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A legal review of the jurisdiction of duties in civil and public litigation

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[Abstract]

If one wants to file a lawsuit against the administrative office, he or she should decide whether to file a civil lawsuit or an administrative lawsuit. The type of lawsuit must be determined to determine which court to file the lawsuit with. Korea seems to have a clear distinction between administrative and judicial legal relationships, but it is not easy to distinguish between public and judicial cases unless the public and judicial discrimination are maintained. The practice or precedent of litigation is always difficult to distinguish because the litigation is based on the discrimination of whether the litigation belongs to a legal relationship in public law or judicial law.

I believe that if the administrative litigation law establishes a provision related to the designation of a duty and stipulates that "if a litigation case is questioned whether it is an administrative or civil lawsuit, the Supreme Court-related court shall designate the competent court at the request of the parties," the lower court will be guaranteed the right to swift a trial, and the legal representatives will be freed from the exhaustive agony.

▸ **Key words**: a civil lawsuit, an administrative lawsuit, the administrative litigation law, establishes a provision related to the designation of a duty, a competent court

[요 약]

행정청을 상대로 소송을 제기하려는 경우 민사소송으로 할 것인지, 행정소송으로 할 것인지를 정해야 한다. 소송의 종류가 정해져야 어느 법원에 소송을 제기할 것인지를 판단할 수 있다. 우리나라는 공법상의 법률관계를 대상으로 하는 것은 행정소송, 사법상의 법률관계를 대상으로 하는 것은 민사소송으로 그 구별이 명확한 것처럼 보이지만 공법상의 당사자소송과 민사소송은 공.사법의 구별에 관하여 주체설을 취하지 않는 한 구별이 쉽지 않다. 소송실무나 판례는 '당해 소송물이 공법상의 법률관계에 속하는 것인지, 사법상의 법률관계에 속하는 것인지를 구별기준으로 하여 일명 소송물설을 취하고 있어 그 구별은 늘 어려운 과제이다. 행정소송법에 직무관할지정관련 조항을 신설하여 '소송사건이 행정소송인지 민사소송인지 여부가 문제된 경우에는 대법원이 관계된 법원 또는 당사자의 신청에 따라 결정으로 관할법원을 지정한다.' 라고 규정한다면 하급심으로서도 부담을 줄이고 당사자들은 신속한 재판을 받을 권리를 보장받게 되고, 소송대리인들로서도 형식적인 절차로 인한 소모적 고뇌로부터 해방될 수 있다고 생각한다.

▸ **주제어**: 민사소송, 행정소송, 행정소송법, 직무관할지정관련 조항의 신설, 관할법원

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I. Introduction

If one wants to file a lawsuit against the administrative office, he or she should decide whether to file a civil lawsuit or an administrative lawsuit. The type of lawsuit must be determined to determine which court to file the lawsuit with. Korea seems to have a clear distinction between administrative and judicial legal relationships, but it is not easy to distinguish between public and judicial cases unless the public and judicial discrimination are maintained. The practice or precedent of litigation is always difficult to distinguish because the litigation is based on the discrimination of whether the litigation belongs to a legal relationship in public law or judicial law.

There is an administrative court as a specialized court in charge of the first trial of an administrative case, but it is also a general court. The distinction between the administrative court and other courts is a matter of determining the division of duties between courts, and the qualifications, status, and other aspects of judges who are members shall be the same as those of general local courts. In areas where no administrative court is established, the main court of each district court shall have jurisdiction over cases that fall under the authority of the administrative court until the administrative court is established.

The jurisdiction of the Administrative Court in administrative cases is exclusive jurisdiction. Violations of exclusive jurisdiction are an absolute reason for appeal. The problem comes up from here. In the case of a civil suit filed under the public law, if the case is filed by the Supreme Court after substantive judgment, the case will be destroyed on the grounds of violation of full-time jurisdiction. Thus, a trial of the sixth trial will take place.

It may be harsh to say that the public is not eligible for a swift trial because ordinary people have not clearly distinguished civil and public action suits from those of the parties which are hard even for legal professionals to judge theoretically.

In this paper, it is the court's obligation to investigate authority, and instead of blaming the parties for misjudging the obligation, the paper will suggest how to deal with it within the current legal system will help the public realize their rights to a faster trial. Also, it proposes to expand the application system for designation of jurisdiction as a legislative theory and to establish and resolve the system for designation of duties.

II. Structure of the party litigation system under the public law

1. Formation and development of the party litigation system under the public law

The Administrative Litigation Act, which was first established in 1951 after the liberation of the government, did not provide a separate provision for party litigation. However, Article 1 stipulated that 「the proceedings concerning the cancellation or modification of the disposition of the administrative office or its affiliated institutions shall be governed by the Act」.The contents of the regulation may be divided into 「a lawsuit against the cancellation or modification of its disposition against the administrative office or its affiliated institutions」 and 「a lawsuit against the public right relationship」, in which the latter part prescribed the party lawsuit.

After that, when the Administrative Litigation Act was amended in 1984, types of administrative litigation were divided into four types, and the litigation was taken in the same structure as the current system regarding the litigation of the parties.

The current law defines a lawsuit against the party as 「a lawsuit against a legal relationship caused by the administration's disposition, etc. and another lawsuit against a legal relationship under the public law, in which one party is accused」.Unlike an appeal lawsuit based on the superior status of the administrative office, the party lawsuit may be similar to the civil lawsuit, but the administrative litigation law resolves disputes in legal relationship

under the public law, and legal disputes are resolved by the civil litigation. Conventionally, in the litigation practice, when citizens claim their rights to the state on an equal footing, it has been dealt with almost by the civil litigation without asking whether the legal relationship is legal or judicial. Prior to the inauguration of the Administrative Court through the amendment of the Court Organization Act in 1997, the administrative litigation was operated on a two-judge basis. Because the level of the administrative litigation is different from that of the civil litigation, it could be disadvantageous for citizens to follow suit. Through the revision of the Court Organization Act, the administrative court in charge of administrative cases was launched on March 1, 1998, and the administrative litigation, which had previously been operated as a second trial system, was changed to a third trial system, eliminating the difference between civil litigation and the level. As a result of such change in the system, the theory of utilization of the party litigation under the public law has drawn attention. The launch of the administrative court has become more significant in terms of the division of the party litigation and the civil litigation under the public law[1].

In Germany, which had a significant impact on our legislation, the dual form of appeal and the party litigation against subjective administrative litigation was adopted and utilized in some German states after World War II until the enactment of the Administrative Court Act in 1960. However, when the Administrative Court Act was enacted in 1960, the structure of administrative litigation was defined as implementation, formation, and confirmation lawsuits, and the dispute resolution method could be considered to break down strict boundaries and flexibly resolve the problem[2].

In the case of the administrative litigation in France, the two types of overtaking litigation and complete psychological litigation are stipulated, with the former responding to cancellation lawsuits and the latter responding to party lawsuits [3].

In Japan, Article 1 of the Special Act on Administrative Case Litigation, which took effect in 1948, stipulated that 「Litigation for the cancellation or modification of illegal disposition by the administration and other litigation related to rights under the public law shall be governed by the Civil Litigation Act」. Such regulation method has a similar structure to Korea's first administrative litigation law enacted in 1951, and its theoretical framework was formed and developed according to theories and precedents under the Special Act on Administrative Case Litigation.

Then, reflecting the movement of these theories and case law, Article 4 of the Administrative Case Litigation Act, which was enacted in 1962, became independent of the provisions concerning the litigation of the parties. And due to the revision of the Act in 2004, the amendment stipulated that 「 Litigation for the determination or disposition of a legal relationship between the parties, the litigation for the legal relationship with the defendant under the provisions of the Act, and the legal relationship with the public law, and other litigation against the legal relationship under the public law」.

Under Korea's public law, the party litigation system seems to have been established and developed under the Japanese Administrative Case and Litigation Act. In Japan, however, the prevailing trend of academia is to passively evaluate the theory of active utilization of the party litigation system under the public law on the premise of the unilateralism of public law and justice. However, the difference is that in Korea, active utilization theory is dominant on the premise of dualism of the public law and the judicial law regarding the litigation system of the parties[4].

2. Types of Party Litigation

2.1 Substantial party litigation

Substantive party litigation means a lawsuit against a legal relationship under the public law, in which one party in the legal relationship is accused. A lawsuit concerning a legal relationship under the public law is a lawsuit in which the rights or legal relationship subject to legal claims

belong to the public law. In other words, it means a lawsuit against the public authority as a litigation or a lawsuit against the legal relationship itself that can be resolved through the application of the public law and regulations.

The litigation is characterized as a comprehensive litigation in that it is targeted at the general public of legal relations under the public law.

The party litigation is a comprehensive concept and is a type of the litigation that can create a new type of the litigation as a kind of residual idea that refers to all lawsuits except for appeals. It can be used as a means of relief to flexibly respond to various forms of administrative action in response to the expanding administrative action in modern society. Under the Korean Administrative Litigation Act, the parties' lawsuits are not bounded by the framework of classification of lawsuits under the Litigation Act, and in some cases, the lawsuits can cover various types of lawsuits, such as implementation lawsuits and confirmation lawsuits[5].

Examples of the actual party litigation are the followings: a lawsuit seeking confirmation of the identity or status of a public official or a student of national or public school or a person of national merit(6) and a dispute over the eligibility of members of the Urban Redevelopment Association, etc. civil servants, students of state or public schools, or lawsuits[6] seeking confirmation of the status or status of national merit, and disputes[7] over the eligibility of members of urban redevelopment associations. In addition, a monetary litigation[8] under the public law or a lawsuit concerning a contract under the public law can be said to belong to the litigation.

2.2 Formal party litigation

2.2.1 Requirements for formal party litigation

The formal party litigation means 「a lawsuit involving a legal relationship caused by the disposition, etc. of the administrative office, in which one party in the legal relationship is accused」.This lawsuit refers to a case in which the statute constitutes a lawsuit between the parties in the form of rights, although it is actually a lawsuit that has the meaning of disapproval of administrative actions. The requirements for formal party litigation are the following two: 「a lawsuit regarding a legal relationship that causes the disposition of the administrative office, etc.」 and 「a lawsuit against one party in that legal relationship as a defendant」. Such formal party litigation is a form of litigation on the premise of the existence of special statutes.

A representative example of the formal party litigation is the 「Act on the Acquisition and Compensation of Land, etc. for Public Interest Projects」 and 「Litigation over compensation for loss during the retrial of the Acceptance Committee」 as prescribed in Article 85. A lawsuit concerning the original disposition or retrial shall correspond to an appeal lawsuit, which is 「A lawsuit filed against the disposition, etc. of the administrative office or non-operation」. For example, if the compensation for loss of land is determined by the acceptance decision of the Acceptance Committee, which is a disposition as a public authority exercise, and if it disagrees with it, it shall be contested by a lawsuit to cancel the acceptance decision as a defendant. This is because the acceptance decision to determine the right to claim loss compensation between the landowner or the relevant person and the operator constitutes a disposition to form a legal relationship between the parties in the lawsuit. However, Clause 2 of Article 85, which is about 「acquisition of land, etc. for the public works and the compensation act」, stipulates that 「the litigation for compensation for loss during the retrial of the Acceptance Committee」 「if the administrative litigation to be filed pursuant to paragraph is an increase in compensation, the operator or the relevant person shall be the defendant」. In accordance with the regulation, for example, if the landowner disagrees that the amount of compensation for the decision is too low, one shall file a lawsuit against the accepting committee to demand an increase in compensation from the project operator without filing a lawsuit

against the decision cancellation. In spite of the fact that the contents of the 「disposal and retrial」 are thus contested, It is referred to as a 「formal party lawsuit」 based on the fact that the parties have taken a form in which legal relations are contested under the special provisions of the Act.

The reason why such formal party litigation is recognized is that the benefit of acknowledging such a lawsuit is more appropriate to have direct stakeholders fight as litigants or settle disputes than to take the form of a cancellation lawsuit against the Disposition Office[9].

In addition to Clause 2 of Article 85, 「the Act on Acquisition and compensation of land, etc. for public utilities」, there are lawsuits over intellectual property rights (Article 187 of the Patent Act, Article 167 of the Design Protection Act, Article 163 of the Trademark Act), such as patent invalidation trial, extension of patent rights validity appeal trial, etc.

Conflicts of opinion on whether the formal party litigation can be recognized solely by the provisions of the Administrative Procedure Act without the authority of the explicit and individual basis law

In the case of the Japanese Administrative Case Litigation Act, the background of the theoretical confrontation over whether formal party litigation can be recognized under the interpretation of the Administrative Litigation Act without the authority of individual laws is as follows: 「To defend one party in relation to the legal relationship in accordance with the provisions of the statutes as a lawsuit against the disposal or decision to confirm or form a legal relationship between the parties」.However, our Administrative Litigation Act stipulates that a formal party lawsuit is 「a lawsuit concerning a legal relationship that causes the disposal of the administrative office」 and 「a lawsuit in which one party in that legal relationship is accused」. Unlike the legislation of Japan's formal party litigation, our Administrative Procedure Act does not require 「the provisions of the statute」.Under the premise of differences in the regulations, the question of whether it is generally recognizable based solely on the provisions of the Administrative Procedure Act is raised in interpreting the Korean Administrative Procedure Act.

2.2.2 Negative

This view requires explicit and individual evidence, and the formal party litigation is not possible only under Clause 2 of Article 3 of the Administrative Procedure Act.

2.2.3 Positive

This view is that the formal party litigation is possible only under Clause 2 of Article 3 of the Administrative Procedure Act.

2.2.4 Conclusion

The criteria for defining the scope of the party's litigation and civil litigation is the followings. First, consider whether a lawsuit is right under the public law or the judicial law. Second, consider whether the legal relationship between the parties is the public or the judicial relationship. Finally, if it is difficult to determine whether to apply the party lawsuit under the public law even under these two standards, it is necessary to determine whether to apply the lawsuit under the public law in consideration of the adequacy of dispute resolution in terms of litigation law or function. For the active utilization of a party's litigation under public law, it would be reasonable to interpret that it falls within the scope of the party's litigation under public law if it meets any of these three criteria.

III. Standards and Necessities for Distinguishing Party Litigation and Civil Litigation under the Public Law

1. Standards for distinction between the parties' suit and civil suit under the public law

It is difficult to say that even the members of the final and best judicial body have specific and clear standards for distinguishing between legal and

judicial litigation on specific matters. It is only judged when each individual case is dealt with. Top legal professionals differ on specific issues, and that view does not maintain constancy.

There are some views about how to distinguish between the party litigation and the civil litigation under the public law. The view, which is called "theory of an object of lawsuit", is based on the matter of a lawsuit, and if it is a public right, it is an administrative case; however, if it is a judicial right, it is a civil case. The view called "theory of legal relationship" distinguish two cases based on the legal relationship. If the legal relationship is a public relationship, it is said to be an administrative case; however, if the legal relationship is a judicial one, it is said to be a civil case. As criterion to determine a legal relationship[10].

The Administrative Litigation Act is a lawsuit on legal relationships caused by the administrative office's disposition, etc. and other litigation on legal relationships in the public law. The Act defines "a lawsuit in which one party of the legal relationship is accused," and whether the lawsuit is under the public law or the judicial law, if the legal relationship is under the public law, it is an attitude[11] based on "theory of an object of lawsuit." The Supreme Court sees the matter differently, but generally takes this view.

2. The difference between the parties' litigation and civil litigation under the public law

It is also necessary to distinguish between appeals and civil lawsuits under the Administrative Procedure Act, which clearly distinguishes the handling of administrative and civil cases. However, the parties' lawsuit and civil lawsuit under the public law are things that are virtually confusing. Although the parties' litigation under the public law has a similar appearance to the civil litigation in terms of filing a lawsuit as an equal party, the litigation law applied in our current legal system is different. Therefore, distinction is needed because the establishment of administrative courts creates jurisdiction problems and the special provisions of the Administrative Procedure Act can be applied[12]. The Administrative Procedure Act also stipulates the compliance of the Civil Procedure Act, which can be called the Basic Law of Procedure. Clause 2 of Article 8 of the Administrative Litigation Act stipulates that the Civil Litigation Act shall apply to matters not specifically provided in this Act regarding administrative litigation. Special provisions prescribed by the Administrative Procedure Act are the followings: the defendant's administration, merger of related cases, participation in third-party and administrative agencies' litigation, change of type of litigation, change of litigation due to a change in disposition, order to submit administrative trial records, trial examination, the momentum of a judgment, cost of litigation, the defendant's eligibility, the duration of complaint, restrictions on the provisional sentences, etc.

Korea's judicial system has a one-way judicial system that deals with administrative litigation in general courts.

However, by distinguishing between the public and judicial law, the judicial law requires civil litigation procedures, and the public law requires administrative litigation procedures. In this regard, there is a benefit to distinguish between the public and judicial law while having a one-way judicial system. However, even if it is a public law relationship, the parties' litigation is not much different from that of civil litigation procedures in its substance and core contents. Also, it is a tradition of court practice to proceed without any difference in fact recognition or verification procedures, which can be said to be the core of litigation.

Due to such differences, the parties seeking to file a lawsuit must first distinguish whether it is subject to an appeal suit under the Administrative Litigation Act or a suit against the parties, and then distinguish whether it is a civil suit or public

suit. If the parties misjudge and file a lawsuit against this type of choice, it is unfair to penalize the parties, and there is a risk of harming the parties' judicial trust. The civil litigation and the party litigation are difficult even for the court to distinguish them accurately, so it is too harsh to blame the parties for not being able to distinguish them clearly and to ask them to take disadvantages. In this regard, it is meaningful to think that a lawsuit filed by confusing administrative and civil lawsuits should be transferred to the competent court. The old view of the Supreme Court, says that "public or administrative litigation may not be optionally filed." However, in cases where it is difficult to distinguish whether the cases are the parties' litigation or the civil litigation under the public law, the combination of the civil and the administrative litigation, saying the trial shall be conducted in combination with the civil and the administrative procedures in accordance with the type of litigation filled by the parties, is persuasive in terms of promoting the benefit of the parties.

In order to resolve this issue, the Supreme Court intends to transfer the case to the corresponding court if it is found out in the first trial, and if it is found out in the appeal, it will not be returned to the first trial court, but the Court of Appeals has states its intention to hear the case as the first trial in terms of the remedy of the rights of the parties or judicial economy. However, if the Appeal misjudges the suit as a civil suit, it is controversial about the way the Supreme Court handles it. As a legal trial, the Supreme Court cannot investigate and judge the facts, so it will send the case back. In this case the view, which is called the combination of the civil and the administrative litigation, is in line with the parties' rights relief or judicial economy because the lawsuit may be operated as a six-judge system and delay the lawsuit.

IV. A Solution to the Problem of Duty Management

1. Civil and administrative litigation combined theory

In terms of the distinction between the parties litigation and the civil litigation under the public law, in cases where it is unclear whether it is an administrative or civil lawsuit case, it is widely guaranteed that the parties have rights to a swift trial even if they proceed with a mix of civil and administrative litigation regulations. However, the court does not have such standard, so it is understood to be more lenient in interpreting the violation of procedures that effectively affected the ruling.

2. Resolve administrative cases by interpreting the cases as not exclusive jurisdiction of the administrative court

If a lawsuit filed by misidentification is known in the first trial, the Supreme Court shall transfer the lawsuit to the court in accordance to solve such problems. And if such problems are found at the Appeal, the Appeal does not return such trials to the first trial but hear the cases as the first trial in terms of the remedy of the rights of the parties or judicial economy. The violation of the exclusive jurisdiction is defined as an absolute appeal, and if the jurisdiction of the administrative court of an administrative case is interpreted as exclusive control, it can be resolved by transfer only if the case is in fact, but if it is appealed to the Supreme Court, it is difficult to avoid dismissal. It could be simply resolved if it is interpreted that administrative court jurisdiction in administrative cases is not exclusive jurisdiction. Although there is no prestigious regulation in the Administrative Procedure Act that administrative cases fall under the exclusive jurisdiction of the administrative court, it is common to say that administrative cases fall under the exclusive jurisdiction of the administrative court (21). If the administrative case is interpreted as arbitrary jurisdiction, not

exclusive control of the administrative court, there are problems where the administrative litigation case is scattered in courts nationwide, inefficient, and the purpose of setting up the Seoul Administrative Court cannot be achieved. However, other than the Seoul Administrative Court, the first trial court should actively utilize the transfer system, which is based on judicial economy. Administrative Court is installed only the Seoul Administrative Court and District Court in the other parts of the claimed administrative judge a case in administration (including Gangneung). Therefore, except for the Seoul Administrative Court, there will be no problem of violations of the exclusive jurisdiction.

However, if the litigation case against the parties under the public law is handled as the civil lawsuit, it may be a problem of whether it affected the judgment as a violation of the procedure, even if it is not a violation of the exclusive jurisdiction. The case, in which the case should be treated as the parties' litigation as a civil litigation, should not be interpreted as a violation of procedures unconditionally. After determining whether the case was subject to the application of special provisions of the Administrative Procedure Act, only if cases that the special provisions should have been applied is treated simply as a civil case and influenced the judgement, it can be interpreted as an appeal for violation of the procedure.

3. Resolution by jurisdiction

Article 28 of the Civil Procedure Act provides for the designation of the following. The higher court directly in common with the relevant court shall determine the competent court upon the application of the relevant court or party. The reason for this is when the jurisdiction is not legally or practically practicable, and when (2) the jurisdiction of the court is not clear.

It is hard to say that it falls under the jurisdiction of a court but cannot exercise its right to trial. And it can be problematic when the jurisdiction of the court as prescribed in Clause 2 is unclear.

However, because Clause 2 is in a place with many exclusive jurisdictions, in the event of a complaint to any court, an application for designation of the exclusive jurisdiction is made before or after the petition, which is not within the jurisdiction of the duties, but is limited to the jurisdiction of the land jurisdiction. In the case of an application for designation under Clause 2, the relevant court may also apply for designation. But in fact most are at the request of the parties. As prescribed in Clause 2, it is a regulation that cannot be applied to solve the jurisdiction of an administrative litigation case or civil litigation case, which can be called a duty-related issue.

Since the final judgment of the matter of duty is practiced by the Supreme Court, it is meaningless for a high court to designate jurisdiction.
It is necessary to stipulate that the decision to designate jurisdiction by determining whether it is an administrative or civil lawsuit as a litigation of the parties under public law should be made by the Supreme Court, not by a direct higher court.

Determining whether it belongs to the jurisdiction of a person in the public law or the civil lawsuit is a matter of direct investigation, and the relevant court must actively apply for designation of the Supreme Court in order to be free from any violation of the statutory procedures.

It is not desirable to spend too much time and effort on the form of litigation, even though the court in charge of the lower court should focus on substantive judgment. In fact, if the litigation's form is questionable, the court shall apply to designate jurisdiction to the Supreme Court, and the Supreme Court shall quickly designate a competent court that suits the nature of the case. The parties are then guaranteed the right to a speedy trial and the court in charge can focus on the process of making substantive judgments.

Ⅴ. Conclusion

Within the current administrative litigation law system, it is desirable to say that the lower court's transfer or transfer procedures are being used well. In light of the fact that previous precedents are changed depending on how the Supreme Court will view the nature of the lawsuit, it is meaningful to say that the outcome of the trial should be respected if it is not a violation of the procedure that affects the outcome of the ruling.

I believe that if the administrative litigation law establishes a provision related to the designation of a duty and stipulates that "if a litigation case is questioned whether it is an administrative or civil lawsuit, the Supreme Court-related court shall designate the competent court at the request of the parties," the lower court will be guaranteed the right to swift a trial, and the legal representatives will be freed from the exhaustive agony.

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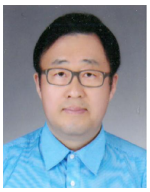

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