Special Contribution

Normative Evaluation on Judicial Governance in Korea: Focusing Standing Issue

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ABSTRACT

This essay introduces and evaluates the phenomenon of judicial governance in South Korea by the example of Amendment Bill to the Administrative Litigation Act proposed by the Korean Supreme Court in 2006. In this bill, the Korean Supreme Court attempts to expand its own power by changing the standing requirement for an administrative lawsuit from having a "statutory interest" to having a "legally just interest." Invoking the institutional capacity of courts, this essay argues that this bill not only violates the principle of separation of powers, but disrupts the inner dynamics of representative democracy by allowing courts to reconsider defeated proposals. The democratic process will then be forced to reopen and become an endless cycle. It is the legislature, rather than courts, that is better equipped to coordinate conflicting values in a plural society.

Keywords: *Standing of Administrative Litigation, Separation of Powers, Legitimacy of Judicial Governance, Coordination*

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CONTENTS

I. INTRODUCTION 165

II. SIMILARITIES BETWEEN THE KOREAN AND TAIWANESE ADMINISTRATIVE LAWS 166

III. THE AMENDMENT BILL PROPOSED BY THE KOREAN SUPREME COURT 167

IV. A NORMATIVE EVALUATION OF THE AMENDMENT BILL 170
A. *Separation of Power* 170
B. *Safeguard for Representative Democracy* 170
C. *Should the Court Make Policy Decisions?* 172

V. LAW AS COORDINATION 173
A. *Value Pluralism* 173
B. *Moral Coordination Problem* 174
C. *Law as Solution to Moral Coordination Problem* 175
D. *Positional Authority of the Legislature in Coordinating Value Conflict* 176

VI. CONCLUSION 178

REFERENCES 180

I. INTRODUCTION

The major theme of this conference is to examine the international trend toward judicialization of governance. A critical issue raised by this phenomenon is the extent to which the court can really provide efficient or legitimate governance. Entering the twenty-first century, the court remains a counter-majoritarian institution to a large extent. Judges usually are a small group of legal elites who decide cases without expert support and direct input from the people through the election. The question of whether this old institution can handle the new task of governance therefore renews a long-lasting debate on the proper role of the court in modern constitutional democracy. This essay attempts to reflect on this issue by analyzing an amendment bill proposed by the Korean Supreme Court to expand its power to decide whether the standing requirement is satisfied.

The second part of this essay will briefly discuss the similarities between Korean and Taiwanese administrative laws in terms of their contents and procedures. In his presentation, Professor Tom Ginsburg has already pointed out that these similarities are the result of modernization.[1] Among different factors of modernization, democratization is often seen as the main factor contributing to the similarities between these two countries.

This essay, however, will not simply reiterate his discovery. Instead, the third and the fourth parts of this essay will focus on the role of standing doctrine in modern democracy. In particular, this essay will focus on how the Korean courts attempt to expand its judicial power through amending this doctrine. My argument is that in modern democracy, it is important to prevent the cycling phenomenon in the political process. The most common cycle-prevention technique is prohibition on motions for reconsideration of defeated alternatives. Through amending the standing doctrine, which changes the requirement for obtaining judicial review from having a "statutory interest" to having a "legally just" interest, the Korean courts allow the defeated alternatives to be challenged again in the judicial branch, and in this way trigger more cycling phenomenon. This amendment, I would argue, violates the separation of power and endangers representative democracy.

The fifth part of this essay attempts to explain why the court should limit its role and not make policy decisions. Besides preventing cycling phenomenon, this essay argues that the legislature has the positional authority to solve moral coordination problems. Modern societies are societies of value pluralism, and there are times when the government has to

1 . *See generally* Tom Ginsburg, *Judicialization of Administrative Governance: Causes, Consequences and Limits*, 3(2) NTU L. REV. 1, 11-12 (2008).

step in and choose among incommensurable and incomparable values. These choices, however, should be made by the legislature due to its positional authority, an authority that comes from its position relative to other government branches. The legislature is not only designed in the way to coordinate, but occupies the position to make law, the major government tool to coordinate a society. The judiciary, however, does not have such authority. Its duty is to interpret law, which is in turn enacted by the legislature. Also, the court is not equipped with institutional capacity to coordinate the society. Judges work alone and apply their individual wisdom to resolve legal problems. This essay therefore maintains that, if the court takes too much practical reasoning and personal policy preferences into consideration, the legal order set up by the Constitution might be soon destroyed.

II. SIMILARITIES BETWEEN THE KOREAN AND TAIWANESE ADMINISTRATIVE LAWS

If we look into the number of total administrative cases filed in the court, including the first instance, second instance and Supreme Court, what could be observed in both countries is a gradual increase in the number of cases filed (*See* Table 1). Although the absolute amount of litigation in South Korea remains twice as much as that in Taiwan, it could be reasonably explained by the fact that the Korean population is also roughly twice as big as Taiwan's. Korea's population is 48 million, while Taiwan has only 23 million people. Moreover, the percentage of cases won by the plaintiff is pretty similar in both countries as well. In 2004, the winning percentage of administrative law cases in Korea was 19.1%, while the winning percentage in Taiwan was 17%. The number remains steady in the long term but fluctuates slightly every year. In 2005, the number was about 16.4% in Korea and 13.6% in Taiwan. In 2006, the number fluctuated to 18% in Korea and 14.3% in Taiwan.[2] Based on these statistics, the similarities between Korea and Taiwan are very clear, and the similar historical experience of democratization might be seen as the main factor contributing to these similarities.[3]

2. For the statistics regarding Korean administrative cases, see Administrative Cases (During the Past 5 Years), http://eng.scourt.go.kr/eng/resources/statistics_litigation_ac.jsp (last visited Aug. 24, 2009). With regards to the Taiwanese counterpart, see Hsing Cheng Su Sung Ti Yi Shen Chung Chieh Chien Shu [Statistics of the First Instance Administrative Cases], http://www.judicial.gov.tw/juds/report/sg-2.htm (last visited Aug. 24, 2009).

3. Ginsburg, *supra* note 1, at 11-12.

Table 1

Years	Total Number of District Court Cases	For Plaintiff (A)	For Agency (B)	For Both in Part (C)	(A)+(C)	(A)+(C) %
2004	12,092 T:6,090	1,814 (15%)	4,920 (40.7%)	496 (4.1%)	2,310 (19.1%)	19.1% T:16.9
2005	13,406 T:6,384	1,679 (12.5%)	5,723 (42.7%)	522 (3.9%)	2,201 (16.4%)	16.4% T:13.6
2006	13,431 T:6,326	1,745 (13%)	5,604 (41.7%)	677 (5.0%)	2,422 (18.0%)	18.0% T:14.3

*From: Author.

III. THE AMENDMENT BILL PROPOSED BY THE KOREAN SUPREME COURT

In 2006, the Ministry of Court Administration of the Korean Supreme Court proposed a legislative bill which attempts to amend the Administrative Litigation Act (ALA).[4] There are three major changes in this bill. Firstly, the bill abandoned the use of administrative disposition and replaced it with administrative act, a more inclusive concept. Also, this bill included permanent injunction as one type of remedies. The most problematic change in this bill, however, is that the scope of standing to file an administrative lawsuit was expanded. The current Section 12 of ALA states that "[w]hoever has a statutory interest can file an administrative litigation."[5] The Section 12 of the Amendment Bill, however, changes the condition to "[w]hoever has a *legally just* interest can file an administrative litigation (emphasis added)."[6]

The first and maybe the most fundamental problem with the Amendment Bill is that it was proposed by the Korean Supreme Court, rather than by the legislative or executive branch of the Korean Government. In Japan, a similar bill amending Japanese Administrative Litigation Act was proposed by the political branches.[7] In the United States, the Constitution clearly states that except for the Supreme Court, the Congress may ordain

4. Administrative Litigation Act, Law No. 3754 of 1984, amended by Administrative Litigation Act, Law No. 6627 of 2002 (Korea).

5. Administrative Litigation Act, § 12.

6. Bill of Administrative Litigation Act, § 12, proposed by the Supreme Court of Korea. Court Organization Act, Law No. 3992 of 1987, as amended by Law No. 8411 of 2007 (Korea) provides in art. 9(3) that "[i]f it is deemed necessary to enact or revise Acts related to the organization, personnel affairs, operation of courts, litigation procedures, registration, family register, and other court affairs, the Chief Justice of the Supreme Court may present in writing his opinion to the National Assembly." Based upon this provision, the Chief Justice presented his opinion concerning reformation of administrative litigation to the National Assembly on September 8, 2006. Among the materials supporting his opinion, the Amendment Bill was included.

7. Narufumi Kadomatsu, *Judicial Governance Through Resolution of Legal Disputes?—A Japanese Perspective*, 4(2) NTU L. REV. 141, 155-58 (2009).

and establish inferior courts at its will.[8] The U.S. Supreme Court also recognized that the power to create or modify judicial jurisdiction is possessed solely by the Congress even when it comes to issuing habeas corpus.[9] In Korea, however, it is the Supreme Court that makes policy decision regarding their jurisdiction. This phenomenon, therefore, raises serious separation of power concerns.

Another problem is that the Amendment Bill changes the requirement to file an administrative litigation from "ha[ving] a statutory interest" to "ha[ving] a *legally just* interest."[10] If passed, the amended provision will free the Court from statutory control when it comes to determining whether or not standing requirement is satisfied. The current provision requires statutory interests in determining if a case could be filed. A complainant must demonstrate that he or she has an interest based upon or created by a statute. Not only does the statute have to be enacted by the legislature, but its purpose must be to protect the interest of individuals, rather than the interest of general public. The current Section 12 of ALA therefore represents an example of legal positivism, which sees statutory law as the main source of legal norms.

Under the current Section 12 of ALA, a complainant must pass two gates to access the courtroom against government actions that infringe their interests (*See* Diagram 1). The complainant first has to satisfy the requirement laid out in the ALA, that is, to demonstrate a statutory interest. This requirement therefore leads the complainant to the second gate, individual statutes. The legislature has the power to determine who and under what condition could go to court by enacting individual regulatory legislation such as environmental protection law, consumer protection law, or health care law. According to its legislative discretion, the legislature might design different standing requirement in different statutes. In this framework, both the first and the second gate are controlled by the legislature. The enactment of both the ALA and individual regulatory statutes are within the purview of the legislature. The legislative branch, therefore, has total control of how wide the gates should be.

8. U.S. CONST. art. III, § 1.

9. *Ex parte* McCardle, 74 U.S. 506, 514-15 (1869).

10. Professor Kadomatsu in his essay translated it as "legal interest." Kadomatsu, *supra* note 7, at 151, 156. In this essay, however, it is translated as "statutory interest" so as to emphasize that these interests must be based on statute.

Diagram 1

Realm of Politics	1st Gate	2nd Gate	Realm of Law
Legis./Executive	Administrative Litigation Act (Statutory Interest)	Individual Administrative Legislations	Courts

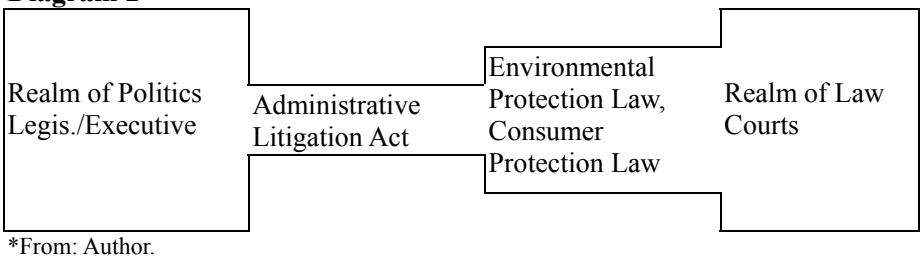
*From: Author.

The Amendment Bill tries to change this framework. It says "whoever has a legally just interest can obtain judicial review." It discards legal interest test, and cuts out the nexus between standing and relevant statutes. Under this new test, judges, rather than the legislature, decide who can file an administrative litigation. Judges can decide whether or not the plaintiff should be given standing to file a litigation based on considerations beyond the scope of protection provided by relevant statutes.

Under the amended provision, the power to control these two gates has been shifted. Although the legislature still controls the first gate, which is the ALA, when it comes to the second gate, however, the gatekeeper suddenly is switched to the Court. The complainant no longer has to find out a statutory basis for his or her claim. Instead, the requirement of standing now becomes legally just interests, an abstract concept which has to be clarified by the court in a case-by-case basis. The court can now rely on its own individual moral or political judgment to determine whether a complainant has demonstrated a legally just interest. This is a 180 degree change and the Court by doing so expands its own jurisdiction.

If the Amendment Bill is passed, the current legal framework shown in Diagram 1, in which both gates are controlled by the legislature, will soon be replaced by one depicted in Diagram 2. The first gate remains the Administrative Litigation Act, whose author is the legislature. The second gate, however, becomes the individual judgments made by the Courts. The width of the gate will be based upon the gatekeeper's discretion. The legal stability produced by statutory law, which is hailed by legal positivists, therefore will very likely be weakened.

Diagram 2



*From: Author.

IV. A NORMATIVE EVALUATION OF THE AMENDMENT BILL

The Amendment Bill by the Korean Supreme Court is a dangerous move in two fronts. It may not only conflict with the principle of the separation of power, but disrupt the inner dynamics of representative democracy.

A. *Separation of Power*

In a constitutional democracy, standing doctrine often serves as one of many mechanisms to assure that government functions are allocated properly among different branches. Standing doctrine is just like the bailiff who controls the entrance to the courts. It filters out improper grievances and makes sure only people who have legal right can file lawsuits. In a constitutional democracy, not everybody's grievance against government actions can be dealt with by the court. Rather, only those disputes and controversies that are recognized by the legislature, which in turn are elected by the people, can have access to the judiciary. The rationale behind this restriction on judicial power is the fear that as a nondemocratic institution, the court might rely on its own moral and political judgment to overturn decisions made by the legislature and the executive branches. Through standing doctrine, we could limit the court to its traditional and limited role, that is, to protect individuals and minorities against majority tyranny.[11]

Under the Amendment Bill, however, it will be the court, rather than the legislature, that decides who has standing to file litigation against government actions infringing their interests. The Amendment Bill made by the Supreme Court therefore tilts the balance of Separation of Powers in favor of the courts, and for this reason might conflict with the principle of separation of power.

B. *Safeguard for Representative Democracy*

The second critique of the Amendment Bill involves the effective functioning of representative democracy. In ordinary political processes, a Condorcet paradox often exists in which any proposed outcome that could win majority support is accompanied by alternatives that are able to obtain majority support as well.[12] Through the manipulation of voting procedure, candidates or proposals with only minority support could still win the election or voting by drawing support from those who do not like them but

11. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

12. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 275-77 (1991).

hate alternatives more. Unless there is a Condorcet winner, a candidate or proposal which could win a two-candidate or two-proposal election against each of all the other candidates or proposals, the political process will become subject to an endless cycling and the one who controls the procedure can control the result.[13] This cycling phenomenon therefore disrupts the inner dynamics of representative democracy.

The Condorcet winner, however, does not always exist. In fact, most of the time public support for certain proposals is neither objective nor reflecting the true majority opinion. Instead, it is usually heavily influenced by what procedures people are using and what alternatives people think they have. As a result, some techniques or safeguards to end the cycling phenomenon are required for representative democracy to function well. The most common technique applied by most democracies is the prohibition on motions for reconsideration of defeated proposals. People should respect and accept the policy decisions made by the legislative or executive branch even though these decisions might be the result of particular procedural arrangement rather than true Condorcet winner. However, people who lost in the political process always have a strong incentive to look for alternative sites or forums to reassert their claims, and the court, with its anti-majoritarian nature, is often seen as the most favorable forum for political minority to revive their defeated proposals. Even without an individual legal right recognized by statutes, people who lost in the political process might still try to sugarcoat their defeated proposals as something related to the public interest and bring it to the court in the hope that the court will overturn the decisions made by the legislative and executive branches.[14]

Under this circumstance, if a court really decides to take an active attitude and revives these defeated proposals, the cycling phenomenon can be triggered by the judicial branch. The democratic process will then be forced to reopen and become an endless cycle in which necessary policy products are difficult to produce. It is for this reason that standing doctrine plays a critical role in representative democracy. As Justice Antonia Scalia once said, "the law of standing . . . restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."[15] Standing doctrine therefore should be seen as the judicial version of prohibition on motion for reconsideration of defeated proposals. Without standing doctrine, the

13. *Id*.
14. *See* Sierra Club v. Morton, 405 U.S. 727, 734-41 (1972).
15. Scalia, *supra* note 11.

stability and fairness of representative democracy will be significantly weakened.

C. *Should the Court Make Policy Decisions?*

The fundamental question behind the Amendment Bill and the standing doctrine, therefore, is whether the court should be allowed to make important policy decisions. Should the court become the alternative site for people who lost in the political process to reassert their defeated proposals? This issue not only involves someone's preference on particular policy proposal, but more importantly, represents a fundamental difference in legal philosophy.

People who believe that the court should play the role as a policy maker usually support their arguments by indicating that the court itself is also a political branch, and cannot separate itself from the broader political realm. Moreover, the court is constantly interacting with politics, whether we want to admit it or not. Based on this assumption, this school of thought maintains that the court should definitely take policy into account because in the scenario of majoritarian tyranny, the judiciary is the only institution left that is capable of protecting the minorities. If the court simply defers to policy decisions made by the majority, which often is represented by the legislature, the court in reality might help entrench unjust majority rule and weaken the foundation of constitutional democracy.[16]

This position, however, is not sustainable. The fundamental problem with this argument is that it is based upon a false legal philosophy. It represents a faith that the court is an institution capable of judging conflicting values.[17] It believes that the court could decide which policy and its underlying value is best for the society. In reality, however, the court does not possess such capacity. Instead, it is the political branch, the legislature and the administration that is better positioned and better equipped to deal with value confrontation.[18] If we forcefully insert the court into the political process, whether it is because we try to revive our own policy preference or because we really believe it will lead to greater public good, what we really will find out is the fact that too many cooks simply spoil the broth. Too many policy makers only weaken the dynamic of constitutional democracy.[19]

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16. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

17. In *Missouri v. Holland* (1920), Justice Holmes stated that a constitution "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." This statement is seen by many as an early example of living constitution, a theory of constitutional interpretation which argues that the meaning of constitution evolves with time and the judge should make judgment according to its current meaning. Missouri v. Holland, 252 U.S. 416, 433 (1920).

18. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 86 (2d ed., 2008).

19. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

V. LAW AS COORDINATION

The reason why the court is not in a good position to handle value confrontation is because the judicial branch is not the *main* institution designed to facilitate coordination. Instead, judges work alone and apply their individual wisdom to figure out legal problems. In a society of value pluralism, however, moral coordination is a basic element in making any public policy. This emphasis on coordination therefore rules out the court as a proper policy maker.

A. *Value Pluralism*

What makes the court a bad candidate for making policies, in other words, is the fact that there are multiple and often conflicting values coexisting in our societies. Ever since industrial revolution, life in modern societies has become more and more fluid, complicated, and fast changing. People constantly interact with other human beings with different belief and life style, and for this reason modern societies can no longer operate on the basis of single dominant philosophy or ideology. The phenomenon of value pluralism therefore becomes common and inevitable, and it could be observed especially in constitutional democracies, where the right to express different life style is legally protected.

In a society of value pluralism, different people can legitimately hold different values. Values, however, are oftentimes incommensurable and incomparable. Although some values might be compatible with each other because they are derived from the same comprehensive and encompassing value, most of the time values are incommensurable because there is no objective measure to assess them. Economists might believe that price can be seen as a universal metric for measuring how individuals assess their own values. In reality, however, there are so many things that cannot be put a price tag on. A typical example of this problem might be how life should be measured when an agency is conducting cost-benefit analysis. For example, when the Department of Transportation is promulgating safety standards regulating automobile manufacturers, how should we assess life in relation to economic benefit? How much economic benefit are we willing to sacrifice in order to save one life from car accident?[20]

Values are also incomparable. Within the boundary of law, people in modern constitutional democracies can choose whatever lifestyle they want and it is difficult to judge whose lifestyle is the best. For example, Arnold Schwarzenegger used to be a famous action movie actor, but now he has

20. *See* EDWARD J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS 194-201 (5th ed. 2007).

become the Governor of the California State. Could we judge which phase of his life is better than the other? The answer will be no, because this is a personal judgment. Similarly, the President of the United States Barrack Obama used to be a community organizer. He was also a lecturer in constitutional law at University of Chicago Law School before he was elected to the Senate. How should we evaluate his life? Should we see him as a community organizer, a senior lecturer, a U.S. Senator, or the President of the United States? These are all career decisions in his life and it is difficult for other people to judge which one is better than others.

B. *Moral Coordination Problem*

When incommensurable and incomparable values conflict with each other, a society then faces the problem of moral coordination. Theoretically, if a society only has one unitary philosophy or ideology, value confrontation can be resolved by deducting answers from that comprehensive ideology. Also, if values are comparable, human beings can reach the right value judgment by balancing different values. Finally, if values are commensurable, then a society could solve value confrontations by conducting cost-and-benefit analysis. In reality, however, values are incommensurable and incomparable. For this reason, what human beings do is simply to choose between alternative values, and the choice between alternative values is called moral coordination.

Examples of moral coordination could be found in every aspect of our life, from technical traffic rules to controversial regulations on issues like stem cell research. The Matrix 1 shows that how people in a society coordinate collective behaviors in order to choose which side of the road they should use. The Matrix 1 reflects the nature of the moral coordination problem situation, that is, in a given society, people often want to behave as the majority of the society do, but they are uncertain about how the majority will eventually behave. Under this scenario, each person makes his or her own choice based on his or her expectation of the other party's behavior. Coordination therefore cannot be done by single person. Rather, it involves the collective expectation of what the majority of a society will act. If the collective expectation is diverse, the people in a society will not be able to act in a coordinated way.

The solution to this coordination problem is trying to reach a consensus or cohesive expectation on a particular behavior or choice. It is possible that the society sometimes coordinates itself and reaches a consensus without the intervention of the government. Social and cultural norms in many cases also

help coordinate the collective behavior.[21] There is no law regulating that we should stand in line while waiting to purchase a movie ticket, but most people know that it is a decent way of action. There are countless behaviors needed to be coordinated and a significant part of them are coordinated by the society, culture, or tradition.[22]

		Driver B	
		Left-hand side	Right-hand side
Driver A	Left-hand side	(1, 1)	(0, 0)
	Right-hand side	(0, 0)	(1, 1)

[Matrix 1] Payoff of Coordination Problem

However, when the collective expectation is diverse and the society cannot reach a consensus on a particular behavior or choice by social norms, culture, or tradition, the government should in this case step in and make the choice to resolve the moral coordination problem. For example, the Japanese and the British governments made a decision that automobiles should drive on the left-hand side of the road, while in the United States, it is the right-hand side of the road that should be used. In order for a society to develop and move forward, common rules and standards are definitely needed. Sometimes social and cultural norms could fill the gap. However, when they are not sufficient, someone in the society has to make a decision, and most of the time, it is the state that should take this responsibility.

C. *Law as Solution to Moral Coordination Problem*

When the government, especially the legislature, tries to solve the moral coordination problem, law usually is the major tool. The basic function of statutory and positive law is exactly to coordinate collective social interactions by setting uniform rules for people to follow. These rules are choices among alternative values, and most of the time these choices do not provide the society with right or wrong answers to the underlying value conflicts. Because these conflicting values are often incommensurable and incomparable with each other, every person could possess his or her own answer depending upon his or her preference or judgment. For example, in South Korea a citizen must be at least forty years old to be eligible for presidential candidacy. Taiwan has the same age requirement for presidential candidate. In reality, there might be no real difference in capacity between a

21. *See generally* W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (1999).

22. *See generally* W. Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985).

person who is forty and one who is forty-two. Such a rule, however, still exists in almost every democratic country. Another example is intoxicated driving. In South Korea, the permitted level of alcohol concentration in blood used to be 0.05%. Recently, however, it is about to suddenly drop to 0.03%. The real difference of a person's self control ability between 0.05% and 0.03% might be trivial. After the rule is promulgated, however, it still guides the collective behavior. These are the examples of law as a tool to coordinate collective behavior without clearly answering the underlying value conflicts.

The reason why the government should try to solve the moral coordination problem is because the political branches, especially the legislature, are particularly designed in the way to coordinate conflicting values. As the major representative institution, the legislature consists of members representing people with different values and positions. These legislators come together and make policy decisions not by imposing the will of a handful of elites, but by bargaining, communicating, and reaching consensus. Moreover, the final result has to be passed by the majority rule. In other words, the composition of its members, the way it operates, and how it makes decisions all make the legislature a much better vehicle than the judiciary in coordinating moral disagreements. It is the political process, rather than a few legal elites, that should possess the power to solve the coordination problem.

D. *Positional Authority of the Legislature in Coordinating Value Conflict*

The legitimacy of the legislature to solve the moral coordination problems, therefore, came from its institutional design, which in turn reflects its special position within modern constitutional government. Law is the major government tool in coordinating collective behaviors, and the legislature is the major author of it. Although the law is implemented and interpreted by the executive and the judiciary branches, it is the legislature that has the power to decide what the law will ultimately be. The position occupied by the legislature relative to other government branches hence entails an active duty to coordinate conflicting values in the society, and most institutional features of the legislature, including the composition of its members, the way it operates, and how it makes decisions, are all designed in the way to fulfill the task. This positional authority, which comes from the legislature's position relative to other government branches, therefore makes the legislature a significant institution when it comes to solving moral coordination problem. With this positional authority, therefore, people naturally look upon the legislature to coordinate alternative values when the society itself cannot achieve that goal.

Like many others, Professor Jiunn-Rong Yeh agreed to distinguish three models of government legitimacy: transmission-belt, expertise, and participatory theory.[23] Transmission-belt theory argues that a government action is legitimate when the government acts within the boundary of legislative delegation through which the democratic legitimacy flows from the legislature to the government agency.[24] Expertise theory argues that the government agency obtains legitimacy based on its own expertise.[25] Participatory theory maintains that government legitimacy could best be provided by public participation in the administrative process.[26] Among these three theories, transmission-belt theory put emphasis on positional authority. It recognizes the relative position of different government branches in modern constitutional government, while the expertise theory assumes that the government by exercising its expertise obtains "dispositional authority," authority that is based on one's quality or characteristic instead of one's position in the government structure. In a constitutional democracy, it is important to have positional authority. A person obtains authority by staying in a particular position instead of having some personal qualities or charisma. In this way, the Constitution could control the exercise of powers by regulating powers and obligations of every significant position as well as its relationship with others.

This essay therefore argues that it is the political process (especially the legislature) that should take the responsibility to make moral coordination. This is because the legislature not only occupies the very position to coordinate but also is designed exactly in the way to carry out that function. The judiciary, however, does not have that authority. It occupies the position to interpret law enacted by the legislature and is not equipped with institutional capacity to coordinate alternative values in the society. The legislature hence is naturally seen as a more significant institution in solving moral coordination problem. This does not mean that we think legislators are better or more charming persons than the judges on the bench are. Rather, it is simply because we believe that positional authority matters in a constitutional democracy, and it is the legislature rather than the judiciary that is in the position and has the institutional capacity to carry out that function. The court should be loyal to its duty, which is to interpret the law made by the legislature. If the court tries to take practical reasoning or policy

23. *See* Jiunn-Rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, 3(2) NTU L. REV. 31, 47-48 (2008) and JIUNN-RONG YEH, HUAN CHING HSING CHENG TE CHENG TANG FA LU CHENG HSU [DUE PROCESS OF LAW IN ENVIRONMENTAL ADMINISTRATION] 21-30 (1992). For detailed introduction of the three models, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

24. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 16-18 (1985).

25. *Id.* at 19-22.

26. *Id.* at 22-23.

preferences into consideration, the legal order set up by the Constitution might be soon destroyed. As Joseph Raz argues, if authority is justified by the demand of coordination, authoritative directions need to be accepted as "exclusive reasons." It is because authority can solve coordination problem if, and only if citizens behave according to authority's directions, not by each one's practical reasoning.[27]

As a result, it is not wise to let the court second-guess political branches' decisions regarding moral coordination problems, and standing doctrine in administrative litigation plays exactly this function, that is, preventing the court from second-guessing policy decisions made by the legislature.

VI. CONCLUSION

This essay introduces and evaluates the Amendment Bill to the Administrative Litigation Act proposed by the Korean Supreme Court in 2006. In this bill, the Korean Supreme Court attempts to expand its own power by changing the standing requirement for an administrative lawsuit from having a statutory interest to having a legally just interest. This essay argues that this bill not only violates the principle of separation of powers, but disrupts the inner dynamics of representative democracy by allowing the court to reconsider defeated proposals. The democratic process will then be forced to reopen and become an endless cycle.

The basic reason why the court should not make policy decisions is because it is neither in the position nor with the institutional capacity to decide which policy and value best suit our society. Policy making requires moral coordination. The judicial branch, however, is not designed to make such coordination. Instead, judges work alone and apply their individual wisdom to solve problems. In a society of value pluralism, multiple philosophies and ideologies coexist with each other. Because these values often are incommensurable and incomparable, consensus or moral coordination are necessary for a society to orchestrate individual behaviors.[28] Consensus sometimes could be provided by the social or cultural norms. However, when a society cannot reach a common consensus by itself, in order for the society as a whole to move forward, it is crucial for the government to step in and use law as a tool to solve moral coordination problems, and it is the legislature instead of the judiciary that is better equipped to take this responsibility.

Unlike the judiciary, the legislature is particularly designed to coordinate conflicting values. Its institutional design also reflects its special

27. *See generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

28. *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 192-95 (2001).

position in modern constitutional government, in which the legislature makes the law and the other branches implement and interpret it. This special position therefore entails positional authority to deal with moral coordination problems, and the legislature for this reason is often seen by the people as the major institution to deal with these problems. The legislature possesses such positional authority not because legislators are better persons than judges, but because of its institutional design and special position relative to other government branches under the Constitution.

As a result, excessive judicial review will not do too much good to our society. Instead, it will be detrimental to the political process. It will reopen decisions that have already been made by the legislature and therefore create cycling phenomenon. As Justice Scalia stated, the purpose of judicial review should be limited to protect the right of the minority. However, the attempt by the Amendment Bill to blur the standing requirement to file an administrative litigation represents an effort to judicialize the political process, which is definitely beyond the scope of its purview. As Justice John Marshall mentioned in *Marbury v. Madison*, the case that opened the history of judicial review, "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion."[29] The Korean Supreme Court should pay attention to this caveat, and take a more self-restraining attitude toward its own power.

29. Marbury v. Madison, 5 U.S. (Cranch 1) 137, 170 (1803).

REFERENCES

Ackerman, B. (1991). *We the people: Vol. 1*. Cambridge, MA: The Belknap Press of Harvard University Press.

Administrative cases (during the past 5 years). (n.d.). Retrieved August 24, 2009, from Supreme Court of Korea Web site: http://eng.scourt.go.kr/eng/resources/statistics_litigation_ac.jsp

Administrative Litigation Act, Law No. 3754 of Dec. 15, 1984, § 12, amended by Administrative Litigation Act, Law No. 6627 of Jul. 1, 2002 (South Korea).

Amendment Bill of Administrative Litigation Act, § 12, proposed by the Supreme Court of Korea (2006).

Dahl, R. A. (1957). Decision-making in a democracy: The Supreme Court as a national policy-maker. *Journal of Public Law*, *6*, 279-295.

Ex parte McCardle, 74 U.S. 506 (1869).

Ginsburg, T. (2008). Judicialization of administrative governance: Causes, consequences and limits. *National Taiwan University Law Review*, *3*(2), 1-29.

Hsing Cheng Su Sung Ti Yi Shen Chung Chieh Chien Shu [Statistics of the first instance administrative cases]. (n.d.). Retrieved August 24, 2009, from Judicial Yuan Web site: http://www.judicial.gov.tw/juds/report/sg-2.htm

Kadomatsu, N. (2009). Judicial governance through resolution of legal disputes?—A Japanese perspective. *National Taiwan University Law Review*, *4*(2), 141-162.

Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting).

Marbury v. Madison, 5 U.S. (Cranch 1) 137 (1803).

Mashaw, J. L. (1985). *Due process in the administrative state.* New Haven, CT: Yale University Press.

Mishan, E. J., & Quah, E. (2007). *Cost and benefit analysis.* London: Routledge.

Missouri v. Holland, 252 U.S. 416, 434 (1920).

Rawls, J. (2001). *Justice as fairness: A restatement*. Cambridge, MA: Belknap Press of Harvard University Press.

Raz, J. (1979). *The authority of law: Essays on law and morality.* New York: Oxford University Press.

Reisman, W. M. (1985). Lining up: The microlegal system of queues. *University of Cincinnati Law Review*, *54*, 417-449.

Reisman, W. M. (1999). *Law in brief encounters*. New Haven, CT: Yale University Press.

Rosenberg, G. N. (2008). *The hollow hope: Can courts bring about social change?* (2th ed.). Chicago: University of Chicago Press.

Scalia, A. (1983). The doctrine of standing as an essential element of the separation of powers. *Suffolk University Law Review*, *17*, 881-894.

Sierra Club v. Morton, 405 U.S. 727, 734-41 (1972).

Stewart, R. B. (1975). The reformation of American Administrative Law. *Harvard Law Review*, 88, 1667-1813.

U.S. CONST. art. III, § 1.

Yeh, J.-R. (1992). *Huan Ching Hsing Cheng Te Cheng Tang Fa Lu Cheng Hsu* [Due process of law in environmental administration]. Taipei, Taiwan: Author.

Yeh, J.-R. (2008). Democracy-driven transformation to regulatory state: The case of Taiwan. *National Taiwan University Law Review*, *3*(2), 31-59.