

**Effectiveness of Pretrial Disposition Reform: Interactions
between Judicial Efficiency and Access to Justice**

Jinkyoo Lee

A dissertation
submitted in partial fulfillment of the
requirements for the degree of

Doctor of Philosophy

University of Washington

2014

Reading Committee:

Yong-Sung Jonathan Kang, Chair

Maureen Howard

Hwasook Bergquist Nam

Jane K. Winn

Program Authorized to offer Degree:

School of Law

© Copyright 2014
Jinkyoo Lee

University of Washington

Abstract

Effectiveness of Pretrial Disposition Reform: Interactions between Judicial Efficiency and
Access to Justice

Jinkyoo Lee

Chair of the Supervisory Committee:
Professor Yong-Sung Jonathan Kang
School of Law

Judicial efficiency achieved by filtering cases that do not deserve trial and litigants' right to access to justice are competing values of most of civil justice systems. How these two values are interacting and how these are balancing influence actors of the system, decide effectiveness of legal institutions, and lead future civil procedure reforms. Through analysis of Korean civil litigation proceedings, existing studies, observations of court hearings, and interviews with Korean judges and lawyers, this dissertation investigates how disposition without trial and related procedural safeguards of Korean civil procedure are actually working and how interactions between efficiency and procedural fairness influence actual use of procedural mechanisms. Based on that, this dissertation evaluates comparative law projects that recommend adoption of disposition without trial of the U.S. civil procedure suggested by Korean legal scholars. This dissertation argues that fundamental procedural values in action that are unique in certain society and at certain time period decide actual use of procedural devices and effectiveness of legal reforms. It also contends that, in Korean context, maximum level of access to adjudication on the merits and truth finding function of civil litigation are driving judges' and lawyers' civil litigation practices toward minimal use of disposition without trial that limits litigants' access to court and maximum use of procedural safeguards, thus establishing a one-sided model biased with access to justice in terms of balancing model. By applying this explanatory theory to comparative civil procedure projects in Korea, this dissertation evaluates these projects in light of considering fundamental procedural values in action; and illustrates the ways of designing comparative civil procedure projects that appropriately reflects contexts of adopting society and raises effectiveness of the legal reforms.

TABLE OF CONTENTS

	Page
List of Tables.....	vii
McCune-Reischauer Romanization.....	viii
Chapter 1: Introduction.....	1
1.1. Introduction.....	1
1.2. Purpose and significance of this research.....	8
1.2.1. Understanding before reforming: suggesting necessary steps of comparative law project.....	8
1.2.2. Learning from actors' perceptions: providing empirical data.....	9
1.2.3. Coherent understandings of Korean civil procedure as one example of civil procedure in civil law tradition.....	10
1.3. Research questions and methodology.....	14
1.3.1. Statement of Research Questions.....	14
1.3.2. Research Methods.....	14
1.3.3. Strategy of Inquiry.....	15
1.3.4. Theoretical Framework.....	16
1.3.5. Data Collection.....	17
1.3.6. Demographics of interviewee (judges).....	26
Chapter 2: Concerns about inefficiency in judiciary and suggested solutions in Korea.....	28
2.1. Introduction.....	28
2.2. Litigiousness in Korea.....	30
2.3. Concerns about judicial inefficiency.....	38

2.3.1.	Introduction: Is litigiousness problematic?.....	38
2.3.2.	Burden on judiciary.....	39
2.3.3.	Concerns for lawsuit abuse.....	43
2.3.4.	Judicial efficiency: how and when cases are disposed?.....	46
2.4.	Suggested policy responses: adopting U.S. disposition without trial.....	48
2.4.1.	Adopting summary judgment.....	48
2.4.2.	Adopting Rule 11 sanction.....	50
2.4.3.	Adopting early disposition for regulating SLAPP.....	51
2.5.	Reviewing suggested policy responses: what this study can contribute?.....	54

Chapter 3: U.S. disposition without trial reforms as responses to concerns of judicial inefficiency.....55

3.1.	Introduction.....	55
3.2.	“Litigation explosion” in the U.S. and calls for civil procedure reforms.....	58
3.2.1.	Concerns about litigiousness in the U.S. society.....	58
3.2.2.	Questing concerns of frivolous lawsuit.....	58
3.2.3.	Calls for civil procedure reform to regulate frivolous lawsuits.....	62
3.3.	Reforming Rule 56 summary judgment.....	64
3.3.1	Definition and functions of summary judgment.....	64
3.3.2	Broad discovery as basis of summary judgment.....	69
3.3.3.	Changes in summary judgment standard: The <i>Celotex</i> trilogy.....	71
3.3.4.	Current summary judgment practice and “vanishing trial”.....	84
3.4.	Heightening pleading standard.....	89
3.4.1.	Rule 12(b) motion to dismiss and pleading standards before <i>Twombly</i> and <i>Iqbal</i>	89
3.4.2.	Plausibility test developed in <i>Twombly</i> and <i>Iqbal</i>	93
3.5.	Amending Rule 11: the Lawsuit Abuse Reduction Act of 2011.....	104

3.5.1.	Brief history of the Rule 11.....	104
3.5.2.	Current Rule 11 sanction.....	105
3.5.3.	The Lawsuit Abuse Reduction Act of 2011 and 2013.....	106
3.6.	Summary: a new form of managerial judging through disposition without trial.....	108
3.7.	How do Korean scholars consider contexts of U.S. disposition without trial?.....	110
Chapter 4:	Disposition without trial and related procedural safeguards in Korean civil procedure.....	113
4.1.	Introduction.....	113
4.1.1.	Ambiguous distinction between pretrial and trial stages.....	114
4.1.2.	Overview of disposition without trial.....	117
4.2.	Dismissal of complaints.....	120
4.2.1.	What is pleading standard in Korea?.....	120
4.2.2.	Order to correct complaints as procedural safeguard.....	128
4.2.3.	Court's duty to clarify (Litigants' right for clarification) as procedural safeguard.....	133
4.3.	Dismissal for lack of 'requirements of lawsuit'.....	150
4.3.1.	What are requirements of the lawsuit?.....	151
4.3.2.	How is satisfaction of requirements of lawsuit reviewed?.....	154
4.3.3.	How actively do judges render dismissal judgment for lack of requirements of lawsuit?.....	155
4.3.4.	Court's clarification when reviewing requirements of lawsuit.....	162
4.3.5.	Summary.....	163
4.4.	Judgment without trial.....	165
4.4.1.	Process.....	166
4.4.2.	How actively do judges render judgment without trial?.....	167

4.4.3.	Right to object as procedural safeguard.....	169
4.4.4.	Summary.....	170
4.5.	Decision recommending performance.....	171
4.5.1.	Process.....	171
4.5.2.	How actively do judges render decision recommending performance?.....	172
4.5.3.	Right to object as procedural safeguard.....	174
4.5.4.	Summary.....	174
4.6.	Summary: Two groups of disposition without trial.....	176
Chapter 5:	Reasons for lack of involuntary dismissals.....	179
5.1.	Introduction.....	179
5.2.	Institutional aspect: Constitution.....	181
5.2.1.	Constitutional right to claim adjudication.....	181
5.2.2.	Procedural due process.....	185
5.2.3.	Other procedural rights as constitutional rights.....	187
5.2.4.	Summary.....	188
5.3.	Institutional aspect: Procedural law and practice.....	190
5.3.1.	Dismissal without prejudice.....	190
5.3.2.	The foremost goal of civil litigation practice: finding truth.....	192
5.3.3.	‘Lack of enough hearing’ as a cause for appeal.....	206
5.3.4.	Summary: “dismissal, not useful and even not desirable”.....	206
5.4.	Historical and cultural aspects: Images and roles of judges.....	208
5.4.1.	“A trial by a local governor”.....	209
5.4.2.	Judicial paternalism.....	211
5.4.3.	Ruling as judges wish, regardless of law or principle.....	214

5.4.4.	Summary.....	217
5.5.	Social aspect: anti-authoritarianism and growing criticism against judiciary.....	219
5.5.1.	Social changes and anti-authoritarianism.....	219
5.5.2.	Anti-authoritarianism and criticism against judiciary.....	223
5.5.3.	Responses from judiciary: “Courts serving citizens”.....	231
5.5.4.	Criticism against judiciary and dismissal practice.....	232
5.5.5.	Summary.....	236
5.6.	Summary: civil litigation practice driven by value priority.....	238
Chapter 6:	Interactions between disposition without trial and procedural safeguards.....	240
6.1.	Introduction.....	240
6.2.	Grounds for theory developing: observed interactions and balancing between dispositions without trial and procedural safeguard.....	242
6.2.1.	Judges make efforts to avoid dismissals because dismissal does not satisfy shared values of civil litigation.....	243
6.2.2.	Procedural safeguards are helpful in achieving a judge’s goal of avoiding dismissals.....	245
6.2.3.	Civil procedure reform to improve judicial efficiency is not working when it conflicts with the right to claim adjudication.....	245
6.2.4.	Facing judicial inefficiency, judges use procedural safeguards also for efficiency.....	252
6.2.5.	What roles do low litigation costs play in these interactions?.....	253
6.3.	Explanatory theory: balancing models decided by fundamental procedural values in action.....	256
6.3.1.	Fundamental procedural values in action.....	256
6.3.2.	Balancing models for explaining interactions between disposition without trial and procedural safeguards.....	261

6.4.	Summary: revisiting Langbein and Maxeiner.....	266
Chapter 7:	Conclusion: Adopting U.S. disposition without trial for Korean civil procedure?.....	268
7.1.	Summary of dissertation.....	268
7.2.	Policy suggestion: adoption of U.S. pretrial disposition.....	272
7.2.1.	Heightening pleading standard.....	273
7.2.2.	Summary judgment.....	274
7.2.3.	Rule 11 sanction.....	286
7.3.	Recommendations for future study.....	287
7.3.1	Fundamental procedural values in action in the U.S. civil litigation practice.....	287
7.3.2.	How is lawsuit abuse defined and perceived by legal professionals and by lay people?.....	288
7.3.3.	Mediation as a tool for enhancing efficiency.....	288
7.3.4.	Gender role and judgeship.....	289
	 Bibliography.....	 290
	 Appendix A: Interview consent form (in English).....	 311
	Appendix B: Interview consent form (in Korean).....	314
	Appendix C: Trial Satisfaction Survey (Eastern District Court of Seoul) (In English).....	320
	Appendix D: Trial Satisfaction Survey (Eastern District Court of Seoul) (In Korean).....	322

LIST OF TABLES

Table Number		Page
2-1.	Changes in number of civil cases filed in Korea	30
2-2.	Comparing litigiousness between U.S. and Korea	34
2-3.	Rasmusen and Ramseyer's measure of litigation among countries, 2000-2009.....	36
2-4.	Changes in burden of district court judges in Korea	39
3-1.	U.S. District Courts – Civil Cases Terminated	85
4-1.	Korean District Courts – Civil Cases Terminated	118
4-2.	Two groups of disposition without trial in Korean Civil Procedure	176
6-1.	Balancing Models	263

McCUNE-REISCHAUER ROMANIZATION

Throughout this dissertation, I rely on the McCune-Reischauer Romanization system because this work was produced in a U.S. academic setting. I did not use the romanization system for names of Korean authors or individuals who have already published their names with different romanization preferences. I offer apologies in advance to those who have a romanization preference for their names but of which I am unaware. I also did not use the Romanization system for well-known English name of a city (e.g. Seoul).

ACKNOWLEDGMENTS

**“Three times I pleaded with the Lord to take it away from me.
But he said to me,
“My grace is sufficient for you, for my power is made perfect in weakness.”
Therefore I will boast all the more gladly about my weaknesses,
So that Christ’s power may rest on me.
That is why, for Christ’s sake,
I delight in weaknesses, in insults, in hardships, in persecutions, in difficulties.”**

(2 Corinthian 12:8-10)

I was walking through Quad of UW campus on one summer day, four days before my Dissertation defense, to deliver the first bindings of my dissertation to professors whose offices were scattered throughout the campus. Even though I have worked on the dissertation writing for more than one year, holding it, which was in a brief book format for the first time, gave me inexpressible joy. Such joy was so special because, day by day, I was going through hard times due to sufferings of my families in Korea, financial hardship, and uncertainty of future. Above-quoted Bible verses, 2 Corinthian 12:8-10, suddenly surged into my heart through a contemporary Christian song, “You are my all in all.” With the sudden joy of completion of long journey, God was telling me that, “*My Grace is enough for you.*” I realized, “No, it was more than enough, far more than enough,” As Paul in the Bible pleaded with God to remove his sufferings, I was complaining about difficulties I see and what I did not have. However, I could see countless blessing that I have enjoyed during my life, especially during my journey in Seattle. This acknowledgment might be able to reveal only a small part of such blessings that made me go. Whether listed or not, all of you who have shared your life with me and supported me were blessings to me which have been more than enough.

I was significantly indebted to my co-workers in faith for love (Romans 13:8). Without their love and care, and without God’s grace behind those, I would have not been

what I am (1 Corinthians 15:10). Members of my bible study group (“순”) have been witnesses of difficulties of my family and how God handled, and is handling such hard times. I deeply appreciate these friends in faith: Sanghun(상훈), Namjo (남조), Daniel (성훈), Annie (은이), Doyeon (도연), Eojin (어진), Myeungsoo (명수), Jiyoung (지영), Sungchan (성찬), Jane (재인), Inkyng (인경), Jinsung (진성), Jeemin (지민), Eric (종일), Linda (경숙). Because of your sympathy and prayer, I could show and share my weaknesses and difficulties; and experience Christ’s power in me which rested all the thunder storms inside. Also, regularly meeting Jesus in books of Gospel and in spirit through our Wednesday bible study, “English through Bible,” made my yoke easy and my burden light, thus let me find rest for my soul (Matthew 11:29~30). I deeply appreciate Professor Kenneth Pyle and Anne Pyle, a devoted couple to the Lord and a role model of our couple, for leading the bible study with love of Christ and ceaseless prayer for members. Kyoin and I learned so many things from their service. I also appreciate Nancy Payne, our co-leader, for your love, openness, and understanding. She is such a great discussion leader and a caring mom. Many thanks to bible study group members from all over the world! Whether they knew the Lord or not, their comments and questions were just fabulous. As Anne confessed many times, their stories made our faith grow. Lastly, I appreciate two churches, University Presbyterian Church (UPC) and Community church of Seattle (형제교회), and pastors, Pastor George Hinman, Pastor Jun Kwon (권 준 목사님), Pastor Kwang Jin Ahn (안광진 목사님), Pastor Nakkyu Sung (성낙규 목사님) for providing such wonderful communities and their life-transforming sermons and services.

It was such a blessing that I could study at University of Washington which is an academic community open to interdisciplinary and comparative research and study. I am very grateful for professors at law school dedicated to establish nation’s leading Asian and comparative law study including Professor Veronica Taylor who set up one of the most unique and interdisciplinary law school Ph.D program. In the program, I was benefitted by its requirement of using social science research method. It was hard to learn about it, however, it was worth. For the same reason, I appreciate my teachers of Ph.D core courses, Professor Veronica Taylor, Professor Elin Cohen, and Professor Jane Winn for Doctoral dissertation seminar class; Professor Susan Whiting for Empirical research method class; and Professor Chulwoo Lee (이철우 교수님) for Law and society in Asia class. Thanks to such courses, I

could design research, conduct filed research, and write up this dissertation under supervision of my committee members: Committee chair Professor Yongsung Jonathan Kang (강용승 교수님) who has been a wonderful mentor and big brother from my first day at UW Law until now and committee members, Professor Jane Winn, Professor Maureen Howard, and Professor Hwasook Nam (남화숙 교수님). Encouragement and sage words from my committee members made me go through. I appreciate. I am also indebted to my Civil Procedure teachers, Professor Dustin Buehler, Professor Elizabeth Porter, Professor Lea Vaughn, Professor Carl Goodman, and Professor John Haley; and my ADR teachers, Professor Alan Kirtley and Professor Julia Gold for their guiding and leading me to build up foundation for my doctoral research in the field of dispute resolution. Also, thank you my cohort, Jay, Linda, Aziz and Haitham for sharing feelings and experiences of the most confusing and difficult time and moments in the program, that is, first two years. Good luck guys wherever you are. I am very grateful for supports and smiles from my colleagues in different years, Anna, Hadar, Hsinyang, Amy, Bivitri, Paul, Tung, Al fitri, Nisa, Amira, Yu Un, Maria, Herliana, Watcha, Luke, Herliana, Wenda, George, Da-young, Juan, Bashir, Ti Tea, Andy, Gillian Sipim, and Po-liang. You are such a great friends. I know better than anyone else that pursuing Ph.D in Law school is a “road less taken.” Your journey might be difficult, however, for sure, it is worth doing it. Best wishes for your works and projects.

I am also very grateful for my teachers and friends in Korea who have been and are my roots. I do not know how to express my gratitude to Professor Young-Hwan Chung (정영환 교수님) who is my advisor and mentor at Korea University. Professor Chung has been a great role model as a scholar with open mind and a mentor with careful heart. He treated me and my wife like his own son and daughter. I deeply appreciate. Many thanks to my Civil procedure teachers in Korea, Professor Byung-Hyun Yoo (유병현 교수님), Professor Nam-Geun Yoon (윤남근 교수님), Professor Kyung-Wook Kim (김경욱 교수님), and Professor Young-Joo Hahm (함영주 교수님) for words of encouragement and insightful teaching and comments. My co-workers in faith at Korea University College of Law Christian Fellowship (법기모) have been located in the deepest place in my heart during college years and beyond, whenever I study and worship God. Many of them also served as interviewees for me. I

deeply appreciate. Especially, I am very grateful for two lawyers, Jong-Sik Boo (종식이형) and Ji-Heon Oh (지현이), for walking with me when I was passing the darkest valley last year. I thank God for sending and working through great leaders, Professor Il-Soo Kim (김일수 교수님) and Professor Joon-II Yi (이준일 교수님). May the Lord let me learn from their devotion and service for God and co-work for whatever he rejoices. I also appreciate my interviewees, 25 judges and 21 lawyers, for welcoming and teaching me. It is very regretful that I cannot list your name because of confidentiality. However, I want to express my deepest gratitude for your openness and generosity. I hope this dissertation can contribute to build better civil justice system of Korea. If such goal is achieved in someday, then it is because of your service.

My family. My father, mother, and brother are currently going through the most difficult and harsh time in their lives. I do not know how to say my apologies and gratitude for their ceaseless and coherent love and supports. All I and Kyoin achieved were possible because of you. Thank you. I love you. Exactly same to my family in law. Thank you for my parents in law for your love, prayer, and supporting despite of their difficult situations. I also appreciate my brother and sister in law for your kindness and cares. May Lord bring peace to my family and Koin's family. I also express my gratitude for my extended family in Seattle, Dickerson family. Especially, Martha Dickerson, a wonderful landlady, has been with us in prayer in our most difficult times as well as in the same house. She is such a great role model of devoted Christian.

It is very hard to abstract thousands of words of gratitude and reminiscence for my wife Kyoin Kim in few sentences. During the five years so far, all I have focused on was studying in LL.M and Ph.D programs. I thank Kyoin for her ceaseless understanding and caring for me during the long period of study. She has been my best friend, warm companion, comforter with sympathy and tear, trustful co-worker in faith, insightful commenter, and careful teacher. Most of all, I am very grateful for her unique role of providing candid advices based on her observing and sharing of my true life. Thanks to her and God who worked through her, I could move myself closer to God. I honor her for being a wife of noble character who brings me good, speaks with wisdom and faithful instruction, and, most of all, fears the LORD (Proverbs 31).

However, God is the one who knows me more than anyone else. He knows how I am weak, how I am arrogant, and how my knowledge is poor as well as all my ugly sins. To be honest, I am not able to and not willing to boast about my weakness although I quoted Paul's confession in 2 Corinthians 8:10-12 at the head of this Acknowledgment. I hate my weakness; and I do not others know about my weakness. I cannot, without God's grace, mercy, and empowerment. It is only Him to change and raise me until I "reach unity in the faith and in the knowledge of the Son of God and become mature, attaining to the whole measure of the fullness of Christ" (Ephesians 4:13).

This dissertation is a small product of my long journey of such maturing with Christ. Wherever I go or whatever I do from now on, I hope God use what I have learned for his sake, and make his power perfect in weakness of me.

DEDICATION

To God who is my rock, my fortress, my deliverer, my shield, the horn of my salvation,
my stronghold, my refuge, and my savior (2 Samuel 2:2~3)

And

My family

Chapter 1: Introduction

1.1 Introduction

What are incentives for civil procedure reform? In the U.S., reducing litigation costs through screening out “frivolous lawsuits”¹ in early stage of litigation has been a motivation for transforming civil procedure in certain ways that raise bar to trial. For example, in *Celotex Trilogy* of 1986², U.S. Supreme Court transformed summary judgment from a device that is seldom used only when the result of litigation is so obvious to a favorable motion to dispose cases before trial.³ With respect to pleading, the Supreme Court, in *Bell Atlantic Corp. v. Twombly*⁴ and *Ashcroft v. Iqbal*⁵, transformed Rule 12(b)(6) motion that was rarely granted⁶ to an attractive tool for pretrial disposition by enhancing pleading standard. In addition, from the same motivation, the Lawsuit Abuse Reduction Act of 2011 and that of 2013⁷ (Bill) suggest to amend Rule 11 sanctions by adding stricter sanctions including “striking the pleadings” and “dismissing the suit” against parties and their lawyers who presented false statement to the court.

These changes show how vigorously actors in U.S. civil justice system have

¹ More precisely, it should be called as “a case that seems to have risk of being frivolous,” because no one can conclude that certain lawsuit is frivolous before the end of the proceeding and without sufficient evidence.

² This term refers three U.S. Supreme Court cases decided in 1986 including *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

³ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1041 (2003).

⁴ 550 U.S. 544 (2007).

⁵ 556 U.S. 662 (2009).

⁶ CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 66A, at 461 (7th ed. 2011).

⁷ Lawsuit Abuse Reduction Act of 2011, H. R. 966, 112th Cong. (2011); Lawsuit Abuse Reduction Act of 2013, H. R. 2665, 113th Cong. (2013).

reformed their civil procedure, more specifically, “disposition without trial”⁸ to respond to alleged problems of civil litigation system such as lawsuit abuse, litigiousness and high litigation cost. These reforms, however, invited severe critics and concerns in terms of access to justice and procedural fairness. It was because enhancing pretrial dispositions would necessarily restrict litigants’ access to court considering competing and contrasting relationship between efficiency and access to justice.

This struggle between efficiency and access to court is an important issue also in Korea where concerns about lawsuit abuse and judicial inefficiency have been increasing; and civil procedure reforms through enhancing disposition without trial have been suggested as solution for such problems. Korea has become very litigious since mid-1970s; and, in mid-1990s, news media began to report about lawsuit abuse. Pointing out serious problems of litigiousness and frivolous lawsuits, Korean scholars suggested adopting disposition without trial of U.S. civil procedure as a way of improving Korean civil litigation.⁹

However, this approach is problematic at least for two reasons. First, adopting

⁸ It means “mechanisms for resolving cases without trial;” and it includes dismissal for failure to state a claim, demurrer, judgment on the pleadings, voluntary and involuntary dismissals, default judgment, summary judgment (GEOFFREY C. HAZARD, JR ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS 980-84 (10th ed. 2009)). Benjamin A. Spencer (A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 731 (3rd ed. 2011), and Joseph W. Glannon Et al (JOSEPH W. GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 977-78 (1st ed. 2011) also use the same term “disposition without trial.” Other scholars use different terms for referring these disposition mechanisms. For example, Jack H. Friedenthal (JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 947 (11th ed. 2013)), Allan Ides and Christopher N. May (ALLAN IDES AND CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 983 (4th ed. 2012)), A. Leo Levin Et al (A LEO. LEVIN ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 652 (2nd ed. 2000)), and David Crump (DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 545 (6th ed. 20012)) use “Adjudication without trial”; Richard D. Freer and Wendy Collins Perdue use “Adjudication without trial or jury” (RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 487 (6th ed. 2012)); Richard L. Marcus uses “Adjudication before trial” (RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 424-25 (4th ed. 2008)); Stephen C. Yeazell (STEPHEN C. YEAZELL, CIVIL PROCEDURE 523 (8th ed. 2012)) uses “Resolution without trial;” and John T. Cross uses “Dispositive motions” (JOHN T. CROSS ET AL., CIVIL PROCEDURE: CASES, PROBLEMS AND EXERCISES 733 (3rd ed. 2011)). Likewise, many scholars are using terms “disposition without trial,” “adjudication without trial,” or terms similar to these. It does not seem that there exist significant and meaningful differences among these terms. Thus, hereinafter, this study interchangeably uses “disposition without trial” and “pretrial disposition” when referring the procedural mechanisms that resolve cases without having trial.

⁹ See Section 2.4 of this dissertation.

foreign system is not always the right answer, because it is planting vines that have been fruitful at different soil. No one can guarantee whether the vines bear fruits in the new land as much as it had done. Therefore, before suggesting adoption of foreign legal institutions, one should thoroughly examine ones' own system first: what are working, what are not, and why. Disposition without trial in Korea has rarely been studied in the context of evaluating and enhancing judicial efficiency. Second, U.S. disposition without trial reforms have been very controversial because of its possible restriction of litigants' access to court. Recent developments of disposition without trial, especially enhanced pleading standard, are not yet verified as heading toward right direction. So, actors of the reform projects should bear in mind that the U.S. dismissal practices also have weaknesses; and think about how to resolve the problems.

These problems show necessity of having more cautious and considerate ideas when designing reform projects based on comparative law research. Robert Kagan's view on comparative study shed light on this issue. In his book *Adversarial Legalism*, he first denies the generally-accepted goals of comparative study, which is "to recommend specific reforms or transplants from other political and legal systems."¹⁰ It is because there is no guarantee that success in one system will result in success in a different system, as stated in above problem statement. Then, why do we compare? According to Kagan's remarkable expressions, it is to "reveal roads not taken, unconsciously maintained patterns, and sources of resistance to change."¹¹ This idea can be adequately summarized as, "not transplant surgery but psychotherapy."¹² Although this sounds somewhat vague and riddle-like, it clearly shows necessary steps for comparative law project: thoroughly examining one's own

¹⁰ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 5-6 (2001).

¹¹ *Id.*

¹² *Id.* at 5.

system, looking outward, then inward again.

From this point of view and recognition of problem, this study attempts to provide gap-fillers. It mainly focuses on the first step in Kagan's comparative law research method, having thorough understanding of Korean's own system. By examining judges' and lawyers' perceptions on how disposition without trial and related procedural safeguards are working in their daily practices, this study attempts to provide in-depth knowledge of Korean disposition without trial practice and explanatory theory on how the system is working.

This dissertation consists of seven chapters. This introduction chapter (Chapter 1) explains purpose and significance of this research, research questions and methodology, and organization of dissertation.

In more detailed format, Chapter 2 provides problem recognition and problem statement of this study. It first reviews litigiousness in Korea. Korea became very litigious society; and such litigiousness has imposed burden on judiciary and raised risk of lawsuit abuse. Litigiousness can cause judicial inefficiency when cases that do not deserve trial are not disposed in appropriate early stage of litigation. Afterward the chapter explains what solutions have been recommended by legal scholars. These scholars mainly argued for need of adopting U.S. disposition without trial, because such device seem to work for enhancing efficiency by cutting off cases that do not deserve trial. Chapter 2 closes with evaluation of these recommendations that shows necessity of this research.

Before analyzing findings of this study, Chapter 3 explains what is disposition without trial in the U.S. adoption; how it has been developed and changed in order to enhance efficiency of civil litigation; and how actors in the U.S. have responded to it. Such reforms include summary judgment reform by the three U.S. Supreme Court cases rendered in 1986;

enhancing pleading standard, from notice pleading to so called “plausibility pleading”; and reinforcing Rule 11 sanction by the Lawsuit Abuse Reduction Act of 2011 and 2013, which is currently being discussed at U.S. Senate. Based on the contexts of these reforms, the chapter analyzes how seriously Korean proponents of adopting U.S. disposition without trial consider and reflect such contexts and criticisms against U.S. disposition reforms.

Chapter 4 shows how current disposition without trial in Korean civil procedure is working; and how procedural safeguards related to each disposition device are working. Based on existing studies and field research, this study found that there are two different types of disposition without trial in terms of characteristics and actual usage, which include dismissal of complaint and dismissal for lack of requirements of lawsuit for one group and judgment without trial and decision recommending performance for other group. It found that dispositions that belong to the first group are rarely used by judges, contrary to that for the second group which is very actively used. Interviews with judges and lawyers also show that judges use procedural safeguards related to disposition, such as order to correct complaints and judge’ clarification, very actively in order to avoid dismissals.

Chapter 5 analyzes why actual use dismissals is rare as shown in Chapter 4. Based on interviews of Korean judges and lawyers and court hearing observation as well as existing observations on Korean law and Korean society, this study found reasons for such passive use of dismissal. These reasons include institutional, historical and cultural, and social aspects. As an institutional aspect, with respect to Constitution, it turned out that Korean judges have tried to guarantee litigants’ right to claim adjudication by providing maximum level of access to court’s judgment on the merits. Such guarantee is far beyond what Constitution requires judges to do for the right to claim adjudication. With respect to procedural law and practice, it were found that some judges regard dismissal of complaints as inefficient because such

dismissal is without prejudice; that judges prefer to hold trial for as many cases as possible, because finding truth is recognized as the foremost goal of civil litigation; and that dismissal can be recognized by judges in appellate court as “providing not enough hearing” when the party appeal the dismissal decision. In terms of historical and cultural aspects, it turned out that traditional images of judges who were requested to take care of litigants as parents do for their child and serve people are still lingering; and that such images are continuing in a form of judicial paternalism. So, now, judges are willing to teach the parties rather than dismissing their complaints or cases; and Korean people also expect judges to be a solver of every problem, where legal problem or not. Lastly, in social aspect, social changes driven by anti-authoritarianism and criticism against judges for being unfair and being authoritative have affected judges’ practice and made them to be very sensitive to complaints from litigants and public. Such change made use of dismissal more difficult.

Based on these contexts, Chapter 6 develops a theory on interactions between disposition without for efficiency and procedural safeguards for access to court. From observed interactions between these two procedural devices and two values, I found that “fundamental procedural values in action,” which is a concept developed by this study, controls and decide balancing models that explain such interactions. In case of Korean civil procedure, fundamental procedural values in action include maximum guarantee of access to judgment on the merit and truth finding as the foremost goal of civil litigation. These values drive Korean civil justice system to be a one-sided model biased by access to court with limited reactive reforms.

As a conclusion chapter, Chapter 7 applies the theory developed in the Chapter 6 to policy suggestions that recommend adopting U.S. disposition without trial. In doing so, this study acknowledges necessity to enhance disposition without trial whether to adopt from U.S.

or not. Then it evaluates validity of adopting each disposition without trial in the U.S. civil procedure, based on fundamental procedural values in action in Korean civil procedure. As results of such evaluations, it concludes that only disposition without trial that can provide litigants, especially plaintiffs, with opportunity to have courts' determinations on the merits of the cases can be accepted and used; and that modifications to the U.S. disposition without trial should be done for adopting, based on lack of trial preparation that can satisfy the parties' need and expectation for truth finding by judges. In addition to this application, this chapter and whole dissertation closes with limitations of this study, that is, themes for another research in the future. These remaining themes include fundamental procedural values in action in the U.S. civil litigation practice, definition of lawsuit abuse and/or frivolous lawsuit and use of mediation for enhancing judicial efficiency; and gender roles and judgeship.

1.2 Purposes and significance of this research

1.2.1 Understanding before reforming: suggesting necessary steps of comparative law project

This study can contribute in three ways. First, for Korean policy makers who consider reforming civil procedure by adopting U.S. pretrial disposition, this study provides in depth understanding of current disposition practice in Korea that should be considered for the comparative law project. This study explores following questions: Is adopting foreign system always the best solution? What should we consider before deciding whether, what, and how to adopt? Based on Kagan's observation that comparative law is "not transplant surgery but psychotherapy,"¹³ this study attempts to find answers to these questions by focusing on necessary steps of comparative law research that have not been seriously considered. Because the goal of comparative research is not merely transplanting legal institutions that seem to be working in the foreign country but reforming one's own system with new perspectives and insights from such foreign systems, such steps for the comparative law research deserve more attentions. These steps include: thoroughly examining current practices and problems of one's own system, looking other systems to find insights, and building one's own system using these insights.

As these steps clearly point out, comparative legal reforms should begin with examining one's own system; then, it should end up with revisiting their own system with insights from other systems. According to such idea, having through understandings of one's own system is a corner stone of comparative law research; and it is a more fundamental

¹³ KAGAN, *Supra* note 10, at 5.

step than observing foreign system. For example, let's assume that Korean scholars argue for adopting U.S. summary judgment to screen out some cases before trial. In the U.S., rendering summary judgment is possible because extensive evidence collecting through liberal discovery is allowed before such rendering. Data acquired through discovery enables the parties to claim and defend for their positions; and judges to conclude certain cases without having trial. However, Korea does not have discovery; and procedural devices for collecting evidence before trial are very limited. Moreover, Korean actors do not know whether such limited evidence collection procedure can provide enough evidence to conclude cases before having trial. Also, vague boundary between pretrial and trial makes the adoption of summary judgment difficult. Likewise, one should thoroughly understand his/her own system before designing specific reform plans.

In addition, actors in Korean legal system have not fully considered adopting U.S. dismissal practice to regulate lawsuit abuse until recently, because concern of lawsuit abuse is a recent issue. With such new perspective, this study pursues better and holistic understanding of Korean disposition practice in terms of balancing efficiency and access to justice. This perspective is what Korean actors think they know, but maybe they do not actually. To fill this gap, this study attempts to provide explanatory theory on Korean disposition without trial and procedural safeguards based on empirical data.

1.2.2 Learning from actors' perceptions: providing empirical data

This study attempts to provide perceptions of legal profession as empirical data. It attempts to learn from Korean judges and lawyers about how current disposition without trial and related procedural safeguards are working. It examines their perceptions because

Korean codes and court cases do not provide enough explanation of policy backgrounds related to judicial efficiency or access to justice. Korean codes are short and abstract; and it does not have official explanation of the code, which is similar to notes of advisory committee in rules in the U.S. Thus, Korean codes cannot show underlying policy considerations. Also, Korean courts cases provide legal reasoning only. The cases show what applying law is and why facts of the specific case satisfy certain requirements or not. When applying law to the facts, Korean judges rarely provide detailed rationale that indicates values or policy concerns weighed by the judge. Oftentimes conclusory statements replace such rationale.

However, not mentioning about policy considerations in judgment does not necessarily mean that judges do not have such considerations. Korean judges might have clear ideas about policy issues such as responding lawsuit abuse, functions of dismissal, and practical reasons of their practice. They might have shared the ideas with each other; but might not think it necessary to publish those through court decisions. Also, it might be true that the court cases did not deal with certain policy issues because such issues were not primary points of each lawsuit and the judges did not feel obliged to explain those. In these cases, learning from perceptions from judges can reveal what has never been said through court decisions. Considering that policy considerations of judges can hardly be drawn from Korean codes and court cases, exploring the legal practitioners' perceptions through empirical research can play significant roles in finding values and considerations underlying litigation practice.

1.2.3 Coherent understandings of Korean civil procedure as one example of civil procedure in civil law tradition

Lastly, using these empirical data, this study could contribute to comparative law literature by providing coherent understanding of Korean civil procedure that belongs to civil law tradition. It is an important task because sometimes there are incoherent or conflicting explanations of civil law system. For example, U.S. scholars' understanding of pleading standard in civil law countries seem to conflict with each other. James Maxeiner and Scott Dodson's comparative legal studies show different observation of the pleading standard in civil law system.

James Maxeiner gives civil procedure in the German civil law system very high score and argues for learning from this system in order to fix failures of U.S. civil procedure. In his eloquent article "Pleading and Access to Civil Procedure: Historical and Comparative Reflection on *Iqubal*, A Day in Court and a Decision According to Law," he clearly shows how U.S. pleading has failed and offers possible solutions. Maxeiner argues that there have been three types of pleading systems,¹⁴ in the U.S., but all of them have failed to regulate case management properly because all three systems "expected too much of lawyers and too little of judges" and "all relied on courts to decide issues and left lawyers to apply law."¹⁵ As one solution to this pleading problem, he suggests learning from the German system noting that this system, from the perspective of the cooperation between parties and the court, has worked very well.¹⁶ He summarizes features of German civil procedure as follows: pleading is used to prepare the way for the first hearing, not for intercepting cases; almost every plaintiff has the chance for a day in the first hearing; the judges' role is to apply the law when the parties provide the facts, rather than finding the facts by themselves; the judges' duty is to

¹⁴ This three systems include common law pleading, fact pleading (or code pleading), and notice pleading.

¹⁵ James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflection on Iqubal, A Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1270 (2010).

¹⁶ *Id.* at 1280-88.

elucidate and the parties' duty is to provide clarification; the fee system is "the first line of defense against frivolous lawsuits" in which losers pay; the judges supervise evidence taking; judges' review on complaints and requesting supplement in order to save the complaint; and there are written proceedings or early first hearing on order to find important issues in dispute.¹⁷ According to Maxeiner, civil procedure in Germany and civil law countries generally guarantee litigants' access to justice by using pleading as preparation for their first hearing, not as a mechanism for screening out meritless cases. Also, judges' active role in gathering evidence and leading the litigation processes is said to contribute to the protection of the parties' procedural fairness.

Maxeiner's work¹⁸ provides numerous insights for thinking about the current debate on the new pleading standard. It diagnoses problems and causes of the problems clearly. However, there are problems in his argument favoring German civil procedure. According to Maxeiner, a major reason for his favorable view is that the German system has been maintained for long time without major changes. Can surviving long time as a law be sufficient reason for arguing that the German civil procedure successfully achieved protection of procedural fairness? More empirical findings might answer some of those questions. Abstract goals such as procedural fairness or procedural due process are hard to recognize unless one is conducting research about concrete and specific facts. This is why the present study tries to look at law in action rather than law in the book. Also, as noted above, Maxeiner's solutions from his comparative research have limitations in that one cannot guarantee whether adopting the German system, which would entail major changes to the current U.S. system, would be successful or even possible. Considering Kagan's method of

¹⁷ Maxeiner, *Supra* note 15, at 1280-88.

¹⁸ Co-authoring with two other scholars, Maxeiner also published a book comparing civil procedure in the U.S., Germany, and Korea (JAMES R. MAXEINER ET AL., *FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE* (2011)).

comparative legal study, Maxeiner's solutions seem to be difficult to achieve and even not desirable. It is because an approach that works in Germany does not guarantee the same results in the U.S. In this aspect, Maxeiner's suggestions lack further considerations of how to utilize what the U.S. civil procedure already has. It seeks only adoption or transplant of ideas from outside.

Another comparative law scholar, Scott Dodson has ideas somewhat similar to Kagan's. In his comparative work "Comparative Convergences in Pleading Standards," Dodson reviewed the new pleading standard in *Twombly* and *Iqbal* and noted that changes in pleading standard is to catch up with "global norm" that requires "more rigorous fact pleading."¹⁹ Dodson recognizes the Supreme Court's new pleading standard as approaching fact pleading in civil law countries by dismissing cases more rigorously under a stricter pleading standard.

Dodson's observation of pleading standard in civil law system is quite different from Maxeiner's image of civil procedure in civil law countries. Maxeiner observes that pleading in civil law countries is for preparing the first hearing and that almost every litigant deserves to attend. It is not for dismissing the case before trial; rather, it guarantees the most access to court. Dodson, however, understands that fact pleading in civil law systems has the function of sorting out meritless cases, a function which the U.S. Supreme Court tried to apply. There seems to be no way to figure out whose observation of the civil law pleading standard is correct. That is another reason why empirical approach of this study is needed.

¹⁹ Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 455 (2010).

1.3 Research questions and methodology

1.3.1 Statement of Research Questions

- (1) How do Korean judges and lawyers perceive use of disposition without trial?
- (2) What are perceptions of Korean judges and lawyers on how procedural safeguards related to disposition without trial work?
- (3) How do disposition without trial and procedural safeguards interact with each other?
- (4) How do Korean proponents of U.S. disposition without trial consider controversy over and weakness of U.S. disposition?

1.3.2 Research Methods

This study uses qualitative research methods rather than a quantitative approach, because its research questions concern understanding and interpreting the perceptions of the various actors rather than examining relationships between variables. Because qualitative research methods provide ways of “exploring and understanding the meaning individuals or groups ascribe to a social or human problem,”²⁰ this approach is appropriate to the goals of the present study.

²⁰ JOHN W. CRESWELL, RESEARCH DESIGN 4 (2009).

1.3.3 Strategy of Inquiry

As a strategy of inquiry, this study primarily uses grounded theory. Grounded theory is “a *general methodology* for developing theory that is grounded in data systematically gathered and analyzed,”²¹ and it fits into the “general, abstract theory of a process, action, or interpretation grounded in the views of participants.”²² This study chose grounded theory for the purpose of contributing to the development of an explanatory theory describing how Korean disposition without trial is working in terms of enhancing efficiency while protecting procedural fairness for the litigants. Because the question of how actors in civil litigation perceive the functions of disposition without trial and procedural safeguards is crucial in this study, the use of grounded theory, which focuses on the interpretation of “the perspectives and voices of” participants, is particularly appropriate.²³ Also, I want to get benefit from strengths of grounded theory, which include constant interplay between data collection and theory development when exploring participants’ perception.

Grounded theory has unique characteristics in terms of data collections and analysis as follows. First, Grounded theory does not have fixed sample. Sample in the grounded theory is only initial and tentative one; and it is for addressing initial research questions, reflecting population distributions.²⁴ According to the progress and directions of theory development, scope of sample is supposed to vary through theoretical sampling.

Second, in Grounded theory, data collection and data analysis are supposed to be conducted simultaneously; and researchers are supposed to move back and forth between

²¹ Anselm Strauss & Juliet Corbin, *Grounded Theory Methodology: An Overview*, in HANDBOOK OF QUALITATIVE RESEARCH 273, 273(Norman K. Denzin & Yvonna S. Lincoln eds., 1994).

²² CRESWELL, *Supra* note 20, at 13.

²³ Strauss & Corbin, *Supra* note 21, at 274.

²⁴ KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS 100 (2006).

these two elements. Grounded theory researchers are expected to gather more data when their analysis by coding drives them in new or different directions.²⁵ Such additional data gathering is called as theoretical sampling.

Third, Grounded theory has two-tier coding and categories. Coding, in this context, means “the process of categorizing and sorting data.”²⁶ According to Charmaz, the qualitative coding used by grounded theory is different from other quantitative coding in that it creates “categories from interpretation of the data” rather than using “preconceived, logically deduced codes.”²⁷ The first stage of the analysis is initial coding. In this stage, researchers attempt to find “what they can define and discover in the data” in order to make the data available for further finding of “leads, ideas, and issues.”²⁸ This stage is a process of making codes for further analysis. The next stage is focused coding. Focused coding is “the second, selective and conceptual, phase of the coding process.”²⁹ In this stage, researchers select and focus among codes developed in the previous stage. They select codes that are deemed to be important in their theoretical model and focus on them. Because this is the first phase of the “analytic level,” in this stage, researchers are supposed to develop categories for theoretical development, beyond descriptive codes.³⁰

1.3.4 Theoretical Framework

This study begins with examining existing comparative civil procedure studies,

²⁵ Kathy Charmaz, *The Grounded Theory Method: An Explication and Interpretation*, in CONTEMPORARY FIELD RESEARCH 109, 114 (Emerson R. M. eds., 1983).

²⁶ *Id.* at 111.

²⁷ *Id.*

²⁸ *Id.* at 113.

²⁹ *Id.* at 116.

³⁰ *Id.* (According to Charmaz, The purpose of the stage is “to build and clarify a category by examining all the data it covers and variations from it.”).

because one of the purposes of this research is to verify the conventional wisdom that civil procedure in civil law countries provides a sufficient guarantee of procedural fairness. Thus, based on similarities and differences between U.S. and Korean dismissal practice, this study will figure out which points should be observed through field work for comparison.

In addition, this study uses its own framework based on the interaction between disposition without trial and procedural safeguards. Using this new framework also fits into its strategy of inquiry in that grounded theorists develop their own framework rather than relying on frameworks developed by previous research.³¹ The new framework and research questions of this study have not been attempted in previous studies. Thus, although this study basically deals with what seems to be generally accepted in the literature, its theoretical framework will be “shaped from the data” continually as data collection and analysis proceeds forward.³²

1.3.5. Data Collection

1.3.5.1 Sources of data

Data sources include direct observation of court hearings, in-depth interviews with judges and lawyers, field notes, documents including court orders and case records, and personal accounts. Regarding observation, In Korea, court hearings are open to the public, thus I could get access to all hearings of civil cases. However, certain court documents are limited to court personnel. So, I could get only court records that are open to public. I also interviewed judges and lawyers to learn their perceptions on disposition without trial and procedural safeguards.

³¹ Charmaz, *Supra* note 25, at 110.

³² *Id.*

1.3.5.2 Population, Initial sampling, and Actual sampling

The population of this research is all judges working at district courts and lawyers practicing in Korea. Among this population, this study deliberately selects certain courts and judges rather than random sampling. It is because this study aims to get in-depth understanding of perception of judges and to fit emerging theory with data instead of finding representative explanations. This emphasis on in-depth understanding from the experiences of the interview subjects distinguishes this study from other quantitative works.

As an initial sample, this study chose the Seoul central district court, which is the biggest district court in Korea and has the greatest number of civil cases and judges. It was because the district court can provide the widest variety of data. Regarding the issue of representation, most judges in Korea can be said to have similar levels of education and training. After graduating law school and passing the bar exam, they spent two years in judicial research and training center. Also, a new judge is assigned to and works for a three-judge court in order to learn from the head of this court. Judges circulate to other district courts located in other provinces every two or three years. That also indicates that the gap between district courts in terms of their practices is not huge. Therefore, this study selects and focuses on the Seoul central district court.

The Seoul central district court has forty-one civil divisions that form three-judge courts and fifty-four judges who manage civil cases by themselves as one-judge courts.³³ The civil divisions are grouped into two departments and the fifty-four judges who make up the one-judge courts are divided into three departments.³⁴ In terms of the number of

³³ Seoul Central District Court, http://seoul.scourt.go.kr/dept_info/DeptInfoList.work (last visited September 21, 2012).

³⁴ *Id.*

interviews, I limited the number of judges to interview in order to be more realistic. Thus, among all the judges in the forty-one civil division and fifty-four one-judge courts, I planned to interview judges in the first department of the twenty-four civil divisions and the first department of the eighteen one-judge courts. Also for lawyers, I did not set exact number of interviewees. Instead, I planned to lawyers whose cases are or were filed to the Seoul central district court.

Unlike the initial sample, my field research ended up with interviewing 25 judges working at district courts in the greater Seoul area³⁵ and 21 lawyers practicing in the area. I expanded the scope of sample court, from one district court in Seoul to several district courts in greater Seoul area, because I could not secure enough number of judges to interview from the Seoul central district court. Also, as interviews go on, it turned out that this research can also have some level of generalizability that this research had not aimed. It was because almost every judge I interviewed had experience of working at several district courts in area other than the greater Seoul area during their career. It was also because judges' statements regarding their practice showed coherency except very few distinguished matters.³⁶

Also, actual sample of this study has less number of judges than that of initial sample. It is because I decided that data is saturated. Statements of the forty-six interviewees showed repeating and coherent practices, experiences and opinions that seem to be shared by the judges and lawyers. Likewise, in terms of court practice, judges' and lawyers' perceptions were not diverse. Thus, I concluded that statements from additional interviewees are not likely to provide new data and information.

In terms of observations of court hearing, I could sit and observe fifty trial sessions

³⁵ This number includes few judges working at district courts in other area. Some of them had worked at district courts in the greater Seoul area months or years ago. I included them to test generalizability of what greater Seoul area judges said.

³⁶ In analysis chapters, I explained how judges' perceptions of their practice were similar and different regarding each issue.

held in five courts in the greater Seoul area and presided by eight of one-judge court and three-judge court. These trial sessions were all about civil cases; and I recorded my observation through making field notes.

1.3.5.3 Data Recording Procedures

Interview protocol of this study includes heading, instructions for the interviewer, and questions. The interviews were semi-structured; and, in order to get answers showing the interviewees' perceptions and opinions, it mainly used open-ended questions. Examples of the questions are as follows:³⁷

- How are you?
- Could you tell me briefly about yourself and your work as a professional?
- As a judge, could you tell me about your experience of dismissal practice?
What roles do you think dismissal is playing in civil litigation?
- How does the increasing number of lawsuits affect your dismissal practice?
- How are dismissal of complaint and dismissal for lack of requirements of lawsuit different from each other in terms of the standard for the dismissal decision?
- When you consider dismissal for lack of requirements of lawsuit, how does your standard for the decision differ according to the various types of requirements of lawsuit?
- Could you tell me about guidelines or any other resources that are helpful when deciding whether you dismiss the case or not?
- Could you share your experience of procedural safeguard for fairness? What

³⁷ I borrowed format of some questions from Charmaz's sample of grounded theory interview questions (*See* CHARMAZ, *Supra* note 24, at 30-31).

do you consider when using those safeguards? How do those work in dismissal practice? Why?

- How does the due process clause in the Constitution impact your daily practice?

- How do you use a clarification order? How often? On what standard do you decide to order clarification?

- Could you tell me how the document production order is working?

- What are the other ways the parties can use when their request for document production is denied? What is your role in that process?

- Is there any other procedural safeguard for fairness that I did not ask about?

- As a lawyer, how would you describe your experience of dismissal practice in the court?

- Was there any reaction from your clients in terms of procedural fairness concerns after they went through dismissal practice in the court? Could you share the experience?

- What do courts require for surviving dismissal of complaint or dismissal for lack of requirements of lawsuit?

- How would you describe your experience of procedural safeguards in the litigation?

- Was there any procedural safeguard for fairness under the civil procedure code that is helpful or not so helpful? Why? Were there any procedural safeguards that are rarely used? Why do you think that is the case?

- How do you think about procedural fairness protection in civil litigation and in dismissal practice? What are the grounds of your evaluation?

- What do you think are the most important ways to protect procedural fairness? How did you discover them?

- After having these experiences, what advice would you give to someone who

seeks ways to protect procedural fairness in dismissal practice?

- Is there anything that you might not have thought about before that occurred to you during this interview?

- Is there anything else you think I should know in order to understand the dismissal practice and procedural safeguards better?

- Is there anything you would like to ask me?

- May I come back to you and ask questions if I have further questions?

In addition to interviews, in order to record what is observed from court hearings and court documents, I kept writing field notes. Statements and events were also recorded in the notes.

1.3.5.4 Data Analysis and Interpretation: Two-tiered coding and Memo writing

For initial coding, I made and looked at the transcript of an interview and field notes of my observations, then conducted line-by-line coding based on the participants' comments and incident-by-incident coding for the events observed. While conducting the coding, I constantly compared statements and codes I had collected from the interview and observations in order to refine codes and to find more adequate ideas and analytic views. For the next stage of analysis, focused coding, based on the codes that I developed in the previous initial coding stage, I selected codes related to the interaction between disposition without trial and procedural safeguards. Then I developed categories from the selected codes for further analysis.

In doing so, I kept writing memos in order to define leads for collecting data. Memo writing is a unique tool of grounded theory. By memos this study means "written

elaborations of ideas about the data and the coded categories.”³⁸ It functions as “an intermediate step between coding and writing the first draft of the analysis”³⁹ by giving researchers “a space and place for making comparisons between data and data, data and codes, codes of data and other codes, codes and category, and category and concept and for articulating conjectures about these comparisons.”⁴⁰

1.3.5.5 Theoretical Sampling

When using grounded theory, a researcher does not have to fix his or her sample. Instead, the sample grows according to the direction indicated by the data collection and analysis. The additional sample includes sources of data that are needed for the focused direction of theory developing. This is called theoretical sampling. In that stage, a researcher tries to fill gaps and holes in terms of theory developing. Thus, after doing data collection and analysis, I went back to the field and collect delimited data related to specific issues only for specific information I needed for theory developing. I repeated going back and forth between data collection and theory developing until the saturation of categories was complete, that is, until I got enough volume of data. For this theoretical sampling I revisited my interviewees through e-mails and messages provided by social networking services and got answers through the same media.

1.3.5.6 How to prevent bias

Grounded theory has strength in terms of preventing bias compared to other qualitative inquires and to quantitative methods in that it does not have hypothesis in the

³⁸ Charmaz, *Supra* note 25, at 120.

³⁹ *Id.*

⁴⁰ CHARMAZ, *Supra* note 24, at 72-73.

beginning stage of research design and data collection. When having hypothesis to prove through data researchers are more likely fall into risk of forcing their data collection and data analysis into the same direction as that of hypothesis rather than interpreting or reflecting the reality they found from the data. Because researchers who use grounded theory do not have hypothesis that might force them in a certain direction and they should be open to emerging process and even new research questions, I would argue that they are in better position in terms of avoiding bias in data collection and data analysis.

However, grounded theorists also bear risk of “preconception,” which is “forcing their data into preconceived codes and categories.”⁴¹ Although being less risky than other research methods, grounded theory still has risk of being biased. To prevent and correct the preconception, Charmaz suggests researchers to stick to data themselves rather than their thoughts and even their interpretations.⁴² Her suggestion for specific ways to avoid the preconception is asking questions such as “Do these concepts help you understand what the data indicate?” “How does my coding reflect the incident or described experience?” “Have I clear, evident connections between the data and my codes?” to researchers themselves when coding.⁴³ Coding full interview transcriptions rather than coding only interview notes can also help researchers to focus on the data.⁴⁴ This study accepts all these advices from Charmaz, thus I will conduct coding keep asking such questions on the connections between the data and the coding and code from full interview transcriptions and field notes. Also, in order to show the process of coding, I will keep writing whole process of developing codes including comparison between data and incidents.

⁴¹ CHARMAZ, *Supra* note 24, at 73.

⁴² *Id.* at 68-69.

⁴³ *Id.*

⁴⁴ *Id.* at 70.

1.3.5.7 Ethical Considerations

I used safeguards for research ethics. First, I gained informed consents by participants using written consent form. The consent form indicated that interviewees' statements will be presented and published; and that confidentiality will be kept.⁴⁵ Considering the constant interplay between data collection and theory when using grounded theory, letting interviewees know how their comments are going to be interpreted and formed as a theory is an inevitable part of this research. For confidentiality and anonymity, I will keep informant identity, memos, and interview transcripts confidential. I will not make those material public. Verbatim transcript and written interpretations will be available only to participants. Also, I got permission for interviewing human subjects from Institutional Review Board (IRB) of Human Subject Division of University of Washington.⁴⁶

1.3.5.8 Expectations before the field research

Unlike any other quantitative research methods, this study based on grounded theory does not have a hypothesis. This is because while quantitative research uses "preconceived" categories or codes, such categories or codes in grounded theory are not fixed.⁴⁷ A researcher using grounded theory cannot set out and prove or disprove a hypothesis because what is supposed to be set as variables or hypothesis will emerge through the course of research while going back and forth between data collection and analysis. That can be a totally different area or a new research question.⁴⁸ Ground theory aims to provide testable hypothesis after conducting data collection, analysis, and theoretical sampling to some extent.

⁴⁵ I used two consent forms, one in English and one in Korean; and got signature of interviewees on both forms. See Appendix A and B for entire consent form written in English and Korean.

⁴⁶ Such permission is required for a researcher if he or she is doing research which collects data from human subject. For more information, please see, <http://www.washington.edu/research/hsd/>.

⁴⁷ CHARMAZ, *Supra* note 24, at 46.

⁴⁸ *Id.*

For this reason, this study does not set any specific hypotheses. Instead, it only had some opened expectations regarding what could emerge.

Because this study tries to observe how Korean civil procedure and its procedural safeguards are working, it expected to see the perceptions of the various actors through observation and interviews over the course of field research. Because this study employs the methods of qualitative research, what I expected to find depended on what the actors or interviewees say. First, regarding lawyers' interaction with judges, I expected to hear words describing their experiences or their evaluations of these experiences, such as "so helpful," "minimal," "inevitable," "authoritative," "hard to contact," etc. When describing judges' and lawyers' experiences of procedural safeguard for fairness, participants might say "rarely experienced," "frequently used," "do not need those," "never experienced over my whole career," "experienced but found that to be not so helpful," "there are some limitations," etc. In addition, when asking about judges' and lawyers' perception of procedural fairness and the role of safeguards in civil procedure, I expected to hear far more varied expressions.

1.3.6. Demographics of interviewee (judges)

Through empirical research, this study attempts to find actual disposition practices of judges and their values and thoughts underlying such practice. This study collected such attributes as gender, work experience (years), and number of regions served. I interviewed 25 judges that include 10 female judges and 15 male judges. With respect to work experience, most of the interviewed judges had work experience of 6 to 15 years. Three judges (12%) had work experience less than five years; 11 judges (44%) had 6~10 year experience; 7 judges (28%) had 16~20 years; and only 2 judges (8%) had more than 21 year

work experience. In terms of number of regions served, most of the judges served more than three different regions. More specifically, 2 judges (8%) worked at only one region; another 2 judges (8%) worked at two different regions; 6 judges (24%) at three regions; 10 judges (40%) at four regions; and 5 judges (20%) at more than five different regions.

Chapter 2 Concerns about judicial inefficiency and suggested solutions in Korea

2.1 Introduction

Concerns about frivolous lawsuits and litigation costs; reform efforts by enhancing disposition without trial to solve such problems; and criticisms against such changes for the risk of infringing litigants' access to court, which are ongoing social issues in the U.S., are also important and urgent issues in Korea. From the similar background of litigious society, in Korea, concerns about judicial inefficiency that can be caused when cases that do not deserve trial are not disposed in proper timing have been raised. Considering that the number of civil cases filed has been rapidly increased while the number of judges has been increased slowly, that concerns about lawsuit abuse have been raised continually, and that vast majority of cases have trials that take over a year, in average, disposing cases for which having trial is not necessary is an important matter. From such problem recognitions, Korean legal scholars suggest adopting dispositions without trial in the U.S. civil procedure, including dismissals, summary judgment, and Rule 11 sanctions. It is because there is lack of devices to dispose cases that do not deserve trials. These procedural devices can enhance efficiency through finishing certain cases in their early stages, before trial. Also, these are actively used in the U.S. civil procedure.

However, expecting that disposition without trial in the U.S. civil procedure would automatically work in Korea is too simple and naïve. First, it is because we do not know yet

whether these dispositions would fit into Korean civil procedure and contexts around the procedure rules. Also, we do not know yet how current dispositions in Korean civil procedure are working. Second, it is not yet discovered or shared that how these disposition devices would work in Korea in terms of balancing with litigants' access to court. When it comes to enhancing pleading threshold by establishing new pleading standard, this issue is not yet fully developed and discussed in the U.S. also. These circumstances make interaction and balance between disposition without trial and access to court an important issue to be explored when planning reform of disposition without trial in Korea. Current suggestions from the legal scholars do not seem to give priority to such points.

This chapter explains about these problems and about suggested solutions. It shows how litigious Korean society is; and why it is problematic. Then, it examines possible solutions for the problems suggested by Korean legal scholars. By doing so, it shows why this study is needed.

2.2 Litigiousness in Korea

How can we conclude that one society is litigious? This question is raised by Marc Galanter who was living in and researching about U.S. society in late 1970s and 1980s when the problem of litigiousness was hot topic in that society. Reviewing comments and observations on litigiousness in U.S. society, Marc Galanter casts two critical questions: “How do we know how much litigation we have?” and “How much is too litigious?”⁴⁹ He suggests, regarding the second question, comparison to past and other society as possible ways to find close answer to the question.⁵⁰

In this section, following Galanter's recommendations, I try to provide undated information on litigiousness in Korea. First question for the showing is how litigiousness in current Korean society has changed from the past. The following Table 2-1 shows these changes.

Table 2-1 Changes in number of civil cases filed in Korea

Year	Population	Increase Rate of Population	Number of Civil cases filed	Increase Rate of Civil cases	Number of civil cases per 1,000 people
1965	28,530,000	-	62,426	-	2.19
1970	31,923,000	+11.89%	58,134	-6.88%	1.82
1975	35,281,000	+10.52%	102,138	+75.69%	2.89
1980	38,124,000	+8.06%	134,204	+31.39%	3.52
1985	40,806,000	+7.03%	316,177	+135.59%	7.75
1990	42,869,000	+5.06%	302,156	-4.43%	7.05
1995	45,093,000	+5.19%	524,065	+73.44%	11.62
2000	47,008,000	+4.25%	771,551	+47.22%	16.41
2005	48,138,000	+2.40%	1,169,283	+51.55%	24.29
2010	49,410,000	+2.64%	1,041,468	-10.93	21.08

⁴⁹ Marc Galanter, *Reading the Landscape of Disputes: What we Know and Don't know (and Think we know) about our allegedly contentious and litigious society*, 31 UCLA. L. REV. 4, 10 (1983).

⁵⁰ *Id.* at 11.

Source: THE OFFICE OF JUDICIAL ADMINISTRATION, SABEOB YEONGAM [THE YEARBOOK OF KOREAN JUDICIARY] (1977-2011)
Statistics Korea

The Table 2-1 shows increases in the number of civil cases filed by comparing number of cases and population. The table shows population, increase rate of population by years, number of civil cases, increase rate of civil cases, and number of civil cases per 1,000 people. This number of lawsuits per certain number of people is an index ordinarily used for measuring litigiousness.⁵¹

Contrary to stable and even diminishing population growth, civil cases have skyrocketed during the periods. The number of civil cases filed had continuously increased from mid-1970s to mid-2000s. However, after mid-2000s the number had been decreased slightly. Table 2-2 for the comparison between litigiousness in Korea and in the U.S. shows these stagnant increases in civil cases. These figures implicate that Korean is becoming more litigious than in the past. Now, remaining question is how much litigious is Korea compared to other societies.

In comparative law literature, Japan's propensity to avoid litigation has been a very popular research topic. Many scholars have tried to figure out why Japan has such a small number of lawsuits despite of their economic growth and advanced level of industry. They have suggested several possible factors which might have contributed to this non-litigiousness. These factors include a cultural explanation that Japanese people prefer informal dispute resolution and have weak legal consciousness;⁵² an institutional explanation that high litigation costs caused by lack of legal institutions, such as judges and lawyers,

⁵¹ For example, Galanter, *Supra* note 47, at 4; Kahei Rokumoto, *Some Comparative Observations, in KOREA AND JAPAN: JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD* 353 (DAI-KWON C HOI & KAHEI ROKUMOTO EDS., Seoul National Univ. Press, 2007).

⁵² Takeyoshi Kawashima, *Dispute Settlement in Japan, in THE SOCIAL ORGANIZATION OF LAW* 58, 61-62 (DONALD BLACK & MAUREEN MILESKE EDS., Seminar Press, 1973).

discouraged use of lawsuit despite of Japanese people's historical litigiousness;⁵³ and law and economic explanation that settlement is more profitable than litigation in Japan due to clear predictability of litigation.⁵⁴

In contrast to Japan, it is often observed that Korean society has higher level of litigiousness. According to judicial statistics, Korea is almost six times more litigious than Japan although both countries have similar judicial institutions due to Korea's adoption of Japanese legal system.⁵⁵ This observation is based on the number of litigation cases per 1,000 populations. Such difference is somewhat counter-intuitive, because Korean legal system is based on the Japanese model and the ways in which Japan manages its legal system have been important references for running and improving Korean system.

Rokumoto does not give clear explanations of the difference in litigiousness between the two countries. It might be hard for him to explain factors distinguishing the Korean situation from the Japanese using existing frames, such as cultural, institutional, or law and economic approaches. Because one could say that Korea and Japan share a similar Confucian culture, in addition to Korea's experience of Japanese colonization, culturists might find it difficult to explain this drastic difference between the two countries. In the same way, institutional explanations cannot show a reason for the difference in litigiousness because the two countries have very similar legal institutions, including legal education, bar examination, training of lawyers, and the ratio of lawyers and judges to the population.

Jeongoh Kim tries to explain this litigiousness in Korea by showing drastic changes in Korean legal culture. Based on the same judicial statistics as what Rokumoto used,

⁵³ Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?: An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31, 34 (2006); J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 113 (1988); JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER* 83 (1991).

⁵⁴ Ramseyer, *Supra* note 53, at 114.

⁵⁵ Rokumoto, *Supra* note 51, at 356.

which is the number of litigation cases per 1,000 populations, Jeongoh Kim observes that Korean is becoming a “litigation explosion” society, which was an famous expression used to describe high litigation rate in the U.S. in the 1970s.⁵⁶ How does he explain about causes of such drastic increases in the amount of litigation in Korea? He finds an answer from the changes in the Korean people’s recognition of law and legal rights that have been rapidly enhanced.⁵⁷ Based on a survey of people’s legal consciousness, he concludes that Koreans no longer deem filing lawsuits as shameful acts or behavior disturbing harmony in the community.⁵⁸ Instead, for them, filing lawsuits is an important way of protecting their property and the quality of their daily lives.⁵⁹ He finds the contexts underlying this change in legal consciousness from the collapse of traditional norms following rapid economic development and enhanced recognition of property and legal rights.⁶⁰ Jeongoh Kim’s explanation is based on a cultural approach; however, his cultural explanation is different from that for Japanese legal culture represented by Kawashima. His cultural view focuses on what has been changing in Korea whereas Kawashima’s cultural explanation is limited to the culture that has been firmly remained in Japanese society.

Is this cultural approach based on Korean people’s legal consciousness only way to explain “litigation explosion” in Korea? Through macro frame of social structure, Do-hyun Kim observes that “multiplex relationship” between social members in the traditional Korean society was replaced by simplex relationship in times of industrialization and urbanization, and people having this simple relationship do not hesitate filing lawsuits against each other

⁵⁶ JEONGOH KIM, HANKUK ŬI PŎP MUNHWA: INSİK, KUCHO, PYŎNHWA [KOREAN LEGAL CULTURE: UNDERSTANDING, STRUCTURE AND CHANGE] 157-158 (2006).

⁵⁷ *Id.* at 167.

⁵⁸ *Id.*

⁵⁹ *Id.* at 169-70.

⁶⁰ *Id.*

when having troubles.⁶¹ Kim observes Korean society as an unstable society where traditional social structures and norms were disappeared but modern counterparts are not rooted yet.⁶² He argues that, in this status of “anomie”, whether structurally or psychologically, people tend to rely on litigating rather than other ways to resolve disputes, and that contributes to the “flood of litigation.”⁶³

From this perspective of social structure, Kim disagrees with Pyong-choon Hahm’s cultural explanation that Korean people are not willing to choose adversarial dispute resolution methods that have such features as competition, conflict, clear distinction between winners and losers, because of their traditional affective relationships.⁶⁴ Hahm’s observation of reluctant litigants is similar to Kawashima’s cultural approach for Japan. As Kawashima’s cultural approach faced several opposing ideas, Hahm’s explanation of Korean people’s traditional non-litigiousness was opposed by several scholars.

Another good way to understand litigiousness of one society is to compare with other societies. Comparison with the U.S. that is often cited as very litigious society would be good starting point. Based on the number of lawsuits per population, following Table 2-2 shows how litigious the U.S. and Korean societies were during the same period of time.

Table 2-2 Comparing litigiousness between U.S. and Korea

Year	United States			Korea		
	Number of civil cases filed	Increase rate of civil cases	Number of civil cases per 1,000 people	Number of civil cases filed	Increase rate of civil cases	Number of civil cases per 1,000 people
2000	15,516,208	-	54.99	771,551	-	16.41
2001	16,024,601	+3.28%	56.23	881,337	+14.23%	18.61

⁶¹ DO-HYŎN KIM, HANKUK ŬI SOSONG KWA PŎPCHO: ÖTTÖKE PYŎNHAEYA HAL GÖSINGA [LITIGATION AND ADJUDICATION IN KOREA: HOW IT SHOULD BE CHANGED] 61-62 (2007).

⁶² *Id.* at 62-63.

⁶³ *Id.* at 63.

⁶⁴ Pyong-choon Hahm, *The Affective Society: Values and Law in Korea*, in KOREAN JURISPRUDENCE, POLITICS AND CULTURE: 282, 316 (Yonsei Univ. Press, 1986).

2002	16,610,033	+3.65%	57.75	1,054,872	+19.69%	22.13
2003	17,412,396	+4.83%	60.12	1,191,726	+12.97%	24.90
2004	17,144,279	-1.54%	58.55	1,233,363	+3.49%	25.67
2005	16,993,437	-0.88%	57.50	1,169,283	-5.20%	24.29
2006	17,543,647	+3.24%	58.80	1,339,090	+14.52	27.68
2007	18,370,727	+4.71%	60.99	1,267,054	-5.38%	26.07
2008	19,670,647	+7.08%	64.69	1,314,833	+3.77%	26.86
2009	19,782,816	+0.57%	64.48	1,133,537	-13.79%	23.53
Average		+2.76%	59.41		+4.92%	23.61

Source: THE OFFICE OF JUDICIAL ADMINISTRATION, SABEOB YEONGAM [THE YEARBOOK OF KOREAN JUDICIARY] (1977-2011)
 Statistics Korea
 U.S. Census
 National Center for State Courts,
<http://www.courtstatistics.org/Civil/CivilGrowth.aspx>
 Federal Judicial Caseload Statistics
<http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>

Note: The number of civil cases in the U.S. combines cases filed in state courts and federal courts. Korean has only one court system applying same laws under supervision of Korean Supreme Court.

These changes during a decade allow observations that deserve attentions. First, the number of civil litigation per 1,000 people in the U.S. varies from 54.99 cases to 64.99; and its increase rates show that the number of civil cases is gradually increasing in a stable way, averaging 2.76%. Second, in terms of Korean civil litigation, these numbers vary from 16.41 to 27.68; and the average increase rate was 4.92%, that is almost two times more than that of the U.S. However, the average increase rate might show that speed of increases in the cases is somewhat moderated than a decade ago. Third, the rapid increase in the number of civil cases, as shown in the Table 2-1, has stopped since the year of 2004. Since that time, the increase rates have been less than 5%, even decreasing in the years of 2005 and 2007, with one exception of year 2006. In the years of 2009 and 2010 (from the Table 2-1), the number of civil cases decreased at rates of more than 10%. This shows that increasing litigiousness in Korea began to be stabilized similar to the U.S. since the year of 2004. But, still, the increase rate in Korea is higher than that of the U.S.

How about other countries? Rasmusen and Ramseyer's up-to-date measure of

litigation enables scholars to compare litigiousness in the U.S. and Korea with that of other countries.⁶⁵ The following table shows their comparison of the number of litigation per 100,000 people among countries. I added data for U.S. and Korea based on Table 2-2 that shows number of civil cases filed during the same period.

Table 2-3 Rasmusen and Ramseyer's measure of litigation among countries (2000~2009; recomposed by author)

Countries	Australia	Canada	France	Japan	U.K. (England)	U.S.	Korea
Number of civil cases file (per 100,000 people)	1,542	1,459	2,416	1,768	3,681	5,806 (5,941)*	(2,361)**

Source: Rasmusen, Eric Bennett and Ramseyer, J. Mark, *Are Americans More Litigious? Some Quantitative Evidence* (January 8, 2010), available at SSRN: <http://ssrn.com/abstract=1907203> or <http://dx.doi.org/10.2139/ssrn.1907203>.

Note: * This number is based on an average number of civil cases filed in the U.S. from 2000 to 2009 as shown in the Table 2-2.

** This number is based on an average number of civil cases filed in Korea from 2000 to 2009 as shown in the Table 2-2.

According to these figures, it could be reaffirmed that the U.S. is one of the most litigious societies. Contrary to its fame as non-litigious society, Japan had as many as, and a bit more, civil cases than that Australia and Canada have. However, Rasmusen and Ramseyer's article does not provide clear idea about the specific year(s) these numbers belong to. From their later explanations, I could assume that these numbers are not from the same year due to availability of data, and that the data is of recent years, from 2000 to 2009.⁶⁶ How can I situate Korea in this comparison of litigiousness? As an average in ten years, Korea had 2,361 cases per 100,000 people, and the U.S. had 5,941 cases. This figure for the

⁶⁵ Eric Bennett Rasmusen and J. Mark Ramseyer, *Are Americans More Litigious? Some Quantitative Evidence* (January 8, 2010), available at SSRN: <http://ssrn.com/abstract=1907203> or <http://dx.doi.org/10.2139/ssrn.1907203>.

⁶⁶ *Id.* at 6-7.

U.S is not drastically different from the number Rasmusen and Ramseyer used, which is 5,806 cases. Considering these numbers, it would be fair to say that Korea was more litigious than Australia, Canada, and Japan; less litigious than U.K. and the U.S.; and had a similar number of civil cases to that of France during the time period.

Considering these observations from the data that compares litigiousness in Korea with that in previous years and with other countries, one can find that litigiousness in Korea has rapidly increased to the extent similar to or more than other developed countries. Thus, I would argue that the idea of litigious Korean society is no more a myth. Rather, it is a reality deserving attentions from actors in Korean legal system.

2.3 Concerns about judicial inefficiency

2.3.1 Introduction: Is litigiousness problematic?

In previous sections, this study showed litigiousness in Korean society. Then, the question becomes: is having many lawsuits a problem? One might say that having many lawsuits is not problematic if the cases are properly resolved through the judicial system.⁶⁷ Such observation makes sense because increases in lawsuits might be caused by population growth, by business development, by improved recognition of legal rights and obligations, and/or by enhanced trust on the courts.

However, being litigious can be problematic in two ways: judicial inefficiency and risk of lawsuit abuse. First, having too many lawsuits can impose too much burden on judicial system; and it can cause substantive amount of social costs, such as too much workload for judges, delay of litigation, litigation costs, etc. Second, being more litigious could bear risk of having more lawsuit abuse. Pointing out that Korea has five times more number of lawsuits per population than Japan, as of 2011, Si-Yun Lee opined that such litigiousness indicate two changes in Korean society.⁶⁸ The first aspect is popularization of lawsuit.⁶⁹ According to Lee, in the past, there is a saying, “who lives by lawsuits will die by

⁶⁷ Gyooho Lee also sees rapid increase in the number lawsuit itself non-problematic. According to his opinion, litigiousness becomes problematic if it causes reduction of social resources, that is, when social costs exceeds social benefits. From this frame, Lee observed that the new trial preparation proceeding amended in 2003 significantly increased the litigants' benefits, thus contributing to the increase in litigation. He also argues that one should consider ways to minimize social costs of court, time and efforts required for the increased amount of lawsuits (Gyooho Lee, “사인의 제소여부결정 모델과 민사사건 증가의 원인에 대한 법경제학적 분석” [*A Theoretical Analysis of Increase in Civil Case Filings on Basis of an Economic Model as to a Rational Actor's Incentive to Bring a Suit*], 8-2 MINSА SOSONG [CIVIL PROCEDURE] 36 (2004)).

⁶⁸ SI-YUN LEE, SIN MINSА SOSONG PÖP [NEW CIVIL PROCEDURE], 32 note 6 (7th ed. 2013).

⁶⁹ *Id.*

the lawsuits;” and people restrained themselves from using lawsuit for problem solving.⁷⁰ However, he argues, now is “golden ages of right to claim adjudication” in which people believe that whenever there is infringement of rights then lawsuit shall be filed.⁷¹ The second change is increase in lawsuit abuse that caused by social trends recommends filing lawsuits when someone feels unfair.⁷² However, it is very difficult to find proofs for connecting litigiousness and lawsuit abuse, because increases in lawsuits could mean increase in both meritorious lawsuits and frivolous ones. Because it is very difficult to conclude that certain cases are frivolous, precise rate of frivolous lawsuits is usually under the veil.

Then, how problematic is Korea’s litigiousness? As stated above, it is good ways to examine how much burden do Korean judges have and to review how severe lawsuit abuses are. Following paragraphs attempt to assess burdens on judiciary based on judicial statistics and review media reports of lawsuit abuse.

2.3.2 Burden on judiciary

As the first step of reviewing litigiousness in Korea, checking burden of increased lawsuits on Korean judicial system is necessary. Following table shows one aspect of this burden: number of civil cases assigned to one district court judge.

Table 2-4. Changes in burden of district court judges in Korea

Year	Increasing rate of the number of civil cases	Number of district court judges	Increasing rate of the number of district court judges	Number of civil cases assigned to one judge	Increasing rate of the number of civil cases assigned to	Number of days elapsed for one civil case	
						Three-judge	One-judge

⁷⁰ LEE, *Supra* note 68, at 32 note 6.

⁷¹ *Id.*

⁷² *Id.*

				one judge		court	court
1980	-	445	-	278.6	-	N/A	N/A
1985	+135.59%	583	+31.01%	528.3	+89.63%	150.0	93.0
1990	-4.43%	782	+34.13%	371.4	-29.70%	198.0	123.0
1995	+73.44%	921	+17.77%	553.2	+48.95%	213.0	144.0
2000	+47.22%	1,091	+18.46%	690.7	+24.86%	264.0	174.0
2005	+51.55%	1,502	+37.67%	761.7	+10.28%	300.0	183.0
2010	-10.93%	1,999	+33.09%	521.0	-31.60%	260.3	168.0
Average	+48.74%		+28.69%		+18.74%		

Source: THE OFFICE OF JUDICIAL ADMINISTRATION, SABEOB YEONGAM [THE YEARBOOK OF KOREAN JUDICIARY] (1977-2011)

This table shows the number of civil cases filed and number of judges; and how these figures affect caseload of judges. The table attempts to measure burden on judiciary using the average number of cases assigned to one judge and the average length of time elapsed for one case. Such length of time is an indicator based on the premise that it takes more time if judges have more caseloads.⁷³

As this table shows, increase in the number of cases causes increase in the number of cases assigned to one judge. For example, in the period between 1980 and 1985 when the numbers of civil cases were drastically increased, the number of cases assigned to one judge was almost doubled. The periods from 1990 through 2005 showed the same pattern. However, I could find that increase in the number of judges had an offsetting effect on the burden of judges. The number of district court judges has been increased continually. I would argue that, due to this increase, in the periods between 1985 and 1990 and between 2005 and 2010 when the number of litigation decreased, the burdens of district court judges were significantly relieved. During these two different periods, the decrease rate of the number of cases assigned to one district court judge was far greater than the decrease rate of litigation. That implicates how increase in the number of judge relieves judges' burden of

⁷³ These indicators show only limited reality of judicial burden in that it cannot reflect diverse complexities of cases that also require different length of time for resolution. However, this indicator is the only one for measuring burdens on judiciary used by Korean judiciary's official statistics.

deciding cases. That might be explained by that decrease in the number of litigation and increase in the number of judges significantly shortened the time needed for resolving cases although the cases might have becoming more complex as time goes by.

With respect to another aspect of burden on judiciary, which is length of time spent for deciding cases, Korean courts have maintained the time length relatively stable compared to the changes in the number of cases and judges. This number of days spent for one case might vary by two factors: amount of burden on judges and complexity of each case. First, the required time length for deciding one case could be longer when judges have more caseload, and it could be shorter when they are less burdensome. The complexity of cases should be considered because one very complex case might impose more burden than three to five less burdensome cases do. In the years of 1985, 1995, and 2010, the numbers of cases assigned to each judge were relatively similar to each other; but the length of time spent for deciding one case varied. It took more time in 2010 than in 1995, and more in 1995 than in 1985 although the number of assigned cases were relatively similar. That might be explained by generally known fact that cases have become complex more and more as time has gone. In addition, the number in 2010 is remarkable, because it was the first time when the average length of time for deciding a case was shortened.

Reviewing the figures, I could observe that having more litigation adds burden on Korean judiciary, and that increase in the number of judges has relived the burden to significant extent. The figures between 2005 and 2010, specifically, reduced litigation; increased judges; and shortened time spent for deciding a case. It seems to signal optimistic changes in terms of burden on judiciary if the trend will be continued. However, despite of the continual increases in the number of judges, caseload for district court judges is still high when comparing the figures for 2010 with that for 1980s. Also, considering the fact that

civil cases are becoming more complex, judicial burden in Korea, compared to the past, is not small. Although the number of litigation has been decreased in recent five years, the amount of burden on judiciary is still being increased significantly compared to two to three decades ago.

Following observation of a former judge who spent twenty years on the bench also shows how increased burdens on judiciary affect their decision making.

“Even after my retirement, I still think that judicial workload should be reduced more. It is not for welfare for judges. It is because, as a lawyer, I wish judges to spend more time for deciding my cases. Korean judges are highly skilled and trained professionals, so they can finish their work for limited time regardless of how many cases they have, somehow. However, that “somehow” is a problem. If judges are allowed to read records and judge mechanically, they can dispose even ten times more cases. If they finish trials for all the cases after the very first trial session, they would be able to write decisions dismissing the cases for lack of evidence. If judges are required to decide cases only based on documents regarding rights and obligations, then they would be able to dispose far more cases, nicely. However, that is not what I expect from judges. ... Judges are government officials who receive their salaries from the tax paid by people. Eventually, how judges should be cannot help following what the people expect from them. I expect them to read records of the cases and think about these again and again when necessary and if their time allow as well as working hard. I do not want judges to work like bulls and to produce certain exact number of decisions in certain limited time. ... I do not agree with the idea and expectation that judge’s decision making should

maximize productivity based on time input same as other production areas.”⁷⁴

Above statement indicates that current caseload for a judge does not allow them to contemplate and ponder enough for deciding cases, and that such heavy workload is driving them to rule without enough considerations. It also shows that such burden on judiciary due to caseload is problematic in terms of quality of decision making.

These observations and implications mentioned so far show that litigiousness in Korea is problematic at least to some extent. Following sections will examine the second condition for litigiousness to be problematic: increase in lawsuit abuse.

2.3.3 Concerns for lawsuit abuse

Increase in lawsuit abuse makes litigiousness problematic. However, measuring exact amount of lawsuit abuse is almost impossible, because, so far there has no absolute definition of lawsuit abuse and condition making certain cases frivolous. One might be able to notice certain cases were lawsuit abuse only after all the facts are revealed and tried or when the plaintiff's purpose turns out to be harassing the defendant after the end of the lawsuit. However, these occasions are very exceptional. Then, how can we make sure that lawsuit abuses in Korea have been increased along with its litigiousness? Providing precise figures or concrete conclusion is not purpose of this study. Instead, I would argue that being more litigious has risk of having more lawsuit abuse; and that actors of the litigious society should be more vigilant about lawsuit abuse and ways to regulate it.

How serious or severe is lawsuit abuse in Korea? Media reports about lawsuit

⁷⁴ Chaewoong Lim, *Is Being a Judge Weary?* (2), Facebook, Jun. 5, 2014, <https://www.facebook.com/lcwcoc?fref=ts>.

abuse in Korea began relatively recently, since mid-1990s. These reports were about anecdotal evidences of lawsuit abuse that have been limited to certain types of lawsuit or specific persons who seemed to use litigation only for harassing others. I searched newspaper archive from 1920s which was provided by Korea Press Foundation⁷⁵ using the term “lawsuit abuse” and found that news or editorial on that issue has not found until 1994 when Hankyoreh News reported about a lawsuit filed by the son of the president of Korea at the time against a media corporation.⁷⁶ Since the time, with few exceptions⁷⁷, Korean media have reported lawsuit abuse focusing on specific types of lawsuit. These reports include lawsuits filed by corporations against labor unions;⁷⁸ lawsuits by government or government officials against media corporations or participants of demonstrations;⁷⁹ lawsuits by

⁷⁵ Korea Press Foundation, <http://www.kinds.or.kr/> (last visited November 6, 2012).

⁷⁶ Editorial, *Power and Media: Thinking about Two-Billion-Won lawsuit and 'Fast to the death'*, HANGYÖRE SINMUN [HANKYOREH NEWS], May. 5, 1994, at 1 (pointing out that 2 billion won (approximately 1.82 million dollars) libel action brought by Hyun-chöl Kim, son of the president of Korea, was a lawsuit abuse to harass media and restrict freedom of speech).

⁷⁷ There were few number of editorial reporting general lawsuit abuse. For example, Editorial, *Shame of 'Litigation Republic'*, SEOUL SINMUN [SEOUL NEWS], Mar. 2, 2000, at 7 (reporting rapid increases in civil and criminal cases and pointing out lack of trust and mediating function in the society).

⁷⁸ Editorial, *The first step for Labor Union and Company to 'find balance'*, HANGYÖRE SINMUN [HANKYOREH NEWS], Mar. 15, 2003, at 3 (reporting Korean government's new policy restricting filing damage lawsuits against labor union and members of the unions; and evaluating the move as a corner stone to build trustful relationship between labor union and company); Editorial, *Police investigation of Ssangyong automobile has lost fairness and justification*, HANGYÖRE SINMUN [HANKYOREH NEWS], Aug. 10, 2009, at 27 (pointing out that, considering the amount of damages required by the plaintiff company is ten times more than actual loss of equipments and medical bills for the injured, the actual purpose of lawsuit is not for money damage, but threatening the labor union and its members).

⁷⁹ This type of alleged lawsuit abuse is the most recent and the most highly criticized one. See Editorial, *Supra* note 70; Editorial, *For new government to be successful, it should be open to criticism from media*, DONG-A ILBO [DONG-A DAILY], Dec. 28, 2007, at 35 (criticizing failures of president Mu-Hyun Roh's media policy based on the fact that the government had filed 22 civil and criminal lawsuits for five years, and no single case of them was successful; and pointing out loss of national resources due to the lawsuit abuse); Editorial, *Intelligence agency's inspection on the court: they are not changed*, HANGYÖRE SINMUN [HANKYOREH NEWS], Jul. 5, 2008, at 31 (reporting revealed inspection of national intelligence agency on the court in which the president Myung-Bak Lee's lawsuit against Hankyoreh News is pending); ; Editorial, *Myung-Bak Lee's Government persistently has tried to suppress criticism and checks against itself*, HANGYÖRE SINMUN [HANKYOREH NEWS], Sep. 16, 2009, at 31 (reporting 200 million won (approximately 182 thousand dollars) lawsuit brought by the president Myung-Bak Lee against Won-Soon Park, the most famous NGO activist and civil rights lawyer in Korea; and pointing out that the lawsuit is to threaten criticism against government from activists advocating civil rights and social changes by aiming representative person); Editorial, *Abusing 'strategic lawsuits against criticism' should be regulated first*, HANGYÖRE SINMUN [HANKYOREH NEWS], Sep. 16, 2010, at 31 (reporting the fact that the lawsuit against NGO activist Won-Soon Park was dismissed by the court and that the court had pointed out that there is severe risk for other government agencies to abuse lawsuit in the same way).

universities against its students or employees;⁸⁰ environmental lawsuits by environmental protection NGOs;⁸¹ and lawsuits against behavior that inflicts family morals.⁸²

What were grounds for the media to define certain lawsuits as lawsuit abuse? The most obvious ground was the amount of money the plaintiff claimed. Claiming excessive money compared to possible and reasonable amount damages gave the lawsuit the name of frivolous lawsuit. The second conspicuous ground for lawsuit abuse was about motivations of filing lawsuits: to threat free speech, civil rights movement, or labor movement. This is a separate ground from the first one; however, these two are closely related in that people can infer purposes of lawsuits from the amount of money sought. Amount of claim that is far beyond reasonable amount of damages reasonably draws motivations other than recovering damages, such as revenge and threatening. Moreover, such a lawsuit actually has chilling effect. Third, most of media reports showed respect to courts' decisions when declaring certain cases as lawsuit abuse. Rather than criticizing court decisions on whether given lawsuit was meritless, media played a role of spreading these court decisions to the public. Thus, from the media reporters' view, filing several lawsuits against the same defendant and for the same matter and being dismissed all the cases was clear proof of lawsuit abuse. The

⁸⁰ Editorial, *Korea University's excommunication as a disciplinary action infringed rule of law*, KYŎNGHYANG SINMUN [KYUNGHYANG NEWS], Sep. 3, 2010, at 40 (criticizing Korea university's excessive disciplinary action against its students as being 'fake rule of law' based on the fact that the university filed five lawsuits against the same seven students for four years and ended up losing all the cases); Editorial, *Hongik University harmed itself by litigation bomb*, KYŎNGHYANG SINMUN [KYUNGHYANG NEWS], Jul. 1, 2011, at 31 (criticizing Hongik university's excessive lawsuits against its part-time employees).

⁸¹ Editorial, *Lawsuit abuse by Environment protection organizations increases people's burden*, DONG-A ILBO [DONG-A DAILY], Mar. 9, 2006, at 35 (arguing that there are too many organizations for environment protection; that their morality and expertise are doubtful; and that environmental lawsuits is causing significant loss in terms of national resources).

⁸² Editorial, *Morality, more than Law*, KUKMIN ILBO [KUKMIN DAILY], Jun. 13, 1998, at 3. This editorial is about court decision denying a daughter's lawsuit against her father claiming that the father should be evicted. The daughter was an owner of the house where her father and brother were living. She filed the lawsuit to evict her father and brother from the house. The district court dismissed the case because eviction claim by this daughter who has moral obligation to support her parents is against family morals, thus a lawsuit abuse. This family morals seem to be based on traditional value in Korea putting more weight on community values than on individual's legal rights. Pointing out rapid increase in the lawsuits against the family morals, thus welcoming the court decision, the editorial emphasizes that even enforcement of property right should consider family morals more.

fourth and last ground has something to do with traditional value or morals in Korea. As of right, everybody can sue everybody if she has legal grounds. However, in Korean society, certain moral values are working as limits of executing legal right. For example, in the lawsuit by the daughter who was a landlord against her father and brother who were living at the house for vacating the house, the court refused to help executing the plaintiff legal rights based on moral values. Likewise, there are certain moral values one should comply with even when he executes proper rights.

Then, how can we diagnose lawsuit abuse in Korea considering these media reports? Civil procedure code has maintained to regulate lawsuit abuse since its enactment in 1960s and courts have dismissed cases for being meritless and lawsuit abuse. Then why the media did not begin to report lawsuit abuse until recently? One answer could be increased level of problem definition and concerns regarding the issue of lawsuit abuse in the society. It can be said that accumulated cases that seem to be frivolous have formed some patterns mentioned above and drawn more attention from the media. Considering the fact that reports on lawsuit abuse have been raised by both group of newspapers that respectively represent conservative and progressive views, ideological context of reporting lawsuit abuse is different that of the U.S. where problem recognition of litigiousness and lawsuit abuse are allegedly initiated by conservative, pro-business groups. To sum up, recent reports of lawsuit abuse deserve more attention in terms of developing ideas for enhancing judicial efficiency through regulating lawsuit abuse.

2.3.4 Judicial efficiency: how and when cases are disposed?

As above paragraphs show, burdens on judiciary have been added, compared to slow

increase in judicial resources; and lawsuit abuses are often observed to the extent that it already formed certain patterns. In these circumstances, the civil justice system is more likely to become inefficient unless cases are disposed in proper timing and ways. When the civil litigation system cannot dispose cases that do not deserve much attention from judiciary in right timing, resolutions of other complex cases that require more judicial resources can be delayed and even neglected. This is judicial inefficiency that makes litigiousness problematic.

However, measuring judicial inefficiency in this context, in the level of whole civil cases in certain civil justice system, is very difficult in that it is hard to figure out which case deserve trial and which not. This is why it is hard to conclude whether Korean civil litigation system is inefficient and how.⁸³ However, based on the assumption that current civil litigation system should be improved in terms of judicial efficiency, Korean legal scholars have suggested ideas for reforming civil procedure. Following section explains about and evaluates these suggestions.

⁸³ Chapter 4 through 6 of this dissertation, based on interviews with Korean judges and lawyers, provide partial answer for this issue by showing that current disposition without trial works only when it does not restrict litigants' right to claim adjudication, that is having court decision in the merits, and when it does not conflict with truth finding goal of civil litigation; and that efficiency is not a fundamental procedural value in action, thus, for other values, it can be refused.

2.4 Suggested policy responses: adopting U.S. disposition without trial

What have been policy responses or suggestions regarding litigiousness and lawsuit abuse? Until very recently, Korean judiciary has not mentioned about their concerns on lawsuit abuse policy responses against it. On July 30, 2013, the chief judge of Seoul District Court announced the court's new policy against lawsuit abuse.⁸⁴ The court has discussed how to reduce lawsuits filed only to harass judges or defendants after it realized that judges' works have been significantly disturbed by lawsuit abuse and that several judges have been defendants in civil litigations complaining about their running of court proceeding or ruling.⁸⁵ As a new policy, the court suggested more active use of order to pay security deposit for litigation expenses that was adopted in 2010 but have not been used much; and more active use of a judgment without trial in small claim cases.⁸⁶ Detailed explanation of these devices will be discussed.⁸⁷ As this event shows, enhancing efficiency became an urgent issue; and suggested policy mainly focuses on more active use or development of disposition without trial.

2.4.1 Adopting summary judgment

Legal scholars have suggested civil procedure reforms by adopting disposition tools from U.S. civil procedure, such as summary judgment and Rule 11 sanctions assuming that Korean society has severe problems of lawsuit abuse. Without thorough examining of

⁸⁴ Se-mi Hong, *Seoul Central District Court will block malicious and repetitive lawsuits*, PÖPRYUL SINMUN [THE LAW TIMES], Aug. 1, 2013, <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=77207> (last visited December 11, 2013).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Section 6.2.3.4 of this dissertation for the order to deposit security for litigation costs; and section 4.4 of this dissertation for a judgment without trial.

lawsuit abuse itself, for example, Dae-Sung Oh approaches this issue by seeking ways to reduce burden of defendants to show up at court hearings especially when plaintiff's lawsuit seems to be an abuse.⁸⁸ He first points out that, in Korean civil procedure, procedural tools that dispose cases without trial, that is, judgment based on documents, is very limited.⁸⁹ He then supports needs of such judgment on papers by pointing out that there are people who use litigation only to harass opposing parties maliciously: filing a lawsuit to enforce a contract even though the plaintiff does not have a contractual right; or suing again and again despite of final judgment for purpose of reducing the amount he should pay through mediation.⁹⁰ As a policy recommendation, Oh suggests ways to adjudicate without court hearing, like summary judgment in U.S. civil procedure, when there is no issue regarding facts of the case.⁹¹ However, he stressed that unambiguous requirements and procedure should be addresses not to infringe the litigants' right to a day in court.⁹²

Oh's experiences and suggestions provide very clear points that there are certain lawsuit abuses civil procedure should take care of; and that current civil procedure, including dismissal practice, is not functioning properly to the extent that it needs procedural reforms. However, his article introducing and suggesting U.S. style summary judgment lacks observation of how current dismissal practice is working and what kind of procedural infrastructure should be equipped to make summary judgment-like procedure work.

⁸⁸ Dae-sōng Oh, “미국민사소송에서의 약식재판(Summary Judgment)” [*Summary Judgment in U.S. Civil Procedure*], 14-2 MINSА SOSONG [CIVIL PROCEDURE] 748 (2010).

⁸⁹ *Id.* at 774-76.

⁹⁰ *Id.* at 777-78 (This second example came from Dae-Sung Oh's personal experience as a mediator for court-connected mediation. In the case the plaintiff filed a lawsuit although there was a final judgment on the claim. However, the court neglected the fact that the plaintiff already received a final judgment, and referred the case to mediation. In the mediation, the parties agreed on the reduced amount of money the plaintiff should pay to the defendant on the condition of plaintiff's voluntary payment).

⁹¹ *Id.*

⁹² *Id.*

2.4.2 Adopting Rule 11 sanction

As another example, Young Ho Kong also approaches this issue procedurally but made suggestions regarding education of law students and lawyers.⁹³ Looking at U.S. civil procedure, he begins with weakness of the liberal pleading standard in terms of screening frivolous lawsuits out.⁹⁴ Then he focuses on the revision of Rule 11 in 1993 heightening obligation of lawyers to be more cautious about investigating and their intention when submitting documents to courts or presenting their arguments, thus preventing frivolous lawsuits raised by the lawyers.⁹⁵ Admitting the fact that frivolous lawsuits are proliferating in Korea and there should be “some enforcement mechanism to deter and prevent” these claims, such as punishment for lawyers, he suggests that Korean legal education for law students and lawyers should focus on educating more rigorous legal research and legal ethics for prevent lawyers’ frivolous claims.⁹⁶

Kong’s suggestions show a different angle of responding to lawsuit abuse, from dismissing cases to regulating lawyers' practice. This new focus on legal education is very meaningful in Korea where in transitional period of changes in legal education. However, his article explaining revision of FRCP Rule 11 generally lacks specific suggestions regarding how to reflect these requirements for lawyer to withhold punishment regarding their practice. Also, because, he neglected changes in U.S. pleading standards and its dynamics regarding the Rule 11, his suggestions lack holistic idea of how to prevent or screening out meritless lawsuits.

⁹³ Young Ho Kong, *An Analysis of Rule 11 of the United States Federal Rules of Civil Procedure as a Measure to Deter Frivolous Litigation*, 15-1 MINSASA SOSONG [CIVIL PROCEDURE] 553 (2011).

⁹⁴ Kong seems to have missed to check *Twombly* and *Iqbal* even though this article is written in February 2011, because he concluded that, citing *Conley* only, U.S pleading standard is too liberal, thus, can do nothing regarding dismissing frivolous lawsuits.

⁹⁵ Kong, *Supra* note 93, at 553.

⁹⁶ *Id.* at 591-92.

2.4.3 Adopting early disposition for regulating SLAPP

Legal scholars who seek procedural ways to regulate strategic lawsuit against public participation (“SLAPP”) generally suggest to adopt early dismissal of U.S. civil procedure or to make new institutions similar to that. For example, Kyung-Sin Park shows increases of SLAPP filed by government departments or government officials in 2008-2009 when public speech of Korean citizens on government policies continued.⁹⁷ To prevent and regulate these lawsuits oppressing freedom of speech, he suggests considering Anti-SLAPP theory developed in the U.S. His suggestions are based on the active use of early disposition in the U.S. civil procedure that include Rule 12(b)(6) motion to dismiss and motion for summary judgment. Specifically, based on these motions, he suggests shifting burden of proof from the defendant to the plaintiff when motion to dismiss or motion for summary judgment is filed in litigations cause of action of which is public petition or public speech; stopping burdensome evidence gathering process while processing these motions; and charging the plaintiff all the costs of litigation if the motion to dismiss or for summary judgment is granted.⁹⁸

However, he points out that these recommendations cannot be used unless Korean civil procedure is significantly revised, because dismissal in Korea is not for speedy screening of frivolous lawsuits, thus dismissal is usually decided late stage of litigation making little difference in terms of reducing defendants’ monetary, psychological, and time

⁹⁷ Kyung-Sin Park, “전략적 봉쇄소송 억제법리(Anti-SLAPP Thoery)에 대한 이해와 한국에서의 적용 가능성” [*Understanding Anti-SLAPP Thoery and Applicability of the theory in Korea*], 14-3 PŎPHAK YŎNKU [INHA UNIVERSITY LAW REVIEW], 169, 170 (2011).

⁹⁸ *Id.* at 186.

burdens.⁹⁹

Solutions suggested by other scholars similarly focus on early disposition of SLAPP in order to reduce burden of the defendants. For example, as ways of regulating SLAPP Young-Su Jung suggests looking at legislative resolution and adjudicative resolution in the U.S., according to his own classification, which respectively means revision of procedural rules and judge's special management for SLAPP cases.¹⁰⁰ He objects to use Rule 12(b)(6) motion to dismissal and Rule 56 motion for summary judgment in current U.S. Federal Rules of Civil Procedure, because it would be easy for a plaintiff to pass the Rule 12(b)(6) threshold if he argues for torts and because summary judgment cannot save a defendant's time and money for discovery.¹⁰¹ However, his suggestions still focus on requiring more specific and detailed facts in pleading stage and dismissing cases in early stage of the litigation.¹⁰²

Chong-Sō Kim also suggests looking at legislative and adjudicative developments in the U.S. that mainly use early disposition of cases.¹⁰³ Unlike Young-Su Jung's suggestions, Kim's adjudicative resolution includes Rule 12(b)(6) motion to dismiss and Rule 56 motion for summary judgment.¹⁰⁴ However, Chong-Sō Kim argues that there are certain conditions that shall be satisfied for the use of U.S. anti-SLAPP devices in Korean contexts, including early dismissal process after having pretrial hearing and a defendant's right to get back litigation costs including lawyer's fees when the lawsuit is dismissed.¹⁰⁵

⁹⁹ Park, *Supra* note 97, at 187.

¹⁰⁰ Young-Su Jung, "전략적 소송(SLAPP)에 관한 연구" [*A Study on Strategic Lawsuit Against Public Participation (SLAPP)*], 15-2 MINSŌ SOSONG [CIVIL PROCEDURE] 495, 518-23 (2011).

¹⁰¹ *Id.* at 512-13.

¹⁰² *Id.* at 518-23 (In addition to such disposition devices, he suggests allocating litigation costs to the plaintiff when the defendant prevails on the merits and conducting preliminary hearing in order for a judge to order the plaintiff to deposit discovery costs which he can get back when he prevails on the merits).

¹⁰³ See Generally, Chong-Sō Kim, "전략적 봉쇄소송 규제법제에 관한 연구" [*A Study on the Regulations of the Strategic Lawsuit Against Public Participation (SLAPP)*], 30 MINCHU PŎPHAK [DEMOCRACY LEGAL STUDY] 11 (2006).

¹⁰⁴ *Id.* at 26-28.

¹⁰⁵ *Id.* at 39.

As a recent development, Jung Hwan Kim also emphasized seriousness of SLAPP in Korean internet contexts and recommended solutions.¹⁰⁶ Kim's article provides recent updates of development of anti-SLAPP resolutions, legislative and adjudicative, in the U.S. and other countries that focus on early disposition.¹⁰⁷ Based on the complexity theory, the author argues that adding new laws on top of existing adjudicative resolutions would end up with increasing complexity of legal system; thus adjudicative resolution should be preferred.¹⁰⁸ Kim's adjudicative resolution includes early dismissal according to each judge's discretion and dismissal of cases for being lawsuit abuse.¹⁰⁹ He disagrees with use of Rule 12(b)(6) motion to dismiss and Rule 11 sanction. As for the Rule 12(b)(6) motion, Kim evaluates that a plaintiff bears relatively light burden of proof and most of the SLAPPs are based on the grounds that are likely to pass the stage.¹¹⁰ Regarding Rule 11 sanction, he argues that effects on a plaintiff are not significant and that for the sanction lawsuit should proceed while spending a defendant's resources.¹¹¹

¹⁰⁶ Jung Hwan Kim, “인터넷상 표현의 자유와 전략적 봉쇄소송(SLAPP)” [*Freedom of Expression on the Internet and Strategic Lawsuit Against Public Participation(SLAPP)*], 43 ANAM PŎPHAK [ANAM LEGAL STUDY] 953 (2014).

¹⁰⁷ *Id.* at 972-976.

¹⁰⁸ *Id.* at 979.

¹⁰⁹ *Id.* at 978.

¹¹⁰ *Id.* at 970.

¹¹¹ *Id.* at 970-71.

2.5 Reviewing suggested policy responses: what this study can contribute?

As comparative law projects, above mentioned policy suggestions for adopting U.S. pretrial dispositions are missing several steps for the comparative law projects. Such steps include thoroughly examining how current system works; figuring out reasons and contexts for working/not working of the institutions that may decide and control effectiveness of such adoptions; and criticisms that have been raised against U.S. disposition without trial. Instead, above mentioned articles mainly focus on explaining about U.S. institutions in detail and on showing expectations of what such institutions would do in Korean contexts.

This study attempts to fill these gaps. Through data from interviews with Korean judges and lawyers, this study aims to find actual use of current disposition without trial; reasons of and contexts related to such actual usages; and prerequisites for disposition devices in order to achieve its aimed goals. Before analyzing Korean dispositions in the next chapter, this study first reviews disposition without trial in the U.S. In doing so, this study provides contents and contexts of disposition reforms in the U.S., and shows criticisms against each civil procedure reform. All these contexts and criticisms are what are missing in the discussions of adopting U.S. pretrial disposition.

Chapter 3: U.S. disposition without trial reforms as concerns of responses to judicial inefficiency

3.1 Introduction

Although Korean proponents of adopting U.S. disposition without trial are optimistic about general aspects of such disposition, in the U.S., current version of summary judgment, pleading standard, and Rule 11 sanction have been very controversial due to alleged restriction of litigants' access to court. As the previous chapter shows, Korean legal scholars who suggested adoption of U.S. disposition without trial generally focus on intended function and strengths of such institution. They suggest to study such disposition tools and to apply whole or part of these institutions to Korean civil litigation. However, in the U.S., recent reforms of disposition without trial aimed to enhance efficiency through raising the bar for the cases to reach trial based on concerns of litigiousness, litigation costs, and frivolous lawsuits. Although there were proponents of such moves, these reform agenda faced severe criticisms. Dissenters of the reform idea mostly concerned about litigants' access to justice which would certainly be reduced by these stricter requirements for cases to reach trial. Far from Korean reformers' rosy prospections for the U.S. disposition without trial, in the U.S., enhancing efficiency through filtering cases out is facing severe objections.

For Korean reformers, having in-depth understanding of contexts of and debates on U.S. disposition without trial is important for two reasons: effectiveness of reform and contextualized approach toward modification. First, understanding weaknesses of U.S. disposition that have been raised by critical discussions enables Korean readers to understand

possible resists and barriers against actual use of the disposition process. Such understanding would lead Korean reformers to consider ways to overcome or deal with such expected hardships of using newly adopted institutions. Without these efforts, effectiveness of reform would hardly be secured or, at least, face severe difficulties. Second, in-depth understanding of contexts of U.S. disposition reforms and related debates provides better ideas for contextualizing foreign institution into Korean contexts. Almost every adoption of institution, if such adoption is recognized as feasible, should pass the stage of modification. There hardly is an institution that perfectly fit to other system as well. Considering huge differences in Korean legal system and U.S. counterpart, necessity of modification is manifest. In depth understanding of contexts of U.S. disposition that include how the system has been changed, why reforms were planned, and what problems were raised after the reform provides Korean reformers rich data for considering modification for Korean context. Because U.S. disposition without trial has been and is going through drastic reforms and debates, especially, having detailed knowledge of it would provide crucial insights for reform agenda in Korea. Surely, having detailed understanding of contexts and weakness of U.S. disposition without trial would empower Korean process designers to think about effectiveness of the planned reform and to make better working modifications to the foreign process.

In order to suggest ways for more effective procedural reform and better ideas of what to consider for modification to the U.S. disposition without trial for Korean context, this chapter attempts to provide detailed explanations of why and how U.S. disposition without trial has been reformed and what were criticisms against such reforms. This chapter begins with explanation of contexts of disposition without trial reforms in the U.S. that consists of concerns about “litigation explosion” and frivolous lawsuits, calls for civil procedure reform,

so-called “tort reform”, and reactions from academia. This dissertation finds that proponents of the tort reform movement are also pushing recent disposition without trial reforms through U.S. Supreme Court cases and legislation. Afterwards, this chapter explains about recent reforms of summary judgment, pleading standard, and Rule 11 sanction in terms of how such reforms have been progressed and what have been raised as weaknesses of such reform ideas. This chapter concludes that all these reforms show emerge of a new form of “managerial judging” to enhance judicial efficiency in sacrifice of litigants’ access to court.

3.2 “Litigation explosion” in the U.S. and calls for civil procedure reforms

3.2.1. Concerns about litigiousness in the U.S. society

U.S. society has been accused of having too many lawsuits. Many commentators observed that over-emphasizes of the trial-type dispute resolution and too much regulation, as well as positive changes including population growth, business development and enhanced access to courts, caused this “litigation explosion”; and showed deep concerns about burden on the judiciary as a result of it.¹¹² Debates on “tort reform,” which emerged in the 1970s and are still continuing, are probably the best known manifestation of this discussion. Worrying about rapidly increasing number of litigations and their consequent costs, some groups have led the debate on the malfunctioning of the U.S. civil justice system and its reform. That was called tort reform, because most of the “extreme” court cases¹¹³, which proponents suggested as the reason for the reform, were tort claims. Basically, the tort reformers wanted to make bringing lawsuits harder and to cap damages, especially punitive damages.

3.2.2. Questioning concerns of frivolous lawsuit

¹¹² Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970) (observing population growth and “increased democratization of the legal process” allowed under-privileged people to access to courts; and pointing out such changes will impose significant burden on judiciary); Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1351 (1972); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW U. L. REV. 767, 767-70 (1977) (making the term “Hyperlexis” Manning alerts incapacities “overactive law-making” can cause); Austin Sarat, *The Litigation Explosion, Access to Justice and Court reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 319-20 (1985) (pointing out that the litigation explosion, paradoxically, might make court “inaccessible to many meritorious claims”).

¹¹³ The so-called McDonald's coffee cup case (*Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 W L 360309 (N.M. Dist. Aug. 18, 1994)) is a representative one.

From academia, however, voices objecting the widely accepted concept of frivolous lawsuits are raised. Lawrence Friedman, in his book *Total Justice*, opposed to the idea that the “litigation explosion” had been caused by frivolous lawsuits filed by greedy plaintiffs and lawyers.¹¹⁴ Instead, he explains that such increase in lawsuits might have been caused by changes in legal culture that raised expectation of people for government to control broad range of hazardous conditions in the society through law, which Friedman referred as “Total Justice,” thus producing demands of more law.¹¹⁵ According to Friedman, as a result of such changes in legal culture, members of American society got to have two major expectations, “a general expectation of justice” and “a general expectation of recompense,” which respectively means the people’s expectation of fairness “everywhere and in every circumstance” and their expectation of wrongdoers’ complete compensations for the victims that cover “any and all calamities.”¹¹⁶ For them, litigation is a good method to realize such expectations. Also, he witnesses huge expansion of areas in law based on which people newly became able to file lawsuits successfully for remedy including areas of tort, civil rights, and regulation of prison and other government agencies.¹¹⁷ Likewise, Friedman does not regard litigiousness in the U.S. society as malfunction of the civil justice system. Rather, he observes it as development of the system responding to the changes in, developments of, and demands from the society.¹¹⁸

From the same view on “the myth of frivolous lawsuits”, Marc Galanter focused

¹¹⁴ LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 4-5 (1982) (“It is ... misleading or downright wrong to think of this as a *litigation* explosion. Courts have not expanded their work quantitatively as much as the work has altered in a more qualitative sense.”).

¹¹⁵ *Id.* at 30-34 (“There has developed in this country what I call here a general expectation of justice, and a general expectation of recompense for injuries and loss. Together, these make up a demand for what will be called “total justice.”).

¹¹⁶ *Id.* at 43.

¹¹⁷ *Id.* at 22 (“[I]n contemporary law, as compared to a century ago, no area of life is completely beyond the potential reach of law. ... There are fewer and fewer “zones of immunity” from law.”).

¹¹⁸ *Id.* at 5 (“There have been ... enormous changes in social organization, which in turn have had an impact of legal culture-on the level of demands that people make on the legal system. ... the [U.S.] legal system has taken a number of significant steps toward fulfilling these demands.”).

more on who the tort reformers were and by what methods they led their reform movements.¹¹⁹ He argues that tort reformers were basically “large organization actors” and that their “jaundiced view” of the U.S. civil justice system formed the background of the tort reform movement¹²⁰. That is to say, big corporations were the main actors of tort reform, claiming for reducing lawsuits against them; and they tried to make the view of the U.S. civil procedure uglier than it was in reality. Taking into consideration of the generally accepted (although abstract) view of litigation issues in America in the 1970s, his argument or finding is somewhat counter-intuitive. It was because, at that time, people were caught by and obsessed with problem recognition of litigiousness in American society. The so-called McDonald coffee cup case was an important example for Galanter. According to his interpretation, this case might be the best “legal legend” ever created by the tort reformers and the media influenced by the big corporations that ignored the real facts and the seriousness of the plaintiff’s injury as well as the actual grounds for the amount of money she requested.¹²¹ Instead, they emphasized and exaggerated only those facts of the litigation that would seem extreme or unreasonable to the public.¹²² This case might be an extraordinary example showing huge gap between reality and what tort reformers promote. However, considering the weight and influences that the case had in process of the tort reform movement, Galanter’s argument and findings provide important reasons for questioning grounds of attempts to regulate people’s access to court.

Years later, in furtherance of importance of the role of media in shaping legal

¹¹⁹ Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 752 (1998).

¹²⁰ *Id.* at 717-20.

¹²¹ *Id.* at 717-20. *See also* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 694 (2004) (“The media gleefully report these weird cases, usually without bothering to see if they have any basis in fact.”).

¹²² Galanter, *Supra* note 119, at 731-32. *See also* Friedman, *Supra* note 121, at 694-95 (“In fact, empirical data to support the idea of a “litigation explosion” is slight or nonexistent.”).

knowledge of ordinary people including the idea of litigation explosion and frivolous lawsuits, William Halton and Michael McCann, in their book *Distorting the Law*, shared their research results on how legal knowledge is formed and disseminated to ordinary people by media.¹²³ The authors showed how mass media had socially produced legal knowledge by distorting image of law and lawsuit by “normalizing the atypical” of certain exceptional and eye-catching cases including the McDonald coffee cup case.¹²⁴ They also observed that such distorting efforts by mass media have been connected with tort reformers who used to supporters of big companies that are, in most cases, defendants of tort litigation.¹²⁵ In opposite way, mass media also did not report results of research by realist social scientists and legal scholars that were based on reliable empirical data revealing how groundless the concept of frivolous lawsuits is.¹²⁶ Likewise, the authors, based on valid empirical data, show how mass media had disseminated distorted legal knowledge of litigation to the U.S. society.

As a recent example of such “distorting the law” by media, the documentary film “Hot Coffee” shows detailed contexts of the McDonald coffee cup case.¹²⁷ The movie shows contexts of the case that have not been reported by mass media. Through interviews with the plaintiff, jurors of the case and ordinary people, the movie showed how severely the

¹²³ WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

¹²⁴ *Id.* at 5 (“Such connections provide just one example of how mass media seize on dramatic anomalies as a way of normalizing the atypical so that it becomes, over time, a matter of “common sense.””).

¹²⁵ *Id.* at 17-21 (“the simplistic, fragmentary *form* and dramatized, personalized, decontextualized content of most news reporting about civil litigation parallels to a remarkable degree the simplistic, anecdotal moral accounts and titillating tales routinely circulated by tort reformers”). *See also Id.* at 24-25 (“the simplistic narratives disseminated by policy-driven tort reformers have at once reinforced and been reinforced by everyday news reporting along with enduring ideological commitments endorsing individual responsibility and disparaging legalistic state paternalism”). For their accounts of how torts reformers were connected with the big companies, *See generally Id.* at 39-52.

¹²⁶ *Id.* at 106-10 (analyzing three reasons of why research results of the realist scholars, that is, “the social scientists’ predilections for empirically cautious, rigorous, and testable truths and conventions celebrating value-neutral study,” could not be developed as “actionable agenda”).

¹²⁷ *HOT COFFEE* (HBO 2011).

plaintiff was damaged; how the amount of the claim was calculated; and on what grounds jury in the case reached the conclusion. It also shows that policy of McDonald at the time was to maintain temperature of their coffee to be “really hot.” By presenting these, the movie shows how “groundless” the accusations by mass media and people who accepted such reports and distorted legal knowledge that lacked detailed contexts of the case were.

3.2.3. Calls for civil procedure reform to regulate frivolous lawsuits

Despite of objections against the idea of frivolous lawsuits described above, concerns of frivolous lawsuits and judicial inefficiency have been continued by pro-business interests groups. By using the tort reform movement as an icon of reform efforts that make filing lawsuits more difficult, the same social groups are still leading public opinion. By criticizing both the people who sue and their lawyers, and by reducing incentives for lawsuits, these interest groups who do not want to spend their resources for defending lawsuits have tried to regulate filing lawsuits more strictly. However, another group of people who stand in opposite side show concerns about litigants’ accesses to justice. They accuse big companies and media groups who support these companies of “distorting” law through reporting only extreme cases that may give impression of severe lawsuit abuse.

This study observes that the pro-business interest groups who led the tort reform movement are driving civil procedure reforms for raising thresholds for litigants to file and maintain lawsuits; and that the U.S. Supreme Court has followed such calls for civil procedure reform through reforming summary judgment, pleading standard, and Rule 11 sanction, under the slogan of preventing frivolous lawsuits and reducing litigation costs.¹²⁸

¹²⁸ Observations of this trend are as follows: Elizabeth M. Schneider, *The Challenging shape of Federal civil*

As a beginning of such summary judgment reform, the *Celotex* trilogy in 1986¹²⁹ made drastic changes in summary judgment practice. Through these cases, the U.S. Supreme Court declared summary judgment as a procedural tool for intercepting meritless cases in order to enhance efficiency by shifting burden of proof. “Strong pro-summary judgment language” of majority justices established the motion for summary judgment as an eminent tool for efficiency.¹³⁰ By doing so, the court made it easier for the defendants to get their motion for summary judgment granted. The *Twombly*¹³¹ and *Iqbal*¹³² cases, about twenty years after the trilogy, made a further step for the same purpose. This time, the U.S. Supreme Court changed its pleading standard to make it more difficult for the plaintiffs to survive the Rule 12(b)(6) motion. Debates on these decisions are still progressing. Also, under the name of “Lawsuit Abuse Reduction Act,” legislative efforts to amend the Rule 11 in a direction strengthening sanctions against lawyers are suggested and now discussed in Congress. This suggested Rule 11 amendment is to prevent parties and their lawyers from filing groundless facts and arguments. In following sections, I will explain how these reforms have shaped (and will shape) disposition without trial practice.

pretrial practice: the disparate impact on civil rights and employment discrimination case, 158 U. PA. L. REV. 517, 518 (2010)(“Pretrial practice in federal civil litigation has dramatically changed over the last thirty years. Pretrial practice, pleading, discovery, *Daubert* motions, summary judgment, and settlement have become the focus of federal civil litigation while trials have vanished.”).

¹²⁹ *Matsushita Electronic Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett* , 477 U.S. 317 (1986).

¹³⁰ *Miller*, *Supra* note 3, at 1028.

¹³¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹³² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

3.3 Reforming Rule 56 summary judgment

3.3.1 Introduction to summary judgment

A party can file a motion for summary judgment for whole or part of the case when “there is no genuine dispute as to any material fact” and the party “is entitled to judgment as a matter of law”; and upon the moving party’s showing of these, “the court shall grant summary judgment.”¹³³ Summary judgment is a pretrial disposition that can be rendered when no facts were disputed and the dispute is only about law or when one party does not present evidence of important element of his/her legal claim.¹³⁴ In cases where evidentiary facts are disputed, where witnesses’ credibility is impeached, and where evidence is conflicting, trial is needed in order to hear from the witnesses through direct examination and cross-examination.¹³⁵

As brief history, Summary judgment was originated from England law, the Bills of Exchange Act of 1855; and, until the Federal Rules of Civil Procedure was enacted in 1938, roles of summary judgment had been very limited. It was only for “clear-cut cases” and not for complicated cases.¹³⁶ The Federal Rules of Civil Procedure expanded roles of summary judgment. Pleading standard under the rule was that notice pleading standard which is very liberal; thus pleading stage was not able to filter out “cases initiated with ambiguous,

¹³³ FED. R. CIV. P. 56(a) (“RULE 56. SUMMARY JUDGMENT (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.”).

¹³⁴ STEPHEN C. YEAZELL, CIVIL PROCEDURE 581 (8th ed. 2012).

¹³⁵ WILLIAM W SCHWARZER, ALAN HIRSCH, AND DAVID J. BARRANS, THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE 39 (1991).

¹³⁶ Miller, *Supra* note 3, at 1016-18 (“For example, the motion was used to eliminate time-barred claims and cases involving clear immunity from liability.”).

extremely broad, and, occasionally, frivolous complaints” because of its low threshold.¹³⁷ Instead, drafters of the rule delegated the role to summary judgment.¹³⁸ However, such expansion of summary judgment raised concerns of Constitutional right to jury trial.¹³⁹ In the historic case *Poller v. CBS, Inc.*, U.S. Supreme Court declared that use of summary judgment should be discouraged in complex anti-trust cases, considering importance of trial by jury.¹⁴⁰ Such concern is still remaining unresolved.

In terms of procedures, the parties to litigation can move for summary judgment during and after the pleading stage and discovery. Plaintiffs and defendants are allowed to file motion for summary judgment “at any time until 30 days after the close of all discovery.”¹⁴¹ Upon such filing, judges can render summary judgment based on affidavits and discovery materials submitted by the parties. The parties can support their positions by “citing to particular parts of materials in the record” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”¹⁴² Responding to such supports a party,

¹³⁷ Miller, *Supra* note 3, at 1018-19.

¹³⁸ *Id.* at 1018-19; STEVEN N. SUBRIN & MARGARET Y. K. WOO, *LITIGATING IN AMERICA*, at 166 (1st ed. 2006) (“The Federal Rules have such liberal pleading requirements that it is easy to see why the drafters would value summary judgment as a purifying device to filter out unmeritorious claims.”).

¹³⁹ Miller, *Supra* note 3, at 1019-20.

¹⁴⁰ 368 U.S. 464, 473 (1962) (“Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of “even handed justice.””).

¹⁴¹ FED. R. CIV. P. 56(b) (“RULE 56. SUMMARY JUDGMENT (b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.”).

¹⁴² FED. R. CIV. P. 56(c)(1) (“RULE 56. SUMMARY JUDGMENT (c) PROCEDURES. (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”).

opposing party can object by arguing such factual grounds would be inadmissible.¹⁴³ There is a safeguard for the non-moving party regarding his/her objection. When the non-moving party cannot submit facts that are necessary for his/her objection, for “specific reasons,” the court may allow some accommodations for the party including postponing consideration of the motion for summary judgment or denying it, permitting additional time for the non-moving party to secure needed affidavits and declarations or to take discovery, and issuing orders that seem to be proper considering circumstances.¹⁴⁴ A judge is not obliged to consider other than submitted by the parties as stated above; however, in his/her discretion, he/she may refer to materials that are already in the records.¹⁴⁵

There exists a complex issue regarding what burden of production the moving party and the non-moving party have when submitting above materials. The *Celotex* trilogy that is explained in detail at other part of this chapter initiated changes in and shifts of this burden of production which have been very controversial. Before *Celotex*, the moving party was supposed to bear burden of production for the non-existence of factual dispute, regardless of who bears burden of persuasion at trial. Such standard was established in *Adickes v. S.H. Kress & Co.*, where the Court declared that the moving party must “show the absence of any genuine issue of fact,” and the material presented by the moving party “must be viewed in the light most favorable to the opposing party.”¹⁴⁶ Under this standard, the moving party has to show that there is no factual question that requires trial although the party does not have to

¹⁴³ FED. R. CIV. P. 56(c)(2) (“RULE 56. SUMMARY JUDGMENT (c) PROCEDURES. (2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”).

¹⁴⁴ FED. R. CIV. P. 56(d) (“RULE 56. SUMMARY JUDGMENT (d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.”).

¹⁴⁵ FED. R. CIV. P. 56(c)(2) (“RULE 56. SUMMARY JUDGMENT (c) PROCEDURES. (3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.”).

¹⁴⁶ 398 U.S. 144, 153, 157 (1970).

negate nonmoving party's arguments.¹⁴⁷ In case where the moving party fails to do so, nonmoving party does not have burden to show any evidence.¹⁴⁸ Likewise, under the summary judgment standard in *Adickes*, the moving party had burden of production regarding non-existence of genuine disputes of facts. This standard remained valid for sixteen years until *Celotex*.¹⁴⁹ However, in *Celotex Corp. v. Catrett*,¹⁵⁰ the U.S. Supreme Court held that in situation where the non-moving party will bear burden of persuasion at trial, the moving party does not have to negate non-moving party's position in order to show non-existence of factual dispute; instead, the moving party have to show merely that existing record contains no evidence that the non-moving party will be able to prove essential elements for his/her case. By doing to, along with two other cases rendered in the same year, U.S. Supreme Court transformed contemporary summary judgment practice which became more favorable for the defendant-moving party.¹⁵¹ Details about the three cases and discussions on the issue are stated in following parts of this chapter.

After examining the motion and supporting materials from both parties, a judge shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹⁵² However, a judge may render certain judgments that are not direct response to the moving party's motion. A judge may grant summary judgment for non-moving party; may grant

¹⁴⁷ Miller, *Supra* note 3, at 1026.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ("The Supreme Court did not speak directly to summary judgment practice for sixteen years following *Adickes*.").

¹⁵⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹⁵¹ GENE R. SHREVE, PETER RAVEN-HANSEN & CHARLES GARDNER GEYH, UNDERSTANDING CIVIL PROCEDURE, at 386 (5th ed. 2013) ("A trio of decisions by the Supreme Court in 1986, however, changed the price of summary judgment for some movants. Today a defendant who would not have the burden of production at trial may be able to move for summary judgment on little more than a bare motion, placing almost the entire cost of summary judgment on the plaintiff.").

¹⁵² *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

moving party's motion based on grounds other than what presented by the parties; and may consider rendering summary judgment, regardless of whether a party filed a motion for summary judgment, when he/she finds that material facts of the case are not in genuine dispute.¹⁵³ Before rendering such judgment independent from the motion, a judge shall notify to the parties and allow them to have reasonable time to respond.¹⁵⁴

In terms of the functions of summary judgment, it plays a significant role disposing cases full-scale trials for which are not necessary.¹⁵⁵ Theoretically, summary judgment performs as an additional gate for screening out meritless cases that survived the pleading stage. However, in real, considering that notice pleading had passed almost every case to continue without being dismissed, summary judgment had been the sole and most important tool for disposing cases that do not deserve trials.¹⁵⁶ However, under the current plausibility pleading standard that was developed through *Twombly* and *Iqbal*, it is not yet certain how much burdens that summary judgment is bearing would be relieved by Rule 12(b)(6) dismissal of the pleadings that do not satisfy the enhanced pleading standard.¹⁵⁷ Considering this significant function of summary judgment in terms of disposing cases before trial, summary judgment can also be recognized as a procedural device that can restrict or even

¹⁵³ FED. R. CIV. P. 56(f) (“RULE 56. SUMMARY JUDGMENT (f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.”).

¹⁵⁴ FED. R. CIV. P. 56(f).

¹⁵⁵ EDWARD BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE*, at 1-2 (1st ed. 2006) (“As the primary procedure used to avoid unnecessary civil trials, summary judgment is probably the single important pretrial device used today. Rule 56 performs a “workhorse” task in the federal procedural system and occupies center stage in attaining the goal of conserving the expenditure of judicial resources.”).

¹⁵⁶ *Id.* at 2 (“Its importance is especially great in light of the Federal Rule’s commitment to a form of “notice pleading,” which consciously deemphasized the historical focus on the pleadings and shifted the system’s emphasis to the discovery process and beyond. Under this procedural structure, summary judgment will often provide the only viable procedural barrier to the holding of unnecessary trials.”); According to Langbein, such de-emphasis of pleading and emphasis of discovery in terms of gate keeping role was due to the drafters’ willingness to encourage settlement based on the expectation that weakness and strength of each party may be revealed through discovery and the parties may easily find need for settlement after having discovery (John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522, 548 (2012)).

¹⁵⁷ See Section 3.4 of this dissertation.

infringe litigants' right to be heard by jury or judge at trial.

3.3.2 Broad discovery as basis of summary judgment

The Rules of Civil Procedure provides broad discovery as a tool for the parties' facts investigation. Discovery is a pretrial procedure that provides the parties to the litigation with formal opportunity to obtain relevant information of the case. In the U.S., according to its adversarial system, information collecting is performed by the lawyers rather than by judges. It is a lawyer rather than a judge who decides what theory he would argue for and what information he needs to seek for supporting the theory.¹⁵⁸ Such "attorney controlled" and "entrepreneurial" model of evidence collection is "one of the distinguishing features of the American legal system."¹⁵⁹

In order to achieve such goal of through private investigation by the parties, lawyers use broad range of discovery mechanisms including interrogatories, oral deposition, written depositions, request for production of documents, examination of places and things, mental and physical examination, and request to admit as well as mandatory disclosure required by rules. Such broad discovery was established through enactment of the Federal Rules of Civil Procedure in 1938. Before the 1938 rules, discovery was very limited. The Federal Rules chose to broaden discovery by including every discovery device being discussed at that time for two reasons: influence of legal realism and simplified pleading under notice pleading standard. First, the "virtually unlimited discovery" was required to satisfy goals of civil litigation under legal realism that include accumulation of facts and decision making based

¹⁵⁸ SUBRIN & WOO, *Supra* note 138, at 131.

¹⁵⁹ *Id.* at 130 (The authors find "cultural distrust of official power" as one reason for establishing the adversarial evidence gathering through discovery).

on scientific method and rationality.¹⁶⁰ Second, as stated above, notice pleading standard adopted by the Federal Rules required no more than simplified pleading; and drafters of the rule delegated the function of narrowing issues which has been conducted by pleading to discovery.¹⁶¹ In order to find more detailed information of the case, broad discovery has been called for.¹⁶² Amendments to the Federal Rules have also expanded scope of discovery. An amendment in 1946 included materials that would not be admissible in trial to the scope of discoverable material.¹⁶³ An amendment in 1970 eliminated a requirement that the requesting party has to show good cause for the discovery request; and it made use of discovery unlimited in terms of the number a party can request discovery.¹⁶⁴ This amendment “opened” “the floodgates” of discovery; and “immediate backlash” followed.¹⁶⁵ Such reactions and criticism prompted discussions about how to regulate broad discovery; and, as a result, an amendment in 1993 enacted ways to limit discovery including requiring discovery plan discussion by the parties in early stage of the litigation and setting cap for the number of depositions and interrogatories.¹⁶⁶ An amendment in 2000 narrowed scope of discoverable materials: from any matter to materials to those are relevant to subject matter of the pending action.¹⁶⁷ However, these amendments do not seem significantly change the scope of discovery. Rather, it can be evaluated as initiating better ways to regulate use of discovery. Considering that the most recent amendment to the Federal Rules regarding discovery was the amendment in 2006 and that the amendment mostly focused on regulating e-discovery, the broad scope of discovery that has been developed until 1970 still remains

¹⁶⁰ SUBRIN & WOO, *Supra* note 138, at 133.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 559 (2010).

¹⁶⁴ *Id.* at 561.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 563.

¹⁶⁷ *Id.* at 577.

intact.

Such wide-open discovery plays a crucial role in summary judgment for two reasons: the most important source of investigated facts and increasing reliance on document evidence. First, fruits of discovery constitute important, if not whole, part of information for judges to rule the motion for summary judgment. Because of such importance of enough and appropriate discovery for supporting or objecting the motion for summary judgment, it is generally acknowledged that the motion should not be granted if the parties did not have enough time for conducting discovery.¹⁶⁸ Considering this, Fed. R. Civ. P. 56(d)(2) provides non-moving party with additional time for taking discovery if the party shows shortage of time for enough discovery with reasons. Second, as Langbein observes, a trend of “the centrality of documentary discovery in nontribal procedure” that relies more on documents than witness testimony for deciding cases is also a stimulating force of summary judgment.¹⁶⁹ The centrality of document has been established mainly by record keeping practices of large institutions such as big companies and government.¹⁷⁰ Because these institutions keep every single details of their practice in documents, whether paper or electronic, such documents produced by discovery provide very detailed information needed for disputing the cases where such actors are involved in, providing more reliable sources than witnesses in trial who often forget things and look through his/her point of view do.¹⁷¹ Also, liberal discovery enables the parties to seek documents with broad scope of tools. Such change of focus is also moving venue of dispute resolution, from trial to summary judgment.

3.3.3 Changes in summary judgment standard: The *Celotex* trilogy

¹⁶⁸ SUBRIN & WOO, *Supra* note 138, at 167.

¹⁶⁹ Langbein, *Supra* note 156, at 548-49.

¹⁷⁰ *Id.* at 549.

¹⁷¹ *Id.*

In 1986, the U.S. Supreme Court rendered three important decisions¹⁷² on the summary judgment practice. Through these decisions, which are also known as the “*Celotex* trilogy,” the Supreme Court made remarkable changes in summary judgment practice mainly by shifting burden of proof, which the moving party (mostly the defendant) of the motion for summary judgment had borne, to the responding party (mostly the plaintiff). Such shift made it easier for the motion for summary judgment to be granted.

3.3.3.1. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹⁷³, the first case of the trilogy, the plaintiffs (respondents) were American companies that manufactured and sold television sets; and the defendants (petitioners) were a Japanese company and its American affiliates that also manufactured and sold television sets.¹⁷⁴ Cause of action for the case was antitrust conspiracy; and the plaintiffs claimed that the defendants “had illegally conspired to drive American firms” from the American market through “scheme to raise, fix and maintain artificially high prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain low prices for television receivers exported to and sold in the United States.”¹⁷⁵ After several years of long discovery, the defendants moved for summary judgment.¹⁷⁶

The District Court found that “the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy,” thus granted summary

¹⁷² *Matsushita Electronic Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹⁷³ 475 U.S. 574 (1986).

¹⁷⁴ *Id.* at 577.

¹⁷⁵ *Id.* at 577-78.

¹⁷⁶ *Id.* at 578.

judgment for the defendants, because the court found that some evidence showed that defendants' acts were conspiracy, but did not injure plaintiffs; and because it was more plausible to see the price-cutting by the defendants as a competition strategy rather than a monopoly.¹⁷⁷ The Court of Appeals for the Third Circuit reversed.¹⁷⁸ After finding that many evidences that had been declared as inadmissible by trial court were admissible, the court concluded that, based on such admissible evidences, "reasonable fact finder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market."¹⁷⁹

U.S. Supreme court reversed the decision from appellate court and remanded the case. Majority opinion required the plaintiffs to establish that "there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury" in order to survive the summary judgment.¹⁸⁰ As components for the showing, majority required two showings, first, the nonmoving party should show "an injury to them resulting from the illegal conduct."¹⁸¹ Second, majority opinion required the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts" and show "specific facts showing that there is a genuine issue for trial, after the moving party fulfilled its burdens."¹⁸² Majority opinions explained that such two "settled principles" requires the nonmoving party's claim to be plausible.¹⁸³ It declared that "if the factual context renders respondents' claim implausible- if the claim is one that simply

¹⁷⁷ 513 F.Supp. 1100, 1125-1127 (1981).

¹⁷⁸ 723 F.2d 238 (1983).

¹⁷⁹ *Id.* at 311.

¹⁸⁰ 475 U.S. 574, 585-86 (1986).

¹⁸¹ *Id.* at 586 (Majority opinion express such injury as "antitrust injury").

¹⁸² *Id.* at 586-87.

¹⁸³ *Id.* at 587 (For majority opinion, "plausible" means making economic senses by showing persuasive evidence).

makes no economic sense-respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”¹⁸⁴

Applying these procedural standards to the case, majority opinion declared that “a plaintiff seeking damages for a violation of § 1 must present evidence “that tends to exclude the possibility” that the alleged conspirators acted independently.” After reviewing the nature of alleged conspiracy, a predatory pricing scheme, the majority opinion concluded that the defendants did not achieve the goal of attaining monopoly that is necessary for the predatory pricing conspiracy to be successful¹⁸⁵; and that such failure “is strong evidence that the conspiracy does not in fact exist”; and, finally, that “the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a “genuine issue for trial” exists within the meaning of Rule 56(e).¹⁸⁶

Dissenting opinions by four justices, Justice White, Justice Brennan, Justice Blackmun and Justice Stevens opposed the conclusion drawn by majority opinions in three reasons. First, dissenting opinion pointed out that majority opinion’s summary judgment standards that requires plausible inferences of the genuine issue for trial is going “beyond the traditional summary judgment inquiry” and deciding “for himself whether the weight of the evidence favors the plaintiff,” thus undermining “the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.”¹⁸⁷ Second, the dissenting opinion argued that, by making assumptions, majority opinion erroneously made its own conclusion which is the task belongs to fact finders.¹⁸⁸ According to dissenting

¹⁸⁴ 475 U.S. 574, 587 (1986).

¹⁸⁵ *Id.* at 590-91.

¹⁸⁶ *Id.* at 592.

¹⁸⁷ *Id.* at 600-01 (“If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.”).

¹⁸⁸ *Id.* at 601-04 (“I believe that this is an assumption that should be argued to the factfinder, not decided by the

opinion, assuming that there are only certain possible occasions in which the plaintiff's antitrust damages can occur, majority opinion wrongly limited situations for the antitrust damages.¹⁸⁹ Also, majority opinion ignored the evidence ("The DePodwin Report") that alone can "create a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country."¹⁹⁰ Third, dissenting opinion argued that the two grounds for reversing and remanding the Third Circuit's judgment¹⁹¹ are "without substance."¹⁹² As of the first ground, dissenting opinion agreed with logic of the Third Circuit's judgment to draw inference of genuine issue of material fact.¹⁹³ As of the second ground, dissenting opinion criticized majority opinion for unnecessarily adhering to whether expert witness was persuasive.¹⁹⁴

3.3.3.2. *Anderson v. Liberty Lobby, Inc.*

In *Anderson v. Liberty Lobby, Inc.*¹⁹⁵, the plaintiffs Liberty lobby which was a non-profit corporation and Willis Carto who was a public figure filed a libel action against magazine, its publisher, and its chief executive officer for the magazine articles that are allegedly portraying the plaintiff as "neo-Nazi, anti-Semitic, racist, and Fascist."¹⁹⁶ After discovery, the defendants filed a motion for summary judgment under Rule 56 asserting that,

Court.").

¹⁸⁹ 475 U.S. 574, 601-02 (1986).

¹⁹⁰ *Id.* at 602-03 ("No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.").

¹⁹¹ *Id.* at 604 ("(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.").

¹⁹² *Id.*

¹⁹³ *Id.* at 605 ("The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.").

¹⁹⁴ *Id.* at 606 ("But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales.").

¹⁹⁵ 477 U.S. 242 (1986).

¹⁹⁶ *Id.* at 244-45.

as public figures, the plaintiffs are required to prove their case with “clear and convincing evidence” that is a standard established in *New York Times Co. v. Sullivan*;¹⁹⁷¹⁹⁸ and that actual malice was absent in the case “as a matter of law.”¹⁹⁹

United States District Court for the District of Columbia granted the motion for summary judgment and entered judgment in favor of defendants.²⁰⁰ The court found that Bermant, who was an employee of defendants and the author of the articles, conducted through investigation and research; and relied on various information sources; and that such acts “precluded a finding of actual malice.” Plaintiffs appealed. The Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part.²⁰¹ Opposing to the district court’s summary judgment standard in libel cases, the court held that the *New York Times* requirement of clear and convincing evidence is “irrelevant” “for the purpose of summary judgment,” thus the non-moving party does not have to “show that a jury could find actual malice with “convincing clarity.”²⁰²

The U.S. Supreme Court vacated the decision of the Court of Appeals and remanded the case. With respect to summary judgment standard, the court required that, for a non-movant to survive the motion, he should prove that there is a genuine issue of “material fact,” not merely “some” factual dispute.²⁰³ Also, regarding what is “genuine,” the court required

¹⁹⁷ 376 U.S. 254 (1964).

¹⁹⁸ 477 U.S. 242, 244 (1986) (“In *New York Times Co. v. Sullivan*, we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—“with knowledge that it was false or with reckless disregard of whether it was false or not.” We held further that such actual malice must be shown with “convincing clarity.”).

¹⁹⁹ *Id.* at 245.

²⁰⁰ 562 F.Supp. 201(1983).

²⁰¹ 746 F.2d. 1563 (1984) (It affirmed as to 21 allegedly defamatory statements; and reversed 9 allegedly defamatory statements).

²⁰² *Id.* at 1570 (“Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff’s case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant’s uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions—marshalling for the court all the facts supporting his case, and seeking to contest as many of the defendant’s facts as possible.”).

²⁰³ 477 U.S. 242, 247-48 (1986) (“By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

evidence, under the standard of proof that would be applicable at trial, based on which “a reasonable jury could return a verdict for the nonmoving party.”²⁰⁴”The court mentioned that this “genuine issue” summary judgment standard “mirrored” the standard for Rule 50(a) directed verdict motion.²⁰⁵ With respect to this “genuine issue” summary judgment standard that “verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits,” the court clarified its requirement of sufficient evidence for surviving summary judgment.²⁰⁶

Based on this summary judgment standard, the court held that the “convincing clarity” is relevant in ruling on a motion for summary judgment, as it is required under the “substantive evidentiary standards” in trial.²⁰⁷ According to this, proper question for summary judgment ruling became “whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.”²⁰⁸ In this reason, the court concluded that the Court of Appeals did not apply correct standard; and ²⁰⁹it vacated and remanded the case.

As a dissenter, Justice Brennan opposed the majority opinion’s idea that summary

judgment; the requirement is that there be no genuine issue of material fact.”).

²⁰⁴ 477 U.S. 242, 248 (1986).

²⁰⁵ *Id.* at 251-52. Now, this motion for directed verdict is called as “a motion for judgment as a matter of law.” Citing previous decisions, the court showed how similar and how different summary judgment standard and directed verdict standard (“And we have noted that the “genuine issue” summary judgment standard is “very close” to the “reasonable jury” directed verdict standard: “The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. . . . In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”).

²⁰⁶ *Id.* at 252 (“the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”).

²⁰⁷ *Id.* at 253 (“When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence”).

²⁰⁸ *Id.* at 255-56.

²⁰⁹ *Id.* at 257.

judgment ruling should be decided based the substantive evidentiary standards.²¹⁰ He maintained that majority opinion’s proposition for the standard did not have any legal authority.²¹¹ Especially, with respect to the majority’s proposition that “there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party,” Justice Brennan criticized such proposition by indicating that, in *Adickes v. S.H. Kress & Co.*, there was no admissible evidence favoring the nonmoving plaintiff.²¹² Justice Brennan also criticized majority opinion for confusing trial judges as for what the heightened evidentiary standard means.²¹³ Another dissenting opinion by Justice Rehnquist and Justice Burger opposed to the point that “clear and convincing evidence” standard should govern when deciding a motion for summary judgment.²¹⁴

3.3.3.3. *Celotex Corp. v. Catrett*

In the last decision of the trilogy, *Celotex Corp. v. Catrett*²¹⁵, the Supreme Court addressed the issue of the moving party's burden of proof. In the case, the plaintiff, as an administer of the estate of the deceased worker of the defendant corporation, filed a wrongful death claim based on the argument that the deceased died as a result of having been exposed to asbestos through products of the defendant Celotex Corporation.²¹⁶ The defendant filed a summary judgment arguing that the plaintiff had “failed to produce evidence that any [Celotex] product ... was the proximate cause of the injuries alleged within the jurisdictional

²¹⁰ 477 U.S. 242, 257-58 (1986).

²¹¹ *Id.* at 258-59.

²¹² *Id.* at 263-64.

²¹³ *Id.* (“the Court, while instructing the trial judge to “consider” heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a “fair-minded” jury could “reasonably” decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.”).

²¹⁴ *Id.* at 268-69.

²¹⁵ *Celotex Corp. v. Catrett* , 477 U.S. 317 (1986).

²¹⁶ *Id.* at 319.

limits of [the District] Court.”²¹⁷

The District Court for the District of Columbia granted the motion for summary judgment by declaring that there was no showing that “that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.” The plaintiff appealed and the Court of Appeals for the District of Columbia Circuit reversed.²¹⁸ Majority of the court held that the defendant (moving party) did not meet its burden because it “made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion.”²¹⁹

The U.S. Supreme Court reversed the judgment of the Court of Appeals, and the case was remanded. The court denied, or at least undermined moving party's initial burden of proof, which was the ground of denial of summary judgment in the Court of Appeals decision, by interpreting Rule 56(c) as requiring nonmoving party “to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof” at trial.²²⁰ The court denied the existence of the burden on the moving party's side, holding that they found “no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.”²²¹ For the majority opinion, moving party has initial burden to show only that “there is an absence of evidence to support the nonmoving party's case,” instead of establishing non-existence of genuine issue of material fact.²²² As a rationale for such interpretation, the majority opinion emphasized purposes of summary judgment which is disposing “factually unsupported claims or

²¹⁷ 477 U.S. 317, 319-20 (1986) (“In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products.”).

²¹⁸ 756 F.2d 181 (1985).

²¹⁹ *Id.* at 184.

²²⁰ 477 U.S. 317, 322-23 (1986).

²²¹ *Id.* at 323 (“On the contrary, Rule 56(c), which refers to the affidavits, if any, suggests the absence of such a requirement.”).

²²² *Id.* at 325.

defenses.”²²³ At the end of the opinion, majority added their views on summary judgment by stressing a role of the procedural device in protecting rights of the litigants who oppose “claims and defenses without factual basis, especially in the era of notice pleading where motion to dismiss hardly fulfill this function.”²²⁴

Pointing out that majority opinion did not clarify what is the burden of moving party, dissenting opinion by Justice Brennan, Justice Blackmun and Justice Burger provided specified explanation of such burden of the moving party through dividing it into initial burden of production and ultimate burden of persuasion. And, they opposed the conclusion of majority that Celotex satisfied the initial burden of production. This dissenting opinion divided occasions into two groups according which party bears the burden of persuasion at trial. If the moving party has such burden at trial, the party “must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial.”²²⁵ In the second group of cases to which most of the cases seem to belong, where the non-moving party bears the burden of persuasion at trial, the moving party may satisfy the burden of production either by submitting “affirmative evidence that negates an essential element of the nonmoving party's claim” or by demonstrating that “nonmoving party's evidence is insufficient to establish an essential

²²³ 477 U.S. 317, 323-24 (1986) (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.”).

²²⁴ *Id.* at 327 (“Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”).

²²⁵ *Id.* at 331.

element of the nonmoving party's claim."²²⁶ Thus, according to the dissenting opinion, Celotex should have submitted affirmative evidence negating elements of the plaintiff's claim or showed the plaintiff's evidence was insufficient. The dissenting opinion concluded that Celotex did not satisfy the initial burden of production.²²⁷ According to the opinion, Celotex only argued that there is no evidence for proving the plaintiff's claim; however, there were evidences in the court record, at least one, that might establish that the deceased had been exposed to Celotex's asbestos products; and Celotex could not satisfy the burden of production by failure to argue that such evidence was inefficient.²²⁸

3.3.3.4. Meaning and impacts of the *Celotex* trilogy

By lowering moving party's burden of proof and by heightening non-moving party's burden of proof, these three Supreme Court cases on summary judgment standard shaped summary judgment to be more movant-friendly. These cases made the burden of production required for prevailing at trial and that for summary judgment same.²²⁹ With respect to the burden of moving party, in *Celotex*, the Supreme Court lowered the burden on the moving party's side by denying its burden to make a sufficient showing on an essential element;²³⁰ and the court imposed such burden to nonmoving party.²³¹ In *Matsushita*, the court required nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts" and to show specific facts that make the party's claim plausible.²³² Also in *Anderson*, the court required the nonmoving party to prove existence of a genuine issue of

²²⁶ 477 U.S. 317, 331 (1986).

²²⁷ *Id.* at 334-36.

²²⁸ *Id.*

²²⁹ YEAZELL, *Supra* note 134, at 588.

²³⁰ 477 U.S. 317, 323 (1986) ("On the contrary, Rule 56(c), which refers to the affidavits, if any, suggests the absence of such a requirement.").

²³¹ *Id.* at 322-23.

²³² 475 U.S. 574, 586-87 (1986).

“material fact,” not merely “some” factual dispute.²³³ In order to show there is “genuine” issue, the nonmoving party is required to prove to the extent that the party can get a judgment as a matter of law in trial.²³⁴ Reflecting these significant changes in terms of summary judgment practice, as of the year of 2006, these three cases were the most cited Supreme Court cases.²³⁵

However, these significant moves raised intense reactions from scholars who concerned about excessive use of summary judgment to cut cases before jury trial that would be caused by such policy choice. Among these scholars, for example, Arthur Miller observed from the *Celotex* trilogy “strong pro-summary judgment language” for establishing the motion for summary judgment as a tool for efficiency, that is, terminating meritless lawsuits;²³⁶ and, as a result, the trilogy transformed summary judgment from nominal and unsuccessful motion to a favorable choice for disposing of cases before trial.²³⁷ Miller argues that although the three cases of the trilogy may be interpreted as not infringing the litigants’ right to a day in court, district courts, driven by legal legend of frivolous and meritless lawsuits, can have incentives to terminate cases too easily without seriously considering value of the parties’ opportunity to present their cases, thus intruding litigants’ right to have full hearing.²³⁸ With respect to this policy choice, there are also critics of the decisions based

²³³ 477 U.S. 242, 247-48 (1986) (“By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.”).

²³⁴ *Id.* at 248.

²³⁵ Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy*, 63 WASH. & LEE L. REV. 81, 143-44 (2006).

²³⁶ Miller, *Supra* note 3, at 1028.

²³⁷ Miller, *Supra* note 3, at 1041; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 136 (1988) (“My question is “Why?” Why take an already effective pro-defendant rule of civil procedure and make it strikingly more pro-defendant? Did the Supreme Court have any evidence that defendants were losing at the hands of unreasonable juries cases that reasonable judges would have snuffed out before trial if only the judges had authority under rule 56 to deem the nonmovant’s existent but weak facts insufficient to propel the matter forward? No such evidence appears in *Matsushita*, *Liberty Lobby*, *Catrett*, or legal literature generally.”).

²³⁸ Miller, *Supra* note 3, at 1133.

on concerns of possible infringement of litigants' right to jury trial, because determination of facts and application of law to the fact in pretrial stage is shifting traditional power of jury to judges.²³⁹ Considering division in the roles of jury and judges, commentators pointed out that the decisions conferred broad discretion to the judges what used to be differed to jury.²⁴⁰

In addition to rebuking Supreme Court's policy choice in *Celotex* trilogy, there are criticisms against legal reasoning of the court. For example, Melisa Nelken argued that this second proposition of the majority opinion is wrong considering clear language of Rule 56, and the majority made this wrong argument in order to maintain their wrong opinion about the moving party's initial burden. When explaining summary judgment practice after *Celotex*, Nelken divided the practice into two occasions: when the moving party has the burden of proof at trial and when the nonmoving party has.²⁴¹ Nelken argues that the first occasion has nothing to do with *Celotex*, thus, the moving party should show that there is no genuine issue of any material fact and that he deserves to receive judgment as a matter of law.²⁴² Also the case did not indicate anything on whether the moving party can use inadmissible evidence to support the motion for summary judgment.²⁴³ However, if the nonmoving party bears burden of proof at trial, then the *Celotex* comes in to play to reduce moving party's initial burden and to allow nonmoving party to used evidence inadmissible at

²³⁹ See generally Suja A. Thomas, Why Summary Judgment is Unconstitutional, 93 VA. L. REV. 139 (2007); THOMAS D. ROWE, JR., SUZANNA SHERRY, AND JAY TIDMARSH, CIVIL PROCEDURE 257-58 (2008).

²⁴⁰ Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 492-93 (1988) ("this reading of the Matsushita opinion is dangerously overbroad and, if adopted in other substantive areas of the law, could seriously alter the balance of power between judge and jury."); Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 DICK. L. REV. 25, 52 (1989) ("Super summary judgment, the standard employed in *Matsushita* and to some extent in *Anderson* and *Celotex*, has given federal district courts a license to look beyond the evidence of record and impose the courts' own beliefs based on outside information or studies when ruling on summary judgment motions."); Kyle M. Robertson, Note, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C. L. REV. 747 (1987) ("The heightened burden of proof at the summary judgment stage requires not only more from plaintiffs, but also from judges. . . . In making that determination, judges must be guided by the "reasonable jury" standard and must not make their own independent determination.").

²⁴¹ Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L. J. 53, 81-83 (1988).

²⁴² *Id.* at 81.

²⁴³ *Id.*

trial when the evidence is “reducible” to admissible form.²⁴⁴

However, at the same time, many commentators welcomed the decisions expecting more active use of summary judgment will reduce litigation costs and court dockets, thus enhancing judicial efficiency.²⁴⁵ These proponents also expected that the new summary judgment standard will encourage settlement and contribute to better case management.²⁴⁶

3.3.4. Current summary judgment practice and “vanishing trial”

Did summary judgment make civil justice system more efficient? This question is related to effectiveness of summary judgment stand reform in *Celotex* trilogy. This is an important question; and a hard question as well. At least, the three Supreme Court cases transformed summary judgment from a seldom-used device to a favorable choice for disposing cases in their early stage of litigation.²⁴⁷ It was a ground breaking change. However, still remaining question is whether such transformation has contributed to enhancing judicial efficiency. In following paragraphs, this study reviews how summary judgment is working or can work in terms of enhancing efficiency based on literature.

²⁴⁴ Nelken, *Supra* note 241, at 82-83.

²⁴⁵ Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 194 (1987) (“This emerging trend signals a new era for summary judgments, one in which the old presumptions are giving way to a policy of balancing and efficiency, and the mechanism is more appropriate to double as a sufficiency motion-allowing some sort of trial itself on the paper record.”); Stephen A. Bullington, Comment, *Justice Delayed is Justice Denied: Summary Judgment Following Anderson v. Liberty Lobby, Inc.*, 30 ARIZ. L. REV. 171, 177 (1988) (“justice seems better served through the application of summary judgment where cases are patently without merit such that the doctrine obviates unnecessary defenses, expenses, exposure and aggravation which often accompany meretricious litigation.”).

²⁴⁶ William W. Schwarzer, *Summary Judgment and Case Management*, 56 Antitrust L.J. 213, 213-14 (1987) (“Thus did the Supreme Court in last term’s *Celotex* decision move the summary judgment procedure into the mainstream of modern case management”; “Three decisions of the Supreme Court during the 1986 term substantially clarified summary judgment law and thereby increased the utility of Rule 56.”).

²⁴⁷ Miller, *Supra* note 3, at 1041.

Table 3-1 U.S. District Courts – Civil Cases Terminated

Year	Total Cases	No Court Action	Before Pretrial	During or After Pretrial	During or After Trial
2001	247,913 (100%)	42,193 (17.14%)	180,702 (72.89%)	20,102 (8.11%)	4,916 (1.98%)
2002	258,748 (100%)	41,827 (16.17%)	191,508 (74.01%)	20,916 (8.08%)	4,497 (1.74%)
2003	250,681 (100%)	41,619 (16.60%)	184,621 (73.65%)	20,333 (8.11%)	4,108 (1.64%)
2004	258,391 (100%)	58,169 (22.51%)	176,643 (68.36%)	19,569 (7.57%)	4,010 (1.55%)
2005	280,002 (100%)	62,592 (22.35%)	178,440 (63.73%)	35,240 (12.59%)	3,730 (1.33%)
2006	258,009 (100%)	59,363 (23.01%)	170,636 (66.14%)	24,486 (9.49%)	3,524 (1.37%)
2007	236,256 (100%)	53,581 (22.68%)	149,803 (63.41%)	23,014 (9.74%)	9,858 (4.17%)
2008	234,174 (100%)	56,167 (23.99%)	150,570 (64.30%)	22,791 (9.73%)	4,646 (1.98%)
2009	276,684 (100%)	55,696 (20.13%)	192,991 (69.75%)	24,665 (8.91%)	3,342 (1.21%)
2010	314,233 (100%)	52,700 (16.77%)	229,448 (73.02%)	28,874 (9.19%)	3,211 (1.02%)
2011	305,713 (100%)	54,731 (17.90%)	221,299 (72.39%)	26,460 (8.66%)	3,223 (1.05%)
2012	254,615 (100%)	54,812 (21.53%)	171,764 (67.46%)	24,874 (9.77%)	3,165 (1.24%)

Source: United States Courts (www.uscourts.gov) Caseload statistics 2001~2012
(Table C-4)

Above table clearly shows how many cases are disposed before reaching trial, which is around 98 percent average. It is remarkable that vast numbers of cases are disposed before pretrial. Is that mean that pretrial dispositions are working very well? Is it because of the fact that Americans settle much? Under the term “vanishing trial,” scholars have shared their observations and discussed about this trend.²⁴⁸ Did developments of summary

²⁴⁸ Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258-59 (2005) (“In the fiscal year ending two months before the Federal Rules of Civil Procedure took effect in 1938, 19.9% of cases terminated by trial. In 1952, the trial rate for all civil cases was 12.1%. In 2003,

judgment through *Celotex* trilogy, standard that seem to favor moving party of the motion for summary judgment cause increased in the use of summary judgment, thus reduction of trial?

For some scholars, development of pretrial disposition including summary judgment was suggested as an important cause of such decrease in the number of trials. Mark Galanter, for example, opined that ratio of cases terminated before pretrial was twenty percent in 1963, but, the figure reached sixty-eight percent in 2002 due to the courts' active involvement in order to dispose cases in early stages.²⁴⁹ According to Galanter, such change could be caused not only by active settlements but also by increased use of adjudication without trial including summary judgment and pretrial dismissals.²⁵⁰ Martin Redish also observed that developments in summary judgment law can explain decrease in the number of trials to significant extent.²⁵¹ Acknowledging rapid increase in the use of summary judgment during recent decades, Stephen Burbank observed that the number of cases terminated by summary judgment have significantly increased from 1.8 percent in 1960 to 7.7 percent in 2000.²⁵² However, Burbank argued that such increase began even before the *Celotex*, in 1970s, thus undervalued impacts of *Celotex* trilogy on the decrease in trial.²⁵³ Using the phrase "The vanishing trial is ... the vanishing jury," Lawrence Friedman points out those current trends of civil litigation are shifting jury's power and discretion to judges.²⁵⁴ He observes that this "historical development" underlies a new trend of "managerial judges," in

only 1.7% of civil terminations occurred during or after trial.").

²⁴⁹ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 482 (2004).

²⁵⁰ *Id.*

²⁵¹ Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) ("changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials.").

²⁵² Stephen Burbank, *Drifting toward Bethlehem or Gomorrah?: Vanishing Trials and Summary Judgment in Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004).

²⁵³ *Id.* at 620-21.

²⁵⁴ Friedman, *Supra* note 121, at 698 ("The vanishing trial is, in many regards, the vanishing jury. Power and discretion have shifted away from the jury and more and more now is in the hands of the judge. To put it another way, the long-term historical development is to shift decision making from amateurs to professionals.")

Resnik's terms.²⁵⁵²⁵⁶ For Friedman, the managerial judges in contemporary civil litigation chose "to manage and settle as many matters as possible before the trial," "to coerce a settlement" and "to force the decision one way or the other" in pretrial stage, using "enormous discretion."²⁵⁷ Although Friedman did not mention summary judgment, it can reasonably be understood that his account of judge's use of huge discretion to settle matters in pretrial stage includes active use of summary judgment.

There are also other explanations of the rapid reduction of trials refusing to accept the explanation that increased use of summary judgment led reduction of trial. For example, Judith Resnik shared two different but co-related analyses: "*proliferation* of adjudicatory processes" and "*privatization* of disputing processes".²⁵⁸ According to the first explanation, adjudication process has been spread to public courts other than federal courts and state courts, to administrative agencies, and to private dispute resolution centers; however, data collectors have focused only on the number of trials in formal federal courts and state courts.²⁵⁹ Second explanation points out that litigant's limited resources for trial and complaints against adjudication process led them to find other resources for dispute resolution.²⁶⁰ These two explanations similarly suggest increase in the use of ADR as significant factor of reduction of trial.

Yeazell also puts weight on increased settlement based on procedural reforms.²⁶¹ Summarizing common features of civil procedure reform in 20th century as "procedure: the belief in facts rather than law, the belief in information rather than argument, the belief in

²⁵⁵ Friedman, *Supra* note 121, at 698.

²⁵⁶ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. LEGAL STUD. 374 (1982).

²⁵⁷ Friedman, *Supra* note 121, at 698.

²⁵⁸ Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Legal Stud. 783, 785-86 (2004).

²⁵⁹ *Id.* at 785.

²⁶⁰ *Id.* at 785-86.

²⁶¹ Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. Empirical Legal Stud. 943, 948 (2004).

broad rather than narrow focus for disputing, and a belief in agreement rather than adjudicated conflict,” Yeazell observed that procedural reforms diminishing the role of pleading, expanding the discovery and the role of expert witnesses, and enabling broad joinder caused reduction of trial.²⁶²

To sum up these comments from legal scholars, it becomes manifest that, at least, more active use of summary judgment has contributed in reduction of trials, although it is not clear how much such contribution has been. Considering the fact that *Celotex* cases greatly facilitated and enhanced use of summary judgment, it can be said that summary judgment reforms through the trilogy contributed to enhancing judicial efficiency at least to some extent.

²⁶² Yeazell, *Supra* note 261, at 948, 954.

3.4 Heightening pleading standard

3.4.1 Rule 12(b) motion to dismiss and pleading standards before *Twombly* and *Iqbal*

FRCP Rule 12(b) illustrates various motions for dismissal. Grounds for such motions to dismiss include lack of subject-matter jurisdiction (Rule 12(b)(1)); lack of personal jurisdiction (Rule 12(b)(2)); improper venue (Rule 12(b)(3)); insufficient process (Rule 12(b)(4)); insufficient service of process (Rule 12(b)(5)); failure to state a claim upon which relief can be granted (Rule 12(b)(6)); and failure to join a party under Rule 19 (Joinder of Parties) (Rule 12(b)(7)).²⁶³ Among these, Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is used when a defendant wants to tackle the sufficiency of the plaintiff's pleading. Pleading standard means a standard used by judges when determining whether certain pleading satisfies the requirements for surviving this Rule 12(b)(6) motion.

With respect to what FRCP requires for a complaint, Rule 8(a)(2) demands a complaint to have “a short and plain statement” of ground for jurisdiction and of the claim as well as a demand for the relief.²⁶⁴ Likewise, being short and plain is the only requirement for

²⁶³ FED. R. CIV. P. 12(b) (“RULE 12. DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED; MOTION FOR JUDGMENT ON THE PLEADINGS; CONSOLIDATING MOTIONS; WAIVING DEFENSES; PRETRIAL HEARING (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”).

²⁶⁴ FED. R. CIV. P. 8(a) (“RULE 8. GENERAL RULES OF PLEADING (a) Claim for Relief. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the

pleading in terms of how specific statements in a complaint should be and how much details it should have. In order to supplement this vague requirement, courts have developed pleading standards specifying what this rule requires for pleading to survive the Rule 12(b)(6) motion. Followings are historical developments of pleading standard initiated by court decisions.

3.4.1.1 Common law pleading (Issue pleading) standard

Under English common law pleading, a plaintiff chooses the “form of action” for her case from the pool of ready-made forms rather than writing a new pleading. The form of action determined “subsequent course of the lawsuit,” governing law, and procedure.²⁶⁵ After that, the litigants are required to agree on and produce “a single issue of law or fact” for resolution.²⁶⁶ This pleading standard was efficient in that decision makers only have to render a judgment on the single issue written on the complaint.²⁶⁷ However, because of this characteristic, choosing appropriate format became more important task than arguing merits; and it became difficult for the complaint to notify accurate information of the lawsuit to the defendants.²⁶⁸ For the same reason, it was also hard for the judges to render accurate and just decisions.²⁶⁹ Also, the forms were not up-dated; and that made the problems worse.²⁷⁰ Such

relief sought, which may include relief in the alternative or different types of relief.

²⁶⁵ Maxeiner, *Supra* note 15, at 1271.

²⁶⁶ Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (“The exact issue had to be defined by it[pleading.]”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986); Maxeiner, *Supra* note 15, at 1271.

²⁶⁷ Maxeiner, *Supra* note 13, at 1272 (“Common law pleading made proceedings efficient. There was only one issue. If it was an issue of law, no trial was needed. If it was an issue of fact, trial was a limited affair. The jury did not have to apply law to fact.”).

²⁶⁸ Clark, *Supra* note 266, at 542 (“To enforce this result, the rules were insisted on to an extent that, as it now appears, form was exalted over substance, and the means became the end.”); Marcus, *Supra* note 266, at 437 (“They [Complaints] certainly told the defendant little or nothing about the plaintiff’s claims, and the defendant would remain in the dark until trial because discovery was limited or nonexistent.”).

²⁶⁹ Maxeiner, *Supra* note 15, at 1272 (“By forcing the parties to make one point determinative at an early stage, common law pleading condemned cases not to be decided on the merits, but to be determined on a point that might not be material to their claims of right.”).

dissatisfactions of the common law pleading invoked reform efforts mainly led by David Dudley Field, the drafter of the New York code of 1848, which is also called as “Field Code of Civil Procedure.”²⁷¹

3.4.1.2 Code pleading (Fact pleading) standard

The Field Code no longer required a plaintiff choose one form; instead, it ordered complaints to contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”²⁷² Instead of forcing the litigants to “rely on fictions and fictitious claims,” as Common law pleading did, the Code pleading demanded “the actual facts.”²⁷³ However, code pleading has been criticized for its strict requirement that every fact that is essential to liability should be alleged clearly and precisely. Such change caused another problem, which is “great difficulty” in distinguishing ultimate facts that were proper from conclusions that were not.²⁷⁴

3.4.1.3 Notice pleading standard

In order to improve pleading problems of the common law pleading and the code pleading, notice pleading standard was established by the Federal Rules of Civil Procedure in 1938, which has been acknowledged as actively guaranteeing litigants’ access to court and

²⁷⁰ Maxeiner, *Supra* note 15, at 1272 (“Long before common law pleading was introduced to America, the development of forms of action was ended. There was a limited and unchanging selection.”).

²⁷¹ Marcus, *Supra* note 266, at 438.

²⁷² NEW YORK CODE at §120(2).

²⁷³ Maxeiner, *Supra* note 15, at 1274.

²⁷⁴ Marcus, *Supra* note 266, at 438 (“In particular, there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion.”).

adjudication on the merits.²⁷⁵²⁷⁶ According to Charles Clark, who was a principal drafter of the Rule, the notice pleading “is in general a very brief statement designed merely to give notice to the opponent.”²⁷⁷ Rising “generality of statement permitted,” notice pleading requires only “some facts” enough for noticing the opponent of the general nature of the dispute instead of particular facts of the accident.²⁷⁸ In terms of the task of screening out meritless cases, Clark opposed to conduct the task which should review merits of the case in pleading stage, and defer it to pretrial stage.²⁷⁹ As a result of such idea, the Rule 8 required only a “short and plain statement of the claim showing that the pleader is entitled to relief.”

Reflecting these ideas underlying the Federal Rules of Civil Procedure, in *Conley v. Gibson*²⁸⁰, the Supreme Court clarified that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief.” This ruling established the “no-set-of-facts” standard that was abolished by *Twombly* in 2007, fifty years later. According to what drafter of the Rule intended, the court manifested that the pleading standard “assigns the fact gathering process to the discovery rather than the pleading stage” and “rejects case screening as a pleading function.”²⁸¹ Because notice pleading does not have the function of screening

²⁷⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A double play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 3-4 (2010) (“the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information.”).

²⁷⁶ Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002) (“Rule 8 requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” This “jewel in the crown of the Federal Rules” was the drafters’ attempt at correcting the negative experiences of pleadings at common law and under the codes.”).

²⁷⁷ Clark, *Supra* note 266, at 543; Fairman, *Supra* note 276, at 551 (“Rather than require pleadings to shoulder the multiple burdens of the past—including factual development, winnowing issues, and speedy disposition of meritless claims—the rules would require pleadings to do the one thing they do best: provide notice.”).

²⁷⁸ Clark, *Supra* note 266, at 543-44 (“The aim of pleadings should be therefore to give reasonable notice of the pleader’s case to the opponent *and to the court.*”).

²⁷⁹ Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 188 (1958) (“The pleading starts the case off generally. When you get to the point of trial preparation, then you are really going into the merits. You need to have these other adjuncts.”).

²⁸⁰ 355 U.S. 41 (1957).

²⁸¹ Robert G. Bone, *Twombly, pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 880 (2009).

out meritless cases, this role has been assigned to summary judgment. By establishing this pleading standard, *Conley* lowered threshold at the pleading stage and made the procedural phase less important in terms of disputing.²⁸²

3.4.2 ‘Plausibility’ pleading standard developed in *Twombly* and *Iqbal*

3.4.2.1 *Bell Atlantic Corp. v. Twombly*

In *Bell Atlantic Corp. v. Twombly*,²⁸³ the plaintiff filed an antitrust conspiracy claim arguing that the defendants, telecommunication service providers (“Incumbent Local Exchange Carriers”; “ILECs”) conspired to inflate charges for local phone and high-speed internet services, through parallel conducts that inhibited entry of the competitors (“Competitive Local Carriers”; “CLECs”) to the market and through agreement among the ILECs not to compete against one another.²⁸⁴ The defendants filed a motion to dismiss for failure to state a claim.

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted.²⁸⁵ As for the argument of the parallel conducts, the court concluded that the alleged parallel conducts, by themselves, do not state claim under the Sherman Act § 1; and that additional facts that “ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior” are needed.²⁸⁶ As for the allegation of the agreement among the defendants not to compete each other, the court concluded that the complaint did not allege facts that suggest that refraining from competing in territories of other ILECs was contrary to ILECs' apparent

²⁸² Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOWARD L.J. 73, 73 (2008) (“The Supreme Court's decision in *Conley* greatly reduced both the strategic importance of pleading and the influence of pleading on the subsequent trial and decision of claims.”).

²⁸³ 550 U.S. 544 (2007).

²⁸⁴ *Id.* at 549-51.

²⁸⁵ 313 F.Supp.2d 174 (2003).

²⁸⁶ *Id.* at 179.

economic interests; and that they could not find any inference that the defendants' actions were the result of conspiracy.²⁸⁷ The Court of Appeals for the Second Circuit reversed the judgment.²⁸⁸ After declaring that "the pleaded factual predicate must include conspiracy among the realm of "plausible" possibilities in order to survive a motion to dismiss," the court declared a standard the court used for ruling the Rule 12(b)(6) motion to dismiss through explaining that "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence," in order to "rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim."²⁸⁹ Under this motion to dismiss standard, the court concluded that the district court concluded based on wrong standard that requires "plus factors," which are additional factors required for surviving summary judgment in antitrust conspiracy claims.²⁹⁰

The U.S. Supreme Court reversed the judgment of the Court of Appeals and remanded the case.²⁹¹ As a general standard for pleading to survive Rule 12(b)(6) motion, the court required a plaintiff to provide "grounds" of his entitlement of relief which should be "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action."²⁹² For that, factual allegations "must be enough to raise a right to relief above the speculative level".²⁹³ Applying this general standard to the Sherman Act § 1 claim, the court provided more specific explanation of the pleading standard they were applying. The court required "enough factual matter" as "plausible grounds to infer" alleged illegal acts of the

²⁸⁷ 313 F.Supp.2d 174, 188 (2003).

²⁸⁸ 425 F.3d 99 (2005).

²⁸⁹ *Id.* at 114.

²⁹⁰ *Id.* at 114 ("These "plus factors" may include: "a common motive to conspire," evidence that "shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators," and evidence of "a high level of inter firm communications").

²⁹¹ 550 U.S. 544 (2007).

²⁹² *Id.* at 555.

²⁹³ *Id.*

defendant.²⁹⁴ The court explained that such “plausibility” standard calls for factual evidence than “probability requirement.”²⁹⁵ According to this standard, allegation of parallel conducts should have more factual grounds than “a bare assertion of conspiracy,” that is, “context that raises a suggestion of a preceding agreement”; and “a conclusory allegation of agreement at some unidentified point” is not enough.²⁹⁶

The court shared its motivation of establishing such new pleading standard, which is “the practical significance of the Rule 8 entitlement requirement” in playing two imperative roles.²⁹⁷ First, disposing more complaints without factual grounds in pleading stage can contribute to finishing “a largely groundless claim” at the point of “minimum expenditure of time and money by the parties and the court.”²⁹⁸ Second, disposition in pleading standard is necessary for regulating expensive and massive antitrust discovery.²⁹⁹ The court pointed out insufficient roles of judicial supervision and summary judgment with respect to regulation discovery abuse.³⁰⁰

From these motivations, the court declared retirement of *Conley's* “no set of facts” language as a pleading standard.³⁰¹ The court pointed out that ““no set of facts” language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings”; and that “a

²⁹⁴ 550 U.S. 544, 556 (2007).

²⁹⁵ *Id.* (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

²⁹⁶ *Id.* at 556-57 (“A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.”).

²⁹⁷ *Id.* at 557.

²⁹⁸ *Id.* at 558 (“something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “‘a largely groundless claim’” be allowed to “‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’”).

²⁹⁹ *Id.* at 559 (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint”).

³⁰⁰ *Id.* at 559-60.

³⁰¹ *Id.* at 562-563.

wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some “set of [undisclosed] facts” to support recovery.”³⁰² Reminding of questions about and criticisms against the *Conley*'s “no set of facts” standard, the court abrogated the case.³⁰³

Applying this pleading standard to the complaint in this case, the court concluded that what the plaintiff’s complaints contained were mere legal conclusions; and that it depends only on descriptions of parallel conduct” not on “independent allegation of actual agreement among the ILECs.”³⁰⁴ Determining that the complaint did not satisfy the plausibility standard, the court declared that the complaint in this case should be dismissed.³⁰⁵

Dissenting opinion by Justice Stevens and Justice Ginsburg strongly opposed to the new plausibility pleading standard based on the context of history of the Federal Rules of Civil Procedure and on validity of *Conley*'s “no set of facts” standard that can justified by the policy choice of the drafters of the Rule. Dissenting opinion explained that the intention of the designers of the Rule was to “restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial,” departing code pleading.³⁰⁶ The opinion also strongly opposed the view of majority that the *Conley*'s “no set of facts” language has been “questioned,” “criticized,” or “explained away” by showing long list of cases that rendered decisions based on the language.³⁰⁷ In addition, the decision showed how the three cases that had been basis for the *Conley* decision consistently directed the role of pleading in the Federal Rules of Civil Procedure Era, which

³⁰² 550 U.S. 544, 561 (2007).

³⁰³ *Id.* at 561 (“But the passage so often quoted (“no set of facts”) fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.”).

³⁰⁴ *Id.* at 564.

³⁰⁵ *Id.* at 570 (“we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

³⁰⁶ *Id.* at 575-76.

³⁰⁷ *Id.* at 576-78.

is absolutely not “puzzling” as majority concluded with haste and without firm authority and grounds.³⁰⁸ Dissenting opinion evaluated majority’s new pleading standard as requiring a standard for summary judgment in pleading stage.³⁰⁹

3.4.2.2 *Ashcroft v. Iqbal*: Expanding the plausibility standard beyond antitrust cases

In *Ashcroft v. Iqbal*³¹⁰, a Muslim Pakistani Javaid Iqbal brought an action against government officials, alleging that “he was deprived of various constitutional protections while in federal custody” that followed the 9/11 terror, against “numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI).”³¹¹³¹² The plaintiff’s complaint the complaint alleged that the defendants “adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.”³¹³ As for the petitioners Ashcroft and Mueller, the complaint argued that they “each knew of, condoned, and willfully and maliciously agreed to subject” the plaintiff to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”³¹⁴ The petitioners filed

³⁰⁸ 550 U.S. 544, 579-85 (2007).

³⁰⁹ *Id.* at 586 (“Everything today’s majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has escribed. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage.”).

³¹⁰ 556 U.S. 662 (2009).

³¹¹ *Id.* at 666.

³¹² *Id.* at 667 (“Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 “the FBI had received more than 96,000 tips or potential leads from the public. . . . In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. Of those individuals, some 762 were held on immigration charges; and a 184–member subset of that group was deemed to be “of ‘high interest’ ” to the investigation. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.”).

³¹³ *Id.* at 666.

³¹⁴ *Id.* at 669 (“The pleading names Ashcroft as the “principal architect” of the policy . . . and identifies Mueller

an Rule 12(b)(6) motion to dismiss.³¹⁵

The United States District Court for the Eastern District of New York denied the motion to dismiss declaring that the complaint sufficiently stated a claim.³¹⁶ The petitioners brought an interlocutory appeal; and the United States Court of Appeals for the Second Circuit affirmed the District Court's decision.³¹⁷ Interpreting *Twombly* as calling for a “flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible,”³¹⁸ the court found it unnecessary to apply the pleading standard in *Twombly*, because the court concluded that petitioners’ appeal in this case did not show contexts for such factual amplification.³¹⁹

U.S. Supreme Court reversed the judgment of the Court of Appeals and remanded the case holding that the plaintiff’s pleadings are insufficient.³²⁰ Citing *Twombly*, the court manifested its new pleading standard established by *Twombly*, by declaring that “the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation,” and that “(a) pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do. ... Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.””³²¹

According to this *Twombly*’s construction of Rule 8, the court held that the plaintiff’s complaint did not state his claims of discrimination “across the line from conceivable to

as “instrumental in [its] adoption, promulgation, and implementation.”).

³¹⁵ 556 U.S. 662, 666 (2009).

³¹⁶ 2005 WL 2375202 (E.D.N.Y.) (2005) (“it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against.”).

³¹⁷ 490 F.3d 143 (2007).

³¹⁸ *Id.* at 157-58.

³¹⁹ *Id.* at 174.

³²⁰ 556 U.S. 662 (2009).

³²¹ *Id.* at 678.

plausible.”³²²The court first concluded that the plaintiff’s allegations on the complaint “amount to nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim; thus that the allegations are “conclusory and not entitled to be assumed true.”³²³Next, with respect to whether the complaint plausibly suggest an entitlement to relief, the court held that the inference that the plaintiff’s arrest was the result of unconstitutional discrimination, even assuming the inference was plausible, that inference alone does not suffice for entitlement of relief, unless the complaint contains “facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as “of high interest” because of their race, religion, or national origin.”³²⁴The court concluded that the plaintiff’s complaint has failed to show such purposeful adoption of the policy by the petitioners.³²⁵

A dissenting opinion by Justice Stevens and Justice Ginsburg pointed out that majority misapplied the *Twombly* decision when holding that the complaints failed to satisfy Rule 8(a)(2).³²⁶ Distinguishing the complaint in the current case from that of *Twombly*, dissenting opinion found that “the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct.”³²⁷ Instead, according to the opinion, allegations in the complaint contained “enough facts to state a claim to relief that is plausible on its face.”³²⁸The opinion also criticized majority for making conclusion based only two isolated statements in the plaintiff’s complaint rather than taking the complaint as a whole,

³²² 556 U.S. 662, 680 (2009).

³²³ *Id.* at 681.

³²⁴ *Id.* at 682.

³²⁵ *Id.* at 682-83 (“Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin.”).

³²⁶ *Id.* at 688.

³²⁷ *Id.* at 696-97.

³²⁸ *Id.* at 697 (“The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. Iqbal's complaint therefore contains “enough facts to state a claim to relief that is plausible on its face.”).

thus failing to find that the petitioners “helped to create the discriminatory policy.”³²⁹

3.4.2.3. Meaning and impacts of *Twombly* and *Iqbal*

Twombly established a new pleading standard that calls for plausibility of factual allegation on the complaint; and, by applying the standard in the case other than antitrust case, *Iqbal* made the pleading standard trans-subjective one. The new plausibility standard raised threshold for the plaintiffs to that of summary judgment; and, by doing so, it raised concerns of the litigants’ access to justice. In these reasons, the new pleading standard established by *Twombly* and *Iqbal* became very controversial.³³⁰ In following paragraphs, this study introduces such concerns and criticisms from legal commentators.

First, abandoning and departing from the notice pleading standard in *Conley*, *Twombly* established the plausibility pleading standard that requires as through factual grounds as summary judgment does, in pleading stage, ignoring what drafters of the Federal Rules of Civil Procedure set. A. Benjamin Spencer observes such departure as wrong interpretation of the Rule 8 that challenged “the liberal ethos of the Federal Rules” by making it harder for the plaintiffs to access to court in pleading stage.³³¹

³²⁹ 556 U.S. 662, 697-99 (2009) (“the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11” ... and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”).

³³⁰ Bone, *Supra* note 281, at 880 (“Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics attack it as a sharp departure from the “liberal ethos” of the Federal Rules, favoring decisions “on the merits, by jury trial, after full disclosure through discovery.”); Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming Twombly, even after Iqbal*, 158 U. PA. L. REV. 473 (2010) (“Scholarly reaction to *Twombly* has been largely critical, with most complaining that the Court imposed a heightened specificity standard of pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery. Scholars have criticized the Court for abandoning decades of precedent and rejecting ideas central to the Federal Rules of Civil Procedure.”).

³³¹ A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 446-47 (2008) (“[I]t is an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court. Indeed, the Court's new standard is a direct challenge to the liberal ethos of the Federal Rules more generally. In the wake of the tightening of summary judgment standards and a narrowing of the scope of discovery, as well as the

Second, such plausibility pleading standard is recognized as problematic because it requires evidence the plaintiffs cannot find before discovery in pleading stage. Interpreting *Twombly* as erecting “an additional ‘plausibility’ requirement of fact pleading,” Scott Dodson commented that “using fact pleading standards” to weed out meritless lawsuits is problematic because these standards require evidence which “(antitrust) plaintiffs often do not possess” prior to discovery.³³² Other scholars showed similar concerns of the lack of discovery, an opportunity to gather evidence.³³³ With respect to constitutional right, pointing out lack of discovery opportunity for the plaintiff before dismissing the complaint under the plausibility pleading standard, from the point of view based on the Constitution, Suja Thomas argues that the new pleading standard in *Twombly* violates the Seventh Amendment right of trial by jury in that the standard “failed to follow its long-standing common law jurisprudence on the Seventh Amendment” that empowers jury, not court, to decide facts however improbable the

advent of strong judicial case management, the *Twombly* decision has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers. A judicial administration model, or what one may term a “restrictive” or “efficiency oriented” ethos, now seems firmly established in its place.”); Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17 (2008) (“The *Twombly* holding marks a significant retreat from the concept of notice pleading and certainly the end of notice pleading as envisioned by the drafters of the Federal Rules.”); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 (1998) (“The drafter of those rules—Charles Clark, who was Professor Wright’s mentor—initially favored abolishing pleading motions altogether under the new national procedures so that all merits dispositions would have to be by summary judgment. Although the drafters declined such a radical course, they clearly intended to curtail reliance on the pleadings and minimize pleading practice.”).

³³² Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN. BRIEF 135, 138-39 (2007), available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

³³³ Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1255-56 (2008) (arguing that opportunity for discovery is the main difference between summary judgment and pleading while they requires the plaintiff higher burden than that of the moving party, mostly defendant, and that makes the new pleading standard problematic). In contrast to these opinion, Richard Epstein argues that discovery is allowable only when a plaintiff can get evidence from private source, thus justifying the defendant’s discovery costs (Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 81-82 (2007)); Spencer, *Supra* note 331, at 471 (“Requiring plaintiffs to offer factual allegations that plausibly suggest liability is a particular burden when key facts are likely obtainable only through discovery”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1 (2009) (“[If] properly stating a claim requires the addition of facts that the plaintiff cannot know ex ante, the pleading standard present an insurmountable barrier to access in certain cases.”).

evidence might be.³³⁴

Third, it has been concerned that meritorious cases can be dismissed under the Rule 12(b)(6) motion to dismiss or even the plaintiffs will be deterred from filing meritorious lawsuits for fear of being dismissed, thus infringing litigants' access to justice. Pointing out information asymmetry, Hoffman predicts that the heightened pleading standard will block the plaintiffs to file their claims and let meritorious cases be dismissed.³³⁵ Pointing out that Justice Souter, "who had authored the majority opinion in *Twombly*," disagreed with the majority opinion in *Iqbal*, Lisa Eichhorn also evaluates the case as making "Rule 12(b)(6) dismissal a threat to even more potentially meritorious lawsuits" by applying *Twombly* "beyond its author's intentions."³³⁶

However, not every commentator is critical to the new pleading standard. Focusing on enhancing judicial efficiency, a group of commentators welcomed the new pleading standard as a necessary screening device in contemporary litigation. Situating *Twombly* in broader context of access to justice and regulating meritless lawsuits,³³⁷ Robert Bone agrees with the Supreme Court's two reasons of dismissal of the complaint in the pleading stage: risk and cost of meritless lawsuit and lack of allegations in the complaint enough to support merit of the case.³³⁸ For him, the plaintiff in the case failed to provide the defendants' special

³³⁴ Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1853-54 (2008).

³³⁵ Hoffman, *Supra* note 333, at 1263 ("Indeed, the best empirical evidence now available shows that, because of information asymmetries, when a heightened pleading standard is imposed, some meritorious cases will not be filed and, further, some that are filed will be dismissed (or settled for marginal value)."); Randy Picker, *Twombly*, Leegin, and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161 (2007).

³³⁶ Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Aschcroft v. Twombly*, 62 FLA. L. REV. 951, 962-63 (2010) (further arguing that majority opinion in the case strategically used the term "entitlement" to transform plaintiff's role from someone who was generally presumed to have a right to proceed to discovery into someone who is being presumptuous and displaying an outsized sense of entitlement in even requesting to proceed, and that the majority opinion relied on "a judging - as-measuring metaphor" that wrongly connected the plausibility test to notion of objectivity).

³³⁷ Bone, *Supra* note 281, at 876.

³³⁸ Bone, *Supra* note 281, at 884; Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) ("*Twombly* thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings.").

conducts departing from “normal baseline” in the communications market.³³⁹ Richard Epstein joins this group. According to Epstein's standard for assessment of cases to decide whether the cases go forward, the plaintiff's claim based only on public sources should be dismissed at the pleading stage for the defendant to avoid discovery.³⁴⁰ So, discovery is allowable only when the plaintiff can get evidence from private source, thus justifying the defendant's discovery costs.³⁴¹ In former case, motion to dismiss can be understood as “mini summary judgment.”³⁴² Focusing on special features of the *Twombly* case, Epstein goes through every single argument of the plaintiff in *Twombly* and argues that the conclusion that the plaintiff's claim is meritless is obvious from public sources, and that discovery would not have been able to provide new facts useful in changing this result.³⁴³ Thus, following his standard, the Supreme Court's decision on *Twombly* makes sense in that the plaintiff's claim does not deserve discovery.

³³⁹ Bone, *Supra* note 281, at 884-86.

³⁴⁰ Epstein, *Supra* note 333, at 81.

³⁴¹ *Id.* at 81-82.

³⁴² *Id.* at 82.

³⁴³ *Id.* at 83-94.

3.5 Amending Rule 11: the Lawsuit Abuse Reduction Act of 2011

3.5.1. Brief history of the Rule 11

There have been numerous attempts to reform the Rule 11 sanctions in order to regulate litigation cost and lawsuit abuse since 1995, which have been not successful.³⁴⁴ The Rule 11 enacted in 1938, and amended in 1983 and 1993; so current version of the rule is classified as 1993 version of the rule that significantly amended 1983 version of the rule.³⁴⁵ Until the end of 1970s, the rule remained unchanged and very rarely used.³⁴⁶ However, along with concerns of litigation crisis and lawsuit abuse that hit American society in late 1970s, amendment of the rule had been discussed until the rule was amended in 1983.³⁴⁷

The amendment in 1983 mandated judges to impose sanctions when they find violation of the rule; and used the term “Sanction” instead of “appropriate disciplinary action” in order to show how seriously the lawyers should accept the rule.³⁴⁸ Effects of the amendment were remarkable. Far more cases applying the Rule 11 were reported.³⁴⁹ However, at the same time, such increasing sanction under the Rule 11 generated additional litigation costs for disputing the sanction.³⁵⁰

³⁴⁴ Lonny Hoffman, *Case against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 546-47 (2011) (According to Hoffman, such attempts include “Lawsuit Abuse Reduction Act of 2005,” “Lawsuit Abuse Reduction Act of 2004,” “F frivolous Lawsuit Prevention Act of 1997,” and “Attorney Accountability Act of 1995.”).

³⁴⁵ Lonny Hoffman, *The Lawsuit Abuse Reduction Act: The Legislative Bid to Regulate Lawyer Conduct*, 25 REV. LITIG. 719, 722 (2006).

³⁴⁶ Peter A. Joy, *The Relationship Between Civil Rule 11 & Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 765 (2004) (“The first iteration of Rule 11, in effect from 1938 through 1983, produced only nineteen reported cases in which parties filed Rule 11 motions during a thirty-eight year period.”).

³⁴⁷ Hoffman, *Supra* note 345, at 722-26.

³⁴⁸ *Id.* at 727.

³⁴⁹ Joy, *Supra* note 346, at 766 (“the amended form of Rule 11, in effect from 1983 through 1993, was a full-fledged speed trap resulting in nearly 7000 published Rule 11 opinions in less than ten years.”).

³⁵⁰ Hoffman, *Supra* note 345, at 728.

The amendment of the rule in 1993 reflected such concern. It made judge's imposing sanction discretionary instead of mandatory; and it established the safe harbor provision under which the party and lawyer can withdraw documents they submitted within twenty one days when they find error after the submission.³⁵¹

3.5.2 Current Rule 11 sanction

Rule 11 deals with lawyer and unrepresented party' conducts regarding presentation of written documents, that is, "a pleading, written motion, or other paper."³⁵² The rule prohibits these actors from presenting written documents to the court "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"; to raise "claims, defenses, and other legal contentions" only when these "are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law"; to raise factual arguments or denials of factual arguments only when these arguments or denials "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."³⁵³

³⁵¹ Hoffman, *Supra* note 345, at 729.

³⁵² FED. R. CIV. P. 11(b). ("Rule 11(Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions) (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.").

³⁵³ FED. R. CIV. P. 11(b)(1)-(4).

The sanction for the violation of this Rule 11 shall be “appropriate sanction.”³⁵⁴ More specifically, the sanction “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated”; and it may include nonmonetary directives, an order directing payment of reasonable attorney’s fees to the movant or payment of penalty to the court, and payment of “other expenses directly resulting from the violation.”³⁵⁵ Also, there are limitations of monetary sanction.³⁵⁶

There is an exception to the rule. Such sanction does not apply to discovery. Rule 11(d) manifests that the rule “does not apply to disclosures, discovery requests, responses, objections, and motions under Rules 26 through 37.” Also, as a safe harbor provision, the motion for the Rule 11 sanction cannot be filed and presented to the court if the party who was accused of the violation withdrew or properly corrected the documents he submitted within 21 days since submission of the materials.³⁵⁷

3.5.3. The Lawsuit Abuse Reduction Act of 2011 and 2013

³⁵⁴ FED. R. CIV. P. 11(c)(1) (“Rule 11(Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions) (c) Sanctions. (4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation”).

³⁵⁵ FED. R. CIV. P. 11(c)(4).

³⁵⁶ FED. R. CIV. P. 11(c)(5) (“Rule 11(Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions) (c) Sanctions. (5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b)(2); or (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.”).

³⁵⁷ FED. R. CIV. P. 11(c)(2) (“Rule 11(Signing Pleadings, Motions, and Other papers; Representations to the Court; Sanctions) (c) Sanctions. (2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney’s fees, incurred for the motion.”).

To reduce lawsuit abuse, the Lawsuit Abuse Reduction Act of 2011³⁵⁸ suggested amending Rule 11 in a direction strengthening its sanctions in two ways. First, the act made imposition of the sanctions mandatory, by switching “may” to “shall.”³⁵⁹ It is restoring the 1983 version of the Rule 11.³⁶⁰ Second, the act removed this safe harbor clause.³⁶¹ Through eliminating chance of correcting false representation and adding dismissal as one result of the fault, the Act significantly reinforced Rule 11 sanctions. Third, it authorized courts to “impose additional appropriate sanctions” including “striking the pleading, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment at a penalty into the court.”³⁶² Such changes in additional sanctions authorize or even “encourage” use of monetary sanctions.³⁶³ It also adds causes of dismissing pleading and lawsuit; thus making dismissal more available and approachable option in early stage of litigation.

However, the bill was not enacted and the Lawsuit Abuse Reduction Act of 2013 was re-introduced.³⁶⁴ The bill passed in the House on November 14, 2013; and as of March 04, 2013, the bill is mooring at Senate for consideration. Contents of the Lawsuit Abuse Reduction Act of 2013 are exactly same as that of the Act of 2011.³⁶⁵ This repetition without any modification after failure on enactment clearly shows strong willingness of proponents of the reform and small window of compromising regarding the contents to be amended. Likewise, concerns of litigation costs and frivolous lawsuits and civil procedure reform are still on the table as imperative issue.

³⁵⁸ Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (2011).

³⁵⁹ Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. § 2(a)(1) (2011).

³⁶⁰ Hoffman, *Supra* note 344, at 548.

³⁶¹ Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. § 2(a)(2) (2011).

³⁶² Lawsuit Abuse Reduction Act of 2011, H. R. 966, 112th Cong. § 2(a)(3) (2011).

³⁶³ Hoffman, *Supra* note 344, at 548 (“This change departs drastically not only from current law but even from that earlier version of the rule inasmuch as compensation never has been the express purpose of the rule.”).

³⁶⁴ Lawsuit Abuse Reduction Act of 2013, H. R. 2665, 113th Cong. (2013).

³⁶⁵ Lawsuit Abuse Reduction Act of 2013, H. R. 2665, 113th Cong. § 2(a)(1)-(3) (2013).

3.6 Summary: a new form of managerial judging through disposition without trial

In the U.S., concerns about judicial inefficiency traces back to even before the tort reform movement, to the early 1900s; and it led emerge of managerial judging.³⁶⁶ According to Resnik, such concerns led trial judges in the U.S. to depart from the traditional role of judge under which “judges are not supposed to are not supposed to have an involvement or interest in the controversies they adjudicate,” and to have more active managerial roles under which judges are supposed to intervene for settlement and early and quick dispositions of the cases.³⁶⁷ It is noticeable that traditional roles of judges in the U.S. began to change approximately a century ago toward managerial judging. This old and ongoing move toward more active participation of judges reflects ongoing concerns about judicial efficiency.

However, as this chapter reviews, concerns of judicial inefficiency have not been resolved yet even through emerge of managerial judging; and such efforts continued to recent reforms on disposition without trial as “a new version of managerial judging.” This dissertation observes that current reforms of summary judgment, pleading, and the Rule 11 sanction reflects efforts to enhance judges’ role and power of managing cases. It is a new version of managerial judging because it now expands area of judge’s discretion by reducing that of jury. The old version of managerial judging was “less visible” and “usually unreviewable.”³⁶⁸ However, this new form of managerial judging, which is expanded and reinforced, is now obvious to everyone and is showing its willingness to bear review process. The old version of managerial judging focused more on drawing settlement and speeding

³⁶⁶ Resnik, *Supra* note 256, at 395 (“Since the early 1900’s, judges have attempted to respond to criticism of their efficiency by experimenting with increasingly more managerial techniques.”).

³⁶⁷ *Id.* at 374-75, 379-80.

³⁶⁸ *Id.* at 380.

time schedule for the cases. On top of that, the new version of managerial judging aims to more actively manages cases through screening those before reaching to the jury. By heightening burdens of the non-moving party and reducing the burdens of the moving party in *Celotex* trilogy, summary judgment became popular tool for ending cases before trial; by heightening pleading standard in *Twombly* and *Iqbal*, more cases can possibly be dismissed even before discovery; and, when it is enacted, the Lawsuit Abuse Reduction Act of 2011 and 2013 would increase cases dismissed for the violation of the Rule 11 before having trials. In summary, these series of enhancing disposition without trial function as new and reinforced managerial judging.

These current trends of managing disposition without trial have been accused of restricting litigants' access to court; and that drove current reforms of disposition without trial very controversial. As shifts to managerial judging attracted concerns of "the erosion of traditional Due Process safeguards," moves to managerial judging bears risk of infringing litigants' access to justice.³⁶⁹ Moreover, this new version of managerial judging also threatens constitutional right to jury trial, as critics against summary judgment reform, heightened pleading standard, and strengthened Rule 11 sanction commonly point out. The point that managerial judging newly enhanced by disposition reforms attempts to achieve judicial efficiency in sacrifice of litigants' access to court points out weakness and risk of disposition without trial reforms.

³⁶⁹ See generally Resnik, *Supra* note 256, at 224-31.

3.7 How do Korean scholars consider contexts of U.S. disposition without trial?

Such possibility of infringing access to justice in exchange of enhancing disposition without trial and contexts of and discussions on such reforms are the points that reformers in Korea bear in mind. In order for Korean civil procedure reform for enhancing judicial efficiency to be come up with more effective solutions and to best contextualize U.S. disposition without trial, information and analysis provided by this chapter should be considered seriously.

Korean legal scholars' policy suggestions to adopt U.S. disposition without trial are missing these points in two inter-connected reasons: lack of reflecting reforms of U.S. disposition and lack of considering weakness of U.S. disposition.³⁷⁰ First, suggestions of adopting U.S. disposition without trial including pleading standard, summary judgment, and Rule 11 sanction hardly reflect fundamental reforms of these procedural devices described in this chapter. For example, some proponents of anti-SLAPP resolution argues that Korean civil procedure needs to legislate or adopt early dismissal devices based on the understanding that Rule 12(b)(6) pleading standard requires too low threshold.³⁷¹ Also, Young Ho Kong argues for adopting Rule 11 sanction to prevent lawsuit abuse based on the notion that current pleading standard in the Federal Rules is too liberal.³⁷² These ideas are based only on notice pleading standard that lasted until emerge of *Twobly* decision in 2007. Such observation is misleading because those scholars call for a new and special pleading standard, whether legislative or adjudicative, that requires more specific and detailed fact presentation on a

³⁷⁰ For the details of such suggestions, see 2.4 of this dissertation.

³⁷¹ Jung, *Supra* note 100, at 512-13; Kim, *Supra* note 106, at 970.

³⁷² Kong, *Supra* note 93, at 553.

complaint, exactly what current pleading standard after *Twombly* and *Iqbal* are doing.

Second, because of missing these reforms processes and underlying discussions on the disposition devices, proponents of U.S disposition hardly consider weakness of current disposition without trial in the U.S: restriction of access to court. Dae-Sung Oh who suggests adopting summary judgment cited three cases of *Celotex* trilogy when explaining burden of production; however, he does not explain how summary judgment practice changed because of the cases and what risks have been presented by the change.³⁷³ Although he explained about *Celotex Corp. v. Catrett* in detail, he did not mention about reactions to and discussions on the case.³⁷⁴ When arguing for adopting Rule 11 sanction, Young Ho Kong also missed legislative actions and discussions about the Lawsuit Abuse Reduction Act (Bill) which has several versions since 2005 and struggles between enhanced regulation and infringed access to court which are represented by the Act. By doing so, Kong neglects possible infringement of litigants' access to court that can be caused by enactment of the Lawsuit Abuse Reduction Act. In addition, a common feature of proponents of anti-SLAPP is adopting or developing early dismissal devices. However, these suggestions lack consideration of flip-side of such enhancement of early dismissal, which is significant limitation of litigants' access to court that has brought considerable amount of controversy regarding disposition without trial in the U.S.

In addition to that, Korean proponents of adopting U.S. disposition without trial generally neglect how current Korean disposition is working; what are driving forces of the reality; and how U.S. disposition without trial would fit into Korean contexts. As this study argues, these points, in addition to understanding weakness of the U.S. disposition without trial, are what should be considered for effective reform and contextualization by proper

³⁷³ Oh, *Supra* note 88, at 763-68.

³⁷⁴ *Id.* at 767-68.

modification. Following chapters 4, 5, and 6 provide observations and analysis on current Korean practice, another inevitable step for a comparative law project.

Chapter 4: Disposition without trial and related procedural safeguards in Korean civil procedure

4.1 Introduction

One important goal of this study is to figure out what roles current dispositions without trial in Korean civil procedure are playing in terms of enhancing judicial efficiency and regulating lawsuit abuse. The term “pretrial disposition,” which is often used to explain dismissals or summary judgment in the U.S. civil procedure, does not fit to Korean civil procedure, because there is no clear distinction between trial and pretrial stages in Korean civil litigation, as described in following paragraphs. With respect to this distinction of pretrial and trial, current Korean civil procedure has two different tracks: having trial after completing trial preparation process and trial without such process. A presiding judge has discretion to decide whether having trial preparation process or not. In addition to this ambiguous boundary between pretrial and trial, timing of dismissal in Korean civil litigation precludes use of the term “pretrial disposition.” It does not need to be decided before trial whether certain complaints or cases should be dismissed. Complaints or cases may be dismissed before trial, during trial, and even after trial at district courts. These are the reasons why this study uses the term “disposition without trial” instead of pretrial disposition.

Putting it more precisely, disposition without trial can cover two types of devices in Korean civil procedure: adjudication without trial without considering merits (dismissals), and a judgment on the merits without having trial (a judgment without trial; a decision

recommending performance). This term also include devices in the U.S. civil procedure this study focuses on: adjudication on the merits (default judgment; summary judgment) and adjudication without regard to the merits (dismissals).

Based on these definitions, this chapter examines how Korean disposition without trial is working. This introduction section further provides backgrounds for understanding Korean civil procedure and its disposition without trial. Then, in following sections, this study reviews how each type of disposition without trial is working, based on rules, cases, existing commentaries and studies, and interviews of Korean judges and lawyers. Also, in this chapter, procedural safeguards related to each disposition without trial will be reviewed, in order to figure out how these procedural devices for fairness are interacting with disposition without trial.

4.1.1 Ambiguous distinction between pretrial and trial stages

The most distinguishable difference between trials in civil law and common law traditions is existence of jury trial. In civil law system, there is no jury. It is judge's responsibility to observe witness, find facts, and apply the facts to laws. According to John Merryman and Rogelio Pérez-Perdomo, trial in civil law tradition is a "series of isolated meeting of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made," because there is no need for concentrated trial considering jury.³⁷⁵ Because this type of trial defines issues "as the proceeding goes on" instead of using concentrated trial sessions, only small portion of

³⁷⁵ John Henry Merryman and Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 113-14 (2007).

evidence is observed in each session.³⁷⁶ That allows lawyers to have plenty of time between sessions; and it makes discovery and pretrial procedures less important compared to the other type of trial such as trial in the U.S.³⁷⁷

Trial in Korean civil procedure is not quite different from these observations except recent reform efforts to set up pretrial stage (or “brief preliminary stage” according to Merryman and Pérez-Perdomo) by enhancing trial preparation process in order to concentrate its trial. Until the fundamental amendment of the Korean Civil Procedure Code in 2002³⁷⁸, Korean civil procedure did not have a mandatory pretrial stage. Before the amendment, trial preparation process was permissive; and such process was not used actively because it was not mandatory.³⁷⁹ Thus, judges often held several trial hearings and used such hearings for defining issues and collecting evidence. This practice fits into Merryman and Pérez-Perdomo’s “brief preliminary stage” as one of three separate stages of civil proceeding.³⁸⁰ In this preliminary stage, judges reviewed only small portion of the parties’ arguments and evidences, and scheduled another hearing for reviewing another tiny portion of evidence. Oftentimes, hearings in the trial stage continued for long time without making significant progress.

³⁷⁶ Merryman and Pérez-Perdomo, *Supra* note 375, at 113-14.

³⁷⁷ *Id.*

³⁷⁸ Korean Civil Procedure Act (in Korean, “Minsa sosong PŏP”) was first enacted on Apr 4, 1960 after Korea’s independence from Japanese colonization in 1945. This first version of Civil Procedure Act was based on Japanese Civil Procedure Act that Korean court has used since Japanese colonization. Because that Japanese Act was based on German Civil Procedure Act, it can be said that Korean Civil Procedure Act can be classified as a civil procedure that belongs to German law category (DONG-YOON CHUNG & BYUNG-HYUN YOO, *MINSA SOSONG PŏP [CIVIL PROCEDURE]*, 48 (3rd ed. 2009)). As of April, 2014, the Civil Procedure Act has been amended twenty two times; and the current version of Civil Procedure Act was amended on May 19, 2011. Among these amendments, the 2002 amendment has special meaning in that it was the first and only amendment of whole parts of the Act. It also regarded as “the most dramatic reform” in that it reinforced legal bases for pretrial phase and concentrated trial (Youngjoon Kwon, *Litigating in Korea: a general overview of Korean civil procedure*, in *LITIGATION IN KOREA 1*, 4 (KUK CHO EDS., Edward Elgar Publishing, 2010).

³⁷⁹ CHUNG & YOO, *Supra* note 378, at 392; MOON-HYUCK HO, *MINSA SOSONG PŏP [CIVIL PROCEDURE]*, 415-16 (6th ed. 2008); SANG-SOO KIM, *MINSA SOSONG PŏP GAERŎN [INTRODUCTION TO CIVIL PROCEDURE]*, 137 (5th ed. 2009).

³⁸⁰ Merryman and Pérez-Perdomo, *Supra* note 375, at 112.

To solve this problem of delay and waste of the parties' resources, through the 2002 amendment³⁸¹, Korean civil procedure code reinforced trial preparation stage by making the process mandatory.³⁸² Legal scholars welcomed this 2002 amendment because it was the first huge change of civil procedure since the year of 1960 when the Civil Procedure Code was first enacted, in order to reflect ideas for making the parties more informed and prepared for the trial stage, thus saving their time and resources.³⁸³

However, there have been criticisms against this new trial preparation process. These usually point out that the preparation process took too much time and resources of the parties, especially who litigate without being represented, even for the simple cases that does not need to be prepared so thoroughly. Woo-young Rhee observes that adequate and efficient exchanges of trial preparation documents are difficult to expect considering that representation by lawyers are not mandatory in Korea.³⁸⁴ Rhee also adds delays of case resolution due to lack of case classification, nominal exchanges of documents, lack of necessary evidence examination, lack of guarantee of procedural rights for an opposing party, lack of through application of dismissal of arguments and evidences untimely submitted, and

³⁸¹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 6626, Jan. 26, 2002 (S. Kor.).

³⁸² Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 6626, Jan. 26, 2002, art. 258 (S. Kor.) (“Article 258 (Designation of Date for Trial) (1) The presiding judge shall designate the date for trial preparation proceedings immediately, except for the cases where an adjudication is given without trial pursuant to Article 257 (1) and (2). However, this shall not apply where there is no need to bring a case to the trial preparation proceedings. (2) The presiding judge shall, where the trial preparation proceedings are completed, designate the date for trial and notify the date to the parties immediately.”). This translation is based on official English translation of Korean Civil Procedure Act conducted by Korea Legislation Research Institute which is a legal research institute funded by Korean government (the translated version is reachable at http://elaw.klri.re.kr/kor_service/lawTotalSearch.do). However, the author of this dissertation changed the translation when it seems to incorrect or when the translation used wrong terms. Hereinafter, quoted English translations of Korean Civil Procedure Act are what the author translated based on the official translation by Korea Legislation Research Institute.

³⁸³ Professor Si-Yun Lee, well-known author of Korean civil procedure textbook, changed the title of his textbook from ‘Civil Procedure’ to ‘New Civil Procedure’ commemorating this historic change by 2002 amendment.

³⁸⁴ WOO-YOUNG RHEE, MIGUK YŎNBANG MINSA JŎLCH’A (I) [U.S. FEDERAL CIVIL PROCEDURE I] 18 (2007).

non-concentrated trial as problems of current trial preparation process.³⁸⁵

Reflecting these opinions, Korean Supreme Court led the 2008 amendment of the code in order to convert the mandatory trial preparation process to permissive one.³⁸⁶ According to this amended Article 258, judges may, in principle, schedule trial without trial preparation proceeding; and having trial preparation proceeding became exceptional. Likewise, this change allowed judges in the trial court, upon receiving an answer from the defendant, to skip trial preparation process when it seems to be unnecessary. Equipped with such discretion to select trial preparation proceeding, judges may refer the case to trial preparation process or skip the process. Because of this change, use of trial preparation process became exceptional; and it is recommended to use the process only when assigned cases are too complicated or require knowledge of experts. So, Korean civil procedure now has two kinds of proceedings: one is closer to trial in civil law tradition; and the other is a trial followed by pretrial stage making it closer to its counterpart in common law tradition.

4.1.2 Overview of disposition without trial

Following table illustrates types of disposition without trial in current Korean civil procedure and number (ratio) of cases terminated by each type of disposition without trial. Put it more precisely, settlement and mediation are not disposition without trial which this study examines, however, these are included in the table in order to show diverse ways of disposing cases.

³⁸⁵ RHEE, *Supra* note 384, at 18.

³⁸⁶ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 9171, Dec. 26, 2008, art. 258 (S. Kor.) (“Article 258 (Designation of Date for Trial) (1) The presiding judge shall designate the date for trial immediately, except for the cases where an adjudication is given without trial pursuant to Article 257 (1) and (2). However, this shall not apply where there is need to bring a case to the trial preparation proceedings. (2) The presiding judge shall, where the trial preparation proceedings are completed, designate the date for trial immediately”).

Table 4-1 Korean District Courts – Civil Cases Terminated

Year	Total Cases	Dismissal of Complaint	Dismissal of Cases	Voluntary Dismissal	Final judgments	Decision recommending performance	Settlement	Mediation
1980	111,730 (100%)	N/A ³⁸⁷	865 (0.8%)	27,021 (24.2%)	62,024 (55.5%)	N/A	15,176 (13.6%)	N/A ³⁸⁸
1985	291,506 (100%)	N/A	3,561 (1.2%)	52,235 (17.9%)	203,965 (70.0%)	N/A	15,331 (5.3%)	N/A
1990	266,237 (100%)	N/A	1,665 (0.6%)	58,179 (21.9%)	175,183 (65.8%)	N/A	10,439 (3.9%)	N/A
1995	471,202 (100%)	31,817 (6.8%)	2,000 (0.4%)	86,014 (18.3%)	310,370 (65.9%)	N/A	13,712 (2.9%)	17,948 (3.8%)
2000	719,322 (100%)	34,514 (4.8%)	1,556 (0.2%)	99,392 (13.8%)	521,276 (72.5%)	N/A	12,973 (1.8%)	40,695 (5.7%)
2001	792,829 (100%)	44,439 (5.6%)	1,219 (0.2%)	104,584 (13.2%)	398,534 (50.2%)	184,449 (23.3%)	6,412 (0.8%)	44,375 (5.6%)
2002	969,355 (100%)	50,486 (5.2%)	1,100 (0.1%)	105,342 (10.9%)	443,486 (45.8%)	306,573 (31.6%)	6,583 (0.7%)	45,183 (4.7%)
2003	1,141,608 (100%)	42,036 (3.7%)	1,138 (0.1%)	111,908 (9.8%)	572,205 (50.1%)	335,508 (29.4%)	18,654 (1.6%)	43,089 (3.8%)
2004	1,170,534 (100%)	29,576 (2.5%)	1,324 (0.1%)	99,609 (8.5%)	609,751 (52.1%)	346,863 (29.6%)	21,655 (1.9%)	47,956 (4.1%)
2005	1,136,740 (100%)	20,494 (1.8%)	1,150 (0.1%)	107,793 (9.5%)	639,699 (56.3%)	284,471 (25.0%)	22,145 (1.9%)	48,557 (4.3%)
2006	1,203,174 (100%)	9,898 (0.8%)	1,406 (0.1%)	107,358 (8.9%)	743,590 (61.8%)	265,831 (22.1%)	20,761 (1.7%)	41,490 (3.4%)
2007	1,222,270 (100%)	12,320 (1.0%)	1,653 (0.1%)	98,982 (8.1%)	766,825 (62.8%)	253,450 (20.7%)	27,367 (2.2%)	46,894 (3.8%)
2008	1,284,430 (100%)	9,986 (0.8%)	1,835 (0.1%)	101,788 (7.9%)	848,799 (66.1%)	223,773 (17.4%)	31,124 (2.4%)	51,958 (4.0%)
2009	1,102,464 (100%)	13,502 (1.2%)	2,098 (0.2%)	109,598 (9.9%)	676,640 (61.4%)	198,598 (18.0%)	32,781 (3.2%)	52,146 (4.7%)
2010	989,868 (100%)	13,121 (1.3%)	2,431 (0.2%)	109,449 (11.1%)	619,383 (62.5%)	138,270 (14.0%)	36,191 (3.7%)	54,081 (5.5%)
2011	967,988 (100%)	12,978 (1.3%)	2,555 (0.3%)	110,866 (11.5%)	625,517 (64.6%)	111,415 (11.5%)	34,782 (3.6%)	52,616 (5.5%)
2012	1,020,187 (100%)	17,309 (1.7%)	2,746 (0.2%)	126,512 (12.4%)	649,576 (63.7%)	110,547 (10.8%)	36,972 (3.6%)	54,640 (5.5%)

Source: THE OFFICE OF JUDICIAL ADMINISTRATION, SAPÖP YÖNGAM [THE YEARBOOK OF KOREAN JUDICIARY] (1980-2011)

Reviewing this table provides early observations of how civil cases are disposed in Korean court system. First, ratios of dismissals including dismissal of complaints and

³⁸⁷ The number of dismissal of complaint was not collected until the year of 1991.

³⁸⁸ The number of cases terminated by mediation was not collected until the year of 1995.

dismissal of cases are very low. The ratio of cases disposed by dismissal of complaint has been decreased and is currently less than two per cent. The ratio for dismissal of cases has been even lower. Compared to these involuntary dismissals, the ratio for voluntary dismissal is higher, more than ten per cent, in average. Second, the ratio of cases disposed by decision recommending performance, which is a new procedural device since 2001, has been over twenty per cent until 2007 and over ten per cent from 2007 to 2012. Third, the ratio of cases disposed by settlement and mediation has been around five per cent or less. With respect to the perspective of this study, how current Korean disposition without trial is working, these observations provide points to examine further: how involuntary dismissals in Korean civil procedure are working and how these are different from other disposition without trial such as decision recommending performance.

4.2 Dismissal of the complaint

4.2.1 What is pleading standard in Korea?

Under the Civil Procedure Act, plaintiffs are required to specify the parties to the case, their legal representatives, claim, and the grounds the claim.³⁸⁹ These four are mandatory and required items of a complaint.³⁹⁰ Judges can dismiss the complaint if it does not have these mandatory items.³⁹¹ As the Article 254(1) sets forth, the judge shall provide the plaintiff with opportunity to correct and fix the defects in his complaint, that is, wrong or missing statement of the four mandatory items. This procedural safeguard will be discussed in later part of this chapter. It is relatively not difficult to figure out meanings of statements of the parties, their lawyers, and the claim. In order to specify the parties, plaintiff should write down name and address of the parties.³⁹² “Legal representative” means a person who is, by law, allowed to represent other person for the benefit of the person to be represented. “Claims” means what the plaintiff wants from the defendant as a conclusion of the lawsuit if he prevails.³⁹³ “Grounds of the claim” means legal and factual grounds of the claim. Legal

³⁸⁹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 249(1) (S. Kor.) (“Article 249 (Matters to be Entered in a Complaint) (1) In a complaint, the parties and their legal representatives, claim, and grounds of the claim shall be entered”).

³⁹⁰ YOUNG-HWAN CHUNG, MINSASOSONG PŎP [CIVIL PROCEDURE], 370-371 (1st ed. 2009); CHUNG & YOO, *Supra* note 378, at 73; LEE, *Supra* note 68, at 251; Ho, *Supra* note 379, at 85-96; SANG-HYUN SONG & ICK-HWAN PARK, MINSASOSONG PŎP [THE LAW OF CIVIL PROCEDURES IN KOREA], 244-48 (6th ed. 2011); HONG-YUP KIM, MINSASOSONG PŎP [CIVIL PROCEDURE], 85-96 (2nd ed. 2011); KIM, *Supra* note 379, at 56-58.

³⁹¹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1), (2) (S. Kor.) (“Article 254 (Right of Presiding Judge to Examine a Complaint) (1) In case where a complaint is contrary to the provisions of Article 249 (1), the presiding judge shall fix a reasonable period, and order to correct the defects within such fixed period. The same shall also apply to the case where stamps as required under the provisions of Acts are not affixed to the complaint. (2) When the plaintiff has failed to correct the defects within the period, under paragraph (1), the presiding judge shall dismiss the complaint by his order.”).

³⁹² NATIONAL COURT ADMINISTRATION, Pŏpwon Silmu Cheyo Minsa Sosong II [SUMMARY OF COURT PRACTICE: CIVIL PROCEDURE II] 5 (2005).

³⁹³ *Id.* at 12.

grounds are counts of the claim such as tort and non-performance under specific clauses. With respect to factual ground, however, a question may arise when trying to figure out what “facts supporting claims” mean. How specific the facts should be? This question is about pleading standard. It can be said that the question is similar to the question that has been asked by actors of U.S. civil procedure since *Twombly* decision. According to Korean legal scholars, the plaintiff shall state enough facts to distinguish his claim from other claims.³⁹⁴ If so, this standard is similar to the notice pleading standard in the U.S. civil procedure. It is because such requirement aims to notify the defendant of the litigation through requiring the plaintiff to provide enough facts, rather than for screening out cases for not being specific enough. However, the answer to the question of Korean pleading standard is not that clear in that the Enforcement Rules on the Civil Procedure Act may be understood as requiring more detailed matters for a complaint.

The Enforcement Rules on the Civil Procedure Act, revised in 2007, however, seem to require plaintiffs to state specific facts to support his claim, specific opinions about defendants’ defenses, and a list of the evidence he will use at trial on a complaint.³⁹⁵ This revision of the enforcement rule was intended to encourage parties to prepare their cases at an earlier stage of the lawsuits and to exchange the information with each other before trial, in line with trial preparation reform in 2002.³⁹⁶ Considering that this rule requires the plaintiff far more than merely stating facts enough to distinguish the claim with other claims, it may

³⁹⁴ LEE, *Supra* note 68, at 254-56. Si-Yun Lee supports his interpretation by citing FRCP 8(a). He argues that such interpretation can also be supported by the FRCP Rule requiring “short and plain statement.”; CHUNG, *Supra* note 390, at 374-75; CHUNG & YOO, *Supra* note 378, at 75-76; Ho, *Supra* note 379, at 92-96; SONG & PARK, *Supra* note 390, at 247; KIM, *Supra* note 390, at 296; KIM, *Supra* note 379, at 57-58.

³⁹⁵ Minsa sosong kyuch’ik [Enforcement Rules on the Civil Procedure Act], Supreme Court Decree No. 848, Jul. 9, 1983, *amended by* Supreme Court Decree. No. 2396, May. 2, 2012, art. 62 (S. Kor.) (“Article 62 (Matters to be Entered in a Complaint) With respect to the grounds of the claim in a complaint, followings shall be entered. 1. Specific and detailed facts supporting the claim; 2. Specific and detailed statements regarding predicted defenses of the defendant; 3. Evidence for the facts that shall be proved.”)

³⁹⁶ CHUNG & YOO, *Supra* note 378, at 76; LEE, *Supra* note 68, at 255-56; KIM, *Supra* note 390, at 296.

be said that this standard requires the plaintiff to show more than what plausibility standard in *Twombly* requires.

Does this rule conflict with the Civil Procedure Act that requires only enough facts for making notice of the litigation? It is clearly mentioned neither in laws nor in court cases. Legal scholars opined that failure to comply with the requirement by this rule does not cause dismissal of the complaint, because the Enforcement Rule is only a recommendation.³⁹⁷ Si-Yun Lee interprets the rule as a rule only for recommendation without punishment or any disadvantage for not following it.³⁹⁸ This interpretation of the rule as a mere recommendation is disagreeing with the idea that Korean pleading standard is stricter than notice pleading standard. As a practice guide for judges, the “Summary of court practice” explains that, regardless of debate on the issue of how specific facts complaints should have, at least, complaints should have facts specific enough to prevent the parties from confusing identity of cases.³⁹⁹ These scholarly commentaries and judicial practice guide, as black letter laws, may provide information of what courts expect from a complaint to some extent. However, is it same as what judges and lawyers are experiencing in their daily practices?

What is law in action in terms of pleading standard? How is the pleading standard working? In what cases do judges dismiss complaints, and what standards do they use in their daily practice? These are very important questions with respecting planning and evaluating legal reforms; however, reviews of law in books cannot provide answers for the question. Also, court cases and scholarly articles on Korean civil procedure provide only limited, at best, understanding of such part of court practice. That is why this study used

³⁹⁷ LEE, *Supra* note 68, at 255-56 (7th ed. 2013); KIM, *Supra* note 390, at 296. Dong-Yoon Chung and Byung-Hyun Yoo explains that such additional items for a complaint are used in practice and that such complaint with more detailed information functions as trial preparation documents as well (CHUNG & YOO, *Supra* note 378, at 76).

³⁹⁸ LEE, *Supra* note 68, at 255-56.

³⁹⁹ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 18.

interviews of Korean judges and lawyers as data. As this chapter shows below, from the interviews, this study found that Korean judges very rarely dismiss complaints and provide maximum opportunity to correct defects, and that pleading standard in action requires only something written that can be understood, thus applying more lenient standard than notice pleading standard in the U.S.

Most of the judges and lawyers interviewed recalled that there are only two occasions in which a complaint may be dismissed in regular circumstances: lack of a defendant's address and failure to pay filing fees. Dismissal of complaints for other grounds was not what judges and lawyers usually have experience and heard about. These answers implicate that Korean judges rarely dismiss complaints, because most of plaintiffs are likely to fill in defendants' addresses correctly and pay the filing fee, in order to proceed. It also shows that judges are not willing to dismiss complaints unless defects of the complaint are not curable through order to correct, such as, not being able to find defendant's address or not paying filing fee, which is very rare. The summary of court practice explains in detail what judges should do before dismissing complaints for lack of address and lack of filing fee payment using separate sections.⁴⁰⁰ A statement from one lawyer who served as a judge for more than ten years clearly shows how difficult dismissal of complaints is:

“Dismissal of complaint is very rare. Judges do not dismiss right away even when requirements for complaints are not satisfied. Judges usually give opportunities to correct the complaints by rendering correction order. Dismissal is very rare. It is also not consistent with Korean culture to dismiss right away. For example, a judge orders a plaintiff to make proper correction for his complaint within seven days; and the judge notifies to the plaintiff that his complaint will be dismissed if he does not correct as ordered. However, actually, dismissing the complaints for the plaintiff's failure to follow the order

⁴⁰⁰ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 44-45 & 72-73.

within the seven days is not consistent with Korean culture. Plaintiffs will resist very strongly. So, judges feel burdensome. In this reason, judges try to provide plaintiffs with as much opportunity as possible. That is why dismissal of complaint is so rare. Because dismissal of complaint is so rare, it would be difficult to say when complaints are usually dismissed. There are few cases in which complaints are dismissed for not paying filing fee, and for not obeying orders to correct the statement of address.”⁴⁰¹

I asked to lawyers and judges whether they witnessed complaints that were dismissed for lack of sufficient statements of claims or factual grounds, in order to figure out what pleading standards judges are using. Most legal professions answered, “Mostly not.” Although judges still seem to be open to the possibility of dismissing complaints for the lack of statements of claims or factual grounds, the possibility of such dismissal seemed to be very limited: when judges do not understand what the party wants to say or when the parties are asking for something legally impossible. Following statements from judges show how rarely complaints are dismissed for lack of sufficient factual statements:

“There are very few cases where it is almost impossible to proceed with litigation based on statement of claims or state of facts supporting claims. Most of such occasions are when *pro se* litigants drafted complaints by themselves. These complaints are too rough and it is almost impossible to understand what the plaintiffs want to request or argue. In such cases, I order the plaintiff to correct complaint; and dismiss the complaint if the plaintiff does not do so.”⁴⁰²

“Judges dismiss complaints when statements of claim require what is impossible to execute or what are too ambiguous. A statement such as “I want the defendant to pay damages occurred during the period I could not do business” instead describing specific amount of claim and a statement such as

⁴⁰¹ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

⁴⁰² Interview with Judge No.2, in Seoul, Korea. (Apr. 24, 2013).

“I want the defendant to love me” when requesting injunction are examples of such erroneous statements of claim. There is almost no occasion in which complaint is dismissed for being not specific enough in terms of factual grounds for the claim. Mostly, when factual grounds in the complaints seem to be not specific enough, the plaintiffs would lose on the merit for lack of legal grounds.”⁴⁰³

“Judges are supposed to dismiss complaints when statements of factual ground for claim are lacking; however, I personally have never done it. If the plaintiff submitted anything, then I usually explain factual grounds I understand from the statement on the complaint to the plaintiff and make sure such understanding is correct. When the statement is extremely vague, through clarification, I let the plaintiff know what parts are vague, thus he should make those parts clearer. In this way, I let the plaintiff argue more clearly. Then I decide on the merits.”⁴⁰⁴

These judges’ answers indicate that they hardly dismiss complaints for insufficient statements of claim or factual grounds for claims. So, I reminded these interviewees of the Enforcement Rules on the Civil Procedure Act Article 62 requiring a complaint to have specific facts supporting facts, statements against the defendant’s likely argument, and a list of evidence; and asked how this enforcement rule works in terms of dismissing complaints. These judges answered that they do not dismiss complaints even if a complaint lacks these items, because there is no clause allowing dismissal for that reason. Such answers also confirmed that the provision of the Enforcement Rules works only as a guideline for judges; and that Korean pleading standard is not strict as the plausibility pleading standard of the U.S. civil procedure.

Also, I could observe that judges, in trial sessions, tried to correct and clarify the parties’ statements of claim and statements of factual grounds for the claims by reading

⁴⁰³ Interview with Judge No.5, in Suwon, Korea. (Apr. 25, 2013).

⁴⁰⁴ Interview with Judge No.6, in Uijeongbu, Korea. (Apr. 29, 2013).

through documents the parties submitted and asking questions for clarification.⁴⁰⁵ In other trial session, the judge mentioned that he cannot understand the plaintiff's statement of claim; and recommended the plaintiff who was a *pro se* litigant to contact legal aid (“*Sosong Kucho*”; 소송구조) office and get legal services for correcting the complaint.⁴⁰⁶

Rather, from these statements and observations, I could find that Korean pleading standard in action is far from the plausibility standard of U.S. civil procedure. It was not even close to the notice pleading standard, because court practices require very low thresholds for complaints. Considering judges' duty to order to correct complaints,⁴⁰⁷ the pleading standard in action is requiring only “something readable or understandable that can be more specific through corrections and clarifications.” This pleading standard requiring even lower threshold than notice pleading standard does is similar to what is observed by Charles Clark. Explaining about the notice pleading, Clark viewed the standard as something in the middle of “liberal” pleading standard in Civil law countries and “stricter” pleading standard in common law countries.⁴⁰⁸ Korean pleading standard in action might be classified as this “liberal” pleading standard which is less strict than notice pleading standard. Because of this low threshold, for Korean lawyers, it is “shameful,” “unimaginable,” or even “a malpractice” if their clients' complaints are dismissed. Following comments from judges and lawyers clearly showed how low the pleading threshold is:

⁴⁰⁵ Field notes on court hearing observation, in Seoul, Korea. (Apr. 3, 2013).

⁴⁰⁶ Field notes on court hearing observation, in Seoul, Korea. (Apr. 11, 2013).

⁴⁰⁷ Minsa sosong pōp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1) (S. Kor.) (“Article 254 (Right of Presiding Judge to Examine a Complaint) (1) In case where a complaint is contrary to the provisions of Article 249 (1), the presiding judge shall fix a reasonable period, and order to correct the defects within such fixed period. The same shall also apply to the case where stamps as required under the provisions of Acts are not affixed to the complaint.”).

⁴⁰⁸ Clark, *Supra* note 266, at 542 (“We are therefore in a middle position between the common and the civil law. We still expect something of pleading but are more disposed to realize that there are difficulties in the way of complete achievement of its ends”).

“As far as I know, courts accept all the complaints as long as it has proof of filing fee payment. Even when a complaint is written in hand writing and looks weird, courts first receive the complaint and make the plaintiff correct later. So, judges hardly dismiss complaints for insufficient statement of factual grounds. The reason why courts accept complaints as much as possible is that complaints can be fixed later, at least, as long as statement of claim can be confirmed. On the contrary, not paying filing fee is not something courts can correct. Compared to such error impossible to correct, insufficient contents are something judges can handle with, because judges can fix the problem by letting plaintiffs make the contents clearer, through clarification. In this way, judges try to provide maximum level of opportunity for plaintiffs to have adjudication.”⁴⁰⁹

“In my opinion, it can be said that there is no dismissal of complaint at all. Only complaints written by *pro se* litigants are dismissed. Even such complaints are rarely dismissed, because judges make the *pro se* litigants to correct “this and that” through order to correct. Judges review the cases after making rough format of case using such orders, because that would be more convenient for judges. In Korea, there is no concept of cutting off cases in advance of having trial. Using every possible tool including persuading litigants, judges do their best for guaranteeing litigants’ opportunity to be heard.”⁴¹⁰

These statements, especially Lawyer No. 10’s remark that Korean courts do not consider cutting cases before trial, are consistent with Maxeiner’s observation on civil procedure in Civil Law system represented by German civil procedure that pleading is used to prepare the way to the first hearing for decision on the merit, not for intercepting cases,⁴¹¹ in that Korean judges do not regard complaint review as a procedural phase in which

⁴⁰⁹ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

⁴¹⁰ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

⁴¹¹ Maxeiner, *Supra* note 15, at 1280 (“In Germany pleadings help direct proceedings to decisions on the merits. In Germany pleadings help bound proceedings from going off into the immaterial. The key word is *help*. Pleading are part of the overall process of applying law to fact. They begin that process; but they do not end it. They do not choose law; they do not define issues. What pleadings do is prepare the way for the first

insufficient complaints are cut off. Instead, Korean judges are willing to provide maximum level of opportunities for plaintiffs to correct their complaints and proceed further.

4.2.2 Order to correct complaints as a procedural safeguard

Under the Article 254 of the Civil Procedure Act, judges should provide plaintiffs with opportunities to correct flaws and deficits in their complaint.⁴¹² Under the article 254(1), it is a judge's duty to allow certain amount of time for a plaintiff to correct his defects of his complaint if the judge finds any. The judge shall first "order" to correct the complaint before dismissing the complaint for the defects. Such order is called as "order to correct complaint ("*Sochang pochöng myöngryöng*"; 소장보정명령)." The judge may dismiss the complaint if the plaintiff does not follow the order, as the Article 354(2) sets forth.

What is the process for reviewing complaints before ordering corrections or dismissing complaints? Complaint review process has several steps. These steps show how many layers of procedural safeguard are there in order to fix the flaws in a complaint. As the first step, when the plaintiff submits a complaint, then a clerk of the court in charge of receipt first reviews the complaint to find whether it contains mandatory items.⁴¹³ This clerk, however, does not have a final authority to conclude legality of complaint, because only

hearing, the day in court that every German litigants receives").

⁴¹² Minsa sosong pöp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1), (2) (S. Kor.) ("Article 254 (Right of Presiding Judge to Examine a Complaint) (1) In case where a complaint is contrary to the provisions of Article 249 (1), the presiding judge shall fix a reasonable period, and order to correct the defects within such fixed period. The same shall also apply to the case where stamps as required under the provisions of Acts are not affixed to the complaint. (2) When the plaintiff has failed to correct the defects within the period, under paragraph (1), the presiding judge shall dismiss the complaint by his order.")(underlines added by author).

⁴¹³ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 30.

judges have such authority.⁴¹⁴ When finding flaws on the complaint, this clerk cannot refuse to accept the complaint⁴¹⁵, but can recommend the plaintiff to correct the flaws.⁴¹⁶ Second, after cases are assigned to specific judges, a clerk assigned to a specific judge(s), who is called as ‘participating clerk,’ reviews complaints that a clerk in charge of receipt already reviewed.⁴¹⁷ Similar to a clerk in charge of receipt, this participating clerk can also recommend corrections.⁴¹⁸ As a third step, judges will be reported about flaws on the complaints when plaintiffs do not correct such flaws as recommended by clerks, or when filing fees are not paid.⁴¹⁹ Then judges should review such complaints and immediately order corrections.⁴²⁰ Because there is no time limit for dismissal of the complaint, the court can order a correction of the complaint even after the beginning of the trial if it finds flaws in the complaint.⁴²¹ Order to correct complaint should manifest items to be corrected.⁴²² In practice, usually, five to seven days are allowed as periods for correction.⁴²³ If an order to correct complaint lack such period for correction, the order cannot be valid order.⁴²⁴ This period for correction is not a fixed period, thus plaintiffs can request for extension.⁴²⁵ The

⁴¹⁴ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 30.

⁴¹⁵ Minsa sosong kyuch’ik [Enforcement Rules on the Civil Procedure Act], Supreme Court Decree No. 848, Jul. 9, 1983, *amended by* Supreme Court Decree. No. 2396, May. 2, 2012, art. 5(1) (S. Kor.) (“Article 5 (Receipt of litigation documents and recommendation to correct litigation documents) (1) Receipt of litigation documents submitted by the parties to a litigation or other person who has interest in the litigation shall not be denied without proper causes”).

⁴¹⁶ Minsa sosong kyuch’ik [Enforcement Rules on the Civil Procedure Act], Supreme Court Decree No. 848, Jul. 9, 1983, *amended by* Supreme Court Decree. No. 2396, May. 2, 2012, art. 5(3) (S. Kor.) (“Article 5 (Receipt of litigation documents and recommendation to correct litigation documents) (3) Court clerks may indicate portion of the received litigation documents to be corrected and recommend to correct the portion”).

⁴¹⁷ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 32.

⁴¹⁸ Minsa sosong kyuch’ik [Enforcement Rules on the Civil Procedure Act], Supreme Court Decree No. 848, Jul. 9, 1983, *amended by* Supreme Court Decree. No. 2396, May. 2, 2012, art. 5(3) (S. Kor.).

⁴¹⁹ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 38.

⁴²⁰ Minsa sosong pōp [Civil Procedure Act], Act No. 553, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1) (S. Kor.).

⁴²¹ Supreme Court [S. Ct.], 67Da1744&1746 (consol.), Dec. 26, 1969 (S. Kor.).

⁴²² NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 40.

⁴²³ *Id.*

⁴²⁴ Supreme Court [S. Ct.], 80Ma160, Jun. 12, 1980 (S. Kor.).

⁴²⁵ Supreme Court [S. Ct.], 78Ma233, Sept. 5, 1978 (S. Kor.).

presiding judge has authority to permit such request for extension under his discretion.⁴²⁶ If the plaintiffs do not correct within designated correction periods as ordered, judges should order dismissal of the complaints.⁴²⁷ However, even after lapse of such correction periods, the plaintiffs can make corrections, and, then, judges cannot order dismissal.⁴²⁸ Likewise, submitted complaints go through several layers of review process by several actors, and plaintiffs receive multiple opportunities to correct their complaints following recommendations or directions of clerks or judges.

As stated above, based on the law, the order to correct seems to have multiple layers of protection of the plaintiff's access to further stage of the litigation without being dismissed. How is this procedural safeguard actually working? Because it is court's duty to render an order for correction of complaint, judges are supposed to let the plaintiff know the flaws he found and correct those.⁴²⁹ Judges are supposed to do so. Is that what really happening in a daily practice? Because there is no article or scholarly comments on that point so far, this study analyzed based on interviews with judges and lawyers.

Data from interviews indicated that order to correct complaints is being used even more actively than what law requires as following interview quotes show. According to the data, judges are giving more opportunities to correct complaints in terms of time period and methods of communication although they do not have to do so. Statements from following judges provide more specific contexts of such active use of the order:

“Judges can dismiss complaints if plaintiffs leave a mandatory item totally unfilled. However, if they write down something, judges are willing to induce

⁴²⁶ Supreme Court [S. Ct.], 69Ma500, Dec. 19, 1969 (S. Kor.).

⁴²⁷ Minsa sosong pŏp [Civil Procedure Act], Act No. 553, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(2) (S. Kor.).

⁴²⁸ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 43.

⁴²⁹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1) (S. Kor.).

the plaintiffs to specify more. As you know, judges are supposed to render order for correction. So, judges allow substantial amount of time for such correction. Frankly speaking, in practice, judges do not dismiss even when the plaintiffs do not correct within the period ordered. For example, when a judge permit a week for correction, but the plaintiff does not do so, then the judge would give another month or two instead of dismissing the complaint. The judge would dismiss only when it becomes manifest that the plaintiff is not willing to correct as ordered. Judges are not willing to dismiss complaints, if that is possible.”⁴³⁰

“With respect to dismissal of complaints, mostly, proof of filing fee or address is in issue. Judges usually order correction of these items. Courts send such orders several times, two to three times. In addition, court clerks make phone calls for notice. Another notice by phone call will be done several times, if the judge is willing to dismiss, before actually rendering dismissal.”⁴³¹

Lawyers also admit that courts are very active in correcting flaws on the complaints.

One lawyer who has ten-year career recalled it as a result of recent change:

“In the past, judges would have dismissed without any notice before the dismissal. However, now, court clerks may notify all. They actively provide opportunity to correct, and frequently contact litigants very kindly. As far as I know, such correction order or notice is being performed very well.”⁴³²

Civil Procedure Act Article 254(1) requires judges to fix certain time period and to let plaintiffs fix flaws on their complaints; and the Article 254(2) allows judges do dismiss complaints when a plaintiff failed to correct the defects “within the period.”⁴³³ According to

⁴³⁰ Interview with Judge No.1, in Seoul, Korea. (Apr. 17, 2013).

⁴³¹ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

⁴³² Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

⁴³³ Minsa sosong pōp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 254(1), (2) (S. Kor.) (“Article 254 (Right of Presiding Judge to Examine a Complaint) (1) In case where a complaint is contrary to the provisions of Article 249 (1), the presiding judge

the Article 254, judges “shall” dismiss the complaint when the plaintiff did not comply with the order to correct complaint. However, as above statements show, Korean judges usually permit additional time periods even after the plaintiff’s failure to follow an initial order to correct. That implicates that Korean judges are using the order to correct more actively than what law requests. It also implicates that Korean judges are providing maximum (at least, more than sufficient) level of protection for plaintiffs in order to avoid dismissal of complaint.

As an additional example of such active protection, there is a Supreme Court case that required judges to make efforts to supplement complaints with errors even before ordering correction of complaints. In a case where the plaintiff’s complaint was dismissed because of failure to state address of defendants, Supreme Court reversed the decision declaring the presiding judge’s obligation to make efforts to find correct address to serve.⁴³⁴ In this case, service to the defendant company’s address was not completed because they moved to another places. Seoul district court then ordered the plaintiff to correct address part of the complaint within five days, and later dismissed the complaint when the plaintiff failed to do so within the period.⁴³⁵ The plaintiff appealed, and Supreme Court declared that the presiding judge should have served again to the address of representatives of the defendant companies when service to the companies were not completed before rendering order to correct.⁴³⁶ The Supreme Court declared presiding judges bear obligation to make efforts to correct the flaws in the complaint by themselves before rendering order to correct complaints. Considering this case, it becomes clear that courts are making a great deal of efforts to proceed with litigation despite of errors in the complaint.

shall fix a reasonable period, and order to correct the defects within such fixed period. The same shall also apply to the case where stamps as required under the provisions of Acts are not affixed to the complaint. (2) When the plaintiff has failed to correct the defects within the period, under paragraph (1), the presiding judge shall dismiss the complaint by his order.”)(*underlines added by author*).

⁴³⁴ Supreme Court [S. Ct.], 97Ma600, May. 19, 1997 (S. Kor.).

⁴³⁵ Seoul District Court [D. Ct.], Ja96La2780, Jan. 31, 1997 (S. Kor.).

⁴³⁶ Supreme Court [S. Ct.], 97Ma600, May. 19, 1997 (S. Kor.).

4.2.3 Court's duty to clarify (Litigants' right for clarification) as procedural safeguard

4.2.3.1 Court's clarification in general

Judges may ask questions to the parties during trial; require the parties to prove specific points of their argument; and give the parties opportunities to deliver their opinions on the points raised by the judge when the arguments or statements of the parties are unclear and improper.⁴³⁷ As of right, judges may ask questions in order to make legal and factual points clearer to him. It is not only a judge's right. Also, the parties to the litigation may ask such clarification, as the Article 136(3) sets forth.⁴³⁸ Utilizing such right, the parties may ask judges to provide opportunities to clarify opposing party's statements. In this aspect, clarification is judge's obligation as well. Thus, court's clarification (“*Pöpwon üi Sökmjöng*”; 법원의 석명권) may be called as a right to clarification (“*Sökmjöng gwön*”; 석명권) or an obligation to clarify (“*Sökmjöng üimu*”; 석명의무)(Hereinafter, “clarification”).

Clarification is understood as an expansion of the parties' participation; and as application of the due process right to be heard to the area of rule application which has been

⁴³⁷ Minsa sosong pöp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 136(1) (S. Kor.) (“Article 136 (Right to Request clarification, Right to Ask Questions, etc.) (1) The presiding judge may, in order to clarify the litigation relations, ask the parties questions, and urge them to testify, on the factual or legal matters.”).

⁴³⁸ Minsa sosong pöp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 136(4) (S. Kor.) (“Article 136 (Right to request clarification, Right to Ask Questions, etc.) (3) Each party may, if deemed necessary, request the presiding judge to ask questions necessary for clarification of the other party.”).

interpreted as the sole power of the court.⁴³⁹ Because clarifying is also an obligation of the court, when clarifying, judges should consider the litigation skills of the parties and their lawyers; and provide adequate helps to the parties who seem to have weaker bargaining power.⁴⁴⁰

However, there are limitations for judges' use of clarification. Such limitations stem from the "principle of adversarial proceedings" ("Pyõnron juũ"; 변론주의). This principle is acknowledged as Korean civil procedure's fundamental principle although there is no specific article in the Civil Procedure Act proclaiming this principle.⁴⁴¹ This principle of adversarial proceedings imposes on litigants responsibilities for collecting facts and evidence and submitting these; and requires judges make decision based solely on the materials collected and submitted by litigants.⁴⁴² As specific sub-principles of the principle of adversarial proceedings, first, judges cannot decide the case based on facts or legal arguments that are not submitted by the parties.⁴⁴³ It means that judges are allowed to make decisions using only facts or arguments presented by the parties to the court, and that they cannot determine based on what they assumes or predicts. Facts that are not argued by the parties are deemed not to exist; and the parties bear disadvantages from such legal treatment.⁴⁴⁴ As the second principle, facts that are not disputed should be basis of decision

⁴³⁹ CHUNG, *Supra* note 390, at 431-32; CHUNG & YOO, *Supra* note 378, at 322; LEE, *Supra* note 68, at 318-19; Ho, *Supra* note 379, at 368-69; SONG & PARK, *Supra* note 390, at 358; KIM, *Supra* note 390, at 393-94.

⁴⁴⁰ CHUNG, *Supra* note 390, at 431-32; CHUNG & YOO, *Supra* note 378, at 322; LEE, *Supra* note 68, at 318-19; Ho, *Supra* note 379, at 368-69; SONG & PARK, *Supra* note 390, at 358; KIM, *Supra* note 390, at 393-94.

⁴⁴¹ CHUNG, *Supra* note 390, at 422; CHUNG & YOO, *Supra* note 378, at 308-09; LEE, *Supra* note 68, at 307; Ho, *Supra* note 379, at 353-54; SONG & PARK, *Supra* note 390, at 348; COURT ADMINISTRATION, *Supra* note 392, at 331.

⁴⁴² CHUNG, *Supra* note 390, at 422; CHUNG & YOO, *Supra* note 378, at 308-09; LEE, *Supra* note 68, at 307; Ho, *Supra* note 379, at 353-54; SONG & PARK, *Supra* note 390, at 348; KIM, *Supra* note 390, at 364; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 331.

⁴⁴³ CHUNG, *Supra* note 390, at 425; CHUNG & YOO, *Supra* note 378, at 310-11; LEE, *Supra* note 68, at 308; Ho, *Supra* note 379, at 356; SONG & PARK, *Supra* note 390, at 351; KIM, *Supra* note 390, at 365; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 331.

⁴⁴⁴ CHUNG, *Supra* note 390, at 425; CHUNG & YOO, *Supra* note 378, at 310-11; LEE, *Supra* note 68, at 309;

without any taking and examining evidence.⁴⁴⁵ Such admission of the party has binding effects; and, to that extent, fact-finding authority of courts is restricted.⁴⁴⁶ Thus, judges have to accept these admitted facts even though he has firm belief that the facts are not true.⁴⁴⁷ Third, evidence for the disputed facts is limited to that requested by the parties; and judges, in principle, cannot examine evidence that is not submitted by the parties by their own initiative.⁴⁴⁸ Such judge-initiated evidence examination is permitted only to supplement lack of evidence.⁴⁴⁹ Likewise, Korean civil procedure is, in theory, to some extent, similar to adversarial system in the U.S. in which the parties, rather than judges, dominate the proceeding, rather than to inquisitorial system.⁴⁵⁰

This principle of adversarial proceedings works as a limitation of the court's clarification.⁴⁵¹ Because of this, setting appropriate scope of clarification that considers the principle of adversarial proceedings is a key issue in clarification practices.⁴⁵² Although court administration seems to allow wide room for individual judges' discretion,⁴⁵³ generally recommended guideline regarding the scope of clarification is as follows. First, clarification is allowed for indicating what part of the petitions or arguments by the parties are not clear,

Ho, *Supra* note 379, at 356-57; SONG & PARK, *Supra* note 390, at 351; KIM, *Supra* note 390, at 366; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 331.

⁴⁴⁵ CHUNG, *Supra* note 390, at 429; CHUNG & YOO, *Supra* note 378, at 319; LEE, *Supra* note 68, at 312; Ho, *Supra* note 379, at 363; SONG & PARK, *Supra* note 390, at 355-56; KIM, *Supra* note 390, at 381; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 332.

⁴⁴⁶ LEE, *Supra* note 68, at 312; Ho, *Supra* note 379, at 363; SONG & PARK, *Supra* note 390, at 356; KIM, *Supra* note 390, at 381; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION *Supra* note 392, at 332.

⁴⁴⁷ Supreme Court [S. Ct.], 82DaKa1528, Feb. 8, 1983 (S. Kor.); NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 332.

⁴⁴⁸ CHUNG, *Supra* note 390, at 429; CHUNG & YOO, *Supra* note 378, at 319; LEE, *Supra* note 68, at 312-13; Ho, *Supra* note 379, at 363; SONG & PARK, *Supra* note 390, at 356; KIM, *Supra* note 390, at 381; KIM, *Supra* note 379, at 127; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 332.

⁴⁴⁹ CHUNG, *Supra* note 390, at 422; CHUNG & YOO, *Supra* note 378, at 319; LEE, *Supra* note 68, at 312-13; Ho, *Supra* note 379, at 364; SONG & PARK, *Supra* note 390, at 356; KIM, *Supra* note 390, at 381; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 332.

⁴⁵⁰ Although it was for German civil procedure, Maxeiner also stressed that the system is not inquisitorial as accepted in the U.S. (Maxeiner, *Supra* note 15, at 1251 ("Contrary to a misconception widely held in the United States, German civil proceedings are **not** inquisitorial").

⁴⁵¹ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 367.

⁴⁵² *Id.* at 368.

⁴⁵³ *Id.* ("In practice, scope of clarification differs according to individual judges' personal value regarding litigation and skills of leading proceedings").

incomplete, or contradictory to other statements of them; for providing opportunity to correct such points; and for urging submission of evidence for facts the parties disputed.⁴⁵⁴ This type of clarification is called as ‘passive clarification.’ Second, it has been discussed whether ‘active clarification’ by which judges recommend the parties to submit new petitions or materials for offense or defense.⁴⁵⁵ Although there is an argument that such active clarification may be allowed in order to find truth, Supreme Court opposed such active clarification declaring that it is a violation of the principle of adversarial proceeding, thus going beyond the limitation of clarification, for judges to recommend the parties to submit facts or other materials for offense or defense that they did not submit.⁴⁵⁶

Likewise, in principle, court’s clarification recommending the parties to submit new facts or evidence that they did not plan to do so is not allowed, because it is an active clarification. How are judges using clarification in daily court practice? Do they follow above principle, thus use only passive clarification only? Or do they sometimes use active clarification? In what situations, do judges use active clarification? These are important questions with respect to figuring out how clarification is working as a procedural safeguard; however, these are topics that have been barely covered by scholarly articles. This is why this study used interview as a way of finding answers to the questions.

I asked those questions to judges and lawyers. The most common answer was “it depends on judges.” Compared to other interview questions, the question of how judges use clarification invited the most diverse answers. Considering that Korean judges’ practices are

⁴⁵⁴ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 368-69.

⁴⁵⁵ *Id.* at 369.

⁴⁵⁶ Supreme Court [S. Ct.], 98Du2768, Mar. 23, 2000 (S. Kor.) (In this case, the plaintiff, a citizen, filed a lawsuit for canceling city planning of the defendant, city of Gun-San. Gwang-Ju High court rendered a decision favoring the plaintiff based on defects of basic examination related to the city planning. However, the Supreme Court reversed the decision because the plaintiff have never argued for the defects of the basic examination. According to the court, using clarification, the High court requested the defendant to submit proof for adequacy of the basic examination; and rendered the judgment for the plaintiff when the defendant did not submit such proof. The Supreme Court ruled it as going beyond limits of clarification while violating the principle of adversarial proceeding); Supreme Court [S. Ct.], 2001Da15576, Oct. 9, 2001 (S. Kor.).

standardized to significant extent and that judges' experience of presiding litigation process can be said to be similar, it was unexpected finding to some extent. However, such diversity is consistent with court administration's practice guide that acknowledges different styles of clarification practice by individual judges according to their "personal value regarding litigation and skills of leading proceedings." Also, there was a significant gap between the answers from judges and those from lawyers, as shown in following paragraphs. Judges mostly acknowledged necessity for active clarification, whether he or she is actually using it or not; however, many lawyers found that such active clarification is violation of the principle of adversarial proceeding, thus inappropriate. It was also unexpected finding, considering that judges and lawyers interviewed provided almost identical perception of court practices in other areas. Such gap between perceptions of two different professional groups might be explained by the fact that judges' clarification is an area of practice in which interests between judges and lawyers could conflict. Following sections explain this further in detail.

4.2.3.1.1 When do judges use clarification?

It is found that there are two types of judges divided by how and when they use clarification: judges who use clarification only to make sure meaning of ambiguous statements and judges who give hints for the party who deserves to prevail on the merit. The first group of judges shared their opinions that a judge should use clarification only to clarify absurd and ambiguous factual statements or arguments of the parties. For them, only passive clarification should be allowed. These judges are precisely complying with limits of the clarification as legal principles require:

"It significantly depends on managing style of each judge. My current

advising judge⁴⁵⁷ takes the principle of adversarial proceeding very seriously. So, he clarifies only when the meaning of certain party's argument is not clear. Even in these occasions, he is very cautious. Because at least one party is a *pro se* litigant in most of such occasions, my advising judge first recommends the *pro se* litigant to have legal advices from legal professionals. Likewise, our three-judge court uses clarification only when the parties cannot organize facts argued by them in legally meaningful statements. We only request them to make clearer statements.⁴⁵⁸

This judge and his three-judge court might be an example of the first type of judges who strictly keep limit of use of clarification. However, more judges belong to the second group. They are struggling between considering realistic needs to clarify and keeping limits of the clarification. As an effort to find rational and practical compromise, these judges try to go further rather than merely making sure what litigants meant by their ambiguous statements. For them, clarification is a tool for helping the parties who deserve to prevail on the merit but lack legal skill or aids. For example, they are eager to clarify when a party who has a very strong case is obviously missing what they have to say. Judges share:

“I use clarification when meaning of arguments by the parties is not clear, or when there is legal or factual issues obviously neglected. There is no problem when clarifying ambiguity; however, it is sometimes difficult to make decision of whether I should let the parties know important points they seem to miss. I hesitate to comment on that because of the principle of adversarial proceeding. Sometimes I thought that I am intervening too much although it is not necessary to do so. However, I am willing to do so as much as possible if the parties do not argue one single point that is enough for them to prevail. These situations happen in litigation by the parties represented by lawyers as well as litigation by *pro se* litigants. I tell them, “There are possible ways, this and that, however, this way has more possibility for you to prevail”. I guess that

⁴⁵⁷ This Judge No.14 is a member judge of a three-judge court, so this judge has a senior judge who advises him.

⁴⁵⁸ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

most of the judges would do so if it is so obvious that certain party should prevail but the party is not arguing so. Judges oftentimes lead litigation while teaching the parties. They cannot help but doing do, because it looks unfair that certain party who obviously deserves to prevail loses the litigation only because of not arguing certain points.”⁴⁵⁹

“I use clarification mostly when a party can prevail if I let him correct statement of claim or facts that supports the claim; and when it is possible for the party to have legal remedy. I consider whether certain party is obviously likely to prevail and whether such clarification is excessive intervention violating the principle of adversarial proceedings.”⁴⁶⁰

“In civil litigation, parties can prevail only when they argue. I clarify when a party should prevail but cannot argue for the case. In such occasions, I consider whether I should wait until the party argues, following the principle of adversarial proceedings, or I should lead them to make certain arguments. This practice differs depending on values of each judge. Some judges teach what to argue, without any hesitation or caution, and other judges only give hints.”⁴⁶¹

I could also observe that judges ask more questions to *pro se* litigants than to the parties represented by lawyers.⁴⁶² When asking questions, the judges used lay people’s terms instead of legalese and tried to explain as patiently and thoroughly possible.⁴⁶³ Based on these statements and observation, it can be inferred that these judges are sometimes using active clarification when it is necessary for helping the party who deserves to prevail on the merit. They give hints to the parties or indicate to them what they are missing although such active clarification is prohibited by court administration and Supreme Court cases. Such clarification can be a violation of the principle of adversarial proceeding. However, for

⁴⁵⁹ Interview with Judge No.1, in Seoul, Korea. (Apr. 17, 2013).

⁴⁶⁰ Interview with Judge No.13, in Bucheon, Korea. (May. 3, 2013).

⁴⁶¹ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

⁴⁶² Field notes on court hearing observation, in Seoul, Korea. (Apr. 10, 2013).

⁴⁶³ *Id.*

these judges, it is a violation for the benefits of the parties who have rights to prevail on the merits.

As the judges recall, in many cases, *pro se* litigants cannot speak for themselves well enough although they seem to have strong cases. Most of the judges who admit that they use active clarification acknowledged that they use clarification more actively and more often for the benefits of *pro se* litigants. Oftentimes, judges acknowledge that it is very difficult for them to understand documents drafted by *pro se* litigants. Also, *pro se* litigants oftentimes do not have legal knowledge enough to conduct litigation. So they often omit important legal arguments or evidences although they have very strong cases. Why are the judges willing to help *pro se* litigants who could have hired lawyers but decided not to do so? Many judges opined that it seems to be unfair that *pro se* litigants have disadvantageous results only because of lack of legal knowledge.

“In principle, judges are supposed to clarify meaning of the facts that are important for satisfying legal requirements. In case where parties are represented by lawyers, judges let lawyers handle everything. However, in litigation by *pro se* litigants, I give some hints when there seems to be disadvantages only because they do not know law. For example, I ask, “Are you saying that you do not have to pay back because it has been too long?” in occasions where statute of limitation is obviously lapsed but the debtor is not arguing it.”⁴⁶⁴

“I use clarification when certain party is using vague lay people’s terms because they do not know law or legal terms, although they can make valid legal statements in the case. Then I recommend them to have legal counseling or to learn about legal terms from paralegals.”⁴⁶⁵

⁴⁶⁴ Interview with Judge No.9, in Seoul, Korea. (Apr. 30, 2013).

⁴⁶⁵ Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

To the contrary, for lawyers, it is crossing the lines that judges use clarification in order to help one party or to provide hints, because that is a violation of the principle of adversarial proceedings. Many lawyers said that they experienced and witnessed that many judges ignored this principle when clarifying:

“Whenever I conduct civil litigation I frequently sense that judges do not follow the principle of adversarial proceeding. It is especially so when opposing party is a *pro se* litigant.”⁴⁶⁶

“As lawyers, I am very grateful if judges use clarifications appropriately. However, sometimes, some judges intervene too much through clarification, to the extent that they violate the principle of adversarial proceeding. In fact, litigation ability is important, isn't it? Of course there is gap in terms of litigating capacity between plaintiffs and defendants. Even lawyers have different levels of ability with respect to conducting litigation. Litigants who do not appoint lawyer decide to bear risk thereof. However, judges intervene too much in such cases. Some judges teach every single point. They correct when the *pro se* litigants are arguing in wrong direction. They are just too kind. It might be okay to say that you had better correct this part and that part. However, some judges even suggest court cases that might support the parties' cases. Is it different from what private lawyer does for their clients? In my opinion, it is obvious violation of the principle of adversarial proceeding. Considering litigation reality in Korea, judges often use such active clarification because they are too smart and want to do all. They can see everything. In Korea, the principle of adversarial proceeding is a fundamental principle of civil litigation. However, in real world, inquisitorialism is significantly strong. That could be explained by cultural difference. Korean litigation is still “litigation by local governor” because of strong culture for that continued for so long. Reality of civil litigation is so different from what textbook says. I truly hope judges restrain themselves from relying on such active clarification.”⁴⁶⁷

⁴⁶⁶ Interview with Lawyer No.5, in Seoul, Korea. (Apr. 19, 2013).

⁴⁶⁷ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

“It totally depends on styles of individual judges. It also depends on whether the litigation is conducted by lawyers or by *pro se* litigants. Usually judges use clarification more actively in the litigations by *pro se* litigants. Some judges let the parties handle everything; and other judges ask many questions. Sometimes, unexpected court decisions are rendered. In these “surprising” cases, decisions are based on the issues that were never disputed during trial. However, such issues were regarded as important by the presiding judge. This is violation of the principle of adversarial proceeding. In such cases, the parties did not argue, or raised the issue even after the trial. Then, judges should have re-opened the trial and checked precisely using clarification. But they did not do so. Instead, they determined by assumption. It is obviously lack of enough hearing, which can be a reason for appeal. Parties discover the issues only after receiving the losing court decision. They would have explained and argued about the issue if trial had re-opened and the issue had been disputed in that proceeding. Such decision is weird. Although not many judges use clarification to the extent that violating principle of adversarial proceeding, it is very irritating when judges clarify for the benefits of opposing party.”⁴⁶⁸

As these statements show, lawyers have a great deal of concerns about judges’ use of active clarification. Other research result also supports that lawyers concern about too frequent use of active clarification. “Civil Litigation Report 2013” is a research by National Court Administration based on interviews with judges and lawyers; and it is designed to report about issues of district court practice that are to be discussed and improved.⁴⁶⁹ In the report, one lawyer pointed that “act of guardianship by court” using clarification only increases number of litigations filed by *pro se* litigants, thus adding work load of judges.⁴⁷⁰ Such evaluation show how seriously lawyers are perceiving problems of active clarification.

⁴⁶⁸ Interview with Lawyer No.7, in Seoul, Korea. (Apr. 22, 2013).

⁴⁶⁹ NATIONAL COURT ADMINISTRATION, MINSCHAEPAN REPORT 2013 [CIVIL LITIGATION REPORT 2013] (2013).

⁴⁷⁰ *Id.* at 177.

Do judges regard active clarification as problem? Are they ignoring the principle of adversarial proceedings as some lawyers observed? At least, most of the judges were acknowledging that the principle is what they primarily consider when clarifying. However, many judges confessed difficulties of balancing the principle and benefits of more active clarifications. Also, according to the same report, active use of clarification is even recommended as a tool for enhancing concentrated trial.⁴⁷¹ Regarding that issue, judges suggested more active use of clarification from very early stage of litigation would enhance early collection of evidence.⁴⁷² It might be inferred, from such suggestion, that court administration and judges do not regard active clarification as serious problem as lawyers do.

4.2.3.1.2 Is court's clarification helpful?

So far, this study examined how actively judges are using clarification. In order to figure out how judge's clarification works as a procedural safeguard, it would be necessary to check whether it actually helps the parties in terms of their access to justice. I asked questions of how helpful judges' clarifications are; and most of the lawyers admitted its usefulness. With respect of reasons of such usefulness, lawyers acknowledged that they could get sense of what the judge was caring for on their cases; and that judge's points of interest is so important in terms of deciding directions of their offenses and defenses. However, when the judges' clarifications provided hints for the opposing party, then the clarifications could be critical attacks against them as well. That is why the clarification is recognized as a "double-edged sword" for lawyers.

"It helps. It shows what is firm belief of the judges, and guides directions of

⁴⁷¹ NATIONAL COURT ADMINISTRATION *Supra* note 469, at 35.

⁴⁷² *Id.* at 35-36 (It is somewhat ironical that the same report has recommendation of and critics against judges' use of active clarification).

trial that I should focus on later. It is because asking about certain issues several times usually indicates that the judge is interested in that point. So, I should do something regarding that issue or facts.”⁴⁷³

“Useful. It gives hints for what the court is considering. In some cases, I can even predict likely results to some extent based on a judge’s questions. Because judges lead trials based on how they will write decisions, clarifications give hints of the specific part of the case for which this judge is trying to make decision. As the timing is closer to the end of trial, it becomes easier to predict possible results from the judge’s clarification.”⁴⁷⁴

“It helps a lot, although opposing parties hate that. However, for lawyers who are familiar with the Korean court practice might not feel uncomfortable for such practice, because they already have known about it. Clarification is helpful, because it reveals how judges think about the specific case. The parties and their lawyers care so much of their judges’ thoughts. So, they are extremely interested in on what points their judges try to clarify.”⁴⁷⁵

As these statements show, for the parties, judge’s clarification is an opportunity to have understanding or prediction of how the judge thinks, evaluates, and even concludes the specific case. Such thoughts of judge are called as ‘a firm belief (“*Simjŭng*”; 심증) of judge.’ This firm belief means a judge’s understanding and preliminary conclusion of the case without relying on substantive evidence (which is called as “*Muljŭng*”; 물증). Such firm belief is formed based not on evidence but on judge’s sense or impression about the case. Although it is only belief of judge which is not connected with substantial evidence, as lawyers acknowledge, it is extremely important. It is because trier of fact and decision

⁴⁷³ Interview with Lawyer No.5, in Seoul, Korea. (Apr. 19, 2013).

⁴⁷⁴ Interview with Lawyer No.8, in Seoul, Korea. (Apr. 23, 2013).

⁴⁷⁵ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

maker is a judge in Korean civil procedure. Because of this importance of judge's firm belief, National Court Administration suggested judges to openly reveal and exchange their thoughts or impressions of the case with the parties.⁴⁷⁶ Such recommended practice is called as 'exchange of judge's firm belief.'⁴⁷⁷ It is said that such exchange is for the benefits of the parties.⁴⁷⁸ By the exchange, they can openly learn about how their judge is viewing and evaluating their case so far, thus can modify or supplement their approach.⁴⁷⁹ Likewise, importance of judge's clarification, from the perspective of the parties and their lawyers, is obvious.

4.2.3.1.4 Court's clarification also for efficiency

As stated above, judges' clarification is for checking and correcting what the parties meant by what they argued and submitted. That is what law requires. However, this study also found that some judges, with clarification, do more than helping *pro se* litigants and giving clues to the party who deserves to prevail. In addition to these, some judges use clarifications in order to get information unspoken and to find answers to their own questions. In order to enhance efficiency of the proceeding, these judges do not wait until the parties raise certain information of the case. They just initiate exploring without the parties' request. According to lawyers' experiences in a court room, judges re-organize cases in a format which helps their understanding of the cases and decision writings. Clarification is used for collecting missing puzzles of the picture drawn by the judges.

“Sometimes judges correct what is vague by themselves. It is because they

⁴⁷⁶ NATIONAL COURT ADMINISTRATION, *Supra* note 469, at 114.

⁴⁷⁷ *Id.* (It is also recommended in order to make litigation proceeding more open to citizens) .

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

are too smart. In Korea, the smartest persons become judges. So, they can re-organize ambiguous facts as they understand by asking, “You meant this, right?” even when the parties cannot understand that. They correct also by using clarification asking, “Plaintiff, defendant, your argument means this and that, right?” By doing so, judges organize cases in order to make it easier for them to write decisions.”⁴⁸⁰

“It depends on judges. But, it seems that they actively ask about specific parts of our arguments that they need to determine for writing decisions. The most difficult and important task for judges is writing decisions; and without such clarification, writing decisions would be difficult. Korean courts seem to use clarification very actively.”⁴⁸¹

However, one should be cautious before concluding that Korean judges are using clarification to enhance efficiency. It is because, for judges especially, asking questions on the unspoken information and issues could be a necessary step for solving the dispute. It could also be an effort to have better understandings of the cases as one judge explained:

“I also use clarification when I do not fully understand the case; and when I cannot draw whole picture of the case which is about facts, evidences, and places to which certain evidence fits. Of course, the party who argued specific facts provides with evidence for the facts; and the case would be dismissed if the party fails to prove it. However, sometimes, whole picture of the dispute becomes important. When I cannot understand matters for the whole picture or frames of the case, such as, reasons why this case became a dispute, why these became issues, and where evidence to be reviewed is fitting in, then I ask questions like a detective, if it is necessary for better resolution of the dispute.”⁴⁸²

⁴⁸⁰ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

⁴⁸¹ Interview with Lawyer No.8, in Seoul, Korea. (Apr. 23, 2013).

⁴⁸² Interview with Judge No.2, in Seoul, Korea. (Apr. 24, 2013).

4.2.3.2 Courts' clarification when reviewing complaints

How is courts' clarification used when deciding dismissal of complaints? Korean courts mandate judges to use clarification when the missing or deficit item on the complaint is one of the items to be investigated on judges' own initiative (“*Chikkwŏn chosa sahang*”; 직권조사사항).⁴⁸³ Scope of such obligation is broad. Even in cases where it was clear that statement of claim itself seemed not to be acceptable as legal claim and where the statement of claim was clearly inconsistent with factual grounds for the claim, Korean Supreme Court mandated judges to use clarification in order to ask the plaintiff about what were real purposes of that litigation and to correct the statement of claim.⁴⁸⁴

“There is almost no dismissal of complaint for stating not specific enough statement of factual grounds. Judges usually order to correct, or ask questions to clarify through clarification after holding a hearing. Dismissal instead of doing these is very rare.”⁴⁸⁵

“Do I dismiss for statement of factual grounds which is not specific enough? I have never seen such dismissal for ten years. Judges use clarification before

⁴⁸³ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 13 (Judges shall investigate certain matters set by law on their initiative. For other matters, they do not have to do so).

⁴⁸⁴ Supreme Court [S. Ct.], 92Da32258, Nov. 10, 1992 (S. Kor.) (In this case, the plaintiff purchased and possessed a building that had not been officially registered, without any permit. The plaintiff files a lawsuit seeking declaratory judgments making sure that he is possessing the building in dispute based on his appropriate legal ownership. Seoul district court denied the plaintiff's claim based on the theory that ownership of a non-registered building belongs to a person who initially built the building and that the plaintiff who purchased the building from the person has only *de facto* status for disposing the building, not ownership. So, the district court ruled that the plaintiff could not argue for right based on ownership. Reversing this decision, the Supreme Court held that the plaintiff had *quasi* ownership based on his *de facto* status for using, profiting, and disposing the building although he did not have legal ownership; and that the district court should have made corrected, through clarification, the plaintiff's arguments based on legal ownership in his claim portion of complaint in order to change it to arguments based on the *de facto* status for using, profiting, and disposing the building. The Supreme Court reasoned that dismissing the plaintiff's case only for wrong expression of his right is not adequate; and that court should clarify and correct such wrong expression regarding legal matters by the parties); Supreme Court [S. Ct.], 99Du2017, Nov. 13, 2001 (S. Kor.).

⁴⁸⁵ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

dismissing complaints; and say that statement of factual grounds should be corrected, supplemented, or reorganized. In one of recent case of mine, the opposing party has not reorganized statement of factual grounds although the judge had ordered to do so one year ago. The grounds for the party's claim are very vague. I kept waiting for the opposing party to re-organize the statement as ordered, for one year. After the one year the judge gave another chance for the opposing party to organize his statements although I had requested to the judge to end the proceeding quickly. And the judge told the opposing party that he should organize facts like what I did. Likewise, Korean judges give full opportunity; and sometimes correct the errors by themselves.⁴⁸⁶

I could also observe that, during trial sessions, judges ask questions in order to clarify the plaintiffs' statements of claim and factual grounds.⁴⁸⁷ After hearing answers from the plaintiffs, judges made changes in his/her records and continue the proceedings.⁴⁸⁸ The judges did not even mention about the defects of the complaints and possibility of dismissal due to such defects.⁴⁸⁹ Likewise, court's clarification is playing the same active and important role in correcting complaints as it does in other areas of civil litigation. It is turned out that, by using order to correct and by asking questions for clarification, judges provide more than enough opportunities to correct a plaintiff's complaint.

4.2.3.3 Summary

To sum up, as a procedural safeguard for fairness, judge's clarification is actively used for the benefits of litigants, especially for *pro se* litigants. It turned out that judge's clarification is properly working; however, sometimes, too much. This active use of clarification, especially use of active clarification, is turned out to be controversial, in that it

⁴⁸⁶ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

⁴⁸⁷ Field notes on court hearing observation, in Seoul, Korea. (Apr. 3, 2013).

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

could violate the principle of adversarial proceeding. However, judges' efforts to provide maximum opportunity for the parties who should prevail can be understood as their attempts to render decisions that reflect reality rather than procedural rules. As stated in following chapters, this emphasize of finding truth is one of key characteristics of Korean civil procedure.

4.3 Dismissal for lack of ‘requirements of lawsuit’

The phase of complaint review discussed above is initial threshold for lawsuits to continue. Next gate for the cases with sufficient complaints is satisfaction of all the “requirements of lawsuit (“*Sosong yogŏn*”; 소송요건).” Requirements of lawsuit is a broad term; and it includes certain procedural demands for a lawsuit to continue to having a trial on the merits. Thus, it is also called as “requirements for trial on the merit” or “requirements for judgment on the merits.”⁴⁹⁰ When it is obvious that a lawsuit lacks such requirements, the lawsuit becomes “unjustifiable”; and a judge shall dismiss the case without having trial.⁴⁹¹ When there seems to be possibility of correction, the judge shall provide the parties with opportunity to correct such defects; and the judge, as Civil Procedure Act Article 219 sets, may dismiss the case when defects are not corrected.⁴⁹² However, this Article does not mean that a judge cannot hold a trial session on the merits. Rather it means that a judge may dismiss the lawsuit when he or she finds defects of the lawsuit regarding requirements of lawsuit during trial.⁴⁹³ As this comment implicates, Civil Procedure Act does not mandate judges to complete examination of requirements of lawsuit before having trial. They may schedule and have a trial without regards to whether all the requirements of lawsuit are satisfied; and may examine satisfaction of the requirements in the trial sessions at the same

⁴⁹⁰ CHUNG, *Supra* note 390, at 295; CHUNG & YOO, *Supra* note 378, at 348; LEE, *Supra* note 68, at 198; SONG & PARK, *Supra* note 390, at 197; KIM, *Supra* note 390, at 210; KIM, *Supra* note 379, at 90.

⁴⁹¹ CHUNG, *Supra* note 390, at 304; CHUNG & YOO, *Supra* note 378, at 348; LEE, *Supra* note 68, at 203-04; SONG & PARK, *Supra* note 390, at 201-02; KIM, *Supra* note 390, at 210.

⁴⁹² Minsa sosong pŏp [Civil Procedure Act], Act No. 553, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 219 (S. Kor.) (“Article 219 (Dismissal of Lawsuit without Holding Any Trials) In the case of an unjustifiable lawsuit whose defects are not correctable, such lawsuit may be dismissed by a judgment without holding any trials.”).

⁴⁹³ CHUNG, *Supra* note 390, at 304; CHUNG & YOO, *Supra* note 378, at 348; LEE, *Supra* note 68, at 203-04; Ho, *Supra* note 379, at 270; SONG & PARK, *Supra* note 390, at 201-02.

time with examining matters regarding merits of the case.⁴⁹⁴

4.3.1 What are requirements of the lawsuit?

Provisions of the requirements of a lawsuit are scattered throughout the Civil Procedure Act. Some of them are not manifested in the Act; others are what recognized by scholars' interpretation or court cases. Legal scholars and summary of court practice generally categorize the requirements of lawsuit into four groups.⁴⁹⁵

The first group relates to the requirements regarding the court. The first requirement for the court is having jurisdiction. The court to which the plaintiff files the lawsuit must have international, personal, and subject matter jurisdiction.⁴⁹⁶ Also, the case should be a civil case, rather than an administrative or family law case. It is because Korea has separate court system for administrative or family law cases.

The second group includes requirements regarding the parties. The parties should be living; be capable; and have standing.⁴⁹⁷ If legal representative is required, the party should have valid representative.⁴⁹⁸

The third group concerns the claim. The claim should be specified; and there should be no *res judicata* affecting the claim the plaintiff is bringing.⁴⁹⁹ Also, there should

⁴⁹⁴ Timing of reviewing requirements of lawsuit will be discussed further.

⁴⁹⁵ CHUNG, *Supra* note 390, at 296-97; CHUNG & YOO, *Supra* note 378, at 349-50; LEE, *Supra* note 68, at 199-200; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 198-99; KIM, *Supra* note 390, at 211-12; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 74.

⁴⁹⁶ CHUNG, *Supra* note 390, at 296; CHUNG & YOO, *Supra* note 378, at 349; LEE, *Supra* note 68, at 199; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 198; KIM, *Supra* note 390, at 211.

⁴⁹⁷ CHUNG, *Supra* note 390, at 296; CHUNG & YOO, *Supra* note 378, at 349; LEE, *Supra* note 68, at 199; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 198; KIM, *Supra* note 390, at 211.

⁴⁹⁸ CHUNG, *Supra* note 390, at 296; CHUNG & YOO, *Supra* note 378, at 349; LEE, *Supra* note 68, at 199; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 198; KIM, *Supra* note 390, at 211.

⁴⁹⁹ CHUNG, *Supra* note 390, at 297; CHUNG & YOO, *Supra* note 378, at 350; LEE, *Supra* note 68, at 199; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 199; KIM, *Supra* note 390, at 211.

be “value of lawsuit (“*So ūi Iik*”; 소의 이익)”.⁵⁰⁰ Value of lawsuit means interests or needs that justify the parties’ request of judgment on the merits of the case.⁵⁰¹ Through this requirement, a court can concentrate its energy to cases that actually require judgment on the merits; and a defendant can save efforts for responding to unnecessary lawsuits.⁵⁰² In this sense, this requirement functions as a tool for screening cases that do not deserve judgment on the merits.⁵⁰³ In order to have value of lawsuit, (1) the claim must be about specific rights or legal relationship;⁵⁰⁴ (2) there should not be a pending claim identical to the claim the plaintiff is trying to argue;⁵⁰⁵ (3) there should be no contract between the parties prohibiting them from filing lawsuits against each other;⁵⁰⁶ (4) the claim should not be in bad faith.⁵⁰⁷

What makes a lawsuit a bad faith lawsuit? Korean courts and legal scholars interpret that filing a bad faith lawsuit is abusing one’s right to claim adjudication. Compared to other requirements, requiring the claim to be in good faith is very abstract, thus, should be specified. According to scholars, lawsuit abuse is defined as ‘a lawsuit pursuing

⁵⁰⁰ CHUNG, *Supra* note 390, at 297; CHUNG & YOO, *Supra* note 378, at 350; LEE, *Supra* note 68, at 199; Ho, *Supra* note 379, at 272; SONG & PARK, *Supra* note 390, at 199; KIM, *Supra* note 390, at 211.

⁵⁰¹ CHUNG, *Supra* note 390, at 304-05; CHUNG & YOO, *Supra* note 378, at 357-58; LEE, *Supra* note 68, at 207; Ho, *Supra* note 379, at 273; SONG & PARK, *Supra* note 390, at 204; KIM, *Supra* note 390, at 220; KIM, *Supra* note 379, at 90.

⁵⁰² CHUNG, *Supra* note 390, at 305; CHUNG & YOO, *Supra* note 378, at 357-58; LEE, *Supra* note 68, at 207; Ho, *Supra* note 379, at 273; SONG & PARK, *Supra* note 390, at 205-06.

⁵⁰³ CHUNG, *Supra* note 390, at 305; CHUNG & YOO, *Supra* note 378, at 358; LEE, *Supra* note 68, at 207; Ho, *Supra* note 379, at 273; SONG & PARK, *Supra* note 390, at 205-06.

⁵⁰⁴ CHUNG, *Supra* note 390, at 309; CHUNG & YOO, *Supra* note 378, at 362; LEE, *Supra* note 68, at 208; Ho, *Supra* note 379, at 274; SONG & PARK, *Supra* note 390, at 207; KIM, *Supra* note 390, at 222; KIM, *Supra* note 379, at 91.

⁵⁰⁵ Minsa sosong pōp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, amended by Act. No. 10629, May. 19, 2011, art. 259 (S. Kor.) (“Article 259 (Prohibition of Double Lawsuits) For the case pending before a court, neither party shall institute any lawsuit again.”).

⁵⁰⁶ CHUNG, *Supra* note 390, at 311; CHUNG & YOO, *Supra* note 378, at 363; LEE, *Supra* note 68, at 210-11; Ho, *Supra* note 379, at 281; SONG & PARK, *Supra* note 390, at 209; KIM, *Supra* note 390, at 227-28.

⁵⁰⁷ CHUNG & YOO, *Supra* note 378, at 363; LEE, *Supra* note 68, at 213-14; SONG & PARK, *Supra* note 390, at 212; KIM, *Supra* note 390, at 233. However, Young-Hwan Chung disagree with classifying this requirement as a requirement of the value of lawsuit in that good faith is a concept in higher level than value of lawsuit and that the concept of good faith is supposed to be applied as a last resort (CHUNG, *Supra* note 390, at 314-15 (1st ed. 2009)). Moon-Hyuk Ho also disagree with such classification in that being in good faith can be classified as substantive law requirement rather than procedural requirement (Ho, *Supra* note 379, at 286).

other purposes than the claim itself;⁵⁰⁸ ‘a lawsuit for enforcing legal right which is against purposes of the law allowing the right;⁵⁰⁹ or ‘a lawsuit only for delaying progress of the case.’⁵¹⁰ As representing forms of bad faith lawsuit, followings have been discussed by scholars and in court cases. First, filing several lawsuits against the same defendant for the same matter to harass the defendant is a lawsuit abuse.⁵¹¹ It is obviously abusing legal system to file a lawsuit only to harass the defendant. Second, filing a useless and unnecessary lawsuit, for example, when winning party appeals because he does not like the reasoning of the decision, is a lawsuit abuse.⁵¹² Third, filing a lawsuit to extort money from the defendant is a lawsuit abuse.⁵¹³ As a leading case,⁵¹⁴ Korean Supreme Court dismissed a lawsuit for declaring non-existence of board of director decision filed by one director for being bad faith, because the plaintiff had consent to resign his director position and had not raised any objection against current directors’ taking over and managing the school foundation.⁵¹⁵ The court concluded that the plaintiff’s lawsuit is only for obtaining money from current directors or the school foundation.⁵¹⁶ Fourth, filing a lawsuit only to avoid law or for tax evasion falls into the category of lawsuit abuse.⁵¹⁷ Likewise, value of lawsuit is connected more closely to merits of the cases than other requirements.

These three groups include requirements of lawsuit generally applicable for all types of litigation. Unlikely, the fourth group includes requirements of lawsuit for special litigation including joinder, counter claim, intervention, appeal, interlocutory appeal, lawsuits for declaratory judgments or for claiming performance of a contract in advance of due date,

⁵⁰⁸ LEE, *Supra* note 68, at 213; KIM, *Supra* note 390, at 27; KIM, *Supra* note 379, at 15.

⁵⁰⁹ CHUNG, *Supra* note 390, at 109.

⁵¹⁰ CHUNG, *Supra* note 390, at 111; KIM, *Supra* note 379, at 15.

⁵¹¹ CHUNG & YOO, *Supra* note 378, at 363.

⁵¹² LEE, *Supra* note 68, at 33.

⁵¹³ *Id.*

⁵¹⁴ LEE, *Supra* note 68, at 213; SONG & PARK, *Supra* note 390, at 198-99.

⁵¹⁵ Supreme Court [S. Ct.], 74Da767, Sept. 24, 1974 (S. Kor.).

⁵¹⁶ *Id.*

⁵¹⁷ LEE, *Supra* note 68, at 33.

and so on. These special litigations have unique requirements in addition to all other general requirements of lawsuit. For example, in terms of value of lawsuit, the plaintiff of an action claiming performance of a contract in advance of due date should show necessity to claim in advance⁵¹⁸ in addition to all other requirements. Also, the plaintiff of a lawsuit for declaratory judgment should show that the claimed right or legal status are (or soon will be) in danger, and that filing the lawsuit is the most efficient way to remove the danger.⁵¹⁹

4.3.2 How is satisfaction of requirements of lawsuit reviewed?

With respect to most of the requirements of lawsuit, a court should, on its own initiative, examine whether the plaintiff's claim satisfies these requirements.⁵²⁰ For other requirements, a judge does not need to examine unless the parties request to do so.⁵²¹ In terms of timing for reviewing requirements of lawsuit, logically it should be before trial on the merits, because it is a condition precedent for trial; however, practically, judges are not bound by such logic.⁵²² Judges can review requirements of lawsuit when reviewing complaints and during trial.⁵²³ When judges find lack of requirements of lawsuit during trial, the judges should hold the trial immediately and order corrections.⁵²⁴ When it turned out that correction is impossible or when the plaintiffs do not follow order to correct, then judges should dismiss

⁵¹⁸ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 251 (S. Kor.) (“Article 251 (Lawsuit Claiming Future Performance) A lawsuit claiming a performance in the future may be instituted only if there exists any necessity for claiming in advance.”).

⁵¹⁹ CHUNG, *Supra* note 390, at 325-27; CHUNG & YOO, *Supra* note 378, at 369; LEE, *Supra* note 68, at 222-25; Ho, *Supra* note 379, at 289; SONG & PARK, *Supra* note 390, at 223-24; KIM, *Supra* note 390, at 254-61; KIM, *Supra* note 379, at 96-98.

⁵²⁰ CHUNG, *Supra* note 390, at 297-98; CHUNG & YOO, *Supra* note 378, at 351; LEE, *Supra* note 68, at 201; SONG & PARK, *Supra* note 390, at 199-200; KIM, *Supra* note 390, at 214-15.

⁵²¹ CHUNG, *Supra* note 390, at 297-98; CHUNG & YOO, *Supra* note 378, at 351; LEE, *Supra* note 68, at 201; SONG & PARK, *Supra* note 390, at 200; KIM, *Supra* note 390, at 214-15.

⁵²² NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 73.

⁵²³ *Id.*

⁵²⁴ *Id.*

the cases by judgment.⁵²⁵ Such dismissal of case has *res judicata* effect.⁵²⁶ The lack of the requirements of a lawsuit deprives a plaintiff of not only an opportunity to proceed to trial, but also an opportunity to have a judgment on merit.

Likewise, this type of dismissal is different from a dismissal as a pretrial disposition in the U.S., in that the decision of whether the action satisfies those requirements can be made in the middle of trial. This difference relates to the fact that the boundary between pretrial and trial is ambiguous in Korea and that judges, instead of jurors, are the person who decide on the facts. At the trial stage, judges should decide whether the action satisfies all requirements of the lawsuit first, then they examine its merit. Thus, all plaintiffs have chances to appear in court for a trial whether it ends with a judgment on the merits or is dismissed.

Is the difference mean that Korean civil procedure provides better process or protection in terms of access to court, compared to the U.S. counterpart? There is no easy answer to that question. The parties whose cases are dismissed are still deprived of opportunity to be heard, or, to be precise, to be heard “more.” It is because their trial ends when the dismissal is rendered. Also, they lose the opportunity to resolve their dispute through judgment on its merit that has *res judicata* effect. Thus, although the timing of dismissal is somewhat later compared to the U.S. pretrial disposition, the dismissal has a similar restrictive effect in terms of the parties' constitutional right for adjudication.

4.3.3 How actively do judges render dismissal judgment for lack of requirements of lawsuit?

⁵²⁵ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 73.

⁵²⁶ CHUNG, *Supra* note 390, at 304; LEE, *Supra* note 68, at 203; SONG & PARK, *Supra* note 390, at 201; KIM, *Supra* note 390, at 219; Supreme Court [S. Ct.], 97Da25521, Dec. 9, 1997 (S. Kor.).

Do Korean judges also hesitate to dismiss cases for lack of requirements of lawsuits as they generally do when reviewing complaints? How actively and for what purposes do judges use dismissal for lack of requirements of lawsuit? I could not find any rules or cases that can answer to these questions. Scholarly commentary in Korea does not provide information on that point. Such lack of information might be because such practices belong to an area of discretion of each judge. Obviously, under the Civil Procedure Act, they may dismiss a lawsuit when they find lack of any requirements of lawsuit. However, how often and how actively they dismiss would be different matter. In order to explore actual usage of this type of dismissal, I conducted interview. Most of interviewed judges said that they dismiss as law and legal textbook set, without special consideration or hesitation, when a lawsuit lacks “typical” requirements of lawsuit. However, with respect other “exceptional” requirements, dismissal is not simple. Such exceptional requirements include dismissal for lack of value of lawsuit and dismissal for filing a bad faith lawsuit. Following sections explain about how judges use thus type of dismissal and what they consider in their actual practice.

4.3.3.1 Typical requirements and exceptional requirements

Unlike dismissal of complaints, judges admit that they often dismiss cases when the cases lack typical requirements and when such deficiency is clear on its face. Such typical requirements include lacks of jurisdiction, lacks of standing, filing a lawsuit identical to pending proceeding, *res judicata*, etc. Because these are so manifest, statements like these were common among judges: “We dismiss these cases just as textbooks say” or “I could observe quite number of dismissals for typical reasons.”

Unlike these typical ones, judges acknowledged that it is very hard to dismiss lawsuits for lack of value of lawsuit or for filing a bad faith lawsuit. With respect to the former, value of lawsuit has been recognized as what judges might be able to find only after having several trial sessions. One judge's comment exactly supported the explanation as follows:

“It is very rare to dismiss a case for lack of value of lawsuit before having trial sessions. Usually, judges first begin trial. Lack of value of lawsuit is what is discovered during the process, rather than what is obvious before having trial. So, it is burdensome to dismiss cases at a glance before trial. Because value of lawsuit means legal value of lawsuit, which is different from economic value of lawsuit, it is hard to dismiss for the reason that certain cases are economically useless. If arguments of the plaintiffs are something worthy to think about, then judges hold trial and dismiss the cases later based on what is discovered during the trial. It is very difficult to decide whether certain lawsuits have value of lawsuits based only on complaints and trial preparation documents.”⁵²⁷

This judge distinguished legal value and economic or factual values, and that shows how judges interpret the requirement, “value of lawsuit.” A lawyer agreed with the idea that deciding whether a certain case has value of lawsuit before having trial sessions is very difficult:

“There are only few requirements of lawsuit for lack of which cases are dismissed. So, if lawyers file lawsuits without considering these requirements and the cases are dismissed, then it can be malpractice for which the lawyers could be sued. However, lawsuits for declaratory judgments are exceptional in that existence of value of declaration is difficult to confirm in advance.

⁵²⁷ Interview with Judge No.1, in Seoul, Korea. (Apr. 17, 2013).

Compared to other requirements, many cases are dismissed for lack of such value of declaration.”⁵²⁸

With respect to the second type of exceptional requirement, judges and lawyers’ experiences of dismissal for being bad faith lawsuits showed the biggest gap between what text books teach and what they see in their daily practices. For many of them, this type of dismissal exists only in textbooks. Also, they were recognizing that arguing and deciding based on the bad faith account is not common and even not admirable. How do lawyers use the bad faith lawsuit arguments?

“There hardly exists a case in which only issue is whether the lawsuit is in bad faith. I haven’t experienced a single case like that. Bad faith is what lawyers argue when there is nothing more to argue. Oftentimes, lawyers argue bad faith as an argument supplementary to other arguments. In these occasions, lawyers add argument of bad faith just in order to add something. They use the term bad faith, because arguing bad faith looks more professional than saying, “It is unfair.” Such usage is the only one I can recall. However, I acknowledge that there are court cases in which bad faith was main reason for the decisions. I think such cases are very exceptional, only cases in which it seems that certain party should prevail in terms of substantive right, but there seems to be no legal ground that can be applied in the cases. Likewise, cases decided on the ground of bad faith are very exceptional and rare.”⁵²⁹

Judges are also very skeptical about the bad faith argument.

“I have never seen a single case dismissed for bad faith. I have never rendered such decision. Sparsely, I saw some Supreme Court cases declared

⁵²⁸ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

⁵²⁹ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

to be abuse of lawsuit because of useless repetition of the same lawsuit.”⁵³⁰

“I have never seen a dismissal for being bad faith, and it is not desirable dismiss for such reasons. Bad faith is just too abstract. I think bad faith can be considered only when consolidated with other legal grounds.”⁵³¹

Likewise, dismissing cases for being bad faith is very unusual and even undesirable practice although law text books list several cases as example of litigation filed in bad faith. This is a significant gap between what textbooks teach and what judges and lawyers experience in that several judges and lawyers said that they have never experienced or heard about dismissal of cases for being filed in bad faith.

4.3.3.2. When in doubt, decisions on merits rather than dismissing cases

Judges mentioned about few cases where it is ambiguous whether they should dismiss the cases or render decisions on the merits after completing trials.

“Some rights can only be discovered after substantive trial hearings. In such cases, overall screening is needed. So, whether to dismiss the cases cannot be decided before trial. In many cases, grounds for dismissal are discovered only after having trial sessions.”⁵³²

“It is desirable to proceed further unless it is so clear on the complaints that the case should be dismissed.”⁵³³

Likewise, these judges prefer to continue the proceeding until the end of the lawsuit

⁵³⁰ Interview with Judge No.6, in Uijeongbu, Korea. (Apr. 29, 2013).

⁵³¹ Interview with Judge No.5, in Suwon, Korea. (Apr. 25, 2013).

⁵³² Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

⁵³³ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

and to render judgment on merits. However, some lawyers find such practice inefficient:

“Whether to dismiss a case can be decided only after having all trial sessions. In terms of litigation efficiency, it is not efficient.”⁵³⁴

As these comments show, guaranteeing the parties with opportunities to be heard at trial is a very important task for judges, so they try to provide maximum level of access to trial in various ways including restricting dismissal.

4.3.3.3. Recommending voluntary dismissal rather than dismissing the case

According to the interviews, it turned out that, even when it is clear that a case lacks a requirement of a lawsuit, judges do not dismiss the case right away. Instead, they request the plaintiff lawyer to voluntarily dismiss the case. Judges and lawyers recalled efficiency concerns as a reason for such practice:

“I recommend the plaintiff to voluntarily dismiss the case when I found grounds for dismissal. Then, the plaintiffs, if represented by lawyers, understand that they are doing a litigation that lacks procedural requirements. I can dismiss such cases. However, voluntary dismissal is better. Legal effects of involuntary dismissal and voluntary dismissal are the same in practice, but voluntary dismissal relieves work load of judges. It is because judges should write decisions when dismissing cases; but they do not have to in case of voluntary dismissal.”⁵³⁵

“Judges dismiss cases as law requires. What I experienced were dismissals of the cases for lack of value of declaration in a lawsuit for declaratory judgment, for infringing res judicata, and some of duplicate lawsuits. However, even

⁵³⁴ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

⁵³⁵ Interview with Judge No.1, in Seoul, Korea. (Apr. 17, 2013).

when grounds for dismissal are discovered, judges hold trial hearing and recommend the plaintiffs to voluntarily dismiss their cases rather than dismissing right away. It is because appellate court can reverse the dismissal judgment for lack of enough hearing, if it is appealed.”⁵³⁶

“Judges’ clarification is helpful in terms of avoiding dismissals. Judges recommend voluntarily dismissal of a case when the case seems to deserve dismissal. It is because they do not want to write decisions. By recommending voluntary dismissal, judges are signaling that the plaintiffs do not have to waste of their time for the cases that will be dismissed. Of course, they can end the proceeding by dismissing the case; however, they do not do that in order not to write decisions. Judges make every possible effort to reduce decisions to be written by them.”⁵³⁷

I could also observe such recommendation of voluntary dismissal. In the trial session, the judge recommended the plaintiff to voluntarily dismiss the case by saying, “How about voluntarily dismissing this case? I think your understanding of the rules for this case is somewhat misleading. It is possible for me to dismiss this case. So I recommend you to consider whether maintaining this case or not.”⁵³⁸ These statements implicate that judges consider more efficient ways and methods that can reduce their workload and save their time and energy. Recommending voluntary dismissal is one example of such efforts. Are judges’ time and energy efficiently saved when the parties voluntarily dismiss instead of the judges dismiss the cases? It was found that relieving the judges from the duty to write decisions are perceived as reducing judges’ workload and burdens and saving their time and energy. Rare use of dismissal seems to be very inefficient, because such practice could be understood as dragging cases that do not deserve trial until the end of litigation and as wasting time and energy of judges and the parties. In this circumstance, the finding that

⁵³⁶ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

⁵³⁷ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

⁵³⁸ Field notes on court hearing observation, in Seoul, Korea. (Apr. 3, 2013).

judges are making vigorous efforts to save their time and energy and to enhance efficiency indicates that judges have needs of improving current civil litigation system to be more efficient, and that they are willing to make efforts for such improvements in other areas as well.

4.3.4 Court's clarification when reviewing requirements of lawsuit

Because court can order clarification at any stage of litigation, such clarification can be used when reviewing requirements of lawsuit as well as examining complaints. Using this clarification, judges can make the parties cure the lack of requirements of lawsuit. By asking questions, court can let the parties know what are lacking and to be supplemented or corrected. Also, in some cases, presiding judges are required to go beyond mere checking. In a recent Supreme Court case, the court declared it illegal to dismiss a case in which statement of the parties to the case was incorrect after merely ordering to correct the statement without any corrective action initiated by the presiding judge.⁵³⁹ As seen in the cited wording, the Supreme Court declared ordering correction of the statement of the parties as not enough; and it required more active intervention by the presiding judge including a legal action to correct statement of the parties. The court required the judge himself to find who the right party to the litigation is; and to let the plaintiff change the statement of the party according to the finding. Clarification is the tool for this active intervention by the judge. Judge can let the plaintiff know who seems to be right party and recommend the plaintiff to

⁵³⁹ Supreme Court [S. Ct.], 2012Da68279, Aug. 22, 2013 (S. Kor.) (“When a plaintiff stated the parties imprecisely and incorrectly stated persons not having legal standing or capacity to be a party to litigation, then the court should not rely only on the statement on the complaint. Rather, it should confirm who the parties are based on claims and factual basis for the claim. After confirming right parties in this way, the court should take an action to make the plaintiff to correct statement of the parties. Dismissing the case after mere ordering the plaintiff to correct without such judicial action to correct is illegal”).

change the statement of the party using court's clarification.

4.3.5 Summary

With respect to actual use of dismissal for lack of requirements of lawsuit, judges and lawyers gave different answers from that for dismissal of complaint. Unlike dismissal of complaint that is perceived by judges and lawyers as being very rare and very exceptional, dismissal of cases for lack of requirements of lawsuit was not recognized in that way. Most of judges answered that they dismiss as law sets and legal textbooks explain when they find lack of requirements of lawsuit, except for few requirements lack of which can hardly be found and confirmed without trial. Most of lawyers also admitted that. However, as shown in the above Table 4-1 (4.1.2), the number of cases dismissed is very low, even lower than the number of dismissal of complaints.

Why is there such difference between what judges perceive and actual number of cases dismissed? From the data analyzed above, some possible reasons can be inferred. First, the number of cases lacking requirements of lawsuit can be actually small. It can be understood from the statement of lawyers that they know enough to avoid such dismissal for lack of typical requirements. Then, what about *pro se* litigants? Litigation by *pro se* litigants is the point this first reason cannot explain enough. Second reason is active use of procedural safeguards such as judge's order to correct and clarification. Similar to occasions for dismissal of complaints, judges actively use these safeguards; and these devices actually work for correcting errors, thus avoiding dismissal. Third reason would be active use of recommendation for voluntary dismissal. Effects of such recommendation can be found from the Table 4-1 (4.1.2) indicating high percentage of cases resolved by voluntary

dismissal. These possible reasons regarding actual uses of dismissal for lack of requirements of lawsuit show, to some extent, how such dismissal and procedural safeguards are working and interacting with each other. More detailed analysis for this point will be followed in following chapters.

4.4 Judgment without trial

In addition to dismissals, a judgment without trial (“*Mu pyŏnron pangyŏl*”; 무변론 판결) is another type of disposition without trial. Similar to default judgment in the U.S. civil procedure, judges may render a judgment without trial when defendants do not file answers within 30 days from when they received a copy of complaints.⁵⁴⁰ As the Article 257(1) sets forth, the defendant’s failure to submit answer is deemed as admission of all the grounds in the complaint argued by the plaintiff. Based on such deemed admission, judges may render judgment without having trial. There are two exceptions to this rule. First, a judge may not render the judgment without trial if there are matters to be examined by judges.⁵⁴¹ Second, if the defendant submitted belated answer that does not admit arguments in the complaint before announce of the judgment, then a judge may not render the judgment without trial.⁵⁴² Also, even in case where the defendant submitted an answer, such judgment without trial may be rendered if the answer admits all the arguments and grounds raised by the plaintiff’s complaint.⁵⁴³ Because Article 257(1) applies to this occasion, the two exceptions to the rule also apply.⁵⁴⁴

⁵⁴⁰ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(1) (S. Kor.) (“Article 257 (Judgment Rendered without Holding Any Trials) (1) A court may, when a defendant has failed to submit a written defense under Article 256 (1), render a judgment without holding any trials by deeming that he has admitted the facts constituting the counts of the claim: Provided, that the same shall not apply to the case where there exist any matters to be investigated ex officio, or where the defendant has submitted a written defense with a purport that he contests the claim of a plaintiff until a judgment is declared.”).

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(2) (S. Kor.) (“Article 257 (Judgment Rendered without Holding Any Trials) (2) The provisions of paragraph (1) shall apply to the time when the defendant submits a written defense with a purport of admitting all the facts constituting the counts of the claim and fails to make a separate plea.”).

⁵⁴⁴ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(1),(2) (S. Kor.).

This type of disposition without trial was designed for speedy process by skipping scheduling and having trial sessions if the defendant is not willing to defend the case.⁵⁴⁵ Unlike dismissals, a judgment without trial is not depriving plaintiffs of opportunities to proceed. Rather, it restricts defendant's procedural opportunities based on non-existence of their participation.

4.4.1 Process

Even in case where judges render judgment without trial, a hearing for announcing the judgment should be held.⁵⁴⁶ For speedy process, court notifies the defendant of date for announcing judgment without trial when serving copy of the complaint.⁵⁴⁷ This notice usually contains statements explaining that the notified date for judgment without trial will be canceled if the defendant submits an answer to argue against the plaintiff.⁵⁴⁸ Likewise, scheduled date for judgment without will be canceled if the defendant submits answer before the date.⁵⁴⁹

For cases where answers are not submitted, but are legally or practically not adequate for judgment without trial, judges should immediately schedule the first trial date.⁵⁵⁰ Such

⁵⁴⁵ CHUNG, *Supra* note 390, at 380-81; CHUNG & YOO, *Supra* note 378, at 670; LEE, *Supra* note 68, at 262; Ho, *Supra* note 379, at 102; SONG & PARK, *Supra* note 390, at 304; KIM, *Supra* note 390, at 303; KIM, *Supra* note 379, at 61; NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 438 (“Judgment without trial is allowed because it accords with the parties’ intention and because efficiency of civil procedure can be enhanced in that it can save time and efforts of the parties to have trial where there is no reasonable interest for having it.”).

⁵⁴⁶ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 439.

⁵⁴⁷ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(3) (S. Kor.) (“Article 257 (Judgment Rendered without Holding Any Trials) (3) The court may, when serving a duplicate of the written complaint on the defendant, concurrently notify him of the date of declaring a judgment without holding any trials under the provisions of paragraphs (1) and (2).”).

⁵⁴⁸ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 440-41.

⁵⁴⁹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(1) (S. Kor.).

⁵⁵⁰ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(2) (S. Kor.).

cases include an occasions where copy of complaint was served by publication,⁵⁵¹ where there are certain items judges should examine on their own initiative,⁵⁵² and where portion of the principle of adversarial proceedings are not applied.⁵⁵³

4.4.2 How actively do judges render judgment without trial?

Utility and necessity of judgment without trial seems to be acknowledged by legal scholars. For example, Dae-sung Oh explained that this type of disposition was necessary in that it would be meaningless and uneconomical to hold trial and to mandate the parties to appear even in the case where the defendant does not seem to have intention to defend.⁵⁵⁴ He observed that, in this reason, judgment without trial contribute to expedite court proceeding and to relieve court's burden.⁵⁵⁵

These evaluations and opinions of scholars on judgment without trial indicates that such disposition device is working in right direction. However, it only provides general and abstract evaluation of the procedure, without showing whether judges are experiencing the same strength of this type of disposition and whether there is any barrier for using the disposition. In order to find more specific and field-based experiences, I asked questions of how judgment without trial is used, especially compared to dismissals that is also a disposition tool but not used much. Most judges opined that, unlike dismissals, a judgment

⁵⁵¹ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 256(1) (S. Kor.) (“Article 256 (Obligation to Submit Answer) (1) In case where a defendant contests the claim of a plaintiff, he shall submit a written answer within 30 days from the date of receiving a service of a copy of the written complaint: Provided, that the same shall not apply to the case where the defendant has received a service of a copy of the written complaint by the method of a service by public notice.”).

⁵⁵² Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(1) (S. Kor.) (For example, when examining requirements of lawsuit).

⁵⁵³ For example, family cases and administrative cases (NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 438).

⁵⁵⁴ Oh, *Supra* note 88, at 775.

⁵⁵⁵ *Id.*

without trial is very actively used, as following statement represents:

“It is frequently used. In many cases, judgment without trial is rendered when the defendant did not answer at all to the complaint, thus regarded as admitting what the plaintiff argued. In other cases, defendants submitted answers, but, the contents of the answers are very nominal, saying, “I cannot admit arguments by the plaintiff,” rather than disputing every single point of the plaintiffs’ arguments. In these cases, judges allow trial; but, such defendants usually do not appear. Thus, such cases end by judgments based on deemed admission. Judges render these judgment without trial and judgment based on deemed admission regularly, to the extent that they often talk to each other, saying, “In this week, I had this many cases for judgment without trial and this many cases for judgment based on deemed admission.” These two judgments are used to “cut off cases.” It is meaningful in that judges can focus more on complex cases by finishing cases for which much consideration is not required swiftly, thus, effectively reducing accumulated cases. Also, in these occasions, judges do not have to write decisions. Instead, judges can make decision by attaching what the plaintiffs submitted. So, it is more efficient. However, appellate courts do not like such judgments. In most cases, defendants neglects the notice that defendants may receive judgment without trial unless they submit answers within 30 days from the service of complaints, and misses the period without submitting answers. Then they appeal after having judgment without trial. Appellate court judges hate that, because they have to newly conduct hearings and evidence examination that could have done at trial court level.”⁵⁵⁶

Then, why is it actively used? The judge continues:

“It is because judges can automatically render judgment without trial when defendants do not respond at all, without considering whether to render such decision after reviewing contents of the cases. It is because law gave

⁵⁵⁶ Interview with Judge No.18, in Suwon, Korea. (May. 8, 2013).

justification to deem defendants' non-response as complete admission of what plaintiffs argued."⁵⁵⁷

Why is actual use of judgment without trial different from that of dismissals? According to these remarks, judgment without trial is not wholly based on judge's discretion. Rather, it is a result of defendant's choice not to respond. So, the judgment is initiated not by judges but by defendants who did not take required actions. Unlike dismissals, this justification does not conflict with litigant's right to claim adjudication, because it is not denying opportunity of the people who is actively requesting courts' decision. Also, rendering a judgment without trial when defendants did not make any response is what is clearly manifested in the code of civil procedure.⁵⁵⁸ Similar to dismissals based on lack of typical requirements of lawsuits, judges do not have much burden when they do what law clearly allows without any room for discretion.

4.4.3 Guaranteeing opportunity to submit answer as procedural safeguard

Judgment without trial seems to be a device restricting defendants' access to court by taking their opportunity to be heard at trial. However, there are opportunities for defendant to take that opportunity back by submitting answer even after the period for submitting answer has lapsed. A judge cannot render judgment without trial when a defendant submitted his answer after the period for answer submission but no later than judge's official declaration of judgment without trial for the case.⁵⁵⁹ According to summary of court practice, the scope of such opportunity becomes broader. It recommends judges to urge defendants

⁵⁵⁷ Interview with Judge No.18, in Suwon, Korea. (May. 8, 2013).

⁵⁵⁸ Minsa sosong pŏp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 257(1) (S. Kor.).

⁵⁵⁹ *Id.*

who did not submit answers but appeared on a hearing date for declaration of judgment without trial and verbally argued against plaintiffs' complaints to submit answer, to postpone or cancel the hearing date, and to wait for the defendants' submission of answers.⁵⁶⁰

4.4.4 Summary

There seems to be minimal gaps among what Civil Procedure Act sets, what national court practice recommends, and what judges are actually doing. Obviously, defendants' failure to submit answer could be a fair ground for disadvantageous legal decision against him. Based on this unambiguous ground, judges do not find any difficulty and hesitation for rendering judgment without trial. Moreover, Civil Procedure Act and recommended court practice provides more than enough opportunity for defendants to submit answer, even after the legal period set for answer submission. It implicates that this procedural safeguard could be one factor for active use of judgment without trial.

⁵⁶⁰ NATIONAL COURT ADMINISTRATION, *Supra* note 392, at 441-42.

4.5 Decision recommending performance

As shown in the above Table 4-1 (4.1.2), more than ten per cent of civil cases, although the ratio is decreasing by years, are disposed by decision recommending performance (“*Ihaeng kwŏnko kyŏlchŏng*”; 이행권고결정), without having trial. According to these figures, this type of disposition seems to be used very actively. In following paragraphs, I will explore how this disposition is being used.

When the amount of claim is less than 20,000,000 Won⁵⁶¹, the claim is classified as small claims; and special proceeding governed by Small Claims Adjudication Act applies to the claim.⁵⁶² A decision recommending performance is a special device allowed in small claims. It was adopted in 2002 in order to expedite proceedings and to relieve burdens of the parties to appear at court room when it is not necessary.⁵⁶³

4.5.1 Process

By decision, court can recommend defendants to perform as plaintiffs required on the complaints.⁵⁶⁴ As the Article 5-3(1) shows, the Article itself does not set any circumstance in

⁵⁶¹ As of April 22, 2014, this amount of money is approximately 19,262 U.S. dollars.

⁵⁶² Soaek sagŏn simpan pŏp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 2(1) (S. Kor.) (“Article 2 (Scope of Application, etc.) (1) This Act shall apply to civil cases provided by the Supreme Court Regulations (hereinafter referred to as the “small claims”) among cases under the jurisdiction of district courts and their branch courts.”).

⁵⁶³ NATIONAL COURT ADMINISTRATION, PŎPWON SILMU CHEYO MINSŌ SOSONG III [SUMMARY OF COURT PRACTICE: CIVIL PROCEDURE III] 399 (2005).

⁵⁶⁴ Soaek sagŏn simpan pŏp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 5-3(1) (S. Kor.) (“Article 5-3 (Recommendation of Performance by Decision) (1) A court may, in case where an action is instituted, recommend the defendant to perform according to the gist of claim, by annexing a duplicate of bill or a transcript of protocol for the institution of action by a decision: Provided, that this shall not apply to the case falling under any of the following subparagraphs:

1. Where it has switched over to the litigation procedure from the procedure for urging performance or arbitration; 2. Where the claim or ground of the claim is obscure; 3. Where it is deemed that it is improper to

which a judge may render a decision recommending performance. It shows that judges have broad discretion in rendering such decision.⁵⁶⁵ Such discretion reflects past experiences of courts that, especially among small claims, there have been many cases in which parties did not have any different opinions on the facts and legal issues and did not dispute with each other.⁵⁶⁶ In such cases, defendants often did not appear and their admissions were deemed based on the failure to appear.⁵⁶⁷ Because these cases do not require meaningful trial sessions for disputing each other, the Small Claims Adjudication Act allowed broad discretion to judges for rendering this decision recommending performance. However, there are exceptions to this discretion. In some occasions judges may not render such decision recommending performance.⁵⁶⁸ These occasions include where the case is what has been switched over to the litigation procedure from the procedure for urging performance or arbitration; where the claim or grounds of the claim is obscure; or where recommending performance is deemed to be improper.⁵⁶⁹

Court administration encourages judges to use this type of disposition more actively than what law has set. According to summary of court practice, although text of this provision implicated that rendering a decision recommending performance is not mandatory, court administration highly recommend judges to render this decision for all small claim cases unless there are conspicuous errors on the complaints.⁵⁷⁰

4.5.2 How actively do judges render decision recommending performance?

recommend a performance.”).

⁵⁶⁵ CHUNG & YOO, *Supra* note 378, at 1005.

⁵⁶⁶ CHUNG, *Supra* note 390, at 1207; CHUNG & YOO, *Supra* note 378, at 1005.

⁵⁶⁷ *Id.*

⁵⁶⁸ Soaek sagŏn simpan pŏp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 5-3(1) (S. Kor.).

⁵⁶⁹ *Id.*

⁵⁷⁰ NATIONAL COURT ADMINISTRATION, *Supra* note 563, at 400-01.

As state above, in practice, judges are recommended to render decision recommending performance for all cases.⁵⁷¹ Following statement by a judge provides more detailed contexts of how such decision is used in a daily practice:

“Before decision recommending performance was enacted, judges used judgment based on deemed admission when defendants did not appear at initial trial session. Because there were too many small claims and only small number of judges were assigned to take care of the small claims, such practice caused delay of case disposition due to heavy work load. That invited a great deal of complaints by the parties, especially plaintiffs. Plaintiffs were totally unhappy with such practice, because judges set initial trial date long time after the submission of the complaints although defendants did not dispute. So, many people welcomed the decision recommending performance. According to law, decision recommending performance is under the discretion of judges, however, in small claim practice, judges first serve decision recommending performance for all cases, because it is a way good for courts and plaintiffs. In these reasons, courts encourage active use of such decision and court staffs that are in charge of drafting decision recommending performance is assigned in every small claim courts.”⁵⁷²

Answers form other judges did not show any meaningful differences. Likewise, judges agree that decision recommending performance is a very convenience disposition device for speedy resolution of cases for the benefits and plaintiffs and courts. Also, as stated above, court administration encourages judges to use decision recommending performance; and there seems to be no obvious hesitation or barrier for judges to follow such policy of the court.

⁵⁷¹ NATIONAL COURT ADMINISTRATION, *Supra* note 563, at 400-01.

⁵⁷² Interview with Judge No.18, in Suwon, Korea. (May. 8, 2013).

4.5.3 Right to object as procedural safeguard

Defendants can object such decision by filing objections. A defendant can file objection within 2 weeks from the date he received the decision recommending performance, and even before he receives the decision.⁵⁷³ When the defendant files such objection, then the court should immediately schedule a date for trial.⁵⁷⁴ If the defendant does not file objection within the period, then the decision recommending performance is confirmed. Such confirmed decision has the same effect as final judgments of the court including *res judicata* effect.⁵⁷⁵

4.5.4 Summary

Dae-Sung Oh who argued for adopting U.S. summary judgment to Korean civil procedure classified this decision as procedural device in Korean civil procedure that is similar to U.S. summary judgment.⁵⁷⁶ However, he evaluates that decision recommending performance has only limited function of disposing cases in that the decision cannot be final

⁵⁷³ Soaek sagön simpan pöp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 5-4(1)(2) (S. Kor.) (“Article 5-4 (Objection against Decision Recommending Performance) (1) The defendant may, within 2 weeks from the date of receiving a transcript of a decision on recommending performance, file an objection in writing. He may file an objection even before receiving such a transcript. (2) The time limit under paragraph (1) shall be a peremptory period.”).

⁵⁷⁴ Soaek sagön simpan pöp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 5-4(3) (S. Kor.) (“Article 5-4 (Objection against Decision Recommending Performance) (3) A court shall, in case where an objection is filed under paragraph (1), without delay designate a legal date for trial.”).

⁵⁷⁵ Soaek sagön simpan pöp [Small Claims Adjudication Act], Act No. 2547, Feb. 24, 1973, *amended by* Act. No. 7427, Mar. 31, 2005, art. 5-7(1) (S. Kor.) (“Article 5-7 (Validity of Decision Recommending Performance) (1) A decision recommending performance shall, in case where it falls under any of the following subparagraphs, be valid equal to an final judgment:

1. Where the defendant fails to file an objection within the term under Article 5-4 (1);
2. Where the ruling of dismissing an objection becomes final; and
3. Where an objection is withdrawn.”); NATIONAL COURT ADMINISTRATION, *Supra* note 563, at 415.

⁵⁷⁶ Oh, *Supra* note 88, at 774 (Judgment without trial is also classified as procedural device similar to U.S. summary judgment in this article).

when defendants objects.⁵⁷⁷ Although such evaluation makes sense to some extent, decision recommending performance seems to work actively in that still more than ten per cent of civil cases are terminated by this type of disposition and court administration and most of judges agree with its utility. Such limitation pointed out by Oh can also be understood as fair and effective safeguard for defendant. Thus, decision recommending performance seems to have proper balance in terms of efficiency and access to justice.

⁵⁷⁷ Oh, *Supra* note 88, at 776.

4.6 Summary: Two groups of disposition without trial

Findings of actual usage of each disposition without trial can be summarized as following table shows.

Table 4-2 Two groups of disposition without trial in Korean Civil Procedure

Classification	Group A disposition	Group B disposition
	Dismissal of complaint / Dismissal for lack of requirements of lawsuit	Judgment without trial / Decision recommending performance
Whose access to court is restricted?	Plaintiffs	Defendants
Is this disposition based on the merits?	No	Yes
Are there incentives to have trial?	Yes (only plaintiffs)	No
How actively is this disposition used?	Rarely used	Actively used
How are procedural safeguards?	More than enough (sometimes more than what law requires)	Enough (just as law requires)

Above table summarizes significant contrast between two types of dispositions without trial: dismissal of complaint and dismissal for lack of requirements of lawsuits for one group, and judgment without trial and decision recommending performance for other group, based on what this study found. Although all these dispositions are for enhancing efficiency of civil litigation by reducing time and efforts for the cases that do not deserve, actual usage and characteristics thereof were significantly different. Dispositions that belong to the same group showed same or similar patterns. Before examining what causes such difference, in this section, I will summarize how these two groups of dispositions without trial is different.

First, Group A disposition, dismissals, by its definition, restricts plaintiffs' rights to be heard, because it prohibits them to proceed with trial or having judgment on the merits. In contrast, Group B disposition deprives defendants' opportunity to argue in front of decider. By rendering judgment without trial, defendants' access to court is restricted.

Second, Group A disposition is without regard to merits of the case. Rendering dismissal is to declare that there is no necessity or need to go further to trial where merits of the cases are reviewed. Procedural requirements, rather than substantive requirements are basis for dismissals. Conversely, Group B disposition is court's judgment on merits. Although there is no actual trial for disputing or reviewing merits of the cases, provisions in Civil Procedure Code authorizes judges to deem certain actions of the parties as admission of what opposing party argued: no answer for judgment without trial, and non-existence of characteristics of cases for decision recommending performance.

Third point, incentives to have trial is connected with the above second point, in that adjudication based on the merits does not have any incentive to have trial, but adjudication that does not based on the merits still has such incentives. The degree of such incentives may differ by legal culture or any other characteristics of certain country and system, as following chapters review in detail. In Korea, it turned out that Group A disposition requires significant amount of consideration and procedural safeguards for not taking opportunity to have trial, however, Group B disposition does not.

Fourth, as interview statements show, there is a significant contrast between Group A and Group B dispositions. Group A disposition is rarely used and Group B disposition is actively recommended and used. The reasons why Group B disposition is actively used are clearly revealed. Reasons for rare use of Group A disposition will be reviewed in the following chapter.

Lastly, both Group A and Group B dispositions have procedural safeguards that are actually working for guaranteeing procedural rights of the parties who are deprived of access to the trial. However, degree of guarantee of these safeguards is different: safeguards for Group A disposition provide higher level of protection than that for Group B. In case of Group A disposition, order to correct complaints and judge's clarification are used very actively, especially for the benefits of *pro se* litigants. Its usage might even be 'too much' for some people to the extent that prioritizing it more than civil procedure's fundamental principle of adversarial proceeding, as lawyers criticize.

In following chapter, I will review why these differences are caused. By examining why there are so few dismissals, this study would go into deeper level of Korean civil procedure and society that is forming such practices.

Chapter 5: Reasons for passive use of dismissal

5.1. Introduction

As shown in the previous chapter, most of Korean judges interviewed showed varying degrees of hesitation or passive attitudes toward dismissing complaints or cases. Also, most of judges are using order to clarify in order to avoid dismissal of cases and/or to let cases continue to the end of the trial. Why are they so passive in dismissing complaints or cases although it is authorized by law and is even required for them to do so? Reasons for such passive use of dismissal might be found from diverse aspects of civil litigation system including institutional, cultural, social and historical ones. It could fairly be said that almost all aspects of Korean civil litigation system, as a mixture, have influenced such practices of judges. Thus, it would be near impossible and even undesirable to point out one single reason that explains this phenomenon. Rather, various aspects of civil litigation are working together and simultaneously. A mixture of these different attributes of civil litigation system, which is defined by this study as ‘fundamental procedural value in action,’ will be discussed in the next chapter.

In this chapter, this study examines each one of these aspects in detail. When reviewing each aspect, this study examines what is known through law provisions and existing studies and what is not known yet. The yet-known parts will be explored through analyzing interviews of judges and lawyers. It begins with institutional aspects including Constitution, civil procedure rules, and court practices. In addition, it also looks at how cultural and historical aspects and social aspect have affected current dismissal practice in

Korea. By doing so, this study would argue that these non-institutional aspects have driven judges to avoid dismissal in real; and that civil procedure reforms solely based on institutional aspects are likely to face difficulties in terms of effectiveness.

5.2. Institutional aspect: Constitution

As a general characteristic, Constitutions in modern countries declare fundamental principles for managing government's functions. Adjudication is one of these functions governed by constitutional principles; thus, civil litigation should follow what Constitution requires. Likewise, constitutional rights and principles apply to civil litigation.⁵⁷⁸ Put it slightly different, civil procedure rules should be drafted in ways that reflect and specify constitutional principles.⁵⁷⁹

Followings are constitutional rights and principles that are related to the issues of disposition without trial and procedural safeguards. According to interviews of judges, constitutional right to claim adjudication turned out to be the most obvious ground for judges to avoid dismissal through providing maximum level of access to trial and judgments on the merits. Also, procedural due process is supposed to provide procedural safeguards with regard to disposition without trial. However, it is not clear whether actors in Korean civil litigation practice are actually recognizing and complying with procedural due process when disposing cases.

5.2.1. Constitutional right to claim adjudication

Article 27 of the Constitution of Korea declares constitutional right to claim adjudication.⁵⁸⁰ As its name stands for, the right to claim adjudication guarantees and

⁵⁷⁸ Sök-cho Chang, “헌법과 민사소송법” [*Constitution and Civil Procedure*], 9-1 MINSA SOSONG [CIVIL PROCEDURE] 41 (2005).

⁵⁷⁹ *Id.*

⁵⁸⁰ DAEHAN MINKUK HÖNPÖP [HÖNPÖP][Constitution of the Republic of Korea] art. 27 (S.Kor.) (“Article 27 (1) All citizens shall have the right to petition in writing to any government agency under the

protects broad range of rights to access to court. With respect to civil litigation, such constitutional rights include (1) the right to claim adjudication that is in conformity of acts⁵⁸¹; (2) the right to claim adjudication presided by judges who are qualified by related acts⁵⁸²; and (3) the right to claim speedy adjudication.⁵⁸³ Likewise, this article of Korean Constitution guarantees people's access to court by declaring that any people can require courts to resolve his or her legal dispute and that court cannot refuse to adjudicate without adequate reasons.⁵⁸⁴ It is also understood as a constitutional clause for rule of law in that it requires courts to resolve disputes according to law.⁵⁸⁵ This clause is also known as a 'ground right for other ground rights.'⁵⁸⁶

In the context of civil litigation, "adjudication that is in conformity of acts" means litigation proceedings according to laws including Civil Procedure Act which is the most fundamental legal ground establishing civil litigation process. Likewise, Constitution itself does not have specific and manifest requirements for civil litigation, disposition without trial,

conditions as prescribed by Act. (2) Citizens who are not on active military service or employees of the military forces shall not be tried by a court martial within the territory of the Republic of Korea, except in case of crimes as prescribed by Act involving important classified military information, sentinels, sentry posts, the supply of harmful food and beverages, prisoners of war and military articles and facilities and in the case of the proclamation of extraordinary martial law. (3) All citizens shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary. (4) The accused shall be presumed innocent until a judgment of guilt has been pronounced. (5) A victim of a crime shall be entitled to make a statement during the proceedings of the trial of the case involved as under the conditions prescribed by Act.") (This is an official version of English translation of Korean Constitution, which can be found at http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf. This version of translation uses the term 'the right to trial,' however such translation is incorrect, because 'trial' could be understood as meaning only one phase of civil litigation. Instead, this study uses the term 'adjudication' instead of trial, in order to include all phases of litigation and accesses to courts. Also, this study added the word 'claim' to be more precise translation for a Korean term '*Chaepan Ch'ōngg ukwōn*' (underline is added by the author). In these reasons, this study uses the term 'the right to claim adjudication' instead of 'the right to trial.' However, this study used these two words interchangeably, when necessary.

⁵⁸¹ DAEHAN MINKUK HÖNPÖP [HÖNPÖP][Constitution of the Republic of Korea] art. 27(1) (S.Kor.).

⁵⁸² *Id.*

⁵⁸³ DAEHAN MINKUK HÖNPÖP [HÖNPÖP][Constitution of the Republic of Korea] art. 27(3) (S.Kor.).

⁵⁸⁴ Ki-mun Hong, "헌법과 민사소송법" [*Constitution and Civil Procedure*], 9-2 MINSAsOSONG [CIVIL PROCEDURE] 7 (2005).

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* ('Ground right' is another expression of constitutional right that is used in Korea. This term stems from a German term, '*Grundrecht*.')

and procedural safeguards. Moreover, there is no existing study analyzing how these constitutional rights influence actual use of dismissal or procedural safeguards. However, as this study shows, this right claim adjudication itself is the reason why judges try to avoid dismissal and provide abundant procedural opportunities although what Constitution says is too abstract for civil litigation practice. For example:

“Judges should give the plaintiffs chances to correct. When statement of claim on the complaint is not clear, judges should give opportunity to supplement by order to correct. If such correction by drafting document seems to be difficult for them to do, then judges should hold trial session and clarify it there. The reason why we do this is to guarantee citizen’s right to claim adjudication. It is not right thing to do dismissing complaints only because of lack of format, because of that, recently, there are a great number of litigations filed by litigants without appointing legal representatives, and that different persons have different legal knowledge.”⁵⁸⁷

“It is because of the right to claim adjudication. Oftentimes, dismissal is rendered differently according to who is conducting litigation. In case where a party is represented by a lawyer, judges may dismiss a complaint right away if the lawyer does not correct within the period mandated by a correction order. However, if a party is not represented by a lawyer or a party is “weak,” such as senior or people with disability, then judges usually order correction several times or explain more specifically and more detailed. If the party is unable to understand the court’s order for correction, then judges call the party to judge and explain with plain languages. It is because substantial guarantee of the right to claim adjudication is required for such party.”⁵⁸⁸

These statements implicate that judges dismiss passively because they perceive that depriving plaintiffs of opportunity to proceed with trial stage for the lack of format or

⁵⁸⁷ Interview with Judge No.5, in Suwon, Korea. (Apr. 25, 2013)

⁵⁸⁸ Interview with Judge No.16, in Seoul, Korea. (May. 7, 2013).

violation of other procedural matters is not along with guarantee of constitutional right to claim adjudication. It also shows that judges are willing to guarantee such constitutional right more substantially when necessary although such extent of guarantee is not required by law. Lawyers' experiences and observations of judges' practices support this point:

“Judges seem to have strong desire to help litigants with remedying rights. And such helps are based on the right to claim adjudication. They seem to recognize dismissals, as its name shows, are just cold judgments.”⁵⁸⁹

“The right to claim adjudication is constitutional right; and Korean civil procedure proceedings have formed by such right. So, it is not easy to cut off cases. It is more difficult to dismiss, especially when trial sessions continued and trial is almost finished.”⁵⁹⁰

Lawyer No.9 has more than ten years of experiences as a judge. His statement may show how identical lawyers' and judges' opinions are on the point that judges seriously care about the right to claim adjudication and that it is a reason for passive dismissal.

On top of such perception that passive dismissal is a restriction of the litigants' right to claim adjudication, judges regard deciding on the merits as fulfilling their duty even when a case deserves dismissal for its procedural defects as these judges share:

“Dismissing a case or a complaint for procedural defects is more burdensome than rendering decisions on the merit. It is because dismissal skips ruling on the merits what the parties requested to the court. Dismissal is finishing litigation regardless of whether the party's argument was valid or not. It is a matter of how strictly judges should manage procedural requirements of litigation. Korean court's recent position prefers providing the litigants with

⁵⁸⁹ Interview with Lawyer No.3, in Seoul, Korea. (Apr. 18, 2013).

⁵⁹⁰ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

maximum access to the judgment on the merits. According to interpretation of law, judges should not decide on the merits when there are procedural defects in the case; however, current judges take position actively providing judgment on the merit for the litigants' right."⁵⁹¹

“Writing dismissal order or dismissal judgment is easier than writing decision on the merits because we do not have to decide complex issues of the case. However, when dismissing cases, I feel like I did not fulfill my responsibilities for the litigants. ... Recently, there are some occasions judges add their conclusion on the merits in their dismissal judgment especially when substantial amount of trial sessions were completed although they do not have to do so. It is because the parties have disputed on the merits. Such practice shows a function of court decision, which is answering to the litigant's claims.”⁵⁹²

As these judges share, judges perceive providing litigants with access to ruling on the merits as professional duty or service to the litigants. They do so not because such practice is required by law, but because they are willing to do so. Why do they guarantee litigants' access to judgment on the merit this far? Following paragraphs that analyze cultural, historical, and social aspects of civil litigation would give an answer to the question.

5.2.2. Procedural due process

Korea adopted due process clause from the U.S. Constitution through the Constitution Amendment in 1987. Adopting U.S.-style due process might have been somewhat unexpected based on the fact that Korean legal system in 1980s depended heavily on the German and Japanese legal system. The due process clause requires procedural

⁵⁹¹ Interview with Judge No.15, in Seoul, Korea. (May. 6, 2013).

⁵⁹² Interview with Judge No.16, in Seoul, Korea. (May. 7, 2013).

safeguards when limiting people's fundamental rights.⁵⁹³ The Constitution article 12(1) declares, “All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through Due Process.”⁵⁹⁴ According to scholarly interpretation, this constitutional clause requires that all the proceedings that can restrict people’s constitutional right should be formed by and should abide with law; that contents of the law should be reasonable and legitimate; and that, especially in criminal proceedings, such proceedings should be formed and maintained for minimizing possibility of infliction of ground rights of the accused.⁵⁹⁵

From the text of the Constitution clause, it seems that due process is guaranteed only in criminal proceeding. Is that really so? The Korean Constitutional Court interprets the article broadly. The Constitutional Court stated that the due process clause in the Constitution is an independent constitutional principle; that it functions as criteria when deciding the constitutionality of a given law; and that the scope of its application is not limited to criminal proceedings but extends to all governmental functions.⁵⁹⁶ According to such interpretation, it should be reviewed whether deprivation of an opportunity to be heard at trial and to receive judgment from the court satisfies due process requirements, because such disposition would limit the constitutional right to claim adjudication. In this aspect, it can be said that procedural due process and the right to claim adjudication is closely connected. Such connection is also found at scholars’ observations. Ki-Moon Hong observes that the right to claim adjudication and procedural due process are in an “inside-outside relationship” in that constitutional basis of procedural due process is the right to claim

⁵⁹³ DAEHAN MINKUK HÖNPÖP [HÖNPÖP][Constitution of the Republic of Korea] art. 12 (S.Kor.).

⁵⁹⁴ Official version of English translation of Korean Constitution, http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf.

⁵⁹⁵ Chang, *Supra* note 578, at 65.

⁵⁹⁶ Constitutional Court [Const. Ct.], 88Hun-Ga6, Sept. 8, 1989 (S. Kor.).

adjudication.⁵⁹⁷

However, with respect to civil litigation, it is difficult to find academic discussions on and application of due process in civil litigation cases. What types of safeguards does the due process provide? How is it related to passive use of dismissal? Unlike the U.S., in Korea, roles and requirements of the due process clause in the Constitution have not developed through academic discussion yet. Moreover, judges and lawyers whom I interviewed did not use the term “(procedural) due process” even when they mention about procedural safeguards and people’ right to claim adjudication. Based on such observation, it can be inferred that (procedural) due process is a concept that is not commonly used and applied in Korean civil litigation practice although it is declared in Constitution. That is the reason why this study uses the term “procedural fairness” instead of “procedural due process.”

5.2.3. Other procedural rights as constitutional rights

This broad term, “procedural rights” is acknowledged as a constitutional right although there is no such term on the text of Constitution.⁵⁹⁸ This right requires actors of litigation to respect litigants as subjects, rather than objects, and to provide opportunities for litigants to realize such status as subjects of proceedings.⁵⁹⁹ In this reasons, the right to be heard at trial, which is the right for litigants to explain their opinions by arguing, proving, and making statements, is the most important and profound part of the procedural rights.⁶⁰⁰

This procedural right seems to be similar to the right to claim adjudication, because the latter also requests courts to allow opportunities to argue about their cases and to make

⁵⁹⁷ Hong, *Supra* note 584, at 14-15.

⁵⁹⁸ *Id.* at 15.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

decisions after that. Thus, it can be understood as more specific version of the right to claim adjudication. Legal professionals also use these terms interchangeably, as this statement shows:

“Judges try not to dismiss complaints or cases in order to guarantee procedural rights of the parties to the maximum level. The litigants would complain severely when judges do not guarantee such procedural rights properly. Especially, in these days, reproachable attitudes of judges are becoming social issues. Thus, it is becoming a trend to avoid immediate dismissal without clarification and to delay dismissal as much as possible, until the end of trial, for the purpose of providing more procedural protections. Judges dismiss only after waiting so long. Likewise, judges provide full opportunity to supplement in order for litigants to receive judgments on the merits.”⁶⁰¹

5.2.4. Summary

With respect to constitutional aspect of passive use of dismissal, two points were found. First, judges and lawyers have a vague perception of litigants’ constitutional rights regarding access to court. Their understanding is vague in that constitutional ground for their practice, whether it is based on procedural due process, right to claim adjudication, or other procedural rights, was not clear. Regardless of specific constitutional ground, judges and lawyers use these constitutional grounds interchangeably. In most cases, litigants’ right to claim adjudication is used for representing all these constitutional grounds. Likewise, statements of judges and lawyers do not show what specific parts or components of the broad right that drive them not to dismiss. It is the reason why this study finds judges and lawyers’ perceptions of litigants’ constitutional rights to access to court is vague. However, their

⁶⁰¹ Interview with Lawyer No.8, in Seoul, Korea. (Apr. 23, 2013).

perception of this constitutional right is very firm in that

Second, however, judges and lawyers' perceptions of constitutional rights for access to court are very firm in that they try to guarantee litigants' right to claim adjudication even more than what Constitution requires. Judges perceive that protecting this right is one of the most important values to the extent that it can justify inconveniences or concerns for other values including speedy trial and efficient case management. Also, they perceive that having judgment on the merit is an important part of the right to claim adjudication. This understanding is broader than what Constitution requires because such access to judgment on the merits is not what Constitution guarantees as a right; and because judges can (and sometimes they should) dismiss complaints or cases that lack procedural requirements or formality. Many judges explained that they are providing opportunities to correct flaws as much as possible before trial and even during trials, in order to provide maximum opportunity for the litigants to have courts' decision confirming their legal positions and arguments. This shows how seriously and broadly Korean judges protects the right to claim adjudication.

5.3 Institutional aspect: Procedural law and practice

In this section, I review reasons of passive use of dismissal that are related to current civil procedure rules and practices. As this study argues, it might be hard to conclude that these rules themselves cause passive use of dismissal, because it would be judge's choice in daily practice that makes differences in the same institutional settings. It would be possible that judges make same or similar decisions regarding certain institutions; and it is also possible that different judges use such institutions differently. Therefore, this study finds reasons for passive use of dismissal mainly from judges' practices: how they make choices between values and which value they prioritize than other values. Of course, civil procedure rules are connected to such practice in that it provide basis for such choices of legal practitioners as mandatory procedural safeguards contribute to active guarantee of access to court.⁶⁰² From this point of view, following paragraphs review current procedural settings and how judges are making decisions in such circumstances.

5.3.1. Dismissal without prejudice

Judge's order to dismiss complaint does not have *res judicata* effect, so it is dismissal without prejudice. The plaintiff whose complaint is dismissed can file the same lawsuit after correcting faults of his complaint. In contrast, dismissal of cases based on lack of requirements of lawsuit has *res judicata* effect; so the plaintiff cannot file the same lawsuit

⁶⁰² For detailed explanation of how procedural safeguards are working in practice of disposition without trial, see sections 4.2.2, 4.2.3, 4.3.4, 4.4.3, and 4.5.3. Thus, this section explains about procedural rules and practices other than procedural safeguards related to disposition without trial.

again if he did not appeal within allowed period.⁶⁰³ For some judges, such institutional setting is the reason for not dismissing complaints. Among these judges, many gave a simple and quick answer for the question about passive use of dismissal: efficiency. The judges opined that not dismissing cases is more efficient, because the plaintiffs can file the same lawsuits after their complaints are dismissed, and judges have to re-examine the re-filed complaints. In cases where the plaintiffs file the same lawsuit again without correcting faults of the complaints, re-examining and re-dismissing for the same reason can be repeated few more times. Considering such possibility of repetition, judges perceive that leading the plaintiffs to correct flaws and to proceed with the proceeding would take less labor than dismissing and repeating the whole processes.

In this reason, judges who try to avoid dismissal of complaints perceive that dismissal of complaint is “useless”, “with few benefits”, or “to make work doubled,” as these statements show:

“It (not dismissing complaints) is because the parties can file the same lawsuit again. It is repetitive process that is not necessary and useless. So, I recommend them to correct the complaints if they really want to proceed with.”⁶⁰⁴

“Dismissing a complaint and examining the same complaint after re-filing make judges work twice for the same case. So, judges try to make a case to be resolved in a single proceeding if it is possible. In this reason, dismissal of complaint is very exceptional. Such decision is rendered only when courts have absolutely no idea about how to proceed with the case.”⁶⁰⁵

There also are concerns about functions of dismissal when considering such lack of

⁶⁰³ LEE, *Supra* note 68, at 189; Supreme Court [S. Ct.], 97Da25521, Dec. 9, 1997 (S. Kor.).

⁶⁰⁴ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

⁶⁰⁵ Interview with Judge No.12, in Ansan, Korea. (May. 1, 2013).

res judicata effect of dismissal of complaints. For them, dismissal of complaints is not working for preventing lawsuit abuse, because the plaintiffs can file the lawsuit again and again even after being dismissed.

“They can file (lawsuits) again and again even after the dismissal. There is no way to prevent it. So, dismissal of complaint cannot block lawsuit abuse; and it indicates that dismissal of complaint is hardly beneficial.”⁶⁰⁶

To sum up, it turned out that judges recognize dismissal of complaints that does not have *res judicata* effect as an institution that is lacking functions and reasons to use.

5.3.2 The foremost goal of civil litigation practice: finding truth

“In Korea, substantial justice should be prioritized than procedural justice.” This comment was what I heard most commonly from judges and lawyers when asking questions about disposition without trial and procedural safeguards. By “substantial justice”, they mean finding truth of the case and rendering judgments in consistent with the truth. For them, “procedural justice” means what procedural rules set, thus to be followed as process, regardless of whether such institution is for efficiency or for procedural safeguards. The above statement shows a value priority that has been embedded among legal practitioners. According to this, court’s function to find truth of cases always prevail what procedural rules set, when there is conflicts between the two. It also means that finding truth, as the foremost goal of civil litigation, justifies even significant violations of procedural rules. It is also what litigants and citizens expect from courts.

⁶⁰⁶ Interview with Judge No.13, in Bucheon, Korea. (May. 3, 2013).

This goal of finding truth was turned out to be one reason of passive dismissal. It is because dismissal takes away an opportunity to explore what is truth through trial. How seriously this goal of finding truth is working in Korean civil litigation can be observed from the failure of reform efforts for concentrated trial(“*Chipchung simri*”; 집중심리), as following paragraphs explain.

5.3.2.1 Finding truth as a reason for passive dismissal

As stated above, judges and lawyers regard finding truth as the most important goal of civil litigation; and that is exactly what people are expecting from courts. It is ambiguous which caused which; however, it is unambiguous that finding truth is common goal between judges and litigants. From this point of view, dismissal can be something illegitimate and lacking to be an official answer or report by courts about the dispute, because it has nothing to do with truth of the disputed event. Likewise, finding truth is connected to court's determination on the merit. The parties to the litigation want and expect to receive official conclusion of the matter they have disputed. To satisfy this expectation, whether the results are what the parties expected or not, there are pressures imposed to judges driving them to show something, some efforts and results that look enough and substantial. Dismissal disqualifies under this standard.

Then, what is “truth” in a civil litigation? What is the truth that people expect and judges pursue to find? As this study explained in chapter 4.2.4.1, the principle of adversarial proceeding is, in principle, a fundamental requirement of civil litigation in Korea. Based on that point, Chun-Soo Yang and Se-Na Woo explain about the popular distinction of

substantial truth in criminal litigation and formalistic truth in civil litigation.⁶⁰⁷ According to this distinction, the concept of truth in civil litigation is formalistic in that, according to the principle of adversary proceeding, only the parties bear responsibility to find truth and judges remain as mere observers, and that a conclusion drawn from the material submitted by the parties under their responsibility is regarded as truth.⁶⁰⁸ This contradicts with substantial truth in criminal litigation that means true facts that actually existed as history.⁶⁰⁹ However, they criticize against this concept of formalistic truth, arguing that the principle of adversarial proceeding is merely a matter of policy choice rather than what every civil procedure necessarily has to accept; and that litigants' capacity to conduct is not equal in real world.⁶¹⁰⁶¹¹

Based on such clear classification, regardless of what concept makes more sense, this study tries to explain what truth concept is actually accepted and pursued by legal professionals in civil litigation. Based on interviews with judges and lawyers, this study found that what judges try to find and the parties want to hear from the court is substantial truth rather than formalistic truth.⁶¹² It can be observed from the fact that the principle of adversarial proceeding, which provides grounds for certain fact or conclusion to be formalistic truth, is often ignored by judges for purpose of finding truth. This indicates that judges are not recognizing what was drawn from the process that purely followed the

⁶⁰⁷ Chun-Soo Yang and Se-Na Woo, “민사소송에서 바라본 진실 개념 –법철학의 관점을 겸하여- [A truth concept pursued in civil litigation-also from the perspective of jurisprudence-], 14-2 MINSAsosong [CIVIL PROCEDURE] 35 (2005) (They observe that such truth concept is hardly discussed by civil procedure scholars in contrast to active discussions of substantial truth by criminal law scholars).

⁶⁰⁸ *Id.* at 42 (The authors observe that such formalistic truth is likely to differ from what really happened).

⁶⁰⁹ *Id.* at 36.

⁶¹⁰ *Id.* at 44-46.

⁶¹¹ As an alternative to these concepts of formalistic truth and substantial truth, they suggest the concept of ‘procedural truth,’ which means facts or conclusion confirmed by litigation procedure that has procedural rationality (*Id.* at 52-53).

⁶¹² Procedural truth is excluded, because that concept, because not many judges or litigants would be familiar with such idea.

principle of adversarial proceeding as true; rather, that judges are acknowledging that they need to do more than merely following the principle of adversarial proceeding, in order to find truth in civil litigation. Moreover, from the perspective of the parties, what they want courts to find for them would be substantial truth, what really happened rather than what is regarded as truth only because the procedure followed the principle of adversarial proceeding. Thus, the truth finding pursued by judges the parties is finding substantial truth rather than what is justified by procedural rules or other rationales.

Judges' efforts to find substantial and actual truth influence their dismissal practice. From the perspective of truth finding, dismissal is recognized as depriving the litigants of opportunity to dispute in trial stage and to receive conclusion which is truth discovered by the court. Dismissal is a judgment rendered by a judge(s); however, it is not about merits of the cases, not about who tells the truth and who lies. Such hesitation of judges can be observed from the following statement:

“Dismissal is rare. Textbooks explain that Korean civil procedure is adversarial; however, in practice, it is actively led by judges, not by the parties. Emotion and culture of Korean people request courts to find truth regardless of what procedural rules command. Thus, it is a dominant idea of the people that judges should not let certain party loose the litigation only because the party missed something procedural. That drives judges to be very active in pointing out what the parties missed and what they have to correct. It does not have to be in a form of official clarification. Judges can just say, “Fix it.” Reality is very different from what in the textbooks. A judge used to provide additional opportunities even though a party does not submit within the certain period fixed by the judge. For some lawyers, it is totally nonsense.”⁶¹³

5.3.2.2 Finding truth as a reason for a failure of concentrated trial

⁶¹³ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

It is difficult to figure out whether concentrated trial is actually working and being used by judges from existing studies on Korean civil procedure. So, this study explored actual usage of concentrated trial by interviewing judges and lawyers and by observation of trial sessions. From the interviewees, it turned out that concentrated trial and dismissal of untimely submitted arguments and evidences that is a device for concentrated trial is something what is in the law but almost never works. There are very few exceptional occasions when judges dismiss for belatedness: when it is clear certain litigation offense or defense is only for delaying the litigation process:

“Few times, there are occasions where counter claims filed after trial sessions of the cases, against which the counter claims were filed, were finished. I dismiss such counter claims, because it is too obvious that purpose of such counter claims is delaying proceedings.”⁶¹⁴

It is turned out that there are only few judges who strictly follow the rule of concentrated trial by dismissing belated arguments and evidences and by not allowing additional trial session. However, such practices are perceived as very exceptional, for some, even as undesirable; and these judges are notorious for such strict observance among judges. Following statements provide how these judges are being recognized by other judges:

“Judges who actually try to dismiss belated submission of evidence or argument get bad reputation. They are wired judges. I remember one judge who got worst score in judge evaluation by Seoul bar association. At the very first trial session, this judge always warn lawyers that he will not receive any evidence or argument if the lawyers do not submit to his until certain time.

⁶¹⁴ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

He actually does not receive these materials after the fixed time. Other courts do not do so. He does not receive even though the evidence is very important one. From the show of the parties, it is severely unfair. I can understand such practice if all the judge do the same. But, in real, only he does that. I do not understand what meaning such practice has.”⁶¹⁵

“A judge whom I worked together was such an exceptional judge. He manages litigation in an extreme way by not accepting evidence other than what was attached on the complaints. His rationale is that lawyers should prepare evidence before filing lawsuits; and that lawyers should not attempt to collect evidence using courts. He begins litigation with declaring that he is not going to make decision on the issues that are not written in the complaints. He draws a line very clearly. Lawyers just hate it. As another member of three-judge court, I find it useful, sometimes, because such practice makes issues simple and blocks submission of useless evidence. However, in real, I think such practice would be difficult to maintain.”⁶¹⁶

Is it so difficult to maintain concentrated trial as above statements are indicating? I could observe trial sessions presided by a judge who is well known for his strict compliance with the law requiring concentrated trial. In one trial session, the party did not submit drawing and design for the disputed building.⁶¹⁷ Other judges might schedule additional trial session and request the party to submit those until that session. However, the judge asked the party to draw basic structure of the building, which is only part of these documents needed for the trial, in court room using OHP facility.⁶¹⁸ In this way, the judge prevented the parties from having additional trial session.⁶¹⁹ In another trial sessions for another cases, there were occasions where the lawyers were not prepared because they did not receive trial

⁶¹⁵ Interview with Lawyer No.7, in Seoul, Korea. (Apr. 22, 2013).

⁶¹⁶ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

⁶¹⁷ Field notes on court hearing observation, in Seoul, Korea. (May. 8, 2013).

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

preparation documents of opposing party until recently, where statements of factual grounds were not clear.⁶²⁰ In such cases, the judge did not schedule another trial sessions.⁶²¹ Instead, he allowed the parties to go out of court room and prepare more thoroughly; and he asked them to come back few hours later on that day.⁶²² A few hours later, the lawyers and the parties came back after preparation and the proceedings could continue.⁶²³ I observed the judge allowed an additional trial session for only one case out of the seven cases scheduled on that day.⁶²⁴ He allowed such additional hearing because the court acknowledged that additional witness examination is necessary.⁶²⁵ I observed that the judge actually made it possible to execute concentrated trial and that such practice could save time for the parties by preventing additional trial sessions that are not necessary.⁶²⁶ I could interview the judge and hear about his opinion on why executing concentrated trial is difficult.

“There are three reasons of rare use of concentrated trial. First, lawyers’ resistance is so strong. Second, court’s poor understanding of the case records before having trial sessions. Lastly, in litigation culture in Korea, there is “inappropriate consideration” between judges and lawyers who are in small legal world. So, judges hesitate to dismiss belated argument or evidence.”⁶²⁷

However, he also acknowledged that it is difficult to strictly execute dismissal of belatedly submitted evidence due to lack of specific standard for determining “belated” and due to realistic difficulties to prepare all the evidence within certain time period. So, he uses alternatives as follows:

⁶²⁰ Field notes on court hearing observation, in Seoul, Korea. (May. 8, 2013).

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ *Id.*

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ Interview with Judge No.19, in Seoul, Korea. (May. 9, 2013).

“Our three-judge court also did not use dismissal of belatedly submitted evidence although we imposed some sanctions against such submission. Because strict execution of such dismissal is very difficult, we use flexible alternatives that can be accepted in current circumstances. For example we send notice to the parties when the case is officially initiated and assigned to out three-judge court. In the notice, we advise the parties to prepare evidence in advance by setting specific time limits. For example, we encourage the parties to send factual inquiries (“*Sasil Chohoe*”; 사실조회) to institutions right away because receiving answers to such inquiries takes long time. We generally accept petition for such factual inquiry until when trial session is scheduled. We recommend the parties file all their petitions for factual inquiry before such scheduling of trial session. However, after trial session is scheduled, we only accept such petition on a conditional basis. The condition is that the filing party shall cancel such petition for factual inquiry if the party does not receive answers to the inquiry until the beginning of the first trial session. Generally it takes three weeks for a party who requested factual inquiry to receive answer for the inquiry. They can receive such answers if their lawyers actively contact the answering person/institute and urge them enough. We do not accept petition for factual inquiry after the first trial session begins. It is because the parties should prepare their trial before the beginning of the trial. Likewise, dismissal of belatedly submitted evidence is new and strange to our litigation culture; so, flexible management that can relieve shock is needed. For that, elucidating due dates and strictly executing such dates is necessary.”⁶²⁸

Above judge opined and showed that executing concentrated trial based on dismissal of belatedly submitted evidence is possible and desirable. Then, why do other judges and lawyers think that concentrated trial is so difficult and undesirable to execute? Answers to this question can be summarized in three inter-connected categories: lack of preparation, changing and “growing” characteristics of civil litigation circumstances, and finding truth as

⁶²⁸ Interview with Judge No.19, in Seoul, Korea. (May. 9, 2013).

a foremost goal of civil litigation. These categories are connected with each other in that trial should not be allowed when there is lack of preparation when considering the goal of truth finding and that circumstances that change and grow during trial period should be reflected in order to find truth. To sum up, because finding truth is such an important goal, preparation of trial should be done, and all the circumstances that are changing before the time of judge's decision making should be considered. Thus, compared to finding truth, achieving efficiency through concentrated trial cannot have a priority. In following paragraphs, I will describe legal professionals' perceptions on these categories.

First of all, concentrated trial is difficult to execute, because there is not enough opportunity for the parties to prepare trial before the concentrated trial sessions. Such lack of preparation is due to lack of procedural devices for trial preparation at pretrial stage. Although some cases go through trial preparation proceeding, as this study explains in the previous chapter,⁶²⁹ these cases are limited to complex cases, and most of the cases do not have such preparation stage. Instead, in the normal cases, judges use certain number of trial sessions for finding issues and for submitting and examining evidences through using the periods between trial sessions. In such situation, requiring judges to finish the trial in the first few trial sessions without having intervals that can be used for actual preparation of the litigation could be a goal hard to achieve, as most of judges recall:

“Concentrated trial is desirable. However, in order to implement concentrated trial, completion of evidence examination should be done first. For that, trial preparation is necessary. It is too ideal expecting that litigants who do not know each other meet one day and finish all the dispute resolution on that day. It rarely exists. Concentrated trial in the U.S. is possible because of their well-equipped discovery, and enough opportunity for trial preparation. Then,

⁶²⁹ See Section 4.1.1 of this dissertation.

it becomes possible to finish at court within short and concentrated trial period. In Korea, we do such preparations in trial sessions. Judges keep asking the parties to prepare, repeatedly. We do not have discovery. Of course, we have trial preparation; however, current trial preparation is merely coming to a court. It is meaningless to require judges to expedite proceedings and to hold one-day trial session and make decision. Moreover, for such preparation, the parties have to follow judges' order or recommendation to prepare. In some cases, they just could not. Even some parties are not willing to follow judges' words although they can. There can be many reasons for that. Dismissing belatedly submitted evidence and argument after setting specific due date for the submission can be a possible way; however, in practice, judges do not use such dismissal because it is possible that such decision can be reversed at appellate courts for being 'lack of enough hearing'. Because of that appellate courts examine facts and evidence all over again from the scratch and that filing fee for appeal is not that high, almost every litigant who lost at the first instance court appeals without difficulty. With respect to civil litigation system, there are so many institutions to be changed, in order to keep up with the goal of concentrated trial. We do not have institutional prerequisites for the concentrated trial; so, in real, it is very hard to do so. Concentrated trial is merely a slogan. Do you think that judges do not want to do so? Yes, they want. But, just impossible.⁶³⁰

“Some judges who prioritize speedy trial use dismissal of untimely submitted evidence and argument; however, it is very difficult to apply this rule as it requires. First, it takes long time for the parties to prepare all evidence for one-time submission; however, court's scheduling does not reflect such difficulties. In addition, lawyers have too many cases to be tried at the same period; so it is very difficult for them to concentrate on only one case. Also, adhering to the concentrated trial in these circumstances would impair litigants' satisfaction of the proceeding. Oftentimes, bar association collect and reveal degree of litigants' satisfaction. Considering legitimacy and satisfaction of litigants, scheduling additional trial sessions is a better idea.”⁶³¹

⁶³⁰ Interview with Judge No.1, in Seoul, Korea. (Apr. 17, 2013).

⁶³¹ Interview with Judge No.7, in Seoul, Korea. (Apr. 30, 2013).

“I heard that, in the U.S., it takes almost one year for the parties to organize their issues and submit evidence before trial; and that strengths and weaknesses are found during that time period for trial preparation, thus mediated dispute resolution is active. Our system is different in that the parties can organize issues and submit evidence also after the beginning of trial. If we had a system like that of the U.S., then Korean judges can also lay the responsibility for not accepting untimely submitted materials on the parties. I personally think our institutions should be improved in that way. Adopting such pretrial system would be beneficial for courts, because it can prevent the parties from hiding materials and delaying proceedings. There are needs for improvements. Without such institutional settings, concentrated trial is not realistic and feasible idea.”⁶³²

Second, concentrated trial is not easy and even not ideal, because circumstances in civil litigation keep changing and growing like “living organisms(“*Yugich’e*”; 유기체).” Especially lawyers argued that it is almost impossible to conduct concentrated trials as civil procedure requires, under current civil litigation settings. It is because it does not provide enough time and procedure to collect all the information and evidence before the beginning of a trial. The lawyers shared their experiences that issues and evidences of their cases were continuously added and changed as living organisms grow.

“In civil litigation, offenses and defenses are so important. In order for trial to be concentrated in an ideal way, society should be transparent; consensus for all the facts should be achieved; and participants should reveal all their thoughts at an early stage of the litigation. In real, every participant of litigation has different idea and strategy. Some clients do not tell even their lawyers about stories or facts that seem to be disadvantageous to them. In extreme cases, lawyers think, “This guy deceived me.” Also, in litigation, it is very important to know thoughts of opposing party; so, I sometimes remain

⁶³² Interview with Judge No.12, in Ansan, Korea. (May. 1, 2013).

silent for the first three to four trial sessions. Can it be criticized for not being concentrated? I do not think so, because rules themselves are not clear. It would have been much better if procedural rules had been clear enough, like, “Parties cannot argue later what they did not argue at the first trial session.” In cases where there are serious disputes on many issues, it is hardly possible to conduct concentrated trial.”⁶³³

How do judges think about this point? Some judges blamed lawyers for not submitting arguments and evidence in timely manner. However, they also admitted that lawyers have too many cases, so they cannot focus solely on one specific case; and that issues and evidence are emerging and changing as trial goes.

“Civil cases are like living organisms. They keep changing in unpredictable ways. Some issues become manifest as trial sessions proceed with. I heard from the lawyers that the parties do not tell them stories that may have adverse effects on them; and that the stories from their clients are what are reorganized in a way that seems to be advantageous to them. Considering these reality, it is necessary to have few trial sessions to figure out what are real issues to explore.”⁶³⁴

“In criminal litigations, cases come to judges after investigations of the cases were completed; so it is possible to conduct concentrated trial after collecting all the investigation records. In contrast to that, in civil cases, issues of the cases come up in the process of exchanging offenses and defenses; and counter-arguments and counter-counter-arguments keep emerging from the trial preparation documents. So, it is very difficult to concentrate trial.”⁶³⁵

Third and the most fundamental reason why concentrated trial has failed is that it conflicts with truth finding by a court, which is the foremost goal of civil litigation. Mostly,

⁶³³ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

⁶³⁴ Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

⁶³⁵ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

lawyers emphasized this reason, because they are someone who are supposed to show and provide grounds for truth for their clients; and because their success in the case depends on submission of proper evidence.

“It is nonsense to finish civil trial in one session or two. Then, severely unfair results will be produced. Moreover, it will be very difficult to find substantial truth from such shortened trial. I understand position of the courts. They should consider efficiency. I also agree with that finishing litigation as early as possible is beneficial. However, this can be what plaintiffs and defendants do not really want.”⁶³⁶

“Accepting untimely submitted evidence or issue is beneficial to both judges and lawyers, in that judges are willing to find conclusion close to truth; and that the parties can have new issues through such submission. It is a matter of value judgment. Which one is better? Dismissing belated submission for expediting proceeding, or reflecting it by having additional trial sessions. Judges experience a great deal of conflicts among them, because both finding substantial truth and concentrating trial are important goals. Many of them try to find balance between these two extremes. I personally think that extreme adjudication is not right one. There are some judges who always declare that he will have one trial session. These judges say that they provide enough opportunity for preparing such concentrated trial; however, in real, it is not that simple. Judges allow certain periods that are enough in their opinion; however, society does not run as they expect. Much more time is needed. So, in order to implement concentrated trial seriously, there should be no time limit for trial preparation.”⁶³⁷

Although lawyers have a great deal of interests in such submission of evidence, judges also regard finding truth through submitted materials as very important regardless of such materials were submitted in timely manner. Thus, also for judges, truth finding is a

⁶³⁶ Interview with Lawyer No.7, in Seoul, Korea. (Apr. 22, 2013).

⁶³⁷ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

very important value.

“I do not dismiss the belated evidence unless the opposing party strongly appeals for the dismissal. It is because substantial resolution of the dispute is more important.”⁶³⁸

“Issues and evidence that were not submitted at trial preparation session often are submitted in trial sessions. However, it is court practice not to sanction against such belated submission, although Civil Procedure Act has a clause for dismissal of such belated materials. Such dismissal is even rarer in trial courts. It is because dismissing substantively important evidence only for being late can produce decisions that are different from reality. So, I do not dismiss untimely submitted materials unless it is so obvious that such submission is only for delaying proceeding.”⁶³⁹

“As a judge, it is difficult to dismiss belated evidence for not obeying judge’s control of proceeding, because the party can make argument based on his right. So, such dismissal is problematic in terms of concrete validity. There are more occasions where the parties who have legal representatives miss timing of submission because their lawyers have too many cases. In such cases, giving disadvantages to the parties for the faults of their lawyers is somewhat cruel, although there are procedural rules requiring that.”⁶⁴⁰

As these statements show, judges value truth finding to the extent that it surpasses finishing trial in certain periods. I could also observe that, in a trial session, one party requested the judge to allow additional trial session; and the party said that he can find important evidence during the period until the next trial session.⁶⁴¹ The judge accepted this request and scheduled another trial session by saying that the party is allowed to reinforce

⁶³⁸ Interview with Judge No.13, in Bucheon, Korea. (May. 3, 2013).

⁶³⁹ Interview with Judge No.14, in Daejeon, Korea. (May. 3, 2013).

⁶⁴⁰ Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

⁶⁴¹ Field notes on court hearing observation, in Seoul, Korea. (Apr. 10, 2013).

evidence.⁶⁴² Moreover, other judges even asked the parties whether they want to have additional trial session for submitting evidence.⁶⁴³ Likewise, judges were very open to allow additional trial sessions when there is necessity for that in terms of finding and submitting new and important evidence. It implicates that finding truth by new evidence, whether belated or not, is perceived by judges as preempting rules for concentrated trial.

5.3.3. ‘Lack of enough hearing’ as a cause for appeal

Why do judges in appellate court care much about avoiding lack of enough hearing (“*Simri michin*”; 심리미진)? Although I could not hear from appellate court judges, it can be referred from the below statement that judges try to conduct hearing as faithful as possible, because they perceive such hearing is a way to guarantee constitutional right to claim adjudication; and that the appellate court judges often dismiss trial court decisions for being lack of enough hearing, in order to set high standard regarding faithful hearing.

“Our judges have thoughts that they should conduct faithful hearing. So, they cannot dismiss materials only for being late, because they think that faithful hearing should consider all relevant evidence available. Judges think such faithful hearing is a way to guarantee litigants’ right to claim adjudication which they value so much.”⁶⁴⁴

5.3.4 Summary: “dismissal, not useful and even not desirable”

For Korean judges, when it comes to the goal of enhancing efficiency, dismissing complaints is not recognized as useful, because there is no *res judicata* effect for dismissal of

⁶⁴² Field notes on court hearing observation, in Seoul, Korea. (Apr. 10, 2013).

⁶⁴³ Field notes on court hearing observation, in Seoul, Korea. (Apr. 11, 2013).

⁶⁴⁴ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

complaints and the plaintiffs can file the exactly same complaints again. In this institutional context, judges choose to keep the case and let the litigants go further, rather than dismissing the cases and re-reviewing the same ones when the plaintiffs file again. This shows how Korean judges pursue efficiency, although it is different from what can be achieved by dismissing complaints.

Moreover, dismissal is recognized as not desirable when it conflicts with a truth finding function of civil litigation. A goal of enhancing efficiency through dismissal is not accepted as a prime goal, in such context. As the failure of reforms for concentrated trial shows, finding truth is perceived as the most important goal of civil litigation by Korean judges and lawyers; and such value is regarded as having priority when it conflicts with other values, such as judicial efficiency. This value priority applies to dismissal as well. Efficiency through dismissal is recognized as having lower priority than finding truth. Such gap in terms of priority becomes manifest with respect to dismissal, because dismissing complaints and cases are perceived as depriving litigants' opportunities to have trials which are official stages for truth finding in the court system. This led most judges to ignore the concentrated trial and dismissals; and it shows how institutional values conflict in real and which value prevails in such conflicts.

This prime goal of truth finding requires judges to conduct faithful hearing. Especially appellate court judges look closely whether trial court judges follow such an important demand. For these appellate court judges, dismissals are not accepted as be results of enough and faithful hearing in many cases; and this is working as a burden for trial court judges when dismissing complaints or cases. It also shows when dismissals can be something not desirable.

5.4 Historical and cultural aspects: Images and roles of judges

Images of judges that include judges' views of themselves and people's views of judges are playing important roles when judges' consider whether they dismiss or let the plaintiffs continue. Similar to many other societies, in Korea, judges are the legal professionals who are highly respected for their roles and credentials; and they are expected to perform their job according to high professional standards. On top of that, because there are lingering images of traditional local governors who also had performed as judges, the term "A trial by a local governor (*Wönnim Chaepan*"; 원님재판)" is still used by judges and lawyers, although judges do not govern administration of local area and local government officials do not make binding legal decisions any more. This image still has significant impacts on the judges' practice.

However, in terms of judges' practices, this image is perceived differently by judges, lawyers, and lay people who are prospective litigants. Judges accept the image of a trial by a local governor as calls for them to take good care of their people, litigants, to the extent that such attitude forms judicial paternalism. For lawyers, however, the same concept works very differently. They use the term, a trial by a local governor, for indicating that judges sometimes rule as they wish, regardless of law or principle, just as local governors had too broad discretion without proper devices for checks and balances. Lay people, according to observations by judges and lawyers, regard court as the place that provides answers to all type of cases, and judges as someone who has authority to make all their problems and issues resolved. In following paragraphs, this study shows how such images of judge work in terms of passive dismissal.

5.4.1 “A trial by a local governor”

In *Chosŏn* Dynasty, which lasted from the year of 1392 to the year of 1910 when colonized by Japanese Empire, local governors who took charge of all the administration decisions also took charge in adjudication.⁶⁴⁵ It was because adjudication and administration were not divided until the time of modernization.⁶⁴⁶ Adjudication was the most important task for the local governors to the extent that their performances as judges are evaluated as basis for their job performance and that the local governors cannot delegate the tasks of adjudication to government officials with lower ranks.⁶⁴⁷ Local governors who render fair and wise decisions gained fame among the people in the whole country.⁶⁴⁸ Description of a trial by local governor is as follows:

“In the middle of local governor’s office, a local governor is sitting on a high chair that shows his dignity; and officials of the town who seem to have high ranks are standing left and right sides of the local governor. On the floor, a petty official of the town is diligently writing something down on the papers. There are stepping stones under the hall where the local governor is sitting; and there are stairs from the stepping stones to the hall. Two persons are standing on the stepping stones. Although the local governor says something in quiet voice, the two persons deliver the words in very loud voices. In the yards, petty officials are standing in two rows. There are also soldiers standing among them. It clearly seems to be neat and ordered. In the yard and at the middle of the two rows of petty officials, two persons are sitting together with their heads down. Their relationship does not look good. They seem to have

⁶⁴⁵ Sang-Hyuk Im, “법정의 풍경” [*Scenes of a courtroom*], in CHOSŎNS ŬI ILSANG, PŎPJŎNG E SEŎDA [DAILY LIFE IN CHOSŎN DYNASTY STANDS IN A COURT ROOM] 60, 62 (THE SOCIETY OF KOREAN MANUSCRIPTS EDS., Yŏksa bipyŏng sa [History Criticism Press], 2013).

⁶⁴⁶ PYONG-HO PARK, HANKUK PŎPCHESA [LEGAL HISTORY OF KOREA] 146 (2012).

⁶⁴⁷ Im, *Supra* note 645, at 62.

⁶⁴⁸ *Id.*

severe disputes.”⁶⁴⁹

What are local governors supposed to do when adjudicating cases? It is required for local governors to follow well-accepted interpretation of law; to render reasonable judgments; and to thoroughly examine evidences in order to make decisions according to law.⁶⁵⁰ Local governors who interpret laws as they wish, misinterpret or misapply laws due to lack of legal knowledge, or let lower officials make all adjudication decisions instead of themselves, instead of following above requirements, were recognized as harassing people.⁶⁵¹

How did they perform this adjudication task? Some local governors stood on the side of the people who had power and accepted pointless arguments of them; and other local governors realized importance of social justice of “suppressing the strong and supporting the weak (“*Ökgang puyak*”; 억강부약)” and tried to realize the value.⁶⁵² According to Pyong-Ho Park, the former type of local governors was majority.⁶⁵³ He observed that, in many cases, when one party to the litigation was someone who had power or knew someone who had power, or when the local governor received a secret request for favor, then they often delayed the proceeding or misjudged.⁶⁵⁴ Sometimes local governors could not manage litigation proceeding smoothly, thus were not able to solve unfair situations of the litigants; and even were laughed at by people.⁶⁵⁵

⁶⁴⁹ Im, *Supra* note 645, at 60.

⁶⁵⁰ JAE-MOON KIM, HANKUK CHÖNTONG MINJU JUŬI IRON KWA PÖP ŬI CHÖNGSIN [KOREAN TRADITIONAL DEMOCRACY THEORIES AND SPIRITS OF LAW] 204 (2007).

⁶⁵¹ *Id.* at 204-06.

⁶⁵² Geung Sik Jung, “분쟁과 재판” [*Disputes and adjudication*], in CHOSŎNS ŬI ILSANG, PÖPJÖNGE SEÖD A [DAILY LIFE IN CHOSŎN DYNASTY STANDS IN A COURT ROOM] 34, 56 (THE SOCIETY OF KOREAN MANUSCRIPTS EDS., Yöksa bipyöng sa [History Criticism Press], 2013).

⁶⁵³ PYONG-HO PARK, KEUNSE ŬI PÖP KWA PÖP SASANG [LAW AND JURISPRUDENCE IN MODERN TIMES] 73 (1996).

⁶⁵⁴ *Id.*

⁶⁵⁵ Jung, *Supra* note 652, at 56.

5.4.2 Judicial paternalism

How is a term “a trial by a local governor” perceived by judges? For many judges interviewed, the term stands for judges’ roles of taking care of litigants beyond merely rendering decisions and solving every kind of problems, just as local governors did hundreds years ago. In *Chosŏn* dynasty in which knowledge of Confucius teachings of China were regarded as the most important qualification for government officials and society leaders, local governors are required to take care of their people. It was because Confucius teachings for ideal government officials and social leaders include “Fearing heaven and loving people (“*Kyŏngch’ŏn aein*”; 경천애인)” and government officials’ roles as parents of the people. According to Sang-Yong Kim, ideologically, *Chosŏn* dynasty placed the people at highest place by declaring, “People are the heaven of the King”, “People are basis of the country”, and “People are compatriots”.⁶⁵⁶ These teachings can be summarized as “politics for acquiring trust from the people and politics according to wills of the people.”⁶⁵⁷ However, at the same time, Confucius teachings justified complete control of the King by teaching that the relationship between the people and the king is same as that between parents and children, by saying, “People are new-born babies of the King”, “King is the parents of the people, and the people is the king’s legitimate children.”⁶⁵⁸

Such teachings still speak in a form of judicial paternalism, in that the teachings require decision makers go beyond merely providing official answers to the legal dispute. It requires judges to take care of their people, litigants, as parents do for their children. It is possible that judges do not connect themselves to local governors in *Chosŏn* dynasty.

⁶⁵⁶ SANG-YONG KIM, HANKUK PŎPSA CHUNGSIM PŎPSA WA PŎP CHUNGCH’AEK [LEGAL HISTORY AND LEGAL POLICY: FOCUSING ON KOREAN LEGAL HISTORY] 46-47 (2006).

⁶⁵⁷ PARK, *Supra* note 646, at 102-06.

⁶⁵⁸ KIM, *Supra* note 656, at 46-47.

However, whether they do so or not, judicial paternalism is what has been basis of judges' practice in Korea. Such judicial paternalism has two features in terms of judge's practice of managing dispute resolution process. First, judges are willing to provide maximum level of opportunities for litigants to access to courts. In doing so, judges teach litigants and even admonish them, as parents do for their children. Second, judges try to solve as many problems submitted to them as possible, regardless of whether these problems can be solved legally or not. For these judges, their roles as someone who listen to the litigants' stories are more important tasks than screening non-legal problems out of the court, in order to relieve the litigants' feeling of unfair. Because of this second image, judges are recognized as grievance solvers by lay people.

Then, how does this judicial paternalism work in terms of dismissal practice? Reflecting the features of judicial paternalism mentioned above, judges try to avoid taking away litigants' opportunity to have trial, for several reasons. First, judges are not hesitating to support or even teach litigants in order to avoid dismissal and to lead them to trial and resolution on the merits of their cases, as these judges share:

“Dismissal looks like a court decision that lacks sincerity. Plaintiffs file lawsuits because they feel unfair for something and they want judges to listen to them. So, it looks cold-hearted to dismiss these cases only because they lack legal knowledge or their expressions are coarse. So judges prefer to teach them instead of refusing them by dismissal and to let them use legal aid if they did not hire lawyers for financial reasons. Dominant view of the courts is letting the plaintiffs continue their cases through teaching, disciplining and educating them.”⁶⁵⁹

“The reason for hesitating dismissal is that judges are supposed to guarantee the constitutional right to claim adjudication as supporters for the litigants.

⁶⁵⁹ Interview with Judge No.6, in Uijeongbu, Korea. (Apr. 29, 2013).

The litigants come to courts in order to resolve their disputes. Issues of the disputes are always directly connected to the merits of the cases. Dismissal is depriving them of opportunity to dispute their cases further without determining the merits of the cases.”⁶⁶⁰

Second, the scope of disputes that can be resolved at court is very broad. Instead of refusing to decide disputes that are not legal disputes, judges try to accept broad scope of cases by not dismissing those. Such practice is due to judges’ efforts to relieve grievance of the people who chose to come before them with a feeling that something is unfair.

“The litigants come to the judges because they could not solve their problems by themselves. Using terms of *Chosŏn* Dynasty, they come to local governor and ask him to find whose fault caused the problem. I think that judges are supposed to declare who is right and who is wrong. For this purpose, having trial is necessary.”⁶⁶¹

“There are cultural difference between Korean and the U.S. regarding function of litigation. In Korean, the purpose of litigation is listening to and saving the people who feel unfair. In the U.S., litigation is for resolving dispute.”⁶⁶²

“In Korea, judicial paternalism is common. So, there is a culture of giving more opportunities to persons who cry out with high-pitched voices. If our judges do not give opportunities and dismiss right away, as judges in the U.S. do, then the litigants will immediately go to news reporters and make them to write news articles about the judges. I think this is excessive. So, I think we should dismiss as the U.S. judges do.”⁶⁶³

As stated above, based on judicial paternalism, Korean judges make their best efforts for providing the litigants who come to them with opportunities to have trial and to feel heard.

⁶⁶⁰ Interview with Judge No.13, in Bucheon, Korea. (May. 3, 2013).

⁶⁶¹ Interview with Judge No.2, in Seoul, Korea. (Apr. 24, 2013).

⁶⁶² Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

⁶⁶³ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

Sometimes, judges prioritize this value than what procedural rules require them to do, especially when there is a conflict between such value and procedural requirements. Dismissal is a good example of such procedural rules that are perceived as less important compared to taking care of litigants as parents of them.

However, the term ‘judicial paternalism’ is understood by news media totally differently from what judges and lawyers perceive. In the news media, judicial paternalism is understood as excessively generous punishment compared to what the defendant deserves; and it is criticized as violation of rule of law.⁶⁶⁴ Especially, judicial paternalism is problematic when it comes to the punishment for the crimes committed by owners of big corporations. It is because such people tend to be released easily by bond or probation. Such decisions are criticized for being too generous only for the people who have power and money. Media reporters find reasons for judicial paternalism from judiciary’s recognition of indebtedness for not being able to play their roles during authoritarian regimes.⁶⁶⁵

These news reports show how differently the term ‘judicial paternalism’ is perceived and used by judges and news reporters. However, such news reports are limited in that it only deals with criminal cases and amount of sentence rather than judge’s management of litigation proceeding. Thus, such comments from the news reporters cannot be accepted as providing holistic idea about judicial paternalism in Korea.

5.4.3. Ruling as judges wish, regardless of law or principle

In contrast to judges’ understanding of a trial by local governor, many lawyers

⁶⁶⁴ Min Park, *Danger of ‘Judicial paternalism’*, MUN-HWA ILBO [MUN-HWA DAILY], Jan. 3, 2014, available at <http://www.munhwa.com/news/view.html?no=2014010301073827015002> (last visited February 6, 2014).

⁶⁶⁵ *Id.*

interpret and use the term in order to express or sometimes to satirize judge' use of power beyond proper standards or principles. Such recognition is based on the fact that local governors in *Chosŏn* era had vast range of discretion, thus sometimes they used such power to make decisions as they wish beyond law and principles. So, in modern era, the term a trial by local judge can also mean the judge's excessive use of discretion, which can be regarded as anachronistic. Such perceptions possibly have its roots on the images of local governors who rendered wired and unjust decisions. It is because there were local governors who only knew about Confucius teachings knowledge of which was required for government officials, but knew nothing about law; and who only cared about money without making efforts to render just decisions.⁶⁶⁶ According to such anecdotes in the history, some local governors did not have any legal knowledge, wisdom, or willingness to resolve disputes and grievances of their people; thus, their adjudication had nothing to do with law.

Which practices of judges are regarded as a trial by local judge? Lawyers who were interviewed pointed out that the judges' "overuse" of clarification fits into the images of the local governors. Such observation and evaluation mainly point out that judges who overuse clarification are disregarding the principle of adversarial proceeding according to which they are supposed to let the parties control every argument and evidence submission. The lawyers are recognizing that judges, by using clarification too much, are helping one side of the parties, ignoring the laws and principles that command them not to do so.

"The principle of adversarial proceeding is a core principle of civil procedure; thus, there are many limitations of the use of judge's clarification. However, there seem to be many violations of this principle. To some extent, judge' clarification is used like a trial by local judge. This is problematic. I think

⁶⁶⁶ Jung, *Supra* note 652, at 57.

this is because there are not enough number of lawyers in Korea yet.”⁶⁶⁷

“The principle of adversarial proceeding is a fundamental principle of civil procedure in Korea. However, in real practice, there is strong tendency that judges control litigation proceeding regardless of what the parties submit. This can be understood as cultural difference. Korea has strong culture of a trial by local governor. Because of that culture, in civil litigation, judges are highly likely to control all the phases of the proceeding. It is quite different from what civil procedure textbooks say. I want to request to the judges for restraining such practices. Somebody should write a law review article that critically points out how the principle of adversarial proceeding is important and how it is ignored in daily court practice.”⁶⁶⁸

Then, according to the lawyers’ opinions, what are the reasons for such active use of clarification by judges? Following comment by a lawyer shows one possible reason that can hardly be heard from judges:

“Judges use clarification when they do not understand what is on the documents submitted by the parties. Mostly, they do not understand because contents of such documents are not clear. I observe that Korean judges have certain kind of pressure that they should examine and control everything very thoroughly. I would like to call it as “God complex.” “I should examine every detail of this case, because I know everything and I can do everything.” So, in order to do through hearing, judges keep asking about and making sure unclear parts of the cases. Also, they have very strong sense of responsibility. They also have strong elitism. So, when there is something they cannot understand fully, they keep asking and trying to resolve such uncertainty, instead of dismissing it.”⁶⁶⁹

This comment about a judge’ motivation for active use of clarification shows slightly different aspects of judges’ perception of their own job and roles. However, such strong perception, responsibility and social roles of the judges, whether it is called as elitism or even

⁶⁶⁷ Interview with Lawyer No.4, in Seoul, Korea. (Apr. 19, 2013).

⁶⁶⁸ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

⁶⁶⁹ Interview with Lawyer No.10, in Seoul, Korea. (Apr. 26, 2013).

“God complex,” can be understood as being consistent with what judges stated about themselves: persons who provide litigants with maximum access to trial and who are supposed to listen to and solve all kinds of problems if they can. It is because such strong and thorough recognitions of their social roles can lead the judges to perform as they are expected to do so, which is guaranteeing maximum access to trial although it conflicts with the principle of adversarial principle. Also, it may be difficult for the judges with such strong sense of responsibility to follow the principle of adversarial principle by remaining only as observers or referees.

5.4.4. Summary

An image of a local governor in *Chosŏn* Dynasty who used to be a judge still remains in the perceptions of judges and lawyers; and it still influences judges’ practices. For judges, this image, combined by Confucius teachings that require government officials to play roles of teachers or even parents of their people, is connected to judicial paternalism. Based on this judicial paternalism, judges perceive their roles as taking care of litigants regardless of their legal capacity, in order to provide them with maximum access to court. They also accept their roles of accepting, listening to, and resolving all kinds of disputes and grievance regarding which the litigants decided to rely on resolution by the court. Considering these roles, dismissal is not a good answer from teachers and parents of the people. Instead, judges are willing to teach, support, and lead the litigants until the very end of litigation, which is judgment on the merits, once the litigants came to the court and delegated resolution of their issues.

As lawyers criticize, such teaching and supporting by judges go beyond what the principle of adversarial proceeding requires, especially when such helps by judges are giving hints for submission of argument or evidence. Regardless of whether such practice is

appropriate or not, it clearly shows that judges' perceptions of their roles and of expectations to them and their practices based on such perceptions prevails over what this fundamental principle of civil procedure requires. That also shows value priority, as shown in the failure of concentrated trial as well.⁶⁷⁰ Likewise, as a historical and cultural aspect, images of and expectations about judges' roles, which is to guarantee litigants' maximum accesses to court, establish and control value priority in judges' practices.

⁶⁷⁰ See Section 5.4.2 of this dissertation.

5.5 Social aspect: anti-authoritarianism and growing criticism against judiciary

5.5.1 Social changes and anti-authoritarianism

Although no power is free from criticisms against it, Korean society was an exception when it was under authoritarian regimes in 1970s and 1980s started by military coups and ruling by two presidents who were military generals.⁶⁷¹ Passing through these “anti-democratic military dictatorship regimes,” authoritarian ruling system settled down and “authority-driven” thoughts and life style deeply rooted in Korean society.⁶⁷² Embedded in Korean society, this authoritarianism remained after end of these military regimes. Even in the era of “civilian government”⁶⁷³ and “government of the people,”⁶⁷⁴ the time period after long fights for democratization, various aspects of authoritarianism still remained in Korean society.⁶⁷⁵ In the society under this authoritarianism, only small number of people monopolized political, economic, and social power;⁶⁷⁶ and ordinary people are required to

⁶⁷¹ These two presidents are Jung-Hee Park who was a president from 1972 to 1979; and Doo-Hwan Jeon who took presidential office from 1980 to 1988. During these periods Korea achieved remarkable economic development from the ruin of Korean War; however, these terms also stand for authoritarian regimes.

⁶⁷² Hyun Sönu, “탈권위주의 사회와 이성적 권위” [*A society escaping authoritarianism and rational authority*, in SEGYEHWAWA JAA CHÖNGCH’ESÖNG [GLOBALIZATION AND SELF-IDENTITY] 259, 259 (A SOCIETY FOR THE RESEARCH OF SOCIETY AND PHILOSOPHY EDS., Ihak Press, 2001).

⁶⁷³ This slogan is used for the government led by president Young-Sam Kim took office from 1993 to 1998. Because his predecessor Tae-Woo Roh who served as a president from 1988 to 1992 was also military general before being elected, president Kim’s government emphasized that their regime is established by civilians, not by military officers. Young-Sam Kim is acknowledged to contribute to democratization of Korea.

⁶⁷⁴ This is a slogan for president Dae-Jung Kim who served as a president from 1998 to 2003. With Young-Sam Kim, Dae-Jung Kim was also known for his fight against military regime for democratization of Korea.

⁶⁷⁵ Sönu, *Supra* note 672, at 260.

⁶⁷⁶ Ho-Geun Song, “세대와 권위” [*Generation and authority*], in HANGUK SAHOE ÖDIRO KANA?: KWÖN WIJUÏ IHU Ï KWÖNWI KUJO, KÛ TAEAN Ï MOSAEK [WHRE IS KOREAN SOCIETY GOING?: AUTHORITY SYSTEM AFTER AUTHORITARIANISM, SEEKING ALTERNATIVES] 285, 286 (DAE-YUP CHO & GIL-SUNG PARK EDS.,

accept and follow decisions of the people who have power and authority, without any doubts and criticisms.⁶⁷⁷

However, gradually, such “distorted authority” faced with resistance and opposition, which can be called as “anti-authoritarianism.”⁶⁷⁸ Korean people began to have doubts and to criticize what people with power have done and are doing publicly. When it comes to misbehavior of “Haves”, in Galanter’s terms⁶⁷⁹, “Have-nots” no longer accepted such faults as something within the boundary of authority. Instead, they began to recognize such authoritarian misbehaviors as social problems that suppress ordinary people as well as personal issues. The government by Mu-Hyun Roh who served as a president from 2003 to 2008 provided momentum for this change and movement. President Roh manifested that he would terminate era of authoritarianism; and he and his cabinets tried to show how government official with high rank can behave without authoritarian attitudes. President Roh tried to show that “new politicians” who escaped authoritarianism are not different from ordinary people by trying to deliver images of “folksy politicians” and politicians who understand difficulties of ordinary people.⁶⁸⁰ Under these circumstances, as of 2000s, authoritarian and hierarchical power was in the process of rapid collapse.⁶⁸¹ According to

Good Information Press, 2005).

⁶⁷⁷ Sönu, *Supra* note 672, at 259.

⁶⁷⁸ *Id.* at 260.

⁶⁷⁹ “Haves” means people who have “power, wealth and status”, and “Have-nots” means people who do not (Marc Galanter, *Why the “Haves” come out ahead: Speculations on the limits of legal change*, 9 LAW & SOC’Y REV. 95, 103 (1974)).

⁶⁸⁰ Kwang-Young Shin, “정치사회와 권위구조의 변화” [*Changes in political society and authority structure*], in HANGUK SAHOE ÖDIRO KANA?: KWÖNWJUÛIHU ÛI KWÖNWI KUJO, KÛ TAEAN ÛI MOSAEK [WHRE IS KOREAN SOCIETY GOING?:AUTHORITY SYSTEM AFTER AUTHORITARIANISM, SEEKING ALTERNATIVES] 143, 159 (DAE-YUP CHO & GIL-SUNG PARK EDS., Good Information Press, 2005) (President Roh bear the risk of being recognized as a leader without dignity and qualification from the perspective of traditional elitism).

⁶⁸¹ Song, *Supra* note 676, at 287 (According to his observation, in 1970s, small number of groups had all political, economic and social power; and social began to be divided in 1990; and political power and economic power are being divided as of 2005); Shin, *Supra* note 680, at 143-44 (With respect to political authority, he also observes that falls of traditional political authority and rise of new authority is important changes in current Korean society).

Ho-Geun Song, especially, young generation believed that rules of competition are not fair and leading groups in the society do not have morality; and this “distrust” caused “withdrawal of respect”.⁶⁸² He observes that equalitarianism that was inherited from older generations drove young generations to believe that social power deserves to be refused when people having such power cannot show responsibility and morality.⁶⁸³

In this process of falls of traditional authoritarian power, communication through internet and social activist group played crucial roles. First, as a media alternative to existing media groups who have been willing to cooperate with “Haves”, internet significantly weakened people’s information dependency on existing media.⁶⁸⁴ Also, by allowing delivery of users’ own opinions, internet published various opinions that could not have been reported by existing media.⁶⁸⁵ Likewise, internet provided bilateral opinion exchanges, for twenty four hours, and every day.⁶⁸⁶ In these reasons, emerge of internet is remarked as “revolutionary event” that fundamentally changed authority structure in Korean society.⁶⁸⁷ Second, social activist groups could grow very rapidly since the end of 1980s due to justification and legitimacy of their acts conferred by the people.⁶⁸⁸ Korean people provided these activist groups with “moral authority,” which is a supreme one compared to authority given to any other social group, because these activists resisted against corruption

⁶⁸² Song, *Supra* note 676, at 290-91.

⁶⁸³ Song, *Supra* note 676, at 290-91; Shin, *Supra* note 680, at 147 (“Korean political parties and politicians who were sticking to old customs were severely distrusted and criticized not because they did not have high level of morality that was required for the group of leaders in the society, but because their morality is below the level of ordinary people”).

⁶⁸⁴ Shin, *Supra* note 680, at 150-51.

⁶⁸⁵ *Id.* at 151.

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.* at 150.

⁶⁸⁸ Dae-Yup Cho, “시민사회와 권위” [*Civil society and authority*], in HANGUK SAHOE ÖDIRO KANA?: KWÖNWIJUŪI IHU ŪI KWÖNWI KUJO, KŪ TAEAN ŪI MOSAEK [WHRE IS KOREAN SOCIETY GOING?:AUTHORITY SYSTEM AFTER AUTHORITARIANISM, SEEKING ALTERNATIVES] 203, 209 (DAE-YUP CHO & GIL-SUNG PARK EDS., Good Information Press, 2005).

and immorality of authoritarian politicians.⁶⁸⁹ Based on this moral authority from the people, social activist groups have fought against authoritarianism.⁶⁹⁰

Observing this anti-authoritarianism, Korean scholars in sociology filed are recognizing that traditional and suppressing pre-modern authority is being dissolve; and that, however, new authority that replaces those is not established yet.⁶⁹¹ Then what are the possible paradigms that are being discussed and suggested? For Ho-Geun Song, young generations who oppose to authoritarianism most severely are willing to produce “persuasive authority.”⁶⁹² In contrast to hierarchical power that consists of “coercion”, “manipulation” and “influence”, persuasive authority stands for power that has characteristics of “inducement”, “encouragement” and “persuasion”.⁶⁹³ It indicates that young generations are looking forward to seeing society leaders with responsibility and morality, someone who they can voluntarily admit, respect and follow. Woo-Hyun Seon defines a new authority as “rational authority”.⁶⁹⁴ This authority is what is established after reaching “rational consensus” after having liberal discussions, rather than “top-down” unconditional coercion.⁶⁹⁵ Declaring that an era where power and position automatically guaranteed authority is already finished, Kwang-Young Shin argues that “an authority escaping

⁶⁸⁹ Cho, *Supra* note 688, at 209.

⁶⁹⁰ *Id.* According to the results of survey of credibility conducted by Ho-Geun Song, social activist groups turned out to have the highest level of credibility from the people, among social groups including political parties, government, judiciary, big corporations, media, military forces, labor unions, universities (Song, *Supra* note 676, at 297-98).

⁶⁹¹ Dae-Yup Cho & Gil-Sung Park, “도입: 새로운 권위 패러다임의 모색” [*Introduction: seeking new paradigm of authority*], in HANGUK SAHOE ÖDIRO KANA?: KWÖNWIJUÏI IHU ÏI KWÖN WI KUJO, KÛ TAEAN ÏI MOSAEK [WHRE IS KOREAN SOCIETY GOING?: AUTHORITY SYSTEM AFTER AUTHORITARIANISM, SEEKING ALTERNATIVES] 11, 14 (DAE-YUP CHO & GIL-SUNG PARK EDS., Good Information Press, 2005)

⁶⁹² Song, *Supra* note 676, at 287.

⁶⁹³ *Id.* at 287-88.

⁶⁹⁴ Sönu, *Supra* note 672, at 278.

⁶⁹⁵ *Id.*

authoritarianism” is the authority that has been established recently.⁶⁹⁶ This type of authority finds legitimacy from the citizens; so it seriously considers public opinion, democratic procedures and politicians and government officers who are free from stereo type authoritarianism.⁶⁹⁷

These observations and opinions on the new authority paradigm have following commonalities. First, these new authorities regard public opinion seriously. It can be understood as reactions to the historical fact that authority without support of the public ended up being collapsed. Second, authority has transformed from what is given to certain leaders due to their positions to what should be gained by leaders based on what and how they have done after they took their offices. No longer, authority comes automatically from certain position or other resources possessed by the leaders. Being persuasive and being rational can be understood as qualifications for earning authority.

As this study explains in following sections, Korean judiciary is also facing serious criticisms from this anti-authoritarianism; and judges are making efforts to abide with what people require as qualifications for new authority: caring public opinion and being persuasive and rational.

5.5.2 Anti-authoritarianism and criticism against judiciary

Korean judiciary was not an exception from this wave of anti-authoritarianism in Korean society. Rather, judiciary’s level of credibility was very low.⁶⁹⁸ As results of survey of credibility conducted by Ho-Geun Song show, Korean people’s credibility on the

⁶⁹⁶ Shin, *Supra* note 680, at 158.

⁶⁹⁷ *Id.* at 158-59.

⁶⁹⁸ Song, *Supra* note 676, at 297-98.

governmental entities is very low, to the extent that it can be called as “extreme distrust.”⁶⁹⁹ Credibility of judiciary had been lowered; and, as of 2001, its credibility was the second lowest, following political parties which had been the lowest, among nine social groups including political parties, government, judiciary, big corporations, media, military forces, labor unions, universities and social activist groups.⁷⁰⁰

Why did judiciary get so low score for credibility? Korean people have criticized court and judges for being unfair and for being authoritarian. First, Korean people have raised questions on fairness of judgment rendered and have reported and criticized specific cases that seem to be severely unfair through news media, books, movies, and activist movements. Such reports focused mostly on how judges had ruled for the benefits of the parties who have money and power and how they had disregarded perspectives of the weak. Second, attitudes of judges in the courtrooms have drawn media attentions more and more; and Korean people reacted very harshly through comments on internet. Social movements that had been drastically raised and developed during 1990s and 2000s added ways to react and raise voices against such wrong doings by the judges. These reactions were enough for these judges to get in troubles. These events coincide with what Korean society has experienced in the process of falls of traditional authoritarian power and rises of requests for new authority paradigm.⁷⁰¹ Also, as Ho-Geun Song observes, it shows how professional groups did not manage their social authority properly and how media and broadcasting groups make professional group to be the most interesting target.⁷⁰² Likewise, rise of these criticisms against judges for being unfair and authoritarian has its roots on social changes toward anti-authoritarian; and it is growing even faster as communicating technologies

⁶⁹⁹ Song, *Supra* note 676, at 297-98.

⁷⁰⁰ *Id.*

⁷⁰¹ See Section 5.2.1 of this dissertation.

⁷⁰² Song, *Supra* note 676, at 286.

empower people to discuss and share with broader scope of people and to respond and act as a class.

How has Korean judiciary reacted to such criticisms? This study observes that the judiciary already recognized and admitted that traditional authority that had been given to someone who became a judge due to their high scores on bar examination and excellent grades at legal research institute is not working anymore. Thus, as this study argues, judges began to make efforts for establishing new authority under new authority paradigms that require caring about public opinion and being persuasive and rational from the view of the people.⁷⁰³ Recent reform efforts and changes in judiciary that encourage and implicitly urge judges to be kind to litigants and to use proper words in courtrooms can be understood as one of the judiciary's efforts to establish new authority that abandons and escapes traditional authoritarian power. In this way, responding to criticisms against them, Korean judiciary chose to change in a way that new authority paradigm requires; and it is still progressing.

With respect to dismissal practice, above mentioned social contexts made it even more difficult for judges to dismiss complaints and cases. Experiencing such social changes, judges became more sensitive to possible reactions of the litigants; and they began to have concerns about litigants' reactions to dismissal instead of judgment on the merits. It is because dismissal can be accepted by litigants as refusal from the court although it is allowed and required by law, and judges are also recognizing that dismissal is not an ideal guarantee of constitutional rights to access to court as explained above.⁷⁰⁴ Likewise, judges became more cautious to render dismissal due to current social changes. Following paragraphs provide more detailed contexts of such changes and its influences on dismissal practice.

⁷⁰³ See Section 5.5.1 of this dissertation.

⁷⁰⁴ See Section 5.2 of this dissertation.

5.5.2.1 Criticism for being unfair: two movies

Is judiciary fair? Do judges decide cases based only on what laws say and evidence without regard to power of the parties and pressures from them? These are questions about fairness in judiciary.

Criticisms against judiciary for being unfair were not raised and shared by lawyers, legal scholars or news reporters. Rather, allegedly victimized persons and book authors and movie makers who made their stories public began movements that request changes and improvements in judiciary toward guaranteeing fair judgment. As one example, the crossbow terror incident (“*Seokgung Tereo Sageon*”) has attracted a great deal of attentions for two reasons: first, it was a physical attack to a judge and second, it was committed by a professor using very unusual weapon. The attacker was a former professor of a university. He had been excluded from reappointment by his university; thus, he filed a lawsuit against the university arguing that he had been rejected because of his whistle blowing. He lost the case at a district court and a high court as well. One day, the professor visited the judge, who was a presiding judge at the trial at the high court, carrying the crossbow. It was alleged that an arrow had been fired during their quarrel and that the arrow had hurt the judge. The professor was charged for attempted murder. It was sensational at the time because it was hardly imaginable to attack a judge for his decision. Judges have maintained very high social status and been recognized as untouchable by ordinary people because of the *de facto* status and power. Also, of course, many judges were shocked by this incident.

This incident was filmed in 2011, and the movie “Broken arrow” questioned about doubtful points discovered by police investigation and criminal trial. It attempted to show that there were no clear evidence supporting that the professor actually aimed and shot the crossbow and whether the judge was actually hit by the arrow. The movie also attracted

vigorous attentions from Korean citizens.

In the same year, 2011, another movie, “Dogani” raised questions of whether judges are fair and impartial when deciding cases in which people having power are accused of what they allegedly have done against the weak. The movie is based on the novel, “Dogani” that is written by famous female author Ji-Young Gong. In this real story, eight students with hearing disability had been physically and sexually harassed by the principal, teachers and administrative staffs of the school they went to, which was a special school for the people with hearing disability, for five years since the years of 2000. Such harassment has been revealed to the public; and, in April of 2005, victims accused Kim, who was a chief administrative staff of the school for raping a girl with hearing disability who was sixteen years old at that time. However, in 2006, prosecution office rendered its decision not to charge Kim for lack of evidence; and in 2007, Kim was charged again and convicted, but he received probation in appellate court.⁷⁰⁵ Such results were recognized by citizens as too weak punishment. The novel and the movie were authored to let public know how that crime was severe and how the results from the criminal system is hard to understand and accept.

Impacts of the movie were more serious than intended. After the story in the novel was filmed and shown to the public, the story attracted a great deal of attentions from broad range of people; and they became frustrated and furious about what happened and what criminal justice system could not do. The movie aroused “public indignation” of Korean people against perpetrators and law enforcement; and such fury of the people led law enforcement to reopen the case.⁷⁰⁶ As a result of the re-investigation in which a new witness

⁷⁰⁵ Il-Geun Kim, *Is “Dogani” decision what ought to be?: a paradox of adjudication justice*, CBS N O-CUT NEWS, Dec. 9, 2013, available at <http://www.nocutnews.co.kr/news/949122> (last visited February 3, 2014).

⁷⁰⁶ *Id.*

was called and delivered testimony, trial court sentenced Kim for 12 years in the jail, 5 years more than what prosecutor recommended, indicating that courts are sensitive shared feeling of the Korean people.⁷⁰⁷ Considering accepted practice of sentencing that judges usually choose same as or less than sentences recommended by prosecutors, this sentence of 12 years was alarming. As this series of events show, the story of “Dogani” accident arouse severe criticism against judges as well as huge shock to the society; and courts reacted with the a judgment that arguably considered satisfaction of people’s requests to the courts.

To sum up, these movies clearly show how doubtful decisions from the court are revealed to, known to, discussed by and shared by members of Korean society. As society changes to less authoritarian and more liberal one, such serious questions about whether Korean judges are fair become open and popular topics. Geung Sik Jung also opined that credibility of court has been lowered as these movies show.⁷⁰⁸ Also, facing severe distrust, courts are receiving a great deal of pressure to change and show how well judges are rendering decisions and serving people.⁷⁰⁹ Under this current trend, Korean judges feel more pressures about their decisions, because these can be revealed to the public in such various formats, at any time.

5.5.2.2. Criticism for being authoritarian: broadcasting harsh words delivered by judges

Similar to other modern countries, in the courtroom, Korean judges have a great deal

⁷⁰⁷ Kim, *Supra* note 705.

⁷⁰⁸ Jung, *Supra* note 652, at 55-56 (“Contemporary Korean people have trusted dispute resolution in the court, that is, litigation although they regard litigation as a necessary evil. However, recently, as shown in the movies dealing with litigation, such as ‘Broken Arrow’ or ‘Dogani,’ credibility of court is being lowered.”).

⁷⁰⁹ Sang-Hee Cho, *Judiciary is conscious of legal awareness of citizens*, FINANCIAL NEWS, Sep. 10, 2012, available at http://www.fnnews.com/view?ra=Sent1801m_View&corp=fnnews&arcid=201209100100076230004477&cDateYear=2012&cDateMonth=09&cDateDay=10 (last visited February 6, 2014).

of power and authority. Korean people acknowledge, accept, and respect such power and authority of judges; however, they also have high expectations of the judges including being fair, unbiased and patient in listening to litigants. Because of such expectations, recent reports of harsh words of judges spoken in the courtroom aroused media attentions and criticisms.

What were the harsh words? What were the reactions to these accidents? Followings are two recent examples. On September 11, 2013, in a civil trial session, one judge of Seoul Eastern District Court told the defendant who is a woman, “Why you, as a woman, talk so much although your husband and even your lawyer is sitting here?”⁷¹⁰ The defendant recalled the scene by saying, “I said to the judge that his statement is not true. Then, the judge shouted against me that women should not talk much.”⁷¹¹ This incident aroused severe criticism for being defaming women.⁷¹² What added people’s resentments was the fact that the same judge defamed seniors a year ago by saying, “Old man shall die”, when he had hard time to listen to what sixty six years old victim of fraud testified.⁷¹³ Although the judge defended him by saying that he did not intend to defame women and that he instead attempted to stop the woman because she kept saying what are totally irrelevant to issues of the case, criticisms against the judge were not relieved.⁷¹⁴ Because of such incidents, the judge resigned.⁷¹⁵

As the second example, on December 14, 2012, a judge who worked at Busan District Court said to a criminal defendant, “Your only education is graduation of elementary

⁷¹⁰ Seon-Hee Jang, “Old man shall die...” a judge who spoke harsh words finally resigned , DONGA.COM , Oct. 11, 2013, available at <http://news.donga.com/3/all/20131011/58134742/1> (last visited February 5, 2014).

⁷¹¹ Jeong-II Im, *The judge with harsh words who said that old man shall die is still misusing his power* , CHOSUN.COM , Oct. 5, 2013, available at http://forum.chosun.com/bbs.message.view.screen?bbs_id=1010&message_id=1054390 (last visited February 5, 2014).

⁷¹² Jang, *Supra* note 710.

⁷¹³ *Id.* (Because of this accident, the judge was reprimanded by Supreme Court as a discipline).

⁷¹⁴ *Id.*

⁷¹⁵ *Id.*

school, right? But I heard that your wife graduated university. Didn't you give her drugs to marry her?"⁷¹⁶ In addition to harshness of these words spoken in court room, its irrelevancy became problematic. Although the criminal defendant has two times of prior conviction for drug uses, the case was not about drug use; rather, it was about violation of lawyer act.⁷¹⁷ It also attracted media attention and criticisms. Finally, Supreme Court punished the judge by salary reduction (by 30%) for two months declaring that the judge damaged court's and judges' dignity.⁷¹⁸

These accidents established a new term, "a judge with harsh words (*"Makmal Pansa"*; 막말 판사); and this word became popular in news media. Also, through social networking services, Korean people shared information about the judge who is in trouble and critical opinions against judges. As an example that shows how these harsh words accidents were serious in Korea society, in December, 2013, Busan district court published a practice manual about proper words and behavior of judges in court rooms.⁷¹⁹ The manual contains and introduces exemplary words and behaviors for various situations; and judges are supposed to practice and use the sample words.⁷²⁰ Also, Supreme Court decided to begin consulting how judges speak and behave in court rooms from the first half period 2014.⁷²¹ Such consulting will be conducted by communication specialists; and they will observe court room proceeding by participating judges and suggest points to be improved for each specific

⁷¹⁶ Yong-Jin Jang, "Didn't you give your wife drugs to marry her?" the judge with harsh words was punished by salary reduction for two months, FINANCIAL NEWS, Mar. 29, 2013, available at http://www.fnnews.com/view?ra=Sent1201m_View&corp=fnnews&arcid=201303300100288600016261&cDateYear=2013&cDateMonth=03&cDateDay=29 (last visited February 5, 2014).

⁷¹⁷ *Id.*

⁷¹⁸ *Id.*

⁷¹⁹ Sung-Wook Wi, *No more judges with harsh words, a manual published*, JUNG-ANG ILBO [JUNG-ANG DAILY], Dec. 4, 2013, available at http://article.joins.com/news/article/article.asp?total_id=13303918&cloc=olink|article|default (last visited February 5, 2014).

⁷²⁰ *Id.*

⁷²¹ Hoon-Nam Kim, *Expanding consulting 'words and behaviors in court rooms' in order to prevent judges with harsh words*, MONEYTODAY, Dec. 6, 2013, available at <http://www.mt.co.kr/view/mtview.php?type=1&no=2013120617242193183&outlink=1> (last visited February 5, 2014).

judge.⁷²² As these reactions from courts show, reports of harsh words by judges and people's criticism against these incidents are still important issue in Korea, in terms of attitude of judges and credibility of courts.

5.5.3 Responses from judiciary: "Courts serving citizens"

This series of events show how Korean judiciary has been criticized for being unfair and for being authoritarian. Judiciary swiftly responded to these criticisms raised against them. Through the Supreme Court's policy making, courts tried to check their judges' court room attitudes and to raise satisfaction of litigants in various ways. Inaugural address by the Chief Justice Yong-Hoon Lee, who served from 2005 to 2011, exactly reflected such concerns and efforts of courts. On September 26, 2005, Chief Justice Lee declared that it was his calling to turn courts back to position serving citizens from the courts for judges and court clerks.⁷²³ His remarks were accepted as predicting extensive reforms and changes.⁷²⁴ Under such slogan, Chief Justice Lee actually and actively reformed many things in judiciary including reinforcing services for citizens, expansion of court room monitoring, and training for judges' words and behaviors in courtrooms.⁷²⁵ During the five years at office, Chief Justice Lee contributed to changing courts to be less authoritarian and to encouraging judges to be more kind.⁷²⁶ This trend in judiciary continued to even after retirement of Chief Justice

⁷²² Kim, *Supra* note 721.

⁷²³ Seok-Ki Min & Jae-Hoon Kim, *New Chief Justice Yong-Hoon Lee, "courts serving citizens"*, MAEIL KYÖNGJE [MAEIL BUSINESS NEWSPAPER], Sep. 26, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=009&aid=0000461580> (last visited February 6, 2014).

⁷²⁴ *Id.*

⁷²⁵ Gu-Yeol Kang, *Chief Justice Yong-Hoon Lee, "Serve citizens," started to reform courts*, SEGYE ILBO [SEGYE DAILY], Dec. 2, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=022&aid=0000133897> (last visited February 6, 2014).

⁷²⁶ Jae-Hong Kim, *[Five years of Chief Justice Yong-Hoon Lee]Groundbreaking improvement of quality of litigation through reinforcing trial focusing on oral statements*, PÖPRYUL SINMUN [LAW TIMES], Sep. 27, 2010, available at <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=54193> (last

Lee. His successor Chief Justice Seung-Tae Yang, in his inaugural address, also declared that courts will continue its efforts to recover credibility by citizens and requested judges to maintain high level of morality.⁷²⁷ Judges and lawyers also recognize that such efforts continue until currently, as one lawyer observes:

“Courts conduct monitoring frequently. Oftentimes, judges in high rankings were sitting back seat of courtrooms for supervising. They sometimes interview the parties and do survey. Court clerks distribute questionnaires that ask about how kind the judge was. Judges care that a lot. When I was beginning practice, ten years ago, judges were very coercive to lawyers and the parties. However, recently, it is hard to find coercive judge. It is because courts care about that so much.”⁷²⁸

During my field research in Korea, I also saw survey form about attitude of judges and litigants’ satisfaction of litigation proceeding.⁷²⁹ The survey contained such questions as “Did judge(s) make efforts to concentrate on listening to participants?”; “Did judge(s) lead the trial session fairly without favoring one side?”; and “Did judge(s) lead the trial session with smooth words and behavior without getting angry or scolding?”⁷³⁰ Any person who attended court hearing can answer the questions anonymously; and submit their answer through drop box located in front of courtrooms to which anyone can have easy access.⁷³¹

5.5.4. Criticism against judiciary and dismissal practice

visited February 6, 2014)(It is a famous anecdote that Chief Justice Lee scolded that there is no place people in which are unkind like courts).

⁷²⁷ Inaugural address by Chief Justice Seung-Tae Yang, on Sep.27, 2011, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=003&aid=0004100887>.

⁷²⁸ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

⁷²⁹ Field notes on court hearing observation, in Seoul, Korea. (Apr. 24, 2013).

⁷³⁰ See Appendix C and D for entire survey form written in, respectively, English and Korean.

⁷³¹ Field notes on court hearing observation, in Seoul, Korea. (Apr. 24, 2013).

How do these changes and criticisms against court affect judges' practices of dismissal and procedural safeguards? Many judges admitted that current social atmosphere is making it even more difficult to dismiss complaints or cases. It is because, according to some judges, leaders of judiciary became "too sensitive" or "oversensitive" to complaints or public opinions. Judges anticipate that people who got disfavoring results from the court proceeding are likely to complain by reporting to media, commenting on web-sites or picketing in front of court houses; and that such demonstration by litigants would be huge concerns and problems for the leaders in the judiciary department what they do not want to see.

5.5.4.1. Fearing complaints

Why did such complaints against judges make them restrain from dismissing complaints or cases? At least, fear of such complaints is one factor that caused less active dismissal, as these lawyers opined:

"Why not actively dismiss? It is because judges are afraid of complaints by citizens. They fear citizens who complain and they fear penalty points that they may get because of such complaints. Government officials are afraid of such things most. And, the judicial paternalism might be another reason. These two, being combined, are the reason why they cannot dismiss and haul so many cases that should have been dismissed earlier."⁷³²

"Judges try not to dismiss in order to guarantee procedural rights of the parties to the maximum level. Litigants can complain when judges do not guarantee such rights properly. Especially, in recent years, judges' reproachable

⁷³² Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

attitudes in court rooms have been social issues. That makes judges hesitate to dismiss right away without clarification. And they postpone dismissal until the end of trial sessions, for the reason of considering guarantee of procedural rights. They dismiss only when correction by the parties is not done until that timing.”⁷³³

A lawyer who served as a judge for twenty years also admitted that judges seriously care about people’s reactions to their practices:

“For example, judges write on the order to correct that the plaintiff should make proper correction within seven days and that the plaintiff’s complaint will be dismissed if he does not correct as ordered. However, actually dismissing the complaints for the plaintiff’s failure to follow the order within the seven days is not consistent with Korean culture. Plaintiffs will resist very strongly. So, judges feel burdensome. In those reasons, judges try to provide plaintiffs with as much opportunity as possible. That is why dismissal of complaint is so rare.”⁷³⁴

These statements implicate that growing criticisms against judiciary have caused judges to be more sensitive to opinion of the people on judges’ practice; and that such change made complaints against judges filed by litigants more dreadful ones.

5.5.4.2. Judges’ efforts to improve ‘adjudication service’

In addition to fear of complaints against judges, judges’ efforts to improve their practice by promoting the concept of “adjudication service (*“Sapŏp seobisŭ”*; 사법서비스)” caused passive dismissal. This concept of adjudication service is new to Korean judges and

⁷³³ Interview with Lawyer No.8, in Seoul, Korea. (Apr. 23, 2013).

⁷³⁴ Interview with Lawyer No.9, in Seoul, Korea. (Apr. 26, 2013).

lay people; and it recently has provided consistent directions for courts' reactions to criticisms against judges. When adjudication becomes service, then judges are more likely to be required to provide litigants with more access to court. Although there is no concrete theoretical connection between providing better services for litigants and reducing dismissal, in real, for judges and litigants, providing more opportunities for having trial and for arguing in front of judges are perceived as providing better services. In this circumstance, dismissal could be recognized as going opposite direction, because it can be seen as refusing citizens' access to court, whether such dismissals have valid legal grounds or not.

Based on such idea of providing adjudication service, judges began to implement various ways to improve their adjudication services. Following this policy of court administration, judges began to make efforts to change their attitude; and such efforts are connected to improving judges' ways of treating the parties and their lawyers. How do lawyers evaluate these changes? One lawyer's statement shows how such efforts of the court are achieving its goals. According to the lawyer, judges became much kinder compared to ten years ago when the lawyer began to practice.

“Recently, Korean courts are very cautious since the crossbow terror incident, the crossbow professor accident. There is overall atmosphere among judges that they should be kind to the parties, kinder to the parties than to lawyers. I guess that there might be a direction or order from the Supreme Court to do so. Lawyers made a joke for that, calling such changes as ‘the principle prioritizing the parties.’ Likewise, courts are very cautious about citizens who complain. In the past, it was opposite. They were totally not kind to the people who made complaints. Now, they are too kind; so now lawyers are unhappy about it.”⁷³⁵

⁷³⁵ Interview with Lawyer No.1, in Seoul, Korea. (Apr. 15, 2013).

Judges also admit such strong trend among judges initiated by court administration as responses to criticisms against judges.

“Court administration is not making any efforts to reduce cases. Instead, they are making efforts to increase the number of cases by promoting slogans such as ‘court serving citizens,’ ‘let’s provide quality services,’ and ‘friendly judges’. These changes actually reinforced people’s access to court, so the number of cases might have been increased. Now, court administration’s motto is ‘a court that is not authoritarian,’ so, this trend would indirectly contribute to increase the number of cases.”⁷³⁶

This statement implicates possibility of ‘unspoken policy’ in the judiciary in terms of people’s access to court, which might be guaranteeing maximum access to trial.

5.5.5. Summary

Compare to other aspects of passive dismissal, these social aspects of passive dismissal including anti-authoritarianism, criticisms against judges and courts’ policy reactions are relatively recent events; and these are still going on. This study showed how institutional, historical and cultural aspects of Korean civil litigation have driven judges to refrain themselves from dismissal complaints or cases. On top of that, as shown above, these new social changes are making it more difficult and burdensome for judges to dismiss. Movements against authoritarian government officials and people with high social status and criticisms against judges will keep growing for a while, unless reform efforts of Korean judiciary according to new authority paradigms are successful in establishing new authority of the court. In this regard, such criticisms and social pressure have positive effects when it

⁷³⁶ Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

comes to transforming authority structure in Korean society, at least in Korean judiciary, from authoritarian and hierarchical power to persuasive and rational new authority. In terms of dismissal practice, under this trend, dismissals of complaints or cases have been rare in Korean court practice, and it will be rarer for a while. Likewise, social aspect of passive dismissal shows current status of and future prediction about dismissal practice.

5.6. Summary: civil litigation practice driven by value priority

What this study found from interviews with judges and lawyers about reasons of passive dismissal and contexts surrounding dismissal practice revealed that there are other values that conflict with efficiency pursued by dismissal; and that judges try to avoid dismissals in order to keep up with these values that have higher priority. Such values with highest priority include maximum guarantee of constitutional right to claim adjudication and finding truth.

This value priority has been established by historical, cultural, and social aspects of civil litigation. Images of judges and criticisms against judges have promoted and added priority to maximum level of guarantee of right to access to court and truth finding in civil litigation. To be more specific, mere fact that Korean Constitution has provisions for the right to claim adjudication could not give priority to the right. Acknowledging constitutional right and providing maximum guarantee of such right are totally different matters. Beyond merely acknowledging constitutional right to claim adjudication, Korean judges are making efforts to provide maximum level of access to court. Constitutionally, they do not have to do so. It is not unconstitutional providing lower level of guarantee, if they still provide certain level of guarantee. But, for Korean judges, whether constitutional or unconstitutional is less important issue. Their images and people's expectations to them are driving them to do so. In addition to that, social changes let judges do their best to protect litigants' access to court. Likewise, what confer priority to specific institutional components are historical, cultural and social values and circumstances around these values.

This priority of values also applies even when civil procedure reforms are completed

through legislation. In order to enhance efficiency through concentrated trial, Korea law makers revised Civil Procedure Act and empowered judges with an authority to dismiss untimely submitted arguments and evidences. However, in practice, despite of this newly developed institutional setting, judges are not willing to dismiss belated evidences, thus are not willing to eagerly pursue concentrated trial. It is because finding truth is another important goal of civil litigation practice, and concentrated trial through dismissal of belatedly submitted materials is conflicting with such goal. Based on such institutional circumstances, judicial paternalism established by images of judges and social pressure for better adjudication service drove judges to choose to listen from the litigants more and to let them submit everything they have, instead of taking their opportunity to tell their stories and to show their evidence. Likewise, cultural, historical and social factors decide value priority and reinforce certain institutional factors according to the priority.

In Chapter 6, this study develops explanatory theory on such value priority and its impacts on disposition without trial and procedural safeguards. Based on what are discovered and analyzed in the previous chapter and current chapter, Chapter 6 develops an explanatory theory by using such concepts as ‘fundamental procedural values in action’ and ‘balancing models.’

Chapter 6: Interactions between disposition without trial and procedural safeguards

6.1. Introduction

In the previous chapter that analyzes reasons of passive use of dismissal, this study found that there is value priority established by historical, cultural and social aspects of civil litigation and that value priority controls judges' practice and effectiveness of civil procedure reforms. Likewise, these values having priority control how dispositions without trial work and how judges use and guarantee procedural safeguards. The values also shape how disposition without trial and procedural safeguards interact and how judicial efficiency and access to court interact balance in civil litigation practice. In order to develop explanatory theory on such interaction and balance, this study analyzes how value priority influence such interaction and balance.

Interactions between pretrial dispositions and procedural safeguards that represent interactions between judicial efficiency and litigants' access to justice are matters of how these two different institutions and values are influencing each other. Both efficiency and access to justice are important values of civil justice system. However, these two values oftentimes compete and even conflict with each other. So, maintaining balance between the two values is one of the most important policy goals of civil justice systems. Balance in this context is not mathematical or physical concept that requires exact half or equilibrium. Instead, definition of balance between judicial efficiency and access to justice may differ by each society and each civil justice system. When this balance is broken, in some ways, to

the extent that such imbalance causes problems and harmful results, then actors in the civil litigation system would try to reform the system to recover such balance. Thus, observing interactions between these two values provides better understandings of how certain civil litigation system is working and implications and insights for further procedural reforms.

How efficiency and access to justice in Korean civil justice system are interacting and balancing? Is the system maintaining balance quite well as the society defines or is it one-sided by one value? What reform efforts have been made? How were the results? Based on the findings about how disposition without trial and procedural safeguard are actually working, as stated in the Chapter 4 and Chapter 5, this study attempts to find answers to these questions.

6.2. Grounds for theory developing: observed interactions and balancing between dispositions without trial and procedural safeguard

As shown in Chapter 4 and Chapter 5, Korean judges rarely use dismissals; and there are various reasons for such passive use of dismissal. Then, what does that implicate in terms of interaction between disposition without trial and procedural safeguards? It also relates to the questions of how efficiency and access to court are interacting and balancing with each other.

Many people would be able to recall regular and typical interactions, which are enhancing dismissal by reducing procedural safeguard in order for more efficiency and reducing use of dismissal by enhancing procedural safeguard in order to guarantee more access to court. Recent pleading standard reform in the U.S. civil procedure which is heightening pleading standard in order to reduce discovery cost and to block frivolous lawsuits is an example that belongs to the former category of the typical interactions. In addition, Group B dispositions in Korean civil procedure⁷³⁷ which include judgment without trial and decision recommending performance can be classified as the same type, because these devices reduce defendants' access to trial in order to expedite proceedings. These typical interaction types stem from competing contrasting relationship between efficiency and access to court. Most of reasonable policy makers might be willing to make efforts to maintain balance between these two values when their systems seem to be biased by one value. In this reason, regular and typical types of interactions can be predicted without difficulties.

However, as following observations show, such interactions in Korean civil

⁷³⁷ See Section 4.6 of this dissertation.

procedure are irregular and untypical in that its rare use dismissal is not only because of enhanced procedural safeguards but also because of efforts for judges' self-restrained use of dismissal. Such self-restraints of judges are caused by cultural and social aspects surrounding civil litigation. Likewise, as remaining parts of this chapter explain, this irregularity can be explained by balancing model for Korean civil procedure shaped by "fundamental procedural values in action", as defined by this study.⁷³⁸ Following paragraphs explain observed interactions between disposition without trial and procedural safeguards. Based on such interactions, this study builds an explanatory theory on balancing models and influence of value priority on interactions and balancing between judicial efficiency and access to justice.

6.2.1. Judges make efforts to avoid dismissals because dismissal does not satisfy shared values of civil litigation

Most of Korean judges choose to allow litigants to continue their proceedings in the court until the final stage of litigation which is receiving judgment on the merits rather than dismissing complaints or cases. For example, pleading standard in practice requires very low threshold; and judges dismiss cases only when there are clear and typical lack of requirements of lawsuit. It is not only because Korean civil procedure has sufficient procedural devices to prevent dismissal and correct the procedural flaws of complaints and cases, but also because not dismissing complaints or a case and providing litigants with opportunities to have court decision on the merits is a supreme goal of their practice.

What are the driving forces for the judges to do so? First, historical and cultural

⁷³⁸ See Section 6.3 of this dissertation.

aspects of Korean civil justice system have formed this goal of maximum level of guarantee of access to court; and this goal led judges to use procedural safeguards very actively.⁷³⁹ To be more specific, judges' images of themselves include guardian of people's right to claim adjudication and even parents who should take care of people in their courts like their children; and society members also expect that judges are solvers of every problem whether legal or not. These pressures have led judges to do their best to let litigants continue proceedings until the very end of the litigation, regardless of judicial inefficiency and their heavy workloads.

Second, recent social changes including the rise of anti-authoritarianism and enhanced sharing of public opinion and criticisms through internet added more burdens for judges when considering dismissals.⁷⁴⁰ Anti-authoritarianism has been growing in Korean society and that raised criticisms against courts and personal judges in terms of judges' authoritarian attitudes. Moreover, some judges' harsh words at courtroom brought more severe criticisms. Also, public opinion produced by media reports and internet-based social networking services made judges less confident when they adjudicate. Choosing dismissal has been unpopular option. However, because of these changes, now it became a least favored choice of judges.

As a result of such historical, cultural and social influences, now, Korean judges are providing more access than what law requires.⁷⁴¹ Legally, they do not have to do so. It is because the constitutional right to claim adjudication does not include "a right to have court decisions on the merits;" and a judge can dismiss a complaint or a case for its defects after giving opportunities that law guarantees. However, Korean judges perceive that their duty

⁷³⁹ See Section 5.4 of this dissertation.

⁷⁴⁰ See Section 5.5 of this dissertation.

⁷⁴¹ See Section 5.2 of this dissertation.

to guarantee people's right to claim adjudication go far beyond than this minimal request from Constitution. They do best to provide maximum level of access to court's judgment on the merits of the case even when certain complaints or cases deserve dismissal.

6.2.2. Procedural safeguards are helpful in achieving a judge's goal of avoiding dismissals

As stated above, rare dismissal is not a product of well-equipped procedural safeguards. Instead, judges simply do not want to dismiss. Their self-restraints of dismissal have made use of dismissal a not-common practice. Based on such self-restraint, they are eager to use procedural safeguards. Judges use these procedural devices as wide and active as possible in order to achieve the goal of maximum guarantee of access to court. Having burden for dismissing complaints or cases, they use procedural safeguards as tools for avoiding dismissals. For example, judge use clarification and order to correct complaints very actively.⁷⁴² Judges wait for plaintiffs to correct their complaints even after the time period set as a deadline passed; and they request to amend a complaint repeatedly without dismissing it even when plaintiffs do not follow the order one time or two. Also, judges use clarification to help plaintiffs find and supplement what their complaints or cases are missing.⁷⁴³ Likewise, these procedural devices are actually contributing to a judge's goal of avoiding dismissals.

6.2.3. Civil procedure reform to improve judicial efficiency is not working when it conflicts with the right to claim adjudication and truth finding function of

⁷⁴² See Section 4.2.3 of this dissertation.

⁷⁴³ See Section 4.2.2 of this dissertation.

litigation

It is misleading to conclude that actors in Korean civil procedure are not interested in or ignore judicial efficiency based only on the fact that they rarely dismiss complaints or cases. Rather, enhancing judicial efficiency has been popular theme of civil procedure reform discussion. As results of such reform efforts, the 2002 amendment of Civil Procedure Act enhanced concentrated trial by reinforcing dismissal of untimely submitted offenses and defenses aiming expedited litigation proceeding. Also, the 2008 amendment changed mandatory trial preparation proceeding to be non-mandatory because of its inefficiency experienced and observed by judges.

In common, these reforms aimed enhancing judicial efficiency by expediting proceedings. However, results for these reforms were totally different. Concentration of trial by enhancing dismissal of untimely submitted offenses and defenses has been almost ignored by judges; on the contrary, converting mandatory trial preparation proceeding to non-mandatory proceeding has been well-accepted by judges. This study found that the former was not successful because it is perceived by judges as restricting litigants' right to claim adjudication, especially their access to judgments on the merits, and truth finding in litigation. In contrast, the latter does not have such aspects although it may also restrict procedural opportunity of the parties.

6.2.3.1 A failure of concentrated trial

As stated in the previous chapter, judiciary's reform effort to enhance efficiency through concentrating trial has failed, based on the fact that very few judges are strictly following the law by dismissing belatedly submitted arguments and evidences and that these

judges are perceived as very exceptional by other judges and lawyers.⁷⁴⁴ It can be regarded as a complete failure, because most of judges recognize that concentrated trial is something they do not have to follow, although it is required by law. The reason for such huge gap between procedural rules and reality is that concentrated trial conflicts with truth finding goal of civil litigation. It is because pushing on concentrated trial might result in refusal of belated evidences that can be very important one in terms of finding truth. Because truth finding is a value that has priority in Korean civil litigation practice, judges choose to prioritize this value when they face conflict between efficiency through concentrated trial and truth finding. In this reason, failure of concentrated trial is an important example that shows that civil procedure reforms for enhancing efficiency which conflicts with truth finding function of civil litigation is likely to fail.

6.2.3.2. Improving efficiency in trial preparation proceeding

As described in the Chapter 4, Korean civil procedure reinforced trial preparation proceeding through extensive amendment of the Civil Procedure Act in 2002; however, in 2008, in order to enhance efficiency, actors of Korean civil procedure turned the mandatory trial preparation to not mandatory one, and it reduced scope of the trial preparation proceeding.⁷⁴⁵ Such change was due to negative evaluations of the mandatory trial preparation proceeding. Mandatory trial preparation proceeding has been criticized for being inefficient, because it required judges to have trial preparation proceeding in every case including simple and easy cases. It was widely agreed that parties to the simple cases do not have to spend time and efforts for having meeting in order to find and organize issues and discuss about evidence that will be submitted.

⁷⁴⁴ See Section 5.3.2 of this dissertation.

⁷⁴⁵ See Section 4.1.1 of this dissertation.

Likewise, trial preparation was reduced for efficiency reason. How is the evaluation for the reform in 2008? How do judges accept and reflect this change in their practice? Although there are many articles on expansion of trial preparation proceeding in 2002, and on pointing out problems of this expanded trial preparation process, there are not many scholarly works showing what impacts this reduction of trial preparation has in practice, except initial theoretical criticisms against sudden reduction of trial preparation proceeding. Then, it becomes more important to hear from judges' experiences on that issue. Most of judges did not find or recall any differences between and after reduction of mandatory trial preparation in 2008. Even some judges could not recall when such revision of procedural rules happened. Likewise, based on the statements from the interviewed judges, impacts of this revision in 2008 seem to be minimal.

This study observes that main reason for such small impact is that there has been no difference between trial preparation proceedings and trial sessions. Even when trial preparation was mandatory, judges still used several initial trial sessions for finding and organizing issues, evidences that will be submitted, and tasks that are supposed to be performed in trial preparation proceedings. Thus, trial preparation proceeding did not have any unique value or use that can distinguish itself from what judges can get through trial sessions. This was also same to the parties. According to lawyers interviewed, the parties also did not find any important and noticeable benefits for having trial preparation proceedings, because such process is recognized as having nothing to do with judgments on the merits, or finding truth. Still, the parties are able to have crucial benefits in terms of opportunity to be heard from trial sessions whether they have trial preparation sessions or not. This implicates that not every civil procedure reform for enhancing efficiency fails. Rather, reforms for efficiency that do not conflict with litigants' right to claim adjudication and with

truth finding by judges is likely to achieve its goal, because efficiency is also what judges and litigants want to achieve through their practice.

6.2.3.3. Different types of dispositions without trial

As shown in the Table 4-2 in the section 4.6 of this dissertation, this study divides dispositions without trial into two groups by whose access to court is restricted; whether the disposition is based on the merits; whether there are incentives to have trial; how actively the disposition is used; and how related procedural safeguards are working.⁷⁴⁶ This study found that disposition without trial that is based on the merits; that does not have incentives to have trials; and that defendants' access to court is restricted ("Group B disposition") is actively used by judges as it is designed for. On the contrary, disposition that is not based on the merits; that has incentives to have trials; and that plaintiff's access to court is restricted ("Group A disposition") is hardly used by them.

Group B disposition does not restrict litigants' right to claim adjudication too much, because cases for the type of disposition are likely to be what defendants did not or are not willing to dispute with the plaintiff. Also, this type of disposition shows how the judge concludes on the merits of the case. In contrast, Group A disposition significantly restricts a plaintiff's right to claim adjudication because it takes opportunity to have judgment on the merits away. Also, it leaves court's conclusion on the merits of the case blank; thus, finishes one's journey for finding truth. Likewise, this gap in terms of actual usage also implicates that effectiveness of civil procedure reform is controlled by the litigants' right to claim adjudication and truth finding goal of civil litigation.

⁷⁴⁶ See Section 4.6 of this dissertation.

6.2.3.4. Passive use of order to deposit security for litigation costs for purpose of preventing lawsuit abuse

In order to enhance judicial efficiency through preventing lawsuit abuse, Civil Procedure Act empowers judges to order certain plaintiffs whose cases, based on complaints, trial preparation documents and other litigation records, clearly seem to lack grounds for prevailing to pay security deposit for litigation cost.⁷⁴⁷ By revision of the Civil Procedure Act on July 23, 2010, this article 117(1) added an occasion where the plaintiff's claim seems to be groundless to the occasions for ordering security deposit. Before this revision, a judge could order security deposit only when a plaintiff did not have domicile, office or business place in Korea and when defendant requested so. Likewise, Korean law makers reformed and reinforced order to deposit security for litigation costs in order to prevent groundless lawsuits from proceeding with. Also, having concerns about lawsuit abuse, judges are willing to suggest active use of this order to deposit security for litigation costs as the chief judge of Seoul District Court announced the court's new policy against lawsuit abuse on July 30, 2013.⁷⁴⁸

How actively do judges use this order to deposit security for litigation costs in case of groundless claim? Most of judges interviewed stated that it is very difficult for them to use such order. Many judges did not even recall that there exists an order like this when asked about how courts react to lawsuit abuse. Why it is hard to use this order to deposit

⁷⁴⁷ Minsa sosong pōp [Civil Procedure Code], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 117 (S. Kor.)("Article 117 (Obligation to Furnish Security) (1) In case where a plaintiff has no domicile, office or business place in the Republic of Korea, or where it seems that grounds for the plaintiff's claim are clearly lacking based on complaint, trial preparation documents and other litigation records, the court shall order the plaintiff to furnish a security for the costs of lawsuit, upon request of a defendant. The same shall also apply to the case where the security is insufficient. (2) In case of the paragraph (1), court can order the plaintiffs to deposit security for the cost of lawsuits").

⁷⁴⁸ Se-Mi Hong, *Seoul Central District Court will block malicious and repetitive lawsuits*, PÖPRYUL Sİ NMUN [THE LAW TIMES], Aug. 1, 2013, <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=77207> (last visited December 11, 2013).

security? It is because ordering security deposit can be accepted as that the judge regards the claim as lawsuit abuse; and such appearance can give an impression that the judge is biased by one side of the parties. One judge shares:

“It (passive use of an order to deposit security for litigation costs) is because rendering such order is obviously a prejudgment. Ordering security deposit can give impression that you are a malignant complainer and you will definitely lose this case. Thus, for judges, it is burdensome to render such order. And I do not have to do so because I can just render judgment on the merits for the defendant; and then, the plaintiff will pay the litigation costs. From the perspective of the court, giving such impression is bearing risks, because judges have to face the plaintiffs in courtrooms.”⁷⁴⁹

As this judge predicts, the plaintiffs who are ordered to pay security deposit for the reason that their cases seem to be groundless even before the beginning of the trial can feel unfair. One blogger who received the order to deposit security complains:

“How wired Korean judges and prosecutors are? How wired Korean laws are? They even require me to pay money for making decisions of my case, for doing their job.”⁷⁵⁰

The reason why judges do not want to give such impression to the plaintiffs is that such “prejudgment (“*Yedan*”; 예단)”⁷⁵¹ conflicts with maximum guarantee of litigants’ right to claim adjudication. Prejudgment is a complete opposite of maximum guarantee of access to court. In this reason, judges decide to bear burden of proceeding with cases that clearly seem to be groundless, in sacrifice of efficiency. This also shows value priority and the fact

⁷⁴⁹ Interview with Judge No.11, in Ansan, Korea. (May. 1, 2013).

⁷⁵⁰ Blog “Crying for unfair adjudication (Law is righteous)” <http://blog.naver.com/intent0920?Redirect=Log&logNo=140147141920> (last visited February 11, 2014).

⁷⁵¹ It means a rendering judgment before examining evidence.

that civil procedure reform that conflicts with the right to claim adjudication is likely to fail.

6.2.3.5. Summary

These examples clearly show value priority and low effectiveness of civil procedure reforms due to its conflicts with values that has priority. It also partially implicates how much actors in Korean civil litigation system care about improving judicial efficiency and how difficult making such efforts has been.

6.2.4. Facing judicial inefficiency, judges use procedural safeguards also for efficiency

Facing judicial inefficiency and heavy workload, individual judges attempt to use procedural devices to enhance efficiency by reducing time for deciding cases. Use of clarification is a good example.⁷⁵² Usually, judges use clarification when meaning of the parties' argument or evidence is not clear to their understanding. Some judges try to help one party who deserves to prevail through suggesting points to argue or evidence to submit. These uses of clarification are for the benefit of the parties. However, some judges use clarification inquiry as a tool for expediting the proceeding. By questioning, they lead parties to certain directions or issues that are perceived by them as important ones. By doing so, the judges prevent the party from spending time arguing for "unimportant" or "unnecessary" issues. They also ask questions in order to have better understanding of the case although neither party argued or mentioned about the point. Judge's clarification is also used to lead the proceeding in ways judges think more efficient. For example, when

⁷⁵² See Section 4.2.4.1.4 of this dissertation.

certain cases are likely to be dismissed for lack of requirements of lawsuits, many judges recommend the plaintiffs to voluntarily dismiss in order to save time and efforts for writing dismissal decisions.

6.2.5. What roles do low litigation costs play in these interactions?

In the U.S., reducing litigation costs has been an important motivation of reforming civil procedure. Likewise, high costs for civil litigation is regarded as a fundamental reason of inefficiency of U.S. civil litigation. Especially, fees for lawyers who are used to spend long billable hours for discovery are perceived as highly burdensome and inefficient.

On the contrary, generally, litigation costs in Korea have been recognized as low because of following institutional differences between U.S. and Korea. First, many plaintiffs file lawsuits without appointing lawyers. Such litigations by *pro se* litigants are possible and “doable” in Korea, in that many judges actively help these litigants through clarifications.⁷⁵³ In such cases, *pro se* litigants have to pay only filing fees that are mostly 0.05% of the amount of controversy.⁷⁵⁴ Considering that amount of controversy for the *pro se* litigation would not exceed than 10 billion Korean Won (as of Jan 23, 2014, it is

⁷⁵³ See Section 4.2.3.1.1 of this dissertation.

⁷⁵⁴ According to Minsa sosong dŭng inji pŏp [Act on the stamps attached for civil litigation, Etc.], Act No. 337, Sep. 9, 1954, amended by Act. No. 11156, Jan. 17, 2012, art. 2 (S. Kor.), filing fees differ by amounts of controversy as follows: (1) the filing fee is 0.05% of the amount of controversy when the amount is less than 10 billion Korean Won (as of Jan 23, 2014, it is approximately 9,300 U.S. dollars); (2) the filing fee is 0.045% of the amount of controversy plus 5,000 Korean Won (as of Jan 23, 2014, it is approximately 4.6 U.S. dollars) when the amount ranges between 10,000,000 Korean Won (as of Jan 23, 2014, it is approximately 9,300 U.S. dollars) and 100 million Korean Won ((as of Jan 23, 2014, it is approximately 93,000 U.S. dollars); (3) the filing fee is 0.04% of the amount of controversy plus 55,000 Korean Won (as of Jan 23, 2014, it is approximately 51 U.S. dollars) when the amount ranges between 100 million Korean Won ((as of Jan 23, 2014, it is approximately 93,000 U.S. dollars) and 1 billion Korean Won (as of Jan 23, 2014, it is approximately 930,000 U.S. dollars); and (4) the filing fee is 0.035% of the amount of controversy plus 555,000 Korean Won (as of Jan 23, 2014, it is approximately 516 U.S. dollars) when the amount is more than 1 billion Korean Won (as of Jan 23, 2014, it is approximately 930,000 U.S. dollars).

approximately 9,300 U.S. dollars) in most cases, filing fee may not be too burdensome for litigants. Second, even when the parties are represented by lawyers, the lawyers' fees for conducting litigation are not calculated on hourly basis. Rather, lawyer's fee is fixed when concluding contracts for legal representation. Usually, a person appointing a lawyer and the lawyer agree to pay and receive certain amount of money before the lawyer actually began to work⁷⁵⁵ and additional amount of money as contingency fees. It means that such fees do not vary by length of time spent for the case. Of course, these fees may vary according to difficulty of the case and the socially-accepted level of lawyers. However, time length spent for the case does not matter. Third, losing party pays winning party's litigation costs. When a case is finalized, through judgment, a judge order which party pay which amount of litigations costs.

Likewise, in Korea, litigation cost itself is not recognized as a cause of inefficiency. Most of legal professionals perceive that litigation cost is not high, rather, too low. One judge opined:

“In Korea, filing fee is too cheap, thus threshold of court is too low. So, everyone tends to resolve everything by litigations. Personally, I think that the filing fee shall be increased.”⁷⁵⁶

This perception of filing fee and other litigation costs implicate that low litigation cost caused easier access to court and that such enhanced access to court would increase in the number of litigations. Likewise, litigation cost itself is not recognized as a problem to solve. Rather, it is contributing to make the level of caseloads higher.

However, increase in caseloads because of low litigation costs may burden judiciary

⁷⁵⁵ This money is often called as “retaining fee.”

⁷⁵⁶ Interview with Judge No.10, in Ansan, Korea. (May. 1, 2013).

indirectly if such cases are not disposed efficiently. As stated above, Korean civil procedure can be said to be inefficient because of its lack of efficient case disposition devices and failure of other procedural tools for expediting proceedings and reducing the amount of judges' work. In this circumstance, the litigation cost, which is deemed to be too low, could be a contributing factor for the inefficiency.

6.3. Explanatory theory: balancing models decided by fundamental procedural values in action

Based on above observed interactions and balance between dispositions for efficiency and procedural safeguards for access to court, this study found that certain values that are unique to each civil justice system have profound impacts on actual usage of institutions, thus influencing these interactions and balance between efficiency and access to court. This study defines such values as “fundamental procedural values in action,” and it shows how these values work through balancing models that are also set by this study.

6.3.1. Fundamental procedural values in action

6.3.1.1. Definition and function

The definition of fundamental procedural values begins with how to define “procedural value,” which is a very broad concept. It includes all the values related to civil procedure that are deemed by actors of civil justice system as worthy to protect. Every component of civil procedure has value and reason for enactment. Procedural values stand for values of each and every part of civil procedure. Compared to that, “fundamental” procedural value reflects normative value priority in that it distinguishes itself from other procedural values in terms of differences in priority and importance. It can be what Constitution requires and what has been on basis of civil justice system. Likewise, fundamental procedural values are what every actor in civil justice system can agree with and respect regardless of time and circumstantial settings. However, not every fundamental procedural value is actually working in terms of actual usage in specific settings. Only

fundamental procedural values “in action” do. Using Roscoe Pound’s dichotomy, “law in books” and “law in action,” this study distinguishes fundamental procedural values that “purport to govern” people, here, judges; and that “actually govern” them.⁷⁵⁷ Likewise, this concept shows gaps between norms and effectiveness of the norms in specific society. As this study shows, such gaps are caused by value priority among fundamental procedural values. What shape the fundamental procedural values in action by conferring such priority? Not only institutional setting, but also historical, political, cultural, and social aspects surrounding civil procedure decide which values are actually working and which values preempt other values. Thus, in order to find the values in action, one should look at society, culture, and every other aspect of civil litigation, beyond law.

Then, how is the fundamental procedural value in action different from legal culture? According to Lawrence Friedman, legal culture can be defined as a relevant public’s values and attitudes on law.⁷⁵⁸ Friedman observes that effectiveness of law is decided by the response of interested public; and such response is formed by the people’s values and attitudes.⁷⁵⁹ Similar to Friedman, Austin Sarat defines legal culture as “the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away.”⁷⁶⁰ Sarat also observes that legal culture decides and controls

⁷⁵⁷ Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

⁷⁵⁸ Lawrence M Friedman, *Legal Culture and Social Development*, 4 LAW & SOC’Y REV. 29, 40 (1969) (Information on legal culture of certain society can be found through following questions: “What are the attitudes of different population toward law and the legal system? Who goes to court and why? Who occupies legal roles-lawyers, judges, policemen-and what do the role-players do? What is the conversion process of the legal system; that is, how are demands handled, by whom, and how are decisions made? Which officials have discretion; which do not? What questions are matters of rule, and what questions are matters of discretion? Are various parts of the system bureaucratic or flexible? What are the effects of the outputs on the population and how can we measure them? What is the source of the legitimacy of various parts of the system? Who is supposed to make law; who is supposed to carry it out? Is there much corruption and maladministration and why?”).

⁷⁵⁹ Lawrence M Friedman, *Legal Culture and Social Development*, 4 LAW & SOC’Y REV. 29, 40 (1969) (“the effectiveness of any law, actual or proposed, depends on the response of some public whose interests are at issue”).

⁷⁶⁰ Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC’Y REV. 427, 427 (1977).

effectiveness of law.⁷⁶¹ However, Roger Cotterrell finds Friedman's concept of legal culture is too vague, like "residual category" for general ideas and practices; and such mere aggregation should be developed to be more specific when attempting to use the concept for theoretical explanation.⁷⁶² For Cotterrel, the concept of legal culture has only limited usefulness when "referring to clusters of social phenomena (patterns of thought and belief, patterns of action or interaction, characteristic institutions) coexisting in certain social environments," regardless of concerning relationship between elements that consist of legal culture.⁷⁶³

According to these observations and opinions from legal scholars, legal culture has two characteristics. First, legal culture is an aggregation of values and attitudes that people consider important in terms of legal institutions. Second, in functional aspect, legal culture plays significant roles in deciding and controlling actual usage and effectiveness of law. These two are common characteristics between legal culture and fundamental procedural values. In this sense, concept of fundamental procedural values can be said to be close to that of legal culture in terms of its definition and function.

However, there are also differences between the two concepts. First, according to this definition of legal culture, all values and attitudes which are components of the legal culture are "in action". The term legal culture cannot show actual usage of specific value or attitude. The concept cannot explain why well-recognized value or attitude is not working in real field and how competition of values or priority of values works in effectiveness of institution. As Cotterrell opines, the concept of legal culture cannot explain relationships-

⁷⁶¹ Sarat, *Supra* note 759, at 427 ("Legal culture has long been recognized as an important factor in explaining the character, performance, and effectiveness of law and the legal system").

⁷⁶² Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13, 15-16 (DAVID NELKEN EDS., Dartmouth Publishing Company Limited, 1997)("The imprecision of these (Friedman's) formulations makes it hard to see what exactly the concept covers and what the relationship is between the various elements said to be included within the scope").

⁷⁶³ *Id.* at 21.

including priority of values- existing among elements that consist of legal culture.⁷⁶⁴ However, fundamental procedural values can be divided into ones “in action” and ones not. The concept of fundamental procedural values in action can explain such distinction. It clearly shows which value or attitude prevails in certain circumstances and for certain group of people due to priority of values. Second, fundamental procedural value in action is a concept for narrowing scope of values or attitudes in order to show priority of values. It focuses on civil litigation systems and reforms of the systems in order not to be too vague and too broad as the concept of legal culture might be.

With respect to functions of fundamental procedural values in action, as legal culture does, these values oftentimes decide actual use of certain institutions, especially newly added ones as results of civil procedure reform. It is because these values are deemed to have highest priority by legal professionals and their application of legal institution is likely to follow such value system. When certain institutions that are newly established are pursuing values that are not fundamental or not in action, or values that are conflicting with these fundamental values in action, then such institutions are hardly used in real. It is because actors in the civil litigation system are willing to protect fundamental procedural values in action regardless of goals of such reforms.

Also, in terms of interactions and balance between disposition without trial and procedural safeguards, these values in action would decide such interactions or balances by driving actual usage of procedural institutions. Such influence could be explained by balancing models which are developed by this study.

6.3.1.2. Fundamental procedural values in action that influence interactions between

⁷⁶⁴ Cotterrell, *Supra* note 761, at 21.

efficiency and access to court

What are fundamental procedural values in Korea? Korean Constitution guarantees people's rights to claim adjudication and has provisions for due process. Other fundamental procedural values can be found at article 1 of Civil Procedure Code which declares ideals of civil procedure.⁷⁶⁵ According to the article 1, such goals include fair, speedy, and economic adjudication and good faith litigation. In addition to these values, there are fundamental procedural values that can be found from court practices. These fundamental procedural values from practice are not manifestly declared in provisions of Civil Procedure Act; however, almost every judges and lawyers agree with such values.

Among such fundamental procedural values, which ones are 'in action'? Which fundamental values are actually and firmly held by judges and lawyers? Based on interviews of judges and lawyers, this study found two fundamental procedural values in action that are working in court practice of disposition without trial and related procedural safeguards. The first value is guaranteeing maximum level of litigants' access to judgment on the merits. It means that judges pursue guaranteeing litigants' right to claim adjudication more than they are required to do by Constitution. Although constitutional right to claim adjudication does not include or require judgment on the merits, judges are willing to lead the parties to such judgment. The second value is finding truth as a goal of civil litigation. This value is not mentioned in law provisions or court cases; however, it is perceived by legal professionals as the most important goal of civil litigation. This second value is also connected to the first one, in that making every possible effort to find truth is understood as guaranteeing litigants' right for adjudication. This second value in action is the reason why

⁷⁶⁵ Minsa sosong pōp [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act. No. 10629, May. 19, 2011, art. 1 (S. Kor.) ("Article 1 (Ideal of Civil Procedure and Principle of Sincerity and Faithfulness) (1) A court shall endeavor to have the litigation procedures progress fairly, swiftly and economically. (2) The parties concerned and participants of litigation shall perform the litigation sincerely and faithfully.").

reform efforts for expediting litigation proceeding do not work.

How about speedy adjudication and judicial efficiency? It is clear that these are fundamental procedural values. However, it is difficult to evaluate that these are fundamental procedural values in action. It is because judicial efficiency through speedy adjudication is often ignored when it conflicts with other values such as litigants' right to claim adjudication and truth finding goal of civil litigation, as shown in the case of failure of concentrated trial.⁷⁶⁶ Also, the principle of adversarial proceeding does not seem to be fundamental procedural value in action although this principle is acknowledged as one of the most fundamental principles of civil procedure in most literature. It is because, as shown in actual use of judge's clarification,⁷⁶⁷ this principle is often ignored or deemed to have lower priority when conflicting with judge's needs to make decision that seems to be closer to the truth.

6.3.2. Balancing models for explaining interactions between disposition without trial and procedural safeguards

6.3.2.1. Types of balancing models

Interactions between efficiency and access to justice can be analyzed by how the two values are balancing, whether reactive⁷⁶⁸ or one-sided. That leads to two balancing models this study uses: reactive reforming model and one-sided model. Reactive reforming model,

⁷⁶⁶ See Section 5.3.2 of this dissertation.

⁷⁶⁷ See Section 4.2.4.1 of this dissertation.

⁷⁶⁸ This term "reactive" means responding to something, in this context, to imbalance between efficiency and access to justice. The term is different from what Mirjan Damaška used for explaining concept of "the reactive state." The reactive state means "minimalist government" that "is limited to providing a supporting framework within which its citizens pursue their chosen goals." (MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 73 (1986).

as its literal meaning stand for, can explain a civil justice system where reforms and changes follow when actors balance between the values is broken. If actors of this civil justice system agree that their system is biased with too much by procedural safe guards and that cause unacceptable inefficiency, then reforming the system to enhance efficiency follows.

Then, what does the reactive reforming model look like? As defined above, in this model, civil procedure reforms are invoked in order to recover balance between efficiency and access to justice. Reforms of disposition without trial in the U.S., as explained in the Chapter 3, provide good examples. Change of pleading standard through *Twombly* and *Iqbal* can be said to be a reform effort that is reactive to high costs of liberal discovery. It is because a fundamental motivation of the Supreme Court decisions was screening cases and saving discovery costs that seemed to be too much due to its liberal features. Decision makers, majority justices and others interest groups who directly or indirectly influenced the decisions would have concluded that allowing liberal discovery for all cases including frivolous ones is unbearably inefficient considering defendants' expenses for defending the lawsuit. For them, that situation might have signaled broken balance between efficiency and procedural safeguards; and heightening pleading standard could be an attempt to regain the balance. However, it is too haste to conclude that U.S. civil procedure belongs to the reactive reforming model without more through inquiry of cultural, political, and societal aspects surrounding the institutional settings. That is beyond the scope of this study.

On the contrary, in a civil justice system belongs to one-sided model, reactive reforms are hardly working, because such system is biased with one value to the extent that such bias hinders effectiveness of reactive reforms. Some civil justice systems could be biased with efficiency and some with access to justice. Because the system is so deeply biased with one value, reactions to recover another value are very difficult to be successful.

Such reactions work only when those are not conflicting with values that have priority. As explained below, civil procedure practice in Korea is closer to this type of balancing model in that use of certain type of disposition without trial and other reform efforts to enhance efficiency are not working due to its conflicts with fundamental procedural values in action that guarantee maximum level of access to court. Summary of balancing model is shown in following table.

Table 6-1 Balancing Models

Classification	One-Sided Model	Reactive Reforming Model
Existence of manifest priority of values that causes imbalance	Yes	No
Existence of reform efforts motivated by imbalance	Limited*	Yes
Actual usage of reforms motivated by imbalance	Limited**	Yes

Note: * There can be reform efforts to maintain balance in one-sided model, however, often times actors in the one-sided system do not recognize the imbalance they have as problematic due to the priority of values.
 ** The actual usage of reformed institution is limited in that it is used only when it does not conflict with values having priority in the civil litigation system.

6.3.2.2. Balancing model for Korean civil justice system

Considering fundamental procedural values in action in Korean civil procedure practice, how can Korean civil justice system be located among the balancing models? As this study argues, Korean civil justice system can be categorized as one-sided model biased with access to justice with limited reactive reforms. It is because there is severe imbalance between judicial efficiency and access to justice in this system. Judges are driven by sense

of obligation that they should guarantee litigants court decisions on merits to the maximum level. In such circumstance, dismissals are least-favored choices; and judges want to avoid using dismissal if it is possible. Moreover, many procedural devices for enhancing efficiency are not working as they supposed to be. Main reason for that failure is conflict between what these procedural devices pursue and what people expect from civil litigations. Specifically, concentrated trial and dismissal of untimely submitted offenses and defenses aim efficiency through expediting proceeding.⁷⁶⁹ However, Korean judges and litigants deem finding truth as the most important goal of civil justice system; and according to their understanding, dismissing new issues or evidences submitted late only for being late is undermining truth finding in the process. Likewise, two fundamental procedural values in action, maximum level guarantee of right to claim adjudication and finding truth as the foremost goal of civil litigation, are working and defining Korean civil procedure as one-sided model.

Korean civil procedure, however, is not completely one-sided, because judges are still making efforts to enhance efficiency and some of them are working. Judges' use of judgment without trial and decision recommending performance is one example.⁷⁷⁰ They do not find any difficulties when rendering this type of judgment. It is because this judgment does not conflict with litigants' right to claim adjudication. Judgment without trial is based on the fact the defendant has failed to act and that such failure justifies judges to regard the defendant admit what the plaintiff argued, as Civil Procedure Act sets. Also, this type of judgment is a result of the defendant's conduct rather than presiding judge's decision. However, it is not clear yet how many cases are disposed in this way; and that number might

⁷⁶⁹ See Section 5.3.2 of this dissertation.

⁷⁷⁰ See Section 4.6 of this dissertation. This study categorizes such dispositions as 'Group B disposition' in order to distinguish these from dismissals, which belong to 'Group A disposition.'

not be large. In this sense, considering these dispositions without trial was established in order to enhance efficiency, Korean civil litigation system has a characteristic of ‘limited reactive reform.’

This balancing model explaining Korean civil procedure indicates that reforming Korean civil procedure to enhance efficiency is a desirable goal in terms of reducing judicial burden and related social costs. However, it also shows that, for the reforms to be practically successful and effective, people’s right to claim adjudication and their expectation for truth finding function should be considered seriously.

6.4 Summary: revisiting Langbein and Maxeiner

John Langbein and James Maxeiner suggested looking at German civil litigation system and learning from strengths of the system.⁷⁷¹ For Langbein, “the excesses of American adversary justice” was the problem which he wanted to improve through insights from German civil procedure.⁷⁷² Few decades later, Maxeiner, after observing pleading standard reforms by the U.S. Supreme Court, pointed out failure of pleading standards and recommended to learn from German system which seems to guarantee people’s access to civil procedure in better ways.⁷⁷³

Langbein and Maxeiner’s contributions to comparative law academia through sharp criticisms against current U.S. civil procedure and useful insights for reforms shall not be underestimated. However, their ideas bear limits because they examined only institutional aspect of civil procedure of U.S. and Civil law countries represented by Germany. As this study shows, having institutional settings of Civil law-style civil procedure does not necessarily guarantee litigants’ access to court. In case of Korea, historically and culturally deep-rooted images of and expectations for judges and social pressure against them, rather than civil procedure devices, produced civil procedure practices that guarantee litigants’ high-level access to court. Of course, procedural safeguards such as judge’s clarification is playing important role in Korean courtrooms in terms of helping the parties to continue their cases until having judgments on merits. However, a primary factor that can explain access to justice in Korean civil procedure is fundamental procedural values in action rather than mere institutional settings. These values and priority of values are the reason why Korean

⁷⁷¹ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Maxeiner, *Supra* note 15.

⁷⁷² Langbein, *Supra* note 770, at 823-26.

⁷⁷³ Maxeiner, *Supra* note 15, at 1280-88; *See also* Section 1.2.3 of this dissertation.

judges are actively using, rather than ignoring, the procedural devices designed for access to justice. To sum up, Langbein and Maxeiner's suggestions for civil procedure reforms would be more accurate and useful, with respect to actual usage and effectiveness of institutions, only after figuring out what fundamental procedural values in the U.S. civil litigation system is in action, and how such priority of values would affect their civil procedure reform suggestions.

Chapter 7 Conclusion: Adopting U.S. disposition without trial for Korean civil procedure?

7.1. An explanatory theory as a basis of civil procedure reform

As the previous chapter concludes, civil procedure reform agendas that consider only institutional aspects of certain procedural device have limited effectiveness at best. When considering actual use of the new institutions, social, cultural and historical aspects should also be considered. Fundamental procedural value in action is a concept that reflects such idea. It is also a concept developed based on empirical data from the filed in which procedural devices are used. As this study found, this fundamental procedural value in action determines actual use of procedural devices; and an aggregation of such uses shapes balancing model that can explain how disposition without trial and procedural safeguards are interacting with each other in a specific civil justice system. This balancing model is useful in terms of designing civil procedure reforms, because it can show which values are actually leading and controlling the specific civil justice system. It is also because the balancing model can implicate factors that make certain procedure effective or not in the specific society.

In case of Korean civil procedure which this study explored, the fundamental procedural values in action include maximum level guarantee of litigants' access to adjudication on the merits and truth finding function of civil litigation. Such values have their roots in historical and cultural images and expectation of judges and have been

reinforced by social changes toward anti-authoritarianism and/or building of a new authority paradigm. Through empirical research, this study found that disposition without trial that conflicts with these values is hardly used; and that judges use procedural safeguards more actively than required by laws in order to guarantee these values. Even there are procedural devices that were enacted but almost ignored. For example, concentrated trial and dismissal of untimely submitted arguments and evidence were enacted for enhancing efficiency; however, most of judges do not use these procedures, because significantly shortening trial sessions and refusing to accept arguments and evidence only for being late are accepted and perceived by most of judges as inappropriate because it can hinder finding truth through litigations.

Such findings and analysis of this study show significance of this study and how it achieves its goals.⁷⁷⁴ With respect to goals of this study, first, this study fills gaps in current comparative law projects suggested by Korean legal commentators that focus only on institutional aspects of pretrial disposition in the U.S. civil procedure without considering weaknesses of the U.S. disposition without trial, current status of Korean disposition without trial, and conditions for current Korean disposition to work effectively. This study achieves this goal in two ways: providing detailed contexts of disposition without trial reforms in the U.S. and showing how current disposition without trial in Korean civil procedure are working/ not working and what the conditions for actual usage and effectiveness of the devices are. In the chapter 3, this dissertation provides detailed explanations of U.S. disposition without trial in terms of contexts of reforms of such procedural devices and discussions on these reforms; and shows that Korean proponents of U.S. disposition without trial lacks barely reflect such reforms and hardly consider weakness of U.S. disposition raised

⁷⁷⁴ See Section 1.2 of this dissertation.

by discussions on the reforms. In chapters 4, 5, and 6, this dissertation provides empirical grounds of how current Korean disposition without trial is working and reasons for passive use of dismissal; and develops explanatory theory for interactions between disposition without trial and procedural safeguards in order to show fundamental procedural values in action that determine such interactions and controls effectiveness of procedural reforms. Likewise, this study introduces contexts and critics of reforms of pretrial disposition in the U.S. in order to show what to consider before deciding adoption of such procedure; and provides deeper understanding of Korean disposition without trial that can be used for designing reform projects.

As for the second goal, this study provides empirical data from actors in the field of civil procedure, judges and lawyers. Actors' perceptions allowed this study reflect contexts of actual usage of procedural devices and values underlying such practice that were hardly found from existing literature on Korean civil procedure. Considering gaps between what are introduced by scholarly articles and what are experienced in practice, this study contributes to narrowing the gap. Also, interviews with judges and lawyers provided data by which cultural, historical and social contexts of civil litigation can be explored. Considering that civil procedure textbooks and scholarly articles focus mostly on institutional aspects of civil procedure, the empirical data from actors of civil litigation provide more realistic and pragmatic ideas for enhancing Korean civil procedure.

In order to achieve the third goal, this study provides detailed explanation of civil procedure of Korea, institution and contexts of it. It shows both features of the civil litigation system that can be shared with other civil law countries and unique features of Korean civil procedure that might not be explained by general statements on civil law tradition. By doing so, this study contributes to comparative law literature on civil

procedure. That includes coherent explanation of pleading standard in Korean civil procedure about which observations by U.S scholars are conflicting.

Considering these achieved goals of this study, it has its significance in designing civil procedure reform based on voices of actors in civil litigation. By providing an explanatory theory on fundamental procedural values in action and actual usage of procedural devices driven by such values, this study implicates what values should be respected in order to design civil procedure reforms that have effectiveness. As an example of application of this theory for civil procedure reform projects, next section provides evaluation of suggested civil procedure reform in Korea, which is adopting U.S. pretrial disposition, and policy suggestion regarding the project.

7.2. Policy Suggestion: adoption of U.S. Pretrial disposition

In this section, this study applies above mentioned theory of fundamental procedural value in action and its influence on the balancing model to Korean contexts, especially to currently discussed civil procedure reform agenda of adopting U.S. pretrial disposition. Using the theory, this study explains that judges' roles as protectors and advisors of litigants in guaranteeing maximum level of access to court proceeding and truth finding function of civil litigation, as fundamental procedural values in action, are driving Korean civil justice system to be a one-sided model biased with access to justice, thus, producing severe inefficiency.

Data analyzed in the previous chapters show that current dismissal in Korean civil procedure is not working for enhancing efficiency through screening out cases that do not deserve trials. Although judges are actively using judgment without trial, occasions for the type of judgment are limited to where defendants did not respond at all. Moreover, it turned out that other institutional tools and efforts for enhancing efficiency are playing limited roles at best. As a result, according to judges and lawyers, cases that could have terminated in earlier stages of litigation are reaching the end stage of litigation while consuming time, money and efforts of the parties and the court. Thus, it can be fairly said that Korean civil justice system significantly lacks efficiency and that burdens judges. This imbalance might justify reforms for helping judges lessen their burdens.

Each and every judge acknowledges that increasing number of judges is a fundamental and crucial solution, if not a sole solution. However, they also agree that such idea is too idealistic to implement, considering limited resources available to judiciary. In this situation, reforming pretrial disposition can be one possible solution. Because current

dismissals are not working for efficiency, designing new institution for the purpose of enhancing efficiency can be one possible way of enhancing judicial efficiency. However, in the process, factors that make judges to hesitate dismissing complaints or cases should be considered. Based on this analysis, I attempt to review whether adopting U.S. pretrial disposition for enhancing efficiency of Korean civil procedure is a valid idea.

7.2.1. Heightening pleading standard

Is heightening pleading standard a good idea for reducing the number of cases reaching at trials or for screening out lawsuits that seem to be frivolous as U.S. Supreme Court did in *Twombly* and *Iqbal*? As this study found, Korean pleading standard in action requires even lower threshold than notice pleading standard does; and judges are not willing to strictly dismiss complaints for lack of statement of claims or factual grounds for the claims.⁷⁷⁵ Will having and implementing stricter pleading standard work in terms of reducing caseloads considering these circumstances?

It is very difficult to anticipate that heightening pleading standard will lead judges to dismiss more cases. It is because dismissal practices of Korean judges, especially dismissal of complaints, are not bound by law; and Korean judges prefer helping plaintiffs to pass the pleading stage in order to guarantee people' maximum access to judgment on the merits, which is a fundamental procedural value in action. With respect to dismissal of complaints, Korean judges are "beyond" laws that govern civil procedure and policy from court administrations. Likewise, institutional settings do not have significant meaning to the judges. For them, dismissing complaints is not a matter of pleading standard. Rather, it is

⁷⁷⁵ See Section 4.2.1 and Section 4.3.3.1 of this dissertation.

a matter of values in legal community and the relationship between judges and the people. Thus, like other policies for enhancing efficiency in exchange of litigants' access to court, the heightened pleading standard is likely to be ignored rather than enhancing efficiency.

7.2.2. Summary judgment

Summary judgment is a pretrial disposition of cases based on the merits before having trial. This kind of disposition is relatively new to Korean civil procedure. Although a judgment without trial in Korean civil procedure renders a valid court judgment confirming certain plaintiff's prevailing on the merits, occasions in which this type of judgment can be rendered are very limited. Judgment without trial can be rendered only when the defendant never submits an answer to the complaint or when contents of the defendant's allegations in the answer were nothing more than admitting what the plaintiff argued in her complaint. Thus, it is hard to call this type of judgment as court's ruling based on strength and weakness of the evidence submitted. Thus, a judgment without trial is an institution closer to default judgment in the U.S. civil procedure than a judgment based on judges' official confirmation on the merits. That significantly distinguishes this type of judgment in Korean civil procedure from the U.S. summary judgment that is rendered based on evidential supports on the merits.

Summary judgment is a judge's conclusion of the civil case based on strength and weakness of the merits of the case. That makes this type of disposition attractive to Korean legal actors who try to guarantee litigants' maximum level of access to the adjudication on the merits. Also, when functioning properly, one can expect summary judgment can help judges finish cases for which trials are not necessary earlier, thus enhance judicial efficiency

and lessen judges' burdens. Likewise, as a reform agenda for Korean civil procedure, summary judgment has characteristics that can make it a preferred procedural option. However, considering differences in terms of institutional contexts and value system regarding civil procedure, which is fundamental procedural value in action, there are also features that are not viable to or even conflict with Korean civil procedure practice. Following paragraphs examines these issues.

7.2.2.1. Is summary judgment useful tool for enhancing efficiency?

This question would be an important initial question for the reform project in Korea, because enhancing efficiency is a sole reason of considering adoption of summary judgment. As this study explained, after the *Celotex* trilogy, summary judgment became popular procedural choice for early disposition of the cases; and it, at least, contributed to reduction of the number of trials to some extent.⁷⁷⁶ Likewise, after *Celotex*, summary judgment became useful procedure for disposing cases and improving judicial efficiency. Thus, it can be said that summary judgment helps enhance efficiency although it is hard to figure out how much.

7.2.2.2. Summary judgment and constitutional right to claim adjudication

Summary judgment disposes cases before the beginning of trial, before the cases reach to jury. It ends lawsuits without jury's decision making. In the U.S., that arose debates on whether summary judgment infringes the Seventh Amendment right to jury trial.⁷⁷⁷ In Korea, however, right to jury trial is hardly an issue, because there is no civil jury. Instead, it could be argued that the constitutional right to demand adjudication is significantly

⁷⁷⁶ See Section 3.3.4 of this dissertation.

⁷⁷⁷ See Section 3.3.3.4 of this dissertation.

limited when judges ends cases through summary judgments in early stage of the lawsuits. Also, as findings of this study reveal, litigants and legal professionals highly regard people's right to claim adjudication. Given these, it should be examined what aspects of summary judgment can be accepted in Korea and what are not likely to be admitted.

Regarding constitutionality of summary judgment, summary judgment itself might not infringe the constitutional right, just as dismissals do not. It is because the right to claim adjudication guarantees only adjudication by judges rather than not full trial and judgment on the merits; and reasonable limitation of such right, such as dismissing complaints or cases for lack of formality, is allowed. Likewise, the right to have judge's decision after completing full trial is not necessarily included in the scope of the constitutional right to claim adjudication. As long as judges make certain decision, whether it ends the lawsuit earlier than the end of litigation or not does not matter. Moreover, summary judgment is judges' decisions on the merits based on strength of evidential supports provided by the litigants. So, on the institutional level, having summary judgment in the civil procedure may not raise any serious problem.

However, considering fundamental procedural values in Korean civil justice system, adopting and implementing this new institution that possibly limits litigants' right access to court could cause problems. It is because those procedural values include guaranteeing litigants' opportunity to have judgment on merits and truth finding function of litigations; and summary judgment is a disposition skipping trial anyway. So, there can be litigants' resistances and judges' hesitations to using the device unless these fundamental procedural values are seriously considered when designing the process. Specifically, whether summary judgment hearing can provide satisfactory level of opportunity to be heard should be considered.

Unlike dismissals, summary judgment is judge's decision on merits proclaiming that the lawsuit has "no genuine issue of material fact" considering evidential supports.⁷⁷⁸ Because it is a judgment on the merits, summary judgment is in a better position, compared to dismissals, to be accepted by Korean legal professionals and litigants. Also, summary judgment hearings provide litigants with opportunities to argue for and against the requested summary judgment and to submit evidences to the judge.

However, short length of time allowed for the hearing can be problematic. Considering that trials of Korean civil procedure is a series of sessions scattered through months or years rather than concentrated to a week or two and that judiciary's policy to promote concentrated trial was not successful at all, litigants' expectation of long and full hearing could be an impediment to the effectiveness of summary judgment. It is because litigants would expect maximum length of hearings filled with clarifications by judges and opportunities to change strategies based on what opposing party argued in the previous session. Also, a losing party might think it unfair for these reasons.

These possible *pros* and *cons* to summary judgment may be something every new institution has to go through after being implemented. However, legal professionals and litigants in contemporary Korean society are very sensitive to this issue of people's right to claim adjudication, even more than what Constitutional law requires. Thus, these possible weaknesses of summary judgment in Korean context should be seriously reviewed. It is why followings paragraphs, who should bear the burden of proving existence or non-existence of issue of fact and what opportunities for preparing summary judgment trial are

⁷⁷⁸ FED. R. CIV. P. 56(a) (" Rule 56 Summary judgment (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.").

available, are important for summary judgment to be recognized as “less unfair.”

7.2.2.3. Who bears what burden?

As stated in the Chapter 3, *Celotex* trilogy, the three consecutive cases by the U.S. Supreme Court was ground breaking event in terms of the use of summary judgment. Summary judgment was an institution rarely used before *Celotex*. After the cases shifted the burden of proof to the responding party, the procedural device became a popular choice for the party who wants to dispose the lawsuit earlier. When law imposes the burden of proving non-existence of issue of fact to the party who requests summary judgment, then getting summary judgment would become harder. In contrast, when the responding party bears the burden, then summary judgment would become a central procedural stage that every litigant (although it would be only one side in each lawsuit) wants to have; and the responding party would be exposed to the risk of losing opportunity to continue her case further. That is a dilemma. That is also a matter of policy choice left to procedure designers. Majority of U.S. Supreme Court justices in *Celotex* trilogy chose to make use of pretrial disposition of cases using summary judgment more active and easier for judicial efficiency.

That is also a dilemma for Korean procedure designers if they decide to adopt and implement U.S summary judgment to enhance efficiency in civil litigation system. In order to achieve this goal, imposing the burden of proof to responding party is a better idea than doing otherwise. However, in that case, the burden might be recognized as too severe to the responding party who does not have the burden of proof in trials. To the contrary, when requesting party bears the burden, then summary judgment is likely to be a procedural device that would not be used. It is hard to choose between these two conflicting situations.

Considering institutional settings related to allocating the burden of proof in civil litigation, the burden is more likely to be imposed to the party who requests summary judgment. It is because of that, according to general legal theory in Korea, a plaintiff or a petitioner bears the burden of proof; and that burden shifting rarely happens in Korean civil litigation. If that is the case, summary judgment would not be used actively for the purpose of enhancing efficiency unless policy makers firmly decide to shift the burden to responding party while not fearing to face complaints and criticisms.

7.2.2.4. How long and how much can litigants prepare before summary judgment?

If enhancing judicial efficiency and lessening judge' burdens by disposing cases before trial is the goal for adopting summary judgment, hearings for the summary judgment should be concentrated. If such hearings are continued and lingered for long time, like current trial sessions in Korean courts, managing these long lasting hearing would be additional burdens for judges. When admitting that concentrated hearing for summary judgment is needed, then an important corner stone for such procedure would be preparations for the hearing that include figuring out all the possible issues and collecting all the necessary evidences.

Summary judgment is a judge's decision making based on evidence. And, in the U.S., the parties may be able to figure out issues and gather evidence through pretrial devices including liberal discovery. Contrary to that, in Korea, concentrated trial is what once pursued as an important procedural reform but is not working due to various reasons including lack of preparation due to short time period allowed for the parties, difficulties in finding all relevant issues before exchanging arguments in trial sessions, and pressures to prioritize truth finding rather than speedy processing. To make it worse, trial preparation

through exchanging arguments and list of evidence and pretrial conference was once implemented as mandatory a step but cancelled only after few years for efficiency reasons. Now such trial preparation is not mandatory and is being used much less frequently. Moreover, Korean civil procedure does not have discovery; and the only procedural device equivalent to discovery is document production order. However, it is playing limited role at best.

Likewise, current Korean civil procedure and legal professionals' practices lack several stepping stones for successful functioning of summary judgment. In order to make summary judgment work in Korean context, first, enough time for preparing trial should be provided to litigants. Second, exchanging trial preparation documents and pretrial conference should be used by judges more frequently. Third, document production order should be improved to make the institution more effective. However, still, expectations for truth finding role of civil litigation remain as an impediment. Just as this shared procedural value worked as an impediment against rigid implement of concentrate trial, it would do the same against concentrated hearing for summary judgment. Thus, considering its institutional circumstances and fundamental procedural values imbedded in the legal professionals' practices, current Korean civil procedure has long way to go and impediments to overcome for the successful use of summary judgment.

7.2.2.5. Who initiate?

Summary judgment can be initiated by the parties' motions for summary judgment. In addition, judges can render *sua sponte* summary judgment.⁷⁷⁹ When considering active motion practices by litigants and relatively passive roles of judges in the U.S. civil litigation,

⁷⁷⁹ BRUNET & REDISH, *Supra* note 155, at 165 (“District court authority to render *sua sponte* summary judgment is undisputed.”).

it would be a bit exceptional. Likewise, the door for summary judgment proceeding is widely open. This aspect of summary judgment makes it desirable to the contexts of Korean civil procedure, because party-initiating disposition could empower judges to use pretrial disposition more actively. Judges would worry less about social and cultural pressures against pretrial disposition when such disposition is initiated not by judges themselves but by the parties.

In Korea, dismissals are initiated by judges, not by the parties, as one judge explains:

“Because the parties do not have the right to dismissal, they can only request dismissal; and such request does not bind judges. Judges do not have to give answer to the request. So, such request has meaning only for calling attention of the judges; and holding interlocutory hearing for the issue is not required. Whether certain case should be dismissed is to be investigated on judges’ own initiative. So, when the parties argue that certain complaint or claim should be dismissed, then judges can choose whether to consider such argument or not. Judges do not have to do so.”⁷⁸⁰

Because it is solely judge’s discretion and responsibility to decide whether to dismiss or not, social pressures to judges could work more strongly. That could drive judges not to dismiss and to continue the proceeding until the very end. Explaining about how dismissal of untimely submitted offenses and defenses works, one judge mentioned about differences between when opposing party appeals and when not:

“I do not dismiss belated submission of offense and defense materials unless the opposing party appeals very strongly. It is because substantial resolution of the dispute is an important matter rather than dismissal for being late.”⁷⁸¹

⁷⁸⁰ Interview with Judge No.18, in Suwon, Korea. (May. 8, 2013).

⁷⁸¹ Interview with Judge No.13, in Bucheon, Korea. (May. 3, 2013).

This statement shows that judges have incentives to be more active in dismissing when there is strong outer input from the parties. This is what motion practice does in U.S. civil litigations. Because, in the U.S., judges have obligation to answer to the motion with grounds, reasonable motion to dismiss by the party can be strong incentive for judges to render dismissals if it has grounds. From this point of view, the fact that summary judgment may be initiated by active motion practices could contribute to empowering Korean judges to dispose cases without huge burdens and relatively free from outer pressures.

7.2.2.6. Summary

Considering fundamental procedural values in action in Korea, summary judgment is the most attractive disposition device to adopt for following reasons. First, summary judgment is courts' decision on the merits. Unlike dismissals, it provides litigants with court's answers for the case based on evidence. Considering the fact that people's right to claim adjudication is understood by judges and lawyers as providing the parties with opportunities to receive judgment on the merits, summary judgment can satisfy this expectation. Also, through summary judgment hearing, litigants could have chance to meet judges and to be heard by them. Second, summary judgment is based on motion practice. Bringing request for pretrial disposition into Korean civil procedure could empower Korean judges to be more active in disposing cases before the end of trial. Third, there is necessity to improve judicial efficiency in Korea. Facing severe judicial inefficiency, current court policy makers are focusing only on more active use of mediation. However, use of ADR is a matter that cannot be forced and is not a solution that affects litigation process itself. Because current use of dismissal is significantly limited, summary judgment can be an only solution for designing litigation process that filters out cases that do not deserve trials.

However, there are certain conditions that should be satisfied for effective use of summary judgment in Korea. First, as the most fundamental condition, there should be sufficient opportunities for the parties to collect evidence, discovery or equivalent process, before having hearings for summary judgment. It is significantly important because it relates with Korean people's expectation of truth finding through litigation that is another fundamental procedural value in action. Considering the fact that judges and lawyers perceive that important claims or defenses can pop up during trial sessions and that prohibiting submission of such materials only for being late hinders truth finding through the litigation, it becomes manifest that summary judgment might be recognized as restricting truth finding based on such belated but important evidence. Also, current trial preparation process and evidence collection before trial is very limited. Trial preparation process is not mandatory and it is allowed only for complex cases, opportunities to find and organize issues through exchanging trial preparation documents that contains arguments and list of evidence are also limited. With respect to evidence collection before trial, Korean civil procedure does not have pretrial discovery. The only procedural device for a party to the litigation to get evidence possessed by the opposing party is moving for a court order to produce documents. Korean lawyers and judges perceive that function of the document production order is limited due to lack of sanction against the party who does not produce the ordered documents and because of difficulties in making sure whether the party who was required to produce documents actually possesses the documents or not. Also, in Korean civil procedure, there is no way to have testimony of witness before trial because there is no deposition. In such circumstances, designing new evidence collecting devices that provide litigants with sufficient access to information, whether it is U.S. discovery or not, is a significant

prerequisite for the use of summary judgment.⁷⁸²

Second, summary judgment standard before *Celotex* is required unless broad and liberal U.S. discovery is adopted. Because U.S. summary judgment is based on long and thorough pretrial process including full scale of discovery, its requirements in terms of evidentiary proof would not fit to Korean contexts unless Korea uses the same broad discovery as the U.S. does. Considering limited access to evidence possessed by opposing party or the third party in Korean civil procedure, allocating heightened burden of proof to non-moving party, as established by *Celotex* trilogy, will cause many cases to be disposed in favor of the moving party without providing the non-moving party with adequate opportunity to respond to the summary judgment motion. Although summary judgment itself can be welcomed by litigants and judges because it is adjudication on the merits of the cases, such adjudication based on insufficient preparation of evidence would make litigants, especially the non-moving party whose case is involuntarily ended, feel their access to justice was infringed. In this reason, burden shifting in the *Celotex* trilogy should not be accepted as a summary judgment standard for Korean civil procedure. Also, for the same reason, in order to prevent such occasion as where summary judgment is rendered for the moving party but a judge did not allow sufficient opportunity for non-moving party to collect evidence showing necessity of trial, Rule 56(d) protection which allows the non-moving party to have additional time to respond summary judgment motion and helps the party in other ways should be maintained.

⁷⁸² Considering these possible barriers to use of summary judgment in terms of cultural, historical, social and institutional aspects of civil litigation, the most direct and fundamental solution for effectiveness of summary judgment would be expanding use of trial preparation process and development of effective pretrial evidence collection tools. Expanded use of mandatory trial preparation would allow the parties to find and organize issues and strengthened pretrial evidence collection would provide better evidentiary grounds for the summary judgment. However, such changes might need another set of thorough research and discussions. It is beyond the scope of this dissertation.

Third, document evidence and witness shall be considered differently in summary judgment ruling unless Korean civil procedure adopts U.S. deposition or equivalent devices. Because Korean civil procedure does not have deposition and it only has limited pretrial procedural device for gathering documents possessed by the opposing party or the third party, as of the time before trial, evidence that can be used for the ruling of summary judgment include evidence possessed by each party and documents collected from other party or the third party. Under current rules, there is no way to secure witness testimony before trial. So, one of the important issues for summary judgment ruling would be whether witness examination is needed in trial for resolution of the case. If it is, then judges should not render summary judgment.

Lastly, it should be considered to extend time allowed for preparing summary judgment. In the U.S., summary judgment is pretrial motion, so the motion should be filed before the trial. However, in Korea, for many cases, there is no clear boundary for pretrial and trial; and judges utilize first few trial sessions for trial preparation, collecting issues and evidence. In this situation, mandating the parties file a motion for summary judgment before beginning of the trial is same as requiring them to file the motion without having opportunities to prepare or with very limited evidence. So, it should be considered to allow filing a motion for summary judgment during trial. If that is the case, summary judgment would function as reducing time and resources for remaining trial sessions. However, it is doubtful to what degree the parties and the court can save their resources through this summary judgment motion during trial, because holding summary judgment hearing would also consume similar amount of resources that is required for one more trial session or two.

To sum up, these conditions are, at least somehow, connected to a crucial difference between the U.S. and Korea: existence of discovery. So, as a fundamental step, providing

litigants with evidence collecting opportunities through discovery or equivalent devices is an important matter. However, the second, third, and fourth conditions are for the management of summary judgment in case of not having such evidence collection devices yet. How to satisfy these conditions would be a good topic for further research.

7.2.3. Rule 11 Sanction

In Korean context, adoption of the Rule 11 sanction was suggested to prevent lawyers from filing frivolous lawsuits by forcing them to conduct more thorough research and preparation before filing lawsuits.⁷⁸³ If adopted, sanctions under the current Rule 11 would work in terms of preventing lawyers from presenting false statements or groundless claims. Moreover, if the proposed Lawsuit Abuse Reduction Act of 2013 is enacted, then judges will be empowered to dispose cases that are judged as being frivolous by dismissing the case or striking the pleading.

However, it is doubtful whether judges are willing to use such sanction as they are permitted and/or required to do. Rather, considering social aspect of Korean civil litigation in which judges are facing inner and outer pressures to be kind and less authoritative, judges are likely to avoid use of such sanctions. It is also because, under this social atmosphere, the litigants and the lawyers who are sanctioned are more likely to resist and criticize against the judges very hard; and the judges are likely to be afraid of being criticized. Thus, regardless of the choice between current Rule 11 and the Lawsuit Abuse Reduction Act of 2013, strengthening sanctions against the parties and lawyers is less likely to be actually used by judges despite of its usefulness.

⁷⁸³ Kong, *Supra* note 93, at 553-54.

7.3 Recommendations for future study

There are themes and issues that are closely related to this study but excluded from the scope of it. I would like to list these as limitations of this study and themes for further research.

7.3.1. Fundamental procedural values in action in the U.S. civil litigation practice

As this study finds and argues, fundamental procedural values in action shapes balancing models for efficiency and access to court, and decides whether certain reforms would like to be successful or ignored. As for the U.S. civil procedure, enhancing efficiency has been famous theme for civil procedure reforms. However, it seems to be neglected or ignored to review how such reforms would go along with fundamental procedural values that are actually perceived and pursued by legal professionals and litigants. For example, as pointed out by some legal scholars, reforms of summary judgment or/and pleading standard raises question of how seriously are judges perceive and value litigants' right to trial by jury, that is recorded in U.S. Constitution, civil procedure, and many other important materials for practice. It is a common sense that U.S. civil litigation is based on jury trial; however, it is still vague how seriously legal professionals, especially judges, are accepting this fundamental procedural value in their daily practices. This study excluded this theme, because it did not conduct field research on that issue. However, it would be valuable if data on which procedural values are actually working are collected.

7.3.2. How is lawsuit abuse defined and perceived by legal professionals and by lay people?

In discussions regarding judicial efficiency, definition of lawsuit abuse or frivolous lawsuit is an important question that should be resolved first, because many reform efforts for enhancing judicial efficiency are based on concerns of lawsuit abuse. However, at the same time, it would be very difficult, if possible, to find a correct answer for the definition of lawsuit abuse, because there may be many different ideas especially on this issue. This study excluded this issue and question because it focuses on interactions and balancing between efficiency and access to court in general civil litigation practices, not limited to civil litigations that could be lawsuit abuses. However, this is a very important issue, and attracting social consensus on this issue, if possible, would significantly contribute to reduce social conflicts on litigating.

7.3.3. Mediation as a tool for enhancing efficiency

Most of the judges and lawyers who were interviewed answered that promoting use of mediation is what judicial administration in Korea is doing for enhancing judicial efficiency. Mediation in Korean is rapidly developing although focus is still on court-connected mediation rather than private mediation using various resources. This study excluded mediation from the scope of analysis because it focuses on litigation process rather than alternative one. However, considering increasing passion for mediation and circumstances in Korea in which judicial efficiency is hard to be achieved due to its unique factors, enhancing judicial efficiency is noticeable. It is important to study judge's use of

mediation also because judge-driven court-connected mediation in Korea has risk of infringing autonomous dispute resolution by the parties by forcing them to accept judge's conclusion.

7.3.4 Gender role and judgeship

As this study shows, traditional images of judges are still lingering and are continued to judicial paternalism. Korean judges are willing to or required to take care of litigants as local governors in Chosŏn Dynasty were supposed to do. In the era, only man can work as a government official. So, one can easily connect images of judges with masculinity. Now, Korea has number of female judges. How do these female judges accept and experience gender role of judge? Were images and roles of judges in Chosŏn Dynasty really masculine? How are those of contemporary judges? How are current female judges performing their job in terms of gender role? Because interviews of this study did not find any significant differences between male judges and female judges, further study from such perspectives will contribute to develop theory on gender role and female judges' practices.

Bibliography

Laws and Regulations

(U.S.)

U.S. Constitution

Federal Rules of Civil Procedure

The Lawsuit Abuse Reduction Act of 2011 (Bill)

The Lawsuit Abuse Reduction Act of 2013 (Bill)

(Korea)

DAEHAN MINKUK HÖNPÖP [HÖNPÖP] [Constitution].

Minsa sosong pöp [Civil Procedure Code], Act No. 547 (April 4, 1960), amended by Act. No. 10859 (July 18, 2011).

Minsa sosong deung inji pöp [Act on the stamps attached for civil litigation, Etc.], Act No. 337 (September 9, 1954), amended by Act. No. 11156 (January 17, 2012).

Minsa sosong kyuch'ik [Enforcement Rules on the Civil Procedure Code], Supreme Court Decree No. 848 (July 9, 1983), amended by Supreme Court Decree. No. 2396 (May 2, 2012).

Minsa chochöng pöp [Civil Mediation Code], Act No. 4202 (January 13, 1990), amended by Act. No. 11157 (January 17, 2012).

Soaek sagön simpan pöp [Small Claims Adjudication Act], Act No. 2547 (February 24, 1973), amended by Act. No. 7427 (March 31, 2005).

Court Cases (in reverse chronological order by Court)

(U.S.)

(Supreme Court cases)

Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Liebeck v. McDonald's Restaurants, P.T.S., Inc., 1995 WL 360309 (N.M. Dist.) (1994).

Rock v. Arkansas, 484 U.S. 44 (1987).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Matsushita Electronic Industrial Co. v. Zenith Radio Corp, 475 U.S. 574 (1986).

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Poller v. CBS, Inc., 368 U.S. 464 (1962).

Conley v. Gibson, 355 U.S. 41 (1957).

(Appellate court cases)

Iqbal v. Ashcroft, 490 F.3d 143 (2007).

Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2005).

Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (1985).

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (1984).

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (1983).

(District court Cases)

Ashcroft v. Iqbal, 2005 WL 2375202 (E.D.N.Y.) (2005).

Twombly v. Bell Atlantic Corp., 313 F.Supp.2d 174 (2003).

Liebeck v. McDonald's Restaurants, P.T.S., Inc., 1995 WL 360309 (1994).

Liberty Lobby, Inc. v. Anderson, 562 F.Supp. 201 (1983).

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 513 F.Supp. 1100 (1981).

(Korea)

(Constitutional Court cases)

88 Hun-Ga 6, ROK Constitutional Court (September 8, 1989).

(Supreme Court cases)

2012 Da 68279, Supreme Court (August 22, 2013).

2004 Da 11346, Supreme Court (May 14, 2004).

2001 Da 73480, Supreme Court (February 22, 2002).

99 Du 2017, Supreme Court (November 13, 2001).

2001 Da 15576, Supreme Court (October 9, 2001).

98 Du 2768, Supreme Court, (March 23, 2000).

97 Da 25521, Supreme Court (December 9, 1997).

97 Ma 600, Supreme Court (May 19, 1997).

92 Da 32258, Supreme Court, (November 10, 1992).

82 Da Ka 1528, Supreme Court (February 8, 1983).

80 Ma 160, Supreme Court (June 12, 1980).

78 Ma 233, Supreme Court (September 5, 1978).

74 Da 767, Supreme Court (September 24, 1974).

67 Da 1744&1746 (consol.), Supreme Court (December 26, 1969).

69 Ma 500, Supreme Court (December 19, 1969).

(District Court cases)

Ja 96 La 2780, Seoul District Court (January 31).

Books and Articles

Beisner, John H. “Discovering a Better Way: The Need for Effective Civil Litigation Reform”
Duke Law Journal, Vol. 60 (December 2010):547-596.

Bone, Robert G. “*Twombly*, pleading Rules, and the Regulation of Court Access” Iowa Law
Review, Vol. 94 (February 2009):873-936.

Brunet, Edward & Martin H Redish. *Summary Judgment: Federal Law and Practice*. Los
Angeles, CA, Thomson/West, 2006.

Bullington, Stephen A. “Justice Delayed is Justice Denied: Summary Judgment Following
Anderson v. Liberty Lobby, Inc.” Arizona Law Review, Vol. 30 No. 1 (1988):171-181.

Burbank, Stephen. “Drifting toward Bethlehem or Gomorrah?: Vanishing Trials and
Summary Judgment in Federal Civil Cases” Journal of Empirical Legal Study, Vol.
1 No. 3 (November 2004):591-626.

Cavanagh, Edward D. “*Twombly*: The Demise of Notice Pleading, the Triumph of Milton
Handler, and the Uncertain Future of Private Antitrust Enforcement” Review of
Litigation, Vol. 28 No.1 (Fall 2008):1-34.

Chang, Sök-cho. “헌법과 민사소송법 [Constitution and Civil procedure]” Minsa Sosong
[Civil Procedure], Vol. 9 No. 1 (May 2005):40-85.

Charmaz, Kathy. “The Grounded Theory Method: An Explication and Interpretation”, In
Contemporary Field Research edited by Emerson R. M., Boston, MA, 1983.

_____. *Constructing Grounded Theory: A Practical Guide Through Qualitative
Analysis*. Los Angeles, CA: SAGE Publications, 2006.

Chase, Oscar G. *Law, Culture, and Ritual*. New York and London, NY: New York University Press, 2005.

Childress, Steven Alan. "A New Era for Summary Judgments: Recent Shifts at the Supreme Court" *Federal Rules Decision*, Vol. 116 (1987):183-194.

Cho, Dae-Yup "시민사회와 권위 [Civil society and authority]", In *Hanguk sahoe ōdiro kana?: Kwŏnwijuŭi ihu ŭi kwŏnwi kujo, kŭ taeon ŭi mosaek* [Where is Korean society going?: Authority system after Authoritarianism, seeking alternatives] edited by Dae-Yup Cho & Gil-Sung Park, Seoul, Good Information Press, 2005.

Cho, Dae-Yup & Park, Gil-Sung "도입: 새로운 권위 패러다임의 모색 [Introduction: seeking new paradigm of authority]", In *Hanguk sahoe ōdiro kana?: Kwŏnwijuŭi ihu ŭi kwŏnwi kujo, kŭ taeon ŭi mosaek* [Where is Korean society going?: Authority system after Authoritarianism, seeking alternatives] edited by Dae-Yup Cho & Gil-Sung Park, Seoul, Good Information Press, 2005.

Chung, Dong-Yoon & Yoo, Byung-Hyun. *Minsa sosong pŏp* [Civil Procedure], Pachu Book city, Pŏpmun Sa, 2007.

Chung, Young-Hwan. *Minsa sosong pŏp* [Civil Procedure], Seoul, Sech'ang Publishing Co., 2009.

Clark, Charles E. "History, Systems and Functions of Pleading", *Virginia Law Review*, Vol.11 No.7 (1925):517-552.

_____. "Pleading Under the Federal Rules", *Wyoming Law Journal*, Vol. 12 No. 3 (Spring 1958):177-201.

Collins, Daniel P. "Summary Judgment and Circumstantial Evidence", *Stanford Law Journal*, Vol. 40 No. 2 (January 1998):491-518.

Cotterrell, Roger. "The Concept of Legal Culture", In *Comparing Legal Cultures* edited by David Nelken, Aldershot, England, Dartmouth Publishing Company Limited, 1997.

Creswell, John W. *Research Design*. Los Angeles, CA: SAGE Publications, 2009.

Cross, John T., Leslie W. Abramson & Ellen E. Deason. *Civil Procedure: cases, problems and exercises*. St. Paul, Minnesota, Thomson Reuters, 2011.

Crump, David & William V. Dorsaneo, III, Res R. Perschbacher & Debra Lyn Bassett. *Cases and Materials on Civil Procedure*. New Providence, New Jersey & San Francisco, California, LexisNexis, 2012.

Damaška, Mirjan R. *The Faces of Justice and State Authority*. New Haven and London, Yale University Press, 1986.

Dodson, Scott. "Comparative Convergences in Pleading Standards" *University of Pennsylvania Law Review*, Vol. 158 (January 2010):441-472.

_____. "Pleading Standards After *Bell Atlantic Corp. v. Twombly*" *93 Virginia Law Review In Brief* Vol. 93(July 2007):135-143, available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

Eichhorn, Lisa. "A Sense of Disentitlement: Frame-Shifting and Metaphor in *Aschcroft v. Twombly*" *Florida Law Review*, Vol. 62 (September 2010):951-974.

Epstein, Richard A. "*Bell Atlantic v. Twombly*: How Motions to Dismiss become (Disguised) Summary Judgments" *Washington University Journal of Law and Policy*, Vol. 25 (2007):61-99.

Fairman, Christopher M. "Heightened Pleading" *Texas Law Review*, Vol. 81 No. 2 (December 2002):551-626.

Fleming, Macklin. "Court Survival in the Litigation Explosion" 54 *Judicature*, Vol. 54 (October 1970): 109-113.

Freer, Richard D. & Wendy Collins Perdue. *Civil Procedure: Cases, Materials, and Questions*. New Providence, New Jersey & San Francisco, California, LexisNexis, 2012.

Friedenthal, Jack H., Arthur R. Miller, John E. Sexton and Helen Hershkoff, *Civil Procedure: cases and materials*. St. Paul, Minnesota, West Academic Publishing, 2013.

Friedman, Lawrence M. "Legal Culture and Social Development" *Law and Society Review*, Vol. 4 (August 1969):29-44.

_____. *Total Justice*. New York, Russell Sage Foundation, 1985.

_____. "The Day Before Trials Vanished" *Journal of Empirical Legal Study*, Vol. 1 No. 3 (November 2004):689-703.

Friendly, Henry J. "Some Kind of Hearing" *University of Pennsylvania Law Review* Vol. 123 (June 1975):1267-1317.

Galanter, Marc. "Why the "Haves" come out ahead: Speculations on the limits of legal change", *Law and Society Review*, Vol. 9 (Fall 1974):95-160.

_____. "An Reading the Landscape of Disputes: What we Know and Don't know (and Think we know) about our allegedly contentious and litigious society" *UCLA Law Review*, Vol. 31 (October 1983):4-71.

_____. "An Oil Strike in Hell: Contemporary Legends about the Civil Justice System" *Arizona Law Review*, Vol. 40 (1998):717-752.

_____. "The Vanishing Trial: An Examination of Trials and Related Matters in

Federal and State Courts” *Journal of Empirical Legal Study*, Vol. 1 No. 3 (November 2004):459-570.

_____. “The Hundred-Year Decline of Trials and the Thirty Years War” *Stanford Law Review*, Vol. 57 No. 5 (April 2005):1255-1274.

Ginsburg, Tom & Hoetker, Glenn. “The Unreluctant Litigant?: An Empirical Analysis of Japan’s Turn to Litigation” *Journal of Legal Study*, Vol. 35 (2006):31-59.

Glannon, Joseph W., Andrew M. Perlman & Peter Raven-Hansen. *Civil Procedure: A Coursebook*. New York, New York, Wolters Kluwer Law & Business, 2012.

Hahm, Pyung-choon. “The Affective Society: Values and Law in Korea”, In *Korean Jurisprudence, Politics and Culture*, Seoul, Yonsei Univ. Press, 1986.

Haley, John Owen. *Authority without Power*. New York, New York, Oxford University Press, 1991.

Hartnett, Edward A. “The Changing Shape of Federal Civil Pretrial Practice: Taming Twombly, even after Iqbal” *University of Pennsylvania Law Review*, Vol. 158 (January 2010):473-516.

Hazard, Geoffrey C. Jr., Colin C. Tait, William A. Fletcher and Stephen McG. Bundy. *Pleading and Procedure: state and federal cases and materials*. New York, Foundation Press, 2009.

Ho, Mun-Hyuck. *Minsa sosong pŏp [Civil Procedure]*, Pachu Bookcity, Pŏpmun Sa, 2008.

Hoffman, Lonny S. “The Lawsuit Abuse Reduction Act: The Legislative Bid to Regulate Lawyer Conduct” *Review of Litigation*, Vol. 25 No. 4 (2006):719-734.

_____. “Burn up the Chaff with Unquenchable Fire: What Two Doctrinal

Intersections Can Teach Us About Judicial Power over Pleadings” Boston University Law Review, Vol. 88 (December 2008):1217-1270.

_____. “Case against the Lawsuit Abuse Reduction Act of 2011” Houston Law Review, Vol. 48 No. 3 (Fall 2011):545-584.

Hong, Ki-mun. “헌법과 민사소송법 [Constitution and Civil procedure]” Minsa Sosong [Civil Procedure], Vol. 9 No. 2 (November 2005): 1-23.

Ides, Allan & Christopher N. May. *Civil Procedure: Cases and Problems*. New York, New York, Wolters Kluwer Law & Business, 2012.

Im, Sang-Hyuk. “법정의 풍경 [Scenes of a courtroom]”, In *Chosŏns ūi ilsang, pŏpjŏng e seŏda [Daily life in Chosŏn Dynasty stands in a court room]* edited by The Society of Korean Manuscripts, Seoul, Korea, Yŏksa bipyŏng sa [History Criticism Press], 2013.

Joy, Peter A. “The Relationship Between Civil Rule 11 & Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers” Loyola of Los Angeles Law Review, Vol. 37 No. 3 (Winter 2004):765-818.

Jung, Geung Sik. “분쟁과 재판 [Disputes and adjudication]”, In *Chosŏns ūi ilsang, pŏpjŏng e seŏda [Daily life in Chosŏn Dynasty stands in a court room]* edited by The Society of Korean Manuscripts, Seoul, Korea, Yŏksa bipyŏng sa [History Criticism Press], 2013.

Jung, Young-Su. “전략적 소송(SLAPP)에 관한 연구 [A Study on Strategic Lawsuit Against Public Participation (SLAPP)]” Minsa Sosong [Civil Procedure], Vol. 12 No. 2 (November 2011):495-530.

Kagan, Robert A. *Adversarial Legalism: The American Way of Law*. Cambridge,

Massachusetts, and London, England, Harvard University Press, 2001.

Kawashima, Takeyoshi. “Dispute Settlement in Japan”, In *The Social Organization of Law* edited by Donald Black & Maureen Mileski, Taradale, New Zealand, Seminar Press, 1973.

Kim, Chong-Sö. “전략적 봉쇄소송 규제법제에 관한 연구 [A Study on the Regulations of the Strategic Lawsuit Against Public Participation (SLAPP)]” *Minchu Pöphak [Democracy Legal Study]*, Vol. 30 (July 2006):11-47.

Kim, Do-hyön. *Hankuk üi Sosong kwa Pöpcho: Öttöke Pyönhaeya Hal Gösinga [Litigation and Adjudication in Korea: How it should be changed]*. Seoul, Dongguk Univ. Press, 2007.

Kim, Hong-Yup. *Minsa sosong pöp [Civil Procedure]*, Seoul, Pakyöng Sa, 2011.

Kim, Jae-Moon. *Hankuk chöntong minju juüi iron kwa pöp üi chöngsin [Korean Traditional democracy theories and Spirits of Law]*. Seoul, Asia Culture Publications, 2007.

Kim, Jeongoh. *Hankuk üi pöp munhwa: Insik, Kucho, Pyönhwa [Korean Legal Culture: Understanding, Structure and Change]*. Seoul, Nanam Publications, 2006.

Kim, Jung Hwan. “인터넷상 표현의 자유와 전략적 봉쇄소송(SLAPP) [Freedom of Expression on the Internet and Strategic Lawsuit Against Public Participation(SLAPP)]” *Anam Pöphak [Anam Legal Study]*, Vol. 43 (2014):953-987.

Kim, Sang-su. *Minsa sosong pöp gaeron [Introduction to Civil Procedure]*, Seoul, Pöpu sa, 2010.

Kim, Sang-yong. *Hankuk pöpsa chungsim pöpsa wa pöp chungch'aek [Legal history and Legal policy Culture: Focusing on Korean Legal history]*. Seoul, Korean Legal

Research Institute, 2006.

Kong, Young Ho. “An Analysis of Rule 11 of the United States Federal Rules of Civil Procedure as a Measure to Deter Frivolous Litigation” *Minsa Sosong* [Civil Procedure], Vol. 15 No. 1 (May 2011): 553-594.

Kwon, Youngjoon. “Litigating in Korea: a general overview of Korean civil procedure”, In *Litigation in Korea* edited by Kuk Cho, Cheltenham, UK & Northampton, USA, Edward Elgar Publishing, 2010.

Langbein, John H. “The German Advantage in Civil Procedure” *Chicago University Law Review* Vol. 52 (Fall 1985):823-866.

_____. “The Disappearance of Civil Trial in the United States” *Yale Law Journal* Vol. 122 (December 2012):522-573.

Lee, Gyooho. “사인의 제소여부결정 모델과 민사사건 증가의 원인에 대한 법경제학적 분석 [A Theoretical Analysis of Increase in Civil Case Filings on Basis of an Economic Model as to a Rational Actor's Incentive to Bring a Suit]” *Minsa Sosong* [Civil Procedure], Vol. 8 No. 2 (2004): 11-40.

Lee, Si-yun. *Sin minsa sosong pōp* [New Civil Procedure], Seoul, Pakyōng Sa, 2013.

Levin, A. Leo, Philip Shuchman & Charles M. Yablon. *Civil Procedure: cases and materials*. New York, New York, Foundation Press, 2000.

MacCann, Michael, William Hamton. *Distorting the Law: Politics, Media, and the Litigation crisis*, Chicago, The University of Chicago Press, 2004.

Manning, Bayless. “Hyperlexis: Our National Disease” *Northwestern University Law Review*, Vol. 71 (1977):767-782.

Marcus, Richard L. "The Revival of Fact Pleading Under the Federal Rules of Civil Procedure" *Columbia Law Review*, Vol. 86 No. 3 (April 1986):433-494.

_____. "The Puzzling Persistence of Pleading Practice" *Texas Law Review*, Vol. 76 No. 7 (1998):1749-1779.

_____. *Civil Procedure: A Modern Approach*, St. Paul, Minnesota, Thompson Reuters, 2008.

Maxeiner, James R. "Pleading and Access to Civil Procedure: Historical and Comparative Reflection on *Iqbal*, A Day in Court and a Decision According to Law" *Pennsylvania State Law Review*, Vol. 114 (Spring 2010):1257-1290.

Maxeiner, James R., Gyooho Lee, & Armin Weber. *Failures of American Civil Justice in International Perspective*. New York, New York, Cambridge University Press, 2011.

Merryman, John Henry and Pérez-Perdomo, Rogelio. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin*. Stanford, California, Stanford University Press, 2007.

Miller, Arthur R. "The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?" *New York University Law Review*, Vol. 78 (June 2003):982-1134.

_____. "From *Conley* to *Twombly* to *Iqbal*: A double play on the Federal Rules of Civil Procedure" *Duke Law Journal*, Vol. 60 (October 2010):1-132.

National Court Administration. *Pŏpwon silmu cheyo minsa sosong II [Summary of Court Practice: Civil Procedure II]*. Seoul, National Court Administration, 2005.

_____. *Pŏpwon silmu cheyo minsa sosong III* [Summary of Court Practice: Civil Procedure III]. Seoul, National Court Administration, 2005.

_____. *MINSA CHAEPAN REPORT 2013* [CIVIL LITIGATION REPORT 2013]. Seoul, National Court Administration, 2013.

Nelken, Melissa L. “One Step Forward, Two Steps Back: Summary Judgment After *Celotex*”, *Hastings Law Journal*, Vol. 40 No. 1 (November 1998):53-86.

Oh, Dae-sŏng. “미국민사소송에서의 약식재판(Summary Judgment) [Summary Judgment in U.S. Civil Procedure]” *Minsa Sosong* [Civil Procedure], Vol. 14-2 (November 2010):748-788.

Park, Pyong-Ho. *Keunse ūi pŏp kwa pŏp sasang* [Law and Jurisprudence in Modern times], Seoul, Jinwŏn Press., 1996.

_____. *Hankuk pŏpche sa* [Legal history of Korea], Seoul, Minsŏkwŏn, 2012.

Park, Kyung-Sin. “전략적 봉쇄소송 억제법리(Anti-SLAPP Thoery)에 대한 이해와 한국에서의 적용가능성 [Understanding Anti-SLAPP Thoery and Applicability of the theory in Korea]” *Pŏphak Yŏnku* [Inha University Law Review], Vol. 14-3 (November 2011):169-189.

Pound, Roscoe. “Law in Books and Law in Action,” *American Law Review*, Vol. 44 (January-February 1910):12-36.

Ramseyer, J. Mark. “Reluctant Litigant Revisited: Rationality and Disputes in Japan” *Journal of Japanese Study*, Vol. 14 (1988):111-123.

Ramseyer, J. Mark & Rasmusen, Eric Bennett. “Are Americans More Litigious? Some Quantitative Evidence” available at SSRN: <http://ssrn.com/abstract=1907203> or

<http://dx.doi.org/10.2139/ssrn.1907203> (January 2010):1-25.

Redish, Martin H. "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix" *Stanford Law Review*, Vol. 57 No. 5 (April 2005):1329-1360.

Resnik, Judith. "Managerial Judges" *Harvard Law Review*, Vol. 96 No. 2 (December 1982):374-448.

_____. "Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts" *Journal of Empirical Legal Study*, Vol. 1 (2004):783-841.

Rhee, Woo-young. *Miguk Yönbang Minsa Jölch'a (I)* [*U.S. Federal Civil Procedure I*], Seoul, Kyöng-in Publishing Co, 2007.

Robertson, Kyle M. "No More Litigation Gambles: Toward a New Summary Judgment" *Boston College Law Review*, Vol.28 No. 4 (July 1987):747-782.

Rokumoto, Kahei. "Some Comparative Observations", In *Korea and Japan: Judicial System Transformation in the Globalizing World* edited by Dai-Kwon Choi & Kahei Rokumoto, Seoul, Seoul National Univ. Press, 2007.

Rosenburg, Maurice. "Let's Everybody Litigate?" *Texas Law Review*, Vol. 50 (August 1972): 1349-1368.

Rowe, Thomas D. Jr., Suzanna Sherry, & Jay Tidmarsh, *Civil Procedure*. New York, Foundation Press, 2008.

Sarat, Austin. "Studying American Legal Culture: An Assessment of Survey Evidence", *Law and Society Review*, Vol. 11 (Winter 1977):427-488.

- _____. “The Litigation Explosion, Access to Justice and Court reform: Examining the Critical Assumptions” *Rutgers Law Review*, Vol. 39 (1985): 319-336.
- Schneider, Elizabeth M. “The Challenging shape of Federal civil pretrial practice: the disparate impact on civil rights and employment discrimination case” *University of Pennsylvania Law Review*, Vol. 158 (January 2010):518-570.
- Schwarzer, William W. “Summary Judgment and Case Management” *Antitrust Law Review*, Vol. 56 No. 1 (1987):213-228.
- Schwarzer, William W, Alan Hirsch, & David J. Barrans. *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*. Federal Judicial Center, 1991.
- Sherwin, Emily. “The Jurisprudence of Pleading: Rights, Rules, and *Conley v. Gibson*” *Howard Law Journal*, Vol. 52 No. 1 (Fall 2008):73-98.
- Shreve, Gene R., Peter Raven-Hansen & Charles Gardner Geyh. *Understanding Civil Procedure*. New Providence, NJ, LexisNexis, 2013.
- Shin, Kwang-Young. “정치사회와 권위구조의 변화” [Changes in political society and authority structure]”, In *Hanguk sahoe ōdiro kana?: Kwŏnwijuŭi ihu ŭi kwŏnwi kujo, kŭ taeon ŭi mosaek* [Where is Korean society going?: Authority system after Authoritarianism, seeking alternatives] edited by Dae-Yup Cho & Gil-Sung Park, Seoul, Good Information Press, 2005.
- Smith, Douglas G. “The Twombly Revolution?” *Pepperdine Law Review*, Vol. 36 No. 4 (2009):1063-1100.
- Song, Ho-Geun. “세대와 권위 [Generation and authority]”, In *Hanguk sahoe ōdiro kana?:*

Kwŏnwijuŭi ihu ŭi kwŏnwi kujo, kŭ taeon ŭi mosaek [Where is Korean society going?: Authority system after Authoritarianism, seeking alternatives] edited by Dae-Yup Cho & Gil-Sung Park, Seoul, Good Information Press, 2005.

Song, Sang-Hyun & Park, Ick-Hwan. *Minsa Sosong Pŏp* [The Law of Civil Procedures in Korea], Seoul, Pakyŏng Sa, 2011.

Sŏnu, Hyun. “탈권위주의 사회와 이성적 권위 [A society escaping authoritarianism and rational authority]”, In *Segyehwa wa jaa chŏngch'esŏng* [Globalization and Self-identity] edited by A society for the research of society and philosophy, Seoul, Ihak Press, 2001.

Spencer, A. Benjamin. “Plausibility Pleading” *Boston College Law Review*, Vol. 49 (March 2008): 431-494.

_____. “Understanding Pleading Doctrine” *Michigan Law Review*, Vol. 108 (October 2009):1-36.

_____. *Civil Procedure: A Contemporary Approach*, St. Paul, Minnesota, Thompson Reuters, 2011.

Steinman, Adam N. “The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy” *Washington and Lee Law Review*, Vol. 63 (Winter 2006):81-144.

Stempel, Jeffrey W. “A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process” *Ohio State Law Journal*, Vol. 49 No. 1 (1998):95-194.

Strauss, Anselm & Juliet Corbin. “Grounded Theory Methodology: An Overview.” In *Handbook of Qualitative Research* edited by Norman K. Denzin & Yvonna S. Lincoln. Thousand Oaks, CA: SAGE publications, 1994.

Subrin, Stephen N. & Margaret Y. K. Woo. *Litigating in America*. New York, NY: Aspen Publishers, 2006.

The office of Judicial Administration, *Sapŏp yŏngam [The yearbook of Korean Judiciary]*. Seoul, Samwha printings, 1977-2011.

Thomas, Suja A. “Why Summary Judgment is Unconstitutional” *Virginia Law Review*, Vol. 93 (2007):139-180.

_____. “Why the Motion to Dismiss Is Now Unconstitutional” *Minnesota University Law Review*, Vol. 92 (June 2008): 1851-1890.

Valcke, Catherine. “Comparative Law as Comparative Jurisprudence-The Comparability of Legal Systems” *American Journal of Comparative Law*, Vol. 52 (2004): 713-740.

Weakland, Brian L. “Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence” *Dickinson Law Review*, Vol. 94 No. 1 (Fall 1989):25-60.

Wright, Charles Alan & Mary Kay Kane. *Law of Federal Courts*, St. Paul, Minnesota, Thompson Reuters, 2011.

Yang, Chun-Soo & Se-Na Woo. “민사소송에서 바라본 진실 개념 –법철학의 관점을 겸하여- [A truth concept pursued in civil litigation – also from the perspective of jurisprudence]” *Minsa Sosong [Civil Procedure]*, Vol. 14-2 (November 2010):33-65.

Yeazell, Stephen C. “Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial” *Journal of Empirical Legal Study*, Vol. 1 No. 3 (November 2004):943-971.

_____. *Civil Procedure*. New York, New York, Wolters Kluwer Law & Business, 2012.

News Articles (Print and Internet Sources; in reverse chronological order)

“Danger of ‘Judicial paternalism’,” *Munhwa Ilbo* [*Mun-hwa Daily*], January 3, 2014.

“Is “Dogani” decision what ought to be?: a paradox of adjudication justice,” CBS NO-CUT NEWS, December 9, 2013.

“Expanding consulting ‘words and behaviors in court rooms’ in order to prevent judges with harsh words,” *Moneytoday*, December 6, 2013.

“No more judges with harsh words, a manual published,” *Chungang Ilbo* [*Jung-ang Daily*], December 4, 2013.

““Old man shall die,” a judge who spoke harsh words finally resigned,” *dongA.com*, October 11, 2013.

“The judge with harsh words who said that old man shall die is still misusing his power,” Chosun.com, October 5, 2013.

“Seoul Central District Court will block malicious and repetitive lawsuits,” *Pōpnyul Sinmun* [The Law Times], August 1, 2013.

“ “Didn’t you give your wife drugs to marry her?” the judge with harsh words was punished by salary reduction for two months,” *Financial Times*, March 29, 2013.

“Judiciary is conscious of legal awareness of citizens,” *Financial News*, September 10, 2012.

“Hongik University harmed itself by litigation bomb,” *Kyōnghyang Sinmun* [*Kyunghyang News*], July 1, 2011.

“[Five years of Chief Justice Yong-Hoon Lee] Groundbreaking improvement of quality of

litigation through reinforcing trial focusing on oral statements,” *Pöpryul Sinmun* [*Law Times*], September 27, 2010.

“Abusing 'strategic lawsuits against criticism' should be regulated first,” *Hangyöre Sinmun* [*Hankyoreh News*], September 16, 2010.

“Korea University's excommunication as a disciplinary action infringed rule of law,” *Kyönghyang Sinmun* [*Kyunghyang News*], September 3, 2010.

“Myung-Bak Lee's Government persistently has tried to suppress criticism and checks against itself,” *Hangyöre Sinmun* [*Hankyoreh News*], September 16, 2009.

“Police investigation of Ssangyong automobile has lost fairness and justification,” *Hangyöre Sinmun* [*Hankyoreh News*], August 10, 2009.

“Intelligence agency's inspection on the court: they are not changed,” *Hangyöre Sinmun* [*Hankyoreh News*], July 5, 2008.

“For new government to be successful, it should be open to criticism from media,” *Donga Ilbo* [*Dong-a Daily*], December 28, 2007.

“Power and Media: Thinking about Two-Billion-Won lawsuit and ‘Fast to the death’,” *Hangyöre Sinmun* [*Hankyoreh News*], May 5, 2007.

“Lawsuit abuse by Environment protection organizations increases people’s burden,” *Donga Ilbo* [*Dong-a Daily*], March 9, 2006.

“Chief Justice Yong-Hoon Lee, “Serve citizens,” started to reform courts,” *Segye Ilbo* [*Segye Daily*], December 2, 2005.

“New Chief Justice Yong-Hoon Lee, “courts serving citizens””, *Maeil Kyöngche* [*Maeil Business Newspaper*], September 26, 2005.

“The first step for Labor Union and Company to ‘find balance’,” *Hangyöre Sinmun* [*Hankyoreh News*], March 15, 2003.

“Shame of ‘Litigation Republic’,” *Seoul Sinmun* [*Seoul News*], March 2, 2000.

“Morality, more than Law,” *Kukmin Ilbo* [*Kukmin Daily*], June 13, 1998.

Internet Sources

CBS No-Cut News, <<http://www.nocutnews.co.kr/>>

Chosun.com, <<http://forum.chosun.com/>>

DongA.com, <<http://news.donga.com/>>

Financial News, <<http://www.fnnews.com>>

Financial Times, <<http://www.fnnews.com/>>

Jung-Ang Daily, <<http://article.joins.com/>>

Korea Legislation Research Institute, <<http://www.klri.re.kr/>>

Korea Press Foundation, <<http://www.kinds.or.kr/>>

Lawtimes, < <http://www.lawtimes.co.kr/>>

Moneytoday, <<http://www.mt.co.kr/>>

National Center for State Courts, <<http://www.courtstatistics.org/Civil/CivilGrowth.aspx>>

Seoul Central District Court, <<http://seoul.scourt.go.kr>>

Statistics Korea, < <http://kostat.go.kr/portal/english/index.action>>

Supreme Court of Korea, <<http://eng.scourt.go.kr/eng>>

United States Census, < <http://www.census.gov/#>>

United States Courts, < <http://www.uscourts.gov/Home.aspx>>

Movies (in reverse chronological order)

Broken Arrow, Aura Pictures (Korea), 2011

DoGaNi, Sam-Geo-Ri Pictures (Korea), 2011

Hot Coffee, HBO (U.S.), 2011.

APPENDIX A

INTERVIEW CONSENT FORM (IN ENGLISH)

UNIVERSITY *of* WASHINGTON CONSENT FORM

Title: Dismissal practice in Civil Litigation and Litigants' right to a day in court: How do district courts' dismissal practice interact with procedural safeguards for fairness?

Researcher: Jinkyoo Lee, PhD Candidate in Asian & Comparative Law, University of Washington School of Law, Phone #: 1-425-633-4570 (in Korea, 010-3405-0311), e-mail: jklee031@uw.edu
Faculty advisor: Prof. Yong-sung Kang, Prof. Jane K Winn, Prof. Maureen Howard, Prof. Hwasook Bergquist Nam (GSR)

RESEARCHER'S STATEMENT

I am asking you to be in a research study. **The purpose of this consent form is to give you the information you will need to help you decide whether to be in the study or not.** Please read the form carefully. You may ask questions about the purpose of the research, what I would ask you to do, the possible risks and benefits, your rights as a volunteer, and anything else about the research or this form that is not clear. When I have answered all your questions, you can decide if you want to be in the study or not. This process is called "informed consent." I will give you a copy of this form for your records.

PURPOSE OF THE STUDY

One goal of dismissal in civil litigation in the U.S. is to screen frivolous lawsuits out at an early stage in order to protect defendants from burden of answering the meritless and harassing lawsuits. Plaintiffs, however, have constitutional rights to a day in court, and that fact requires courts to guarantee procedural safeguards before dismissing on various grounds. Breaking this subtle balance, the United States Supreme Court has continuously moved toward dismissing more cases for being meritless through heightened legal standards. Such developments have provoked intense criticism regarding plaintiffs' right to a day in court.

Inspired by this tension or balance between maintaining efficient court proceedings and guaranteeing procedural safeguards for fairness, this study examines court policy making and legislative efforts in Korea for improving its civil procedure to restrain alleged lawsuit abuse. This study begins by identifying weaknesses in the current reform efforts and research in Korea particularly with relevant to the adoption of various aspects of U.S. civil procedure law. First, there has been a lack of understanding how the current Korean dismissal practices and procedural safeguards are working. Second, scholars and policy makers in Korea are underestimating the weaknesses of U.S. dismissal practice including the lack or insufficiency of procedural safeguards for fairness. Therefore, based on an in-depth study of current court practice in Korea, this study would assess necessity or practicability of adopting U.S. dismissal practice.

The primary goal of this study is to provide an explanatory theory of current Korean dismissal practice including how procedural safety is being guaranteed and how the dismissal practice and procedural safeguards interact with each other. This point is important also because voices of Korean practicing lawyers and judges have been rarely reflected in academic discussions, which, in the Korean context often drive legal reform or legislation. In terms of the comparative law literature on civil procedure, this study could contribute by articulating reality-based and coherent explanation of Korean dismissal practice.

As a second goal, this study aims to provide reliable empirical data regarding Korean dismissal practice. Legal studies in Korea rely heavily on theoretical or doctrinal research regardless of the research topic. As a result, voices of the public or of professionals are rarely reflected in the research. By providing analysis of practitioners' perceptions, this study could contribute to Korean legal studies by generating ideas for the reform management of dismissal practice based on the perceptions of legal professionals.

The third and ultimate goal of this study is to contribute to the development of a distinct reform agenda for the balance between efficiency and procedural fairness, tailored to Korea's particular circumstances. By examining current Korean dismissal practices and the weaknesses of U.S. dismissal practices, this study will provide more concrete and realistic proposals for the reform of Korean civil procedure law and practice, distinct from the strategy of mimicking foreign law.

STUDY PROCEDURES

This study includes a literature review phase, a field research phase, and a writing phase. You are being asked to participate in the field research phase, and take part in an interview about your experiences and opinions on the district courts' dismissal practice in civil litigation and procedural safeguards for fairness in the practice.

I will ask questions on how current district courts' dismissal practices are working in terms of efficiency and on how procedural safeguards for fairness such as court's clarification, an order to produce documents, and trial preparation proceedings are working to protect litigants' right to access court.

You may refuse to answer any question, and stop the interview at any time. At most, the interview will last from thirty minutes to one hour. If you agree, I may contact you for follow-up interviews with you in which you update relevant information. Duration of follow-up interviews is determined by the subject; and in any event, will never last more than thirty minutes. The field research phase of the project is expected to last a total of two months. In the writing phase, data collected from the interviews will be analyzed and written-up.

As stated above, the information I need from you includes your perceptions and experiences as a judge and a lawyer practicing in greater Seoul area. I have prepared a set of questions for you in this regard. **You might find some of the questions rather sensitive**, such as How do you think district courts guarantee procedural safeguards for fairness for litigants?; Do you think why dismissals in the court are not effectively used? that may reveal your criticism against courts' practices.

RISKS, STRESS, OR DISCOMFORT

There might be minimal stress, discomfort or invasion of privacy during the interview process. If you feel uncomfortable, you may refuse to answer any questions. Please feel free to give general comments if you do not feel comfortable expressing your specific opinion or answer to a given question.

BENEFITS OF THE STUDY

You may not directly benefit from taking part in this study. However, I hope the knowledge obtained by this study will contribute to the developing comparative law research model to improve dismissal practice in Korea based on in-depth and correct understanding of current practice. Also, findings from this research might inspire scholars and practitioners in the U.S. in terms of improving their dismissal practice in a direction toward guaranteeing litigants' access to court.

CONFIDENTIALITY OF RESEARCH INFORMATION

Data will be confidential; the information I will get from this interview will not be linked to you. I will not need to reveal your name for the reliability of my data and arguments. Instead, I will use titles and numbers to identify from which group of interviewees you are (e.g. Judge #2, Lawyer #1). **I will take notes and digitally audio-record this interview, when necessary and you allow it, to ensure accuracy of the information and opinions expressed. The recordings will be kept only until they have been transcribed, and the research**

is complete, and will only be used for the purpose of this research. I will not copy and distribute the notes and the audio-recordings. No one but researcher will have or be given access to the recordings. In addition, I might use direct quote(s) from this interview in my arguments. Before doing so, I will ask you to check on the quote(s) and the context it is used.

Government or university staff sometimes reviews studies such as this one to make sure they are being done safely and legally. If a review of this study takes place, your records may be examined. The reviewers will protect your privacy. **The study records will not be used to put you at legal risk of harm.**

OTHER INFORMATION

You may refuse to participate and you are free to withdraw from this study at any time without consequence.

Jinkyoo Lee

Printed name of study staff obtaining consent Signature Date

Subject's statement

This study has been fully explained to me. I volunteer to take part in this research. I have had a chance to ask questions. If I have questions later about the research, I can ask one of the researchers listed above. If I have questions about my rights as a research subject, I can call the Human Subjects Division at 1- 206-543-0098. I will receive a copy of this consent form.

I give my permission for the researcher to re-contact me for future related research.

I do NOT give me permission for the researcher to re-contact me about future related research.

Printed name of subject

Signature of subject

Date

Copies to: Researcher
 Subject

APPENDIX B

INTERVIEW CONSENT FORM (IN KOREAN)

UNIVERSITY of WASHINGTON CONSENT FORM

논문 제목: 민사소송에서의 각하제도와 소송당사자들의 재판상 절차보장

- 지방법원에서의 각하와 공정한 재판을 위한 절차적 장치들은 어떻게 상호작용하는가?-

(Dismissal practice in Civil Litigation and Litigants' right to a day in court: How do district courts' dismissal practice interact with procedural safeguards for fairness?)

Researcher: Jinkyoo Lee (이진규), PhD Candidate in Asian & Comparative Law, University of Washington
School of Law, Phone #: 1-425-633-4570 (in Korea, 010-3405-0311), e-mail: jklee031@uw.edu

Faculty advisor: Prof. Yong-sung Kang, Prof. Jane K Winn, Prof. Maureen Howard, Prof. Hwasook Bergquist
Nam (GSR)

RESEARCHER'S STATEMENT

저는 귀하께서 저의 연구에 참여해 주시기를 요청드리고 있습니다. **이 동의서의 목적은 귀하께서 이 연구에 참여하실지 여부를 결정하시는데 필요한 정보드리기 위함입니다.** 이 동의서를 천천히 주의깊게 읽어주시기를 부탁드립니다. 귀하는 이 연구의 목적, 제가 드릴 질문문항들, 이 연구에 응하실 때의 잠재적 위험과 이익, 자원봉사자로서의 귀하의 권리, 그리고 이 연구에 대한 어떠한 사항이나 이 동의서 중에서 불명확한 부분에 대해 언제든지 물어보실 수 있습니다.

제가 귀하의 질문들에 대한 답을 드린 후, 귀하께서는 계속 이 연구에 참여하실지 여부에 대해 결정하실 수 있습니다. 이러한 절차를 “숙지 후 동의” 라고 합니다. 귀하의 추후의 사용을 위해 저는 이 동의서의 사본을 귀하께 드릴 것입니다.

PURPOSE OF THE STUDY

미국 민사소송에서 각하제도의 목적 중 하나는 근거없는 소송을 조기에 걸러냄을 통해, 이러한 근거가 희박하고 상대방을 괴롭히기 위해 제기된 소송에 대응할 때 생기는 피고들의 부담을 덜어주는데 있습니다. 그러나 원고들 역시 헌법상 재판청구권을 가지며, 이에 따라 법원은 소장이나 소송을 각하하기 전에 적절한 절차보장을 해 줄 의무를 부담하게 됩니다. 효율적인 재판과 당사자들의 절차보장 사이의 미묘한 균형을 깨면서, 미연방대법원은 끊임없이 법적인 기준을 강화하여 더 많은 사건들을 근거 없는 소송이라는 이유로 각하해왔습니다. 이러한 방향의 각하실무의 발전은 원고의 재판청구권 보장이라는 측면에서 강한 비판을 받아왔습니다.

이러한 효율적인 재판절차와 당사자들의 절차보장 사이의 긴장 및 균형이라는 관점에서, 이 연구는 한국의 민사소송에서 소송남용을 제한하기 위해 시도되는 정책 수립과 입법을 위한 노력에 대해 살펴봅니다. 특히, 현재 논의되고 있는 미국 민사소송의 각하 제도 도입을 위한 제안들이 간과하고 있는 문제점들을 지적하는 것이 이 연구의 시작점입니다.

먼저, 현재 한국 법원의 각하 실무가 어떻게 이루어지고 있으며 절차보장을 위한 장치들이 어떻게 사용되고 있는지에 대한 연구 및 설명이 부족한 상황에서 외국제도의 도입만을 주장하는 문제점이 있습니다. 둘째로, 절차보장의 부족과 같은 미국의 각하 제도가 갖는 문제점들이 간과되는 측면이 있습니다. 그러므로, 이 연구는 현재 한국 법원의 실무에 대한 깊이 있는 연구에 기초하여, 미국의 각하제도 도입의 필요성과 실용성을 검토할 것입니다.

이 연구의 가장 중요한 목적은 한국의 현재 각하 실무에 있어서 절차보장이 어떻게 이루어지고 있는지와 각하와 절차보장을 위한 장치들이 어떻게 상호작용을 하는지 등과 같은 의문에 기초하여, 현재 한국 법원의 각하 실무를 설명할 수 있는 이론을 발견하여 제공함에 있습니다. 이러한 시도가 중요한 이유는, 현재 한국에서의 법제도 개선 및 입법의 기초가 되는 학문적 논의에 있어서 판사와 변호사 등 실무자들의 목소리가 드물게 반영되고 있기 때문입니다. 비교민사소송법의 측면에서도, 이 연구는 한국의 각하 실무에 대한 현실에 기초한 일관된 설명을 제공함을 통해 기여할 것입니다.

두 번째 목적은 한국의 각하 실무에 관한 신뢰할만한 경험적 자료를 제공함에 있습니다. 한국에서의 법학 연구는 연구 주제와 관계 없이 이론적이고 도그마틱한 연구에 치중하는 경향이 있습니다. 그 결과 일반 시민들이나 실무자들의 목소리가 그동안 드물게 반영되어 왔습니다. 이 연구는 실무자들의 인식에 대한 분석을 통해 그에 기초한 각하 제도 개선을 위한 아이디어들을 제공하고자 합니다.

이 연구의 세 번째이자 궁극적인 목적은 한국의 실정에 맞으며 효율성과 공정한 절차라는 두 가치의 균형에 기초한 각하제도 개선 어젠다를 발전시키는데 기여함에 있습니다. 이 연구는 한국의 현재 각하 실무와 미국 각하제도의 문제점들을 살펴봄을 통해, 외국 제도를 막연히 도입하고자 하는 접근을 넘어, 구체적이고 현실적인 제도개선안을 제공하고자 합니다.

STUDY PROCEDURES

이 연구는 문헌 검토, 현장 조사, 그리고 집필의 단계로 이루어져 있습니다. 귀하께서는 현장조사 단계에 참여하시고, 민사소송에 있어서의 각하제도와 공정한 절차 보장을 위한 제도적 장치들에 대한 귀하의 경험과 견해에 대한 문외의리는 인터뷰에 응해주시기를 요청받으셨습니다.

저의 질문사항들은 효율성 제고의 측면에서 민사소송법상 각하제도가 법원에서 어떻게 이용되고 있는지와 공정한 절차의 보장을 위한 장치들- 법원의 석명권, 문서제출명령, 변론준비절차 등-이 어떻게 제공되고 있는지에 관한 것들입니다.

귀하께서는 어떠한 질문에 대하여서도 답하시기를 거부하실 수 있으시며, 인터뷰 중 어느때라도 인터뷰의 중지를 요청하실 수 있습니다. 인터뷰는 30 분에서 1 시간에 걸쳐 진행될 예정입니다. 귀하께서 동의하시는 경우에는, 저는 귀하께 연락을 드려 후속 인터뷰를 요청드릴 수 있습니다. 이 후속 인터뷰의 시간은 귀하께서 결정하실 것이며 최대 30 분을 넘지 않을 것입니다. 이 연구의 현장 조사 기간은 세달에 걸쳐 진행될 것이며, 집필 단계에서는 인터뷰를 통해 수집된 자료들이 분석되고 기록될 것입니다.

앞에서 서술한 바와 같이, 제가 귀하를 통해 얻고 싶은 정보는 서울·경기 지역의 실무자로서 귀하의 인식과 경험입니다. **귀하께서는 몇몇 질문들이 다소 민감하다고 생각하실 수도 있습니다.** 그러한 질문들의 예로는 “지방법원의 공정한 절차 보장은 어떻게 이루어지고

있다고 생각하시나요?” “(법원의 각하제도 운영이 효율성 제고 측면에서 별다른 기여를 하지 못한다고 생각하시는 경우에) 그 이유는 무엇이라고 생각 하시나요?” 등 다소 비판적인 답변이 가능한 질문들을 들 수 있습니다.

RISKS, STRESS, OR DISCOMFORT

귀하께서는 인터뷰 과정에서 약간의 스트레스, 불편함, 또는 사생활의 침해등을 느끼실 수도 있습니다. 만약 이러한 불편함을 느끼실 경우, 귀하께서는 어떠한 질문이라도 답변을 거부하실 수 있습니다. 구체적인 견해나 답변을 표현하시기가 불편하신 경우에는 꼭, 편하게, 그에 대한 언급을 해 주시기를 부탁드립니다.

BENEFITS OF THE STUDY

귀하께서는 이 연구에 참여하심을 통해 어떠한 직접적인 이익도 얻지 못하실 수 있습니다. 그러나, 저는 이 연구를 통해 얻은 현재 실무에 대한 깊이 있고 정확한 이해에 기초한 비교법 연구 모델을 개발하는데 기여할 수 있기를 희망합니다. 또한, 이 연구를 통해 발견하게 된 사항들을 통해, 당사자들의 절차보장을 강화하는 방향으로 미국의 각하제도를 개선하고자 하는 미국의 학자들과 실무가들에게 여러 인사이트를 제공할 수 있을 것입니다.

CONFIDENTIALITY OF RESEARCH INFORMATION

인터뷰 자료는 비밀로 유지될 것이며, 귀하의 인터뷰로부터 얻은 정보들과 귀하는 연결되지 않을 것입니다. 제가 얻은 데이터와 주장의 신빙성을 위해 귀하의 이름을 공개할 필요는 없기 때문입니다. 대신, 저는 직업과 숫자를 사용하여 귀하를 식별할 것입니다 (예를 들어, 판사 #2, 변호사 #1).

인터뷰 동안 저는 노트 필기를 할 것이며, 귀하를 통해 얻은 정보와 견해의 정확성을 담보하기 위해 필요할 경우 귀하의 동의를 얻어 전자적 형태로 인터뷰 내용을 녹음할 것입니다. 인터뷰를 녹음한 파일은 인터뷰 내용이 글로 옮겨지고 연구가 완료될 때까지만 보관될 것이며,

오직 이 연구를 위한 목적으로만 사용될 것입니다. 저는 인터뷰 노트와 녹음 파일을 복사하거나 전송하지 않을 것입니다. 연구자인 저를 제외하고는 그 누구도 이 녹음된 자료에 접근하지 못할 것입니다.

또한, 제 주장을 전개함에 있어, 저는 인터뷰 내용 중 일부를 직접 인용할 수 있습니다. 그러나, 그러한 직접 인용을 하기 전에 저는 귀하께 연락을 드려 제가 인용하고자 하는 부분과 그 배경을 설명드리고 귀하의 동의를 얻을 것입니다.

워싱턴 주 정부 또는 워싱턴 주립 대학의 스태프들이 가끔 연구가 안전하고 합법적으로 이루어졌는지 검토하는 경우가 있습니다. 만약 이 연구에 대한 검토가 행해지게 되면, 귀하를 인터뷰한 자료가 검토될 수 있습니다. 검토자들은 귀하의 사생활을 보장할 것입니다. **이 연구의 기록들은 귀하에게 법적인 위험이나 해를 가하는 용도로는 사용되지 않을 것입니다.**

OTHER INFORMATION

귀하는 참여를 거절하실 수 있으며 인터뷰 도중 어느때라도 아무런 불이익 없이 참여를 취소하실 수 있습니다.

Jinkyoo Lee

Printed name of study staff obtaining consent Signature Date

참여자의 진술(Subject's statement)

저는 이 연구에 대한 충분한 설명을 들었습니다. 저는 자발적으로 이 연구에 참여하기로 결정했습니다. 저는 이 연구 참여에 대해 질문할 기회를 가졌습니다. 추후에 이 연구에 대해 의문사항이 있는 경우, 저는 위에 기재된 연구자에게 질문을 할 수 있습니다. 만약 연구 참여자로서의 제 권리에 대해 의문사항이 생기면 저는 the Human Subjects Division (1- 206-543-0098)에게 연락을 해 문의를 할 수 있습니다. 저는 이 동의서의 사본을 받을 것입니다.

___ 저는 위의 연구자가 장래에 이 연구와 관련하여 저에게 다시 연락하는 것을 허락합니다.

___ 저는 위의 연구자가 장래에 이 연구와 관련하여 저에게 다시 연락하는 것을 **허락하지 않습니다.**

Printed name of subject

Signature of subject

Date

Copies to: Researcher
 Subject

APPENDIX C

Trial Satisfaction Survey (Eastern District Court of Seoul)(In English)⁷⁸⁴

Anonymous Courtroom Survey (Civil)
<p>Our court is making efforts to reduce litigants' inconvenience related to the judges' ruling at courtroom. As a part of the efforts, we collect your comments on inconvenience, complaints, and opinions related to our judges' presiding court hearings. Your answer will be used to minimize inconvenience experienced by litigants in court hearings. We promise that we will keep making efforts to improve adjudication of our court. Thank you for your precious time.</p> <p>* This survey will be used only for the reference of court in terms of improving court hearing management. We will not use your answer for other purpose.</p>
<p>1. What is your status? (You may choose your status related to the court hearing you participated)</p> <p>① Litigant (Plaintiff, Defendant) ② Legal representative ③ Witness ④ Audience</p> <p>1-1. (If you answered ① or ② to the question No. 1)</p> <p>Was judgment for your case announced?</p> <p>① Yes ② No</p> <p>1-2. (If you answered ① to the question No. 1) What was the result?</p> <p>① Prevailing ② Losing ③ Partially prevailing</p>
<p>2. Could you clearly understand voice and terms of the presiding judge?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>
<p>3. Did the judge(s) make efforts to concentrate on listening to participants?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>
<p>4. Did the presiding judge lead the trial session fairly without favoring one side?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>
<p>5. Did the presiding judge lead the trial session with smooth words and behavior without getting angry or scolding?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>
<p>6. Did you have enough opportunity of making statement at the hearing?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>
<p>7. Do you think that your intention was properly delivered to the judge(s) and that judge(s) well understood your intention?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>

⁷⁸⁴ The original form is written in Korean. The author translated the form into English.

<p>8. Was the proceeding speedy without delay?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>	
<p>9. Did you have enough opportunity of proving through submitting documents or witness examination?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>	
<p>10. Did the presiding judge manage the hearing efficiently through organizing arguments or requesting explanations?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>	
<p>11. (If you were witness) Did you testify free from influence from persons related to the litigation or from being forced by atmosphere of the hearing?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>	
<p>12. Is it your first time to answer this form of this court? If not, please answer how many times you answered for the survey.</p> <p>① Yes ② No (tiems)</p>	
<p>13. (If you answered ② to the question No. 12) Was court hearing management of this court improved from when you answered to the former survey?</p> <p>① Strongly Agree ② Somewhat Agree ③ Somewhat Disagree ④ Strongly Disagree</p>	
<p><i>Other opinion (Please feel free to share your opinion on anything related to court hearing management by judge(s))</i></p>	
<p>How to submit this form</p>	<p>Please put this form into the envelop for returning and insert the envelop into the drop box (outside of courtroom).</p>

APPENDIX D

Trial Satisfaction Survey (Eastern District Court of Seoul) (In Korean)

무기명 법정 설문조사 (민사)	
<p>우리 재판부는 재판진행상의 문제로 소송당사자가 겪는 불편을 덜어 드리기 위하여 많은 노력을 기울이고 있습니다. 그 일환으로 우리 재판부의 재판진행과 관련하여 여러분이 경험하신 불편, 불만 기타 의견을 수렴하고 있습니다. 아래의 설문에 답하여 보내 주시면, 소송당사자가 재판과정에서 겪는 불편을 최소화시키는 데 유익한 자료로 활용될 것입니다. 보다 나은 재판을 하기 위하여 계속 노력할 것을 약속드리며, 귀중한 시간을 할애해 주신 점 깊이 감사드립니다.</p> <p>* 회신된 설문조사지는 오로지 당해 재판부에만 전달되어 재판에 참고할 뿐 다른 목적으로는 일절 사용되지 않습니다.</p>	
1. 응답자의 지위는? (응답자의 지위에 해당하는 부분에 한해 답해주시면 됩니다)	
① 당사자 (원고, 피고) ② 소송대리인 ③ 증인 ④ 방청인	
1-1. (1.에서 ①, ②로 응답한 경우) 응답자가 당사자이거나 대리한 사건의 판결은 선고되었나요?	
① 그렇다 ② 아니다	
1-2. (1-1.에서 ①로 응답한 경우) 응답자가 당사자이거나 대리한 사건의 선고 결과는 어떠하였나요?	
① 승소 ② 패소 ③ 일부승소	
2. 재판장의 음성과 용어를 충분히 알아들을 수 있었나요?	
① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
3. 재판부는 상대방을 바라보면서 말을 듣는 데 집중하는 모습을 보였나요.	
① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
4. 재판장이 한쪽 편에 기울지 않고 공정하게 재판을 진행하였나요.	
① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
5. 재판장이 화를 내거나 핀잔을 주지 않고 부드럽게 재판을 진행하였나요.	
① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
6. 충분한 변론기회가 주어져서 의도한대로 변론이 이루어졌습니까?	
① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	

7. 자신의 의사가 충분히 전달되어 재판부가 그 내용을 잘 이해하였다고 생각합니까. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
8. 재판이 지연되지 않고 신속하게 진행되었습니까. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
9. 서류제출이나 증인신문 등 입증의 기회가 충분히 주어졌습니까. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
10. 재판장이 주장을 정리하거나 설명을 요구하면서 효율적으로 재판을 진행하였나요. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
11. (증인의 경우) 재판관여자로부터 영향을 받거나 법정 분위기에 위축되지 않고 자유롭게 진술하였습니까. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
12. 해당 재판부의 살문조사에 응답해 주신 것이 처음인가요. 처음이 아니면 횟수를 기재해주시기 바랍니다. ① 그렇다 ② 아니다 (회)	
13. (12.에서 ②로 응답한 경우) 해당 재판부의 재판진행이 이전 설문조사보다 개선되었나요. ① 매우 그렇다 ② 그렇다 ③ 그렇지 않다 ④ 매우 그렇지 않다	
기타의견 (재판진행과 관련된 일체의 의견을 자유롭게 기재하여 주시기 바랍니다)	
제출방법	이 설문지를 회송용 봉투에 넣어 회수함(법정 밖)에 넣어 주시면 됩니다.

