Court-Annexed Alternative Dispute Resolution in the United States and Korea: A Comparative Analysis

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This essay is a tentative exercise in comparative law. The topic is court-based alternative dispute resolution (‘ADR’) in civil cases.1) The dispute-

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1) I exclude domestic relations cases, in which court-annexed ADR is common in many societies, because they raise distinctive issues stemming from, among other things, the intimate character of the marital relationship, the interests of children of the marriage, and the need to nurture and regulate an ongoing relationship between the spouses. Both the United States and Korea make substantial use of mediation and conciliation in such cases. See Susan Myers, Geoff Gallas, Roger Hanson, and Susan Keilitz, “Divorce Mediation in the States: Institutionalization, Use and Assessment,” 12 State Court Journal 17 (Fall 1988); Sang-Hyun Song, “Alternative Dispute Resolution Procedures in Korea” (1994) in Sang-Hyun Song, Korean Law in the Global Economy 499, 504-09 (1996) (hereinafter Song, ADR Procedures in Korea). I also exclude criminal cases.
resolution devices I will be discussing are *alternatives* to formal litigation ending in a judgment by the tribunal, either because they are less formal (*e.g.*, arbitration) or because they aim directly at facilitating settlement of the case (*e.g.*, mediation or conciliation). They are *court-annexed* because they happen pursuant to court rule, court sponsorship or judicial referral. The element of court involvement distinguishes such devices from arbitration or mediation conducted pursuant to agreements reached by the parties without court intervention. It also distinguishes such devices from other government sponsored dispute resolution programs, such as ombudspersons or administratively sponsored conciliation forums.

Over the past two decades, many courts in the United States have adopted court-annexed ADR programs. Korea has some court-annexed ADR as well, notably in the form of court-annexed conciliation conducted pursuant to the Civil Mediation Act of 1990\(^2\) and there is interest in further development of such programs.\(^3\)

I will begin by describing the some salient features of American civil litigation and the principal motivations and ambitions underlying the adoption of court-based ADR in the United States. In part, such programs sought to respond to rising judicial workloads, particularly in the federal court system, and to traditional concerns about litigation costs and delays. In part, they aimed, within the framework of a traditional court system, to permit parties to achieve results that were more substantively just, more beneficial, or more procedurally satisfying than those available through conventional litigation.

Second, I will summarize the empirical research concerning court-annexed ADR programs and attempt to explain its findings, drawing in that explanation

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on some of the central social science findings about American disputing behavior. ADR programs have not produced significant improvements in litigation costs or delays. Conversely, there is evidence that some programs may have significantly improved party satisfaction or the perceived fairness of the proceedings. These findings raise hard questions about the tradeoffs inherent in the design of ADR systems.

Finally, I will offer some tentative observations about the relevance of the American experience with court-annexed ADR for Korean civil justice policy. Because the two systems are so different and because my knowledge of the Korean system is incomplete, I will largely avoid any prescriptive advice. Instead I will identify questions that might be worth answering and approaches that might be worth exploring as Korean judges, lawyers and law professors continue to think about court reform.

I. The Rise of Court-Annexed ADR

A. Characteristics of American Civil Justice

American civil justice, as traditionally administered in federal and state trial courts, has the following characteristics that mark it as distinctive in comparative law terms and that are relevant to any comparative discussion of American ADR programs.

1. Judicial Passivity and Party Control

The tribunal is passive and reactive. Ordinary civil cases can be commenced and terminated without involvement by the tribunal, and many filed cases are resolved by abandonment or settlement without any judicial intervention. The tribunal takes a following, rather than a leading, role in the factual development of the case, responding to disputed issues presented by the parties instead of setting a course for the lawsuit. Where the case is subject to a final trial by jury, the jury normally is not empanelled until the eve of trial.
As a consequence of judicial passivity, the parties are obliged to develop the factual and legal record on their own and have substantial autonomy in doing so. If they make an error in so doing, they are unlikely to be rescued by the judge or by their opponent. Because judges are relatively passive and juries are infrequently impaneled and poorly compensated, the public subsidy to litigants is relatively low.

2. Extended Pretrial and Extensive Discovery

There is a sharp distinction between the pretrial phase of the case, in which the parties marshal their evidence, submit motions to resolve all or part of the case without trial, and explore the possibility of settlement, and the trial, which is a staged, formal conclusion to the proceeding. This separation, like the tradition of judicial passivity, is in part due to the persistence of the right to jury trial in many actions for civil damages, since it would be prohibitively costly and difficult to empanel a jury except for a well-defined and limited time after all the evidence has been marshaled. During the pretrial phase, American litigants enjoy broad rights of pretrial discovery. They may request from their opponent or third parties all information relevant to the disputed subject matter, whether or not it would be admissible at trial. During pretrial, which can last from several months to several years, the tribunal's involvement is sporadic. During the trial, which typically lasts for a few days but can run much longer, the tribunal is much more intensely engaged, often on a full time basis.

3. Large Role for and a Large Supply of Lawyers

Because of the tribunal’s limited role, particularly in pretrial, and because of the large role played by the parties in the development of the evidence, lawyers have a large role, larger than that in most inquisitorial systems. The number of lawyers engaged in litigation is correspondingly large, both on a per capita basis and in proportion to the number of trial judges. Entry to the profession is relatively easy, requiring three years of post-graduate study and
passing a bar examination. In most states, the pass rate is high. In recent years, the United States has regularly added more than 35,000 lawyers per year, so that the existing stock is now close to 1,000,000 lawyers, or about 1 for every 300 persons.4) Competition among lawyers for litigation business has become more intense, and for much of the past thirty years the price of legal services has fallen.5)

4. A Highly Decentralized System of Civil Justice

American civil justice is highly decentralized. Part of the decentralization is a consequence of constitutional federalism, which contemplates separate judicial systems for the federal government and for each of the fifty states. Federal courts have their own distinct statutory jurisdiction, their own methods for selection and training of judges, and their own distinct court rules. Each state court system has its own independent system of justice, and each usually answers the questions of selection and training of judges and of appropriate procedural rules in a slightly different way than the federal system. These decentralized state choices enjoy substantial constitutional protection from federal interference.

Within federal and state systems, there are additional sources of decentralization, stemming from the fact that in both systems trial courts have a local orientation and enjoy significant autonomy. In both systems, trial judges are usually selected from practicing lawyers in the local litigation bar and, after minimal training, spend their entire judicial career hearing cases in the same locality where they once practiced. (In addition, of course, juries, who act as fact finders in many cases, are invariably drawn from the local community.) These local decision makers have considerable power to set formal and informal rules of practice in the trial court.6) As a practical matter,

4) Charles Silver and Frank B. Cross, “What’s Not to Like About Being a Lawyer?” 109 Yale L. J. 1443, 1491 (2000). Of course not all these lawyers are engaged in civil litigation work.
5) Id. at 1473.
then, local and regional variations in legal practice and legal culture play a large role in the resolution of civil disputes.

B. The Sources of the Pressure for ADR

American interest in court-based ADR had two principal sources. The first was the desire to reduce court workloads, congestion and litigation costs. The impetus behind this aspect of litigation reform was, in substantial part, a perceived surge of litigation. The increase occurred in both federal and state courts, but the most striking increases were in federal court, and I will limit my descriptive data to that system. Between 1960 and 1990, the federal court system in the United States experienced a dramatic increase in cases filed, in a broader range of subject areas. The newer cases were more complex, more contentious, and more time-consuming. Data from the federal courts give the flavor of the problem. Between 1962 and 1999, weighted filings per judgeship, which reflect an adjustment for the complexity and effort involved in more complex cases, increased from 242 in 1962 to 476 in 1999. Congress authorized additional judgeships and expanded the number of non-judicial personnel working in the federal court system. But these

6) In addition, the law of appeal gives significant power to local fact finders. In the normal course, American appellate courts do not hear factual questions de novo or receive new evidence on appeal. Instead, they defer to local tribunals’ decisions on disputed factual issues arising in pretrial and trial. Factual findings reached at trial are reviewed under a standard of clear error. See Fed. R. Civ. P. 52. Factual disputes arising in the course of pretrial are often reviewed under an “abuse of discretion” standard.

7) For material on state court filings see Mark Galanter, “Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society,” 31 U.C.L.A. L. Rev. 4 (1983) (hereinafter Galanter, Landscape) and Mark Galanter, “The Day After the Litigation Explosion,” 46 Md. L. Rev. 3 (1986). Increases in litigation rates for state court tort litigation were modest (3% annually, while those for certain classes of tort claims, such as professional malpractice and products liability, escalated much more rapidly, and a class of mass tort claims really “exploded.” Deborah Hensler et al., “Trends in State Court Litigation: The Story Behind the Statistics” (1987).
expansions did not fully offset the increase in workload, which as the quoted figures suggest, effectively doubled for each authorized judicial position.\footnote{8) See Larry Kramer, “‘The One-Eyed Are Kings’: Improving Congress’s Ability to Regulate the Use of Judicial Resources,” 54 Law & Contemp. Problems 73, 74 (1991).} In a system that emphasizes limited judicial involvement and low judicial budgets, dramatic increases in workload created concern and tension. Just as important, the rise in the number and complexity of cases also led to a widespread impression of excessive costs and delays.

Reform oriented judges identified three causal vectors for the increase in workload: new substantive rights of action, excessively complex or erratic procedures, and American litigiousness. The third of these often received heaviest stress, with commentators decrying an adversarial pathology produced by a uniquely litigious and lawyer dominated legal culture. Some disputants, the critics claimed, were self-destructive, even deluded. Other disputants were charged with disregard for the public good—for wasting public resources on matters not worthy of judicial attention. Lawyers were seen as incompetent or disloyal, padding their fees while leading their clients down the garden path of wasteful litigation. Alternatively, lawyers were portrayed as too loyal, readily yielding to their client's wrongful desires to pursue frivolous or harassing claims.

A second theme in the movement for ADR focused on the limitations of litigation in delivering substantively or procedurally fair or satisfying outcomes for litigants. Within this critique, it was possible to discern several strains. One emphasized the normative imperfection of adjudication because of its tendency to “all or nothing” outcomes, its reliance on formal legal rules that differed from the norms recognized by the parties or their community, and the limitations of fact-finders in dealing with increasingly complex and technical disputes. Another emphasized the inability of litigation to devise remedies that reflected and furthered the parties' long term interests, particularly when those interests would be served by future cooperative relationships.
C. Other Responses to the Perceived Crisis of Civil Justice Reform

Whatever the dimensions and sources of increased judicial business or procedural imperfection, court-annexed ADR was not the only solution available. Throughout the 1980's and 1990's, courts and legislatures had available to them, and in fact pursued, several other procedural options. Some solutions were aimed directly at reducing the volume and complexity of litigation by changing the rules governing jurisdiction, lawyer's fees, damages, and, on occasion, even the existence of the claim itself.9) Some judges actually compromised their neutrality by lobbying for or against such substantive changes.10)

Other strategies encouraged parties to pursue their claims in non-judicial alternative forums. Thus in the federal courts there was a pronounced increase in judicial support for, and judicial deference to, private dispute resolution mechanisms, particularly arbitration pursuant to contract. This support expressed itself largely through changing judicial construction of pre-existing federal statutes governing the enforceability of contract clauses committing the parties to arbitrate disputes arising under the agreement. In the past, federal courts had expressed hostility to arbitration and had invalidated such agreements on public policy grounds. But in the 1980's courts identified a strong public policy in favor of arbitration agreements and began to enforce them, even in the face of strong arguments that they were not knowingly entered into or threatened the substantive purposes of the federal or state regulatory law.11)

Courts also attempted to increase the resources available to handle the

9) An important example at the state level was the increasing adoption of “no fault” schemes for automobile accident cases.


increased demand for court services. As noted, judges actively sought and obtained further increases in the number of judges and other judicial support personnel employed in conventional adjudication.\(^{12}\)

Finally, judges sought additional powers aimed at increasing their ability to control the badly behaved litigants and to eliminate wasteful conflict. In particular, judges were instrumental in bringing about changes in court rules designed to increase penalties for filing meritless or bad faith litigation.\(^{13}\) In addition, judges self-consciously shifted their style of judging, from the passivity traditionally associated with the adversary system, to a more active style, sometimes characterized as managerial judging.\(^{14}\) Managerial judging demanded more engagement by the judge, typically through a series of hearings conducted over the course of the case, in setting limits on the scope and timing of factual investigation, in mediating disputes that arise in pretrial, and in guiding the parties to an appropriate settlement where possible.

D. Types of Court-Annexed Dispute Resolution

Court-annexed ADR was complementary to these different kinds of reforms and embodied several different approaches.\(^{15}\) *Court-annexed arbitration*

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\(^{13}\) An example was the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure, which sought to impose greater obligations on parties and lawyers to determine the merit of claims prior to filing and required the application of sanctions for non-compliance. Unfortunately, the rule lost favor with the courts, in part because of the additional time and resources devoted to litigation of sanctions issues, and was substantially modified in 1993 to dilute its effectiveness. For discussion in a comparative law context, see Stephen B. Burbank and Linda J. Silberman, “Civil Procedure Reform in Comparative Context: The United States of America,” 45 *Am. J. Comp. L.* 675, 678-80 (1997) (suggesting that Rule 11 may have been a case of “the cure being worse than the disease”).

essentially sought to respond to the surge of adversarial litigation by providing a traditional adjudicative outlet, but at lower cost to the parties and the system.\textsuperscript{16} Thus, it involved an actual evidentiary hearing of the merits of the dispute, but with simplified and truncated procedures, before a non-judicial decision maker, typically a practicing lawyer (or panel of practicing lawyers) serving on a volunteer basis or for modest fee paid by the court. Participation in court-annexed judicial arbitration was often mandatory for cases involving smaller amounts. But court-annexed arbitration, unlike arbitration pursuant to contract, was non-binding, because of concerns that requiring parties to abide by the results of such a simplified procedure before a non-judicial officer would be unfair, and, in certain classes of cases, might violate the constitutional right to jury trial. As a consequence, parties dissatisfied with the outcome could insist on a \textit{de novo} court or jury trial. Reformers hoped that litigants would not need to exercise their right to a full trial, either because the initial arbitration was acceptable or because it was a sufficiently clear signal of the likely outcome to permit the parties to negotiate a settlement. In order to deter the exercise of the right to \textit{de novo} trial, some programs imposed liability for costs and fees on a party who demanded a \textit{de novo} trial but who failed to better the outcome in the arbitration proceeding.

A variety of other ADR programs focused on facilitating dispute planning and settlement with more or less intrusive forms of \textit{mediation}\.\textsuperscript{17} Some built

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\item Not every federal or state court adopted all or even most of these reforms. In fact, in some courts, particularly in rural areas where caseload increases have been smaller, probably none have received extensive use. Conversely, in a few crowded urban districts there has been experimentation with all these, as well as with other alternatives not reviewed here. Nonetheless, these strategies describe the basic patterns of response to court crowding and delay.
\item The term mediation is used here to designate any program in which disputants appear before a neutral whose role is not to render judgment on the law and the evidence, but instead to provide information, advice or facilitative intervention aimed at
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directly on existing procedural rules. For example, judges were already authorized to include the topic of settlement in pretrial conferences with the parties and their lawyers.\textsuperscript{18)} It was only a short additional step to require or invite the parties to mediate their disputes before a judge or magistrate. Similarly, judges in some complex cases used their existing authority to appoint special masters to appoint experienced lawyers capable of mediating the dispute and then required the parties to mediate.\textsuperscript{19)} Still more inventive was the \textit{summary jury trial}, a procedure straddling the line between non-binding adjudication and mediation.\textsuperscript{20)}

Other mediation initiatives involved innovative use of non-judicial personnel. In \textit{early neutral evaluation}, parties and their lawyers are required to meet at an early stage in the case with a non-judicial evaluator—again typically a practicing lawyer—who is expert in the type of case involved. Following brief presentations by the parties, the neutral provides a candid evaluation of the strengths and weaknesses of each party's case and then the parties and the evaluator seek to produce a plan for the further management of the case.

An important issue in the design of court-annexed ADR programs has been whether to require participation by parties and their lawyers. Many courts have


\textsuperscript{20)} In summary jury trial, the court convenes the parties before a mock jury so that the parties can present, through their lawyers, a sharply abbreviated version of their trial case, in the hope that the jury's reaction to the presentations will educate the parties about the strength of their respective cases and provide the basis for a negotiated settlement. See, e.g., Richard A. Posner, “The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations,” 53 \textit{U. Chi. L. Rev.} 366 (1986).
made participation mandatory. Such requirements have led to concern that parties may find themselves coerced to settle claims that they strongly desire to litigate. When litigants have contested such mandatory procedures, they have met with mixed success, depending on the clarity of the legal authorization for compulsion, the novelty of the proceeding, and the extent of participation required. Thus, courts have concluded that a represented party can be compelled to appear at a routine settlement discussion conducted pursuant to court rule, but have struck down efforts to compel parties to make or accept settlement offers for a particular amount or to participate in more expensive and more experimental procedures like summary jury trial.21) Between these extremes there is considerable doubt as to what constitutes adequate party participation.22)

II. Explaining the Results of Court Annexed Dispute Resolution

As we have seen, ADR reformers had two kinds of goals. The first was to conserve resources by reducing delays and expenditures. The driving image here was the notion that much litigation was self-defeating or selfish. The second was to achieve “better” outcomes, as measured principally by the satisfaction of the litigants who appeared before the court. The reformers assumed that many litigants would find that ADR offered superior justice when compared with formal adjudication.

Have these goals been achieved? While one cannot yet venture definitive opinions,23) the evidence so far suggests that ADR has not achieved the

21) For discussion, see Bundy, supra note 14 at 59-60.
22) For discussion, see Bernstein, supra note 16, 141 U.Pa.L. Rev. at 2182-83.
23) Court-annexed alternative dispute resolution, unlike many past procedural reforms, has been seriously studied by excellent social scientists, notably in a series of monographs by the Rand Corporation's Institute for Civil Justice. Still, caution is warranted in interpreting the results thus far. None of these reforms has been systematically implemented or studied on a nationwide basis. Moreover, most of the studies were done when the dispute resolution programs were in their infancy, while
reformers' ambitions for reducing private and public costs and delay. Most studies find that court annexed ADR has not significantly reduced court costs, costs to litigants, or delay as measured by the time from the filing of the case to disposition.\(^{24}\) This result has recurred both in early studies of individual arbitration and mediation programs and more recently in studies comparing six different federal district courts which had adopted such programs with other, similarly situated federal courts which had not.\(^{25}\)

The evidence concerning the reformers' ambition for a higher quality of justice is also mixed, though with some favorable aspects. In general, participants in ADR processes express high levels of satisfaction, although the value of the data is limited because of the absence of fully controlled studies.\(^{26}\) Particular programs have generated some interesting reactions. Some early studies found that litigants exposed to court-annexed arbitration showed higher rates of satisfaction than those whose cases were resolved through judicial settlement conferences.\(^{27}\) Similarly, studies of small claims mediation have


\(^{25}\) James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas Pace and Mary Vaiana, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (Rand 1996). The authors found “no major effect of arbitration on time to disposition, lawyer work hours, or lawyer satisfaction.” *Id.* at 18. The authors also found “no strong statistical evidence that the mediation or neutral evaluation programs...significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management.” *Id.* The authors noted that the “finding that ADR has no significant effect on time or cost is generally consistent with the results of prior empirical research on court-related ADR.” *Id.* at 20.


\(^{27}\) *Id.*
found that mediated outcomes resulted in better post-dispute resolution relationships among the parties and better compliance that did adjudicated outcomes.28) But more recent studies have not been able to find a measurable impact on lawyer or litigant satisfaction.29) Some studies suggest that the limited success that court-annexed ADR processes have enjoyed is due to their providing litigants with a better opportunity to “tell their story” to a neutral.30)

Why hasn't court-annexed ADR produced the reductions in cost and delay that had been hoped for? And what explains the benefits that such programs may be producing? The short answer is that the reformers' essential premises were mistaken. The litigation culture that reformers believed was irrational and committed to adjudication was in fact more or less rational and committed to settlement. Moreover, because they focused on individual disputes, rather than on the dynamic flow of the disputing process, the reformers failed to appreciate the overall impact of their reforms.

To understand, it will help to review some of the most important empirical findings by social scientists who have tracked American disputing behavior31) from its inception, at the point when individuals engage in out of court activity, to its conclusion, when actual lawsuits are abandoned, settled, or resolved through adjudication. What this research discloses is a phenomenon that has been described as the dispute resolution “pyramid.” The idea of the “pyramid” captures two notions. The first is an upward progression from lower levels of potential or actual conflict to higher levels that are more focused, formal and costly. The second is a gradual attrition in the number of live disputes, reflecting decisions to settle or abandon claims at each higher

28) MacCoun et al., supra note 24, at 105-06. There is, however, a substantial question whether this outcome was due to distinctive features of the cases sent to mediation. Id.
29) Kakalik et al., supra note 25, at 18, 20.
30) MacCoun et al., supra note 24.
31) The most important work in this field was done in the 1970's and 1980's of the Civil Litigation Research Project of the University of Wisconsin and is brilliantly summarized in Galanter, Landscape, supra note 7.
stage. The bottom of the pyramid represents the universe of potentially litigable events. Above is the much smaller number of claims. Above that is the still smaller number of filed cases, and above that the very small number of cases resolved by some form of adjudication or by trial.

The highly schematized image of the pyramid reflects the basic features identified in the social science research concerning civil disputing in the United States. First, the universe of asserted claims is typically significantly smaller than the universe of potential disputes. Many potential claims are not recognized. Even people who feel aggrieved and know of their rights often decide to “lump it,” that is, to accept the outcome without complaining. Second, most disputed claims do not lead to litigation, but instead are settled or abandoned prior to any court filing. This is true even among disputes taken to lawyers. Third, when litigation is filed, most cases do not consume large amounts of court time or lead to a litigated judgment. To the contrary, the majority of filed cases are resolved by default or settlement, often shortly after the case is filed and without extensive discovery or significant judicial involvement. Filed cases are resolved by adjudication less than one-third of the time, and trials are rare.

Another important finding of this social science work is that the shape of the “disputing pyramid” differs for different kinds of disputes.³²) Consider two common types of disputes: automobile accident cases and medical malpractice cases. Because automobile injuries are easy to recognize, most injuries lead to claims.³³) But medical malpractice claims are hard to recognize—few negligently inflicted injuries lead to claims.³⁴) Claiming behavior is also influenced by costs, including possible damage to valued relationships. The

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³³) Id. at 536-41.
desire to preserve valued relationships plays little role in auto accident cases, but frequently deters malpractice plaintiffs from suing their own doctor. Because medical malpractice litigation also involves significant costs of proof due to the need to hire expert witnesses, would-be claimants are often discouraged from bringing suit prior to filing.35) Third, the rate at which disputes reach court depends critically on the functioning of intermediate dispute resolving institutions. In America, though the rate of claiming for automobile accidents is high, the rate of litigation is much lower, because a well-established and active claims processing network, involving plaintiffs' lawyers and insurance companies, resolves most claims through settlement prior to any court filing. Fourth, the persistence of cases that reach the court system also varies greatly. For example, though few medical malpractice claims are brought, the trial rate for such cases is high, due to the reluctance of doctors to concede fault except where the evidence clearly demonstrates it.36)

The social science story about the realities of dispute processing contradicts the myth of unthinking adversarialism. To the contrary, it suggests that litigation results from rational choices by litigants in light of the available information and alternatives. Toward the top of the pyramid, where parties have retained lawyers or filed suit, this process of rational choice by plaintiff and defendant has been characterized as ‘bargaining in the shadow of the law’.37) In this conception, decisions to settle or litigate result from a bargaining process, in which each disputant's reservation price (in the plaintiff's case, the least that it would accept, in the defendant's, the most that it would pay) is determined by


its estimates of the probability of success at trial, the value of the relief to be awarded by the court, and the costs to be incurred, as well as by the disputant's tolerance for risk and delay. Settlement will not occur if there is no “settlement gap”—that is, if the defendant's reservation price—the most he would pay—fails to exceed the plaintiff's reservation price. When the parties' litigation costs are small relative to the stakes, the facts of the case are close or unclear, or one party has a much larger stake in the case than the opponent, there may be no common ground. Even when there is a settlement gap, settlement may not occur if bargaining fails for strategic reasons.38)

While the literature on bargaining in the shadow of the law suggests that litigants are more coldly rational than the literature of adversarial pathology would allow, a growing body of evidence suggests that the picture is actually more complicated. On the one hand, it is clear that some business disputants adhere to the economic model quite closely. Thus, for example, when grain merchants decide to litigate, they prefer the application of strict formal and impersonal norms (“end game norms”) rather than the more generous and forgiving norms (“repeat play norms”) that they customarily apply in an ongoing business relationship.39) But strict and impersonal rationality is not invariably the norm. Cognitive psychology studies indicate that litigants and their lawyers may often make errors in their predictions of the benefits and costs of litigation, and that these errors may create a bias in favor of continued litigation. Such biases include the tendency for self-serving biases to

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

lead to an unduly optimistic evaluation of one's case\textsuperscript{40}) and the tendency to distrust excessively proposals or evaluations offered by one's opponent.\textsuperscript{41}) At the same time, important work in social psychology has debunked the notion that litigants' goals in and evaluation of dispute resolution processes depend exclusively on whether the outcome favors their side or on the narrow financial benefits and costs of litigation. Instead, litigants assign important weight to procedural values, including whether they were given an opportunity to voice their concerns, whether they trust the decision maker, whether they are treated with respect, and whether the decision maker is neutral.\textsuperscript{42})

This social science view of litigation, including the dispute resolution “pyramid” and the idea of “bargaining in the shadow of the law,” has several implications for the likely success of court-annexed ADR. First, they suggest that basic patterns of disputing behavior make sense and that Americans do not pursue conflict lightly or for its own sake. Litigants are cost sensitive, and normally compose their claims without extended litigation. Social norms and relationships play significant roles in defining the costs and benefits of litigation, and valued relationships are often a significant deterrent to claiming and to litigation. The steep litigation costs associated with extended pretrial and trial are also a significant factor in damping conflict, and explain why the pyramid continues to narrow sharply even after litigation has commenced. We can infer that most disputants are using the processes of negotiation and litigation to identify the information that will allow them to make a sound early decision whether to settle or litigate, not simply to express a sense of grievance or spite.

A second implication of the studies is that procedure plays a limited role in


\textsuperscript{41}) Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution in Barriers to Conflict Resolution 26 (Arrow et. al. eds. 1995).

determining the progress of individual disputes. To a significant degree, each
dispute has an independent social and economic momentum that is in some
measure independent of court-based procedure.43) This is particularly true in
the lower reaches of the pyramid, where the factors that determine the
persistence of litigation, such as the sophistication of the plaintiff, the size of
the stakes and the nature and quality of the relationship between the parties,
are largely independent of procedure.

The progress of disputes, including litigation rate and duration, is also
heavily influenced by the availability of intermediate forms of conflict
resolution short of litigation. I have already highlighted above the roles of
insurance companies in resolving routine motor vehicle disputes short of court
and of plaintiffs' malpractice lawyers in screening smaller and weaker claims.
Other examples of institutional non-judicial intermediaries include Better
Business Bureaus (for consumer disputes), corporate compliance offices or
ombudspersons, and industry sponsored conciliation processes or forums. For
many disputants, these forums provide what they need to resolve their dispute
without incurring the higher costs of litigation, whether by providing them
with a clearer view of the merits, a forum for bargaining, a corrective for
psychological bias, or a setting in which their desire to be heard and
respected is fulfilled.

Arguably the most important mediating force leading to resolution of
disputes short of litigation is the American legal profession itself. Of course it
is true that lawyers function as a gateway to the formal litigation process and

43) Recent studies explain the surge in complex business litigation over the past
few decades on the basis of factors that have nothing to do with the character of the
disputants or with changes in procedural rules. Instead, researchers have found that the
increase is driven by sharp increases in stakes and by greater market competition,
which has rendered long-term relationships between litigants relatively less important.
As a consequence, business litigants are more willing to risk relationships in order to
obtain a fair outcome in a particular transaction. See Jacob E. Gersen, “Markets and
Corporate Conflict: A Substitution-Cost Approach to Business Litigation,” 24 Law &
that access to lawyers sometimes leads to litigation. But lawyers also play a critical role in resolving conflict short of litigation, by advising parties to drop their claims, by bringing parties' underinformed or biased predictions about litigation outcomes closer together,\textsuperscript{44} and by permitting the parties to bargain through intermediaries, reducing interpersonal tensions and sometimes allowing the parties to use the trust and reputational goodwill existing between lawyers to reduce strategic barriers to settlement.\textsuperscript{45} Lawyers also play a central role in the design and staffing of private dispute resolution institutions, which have proliferated during the past quarter century even faster than publicly sponsored alternatives. In substantial part as the result of the initiatives of lawyers, there are a growing number of private mediation and arbitration services, many of them staffed by former judges. There are also a growing number of private lawyers who spend a significant portion of their practices engaged in mediation or arbitration.

These factors—the basic rationality of most disputing, the internal social and economic forces that drive much litigation, and the winnowing effect of intermediate institutions of conflict resolution—in turn indicate that the cases which reach court and do not settle shortly after filing tend to be the hard ones, in which some structural feature makes the case genuinely difficult to resolve. At the same time, they suggest that the particular impediments may differ between individual cases and between classes of disputes, varying from the difficulty of discerning the correct outcome on the merits, to some severe disproportion in the stakes (a party who is intent on judicial vindication or on


\textsuperscript{45} Ronald J. Gilson & Robert H. Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,” 94 Col. L. Rev. 509 (1994). The authors suggest that in some urban communities the tremendous growth in the size of the litigation bar has reduced the extent to which lawyers interact with each other and come to trust one another, and that this lack of familiarity may sometimes be an obstacle to settlement.
having his day in court; a party who realizes commercial advantage from delay), to severe mutual distrust that precludes or limits effective bargaining.

This different view of the disputing process helps to explain why court-annexed ADR has had such a modest overall effect on litigated cases. First, for some cases, ADR's effect is simply to increase costs to the courts and parties, with no offsetting benefits. In a system where litigation costs are very high and settlement is the norm, the cases that survive past the very early stages of litigation tend to be the difficult ones. A population of difficult cases calls for strong measures, but American ADR reforms are extremely modest. To save resources, ADR procedures often use inadequately trained and less prestigious non-judicial personnel and are highly limited in time and scope. To avoid offending litigants' sense of fairness or violating their constitutional rights, the procedures are non-binding, and the courts' power to mandate more intensive participation by those who are unwilling is quite limited. Finally, ADR procedures are typically applied to a broad range of cases, without much diagnostic sophistication concerning whether the dispute is one that will benefit from the specific procedural steps that ADR provides. Thus, for many litigants ADR does not significantly change the basic calculations of costs and benefits that drive the disputing process and determine the duration of litigation and the terms of settlement. The consequence is that the resources expended by the court and the parties are wasted because the trajectory of the case toward ultimate trial or settlement is unaffected. This can happen for any number of reasons. Commercial litigants may, for example, be uninterested in resolving their dispute under the cooperative social proffered by a mediator.\footnote{Bernstein, supra note 39.} Or the timing of the ADR process may be poorly matched to the development of the case, so that intervention comes at a time when the parties do not yet have sufficient information to resolve their dispute.\footnote{See, e.g., Kakalik et al., supra n. 25, at 20 (lawyers believed that many ADR sessions came too early in the case, before the parties were “ready to settle.”)}
A further disturbing implication of a rational-dynamic account of dispute processing is that when ADR processes do have effects on disputing behavior, they will often be offsetting or canceling. Thus, there clearly are some cases where ADR benefits parties by reducing costs, producing an earlier disposition, or responding the party desires to be heard or respected. These cases clearly weigh in favor of the procedure. But in other cases, the benefits offered in ADR cause litigation to go on for longer and to cost more than it otherwise would have done. This may happen because parties delay preparation and settlement so as to voice their concerns to a competent neutral.48) Or it may happen because parties would prefer to get their pre-settlement legal advice for free from the judge, rather than pay a price to have their lawyer do the preparation.49)

This analysis also explains why certain ADR procedures might have increased party or attorney satisfaction in certain classes of cases even if there was no positive impact on cost and delay. Some litigants respond positively to having the opportunity to tell their own story or to receive their proper respect, and, to some extent at least, value that opportunity more than a marginal improvement in their likelihood of winning or a marginal reduction in litigation costs. The irony appears to be that although ADR processes put in place primarily to reduce unneeded trials and bring about beneficial settlements, their principal demonstrated public value appears to lie in providing litigants with expanded opportunities to enjoy what many would argue is the core experience of adjudication—the opportunity to tell their side of the story in the presence of a their opponent and neutral arbiters.50)

What then are we to make of the American experience with court-annexed


49) Bundy, supra note 14, at 66.

50) Compare Lon L. Fuller, “The Forms and Limits of Adjudication,” 92 Harv. L. Rev. 353, 364 (1978) (suggesting that the core experience of adjudication is the right to present “proofs and reasoned arguments” in support of one's position.)
ADR? It is clearly too early to concede failure, even on the issue of reducing private and public costs and delays. Nonetheless, the lack of any clear evidence that ADR is accomplishing many of its stated aims is sobering. ADR system design involves tougher tradeoffs than had been thought. The hope had been that ADR would be both less costly and procedurally superior. That hope has proven too good to be true. Instead, it appears that ADR may be procedurally superior for some litigants, but perhaps higher cost for them as well, and that overall costs and delays are a wash.

Reformers continue to argue that court-annexed ADR is worth its costs, if only because some litigants clearly value the opportunity to be heard that it provides. Others suggest that high quality ADR is a service that a modern court system ought to provide, lest litigants and lawyers come to see court-based dispute resolution as a form of second-class justice, while wealthier litigants will increasingly rely on privately funded dispute resolution through retained mediators and arbitrators. This argument, however, may imply significant additional spending on the courts, and hence raises resource concerns similar to those that spawned ADR in the first instance. Moreover, in a society where retired judges, skilled lawyers and other professional neutrals are increasingly available to provide arbitration and mediation services to disputants at competitive rates, the argument for a state subsidy is increasingly doubtful.\(^{51}\)

The evidence on delays and costs also raises the question whether court annexed ADR should remain mandatory or become optional. Virtually all studies show that when court-annexed ADR is optional, most litigants bypass it; accordingly, it has been thought necessary to make participation mandatory in order to ensure that ADR programs have enough users to generate the

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\(^{51}\) Congress's solution with respect to the Federal courts has been to duck the question of funding, and implicitly, the questions of efficacy and quality as well. The Alternative Dispute Resolution Act of 1998, 28 §651 et seq., requires all federal courts to institute alternative dispute resolution programs but provides no funding for such programs.
requisite public benefits. Since those public benefits don't appear to be emerging, the argument for requiring participation increasingly has had to be made in paternalistic terms. The traditional paternalistic arguments in favor of mandatory participation have emphasized party ignorance of the benefits of ADR, lawyer conflict of interest, and strategic barriers to privately agreed upon ADR arrangements. These arguments, however, have diminished force after a quarter century of ADR reform. By now, most lawyers in a jurisdiction using mandatory ADR procedures will have some experience with them, probably more experience than they have with full scale trials, given their rarity. Moreover, most lawyers are now well aware of the growing availability of privately sponsored mediation and arbitration. This market, which was in its infancy when court-annexed ADR reforms began to be adopted, has now grown to the point where, particularly in sophisticated urban markets, parties may choose among a variety of organizations and individual providers, many with legal or judicial experience. The existence of that market demonstrates that private parties represented by lawyers frequently contract for services similar to those provided in court-annexed ADR when they deem them valuable. Moreover, there is good reason to believe that remaining strategic barriers to the use of ADR could be eliminated by means considerably less intrusive than compelled participation.52)

There are several ways that the performance of court-annexed ADR might be improved, and force of the argument against compelled participation reduced, but all involve significant difficulties and costs. Programs could develop better criteria for sorting cases, ensuring that a higher percentage of those cases would actually benefit from being handled in a court-based alternative process. In theory, such criteria could be developed through

52) For solutions, both relying on a blind escrow arrangement which allows parties to inform a neutral party of their willingness to try ADR without alerting the other side, see Bernstein, supra note 16, at 2192; Geoffrey P. Miller, Settlement of Litigation: A Critical Retrospective in Reforming the Civil Justice System 13, 30-31 (L. Kramer ed. 1996).
empirical research, and then applied mechanically at the outset of the case through a tracking system. In practice, however, there are significant obstacles to such an approach. It would require a more precise account of the goals to be achieved in each ADR procedure and of the mechanisms by which the process accomplishes those goals, and significant empirical study to determine which classes of disputes have characteristics specially suited to that procedure. Even with such information, it might not be possible to design a tracking system that would operate from the outset of the case, because of the difficulty of determining the critical characteristics of the dispute from the limited information available at the time of case filing. Thus, tracking systems may have to rely on information developed during the course of the case, and on the potentially fallible discretion of administrators or judges. As an additional or alternative measure, ADR neutrals could receive more intensive and sophisticated training in the diagnosis of disputes and the techniques of dispute resolution. Here again, work will be required to identify the appropriate content and duration of such training. A third strategy would be to attract stronger neutrals by paying them more. Clearly, though, each of these strategies is potentially in tension with public and private cost reduction goals.

Ⅲ. Implications for Korea?

What then are the possible implications of this experience for Korea? I want to start with some important qualifications. First, my own knowledge of the Korean justice system is not as great as it should be, and the English language sources, though most useful, do not permit a full canvass of the


54) See Kakalik et al., supra note 25 at 12.
problem. Second, there are important differences between the two systems that preclude simple comparisons. But while that means that the questions I raise must necessarily be tentative, the American experience suggests that some ideas are worth exploring.

A. Important Similarities and Differences Between the United States and Korea

Several important similarities are worth highlighting at the outset. First, as in the United States, Korean courts tend to be generalists, with relatively little subject matter specialization except in family, patent and administrative law matters.

Second, as in the United States, Korean caseloads have increased dramatically due to four decades of extraordinary economic development and the consequent urbanization of much of the population. In addition to an increase in the number of cases, there has also been an increase in more complex litigation, which often involves an extended trial. As in the United States, the number of judges has also increased rapidly, but not as rapidly as the weighted caseload. Unlike in the United States, staff support available to judges has not been materially increased and there has been little use of non-judicial personnel in adjudicative roles.55)

Third, there is a widespread view that Koreans, like Americans, make heavy use of the court system. Per capita rates of civil litigation in Korea are more than 10 times higher than comparable rates in Japan and almost fifty percent higher than for California.56)

Several differences are obvious and important. First, Koreans more

55) Yang, supra note 3, at 309-11.

frequently pursue filed cases to judgment than in the United States. Whereas in United States courts, approximately 70% of filed cases are resolved by settlement, in Korean courts that number is closer to 20%, and approximately 70% of filed cases are resolved by a formal judgment after trial.\(^{57}\)

Second, Korean trial courts are based upon a civil law model. Consistent with this civil law lineage, trials in Korea are before a judge (or in complex cases, a panel of three judges), not before a jury. In addition, as in civil law systems elsewhere, once issue has been joined, the judge takes control of the case and there is no sharp differentiation between pre-trial and trial. In consequence, almost all cases filed in Korea receive some judicial attention. Moreover, during the trial, the judge takes a more active role in the case than is typical in common law jurisdictions.\(^{58}\) The combination of high trial rates and greater overall judicial engagement means that the effective state subsidy to litigants, as measured by judicial effort, appears somewhat higher than in the American system.

Third, Korea's legal profession is organized differently than in the United States. In the United States, efforts to limit the number of lawyers entering practice have now been abandoned. Rather than rely on solely a restrictive bar examination to ensure quality, the general approach to attorney regulation has been to rely upon a combination of graduate law training, the bar examination, the market, conventional private legal remedies, and professional discipline. As noted, the consequence is a relatively competitive market in litigation services. In contrast, in Korea, the decision has been made to regulate quality through a very high threshold passage rate on the bar

\(^{57}\) In 1997, 4.6% of civil cases were resolved by court-annexed mediation, 2.5% by settlement in court, 17.5% by voluntary dismissal (some of which were associated with out-of-court settlement), and 68.3% by formal judgment. 1998 Korean Judicial Almanac at 428. In 1999 the comparable figures were: mediation (4.2%); settlement (2.5%); voluntary dismissal (13.4%), and formal judgment (73.4%). 2000 Korean Judicial Almanac at 410.

\(^{58}\) Song, “ADR Procedures in Korea”, supra note 1 at 508 (“Korean procedures are dominated by the judge”).
examination, which severely limits the number of lawyers entering the profession each year.\textsuperscript{59} Though the level of ability in the bar is high, the number of lawyers admitted to practice and engaged in court litigation and dispute resolution in Korea is proportionately smaller than in the United States or in most other civil law systems.\textsuperscript{60} While legal scriveners can assist parties in preparing litigation documents in simpler cases, and while there has recently been an increase in bar admissions,\textsuperscript{61} the number of fully trained lawyers capable of resolving complex disputes will remain relatively low for the foreseeable future and the cost and unavailability of such lawyers correspondingly high. As a consequence, many litigants in Korea are not represented by counsel, and this too appears likely to continue for some time to come. The lack of representation by counsel again places a greater burden on the judge and increases the effective public subsidy to litigants.\textsuperscript{62}

Fourth, the Korean judicial system is much more centralized and uniform than the American system. Korea has a single national system of courts, controlled from the national capital and subject to uniform procedural standards. It has a career judiciary, which receives centralized and uniform training at the Judicial Research and Training Institute, supervision from the higher courts, and constant rotation that prevents judges from developing strong attachments or loyalties to particular local communities. The implementation of court-annexed ADR on a uniform basis is likely to be much more straightforward in Korea than in the United States.

\textsuperscript{59} Some suggest that the principal motivation for restricting the supply of lawyers might be to ensure higher incomes for those admitted to the bar. See Dai-Kwon Choi, “How Is Law School Justified in Korea,” 41 \textit{Seoul Law Journal} 25, 50-51 (2000). Similar criticisms have been leveled at attempts by American lawyers to restrict the number of lawyers entering the profession.


\textsuperscript{61} Choi, \textit{supra} note 59, at 30 (reporting an increase from 300 per year in 1995 to 700 in 1999). Further increases have been proposed but are presently on hold.

\textsuperscript{62} Kim, \textit{supra} note 56, at 56.
Considering these similarities and differences together, the most striking feature of the Korean system is the tremendous pressure placed on trial judges, stemming from the combination of increasing caseloads, increasing complexity of filed cases, many pro se cases, a high rate of trial to judgment among filed cases, and a relative lack of clerical or professional assistance for judges. One might think that this workload would translate into extensive higher costs or extensive delays, but in fact private litigants' costs appear to be relatively low in comparative terms, perhaps due to the significant portion of the litigation workload carried by judges. Moreover, while some complex disputes last for considerable periods, the median time to termination in Korean courts is relatively modest by comparative standards.\(^63\) Instead, it appears that Korean judges have absorbed the increase in workload simply by working harder. But this approach is apparently reaching its practical limit, because talented and productive judges are free to move to private practice, where workloads are less demanding and salaries are several times higher than in the public sector. Just as important, the abler younger graduates of the Judicial Research and Training Institute, who in former times opted almost uniformly to begin their careers as judges, now increasingly choose private practice.\(^64\) A number of observers believe that the resulting “brain drain” presents a serious threat to the health of the Korean system of justice.

B. Korean Court-Annexed ADR

Korea has increased its commitment to court annexed ADR in civil cases.

\(^63\) Kim, \textit{supra} note 56, at 46 (reporting that in 1997 median time from filing to termination was 5.3 months and suggesting that decreasing the length of civil proceedings is not a significant issue for Korea); Song, “ADR Procedures in Korea,” \textit{supra} note 1, at 509 (the problem of delay in Korea “is not nearly so serious as in American courts.”)

\(^64\) James M. West, \textit{Education of the Legal Profession in Korea in Song, supra} note 1, at 363, 398-99.
Recent legislation provides for increased use of court-annexed conciliation, in which it is contemplated that trial judges will play the leading role.\(^{65}\)

Conciliation can be commenced either by the request of a party or referral by the judge assigned to try the case. Sessions are hosted either by the assigned judge, by a judge who presides over the mediation division of the court, or by a court-annexed mediation committee composed of a judge from the mediation division of the court and two members selected, on the basis of relevant expertise, from a standing panel of community members selected by the court. Panel members consist of practicing lawyers and other professionals, including architects, accountants, doctors, and construction experts. Conciliation sessions are informal: they are held outside of courtrooms and judges do not wear robes. A judge may devote several sessions to a single case. At the close of the mediation session, if the parties have not themselves reached agreement, the mediator or mediation panel may propose a mediation award, but if a party files a timely objection the award is vacated and the case is transferred to the regular trial calendar.

Apparently there has been no systematic empirical analysis of the conciliation procedure. Thus, there does not appear to be any definitive answer to the question whether conciliation actually reduces costs and delays for the parties or the courts. Reports suggest that this procedure does not have a large impact on caseloads,\(^ {66}\) but that it is very successful in bringing about settlement in automobile accident cases, less so in more complex civil litigation.\(^ {67}\)

\(^{65}\) Woo, \textit{supra} note 2; Song, “ADR Procedures in Korea,” \textit{supra} note 1; Su-II Son, “New Trends in Resolving Civil Disputes: Recent Experiences in Korean Courts” (unpublished manuscript on file with the author).

\(^{66}\) See sources cited at note 57, \textit{supra} (indicating that less than 5\% of cases are resolved through conciliation); accord, Song, “ADR Procedures in Korea,” \textit{supra} note 1, at 509 (“the number of cases disposed of through conciliation/mediation is not very significant”); Yang, \textit{supra} note 3, at 311 (less than 10\% of cases resolved through conciliation).

\(^{67}\) Kim, \textit{supra} note 56, at 36-37.
preserving the most precious resource in the Korean system: the time of the judges. Court-based conciliation is often conducted exclusively by the judge, and even when the judge works with a panel of non-judicial mediators, the judge is invariably present and takes a leading role. It may be, of course, that the time which judges spend replaces larger amounts of judicial time that would be spent at trial and in the time-consuming work of preparing written judgments, but it is uncertain whether that is what is happening. After all, the cases where judges report the most success in mediation are those that ordinarily would take modest amounts of time to try; and some cases fail to settle in mediation and have to be tried anyway.

With respect to the question whether court-annexed ADR contributes to the quality of outcomes, anecdotal evidence is very favorable. Korean observers praise the informality and flexibility of the conciliation procedure. Just as important, they praise its capacity to reach outcomes that better take account of Korean social norms. The starting point here is that in traditional Korean society, litigation is a last resort, and is not undertaken lightly. Social and commercial relations are governed by moral norms of respect, reciprocity and right dealing. Law comes into play only when morality fails: it is reserved for bringing to heel those who have demonstrated by their conduct that they are immoral and unworthy of respect. In such a society, the bringing of a

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68) Judge Woo makes this point very well. Woo, supra note 2, at 610, 628, 632.
69) Kim, supra note 56, at 36-38 (conciliation is most effective in simple automobile personal injury cases).
70) Song, “ADR Procedures in Korea,” supra note 1, at 507 (“conciliation helps to bridge the gap between the formal legal order … and the actual life of individuals in Korean society”).
71) See Dai-Kwon Choi, The Development of Law and Legal Institutions in Korea in Traditional Korean Legal Attitudes 54, 60 (Chun, Shaw & Choi eds. 1980) (in traditional Korean thought, law is reserved “as the last resort against a morally intractable person … [and] represents punishment inflicted on one who does not know what is shameful.”); Pyong-Choon Hahm, The Korean Political Tradition and Law: Essays in Korean Law and Legal History 19 (1967) (describing the traditional view as being that “law was an instrument of chastising the vicious and the depraved.”)
lawsuit signals a rupture in the social relations between the litigants, reflecting deep disappointment and anger on the part of the plaintiff, and mortal offense on the part of the accused defendant.\footnote{Professor Hahm states that in traditional Korean society, disputes and quarrels were viewed as “detestable and disturbing.” \textit{Id.} at 29. \textit{See} also, Choi, \textit{supra} note 71, at 75 (describing “social harmony” as a “paramount virtue” in traditional Korean thinking). Professor Song refers to the “national character of trying to avoid confrontation.” \textit{Song, “ADR Procedures in Korea,” supra note 1, at 507.}} For disputants who experience litigation in this way, the lawsuit may not be centrally about the formal relief available from the court, which indeed may be wholly inadequate to address the fracture of the social bond. Instead, what may be critical is the opportunity for parties to air their perceived grievances before an authoritative figure in a way that vindicates each party's personal sense of dignity and self-respect and to have the authoritative figure in turn propose a socially appropriate solution.\footnote{Professor Choi describes the traditional Yi dynasty magistrate as allowing “people with whatever grievances to come to court as they would come to their parents home to have their grievances heard.” Choi, \textit{supra} note 71, at 76 \& n. 55 (citing Chong Yag-Yong, \textit{Kugyok Monminsinsa}, II, 433 ff.)} Such a personal, highly moralized, and non-technical view of litigation and the judge's role is very different from a perspective which views litigation as something to be handled by expert professionals or as a necessary inconvenience of business to be resolved through bargaining at the lowest possible transaction cost.

To the extent that Korean conciliation is playing this sort of role, it is obviously generating benefits of considerable importance, whether or not they translate into savings in time and money. It seems plausible that the traditional view characterizes many of the disputes in which individual plaintiffs appear \textit{pro se}. It is less clear that the traditional view applies, or will continue to apply in the future, to the increasing volume of litigation involving business “repeat players,” such as insurance, financial and manufacturing companies. The growing presence of these more technical-rational litigants may in turn suggest the need for ADR procedures less

\textit{Id.} at 29. \textit{See} also, Choi, \textit{supra} note 71, at 75 (describing “social harmony” as a “paramount virtue” in traditional Korean thinking). Professor Song refers to the “national character of trying to avoid confrontation.” \textit{Song, “ADR Procedures in Korea,” supra note 1, at 507.}
oriented to traditional cultural norms.

C. Looking to the Future: Court-Annexed ADR and Alternatives to the Alternatives

Detailed empirical knowledge of the Korean justice system, of the kind that would permit firm recommendations, is not available. Still, there are several signposts that emerge from the preceding discussion. First, expansion of court-annexed ADR using judges will not be easy. The time of the judges is critically short, and demands that judges invest more time or resources in ADR seem unrealistic in view of other calendar pressures. On the other hand, those who propose additional training in ADR for judges whether at the JRTI or in continuing education are, in this outsider's view, clearly correct. If judges are to devote significant time to conciliation efforts, they should be provided with the knowledge and skills necessary to make their intervention fully effective. It must be recognized, however, that such an effort will require a clear account of what court-annexed ADR is intended to accomplish, criteria for identifying the kinds of disputes that will benefit from ADR, and well-specified techniques for use by neutrals. In the best of circumstances, such an effort will involve significant research and training costs.

Another alternative would be to expand ADR in Korean courts, but using non-judicial personnel, a strategy pursued by ADR programs in most American courts. While such programs have not reduced litigation costs overall, there is little doubt that they have freed up judicial time for other tasks and have sometimes generated high levels of disputant satisfaction. Can such a strategy work in Korea? There are reasons to be doubtful. First, there is a serious

74) See Son, supra note 65 at 3 (describing how caseload pressures limit judicial participation in conciliation sessions); Yang, supra note 3, at 311 (“ironically Korean judges are too busy” for ADR).

75) Woo, supra note 2, at 632-33.
question whether court-based ADR can work in Korea unless a judge is involved. In disputes that have a strong personal moral component, it may be that only a neutral with the high social and moral standing of a judge can meet the parties needs for catharsis and closure. For other disputants, the issue may be neutrality. Korean society is still characterized by strong informal networks of obligation based upon, among other things, family, school, professional and regional ties. By virtue of their formal role, their national orientation, and their separateness from every day life, judges have more independence from these networks than most in Korean society and hence a greater degree of neutrality.76) Second, even if judges are not essential participants in the conciliation procedure, it is likely that the person running the session will often need to have legal training, whether their job is evaluating the case or brokering a negotiated solution. American courts have designed their programs to make heavy use of practicing lawyers who work for low fees or for free. But it is obviously much easier to find lawyers willing to work for such low wages in a highly competitive, indeed arguably over-expanded, market for lawyers like the United States. Korean programs have already had difficulty maintaining dispute resolution panels that include lawyers due to scheduling difficulties and low pay.77) To the extent that the conclusion is reached that court annexed dispute resolution cannot proceed without judicial involvement, the potential for court annexed dispute resolution to deal with the most pressing problem facing the Korean civil justice system is obviously reduced.

Another important alternative would be to strengthen the role of dispute resolution that occurs either prior to filing in court or without judicial intervention. The guiding insight here is that in Korea, the courts are doing much of the dispute resolution work that is done in other societies by

76) Id. at 629 (“the court is deemed to possess the highest degree of neutrality”); Son, supra note 64, at 1-3 (suggesting that the judge is more effective than civilian mediators).

77) Song, “ADR Procedures in Korea,” supra note 1, at 503.
intermediate out of court dispute resolution processes.78) To be sure, changes in Korean society have contributed to increased workload, including the extremely rapid development of Korea's industry and commerce, its rapid urbanization, rising levels of personal wealth, and the advent of regulatory and administrative systems.79) But the design of Korean institutions is also a contributor. Korean litigation is heavily subsidized, in the sense that judges carry a large portion of the workload for the litigants, especially in cases where the litigants proceed without counsel. The low cost of litigation presumably contributes to both the number of cases filed and to their duration. It seems most doubtful that seventy percent of litigants would insist on trial to judgment if they had to pay a higher percentage of the costs of trial.

Korean filing rates almost certainly also reflect the lack of viable intermediate non-judicial dispute resolution institutions. With respect to disputes between ordinary citizens, it is quite plausible that rapid urbanization of the population has reduced or eliminated the efficacy of intermediate dispute resolution institutions common to rural communities characterized by continuing relationships and more traditional relations of authority. Additionally, the relative scarcity of lawyers in Korea and the frequency of pro se appearances in the Korean courts suggests that one of the main social mechanisms for resolving disputes short of litigation—negotiation between the parties' attorneys—is much less common in Korea as in other countries.

Are there strategies, then, that might reduce the demand for judicial resources by other means? One obvious but controversial possibility would be to reduce the subsidy to litigants. Litigants with claims over a certain amount could be required to retain attorneys, thereby increasing both litigants' costs and their capacity to shoulder some of the dispute processing tasks that are now carried by judges.80) Another approach, which could be combined with

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78) Id. at 509 (“In Korea, settlements are generally worked out in courts, with the judge acting as mediator, while in the American legal setting, much of the bargaining that prevails takes place outside of court.”)

79) Kim, supra note 56, at 3.
the first, would be to selectively increase filing fees for cases that place a disproportionate demand on judicial resources.\textsuperscript{81} Such measures would have the benefit both of reducing litigation and of encouraging the development and use of out-of-court dispute resolution institutions.

Another strategy would aim directly at strengthening of existing out of court institutions. The Korean Commercial Arbitration Board (“KCAB”) settles some cases by mediation, conciliation or arbitration,\textsuperscript{82} but the numbers are still very small as compared to current court caseloads, and growth in their use has been very modest.\textsuperscript{83} More encouraging is the increasing, number of cases resolved by KCAB through legal counseling.\textsuperscript{84} There are also a substantial number of statutes that require or permit conciliation prior to resort to litigation, typically under the auspices of a relevant government ministry.\textsuperscript{85} But while a few such committees have been formed and have significant caseloads, the leading scholarly test on the topic reports that “most of the remaining committees have not been formed or sit idle with an empty docket.”\textsuperscript{86}

It is not hard to divine why out of court dispute resolution has had such

\begin{itemize}
\item[80] Kim, supra note 56, at 56 (advocating the strategy as a way of reducing judicial workloads).
\item[81] Erhard Blankenburg, “The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany,” 28 Law and Society Rev. 789, 799 (1994) (describing how this strategy reduced litigation and increased out of court settlement in certain classes of disputes).
\item[82] Song, “ADR Procedures in Korea,” supra note 1, at 499.
\item[83] Compare Song, “ADR Procedures in Korea,” supra note 1, at 499 (reporting that 755 cases were filed with KCAB in 1987) with Kim, supra note 56, at 3 (335,000 civil cases filed in 1987). See also Son, supra note 64, at 8 (reporting that the KCAB “has been dealing with a relatively small number of cases”). More recent figures are lower. In 1997, KCAB disposed of only 133 cases, and in 1998 only 192. The Law Times at 16 (September 16, 1999).
\item[84] Song, “ADR Procedures in Korea,” supra note 1, at 500 (showing a 250% increase in cases resolved through legal counseling between 1988 and 1993).
\item[85] Id. at 503 (listing 21 such laws).
\item[86] Id. at 504.
\end{itemize}
modest patronage to this point. First, such institutions are relatively new. 87) Second, the current system, with its modest costs and limited delays, provides few incentives for voluntary use of out of court dispute resolution institutions. Third, there are some cases in which both parties have an urgent desire, wholly independent of the merits, to air their dispute before a respected community figure like a judge. Fourth, with respect to conciliation forums affiliated with government agencies, some litigants may fear that the conciliators' affiliation with the agency will compromise their neutrality. Finally, the small number of lawyers in private practice, and their heavy focus on court litigation may pose significant obstacles to the development of private out of court dispute resolution devices. Moreover, lawyers often play an important role in providing manpower for pre-court dispute resolution institutions. In other societies transactional lawyers play an important role in providing for resort to ADR as part of regular transactional planning.

These obstacles to increased use of out of court dispute resolution need not be insuperable. What is critical is to identify classes of cases which pose significant burdens for the courts and which currently receive relatively limited processing before reaching court. The courts might combine with relevant government agencies or concerned industries to sponsor a mandatory requirement that litigants in particularly burdensome classes of cases resort to a legal advice bureau or a conciliation forum before filing a claim. Such measures have significantly reduced certain classes of litigation in other countries. 88)

Existing institutions available for dealing with those disputes

87) Song Kun Liew, “Recent Developments in Commercial Arbitration in the Republic of Korea: The Revised Rules of the Korean Commercial Arbitration Board” in Song, supra note 2, at 479, 480 (noting that prior to the adoption of the KCAB Rules in 1973 “private law disputes of any nature were settled solely in the courts”).

88) See Blankenburg, supra note 81, at 802 (describing how provisions requiring resort to landlord tenant commissions have reduced landlord-tenant litigation in The Netherlands). For a discussion of how similar dispute management procedures have reduced automobile accident litigation in Japan, see Takao Tanase, “The Management of Disputes: Automobile Accident Compensation in Japan,” 24 Law & Society Rev. 651 (1990).
might receive selective additional funding and support designed to strengthen their procedures and give them greater credibility. Least restrictively, the courts might review policy choices respecting the diffusion of legal knowledge, looking for situations in which increasing the supply of lawyers or the availability of advice from non-lawyers and private institutions might serve to dampen needless conflict.

In a talk directed at judges and legal academics, it is worth noting how thinking about court-annexed ADR casts light on perhaps the most contentious issue in the Korean legal community—the debate over further expansion of admissions to the bar. Speaking solely from the perspective of dispute resolution, and assuming that adequate lawyer quality can be maintained by means other than the bar examination, several factors appear to weigh in favor of some further expansion. Such an expansion would involve relatively limited cost, since those passing the bar would be drawn from those who already receive substantial training at college and while studying for the bar. Moreover, contrary to conventional wisdom, a larger supply of lawyers appears likely to reduce pressure on the courts by facilitating earlier settlements and by increasing the potential for the eventual creation of a broader range of viable ADR institutions, both in and out of court. 89) On the other side of the ledger, lawyers in a larger bar may eventually find it more difficult to negotiate settlements with each other on the basis of reputation. Still, the balance appears to favor expansion.

The most important comparative lesson, however, is the importance, in designing new ADR processes, of being attentive to the character of the problem cases at which the process is aimed, careful to measure the effects of reforms once adopted, and realistic about the likely tradeoffs in the design of any system. Without such care and attention, there is a risk that ADR reforms will degrade the system rather than improving it.

89) See Gilson and Mnookin, supra note 45.
미국과 한국의 Court-Annexed Dispute Resolution에 대한 비교법적 분석

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미국과 한국에서는 법원이 관여하는 대안적 분쟁해결제도(ADR)를 통하여 민사사건을 해결하는 제도를 정착시키기 위하여 노력하며 왔다. 미국에서는 급증하는 소송사건을 적절하게 해결하기 위하여 사법개혁작업의 일환으로 법원이 관여하는 ADR을 도입하였는데, 그 목적은 소송비용을 경감하고 소송지연을 억제하면서도 보다 적정한 분쟁해결을 추구하는 것이었다. 그런데, 미국 법사학자들의 경험적 연구결과, 법원이 관여하는 ADR이 본래 추구하였던 목적을 모두 달성하였다고 보기 어렵다는 것이 밝혀졌다. 비록 미국과 한국의 사법제도가 매우 다르기는 하지만, 위와 같은 미국의 연구결과는 한국 법원의 과중한 업무부담을 해결하는 문제에 대하여 약간의 시사점을 제공할 수 있다고 생각한다.

미국의 민사소송절차는 당사자주의에 기초하고 있기 때문에, 판사는 절차적으로 매우 수동적인 역할만을 담당하고 있다. 미국에서는 생방당사자가 Discovery 등을 통하여 자율적으로 사실관계를 규명하는 등 당사자가 모든 절차를 주도하고 있고, 따라서 민사분쟁의 해결에 관하여 변호사들이 핵심적인 역할을 하고 있으며, 변호사의 숫자도 상당히 많다.

미국에서는 1960년대 이후 민사소송사건이 급증하였고, 상당수의 소송사건은 그 내용도 매우 복잡하게 되었다. 이에 관하여 일부 법학자(개혁론자)들은 미국 인들이 유별나게 소송하기를 좋아하고 변호사가 절차를 주도하고 있는 독특한 사법제도 때문에 ‘소송폭발(litigation explosion)’이라는 결과가 발생하였다고 주장하였다. 한편, 판사를 중용시키는 식의 단순한 대치방법으로 법원의 제판업무 부담을 경감시키기 어렵게 되자, 미국 의회와 법원은 제판관활권을 제한하거나

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사법개혁작업의 일환으로 ADR 등 새로운 제도를 도입하여 민사소송사건의 중가추세나 소송절차의 지연사를 억제하려고 시도한 것이 큰 성과를 거두지 못했던 것이다. 특히, 미국과 같이 소송비용이 고액이고 화해가 일상적인 사법 제도하에서, 실질적인 위험을 감수하고 소송이 제기된 사건의 경우 원칙적으로 분쟁의 해결이 어려운 사안일 가능성이 높다는 점을 감안해야 한다.

물론 ADR 등 소송 이외의 방법으로 민사분쟁을 해결할 수 있다면, 이는 소송사건의 증가를 억제할 수 있는 중요한 수단이 될 수는 있다. 그런데, 미국의 사법제도에서 소송 이외의 방법으로 민사분쟁을 해결하는 것이 대하여 가장 중요한 역할을 하고 있는 것 바로 ‘법률전문가(legal profession)’이다. 변호사는 단순히 소송을 준비하는 역할만을 수행하는 것이 아니라, 쟁점 당사자의 소송결과에 대한 지나친 낙관론을 억제하고, 쟁점 당사자로 하여금 합리적이고 실질적인 거래를 하는 등의 방법으로 분쟁을 해결하는 데에 결정적인 역할을 하기 때문이다.

나아가, ADR이 효과를 거둘 수 있는 유형의 사건도 있지만, 어떤 사건의 경우 ADR이 최종적인 공판절차 또는 화해에 이르는 궤도(trajecory)에 아무런 영향을 미치지 못하기 때문에, 그 중간에 ADR을 진행하는 절차가 난비에 불과한 경우도 있다는 점을 주목해야 한다. 극단적으로는 미국에서는 ADR 제도를 새로운 도입하기 이전이라면 당사자간의 타협을 통해서 자율적으로 종결될 수 있었던 사건들임에도 불구하고, 당사자가 긴급적인 제3자에게 자신의 이야기를 해보는 기회를 갖기 위하여, 혹은 무로로 법률상담을 받거나 화해를 위한 협상과정에서 도움을 받기 위하여, ADR 단계까지 절차를 연장하는 부작용도 발생하고 있다.

한편, ADR이 당사자 또는 그 소송대리인의 절차적 만족도를 높일 수 있는 데, 당사자의 선호하는 측면과 변호사들이 선호하는 측면이 반드시 일치하는 것은 아니다. 하지만, 일반적인 미국 변호사들은 의도적으로 소송을 지연시키기보다는 오히려 화해로 사건을 종결시키려고 노력하고 있다고 볼 수 있다.

반면 ADR이 실패성이 있는 사건만을 엄선한 다음, 현재보다 더 속련되고 경험 많은 중립적 제3자가 절차를 진행하도록 한다면, ADR이 실질적으로 소송비용을 경감시키고 소송지연을 억제할 수 있는 기능을 할 수도 있다. 하지만, 현재까지는 외와 같은 유형의 사안을 엄선할 수 있는 기준에 대하여 확실하게 밝혀진 것이 없고, 고급인력을 확보하기 위해서는 상당히 예산을 추가로 확보해
아 하기 때문에, 필연적으로 이에 관한 비용문제 등이 다시 대두될 것이다.

다룩법계 사법제도를 기본으로 하고 있는 한국의 경우, 판사가 소송절차를 주도적으로 진행하고 있으며, 상대적으로 변호사의 숫자가 적고, 당사자 본인소송이 많다는 점 등에서 미국과 상이한 사법제도를 가지고 있지만, 위와 같은 미국의 법사회학적 연구결과는 한국의 제도개혁에 약간의 시사점을 제공할 수 있을 것이다. 왜냐하면, 한국에서도 급격한 경제발전 등으로 인하여 소송사건이 급증하고 있고, 인구 대비 판사의 수가 상대적으로 적으며, 전문화되지 않은 재판부 (generalist tribunals)의 업무량이 과중한 상태에서, 법원이 관여하는 ADR를 활성화시키려고 노력하고 있다는 점 등 미국과 상당한 공통점을 발견할 수 있기 때문이다.

그런데, 한국에서 ADR을 도입하는 등 각종 사법개혁작업을 진행하는 경우, 다름보다는 화합을 중시하는 한국의 전통적인 사회규범에서부터 보험회사 등과 같이 민사소송을 계속 반복하게 되는 기업형 소송이 증가하는 현대사회의 실상까지 포괄하여 충분한 연구검토를 선행해야 할 것이다.

한국의 사법제도에서 가장 소중하게 취급해야 하는 것은 판사들의 시간이라고 볼 수 있다. 미국에서 일반화되어 있는 ‘생방 당사자를 대리하는 변호사 사이에서 이루어지는 분쟁해결협상’이 한국에서는 보편화되어 있지 않다는 점과, 미국에서는 판사 이외의 다른 법률전문가(보통 변호사)가 ADR 절차를 주체화하도록 함으로써 판사들의 시간을 절약하는 방식을 취하고 있다는 점 등을 함께 고려할 때에, 한국에서도 ADR 등에 관한 변호사들의 참여를 넓히고, 이에 대한 적절한 교육을 병행하는 것을 긍정적으로 검토할 필요가 있다. 또한 대륙법계 사법제도를 취하고 있는 일부 국가에서 성공적으로 활용되고 있는 방식, 즉 법원이 관여하지 않는 ADR을 담당하는 기관을 별도로 설치한 다음, 분쟁당사자로 하여금 이를 이용하도록 권장하는 방식도 검토할 여지가 있다.

결론적으로 한국에서 ADR을 폭넓게 도입하기 위해서는, 먼저 새로운 제도의 도입목적, 효과 및 부작용 등에 대하여 실질적으로 검토하는 것이 가장 중요하다. 만일 이에 대한 신중한 평가와 검토를 거치지 아니하고 사법개혁의 이름으로 새로운 절차를 설립하여 도입하는 경우, 기존 제도를 발전시키기보다는 오히려 실질적으로 퇴보시킬 위험이 있기 때문이다.