights Lawyer: A Special Symposium in Commemoration of Cho Young-Rae," *Bop Gwa Sa-Hoe* (Law and Society), Vol. 4, Spring, 1991, pp.82-104. The two most well-known cases he successfully litigated are the so-called "Sexual Torture Case" of 1986 and the Flood Cases of 1987. In the Sexual Torture Case, a female student sued the police officer who interrogated her for her alleged illegal anti-government activities as a "camouflaged factory laborer." She claimed that the officer sexually abused her as a means of obtaining a confession. The case lasted for almost two years, resulting in the prosecution of the officer concerned and many other high ranking police officials who authorized or condoned this method of interrogation. This case was a fatal blow to the Government of President Chun, whose moral integrity was under heavy attack. Throughout the entire proceedings, in multiple litigation, both criminal and civil, Cho played

decisive roles in overcoming the many systematic barriers set up by the government, till final victory. For details, see Human Rights Report of 1986, The Korean Bar Association, December 1986, pp. 147-178. The Flood Cases are a series of lawsuits filed by the residents of a downstream area of the Han River, Seoul, for the compensation for losses allegedly caused by the negligence of the government in controlling the water level during stormy rain. In 1990, the cases finally ended up in victory for the plaintiffs. The Flood Cases are phenomenal in two respects. First, these are the first cases where negligence of the government has been proved in such circumstances. Secondly, the cases were the first "class action" suits. Almost thirty thousand plaintiffs were involved in their individual capacities, owing to the limited availability of class actions under the Korean law (Article 49, Code of Civil Procedure). These cases caused serious discussion in the Korean legal community on the pros and cons of implementing the American-type class action. For detailed chronologies of the Flood Cases, see *Bop Gwa SaHoe* (Law and Society), Vol. 4 (1991), pp.107-109.

35. Leaflet, note 29 *supra*. Out of a total of 2,568 active members, 1,628 practice in Seoul, and 645 practice in five Direct Control Cities (Pusan,206; Taegu,170; Kwangju,109; Taejon,93; Inchon,67).

36. *Id.*

37. Article 3 (Duty of Lawyer): A lawyer shall handle matters relating to litigation, agency activities in applying for administrative decisions or other general legal affairs. . . .

38. Many literary works have accused the criminal justice system of illegal practices. One classical work is *Yuk-Jo-Ji* (literally meaning Six Devilling Tortures) by a novelist, Chung Eul Byoung (1965).

39. Law No. 3862, December 23, 1986.

40. Leaflet, *Min Byun*, January 1, 1993.

41. For example, *Inkwon-Bogosoe* (Human Rights Reports of 1989-1990), *Min Byun; Byunron-Jip (1)* (Collected Documents of Defences (1), May 25, 1991, *Min Byun*.

42. Leaflet, note 40 *supra*.

43. For a leading example, see Hahm, Pyong Choon, *Korean Jurisprudence, Politics and Culture*, Yonsei University Press (1986), pp. 241-245.

44. Between 1982 and 1991, there was an increase of 47 percent in the total number of legal disputes recorded (from 7,253,418 in 1982, to 10,621,950 in 1991). Regular lawsuits have also increased by 48 percent for the same period (from 385,311 to 569,086 in 1991). See *SaBop YonGam* (The Judiciary Almanac), 1992, p. 499. This means at least one of every four Koreans was involved in a legal conflict. The statistics cover all kinds of legal disputes handled by the judiciary branch, including regular lawsuits, some civil and domestic affairs cases subject to mandatory conciliation etc., and non-contentious cases, such as disposition of uncontested wills.

45. In 1991, in civil litigation at first instance, 65 percent of the plaintiffs and 53 percent of the defendants argued on their own behalf (*id.* at 670). For the second instance, *pro se* rates were around 7 percent for both sides.

46. In 1991, 64 percent (51,318 out of 147,691) of criminal cases at the first

instance, defendants were not assisted by a lawyer (*id*. pp.551, 900) No official records are available for appellate cases.

47. In 1991, in approximately 12 percent of criminal cases, an attorney was appointed by the government (*id*. at p. 904) as required by the law (Art.282, Code of Criminal Procedure, provides that a counsel should be appointed for indigent defendants charged with a crime which can be punished with more than three years' imprisonment).

48. Korean law prohibits a non-lawyer from involvement in the legal disputes of others in return for remuneration. Violators are subject to criminal sanctions (Sec.2, Art.78, of the Attorneys' Act, note 12 *supra*).

いかに裁判官を造り上げるべきか

安 京煥（アン ギョンホアン）
（ソウル大学・法学部教授）

一、まえがき

自由民主々義国家で裁判所は、国民が最後に頼れる堡塁である。裁判所は、自由民主主義の根本秩序を守る大義の見張り役であり、国民の日常的な正義の代弁者である。裁判所を信頼できない国は、もう民主国家ではない。

建国と時を同じくして、戦争に巻き込まれた新生の民主共和国「大韓民国」を訪問したアメリカ連邦大審院の判事ウィリアム・ダグラスは、みんなが絶望の目で眺めていたこの小さな国の将来がごく明るいと書いた。ダグラス判事は、こうした楽観論の理由の一つとして独立した裁判所の役割が期待されることを挙げている。当時、老かいな政治家として知られていた李承晩大統領の専横に対して、きぜんとして立ちかった金炳魯大法院長（最高裁判所長官）の勇気に深い感銘をうけたのだろう。

引続き韓国の状況を追跡していたダグラス判事は、学生革命の偉大な勝利を遡及法の制定によって締めくくろうとした動きに失望を表わしたが、五・一六軍事クーデターで正常な司法権の機能が麻痺するのを見てからというもの韓国からまったく目をそらしてしまった。ダグラスではなく他の誰であろうと、その状況のもとではそうしたに違いない。裁判所に愛着を感じれば感じるほど虚ろな気持ちが募るばかりだったろうから、かえって目を閉じて見ない方がよかったのかも知れない。

この数十年間の韓国の法曹史を観察してきた者であれば、誰も韓国の裁判所が民主主義国家の大義の先鋒であったとはあえて言えないだろう。「判決で言わざるを得ない時に沈

新任の尹瑢大法院長(最高裁長官)の就任式光景.

黙を守り、判決で語ってはならない時に雄弁であった」裁判所に対して憤慨を覚えた国民ほど無力な裁判所を哀れんだに違いない。また、裁判所に勤めていた者を含めて誰も裁判所が時代の民主化の先鋒を務めた旗手であったと自信を持って言える者もいまい。われわれはダグラスのような異邦人ではない。われわれは中立的な観察者や傍観者に留まるわけにはいかない。われわれは裁判所の保護者であると同時に見張りにならなければならない。

裁判所は、われわれの敵ではない。それにもかかわらず、われわれはこれまで裁判所を敵とみなすかせいぜい冷笑と風刺の対象として見たに過ぎない。裁判所が本来の役割を果たし得なかったとしても、それは裁判官のせいだけではない。窮極的にはわれわれ国民みんなの責任である。

いまやわれわれは、測り知れぬ多くの問題があるにもかかわらず自由民主主義と市場経済の原理が国法の最高の秩序だという事実をもう一度確認しなければならない。これと対立するイデオロギーは、道徳的正当性に対する論議はさておいて少なくとも、現実の制度として定着させようとした実験に失敗したという厳然たる歴史的な事実だけは受け入れざるを得ない。だとすれば、自由民主主義国で裁判所の役割を正しく認識し、裁判所をしてこの役割を正しく遂行できるよう激励と叱責を共に送らざるを得ないのである。

が十分に発揮されることをいう。これら三つの職種間に共通する資格条件は、ただ一つ、俗に司法考試の名で通っている司法試験に合格し二年間の司法研修院の教育を修了することである。で、「法曹人大観」や「法曹人名簿」等の人名録は、歴代の司法試験の合格者の一覧表に過ぎない。

このように、われわれは検事、弁護士はもとより判事すら試験を通して生産する。だとすれば、その試験の性格と内容、そしてこれらの試験に至るまでの教育の過程が国民が頼る最後の堡塁の見張り役であり、国民の日常生活の正義を保証する裁判官の資質を養うに足る制度であるどうかを検討しなければならない。

(2)、裁判官になるのに必要な能力は何であろう。裁判官の任務は一言で要約すれば、紛争解決の能力である。紛争解決のためには、第一に紛争となっている事実を正しく把握し、第二に、これに対して正しい法律を正しく適用することを要する。前者を「事実認定の過程」と言い、後者を「法の適用の過程」と言っている。

法の適用の過程は、憲法を頂点とする法律、命令等の制定法ならびに判例法と裁判官の職業的な良心の発露である条理など、判決の根拠となる権威規範(専門的な用語では法源という)を当該事件に適用する過程である。この過程に必要な能力は比較的単純とも言えるだろう。こうした能力は、法的な

二、われわれは「試験」によって裁判官を生産する

(1)、韓国語には、外国語に翻訳することのできない韓国語独特の単語がある。「法曹」という語もそれである(但、漢字使用圏の中国と日本は除く)。この語は判事、検事そして弁護士等をひっくるめて言う語である。そして、この三つの職種の機能が共に助け合う性格を帯びていることから「法曹三輪」ともいう。この三つの車輪が正常に回ってこそ司法の機能

裁判所にかけるわれわれの期待は、民主主義に対する根強い執着から来ている。韓国の裁判所が抱えている問題を解決するためには単なる裁判所の内部的な組織と運営、ならびに裁判官一人一人の姿勢についてとやかく言ったからといって実現する性質のものではない。

裁判官を造り出す制度と裁判官を保護し監視する公的私的な制度を共に論じてこそ真の意味における司法改革のための改善策が講じられるだろう。こうした観点に着目して本稿は、主に韓国で裁判官を造りあげる過程に内在する問題点を法学の教育と司法試験制度を中心に述べていきたい。

司法制度の具体的な運用と関る問題点は、これまでに十分指摘されているためここでは深入りしない。

知識の学習と技術的な訓練を通じて比較的容易に高めることができる。ただ条理の場合は異なる。条理とは、裁判官の職業上の常識と良心を意味するため職業人である前に普通人としての裁判官の常識と理性が間接的に影響を及ぼすのである。

(3)、事実認定の能力は、単なる法理論の研究や法の適用に関する実務訓練で短時間内に高めることのできる性質のものではない。こうした能力は、人間的に成熟しなければ容易に備わるものではない。裁判所に送られてきた訴訟は、人間の社会的な共同生活の中で発生する葛藤である。したがって、人間の間の葛藤について公的に判断する職務上の責任がある裁判官は、人間的に成熟していなければ偏狭なドグマの侍女になりやすい。

自分が軍事独裁政権のもとでの「司法波動」の主役であった李範烈弁護士は、裁判の過程を計量的に分析すれば事実の認定と法規適用の過程を八〇対二〇に分離することができると言っている。(『月刊朝鮮』一九九三年八月号)一言で言えば韓国の裁判官は、正しい裁判のために備えなくてはならない事実認定の能力が足りないというのである。李弁護士は、裁判官たちに小説を読むようにと勧めている。少なくとも二百冊の小説を読んでいない人間は、判決を下す資格がないとすら極言している。言い過ぎの嫌いがあると言うものの一理ある言葉だ。

事実認定の能力とは、言い換えると人生に対する深い洞察力のことである。勿論、直接の体験をすればそれに越したことはないが、一人一人が生まれて成長した背景は人為的に変えられるものではない。また、いかに多彩な経験を無理して蓄積しようとしても、今の韓国では裁判官になるまで踏んでいかなくてはならない誠実な学習生活がこうした直接体験の機会を阻んでいる。そうだとすると、間接体験の道しかない。もっとも効果的な間接体験の方法の中の一つが小説を読むことである。小説は人間の葛藤をもっとも厳しい形で再現したものである。単に、表にあらわれた結果よりも、こうした外形的現象の裏側にひそんだ根本的な人間の情緒に対する深い洞察を盛り込んでいるのである。

要するに、裁判官の業務上、切実に要求されるものは他人の話を傾聴する姿勢と、このような話の中で判決に必要な、本質的でしかも核心的な要素を抽出する能力である。だとすると、われわれはこうした裁判官の能力を高められる制度を持ち合わせているのだろうか。まず、裁判官の人間試験である司法試験の合格に至る過程から察してみよう。検事と弁護士は、裁判官の事実認定と法の適用を機能的に補助する地位にあるため、ここでは、別に論議しないことにする。

三、司法試験は「裁判官」の試験としては問題がある

(1)、韓国の司法試験は「一回勝負」の試験である。すべての試験がそうだとも言えるだろうが、司法試験の勝負は機械的な事実の暗記の量によって絶対に左右される。韓国の法曹界を長い間観察した、ある外国の法律家の指摘によると韓国の法曹は「記憶力の美徳(Meritocracy of Memory)の制度である。(James West 「Legal Profession and Education In Korea」, 1990)。試験の成否は、どれほど多くの法曹を機械的に覚えているかということによって決まる。言い換えれば、コンピューターとしての人間の能力を試験するようなものだというのである。

毎年二万人を上回る応試者のうち千名ほどの「大学卒の常識的な人」を選びだすという客観式の第一次試験は、それこそ幼稚極まる奨学クイズ式の試験である。枝葉末端的な事実の暗記により当落が左右される試験は、ある教授の直線的な表現を借りれば、悪名高い「かんと暗記力の試験」である。「論述試験」と命名した第二次試験は、長時間に亘る反覆的な作業を通じて膨大な範囲の内容をひたすら機械的に暗記することによってのみ合格できる。「××に関して論ぜよ」といった方式を押し通している(多くの場合「論ぜよ」という文句も省略されたまま、名詞だけ提示することが多い)第二次試験は論理的な思考力や分析力を測定する試験ではない。これもやはり予想問題の的中率が変数として働く、まったくの暗記力テストである。(崔松和、「法曹人の能力と法学教育」、「韓国社会の実相と反省」、一九九二年)「論ぜよ」式の問題は、論議の焦点がはっきりしてこそ論じることができる。ところが、このような問題で模範答案として要求している内容は受験生自身の論理的主張の展開ではなく主題と関連する情報の目次の羅列に過ぎないのである。

こうした暗記力の試験を準備するためには、何よりも精神を「集中」させなければならない。それで考えることが複雑にならないように小説はもとより新聞すら読まない受験生も多く、このような受験生であればあるほど合格率が高いそうである。多くの受験生が学校よりも山寺などにちっ居して「集中」することを好んだ過去の考試準備の慣習は、今もあまり変った様子はない。ドアを閉め切ったまま外出もせず人造語の暗記に全力を尽す受験生の態度は、フランツ・カフカが大学の法科時代を回想して描写した「人間に対する確実な無関心」を育てる態度そのものである。

近年になって独りでするよりは数人による「グループ・スタディー」が好まれるパターンが生れているが、だからと言って受験準備の内容が変ったわけではない。「グループ・スタ

ディー」の目的は、独学では解らなかった法の論理を討論を通じて共同開発しようというのではなく受験の情報を交換するとか、相互協力して模擬試験をやってみようというものに過ぎない。時日がたつにつれて出題の範囲が広くなり、また出題者の悪趣味や常識はずれの考えから枝葉末端の問題が出題されることも少なくない。このため「共同作業」が必要になったまでのことである。

暗記力をテストする試験の由来を朝鮮時代の科学制度(官吏登用試験)に求める人もいる。そして司法試験を国の指導者を選抜していた科挙制度と同じ性格の、指導者の登竜門として考えている者も少なくない。しかし、こうした比喩は適切でない。

「読書百遍、意自ら通ず」というモットーのもとに朝鮮時代の科挙志望生の両班(ヤンバン)が暗誦していたのは、いわゆる中国の古典であった。古典は、個人的なレベルの人格陶冶に関する道徳教科書であると同時に共同生活の秩序とバランスを担当すべき官吏が備えなくてはならない経世治国の基本原理であったのである。古典を繰り返してそらんじれば、世の中の基本的なことわりは自ずとマスターできると信じていた素朴な時代に支配層の文化である漢学の知識とその応用力(作文)、そして指導者としての総合的な品性を測定していた試験である。

現在の司法試験は、このような総合的な時代の知性と指導者としての品性を求めているのではない。むしろ時代の激動と世の中の変化にほおかむりしてこそ試験に有利なのである。至って静的であり、単調であった時代に知的人格者としての指導者を選抜していた総合試験と社会的分化の極致を見せている。現代の法的制度という、比較的単純な政策執行者としての公務を担当する法曹人を生産するための試験を同格において比べるわけにはいかない。司法試験は、健全な常識を備えた法曹専門家の選抜のための試験という当為にもかかわらず、実際には、健全な常識を欠いた法律技術者を選抜する技術考試に転落した。要するに現在の司法試験は、判事を選抜する試験としては適当でないのである。

(2)、司法試験の応試資格には制限がない。言い換えれば、大韓民国の国民であれば誰でも判事になるための試験を受けることができる。四年制の法科大学を卒業する必要もなければ、甚だしい場合は正規の教育をまったく受けたことのない、卓越した記憶力の持主である「無学のもの」も試験にさえ合格すれば判事になれる。これは事あるごとに、すべての国民に機会が与えられねばならないという、誤った平等意識のためである。貧しさのために上級学校に行けなかった不幸な人々にも合格さえすれば新版の「御賜花」(国王が国家試験の科挙合格者に賜った花)を差すことのできる、一種の「コリア

ン・ドリーム」のシンボルとして「国家の最高試験」を残しておきたい国民的な情緒があるのも事実である。しかし、このような制度は法学の専門性を全面的に無視し法と大学の存在価値を源泉的に否定する発想である。

現代の福祉社会で国家が公認するすべての資格証は、その前提となる要件が満たされなければならない。資格証とは、職業の専門性に対する国家的な公認を意味するものである。このため資格試験を通じて専門家としての実力を測る前にかなりの期間に亘る正規教育の履修を要求するのが原則である。六年過程の医科大学を卒業した者が医師の免許試験を受けることができ、薬剤師の免許試験を受けるためには、それに先立って四年間の薬学大学の過程を履修しなければならない。

医師や薬剤師のように、人体に直接かかわる職業だけでなく建築士などのような、その他の国家公認の資格試験も同じような受験資格制限が設けられている。しかし、ただ一つ司法試験だけは、このような制限のない全面開放である。司法試験はだれかが科挙試験にたとえているように「特別な」人だけが合格する、それこそ神話を生む試験である。それなのに大韓民国の国民であれば、だれも合格の夢を抱くことができるとしたことがそもそもの間違いである。この無意味な全面開放は法科大学教育の、は行性の主な原因であるという事実はさておいても国民の不健全な射倖心を煽るだけである。しかし、このような受験資格の完全開放にもかかわらず実際に法科を卒業していない者が司法試験に合格することはごくまれであり、最近は大学卒以下の学歴を持つ合格者は皆無に近い実情である。それなら資格を制限する必要はないではないかと反問があるかも知れない。

問題は合格者にあるのではなくて受験者にある。司法試験受験者にある。司法試験受験者の身分は、それこそ様々である。家政学部の中退生、英語の教師、地方新聞普及所の所長、貿易会社の退任の社員等々、数百種の職業を列挙することができる。誠実な日常の連続を通じて望むだけの身分上昇を実現する見通しがつかない者にとっては、いかに時期が遅れているにせよ一旦合格さえすれば、かなりの収入と社会的な地位が保障される合格に「一回勝負」を挑むのはあり得ることである。希に成功した「特別な」合格者が現われ、その過程が客観的な統計や常識から考えられない、向こう見ずの行為であればあるほどマスコミは余計に騒ぎ立てる。そして、「七転び八起きの神話」だとか、まことに見上げた人間勝利の事例に仕立ててこれを劇化するのである。

ある意味では、韓国の司法試験は身分と富の移動がほとんど行なわれない、安定した西欧社会における宝くじ制度と似通った役割をする。当せん率が低ければ低いほど効果の高

夢に酔っていた就職適齢期の若者が一朝にして、人間をこの上なく小さく思わせるような会社の末端社員として新たに出発しようと決心するのはなかなか容易なことではない。麻薬中毒者は薬を絶つことが短期的には苦痛であるけれども、長期的な見方からすれば自分の精神的、肉体的な健康にプラスとなることが信じられない。いかに将来の見通しが明るいから、と説得してみたところで効果は期待し難い。それで強制的に麻薬を絶つようにする措置が必要となる。同じように司法試験の受験回数を制限するのである。

司法試験を口実にして、健全な社会への参加の道を自ら塞いでいるような、不健全な人々の話はしたくない。ただ一つ強調すべきことは、司法試験を通じて生産される裁判官は非常識的な選民意識や補償心理を持ってはならないということである。現在の司法試験制度は、こうしたまともでない心理の所有者である裁判官を量産するおそれが極めて高い制度である。受験回数の制限は、こうした不合理が発生する余地を少なくするのにもかなり役立つだろう。

四、われわれは、裁判官の意識改革を助けねばならない

(1)、裁判官は、天才や秀才であることを要しない。裁判官に必要な知的能力は、平均的な知性人のレベルであれば事足りる。しかし韓国では、大学入試と司法試験の特殊性から生じた国民の意識のために裁判官を途方もなく知的に優れた者と認識するのが常であり、裁判官自らも知的選民意識に捉われている。

しかし、これは重大な錯覚である。特殊な個人的能力と努力を通じて高い知的水準に達した裁判官は、むしろ例外に属する。法科に入学するためには多くのことを暗記しなければならない。

平準化を目指してきた韓国の大学入試は、この数十年の間、創意的な考えよりは単純な事実の反覆暗記をテストしてきた。もっとも優れた暗記能力を持っていることが立証された者が法科に入学でき数多くの法科学生のうち、もっとも優れた暗記力を持っている集団が司法試験に合格する。こういう「人間コンピューター」が裁判官になるのである。

裁判所の将来を心配している、ある史学者が適切に指摘したように(李仁浩、『法曹改革のための提言』『韓国日報』九三年六月一七日)現在の裁判官は、知的な面では、大学卒業生の平均水準を下回る。全体的な学力のレベルが低かった過去は、法律家志望生は少なくとも専門学校以上の教育を受けていたので何とか相対的に高い知的な背景を持つことができた。しかし、大学校育が普遍化している今では法律書籍に全面的に

い公的「カタルシス」の制度なのである。自由民主主義の国家で国民の守護者であり代弁者であるところの裁判官を選抜する試験を、こうした公的カタルシス制度で維持するということは、このうえなく危険でありかつ無責任な発想である。

(3)、司法試験には、年令や学歴など応試資格に制限がないだけでなく受験回数にも制限がない。このため「七転び八起き」の神話が誕生するのである。ところが、このような制度は国家的レベルから見ると、おびただしい労力の損失を招く。司法試験準備生は国全体の基準からみて比較的優秀な人々である。彼らは他の職業を通じてでも社会の発展に能動的に貢献することのできる十分な資質の持主である。

どの大学でも法科は、もっとも優れた学生の集まるところである。全国的に年間八千名以上の学生が輩出される法科卒業生には、司法試験を通じて法曹人にならなくても社会進出の道がいろいろと開かれている。進取的な性向の卒業生は、法曹界以外の道を選ぶのが自分のためにも、あるいは国全体のためにも一層望ましいのである。実際に、法科卒業生の社会活動の業績をまとめてみると、当初から司法試験以外の進路を選んだか、あるいは司法試験を目指したか適当な時期に方向を転換した卒業生の社会的な貢献度が目立っている。しかし、一回勝負でばん回し得る司法試験の魅力は、ちようど阿片にも似た破壊的な中毒性の害悪にもなる。ひとたびこの道に足を踏み入れれば、途中下車が大変難しい。これは、試験の合格のための実力が年を重ねるにつれて伸びていくものではないことを示すものでもある。ある程度の基本的な知識が備われば試験の直前にこれを反覆暗唱しなければならない。

数年前に物故した、ある元老法学者の表現を借りれば、この試験は底に穴のあいている水桶に水を満たす作業に似ている。一定の高さに引いておいた線の上まで水を満たして置かないことには合格できない。頭の中に貯めておいた水の、絶え間ない漏水現象を防ぐため新しい水を続けて注ぎ込まねばならない。穴を通じて漏れる水と新たに流れ込んだ水は同じ量でなければならない。ある程度、水を満たしてみた経験のある受験生であれば試験の合格は質的な能力の問題ではなく試験の日が近づいてきたときから行う反覆作業と予想問題の的中率という運の問題だと信じるようになる。このために放棄することが難しくなってくるのだ。事実そうなのである。落第の成績も「論ぜよ」といった試験が与える問題点ほどに予想がはずれたりするのである。

大学を卒業した後、一定の時間がたてば他の職場への道が閉ざされてしまう。すべての職場が新入社員の年令の上限を設けているからである。名誉を目前に途方もなく大きな

「統治権」の時代は既に去った

安京煥（アン　ギョン　ファン）
（ソウル大学教授・法学）

三党合党の策略に失望

私は、一昨年暮れの大統領選挙で金泳三候補に一票を投じなかった。この世の中を大きく変えられる人物だと考えなかったからである。「軍事独裁」に正面から挑戦する政治家の行動パターンとしては、金候補の前歴が何か物足りなかったのである。何より「民自党」を作り、結局後見人の座にのし上がった彼の政治策略に我慢できなかったのである。

文民時代の幕開けを早める絶好の機会と考えた一九八七年の選挙の時は、天は非情だとまで思った。以前は薄情に思えるほどに、この国の野党の大統領候補を連れていきながら、今回はなぜそのまま傍観しているのかと、お互い一寸たりとも譲らない「両金氏」のうちの一人を天が選択してくれたら、という心境でもあった。

しかし、就任するやいなや金大統領は「期待外の果断さのある姿」を見せてくれた。ターゲット捜査、政治の報復云々。とにかく、果敢な粛正作業を通じ、目にあまる行動をしていた連中を目の前から取り除いてくれた。

青瓦台は政治資金を受け取らないと公約し、その公約は私の知る限りでは誠実に守られている。高位公職者の財産を公開したし、金融実名制度も実施して黒い金ブラック・マネーの横流しを防いだ。細部の事がらにあってはおろそかな点も多く、中途半端に終わったところもあるが、少なくとも道徳政治と公正取引の基本的な原則だけは鮮やかに示した。

しかし、このような注目に価する業績にもかかわらず、一つ、はっきりさせておかなければならないことがある。それは大統領は決して「統治権者」ではないという事実である。このような改革の業を「統治権者」の決断でなし得たと考えるとすれば、それは前任者たちの時代錯誤的な発想を踏襲するものである。国民主権

没入しなければならない司法試験の準備生たちは大学教育が行なっている普遍的な知性人教育の機会すら自ら放棄するよう強いられている。こうして生れた裁判官を知的に優れた集団として考えるとすれば大変な錯覚である。

司法試験合格者の知的能力への社会の認識に少しずつ変化が生じているが、それだけに裁判官自身も謙虚な気持ちで自らを顧みる心構えが必要である。司法試験の合格と同時に人生を早くも決算し残る余生を決算の利子を頼りにして生きていこうとする安逸な態度から是が非でも脱しなければならない。それ故、自らの知的錬磨のためにたゆまぬ努力を注がなくてはなるまい。もしも知性人の仲間に入りたい欲望があるとすれば。

(2)、しかし、知性はそれほど重要なものではない。裁判官に必要なことは資質よりも姿勢であり、知識よりは使命感である。職業人としての裁判官に何よりも切に求められるのは、強い正義感と固い意志である。頭のよい人が正義感を欠くか信念のない時は、一層大きな社会的悪を犯しやすいことをわれわれは過去の事例を通してあまりにもよく知っている。韓国の社会では「勉強をよくする人」、「頭のよい子供」には道徳的な免罪符を与えてきた。共同体の一員としての最少限の義務すら強いないまま、ひたすら試験選手に育ててきた。毎年、法科入学試験の面接考試を受けた受験生は大部分、祖父の名や、はなはだしきは父の誕生日すら答えられなかった。自分が寝た後のふとんさえ自分で畳んだことのない試験選手が法科学生になって正義と平等の道に邁進していると自負するのである。

法科における試験の不正は、裁判官の不正と同じくあってはならないことである。不正な裁判官が席を守っていてはならないように不正を犯す予備裁判官も断じて法科学生の資格がない。しかし、韓国の大学の法科は「将来のために」不正な学生を見て見ぬふりをするとか彼に寛大な処分を下すのである。教育という名のもとに教育を放棄するのである。法律知識の転換に先立って裁判官を志望する人は、絶対に不正を犯してはならないという意識一つだけでもしっかり植えつけてやるのが法学教育の存在意義である。

われわれは裁判官を愛するから叱責するのである。自分の子供、自分の弟子を裁判官に仕立てようとする親と師は、地域共同体の責任を分担する尊敬される人間、正義感に満ちた裁判官を愛する子供と弟子の未来像として描かねばならない。裁判官に最後の期待をかけたいとしている民主国家も、彼らの正義の闘争を支援し不義を仮借なくしったしなければならない。

（季刊『批判』一九九三年秋季号）

とはできないという、周辺人物の「良識に欠けた」忠義心が一つになって「文民王」を登極させるのである。

「法」を守る伝統を作らねば

毎朝、各界の人々とジョギングする健康な大統領の姿は、徳寿宮博物館で見られる国王の鹵簿図(行幸・行啓の行列図)ではない。世の中を根本的に変えることのできない物だと考えていた私の浅はかな了見を恥ずかしく思う。

民自党を掌握したことも、顧みれば「制度の中に入って合法的に制度を変えた」レベルの高い法律家的な改革であったわけだが、それをただ単に「政治十段」の小憎らしい妙手と考えた私の稚気を反省する。しかし、万が一の杞憂に、この一言だけは進言したい。大統領は決して統治権者でも国王でもない、国民の公僕である大統領にすぎないと。混濁した世の中をきれいにするのはいいが、法を通じてきれいにしてほしいと。

(「中央日報」三月三日)

の民主国家においては「統治権」や「大権」などといった言葉はそぐわない。このような語は専制君主制国家の遺物にすぎない。このような語は、国の主人が召使を治める権限といった意味あいが濃く感じられる。国王が臣民を治める根拠がいわゆる統治権であり、大権である。このような用語は、国民が国の主人になる民主共和国の建設とともに古語辞典の中に葬り去られなければならない言葉なのである。理非を明らかにするなら、大統領の法的地位というものは、国の公僕の頭に過ぎないのである。

在任一年、注目すべき業績

もちろん、大統領には国家の元首と行政部の首班という資格において憲法上の特別な権限が与えられている。しかし、このような特権はあくまでも法が認めるところの権限である。国の主人である国民が適正な手続きを踏み、憲法という文書を通じて大統領に委任した権限にすぎないのである。

在任一周年の記念会見において、「大統領が全ての責任を負ってリードしていくこと」が大統領制の本領であると金大統領は語った。その通りである。しかし、万が一にも大統領が国法を守らなくともいいといったような意味でその言葉を使ったとしたなら、それは重大な誤りであることを知らなければならない。

国務総理にも、国務委員の提請権という憲法上の権利があるという事実を無視する大統領は、王として自らを滅ぼす人間である。

これまでの金大統領を高く評価している治績は、民主法治主義がそれなりに根をおろしている国であったなら、あえて大統領が表立たなくともいいことがほとんどである。不正腐敗の撲滅は、所信をもった監査院長と検察総長の二人だけでもできることである。いや、二人のうちの一人だけでもできることであった。しかし、このようなことが前任者の時代にはなされなかったのは、大統領自らが法を守るということにおいて、その模範を示さなかったからである。たぶん、彼等は密かに自らを法の上に立っている「統治権者」だと信じていたからかもしれない。青瓦台を建築するにあたり、巨大な宴会の広間を兼ね備えた現代風の王宮をモデルにし、一般の人々の出入りを禁じた紫禁城を構築した発想がそのいい例である。

大統領を王として仕える周辺の人々の思考方式も、また変わらねばならない。民自党の党大会を延期する総裁の決定が「統治権の次元」の問題であるため、法で問題視するこ