
Korean Administrative Case Decisions in ‘Law and Development’ Context

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Abstract

In Law & Development Context, Korean administrative case decisions show good example of how they are related with public governance and economic development. From the above arguments, we can see following four points.

First, Korean economic development in early stage (1962-1979) is indebted more to ‘efficient’ government rather than ‘transparent’ government. Most of these efficiencies were accomplished by public agency’s broad discretionary power through ‘administrative guidance’. In this period, judiciary was reluctant to engage in government’s discretionary power conducted through administrative guidance. After accomplishing basic economic development, more emphasis was laid upon transparency of government. Second, in each stage of economic development, the Korean government used globalization differently. In the early stage, the Korean government supported enterprises to increase export through administrative guidance. Globalization in this period was somewhat limited. After establishing basic economic development, the Korean government faced the liberalization of global economy in more positive manner. Strengthening transparency of government procurement through joining WTO GPA took place in this stage. Third, in establishing legal system concerning transparency of government, it was important to actualize the spirit embodied in the Constitution. The Supreme Court and the Constitutional Court took a critical role to make the Administrative Procedure Act and Information Disclosure Act work well according to the spirit of Constitution. In addition, the democratization of Korean society was a basis for this phenomenon. Fourth, in order for transparency related statutes to firmly establish their roots, people’s awareness on the rule of law needs to increase. Many important decisions are pouring out from the Constitutional Court and the Supreme Court, and these decisions are widely discussed among non-legal professionals. Also, the rapid development of internet industry facilitated people’s access to legal resources. These phenomena are expected to increase people’s awareness on the rule of law.

International economic environment changed a lot in contrast with that of Korean early economic development. Therefore, the Korean experience cannot be applied universally to other developing countries. However, even in today’s world, the role of state in economic development should be emphasized, and I think Korean experience can be an important reference from which developing countries can learn.

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I. Introduction

1. 'Law and Development' Movement in Korea

'Law and Development (L&D)' is a term usually used to describe legal assistance programs for developing countries and related academic work. This movement was initiated by developed countries such as US, European countries, followed by Japan. But this movement experienced up and downs since its launching in 1960s. Originally scholars sought to develop a theory on the role of law in state and market development that can be integrated into a general modernization theory. Furthermore they thought this modernization theory could be applied to developing countries as well.¹⁾

However, this theory did not fit squarely with the developing countries' cultural, political situation. L&D movement was criticized as ethnocentric and naive.²⁾ The critique was taken by many to be a denunciation of the movement. As a result, the law and development movement lost its momentum. In 1990s, however, this movement revived at the end of the Cold War and the collapse of communism in Eastern Europe and the former Soviet Union.³⁾

Recently this 'law and development' movement has gained popularity in Korea as well. The reason for that can be explained as follows. Developing or transition countries in Asia are becoming more interested in Korean experience of economic development and the role of law. Since these countries regard legal systems of developed countries as inaccessibly advanced, they think those systems are not appropriate for them. But considering the unprecedented rapid economic development of Korea, they think Korean model of 'law and development' suits them better.⁴⁾

In this movement, Korean scholars and practitioners are determined not to repeat the mistakes of previous L&D movement of developed countries.⁵⁾ Of course, we

1) David Trubek, *Law and Development*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES. PERGAMON 8443 (N.J. Smelser & Paul B. Baltes eds., Oxford 2001).

2) David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISCONSIN LAW REV. 1062-1102.

3) David Trubek, *supra* note 1, at 8443-8444.

4) KWON, OH-SEUNG, ASSISTANCE FOR LEGAL REFORM IN TRANSITION COUNTRIES [*chaejaejeonwhanguk beopjaejeongbijiwon*] 3-4 (Seoul National University Press 2006).

should not consider Korean experience as universal model for other developing or transition countries. But even for 'right' L&D movement, it is important to see objectively the relationship between law and development in Korean history.

Many legal fields can be included in legal system related to economic development. Antitrust law, regulation law, company law, intellectual property law are typical legal areas. Considering Korean government's critical role in economic development, this paper will focus on the administrative law.

2. *Administrative Law and Economic Development*

Administrative law deals with many legal areas concerned with public administration, such as industrial regulation, administrative procedure, administrative litigation, and information disclosure. All of these areas can be related with economic development. However, this paper will mainly deal with two traditional administrative law issues: 1) discretionary power of government and 2) transparency of government.

These two issues are related with each other, because control of discretionary power is often thought to be a critical ingredient of transparent government. This transparency is often considered to be an indispensable basis for economic development. UN and OECD repeatedly have emphasized the 'good governance' for economic development. Transparency is emphasized for two reasons.⁶⁾

First is to prevent corruption. When people are left alone, they are more exposed to temptations of corruption. Enhancing transparency in government means that the performance of public officials is opened to the public. In this way, public officials can prevent themselves from being engaged in corruption. Prevention of corruption is closely related with economic development.⁷⁾ Developing countries receive Official Development Assistance (ODA) from developed countries or international organizations, but these funds are often used inefficiently. One of the main causes of

5) SIM, DONG-SUB, GLOBALIZATION AND LEGAL COOPERATION-ASSISTANCE FOR LEGAL REFORM IN TRANSITION COUNTRIES AND GLOBALIZATION OF KOREAN LAW THROUGH STRENGTHENING 'RULE OF LAW' [*saegyewha-wa beop-ui gyoryu*] 275-305 (Haeden Press 2006).

6) Kondo, Seiichi, *Fostering Dialogue to Strengthen Good Governance*, in PUBLIC SECTOR TRANSPARENCY AND ACCOUNTABILITY-MAKING IT HAPPEN 7-12 (OECD ed., 2002).

7) Ehrlich Craig P. & Kang, Dae Seob, *Independence and Corruption in Korea*, 16 COLM. J. ASIAN L. 1, 6-12 (2002).

such inefficiency is the corruption of public officials who deal with resources.

Second reason is to increase predictability of government's policies. There are many debates concerning the relationship between government and market. However, there is a consensus that if government's policies are predictable, market participants can rely on the governmental policies and consequently market can operate more efficiently. Enhancing transparency of government is indispensable in guaranteeing the predictability of its policies.

But is this theory compatible with Korean experience? Was discretionary power of government detrimental to economic development in Korea? Was transparency of government basis for economic development in early stage?⁸⁾

In my view, early stage of economic development in Korea (1962-1979) is more closely related with 'efficiency' of government rather than 'transparency' of government. This 'efficiency' is related with discretionary power of government conducted through 'administrative guidance' [*haengjeongjido*]. Transparency of government became significant only after accomplishing basic economic development.⁹⁾

3. Need for analysis of administrative case decisions

For this argument, administrative case decisions will be mainly discussed.¹⁰⁾ There are two reasons for this approach. First, judiciary usually takes a major role of controlling discretionary power of government. Thus, administrative case decisions concerned with discretionary power will show the actual degree of discretion used by government.

Second, in evaluating the degree of legal development in one country, the degree of gap between legal norm and reality is a critical issue. Case decision takes the role of narrowing this gap. Thus, administrative case decisions will show the actual feature of legal development in Korea.

8) In this paper, 'economic development in early stage' means 'economic development in President Park Chung Hee's regime' (1962-1979). In 1961, GDP per capita of Republic of Korea ranked 101st among 125 countries. In 1979, Korea ranked 49th. In this period, Korea can be evaluated to have accomplished basic economic development.

9) In relating to the role of state in economic development, more to see CHANG, HA-JOON, *KICKING AWAY THE LADDER* (Anthem Press 2002).

10) In this paper, 'administrative case decisions' means all decisions regarding to administrative cases including constitutional cases and civil procedure cases.

In relating to discretionary power of government, informal 'administrative guidance' and its related cases will be mainly discussed. Using this informal administrative guidance under broad delegations of authority from legislature, the state was able to maintain flexibility and achieve its goals without extensive legal procedures.¹¹⁾

Three statutes and its related cases will be dealt in relating to transparency: Administrative Procedure Act, Information Disclosure Act and Government Procurement Act.¹²⁾ Administrative Procedure Act provides the administrative interaction process between the people and the government. This process includes hearing, previous notice of administrative disposition, and previous notice of administrative plan, to name a few. Information Disclosure Act secures people's right to know relevant information held by government.¹³⁾ These two statutes are typical Acts in enhancing transparency. Government Procurement Act provides the procedure that is needed for procuring goods, services, and works for government. Considering the huge amount of money that these procuring activities are concerned with, enhancing transparency in government procurement is crucial.¹⁴⁾

II. Discretionary Power — Focusing on Administrative Guidance

1. History

'Administrative Guidance' [*haengjeongjido*] is defined as 'government's de facto exercise of power to induce private people into acting in certain way for realizing certain purpose of public administration'. One of the most crucial merits of

11) Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 43 AM. J. COMP. L. 585, 586 (2001).

12) Of course, Anti-Corruption Act is also transparency related statute, but Administrative Procedure Act and Information Disclosure Act are more closely related with good governance and transparency. So in this paper these two statutes will be mainly dealt. In relating to Anti-Corruption Act in Korea, more to see Ehrlich Craig P. & Kang, Dae Seob, *supra* note 7.

13) Professor Ginsburg points out these two statutes' enactments as a major administrative law reform after 1987. Tom Ginsburg, *The Politics of Legal Reform in Korea*, in LEGAL REFORM IN KOREA 7 (Tom Ginsburg ed., RoutledgeCurzon, NewYork 2004).

14) OECD, TRANSPARENCY IN GOVERNMENT PROCUREMENT: THE BENEFITS OF EFFICIENT GOVERNANCE AND ORIENTATION FOR ACHIEVING IT [TD/TC/WP(2002)31/FINAL], 6-12.

administrative guidance is that it can be used flexibly without statutory provision. With this merit, Korean government has widely used administrative guidance in the course of economic development.¹⁵⁾

According to recent research, administrative guidance was widely used for the various purposes during President Park Chung Hee's regime (1962-1979). Economic purpose consisted more than 50% of these purposes. At that time, government provided incentives such as grant, tax breaks to companies which accomplished designated export goals. Government took unbalanced growth policy with active industrial policy. Government's inducement and regulation of company was conducted primarily by administrative guidance. In this process, Economic Planning Board took a critical role.¹⁶⁾

Administrative guidance was hardly under administrative litigation because of its de facto nature. This is why we cannot easily find administrative guidance related cases during President Park Chung Hee's regime. Consequently, we can see that administrative discretionary power was widely used through administrative guidance and judiciary was reluctant to control this type of discretionary power.¹⁷⁾

2. Current Situation

However, this broad use of administrative guidance was criticized for authoritarian nature, and many scholars advocated need for judicial control. In this context, Constitutional Court intervened in administrative guidance related case, so call 'Kukje Group Dissolution Case'.¹⁸⁾

In 1985, under the President Chun Doo-Hwan's regime, the primary lender of Kukje Group, Korea First Bank, announced its plan to dissolve the Group. After a series of subsequent actions, Kukje was dissolved. But the true intention and

15) HONG, JEONG SUN, KOREAN ADMINISTRATIVE LAW [*haengjeongbeop*] I 457-459 (15th ed. Parkyoungsa 2007).

16) Han, Seung-Yeon, *A Study on Korean Administrative Guidance* [*hanguk haengjeongjido yeongu*], KSI, 232 (2006).

17) At this point following questions will be raised. Other developing countries' governments who have wide discretionary power did not succeed in economic development. What was other factor that enabled Korea to succeed? I think strong anti-corruption strategy through criminal procedure will be one of the answers. However, this issue is out of scope of this paper, so I will not deal with this issue in detail.

18) Decision of July 29, 1993, 89 *Heon Ma* 31 (Korean Constitutional Court).

legitimacy behind the dissolution have been in doubt. Founder of this group filed a constitutional complaint, demanding nullification of the following series of exercises of governmental power for infringing on his fundamental rights: the Minister of Finance's decision to dissolve Kukje Group, Minister of Finance's instruction to Korea First Bank to prepare for the dissolution by taking control of the finance of the Group's member companies and obtaining the right to dispose of them, and Minister of Finance's instruction to Korea First Bank to release a press report about the dissolution.

In this case, Constitutional Court ruled that "Minister of Finance's instructions to Korea First Bank (preparing dissolution and releasing press report) are not directives from upper to under administrative agency, and this instructions trespassed the limit of administrative guidance which is conducted in expectation of private company's voluntary cooperation. Such public power's interventions virtually result in the dissolution of Kukje Group by enforcing compliance from primary lender. These cannot be deemed dispositions, because these deeds were formally conducted by private legal person, the primary lender of Kukje Group. However, as these deeds was substantially conducted by public agency resulting in dissolution of Chaebol, these can be a 'exercise of public power' which is required for Constitutional Complaint".

As witnessed, administrative guidance has been evaluated to have only de facto effect, hence it could not be an object of administrative or constitutional litigation. But in this case, Constitutional Court controlled the 'ostensible' administrative guidance by 'trespassing the limit of administrative guidance' theory.

These case decisions indirectly affected the enactment of Administrative Procedure Act (APA) in 1996. In this statute, the principles of administrative guidance are provided as follows: "(1) The administrative guidance shall be made as little as necessary for the attainment of the purpose thereof, and shall not be unjustly exercised against the will or the counter party of administrative guidance. (2) An administrative agency shall not treat the subjects of administrative guidance disadvantageously because of the subjects' non-compliance with the administrative guidance concerned".

In overall, administrative guidance contributed to the efficient public administration and economic development in early stage. But as market economy is established, consensus was formed that administrative guidance can be detrimental to establishment of market economy. In this context, Constitutional Court tried to

control excessive administrative guidance, and related statutes were enacted.

3. Prospects

Although the use of administrative guidance was somewhat reduced, this is continuously used as an industrial policy. Recently, Minister of Information and Telecommunication conducted administrative guidance relating to rate of telecommunication, and this led to a collective rate policy of enterprise. Should it be regulated as an unfair collaborative act in Monopoly Regulation and Fair Trade Act, or is it exempted from this statute's application?¹⁹⁾

This problem is being dealt in the context of relationship between sector specific regulatory institution and general competition regulatory institution. It is also related with the relationship between industrial policy and competition policy. In Korea, more emphasis was put on industrial policy until 1970s, but the importance of competition policy arose from 1980s. In this context, Monopoly Regulation and Fair Trade Act was enacted in 1980. This shows that the economic development based on governmental initiative is replaced by market economy based on private sector initiative. But use of administrative guidance in some industry (ex. IT industry) shows the need for industrial policy even after achieving basic economic development.

Supreme Court takes the preposition that lawfully conducted administrative guidance induces exceptions of Monopoly Regulation and Fair Trade Act, however, in individual cases Supreme Court usually denies such administrative guidance by interpretation, and hence it narrows the scope of exemption of this Act.²⁰⁾ In principle, as market economy is established, active use of administrative guidance should be diminished. However, lawfully conducted administrative guidance for the purpose of industrial policy should be acknowledged.

19) Monopoly Regulation and Fair Trade Act

Article 58(Lawful Acts Conducted Pursuant to Acts and Subordinate Statutes): This Act shall not be applied to lawful acts of and enterprise or an enterprise's organization conducted in accordance with other Acts and subordinate statutes.

20) Decision of Nov. 23, 2006, 2004 *Du* 8323 (Korean Supreme Court).

III. Transparency

1. History

1) Administrative Procedure Act(APA) & Information Disclosure Act(IDA)

From 1970s, many scholars advocated the necessity of Administrative Procedure Act(APA), and as a result, the draft of APA was firstly introduced in 1987. However it was not enacted by then, because many bureaucrats insisted that this Act may hamper efficient administration, and it was too early to adopt this Act at that time in Korean situation. Nevertheless, many scholars and civic groups continuously advocated on the importance of this Act for enhancing transparency of government. Finally the draft of APA was presented in 1994, and was enacted and promulgated on December 31, 1996, taking effect from January 1, 1998.²¹⁾

From 1980s, many scholars and civic groups also advocated the enactment of Information Disclosure Act(IDA), but it was delayed by the fear of its adverse effects. In 1994, Council for Information Disclosure was established within the Ministry of Government Administration, and this council proposed the draft of IDA. After public hearing, it was enacted and promulgated on December 31, 1996, and took effect from January 1, 1998.²²⁾

Let's examine how the administrative case decisions affected the enactment of these two statutes. First, even before APA and IDA were enacted, their basic spirits were included in the Korean Constitution, and the Constitutional Court actively interpreted them. The Korean Constitution was first designed in 1948, and was amended nine times, with the most recent amendment in 1987. In the constitution of 1987, due process clause was included (§ 12①, ③) and the Constitutional Court was founded on the basis of this Constitution. The Constitutional Court clearly ruled that due process clause applied not only to criminal procedures, but also to legislative and administrative procedures.²³⁾ The freedom of speech and press clause has been provided from the Constitution of 1948(present § 21①) and the Constitutional Court

21) Kim, Dong Hee, KOREAN ADMINISTRATIVE LAW [*haengjeongbeop*] I 365 (12th ed, Seoul, Parkyoungsa 2006).

22) *Id.* at 401.

23) Decision of Dec. 24, 1992, 92 *Heon Ga* 8 (Korean Constitutional Court).

recognized that the claim for information disclosure can be drawn from this clause.²⁴⁾

Second, prior to these statutes' enactments, clauses related to administrative procedure (hearing etc.) were provided in individual statutes, and the Supreme Court actively interpreted them. Supreme Court ruled as follows. "This statute provides that hearing [*cheongmun*] is necessary before public agency's unilateral administrative action that closes the private company's office. The purpose of this clause is to provide private companies with the opportunity to present evidences for their part and thus enable public agencies to act more prudently. As a result, hearing is a mandatory process prior to public agency's administrative action. If public agency acts without hearing, that administrative action is illegal, and should be abolished."²⁵⁾

Third, prior to the enactment of APA and IDA, similar regulations existed in the form of directives [*hunryeong*], but Supreme Court interpreted them passively. This attitude ironically enhanced the necessity of enactment of these legislative statutes. For example, there were the "Prime Minister Directive on Administrative Procedure for the Protection of Civil Rights and Interest"²⁶⁾ of 1989 and the "Prime Minister Directive on Management of Administrative Information Disclosure"²⁷⁾ of 1994. But the Supreme Court ruled that these directives had no legally binding force upon people, and thus it was not illegal to omit the procedure that was provided in these directives.²⁸⁾ These decisions led to a consensus among scholars and practitioners that statutes which are legislated in parliament are necessary.

In this context, administrative case decisions affected enactment of APA and IDA either directly or indirectly, but these enactments are closely related with the establishment of democracy in Korea.

First, the local government of Cheongju city adopted the "Municipal Ordinance on Administrative Information Disclosure"²⁹⁾ in 1991, because many civic groups demanded the public spending of the mayor should be opened to public. Cheongju's experience spread to other local governments. As a result, enactment of statutes at national level became a very natural process. This shows a good example of grassroots democracy in Korea.

24) Decision of Sep. 4, 1989, 88 *Heon Ma* 22 (Korean Constitutional Court).

25) Decision of June 14, 1983, 93 *Nu* 14 (Korean Supreme Court).

26) [*gukmin-ui kwonikgujaell uihan haejeongjeolch-ae kwanhan gukmuchongrihanryeong*]

27) [*haejeongjeongbogonggaeyunyeongjichim*]

28) Decision of Aug. 9, 1994, 94 *Nu* 3414 (Korean Supreme Court).

29) [*haejeongjeongbogonggaejorye*]

Second, Korean civic groups played an important role in the enactment of APA and IDA. The civil protest of June 1987 laid the foundation for democracy after years of military dictatorship. Through this civil protest, the Constitution was amended and direct election system of president was adopted. Since then, civic groups shifted their focus from anti-dictatorship movement to legislative reform movement, and they pressured the government to enact APA and IDA.

Comprehensively, we see that administrative case decisions are closely related with establishment of democracy in Korea. We also find that democracy guarantees high transparency in government and the establishment of market economy. There are many debates on relationship between democracy and market economy. I think Korean experience after 1980s gives one example that democracy and market economy go hand in hand.³⁰⁾

2) Government Procurement Act

Government Procurement Act has a somewhat different history. Government Procurement Act deals with the process of procuring goods, services and works for public agency. As controlling the budget is crucial point, this area was traditionally dealt in public finance law. This is the reason why government procurement was provided in Public Budget and Accounting Act³¹⁾ and Local Government Finance Act.³²⁾

However, nowadays government procurement is provided in individual statutes separated from Government Budget and Accounting Act and Local Government Finance Act. 'Act on the contract in which state is party'³³⁾ was enacted in 1995 (hereinafter 'Central Government Procurement Act: CGPA'), and 'Act on the contract in which local government is party'³⁴⁾ (hereinafter 'Local Government

30) For example, professor Chua asserts that democracy and market economy do not always go hand in hand especially in multi-ethnic countries. In overall, Korea has somewhat less problems in regard to multi-ethnicity. I think it can be one of the reason that democracy and market economy got along very well in Korea from 1980s. More to see Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 Yale L.J. 1(1998).

31) [yeosanheogyebep]

32) [jibangjaejeongbeop]

33) [gukgall dangsajarahanun gyeyake kwanhan beopryul]

34) [jibangjachidanchaell dangsajarahanun gyeyake kwanhan beopryul]

Procurement Act: LGPA') was enacted in 2005.

The influence of WTO Government Procurement Act (GPA) was absolute in enacting these statutes. Korea tried to join GPA three times during Tokyo Round, but failed due to developed nations' discontent with Korean government's annexes. Korea managed to enter GPA in 1994 during Uruguay round.³⁵⁾ After joining this agreement, Government Procurement Act was enacted in 1995 separately from Public Budget and Accounting Law.

Even after the enactment of Government Procurement Act, procurement of local government was still regulated by Local Government Finance Law. But in 2005, Local Government Procurement Act was enacted separately from Local Government Finance Law. Considering the timing of the enactment, Local Government Procurement Act may seem irrelevant with WTO GPA, but the opposite is more persuasive. Local Government Procurement Act was enacted for the purpose of establishing the procurement law regime which corresponds to that of the central government. So WTO GPA indirectly influenced on the enactment of Local Government Procurement Act. The role of administrative case decisions in enactment of these statutes is as follows.³⁶⁾

First, this enactment has little relationship with decision of the Constitutional Court. This is due to the fact that procurement law regime was traditionally considered as a part of private law(especially contract law), and many scholars thought that private law had relatively little relationship with Constitutional law.

Second, the Supreme Court has ruled that administrative litigation is permissible to debarment.³⁷⁾ This shows the Supreme Court's effort to strengthen the transparency of procurement by regulating the discretionary power of procuring agencies. Of course, this administrative case decision may not be seen as having direct effect upon the enactment of these statutes. However, this decision made a foundation for a new procurement law regime focusing on transparency.

Overall, administrative case decision's influence on enactment of these statutes is very limited. On the other hand, globalization based on WTO law took a pivotal role.

35) More to see, Yang, Junsok & Kim, Hong-Youl, *Multilateral Discussions of Government Procurement and Implications for Korea* [dajamuyeoknae jeongbujodalnonuiwa jeongchaekjeok sisjeom] KIEP (2001).

36) Kim, Dae-In, *Government Procurement Contract in the context of "Correlation between Public Finance Administrative Law and International Trade Law"*, in ISSUES IN RELATING TO FINANCE MANAGEMENT IN STATE FINANCE LAW ERA, 86 (Korea Legislation Research Institute, Dec. 2006).

37) Decision of Aug. 23, 1994, 94 Nu 3568 (Korean Supreme Court).

WTO GPA affected domestic procurement law in two different ways. Firstly, it enhanced transparency of procurement. But secondly, it also minimized the use of industrial policy by the Korean government.³⁸⁾

2. Current Situation

1) Administrative Procedure Act (APA) & Information Disclosure Act (IDA)

Three most widely used contents of Administrative Procedure Act are ① procedures relating to disposition [*cheobun*], ② previous notice of administrative legislation [*haejeongsang ipbeopyeogo*], and ③ previous notice of administrative plan [*haejeongyeogo*].

Let's see one example of procedure relating to administrative action. Before sanctioning drunk driving, the standard for administrative action needs to be made public so that drivers know what level of alcohol intakes leads to cancellation or suspension of their driver's license (§ 20).

Before imposing disadvantageous disposition, administrative authority should notify the title of the disposition, full name or title, and domicile of parties concerned, and the factual ground and legal basis of the administrative disposition, etc (§ 21). Before imposing disposition, opinion hearing procedure should take place. There are three kinds of opinion hearing procedure: hearing [*cheongmun*], public hearing [*gongcheonghoe*], and notification of one's opinion [*uigyeojaechul*]. Of these three procedure, hearing or public hearing should take place when other individual statutes stipulate or public agency deems it necessary (§ 22).

The Supreme Court ruled that "when previous notice of administrative action or the chance to express one's opinion is not guaranteed, the administrative action is illegal because of defect in the procedure."³⁹⁾

When enacting, amending or abrogating legislation, the administrative bureau needs to notify it in advance through official journals, internet, newspapers or broadcasting networks (§ 41, 42). The period of this notice should be at least 20 days (§ 43). When administrative bureau wants to establish, implement or revise plans which may heavily influence lives of the people or cause of conflict in interest,

38) More to see, Kim, Dae-In, *supra* note 36, at 83-125.

39) Decision of May 28, 2001, 2000 *Du* 10212 (Korean Supreme Court).

it needs to announce it publicly beforehand (§ 45).

The Supreme Court ruled that if previous notice is not substantially guaranteed, administrative action is illegal because of defect in administrative procedure.⁴⁰⁾ In relation to cases which is excluded from APA's application, the Supreme Court ruled as follows. "Even though Article 14 Paragraph (4) Item 3 of APA stipulates 'when reasonably deemed that there are grounds that hearing of opinions is impractical or the hearing is clearly unnecessary considering the nature of the dispositions concerned' as reasons where omitting the hearing process is possible when performing an infringing administrative disposition, 'whether there are grounds that the hearing of opinion is impractical or the hearing is clearly unnecessary' prescribed herein, must be determined by the nature of the administrative disposition concerned, and not by whether the hearing notice had been returned nor by the method of notification of the hearing, etc. In addition, the fact that the party concerned with the administrative disposition had been absent on the date of the hearing notified as such, alone does not justify the administrative agency's infringing administrative disposition conducted without having opened the hearing required by the relevant Act or subordinate statutes. Therefore, an infringing administrative disposition without having undergone the process of a hearing on the grounds that the notice of the hearing had been returned or on the grounds that the party concerned with the administrative disposition had been absent on the day of the hearing shall be determined as unlawful".⁴¹⁾ It shows the Supreme Court's effort to minimize the scope of exception to APA's application.

IDA emphasizes the principle of 'information disclosing' (§ 3), but allows exception on issues concerning national security, defense, unification, and diplomatic relations, and other private information which is evaluated to be seriously infringing upon an individual's privacy or freedom (§ 9). IDA also provides that all people have a right to claim for information disclosure (§ 5①), and urges public agencies to list and show all information they have, which should be easily accessed through telecommunication network (§ 8①).

When asked to disclose a piece of information, related public organization needs to decide whether or not to disclose it within 10 days from the date of the request (§ 11). National agencies operate a Committee on Information Disclosure in order to

40) Decision of May 28, 2001, 2000 *Du* 10212 (Korean Supreme Court).

41) Decision of Apr. 13, 2001, 2000 *Du* 3337 (Korean Supreme Court).

decide on which information to open or close to the public (§ 12). When it decides to disclose, it needs to notify date and place of disclosure to the person requesting the information (§ 13).

In relation to non-disclosure information, the Supreme Court ruled that “public agency’s ordinance based on the statute” does not mean all ordinances based on delegation of statute. It only means specific ordinance which is concretely delegated from the statute. Thus the Supreme Court minimized the sphere of non-disclosure information.⁴²⁾ This approach was adopted in the revised 2004 IDA.⁴³⁾

In other related case, the Supreme Court tried also to restrict the scope of non-disclosure as follows. “Article 1, 3 and 6 of the Act prescribes that public institutions in principle shall disclose informations in their possession and management to the people in order to ensure people’s right’s to know and secure people’s participation in state affairs and the transparency of the operation of state affairs. Thus, public institutions receiving people’s request of disclosure must disclose informations unless non-disclosure grounds provided under each item of Article 7(1) of the Act are applicable, and in case of non-disclosure, public institutions must plead and prove the reason why such and such item of Article 7(1) or the Act apply to certain part of informations since they collide with certain legal interests or basic rights upon specific confirmation and examination of informations requested to be disclosed, and thus, it cannot be justified to reject such request merely based upon a comprehensive ground. Accordingly, the whole purport of alleging Items 4 and 6 of Article 7(1) of the Act cannot be viewed that the defendant cited them merely as exemplary grounds for not disclosing the information of this case under the presumption that information of this case consulted information non-disclosure under Article 7(1) of the Act.”⁴⁴⁾ In this way, the Supreme Court restrained

42) Decision of Dec. 11, 2003, 2003 *Du* 8395 (Korean Supreme Court).

43) IDA (revised in 2004) Article 9 (Information Subject to Non-Disclosure)

(1) All information that is held and managed by public institutions shall be disclosed to the public: Provided, that the information falling under each of the the following subparagraphs may not be disclosed to the public:

1. Information that is classified as a matter that needs to be kept secret or closed under orders given under this and other Acts (limited to the rules of the National Assembly, the rules of the Supreme Court, the rules of the Constitutional Court, the rules of the National Election Commission, the Presidential Decree and municipal or local ordinances)

2.-3. omitted

44) Decision of Dec. 11, 2003, 2001 *Du* 8827 (Korean Supreme Court).

the scope of non-disclosure.

In the 1996 IDA, “people who had statutory interest” could protest, appeal, or file a lawsuit. However the Supreme Court ruled that “anyone who is denied disclosure has statutory interest”⁴⁵⁾ and this decision affected amendment of this clause. In present Act, if application for disclosure is denied, “anyone who does not accept this decision” can protest to administrative authority concerned (§ 18), or appeal to upper administrative authority (§ 19), or file a litigation to court (§ 20).

Overall, we see that administrative decisions heavily influenced the revision of Information Disclosure Act. Many decisions were adopted by Legislature.⁴⁶⁾ This shows one example of legal activism in Korea.⁴⁷⁾

2) Government Procurement Act

Central Government Procurement Act provides two cases: procurement from national contractor & procurement through international tender (competition). Presidential Decree (hereinafter ‘Decree’) and Ministerial Ordinance (hereinafter ‘Ordinance’) were enacted by delegation of CGPA. Especially in regard to international tender, International Contract Dispute Resolution Council was established (CGPA § 29). Furthermore, by delegation of this statute, international tendering process is regulated by ‘Presidential Decree on Government Procurement through International Tender (hereinafter ‘Special Decree’)⁴⁸⁾ or ‘Ministerial Ordinance on Government Procurement through International Tender (hereinafter ‘Special Ordinance’).⁴⁹⁾ Special Decree provides non-discrimination as a principle of international tender, and bans the discriminatory distribution of information (§ 4).

A typical example of transparency is information disclosure clause. In international tendering, procuring agencies should comply to the request from bidder for information disclosure, and information concerning practice or procedure of

45) Decision of Mar. 11, 2003, 2001 *Du* 6425 (Korean Supreme Court).

46) Kyoung, Keon, *Two Realities of Information Disclosure System* [jeongbogonggaejaedo unyongui dusiljae] 11 (Association of Administrative Law and Practices Studies Monthly Workshop, Dec. 2004).

47) Professor Ginsburg asserts Korean administrative law reform shows relatively legal activism tendency than that of Japan. Tom Ginsburg, *supra* note 11, at 586.

48) [tuikjeongjodaluilwihan gukgall dangsajarahanun gyeoyake kwanhan beopryulsihaengryeong tuikbyeolgyujeong]

49) [tuikjeongjodaluilwihan gukgall dangsajarahanun gyeoyake kwanhan beopryulsihaengtuikbyeol gyuchik]

procurement should be included in the list of disclosure (Special Decree § 17②; Special Ordinance § 4①). If this disclosure arises the discouragement of legal execution or infringement of public interest, information disclosure can be denied (Special Ordinance § 4③).

In regard to domestic tendering, procuring agencies or contracting officer should disclose following informations through 'designated information processing tool' (on-line): purpose of contract, bidding time, calculated or anticipated price, method of contract, name of contractor, size of contract, overall price of contract, etc (Decree § 92-2, Ordinance § 4③). Nevertheless, in procurement of local government, information related to contracting is not included in the list of disclosure (LGPA § 84).

In regard to method of contract through international tendering, there are three types: open competition, selective competition, and single-source contract (Special Decree § 7). This was stipulated according to the WTO GPA. In regard to domestic tendering, there are four types: open competition, limited competition, selective competition, and single-source contract (CGPA § 7, LGPA § 9). Open competition is the principal method. It is a similar enactment to that of UNCITRAL Model law on Government Procurement. It can be evaluated positively because there are high chance of strengthening transparency in Korean situation.⁵⁰⁾

Disputes regarding government procurement are dealt by judiciary, and Supreme Court rules that these disputes should be dealt by civil procedure. This is because the Supreme Court deems government procurement contract as a private contract. One reason for this attitude is because Government Procurement Act provides "(government procurement) contract should be concluded by consent of coordinate parties, each party should fulfill this contract in good faith" (CGPA § 5).⁵¹⁾ 'Lawsuit for confirmation of awarding contractor' is the most frequently used remedy in civil procedure. There are some government procurement disputes which are dealt in administrative lawsuit. A conspicuous example for this is a dispute regarding debarment. The Supreme Court deems debarment as administrative disposition, and permits quasing litigation [*chuisosong*].

50) Kim, Dae-In, *Enhancing Transparency in Government Procurement Contract* [*Jeongbujodalgyeyakui tmyeongseongjaegoll uihan beopjaegaeseonbanhan*] 137-138 (Korea Legislation Research Institute, Oct. 2006).

51) Decision of Sep. 11, 2001, 2001 *Da* 33604 (Korean Supreme Court).

3. Prospects

1) Administrative Procedure Act (APA) & Information Disclosure Act (IDA)

Despite the short history of the APA and IDA, they greatly strengthened transparency in the government. While there are many analysis concerning causes of the Asia's financial crisis in 1997, many agree that the financial supervisory system's malfunctioning fuelled the crisis. Conversely, enhanced transparency in government with the adoption and implementation of APA and IDA is expected to contribute to the overcoming weakness of Korean economic regulation system.

Nevertheless, there are shortcomings in these statutes. In case of APA, hearing [*cheongmun*], which is a core element, is undertaken passively in a limited scope, i.e., only when other statute calls for this procedure or when administrative authority deems it necessary is it taken into effect.⁵²⁾ Public hearing [*gongcheonghoe*] on controversial issue is often disrupted by opposing groups.⁵³⁾

As for Information Disclosure Act, large amount of information is still closed to the public, infringing on the people's right to know. Moreover, many critics say that Information Disclosure is often misused for private interest, thus weakening the statute's real function of monitoring administrative agencies.⁵⁴⁾

Policies and institutions need to be improve in order to overcome these weaknesses, yet more importantly, people's understanding on rule of law also needs to be upgraded to ensure the success of these statutes. In most countries, people's awareness of rule of law goes through three stages. In the first stage, the sense of responsibility (imposed by government) is only emphasized. In the second stage, the rights of the people are emphasized in repulsion of the first stage. In the third stage, people's rights and voluntary sense of responsibility are balanced. Misuse or abuse of two Acts in Korea shows that the country is yet in the second stage.⁵⁵⁾

52) Hong, Jeong Sun, *supra* note 15, at 482.

53) Recently public hearing relating Korea-US FTA(Free Trade Agreement) was disrupted by anti-FTA civic groups. Many civic groups in Korea think that disrupting the public hearing is one of the methods to express their opinion clearly. Of course there are many reasons for this phenomenon. Civic group should not be solely blamed for this phenomenon. Because public hearing in Korea was only done for formality traditionally.

54) Kyoung, Keon, *supra* note 46, at 3.

55) This theory is application of Professor Park's so called "3 stages of administrative law development theory" to people's understanding on rule of law. Professor Park asserts administrative law in Germany and Korea is

However, many indicators show that the understanding on the rule of law develops from the second to the third stage. Many important decisions are pouring out from Constitutional Court and Supreme Court, and these decisions are widely discussed among non-legal professionals.⁵⁶⁾ Also, the rapid development of internet industry facilitates people's access to legal resources. These phenomena are expected to balance the sense of responsibility and the sense of right in Korea.

2) Government Procurement Act

With respect to Government Procurement Act, e-procurement is established successfully, enhancing transparency in government tremendously.⁵⁷⁾ But single-source contract [*suiigyeyak*] is often indicated as main source of corruption.⁵⁸⁾ Many efforts were made to fight against corruption in single-source contract, but this problem is not solved yet.

The reason for corruption in single-source contract can be found in limited scope of trust. Francis Fukuyama asserts that 'trust' as a social capital is indispensable in the development of Capitalism. The enlargement of 'level of trust' in one society minimizes the transaction cost, and it can be an engine for developing the Capitalism. He points out that Korea has limited scope of trust (limited to blood relationship, school tie, etc).⁵⁹⁾

In a case that procuring agency evaluated qualification for contract in breaching the standard stipulated in Presidential Decree on Government Procurement Law, Supreme Court ruled "breaching the standard stipulated in Presidential Decree on

developed through 3 stages: Authoritarian Stage → Liberal Stage → Communitarian Stage. More to see Park, Jeong-Hoon, *The Purpose and Direction of Administrative Law Education* [*haengjeongbeopgyoyukui mokjeokgwa banghyang*], in *THE SYSTEM AND METHODOLOGY OF ADMINISTRATIVE LAW* 75 (Parkyoungsa 2005).

56) Professor Lim says Constitutional Court "has processed thousand of complaints from ordinary citizens, and has no doubt helped give ordinary Koreans a sense of rights they had lacked for so many decades under various forms of authoritarian rule". Lim, Ji-Bong, *The Korean Constitutional Court, judicial activism, and social change*, in *LEGAL REFORM IN KOREA*, ROUTLEDGE CURZON 18 (Tom Ginsburg ed. 2004).

57) More to see, APEC, TO ENHANCE EFFICIENCY AND TRANSPARENCY IN THE PUBLIC PROCUREMENT SECTOR BY UTILIZING THE GOVERNMENT ELECTRONIC PROCUREMENT SYSTEM (GePS) -submitted by Republic of Korea [2003/SOMIII/GPEG/009].

58) Jeong, Won, *The Limit of Single-Source Contract* [*suiigyeyak-ui beopjeok hangye*] 2 *GOVERNMENT CONTRACT LAW REVIEWS* 107-146 (Korean Government Contract Law Association, 2006).

59) FUKUYAMA, FRANCIS, *TRUST: THE SOCIAL VIRTUES AND CREATION OF PROSPERITY* (Free Press 1996).

Government Procurement Law does not automatically lead to nullification of the contract. The breach should have such gravity as enormously infringing the fairness of tendering process, and other party knew or could have known this situation, or it should be evident that this awarding or conclusion of contract was initiated by infringing the good custom or other established social order. Only under this special circumstance, government procurement contract is rendered void.⁶⁰⁾ Above decision is based on two theories. One is a view that government procurement contract is a private law contract. The other is that public finance law has no legally binding effect towards people. But these theories should be criticized for two reasons.

First, it does not reflect the legal nature of Government Procurement Act. As separated from Public Finance and Accounting Law, newly enacted Government Procurement Act adopted many clauses concerning transparency. It increased public law elements in the Government Procurement Act. The Supreme Court should have paid more attention to the legal nature of Government Procurement Act.⁶¹⁾

Second, it does not correctly reflect enactment history of Government Procurement Act. Under WTO GPA's influence, Government Procurement Act strengthened the protection of unsuccessful bidder. In this perspective, denying the legally binding effect towards people is not persuasive.⁶²⁾

In considering the public law element of this contract, major transparency related clauses should be deemed mandatory, so that violation if this clauses lead to nullification of contract. For example 'tendering nullification clause' or 'method of contract clause' should be interpreted to have a mandatory nature.

More fundamentally, we should raise the following issues: "Is it right to deal with government procurement disputes principally by civil procedure?" If we consider government procurement as a public contract, disputes arising therefrom should be handled by administrative procedure.⁶³⁾

60) Decision of Dec. 11, 2001, 2001 *Da* 33604 (Korean Supreme Court).

61) Kim, Dae-In, *supra* note 36, at 110.

62) *Id.* at 110-111.

63) Kim, Dae-In, *supra* note 50, at 148-160.

IV. Conclusion

In Law & Development Context, Korean administrative case decisions show good example of how they are related with public governance and economic development. From the above arguments, we can see following four points.

First, Korean economic development in early stage (1962-1979) is indebted more to 'efficient' government rather than 'transparent' government. Most of these efficiencies were accomplished by public agency's broad discretionary power through 'administrative guidance'. In this period, judiciary was reluctant to engage in government's discretionary power conducted through administrative guidance. After accomplishing basic economic development, more emphasis was laid upon transparency of government.

Second, in each stage of economic development, the Korean government used globalization differently. In the early stage, the Korean government supported enterprises to increase export through administrative guidance. Globalization in this period was somewhat limited. After establishing basic economic development, the Korean government faced the liberalization of global economy in more positive manner. Strengthening transparency of government procurement through joining WTO GPA took place in this stage.

Third, in establishing legal system concerning transparency of government, it was important to actualize the spirit embodied in the Constitution. The Supreme Court and the Constitutional Court took a critical role to make the Administrative Procedure Act and Information Disclosure Act work well according to the spirit of Constitution. In addition, the democratization of Korean society was a basis for this phenomenon.

Fourth, in order for transparency related statutes to firmly establish their roots, people's awareness on the rule of law needs to increase. Many important decisions are pouring out from the Constitutional Court and the Supreme Court, and these decisions are widely discussed among non-legal professionals. Also, the rapid development of internet industry facilitated people's access to legal resources. These phenomena are expected to increase people's awareness on the rule of law.

International economic environment changed a lot in contrast with that of Korean early economic development. Therefore, the Korean experience cannot be applied universally to other developing countries. However, even in today's world, the role of state in economic development should be emphasized, and I think Korean experience

can be an important reference from which developing countries can learn.

KEY WORDS: Law and Development, Administrative Guidance, Transparency, Administrative Procedure Act, Information Disclosure Act, Government Procurement Act