
The Structures and Roles in Judicial Review of Administrative Litigation in Korea

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Abstract

The purpose of this paper is to review the basic structure of administrative litigation system of Korea and its role in the judicial review over the exercise of public powers. The courts' jurisdiction over administrative litigation has an evident constitutional ground, but the concrete forms of action have been decided by the legislature. The main forms of judicial review are appeal litigations which include a suit for invalidation, a suit for affirming the nullity and a suit for affirming the illegality of omission of a "disposition" in the Administrative Litigation Act.

Until recently, the scope of review under the appeal litigation has been restricted mainly by the courts' narrow interpretation of the concept of "disposition" and their view on the purpose of litigation. A disposition means an administrative legal decision with direct binding force on a specific case. The administrative activities with only factual effect (administrative guidance, administrative investigation, etc.) and administrative rule-making have been excluded from the concept of "disposition." The purposes of appeal litigation are both to protect the legal right or interest of individual inflicted by an administrative decision (subjective purpose) and to secure lawful exercise of administrative power (objective purpose). However the subjective purpose has been stressed as a primary purpose of appeal litigation and the standing for public interest lawsuit has been denied.

But there are observable changes of the courts' attitude responding to the recent social changes: democratization, decentralization and globalization. The 2004 Supreme Court's proposal to amend the Administrative Litigation Act, which adopts new forms of actions providing remedies of injunctions and more expansive concepts about the subject matter and standing for appeal litigation, can be seen as an evidence of the courts' changing self-image.

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I. Introduction

Rule of law with separation of powers and representative democracy¹⁾ has been accepted by most democratic States as a principle to control the execution of public powers. The judicial review of administrative decisions for their constitutionality or legality is essential to the legitimacy of the administrative process under the rule of law. In Korea appeal suit against administrative disposition under the Administrative Litigation Act('the Act' from below) is the main procedure for judicial review. There are additional forums where the legality of administrative activities can be checked. Those are tort action against the State, civil or criminal action where the legality of administrative activity is a prior issue, as well as constitutional litigation at the Constitutional Court.

Judicial review rests on two basic premises. First, the administrative power is exercised legitimately only in accordance with the Constitution and statutes. Second, judicial decision trumps administrative decision as for the issue of 'legality.' If judges could always find in the Constitution and the related statutes determinate answers for the legality, the two premises would be just repetition of same proposition. But due to the judicial discretion in deciding the reviewability of administrative activities and the unavoidable indeterminacy in interpreting the related legal norms, the level of judicial control of public power can be different depending on the attitude of judiciary. The fact that the judiciary doesn't have official power to make law in Korea doesn't make big difference.

The purpose of this paper is mainly informative. It is to show the landscape of judicial review in Korea as it is. For the proper view we should look at the various forums with the judicial attitudes prevailing in those forums. It will examine appeal litigation system under the Act and survey other procedures as far as the judicial review is concerned. Then the judicial attitudes toward judicial review will be looked into, which have been revealed in the emphasis of purpose of administrative litigation, the legal dogmas postulated as the basis of appeal litigation, and the legal interpretations about judicial reviewability.

1) There are various ideas about what is 'rule of law' and how to realize it. Especially the Rule of Law tradition of Anglo-American legal systems is contrasted with Rechtsstaat which emphasizes rule by statute enacted by parliament. But it will be the common essence of rule of law to reject the arbitrary ruling by man and endorse the ruling based on reason in law established by people's will. SUNG NAK-IN, CONSTITUTIONAL LAW 155 (2004).

This paper consists of the five parts: I. Introduction, II. Forms of Action, III. Availability of Appeal Litigation, IV. Other forums for Judicial Review and V. Conclusion. In Part I, we will see the brief history and the present legal grounds of administrative litigation. In Part II, after an overview of the forms of action under the Act, I will examine the functional classification of suits (subjective or objective litigation) and the nature of appeal litigation (formative or declaratory judgment) as essential elements deciding the structure of administrative litigation after an overview of the various forms of action under the Act. In Part III, the special requirements for lawful appeal litigation will be examined. Part IV will survey other forums for the substantial judicial review. Finally, in Part V the recent efforts of the Supreme Court to revise the Act will be introduced.

1. A Brief History of Administrative Litigation Law

Following the establishment of the independent government of the Republic of Korea in 1948, the ‘drafting committee of a statute for judicial relief from administrative infringement’ was organized at the Ministry of Government Legislation. The first Administrative Litigation Act, with 14 sections, was enacted in 1951 during the Korean War. It was modeled on the Act for Special Provisions concerning the Procedure of Administrative Suit of Japan which had been enacted in 1948.

Since the President Park Chung Hee had gained power through military coup in 1961, the intensive economic development strategy was pushed by the administrative government. It had blossomed into successful economic growth for such a short period, while it unfortunately accompanied retardation in implanting democracy and rule of law at the flowerbed. As a natural result, administrative authorities under the President’s control had been endowed with superior position over legislative or judicial bodies and highly discretionary power over citizens. In such a situation, the idea of judicial control of administrative discretion was not so welcomed that the administrative litigation as a legal institution was used in a very restricted manner.

In 1984 after the end of the President Park’s regime, the Administrative Litigation Act was extensively revised. The basic structure of the present Act was formed then. Administrative cases had to be brought to the High Court with subsequent recourse to the Supreme Court. A plaintiff was required to exhaust administrative remedy by the Administrative Appeals Commissions which were affiliated to administrative

agencies. The basic structure such as the forms of action still seemed similar as the Japanese statute, but the Act had some intentional variations from Japanese for encouraging different judicial approaches to the structure and function of judicial review. For example, it defined the concept of “disposition,” the subject matter of judicial review, more broadly than Japanese. But it had taken quite a long time for courts to actually apply it so broadly.

Since the democratization in the late 1980s, the role of the judicial body has changed substantially. It was the Constitutional Court established by the Constitution of 1988 that led the activation of judicial review. It has done more than expected to perform its duty: to fully protect the people’s fundamental rights and effectively check governmental powers.²⁾ The Constitutional Court has exclusive power over the final judicial review of statutes enacted by the Congress, but it also shares with general courts the jurisdiction over review of the execution of administrative powers mainly in the form of ‘constitutional complaint.’ The administrative litigation at general court has been also vitalized.³⁾ For example, the Supreme Court has expanded the scope of review, and made active use of unwritten principles of administrative law (i.e. the principle of proportionality, the protection of legitimate expectation etc.) as legal standards to check administrative discretion. In 1994 as a part of judicial reform there were additional important changes in the administrative litigation system. The 1994 Act repealed the rule of exhaustion of administrative appeal and instead allowed complainants to choose between administrative litigation and administrative appeal from the beginning.⁴⁾ Also it established the Administrative Court as a specialized court for the first instance of administrative litigations, and allowed two subsequent chances of appeal from its decision to the High Court and then, to the Supreme Court.

2) As of December 2004, the Constitutional Court had declared 418 articles of Laws (statutes, presidential decrees etc.) unconstitutional and revoked about 214. governmental actions. <http://www.ccourt.go.kr/home/english/welcome.jsp>

3) In 2003, the number of administrative cases at first trial was 11,411 and at the final appeal (the Supreme Court) 1,564. http://www.scourt.go.kr/scourt_en/jdc_info/statistics/cases/adm_cases/index.html

4) Paradoxically, the administrative appeal, which is relatively cheaper, faster procedures giving broader remedies to complainant, has been used more actively since it became optional procedure.

2. The Legal Grounds for the Administrative Litigation

1) Constitutional Grounds

According to the Article 107(2) of the Constitution the Supreme Court has the ultimate power of judicial review of administrative actions and rule-makings.⁵⁾ It is similar as the system of the U.S. and Japan, contrary to the French, in that general court, not separate administrative court (like Conseil d'État) has jurisdiction over administrative litigations. The Administrative Court is a specialized court in administrative litigation, but is still a part of the unitary judicial system under the Supreme Court. And general court, not the Constitutional Court, has power to decide the issue of constitutionality as far as administrative activity is concerned. The allocation of jurisdiction between the Constitutional Court and general courts depends on the subjective matters, not on the nature of legal issues (constitutionality or statutory legality.)

2) Statutory Grounds

The Act applies to administrative litigations as a general law unless other statutes state otherwise. It provides four forms of action: appeal litigation, party litigation, public litigation and agency litigation. There are three types of appeal litigation: litigation for revocation, litigation for affirming null and void and litigation for affirming illegality of inaction. The Act provides the general right to bring an appeal suit in all areas of administration. It means that the person who is affected unfavorably by an administrative activity can bring a suit without specific provision allowing judicial remedy at the individual statutes.

But the Act is not self-sufficient law for administrative litigation. It consists of just 46 articles, which prescribe only special rules for administrative litigation. Section 8 prescribes that the provisions of the Civil Litigation Act, the Civil Enforcement Act and the Court Organization Act are applied to the matters about which the Act is silent, to the extent they are fit for the nature of administrative litigation. For example, the provisions about exclusion of judge, competency of

5) "The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial."

parties, cost of litigation, service on parties, inspection of proof, appeal to the upper courts etc are applied to administrative litigation, while provisions about waiving, settlement,⁶⁾ preliminary injunction⁷⁾ etc. do not apply.

II. Forms of action

I. An Overview

1) Appeal Litigation

The appeal litigation can be instituted against a disposition or an omission of disposition by an administrative agency. Depending on the object and remedies, there are three forms of action:⁸⁾ Litigation for Revocation to revoke or alter an illegal disposition, etc, Litigation for Affirmation of Nullity to declare the invalidity or inexistence of a disposition, etc, and Litigation for Affirmation of Illegality of an Omission to declare an agency's inaction illegal.

The disposition is a specific category of administrative activity, which can be roughly said to be a legal decision for a concrete case by an agency. A private party aggrieved by an administrative disposition can bring a revocation suit to invalidate it or a nullity-affirming suit to confirm its nullity.⁹⁾ As for the agency's refusal to

6) Until now the settlement or mediation of administrative litigation is not officially permitted. The main reasoning is that the defendant agency has no right to dispose the 'legality' of an administrative disposition, which is regarded as the object of litigation to be decided. But in practice 'settlement or mediation in fact' has been used in way of withdrawal of lawsuit by a plaintiff satisfied with the voluntary change of administrative decision by the defendant agency.

7) As seen below at the part of forms of action, the 'injunction' as a final remedy is not available under the Act. But the preliminary prohibitory injunction is available in limited cases. Courts can suspend wholly or partly the effect, execution or the continuation of procedure of the disposition upon the plaintiff's request where there is urgent necessity to prevent irreparable damage from being caused by a disposition (Sec. 23 the Act).

8) The Administrative Litigation Act sec. 3.

9) Constitution, Art. 107(2). It can be said that the constitutionality review of a disposition also occurs when judges decide the cases based on the general principles of administrative law such as principles of equality, proportionality, the protection of legitimate expectation etc. Because the positive legal ground of the general principles are found in the Constitution. For example, the constitutional grounds of equality and proportionality are Art. 11 and Art. 37(2). Art. 37(2) provides that "The Freedoms and rights of citizens may be restricted only by statute when necessary for national security, the maintenance of law and order of for public welfare."

exercise public power, just invalidating the refusal cannot be a satisfying remedy for the applicant. For the substantial remedy the Act provides that when a court decides the revocation of refusal disposition, the agency has a statutory obligation to issue a new disposition in response to the original request of the plaintiff according to the intention of judgment.¹⁰⁾ The obligation can be enforced indirectly through the first-instance court's order of reparation to the requesting party.¹¹⁾

In case an agency fails to take any "disposition", i.e. there is no answer to the application of a disposition (permission, license etc.), the applicant can seek a declaratory judgment that the 'inaction' is illegal through the litigation for affirming the illegality. The affirming judgment gives rise to an obligation of agency to make an official decision, whether to issue a disposition requested or to reject it. This form of action has been scarcely used for the insufficient remedy for plaintiff as well as the fact that there are not so many cases of agency's pure "inaction."¹²⁾

2) Party Litigation

The party litigation can be brought to solve disputes concerning legal relations which are caused by disposition, public contract, eminent domain, or otherwise a matter of public law in its nature. While appeal litigation is a specially designed form of action for judicial review, party litigation is more similar to general civil procedure. The party litigation in the Act is usually called "party litigation in public law" in order to differentiate it from civil litigation. Other than appeal litigation, an administrative agency cannot be a party because a legal right or duty can not appertain to it. Only a legal entity (including natural person and legal person) can be a party. The main legal issue is what are the legal rights or obligations of the parties,

10) The Administrative Litigation Act sec. 30 (Binding Force of Revocation Judgment etc.) (2) If a disposition revoked by a judgement is involved in the rejection of a request of the party, the administrative agency, that has made such a disposition, shall make a new disposition to the previous request in keeping with the aim of such a judgment.

11) The Administrative Litigation Act sec. 34.

12) According to the legislative history of 1984 amendments to the Act, this form of action as a remedy for the agency's inaction was a legislative compromise of 'litigation for order to do disposition (specific disposition when there is no discretion exercisable by agency, and non-specific disposition just within the discretionary power when there is discretion exercisable by agency) which is similar as mandamus. Then, the Justice Department proposed the introduction of the litigation for order to do disposition, but the Supreme Court opposed to such an expansion of jurisdiction on the ground that it was too early for courts to exercise such an interventionary power to the administration.

not whether the related administrative activity is illegal or not. Courts can award various final remedies: declaratory judgment of legal rights, monetary damage or specific performance like in civil action. In case a disposition is related, its legality could be reviewed as a collateral issue. The court cannot invalidate a disposition at party litigation.

Party litigation seems to have potential as a comprehensive and flexible form of action for judicial protection of individuals' rights. However, until now it has been under-used only in limited areas. The preemptive role of appeal litigation and the court's conventional use of civil litigation in tort actions against the State are the main reasons for the limited use. Many administrative scholars have argued that the form of party litigation should be used more than now in two ways. One way is to reclaim the litigations which should have been subject to party litigation but is subject to civil litigation at present: tort action or unjust enrichment action against the State, and (a few scholars argue) the action about governmental procurement contract etc. The other way is to use it as a supplement to appeal litigation. It can be prototypical procedure for all the administrative litigations uncovered by appeal litigation.¹³⁾ For example, party litigation can be used to get proper remedies against the administrative factual activities or rulemakings.

3) Public Litigation

The public litigation in the Act is a group of lawsuits which can be instituted by a person without his or her own self interest to seek the correction of illegal acts by the State or organs of public entities. One cannot file a public litigation unless an individual statute creates a specific type of it. At present there are only a few examples of public litigation statutorily prescribed: a suit for nullifying the national referendum under the National Referendum Act, a suit for nullifying an election or a candidate being elected under the Public Official Election Act and a newly introduced "local residents' suit" against the head of local government under the Local Autonomy Act.¹⁴⁾

13) KIM NAM JIN & KIM YEON TAE, ADMINISTRATIVE LAW I 760 (2007).

14) Local Autonomy Act sec. 13-5 (Residents' Lawsuit) (1) The residents having made a request for inspecting the matters concerning the payment of public money, the matters concerning the acquisition, management and disposition of property, the matters concerning the conclusion and execution of contract for trade, lease, undertaking

4) Agency Litigation

The agency litigation is also a group of litigation which can be instituted when disputes arise over the existence or non-existence and exercise of power between agencies of the State or the organs of public entities. According to the section 2 of the Constitutional Court Act, the Constitutional Court has jurisdiction over the competence disputes between state agencies, between a state agency and a local government, or between local governments. The competence litigations under the Constitutional Court Act are excluded from the ‘agency litigation.’ Then in which case an individual statute can make new agency litigation?

The competence disputes can be categorized into the disputes between the organs of different entities and the disputes between the organs of the same entity (i.e. internal disputes). Conflicts between a head of local government and an agency of central government would be the former case, while conflicts between the head and the local council of the same local government would be the latter case. Legal scholars divide on whether the agency litigation in the Act includes both of the categories or only the latter. From the viewpoint that both categories can be agency litigation, a suit brought by a Secretary of the State against local council to annul the resolution of local council under the Article 159 (6) of the Local Autonomy Act would be a kind of agency litigation. However, from the viewpoint that only the disputes between the organs of the same entity are subject to the agency litigation, it is a special type of litigation rather than agency litigation.

and others with the partner of competent local government, or the matters concerning the neglect of imposition and collection of public money, such as local tax, fees for use, service charge, fine for default, pursuant to Article 13-4 (1) may, where it falls under any of the following subparagraphs, raise a lawsuit against the unlawful acts or the fact of neglect related to the matters requested for inspection against the head of competent local government (where he delegates the authority to handle such matters to the head of the agency under his jurisdiction, it refers to the head of the agency under his jurisdiction; hereafter the same shall apply in this Article and Article 13-6): 1. Where the inspection has not been completed even if 60 days (where the period of inspection was extended pursuant to the proviso of [Article 13-4 \(3\)](#), it refers to the date the extended period has been expired) have elapsed from the date on which the competent Minister or the Mayor/Do governor has accepted the request for inspection; 2. Where one is dissatisfied with the result of inspection as referred to in [Article 13-4 \(3\)](#) and (4) or the request for measures as referred to in the provisions of paragraph (6) of the same Article; 3. Where the head of local government has failed to execute the request for measures by the competent Minister or the Mayor/Do governor as referred to in the provisions of [Article 13-4 \(6\)](#); and 4. Where one is dissatisfied with the implementing measures by the head of local government as referred to in the provisions of [Article 13-4 \(6\)](#).

2. The purpose of Administrative Litigation: Subjective Lawsuit v. Objective Lawsuit

The above four types of administrative litigations can be categorized into subjective lawsuit and objective lawsuit depending on its main purpose. While the main purpose of subjective lawsuit is to protect individuals' rights or interests and provide remedies for the infringed individuals, objective lawsuit's main purpose is to secure that administrative activities be done legally and promote the public interests.¹⁵⁾ It is generally said that appeal litigation and party litigation belong to subjective lawsuit, while public litigation and agency litigation fall under objective lawsuit. In practice, every form of administrative litigation contributes to subjective and objective goals at the same time. When a person appeals to the administrative order for his or her self-interest, the lawsuit provides for chances not only to review the questioned activity but also to deter future illegal activity that would possibly occur to others and ultimately to improve the general quality of administrative activity. Vice versa in a suit for invalidating an election for public interest, a candidate who lost in the illegal election is seeking to realize his self-interest in the fair election. Then the two functions are the two sides of the same coin and the distinction between objective and subjective lawsuits can be said just a matter of emphasis or weight.

Then for what does such a distinction have a meaning? It affects the nature and the span of administrative litigation.¹⁶⁾ It decides the remit of judicial intervention in the execution of administrative power and the relationship between administrative power and judicial power. To define the goal of appeal litigation as the protection of individual's legal right can be a barrier to judicial review in cases the private interest aggrieved is not yet recognized as a legal right, but the actual effect on privates or whole society is serious and unjust. The diffused interest like environmental influence is a good example. Of course the span of judicial role can be enlarged by defining the "right" in broad meaning. That has been the courts' approach to expand

15) The public interest lawsuits in the U.S. can be an example of objective lawsuit.

16) When considering the scope of review decided by the standing, the administrative litigation system of Germany is at one end of the spectrum where the subjective purpose is emphasized and the judicial review systems of the U.S.(injury in fact), France(intérêt direct et personnel) and the U.K(sufficient interest) are at somewhere toward the other end where the objective purpose is emphasized. PARK, JEONG HOON, *Important Issues of the revision of Administrative Litigation Act*, 31-2 PUBLIC LAW 147, 205 (2003).

standing to appeal litigation. However, such an approach would be limited and incremental.¹⁷⁾ If to legitimize administration itself were to be considered as a goal with equal value to the protection of individual's legal right, the judges at administrative litigations will consider more explicitly the spillover effects of the specific judgment on general administrative behaviors. Until recently the administrative law theories have focused predominantly on its subjective function, and the courts have considered those elements only in an implicit manner. Recently some scholars argue that the appeal litigation is also objective lawsuit in its nature and the standing should be expanded enough to cover "just interest" not limited to "statutorily protected interest."¹⁸⁾

3. The Nature of Appeal Litigation

Because appeal litigation is the main institution for judicial review of administrative activities,¹⁹⁾ most of the important administrative law cases have been produced from it. In jurisprudential discussions predominant weight has been put on the appeal litigation. So it is necessary to see the nature of appeal litigation for understanding the structure and scope of judicial review in Korea. Then, the following questions should be addressed: what does 'revocation of an illegal disposition' mean? What is the difference between 'revocation' and 'affirmation of nullity'? By what standards do judges revoke or affirm nullity the disputed disposition? In the Act the most prominent difference between the two is whether the statutory time limit for bringing a suit is applied or not.²⁰⁾ But according to the applicable legal dogmatic, the difference between revocation and affirming nullity

17) Decision of Mar. 16, 2006, 2006Du 330 (Korean Supreme Court). The court said, "the 'interest protected by statutes' is recognized where there is individual, direct, and specific interest protected by the statute which is the direct or indirect legal ground of the (disputed) disposition, while it is not recognized where there is general, indirect, and abstract interest which is shared by general citizens."

18) PARK, JEONG HOON, STRUCTURE AND FUNCTIONS OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 140-141, 160-165 (2005).

19) More than half of all the provisions of the Act (26 among 46 sections) are about revocation litigation and only a few sections are for the other appeal litigations(4) and party litigation(6).

20) The Administrative Litigation Act sec. 20 "A revocation litigation shall be instituted within 90 days from the date a disposition is known to the person and shall not be instituted after the lapse of one year from the date the disposition is made. It is not applied to the nullity affirmation litigation.

rests on the extent or quality of illegality and it also explains why the Act sets time limit for revocation suit and not for the nullity-affirmation-suit.

A key to understand the nature of appeal litigation is to read the statutory text of the Act with the administrative law dogmas. In Korea the administrative law jurisprudence has been systemized based upon legal dogmatics originated from Japan and German administrative law. They constitute main texts for legal education of administrative law and have considerable influence on the interpretation of the Act by courts. I'd like to call such a administrative law dogmatics "shadow institution." There are a few provisions of the Act which can have different meanings from the legal doctrines if they are interpreted in pure textual approach. Those are the concept of "statutorily protected interest" for deciding "standing" and the concept of "disposition" for deciding the object of appeal litigation, both of which are the determining elements of reviewability.

There are two different attitudes toward the interpretation of those concepts with discrepancy between the textual interpretation and the explanatory theories. One is to keep the logical consistency between dogmatics and the interpretation of the statutory provisions. The other sees that the textual difference shows legislative intention to deviate from the dogmatics. So in order to respect the legislative intention the texts should be interpreted literally independent of the established dogmas. If it is considered that the principal parts of the dogmatics were imported, not developed historically in Korea, the attitude supporting textual interpretation seems congenial with the effort to develop administrative litigation model which is fitter for the goal and distinctions of Korean society. The relation of "disposition" of the Act and the legal dogmas about 'administrative act' will be scrutinized below.

According to the Act, one can bring a revocation litigation against the specific type of administrative activity, "disposition." Section 2(1)1 defines it as "the exercise of, or the refusal to exercise public power by an administrative agency as function of law execution in relation to specific facts, other similar administrative actions. Neither the governmental procurement contracts nor administrative guidance do belong to "disposition" because they are deemed not to be related to the exercise of public power. Neither administrative rule-making is a "disposition" because it is general and abstract, not specific, decision. How about administrative activity with only factual detrimental effect on a person which is done by an administrative agency on the statutory ground? From the statutory text of Section 2(1)1 only, it can be a "disposition" because it is the exercise of public power on specific case. But the

courts have decided it is not “disposition.”

According to the general administrative law theories, the administrative activities are classified into four main categories: administrative rule-making, administrative act, administrative contract, and administrative factual activity. The interpretation of “disposition” is related to the dogmatic concept of “administrative act,” which is defined as “an authoritative act in public law which has direct legal effect on private person for executing law at a specific case by an administrative agency.” It came originally from German administrative law with its appeal litigation system. The German appeal litigation system has been one of the models for the Korean appeal litigation system. The Federal Administrative Courts Act of Germany prescribes that the object of appeal litigation is limited to ‘administrative act (Verwaltungsakt).’ Therefore, in Germany an “administrative act” is a theoretic concept as well as a positive statutory concept. In contrast, in Act only the term, “disposition” is used and “administrative act” is just a theoretic concept which describes a group of administrative activities with same characteristics, which should be treated in the same way. However, the concept of ‘administrative act’ plays the role as a prototype of “disposition.” So in order to decide whether a complained administrative activity is a “disposition” or not, one would compare the given activity and the “administrative act” and find how similar and how different they are. It is sure for the Supreme Court to interpret the “disposition” more broadly than ‘administrative act.’ But It is also true that such a way of interpretation has been working as a barrier to fundamental expansion of administrative activities reviewable by appeal litigation.

One of the distinct elements of ‘administrative act’ is “legal direct effect.” Here the substance of “legal effect” is to bring a change on one’s legal status, i.e. legal rights or duties of his or hers. Therefore, the administrative activity with only factual detrimental effect on the person isn’t “disposition” reviewable through appeal litigation. This element is The reason why the “legal direct effect” is required for an activity to be appealed through the revocation litigation should be found in the underlying legal dogmas which decide the nature of “revocation” and “affirming nullity.” When an administrative activity is illegal, how does it affect the activity’s legal effect? It differs depending on the degree of illegality. There are two categories of illegality: ‘simple illegality’ and ‘serious and evident illegality.’

If the act is illegal “seriously and evidently” it is deemed invalid from the beginning. And it also means that everybody can treat it invalid without an official declaration (or revocation) by courts or the issuing public authorities. Then what

courts can do is just to confirm and declare that a challenged administrative decision is originally null and void. So the nature of the “litigation for affirmation of nullity” is to seek a declaratory judgment. Then what is the *raison d’être* of a litigation if it is not necessary to make an illegal act invalid? It is not usually so clear whether the illegality is “serious and evident” or not. Thus, a citizen can’t help risking the breach of valid administrative order if one should judge the nullity of an act for himself. That’s why the authoritative confirmation by court is needed.

On the other hand, when the illegality of a disposition is simply illegal, the action is just “revocable,” not ‘invalid.’ What does “revocable” means? It means that it is necessary for an empowered authority (courts having jurisdiction over revocation litigation or the agency who issued the act²¹⁾) to revoke it in order for an illegal act to be invalidated. And if nobody files a valid revocation suit within the time limit prescribed in the Act the action will gain undisputable validity, even though it is illegal. As a result administrative act can be said to have tentative validity from the date of issue till when the act is undisputable or revoked. Some consider such a tentative validity as a special substantive effect of administrative act, called the “Effect of officially decided matter.” What is the ground for such a special effect? The modern justification seems to be public policies such as securing the effectiveness of law enforcement, legal stability, and protecting the third party’s legitimate expectation about the legality of administrative decisions.²¹⁾ The revocation litigation is the only judicial way to remove the special effect of administrative act. So the nature of revocation is ‘formative’ in that it modifies the legal relationship between them by finally invalidating an administrative act.

To define the nature of revocation litigation in relation to the concept of ‘administrative act’ has resulted in narrowing the sphere of administrative activities which are judicially reviewable through appeal litigation. When an activity with only factual effect (for example, when one paid custom duties by self-assessment system,²²⁾ when a public official was given “admonition” which is not statutory

21) More fundamental justification of such a special treatment of illegal activity of administrative agency could be found in the Socrates’ argument in *Crito* that a citizen who voluntarily accepted the membership of a polity has unqualified obligation to obey its law for the preservation of the polity even though he considers the law is unjust and conflicts with his interests. The nature of the administrative disposition is a legal decision which executes the law, then citizens are obliged to obey the legal decision even though it is illegal unless they appeal following the statutory procedure.

22) Decision of July 22, 1997, 96 *Du* 8321 (Korean Supreme Court)[Claim for revocation of disposition of

disciplinary measure,²³⁾ or when administrative authorities proceeded compulsory execution on private's property), the appeal litigation is not available to dispute the activities' legality. Administrative rule-making and administrative guidance are not the object of appeal litigation not only because they are not specific-facts-related or not authoritative, but also because they do not have such tentative validity.

The Recent new point of view on the nature of revocation litigation deserves mentioning. It presupposes that an illegal activity is null and void from the beginning regardless of the extent of seriousness. Just the legislature decided to limit the period when the administrative decision can be disputed in case the illegality is not so serious, which is the result of balancing between the principle of legality and legal certainty (that is, the need for fast stabilization of administrative decisions.) Therefore the nature of the revocation judgment is declaratory rather than formative like a judgment affirming its nullity. The tentative validity of an administrative act is just a legal fiction or a factual (not legal) presumption as a reflection of the statutory time limits of administrative litigation, not a substantive legal effect. The approach like this enables all of the activities which fit in with the definition of "disposition" of the Act to be litigable by appeal litigation.²⁴⁾

4. *Permissibility of Unspecified forms of action*

Is it possible to bring a suit for judicial review which is not the specified form of action in the Act only on the constitutional ground of judicial power? For example, is it allowed for a complainant to seek a judicial decision to order an agency to do or not to do a specific disposition (similar as mandamus or prohibitory injunction)? Different opinions exist on the interpretation of the related provisions of the Constitution²⁵⁾ and the Act and on the desirable relationship between the executive power and the judicial power under the separation of powers principle.

imposing custom duty].

23) Decision of Apr. 23, 2004, 2003 *Du* 13687 (Korean Supreme Court) [Claim for revocation of disposition of admonition].

24) PARK, JEONG HOON, *supra* note 18, at 165-173.

25) Constitution [*heonbeop*] (1987), Art. 101 (1) Judicial Power shall be vested in courts composed of judges.
(2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

If one interprets that the Constitution which protects the right of access to courts under Article 27(1)²⁶⁾ purports to protect individual's rights without blank²⁷⁾ (like Art. 19(4) of the Constitution of Germany) and that the listed forms of action on the Section 4 of the Act is just exemplary, and also finds no difficulty with separation of powers to grant judiciary the power to mandate administrative agency specific action or inaction, one will see that they are permissible. Otherwise one will see that such a suit is not permissible without amending the Act. From this viewpoint, if courts are granted with the power to order an agency a specific action or inaction, the judicial body does not 'review' but 'perform' first-instance administrative decision-making which belongs to the administrative power. It exceeds the limit of judicial power under separation of powers principle or administrative expertise theory. The list of forms of action is an exhaustive one.

Though many academics support the former view, the courts have asserted the judicial remedies against illegal administrative activities should be strictly limited to the statutory remedies under the Act. Therefore the litigations seeking an affirmative relief like mandamus or prohibitory injunction have been dismissed on the ground that it falls outside of judicial power. Then it seems necessary for the legislature to revise the Act in order to enable litigation for remedies as mandamus and prohibitory injunction to be used. In the 2004 proposal to revise Act by the Supreme Court the provisions for the new forms of action were newly inserted.

5. Choosing Proper Forms of Action

A complainant needs to choose the proper and most effective form of action. Two cases of choice are important: revocation litigation and nullity-affirming litigation, and revocation litigation and party litigation.

The revocation litigation and the nullity-affirming litigation provide the same remedies in their final effect. Theoretically the availability will be decided on the extent of "seriousness" or "clearness" of illegality, but in actual situation it will be the

26) Constitution [*heonbeop*] (1987), Art. 27(1) All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.

27) Seeing that even before enacting the first "Administrative Litigation Act" in 1951, administrative lawsuit was admitted by courts, it can be argued that the jurisdiction over the judicial review is a part of general judicial power under the Constitution of Korea.

prior standard whether the time limit for revocation suit is passed or not. If it is not passed, one is not likely to bring a nullity-affirming suit because to prove that the illegality is “serious and evident” is much harder than to prove just simple illegality. If a plaintiff brings a revocation suit and the judge finds the disposition is seriously and evidently illegal, the judge can make a declaratory judgment affirming the nullity. In the opposite case, the judge can advise the plaintiff to change the form of action into the revocation suit and then decide it. In both cases the requisite conditions for going to merits of revocation suit have to be satisfied.

When a complainant seeks to confirm his or her legitimate legal status (right or duty) infringed by a disposition, he or she has to bring a revocation suit first and cannot resort to directly a party action. For example, when a public officer was discharged and want to recover his office and salary during the discharged period he has to institute a revocation suit for the disposition of discharge first. He cannot seek to confirm his legal status of a public officer by party litigation.

III. The Availability of Appeal Litigation

To decide the availability of administrative litigation is to delimit the boundary within which citizens can redress wrongs done to them by administrative power using judicial resources, as well as to demarcate judicial intervention with administrative activities. So the related values and principles should be referred in order to decide it. Among them are the nature of judicial power, proper separation of powers between legislature, judiciary and administrative branches, the cost-benefit efficiency of judicial control of administrative power through litigation. These considerations are embodied in “conditions of litigation.” These are requisite preconditions to be fulfilled for courts to go to the merits of the case.

”No interest, no lawsuit” is an overall principle applying to all the judicial actions.²⁸⁾ The “interest” means the public value deserving the allocation of judicial resources as well as the interest of plaintiffs redressible by the lawsuit. To recognize the “interest of lawsuit” we have to consider comprehensively various elements related to each other. For appeal litigation the interest of lawsuit is scrutinized as three conditions of litigation: “the suitability of object (that is, the suitability for

28) LEE SI YUN, CIVIL PROCEDURE LAW 185 (2002).

review of administrative activities disputed)”, “standing of a complainant” and “interest of lawsuit in narrow sense.” Those are distinct elements but are intertwined and sometimes interchangeable in essence.²⁹⁾ We will see the three conditions and then a few other special conditions of the appeal litigation which are prescribed in the Act.

1. Subject Matter: “disposition”

The concept and the interpretation of “disposition” as a subject matter of appeal litigation were already seen above. A few things to note is that it functions as a standard of ‘redressibility.’ That is, it excludes administrative activities against which the remedy of appeal litigation is.³⁰⁾ And it also decides the timing judiciary may intervene with administration. In the administrative decision-making process a “disposition” comes up when the decision is finalized and noticed to the addressee. By making only “disposition” litigable the legislature fixed timing of judicial intervention as ‘after the internal decision-making process is done. It is similar as an issue of ripeness, which means that the court will not hear a case unless there is a live controversy.³¹⁾

2. Standing to sue

The revocation litigation may be instituted by a person having “statutory interests” to seek the revocation of a disposition, etc. The interpretations on what “statutory interests” means can be varied from the ‘right in strict sense’ to ‘interest

29) So sometimes it is controversial whether an element has to be considered as an issue of standing or suitability of object. For example, the courts have required that plaintiff has a right to apply for such an action based on the statute or general legal principles, for an agency’s refusal to do so to be a “disposition.” Though courts cast the requirement as a matter of “disposition,” many scholars argues that it should be treated as a matter of standing. Lee Kyung Woon, *The Recent Change of Judicial Precedents on the Rejection of Appointment or Employment-Contract Renewal of Professors*, 80 STUDIES ON PUBLIC ADMINISTRATIVE CASES 80 note 30.

30) This is so only when we see the nature of revocation is to remove the legal effect of disposition (formative judgment). If the nature is seen to be just the affirmation of illegality (declaratory judgment) the scope of administrative activities against which the remedy is effective will increase.

31) “Under the ripeness doctrine, an agency must have taken “final” action felt in an immediate, direct, and concrete way by a complaining party before judicial review is appropriate.” BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 562 (1991).

deserved protection through lawsuit' and even to just 'securing the legality of administration.' As seen above, one who sees the revocation suit as a subjective litigation tends to interpret it as a meaning nearer to the "legal right." While one who sees it as an objective suit tends to interpret the "statutory interest" as 'interest deserved protection,' 'just interest', and nearer to 'the judicial control of administration,' itself. Courts have expanded standing gradually and consistently through the interpretation. At present an interest at stake should be one protected by the statute that is the legal ground for the disposition or the related statutes.

3. Interests of suit

The issues of interests of suit other than the reviewability of sued activity and standing are often called "interests of suit in a strict sense" or the "necessity to protect the right through the litigation." Among the issues, the Act prescribes specially about the situation when the disposition is no more effective due to the lapse of time-period for the legal effect, the enforcement of disposition or other causes. Though there is not a disposition with the legal effect which is to be removed by revocation suit, if the affected person has "statutory interests", he or she can institute a revocation suit. For example, the courts have recognized "statutory interests" to seek the revocation of a disposition which already exhausted its legal effect when the fact that such a disposition exists can be a statutory element considered as one of the conditions of heavier penalty on another breach in the future.³²⁾ The interest of lawsuit in such a case has a similar function as "mootness." A court will not hear a case that has become moot; a real, live controversy must exist at all stages of review, not merely when the complaint is filed.

4. Defendant

According to Article 13 of the Act, one can bring appeal litigation against the administrative agency that has made the disputed disposition. It is one of the peculiarities of appeal litigation. Considering that the legal effect of administrative activities belongs to the State or Local Government which is right-and-duty bearing unit as a legal entity, the defendant should have been the State or Local Government

³²⁾ Decision of Jun. 22, 2006, 2003 *Du* 1684 (Korean Supreme Court).

itself. However, for the efficiency and convenience of parties the legislature statutorily endows administrative agency with special eligibility as a defendant of appeal litigation.³³⁾

5. Time Limit to bring a suit

As already seen above there is time limit to bring a revocation suit. According to the Article 20, revocation litigation shall be instituted within 90 days from the date a disposition is known by the possible plaintiff. It is a legally determined period, which cannot be extended by the court. However in case a plaintiff fails to observe the time limit due to no fault of his own, he or she is allowed to initiate the suit within 2 weeks after the condition is removed. At the same time a revocation litigation is subject to another time limit, one year from the date a disposition takes effect unless there is a legitimate justification for passing it. These are functionally similar as statutes of limitations, but different in that it is the court's obligation to investigate whether to observe it even when the defendant doesn't argue it. When the court finds the plaintiff to have passed the time limit the court is obliged to dismiss the litigation finally.

As seen above there is no time limit for the litigation for affirmation of nullity etc. On the other hand the same time limit is applied to the litigation for affirmation of illegality of an omission according to Article 38(2). However, there are different opinions on what it means exactly because we can hardly figure out when the date is from which the time period is reckoned in case of omission.

6. Exhaustion of Administrative Remedies

Administrative Appeal is the quasi-judicial administrative remedy procedure whose ground is found in the Constitution. Before amending the Act in 1994 one could not bring an administrative litigation without exhaustion of administrative appeals. However, since 1994 amendment, the Act allows in principle a complainant

33) In case the agency who made the disposition actually is different from the agency who is authorized to do it by statute, who should be the defendant? It depends on whether there is a shift of decision-making authority from the agency with statutory authority to the other agency through valid delegation. If there is a shift the delegated agency shall be the defendant and if not the original agency shall be defendant.

to choose whether to bring an administrative litigation directly or to resort to administrative appeal first and then depending on its result to administrative litigation. Otherwise it is only in case individual statutes have a provision to make obligatory to resort to the administrative appeal before instituting a suit.

IV. Other Forums for Judicial Review

1. Judicial Review at Constitutional Court

The Constitutional Court has jurisdictions over five kinds of disputes.³⁴⁾ the constitutional complaint is the procedure where constitutional litigation has often overlapped with administrative litigation. According to the Article 68 of the Constitutional Court Act, anyone whose fundamental rights guaranteed by the Constitution have been infringed through the exercise or non-exercise of governmental powers except the judgments of the ordinary courts may file a constitutional complaint with the Constitutional Court. It is not allowed, however, before exhausting all the relief processes which are available under other statutes.

The “dispositions” subject to administrative litigation also fall into “the exercise or non-exercise of governmental powers.” But due to the rule of exhaustion of all the other remedies and the exclusion of courts’ judgment from the jurisdiction of constitutional complaint, a “disposition” cannot be reviewed at the constitutional complaint procedures in principle. In contrast administrative acts which do not fall into the category of “disposition” can be subject to a constitutional complaint. Those include administrative activities with only factual results and no legal effect (for example, administrative guidance) or administrative rule-making. Therefore, it can be said that in Korea the judicial review of administrative activities are done in two forums: administrative litigation at general courts and constitutional complaints at the Constitutional Court. Whether the disputed acts fall into the “disposition” is the key question for choosing the correct forum.

34) Constitution [*heonbeop*] (1987), Art. 11 (1). The Constitutional Court shall have jurisdiction over the following matters: 1. The Constitutionality of a statute upon the request of the courts; 2. Impeachment; 3. Dissolution of a political party; Competence disputes between State agencies, between State agencies and local governments, and between local governments each other; and 5. Constitutional complaint as prescribed in a related statute.

It is difficult to decide the correct path when the nature of certain activities is hard to define (e.g. activities with only factual results, administrative rulemaking etc.). Especially for the judicial review over administrative rulemaking we can observe a jurisdictional competition between the Supreme Court and the Constitutional Court. According to the Constitutional Court, if administrative rulemaking (including presidential decree, the departmental decree, ordinances of local governments, etc.) directly infringes upon an individual's fundamental or basic rights, the individual may file a Constitutional Complaint against the rule itself.³⁵⁾ Against the rule of exhaustion of all the other remedies the Constitutional Court has reasoned that the courts have failed to classify rule-makings as "dispositions" that there is no other way of seeking remedies except constitutional complaint. But from the opposite point of view the Constitution vests the Supreme Court with the power to "make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial (Article 107, Clause (2))", meaning that the Supreme Court is the only judicial body which has the power to decide the constitutionality of administrative decrees etc.³⁶⁾ The Constitutional Court responded to the argument that it is true, but only when the issue is raised in a trial as a matter calling for prior settlement before deciding the merits. When a regulation has a direct legal effect on specific individuals it need not be reviewed as a prior question. And the procedure where it can be disputed directly is outside of the Supreme Court's jurisdiction. But when a rule directly affects the legal right or duty of a private, it can be subject to the revocation litigation as a disposition and there exists a few decisions where the Supreme Court reviewed administrative regulation.³⁷⁾ So 'who has the jurisdiction over the judicial review of

35) Constitutional Review of Enforcement Decree sec. 35 (4) of Certified Judicial Scriveners Act, Decision of Apr. 25, 1996, 95 *Hun Ma* 331 (Korean Constitutional Court). In this case the disputed provision of the Rule of the Supreme Court restricted the number of paralegal as 5 in one licensed office. The plaintiff, a paralegal who was already employed in an paralegal office, was discharged due to the provision applied. The Constitutional Court decided that the provision itself possibly affected the plaintiff's freedom of occupation and went to the merits to find it unconstitutional.

36) Kim Jong Bin, *The Subject Matter of Constitutional Complaint*, 2 THE CONSTITUTIONAL LITIGATION MATERIALS 201 (1989).

37) The Supreme Court decided that the municipal ordinance which closed a public school (Decision of Sep. 20, 1996, 95 *Nu* 8003 (Korean Supreme Court) Litigation for affirmation of nullity of municipal ordinance]) and the administrative decree which announced the reimbursement rate of medical expense by national medical insurance (Decision of Sep. 22, 2006, 2005 *Du* 2506 (Korean Supreme Court)[abatment of medicine cost rate case]) were

administrative rulemaking' can be said 'unsettled question' in Korea. In the amendment bill of the Act proposed by the Supreme Court, administrative rulemaking is included as a subject matter of revocation litigation. It shows the Supreme Court's endeavor to reclaim the area of rulemaking.

2. Judicial Review at a Civil or Criminal Litigation: Prior Question

When the legality, validity or existence of a disposition is a prior issue to be solved before judging merits of a case, it is a chance for the court to perform judicial review.

For example, a complainant has to dispute the validity of an administrative decision to impose tax when he or she seeks in a civil procedure to get back which he or she already paid. Does the civil court have the power to invalidate the disposition? The courts have found that they have jurisdiction only to confirm a disposition already invalid due to its serious and evident illegality, not to invalidate the simply illegal disposition. Because the courts are also bound by the tentative validity of administrative act. Then if a disposition to impose tax is simply illegal he or she should bring an appeal action against it first while if it is seriously and evidently illegal he or she can bring a civil action directly.

But civil courts have power to decide the issue of 'legality' itself. Tort claims against the State is an representative occasion where a civil court reviews the legality of administrative activities. The Article 29(1) of the Constitution⁴⁹⁾ makes it clear that a person is entitled to be compensated from the State or public organizations for the damages by an unlawful act committed by a public official. In Korea the tort actions have been treated as civil suits, not administrative litigation by courts. Though the Party litigation is a proper form of action for the claim, the judicial custom which had started when administrative lawsuits consisted of only two instances hasn't been changed. The 'illegality' for the tort claim is said to be broader than that of the appeal litigation. The court have said that the issue at the tort action is not the validity of the disposition but only the illegality itself, so the civil court can decide it.

There are similar situations in criminal courts. In a case a person was prosecuted for driving without license, the Supreme Court decided it did not fall into a "driving without license" if he acquired the license using another person's ID Card (registered

"dispositions."

residents' card) when he was underage. Because driving with valid but illegal license does not fall into "driving without license," such an illegality of the license (administrative disposition) is not so serious and evident that made the license null and void from the beginning. The license was deemed valid as far as it didn't invalidated by a revocation judgment. The decision can be interpreted that the criminal court is not allowed to invalidate the illegal license.

V. Conclusion

Overall the scope and remedies of administrative litigation in Korea still has plenty of room for expansion. The limitedness can be attributed partly to the judicial restraint which had prevailed under the authoritarian regime. For courts could have expanded them through broader interpretation of the Administrative Litigation Act. But according to the transition model of the law³⁸⁾ such an attitude of judicial body may be seen as a natural response to keep minimum of independence under the government with deficiency of legitimacy. That is, courts might have prevented political intervention by restricting its role strictly to the protection of individuals' subjective right, not the review of public policy.

But the recent social changes, democratization, decentralization and globalization etc. brought changes to the judicial attitude. The 2004 proposal of amendment of the Act by the Supreme Court can be a remarkable evidence of the courts' changing self-image. It introduced new forms of actions providing remedies of injunctions: litigation for an order of specific performance or prohibitory injunction. It also adopted much broader concept for subject matter and standing for appeal litigation. For the subject matter, the concept of 'disposition' is replaced by a totally new concept of 'administrative act.' Within it are included the activities with only factual results and administrative rulemaking besides the 'disposition.' It purports to replace the theoretic concept of 'administrative act'. Finally it defines the concept of standing more broadly: from the "statutory interest" to "just legal interest." Though to what extent the standing will be expanded by the new definition is to be known only after the future decisions by courts, it is doubtless that such a legislative revision will give a clear message to the courts. It will be very meaningful to watch how the courts will

38) For example, PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

break the path toward ‘Brave New World’: more active judicial control of administrative power.

KEY WORDS: judicial review, administrative litigation, appeal litigation, reviewability, standing, disposition, administrative rule-making