Worker Dispatch in Japan Increases Workers with No Rights Neo-Liberal Labor Policy and Corporate Irresponsibility

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1. Surge of Contingent Workers without Labor Rights

In the past 20 years, the Japanese employment system changed dramatically under the neo-liberal labor policy and the corporate priority on profit seeking, which decreased regular employees and, on the other hand, increased contingent workers on a large scale. Thus, employment disintegration and workers without rights are rapidly spreading in Japan.

The Worker Dispatch Law enacted in 1985 created this situation. Neo-liberalists in the employment field consistently insisted on relaxing and liberalizing the laws to promote worker dispatch.

More than 19 years have passed since the Labor Dispatch Law came into effect. Initially, only limited businesses were allowed to use temporary workers, but the amendment in 1999 liberalized allowable types of work in principle, thereby causing a dramatic change in employment. Research by the Ministry of Health, Labour, and Welfare reports that the number of temporary workers exceeded two million by 360,000 as of 2003, which means that the number more than doubled from one million in the four years from 1999 when the Law was amended. The increase in such a short period was 20%–30% growth year on year, significantly higher than the growth rate before 1999, and the continued increasing trend in 2002 and 2003 marked 10% growth from the previous year. If the year-on-year 10% increase continues for 10 years, the number of temporary workers will be 6 million 120,000 in 2013. If 20%, it will be 14 million 610,000 in 2013, more than 30% of the entire labor market. Now, the worker dispatch business has no restrictions, and temporary workers can be legally used in almost all businesses. Anticipating from the current situation where false contract agreements are common and many public sectors are outsourcing their job to private companies, the indirect employment represented by dispatches or contracting will be the dominant practice in 10 years. Other than worker dispatch, other forms of contingent employment are increasing rapidly.

The "Summary of the Results of the Overall Field Survey of Diversified Employment 2003" announced by the Ministry of Health, Labour, and Welfare in July 2004 states that the percentage of regular employees and contingent workers is 65.4% and 34.6%, respectively, and that the latter showed an increase by 7.1 percentage points from the previous survey in 2001. Official statistics show that more than one-third of the entire labor market comprises contingent workers, especially female and young workers, under the rapidly expanding forms of contingent employment such as dispatch and limited-term and part-time jobs.

2. Spread of the World without Labor Laws

The increase in the number of contingent workers impairs their status with regard to labor rights across a wide range. Almost all industries, including the public sector, face common notable phenomena of an (i) increase in contingent (unstable or discriminatory) employment; (ii) the spread of illegal and/or unpaid overtime causing death or suicide from overwork; and (iii) disabled and stultified labor unions.

In short, many Japanese workplaces have become a "world without labor law" in these 20 years. Recently, the overwork for exceptionally long hours is remarkable, especially among regular male employees in their late 20s and 30s, who are forced to work too much because vacancies from retirees are covered by the use of contingent workers, not by the recruitment of regular employees. According to a labor survey in 2003, there were 6 million 750,000 persons who worked for 60 hours or more a week, including more than 20% of workers in their 30s. These hard workers are called "maybes" exposed to the risk of death by illegal overtime for 80 hours or more a month exceeding the work-hour criteria established by the government to recognize death by overwork.

The government enacted laws one by one, as well as the Worker Dispatch Law, to relax the maternal protection and labor hours required by labor laws, and the government's supervision of corporate compliance with labor standards does not function—the existing laws and regulations are not strictly complied with. Even first-class corporations are less willing to comply with the labor laws. Labor management understating worker's health, labor conditions, and even humanity is being strengthened as a result of false contract agreements publicly adopted by many companies, including first-class corporations opposed to the Worker Dispatch Law and the Employment

Security Law and the illegal unpaid overtime in defiance of labor laws.
Companies that pay less attention to worker's health, life, and employment security are highly rated in the market as high-performance enterprises. The government responsibility for labor administration and corporate social responsibility have reached bottom.

The current situation makes it difficult for Japanese female and young workers to be regular employees. They have no choice but to accept unstable as a temporary worker and suffer low wages with no rights and inhuman hard work. Many contingent workers are under short-term service agreements subject to renewal, in other words, under employment scheduled to be terminated or employment that can be terminated at any time. Extremely unstable employment makes it difficult for contingent workers to insist on their rights under the Labor Standards Law, including without limitation paid holidays and leave before and after childbirth, and no unemployment insurance or social insurance is available for many of them. The judgments won in the cases for sexual discrimination up to the 1970s, such as the invalidity of mandatory termination due to marriage or at a younger age, have been replaced by a discriminatory employment system in which many women are forced to work on a contingent basis. In addition, most contingent workers are isolated in the harsh competition as a non-member of the labor union, and many of them are exposed to bullying and sexual harassment in the workplace, mental health destruction, death, and suicide caused by overwork. As in the case of Nikon Kumagaya Plant (*), not only regular employees but also contingent workers are actually driven to suicide from depression. Many Japanese companies consider the standards established by the Labor Standards Law enacted 58 years ago as the top target, which means that Japanese workplaces or employment systems are extremely degraded from the viewpoint of worker's rights.

3. Worker Dispatch as a Weapon to Disable Labor Unions

In the past 20 years, labor unions have remarkably weakened its resistance in workplaces in Japan. Both the unionization rate and labor dispute actions have significantly decreased. During the 10 years from 1993 to 2002, the number of disputes with action and the workdays lost significantly decreased from 657 to 304 cases (46.2%) and from 116,003 to 12,262 days (14.2%), respectively. No major strike has been conducted in recent years in Japan.

The number of labor disputes in Japan is characteristically far less than that in the United States and Korea where neo-liberalism has a great influence. The labor union is an organization representing the weakest workers. That's why the strong right of association is secured. In Japan, however, it is actually organized only for regular workers of large companies and civil officers because of the persisting weakness that the labor union represents regular employees of an individual company. Due to such weakness, most labor unions in Japan could not resist the companies jointly with dispatch workers and contractors when the temporary manpower and false contract agreement were adopted by them. Thus, the Japanese labor unions have idly passed these 20 years without protecting the interests of contingent workers suffering in the same workplace.

Unfortunately, Japanese labor unions are not supposed to represent contingent workers including temporary workers at present. Their social and ethical authority representing the socially vulnerable has been lost. Consequently, the labor union becomes weaker to be disintegrated, and the contingent workers become more isolated in the trend for neo-liberalism. The worker dispatch system discontinues and weakens the activities of Japanese workers and labor unions, taking advantage of the weakness of the labor union as an organization of an individual company, resulting in the dangers and harms over a long-term period, like asbestos in the workplace.

4. For Abolition of the Worker Dispatch System as the Asbestos in the Employment System"

The Worker Dispatch Law of Japan enacted in 1985 is the poorest system in the world from the viewpoint of protection of dispatch workers and is also convenient only to managers of corporations, especially companies to which workers are dispatched, because Japan has no basic policies to operate this system, which were introduced in the United States and European countries.

The EU member countries introduced the worker dispatch system in the 1970s subject to the establishment of (i) the principle of the same wage for labor of the same value; (ii) the law to restrict termination and the principle to restrict employment for limited periods; and (iii) a cross-corporate labor union representing all workers and the practice of nationwide agreement in each industry including unorganized workers. The enormous nationwide labor union and the law to restrict termination effectively

protected workers' employment. In this circumstance, the worker dispatch system was introduced with minimal adverse effect. Actually, the number of dispatch workers and harmful results is not as great as in Japan. On the other hand, nothing of (i) through (iii) above exists in Japan. Instead, the labor conditions are quite different between companies, and most labor unions are organized within individual companies excluding contingent workers with almost no practice to apply labor agreements to contingent workers. Many harmful effects were inevitably caused by the introduction of worker dispatch in Japan whose system and climate is quite different from those of the EU countries.

Recently, suffering from asbestos has received nationwide attention in Japan. The asbestos brought serious harm to workers and citizens over 20 to 30 years and possibly caused more than 100,000 people to die in Japan. Despite the adverse effect suggested from an early stage, the correct choice to exclude asbestos was delayed due to the opinion that asbestos use can be controlled. Similarly, the worker dispatch system has shown significant harm in the past 20 years, but, until now, there are only a few opinions and activities to seriously oppose the "asbestos in the employment system" in Japan. Labor unions and the labor law community are also not serious about the problems caused by the introduction of the worker dispatch system. Many still consider this system superficially as an employment system suitable to worker's desires and lifestyles or the partial and exceptional employment system. But the actual situation is not like that. It is necessary to understand the significant change in the level of issues.

Under the inseparable relationship with neo-liberalism, the essence of the worker dispatch system lies in the most effective method to avoid the corporate responsibility for employment as an employer and, in addition, to destroy the worker's right to employment and affiliation with other workers. In the case of the Nikon Kumagaya Plant, the Tokyo District Court duly judged that Nikon, the host company to which the worker was dispatched, has an obligation to take care of the health of temporary workers. This is worthy of attention. Indirect employment by its nature allows a company, which earns great profit from employee labor, to avoid its minimum responsibility as an employer. This judgment has reminded us that the indirect employment system, including worker dispatch, should no longer exist.

Destruction of the rights of workers and citizens by the neo-liberalism must be strongly resisted. In Korea, the exercise by contingent workers of their rights attracts a

significant amount of public attention as an important issue. The aforesaid negative phenomena in the Japanese employment system is the direct result of a neo-liberal employment policy and should not be spread in Asian countries. Now, we have no choice but to abolish the Japanese worker dispatch system, which is the "asbestos in the employment system."

(*) Case of Nikon Kumagaya Plant

On March 31, 2005, the Tokyo District Court recognized that both Nikon, as the host company, and the contractor were responsible for the suicide from overwork of a temporary worker who engaged in inspections at Nikon Kumagaya Plant by reason of a violation of the obligation of security and ordered both companies to pay compensation for the damage to the bereaved mother who is the plaintiff. This judgment was announced in newspapers, TV programs, and other media and gets great attention. The temporary worker, who was born in 1975 and died at 23 years of age, was found dead with an electric cord around his neck in the bachelor's dormitory in March 1999, a year and four months after he started to work at Nikon under employment with the contractor. He was in charge of the final inspection of the Stepper, a semiconductor manufacturing device, at Nikon Kumagaya Plant working day and night under a two-shift system and making overseas trips. Tired from too much work, he offered to terminate the employment, but no reply was given to him by the company. Two weeks after his unnoticed absence from work, his mother anxiously visited him and found him in the dormitory room where he lived alone. He left no will, just a simple message on the whiteboard saying that he had wasted time. Reading this, the bereaved family brought action in the Tokyo District Court on July 18, 2000 claiming compensation from both companies by reason of their non-fulfillment of their responsibility as employers. This case revealed that the health and life of young workers were impaired by the corporate priority on profit seeking and the dispatch system under feudalistic and illegal false contract agreement in one of the world's leading companies like Nikon.

For details, see the website http://www10.ocn.ne.jp/~karoushi/, where the judgments of lawsuits for the death of dispatch workers by overwork are posted.

노동자의 무권리를 확대하는 일본적 노동자 파견제도 신자유주의적 노동정책과 기업의 횡포

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1 무권리인 비정규노동자의 급증

신자유주의적 노동정책과 이윤추구제일주의의 기업 경영이 강해지면서 일본에서는 이 20 년 동안에 고용 사회가 격변하여 정규 노동자가 감소하였다. 한편 비정규 노동자(contingent worker)가 급증해서 고용의 붕괴와 무권리 상태가 급속도로 진행되고 있다.

그 계기가 된 것은 노동자 파견법 (1985 년 제정) 이다. 신자유주의자가 고용분야에서 하는 일관한 주장은 파견 노동 확대와 그 법규제의 완화, 더욱 노동자 파견에 대한 자유화였다.

노동자파견법이 시행된지 19 년 이상 경과하였다. 당초 파견 대상 업무는 한정되어 있었으나 1999 년에 법이 개정되자 파견 대상 업무는 원칙 자유화가 되어서 극적인 결과가 나타났다. 후생 노동상 조사에 의하면 2003 년 현재 파견 노동자는 200 만명을 크게 넘어서 236 만명이 되었다. 그것은 1999년에 법 개정 이후 4년간에 100만명에서 200만명으로 배증한 것으로 된다. 그 전의 증가률과 크게 달리 전년 비율로 2 할에서 3 할이라는 큰 증가률이 계속되어 불과 4 년 사이에 파견 노동자는 2 배로 급증하였다. 2002 년에서 2003 년까지의 경우도 전년 비율이 10% 증가하여 그 증가 경향은 달라지지 않다. 전년 비율이 10% 증가가 계속 된다면 10 년후에는 612 만명(2013 년), 전년 비율 20% 증가된다면 10 년후에는 1461 만명(2013 년)이라 전고용 노동자의 30%이상이 파견 노동자화가 될 것이다. 파견 업무에 한정이 없어진 현재 법적으로는 거의 모든 업무에서 파견 노동의 도입이 가능하다. 위장 청부 형태가 만연하여 공무 부문의 민간 위탁화도 급증하므로 10 년 이내에는 파견이나 청부 등 「간접 고용」이 지배적인 고용 관행이 될 거라고 추측할 수 있다.

파견 노동 이외에도 다양한 비정규 고용 형태가 급증한다. 2004 년 7 월에

발표된 후생 노동상의 2003 년「취업 형태 다양화에 관한 총합실태조사결과 개황」에 의하면 「정사원은 65.4% `비정사원은 34.6%」이고, 「전회 조사(2001 년)와 비하면 비정사원은 7.1 포인트 상승하고」있다. 관청 통계에서도 비정규 고용이 노동자 전체의 3 분의 1 을 넘고 말았다. 특히 여성 노동자와 약년 노동자, 파견 노동, 유기 고용, 아르바이트 등 다양한 비정규 고용상태가 급속도로 확대되고 있다.

2 「노동법이 없는 세계」의 퍼짐

비정규 노동자 증대의 결과 무권리 상태가 노동자 전체로 퍼지고 있다. 공무 부문을 포함한 거의 모든 산업에서 (1)비정규 고용(불안정 · 차별고용)의 증가, (2)과로사·과로 자살에 이어지는 위법·미불 잔업의 만연 그리고 (3)노동 조합의 무력 · 형해화라는 점에서 공통한 현상이 현저하게 나타난다.

요컨대 이 20 년 동안에 많은 일본의 직장은 「노동법이 없는 세계」가 되고 말았다. 최근에서는 보통이 아닌 장시간 노동이 두드러진다. 정년에 의한 결원 보충은 정사원 채용이 아니라 비정사원을 도입함으로서 행하기 때문에 특히 20 대 후반에서 30 대 남성 정사원에게는 장시간 노동이 퍼지고 있다. 2003 년 노동력 조사에 의하면 주 60 시간 이상 근무하는 취로자는 675 만명, 30 세대에서는 20%를 넘는다. 이것은 월80 시간 이상이 되는 법외 잔업이고 정부가 설정한 「과로사 인정 기준」을 넘은 장시간 노동자로서 「과로사 예비군」이라 불린다.

정부는 노동자 파견 이외에도 모성 보호나 노동 시간 등 노동법규제를 입법으로 순차 완화하는 한편 노동기준 감독 행정의 기능을 부전 상태에 두고 기존 법규제의 준수도 철저하지 않다. 또 일류 기업조차 노동법을 준수하는 기풍이 희미해졌다. 노동자 파견법이나 직업안정법에 위반하는 위장청부가 대기업을 포함한 많은 기업에서 공연히 도입되어 왔다. 더욱이 노동기준법을 무시한 위법 미불 잔업이 만연하였다. 그 결과 노동자의 건강이나 노동조건, 그리고 인간성을 무시하는 노무관리가 강해지는 경향에 있다. 노동자의 건강이나 생활 · 고용 보장을 경시하는 기업일수록 「퍼포먼스가 좋은 기업」으로서 시장에서 평가된다. 정부의 노동 행정 책임이나 기업의 사회적 책임은 땅에 떨어져버렸다.

현재 일본의 여성이나 약년 노동자는 정사원이 되기가 어렵다. 파견 노동

등 불안정한 고용형태 밖에 선택할 수 없어서 저임금, 무권리, 비인간적이고 과혹한 노동 등으로 괴로워 한다. 특히 비정규 노동은 그 많은 일들이 단기 노동계약을 경신하는 형태로 되어 있고 「해고를 예정한 고용」, 아니면「언제든지 해고 가능성이 있는 고용」이라고 할 수 있다. 고용이 지극히 불안정하므로 노동기준법의 권리(유급 휴가, 산전산후 휴업 등)주장이 어렵고 고용 보험이나 사회 보험 가입을 하지 않는 예도 많다. 1970 년대까지 남녀 차별 재판 투쟁 승리의 도달점(결혼퇴직제이나 약년정년제 등의 무효 등)이 고용형태에 의한 차별로 슬쩍 바꾸어치고 많은 여성이 비정규노동화 되었다. 더욱이 거의 대부분의 비정규노동자는 노동 조합도 없거나 힘든 경쟁 속에서 고립하게 되어서 직장에서는 왕따· 성희롱, 정신 건강의 파괴, 과로사 · 과로자살 등이 퍼지고 있다. 니콘 쿠마가야(熊谷)제작소 사건(*)처럼 정사원뿐만 아니라 비정규노동자도 우울증에 걸려 자살까지 하게 되는 현실이 있다. 일본의 많은 직장에서는 58 년이나 전에 제정된 노동기준법에서 정한 기준이 「최고 목표」로 되어 있다. 정말로 일본의 직장=고용 사회는 노동자의 권리라는 시점에서 보면 참담한 상황이다.

3 노동자 파견은 「노동 조합 무력화의 무기」

이 20 년 동안에 일본에서는 직장에 있어서 노동 조합의 저항력은 크게 후퇴하였다. 조직률 저하와 함께 쟁의 행위가 격감하고 있다. 1993 년에서 2002 년까지 10 년 동안에 「쟁의 행위를 따르는 쟁의」는 건수로 보면 657 건에서 304(46.2%)건으로, 쟁의 손실 일수로 보면 116,003 일에서 12,262 일(14.2%)로 격감하였다. 일본에서는 근년 큰 파업은 개무하다고 할 수 있다. 신자유주의의 영향이 강한 미국이나 한국과 비교하여도 노동 쟁의가 극단으로 적은 것이 일본의 특징이다.

노동 조합은 가장 약한 노동자를 대표한 조직이야말로 강력한 단결권이 보장되어 있다. 그러나 일본에서는 기업별 정사원조직이라는 노동조합의 약점이 극복되어 있지 않아 사실상 대기업 정규고용노동자와 정규공무원 밖에 노동조합조직은 없다. 그런데 일본 노동조합의 거의 대부분은 파견노동이나 위장청부가 도입되었을 때 기업별 정사원조직의 약점을 노정해서 파견 노동자나 하청 노동자와의 연대로 기업에 대항하지 못하였다. 요컨대 일본 노동조합은 같은 직장에서 괴로워하는 비정규 노동자의 이익을 옹호하지 않는 채 20 년을 무위로 지낸 결과가 된 것이다.

현재 일본 노동조합은 아쉽지만 파견 노동자를 비롯한 비정규 노동자를 대표로 하지 않는다. 사회적 약자는 노동 조합의 사회적 도덕적인 대표로서의 권위를 잃은 상태다. 그 결과 신자유주의 풍조 속에서 노동조합의 약체화・해체는 진행되고 노동자의 고립화가 촉진되었다. 바야흐로 노동자 파견제도는 기업별 노동조합이라는 약점을 교묘하게 찔러 일본의 노동자・노동조합 운동을 분단시키고 저미시킨다는 점을 보아서 장기적으로 위험과 유해한 결과를 만들어내는 「고용 사회에서의 아스베스토」이었다.

4 「고용 사회에서의 아스베스토」=노동자 파견제도 폐지를

1985 년 일본노동자파견법은 파견노동자 보호라는 점에서 세계에서 가장 빈약하였다. 그것은 경영자(특히 파견을 요청한 기업)를 위하여 일방적으로 알맞게 해주는 시스템이었다. 일본에서는 서구 각국에서 도입된 노동자 파견제도를 받아들일 기반 자체가 없었던 것이다.

EU의 여러 나라가 1970 년대에 노동자 파견제도를 도입하였는데 각국에서는 (1)동일가치노동 동일임금 원칙의 확립, (2)해고제한입법과 유기고용의 사유제한원칙의 확립, (3)노동자 전체를 대표한 기업 횡단적 노동조합과 미조직 노동자까지 확장되는 산업별 전국협약 관행의 확립이 전제로 되어 있었다. 거대한 전국적 노동조합과 해고제한법이 노동자의 고용을 보호한다는 점에서 유효하게 기능하므로 노동자 파견제도가 도입되어도 폐해가 최소한으로 그쳤고, 현실적으로 보아도 파견노동의 수도 폐해도 일본처럼 크지 않다. 그러나 일본에서는 이(1)에서(3)까지 어떤 것도 존재하지 않았다. 오히려 기업간에서 노동조건의 격차가 크고 노동조합도 기업별 조직이 지배적이라서 비정규 노동자를 조직 대상에서 제외하여 노동협약의 확장 적용 관행도 개무와 같은 상황이다. EU 각국과는 전혀 다른 일본에 파견노동을 도입하면 많은 폐해를 초래하게 된 것은 당연한 일이었다.

최근 일본에서는 아스베스토 피해가 크게 주목을 받고 있다. 20 년에서 30 년을 거쳐 노동자나 시민 전체에게 심각한 피해를 가져오는 아스베스토는 일본에서는 10 만명 이상의 사망자를 낼 거라고 예상되어 있다. 아스베스토의 폐해는 일찍부터 지적해왔으나 「관리하면 사용가능」이라는 논의 때문에 폐지라는 정당한 해결이 늦어졌다. 같은 식으로 노동자 파견제도도 20 년의 경과 속에서 그 폐해가 두드러졌다. 그러나 현재에

이르기까지 일본에서는 「고용 사회에서의 아스베스토」에 대한 본격적인 반대론이나 반대활동은 아직 소수라고 밖에 할 수 없다. 노동자 파견제도 도입의 문제점에 대한 둔감함은 노동조합이나 노동법 학계에서도 공통하다. 아직까지 「노동자의 희망이나 라이프 스타일에 맞는 고용 형태」라 하거나「연변적・예외적인 고용형태이다」라고 한 피상인 이해가 많다. 이제 그러한 말을 하는 상황이 아니다. 문제 차원의 급격한 변화에 눈을 돌려야 하는 것이 필요하다.

신자유주의와 불가분의 관계에 있는 노동자 파견제도의 본질은 기업의 고용책임・사용자 책임 회피에 가장 유효한 수단이라는 점에 있다. 더욱이 노동자의 권리・고용과 노동자의 연대를 파계한다는 점에 있다. 니콘 쿠마가야 제작소 사건에 대한 동경지방재판소 판결은 인수기업(파견의뢰주)인 니콘에 파견 노동자에 대한 건강 배려 의무가 있다는 것을 정면에서 인정하였다. 이것은 주목할 만하다. 본래 청부나 파견 같은 간접 고용은 실제로 노동자를 이용해서 큰 이익을 올리는 기업이 최저한 노동자에 대한 사용자로서의 책임을 피하기 위한 것이다. 이번 판결은 이제 파견노동 등 간접 고용 형태를 폐지할 수 밖에 없다는 것을 재확하게 하였다.

신자유주의의 노동자나 시민의 권리 파괴에 강하게 대항할 필요가 있다. 한국에서는 비정규직 노동자의 권리 실현을 중요한 문제로 삼아 사회적으로 큰 주목을 받고 있다. 일본의 고용 사회에 있어서 이상의 일들 같은 부정적 현상은 신자유주의 고용정책에서 나온 직접적 결과이다. 이것을 아시아 각국에 확장하면 안 된다. 이제서야 「고용 사회에서의 아스베스토」라고 하는 일본 노동자 파견 제도를 폐지할 수 밖에 없다!

(＊)니콘 쿠마가야(熊谷) 제작소 사건

동경지방재판소는 2005 년 3 월 31 일, 니콘 쿠마가야 제작소에서 검사업무에 종사한 파견 노동자의 과로 자살 사건에 대하여 인수기업인 니콘과 청부회사에게 안전 배려 의무 위반의 책임이 있는 것을 인정하여 양 회사가 유족인 어머니(원고)에게 손해 배상해야 하는 것을 명하였다. 이 판결은 신문이나 테레비전 등 매스컴에도 취급되어 큰 주목을 받았다.

파견 노동자의 청년(1975 년생, 사망 당시 23 세)이 기숙사에서 전기 코드를 목에 매어 자살한 모습으로 발견된 것은 하청회사에 입사하여 니콘에서 일을 시작한지 1 년 4 개월 후인 1999 년 3 월이었다. 그는 니콘 쿠마가야 제작소에서 반도체 제조 기계 「스텝퍼」의 최종 검사를 담당하여

낮밤 2 교체 근무나 해외 출장 등도 행하였다. 지나친 과중 노동에 피곤해서 퇴직을 신청하였으나 회사에서는 답도 못 받았다. 결국 그는 무단 결석을 한지 2 주 후에 그를 걱정한 어머니가 찾아 방에서 자살한 모습으로 발견되었다. 유서 등은 없고 화이트 보드에「헛된 시간을 지냈다」라고 한 마디 만 쓰여 있었다. 그것 때문에 유적은 2000 년 7 월 18 일, 동경지방재판소에 양 회사에 대하여 사용자 책임이 있다고 주장해서 손해배상을 요구하는 고소를 제기하였다. 이 재판은 니콘이라는 세계적인 기업 속에서 전 근대적인 위법한 위장 청부에 의한 파견 노동이 횡행하고 있다는 사실, 그리고 기업 이익을 우선으로 하느라고 젊은 사람들의 건강이나 생명을 경시한 사실을 밝혔다.

재판의 자세한 내용에 대해서는 파견사원과로자살재판 홈페이지 (http://www10.ocn.ne.jp/~karoushi/) 참조.

Ruling in favor of plaintiffs in the Sumitomo Metal Industries Gender-based Wage Discrimination Case and sex discrimination lawsuit in Japan

Kiyoko Kitagawa

1 Female workers have been subject to discrimination in Japanese corporate society.

Sumitomo Metal Industries, Ltd., a major company belonging to a representative business group of Japan is also unexceptional.

I joined the company in 1959. At that time, the company did not accept that women could continue working after marriage and forced women to retire from work and conducted a hate campaign in different ways. In the case of women who continued working after marriage without submitting to a forced resignation by their boss, their desks vanished and were dumped in the place for waste when they returned from their honeymoon. There were also some cases where women were forced to retire from work almost every day, for instance, their boss said, "Our department does not need a grandma," or "Women should be a wallflower. A stain on the wall is unneeded." I was also transferred to a different department soon after marriage and deprived of my job for one and one-half years. It was more difficult for me to continue working after delivery. When I went to work after giving birth to my eldest son, I was called out by the manager, who used offensive language, such as "You give your child to a day-care center while even dogs and cats raise a child on their own. You are inferior to dogs and other animals," and forced to retire from work.

The company gave the lowest ability rating to women who continued working without submitting to these harassments, and continued to draw a distinction between men and women in terms of both promotion and salary increases. I retired from work after I had worked for the company for forty years and remained a mere clerk. Compared to men with the same academic background, the gap in annual income and retirement allowance was 5,000,000 yen and 13,000,000 yen, respectively.

I thought that such sexual discrimination was intolerable, and four female clerical officers, including me, filed a suit as plaintiffs against the company in August 1995 in the Osaka District Court for compensation for damages caused by sexual discrimination.

2 The Osaka District Court determined that Sumitomo Metal illegally and sexually discriminated against women and handed down a ruling that ordered the company to pay a total of 63,112,000 yen in compensation on March 28, 2005.

The company insisted in court that the gap between men and women was not gender discrimination but a difference in "recruitment segmentation," which included "recruitment at the head office" and "recruitment at the branch office." Currently most companies as defendants insist on a "difference in recruitment segmentation" to justify the gap in Japanese sex discrimination lawsuits in which discrimination in promotions and wages are contested. The ruling in the Sumitomo Metal Industries Case, however, denied the existence of "recruitment segmentation" insisted on by the company. With respect to the fact that men and women were virtually employed by different procedures, and operations allocated after recruitment differed between men and women around that time when we plaintiffs joined the company, the court judged that such facts had reasonably relevance to the significant gap in promotions and wages between men and women.

Additionally, the ruling judged that Sumitomo Metal established a "shadowy personnel system" that categorized employees assigned to clerical posts into five levels based on academic background without informing employees of such a system, and discriminated because of sex in the ability rating, salary increases, and promotions. In this "shadowy personnel system," women were boxed in the lowest level regardless of academic background and content of operations in which they engaged, and thoroughly discriminated against. The ruling judged such treatment illegal.

The ruling recognized a loss equivalent to differential wages after 1986, payment for pain and suffering caused by the discrimination based on the "shadowy personnel system," and attorney's fees as the loss incurred due to the discrimination.

3 Japan has a history of female workers rising up and taking legal action against gender segregation, such as retirement programs on account of marriage and delivery and a gender-segregated age retirement system, carried on a movement for judicial conflict, and corrected gender segregation piece by piece.

Also, conflict currently continues in many trials with respect to discrimination in promotions and wages. The ruling in favor of the plaintiffs in the Sumitomo Material Case stepped one pace toward victory and gave courage and encouragement to women engaged in judicial conflicts to many women who were subject to gender segregation.

In order to achieve a ruling in favor of the plaintiffs, the plaintiffs, the plaintiffs' attorneys, and an aid agency conducted various efforts, such as distributing bills, gatherings and parades, and extended public opinion to "Gender segregation by Sumitomo Metal is intolerable."

Sumitomo Metal filed an appeal without accepting the verdict of the first hearing, and the trial came to be examined in the Osaka High Court. We think that Sumitomo

Metal should give due consideration to corporate social responsibility, respect the judgment of the Osaka District Court, eliminate illegal gender segregation within the company, and intend to resolve the trial. For that purpose, we continue our efforts to influence public opinion that gender segregation is intolerable further.

수미토모 킨조크(住友金属) 남녀차별 재판의 원고 승리판결과 일본의 남녀차별 재판

北川清子

1 일본 기업 사회에 있어서 여성 노동자는 여러 유형의 차별에 시달려왔습니다. 일본을 대표한 기업 그룹에 속하는 대기업 수미토모 킨조크 코교(住友金属工業) 주식회사도 그 예외가 아닙니다.

저는 1959년에 입사하였는데 당시 회사는 여성이 결혼 후도 계속 일을 하는 것에 대하여 인정하지 않아 여러 수단으로 퇴직을 강요하거나 괴롭혔습니다. 상사의 퇴직 강요에도 굴하지 않고 결혼 후도 계속 일을 한 여성은 신혼여행에서 돌아왔더니 자신의 책상이 사라져 있고 쓰레기터에 버린 상태였다고 합니다. 또 상사한테 「우리 과에 할머니는 필요 없어」「여성은 벽의 꽃이 좋은 거지, 벽의 얼룩은 필요 없어」 등 매일이나 퇴직 강요를 받은 예도 있습니다. 제 자신도 결혼 이후 바로 부서 이동을 당한 데다가 1년반이나 일을 빼앗겼습니다. 출산 후에도 계속 일을 하는 것은 더욱 어려웠습니다. 제가 장남을 출산하여 출사하였더니 부장님이 저를 불러서 「개나 고양이라도 스스로 자식을 키우는데 당신은 자식을 보육소에 맡긴다니. 개 짐승 이하다.」 라고 폭언을 내뱉고 퇴직을 강요하였습니다.

이러한 괴롭힘에 굴하지 않고 계속 일을 한 여성들에 대해서 회사는 최저의 고과를 명하여 승진・승급 양면으로 남성과 차별을 해왔습니다. 저는 근속40년으로 퇴직하였지만 끝까지 평사원이었고 같은 학력의 남성과는 연수로 500만엔, 퇴직금으로 1300만엔이나 격차가 있었습니다.

이러한 남녀 차별을 놓아둘 수 없다고 생각한 결과 저를 포함한 여성 사무직원 4명이 원고가 되고 1995년 8월 회사를 상대로 남녀 차별에 의한 손해배상 지불을 요주하여 오오사카(大阪)지방재판소에 제소하였습니다.

2 2005년3월28일 오오사카 지방재판소는 수미토모 킨조크가 위법한 남녀 차별을 했다고 인정해서 회사에 대하여 합계 6311만 2000엔의 손해배상금 지불을 명하는 판결을 내렸습니다.

회사는 재판 속에서 남녀간의 격차는 성별에 따른 차별이 아니라 「본사 채용」「사업소 채용」이라는 「채용 구분」의 차이에 따른 것이라고 주장하였습니다. 현재 일본에서 승진・임금 차별을 싸우는 남녀차별 재판은 거의 대부분의 피고

기업이 격차의 정당화를 위하여「채용 구분의 차이」를 주장합니다. 그러나 수미토모 킨조크 사건 판결은 회사가 주장하는「채용 구분」의 존재를 부정하였습니다. 또 우리 원고가 입사한 당시 사실상 남녀가 다른 수속으로 채용되고, 채용 후 배치업무 등에도 서로 다른 것으로 되어 있었던 것에 대해서도 남녀간에 생긴 큰 승진·임금 격차와 합리적 관련성을 가지는 것이 아니라고 판단하였습니다.

더욱이 판결은 수미토모 킨조크가 종업원에게 알려주지 않는 채 사무직의 종업원을 학력 등으로 5단계에 나누는「어둠의 인사제도」를 만들어서 그것에 따라 능력 평가, 승진· 승급에 대하여 남녀간에서 차별을 하였다고 인정하였습니다. 이「어둠의 인사제도」에서는 여성은 학력이나 종사하는 업무 내용과는 관계없이 최저 구분에 밀어넣고 철저적으로 차별을 하였습니다. 판결은 이러한 취급을 위법이라고 인정하였습니다.

차별로 인하여 발생한 손해에 대하여 판결은 1986년 이후의 차액 임금에 상당한 손해금과「어둠의 인사제도」로 인하여 차별을 당한 것에 의한 위사료, 및 변호사 비용을 인정하였습니다.

3 일본에서는 결혼 퇴직제· 출산 퇴직제· 남녀별 정년제 등의 남녀 차별에 대하여 여성 노동자가 일어서서 재판과 운동을 계속하면서 하나씩 시정해온 역사가 있습니다.

승진· 임금차별에 대해서도 현재 많은 재판에서 투쟁이 계속 되고 있지만 수미토모 킨조크 사건의 승리 판결은 그 승리의 걸음을 한 걸음 앞으로 하여 재판에서 싸우는 여성들, 더욱 남녀 차별을 괴로워하는 많은 여성들에게 용기와 격려를 주었습니다.

승소 판결을 쟁취하기 위해서 원고· 변호단, 그리고 지원 조직은 쪽지를 뿌리거나 집회, 행진 등 여러 대처를 하여「수미토모 킨조크의 남녀 차별을 용서하지 말자」라는 세론을 전개해 왔습니다.

수미토모 킨조크는 판결에 따라하지 않아 공소하였고 재판은 오오사카 고등재판소에서 심리하게 되었습니다. 우리는 수미토모 킨조크가 기업으로서의 사회적 책임을 충분히 고려하고 사내에 있는 위법한 남녀차별을 철폐하고 재판 해결을 의도해야 한다고 생각합니다. 그것을 위해서「남녀 차별을 용서하지 말자」라는 세론을 더욱 더 널리 전개할 수 있도록 계속 노력하겠습니다.

住友金属男女差別裁判の原告勝利判決と日本の男女差別裁判

北川清子

1 日本の企業社会において、女性労働者は、様々な形の差別に苦しんできました。

日本を代表する企業グループに属する大企業、住友金属工業株式会社も例外ではありません。

私は１９５９年に入社しましたが、当時、会社は女性が結婚後も働き続けることを認めず、様々な手段で退職強要や嫌がらせを行いました。上司の退職強要に負けず、結婚後も働き続けた女性は、新婚旅行から帰ってみると、机がなくなっており、ゴミ捨て場に捨てられていました。また、上司から「うちの課におばあちゃんはいらん」「女性は壁の花がいい。壁のシミはいらん」などと毎日のように退職強要を受けた例もあります。私自身も、結婚後すぐに部署を異動させられた上、１年半もの間仕事を取り上げられました。出産後も働き続けることは更に困難でした。私が長男を出産し、出社したところ、部長に呼び出され、「犬や猫でも自分で子どもを育てているのに、君は子どもを保育所に預けている。犬畜生にも劣る」と暴言を吐かれ、退職を迫られました。

このような嫌がらせに負けず働き続けた女性たちにたいしては、会社は最低の考課を行い、昇進・昇給の両面で男性と差別し続けてきました。私は勤続４０年で退職しましたが、ヒラ社員のままであり、同じ学歴の男性とは、年収で５００万円、退職金で１３００万円もの格差がありました。

このような男女差別を許すことはできないと考え、私を含めた女性事務職４名が原告となり、１９９５年８月、会社を相手に、男女差別による損害賠償の支払を求めて、大阪地方裁判所に提訴しました。

2 ２００５年３月２８日、大阪地方裁判所は、住友金属が、違法な男女差別をしたと認定し、会社に対し合計６３１１万２０００円の損害賠償金支払いを命じる判決を言い渡しました。

会社は裁判の中で、男女間の格差は性別による差別ではなく、「本社採用」「事業所採用」という「採用区分」の違いによると主張していました。現在、日本で、昇進・賃金差別を争っている男女差別裁判では、被告企業のほとんどが「採用区分の違い」を格差の正当化のために主張します。しかし、住友金属事件判決は、会社の主張する「採用区分」の存在を否定しました。また、私たち原告が入社した当時、男女が事実上別々の手続で採用され、採用後の配置業務等も別々のもの

とされていたことについても、男女間の大きな昇進・賃金格差と合理的関連性を持つものではないと判断しました。

更に、判決は、住友金属が、従業員に知らせないまま、事務職の従業員を学歴等により５段階に分けた「闇の人事制度」を作り、これに基づいて、男女間で能力評価、昇給・昇進について差別をしていたと認定しました。この「闇の人事制度」では、女性は学歴にも従事している業務の内容にも関わらず、最低の区分に押し込められ、徹底的に差別されていました。判決は、このような取扱いは違法と認定しました。

差別によって発生した損害について、判決は、１９８６年以降の差額賃金に相当する損害金と、「闇の人事制度」により差別されたことによる慰謝料、及び弁護士費用を認めました。

3　日本では、結婚退職制・出産退職制・男女別定年制などの男女差別に対し、女性労働者が裁判に立ち上がり、裁判を闘いながら運動を行って、男女差別を一つ一つ是正させてきた歴史があります。

昇進・賃金差別についても、現在、多くの裁判で闘いが続いていますが、住友金属事件の勝利判決は、その勝利の歩みを一歩すすめ、裁判をたたかっている女性たち、更に、男女差別に苦しんでいる多くの女性に勇気と励ましを与えました。

勝訴判決を勝ち取るために、原告・弁護団、支援組織がビラまきや集会、パレードなど様々な取り組みを行い、「住友金属の男女差別を許さない」との世論を広げてきました。

住友金属は判決に従わず控訴し、裁判は大阪高等裁判所で審理されることになりました。私たちは、住友金属が企業としての社会的責任を重々考慮し、大阪地方裁判所の判断を尊重して、社内における違法な男女差別を撤廃し、裁判の解決を図るべきであると考えます。そのために「男女差別を許さない」世論をいっそう広げるべく努力を続けています。

September 1, 2005

What's behind the Disaster of JR West Japan Company's Fukuchiyama Line and Amagasaki and Our Fight against It Toward Safety-First Railroad Transportation Services with the Support of Users and People of Japan

Masaru Oya, Kinki Front, National Railway Workers' Union

At 9:18 a.m. on April 25, 2005, a seven-car train derailed and overturned at a curve near Amagasaki on JR West Japan Company's Fukuchiyama Line and smashed into a five-story apartment building. The first car slammed into a parking lot of the building with the second car sticking fast to the building covering the first car, while the third and fourth cars derailed and overturned following the first two cars, leading to a painful disaster where 107 people were killed and 550 injured. Taking this opportunity, we pray for the souls of all victims who lost their lives and hope for the prompt recovery of the injured.

While the Aviation and Railway Accident Investigation Committee of the Ministry of Land, Infrastructure and Transport is now conducting investigations into the cause of the accident, we believe that the following fact has contributed to the accident. Through the breakup and privatization of the Japan National Railways, which was executed 18 years ago, the JR Group has strived to weaken the National Railway Workers' Union and brought management that puts profits before safety, implemented rationalization that aims only at higher efficiency, a congested train schedule, an intensified work schedule for workers, and no communication at the work place. Moreover, following the relaxation of regulations implemented as a national policy, an administrative audit was conducted, and in 1991, its report was announced by the Management and Coordination Agency. The report stated that profitability and management efficiency should be further focused and reinforced while continuing efforts at promoting safety measures. It contained no mention as to how public mass transportation services should be the mission or philosophy. The government gave guidelines based on such an approach to all JR companies and many claim that the government should also be held responsible for the accident because of its inadequate guidance.

In the meantime, the work schedule for drivers was so tight that accidents could occur at any moment. The hard schedule, such as continuous driving for three and a half hours at high speed due to a tight train schedule and a long driving over 700 km in case of an

overnight work schedule in one route, makes it impossible for drivers to maintain their concentration. Since there are many private railways running in the same routes in the Kansai region, JR West Company has established a strained train schedule by repeating timetable revisions each year and forced high speed driving on drivers in order to beat these private railways. If protection systems, such as ATC or ATS that ensures safety even when something unexpected happens to a driver like in this case, had been in place, the accident could have been prevented. The schedule and track conditions that require running at a speed of 120 km per hour and suddenly reducing it to 70 km per hour seem also to constitute the cause of the accident. Currently, trains run at a speed of 130 km per hour on the Tokaido and Sanyo main lines and the Kosei line, which suggest the high probability of an accident worse than this one. It is urgent, therefore, to reduce the maximum speed and change the existing train schedule, which has a strong focus on limited express and rapid trains.

Since the breakup and privatization implemented 18 years ago in April 1987, the number of employees has been reduced by 20,000 from 50,000 to 30,000 due to the so-called manpower-reducing "rationalization" and the increased outsourcing. Attendants have disappeared from dangerous platforms and Track Maintenance/Electric Inspection/Train Maintenance & Repair Departments have been affected by the aggressive outsourcing strategy, leading to dangerous conditions. Moreover, due to increased contract workers, no experienced employees are at stations, and what is worse, the company plans to use contract workers for train conductors. The principle of safe transit, "Safety is the ultimate mission of transportation" (safety code), which had been cultivated through over 100 years of experience since the former Japan National Railways, has not been handed down to the current JR Group. Now is the time for us to claim for a reversal of the JR decisions of refusing the employment of 7600 people and dismissing 1047 employees because of their membership in a labor union and for the government to take the initiative in achieving early reconciliation. Aiming to transform JR companies into a true public transportation group, we are determined to continue our efforts with the support of users and the people of Japan.

Fight of National Railway Workers' Union Kinki Front

On April 1, 1987, the public railway, Japan National Railways, which had been created by the Japanese people over 115 years ago, was privatized and sold by the piece to the business world for virtually nothing. One of the purposes of the government and the business world was to dismantle Sohyo (General Council of Trade Unions of Japan) and Kokuro (National Railway Workers' Union), which had played a major role in the

postwar labor movement. Among the 300,000 employees, the new JR group decided only to "newly" employ 200,000 people, the remaining 100,000 people were forced to leave and 7,600 of whom were denied employment because of their membership in a labor union, such as the National Railway Workers' Union. A total of 1,047 former employees have organized battle/dispute groups and been fighting for 17 years against the infringement of the right to organize.

Through our activities at labor relations commissions, we have won the relief orders regarding employment by JR companies across the nation, whereas the JR employment request was never accepted by the court. The International Labor Organization has issued recommendations to the Japanese government to accept the request six times, and the UN Human Rights Commission has accepted the recommendations.

I, who was 44 years old and an experienced train driver at the time of privatization, turned 63 today. Those colleagues who faced employment discrimination in their 20s are now in their prime.

We believe that the causes of the disaster of JR West Company's Fukuchiyama Line and Amagasaki lie in the rejection of employing experienced employees like us, the exclusion and weakening of the National Railway Workers' Union, which demands safety-first railway transportation, and JR West Japan company's strategies, such as the profit-oriented management, intensified labor, and infringement of human rights in the workplace. We demand that the infringement of the right to organize be corrected, the dismissal of 1047 people should be reversed and their employment with companies including JR be secured, and the government work on the early settlement of the issue.

Article 9 Association of Osaka Lawyers

Maki Shichido

The movement for constitutional revision has been active since around autumn of 2004 in Japan. This movement, which represents that constitutional revision should be done, wages a campaign led by not only the ruling Liberal Democratic Party, at the head of the influence, and major parties, such as the Democratic Party and New Komeito, but also business groups, the *Yomiuri Shimbun,* and some publishing companies. The influence also represents, as the content of constitutional revision, that the Emperor system should be changed and provisions for human rights should be added. These changes can be done by law without revising the Constitution, however, it is clear that the central aim of the influence is to revise the second paragraph of Article 9 and authorize the maintenance of armed forces.

The current Constitution of Japan stipulates in the preceding sentence, "We resolve that never again shall we be visited with the horrors of war through the action of government" and "We recognize that all people of the world have the right to live in peace, free from fear and want." And the first paragraph and the second paragraph of Article 9 stipulate that "The Japanese people forever renounce war and the threat or use of force as a means of settling international disputes" and "In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained; The right of belligerency of the state will not be recognized," respectively. There are few cases worldwide in which a constitution stipulates that war potential will never be maintained; however, the Constitution of Japan stipulates that because Japan caused a lot of damage in the Second World War. At the same time, the constitutional revision drafted by the Liberal Democratic Party, for instance, would omit the second paragraph of Article 9 and instead specify the maintenance of an army for self-defense.

Nine celebrated culturati, such as Kensaburo Oe (Nobel Prize-winning author), and scholars, who opposed such a movement for constitutional revision, gathered and organized the Article 9 Association and started appealing the importance of defending Article 9 to citizens across the country. Under the circumstances, the Article 9 Association started to be established in workplaces and regions across the country one after another. The number of those associations is said to be more than 2000 across the country as of August 2005.

The Osaka Bar Association gained the approval of about 160 member lawyers because of being called for the Article 9 Association by nine members, including the person with experience as chairman, and built the Article 9 Association of Osaka Lawyers on December 2, 2004. The Article 9 Association of Osaka Lawyers was first formed as the Article 9 Association organized by lawyers, and then some other regional bar associations also formed the Article 9 Association, and the number of those associations increased. In the general meeting on the occasion when the Article 9 Association of Osaka Lawyers was formed in December, a constitutional scholar, who belonged to the Article 9 Association organized by culturati, gave a lecture and each lawyer, who had called for the Article 9 Association of Osaka Lawyers, stated that we had to defend Article 9.

The Article 9 Association of Osaka Lawyers intends to gain the approval of a majority of members by Constitution Memorial Day. The Osaka Bar Association has many members, more than 2800; however, the number of advocates is currently about 600 and has not yet gained the majority.

The Article 9 Association of Osaka Lawyers performs various activities, such as a lecture circuit and public activities to pass down the experience of war, in addition to activities to assemble advocates. In April, the Article 9 Association of Osaka Lawyers invited eminent lawyers in Tokyo, who were acting to defend the Constitution (and who were engaged in education to take the bar examination), and those who belonged to Unit 731 as child soldiers in the Sino-Japanese War and were present during the experiments on Chinese human bodies held a lecture with more than 200 people in attendance. The lawyers passionately and clearly told of the justness of maintaining the present Constitution. And those who belonged to the Unit 731 came from far away regardless of advanced age and stated the truth in front of a large number of people that they took Chinese lives in experiments and contaminated Chinese land with bacteria. These lectures won the audience's estimation that either lecture had priceless content.

After that, on May 3, Constitution Memorial Day, the Article 9 Association of Osaka Lawyers held a public meeting at an outdoor site in cooperation with the Article 9 Association organized by those involved in a university and religious workers, and gathered more than 3000 people. The meeting included a sketch by comedians and statements from various organizations and culturati, as well as a lecture by an author, and more than 1000 people participated in the demonstration parade after the meeting.

Additionally, the Article 9 Association of Osaka Lawyers is waging a campaign, in which citizen's war experiences can be heard, toward the summer because the year 2005 falls on the 60th anniversary of the war's end, and the anniversary of Japan's surrender

in the Second World War (anniversary of the birth of South Korea) is August 15. Experiences were collected from citizens by telephone on a war memories hotline in July, and forty calls were received. Among them, some people told about their blood relative's cruelties on the Chinese mainland that had never been related to others.

The Article 9 Association of Osaka Lawyers performs operations in which lawyers, especially young ones, hear and write of these experiences of war, and plans an event where lawyers, including ones with the experience of serving in the war, hear the experience of seven people, who have war memories, in a session to pass down the experience of war on August 12.

The Article 9 Association of Osaka Lawyers continues to gain member's approval and carries on the movement not to change Article 9 of the Constitution in order not to make Japan a country that can go to war again, in cooperation with other Article 9 Associations.

오사카 변호사 9조회에 대하여

七堂眞紀

일본에서는 ２００４년 가을쯤부터 헌법 개정의 움직임이 활발해졌습니다. 헌법 개정을 하자는 세력으로서 정부 자민당을 필두로 민주당, 공명당이라는 주요 정당과 경제 단체, 요미우리(**読売**)신문이나 몇 개 출판사 등이 중심이 되어서 캠페인을 하고 있습니다. 헌법 개정 내용으로서 천황제에 대하여 변경하자든지 인권 조항을 부가하자고 말하지만 이러한 내용들은 헌법을 개정하지 않아도 법률로 할 수 있는 것이므로 그 주안이 ９조２항을 바꾸어서 군대의 보지함을 인정하자는 점에 있다는 것은 명백합니다.

현행 일본국헌법 전문은 「정부의 행위로 인하여 다시 전쟁의 참화가 일어나지 않도록 하기에 결의하고」「전세계 모든 국민이 공포와 결핍에서 떠나 평화 속에서 생존하는 권리가 있는 것을 확인한다」고 되어 있습니다. 또 ９조１항은 「전쟁, 무력으로 하는 위혁 또는 무력 행사는 국제 분쟁을 해결할 수단으로서는 영구히 이것을 방기한다」, ９조２항은 전 항의 목적을 달성하기 위해서 육해공군 기타 전력은 보지하지 않는다, 나라의 교전권은 인정하지 않는다 라는 내용으로 되어 있습니다. 이 전력 불보지는 세계적으로 보아도 헌법에 규정된 예는 적습니다. 일본이 제이차세계대전 때 많은 피해를 만들어내어서 일본국헌법에 규정된 것입니다. 이것에 대하여, 예를 들자면 자민당의 헌법개정안은 ９조２항을 삭제하여 그 대신 자위군의 보지함을 명기하려고 합니다.

이러한 헌법 개정의 움직임에 반대하여 오오에 켄자부로우(大江健三郎)씨 (노벨상 수상작가) 등 저명한 문화인이나 학자가 ９명 모여서 「９조회」를 만들어 전국 시민에게 ９조를 지켜가야 하는 중요성을 호소하기 사자하였습니다. 그 밑에 전국의 직장이나 지역에서 잇달아 ９조회가 만들어졌습니다. ２００５년８월 현재 회원은 전국에서 ２０００명 이상 있다고 합니다.

오오사카(大阪)변호사회에서는 ２００４년１２월２일 회장 경험자인 ９명의 회원들이 호소해서 약 １６０명의 회원 변호사의 찬동을 모아 오오사카 변호사 ９조회를 발족하였습니다. 변호사들의 ９조회 결성으로서는 오오사카변호사회가 가장 빨리 결성되고 그 후 다른 지방 변호사회에서 ９조회가 결성되는 곳은 많아졌습니다. １２월에 있었던

결성총회에서는 문화인들의 「9조회」에 소속하는 헌법 학자의 강연과 함께 발족 중심멤버인 변호사들이 9조를 지켜야 한다고 저마다 호소하였습니다.

오오사카 변호사 9조회에는 헌법기념일까지 회원의 과반수 찬동을 모으자는 목표가 있습니다. 그러나 오오사카 변호사회는 회원수가 2800명을 넘은 큰 단체라서 현재 약 600명에 지나지 않은 찬동자 수는 아직 그 과반수에 미치지 않습니다.

오오사카 변호사 9조회의 활동은 찬동자 모집 이외에 강연활동이나 전쟁 체험 계승 광보 등 여러가지 합니다. 4월에는 헌법 옹호를 위하여 동경에서 활동하는 저명한 변호사(사법시험 수험을 위한 교육에 종사함)와 함께 중일전쟁 때 소위 731부대에 소년 병사로 소속하여 중국인 인체실험에 입회한 분의 강연회를 열어서 200명 이상의 참석 성과를 얻었습니다. 변호사는 현행 헌법을 지키는 올바름을 유창하고 명쾌하게 그리고 열정을 가지고 설명해주셨습니다. 또 전 731부대에 소속했던 분은 고령자에도 불구하고 멀리서 와주셔서 중국인의 목숨을 실험으로 빼앗고 중국 땅을 세균으로 더럽힌 사실을 많은 사람들 앞에서 이야기해주셨습니다. 이 강연 때는 굉장히 귀중한 내용이었다고 청중들에게 호평을 받았습니다.

그 후 5월3일 헌법기념일에는 대학인이나 종교인들의 9조회와 손을 잡아 야외에서 시민집회를 열어 3000명 이상을 모았습니다. 작가의 공연이나 코미디언의 콩트, 여러 단체나 문화인의 성명 발표가 있고 집회 후에는 1000명 이상이 데모 행진에 참가하였습니다.

더욱이 2005년은 종전 60주년을 맞이하는 점이나 일본의 종전기념일(한국의 광복절)은 8월15일이라는 점을 계기로 여름에 이어서 시민의 전쟁 체험 조사 캠페인을 하고 있습니다. 7월에는 전쟁 체험 핫 라인으로서 시민에게 전화로 체험담을 모았더니 40건의 전화가 왔습니다. 그 중에는 지금까지 다른 사람들에게 한 번도 이야기한 적이 없는 대륙에서 한 친적들의 잔혹한 행위를 이야기 해준 사람도 있었습니다.

이러한 전쟁 체험을 특히 젊은 변호사가 듣고 기술하는 작업을 하면서 8월12일에는 전쟁체험을 구전하는 모임으로서 종군 경험이 있는 변호사를 포함하여 전쟁을 체험한 사람 7명에게 체험을 듣는 행사를 기획하고 있습니다.

오오사카 변호사 9조회는 이후 계속 찬동을 호소하면서 다른 9조회와 손을 잡아 일본을 다시 전쟁할 수 있는 나라가 되지 않도록 헌법 9조를 바꾸지 말자라는 운동을 계속 하겠습니다.

大阪弁護士９条の会について

七堂眞紀

日本では、２００４年秋ごろから憲法改正の動きがさかんとなりました。この憲法改正をすべきだという勢力は、政府自民党を筆頭に、民主党、公明党といった主要政党のほか、経済団体、読売新聞やいくつかの出版社が中心となってキャンペーンを行っています。憲法改正の内容として、天皇制について変更したり人権条項を付け加えることも言われていますが、これらは憲法を改正しなくても法律でできることであり、その主眼は、９条２項を変えて軍隊の保持を認めることにあるのは明らかです。

現行の日本国憲法前文は「政府の行為によって再び戦争の惨禍が起こることのないようにすることを決意」「全世界の国民がひとしく恐怖と欠乏から免れ、平和のうちに生存する権利があることを確認する」とし、９条１項は「戦争、武力による威嚇又は武力の行使は、国際紛争を解決する手段としては永久にこれを放棄する」９条２項は、前項の目的を達するため、陸海空軍その他の戦力は保持しない、国の交戦権は認めないという内容です。この戦力不保持は、世界的にも憲法に規定される例は少なく、日本が第二次世界大戦において多くの被害を生みだしたことから日本国憲法に規定されています。これに対し、例えば自民党の憲法改正案は、９条２項を削除し、かわりに自衛軍の保持を明記しようとしています。

この憲法改正の動きに反対する大江健三郎さん（ノーベル賞受賞作家）などの著名な文化人や学者が９人集まって「九条の会」を作り、全国の市民に９条を守る重要性を訴え始めました。そのもとで、全国の職場や地域から、９条の会がつぎつぎに作られ始めました。２００５年８月現在で、その数は全国で２０００以上あると言われています。

大阪弁護士会では２００４年１２月２日、会長経験者ら９名の会員が呼びかけ人となって約１６０名の会員弁護士の賛同を集め、大阪弁護士９条の会を発足させました。弁護士による９条の会の結成としては一番早く、その後ほかの地方の弁護士会でも９条の会が結成されるところが増えました。１２月の結成総会では文化人の「九条の会」に所属する憲法学者の講演とともに、呼びかけ人の弁護士らが９条を守らなければならないと口々に述べました。

大阪弁護士９条の会では、憲法記念日までに会員の過半数の賛同を集めよう

という目的がありますが、大阪弁護士会は会員数が２８００名以上と多いこともあり、現在の賛同者の数は約６００名で、まだ過半数には及んでいません。

大阪弁護士９条の会の活動は、賛同者集めのほか、講演会活動や戦争体験の継承広報等、さまざまなことを行っています。４月には憲法擁護のために活動している東京の著名な弁護士（司法試験受験のための教育に携わっている）と、日中戦争において、いわゆる７３１部隊に少年兵として所属し、中国人の人体実験に立ち会った方を招いて、講演会を開き、２００名以上の参加を得ました。弁護士は、現行憲法を守ることの正しさを流ちょうに明快に、また情熱をもって説き、もと７３１部隊の方は、高齢をおして遠方から来てくれ、中国の人の命を実験で奪い、中国の土地を細菌で汚した事実を大勢の人の前で述べてくれました。このときの講演は、いずれも非常に得難い内容であると聴衆に好評でした。

その後、５月３日の憲法記念日には、大学人や宗教人による９条の会と連携して、野外の会場で市民集会を開き、３０００人以上の人を集めました。作家による講演のほか、コメディアンによるコント、諸団体や文化人からの声明があり、集会後には１０００名以上の人がデモ行進に参加してくれました。

さらに、２００５年が終戦後６０周年にあたること、日本の終戦記念日（韓国の光復節）が８月１５日であることから、夏にかけては市民の戦争体験ききとりキャンペーンを行っています。７月に戦争体験ホットラインとして電話で、市民から体験を集め、４０件の電話がありました。その中には、今まで人に話したことがない親族による大陸での残酷な行為について話をしてくれる人もありました。

これらの戦争体験をとくに若い弁護士に、聴き取って書くという作業を行うとともに、８月１２日には戦争体験を語り継ぐ会として、従軍経験のある弁護士も含め、戦争体験のある人７名から体験を聴く催しを企画しています。

大阪弁護士９条の会は、今後も、賛同を集めるとともに、ほかの９条の会とも連携しながら、日本を再び戦争のできる国にしないために、憲法９条を変えさせない運動を続けていきます。

Lawsuit to oppose the dispatch of Self-Defense Forces to Iraq
～Confrontation with the trend of militarism～

Kimio Tsuji, Lawyer

Introduction　Lawsuit concerning Iraq and the flow of history

I held a trial to oppose the dispatch of Self-Defense Forces to Iraq in Japan. We position this trial as part of the opposition to Prussianization, peace movement, and movement to support the current Constitution. I want to state briefly the significance of this trial in the historical process.

1　Second World War and pacifist Constitution…The birth and transition

Japan carried out military aggression for colonial rule and caused tremendous damage to the people of Asia and the world, and then accepted defeat in 1945 in the situation where the inside of Japan was also tragic. And rare worldwide pacifist constitution was established in recognition of the responsibility as victimizer and horror of war.

This constitution is criticized as having been pressed by the U.S.A., having deflated the spirit of Japan. However, it can be recognized that popular sovereignty, respect for fundamental human rights, and pacifism, which are characterized as the pillars of the constitution, have taken root in people and formed the principle course of Japan.

Declaration of demilitarization by the constitution is believed to make a great contribution to the fact that Japanese have neither killed foreign citizens nor been killed by military strength for sixty years since the end of the Second World War, in addition to the deterrence of the Japan-US Security Treaty.

However, the government view on the maintenance of military strength has been altered repeatedly, and currently Self-Defense Forces with world-class military capacity exists. The government view on armaments or their utilization has also been changed repeatedly. Exercise of the right of collective self-defense and dispatch of Self-Defense Forces abroad, however, are recognized as impossible under the current constitution even by the government view most widely interpreted.

2　Rise of militarism and Constitution…Conservatism in Japan and trend of public opinion

Hawkish politicians, scholars, and mass media have proposed the establishment of a voluntary constitution that authorizes the maintenance of armed forces and emphasized democracy. Nevertheless, they started to chorus that the current constitution was the most significance source of the flaccidness of the Japanese, with no diplomatic

power when September the 11th in the U.S.A. and abduction cases by North Korea occurred. They began to blame such scandals as the breach of trust in the company and decay of education, at the end, even the recession on the current constitution, and consequently make the situation possible to represent the revision of the constitution.

Currently about ninety percent of Diet members approve some sort of revision of the constitution, and major parties are going to draw up a draft of constitutional revisions, respectively. A poll also shows that the number of people who approve the revision of the constitution seems to be more than that of opponents but the number of people who oppose the revision seems to be slightly more than that of supporters concerning Article 9 of the Constitution.

Many people previously opposed the revision of Article 9 of the Constitution based on the viewpoint of unarmed neutrality. Lately opponents include a significant number of people who oppose the revision of Article 9 of the Constitution on the grounds that Self-Defense Forces for an exclusively defense-oriented policy are necessary; such Self-Defense Forces are acceptable under the current constitution; Japan will invade other countries if Article 9 of the Constitution is revised.

Things need to be promoted paying close attention to the fact that public consciousness supporting Article 9 of the Constitution also involves fundamental change.

3 Dispatch of Self-Defense Forces to Iraq…Following the invasion by the U.S.A. based on fabrication

The United States went ahead and used armed force on the grounds of fabricated reasons that Iraq had weapons of mass destruction and chemical weapons. Japanese Prime Minister Koizumi also trusted the opinion of the U.S.A. as a public position and dispatched the Self-Defense Forces to Iraq upon the request of the U.S.A.

Even the government states that the interpretation of the Japanese constitution makes it impossible to dispatch the Self-Defense Forces abroad. Consequently, this dispatch was implemented after the Self-Defense Forces Law was revised, and therefore, the humanitarian dispatch of Self-Defense Forces to non-combat areas and international contributions became constitutional.

Heavy criticism of the dispatch, which overly disrespects the constitution even in consideration of the Japanese economy and military affairs, which is dependent on the U.S. and international relationships, is sparked in Japan.

4 Filing of lawsuit to oppose the dispatch of Self-Defense Forces to Iraq…In eleven courts across the country

Many people are furious at the overly one-way hawkish statements and actions,

such as the rise of militarism, movement to revise the Constitution, and nationalistic claims; however, people cannot find a way nor do they know what to do. Under such circumstances, I got the idea of a trial because the Diet and government were preoccupied with the militarist stance as if they caught a fever, and I expected the judicial system was the final frontier.

With such a national desire, twelve lawsuits to oppose the dispatch of Self-Defense Forces to Iraq are being filed in eleven district courts across the country: eleven prefectural and city governments including Sapporo, Sendai, Tochigi, Yamanashi, Tokyo, Shizuoka, Nagoya, Kyoto, Osaka, Okayama, and Kumamoto from north to south. The number of plaintiffs and lawyers as representatives are about 6000 and about 800, respectively.

5 Issue of trial…Infringement of concrete rights

Unconstitutionality and illegality of dispatching the Self-Defense Forces, atrocities and damages in Iraq, and infringement of rights of plaintiffs become problems in the trial.

Infringement of the rights of a plaintiff is the most controversial among these issues. It is regulated in Japan that a trial needs controversy, that is to say, a trial is held only if a dispute, which means the presence or absence of infringement of concrete rights, exists.

For that purpose, the state only claims in the account that plaintiffs lack eligibility as plaintiffs and credentials to hold a trial because the Self-Defense Forces have just been to Iraq and are not involved in any activities that cause injury to the Japanese and the plaintiff thus the rights of plaintiffs are not infringed. Actually, with respect to past trials related to the Self-Defense Forces, the court has applied this logic, has not authorized the plaintiff to hold a trial, and has given repeated judgments of rejection.

Toward these traditional stances of the state and court, the plaintiffs exercise various ingenuities and will work around the problem.

We claim that people have the freedom and the right to be neither victim nor victimizer placing the peaceful right to exist in the center of rights because the peaceful right to exist is authorized in express terms in the preceding sentence of the constitution, and abandonment of armed forces and respect for human rights are authorized in Article 9 of the constitution and other articles, respectively, as concrete ways of the peaceful right to exist. We also claim that, especially this time, armed Self-Defense Forces entering a partner country infringes the human rights of people of the partner country with the U.S. and the risk of terrorism against Japanese also increases.

Additionally in the Osaka trial, we have two Iraqis joining the plaintiff and

intending to prevent the judgment of rejection, that no human rights are recognized, by demanding damages caused by the concerted illegal activities of Japan and the U.S.

6 Limit of judge…How to treat the judge who runs away from the constitution

Japanese judges are regarded as earnest and noble and that can be said to be an estimable fact. They have a strong feeling that they do not want to relate to political matters; however, they are largely disposed to stand apart from and evade political matters. This bureaucratic tendency and ostrich policy bring results that do good to the strong and powerful and grind the weak and citizens. The judges also try to neither face the constitution squarely nor take a stand for public requests for the Iraqi lawsuit. They single-mindedly frazzle their nerves away weaseling out of the issue, regarding something as unrelated to their own operations. Although they face these obvious violations of the constitution and disastrous results, they interpret the constitution and law as meaning that it is allowed to do nothing in those cases. They cling to the rejection on the grounds that the plaintiff has no right to hold a trial without questioning a witness.

In other trials, for instance, in the lawsuit to claim the unconstitutionality of visiting the Yasukuni Shrine in an official capacity, judges devote their energy to avoid making a judgment on constitutional problems. The only judge in the Fukuoka District Court, who determined that official visits to Yasukuni Shrine by politicians were unconstitutional, wrote a will and handed down a judgment in case anything goes wrong. To that extent, Japanese judges are incorporated in the country's control.

In the Iraqi lawsuit in Yamanashi Prefecture, adoption of a witness was rejected this July and the case was shortly closed. The judges ignored the painful request of the plaintiff and gave up bothering themselves and thinking. The plaintiff from Yamanashi Prefecture laments that the death of the judiciary was shown in front of his eyes.

How to treat judges who run away from the constitution is the greatest challenge.

In Japan, institutional reform has been promoted to some extent aiming at judicial reform for citizens; however, the ideal situation of the judges is left unsolved. This is very difficult and may be resolved only in social structure and culture as a whole, not a piece of problems for reform.

7 Future prospects…International coalition and conformation of public opinion

Current situation cannot be left unsolved even though it is difficult to salvage the situation. It is necessary to exercise various judicial ingenuities and change social conditions, as well as to approach the court. As one of the momentums, the deadline for the period to dispatch the Self-Defense Forces to Iraq will come in December; however, the extension of time should not be done.

It emerged that there are no weapons of mass destruction, which were the reasons for attacking Iraq, and the dispatch of U.S. troops to Iraq was the strategy for the rights and interest in oil and to rule over the Middle East. Originally, France, Germany, China, and Russia did not join the war with Iraq and half of the countries that joined the war have already withdrawn.

The invasion of Iraq is said to be one of the causes of terrorism in Britain.

Half of U.S. public opinion is also said to support the withdrawal from Iraq.

Why are the Japanese Self-Defense Forces stationed in Iraq amid the increase of these negative factors?

We think that we would put together a brochure including the above and deliver it widely, have a rally within the Diet, and appeal to Diet members to withdraw from Iraq.

I think that things will go for the better if international information exchange and coalition are conducted concerning these things.

자위대 이라크 파병 반대 소송

…군국주의 풍조과 대결

변호사 **辻** 公 雄

서문. 이라크 소송과 그 역사의 흐름

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1. 제2차 세계대전과 평화 헌법…그 탄생 및 변천

식민지 지배를 위하여 무력 침략을 한 일본은 아시아, 그리고 세계 사람들에게 다대한 피해를 주었습니다. 또 국내에도 비참한 상황으로 빠져간 1945년에 일본은 패전을 맞이하였습니다. 이후 가해자로서의 책임이나 전쟁의 참화 인식 속에서 일본에서는 세계에도 드문 평화헌법이 만들어졌습니다.

이 헌법에 대해서는 미국이 밀어붙인 헌법이고, 일본의 혼을 빼버린 것이라는 비판도 있지만 헌법의 기둥인 「국민 주권」「기본적 인권의 존중」「평화주의」는 국민에게 정착해서 일본의 이념과 진로를 만들어왔다고 할 수 있습니다.

전후 60년간 일본이 군사력으로 외국인들을 죽인 적도 또 죽음을 당한 적도 없는 것은 일미안전보장조약에 의한 억지력 때문이라기도 하지만 헌법의 비무장선언도 크게 이바지했다고 생각합니다.

그러나 군사력을 보지하는 것에 대해서는 정부의 견해가 몇 번도 개변되어 현재는 세계 유수의 군사력을 가진 자위대가 존재합니다.

군비 내지 그 활용에 대해서도 정부의 견해는 변천해왔습니다. 그러나 가장 넓게 해석한 정부 견해더라도 집단적 자위권의 행사, 자위대의 해외 파견에 대해서는 현재 헌법상 불가능하다고 되어 있습니다.

2. 군국주의의 대두와 헌법…일본 보수주의와 세론의 동향

이전부터 매파의 정치가나 학자, 매스컴들은 무력을 보지한 자주 헌법의 제정을 주장하여 민족주의를 강조해왔습니다. 그것은 미국의 9.11 테러, 또 북한의 납치 사건이 나타나면서 사람들은 일본인의 연약함이나 외교력의 부족함은 현 헌법이 원흉이기 때문이라고 저마다 말하게 되었습니다. 그리고 회사에서 일어난 배임등 불상사, 교육의 황폐, 심지어는 불경기까지 현 헌법

때문이라고 해서 큰 소리로 헌법 개정을 주장하게 되었습니다.

현재 국회의원 중 약 90%가 어떠한 헌법 개정에 찬성하고 또 주요 정당은 제각기 헌법개정안을 작성하고 있습니다.

세론 조사를 해도 헌법 개정에 찬성하는 편이 많다는 결과가 나오되 헌법 9 조에 대해서는 개정 반대를 하는 편이 보다 많습니다.

헌법 9 조 개정 반대 이유로서 이전에는 비무장 중립의 관점을 근거로 하는 사람들이 많았습니다. 그러나 최근에는 전수 방위를 위한 자위대는 필수이고 그러한 자위대의 존재는 현 헌법이라도 가능하다, 헌법 9 조 개정은 타국을 침략하게 될 위험이 생기기 때문에 9 조 개정에는 반대한다고 하는 사람들이 꽤 있습니다.

헌법 9 조를 지키는 국민의 의식도 근본적 변화가 나타난 시실을 주시하며 일을 진행할 필요가 있습니다.

3. 자위대 이라크 파병…날조를 근거로 한 미국의 침공에 추수

미국은 대량파괴병기나 화학병기가 이라크에 있다라는 날조된 근거 사유로 무력행사를 단행하였습니다. 그것에 따라 일본 코이즈미(小泉) 수상도 미국이 주장하는 표면상의 의견을 믿고 미국의 요청대로 자위대 이라크 파병을 행하였습니다.

일본의 헌법 해석으로서 자위대 해외 파병은 정부조차 못 한다고 되어 있으므로 이번 파병에 대해서는 비전투지역으로 보내는 인도파견이나 국제 공헌은 합헌이라고 자위대법을 개정해서 실시하였습니다.

미국에 의존하는 일본의 경제, 군사, 국제적 관계를 고려하더라도 너무나 헌법을 무시한 파병이었기 때문에 일본 국내에서는 큰 비판 소리가 일어나고 있습니다.

4. 자위대 이라크 파병 반대 소송에 대한 제기…전국 11 재판소에서

군국주의의 대두와 헌법 개정의 움직임, 민족주의적 주장 등 너무나 일방적인 매파적 발언이나 행동에 많은 국민들은 속상하면서도 무엇을 어떻게 해야 하는지 그 방법을 찾지 못했습니다. 그러한 분위기 속에서 재판이라는 발상이 나타난 것은 국회도 행정도 열병에 걸린 것처럼 군국주의적 자세로 시종했기 때문에 마지막 방법으로서 사법에 기대한 결과였습니다.

그러한 국민적 욕구 속에서 자위대 이라크 파병 반대 소송은 전국 11 군데 지방재판소에서 12 건 행하고 있습니다. 북쪽에서 삿뽀로(札幌), 센다이(仙台), 토치기(栃木), 야마나시(山梨), 도쿄(東京), 시즈오카(静岡), 나고야(名古屋), 교토(京都),오오사카(大阪),오카야마(岡山),쿠마모토(熊本)인 11 도도부현(都道府県)입니다. 원고는 약 6000 명, 대리인 변호사는 약 800 명입니다.

5. 재판의 과제…구체적 권리의 침해성

재판에서는 자위대 파병에 대한 위헌・위법성, 이라크에서의 잔학한 행위와 피해, 원고들의 권리 침해등이 문제로 됩니다.

이 중에서 가장 문제가 되는 것은 원고 권리의 침해성입니다. 일본에서는 재판은 쟁송성이 필요하다, 즉 구체적 권리의 침해 유무 또는 분쟁이 있을 때만 행한다는 규정으로 되어 있습니다.

그러므로 나라의 답변은 자위대는 이라크에 가 있을 뿐, 일본 국민, 원고들에게 어떤 가해 행위도 주지 않았기 때문에 원고들은 권리를 침해되지 않았고, 따라서 원고 적격은 없다, 즉 원고는 재판을 할 자격이 없다는 주장만 합니다. 실제로 지금까지 자위대에 관한 재판을 보아도 재판소는 이 논리에 따라 원고의 재판 자격을 인정하지 않았고 계속 각하의 판결을 내렸습니다.

이러한 종래부터의 나라 및 재판소의 자세에 대하여 원고쪽은 여러가지 궁리하면서 대항합니다.

권리성의 중핵에 평화적 생존권을 두고 있습니다. 평화적 생존권은 헌법 전문에서 명문으로 인정되어 있고, 그 구체적 방법으로서 헌법 9 조에서 무력 방기, 다른 조문에서 인권 존중으로서 인정되어 있고, 거기에는 피해자도 가해자도 되지 않는 자유와 권리가 있다고 주장합니다. 특히 이번 경우에는 상대국에 무장한 자위대가 몰려갔으므로 미국과 함께 상대국 국민의 인권을 침해해서 일본 국민에게 테러 위험도 증대되었다고 주장합니다.

더욱 오오사카 재판의 경우 이라크인 2 명이 원고로 가입되고 일미공동으로 된 불법 행위에 의한 손해배상을 청구하는 것으로써 구체적 권리가 없다는 각하 판결을 방지하려고 합니다.

6. 재판관의 한계…헌법에서 도망하는 재판관과 어떻게 대할까

일본의 재판관은 성실하고 고결하다고 합니다. 그것은 평가하는 사실이라고 할 수 있습니다.

그러나 그들은 정치적인 것에 관여하고 싶지 않다는 심정이 강하고 정치적인 것에서 거리를 두거나 회피하려고 하는 성벽이 크게 보입니다.

이러한 관료성・무사안일주의는 결과적으로는 강자・권력자에게 이익을 주고 약자・시민을 시달리게 하는 결과를 초래합니다.

이라크 소송에 있어서도 헌법을 정면에서 직시하는 노력도 하지 않고 국민의 요망에 몸을 두지도 않습니다. 오로지 자신의 업무와 관계 없다고 피하기에 부심합니다. 이렇게 명백한 헌법 위반과 비참한 결과에 직면하면서도 그들은 헌법도 법률도 아무것도 하지 않아도 된다고 쓰여 있다고 해석하고 마는 것입니다. 증인을 잘 알아보지도 않은 채 원고에게 재판을 할 자격이 없다고

각하하는 방식에 매달리고 있습니다.

다른 재판, 예를 들자면 야스쿠니신사(靖国神社) 참배 위헌 소송에 있어서도 재판관은 헌법 판단을 피하기에 전력을 줍니다. 유일하게 야스쿠니 참배는 위헌이라고 판단한 후쿠오카(福岡)지재 재판관은 만일을 생각해서 유서까지 써서 판결을 내렸다고 합니다. 그럴 정도까지 일본의 재판관은 나라의 통제 속에 편성되어 있습니다.

이라크 소송에 있어서도 야마나시현의 소송에서는 이번의 7 월에 증인 채용을 각하하여 바로 결심되었습니다. 원고의 비통한 호소에도 마이동풍으로 흘려버리고 스스로 고민하고 생각하는 것을 방기한 재판관이었습니다. 야마나시현의 원고는 사법의 죽음을 눈 앞에서 보았다고 슬퍼하였습니다.

헌법에서 도망하는 재판관, 이러한 사람들과 어떻게 대해야 할지 앞으로 가장 큰 문제가 됩니다.

일본에서는 시민을 위한 사법 개혁으로서 제도적 개혁은 어느 정도 진행되었으나 재판관의 자세 문제에 대해서는 방치된 채로 되어 있습니다. 이 문제는 굉장히 어려운 것이므로 일편의 개혁 문제가 아니라 사회구조, 문화 전체 속에서 밖에 해결 못하는 문제일 지도 모릅니다.

7. 이후의 전망…국제적 연계와 세론 만들기

상황을 타개하기가 어렵다고 해도 그냥 방치해 둘 수 없습니다. 재판상 여러가지 궁리하면서 재판소에 다가가는 것과 함께 사회적 정세를 바꿔가는 것이 필요합니다. 그 하나의 계기로서 12 월에 오는 자위대 이라크 파병 기한을 연장하지 못하도록 저지하는 일이 있습니다.

이라크 공격의 근거로 된 대량파괴병기등은 이라크에 존재하지 않아 미국의 이라크 파병은 석유 이권이나 중동 지배를 위한 전략이었다는 사실이 밝히게 되었습니다. 그리고 원래 프랑스, 독일, 중국, 러시아는 참전하지 않았고 또 참전한 나라의 반은 이미 이라크에서 철퇴하였습니다.

영국에서 일어난 테러도 이라크 침략이 원인의 하나라고 합니다.

미국에서도 세론의 반은 이라크 철퇴를 말하고 있습니다.

이러한 마이너스 요인이 증가되고 있는 속에서 일본이 이라크에 주류해야 하는 이유는 어디에 있습니까.

우리는 이러한 사실들을 쓴 팜플랫을 만들어 넓게 배포하면서 국회내에서 열린 집회 때 국회의원들에게 이라크 철퇴를 호소하려고 합니다.

이러한 일에 대하여 서로 협력해서 국제적 정보 교환을 할 수 있다면 사태는 더욱 좋은 방향에 갈 수 있으리라고 생각합니다.

自衛隊イラク派兵反対訴訟

…軍国主義風潮に対決

弁護士 辻　　公　雄

序　イラク訴訟と歴史の流れ

私は、日本で自衛隊イラク派兵反対の裁判をしています。私どもはこの裁判を軍国主義化への反対、平和運動、護憲運動の一環として位置づけています。歴史的経過の中でのこの裁判の意義を簡単に申し述べたいと思います。

一　第２次世界大戦と平和憲法…その誕生及び変遷

植民地支配のために武力侵略をした日本は、アジアそして世界の人々に多大の被害を与え、日本国内も悲惨な状況に陥る中で１９４５年に敗戦を迎えました。そして、加害者としての責任、戦争の惨禍の認識の中で、世界にも稀な平和憲法が作られました。

この憲法については、アメリカの押しつけ憲法であり、日本の魂を抜いてしまったものなどという批判もありますが、憲法の柱といわれる「国民主権」「基本的人権尊重」「平和主義」は国民に定着し、日本の理念と進路をつくってきたといえます。

戦後６０年間、日本が軍事力で外国人を殺したことも、また殺されたこともないのは、日米安全保障条約による抑止力もありますが、憲法の非武装宣言が大きく貢献していると思われます。

しかしながら、軍事力の保持については、政府の見解が何度も改変し、現在では世界有数の軍事力をもつ自衛隊が存在しています。

軍備ないしその活用についても政府の見解は変遷してきましたが、最も広く解釈した政府見解でも、集団的自衛権の行使、自衛隊の海外派遣は現在の憲法上できないとされています。

二　軍国主義の台頭と憲法…日本の保守主義と世論の動向

以前より、タカ派の政治家や学者、マスコミは武力を保持した自主憲法の制定を唱え、民族主義を強調していました。それがアメリカの９．１１テロや北朝鮮の拉致事件が生じるに至り、日本人の軟弱さや外交力のなさは現憲法が元凶であると合唱しはじめました。会社での背任などの不祥事、教育の荒廃、果ては不況までが現憲法のせいだと言い出し、憲法改正を声高に唱えられる状態になっています。

現在では、国会議員の約９割は何らかの憲法改正に賛成しており、主要政党は各々憲法改正案を作成しつつあります。

世論調査でも憲法改正賛成の方が多いようですが、憲法９条については改正反対の方が少しは多いようです。

憲法９条改正反対の理由として、以前は非武装中立の観点を根拠にしている人が多かったのですが、最近は専守防衛のための自衛隊は必要であり、それは現憲法でも可能である、憲法９条を改正すれば他国へ侵略することになるので９条改正に反対という人がかなり含まれています。

憲法９条を支える国民の意識にも根本的変化があることを注視して、ことを進める必要があります。

三　自衛隊のイラク派兵…捏造を根拠にしたアメリカの侵攻に追随

アメリカは、イラクに大量破壊兵器や化学兵器があるという捏造された根拠事由で武力行使に踏み切り、日本の小泉首相もアメリカの建前の意見を信用し、アメリカの要請に応じて自衛隊のイラク派兵を行いました。

日本の憲法解釈として、政府でさえ自衛隊の海外派兵はできないとしていますので、今回の派兵については、自衛隊法を改正し、非戦闘地域への自衛隊の人道派遣や国際貢献は合憲であるとして、実施となりました。

日本のアメリカ依存の経済や軍事、国際的関係を考慮しても、あまりに憲法を無視した派兵に日本国内では大きな批判が生じています。

四　自衛隊イラク派兵反対訴訟の提起…全国１１の裁判所で

軍国主義の台頭と憲法改正の動き、民族主義的主張など、あまりに一方的なタカ的発言や行動に多くの国民は腹をたてつつも、何をどうしたらよいのかの手立てが見つかりませんでした。そのような中で、裁判という発想がでてきたのは、国会も行政も熱病にかかったかのように軍国主義的な姿勢に終始しており、最後の砦として司法に期待したからです。

そのような国民的欲求の中で、自衛隊イラク派兵反対訴訟が全国１１ヶ所の地方裁判所で１２件の裁判が行われています。北から札幌、仙台、栃木、山梨、東京、静岡、名古屋、京都、大阪、岡山、熊本の１１都道府県です。原告は約６０００人、代理人弁護士は約５００人です。

五　裁判の課題…具体的権利の侵害性

裁判では自衛隊派兵の違憲・違法性、イラクでの残虐な行為と被害、原告らの権利侵害が問題となります。

この中で最も問題となるのが原告の権利の侵害性です。日本では、裁判は争訟性が必要、即ち、具体的権利の侵害の有無、紛争がある時のみ行われるという規定になっています。

そのため、国の答弁は、自衛隊はイラクへ行っているだけであり、日本国民、原告らに何ら加害行為を行っておらず、原告らは権利を侵害されていないので原告適格がない、裁判をする資格がないという主張のみをしています。現に今までの自衛隊関係の裁判についても、裁判所はこの論理に乗り、原告の裁判資格を認めず、却下の判決を繰り返してきました。

このような従来からの国及び裁判所の姿勢に対して、原告側は様々な工夫を凝らしてやっています。

権利性の中核に平和的生存権を据え、平和的生存権は憲法前文で明文として認められており、その具体的方法として憲法９条で武力放棄、他の条文で人権尊重として認められており、被害者にも加害者にもならない自由と権利があると主張しています。特に今回は、相手国へ武装した自衛隊が乗り込んでおり、米国と共に相手国の国民の人権を侵害し、日本国民へのテロの危険も増大させていると主張しています。

更に、大阪の裁判では、イラク人２名に原告に加入してもらい、日米共同での不法行為による損害賠償を請求することにより、具体的権利がないとする却下判決の防止を狙っています。

六　裁判官の限界…憲法から逃亡する裁判官をどうするか

日本の裁判官は真面目で高潔であると言われており、その事は評価すべき事実であると言えます。

しかし、政治的なことにかかわりたくないという気持ちが強く、政治的なことからは距離をおいたり回避しようとする性癖が大です。

これらの官僚性・事なかれ主義は、結果的には強い者・権力者を利し、弱い者・市民を虐げる結果を招いているのです。

イラク訴訟においても、憲法を正面から見つめようとせず、国民の要望に身を置こうともしないのです。ひたすら、己の業務には関係のないことと逃れることに腐心するのです。これだけの明白な憲法違反と悲惨な結果に直面しながら、憲法も法律も何もしないで済むように書いてあると解釈してしまうのです。

証人調べもせず、原告に裁判をする資格はないからと却下することにかじりついているのです。

他の裁判、例えば靖国神社参拝違憲訴訟においても、裁判官は憲法判断を避けることに全力を注いでいます。唯一、靖国参拝は違憲だと判断した福岡地裁の裁判官は、万一のことを考え、遺書まで書いて判決をしたということです。そこまで、日本の裁判官は国の統制の中に組み込まれているのです。

イラク訴訟においても山梨県の訴訟では、この７月に証人採用を却下し、すぐ結審してしまいました。原告の悲痛な願いにも馬耳東風で、自ら悩むこと、考えるこ

とを放棄した裁判官です。山梨県の原告は司法の死を眼前で見せられたと嘆いています。

憲法から逃亡する裁判官、これをどうするかが最大の課題です。

日本では市民のための司法改革ということで、制度的改革はある程度進みましたが、裁判官のあり方については放置されたままです。これは大変難しいことであり、一片の改革の問題ではなく、社会構造、文化全体の中でしか解決できないのかもしれません。

七　今後の展望…国際的連携と世論作り

情況打開が難しいといっても放置しておくことはできません。裁判上の種々な工夫を凝らして、裁判所に迫っていくと共に、社会的情勢を変えていくことが必要です。その一つの契機が、自衛隊のイラク派兵期間期限が１２月に到来しますが、その延長をさせないことです。

イラク攻撃の根拠となった大量破壊兵器等が存在せず、米国のイラク派兵は石油利権や中東支配の戦略であったことが明らかになりました。元々、フランスやドイツ、中国、ロシアは参戦しておらず、また、参加した国の半分は既に撤退しています。

イギリスでのテロもイラク侵略が原因の一つと言われています。

アメリカでも世論の半分は、イラク撤退と言われています。

このようなマイナス要因が増えている中で、日本はどうしてイラクに留まる理由があるのでしょうか。

我々は、これらのことをパンフレットにして広く配布し、国会内で集会を開いて国会議員にイラク撤退を訴えていきたいと考えています。

これらのことについて、国際的情報交換と連携が行われれば事態は一層良い方向に進むのではないか考えています。

Relocation of Futenma Air Station to an Offshore Site

Yutaka Kato,
Okinawa, July 3, 2005

I. US military bases in Okinawa

Currently US military bases cover about 237 km^2 of Okinawa Prefecture. On the main island of Okinawa the bases cover 18.8% of the island's total area. Indeed, Okinawa hosts 75% of the facilities dedicated to US troops stationed in Japan pursuant to the Japan-US Security Treaty.

US military bases in Okinawa were created by expanding Imperial Japanese military bases that were seized in the 1945 occupation, or by building new bases on forcibly taken private land. These clearly violated the Hague Convention because they exceed the purpose of the occupation. In its occupation of Okinawa the US military continued building new bases one after another until about 1955 merely on the issuance of orders. But instead of rectifying this illegal situation in 1972 when Okinawa reverted to Japan, the Japanese and US governments retroactively sanctioned this illegal seizure of land, and since then the Security Treaty has allowed the stationing of troops there.

II. Futenma Air Station relocation plan

1. History of Futenma Marine Corps Air Station

Futenma Marine Corps Air Station in Ginowan City, Okinawa Prefecture, is a Marine Corps air base build when the US military took possession of private land at the time Okinawa was occupied. It covers 480 ha and has a 2,800 m runway.

High-density housing now takes up the area around Futenma Air Station because when the people who lived in this area before the war came back from internment camps they built this urban district. Therefore removal of this base has been a major item on the political agenda for quite some time because of reasons including the noise damage to areas near the base and the frequent crashes of US military helicopters stationed here.

2. Agreement to return Futenma Air Station, and the relocation plan

The September 1995 rape of an elementary school girl by three marines in Okinawa triggered an upsurge in the opposition movement to US military bases. In response, the Japanese and US governments established the Special Action Committee on Okinawa (SACO) to explore the issue of reducing the US military presence in Okinawa, and in December 1996 SACO reached an agreement that Futenma Air Station would be returned on the condition that a substitute facility is provided. In December 1999 Japan's Cabinet decided that as this replacement facility it would build an offshore base near the east coast at Henoko near Nago City in the northern part of Okinawa Island.

After that decision the Japanese government held talks with the affected municipalities, and in September 2002 decided on a basic plan for this offshore base, which calls for a runway whose center is about 2.2 km from the central part of Henoko Village, and built on a reef out in the Ocean. If this base is completed, it will occupy the entire horizon off the coast of Henoko, which is situated between two small capes.

III. Problems with the Henoko relocation plan

1. First US base construction since the reversion of Okinawa

As noted above, all US bases in Okinawa were built on land seized from the people who lived there. Most Okinawans know from their memory of losing well over 100,000 of their people in the Battle of Okinawa that the military is certainly not there to protect them, and they are distressed that US military bases in Okinawa are attack bases used by the US military for its unlawful acts in Asia. Hence there is in the first place strong opposition to allowing the construction of a new advanced US military base.

2. Heavy environmental damage

(1) The natural environment at the planned construction site

Okinawa has some old relict plant and animal species that originate on the Chinese mainland and many endemic species, making it a biogeographically singular region. Development in recent years has severely impacted these valuable species, but despite this crisis situation, the natural environment on land and sea at the construction site is in miraculously good condition.

This area in fact is the world's northernmost habitat of the dugong, a large marine mammal, and the only dugong habitat in Japan. Dugongs once existed in large numbers from Amami Oshima Island southward, but now a population of only several tens of individuals inhabits the area from central to northern Okinawa Island, including the proposed construction site. Therefore the dugong is designated as a natural monument under the Cultural Properties Law, as an internationally rare species under the Law for the Conservation of Endangered Species of Wild Fauna and Flora, as a protected animal under the Wildlife Preservation and Game Act, and as a species whose capture is banned under the Law for Conservation of Aquatic Resources.

The construction site area has a reef that is home to coral communities, which are now few around Okinawa Island, and inside the reef are seaweed beds of eelgrass and other sea grasses. Seaweed communities serve as spawning grounds for marine life and nursery areas for fry, and are therefore vital for the preservation of marine ecosystems. Seaweed is also food for dugongs and sea turtles.

(2) Environmental damage by offshore base construction

Broad land reclamation in the reef area would directly damage the reef and seaweed beds, while the soil runoff from construction would be a crushing blow to eelgrass and other marine flora because they need sunlight.

Seaweed grows in the planned reclamation area and its corresponding area near shore, and dugong behavior is to cross the reef to move between the inside and outside areas. Because the seaweed beds are important feeding grounds to the dugongs, there is concern that their disappearance would rob the dugongs of a food source and have a serious negative impact on them.

There are also concerns about noise and vibration, and marine pollution from jet fuel, wash water, and other substances, and other impacts from military airfield operation. In particular, it is said that a new type of tiltrotor aircraft called the Osprey would be deployed at this offshore base, which raises concerns about more serious noise pollution damage.

There are also worries about the impacts on local economic activities such as fishing and ecotourism.

For these reasons there have been declarations of opposition to the offshore base construction from research organizations such as the Ecological Society of Japan and the The

Mammalogical Society of Japan, as well as environmental organizations and other groups. In November 2004 the Third IUCN World Conservation Congress in Bangkok adopted a recommendation by majority vote, as at the previous congress, asking the Japanese and US governments to protect the Japanese dugong, Pryer's woodpecker (*Sapheopipo noguchii*), and the Okinawa rail (*Gallirallus (Rallus) okinawae*), and the congress also recommended that the environmental impact assessment on the plan to build the airstrip examine multiple alternatives including the zero option.

IV. Current situation

1. State of progress in the relocation plan

Because this relocation plan is subject to the Environmental Impact Assessment Law, the Defense Facilities Administration Agency started pre-project environmental impact assessment (EIA) procedures in April 2004. As these procedures are anticipated to take about three years, project approval and the start of construction would likely come after that.

Meanwhile, the Naha Regional Defense Facilities Administration Bureau is attempting to carry out a boring survey and other operations in the site without waiting for the assessment, saying this was an on-site technical survey to consider the shore protection structure for the offshore base. The boring survey will supposedly be a geological study that will bore in 63 locations in the site over about six months, and will also conduct other tests such as seismic exploration.

2. Problems with the boring survey

The government claims that there are no legal problems with the boring survey because it is just a preliminary study, but EIA experts point out that performing the boring survey before the assessment violates the EIA Law because assessments are supposed to be done before any environmental changes by a project.

Natural scientists also express concerns about the boring survey. Toshio Kasuya, a professor at Teikyo University of Science & Technology who is a dugong researcher, makes an issue of the noise and other impacts of the boring survey and its attendant seismic exploration, and offers these observations: "The idea [of project proponents] that the base may be accepted because the survey will have little deleterious effect on the dugongs jeopardizes the preservation of Okinawa's dugongs," and "In view of factors including the crisis state of Okinawa's dugongs, public opinion, debate in the Diet, and laws pertaining to dugong protection, those who propose this project have the responsibility to prove that it is harmless to the dugongs."

Because the construction site overlaps with seaweed beds that serve as dugong feeding grounds, as stated above, the project represents a direct and serious danger to dugong feeding areas.

3. The continuing opposition movement and changes in public opinion

Despite such problems being pointed out, on April 19, 2004 the Naha Regional Defense Facilities Administration Bureau tried to go ahead and start the boring survey, but was unable to do so because of the strong resistance it met from citizens who staged a sit-in in Henoko Fishing Port. For a time after that, citizen protest actions against the Bureau, which tried to start the survey, resulted in a stalemate.

However, on August 13 a CH-53D US Marine helicopter crashed on the grounds of Okinawa International University in Ginowan City, which further raised awareness on the

danger of Futenma Air Station and elicited renewed calls from Among Okinawans to quickly remove the facility. The Naha Regional Defense Facilities Administration Bureau then turned this to its own advantage, on September 9 starting the boring survey that had been blocked by protesters, and set to work on the underwater survey for scaffolding installation. Instead of using Henoko Fishing Port, where protesters were holding a sit-down blockade, the government used the underhanded tactic of hauling the materials from a distant port.

But due to citizen blockage efforts at sea, as of July 2005 the Naha Regional Defense Facilities Administration Bureau has succeeded in setting up scaffolding for boring in only four locations, and boring itself has been totally blocked. Protesters have occupied the area at sea continuously for over 15 months, and are still there even on rainy days and holidays, absenting themselves only when a typhoon comes. These people include not only Henoko citizens in their 70s and 80s, and people associated with the campaign in Okinawa, but also people who have previously had nothing to do with citizen campaigns. In addition to port sit-ins ranging from several tens to several hundred people, protesters are also blocking the government at sea in canoes and fishing boats. At first there was only one fishing boat at sea, but there has been a steady increase in fishers and organizations renting boats as the campaign progresses.

This campaign could be considered the first instance of a coalition between the anti-base peace movement, which has always been a conscious effort in Okinawa, and the environmental movement, which has been relatively unnoticed. Many kinds of people come to Henoko out of concern for this issue, such as people who became interested and brought their families after reading about it in the newspaper. There are various motives including the feeling that bases are unnecessary, and the will to protect the beautiful sea and the dugongs, but all people are linked by a common purpose. In late 1999 when Governor Inamine announced acceptance of the base, a feeling of stagnation fell over the campaign, but one could say the Henoko style is bringing forth a new campaign.

Under this prevailing situation, it is clear that public opinion in Okinawa wants not only the closure of Futenma Air Station, but also no relocation to Henoko. According to a public opinion poll conducted on September 11 and 12, 2004 by the *Okinawa Time*s and the *Asahi Shimbun*, 81% of Okinawans oppose the relocation, while the percentage in favor had fallen to 10% (*Okinawa Times*, September 15, 2004 morning edition).

4. Lawsuits and other initiatives

(1) Dugong lawsuit in the US

Efforts opposing construction of the offshore facility include a dugong lawsuit in the US led by a counsel from Osaka. This lawsuit was filed in October 2003 in San Francisco Federal Court jointly by the dugong counsel and an American environmental organization. This lawsuit contends that the base construction plan violates the US National Historic Preservation Act (NHPA), which requires that advance consultations by the government are required when actions of the US federal government could affect the historical legacy of another country. In this case there was no consultation even though the dugong is covered by Japan's Cultural Properties Law.

The Pentagon, which is the defendant, argues that the case should be dismissed because, among other reasons, the NHPA is not applicable to Japan's dugong, but in March 2003 the court turned down the Pentagon's motion and decided to start the trial.

(2) Lawsuit for an injunction on the boring survey

In December 2004 a counsel from Okinawa Prefecture filed a lawsuit in Naha District Court, seeking an injunction on the current boring survey on the grounds of local people's rights, including the right to live in peace, environmental rights, and personal rights. This lawsuit is currently hearing the oral arguments of both sides.

5. Review of the relocation plan

The return of Futenma Air Station, which is contingent on the facility's relocation, was originally to be accomplished within five to seven years, but already eight and one-half years have elapsed since the return agreement reached in July 2005. Further, completion of the offshore facility was originally estimated to take 15 or 16 years owing to its size and to the difficulty of the reclamation in the open ocean.

In addition, at first the Japanese and US governments said nothing at all about reviewing the plan for relocation to Henoko, but since late 2004 there have been whisperings about reviews from both governments due to the strong citizen campaign and public opinion in opposition to construction.

The US is currently reorganizing its military worldwide, and the matter of overseas base closures is being explored in venues including the Overseas Base Commission (OBC) of Congress and the government's Base Realignment and Closure Commission. The OBC's May 2005 interim report discusses the need to relocate Futenma Air Station, but noting that building the new base at Henoko would require too much time and expense, it counsels against the new base and recommends dispersing Futenma to existing facilities.

Judging from these circumstances, if the opposition campaign were to weaken, Japan and the US would of course push through their policy of relocation to existing facilities, but the prospects are good for stopping new base construction.

V. Summation

Considering the fact that Futenma Air Station is a Marine Corps base, and the role of the Marines is US aggression throughout the world, closing this Marine air base in Okinawa would be a milestone event not only to the safety of Okinawans, but also to international society and its hope for peace. We in Okinawa intend to spare no effort until achieving victory.

沖縄の米軍普天間飛行場の海上移設問題

２００５／７／３　沖縄　加　藤　　裕

第１　沖縄の米軍基地

現在，沖縄県には約２３７㎢の米軍基地があり，沖縄本島だけに限ってみると島の面積の１８．８％を米軍基地が占めている。日米安保条約に基づき日本に駐留している米軍の実に７５％の専用施設が沖縄に集中している。

沖縄の米軍基地は，１９４５年の占領時に旧日本軍基地を接収して拡張したり，また，民間地域を新たに強制的に囲い込んで建設された。これらは占領目的を超えるもので，明らかなハーグ陸戦法規違反であった。さらに米軍はその後沖縄占領中に５５年ころに至るまで，一片の布令の命令によって次々と新たな米軍基地を建設したのである。しかし，７２年の沖縄の日本復帰時には，日米両政府は，この違法状態を改めるどころか土地の違法な接収の現状を追認して，以後は日米安保条約による駐留を認めることとなった。

第２　普天間飛行場移設計画

１　普天間飛行場の沿革

沖縄県宜野湾市に存する普天間飛行場は，米軍が沖縄占領時に民間地域を占領して建設された海兵隊航空基地で，480haの敷地と2，800mの滑走路を有する。

普天間飛行場の周辺には，戦前この地域に居住していた住民が収容所から帰住して市街を形成したため，周囲は高密度な住宅地域となっている。このため，近隣騒音被害が著しく，また同飛行場に所属する米軍ヘリの墜落事故が頻発するなどしていたことから，かねてよりその撤去が重要な政治課題であった。

２　普天間飛行場返還合意と移設計画

沖縄では，９５年９月に発生した海兵隊員３名による小学生暴行事件を契機に米軍基地反対運動が高揚した。その対応として，日米両国政府は在沖米軍基地の縮小問題を検討する沖縄特別行動委員会（ＳＡＣＯ）を設置し，同委員会は９６年１２月，普天間飛行場に代わる施設が提供されることを条件としてその返還につき合意に達した。この代替施設として，９９年１２月，沖縄本島北部東海岸の名護市辺野古沖に海上基地を建設することが日本政府の閣議決定とされたのである。

日本政府は，その後関係自治体との協議を続け，０２年９月，この海上基地の基本計画を決定した。基本計画によれば，海上基地は，滑走路の中心が辺野古集落の中心部から約２．２km 離れた沖合のリーフ上に位置し，埋立て面積約２０７ha，長さ約 2,500m，幅約 730m の広さで，2,000m の滑走路が予定されている。この基地が完成すると，小さな岬にはさまれた辺野古集落の目の前の海上の水平線は，すべて基地によってさえぎられることになってしまう。

第３　辺野古移設計画の問題

１　日本復帰後初めての新たな米軍基地建設

前述のとおり，沖縄における米軍基地はすべて住民から土地を強奪して建設された歴史的経緯がある。沖縄県民の多くは，十数万人の県民を沖縄戦で失った記憶から，軍隊が決して市民を守るものでないことを知っており，また在沖米軍基地がアジアでの米軍の無法行為のための出撃基地となってきていることにも心を痛めている。それゆえに，自らの意思で新たな最新鋭の米軍基地建設を容認することには，そもそも大きな反対がある。

２　自然環境の深刻な破壊

（１）海上基地予定地周辺の自然環境

沖縄には中国大陸起源の古い動植物が遺存的に残っており，また，固有種も多く，生物地理上の特異な地域であり，

生物多様性の観点から極めて重要な地域となっている。近年の開発によってこれら貴重な自然は深刻な打撃を受けているが，このような危機のもとにある沖縄においても，海上基地予定地の海域や陸域は奇跡的に良好な自然が残されている。

海上基地予定地周辺海域は，大型海洋ほ乳類であるジュゴンの地球上での生息域の北限に当たり，日本国内で唯一の生息地となっている。ジュゴンは，かつては奄美大島以南に多数生息していたが，現在では，沖縄島中部以北の本件海域等にわずか数十頭の個体群のみを残すのみとなった。このためジュゴンは，文化財保護法上の天然記念物，種の保存法上の国際稀少野生動植物種，鳥獣保護法上の保護鳥獣，水産資源保護法上の捕獲禁止対象種に，それぞれ指定されている。

予定地周辺海域にはリーフが存在し，リーフ域には沖縄島周辺で数少なくなったサンゴの群落が残存しており，リーフ内の一帯にはアマモ等（海草）が藻場を形成している。海草の群落は，海の生物の産卵場であったり，稚魚が成長する場でもあったりして，海洋生態系の保全上も，極めて重要である。また，海草はジュゴン，ウミガメの餌ともなっている。

（２）海上基地建設による環境破壊

リーフ周辺の広大な埋め立ては，直接にリーフや藻場を破壊するとともに，建設工事に伴う土砂の流出は，日光を必要とするアマモなど海草類にも壊滅的な打撃を与える。

埋め立て予定地とその陸側海域は海草が生育しており，沖縄ジュゴンは，リーフを横切り，リーフの内外を移動するという行動パターンで生活のサイクルを作っていることから，ジュゴンの餌場として重要な場所となっているが，これらが消失することによりジュゴンの採餌行動に支障を

及ぼし，生息に重大な悪影響が懸念される。

また，軍事空港としての運用による騒音・振動・ジェット燃料や洗浄水等による海洋汚染などの影響も懸念される。特に海上基地では新型垂直離着陸機オスプレイが配備されようとしており，これによる騒音被害の重大化が懸念される。

さらには，この地域における漁業やエコツーリズムなどの経済活動にも影響が心配されている。

このため，海上基地建設については，日本生態学会総会や日本哺乳類学会など研究団体や多くの自然保護団体などから反対声明がだされている。０４年１１月の国際自然保護連合（ＩＵＣＮ）第３回世界自然保護会議（バンコク）でも，前回会議に引き続き，「日本のジュゴン，ノグチゲラ，ヤンバルクイナの保全」を日米両政府に求める勧告が賛成多数で採択され，「ジュゴンの生息海域における軍民共用空港建設計画に関する環境アセスメントでは，ゼロ・オプションを含む複数の代替案を検討すること。」などが勧告された。

第４　現在の情勢

１　移設計画の進展状況

この移設計画は環境影響評価法の対象事業となるため，防衛施設庁は，０４年４月，事業に先立つ環境影響評価手続を開始した。同手続は約３年を要すると見込まれ，その終了後事業認可と着工が予想される。

他方で，那覇防衛施設局は，海上基地の護岸構造の検討のための現地技術調査と称して，環境影響評価をまたずに，予定海域付近でボーリング調査等を行おうとしている。このボーリング調査は，約半年の期間をかけて予定海域の６３カ所にボーリング調査を行って地質調査を行い，さらに弾性波探査などを加えて地質調査を行うというものである。

２　ボーリング調査の問題

政府は，ボーリング調査について，事前調査に過ぎないので法的に問題はないと主張しているが，環境アセスメントの専門家などからは，本来アセスメントは事業による環境改変行為以前になされなければならないのに，アセスメント実施前にこのようなボーリング調査を行うのは，環境影響評価法に反すると指摘されている。

さらに，自然科学者からもボーリング調査に対する危惧が表明されている。ジュゴン研究者である粕谷茂雄帝京科学大学教授は，ボーリング調査やそれに付随する弾性波探査による騒音等の影響を問題にし，「ジュゴンへの悪影響が僅かであるから受容するという（事業者らの）考え方は，いまの沖縄のジュゴンの保全にとって危険である。」「沖縄のジュゴンの危機的な現状と，国民の論調・国会での議論・ジュゴンの保護に関係する各種法令などから見て，工事提案者はジュゴンに対して無害であることを立証する責任があると考える。」と指摘している。

このボーリング調査予定地は，前述のとおり，ジュゴンの餌場である海草藻場と重なっている地域であるため，ジュゴンの餌場が直接重大な危険にされされるのである。

３　反対運動の継続と世論の変化

那覇防衛施設局は，このような問題点が指摘されているにもかかわらず，０４年４月１９日，強引にボーリング調査を開始しようとしたが，辺野古漁港に座り込む市民の強い抗議にあい，開始できなかった。その後もしばらくの間調査に着手しようとする那覇防衛施設局に対する市民らの抗議行動によって膠着状態が続いた。

ところが，同年８月１３日，宜野湾市の沖縄国際大学に米海兵隊所属ヘリコプターCH-53D が墜落した事件により普天間飛行場の危険性がますます現実のものとして認識され，県民

から普天間飛行場の早期撤去の声が挙がるや，那覇防衛施設局は，これを逆手にとって，同年９月９日，市民によって阻止されてきたボーリング調査に着手し，足場設置のための潜水調査を開始した。このときには，住民らの座り込みが続く辺野古漁港からではなく，遠隔地の港から資材を積んで出港するという卑劣な手段までとられた。

しかし，住民らの海上での阻止行動の展開により，０５年７月時点まで，那覇防衛施設局は，海上にボーリング資材設置用のやぐらを４カ所設置したのみで，掘削作業自体は完全に阻止されている。現地では１年３ヶ月以上に及ぶ毎日の座り込みと海上での阻止行動が今もなお続いている。座り込みは，台風の日以外は雨の日も休日も続けられており，辺野古の 70 代，80 代のオジイ，オバアから，県内の運動団体の関係者だけでなく，これまで市民運動とのかかわりのなかった人たちもやってきている。港での連日の数十人から百数十人の座り込みとともに，海上でもカヌーや漁船での阻止行動が広がっている。最初は海上では漁船１隻だけだったが，運動が継続するなかで船の貸出をしてくれる漁民や団体が次々と増えてきた。

この運動は，これまで沖縄で意識的に取り組まれてきた反基地平和運動と，相対的にあまり注目されてこなかった環境保護運動が初めて手を携えることとなったものといえる。辺野古を心配して集まる人たちは，新聞で関心をもって家族で訪れたりなど様々であり，また，基地はいらないという思いや美しい海とジュゴンを守りたいという思いなど動機も様々だが，共通の目標で強く結ばれつつある。稲嶺知事が基地受け入れ表明をした１９９９年末には運動内部でも沈滞ムードが生じていたのが実態であるが，辺野古のスタイルが新しい運動を作り出してきているといえる。

このような情勢のもと，県民世論も普天間飛行場の閉鎖のみならず辺野古海域への移設も望まないことは明らかになっている。例えば，０４年９月１１，１２日に沖縄タイムスと朝日新聞が実施した調査では，８１％が反対で，賛成はわずか１０％に落ち込んでいる（沖縄タイムス２００４年９月１５日朝刊）。

4　訴訟等の取組

（1）　米国ジュゴン訴訟

海上基地建設反対の取組は，訴訟では，まず大阪の弁護団を中心としたアメリカでのジュゴン訴訟に結実している。ジュゴン弁護団とアメリカの自然保護団体が共同して，０３年１０月，サンフランシスコ連邦地裁にジュゴン訴訟を提起した。これは，アメリカの歴史的文化財保護法が，連邦行為により海外の歴史的遺産に影響を与えるおそれがある場合に政府に対して事前コンサルティングを求めているところ，日本の文化財保護法の対象となっているジュゴンへの影響のおそれがあるのにコンサルティングなしに基地建設計画が進められていることを違法と主張するものである。

同訴訟では，被告である米国防総省が，日本のジュゴンは米国歴史的文化財保護法の適用対象外である等と主張して却下判決を求めていたのに対し，裁判所は０５年３月，国防総省の申立を却下し，実体審理に入る決定をした。

（2）　ボーリング調査差止訴訟

また，沖縄県内の弁護団は，０４年１２月，当面のボーリング調査に対して，周辺住民の平和的生存権，環境権，人格権等を根拠として差止を求める訴訟を那覇地裁に提訴した。本訴訟は現在，弁論で双方の主張をやりとりしている段階である。

5　移設計画の見直し

もともと普天間飛行場の移設条件付の返還は，５年から７

年以内をめどとされていたが，すでに０５年７月時点で返還合意から８年半が経過している。そして，海上基地建設は，その規模の大きさと外洋に埋立工事を行うという困難性から，もともと完成まで１５，６年の期間を要すると見積もられている。

それに加えて前記のような強力な反対運動と県民世論があり，以前には辺野古への移設を見直すという声は日米両政府からまったくでてきてなかったのが，０４年末ころになるとそれぞれの側から見直し案がささやかれるようになってきた。

米国は現在世界規模での軍事再編を行っているが，その中で海外の軍事基地の閉鎖問題については，連邦議会海外基地見直し委員会（ＯＢＣ）や政府内の軍事基地再編・閉鎖検討委員会（ＢＲＡＣ）などで検討されている。０５年５月のＯＢＣ中間報告書では，普天間飛行場移設の必要性を述べる一方で，本件新基地建設が時間がかかりすぎていることや費用がかかりすぎることから，これに反対して既存施設への分散移転を提言している。

このような状況からすれば，運動を弱めればもちろん既存の移設方針が強行されるであろうが，新たな基地建設を阻止する展望は目前に開けているといってよい。

第５　終わりに

普天間飛行場は海兵隊基地であり，世界で行っているアメリカの侵略行為で海兵隊がどのような役割を果たしているかと考えると，この沖縄の地で海兵隊飛行場を撤去させることは，県民の生活の安全のみならず，平和を求める国際社会にとっても画期的なことといえる。現地では，その勝利まであらゆる努力を惜しまないつもりである。

以上

Negotiating Globalization: Legal Intermediaries, International Financial Institutions and the Construction of Insolvency Regimes in Indonesia and Korea[1]

Bruce G. Carruthers and Terence C. Halliday[2]

At first blush, it appears that global forces operate like an irresistible force, a uniform monolith that crushes national variants and traditions with all the weight of the world behind it. A more careful consideration of the local/global interaction recognizes that it is an *inter*-action, i.e., a two-sided relationship. The balance of power between the two often varies from place to place. Global effects may be mediated, deflected, attenuated, co-opted, channeled, subverted, transformed, or simply blocked. In place of one master process ("Globalization") moving the world towards greater homogeneity, there are multiple globalizations, unfolding unevenly at different rates and on different levels (Garrett 1998).

Here, we use a particular type of commercial law (corporate bankruptcy or insolvency law) as a lens through which to study local/global interactions. Since the Asian Crisis in 1997, an enormous amount of law-making and institution-building has occurred in many Asian countries to erect insolvency regimes to aid the restructuring of failing companies. While some aspects of this law-making have domestic origins, a great deal of the impetus comes from the pressure exerted or aid supplied by international financial institutions (IFIs), such as the IMF, World Bank, and Asian Development Bank. Nation-states are coerced or persuaded to adopt global norms that have been developed since the late 1990s by the IFIs, and most recently, by the United Nations Commission on International Trade Law (UNCITRAL), whose Legislative Guide on Corporate Insolvency was adopted by the UN General Assembly in 2004 (Halliday & Carruthers 2004)

We understand local/global interactions and mediations by locating them within a two dimensional context (see Figure 1). Intermediation between the global and local will vary depending on where in this two dimensional space they occur. One dimension concerns the balance of power between local (e.g., the national) and global. This balance shapes the kind of interactions that occur, and it varies over time, across contexts, and between countries. The second dimension concerns the "distance" that exists between the local and global as they come into contact. There is significant variation in how congruent or consistent extant local institutions are with their global counterparts. Global institutions can be more or less "localized." As an organization, the IMF remains highly centralized. By contrast the World Bank maintains

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[1] This paper draws from a larger research project on the globalization of bankruptcy law that includes (a) a time-series analysis of all bankruptcy reforms worldwide from 1973 to 1998; (b) participation observation, several hundred interviews and documentary analysis of international financial institutions (IMF, World Bank, Asian Development Bank, European Bank for Reconstruction and Development), international professional associations (International Bar Association, International Federation of Insolvency Practitioners), and world governance organizations (OECD, United Nations Commission on International Trade Law); and (c) case studies of Indonesia, Korea and China.

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offices in many recipient countries and has more local knowledge, expertise and capacity. Local states and their elites can be more or less globalized.

Figure 1 about here

The local/global interaction also depends on the presence of intermediaries. In commercial law-making the most important intermediaries characteristically are lawyers, judges, and law professors. However they pursue their own interests, intermediaries do so on terms set by where a local-global interaction is placed within the other two dimensions. For instance, we hypothesize that mediation within a highly uneven balance of power offers less opportunities for intermediaries (because terms may be dictated by the dominant party) than intermediation when the global and local are relatively evenly balanced.

We provide a brief overview of the process of intermediation that occurred between global institutions and nation-states during the implementation of insolvency reforms from 1997 to the present in Indonesia and Korea. We will see that each situation demands or permits a different kind of intermediation and offers more or less opportunities for the legal intermediaries to insert their own interests into the global-local negotiation.

Mediation of the Local and Global

The gap between the global and local—the area in which they intersect—is an arena of power. Since professional mediators stand at the intersection of the local and global they have a unique opportunity to shape the field of power in directions that benefit professional ideologies and interests. The mediating actors fall into three classes: (1) those whose primary loyalty is to the nation-state and whose orientation is local; (2) mediating actors whose loyalty is to the global institutions that employ or retain them; and (3) 'third party' mediating actors.

Research on globalization rarely investigates the intricate relationships that mediate the local-global encounter in a particular sphere. Therefore we explore who were mediators in each case study, reflect upon their motivations, appraise their capacity to exert influence in either direction (i.e., localizing the global, globalizing the local), identify the mechanisms they employ, and demonstrate, where possible, how the structural position of mediation enabled mediators to craft solutions in which their professions were beneficiaries.

1. Indonesia

Since a wide gap existed in 1997 between the local and global in Indonesia it should follow that the intervention of the IFIs during the Crisis would involve extensive efforts for global institutions to find local counterparts, partners, allies, and sources of information and political support. And because the asymmetry of power was particularly pronounced in favor of the IFIs, the mediation over enactment will disproportionately be undertaken on terms dictated from abroad.

Our research indicates that because the IMF Legal Department had no Indonesian employees or an office in Indonesia it was compelled rapidly to constitute several types of intermediaries.

(1) Experts who could perform a bridging function of mutual "translation" among the key legal systems in play. These included experts who could bridge the [a] the Dutch system, since the insolvency law was derived from Dutch colonial law, and because the IMF needed to know what current Dutch law and practice would meet IMF standards and yet be readily grafted into the outdated Indonesia law. The ideal translator would be equally familiar with both systems. [b] The American system since the IMF lawyer was most familiar with the American emphasis on reorganization and the involvement of the courts represented the best empirical instance of the normative standard for corporate bankruptcy being advocated by the IFIs. The ideal translator would also be equally familiar with both systems. Thus the IMF brought in as consultants Dutch lawyers who knew Indonesian law and an American lawyer who practiced in a prominent Jakarta law firm. (Interviews 2250, 2305, 4010, 2306). .

(2) An indigenous expert who was at once authoritative in his advice to the IMF and legitimate within his own country. That is, the IMF needed to be confident that an expert ostensibly loyal to the Fund (because his services were retained in a client/lawyer relationship) could advise the Fund on courses of action which his *professional* credentials would guarantee were juridically defensible and practically feasible and which his *political* sensibilities would suggest were enactable. The IMF's bargaining position would be enhanced if its indigenous intermediary had high local cultural capital, and the prospect of reaching an agreement eased if the IMF's indigenous representative had high status in the view of the Government of Indonesia's drafters. The IMF consulted with Professor Mardjono since he had high local status (as Dean of the Law School), he knew commercial law and practice from experience (he was the partner of a prominent local law firm), he came recommended by a trusted American, he had a track record in legal diagnosis and prescription from an earlier World Bank consultancy), and he had a positive record of working with multilaterals (Interview 2271).

(3) An on-site manager/monitor/advisor with unquestioned commitment to the IMF. By appointing a Dutch lawyer-scholar, fluent in Indonesian, who was a specialist on the Indonesian Supreme Court, the appointment of a foreigner protected the IMF from the likelihood that nationalist identity might compromise the quality of work or that national connections might be used to compromise reports and recommendations. By placing a manager on the IMF payroll, the Fund ensured that its agent's primary occupational commitments were to its principal. Both steps also helped ensure integrity, an element of character commonly under assault in Indonesian commerce and politics. (Interviews 2250, 2305).

(4) Domestic constituencies: their functions—domestic monitoring and social control; domestic intelligence; domestic lobbying—all add up to localizing and indigenizing the global. If groups are already in existence, then the IMF will use them, as it made use of the Center for Indonesian Law and Policy Studies. If those groups are not in existence, it will create them, as it did with the ad hoc Team of 7 lawyers and retired judges it helped form to scrutinize the judiciary. And if there is an institutional vacuum, then it will push for the establishment of such institutions in the market and civil society. For instance, no profession of insolvency practitioners existed in Indonesia. The IMF pressed the Government of Indonesia to establish such a profession. No

adequate commercial court existed so it pressed for the creation of a Commercial Court. Neither experiment worked very well.
(5) A powerful political sponsor. Ideally, an IFI seeks an internal political ally—a minister or government department—that has the willingness and ability to navigate the difficult shoals of local politics and carry the reform program through to enactment and, most importantly, implementation. In Indonesia the IMF never did find an enduring partner with the political will and capacity to execute the letter and spirit of the IMF/Government of Indonesia agreements. The Minister of Justice steadfastly resisted reforms and the finance ministries, where the IMF usually has most sway and affinity, appeared neither willing nor able to push reforms forward.

2. Korea

Whereas a large gap existed between Indonesia and the global center, and the balance of power favored global financial actors, the Republic of Korea stood much closer to the global centers and the balance of power was much more even. In Asia, Korea has a former colonial and strong trading relationship with Japan, the world's second largest economy. In its relationship with the United States, Korea occupied a key geopolitical position in the Cold War and thus came to have its military, economy and higher educational systems closely integrated with its Cold War protector. And Korea in 1991 was admitted to the OECD, the world's premier club of rich nations.

These associations with the global centers positioned Korea quite differently in relation to the international institutions when the crisis hit in late 1997. On the Korean side, the relationships with IFIs, such as the World Bank and IMF, were handled by the powerful Ministry of Finance and Economy (MOFE) which had been the technocratic driver of Korea's economic miracle. While it was obvious that this relationship would obtain for macro-economic and structural adjustments to economic institutions, it also held for legal reforms. The principal World Bank lawyer in the first intervention teams made MOFE his primary counterpart in substantial part because the Ministry of Justice was considered weak and reactionary within the Korean government. Neither the World Bank nor the IMF had offices in Korea since it had graduated from its status as a developing nation in need of foreign aid (Interviews 2040, 3002).

The closeness of Korea to the U.S., however, changed the structure of mediation between the global and local. Within MOFE, representatives of the IFIs could find economists trained in exactly the same prestigious economic departments in the U.S. as the best and brightest recruited to the IMF and World Bank. Dr. Byeon, a senior MOFE official, and who presided over drafting and passage of the 2001 Corporate Promotion Restructuring Act, had himself been an IMF staffer in Washington. The theories and practices of neo-liberal economics prevailing at the Bank and Fund were entirely familiar to—if not entirely practiced by—Korean finance ministry technocrats. In other words, the global had been internalized within the local in theory if not entirely in practice. (Interview 2290).

Moreover, Korea had developed a sophisticated cluster of government-funded research institutes which enabled foreign institutions to learn quickly from published research and from researchers themselves the parameters of the problems and prospective solutions. For example, the efficiency measures introduced into the 1998 insolvency amendments by agreement between the IFIs and Government of Korea came originally from proposals generated before the crisis by the prestigious Korean Development Institute, which housed some of the nation's leading

economists. Later insolvency reforms to speed up the handling of cases relied on research undertaken by Korean scholars and the Korean Economic Research Institute (Interviews 2040, 4010).[3]

On the law side, the IFIs proceeded initially through MOFE to bring on board the Ministry of Justice which created its own drafting teams. Later the IMF and World Bank dealt directly with the Ministry of Justice, although MOFE always hovered in the background and was always ready to exert pressure on the Ministry of Justice to deliver whatever agreement MOFE had concluded with the IMF.[4] The legal mediators on the Korean side functioned *within* the Ministry of Justice and not in direct relationship with the IFIs as had been the case in Indonesia. Partly this was possible because the drafting teams themselves included key members whose own biographies assured the IFIs of their familiarity with foreign, and especially American, law and practice (which most closely approximated IFI global norms). Professor Soogeun Oh, who has been a primary drafter on all the reform committees (1998, 1999, 2001, 2004), has both law and business degrees from prestigious Korean universities and an advanced law degree from the University of Michigan. Yong Seok Park, the only practicing lawyer also in all the reform committees, has economics and law degrees from Korea, advanced training at Harvard Law School, and six months of practice in a major New York law firm. While their proposed reforms from 1998 to the present all went back to the IMF in Washington for comments, they were drafted at arms-length from the IFIs (Interviews 2283, 3004, 2313, 2314, 2315).

Where further expertise in depth was needed the Ministry of Justice retained two leading law firms to advise on comprehensive reforms of Korean insolvency law: Kim and Chang, a distinguished Seoul law firm; and Orrick and Harrington, a New York firm. The recommendations of these firms were debated and selectively adopted by the Ministry of Justice in association with a technical assistance project of the World Bank (Interview 2316).

The structure of mediation in Korea therefore differs markedly from Indonesia because the higher threshold of competence and a commonality of professional backgrounds in the former assured the IFIs that Korea could be delegated more discretion to draft its own reforms in response to general goals agreed upon by the IFIs and Government of Korea.
(1) On experts who could perform a translating role among the key legal systems in play, the IMF or World Bank in Korea had less need to retain experts who could perform this bridging function. Those experts already existed within Korea because they integrated within their own biographies a familiarity with the two most salient legal systems and IFI global norms.
(2) On sponsorship, in MOFE the IMF had a powerful political sponsor—indeed the most powerful government ministry which not only had great influence inside the government bureaucracy but long and deep ties with the heights of industry and especially the banking industry. Although the primary responsibility for the insolvency reforms moved over to the Ministry of Justice in the last several years, the IMF could still continue to rely on MOFE to bring pressure inside the government if progress was slow.

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[3] On Korean insolvency reforms in general, see Nam et al (1999), Nam and Oh (2000), and Oh (2002, 2003a, and 2003b).

[4] An incipient conflict between the economists and lawyers in the respective ministries continues as a backdrop through all the reforms, since each profession has a different notion of law's capacity to regulate markets (Halliday and Carruthers 2004).

(3) On indigenous experts and (4) on-site managers or monitors, since the IFIs were persuaded early in the reform cycles that Korea would comply with its agreements for insolvency reforms, and that the capacity of Korea to implement reforms could be relied upon given the sophistication of its professionals, neither the IMF nor World Bank felt any necessity to repeat in Korea what they did in Indonesia, namely retain the services of an indigenous expert or hire an on-site manager with unquestioned commitment to the IMF.
(5) The international institutions did not find any need to build domestic constituencies since they believed they could attain their ends entirely through bureaucratic means. Oddly enough, domestic constituencies in the bar and industry opposed parts of each of the reforms but the IFIs relied rather on the political will of the government and the effective alliance of policy institutions (e.g., Korea Development Institute) and MOFE to overcome residual reluctance for change from the profession, courts, or Ministry of Justice. Korea therefore exhibits an absence of intermediaries on the side of the IFIs.

Conclusion:

Those who devise and promulgate global models need local allies, and local interest groups can make use of global agents. Furthermore, the presence of mediating bodies substantially complicates the process of diffusion and adoption. Based in organizations and professional groups that span the public-private divide, combining domestic connections and local "street savvy" with foreign expertise, and with complex loyalties, intermediaries perform the important work of "translating" global models into local languages, and in bridging a gap whose existence justifies their involvement in the first place. Bridging of course also allows the prospect of resistance, adaptation, and the extraction of advantages for the intermediaries. Visible to both sides, but fully accountable to neither, mediators have the opportunity to exploit such gaps in pursuit of their own professional and jurisdictional interests.

In Indonesia, the global institutions pressed strongly for the establishment of expert insolvency professions. The intermediaries gave the IFIs what they wanted—a commitment to open professional markets to foreign lawyers, accountants and insolvency practitioners—but only on conditions foreigners passed an Indonesian language exam, thereby effectively nullifying the external commitment.

In Korea, the shift of business reorganizations from government interventions to a process of corporate reorganization in the market provided a substantial potential opening of work jurisdictions for legal practitioners and accountants. Yet the legal profession seemed reluctant both over the reforms and the expansion of the market. The reasons are two-fold: many lawyers are doubtful that the reforms are necessary or that a comprehensive bankruptcy law represents progress; lawyers more generally have enjoyed a lucrative, tightly-controlled position of market dominance where a small profession has extracted substantial monopoly rents. The Korean mediators leaned towards Korean protectionism rather than global liberalization.

Table 1 about here

The configurations of mediating actors differ considerably by the situational vulnerability

of Indonesia and Korea to influence by international institutions or foreign sovereign nations (Table 1). In each country the IFIs required bridging and indigenous experts, but that need was most acute in Indonesia where the availability of experts was most scarce and the perceived need for action most urgent. In Korea, by contrast, the ready availability of Korean academics, lawyers and economists who were familiar with foreign and domestic situations and the lesser urgency of reform enabled the IFIs to take a more relaxed and less directive approach that could rely on domestic availability of expertise. Since protracted institution-building was needed only in Indonesia's case of extreme vulnerability, only Indonesia warranted an on-site manager to preside over reform cycles. In Korea the IFIs believed that the elite and sophisticated state apparatus could deliver the reforms agreed upon by the IFIs and the Government of Korea without intrusive foreign presence in Seoul.

We find that even in a relatively confined space—one area of law in one region in one period—globalization proceeds with considerable complexity as nations and international actors negotiate over the terms of reconciling the local and the global. Standing at the nexus of those negotiations are a quite small number of collective and individual actors. Their relative power to shape the encounter of the global with the local varied in some measure by the relative balance of power and distance between their nation-states and the global actors that drove legal change. It also depended on their own internal capacities, and how well they were able both to influence the creation of new legal statutes, and to carry out the implementation of newly enacted laws. In deploying these capacities, intermediaries can serve various masters, including themselves. Depending on their own expertise, professional knowledge, and cultural capital, they are predisposed to embrace some models or approaches over others. Such predispositions are not, of course, innocent. And the competition among alternative models is rarely decided "on the merits," in part because the competition is over the appropriate standards for merit. In combination, these different factors (balance of power, distance, capacities and interests of intermediaries) make globalization a variable and contingent process whose outcome is not likely to be very homogeneous. Nor is it likely to be without resistance.

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Figure 1 Situational Vulnerability of Nation-States to Global Pressure

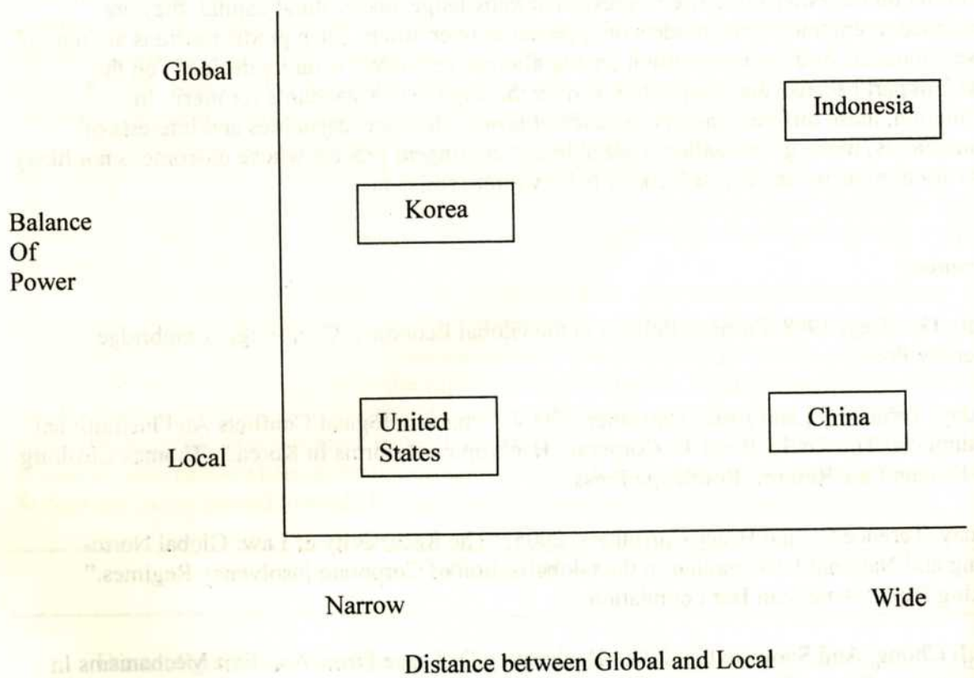

Table 1. Comparisons of Mediating Agents for International Institutions in the Globalization of Insolvency Reforms

	Indonesia	Korea
(1) Bridging Experts	Dutch and American consultants	Domestic experts Law firm consultants
(2) Indigenous Experts	Indonesian law dean and commercial lawyer	None
(3) IFI on-site manager	Present: Dutch expatriate specialist on Indonesian courts (World Bank/IFC office in Jakarta)	Not present
(4) Domestic constituencies for international institutions	Very limited	Limited
(5) IFI Political Sponsor	None	Ministry of Finance and Economy

Notes:
(1) Experts who could perform a bridging function for IFIs of mutual "translation" among the key legal systems in play
(2) An indigenous expert who is authoritative in his/her advice to IFIs and legitimate within his/her own country
(3) An on-site manager/monitor/advisor with unquestioned commitment to the IMF or other IFI.
(4) Domestic constituencies committed to monitoring, intelligence, and lobbying IFI-led or aided reforms.
(5) A powerful political sponsor.

세계화 협상:
인도네시아 및 한국 내 법적 중간매개기관, 국제금융기관 및 파산제도[1]

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언뜻 세계화라는 것이 어찌할 수 없는 불가항력이며, 국가간 상이점과 고유의 전통을 완전히 뭉개 없애버리는 바위처럼 느껴질 수도 있다. 그러나 현지와 세계간 상호작용을 자세히 살펴보면 말 그대로 이쪽과 저쪽 사이에서 이루어지는 작용, 즉 양자간 관계임을 알 수 있다. 양자간 힘의 균형은 국가마다 다르게 나타난다. 세계화의 영향이 어떤 매개를 거칠 수도 있고, 비껴나갈 수도 있고, 약화될 수도 있으며, 어느 정도 흡수되거나 파괴되거나 변형되거나 그도 아니면 아예 완전히 차단될 수도 있다. 전 세계를 균일화시키는 하나의 거대한 세계화 물결이 일고있다기보다는 속도와 강도를 달리하는 다양한 종류의 세계화가 동시다발적으로 일어나고 있다고 보아야 한다(Garrett 1998).

여기에서는 상법의 특정분야(기업파산 및 지불불능 관련법)를 통해 현지/세계 상호작용에 대해 알아보도록 하겠다. 1997 년 외환위기가 아시아를 휩쓸고 간 이래 아시아 각국에서는 파산제도를 재정비하여 위기를 겪고 있는 기업을 혁신하기 위한 노력이 지속되었고, 이에 따라 관련법 및 제도가 무수히 생겨났다. 자국의 필요에 의해 자발적으로 생겨난 법 제도도 있지만 IMF, 세계은행, 아시아개발은행 등 국제금융기관(IFI)의 압력이나 원조에 의해 생겨난 경우가 대부분이다. 오늘날 국가들은 다양한 IFI 에 의해 1990 년대 말부터 확립되기 시작한 세계적 규범을 따르도록 강요 혹은 설득 당하고 있다. 최근의 사례로는 2004 년 UN 총회가 채택한 UN 국제무역법위원회(United Nations International Trade Law, UNCITRAL)의 "기업파산에 관한 법률적 지침(Legislative Guide on Corporate Insolvency)" 을 들 수 있다(Halliday & Carruthers 2004).

우리는 현지/세계 상호작용 및 양자간 매개 상황을 보다 쉽게 이해하기 위하여 2 차원의 평면에 그림으로 표현해보았다(그림 1 참조). 세계와 현지간 상호매개 역시 각 국가가 이 2 차원 평면 공간 어디에 존재하느냐에 따라 달라진다. 한쪽 축은 현지(예를 들면 국가)와 세계간 힘의 균형 정도를 나타낸다. 이 균형 정도에 따라 발생하는 상호작용의

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[1] 이 논문은 파산법의 세계화에 관한 연구 프로젝트 결과를 기반으로 작성되었다. 이 연구 프로젝트는 (a)1973 년부터 1998 년까지 전 세계에서 진행된 파산제도 개혁의 시계열 분석; (b)다양한 국제 금융 기관(IMF, 세계은행, 아시아개발은행, 유럽부흥개발은행 등) 및 국제 전문가 협회(국제변호사협회, 국제파산담당변호사연합 International Federation of Insolvency Practitioners 등), 글로벌거버넌스(국제사회의 공동통치 활동) 단체(OECD, UN 국제무역법위원회 등)에 대한 참여관찰, 수백 건에 달하는 인터뷰, 문건 분석, (c)인도네시아, 한국, 중국의 실제사례 등을 포함하고 있다.

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종류가 결정되며 시간, 주변환경, 국가에 따라서도 달라진다. 나머지 축은 현지와 세계가 접촉을 하면서 생기게 되는 양자간 "거리"를 뜻한다. 현지 기관이 국제기관과 어느 정도 합치하는지, 혹은 어느 정도 일관성을 유지하는지 역시 각각의 경우에 따라 크게 달라진다. 국제기관은 얼마간 "현지화" 될 수 있다. IMF 는 대단히 중앙집권적인 체계를 유지하고 있는 반면, 세계은행은 세계 곳곳의 수혜국에서 사무소를 운영하며 현지에 관한 전문지식 및 수용력을 키워나가고 있다. 반대로 현지 엘리트층이 세계화 될 수도 있다.

그림 1 이곳에 옴

현지/세계 상호작용은 중간매개자의 존재 여부에도 크게 영향을 받는다. 상법 제정에 가장 큰 영향을 미치는 매개자는 변호사, 판사, 법대 교수 등이다. 현지/세계 상호작용이 앞서 언급한 두 축을 기준으로 어느 지점에서 이루어지고 있느냐에 따라 결정되는 조건 하에서 매개자는 이익을 추구하게 된다. 예를 들면 힘의 균형이 매우 불균등한 상황에서는 현지와 세계간 힘이 균형을 이루고 있을 때에 비해 매개자에게 그다지 많은 기회가 제공되지 못한다(우위를 차지하는 측에서 조건을 내걸기 때문이다).

여기에서는 1997 년부터 지금까지 인도네시아 및 한국에서 실행된 파산제도 개혁과 관련하여 국제기관 및 국가간에 진행된 상호매개 과정에 관해 간략히 설명하기로 하겠다. 상황별로 특정 상호매개활동이 요구되기도 하고 허용되기도 함을 알 수 있을 것이고, 세계-현지 협상에서 법적 매개자가 이익을 추구할 수 있는 기회가 많아지기도 하고 적어지기도 함을 알 수 있을 것이다.

현지와 세계 간 중간매개활동

세계와 현지를 단절시키는 틈 양자가 교차하는 지역 은 바로 힘겨루기가 일어나는 영역이다. 바로 이 틈에 서있는 전문 매개자는 목적했던 방향으로 경쟁을 몰고 갈 수 있는 특별한 기회를 얻게 된다. 매개자는 다음 3 가지로 구분된다: (1)국가에 대한 충성이 우선이며 현지 출신인 자; (2)자신이 소속된 국제기관에 대한 충성이 우선인 자, (3)제 3 의 기관에 소속된 매개자.

세계화 관련 연구에는 특정 지역 내 현지-세계간 접촉을 매개하는 그 복잡한 관계에 대한 연구가 빠져있는 경우가 대부분이다. 그러므로 각 사례별로 매개자가 누구였으며 동기는 무엇이었고 영향력을 발휘할 수 있는 역량은 어느 정도였는지(즉 국제기관을 현지화하고 현지 기관을 세계화하는 것), 그들이 도입한 메커니즘은 무엇이었는지 파악한 뒤 가능한 경우 매개의 구조적 위치가 매개자의 해결책 제시에 어떠한 영향을 주었는지 알아보도록 하겠다.

1. 인도네시아

인도네시아에는 1997 년 외환위기가 발발했을 당시 현지와 세계간 격차가 매우 컸기 때문에 IFI 가 개입하여 적합한 현지 기관, 파트너, 동맹 및 정보/정치적 지원을 제공해줄 수 있는 사람을 찾기 위해 대대적인 노력을 펼쳐야 했다. 또한 힘의 무게가 IFI 측으로 과다하게 쏠려있었기 때문에 법률 제정 관련 매개활동 역시 IFI 가 내세우는 조건을 바탕으로 이루어질 수밖에 없었다.

우리의 연구에 따르면, IMF 의 법률부서에는 인도네시아 출신 직원도 없었고 인도네시아 내에 사무소도 개설하지 않은 상태였기 때문에 다양한 형태의 중간매개자를 신속하게 선발할 필요가 있었다.

(1) 핵심적인 법률체계 간에 상호 '의사소통(통역)' 이 이루어질 수 있도록 교량역할을 담당할 수 있는 전문가들. 이러한 전문가들에는 [a] 네덜란드의 체제와 교량역할을 담당할 수 있는 인력이 포함되었다. 인도네시아의 파산법은 네덜란드 식민통치 시절의 법으로부터 파생된 것이었기 때문이다. 또한 IMF 는 현재의 네덜란드 법률 및 관행 가운데 어떤 것이 IMF 의 기준에 부합하며, 또 낡은 인도네시아 법에 신속하게 접목될 수 있는지 확인할 필요가 있었다. 이상적인 통역가는 양국의 체제에 대해 공히 친숙한 인물이어야 했다. 두 번째는 [b] 미국의 체제에 정통한 인력이었다. 미국의 변호사들은 주로 조직 개편을 강조하는 미국식 방식에 익숙해 있으며, 재판부의 개입은 IFI 가 주장하는 기업파산에 대한 규범적 기준에 있어 가장 실질적인 사례들을 대변하는 것이었기 때문이다. 역시 이상적인 통역가는 양국의 체제에 공히 친숙한 인물이어야 했다. 그 결과 IMF 는 인도네시아 법에 대한 지식을 가진 네덜란드인 변호사를 컨설턴트로 기용하였으며, 또한 자카르타에 소재한 유명 법률사무소에서 근무했던 경력을 지닌 미국인 변호사를 기용하였다. (인터뷰 2250, 2305, 4010, 2306).

(2) IMF 에 권위가 실린 자문을 해줄 수 있는 동시에 자국 내에서 합법적으로 활동하고 있는 토착 전문가. 즉 IMF 는 겉으로는 IMF 측에 충성스러운 것처럼 보이는 전문가(그는 고객 대 변호사의 관계로 서비스를 제공하는 것이기 때문)가 실제로도 IMF 가 어떤 일련의 행동(즉 그의 전문가적인 이력에 입각하여 법률적으로 방어가 가능하며 현실적으로 실행이 가능한, 그리고 그의 정치적 감각에 입각하여 충분히 법제화할 수 있다고 판단하는 행동들)을 취해야 할 것인지에 대해 충실하게 자문을 해주리라는 확신을 필요로 했다. IMF 가 기용한 토착민 매개자가 인도네시아의 문화에 정통한 인물이라면 IMF 는 협상에서 유리한 위치를 점할 수 있으며, 또한 IMF 의 토착민 대표가 인도네시아 정부측 기안자들 사이에서 높은 위상을 지닌 인물로 받아들여진다면 협상 타결의 가능성도 증대될 수 있었다. IMF 는 마드요노(Mardjono) 교수에게 자문을 구하였다. 그는 현지에서 상당히 높은 사회적 지위를 점하고 있는

인물(법과대학장)이었으며, 경험을 통해 상법 및 상거래관행에 대한 지식을 확보하고 있었고(그는 유명 법률사무소의 파트너이기도 했다), 신뢰할 만한 미국인이 그를 추천하였으며, 과거 세계은행 자문단에서의 활동을 통해 법률적 진단과 처방에 대한 경험을 축적하고 있었으며, 또한 다국적 기업들과도 우호적으로 업무를 수행했던 이력의 소유자였다. (인터뷰 2271).

(3) 확실하게 IMF 를 위해 일할 수 있는 현지 매니저/감독/자문. 인도네시아어를 유창하게 구사하며 인도네시아 대법원의 체계에 정통한 네덜란드 출신 변호사 겸 학자를 기용함으로써, IMF 는 국수주의적 사고방식으로 인해 업무의 질이 저하된다거나 자국민관의 연관성으로 인해 보고서나 제안의 내용이 변질될 수 있는 가능성을 차단하였다. 매니저를 IMF 의 직원 명부에 올림으로써, IMF 는 해당 요원이 자기가 속한 직장을 위해 자신의 직분을 다하도록 만들었다. 이러한 두 가지 조치를 취함으로써 성실성을 확보할 수 있었는데, 이러한 성실성은 인도네시아의 상거래나 정치에서는 종종 공격의 대상이 되곤 하는 것이었다. (인터뷰 2250, 2305).

(4) 내국인: 그들이 담당하는 기능(국내 활동 감시 및 사회적 통제, 국내 첩보 수집, 국내에서의 로비활동 등)은 모두가 현지화와 토착화에 기여하게 된다. 이러한 조직이 이미 존재할 경우 IMF 는 인도네시아 법률 및 정치학회(Center for Indonesian Law and Policy Studies)를 이용했던 것처럼 이 조직들을 활용할 것이다. 그러한 조직이 존재하지 않을 경우 IMF 는 사법부를 조사하기 위해 구성하였던 '7 인의 변호사와 퇴임판사팀' (Team of 7 lawyers and retired judges)과 같은 임시 조직을 만들 것이다. 또 제도적으로 공백이 있을 경우에는 시장과 시민사회 내에 그러한 제도를 구축하려는 노력을 전개할 것이다. 예를 들어 인도네시아에는 파산전문변호사 같은 직업 자체가 존재하지 않았다. 그런데 IMF 가 정부에 압력을 가하여 그러한 직업을 탄생시켰다. 인도네시아에는 상거래를 전문적으로 다루는 적절한 법원이 존재하지 않았는데, IMF 가 상거래법원을 설치하도록 압박을 가하였다. 이러한 실험은 둘 다 그리 큰 성공을 거두지는 못하였다.

(5) 강력한 정치적 후원자. IFI 에게 있어서는 국내 정치의 함정들을 잘 피해나갈 수 있도록 도움을 주고, 법률의 제정 및 집행을 통한 개혁 프로그램 수행에 보탬이 될 수 있는 의지와 능력을 가진 내부의 정치적 동반자(장관이나 정부 부처)를 물색하는 것이 이상적이다. IMF 는 인도네시아에서 IMF-인도네시아 정부 간 협약의 조항과 정신을 실천할 수 있는 정치적 의지와 역량을 가진 지속적 동반자를 확보하는 데 실패하였다. 사법부장관은 계속해서 개혁을 거부하였으며, IMF 가 가장 큰 영향력을 발휘하는 동시에 가장 친숙하다고 할 수 있는 재무부 역시 개혁을 추진해갈 만한 의지와 역량이 결여된 것으로 드러났다.

2. 한국

인도네시아와 국제적인 금융센터 사이에는 커다란 간극이 존재하였으며 결국 힘의 균형은 세계적인 금융기관들 쪽으로 기울었던 반면, 한국의 경우는 국제적인 금융센터에 더 가깝게 서 있었고 결국 힘의 균형도 비교적 평형을 이루었다. 아시아 국가들 가운데 한국은 과거 식민통치자이자 세계 2 위의 경제 대국인 일본과 긴밀한 통상 관계를 유지하고 있다. 미국과의 관계에 있어서도, 한국은 냉전시대에 핵심적인 지정학적 위치를 점하였으며, 그 결과 한국의 군사, 경제, 고등교육 체계는 냉전시대 수호자였던 미국의 체계와 긴밀한 통합 양상을 나타내게 되었다. 한국은 1991 년 세계 부국들의 모임이라 할 수 있는 OECD 의 회원국이 되었다.

이러한 세계 금융센터들과의 관계는, 1997 년 말 한국이 외환위기에 처하게 되었을 때 국제 금융기관들과의 관계에 있어 한국을 여타 국가들과는 다른 위치에 놓이도록 했다. 한국 입장에서, 세계은행 및 IMF 와 같은 IFI 들과의 관계는 한국의 경제기적에 견인차 역할을 담당했던 강력한 재정경제부(MOFE)에 의해 주관되었다. 이러한 관계는 전반적인 경제체제의 거시경제적이며 구조적인 조정을 가능케 하였으며, 또한 법률적 개혁에도 일조하였다. 1 차 중재팀을 이끌었던 세계은행의 수석변호사는 MOFE 를 1 차적인 실무 협상파트너로 선정하였다. 법무부는 한국 정부 내에서 상대적으로 취약하며 보수적인 집단으로 여겨졌기 때문이다. 한국은 외국의 원조를 필요로 하는 개발도상국 지위를 이미 졸업한 상태였기 때문에 세계은행이나 IMF 는 모두 한국에 사무소를 개설하지 않고 있었다. (인터뷰 2040, 3002).

그러나 한국과 미국의 친밀한 관계가 세계와 현지 사이의 중재구조를 변화시켰다. IFI 대표단은 미국의 저명한 경제학과에서 훈련을 받고 IMF 나 세계은행에 채용된 우수한 인재들과 동등한 수준의 경제학자들을 MOFE 내에서도 발견할 수 있었다. 2001 년 기업구조조정법을 기초하고 통과시키는 과정을 관장했던 MOFE 고위관료 변박사(Dr. Byeon)는 그 자신이 워싱턴에서 IMF 의 직원으로 일한 경력을 가진 인물이었다. 세계은행과 IMF 를 주도하고 있던 신자유주의 경제학의 이론과 실천은 (아직 실천이 이루어지지는 않고 있었다 하더라도) 한국 재경부 관료들에게도 친숙한 내용이었다. 다시 말해, 구체적인 실천은 아니라 하더라도 이론상으로는 세계(the global)가 이미 현지(the local) 속에 정착된 상태였다. (인터뷰 2290).

더욱이 한국은 정부의 지원을 받는 다양한 첨단 연구 기관들을 확보하고 있었으며, 이들은 외국의 기관들이 이미 출판된 연구자료나 연구원들과의 직접적 면담을 통해 문제의 요인과 해결방안을 신속하게 파악할 수 있도록 도움을 주었다. 예를 들어 1998 년 IFI 와 한국정부 사이에 합의된 개정파산법에 수록된 효율적 조치들은 원래 외환위기가 도래하기 전 한국 내 유수한 경제학자들을 확보하고 있는 한국개발연구원(KDI)이 내놓은 제안을 기초로 한 것이었다. 이후 파산 관련 사안들의

신속한 처리를 위한 개혁작업은 한국경제연구원(KERI)의 한국인 연구원들이 주도한 연구결과에 의존하여 진행되었다. (인터뷰 2040, 4010).[3]

법률적 측면에서 볼 때, 애초 IFI는 MOFE를 통해 법무부를 끌어들여 초안작성팀을 구성하도록 추진하였다. 이후 IMF와 세계은행은 법무부와 직접적으로 접촉을 하게 되었지만, 그 뒷편에는 항상 MOFE가 자리를 잡고 앉아 MOFE가 IMF와 체결한 모든 협약을 조속히 수행하도록 법무부에 압력을 가하였다. 한국측 법률 관련 매개자들은 법무부 "내에서" 맡은 바 역할을 수행하였으며, 인도네시아의 경우에서처럼 IFI와 직접적인 관계를 맺지는 않았다. 이는 외국, 특히 미국의 법률과 관행(IFI의 국제적 기준에 가장 근접한)에 친숙한 이력을 지닌 핵심 직원들을 초안작성팀에 포함시킴으로써 IFI에게 확신을 심어주었기 때문에 가능한 일이었다. 개혁위원회가 내놓은 모든 초안(1998, 1999, 2001, 2004)의 1차 작성자였던 오수근 교수는 한국의 유명대학에서 법학과 경영학 학위를 받았으며, 미시건 대학의 법학박사 학위를 소지하고 있었다. 개혁위원회 소속위원 가운데 유일한 현직 변호사였던 박용석 변호사는 한국에서 경제학과 법학 학위를 취득한 후 하버드 법대에서 훈련을 받고 뉴욕의 대형 법률사무소에서 6개월 간 근무했던 이력의 소유자였다. 1998년부터 현재까지 그들이 제안한 개혁안들은 워싱턴의 IMF 본부로 송부되어 검토를 받고 있지만, 그 개혁안들은 IFI와 일정 부분 거리를 둔 상태에서 작성된 것이었다. (인터뷰 2283, 3004, 2313, 2314, 2315).

좀더 전문적인 지식을 필요로 하는 분야에서 법무부는 한국 파산법의 포괄적인 개혁에 대해 조언을 해줄 수 있는 두 개의 우수한 법률회사(한국의 대표적인 로펌이라 할 수 있는 김앤장과 뉴욕의 로펌 오릭앤해링튼)를 확보하고 있었다. 법무부는 세계은행의 기술지원과 더불어 이들 법률회사가 제안한 내용을 논의를 통해 선별적으로 채택하였다. (인터뷰 2316).

따라서 한국에서의 매개구조는 인도네시아와는 뚜렷하게 다른 양상을 나타냈다. 한국측 인력이 지닌 고도의 역량과 전문적 배경에 있어서의 공통성은 IFI로 하여금 IFI와 한국정부 사이에 합의된 전반적 목표 달성을 위해 자체적으로 개혁 초안을 마련할 수 있는 권한을 한국측에 위임해도 좋다는 확신을 심어주었기 때문이다.

(1) 핵심적인 법체계들 사이에서 통역가의 역할을 수행할 수 있는 전문가라는 측면에서, IMF나 세계은행은 이러한 교량 역할을 담당할 전문가 확보에 대한 필요성을 크게 느끼지 않았다. 그러한 전문가들이 이미 한국에 존재하고 있었으며, 이들은 각자 이력을 통해 두 가지 두드러진 법 체계와 IFI의 국제기준에 친숙한 상태였다.

[3] 한국의 전반적인 파산제도 개혁에 관해서는 Nam et al (1999), Nam and Oh (2000) 및 Oh (2002, 2003a, 2003b)를 참고하도록 한다.

(2) 후원자 문제에 있어서도 IMF는 MOFE라는 강력한 정치적 후원자를 확보할 수 있었다. 사실상 MOFE는 정부 내에서 가장 강력한 부처였으며, 정부 관료들에게 막강한 영향력을 행사할 뿐만 아니라, 업계 특히 금융업계와 길고도 밀접한 관계를 구축하고 있었다. 최근 몇 년 사이에 파산법 개혁의 주요 업무가 법무부로 이관되기는 하였지만, IMF는 개혁의 진행속도가 느려질 경우 여전히 MOFE를 통해 정부에 압력을 가하고 있다.

(3) 토착 전문가 및 (4) 현지 매니저 혹은 감독과 관련하여, IFI는 개혁 초기부터 한국이 파산개혁에 관한 협약을 준수할 것이며 한국측 전문가들이 보유한 뛰어난 역량을 고려할 때 한국의 개혁수행능력이 충분히 신뢰할만하다고 확신을 하였기 때문에, IMF나 세계은행 모두 인도네시아에서 벌였던 일들(즉 토착 전문가의 서비스를 활용하거나, 확실하게 IMF를 위해 업무를 수행할 수 있는 현지 매니저 기용 등의 일)을 한국에서 되풀이할 필요를 느끼지 않았다.

(5) 국제 금융기관들은 별도의 국내 조직을 구축할 필요성을 느끼지 못하였다. 관료조직을 통해서도 충분히 목표를 달성할 수 있다고 믿었기 때문이다. 국내의 법조계와 업계가 개혁안의 각 사안에 대해 반대입장을 취한 것은 아이러니한 일이지만, IFI는 정부의 정치적 의지, 정책기관(예를 들어 KDI) 간의 효과적인 협조체제, 법조계와 법원과 법무부 내에 잔존하는 개혁 거부성향을 극복하려는 MOFE의 의지를 신뢰하였다.

결론:

국제적 모델을 구상하고 보급하는 이들은 현지의 동반자를 필요로 하며, 현지의 이익단체들은 국제적인 대리인들을 활용할 수 있다. 더욱이 중간 매개기구의 존재는 보급과 채택의 과정을 상당히 복잡하게 만든다. 공공-민간의 경계를 뛰어넘는 조직 및 전문가 집단을 기반으로, 중간 매개자들은 국내의 네트워크 및 현지에서의 체험을 통해 축적된 지식을 외국의 전문기술이나 복잡다단한 행동양식과 결합함으로써, 국제적 모델을 현지 언어로 "통역하는" 중요한 업무를 수행하며, 교량 역할을 담당한다는 점에서 초기 단계부터 이들을 개입시키는 것은 당연하다고 볼 수 있다. 교량 역할에는 물론 저항, 적응, 중간 매개자의 장점 도출 등의 가능성이 존재한다. 양측에 자신을 충분히 드러내는 한편 어느 한쪽에 대해서도 전적으로 책임을 부담하지 않는 중간 매개자들은, 이러한 간극을 활용하여 자신들의 전문적이며 법률적인 이익을 추구할 수 있는 기회를 갖는다.

인도네시아에서는 국제 기관들이 파산을 전문으로 다루는 직업의 창출을 위해 정부를 강하게 압박하였다. 중간 매개자들은 IFI가 원하는 것(외국의 변호사, 회계사, 파산전문변호사 등에게 전문인력 시장 개방)을 제공하였다. 하지만 외국인의 경우