Abstract

The purpose of this comparative study is to examine how courts in US and Korea may take on the role of a policy facilitator that encourages policy entrepreneurs to open the policy window for addressing climate change. As the result of analyzing MA v. EPA decided in 2007, a typical example of the judicial activism in US, it was found that the US Court widened the scope of standing to sue and ordered passive administrators and legislators to open the policy window. The US state governments and environmental advocate groups used litigation as a strategic tool to nudge the federal government to take actions in the issue area of climate change.

However, climate change policy in Korea was mostly initiated and led by the president and its administration under global governance with little judicial roles. In 2006, the president promulgated the national vision on a low carbon green growth. By launching the Framework Act on Low Carbon, Green Growth in 2010, the government integrated climate change and global warming policy, new renewable energy and sustainable development policy, and others, which were used to be carried out separately under the individual laws of various Ministries.

The less active judicial roles are often found in the field of high specialty such as clean air affairs, the closest area to climate change. The judiciary has been deferring to administrative actions by applying the strict criteria of standing to sue and thus by limiting any chance of reviewing them by itself. The Courts, regardless of types, left an ample space for administrative discretion, and it has never been found that petition’s argument is accepted against administrators’ will, whether anti-environmental or not. In particular, the Constitutional Court tends to lean toward judicial deference more than does the Supreme Court. It has rejected all cases related to clear air at the preliminary step of standing to petition even before entering into judgement on the merits.

Generally speaking, it is highly difficult for civic groups and others to file a lawsuit due to their strict procedural requirements in Korea. The judiciary tends to apply the very strict criteria of standing to whether a plaintiff is qualified or not, and it seriously limits any judicial chance of reviewing administrative actions by itself. It is imperative that related lawsuits be allowed more widely in terms of standing to sue. This will promote more active civic participation in the decision-making process of climate change policy as in US cases.

[Keywords] Climate Change Crisis, Climate Change Policy, Judicial Role, Judicial Review, Carbon Emission

1. Introduction

Whereas, among many social problems, some may be solved or mitigated by the voluntary efforts of community members, many others are abandoned without governmental intervention and drive many people in trouble. However, even if there are many social problems that can be solved or mitigated only by the governmental intervention, not all of them become a target to be solved by intervention. Only some of them become a focus of governmental endeavor due to the bias and interest of political elites who dominate policy-making systems in government as well as the limit of government in its ability.
Government selects some social problems as the policy agenda, which refers to the problems adopted officially by government with its intent to solve them, and the action of selection goes through the policy agenda-setting phase, the first phase in the course of the policy process. To solve and mitigate social problems, government needs to clarify its intention not only to recognize them as problems suitable for its intervention but to review them officially and seriously for solution. To find what will affect the process has great meaning in an academic aspect as well as a practical one.

Agenda-setting is the first phase where political conflict is disclosed around the solution of some social problem, and it offers the critical clues of how social costs and benefits will be allocated on the further phases. Hence, research is needed to find what various factors were in operation until socially salient problems go up onto the platform of official issues to be dealt by government. It is known that there are various participants in agenda-setting, such as politicians, bureaucrats, mass media, political parties, and so on.

How can a court decision be a key driving force for agenda-setting? This study attempts to focus on the role of courts as a facilitator of policy process, who leads a policy agenda out of a stalemate into policy formulation. This study recognizes climate change as a good example of an issue, and, from a comparative perspective, it attempts to find what different features South Korea and the US have shown in the role of courts and administration in the policy process. In particular, it starts with reviewing the most critical case on climate change in US, Massachusetts v. EPA, which ordered administrators and legislators to open “policy window” in climate change.

2. US Case of Climate Change Policy

2.1. By whom and how was it initiated?

The US cases have valuable implications in that the trials of climate change played a key role in building the regulatory policy of greenhouse gas emissions and the measure of climate change. The US state governments and environmental advocate groups have used litigation as a strategic tool to nudge the federal government to take actions in the issue area of climate change.

A monumental case decided in 2007, Massachusetts v. EPA, built a legal basis to regulate greenhouse gases as a kind of air pollutant under the Clean Air Act and to provide EPA with the authority to regulate them. Four years after the decision, the Court reaffirmed that the Act is the legal basis of climate regulations.

The current state is the outcome of fierce discussions and deliberations on the basis of checks and balances among the executive, legislative, and judicial branches as well as through trials. State governments, civic groups, and the judicial branch urged the EPA to carry out the regulation of greenhouse gases through their active participation under Bush Administration with a lukewarm attitude[1][2].

While the EPA proposed the various regulations of greenhouse gases under the administration, US Congress and the president attempted to put serious limits on the EPA’s regulatory authority by allocating no budget [3].

Perhaps surprisingly, the decision also adds fuel to the legislative fire in Congress. Since the Democratic takeover in 2006, numerous climate change bills have been proposed, building on earlier proposals in the 109th Congress that went nowhere. Yet MA v. EPA has not quelled this legislative activity by sending the matter back to EPA, as our expertise-forcing perspective might predict. Instead, the decision seems only to have added to a sense of urgency that a federal law to cut emissions is necessary because the problem is so serious, and because GHG regulation affects virtually every aspect of the economy. In this sense, one might argue, MA v. EPA has a democracy-forcing aspect because it helped, by airing out the issues, to expose to public view the limitations of the Clean Air Act[4].

The industry also attempted to placate the regulatory policy of the EPA through lobbying and trial procedure. Hence, neither basic nor comprehensive law was enacted in order to
respond properly to climate change problems[5][6]. In the absence of legislative activities, state governments and civic groups showed strong intentions to gain their point through various trials. They proposed diverse legal principles to fulfill the requirements of standing to sue, the most serious obstacle, in environmental suits[6].

This checks and balances among various policy members might cause the outcome of greenhouse gas policy to be less progressive, but the process promoted the discussion and research of climate change science and ultimately made it the government possible to design reasonable greenhouse gas policy enough to be widely accepted by the society [7].

2.2. Main role of the court as a policy facilitator

In Massachusetts v. EPA, the US Supreme Court upheld Massachusetts’ standing to challenge EPA’s refusal to regulate greenhouse gas emissions. This was quite monumental because the Court had interpreted that standing to sue shall be valid only when the illegal dispositions of administrative agencies caused individual and concrete damages, and that the simple possibility of damages, or risk, was not enough to fulfill the standing requirement[6][8].

However, the new decision turned the interpretation over and upheld “precautionary-based standing” --- recognizing those simply exposed to the risk of climate change to be the qualified plaintiff. The Court decided that the science of global warming was sufficient to establish standing to sue because its harm would be catastrophic and irreversible; furthermore, its outbreak is subject to great uncertainty[9].

3. Korean Case of Climate Change Policy

3.1. By whom and how was it initiated?

Unlike in the US, the regulatory policy of climate change in Korea has so far been formed by the leadership of the executive branch in the central government. “The Framework Act on Low Carbon, Green Growth,” a comprehensive law related to greenhouse gas regulation, was passed in 2010, but it was caused mainly by presidential initiatives and administrative participation in the active proposal of the bill under the global governance rather than by serious discussion and deliberation in the National Assembly or civil society as well as the judicial process – starkly in opposition to the US case.

The umbrella act was completed by integrating dispersed provisions over the fields of energy and sustainability. Various laws, especially in the fields of energy and sustainability, had been in unsystematic operation before the basic law. In terms of energy, there had traditionally been the Energy Use Realization Act(1980), the Alternative Energy Development Promotion Act(1988), and the Integrated Energy Supply Act(1992). Energy consumption contributed to most carbon emissions, but the past laws focused on its efficient use without the relation with building a low carbon society.

The Framework Act on Energy, passed in 2006, would reflect “environment-friendly use of energy” in legal basic ideas and people’s responsibility, but it did not embody detailed and concrete measures to realize a low carbon society. In 2005, the Act on the Promotion of the Development, Use and Diffusion of New and Renewable Energy was passed to connect energy with a low carbon green growth. The Act, as the complete revision of the Alternative Energy Development Promotion Act, contained support for the commercialization of new and alternative energy technology and the registration program of new and alternative energy facility business as main contents, but it was limited in its focus on the management and support authority of new and alternative energy with some distance from the realization of a low carbon society and the practice of green growth ideas.

In terms of sustainability, the Act on the Promotion of the Conversion into Environment-Friendly Industrial Structure of 1996 had a focus on the proactive forwarding of sustainable development, and its main purpose was to introduce financial measures
such as policy for the conversion to environment-friendly industrial structure and support for facility costs and technology development. While it intended to practice the roles of the industry adopted by UN Conference on Environment and Development at Rio in 1992, it contained only the very passive measures of responding to its Climate Change Convention. It prescribed measures to reduce greenhouse gas emission, but the Minister in charge just “may recommend” the measures.

National measures for the realization of a low carbon society and green growth are reflected partly in individual laws pushed ahead by central administrative agencies as shown in the case of the Ministry of Knowledge Economy in charge of energy issues. However, goods and services to improve the efficiency of energy and resources as well as environment cover all over the economic activities such as economy, finance, construction, transportation, agriculture and fishery, tourism, and so on.

Consequently, in 2008, as the president promulgates the national vision on a low carbon green growth, the various efforts to establish a legislative ground continued to be made. Administrators and legislators proposed a variety of bills such as the Bill of Climate Change Measures, the Bill of Climate Change Response and Greenhouse Gas Reduction, among others. Finally, the Framework Act on Low Carbon, Green Growth was passed through the coordination and integration of those bills[10].

By this law, the government has the authority to push ahead with integrating climate change and global warming policy, new renewable energy and sustainable development policy, and others, which were used to be carried out separately under the individual laws of various Ministries. The law prescribed an implementation system including the Green Growth Committee that shall set up and review the strategies of the green growth state, as well as public policies, to carry forward efficiently and systematically low carbon green growth – for instance, the creation of green technology and industry, the settlement of green building and life, and so on under the harmony of economy and environment.

3.2. Limited roles of the court as a policy facilitator

Under the strong tradition of judicial deference, the Korean courts have attempted to disguise two unshakable fundamental values as seemingly technical and value-free logic toward judicial deference: the administrative state is truly essential under the Korean context, on one hand, and thus the Courts should refrain themselves from being engaged in separation of powers as another policy maker, on the other hand.

Those court decisions used to be the reflection of a historical imperative for the effective administrative state at the cost of democracy and human rights mainly due to a relatively lagged start in industrialization and economic development as well as competition with North Korea. Under Confucian tradition, the Courts used to be also reluctant to challenge the interests of the president directly as they were viewed as a kind of monarch[11].

Under those circumstances, provisions have frequently stipulated the substantial delegation of legislative authority to the administration. Comprehensive legislative delegation to administration is serious to the point of being brought forth as the target of a constitutional petition.

The particularity of the administrative state clearly comes to the front in judicial decisions on the field of high specialty such as clean air affairs. The Courts, regardless of types, left an ample space for administrative discretion, and it has never been found that petition’s argument is accepted against administrators’ will. It does not matter with ideological orientations; whether in pro-environmental petitions or in anti-environmental ones, administrative decisions passed off without serious impediment.

In particular, the Constitutional Court leans toward judicial deference more than does the Supreme Court. The Constitutional Court rejected all of cases at the preliminary
step of standing to petition even before entering into judgement on the merits. Meanwhile, cases appear to fulfill requirements for standing to sue in the hand of the Supreme Court though dismissed in the next step, judgement on the merits.

Generally speaking, it is highly difficult for civic groups and others to file a lawsuit due to their strict procedural requirements. The judiciary tends to apply the very strict criteria of standing to whether a plaintiff is qualified or not, and it seriously limits any judicial chance of reviewing administrative actions by itself. It is imperative that related lawsuits be allowed more widely in terms of standing to sue. This will promote more active civic participation in the decision-making process of climate change policy as in US cases.

In conclusion, the Korean Court had no chance to get involved in opening the policy window of climate change. Then, it is necessary to review whether the Court will be able to take the progressive role of any policy facilitator in the future.

4. Comparison between US and Korea

As shown in <Table 1>, there are clear differences between Korea and the US in factors affecting Climate Change Policy. The policy process of climate change in Korea was in progress mainly under global governance and presidential initiatives, which intended to integrate energy- and sustainability-related laws and programs scattered over different Ministries. The top-down system was little affected by input from the bottom, such as civic groups and non-central governments. Under the bottom-up system of US, main policy entrepreneurs were civic groups and state governments, not the president and federal agencies.

Furthermore, policy participants in Korea showed less intention to resort to the judicial process than did their counterparts in US partially because the traditional trend of judicial deference. Many trials, especially related to constitutional issues, failed to overcome the barrier of standing requirements. In US, policy entrepreneurs consistently requested for more judicial roles in opening the policy window in anticipation of the revival of judicial activism against two other branches. Finally in Massachusetts v. EPA, the Supreme Court widened the scope of standing to sue and, according to claims of the plaintiff, ordered administrators to do something for climate change policy after receiving needed budget.

Table 1. Comparison of Korea with US in factors affecting climate change policy.

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<th>Korea</th>
<th>US</th>
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<tr>
<td><strong>Participants</strong></td>
<td>Policy entrepreneurs</td>
<td>- Civic groups</td>
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<td></td>
<td>- Global governance</td>
<td>- State governments</td>
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<td>- President</td>
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<td>- Central government</td>
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<td></td>
<td>Less active (or inactive) and less influential</td>
<td>- President</td>
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<td></td>
<td>- Civic groups</td>
<td>- Federal agencies</td>
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<td></td>
<td>- Local governments</td>
<td>(especially, EPA)</td>
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<tr>
<td><strong>Nature of policy initiatives</strong></td>
<td>Top-down (affected by global governance)</td>
<td>Bottom-up (within the national system)</td>
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<td><strong>Judicial roles</strong></td>
<td>- Little requested yet</td>
<td>- Strongly requested by policy entrepreneurs</td>
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<td>- Judicial deference to administration</td>
<td>- Judicial activism</td>
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<td>- Decided the illegality of administrative omission</td>
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<td>- Decisive in opening policy window</td>
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5. Conclusion

A set of clean air cases is a prime example of why the study of court decisions can be fruitful for the field of public policy in Korea and US. The area definitely requires such a high level of expertise that neither legislators nor judges can dare to acquire; so, it typically consolidates the foundation for the administrative state, usually causing judicial deference. This may be further happening in the climate change policy in Korea. However, it is not the case with US, where even the Court has recognized the nature of climate change as a wicked and complex problem that may change “existing systems of value, ways of knowing, and institutions of governance”[12][13]. Its decision reflected that climate change should not be simply treated like other clean air issues. In Massachusetts v. EPA, the US Court played as a policy facilitator in the policy process by widening the scope of standing to sue, on one hand, and by ordering administrators and legislators to open the policy window, on the other hand.

Likewise, the first thing to be done by the Korean Court will be to widen standing to sue, so that the Court can have more chances of encouraging policy entrepreneurs to open the policy window or to push ahead with the course of the policy process. So far, Korean judicial review has impeded the further progress of the policy process frequently by deferring to administrative decisions and actions, as shown in climate change case.

6. References

6.1. Journal articles


6.2. Books


6.3. Additional references

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