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RESEARCH STUDIES ON THE ORGANISATION AND FUNCTIONING OF THE JUSTICE SYSTEM IN FIVE SELECTED COUNTRIES

(China, Indonesia, Japan, Republic of Korea and Russian Federation)

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Research studies on the organisation and functioning of the justice system in five selected countries

(China, Indonesia, Japan, Republic of Korea and Russian Federation)

Korea Final Report

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Table of Contents

1. Political, Cultural, Historical and Socio-economic Context 6
   1.1 Major historical events 6
   1.2 Economic system 9
   1.3 Political system 11
      Leadership and Authority 11
      Aims, objectives and visions for the justice sector 11
      Institutions 12
      Accountability 12
      Constitutional Structures 13
   1.4 Other Actors 14
   Conclusion 14
2. Criminal Investigation 15
   2.1 Organisation 15
   2.2 Model 17
   2.3 Tasks and Functions 18
   2.4 Relations 25
   2.5 Mechanisms 27
      Coordination 27
      Administrative 27
      Oversight and Inspection 28
   2.6 Criminal Investigators 29
   Conclusion 30
3. Prosecution/Procuracy 32
   3.1 Organisation 32
   3.2 Model 33
   3.3 Tasks and Functions 35
   3.4 Relations 37
   3.5 Mechanisms 38
      Prosecutorial oversight 38
      Administrative Management 39
      Oversight and Inspection Mechanisms 39
   3.6 Career and transparency issues 40
   Conclusion 41
4. Court system 43
   4.1 Role and Position 43
   4.2 Organisation 43
   4.3 Model 46

4.4 Tasks and Functions 47
4.5 Relations 55
Investigation, Security and Prosecution Agencies 55
State Agencies 55
Legislative Branches 55
Executive Branches 56
4.7 Judicial education and training 56
4.8 Career issues 57
4.9 Guarantee of tenure 59
4.10 Judicial interpretation 60
4.11 Adjudication 60
4.12 Jurors 61
Role 61
Appointment and Training 61
Relationship with Judges 62
Oversight 62
4.13 Regional delimitations 62
4.14 Judicial Independence 63
4.15 Appeals 63
4.16 Positioning 66
4.17 Judicial administration 69
4.18 Oversight and accountability 70
4.19 Other Court Staff 73
4.20 Litigation Costs 73
Conclusion 76
5. Civil and criminal judgement enforcement 79
5.1 Types of Enforcement 79
Civil 79
Criminal 79
Administrative 79
Labour 79
5.2 Organisation 80
5.3 Model 80
5.4 Tasks and Functions 80
5.5 Relations 82
5.6 Process 82
5.7 Mechanisms 84
Administrative 84
Oversight and Inspection 84
Conclusion 84
6. Lawyers and other legal services 86

6.1 Organisation 86
6.2 State Regulation 87
6.3 Lawyers 87
Role in criminal cases 87
Role in civil cases 88
6.4 Education and Training of Lawyers 88
6.5 Disciplining Lawyers 91
6.6 Dispute Resolution 91
[See Sec. 4.4 above]Conclusion 91
7. Justice sector reform 93
7.1 Initiation 93
7.2 Responsibility 94
7.3 Design 95
7.4 Review 96
7.5 Implementation 96
7.6 Evaluation 96
7.7 Remedies 97
7.8 Oversight 97
The Parliament 97
Parliamentary committees 98
The Ombudsman 98
Local and Provincial Government 98
Central Government 98
Conclusion 98
8. Conclusions 100
8.1 Strengths and Weaknesses 100
One of the key strengths of Korean legal and judicial reform has also been a weakness, namely that it has depended in large part on political pressure that is quite contingent. When reformist presidents are in office, reforms move ahead; when conservatives are in power, reforms may stall.8.2 Challenges and Controversies 100
8.3 Current Reforms 101
8.4 Issues for Future Reform 101
References 102

1. Political, Cultural, Historical and Socio-economic Context

Like Vietnam, Korea is an ancient civilization that has operated at the periphery of the Chinese empire. As a result it has been both profoundly influenced by Chinese thought and institutions, while also overcoming significant challenges to remain a distinct nation. In this sense the Korean experience has special significance for the prospects of legal reform and economic modernization in Vietnam. Like Vietnam, but unlike Japan or China, Korea was a colonized society, and has experienced national division caused by the Cold War. But Korea has also had several decades of phenomenal economic development, which has both contributed to and been affected by legal reform.

This section provides a brief overview of Korean legal and political history to set the groundwork for the chapters that follow.

1.1 Major historical events

Korea to 1945: Confucianism and Colonialism

For several centuries before contact with the west, Korea was governed by the Choson dynasty (1392-1910) which is usually considered to be the longest lasting ruling dynasty in all of East Asia. This was a period of great advances in science and culture, the creation of the distinctive and efficient Korean alphabet (hangul), and a great emphasis on neo-Confucianism as the governing ideology. Indeed, most scholars would agree that Confucianism was more entrenched in Korea than in China during this period, especially compared with the Yuan and Qing dynasties. A class system was introduced, with a hereditary class of yangban landowners and bureaucrats providing the backbone of the regime. Chinese ideas about law were dominant, and Korea was governed by a series of codes implemented by competitively selected scholar-bureaucrats.

The magistrates were not specialists in law, but relied on staff experts to guide the course of the legal process. Most law was public in character, with private law issues left to Confucian ritual or notions of custom. There was no formal constitutional constraint on the rulers, but the norms of Confucianism did provide some practical constraint on the decisions of the King. Furthermore, a drum was set up in front of the palace whereby people could appeal directly to the King for justice, and this strategy was sometimes effective.

The arrival of the West was a challenge for all East Asian societies. Korea's response was shaped, for better or worse, by its proximity to Japan, the one Northeast Asian state that was able to successfully avoid colonialism and modernize on its own terms. Having adopted Western style legal institutions in the early Meiji period, the Japanese began to pressure Korea to do the same, but the conservative Choson dynasty resisted. A peasant rebellion in 1894 prompted the weak Korean monarchy to turn to

the Qing for assistance, but Japan sent its own troops and effectively severed Korea's long tributary relationship with China with the Treaty of Shimonoseki in 1895. At the same time, the Korean monarchy passed a Court Organisation Law, along with other statutes as part of a series of last-ditch measures to establish modern legal institutions. These laws abolished hereditary groups and established a principle of equality before the law. Most of these laws, however, were in fact copied from Japan.

Japan's planners sought to create modern bureaucracy and rationalized government structure, including a new judicial structure with professional judges functionally differentiated from other government officials, a change from the Confucian generalist administrative structure. Japanese advisors were placed throughout the Korean government including the Ministry of Justice, and Japanese taught in a new government-run law school established by the Koreans as well. Japanese influence grew as it imposed a protectorate in 1905, and then annexed Korea formally in 1910.

From at least 1910, then, modern law was adopted in Korea not as an instrument to maintain independence in the face of Western colonialism, as it had been in Japan and Thailand, but as a tool to deprive Korea of independence in the interests of Japanese colonialism. Rights of petition and redress that had existed under the Confucian system were eliminated. In a number of areas, basic rules of the Japanese Civil Code were modified to fit colonial exigencies, such as a rule that mortgagees could take mortgaged properties immediately upon default. Even though the form of modern law was introduced, the colonial character of the state meant that notions such as judicial independence, separation of powers, and constitutional rights were minimal, and the paradigmatic function of the legal system was social control through criminal law (Choi 1980: 80).

At the same time, the institutions adopted by the colonial authorities did provide a basis for further institutional development after independence. Law schools were set up, and some Koreans began to study the subject. Because of restrictions on entry into other professions, talented Koreans were drawn to legal study, and eventually some were allowed to become judges in the colonial administration (though the bulk of such positions were reserved to Japanese nationals). And the technology of law was adopted. These institutional legacies laid the basis for the subsequent development of the legal system.

Korea to 1945-87: Rapid Growth in an Authoritarian State

After independence from Japan, Korea was governed by the American occupation authorities for three years before becoming independent in 1948. Shortly thereafter, however, the North Korean army invaded and the Korean War began, only ending with an armistice in 1953. Korea remained a military dictatorship for most of the next four decades, with only a brief period of civilian control in the early 1960s.

During this period, there was some American influence on substantive Korean law, such as the Constitution and some of the major regulatory statutes. But the main structure of legal institutions reflected the Japanese legacy. Three features stand out. First, there was a relatively high status, small legal profession. Passage of the Korean bar exam was extremely difficult, and most of the passers went into the procuracy or courts. Second, the administration was not subject to effective judicial control.

Administrative law was quite under-developed and the bureaucracy was the central institution. Third, the judges were relatively conservative and formalistic. Justice was of fairly good quality, though confined to a small realm of private law. For criminal and constitutional issues, the courts were at best irrelevant.

This was the period of rapid growth in Korea. The dictatorship of Park Chung-hee (1961-79) initiated the export-oriented industrialization program that helped vault Korea into the ranks of the OECD. But his regime is remembered by many for its internal repression, which was very severe. The National Security Act was used to punish anyone suspected of sympathy with communism, and many thousands were jailed.

Park was assassinated in a coup d'état in 1979, and replaced with General Chun Doo-Hwan. Chun amassed a vast fortune in his few years in power, and presided over the deaths of civilian protestors at Kwangju in 1979. In 1986, as preparations for the Olympic Games were under way, mass protests erupted in the streets. Chun negotiated with two major opposition figures to allow a new democratic constitution to be produced, providing for direct election of the president. The negotiated constitution of 1987 also created a new constitutional court to adjudicate constitutional disputes.

Korea 1987- : Democracy and Judicialization

Chun's designated successor, General Roh Tae-woo, won the subsequent election when the two Kims, representing different regions of the country, could not agree on a common strategy. In the years following the 1987 election, democratization advanced significantly despite Roh's military background and association with Chun. Many political rights were restored, and the military moved decisively out of politics during this period. Other liberalizing steps included greater freedom of the press, freedom of labour, and resumption of local government elections.

Since the launch of reforms in 1987, Korea has experienced major changes in its political system, economic structure, and society. The authoritarian regime has faded away and been replaced by a vigorous, if contentious, democratic politics. The economy has been through booms and busts that have reduced, if not eliminated, the central role of the dominant *chaebol* conglomerates. The pace of social change continues to be dramatic as well, with new interest groups and social problems emerging.

In 1997, the country underwent a severe economic crisis leading to intervention from the International Monetary Fund ("IMF"). The IMF made demands for legal and institutional reforms in exchange for bailout funds. Korea made some of the reforms, resisted others, and initiated a major program of economic restructuring that allowed it to pay back the IMF loans on time.

Politically, Korea has been governed by a series of presidents, each limited to a single term of five years. President Kim Young-Sam (1992-1997) was the first civilian to be elected President, and was followed by Nobel Peace Prize winner Kim Dae-Jung (1997-2002). Both men left office with their popularity in severe decline and beset by scandal. The next president, Roh Moo-hyun, was himself an activist labour lawyer who had passed the bar without going to university. (His opponent in the election was also a lawyer, reflecting the importance of lawyers in politics.) Though Roh's administration was marked by major political conflict

(including an attempted impeachment in which the constitutional court decided that he could remain in office), it was notable for significant legal reforms, including the overhaul of legal education and the introduction of a system of lay participation in criminal trials, as well as the establishment of a Human Rights Commission. Roh, however, was dogged by corruption scandals after leaving office, In 2009, he leaped to his death from a cliff behind his home village amid a mounting prosecution probe into allegations that his family accepted a large amount of money from a businessman. The current president, Lee Myung-bak, is former Chairman of Hyundai and considered to be a conservative.

Reforms of the legal system have both reflected and contributed to the profound changes in Korea. Compared with two decades ago, Koreans are much more likely to rely on legal mechanisms to solve disputes and to seek redress from the government. Whole areas of legal practice have emerged from the shadows, including administrative law, bankruptcy, and corporate mergers and acquisitions. Political discourse has also shifted in more legalistic directions, as the courts have become a central arena for dealing with popular demands against corruption and the abuses practiced by the former regime. The Constitutional Court has emerged as a major locus of decision-making, quite a change from a society traditionally dominated by personalistic conceptions of power. A series of scandals involving former presidents and other high level political figures has placed corruption at the centre of the agenda, and brought the prosecutors' office into the limelight. At the same time, reform of legal institutions itself has also been a major political issue.

In all of this, of course, Korea is not alone, but rather one example of a global process of judicialization or legalization (Tate and Vallinder 1995). Many of these changes not only reflect internal dynamics of political and economic liberalization, but they also reflect broader global processes. Indeed, in the past two decades Korea has grappled with every major force affecting world affairs, including democratization, a major economic crisis, pressures from international financial institutions for reform, confrontation with a militarized enemy, and the emergence of civil society as a major force. Korea provides a window into how these broader regional and global processes play out in the legal system.

1.2 Economic system

At independence in 1948, Korea adopted a constitution that reflected collectivist and socialist influences. Chapter VI of the constitution included the principle that economic order should strive to realize social justice, meet every citizen's basic demands, and develop an equitable economy (Art. 84). It also provided for state-ownership of most natural resources (Art. 85), and government management of most public utilities, including transportation, banking, and insurance (Art. 87). Article 86 constitutionalized land reform and the distribution of farmland to the tenants. These ideas reflected a number of influences, including the constitution of the Korean Provisional Government established in China by anti-Japanese forces; the American New Deal advisors; competition with

socialist North Korea; and even Confucian ideas about the economic basis of social order.

Land reform was carried out in the early 1950s, and was mostly completed by the outbreak of the Korean War in 1950. (Unlike the counterpart program in North Korea, compensation was given to landowners.) But the wartime economy and the division of the peninsula during the Cold War had profound changes on the economic structure. Korea was effectively integrated into the global capitalist order under the leadership of the United States.

With the rise of Park Chung-hee in the 1960s, Korea turned to a developmental state economic model. The developmental state model was a mixed one in which capitalism provided the main underpinning, but with heavy state direction as a matter of national strategy. State bureaucrats were involved in channelling capital to favoured sectors, in guiding business planning, and in setting a favourable regulatory environment.

The economy was dominated by the super-conglomerate *chaebol*, sustained by cheap directed credit from state authorities. Courts did not interfere with the family-dominated corporate governance of the *chaebol*. Intra-conglomerate transactions and insider dealings were widespread, while statutory prohibitions against monopolies and insider dealing were for the most part unenforced. *Chaebol* were considered “too big to fail,” and the state provided funds and strategic direction.

Legal insulation of the state was a central element of this “developmental state” model. Under authoritarianism, the government limited legal services by tightly controlling the size of the legal profession. This minimized legal challenges to the economic planning process. The government also enhanced its power through an administrative law regime that insulated government discretion from outside purview. Like counterpart in Japan, the regime utilized “administrative guidance,” that is, informal “suggestions” that private parties had to follow or risk collateral punishment.

In economic ordering, formal contracts were seen as less important to governing economic transactions than informal, ongoing relationships. Contracts were loosely written and could be adjusted to fit changing business conditions. Networks of informal contacts crossed business-government lines and ensured a constant two-way flow of information among the key players. Civil disputes did occur among those who could not rely on connections with the government to resolve problems, but the courts did not play much of a role in the most important sectors of the economy.

This system was in turn subject to pressures in the 1990s, when Korea began to aggressively embrace a liberal model of globalization under the presidency of Kim Young Sam (1992-97). This trend continued after the Asian economic crisis in 1997, allowing Korea to recover quickly and to join the ranks of the OECD. In short, Korea has embraced at least three different economic models in the postwar period, adjusting periodically as world conditions change.

1.3 Political system

Leadership and Authority

The Korean constitutional system is centred on a directly elected president who serves a single term of five years. Re-election is prohibited, which reflects to some degree a desire to prevent a return to dictatorship. Since 1987, five different men have held the office, and the current president is Lee Myung-bak. There is a prime minister, but it would be a mistake to interpret South Korea as a "semi-presidential" system with a split executive. The President has all important executive authority and the prime minister can be viewed as equivalent to a vice-president. The parliament is a unicameral National Assembly, with 299 members elected through a mixed system of districts and proportional representation.

Aims, objectives and visions for the justice sector

Traditionally, the justice sector was seen as being of fairly high quality but covering a fairly narrow scope. The primary aim was social control rather than the facilitation of a private market sphere. Many believe that the legacy of colonialism is partly to blame for the excessive emphasis on the social control functions of law. Law was a tool to repress regime opponents rather than protect citizens from the state and from each other. The goal was not "rule of law" but "rule by law".

Litigation rates were low, and many argued that Koreans were not an adversarial people. But the limited use of law was not so much a matter of culture as much as systematic under-capacity in the legal system. Korea, like the more well-known case of Japan, required all legal practitioners to pass an entrance exam for a specialized judicial training academy, the Judicial Research and Training Institute (JRTI). Graduates of the Institute join the prosecutors' office, the judiciary, or the private bar, with the government offices traditionally receiving the top graduates. There were strict limits on the number of legal professionals (discussed in Chapter Six below.) This effort was supported by the existing private bar, which enjoyed very high fees because of limited entry into the profession. The interests of private and public actors converged to support the status quo of a limited legal profession.

One theme that is of interest is the extent of the Confucian legacy. This legacy is complex, but several elements of it have drawn attention as having particular consequences for the Korean legal system. First, Confucianism is usually seen to incorporate an aversion to litigation and a preference for social norms as the primary regulatory mode. Second, Confucianism is based on notions of social hierarchy, which contrast with liberal assumptions of formal equality. Third, Confucianism reflects a notion that positive law is to be understood in instrumental terms as primarily a tool of the state, rather than an external constraint on state power. The traditional attitude can be characterized as rule by law, as opposed to the rule of law. The paradigmatic area of law was criminal; other areas like civil justice and administrative law, in which the courts serve as a forum to challenge state action, were totally neglected.

These overall objectives of the justice system have changed dramatically in the last two decades, when there has been great increase in the use of law

in all aspects of Korean society. In the economy, litigation rates have increased. A set of nongovernmental organisations has self-consciously sought to use the legal system to advance a vision of social change in many arenas, from environmental regulation to labour to the rights of immigrants. This has led to an inevitable "judicialization" of politics, as political issues become resolved in the courts. Altogether, the system has become basically liberal in orientation in which the law serves to facilitate and underpin market interaction, protect people from government, and resolve social and political disputes.

Institutions

The design of the Korean legal system is fairly similar to most civil law jurisdictions. At the apex of the judicial system are the Supreme Court and Constitutional Court, which have complex inter-relations but discrete jurisdictions, at least in theory. Below the Supreme Court are six high courts with appellate jurisdiction, 13 District Courts (with 40 branch offices), and several courts of specialized jurisdiction, such as the Family Court and Administrative Court. There are municipal courts that exercise jurisdiction over minor disputes and misdemeanours for which the maximum sentence is not more than 30 days in jail or a fine of roughly US $200.

The Supreme Public Prosecutors' Office has a monopoly over prosecution of criminal offenses. Part of the Ministry of Justice, it has branches throughout the country, including 5 High Prosecutors' offices, 18 District offices, and 38 branch offices of the District Prosecutors. The bar is organized along municipal lines, with several associations in various cities, and an umbrella organisation, the Korean Bar Association. Roughly half of practitioners are in Seoul and environs, so the Seoul Bar Association is particularly important.

Korea's post-1987 governance structure has featured a number of independent monitors designed to promote rights of citizens, including an Ombudsman, an Administrative Appeals Commission and a Counter-Corruption Commission. In 2008, these three were combined into a single body, the Anti-Corruption and Civil Rights Commission.

In 2001, Korea established a National Human Rights Commission. This body serves to take complaints and promote human rights, though it does not have formal legal power to order remedies. Many of the issues it deals with involve local criminal justice authorities, as well as national policies that involve discrimination of one kind or another.

Accountability

Despite the institutionalization of alternation in power, old patterns of personalistic politics have remained in place to a certain extent, calling into question the institutionalization of the rule of the law. Each incoming President since 1987 has continued the pattern of purging associates of the previous regime, most recently under the auspices of generational change. This has called into question the extent to which old notions of rule by man had given way to an autonomous legal control of authority.

Corruption allegations have plagued every President since 1987, probably exacerbated by a combination of weak political parties and presidential term limits so that each President has an incentive to grab as much as possible as quickly as possible. The combination of corruption allegations and a history of presidential control over the prosecution has meant that each incoming President has been in the position of deciding whether or not to prosecute his predecessor for alleged corruption. Kim Dae Jung's administration suffered many prominent scandals, including criminal proceedings against Kim's two sons and a nephew. In December 2003, Kim's Chief of Staff Park Jie Won was sentenced to 12 years in prison for bribery charges and for his role in the Hyundai payment to North Korea for the North-South summit. The same week saw sitting President Roh Moo Hyun's right hand man Lee Kwang Jae arrested for election finance violations, to which Roh's remarkable response was that he knew about the illegal campaign funds, but had taken much less than the opposition Grand National Party (which was simultaneously under investigation). As Roh's Presidency quickly degenerated into the usual cycle of accusations and scandals, the prospects for the clean politics to which Koreans aspire seemed dim indeed. After retiring, Roh himself was investigated for corruption, as mentioned above, and this led to his suicide. It remains to be seen whether Lee Myung Bak will suffer a similar fate: his private wealth might in fact insulate him from the need to seek corrupt gains.

Constitutional Structures

Korea's Constitution, originally adopted in 1948, has been subjected to five major amendments, most recently in 1987. Each of these ruptures has occurred during the context of regime change and so we are now in the period of what is called the Sixth Republic. During most of the period before 1987, there was weak enforcement of nominal rights, with negative ramifications for human rights and economic freedoms. Regime opponents were persecuted under the draconian National Security Law, and insulation through the law served the interests of those in power.

This has changed dramatically. The presidential system, though often criticized, has become institutionalized. The National Assembly has also begun to operate with greater independence. Of special relevance to our inquiry is the Constitutional Court, which has emerged as a major player. Of the five designated constitutional courts in East and Southeast Asia (the others being found in Indonesia, Taiwan, Thailand, and Mongolia), it is arguably the most important and influential in its context (Ginsburg 2003, 2009). The Court was established in late 1988 as part of the 1987 constitutional formation of Korea's Sixth Republic. Though expected by the constitutional drafters to be a relatively quiescent institution, the Court has become the embodiment of the new democratic constitutional order of Korea. The Court is routinely called on to resolve major political conflicts and issues of social policy. Since its establishment in late 1988, the Constitutional Court has rendered over 7000 decisions.[1] It is consistently related one of the most effective institutions in Korea by the public. In a recent poll, for example, it was rated the highest of any government body (and just behind several large corporations) in terms of influence and trust (Ginsburg 2009).

[1] Constitutional Court statistics, http://www.ccourt.go.kr/home/english/statistics.jsp#

1.4 Other Actors

The *chaebol* economic groups have been the backbone of the post-war Korean economy, and include world-class firms like Samsung, LG and Hyundai. These groups traditionally interacted with government in an informal manner, with information flowing back and forth easily across networks, and human relations being the crucial channel. In recent decades the chaebol have been beefing up their corporate legal departments, suggesting that formal rules of law are becoming more important in business-government relations, and in private market transactions. While many have attacked the *chaebol* for cosy business-government relations and their preferred position in the economy, Koreans also admire the groups for their success.

An array of non-governmental organisations have emerged in recent years to utilize the law. The most famous of these was the Peoples Solidarity for Participatory Democracy, established by a well-known activist lawyer, Park Won-Soon. These groups sought to use the law to restructure Korean society and combat public corruption, and have used litigation in many different spheres. While it is difficult to find data on success rates, the groups claim that the litigation strategies have produced many profound changes in government policy. In some cases, the litigation has been used to call attention to significant social problems, and to help mobilize supporters to pressure for change. In this sense, the litigation strategies have had more impact than simple cases statistics would identify.

Conclusion

South Korea is an extremely dynamic society. In the early 1950s, it was a poor ex-colony devastated by war, with about the same level of per capita GDP as Egypt. Today it is a member of the OECD and one of the most successful economies in the world. During the high-growth period to 1997, Korea transformed its industrial structure using a kind of developmental state model. In the last two decades, the law has assumed a much more prominent role in Korean governance and society, with groups seeking to use the law to advance particular agendas. The prominence of the constitutional court has made the law more visible to average Koreans. Administrative law and corporate law have evolved to emphasize transparency. These shifts have increased the legitimacy and responsiveness of the justice system.

Yet some aspects of Korea’s system continue to constrain the use of law, particularly the cartelized legal profession that will be discussed in Chapter Six below. This limits access to justice, which remains an issue for the Korean justice system. No doubt reform processes will continue in years to come.

2. Criminal Investigation

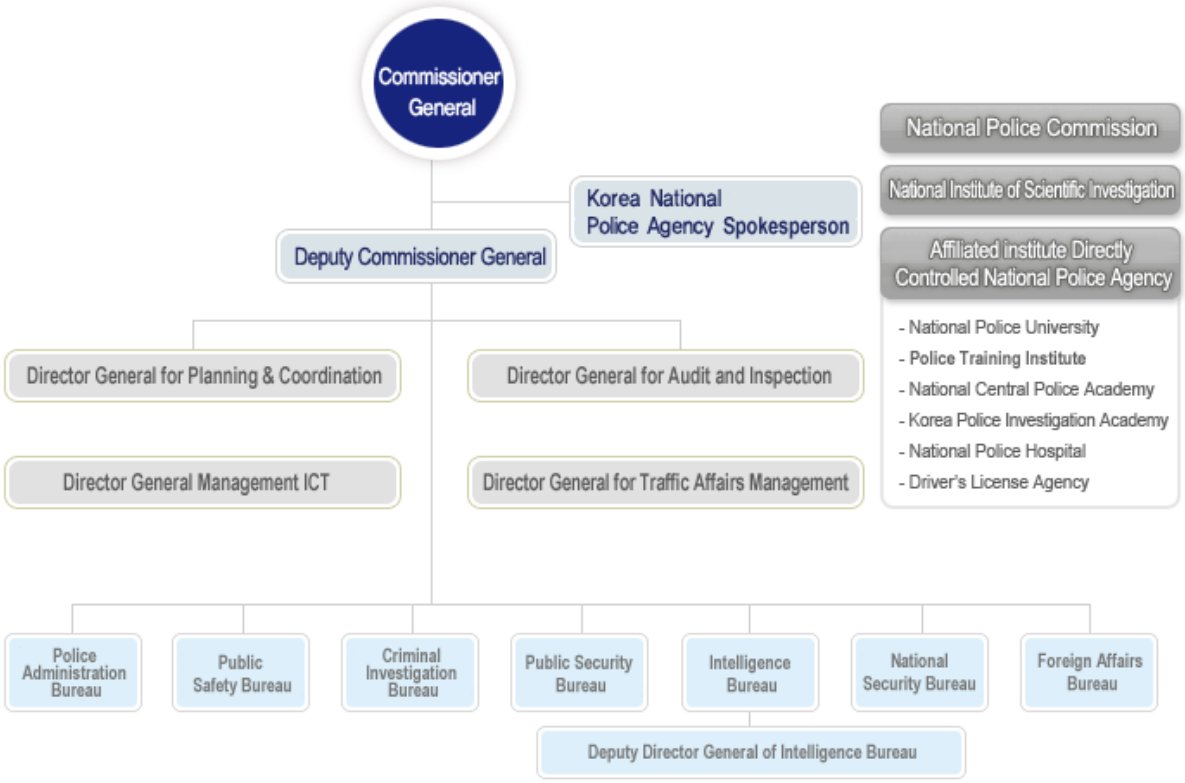
2.1 Organisation

Organisation

Criminal investigation is carried out by judicial police officers,[2] public prosecutors and assistant public prosecutors. The police organization is structured similar to regional governments, but because security conditions differ by region, they do not exactly accord to regional governments, and as demand for security rises, additional police stations and police stands are being installed. Police officials belong to the National Police Agency and are referred to as 'judicial police officers' in the Criminal Procedure Act, divided into officers and constables. The two differ in the degree of competence they hold under the Criminal Procedure Act (Article 196 (1), (2) Criminal Procedure Act). These terms are not official titles or designations of official duties, but reflect qualifications to act within the Criminal Procedure Act. To secure political neutrality there is a 'Police Commission' installed under the Ministry of Public Administration and Safety, which is the highest order consultation and legislative organ of the police administration. The organization of Korea National Police Agency is as follows:

[Figure 1: The Organization of Korea National Police Agency]

[2] Within the police force, "judicial police" are those assigned to the investigation of crimes. The judicial police are under control and supervision of the prosecutor, and include police administrative officials, superintendents, captains, lieutenants, and patrolmen.



There are also "special" judicial police officials, whose powers are created by statutes in areas including forestry, maritime affairs, taxation, customs, monopoly, and military affairs and other special matters. In addition, there is a National Intelligence Service, which investigates national security crimes such as espionage, insurrection, inducement of foreign aggression, rebellion and violation of the National Security Act[3] (Article 3 of National Security Act). It also performs analysis and collection of intelligence concerning national security.

Functioning

Investigative agencies have the approval to investigate any crimes. Thus, both public prosecutors and judicial police officers have authority to investigate criminal cases. In reality, the police initiate the investigation of most criminal cases, including not only routine crimes such as thefts, violence or traffic related crimes but also other serious crimes.[4] However, since prosecutors have the authority to supervise and instruct the police investigation under Criminal Procedure Act (Article 195), the police should report important cases to the prosecutors and conduct investigation under instruction of the prosecutor. In case of complex offences such as large-scale bribery cases involving politicians or high ranking public officials, economic offences, narcotic offences, environmental offences, cases involving organized crime, and tax evasion, the public prosecutor can initiate the investigation *ex officio* or without prior investigation by the judicial police officer.

[3] Law No. 5454 of 13 December 1997 taking effect from 1 January 1998.
[4] While prosecutor is responsible for criminal investigation by law, police carry out and take responsibility of investigating 96% of all recorded criminal cases in reality. See Pyo, Changwon, "Prosecutor, Police and Criminal Investigation in Korea: A Critical Review" *Journal of Korean Law* Vol. 6 No. 2, 2007, p. 192.

After the initial investigation by police is concluded, the case is then transferred to the public prosecutor's office where a public prosecutor continues with the investigation by questioning the suspect and related persons, examining documents and other evidence. The public prosecutor may conduct additional investigations as necessary. At the conclusion of the investigation, the prosecutor in charge decides whether the suspect should be prosecuted. The theoretical reason for the foregoing arrangement is to charge the public prosecutor with the responsibility of ensuring that the police observe the law and due process by giving instructions in advance during the investigation process by the police.

2.2 Model

Introduction of New Criminal Procedure Act of 2007

The system of criminal investigation has been radically changed in the New Criminal Procedure Act of 2007 taking effect from 2008, a result of the process of democratization. Under authoritarian regimes, judicial independence was often constrained by the strong executive powers, especially in criminal cases related to politically sensitive matters. With political democratization, the model of criminal investigation has been transformed from a model focused on crime control to one focused on due process. The right of defence has been strengthened throughout the entire stage of criminal investigation. Although the Criminal Procedure Act enacted in 1954 has been revised several times, the revision in 2007[5] is considered to have been a major overhaul and reformation in the criminal justice system including the criminal investigation system. As many as 121 provisions were revised, marking the largest change in the entire judicial system in a half century, and transforming the criminal trial. The revised Criminal Procedure Act seeks to establish an advanced criminal justice system in accordance with international standards by:

- realizing the defendant's right to defence;
- enhancing the legitimacy of investigation procedure;
- improving the arrest and detention system;
- strengthening the protection of victim's rights; and
- strengthening court-oriented trials.

Adoption of Fundamental Principle of Un-custodial investigation

Article 198 of the Revised Criminal Procedure Act proclaims that a criminal investigation shall be conducted principally on a suspect in a non-custodial status. This creates a presumption against detaining the criminal suspect. Factors to be considered in determining the use of detention are: the severity of the crime, the danger of recidivism, and concern for the

[5] Law No. 8496 of June 1, 2007. The "121 provision" revision was designed to systematically rectify the act by rationally improving the regulations on arrest and detention and the rights and interests of the accused and suspects in criminal procedure; introducing trial-centred court examination procedures; and widening the scope of "*Jaijeung Shinchung*"(an application of re-examination of the public prosecutor's decision not to issue an indictment). It also aims to guarantee the public's human rights and due execution of the government's right to dispense punishment by rectifying shortcomings in criminal procedure as currently handled, including expanding the scope and availability of criminal trial records that can be made public.

peril of a victim or important witnesses. Because of this newly adopted clause, suspected criminals have the *prima facie* right to ask for non-custodial investigation against criminal investigations.

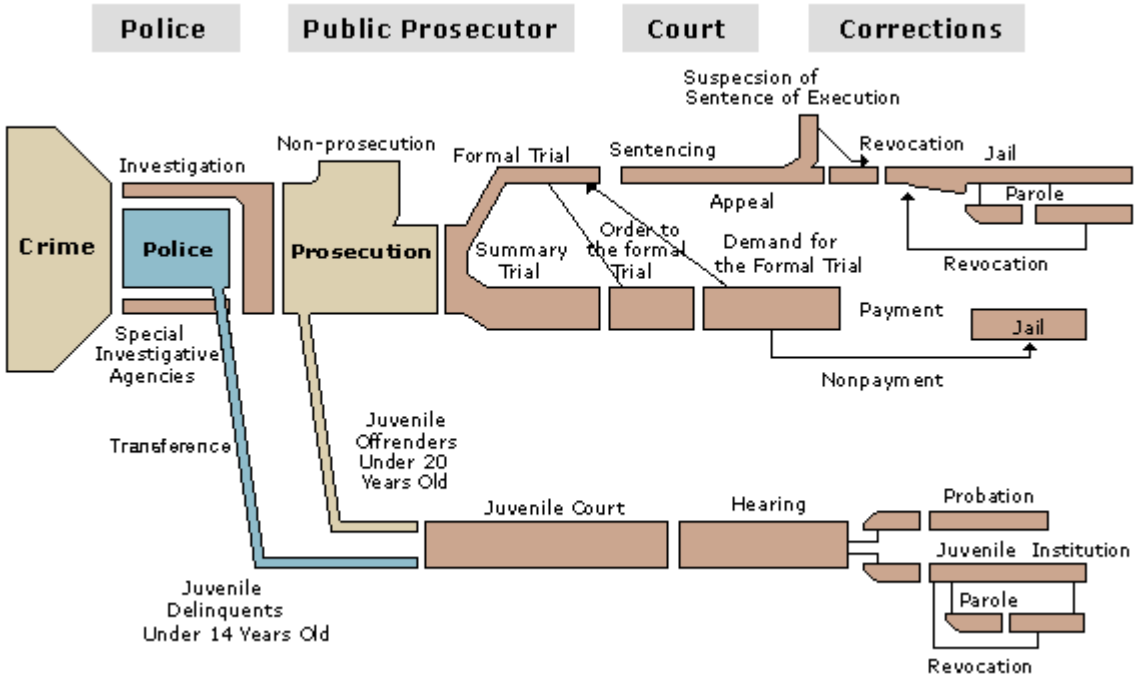
Advance Notification of the Right to Refusal

Article 244-3 of the Revised Criminal Procedure Act strictly requires that interrogating prosecutors and police officers give a suspect advance notification that she may refuse to answer questions. This requirement is different from the generally recognized Miranda Warning that is stipulated in Article 200 (2) of the Revised Act. This revised Article 244-3 of the Criminal Procedure Act is introduced to overcome the common interrogation practice in which the Miranda Warning is delivered *pro forma*. Because of this provision, a suspect must be informed in advance of interrogation that: (i) she has a legal right to refuse to answering any or all the questions; (ii) she will not be subjected to unfavourable treatment of she refuses to answer; and (iii) all of the statement given to the interrogator shall be used as evidence against her. The fact that the notification is given and the response from a suspect as to whether she exercises her right to have an attorney must be recorded in the dossier, the formal document required by the Criminal Procedure Act to be submitted as written evidence at trial. This article will enhance a suspect's awareness of her rights with respect to her response to the interrogation.

2.3 Tasks and Functions

Under the current Korean criminal justice system, a formal investigation can only be conducted by public prosecutors. A general overview of the criminal justice system is as follows:

[Figure 2: General View of Criminal Justice System in Korea]



Police officers and other investigative authorities can conduct investigation only under the direction and supervision of a public prosecutor. But, in reality, prosecutors cannot investigate all crimes because of capacity limitations. Thus, most criminal investigations are in fact conducted by judicial police officers rather than prosecutors. According to the statistics, 97% of all criminal suspects every year are initially investigated by the judicial police, and the prosecutor's role is to screen the cases conducted by judicial police officers.

There are two kinds of investigation methods in Korea. One is compulsory investigation which is conducted under a warrant issued by a judge and the other is voluntary investigation which is conducted without a warrant.

Compulsory Investigation

1. Arrest

First, we will describe arrest and detention during compulsory investigation. Before January l, 1997, the Criminal Procedure Law only had a detention warrant system. . But, through a revision of the Criminal Procedure Act, an arrest warrant system was introduced from the beginning of 1997. If there is probable cause to suspect that a person committed a crime and she refuses to appear in an investigative agency's offices without any reasonable ground, or there is a concern that she may disappear, the investigative authorities can arrest a suspect with an arrest warrant issued by a judge (Article 200-2 Criminal Procedure Act). A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant.

2. Emergency Arrest

The following cases are exceptions to the warrant requirement for arrest:

(i) Any person may arrest, without a warrant, an offender who is committing or has just committed an offence (so-called *in flagrante delicto*).

(ii) The police or public prosecutor may arrest a person who is believed to have committed an offence punishable by death, life imprisonment or up to three years imprisonment when there is not sufficient time to obtain a warrant in advance (Previous Article 200-3 Criminal Procedure Act). The New Article 200-3 of the Revised Criminal Procedure Act added two supplementary clauses as cases of urgency: (i) concern about the destruction of evidence, or (ii) the suspect is on the run or a flight risk.

Article 200-4 of the Revised Criminal Procedure Act mandates that a prosecutor must request a warrant 'without delay' when a suspect has been arrested under the emergency provision. This newly adopted article is, however, very limited in its application for the time being since 'without delay' is not clearly defined in the law. Police officers and prosecutors prefer to interpret 'without delay' as meaning within 48 hours.[6] A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant. This article also includes a measure to prevent abuse of the system. If a prosecutor releases a suspect without requesting a warrant, the prosecutor must notify the accused with respect to the emergency arrest and subsequent release. The released suspect, her attorney, or his or her relatives may review the notification document for any illegalities with respect to the emergency arrest.

3. Detention

The public prosecutor requests a detention warrant from a judge after screening the case if the following conditions are met: (i) The suspect has no fixed dwelling; or (ii) There are reasonable grounds to believe the suspect may flee or destroy evidence (Article 201 Criminal Procedure Act).

4. Mandatory Court Hearing on the Request of the Arrest or Detention Warrant

Article 201-2 of the Revised Criminal Procedure Act demands that a court provide a hearing for all suspects under arrest. Previously a court hearing was provided only at the request of a suspect. The hearing under this article must proceed promptly and be completed by the next day if the warrant is requested. With this revision, the criminal procedure system in Korea has finally overcome suspicions from peers based on the lack of explicit provisions guaranteeing a suspect's fundamental right to be heard by a competent judge before the arrest.

5. Court’s Review of Arrest and Detention

[6] The previous emergency arrest system has been arguably misused to secure premature confession or a suspect's unprepared answer because a prosecutor has the right to have the suspect detained for 48 hours without a warrant. According to the Previous Article 200-4 of the Criminal Procedure Act, if the arresting police officer thinks that detention of a suspect is necessary, a detention warrant must be requested from a judge through the same procedure as in an arrest warrant within 48 hours from arrest.

Article 214-2 of this Revised Criminal Procedure Act allows all suspects to have their arrest reviewed by a court whether they have been subject to a warrant or have been arrested without warrant under the emergency exceptions. Previously, only suspects arrested under a warrant were allowed court review. This article also requires arresting criminal investigators to notify the suspect's attorney, relatives, family members, etc for the purpose of facilitating this review system. Once the request for review is received from a suspect, , a court must complete.

In practice, this article has had a great impact, because approximately over 60% of all suspects under arrest are emergency arrest cases.7 Although this new system review system received relatively little attention when it came into effect in January 2008, it became prominent in the aftermath of the so-called 'Candlelight Vigil Demonstration' protesting President Lee Myung-bak's policies. For the more than three months in the spring of 2008, mass protests held a candlelight vigil to protest a Korea-U.S. deal to fully open the local market to American beef. The new review system became very important in reviewing the emergency arrest of citizen activists. So far, the implementation of Article 214-2 of the Revised Criminal Procedure Act appears to be functioning well in practice. The statistical report of the Supreme Court does not distinguish between cases brought under arrest warrants and detention warrants, but according to its statistics, 1120 arrests out of 1140 were reviewed by the courts. 406 persons were released by court' order (36.3%), while 495 persons' requests were dismissed by the courts after review.[8]

6. Time Limits of Arrest and Detention

When the police detain a suspect, the suspect must be transferred to the public prosecutor within 10 days or else released(Article 202 Criminal Procedure Act). After the completion of the investigation, the police transfer the suspect to the public prosecutor's office. The public prosecutor can detain the suspect for 10 days (Article 203 Criminal Procedure Act). The 10 days detention in police custody and a further 10 days detention under the public prosecutor are granted by a detention warrant. If more investigation is necessary, the judge can grant detention of an additional 10 days upon the public prosecutor's request (Article 205 Criminal Procedure Act). The maximum term of pre-prosecution detention is thus 29 days, since the detainee's transfer day from the police to the prosecutor is calculated in the detention period on both sides. Before questioning, the police or a public prosecutor must inform a suspect of his/her right to remain silent (Article 12 (2) Constitution; Article 200 (2) Criminal Procedure Act).

[7] According to the unofficial statistics of the Supreme Prosecutor's Office, as quoted in a journal article, for 5 months from January 1997 to May 1997 detention warrants against 31913 suspects were requested by the prosecutors. Among 31913 suspects, only 2878 suspects were previously arrested under arrest-warrants, the number of suspects under *flagranto delicto* arrest was 10976, and the number of suspects under emergency arrest was 17878 (approximately over 60%). See Ryu, Jee-Young, "Ginguepchepo-ui munjejeom-gwa gaeseonbangan (Problems of Emergency Arrest System and Their Improvement)" in *Hyeongsabeop Yeongu (Journal of Criminal Law Association)* No. 20 (winter 2003), p. 285, footnote 27.

[8] Source: The Supreme Court, Bopwontonggyewolbo (Monthly Statistic of the Courts), January 2009 – December 2009.

7. Suspect's Right to have an Attorney Participate in the Interrogation

A suspect also has the right to consult with a lawyer during pre-trial detention (Article 12 (4) Constitution). Suspects in police custody are held in police detention cells, while those who have been transferred to the public prosecutor's office are detained in official pre-trial detention houses. The Constitution provides detainees with the right to request the court to review the legality of detention before indictment. Article 243-2 of the Revised Criminal Procedure Act articulates the suspect's right to have an attorney participate in the criminal interrogation. This Article requires that a judicial police officer or a prosecutor must allow an attorney to interview and communicate with a suspect in the interrogation process. This Article is aimed at substantiating the right to attorney in Article 12(4) of the Constitution and codifying the judicial opinion in the Korean Constitutional Court case (2004. 9. 23, 2000 Heon Ma 138), which recognized the suspect's right to obtain, upon request, access to an attorney during interrogation.[9] The suspect's attorney, however, is not allowed to interfere with an investigation into the crime other than the suspect's interrogation.[10] All of the attorney's opinions delivered during the interrogation of her client shall be recorded in the interrogation dossier (Protocol) which is required to be submitted as written evidence at trial and verified by the attorney. This right of suspect is enormously important, and broader than the right upheld in other nations that usually allow an attorney to be present at the place of interrogation.

Before the introduction of Article 243-2 of the Revised Criminal Procedure Act this constitutional right of the suspect was unstable because of the lack of clear legal provision, though rulings by the Supreme Court and the Constitutional Court had emphasized the rights as mentioned above. In line with the democratization process, the Supreme Prosecutor's Office voluntarily introduced 'Managerial Regulation on Attorney's Participation in the Interrogation' in 2003. Now Article 243-2 of the Revised Criminal Procedure Act of 2007 has instituted a clear requirement that investigators must, upon application from a suspect, his counsel, or relative, allow defence counsel to have an interview with the suspect or participate in the investigation "unless there is any justifiable reason otherwise." It also provides that the investigator may designate counsel if the suspect does not have representation. However, contrary to expectations, the new provisions have not been much utilized, as the following table demonstrates:

[9] Even before this landmark decision of Constitutional Court there was a similar decision from the Supreme Court: Decision of 11. November 2003, 2003 Mo 402 [Gongbo 2004, 271].

[10] Originally the government bill of revision included the process of all the stages of investigation in the area where the suspect's attorney may participate. During the deliberation at the National Assembly, the area of participation had been narrowed by worries that the secrecy of the criminal investigation was compromised too much.

[Table 1: Cases in which attorney participated in the interrogation]

Year	2003	2004	2005	2006	2007	Jan to Sept 2008
Cases handled by the prosecutors	1,914,979	2,057,194	1,845,624	1,809,624	1,948,306	1,499,261
Cases in which attorney participated	112	158	303	367	541	580
Percentage	0.01%	0.01%	0.02%	0.02%	0.03%	0.04%

[Source: Peopnyulsinmun (Legal Newspaper) of Jan 20, 2009.]

It is believed that the main reason that attorney representation during interrogation is so rarely utilized is because of the costs. In Korean practice, an interrogation can last over 8 hours once a day. Only a few suspects can bear the expenses of attorney and, even if a suspect wants his or her attorney to participate in the interrogation at any cost, his or her attorney will not usually have the time to participate in the entire interrogation. On the other hand, some assert that the conditional clause 'without justifiable reasons otherwise' may be a factor. However this allegation may be at least partially unfounded allegation, because these days the prosecutors or police officers don't seem reluctant to enforce this Article. Some Prosecutor's Offices voluntarily introduced the prior notification system of an attorney's right to participate in the interrogation. Therefore, for the brisk and vigorous use of this system, the various strategies that could give incentives for the voluntary participation of attorney are urgently needed.

Search and Seizure

Another component of the so-called compulsory investigation rules is search and seizure. The procedure of issuing a search and seizure warrant is similar to that of an arrest and detention warrant. The investigative agencies can search and seize places and things when they have a search and seizure warrant issued by a judge (Article 215 (1) Criminal Procedure Act). A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant (Article 215 (2) Criminal Procedure Act). So, at this stage, a public prosecutor can screen the cases applied for by police officers. But the following cases are exceptions to the warrant requirement for search and seizure:

1. When the police or a public prosecutor arrests or detains a suspect, they can search and seize without a warrant at the crime scene (Article 216 Criminal Procedure Act).
2. The police or a public prosecutor can search and seize things, which are owned or possessed by a suspect who has already been under urgent

arrest within 24 hours from arrest (Article 217 (1) Revised Criminal Procedure Act).[11]
3. the police or a public prosecutor can seize things which are brought forward by the owner or possessor (Article 218 Criminal Procedure Act).

Wiretapping

As in other countries, secrecy of communication is protected by the Constitution in Korea (Article 18 Constitution). But in some crime investigations, the police and a public prosecutor need to wiretap in order to apprehend fugitives and investigate criminal activities. On this point, there is a conflict of interest between the constitutional right and the investigative need. We restrict the legal wiretapping strictly to those cases covered by a special law, the Communication Secrecy Protection Act. Under this Act, wiretapping can only be permitted under strict conditions and by restricted procedures, and a request for wiretapping permission may be made only by a public prosecutor; police officers must apply to a public prosecutor for permission (Article 6 (1) Communication Secrecy Protection Act). So, at this stage, a public prosecutor can screen the case applied by police officers.

The public prosecutor requests a written permission for wiretapping from a judge under the following conditions:

1. There is enough ground to suspect that some specific crimes which are enumerated in the Act are planned, performed or were performed.
2. It is difficult to hinder commitment of crime, apprehend a criminal, or collect the criminal evidence with methods other than wiretapping (Article 5 Communication Secrecy Protection Act).
3. The maximum period for wiretapping is three months, but an additional three months can be granted by a judge, if necessary (Article 6 (7) Communication Secrecy Protection Act).

Voluntary Investigation

In Korea, “voluntary” investigation processes include interrogation of a suspect by summons, inspection at the scene, interrogation of a relevant witness and so on. If it is necessary for criminal investigation, a public prosecutor and the police can demand the appearance of a suspect and listen to the suspect’s statement (Article 200 Criminal Procedure Act). A public prosecutor and the police must notify the suspect that he/she has the right to remain silent in advance before listening to the suspect’s statement (Article 12 (2) Constitution). But a public prosecutor and the police can’t force the suspect to appear without an arrest or detention warrant because interrogation by summons is considered to be voluntary. As in other countries, interrogation of a suspect is one of the most important investigation methods. When a crime is committed, investigative agencies usually perform on-site inspection at the crime scene, if necessary. At the on-site inspection, they try to recreate the crime situation, analyse the

[11] Previously, in case of emergency arrest, investigators were allowed to search and seize items in the suspect's possession, custody, or under suspect's management for 48 hours without warrant under the Article 217 of previous Criminal Procedure Act. This practice was largely criticized because of its rampant absuse. Article 217 of the Revised Criminal Procedure Act limits the scope of the emergency search and seizure to be incidental to the emergency arrest that has already been executed. The new emergency search and seizure is allowed when a seizure of a necessary item is time pressed, so as to obtain warrant for the period of 24 hours.

crime and collect the relevant evidence. This is a very important criminal investigation method, especially when serious and violent crimes such as murder, robbery, rape are committed. A public prosecutor and the police can demand appearance of a witness by summons and listen to the witness's statement. But a public prosecutor and the police can't force the witness to appear.

Video Recording

Article 244-2 of the Revised Criminal Procedure Act introduces a technical advance in establishing a video recording system for interviews with witnesses or interrogation of criminal suspects. Even though video recording has had very limited evidentiary value, restricted to roles such as establishing the genuineness of an interrogation document, serving as an interview document in or helping to refresh witness memory, it will be henceforth be utilized to ensure the strict observance of the law in all criminal investigations. Video recordings, however, have a lot of potential to distort the true facts through editing and manipulation of the scene. Considering the risks, the Revised Criminal Procedure Act strictly requires that (i) a suspect and/or her attorney be informed in advance of the scheduled video recording, (ii) the recording must cover the entire investigation process without omitting any scene, and (iii) when finished, the video recording shall be sealed under signature before a suspect or her attorney. This measure is designed to reduce the risk of manipulation.

Recording of an Investigation Process

Article 244-4 of the Revised Criminal Procedure Act requires that a judicial police officer and an investigating prosecutor record in a separate document items such as (i) the time when a suspect arrives at the place of interrogation, (ii) the time when the interrogation is initiated and ended, (iii) other facts that are need to review the process of interrogation. This revision is aimed at ensuring an interrogation process that is transparent and thus results in the legality of the evidence, the voluntariness of the suspect's statement, and the possibility of effective review of the investigation.

2.4 Relations

Relationship between Prosecutor and Judicial Police Officer

Under the Korean Criminal Procedure Act, the relationship between prosecutor and the judicial police officer is not one of cooperation, but rather a hierarchical one (Article 196 Criminal Procedure Act). Accordingly, the public prosecutor directs and supervises the judicial police officers in connection with criminal investigation and the police officers should obey the prosecutor's official order (Article 53 Public Prosecutor's Office Act). In case a judicial police officer does not comply with a prosecutor's order, the prosecutor can, through his/her chief prosecutor, request that the police officer stop the investigation or request a superior to replace him/her (Article 54 Public Prosecutor's Office Act).

Prosecutor's Authority to Inspect the Place of Arrest or Detention

To deter unlawful arrest or detention, the chief prosecutor of the district public prosecutor's office or its branch offices dispatches prosecutors once a month to the place of the investigation where a suspect is being arrested or detained. The inspecting prosecutor examines relevant documents and questions the arrestee or detainee (Article 198-2 (1) Criminal Procedure Act). If there is reasonable ground to believe that any suspect has been arrested or detained in violation of due process, the prosecutor should release the suspect or order the judicial police officer to transfer the case to the prosecutor's office (Article 198-2 (2) Criminal Procedure Act). The purpose of this system is to protect individual rights from unlawful infringement. This provision emphasizes the prosecutor's role as an advocate of human rights.

Private Complaint Crimes

Some offenses, known as "private complaint crimes," require a private complaint to be brought prior to prosecution. For example, the crime of granting an illegal contract based upon illegal demands (Article 30 of the Fair Contract Awards Act) requires a notice or private complaint from the Chamber of Fair Trade as a pre-condition to prosecution. Another example is tax offenses. There is a requirement of notice from the relevant government official prior to the initiation of proceedings to collect penalties for tax violations under the Tax Evasion Control Act, and a notice of demand from administrative officials in regard to certain proceedings under the Custom Act.

Co-operation for Scientific Investigation

Relying only on traditional investigation methods, it is difficult to solve new kinds of crimes, which are getting more sophisticated and ingenious. For forensic criminal investigation there are several laboratories in the Supreme Public Prosecutor's Office (a lab for DNA Analysis Section, Drug Analysis Section, Polygraph Section, Document Examination Section, Criminal Photography Section, Phonetic Analysis Section and Psychological Analysis Section). Public prosecutors and the police utilize various advanced devices, for example, computer systems, VTRs, poly-graphs, the most state-of-the-art identification equipment such as Automatic DNA Sequencer, Computer Polygraph System and other equipment in performing their prosecutorial functions in order to enhance the efficiency of criminal procedure. Also, investigation equipment such as Passive Night Vision System, Wireless Video Camera, Cellular Telephone Interceptor are also available for scientific investigation. A criminal DNA Data Base is planning to be established and fully operated in the near future. In addition, there is the National Scientific Investigation Laboratory that assists scientific investigation which the police perform. The laboratory is under the direction of the Ministry of Government Administration and Home Affairs and it actually performs a central function and duty in the police's scientific investigation.

2.5 Mechanisms

Coordination

The National Intelligence Service (NIS) is charged with collection, coordination, and distribution of information on the nation's security and strategic environment. The Korean NIS has a duty to maintain documents, materials, and facilities related to the nation's classified information. In this context, the NIS is entitled to investigate the crimes affecting national security. These include violations of the Military Secrecy Protection Law and the National Security Law [12] which prohibit the incitement of civil war, foreign troubles, and insurrection. In addition it investigates crimes related to the missions of its staff. In this limited area the NIS belongs to the category of special police officers.

Administrative

Organized by the United States Army Military Government in 1945, the Korean National Police Agency (KNPA) was formally activated in 1948 by the new Korean government and placed under the Ministry of Interior. Under the Police Act of 1991, the KNPA is an independent organization from the Ministry of Public Administration and Safety, which is also in charge of overseeing elections. The National Police Board, which is a civilian organization, has been established to advise the Commissioner General of the KNPA regarding various police matters such as promotions, budget, equipment and investigation of alleged human rights abuses by the police. The structure of the KNPA itself is a highly centralized and vertical paramilitary structure. The KNPA consists of a headquarters, sixteen metropolitan/provincial police bureaus, the Combat Police, the National Maritime Police, an antiterrorist unit, the Central Police Academy, and other support services, such as a forensics laboratory, a hospital, and other police schools. As of January 2010, there were 244 police stations and 760 police substations (*Jigudai*), 793 police boxes (*Pachulso*) and detachments throughout the country. The National Police Headquarters [13] exercises authority over all police components. Metropolitan and provincial police bureaus are responsible for maintaining public order by directing and supervising their own police stations. The police station is responsible for maintaining public peace within its own precinct. [14] The

[12] The National Security Law dates back to 1948. After liberation from Japan, conflicts between leftists and rightists reached a peak on the Korean Peninsula. The Yeosu-Suncheon Revolt took place on Oct. 19 1948, when troops stationed in the two South Jeolla cities refused to put down a civilian uprising on Jeju Island. The Syngman Rhee government, only two months into its term, acted quickly and mercilessly, suppressing the revolt in eight days. Alarmed by the incident, the government established the National Security Law in December 1948. Both communism and pro-North Korea activities were deemed illegal. During the Chun Doo Hwan administration of the 1980s, the law was merged with the Anti-communism Act. Throughout Korea's modern history, debate about the law has been continuous. Numerous constitutional challenges have been attempted, and the latest ruling came in 2004. The Supreme Court upheld the law's legitimacy, citing the nation's security situation as justification.

[13] As of January, 2010, the national police agency consists of 1 Deputy Commissioner General, 7 Bureaus, 4 Authorities, 1 Spokesperson, 1 Deliberator, 10 Director Generals and 28 Divisions. Subsidiary facilities are the Korea National Police University, Police Training Institute, National Central Police Academy, Police Investigation Training Center, National Police Hospital and Driver's License Agency.

[14] The police station had seven functioning sections: an administration and public safety section, responsible for operation and supervision of police substations and boxes, litigation of minor offenses, traffic control, and crime prevention; a security section, responsible for maintaining public order; an investigation section for investigating criminal incidents, lawsuits, booking criminals, custody of suspects, detention-cell management, and transference

police substation or police box takes initial actions in all criminal incidents, civic services, and accidents. Police boxes are the South Korean equivalent of the cop on the beat. They provide direct contact between the people and the police. Police box personnel are supposed to know their areas and the people who live and work in them. Police boxes are commanded by lieutenants or sergeants and have reaction vehicles available on a twenty-four-hour basis.

Oversight and Inspection

Control Measures over the Police

Owing to the political instability of the twentieth century in Korea, the political neutrality of the Korean National Police Agency (KNPA) has not been secured. Instead, the power of the police had been significantly abused in favour of illegitimate ruling governments as a political tool. The KNPA often participated in manipulating various elections, including a presidential election in 1960. A significant portion of police personnel and resources had been allocated to suppress political opponents and democratic movements, consequently neglecting the primary roles of the police in preventing crimes and serving the public. Under these undemocratic and authoritarian regimes, abuse of human rights and acts of brutality by the police were pervasive. The police used various torture techniques and harsh maltreatment against political suspects, resulting in numerous human rights abuses and torture-related cases of death.[15] One of the most well-known cases is the death of *Pak Chong-chol* during a police investigation in 1987. A 21-year-old student Pak was being interrogated regarding an anti-government student organization and subjected to a forced water intake torture by repeatedly forcing his head under water. Except in a few well-known cases, however, few police officers were criminally charged or disciplined internally because of the violations of human rights.[16]

With the founding of the Sixth Republic, such reports declined. To ensure and enhance the political neutrality of the KNPA, some external and internal control measures have been implemented since the 1990s.[17] First, the current KNPA has been established, which is an independent organization from the Ministry of Interior (now Ministry of Governmental Administration and Safety Affairs), which is in charge of overseeing elections. Second, the National Police Board, which is a civilian organization, has been established to advise the Commissioner General of the KNPA regarding various police matters such as promotions, budget, equipment and investigation of alleged human rights abuses by the police.

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of cases and suspects involved in criminal cases to prosecution authorities; a criminal section responsible for crime prevention; a counterespionage section; and an intelligence section, responsible for collection of intelligence and information.

[15] See Pyo, Chang-Won, "Policing: the past", *Crime & Justice International*, Vol. 17 No. 50, pp.5-6.

[16] See in detail, Cohen, J., Baker, E. (1991), "US foreign policy and human rights in South Korea", in Shaw, W. (Eds),*Human Rights in Korea: Historical and Policy Perspective*, Harvard University Press, Boston, MA.

[17] Recognizing the serious problems caused by the lack of political neutrality of the police, reform plans were proposed several times (i.e. 1955, 1960, 1972, 1980, 1985, 1989). Finally, with the enactment of the Police Act in 1991, the current police, KNPA, which is out of the direct control from the Ministry of Interior, were established and the National Police Board was also created to ensure political neutrality and autonomy for the police

Despite the introduction of control measures and intensive reform efforts, the KNPA has not secured political neutrality and it is still vulnerable to political influence in many ways. For example, the external control measures implemented have been ineffective to ensure political neutrality of the KNPA. The structure of the KNPA itself, which is a highly centralized and vertical paramilitary structure, from top to bottom, can be easily manipulated to serve the interest of the ruling government. Since there has not been a fixed tenure system, the Commissioner General has been frequently changed at the will of the President. In addition, the National Police Board, which was intended to ensure political neutrality and increase transparency of the KNPA, cannot have any influence on the KNPA. The Board belongs to the Minister of Public Administration and Safety as an advisory committee, thus significantly diminishing the political neutrality of the Korea Police Board itself. Worse, the board is only responsible for advising on police policy such as budget, equipment, and personnel administration. It is not given actual power to supervise the operation of the police and thus becomes a perfunctory organization, making it useless for ensuring and enhancing the political neutrality and transparency of the KNPA. To be reborn as a democratic and politically neutral police organization, more structural reforms are necessary. In particular, the structure of the police should be decentralized, to avoid the concentration of police power.[18]

Role of Anti-Corruption and Civil Rights Commission

The Anti-Corruption and Civil Rights Commission (ACRC)[19] performs the following three functions:

- Handle and address public complaints and improve related unreasonable systems
- Build a clean society by preventing and deterring corruption in the public sector
- Protect people's rights from illegal and unfair administrative practices through the administrative appeals system. Thus, ACRC has the function of oversight and inspection over the activities of criminal police officers.

2.6 Criminal Investigators

Recruitment and training of police officers is done through the Central Police Academy, the National Police College, and the Police Consolidated Training School. The Central Police Academy was established in 1987. It is capable of simultaneously offering a six-week training course for police

[18] In order to decentralize police power, each local police headquarter should be given authority and command to perform police works, while a central police headquarters is responsible for coordinating and supervising the police work of local police headquarters. This modified centralized police system, which Japanese police have adopted, has been known to be very effective in decentralizing police power, while maintaining the advantages (i.e. efficiency and effectiveness) of a centralized police system. See in detail, Reichel, P.L., *Comparative Criminal Justice system: A Topical Approach*, Prentice-Hall, Upper Saddle River, NJ (2002).

[19] Legal ground for the foundation of ACRC: Act on Anti-Corruption and the Establishment and Operation of ACRC (Law No. 9402).

recruits, a two-week training course for draftees of the Combat Police[20], and a variety of basic specialized training courses for junior police. The National Police College had graduated some 2,879 (159 women[21]) officers since its first class graduated in 1985. Each college class had about 120 police cadets, divided between law and public administration specializations. The cadets share a collective life for four years at the college. The goal was to establish a career officer's corps similar to those created by the military academies. The Police Training Institute provided advanced studies, basic training for junior police staff, and special practical training courses for security and investigative officers from the counterespionage echelons of police agencies. It also trained Maritime Police instructors, key command personnel for the Combat Police force, and foreign-language staff members. Police Investigation Training Centre provided advanced courses for the scientific investigation skills.

According to the White Paper on Police published by KPNA, the number of police officers (except of the Combat Police) on its payroll is 99,554 in 2009. Recently, in May 2010, the Government Cabinet has approved a bill to add hundreds of riot troops and special crime investigators that will increase the total from 99,554 to 100,611, exceeding the 100,000 mark for the first time since its establishment in 1945. The KPNA celebrates the fact that the number of the nation's police officers is about to surpass 100,000. As of 2009, there is one police officer for every 498 people in Korea, a relatively low ratio compared to other developed countries. According to White Paper the per capita population per policeman in Hong Kong is 249, France is 273, Germany 310, the U.S. is 354, Australia is 450, and Japan is 499 as of 2007 (Korea was 507 that year). Therefore, to improve police service the increase of the number of police officers seems necessary. The annual budget for the Korean police (Korean Won 175,985,200,000 = approx. US$ 146,349,438) accounts for 4.0% on average of the annual governmental budget (Korean Won 6,968,400,000 = approx. US$ 5,794,927,234). Toward improving public safety, the KPNA regularly demands the increase of the annual budget, but the increasing rate per year (5.6% on average) is lower than the rate of whole governmental budget (7.7% on average).[22]

Conclusion

The practice of criminal investigation in Korea has been changing very rapidly. This rapid change has raised some conflicts among institutions involved in criminal justice, for example between the police and prosecutors in the context of investigation. In several countries, the police have criminal investigation departments. In Korea, that role is

[20] The Combat Police force was technically subordinate to the Ministry of National Defence, but the Ministry of Public Administration and Safety and the Korean National Police were responsible for its operational management and budget. During hostilities, the Combat Police reverted to the Ministry of National Defence. The members of the Combat Police were conscripted at age twenty or older and served for approximately two-and-a-half years. Divided into companies, the Combat Police force was assigned to the metropolitan police bureaus. Except for supervisory personnel who were regular KNPA officers, the Combat Police were paramilitary; their primary responsibilities were riot control and counter-infiltration. Under normal conditions, they did not have law enforcement powers as did regular KNPA officers. In 1967 the Combat Police force was organized to handle counter-infiltration and antiriot duties.
[21] The National Police College began admitting women in 1989.
[22] Source: KNPA, *Gyeongchalbaekseo* (White Paper on Police) 2009, p. 341, Table 7-35.

taken by the Special Investigation Division of the prosecutor's office. Currently, there is a strong push by the police force to gain certain investigation rights, but it is being strongly resisted by the prosecution. There is also a struggle between judges and prosecutors. In the past, judges used to issue arrest warrants requested by prosecutors virtually as a matter of course. Currently, the Seoul District Court denies some 40 percent of arrest warrants. In the past, lawyers did not resist the prosecutors. Now, they fight back. As Korean lawyers become more westernized, their voices in court are getting louder. At the same time, there is an increasing number of NGOs adding to the chorus of demands for improvement. As a result, a lot of cases, which would have been judged guilty as a matter of course, are now being found not guilty.

In the meantime, the Korean police, siding with investigating prosecutors, due to the political manipulation of the police under the authoritarian governments, have been violating constitutional and human rights in the investigation process, especially in political cases such as the above-mentioned *Pak Chong-chol* case that ironically served as a momentum for the 1987 democratization movement. The Revised Criminal Procedure Act of 2007 has more new stipulations and provisions in the process of trial, evidentiary rules, discovery procedure, bailment, judicial review of prosecutor's decision of non-indictment, etc. Those other stipulations are closely related to the investigation conducted by a judicial police officer and an investigating prosecutor. Criminal investigation should be performed in the light of these principles.

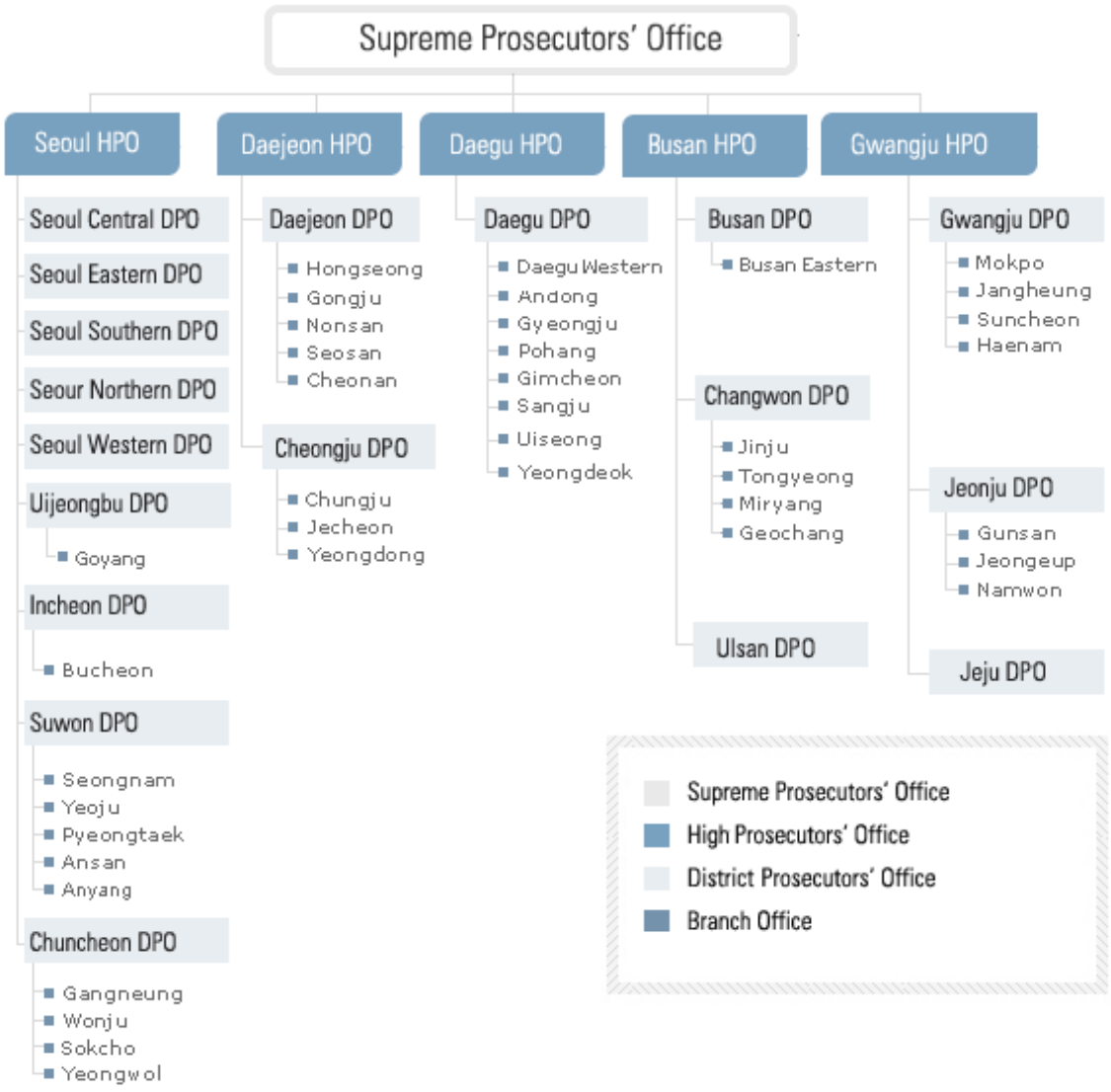
In the investigation process, the Revised Criminal Procedure Act stresses procedural due process in which the rights of defence for a suspect are secured and detention of a suspect is legally checked: adoption of fundamental principle of non-custodial investigation (Article 198 of Criminal Procedure Act), Suspect's Right to have an attorney participation in the interrogation (Article 243-2 of Criminal Procedure Act), the introduction of the video recording system into the criminal interviews with witnesses or criminal interrogation with suspects (Article 244-2 of Criminal Procedure Act), advance notification of the right of refusal (Article 244-3 of Criminal Procedure Act), and the recording of an investigation process (Article 244-4 of Criminal Procedure Act). One of the most important revisions is the request for warrant 'without delay' after emergency arrest. Article 200-4 of the Revised Criminal Procedure Act mandates a prosecutor to request warrant 'without delay' when a suspect is under the emergency arrest, to prevent criminal investigators from abusing the emergency arrest system. Article 201-2 of the Revised Criminal Procedure Act requires a mandatory court hearing on the arrest. Article 214-2 of the Revised Criminal Procedure Act allows all suspects, whether arrested with or without a warrant, access to a court to review the detention. With the revision in 2007, the Korean criminal investigation system has been finally modernized to guarantee the rights of the suspect.

3. Prosecution/Procuracy

3.1 Organisation

The organisation of public prosecutor's office in Korea has already been briefly described (See above 1.3 and 2.1 A). The prosecution has exclusive authority as there is neither a grand jury system nor private prosecution in Korea. The organizational structure of public prosecutor's office is as follows:

[Figure 3: Structure of Public Prosecutor's Office]



3.2 Model

Two Faces of the Prosecutors' Organization: quasi-judicial status

The organizational model of the Korean prosecution system is rooted in a concept of prosecutorial independence that corresponds to the idea of judicial Independence. The concept of judicial independence originates from the principle of separation of powers, and is designed to ensure checks and balances among government organs. In other words, it is generally accepted that judicial independence means that organizations and operations of the judicature shall be independent and separated from the administrative and legislative powers. But the prosecutors' character is in between the judicial and the administrative powers: it is judicial in that it involves indictment and participation in the trial, but executive because the ultimate purpose of the prosecutors' organization is the imposition of appropriate punishment upon criminals.

The prosecution in Korea has occasionally been criticized for being influenced by politics. Such claims are less common since democratization began in. However, there are still some 'political' cases that raise doubts about the investigation motive of the prosecutor's office. For example, on April 23, 2010, the Seoul District Court's ruling on a bribery case involving former Prime Minister Han Myung-Sook exposed the prosecution's political bias. The court found Han not guilty of bribery charges.[23] Han, a well-known Roh supporter who served as Prime Minister in the Roh administration, was running for the mayor of Seoul. She hoped that strong public sympathy for the late leader Roh would help her win the June 2 local elections, but it appears that she lost the election. Conservative Koreans, many of them in the government of President Lee Myung-Bak, despise Roh as a failed left-leaning politician, but supporters have criticized the prosecution for bringing false charges against Han as well as Roh without solid evidence from the political motive. (As mentioned in the Introduction, Roh, who served as president from 2003-2008, took his own life in 2009, about three weeks after appearing at the prosecutor's office for questioning.)

Under Korean law, each prosecutor has independent authority to exercise his/her power in the investigation of crime, participation in the trial process and the execution of judgments. In this respect, prosecutors have the same independence in performing their works as judges have. On the other hand, to enable prosecutors to effectively achieve their purpose, prosecutors form a pyramid organization, at the top of which is the Prosecutor General who can be directed and supervised by the Minister of Justice.[24]

[23] See Korea Times of 23 April 2010.

[24] Article 8 of the Public Prosecutor's Office Act states that the Minister of Justice may "generally" direct and supervise public prosecutors but for "specific cases" can only direct and supervise the Prosecutor General. Thus, in order to secure the independence of public prosecutors from political influences, the role of the Prosecutor General in Korea is extremely important in the criminal justice system. So, the term of the Prosecutor General shall be 2 years, and he shall not be re-appointed, and he shall not promote or join any political party within a two-year period after he retires from office.

Paradigm Shift of 2004

Previously, the monopoly power to prosecute and the significant discretionary power to suspend prosecution were so central to Korean criminal justice that many regarded the system as embodying "prosecutorial justice (*kumch'al sabop*)."[25] In practice, Korean prosecutors normally indicted only when they accumulated what they considered to be overwhelming evidence of a suspect's guilt, and the courts, historically, were predisposed to accept the allegations of fact in an indictment. In other words, the prosecutors reported the result of their investigation (prosecutor-made dossiers) to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter.[26] This predisposition was reflected in both the low acquittal rate, less than one or two percent, in criminal cases and in the frequent verbatim repetition of the indictment as the judgment.[27] The principle of "innocent until proven guilty" applied in practice much more to the pre-indictment investigation than to the actual trial. This was called "skeletonizing (*Hyunghaewha*) of the trial." Thus, the Korean prosecutors might be considered "half-judges"[28] or "de facto judges."[29] Those phenomena of "prosecutorial justice" and "skeletonizing of the trial" have led to criticism that the court seemed to put more emphasis on investigative documents for efficient and speedy trial rather than the courtroom proceeding. The courts themselves aggravated this problem by their accepting the evidentiary power of prosecutor-made dossiers. However, the Supreme Court's ruling on December 16, 2004, has changed nearly everything.[30] It no longer infers the actual genuineness of a transcript from the fact that the accused has signed it. From the beginning of 2005, the paradigm shift could be clearly seen in Korean legal circles, and the noisy quarrel between the Judiciary and the Ministry of Justice erupted into newspapers and TV reports.[31] The 2007 revision of the Criminal Procedure Act has "nearly" confirmed the paradigm shift from prosecutorial justice to concentrated trial. The hot debate over Article 312 (1) of the previous Criminal Procedure Act[32] ended in a compromise: Article 312 (1) of

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[25] For example, Kuk Cho, 'The Unfinished "Criminal Procedure Revolution" Post-democratization South Korea', 30 *Denv. J. Int'l L. & Pol'y* 377 (2002). Japanese criminal procedure is similar to the Korean in this respect.

[26] The previous Article 312 (1) of the Criminal Procedure Act (Law No. 341, Sept. 23, 1954, revised July 19, 2006 as Law No. 7985) has given exceptionally strong evidentiary power to the prosecutor-made dossiers even if they are hearsay. The Supreme Court recognized the legitimacy of this Article 312 (1). See Decision of the Supreme Court of March 8, 1983, 82 Do 3284; Decision of the Supreme Court of June 26, 1984, 84 Do 748. The Constitutional Court also held this article to be constitutional. See Decision of the Constitutional Court of May 26, 2005, 2003 Heon Ka 7.

[27] Statistic in Korea also shows the conviction rate is over 97% in average.

[28] Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law*, Vol. 6 No. 2, 2007, pp. 163.

[29] Cho, Kuk, "The 2007 Revision of the Korean Criminal Procedure Code" " *Journal of Korean Law*, Vol. 8 No. 1, 2008, pp. 18.

[30] Judgment of the Supreme Court of December 16, 2004, 2002 Do 537.

[31] Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law*, Vol. 6 No. 2, 2007, pp. 176.

[32] Before the 2007 revision, it provided that interrogation dossiers, which can include defendants' statements or confessions, may be admissible at trial (i) if they contain a defendant's signature and were made by prosecutors, and (ii) "if there exist special circumstances which make the dossiers reliable," without cross-examination of the interrogators even if the defendants contend that the contents of the dossiers do not match what they stated during interrogation. Assuming that interrogation by prosecutors itself may fulfil the requirement of "special circumstances which make the dossiers reliable," the Supreme Court recognized the legitimacy of Article 312 (1). Thus, prosecutors enjoyed a significant evidentiary advantage. However, Article 312 (1) was strongly criticized because it made it extremely difficult for defendants to escape guilty verdicts at trial once they made self-incriminating statements in front of prosecutors.

the 2007 revision of Criminal Procedure Act keeps the evidentiary power of the prosecutor-made interrogation dossiers alive but imposes stricter requirements. [33] Previously, all of the investigation documents were presented to the judges to be read and reviewed before the beginning of the actual trial. At present, however, the judges are to only review the written indictment prepared by the public prosecutors, and they are not to review the investigation documents before the trial actually begins.[34] Thus, in the new system, which might be called "a concentrated and open trial" or "oral argument-oriented trial," the investigation documents are to be presented to the judges in the courtroom only when each and every document is legally admissible.

3.3 Tasks and Functions

Introduction

Article 4 of The Prosecutor's Office Act declares the powers and duties of prosecutors as the following:

1. To carry out criminal investigation, prosecution and presentation of a criminal case at court.
2. To direct and supervise police regarding criminal investigation.
3. To require the court to justly apply law.
4. To direct and supervise the execution of court decisions.
5. To carry out, direct or supervise law suit or tribunal where the state is involved.
6. Other powers as provided by other laws or regulations.

Under Korean law, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to convict a suspect (Article 247 (1) Criminal Procedure Act). This is called the Principle of Discretionary Indictment, and is the opposite of the Principle of Compulsory Prosecution. The purpose of the Principle of Discretionary Indictment is to enable the prosecutor to take into consideration criminal policy in deciding whether to prosecute a specific suspect. However, some lawyers are critical of this principle in that: (1) such a principle cannot effectively control a prosecutor's arbitrary decision, and (2) it is possible that the exercise of the prosecution authority might be influenced by political pressure.

Discretionary Power and its Criteria

Section 1 of Article 247 of the Criminal Procedure Act provides that the prosecutor may decide to suspend prosecution considering the factors enumerated in Article 51 of the Criminal Act. The prosecutor may decide not to prosecute a suspect taking into account the suspect's age (either young or old), character, pattern of behaviour, intelligence, circumstances, relationship to the victim, motive and method for committing the crime, results and circumstances after the crime. These are non-exclusive, so that prosecutors may exercise their discretionary power considering factors

[33] See in detail, Cho, Kuk, "The 2007 Revision of the Korean Criminal Procedure Code" *" Journal of Korean Law*, Vol. 8 No. 1, 2008, pp. 18-21; Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?*" Journal of Korean Law*, Vol. 6 No. 2, 2007, pp. 175-177.
[34] See Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?*" Journal of Korean Law*, Vol. 6 No. 2, 2007, p. 176.

other than those enumerated in the article. In Korea, many cases are dropped under the procedure as suspension of prosecution. As for the offences stipulated in the Criminal Code such as theft, violence, suspension of prosecution is exercised in about 60 percent of the cases.

Procedure for a Decision of Suspension of Prosecution

1. Written Oath

In principle, the prosecutor reprimands the suspect for committing a crime and has him/her write an oath stating that he/she will not commit a crime again in the future. Irrespective of whether the suspect is detained or not, the prosecutor summons, admonishes the suspect and has that person write an oath. Sometimes in reality, however, the prosecutor sends an admonishing letter to the suspect instead of having him/her write an oath when he/she is not detained, as a means of reducing the prosecutor's work load. When the suspect is a juvenile or student, the prosecutor also has the suspect's parent or teacher submit a written oath to the prosecutor stating that he/she will supervise the suspect well so that the suspect will not commit a crime again in the future.

2. Arrangement for the Suspect's Protection

When deciding to suspend prosecution, the prosecutor may entrust the suspect to his/her relative or a member of the Crime Prevention Volunteers Committee. In the event that there is no person to accept the suspect or if it is inappropriate in the prosecutor's opinion to entrust the suspect to someone, the prosecutor may request social organizations such as the Korean Rehabilitation and Protection Corporation to protect the suspect.

3. Disciplinary Action

In principle, when the prosecutor decides to suspend prosecution against a public official because the crime committed is a trivial one, the prosecutor should ascertain the result of the disciplinary process held by the organization to which such public official belongs. Moreover, within 10 days from the beginning of the investigation against a public official, the prosecutor is obliged to notify the organization to which that official belongs of the fact that investigation is going on. Generally speaking, such organization does not proceed with disciplinary action against the public official. Consequently, it is rare for the prosecutor to ascertain the results of disciplinary action before making a suspension-of-prosecution decision against a public official.

Suspension-of-Prosecution Decision for Juvenile Offenders on the Fatherly Guidance Condition

Prosecution for juvenile offenders under the age of 18 can be suspended under the so-called fatherly guidance condition. It is a suspension-of-prosecution decision on the condition that the offender is subject to the protection and guidance of a member of the Crime Prevention Volunteers Committee for a period of six to twelve months after the decision,

depending on the possibility of committing a crime again in the future. The volunteers are nominated by the chief prosecutor of the district public prosecutor's office. Korea has operated this system nationwide since January 1, 1981 to prevent juvenile offenders from becoming repeat offenders and to rehabilitate them into sound and reasonable citizens. In light of the low rate of such offenders committing another crime and the high rate of usage of this system, we can say that it has worked very effectively so far.

Suspension-of-Prosecution Decision on the Probation Committee Guidance Condition

A similar system operates with regard to adult offenders under a 'Probation Committee.' For offenders who need probation and guidance by experts for a period of six to twelve months, the prosecutor can entrust the offender to a member of the committee.

3.4 Relations

Jaijong Sinchong

The Criminal Procedure Act provides the court with instrument to check the prosecutor's wide authority in indictment ("*Jaijeong Sincheong*"; Court-ordered-indictment System). In the event the prosecutor has decided not to indict, a person who lodged a complaint with a right to such a complaint may make file a petition with the appropriate High Court for adjudication as to whether the prosecutor's disposition was proper (Article 260 Criminal Procedure Act). The court must render a ruling to institute public prosecution, if it is held that the petition has a ground (Article 262 Criminal Procedure Act). The chief public prosecutor of district public prosecutor's office shall, upon receiving a written decision on adjudication, assign a public prosecutor to take charge of the case and the assigned public prosecutor shall institute the public prosecution accordingly. In the past, this system was restricted to certain crimes such as abuse of official authority, illegal arrest and detention, etc., but with the revised act of 2007, all crimes are covered under the system. To formally institute an indictment, a public prosecutor must file and submit a written indictment form with the name of the accused, the alleged crime, the facts thereof, and the applicable provisions of law (Article 254 Criminal Procedure Act).

Special Prosecutor System

The special prosecutor system is designed to allow independent lawyers, other than prosecutors, play a prosecutor's role in investigating a case. Under the system, developed by the United States, lawyers who are independent of the administration are designated as special counsel to investigate alleged irregularities or other illegal activities of high-ranking government officials. The system was introduced to Korea for the first time in 1999, just as it was going out of favour in the United States after the impeachment of President Clinton. Special prosecutors require specific legislation for appointment. A special prosecutor, who may appointed by President, Assembly or Chief Justice, acts independently and has the power to indict anyone based on its investigation.

3.5 Mechanisms

Prosecutorial oversight

The dangerous of the Principle of Discretionary Indictment is that the prosecutor might abuse the power or that the decision will be affected by political pressure. So, it is necessary to set some limitation on the prosecutor's discretionary power. The criteria for the exercise and control of discretionary power should be consistent with the ends of criminal justice. In this sense, the discretionary power is to be exercised and controlled on a standard of rationality. There are several controlling devices which can be classified into two categories: internal controls and external controls.

Internal Control: Control by Superior

All decisions made by a prosecutor are subject to the control of his superior. The superior is required to review and check the propriety of the decision. Also, he must review whether or not the decision complies with the criteria of prosecutorial policy. In practice, the Deputy Chief Prosecutor reviews all cases disposed of by prosecutors prior to the review by the Chief Prosecutor who actually checks only selected cases. The Deputy Chief checks not only the propriety of the decision but clerical mistakes in the case files. The prosecutors are required to write the reason for the decision not to prosecute. The reasoning must be succinct and precise. Writing the reason of the decision not to prosecute is regarded to be important in terms of the control of discretion. The prosecutor is psychologically restrained by this requirement of writing reasons. The Chief or the Deputy Chief Prosecutor usually reads the decision document which is written by the prosecutor. If the Chief or the Deputy Chief thinks that the Decision is inappropriate, then he asks the prosecutor for an explanation of the reasoning for the decision. They discuss the matter thoroughly until they reach a common conclusion. This practice is generally based on the theory that the assigned prosecutor knows more than his superior about the case. In this case, they call the prosecutor to explain the case and the reasoning of the decision. In case of a conflict of opinion on legal issues, superiors are likely to yield to prosecutors, because the legal responsibility for the specific decision is charged not to the superior but to the prosecutor. In the matter of policy, however, prosecutors usually concede to superiors. If a prosecutor anticipates conflict on opinion with a superior, he may discuss the case with them prior to making the decision.

Control by General Guidelines

Prosecutorial discretion is also controlled by general guidelines of instructions issued by the Prosecutor General. Since the Prosecutor General has a duty to carry out a coherent prosecution policy, he, from time to time, issues direction or instruction in the form of general guidelines. The legal character of an instruction as a form of general guideline issued by the Prosecutor General is usually regarded as an internal notification that is in effect merely inside of the prosecutor's office. Nevertheless all the guidelines regarding investigation inside the prosecutor's office are open to the public. Every guideline is numbered, and can be easily found on the internet website of the Supreme Prosecutor's Office. There has

been no case in which the prosecutorial guideline or instruction was the basis for an appeal in the courts' criminal procedure, as it has only 'internal' effects. But prosecutors are bound by these official guidelines. If a prosecutor wilfully disregards these guidelines, he may be subject to disciplinary punishment within the administrative structure. And, the Prosecutor General annually dispatches an inspection team which consists of one Supreme Prosecutor and several Senior Prosecutors to all subordinate prosecutors' offices in order to review the propriety of decisions made by prosecutors. Normally, the emphasis of the inspection is given to the decisions not to prosecute. If they find any impropriety, they may issue a mandate in the name of the Prosecutor General to re-investigate or institute prosecution. The outcome of this inspection is utilized as reference material in the formation of prosecution policy for the next year.

Administrative Management

The qualifications to become public prosecutor are identical to that of a judge and an attorney. Anyone who wants to be appointed as a public prosecutor must pass the Judicial Examination held by the Ministry of Justice and then complete the two-year training course at the Judicial Research and Training Institute, which is supervised by the Supreme Court. The appointment and assignment of all prosecutors are made by the President upon the recommendation of the Ministry of Justice. There are 4 ranks of public prosecutor: Prosecutor General, Senior Chief Public Prosecutor, Chief Public Prosecutor, and Public Prosecutor. Requirements for appointment and assignment to each rank are different. In the mechanisms for administrative management, the "One Body Principle" or the "Principle of Identity of Public Prosecutors" plays a great role. The Principle of Identity of Public Prosecutors means that all prosecutors, each of whom is an independent office, form a uniform and hierarchical organization, at the top of which is the Prosecutor General. This principle was designed to have all prosecutors perform their work as one body and cooperate with each other. Accordingly, even if a specific prosecutor's work is done by another prosecutor, it does not make a difference in terms of legal effect.

Oversight and Inspection Mechanisms

Terms of appeal (Article 10 Prosecution Office Act)[35]

If the prosecutor decides not to indict, the victim has the right to appeal to a higher prosecutor's office within 30 day from the notification. If the appeal is denied, the victim then has another 30 days to appeal his case to Supreme Prosecutor's Office. This procedure is relatively effective compared to other measures, but has a limit, because the higher prosecutor's offices are usually deferential toward their own "family" of fellow prosecutors. This has led to wide use of constitutional petitions when internal appeal in the prosecutors' office ends in failure.

Constitutional Petition (Article 68-78 Constitutional Court Act)

Article 68(1) of the Constitutional Court Act[36] provides that a constitutional complaint can be filed by "(a)ny person who claims that his basic right which is guaranteed by the Constitution has been violated by an

[35] Law No. 9815 of 2 November 2009.
[36] Law No. 10278 of 4 May 2010.

exercise or non-exercise of governmental power". The act does not define the concept of "exercise" or "non-exercise" of governmental power; however, the Constitutional Court of Korea ruled that a prosecutor's decision not to indict is within the scope of the concept. Therefore, the Court can examine the legality of a prosecutor's decision. The victims or suspects may communicate the petition to the Court with the argument that there has been an infringement of his basic rights. The main purpose for having the Constitutional Court deal with the legality of a prosecutor's decision may be to check and balance the discretionary power of the prosecutor to control the indictment decision. The petition must be submitted to the Court after all other remedies are exhausted, meaning the internal appeal (*'Geomchal Hanggo'*) mentioned above (Article 10 of Prosecution Office Act). According to statistics, however, the Court has admitted only a very few cases (103 cases of the total 15705 filed claims as of May 2010), because the constitutional petition mechanism has caused an overload at the court. As of May 2010, the number of constitutional petitions under Article 68 (1) is 15,705, over 70% of total filings at the Court(18,982).[37]

3.6 Career and transparency issues

As quasi-judicial officers, prosecutors must remain truly objective and impartial in carrying out their duties. To achieve these goals, prosecutors must be independent which means being free from any interference. So in the performance of their duties, prosecutors should be subordinated only through laws in order to insulate the criminal justice system from being abused by political opportunism. As the keeper of the rule of law, prosecutors must make sure that all are equal under the law regardless of their status in society. Particularly, if powerful politicians are breaking the law themselves, it is very important that prosecutors be in a position to stand up and demand that justice must prevail. In order to ensure the independence of prosecutors, Korean laws provide the following:

Guarantee of Prosecutor's Status

The President has the authority to appoint and assign public prosecutors upon recommendation from the Minister of Justice. As mentioned above, the qualifications for the public prosecutor are identical to those of the judge. In addition to these requirements, some professional experience is needed to be appointed as a high-ranking public prosecutor (Article 27 Public Prosecutor's Office Act). The status of the public prosecutor, like that of the judge, is guaranteed by law. The public prosecutor may not be dismissed or suspended from the exercise of his/her powers or be subject to a reduction in salary other than through impeachment, conviction of crimes punishable by imprisonment or more severe penalties or other disciplinary actions based on relevant laws and regulations (Article 37 Public Prosecutor's Office Act).

Limitation of Justice Minister's Direction

In view of the importance of the public prosecutor's role in criminal proceedings, the Public Prosecutor's Office Act states that the Minister of Justice, as the chief supervisor of prosecutorial functions, may generally direct and supervise public prosecutors but for specific cases can only

[37] Constitutional Court, Case Statistics of Constitutional Court of Korea, 2010.

direct and supervise the Prosecutor General (Article 8 Public Prosecutor's Office Act). This is to safeguard the public prosecutor's quasi-judicial status by ensuring each public prosecutor's independence from outside influence with regard to the case in hand.

Status of Prosecutor General

The Prosecutor General in Korea is in charge of affairs of the Supreme Public Prosecutor's Office, exercises general controls over the prosecution, and directs and supervises public officials of public prosecutor's offices. So, the role of the Prosecutor General in Korea is extremely important in the criminal justice system. In order to ensure the independence of the Prosecutor General from political influence, the term of the Prosecutor is 2 years, and he shall not be re-appointed. The Prosecutor General may not promote or join any political party within a two-year period after he retires from office (Article 12 Public Prosecutor's Office Act).

Prohibition of Prosecutor's Political Movement

In order to secure the independence of public prosecutors from political influence, the Public Prosecutor's Office Act provides that "No public prosecutor shall commit any of the following acts while in office: (1) To be a member of the National Assembly or a local council, (2) To participate in any political movement, (3) To be engaged in a business the purpose of which is to obtain any monetary profit, (4) To be engaged in any remunerative duties without permission of the Minister of Justice" (Article 43 Public Prosecutor's Office Act).

Conclusion

Consider what might have happened to a suspect in the past, before the 2007 revision of the Korean Criminal Procedure Act. The first move was to take the suspect into custody. Prosecutors could hold suspects for 30 days before indicting them. After indictment, they could continue to investigate the defendant and interview witnesses. Under Anglo-Saxon law, suspects are usually released on bail, but this did not happen in Korea. Summons for investigation were delivered whenever prosecutors felt like it. And if a suspect was really unlucky, prosecutors would alert the press cameramen to one's imminent arrival, thus ensuring that the initial trial would be in the court of public opinion. During interrogation, the suspect was often alone. Customarily, defence lawyers were not allowed to attend investigations of their clients, though some aggressive law firms sometimes insisted on this right, which was guaranteed by law. Historically, confession had been the prime source of evidence. Questioning sessions could be lengthy, repetitive and highly stressful.

If by western standards some of these practices and means might seem a bit excessive, one needs to put the system into its cultural context. For the prosecutors, getting a guilty verdict could be more about saving face and advancing ones career than about justice. If the prosecutors would lose a highly publicized case because they had simply presented no credible evidence, those involved might face an adverse impact on their future. The bright side was that a good prosecutor would only take to court those cases he or she believed were fully winnable. At the same time, the prosecutors

could display a remarkable amount of sympathy and indulgence for first time lawbreakers — provided that the guilty showed sufficient remorse and contriteness. Some foreigners were too quick to judge the Korean legal system when they learned of the conviction rate over 99 percent.[38] But many of these critics failed to grasp the informal, often compassionate actions by prosecutors who settled many cases without going on to court.

The Supreme Court's ruling on December 16, 2004 (2002 Do 537) started to change this system of prosecutorial justice. The change in a Supreme Court' ruling startled the prosecutor's office as well as subordinate courts because it practically meant that it became much easier for the defendant to wipe out the admissibility of the Record by simply refusing to verify the content of it.[39] In this vein, the revision of Criminal Procedure Act in 2007 was a major crossroad. The *Jaijeong Shincheong* (court-ordered-indictment system)[40] was just one among several institutions to limit the discretionary power of prosecutors. In the past, this system was restricted to certain crimes such as abuse of official authority, illegal arrest and detention, etc., but with the Revised Criminal Procedure Act of 2007, all crimes are covered under the system. In this respect, the court is getting away from relying on investigative documents compiled by the investigative institutions as it did in the past, but instead focuses on the oral arguments by the public prosecutor and the defendant in court as well as the evidence examined in court. In addition, the "prosecutorial neutrality" has been at issue in some political cases. Therefore, the introduction of American style "special prosecutor" as the cure for all the problems with the prosecutors has been one of the topics hotly debated for the recent years. The system was introduced to Korea for the first time in 1999, but the range of application was limited by a special act (so-called "one-point solution"). In conclusion, the judicial reform in Korea has begun to consider the prosecutor as the commander of the investigation and, as the proper party in an trial, not as a half-judge; at the same time, the prosecutor still has to do a lot of things as a "representative for the public interests Therefore, the Korean prosecutor is still a unique system that has combined aspects of the common law system and the civil law system.[41]

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[38] See, e.g., "The percentage of acquittal is fluctuating between 0.4% and 0.6%," Park, Sang Ki et al., *Hyeongsa Jeongchaik (Criminal Policy)*, Hanguk Hyeongsa Jeongchaik Yeonguwon (The Korea Institute of Criminology Press), 7d ed. 2003, Seoul, p. 432.

[39] See, Park, Yong Chul, "Does It Matter Who Wrote It? The Admissibility of Suspect Interrogation Record Written by Prosecutors in Korea", *Journal of Korean Law* Vol. 6 No. 2 (2007), p. 187.

[40] In the event the prosecutor has decided not to indict the case, a person who lodged a complaint with a right to such a complaint may make file a petition for adjudication to find whether such disposition is properly made with the High Court having jurisdiction (Article 260 Criminal Procedure Act). The court shall render a ruling to institute public prosecution, if it is held that the petition has a ground(Article 262 Criminal Procedure Act). The chief public prosecutor of District public prosecutor's office shall, upon receiving a written decision on adjudication, assign a public prosecutor to take charge of the case and the assigned public prosecutor shall institute the public prosecution accordingly.

[41] On my evaluation, combined with cultural trails, see, Cho, Byung-Sun, "Reform Trends of Criminal Procedure in South Korea: Transition to Constitutional Guarantee of Human Rights" *Miguk Heonbop Yeongu (Study on the American Constitution)*, Vol. 17 No. 2 (2005), pp. 41-76; Cho, Byung-Sun, "Reform Trends of Criminal Procedure in South Korea: Transition to Globalization and Rule of Law" *Cheongdai Hagsul Nonjip (Journal of Cheongju University)*, Vol. 6 (2005), pp. 31-105; Cho, Byung-Sun, "'Confucian Legacy' in Korean Criminal Justice: An Example of the Capital Punishment Dialogues" *Cheongdai Hagsul Nonjip (Journal of Cheongju University)*, Vol. 8 (2006), pp. 23-52.

4. Court system

4.1 Role and Position

The judicial branch refers to the national authority that exercises judicial power separate from the administrative and the legislative branch. Article 101 of the Constitution stipulates that judicial power belongs to courts consisting of judges and Article 27 of the Constitution further states that all citizens possess the right to have a fair and prompt trial by legitimate legal procedures. These provisions, along with the ideal of judicial independence, enables the judicial branch to serve as a bastion that protects the basic right of citizens. To have a fair trial that fully protects human rights of defendants and plaintiffs, Article 109 of the Constitution requires an open trial, hearings and rulings. In particular, an open trial during criminal trials is protected as a basic right by the Constitution. Exceptions can be made when hearings may jeopardize national security or social customs. The Korean judicial system is based on the three instance trial system; District Court, High Court and the Supreme Court. Except in Military Courts (Court-Martial) [42] , adjudication proceedings are presided over by judges qualified and appointed by and under the Constitution and the relevant statute. A trial is presided either by a single judge or a panel of three judges. For certain categories of relatively serious criminal offenses, trial by way of lay participation was introduced on a pilot program basis in January of 2008.[43]

4.2 Organisation

There are six types of courts in Korea, which are the Supreme Court, the High Courts, the District Courts, the Patent Court, the Family Court, and the Administrative Court.[44] The District Courts, the High Courts and the Supreme Court form the basic three-tier system. Other courts exercise specialized functions with the Patent Court positioned on the same level with the High Courts and the Family Court and the Administrative Court positioned on the same level with the District Courts. The District Court and Family Court may establish a Branch Court and/or a Municipal Court and registration office if additional support is necessary to carry out their task. The Branch Court of both the District Court and the Family Court may be established under one roof. In addition, there is the Constitutional

[42] There is also other special court such as the martial court. The difference between military court and non-military court is that military officers who are not qualified as judges hear cases in military court, whereas in non-martial court only judges may adjudicate cases under the Constitution and the Court Organization Act. However, the Supreme Court has the final appellate jurisdiction over all cases including those adjudicated in military trials. See generally, Lee, Jang-Han, "The Korean Military Justice System" 1986 *Army Law* 37 (1986).

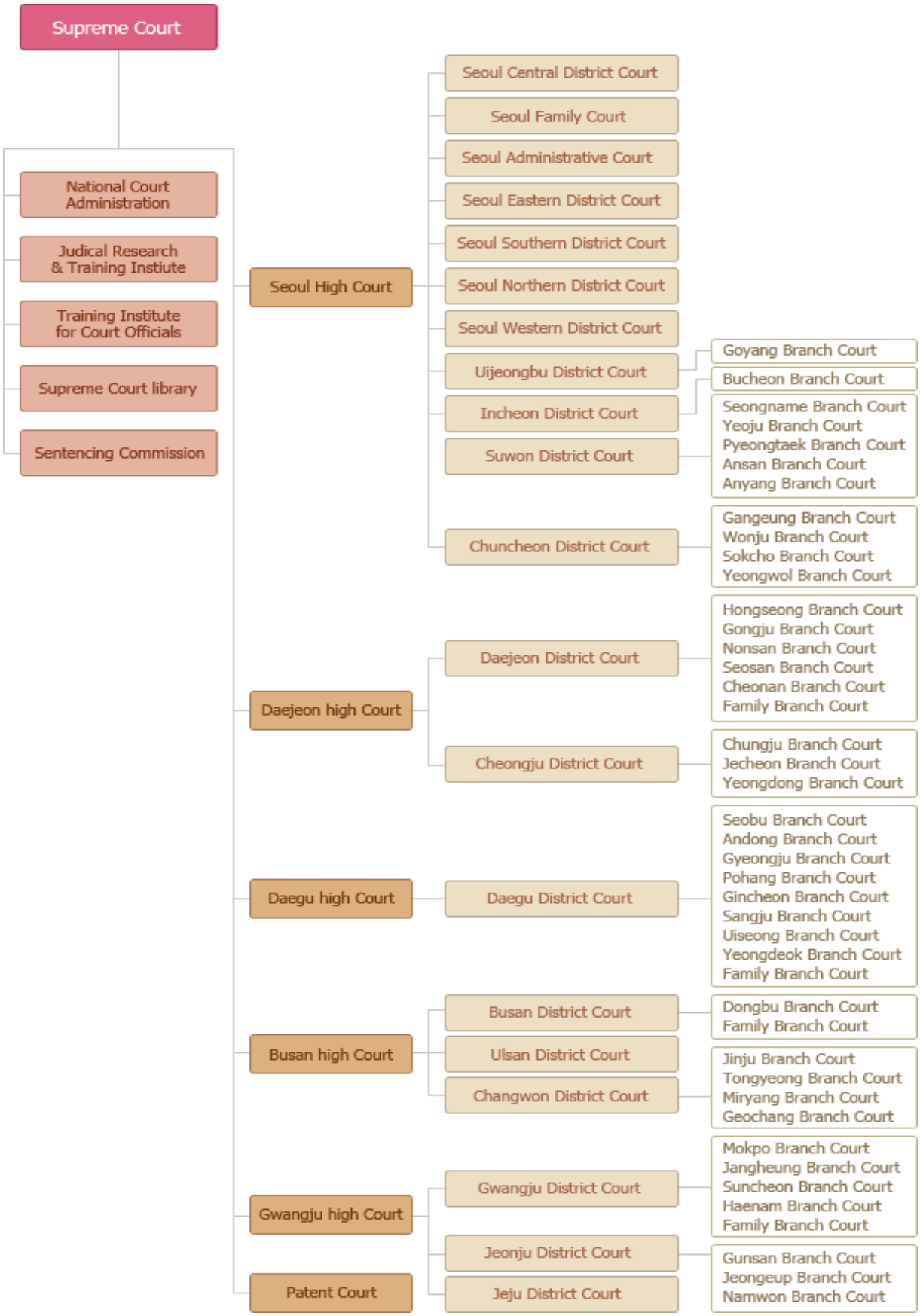
[43] The Civil Participation in Criminal Trials Act (Law No. 8495) that came into effect in January 2008 provides the statutory grounds for South Korea's unique jury system.

[44] The Court Organization Act (Law No. 8794, as most recently revised in 2007) establishes five types of lower courts under the Supreme Court. The Act also provides that the branch courts and/or the municipal courts may be established under the District Courts as necessary.

Court established by and under the Constitution as an independent institution. As of 2009, the number of judges in the Republic of Korea including the Chief Justice and the Justices of the Supreme Court and those in special service as, for example, the professors of the Judicial Research and Training Institute is approximately 2,300.[45]

[45] See Rhee, Woo-young, "Judicial Appointment in the Republic of Korea from Democracy Perspective" *Journal of Korean Law*, Vol. 9, p. 57.

[Figure 4: Court Organization in Korea]



4.3 Model

Judicial System under the Constitution of First Republic

After Korea became independent from Japan in 1945, the Constitution of the Republic of Korea was written and promulgated on the 17th of July 1948. The Constitution declared the separation of powers and provided independence of the courts, term and age limit system of judges, and legal qualification and status guarantee of judges. Ordinary judges were to be reappointed after a ten year term. Based on those provisions of the Constitution, the Court Organization Act was promulgated on the 26th of September 1949 and thereafter a modern judicial system began. While the Constitution formally ensured judicial independence to a significant extent, judicial independence was not firmly secured in practice during the dictatorial period. The President rejected reappointment of some judges when their 10-year-terms expired.

Judicial System under the Constitution of Second Republic

In the constitution of Second Republic established on the 19th of April 1960, Article 78 and Article 81 were amended, and a new article providing for a constitutional court was inserted in Chapter 8. Article 78 in the original Constitution had provided that the Chief Justice of the Supreme Court should be appointed by the president. The Article was amended to provide that the justices of the Supreme Court would be elected by an electoral college consisting of members with qualifications for judges. Ordinary judges were to be appointed by the Chief Justice with the consent of the Supreme Court Justices Council. However, before the election of Chief Justice and other Justices of the Supreme Court could be held, the military revolution on the 16th of May 1961 broke out.

In addition, the Second Republic established a Constitutional Court along the lines of the German model. As with elections to the Supreme Court, these provisions were never effectuated.

Judicial System under Emergency Procedure Act

After the May 16th military revolution, the revolution committee organized the National Rebuilding Supreme Committee, and legislated and promulgated a National Rebuilding Emergency Procedure Act. This Act replaced the constitution for practical purposes, and the Constitution of Second republic was effective only to the extent that it was not in conflict with the Nation Rebuilding Emergency Procedure Act. Under the judicial system under The National Rebuilding Emergency Procedure Act, judicial administrative powers and the right of personnel management of the judges were concentrated in National Rebuilding Supreme Committee, and so the judicial independence could not be secured firmly.

Judicial System under the Constitution of Third Republic

Revulsion against the centralization of power under the National Rebuilding Emergency Procedure Act led to pressure to reinstate systems guaranteeing judicial independence. The Constitution of Third Republic entitled the Supreme Court to the power to adjudicate the unconstitutionality of laws and to dissolve political parties, uplifting the Supreme Court to one of

the highest organizations of state power. It was even possible for the judicial power to attain superiority over other powers depending on its operation. But the so-called *Siwol Yushin* Reforms of in October 1972, again hampered judicial power with a variety of restrictions.

Judicial System under the Constitution of Fourth Republic

The October Revitalizing Reform carried out on the 17th of October 1972 led to the establishment of the Constitution of Fourth Republic on the 27th of December in the same year. It was a beginning of so-called dark days of judicial independence. The Constitution abolished the Judge Recommendation Council, and entitled the president to appoint and assign every judge including the Chief Justice and Justices of the Supreme Court. Judges could be dismissed through disciplinary measures, and the Supreme Court was deprived of its power to review constitutionality of laws, having only the power to request the Constitutional Committee to decide the unconstitutionality of laws.

Judicial System under the Constitutions since Fifth Republic

In the process of establishing the Constitution of Fifth Republic, judicial independence was particularly emphasized. It was to grant the power of appointment of judges and the power of the review of constitutionality that mattered. Under the Constitution of Fifth Republic, as under the Constitution of Fourth Republic, the president appointed the Chief Justice and the Justices of the Supreme Court, while other judges were appointed and assigned their positions by the Chief Justice of the Supreme Court. A disciplinary dismissal was not admitted and the courts were entitled to request a decision of the Constitutional Court when the Constitutionality of a law was at issue.

4.4 Tasks and Functions

Supreme Court

1. Structure

The Supreme Court is comprised of the Chief Justice and 13 Justices. The Chief Justice then appoints one Justice as the Minister of National Court Administration, in a non-adjudicatory capacity. Therefore, in practical effect, the Chief Justice and 12 Justices discharge the adjudicative functions. As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases. It also has the authority to review the ruling rendered by the Korean Maritime Safety Tribunal. In addition, it has exclusive jurisdiction to determine the validity of the presidential or parliamentary election. The Supreme Court has the power to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.

The jurisdiction of the Supreme Court is exercised either by the Grand Bench composed of more than two-thirds of all the Justices with the Chief

Justice presiding, or by the Petty Benches each composed of three Justices or more. Currently, 12 Justices are equally divided into three Petty Benches, so that each Petty Bench has four Justices. While judgments are made by consensus in the Petty Benches, those are sometimes made by a majority of the members present in the Grand Bench. If the members of the Grand Bench are split into two opinions and each opinion does not reach a majority, then the Supreme Court cannot reverse the judgment of the lower court. Most cases are handled in the Petty Benches. However, the case is referred to the Grand Bench in the event that a Petty Bench fails to reach a consensus or a case falls under the categories:

- where it is deemed that any order, rule, or regulation is in contravention of the Constitution;
- where it is deemed that any order, rule, or regulation is contrary to the law;
- where it is deemed necessary to modify the previous opinion of the Supreme Court on the interpretation and implementation of the Constitution, laws, orders, rules, or regulations; and
- where it is deemed that adjudication by a Petty Bench is not appropriate.

The Supreme Court is assisted by a staff of officials, including junior judges on career rotation, and court administration personnel who are selected through competitive examinations (See Section 4.19 below).

High court

Each High Court consists of the chief judge and a certain number of judges. Currently, the High Courts are located in five major cities of Korea - Seoul, Busan, Daegu, Gwangju and Daejeon. The High Courts hear appeals from judgments or rulings rendered either by a panel of three judges of the District Courts or the Family Court, or by the Administrative Court. The High Courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the District Courts or Branch Courts when the amount in controversy exceeds 80 million Korean won (approximately US$ 80,000). The jurisdiction of the High Courts is exercised by a panel of three judges. As of 2009, approximately 290 judges serve at the high court level. In each High Court, there is an administration bureau for internal management and supervision of the court officials.[46]

District court

Each District Court consists of the chief judge and a certain number of judges. There are 18 District Courts around the nation. As in the High Courts, each District Court has an administration bureau which deals with administrative affairs. A Branch Court, Family Branch Court, Municipal Court may be established under the District Court. The District Courts or Branch Courts retain original jurisdiction over civil and criminal cases. In general, a single judge presides over a trial. However, a panel of three judges[47] is required to sit for cases deemed of greater importance, which are as follows:

[46] See Rhee, Woo-young, "Judicial Appointment in the Republic of Korea from Democracy Perspective" *Journal of Korean Law*, Vol. 9, p. 59.
[47] According to the Rule on the Jurisdiction in Civil and Family Law Adjudication, the Supreme Court Rule No. 2163.

- Jurisdiction in Civil cases - cases involving an amount in controversy exceeding 100 million Korean won (approximately 90,000 US$), or if the amount is incalculable. There is an exception for cases involving the claim for payment of checks or bills, or the claim for repayment of loans which are presided over by a single judge regardless of the amount in controversy.
- Criminal cases - cases for which the penalty is death, life imprisonment, or imprisonment for a minimum of one year. There is also an exception for such cases as check counterfeiting, habitual use of violence, habitual larceny, etc. which are presided over by a single judge though they fall under the above mentioned penalties.

In addition, the District Courts have jurisdiction over appeals against the judgments or rulings rendered by a single judge of the District Courts, Branch Courts, or Municipal Courts, except for those which fall under the jurisdiction of the High Courts. This appellate jurisdiction is exercised by a panel of three judges, which is called an appellate panel and different from a trial panel of three judges.

The Municipal Courts exercise original jurisdiction over minor cases. Currently, there are currently 101 Municipal Courts across the nation.[48] The Municipal Courts have jurisdiction over small claim cases in which the amount disputed does not exceed 20 million Korean won (approximately US $18,000) and misdemeanour cases in which the courts may impose penal detention for less than 30 days or a fine not exceeding 200,000 Korean won (approximately US $180).[49]

Specialized Court

Patent Court

The Patent Court was newly established on March 1, 1998 and was accorded a level equal to the High Courts. The Court operates in a two-tier system. When a party is dissatisfied with the decision of the Intellectual Property Tribunal, which was also newly established as an affiliate to KIPO, a lawsuit may be filed with the Patent Court and later to the Supreme Court. The Patent Court has technical examiners to assist judges in highly technical matters.

In patent cases, the court decides on whether the decision of the Intellectual Property Tribunal (IPT) on the rights of patent, utility model, design, or trademark is illegal and should be revoked. The IPT makes decisions on legality of refusal to accept an application for patent registration, on invalidation of patent registration, and on affirmation of the scope of a patent right. The party who is dissatisfied with the decision of the IPT may file a suit seeking to revoke the decision with the Patent Court within 30 days from the date the decision is served. When decision on legality of refusal is challenged, the defendant of a suit shall be the Commissioner of the Korean Intellectual Property Office. When decision on invalidation of patent registration or decision on affirmation of the scope of a patent right is challenged, the defendant of a suit shall be the opposite party in the decision process. On the principle of

[48] According to the Act on the Establishment and the Jurisdiction of the Judicial Courts, Law No. 8244.
[49] According to the Rule on Limited Jurisdiction Case Adjudication, the Supreme Court Rule No. 1779.

separation of powers, the Patent Court can only revoke the decision of the IPT and neither permits patent registration of any invention nor invalidate a patent right.

In Korea, the Patent Court exercises exclusive jurisdiction over patent issues. Under the three-tier system, the Patent Court is situated on the High Court level and has territorial jurisdiction over the entire nation. At the Patent Court, a panel of three judges hears cases. The pleading process and hearings are held as in civil proceedings. As a patent case is a kind of administrative case, the court may examine evidence ex officio if it is deemed necessary. In addition to lawyers, patent attorneys are also permitted to represent the parties in the proceedings at the Patent Court. When the case relates to patent rights or utility model rights, the court normally holds pre-trial hearings where the parties, or their attorneys, are granted the opportunity to fully state their positions and to produce evidence. The Patent Court has technical examiners to assist judges in highly technical matters. They have degrees in various fields such as chemistry, mechanics, metal engineering, life science, electrical engineering, electronics, etc. They may participate in pre-trial and trial proceedings with the presiding judge's approval. To precisely understand the technical aspects of patent- or utility model-related disputes, the Patent Court may hold explanatory sessions where parties or relevant experts can make presentations using drawings, real objects, models, computer graphics, or video devices. When the case relates to design rights or trademark rights, the court does not hold pre-trial hearings because the issues have become evident during IPT decision process. A party who is dissatisfied with the judgment of the Patent Court may appeal to the Supreme Court.

The Patent E-Court: The Patent Court is seeking to introduce an electronic filing system which enables submission, acceptance, and service of documents through electronic devices and a modernized courtroom equipped with high-tech multimedia facilities such as computers, electronic boards, voice recognition cameras, LCD projectors, etc. and a teleconferencing trial system. This kind of move is expected to ease the inconvenience caused by logistical problems, which are inevitable when one court exercises territorial jurisdiction over the entire nation as well as to contribute to establishment of a paper-free court.

Family Court

1. Overview

Currently, there is only one Family Court in Korea located in Seoul. In other areas the functions of the Family Court are performed by the respective District Courts. In addition to domestic relations and juvenile offense cases, the Family Court came to exercise jurisdiction over domestic violent cases in 1988 with the special act relating to Punishment for Crimes of Domestic Violence newly in force. Domestic relations cases are presided over either by a panel of three judges or by a single judge while juvenile offense and domestic violence cases are presided over by a single judge. The Family Court has a conciliation committee to conduct

conciliation proceeding and several investigative officers to perform necessary investigations.[50]

2. Juvenile Offense Case

In case a juvenile aged between 12 to 19 years commits a crime or is delinquent, the chief of the police station, the public prosecutor, or the court may forward the case to the juvenile division of the competent Family Court or District Court. The judge of the juvenile division directs the investigative officer to investigate the crime, the environment of the juvenile, and then decides the case based on the report of the investigative officer. The judge may make protective disposition against the juvenile. Under protective disposition, the juvenile may be left to the care of a guardian, be placed under the supervision of a probation officer, or be sent to a juvenile protection institution, a hospital, or a juvenile reformatory. A community service order or an order to attend a lecture may be issued concurrently with such disposition. However, the protection disposition imposed on the juvenile shall not in any event affect the juvenile's future status.

3. Domestic Violence Case

In case of violence between members of the same household such as spouses or lineal relatives, which results in physical or mental injury, or property damage, the public prosecutor or the court may forward the case to the competent Family Court or District Court. The judge of such court may make a protective disposition, which is aimed at restoring the peace and stability disturbed by the violence as well as improving the constitution of a household. If it is deemed necessary for protection of the victim or proper investigation, the judge may take the following provisional measures: order the offender to leave the dwelling and stay apart from the victim or other family members or order the offender not to enter within a 100 meter radius from the victim's dwelling, etc. In general, the judge directs the investigative officer to investigate the case and decides the case based on the report of the investigative officer. The judge may make one or more protective dispositions against the offender, such as restriction on approach to the victim, a community service order, an order to attend a lecture, probation, and consignment of the offender to an institution for the purpose of preventive custody, rehabilitation, or consultation.

Administrative Court

The Administrative Court was established on a level equal to the District Courts, on March 1, 1998. The Administrative Court is only located in Seoul. Elsewhere, the respective District Courts perform the functions of the Administrative Court. The Administrative Court hears tax, eminent domain, labour, and other administrative cases. In administrative cases, the court decides on whether feasance or nonfeasance of administrative entities is illegal and resolves disputes surrounding legal relationships in public law. Most administrative cases relate to revocation or affirmation of nullity of

[50] See generally, Cho, Byung-Sun, “Juvenile Delinquency and Juvenile Justice System in Korea” *Beophak Nonjip (Journal of Cheongju University Law College)*, Vol. 16 (1999), pp. 81-134.

dispositions or decisions of administrative entities.[51] Dispositions include levy of taxes, suspension or revocation of driver's license, refusal to pay industrial accident compensation insurance money, disciplinary measure against civil servants, suspension or revocation of business license, refusal to accept an application, etc.[52] Decisions include decision of eminent domain by Central Land Tribunal, review decision by National Labour Relations Commission, decision of reparation by the Board of Audit and Inspection, etc.[53] Action for affirmation of status as a civil servant and action regarding a contract in public law are examples of actions that concern legal relationships in public law. Moreover, action for affirmation of illegal nonfeasance is allowed if the administrative entity fails to respond to the application by the public. Only a person who holds a direct and concrete legal interest from revocation of the disposition in question may bring an action before the court. If interest to be restored is indirect or abstract, then the action is not allowed. In general, an action may be instituted without first resorting to a remedy arranged by an administrative entity. However, in regard to levy of taxes, suspension or revocation of driver's license, etc., "exhaustion of administrative remedy"[54] is a prerequisite to filing an action with the court. Legal relationships in administrative law need to be stabilized promptly since there are far-reaching consequences of these influences. In this regard, actions challenging legality of a disposition must be filed within the period prescribed by Administrative Litigation Act or other applicable laws.[55] In principle, administrative proceedings and civil proceedings have similarities in the way they are held. However, as administrative proceedings are more deeply related to the public interest, there is a greater need for the court to intervene ex officio in administrative proceedings rather than in civil proceedings. In administrative proceedings, the court may examine evidence ex officio and consider facts not averred by the parties, though the parties also bear the responsibility to make allegations and to produce evidence. When a disposition is deemed groundless, or, excessively harsh and severe with all circumstances taken into account, even if it has some basis, the court is to revoke disposition in favour of the plaintiff. However, even where a demand of the plaintiff is deemed reasonable, if revocation of disposition is deemed remarkably inappropriate to the public welfare, the court may reject the demand of the plaintiff. The losing party, as in other proceedings, may appeal against the judgment rendered by the trial court to

[51] On so-called "administrative guidance", see, Ginsburg, Tom, "Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea", 43 AM. J. COMP. L. 585, 586 (2001).

[52] In 2003, the number of administrative cases at first trial was 11,411 and at the final appeal (the Supreme Court) 1,564. http://www.scourt.go.kr/scourt_en/jdc_info/statistics/cases/adm_cases/index.html.

[53] See generally, Lee, Hee-Jung, "The Structures and Roles in Judicial Review of Administrative Litigation in Korea" , *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 43.

[54] Administrative Appeal is the quasi-judicial administrative remedy procedure whose ground is found in the Constitution. Before amending the Act in 1994 one could not bring an administrative litigation without exhaustion of administrative appeals. However, since 1994 amendment, the Act allows in principle a complainant to choose whether to bring an administrative litigation directly or to resort to administrative appeal first and then depending on its result to administrative litigation. Otherwise it is only in case individual statutes have a provision to make obligatory to resort to the administrative appeal before instituting a suit.

[55] Professor Ginsburg points out the enactments of Administrative Litigation Act and Information Disclosure Act as a major administrative law reform after 1987. Ginsburg, Tom, "The Politics of Legal Reform in Korea", in Ginsburg, Tom (ed.), *Legal Reform in Korea*, Routlege Curzon, NewYork, 2004, p. 7.

the High Court and then likewise to the Supreme Court. As institution of an administrative action does not preclude the effect or execution of disposition, the judgment in favour of the plaintiff may turn out to be useless if it takes a long time to obtain such judgment. In this regard, the Administrative Litigation Act[56] empowers the court to provisionally suspend, upon a request from the plaintiff or ex officio, the effect or execution of disposition under certain circumstances. However, suspension of execution is not permitted if it is feared to have a seriously negative effect on the public welfare.

The Constitutional Court

The current Constitutional Court was adopted in 1987 at the creation of the Sixth Republic. The Constitutional Court retains jurisdiction over such constitutional issues as the constitutionality of the statute, impeachment, dissolution of a political party, constitutional petitions filed directly to the Constitutional Court, and jurisdictional conflicts involving State agencies and/or local governments. Three factors are necessary to deem an issue of a law's constitutionality a precondition of a court's judgment: first, a concrete case is pending before the court, second, a law applies to the concrete case and third, whether the law's constitutionality affects the outcome of the decision. Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court.[57]

Dispute Resolution System

1. Small Claim Case

A small claim is a case in which the plaintiff claims payment of money, fungibles, or securities not exceeding 20 million Korean won (approximately US$ 17,170). A district court, a branch court, and a municipal court take charge of small claim suits, which amount to over 70 percent of all civil suits. The trial for a small claim adopts various procedures to expedite the resolution of the cases. Here are some examples: When a complaint is filed and there seems no real dispute between the plaintiff and the defendant, the court may render a decision urging the defendant to discharge his/her obligation without asking the reaction of the defendant (a dissatisfied defendant may raise an objection). Some persons in intimate family relations with the parties may represent the parties without court's permission. Evidence may easily be taken. The reasons need not be stated in the judgment. The judgment may be rendered on the same day just after hearings are closed. The grounds for final appeal are strictly limited. The trial proceedings on a small claim, which feature expeditious and convenient processes for resolving disputes, contribute to the protection of the rights of the public. Only about two percent of the judgments rendered by the trial courts on small claim cases are appealed.

2. Civil Conciliation Proceedings

[56] Law No. 6627 of 26 January 2002 taking into effect from 1 July 2002.
[57] See generally, Rhee, Woo-young, “Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication in the Republic of Korea”, *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 17.

A civil conciliation is a legal proceeding whereby a judge or a conciliation committee hears allegations of the parties in dispute, and taking various factors into account, either advises them to make mutual concessions and to seek a compromise solution or renders a compulsory decision to that effect. The civil conciliation proceedings are very useful methods for dispute resolution in that they are more convenient, expeditious and inexpensive than adjudication proceedings, and lead to the ultimate resolution of disputes through an agreement by the parties.

With the enactment of a general statute in 1990, namely the Civil Conciliation Act[58], all types of civil disputes are now encompassed under the court-annexed conciliation. Under court-annexed conciliations, the judge may undertake the conciliation procedure by himself or refer to a conciliation committee composing of three members, including the judge and two other non-judges. Under Article 21 (1) of the Civil Conciliation Act, in cases where it is deemed particularly necessary for conciliation, the conciliation judge may, upon application of one party, order the other party or other persons interested in the case not to change the status quo, or to dispose the goods, and may prohibit other activities which make it impossible or considerably difficult to accomplish the purpose of the conciliation, before the conciliation procedures begin. If conciliation fails, the judge may render a conciliation settlement award. The party who does not accept the award, must file an objection within two weeks from the date the award was served on the parties. If the parties file an objection, the matter will be litigated in court and a judgment will follow trial whereas if they do not file an objection, the settlement award will be finalized. Anyway, if any of the parties object to the conciliation proposal by the judge, the case will be referred back to the ordinary civil process. The settlement award derived from such a conciliation process has the same effect as a judicial compromise and can be readily enforceable. The Supreme Court has been encouraging more frequent use of conciliation proceedings. The number of civil cases resolved in conciliation proceedings has been steadily increasing each year. About 45,715 civil cases were disposed of in conciliation proceedings as of 2006.

3. Labour Dispute Resolution System

The Trade Union and Labour Relations Adjustment Act (TULRAA)[59] regulates dispute settlement. Mediation and arbitration are adjustment procedures. Mediation can be requested by either party and must be completed within 15 days in public services, in general businesses even within 10 days (Arts. 53 and 54 (1) of the TULRAA). It is conducted by either a tripartite committee or a single mediator authorized by the Labour Relations Commission.[60] The mediation proposal needs to be accepted by both parties, for it to have the same effect as a collective agreement (Art. 61 (1) and (2) of the TULRAA). An arbitration procedure must be agreed on by both parties or may be requested by only one if the possibility is established in the previously applicable collective agreement (Art. 62 of the TULRAA). It is conducted by an arbitration committee, which is composed of three members representing the public. After arbitration has started, industrial action must not be taken for 15 days, and the arbitration award of the

[58] Fully revised by Law No. 10200 of 31 March 2010.
[59] Revised partially by Law No. 9930 of 1 January 2010.
[60] Labour Relations Commission Act, Law No. 8474 of 1 January 2008.

committee has the same effect as a collective agreement (Arts. 63 and 70 (2) of the TULRAA).

4. Alternative Dispute Resolution

The definition of Alternative Dispute Resolution (ADR) is not simple, and may vary according to scholars' opinions. Generally ADR in Korea refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, conciliation and consultation. The two most common forms of ADR in Korea are arbitration and mediation. As costs of litigation rise and time delays continue to burden litigants, ADR, which is designed to be a less formal and less complex means of resolving disputes quickly and cheaper than court proceedings, is regarded as an important tool in settling disputes. Arbitration Act which was promulgated in 1966, is an independent body of law which is separate from Civil Procedure Act, and Korean Commercial Arbitration Board is a popular site of dispute resolution.

As with mediation, procedures such as above-mentioned court-annexed conciliation and statutory conciliation have long been used in Korea. Both judicial and administrative procedures may require the parties in dispute to submit to conciliation before adjudicating the matter before a court. Korea has established various Conciliation Committees such as the 'Financial Dispute Conciliation Committee,' the 'Copyright Deliberation and Conciliation Committee,' Consumer Dispute Settlement Committee which was established in the 'Korean Consumers Protection Board,' and the 'Electronic Commerce Mediation Committee.'

4.5 Relations

Investigation, Security and Prosecution Agencies

The exercise of the power of investigation agencies, security agencies and prosecutors can be reviewed by the court, especially through the warrant system, mandatory court hearing on arrest, and review of arrest and detention.

State Agencies

The Administrative Litigation Act empowers the court to decide on whether feasance or nonfeasance of state agencies is illegal. In addition, when the Chief Justice is requested by another government agency to dispatch a judge, the Chief Justice may grant permission if it is deemed proper in light of the nature of service, should the judge consent to it (Article 50 of the Court Organization Act). Currently, judges are dispatched to National Assembly, the Constitutional Court, the Ministry of Unification, and the Ministry of Foreign Affairs and Trade.

Legislative Branches

The Chief Justice is appointed by the President with the consent of the National Assembly. The Justices of the Supreme Court are also appointed by the President with the consent of the National Assembly on the recommendation of the Chief Justice. If it is deemed necessary to enact or

revise laws in connection with the organization, personnel affairs, operation, judicial proceedings, registrations, family registration, and other court affairs, the Chief Justice may present in writing his/her opinion thereon to the National Assembly. The Minister and the Vice Minister of National Court Administration have the right to attend and speak in the National Assembly or the State Council if the issue is related to court administration affairs.

Executive Branches

The judicial branch occupies a strong position, but it is also subject to various restraints under the system of check and balances. The executive branch exercises some role through its involvement in the appointment processes for supreme court justices as described in the last section.

4.7 Judicial education and training

Legal Professional Training System in Korea

To become a judge, one must first pass the Korean Bar Exam and complete a 2-year course offered by the Judicial Research and Training Institute (JRTI) so as to be licensed to practice law in Korea. JRTI was established in 1971 under the Supreme Court to provide training for those have passed the Bar Exam. Since its inception, JRTI has been the only institution that trains and educates prospective legal professionals. JRTI is comprised of President, Vice President, professors and lecturers. The President is appointed by the Chief Justice from among the judges with the rank of chief judge of a High Court.

The Training Institute for Court Officials (TICO) plans and provides a training and development program for court clerks, marshals and other staff of the judiciary. The Institute was founded on September 1, 1979. TICO is headed by a President and has its faculty members. The President carries out all the tasks of the Institute under the direction of the Chief Justice and supervises all the staff members of the Institute. The President is appointed from among the judges or court officials (grade I official). The faculty is appointed among grade III or IV court officials.

Continuing Education of Judges

1. History

JRTI established a training course for the continuing education of judges in 1978. This course, which has been conducted in the form of seminars since 1983, is aimed at improving specialized legal knowledge and practical skills among incumbent judges.

2. Training for Newly-Appointed Judges

In 1988, JRTI established training courses for apprentice judges. After completing these courses, which are held in February, they receive practical training during their two-year apprenticeship, under the guidance of senior judges. Upon completing their apprenticeship, they are formally appointed to the bench. JRTI also has a program designed exclusively after their appointment to the bench. Newly-appointed judges are required to

complete a one-week program, which is designed to help them to acquire know-how in dealing with actual cases in the courtroom.

3. Periodic Training

Apart from seminars, since 1992 JRTI has conducted in-service training for judges at least once every five years after their appointment to office. This periodic training is comprised of four training courses for judges of all levels. Through this course, judge update their professional information on law and related legal issues and acquire a balanced perspective through discussion sessions.

4. Training Courses in Diverse Fields

These training courses include criminal cases, administrative cases, bankruptcy cases, and orientation programs for newly appointed chief judges of branch courts. In addition, a seminar which concentrates on highly debated current issues in the legal practice is held annually.

Overseas Training Programs

The Supreme Court implements and finances overseas training programs to help judges gain advanced work skills, job expertise and motivation and to allow a systematic development of human resources with expertise. Such programs are also intended to introduce an advanced judicial system and operation methodology of other nations as well as to establish a more efficient and optimal legal system in line with rapid changes and the trend of internationalization. Recently, in 2009, the Supreme Court has improved this program, and emphasized long term stays of one year or greater over shorter six month stays. It has also begun to send trainees to more diverse foreign legal systems, including non-English language countries.61 Overseas training programs for judges can be classified as follows:

- Long-term Training Program - through sponsorship and recommendation of the Supreme Court, participants to this program receive training or participate in research in a university, educational institution or research center located overseas.
- Internationalization Training Program - this program aims to promote understanding of diverse cultures and different systems with currently expanding and accelerating global arena as well as to develop new ideas and vitality for the judicial environment.

4.8 Career issues

The Chief Justice is appointed by the President with the consent of the National Assembly.[62] The Justices of the Supreme Court are also appointed by the President with the consent of the National Assembly on the recommendation of the Chief Justice.[63] For the appointment of the Justices,

[61] See Beopnyulsinmun (Law Times) of 16 August 2009.

[62] The National Assembly confirmation hearings were newly introduced in February 2002 under the National Assembly Act (Law No. 9129, as most recently revised in 2008) and the Confirmation Hearing Act (Law No. 8867, as most recently revised in 2008).

[63] The Chief Justice and Justices of the Supreme Court are appointed from among those who are either a judge, public prosecutor, lawyer, qualified lawyer who is engaged in legal affairs at the state organs, local governments, state-run/public enterprises, state-financed institutions or other juristic persons, or a qualified lawyer who is an assistant professor or higher in the field of jurisprudence at an accredited college or university. The candidate must be more than 40 years of age, with an experience of 15 years or longer in one or more of the

an Ad Hoc Advisory Committee for Nomination of Justices, which consists of six to eight persons from various disciplines (mainly legal) is established within the Supreme Court. Currently, the applicable Supreme Court Rule (Rule No. 295; issued July 25, 2003) mandates that the above Advisory Committee should include the Chief Justice of the preceding term, the most senior Justice on the current bench at the Supreme Court, the Minister of the National Court Administration, the Minister of the Department of Justice, the chairperson of the Korean Bar Association, and the chairperson of the Korean Law Professors Association (Article 3 of the Rule), and vests the Chief Justice with discretion to appoint up to two additional members to the Committee as deemed necessary. Upon hearing the advisory opinion of the Committee, which is non-binding, the Chief Justice submits recommendations for the appointment of the Justices to the President.

The Judges of the lower courts are appointed by the Chief Justice with the consent of the Council of Justices (Article 104 (3) Constitution; Article 44 Court Organization Act).[64] Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court. Like many other civil law countries, Korea is taking the "career judge system"[65] whereby those who qualify as judges are immediately appointed as judges.

The Constitution of the Republic of Korea provides that qualifications for judges shall be set by the law (Article 105 (3) Constitution). In accordance, Article 42 (2) of the Court Organization Act states the qualifications for judges as persons who have passed the National Judicial Examination and completed the two-year training program at the Judicial Research and Training Institute or those who have obtained qualifications as lawyers. Private attorneys or public prosecutors can also be appointed judges because they have the same qualifications as judges.[66] After finishing the training, one will be nominated as an apprentice judge for two years. After that period, the person will be appointed a judge. In other words, most of the judges in Korea are generally appointed from among apprentice judges. Some complain that this system produces judges that are very young - most of them are in their twenties or thirties - and not so widely experienced.[67]

In response, on 26 March 2010, the Supreme Court announced a reform under which judges must be appointed from among legal practitioners who have had at least a ten-year career, beginning in 2023.[68] This year was chosen because it will be the year in which graduates from Korea's new system of law schools will reach the milestone of ten years of practice.

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capacities mentioned above. Former Chief Justices and other Justices, for the most part, were judges before their appointment to the respective position.

[64] The Chief Justice annually appoints around 110 new apprentice judges, considering their records in the National Judicial Examination and in the Judicial Research and Training Institute, their ability of sound judgement, and their good sense etc.

[65] In the non-career system that is adopted for example in the United States and England, all qualified judges first become attorneys and will be appointed judges only after acquiring sufficient experience.

[66] The Act on Establishment and Operation of the Professional Graduate School of Law (Law No. 8852) or so-called "Law School Act" was promulgated in 2007 and came into effect in 2008, under which the new graduate-level professional law schools are now in operation as of 2009. The ensuing legislation for the new system for the qualifications to obtain license to practice law in South Korea is currently on the way.

[67] Therefore, Korean Judiciary has sometimes appointed judges among experienced lawyers or public prosecutors as a supplementary measure.

[68] See Internet Newspaper 'Ohmynews' of 26 March 2010.

The career system is one of rotation. Starting as an associate judge in a collegiate division, a judge would trace several steps of becoming a single presiding judge, a chief judge in a collegiate division of district court, a chief judge in a collegiate division of appellate court, and so on as time passes.[69] The most harsh debate relating to this kind of promotion system is focused on promotion from the chief judge in a collegiate division of district court to the chief judge in a collegiate division of appellate court. Judges who fail to get promoted in this step typically resign, usually becoming practicing lawyers (see Section 4.18 below). Some argue that this system is producing a bureaucratic hierarchy among judges. It has been criticized that this system may jeopardize the independence of judges and so endanger the freedom of judgment on the reason that they may weigh options in deciding cases with consciousness of their senior judges' or Chief Justice's opinion.[70] Therefore, according to the above mentioned reform program of the Supreme Court, judges at district courts' level (first track) and judges at appellate courts' level (second track) must be from the earliest stage strictly separated. This so-called two-track system will aim at the prohibition of transfer or shuffling between two tracks and no promotion in each track. This reform program of March 2010 for two-track system is said to look like the American or English life-time career judge system actually.

4.9 Guarantee of tenure

The tenure of the Chief Justice and Justices is 6 years. The age-limit of the Chief Justice is 70, and he/she must not serve consecutive terms. But the Justices whose age-limit is 65 may be reappointed. Although the tenure of other judges is 10 years, they usually serve consecutive terms until they retire either voluntarily or at the age of 63 (Article 45 Court Organization Act). No judge may be removed from office except either by impeachment or by a sentence of imprisonment or heavier, nor may a judge be suspended from office, subject to a reduction in remuneration or other unfavourable treatment except by disciplinary measures (Article 106 (1) (2) Constitution). Remuneration of judges must be suited to the duties and dignity of judges. A judge is subject to disciplinary measures if he/she has committed a serious breach of his/her duties or been negligent in performance of his/her duties. Disciplinary measures may also be taken against a judge who has degraded himself/herself or maligned the dignity of the court. The Judges Disciplinary Committee established within the Supreme Court decides disciplinary actions regarding judges (Article 48 of the Court Organization Act). A resolution of the Committee requires the quorum of majority of all the members and the consent of a majority of the members present.

[69] The Judges Personnel Committee was established as an advisory group to the Chief Justice to plan and coordinate personnel issues. The Chief Justice can evaluate service of the judges and the outcome may be reflected in personnel management.

[70] In consideration of this criticism, the Supreme Court submitted a bill of abolishing the unequal treatment between the chief judges of district and appellate courts to the National Assembly.

4.10 Judicial interpretation

Korea follows a civil law approach to judicial interpretation. The starting point of legal reasoning is almost always a statute or code provision. Judicial precedents play a secondary role. However, in actual practice prior decisions are widely followed by the courts, though there doesn't exist the doctrine of *stare decisis*. Judicial opinions are often characterized as syllogisms. The provisions and their interpretations are the major premise, the proposition stating the crucial facts in the case before the court is the minor premise, and the judge's decision is the conclusion. This type of legal reasoning is a kind of "deductive reasoning." Reasoning by analogy that involves the extension of a legal rule to a fact situation not covered by its express words, but deemed to be within the purview of a policy principle underlying the rule, is actually widely used, though in criminal law reasoning by analogy is strictly prohibited according to the constitutional principle of legality. The grounds consist in the difficulties to distinguish between reasoning by analogy and permissible interpretation of a provision. Although case law is no legal source, court decisions are of central importance to criminal law and procedure, since the "law-in-action," i.e. the law characterizing day-to-day legal practice, is judicial case law to the greatest extent. Thus, in interpreting criminal statutes, the Supreme Court orientates itself to a great extent by publications of legal scholars.

4.11 Adjudication

Except in military courts, adjudication including hearings and rendering judgment is presided over by a judge. Trials are presided over either by a single judge or a panel of three judges. In general, all hearings and rendering of judgments are open to the public.[71] The court conducts its affairs in Korean. Interpretation can be arranged whenever deemed necessary. Procedural formation and substantive formation continue till the case is ripe for adjudication. Adjudication means a final substantive determination on the part of state to apply the law to the particular case. According to the form of adjudications, adjudications can be classified as judgments, decisions and orders. All important final adjudications must be rendered in the form of a judgment which must be based on oral proceedings (Article 37 (1) Criminal Procedure Act). Decisions are also adjudications by a court, but need not be based on oral proceedings (Article 37 (2) Criminal Procedure Act). An order is an adjudication by a judge, and likewise need not be based on oral proceedings (Article 37 (2) (3) Criminal Procedure Act). In terms of the function of adjudication, adjudication can be classified as final adjudication and adjudications prior to final adjudication. Although final adjudication must be rendered basically in the

[71] If there is any possibility that opening of hearings to the public could be subject to impairing national security, public peace and order, or be contrary to good morals, the court may decide to close the hearings to the public. In either case, rendering of judgments must be open to the public under all circumstances. The court may confine for not more than 20 days, or fine for not more than 1 million Korean won (approximately US$ 820), or both on a person who interrupts the conduct of a trial by harsh language, disturbance, etc.

form of a judgment, there is a decision that has character of final adjudication like the acquittal on procedural grounds.

4.12 Jurors

Role

The Citizen Participation Trial introduced in 2008[72] is a unique system that has combined and made partial modification of the jury system of the common law and the lay-judge system of the civil law. The jury, in principle, hands out the verdict without intervention from the judge (an element of the jury system). However, in the event they have not agreed unanimously, they must hear the opinion of the judge (an element of the lay-judge system). Discussion about appropriate punishment is made with the judge who has presided over the hearing (an element of the lay-judge system), but such an opinions are presented to the judge without taking a vote (an element of the jury system). The type of cases can be brought to Citizen Participation Trial is stipulated by law: crimes with the capital punishment, crimes resulting in intentional death, crimes combining burglary, rape, injury, killing, and corruption bribery as well as cases designated by the Rule of the Supreme Court. Cases involving the most serious penalties, capital punishment or life imprisonment, require nine jurors while most others require seven jurors, unless the defendant has admitted guilt in which case five jurors is sufficient.

Defendants (including foreigners) have the right to a Citizen Participation Trial, but the right can be waived and the defendant can choose a conventional trial before a judge only. In addition, the court may decide not to hold the Citizen Participation Trial upon hearing the opinions of the prosecutor, the defendant or the defence counsel. In a recent sexual violence case indicted at the Seoul Central District Court, the defendant wanted a Citizen Participation Trial, but in the face of fierce objection from the victim, the court made the decision to make an exception and deny the right.[73]

Appointment and Training

The juror, the alternative juror and the prospective juror who appeared that day is given a per diem. The prospective juror that appeared on the designated date is paid 50,000 Korean Won (approximately US $40) and those that have performed duties by taking part in the trials after being

[72] As for selected criminal cases, lay participation trials will be implemented on a pilot basis from January 2008. “Citizen Participation Committee” to be formed in 2010, will be composed of members from legal probationers, academia, and NGO groups. The Committee will design a final form of Citizen Participation System to be implemented starting 2012, utilizing the evaluations from the Pilot system. Citizen Participation will be applied to serious criminal cases at first. Applicability of the Citizen Participation System to other types of cases will be determined after reviewing the Citizen Participation's application to criminal cases. The final form of the citizen participation trials particularly suited for the Korean judiciary is planning to be launched by 2012.

73 During the one-year period of January 2008 through January 2009 since the inception of the jury system in South Korea, among approximately 2,500 potential cases (i.e., those cases where the defense could request or could have requested jury trial), the defense requested jury trial in 249 cases or less than 10% of the possible cases. Among 249 cases where the defense requested jury trial during the above period of time, the court decided not to provide a jury trial in 61 cases (24.5% denial rate). See Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp).

designated as the juror and alternative juror is paid the per diem of 100,000 Korean Won (approximately US $80). A juror is selected randomly among the citizens of this country who are over 20 years of age and who live in the jurisdiction of the corresponding district court. The head of the district court compiles the list of the prospective jurors annually by using the resident registration data. When the court holds the Citizen Participation Trial, the necessary number of prospective jurors necessary is randomly selected and notified to the candidate. After questioning the prospective jurors on the date of selection (Voir Dire), the court may make a decision not to select them ex officio.

Relationship with Judges

In the Citizens Participation Trial, there are special regulations regarding trial preparation and trial procedures. Procedures for the trial preparation and trial preparation date are stipulated as mandatory procedures, and the shorthand, audio and video recording of the trials are made mandatory. Intervention by the jury regarding trial on the admissibility in court is prohibited. Following the pleading, the jury deliberates on the guilt or innocence of the defendant without intervention from the judge and renders a verdict unanimously. The representative of the jury is designated who will perform the duty of presiding over the deliberation, requesting the judge to make a statement and compiling the result of the verdict. For a unanimous verdict, the opinion of the presiding judge can be heard at the request of the majority of the juror. In the event the opinion on guilt/ innocence is not unanimous, the verdict is rendered through decision by majority upon hearing the opinion of the judge.

One distinctive feature of lay participation in Korea is that the verdict and sentencing opinion of the jury does not bind the court. This is because it has been argued that the constitutional guarantee of a right to trial by judge means that a jury cannot issue a final decision. Even though the decisions are not binding, they have been followed in roughly 90% of cases during the first several months of the system. It is also the case that the document compiling the result of verdict and opinion is attached to the records of the trial. When the sentence is pronounced, the presiding judge must notify the result of the verdict. The judgement is other than the verdict, the reason must be explained in the written judgement.

Oversight

There are certain legal grounds for which a juror may be challenged for cause and excused, such as a juror incapable of being impartial (Challenge for Cause). In addition, each side can excuse a certain numbers of jurors without giving any reason (Peremptory Challenge). For the safety of the jurors and for their protection, in the court room, jurors are not called by their names.

4.13 Regional delimitations

Every court has territorial competence in cases in which the place of the crime is within its jurisdictional territory or in which the defendant has

his domicile or residence or happens to be present within such jurisdictional territory. If it deems it appropriate, a court can by decision transfer a case pending before it to another court having concurrent competence. This can be done at any stage of the proceedings.

4.14 Judicial Independence

Article 103 of the Constitution stipulates that judges should follow the Constitution, law and regulation, and conscience to declare judicial independence. It is one of the most symbolic parts of a nation that faithfully respects the rule of law and is the request for the separation of three branches. It enables the judicial branch to serve as a bastion that protects the basic right of citizens. To secure the “independence of adjudication” from political or social influences, the personal status of judges is guaranteed as follows:

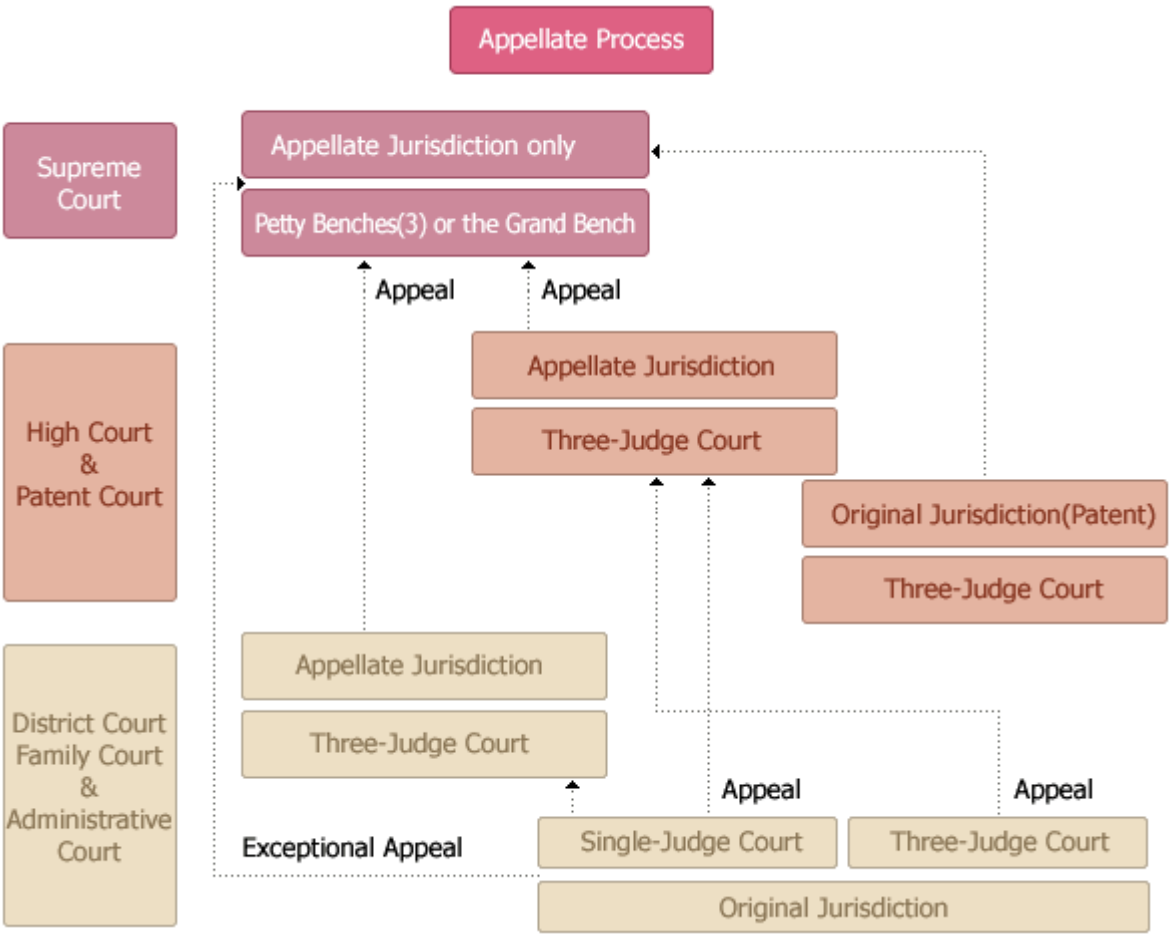
1. No judge may be dismissed from office, except by impeachment or criminal punishment
2. No judge may be suspended from office or have a reduction in salary, except by a disciplinary action of the Judicial Disciplinary Committee of the Supreme Court.
3. To secure political neutrality of judges, the political activities of judges are fully restricted.

4.15 Appeals

Overview over Civil and Criminal Cases

In criminal cases, either the defendant or the prosecutor may initiate an appeal against a judgment of first instance for a review of law or fact. Appellate tribunals can also alter the sentence. The grounds for appeal to the Supreme Court are specifically prescribed in Criminal Procedure Act. In civil cases, a party who is dissatisfied with the judgment of a single judge on any question of fact or law may appeal to the appellate division of the District Court. An appeal against the judgment of a panel three judges of the District Court is lodged with a High Court. Appeal against the rulings or judgments of either the High Court or the appellate division of the District Court must be filed with the Supreme Court, where only question of law may be heard. The organizational structure of the court regarding appeals is as follows:

[Figure 5: Organizational Structure of the Court Regarding Appeals]



Appeal against Minor Offence Summary Trial Procedure

Some minor offences, which are punishable by fines of not more than 200,000 KRW (approximately US$ 180) or detention for less than 30 days, may be brought before the court without a formal indictment. A Summary trial for minor offences is instituted by the chief of a local police station. If the judge considers the summary trial inappropriate, the case may be dismissed. The chief of a local police station should then forward the case to the prosecutor's office. The defendant is entitled to request an ordinary trial, if the defendant is not satisfied with the judgment. In the summary trial, the strict rules of evidence may be waived.

Appeal against Small Claim Action Procedure

For more expeditious and simpler procedures for the settlement of small claims actions, civil cases involving claims not exceeding 20,000,000 KRW (approximately US$ 18,000) are brought as small claim trials. In such trials, the plaintiff can institute an action by making an oral statement to the court clerk instead of filing a written petition to the court. The court clerk must then put such statement record and notify the defendant. The defendant is entitled to request an ordinary trial, if a party is not satisfied with the judgment.

District Court

The District Court is generally the court of original jurisdiction. However, District Court also have jurisdiction over appeals filed against the decisions of a single judge of a District Court, a branch court, or a municipal court. This appellate jurisdiction is exercised by the collegiate division of three judges.

High Court

High courts hear appeals from judgments or rulings rendered either by a panel of three judges of the district courts or the family court, or by the administrative court. High courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the district courts or branch courts when the amount in controversy exceeds 50 million Korean won (approximately US$ 42,920 as of September 2009). The jurisdiction of high courts is exercised by a panel of three judges.

Supreme Court

As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases. Under special circumstances, the Supreme Court hears exceptional appeals from the first trial judgments. It has the authority to review rulings rendered by the Korean Maritime Safety Tribunal. It also has exclusive jurisdiction over the validity of the presidential or parliamentary election. The Supreme Court has the power to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.

In criminal cases, an appeal to the Supreme Court may be made on the following grounds:

1. a violation of the Constitution, law, order, or regulation material to the judgment of the lower courts;
2. the abolition, alternation, or excuse of penalty after the judgment has been rendered by the lower courts;
3. existence of a reason to request for a review; or
4. a grave error in fact-finding or extreme impropriety in the sentencing where the death penalty, a life imprisonment, or an imprisonment of more than 10 years has been imposed. In the Supreme Court, either the Grand Bench composed of the Justices sitting en banc or the Petty Benches, each usually composed of three or four Justices, preside over the cases.

In civil cases, the grounds are limited to the constitutional and legal questions material to the appealed judgment. The six specific grounds for appeal are:

1. cases where a court rendering a judgment has not been constituted in compliance with law;
2. cases where a judge who was precluded by virtue of law from participating in a judgment has participated therein;
3. cases where provisions relating to exclusive jurisdiction have been contravened;

4. cases where there has existed a lack of authority on the part of the legal representative or attorney for commencing procedural acts;
5. cases where the provisions regarding open pleading have been violated; or
6. cases where a judgment has not been supported with reasons or there exists inconsistency in the reasoning.

4.16 Positioning

Strengthening the Role of the Courts in Criminal Cases

As mentioned above, the Revised Criminal Procedure Act of 2007 was designed to systematically improve the regulations on arrest and detention and on the right to legal defence, with the goals of: guaranteeing rights and interests of the accused and suspects in criminal procedure; introducing trial-centred court examination procedures; and widening the scope of "*Jaijeong Shincheong*" (an application of re-examination of the public prosecutor's decision not to issue an indictment).

Article 308-2 of the Revised Criminal Procedure Act explicitly introduces the exclusionary rule of evidence similar to that of the U.S.A. This article pronounces that any evidence which has been gathered in the violation of due process shall not be admitted as effective evidence. Previously, the Korean Supreme Court applied this rule on the interrogatory document submitted as a dossier even though there were no provisions in the Korean Criminal Procedure Act. The rule, however, had a limited application by the Court. Physical evidence, as distinct from an interrogatory document, has been accepted as competent evidence to establish a fact in a case on the grounds that the physical character of evidence cannot be tainted by a violation of the due process. This newly introduced article is not as specific and detailed to resolve the entire dispute on the range of its application. But, the words 'in violation of due process' signifies that any violations of the investigator in gathering evidence against a suspect shall not be tolerated.

Article 316 of the Revised Criminal Procedure Act allows investigators to testify on the statement of a suspect. Previously the Korean Supreme Court has not allowed investigators to testify against suspects for fear that the defendant's power of defence would be severely damaged. [74] The newly inserted Article 316 would be inconsistent with the previous 1995 decision of the Supreme Court and Article 312 (3) of Criminal Procedure Act, denying the admissibility of investigators' interrogation protocol if a defendant does not admit its contents in a trial or in a preparatory hearing. During the deliberation of the revised article, the conclusion was reached that the interrogators' testimony is desirable so long as the interrogators were to be subject to cross-examination by defendants. If defendants take advantage of the cross-examination, they may find significant violations of due process and human rights. Even if investigators testify on the statement of a suspect (which is admissible evidence under Article 316 (1) of the Criminal Procedure Act), the testimony may not carry much weight. This is because, in a case of confession, some independent evidence other than the confession of the accused is necessary to find guilt (so-called

[74] Decision of 24 March 1995, 94 Do 2287.

'principle of supporting evidence to confession'). This is of course also true in non-confession cases. Therefore, allowing investigators to testify on the statement of a suspect may have little impact on the defendants' right to defence.

The 'preparatory hearing' has been introduced in the revised act of 2007. In order to facilitate the efficiency of the newly concentrated public trial, the court may hold preparatory hearing date to organize the points of contention and to discuss the contentions and plans of the prosecutor, the defendant and the attorney (Articles 266-5, 266-10 Criminal Procedure Act). The Revised Criminal Procedure Act of 2007 has somewhat restricted the admissibility of hearsay evidence. For example, if an investigative document records a statement of any person other than the defendant, it will be admissible as evidence only if it was prepared in compliance with the due process and proper method, is verified by the original speaker (declarant) at trial, and the defendant or defence counsel has an opportunity to cross-examine the speaker about its content. In addition, such evidence is admissible only when it is proved that the statement was made in a particular reliable situation (Article 312 (4) Criminal Procedure Act).

Establishment of Oral Hearing in Civil Cases

As for civil trials, the courts tried to strengthen the oral hearing system and realize trials based on the date of pleading. Using only written records for a trial could not sharply bring out the contentious points and it could also cause unnecessary misunderstanding and distrust because parties concerned with the case had no way to know how the conclusion was reached by judges. By establishing the oral hearing system in court, judges will better understand arguments of the parties concerned and at the same time the parties will better understand how their trials proceed. As the oral hearing has strengthened, the work of judges has been carried out more in court than their office. In the past, one trial a week was common but it has gradually changed to twice a week. And to increase the chance that judges and parties concerned meet each other more easily and often, various forms of courtrooms have developed including small courtrooms and electronic courtrooms.

To realize oral hearing trials, the case management method to mandatorily designate the date for pleading in advance has been emphasized. The method of pleading preparation after written pleading can be conflicted with principles of immediacy and publicity, and unnecessary written pleadings can delay the case settlement process. In 2007, the Rules of Civil Procedure[75] were revised and the method of fixing the date of pleading in advance was emphasized. In 2008, revision of the Civil Procedure Act[76] related to the date of pleading was proposed. Before 2002 when the Civil Procedure Act was revised, there were many cases proceeding in the existing way and the method of written pleading had been adapted in principle taking into account the heavy workload of judges. While maintain the old way, the courts pursued to gradually implement the method of fixing the date for pleading in advance by making case classification earlier and reducing the number of written pleading if the heavy workload somewhat reduced. As the

[75] Supreme Court Rule No. 2115 of 1 January 2008; revised again through Supreme Court Rule No. 2259 of 3 December 2009.
[76] Law No. 9171 of 26 December 2008.

intensive hearing method has been established and the number of written pleadings reduced, earlier dates for pleading were adapted. If the system of the date for pleading at an early stage is fully established, judges will meet parties concerned and decide contentious points more quickly and the trials will be more accordant to principles of immediacy and publicity. The enhancement in court communications is also one of the major changes. Based on the idea that the right communications in a courtroom is the prerequisite to realize courtroom-oriented trials, the trial process in a courtroom was video-recorded and judges could monitor and review it for future improvement.

Strengthening a Sponsorial Function of Court in Family and Juvenile Cases

Since 2006, there have been steady changes in trials for family and juvenile matters. In 2007, the performance achievement of the Reform Committee of Family and Juvenile System was reflected in legislative efforts and revisions of the codes of civil, domestic and juvenile procedures. It laid the ground to operate the system of divorce by consent, focusing on children's welfare, and to operate juvenile trials focusing on protection of their rights and promotion of the better future. According to the Revised Civil Act[77], the judiciary introduced the system to provide information of divorce by consent, deliberation period and recommend counselling services. And it became mandatory to submit an agreement on child-raising and parental authority. Courts made and distributed audio/video materials and a small handbook to give detailed information about divorce by agreement. Courts also improved the information and counselling services about trials and mediation related to family affairs and confirmation of divorce by agreement. As a result, courts recommend married couples to receive counselling services from professional counsellors so that they can reach a desirable agreement on who will have parental authority and take care of children in terms of their children's welfare and resolve their dispute peacefully. This helps to ultimately heal fundamental problems of their family. In addition, according to the Revised Juvenile Act,[78] the court-appointed assistant system was introduced and protection measures were diversified. The court order system for counselling and education and the special order system for education of carers were adapted. The judiciary tried to enhance effectiveness of the juvenile care system by strictly implementing and monitoring protective measures such as volunteer custodian care system and child care facilities system. The judiciary also needs to make efforts to settle newly adapted systems such as the court order system for counselling and education and the special order system for education of carers, victim's right to present statement, the recommendation system of reconciliation between victims and offenders. These changes require family courts to play a sponsorial role in family trials and juvenile protection trials. The family courts has began to come up with more concrete measures to expand their roles in resolving disputes and problems related to family and juvenile matters in a more fundamental way.

[77] Law No. 8720 of 21 December 2007; revised again through Law No. 9650 of 8 May 2009 taking effect from 9 August 2009.
[78] Law No. 872 of 21 December 2007 taking effect from 22 June 2008.

4.17 Judicial administration

Overview

Judicial administration refers to administrative management affairs including organization, human resources, budgets, accounting, facilities, etc., which are necessary to operate the Judiciary. The Chief Justice exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof. The Chief Justice may delegate part of the authority to direct and supervise to the Minister of National Court Administration, the chief judge of each court, the President of Judicial Research and Training Institute, the President of Training Institute for Court Officials, or the President of Supreme Court Library. Important judicial administrative affairs require resolution of the “Council of Supreme Court Justices.”

Council of Supreme Court Justices

The Council of Supreme Court Justices is the highest deliberative body in judicial administration. The Council is composed of all the Justices and presided over by the Chief Justice. A resolution of the Council requires a quorum of more than two-thirds of all the Justices and the consent of a majority of the members present. The Chief Justice has a vote in a resolution, and in case of a tie, the casting vote. The Council passes a resolution of consent to the appointment of the lower court judges, establishment or revision of the Supreme Court Rules and Regulations, accumulation and publication of judicial precedents, request for budget, expenditure of reserve fund, settlement of accounts, and such matters as deemed of particular importance and as referred to it by the Chief Justice.

Ministry of National Court Administration

Judicial administration refers to administrative management affairs including organization, human resources, budgets, accounting, facilities etc., which are necessary to operate the Judiciary. The Chief Justice exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof. The Chief Justice may delegate a portion of his/her power to direct and supervise the Minister of National Court Administration, the chief judge of each court, the Dean of Judicial Research and Training Institute, the Dean of Training Institute for Court Officials, or the Chief Librarian of Court Library. Important judicial administrative affairs require resolution of the Supreme Court Justices Council. The Supreme Court may establish rules and regulations concerning judicial proceedings, internal discipline of the courts, or management of business insofar as they are not contrary to the laws. This is the realm of judicial law-making power. Approval by the Supreme Court Justices Council is required when establishing the Supreme Court Rules and Regulations.

Budget

The Supreme Court has the exclusive power for judicial administration. It produces the budget of the judicial branch through the consultation with the executive branch, plans judicial policy, personnel management of judges and court officials, training and re-education of lawyers and court officials, etc. For this purpose, the Ministry of Court Administration and

the Judicial Research and Training Institute belong to the Supreme Court. In practice, the drafting of the court budget is done by the Ministry of Finance and Economy based on estimated revenue and expenditure submitted by the Chief Justice. The National Assembly, after deliberating on the draft budget, passes the court budget bill. Therefore, the independent right of preparing a court budget does not vest solely in the Supreme Court. However, where the government proposes to reduce the amount of budget requested by the Supreme Court, the government should consult with the Chief Justice. The fact that the government has the power of making up a budget of the courts means in some sense, that the government has the actual power to influence judicial policy substantially. Consequently, it is necessary for the judiciary to make up its own budget in order to acquire complete and substantial independence from the government or from the legislature.

4.18 Oversight and accountability

Well Known Problematic Practice of Jeonkwan Yewu

The practice known as "*Jeonkwan Yewu*" in Korean consists of affording preferential treatment during litigation to recently retired judges. Despite official denial by the Korean judiciary, the Korean public widely believes that the practice of judicial cronyism is quite damaging to a fair trial. The practice operates as follows: a recently retired judge who files suit as a private attorney receives favourable treatment from the courts during the legal process. Although such preferential treatment raises questions about impartiality, the Korean legal profession has nonetheless long accepted this unethical practice. Because of the high probability of a favourable outcome, former judges can charge fees significantly above normal rates and, in so doing, make a considerable sum in a short time after retirement. This cronyism pressures Korean judges, by custom, to help former colleagues in this way.

This a practice that undoubtedly undermines substantially the public's trust in the judiciary, reflected in the popular saying, "*Yujeon Mujoe, Mujeon Yujoe*" in Korean, which means "innocence for the rich, guilt for the poor."[79] The two most embarrassing episodes for judicial independence took place, one in 1998, and the other in 1999, when two lawyers, one a former judge and the other a former prosecutor, became were successfully able to almost monopolize all the cases filed at the particular courts in the local cities where they had practised and to amass a fortune within only a short period after entering legal practice. The secrets of their success had consisted in managing with varied methods of remuneration for service a network of several tens of "brokers" who were in fact officials of the courts and the prosecutorial offices and policemen. These officials referred to the lawyers potential clients whom they encountered in the line of their official duties. At the same time, the lawyers were also known to have cultivated particularly close ties with individual judges and prosecutors in their respective localities, inviting them to the first class restaurants, drinking parties, and golf tours at the lawyers' expenses. They were also known to have extended to judges and prosecutors

[79] See Han, In Sup, "A Dilemma of Public Prosecution of Political Corruption" in Yoon, D. K. (ed), *Recent Transformations in Korean Law and Society*, Seoul National University Press, 2000, p. 367.

"friendly" gifts including monetary gifts of modest but varying amounts handed in time of holidays or on arrival or on departure of individual judges and prosecutors. In turn, some of the judges and prosecutors were known to have even referred to the lawyers a few clients whom they happened to encounter, for example, when the latter asked the former for advice for a lawyer. It seems probable that the clients represented by these lawyers must have also received a favorable attention from judges and prosecutors. .

In these cases, the particular lawyers, many of the officials of the court and the prosecutorial office and policemen, and others were arrested and tried on various criminal charges. In the meantime, several judges and prosecutors were subjected to various disciplinary measures including dishonorable discharges. Many other judges, prosecutors, and practising lawyers take the incidents as the most severe embarrassment and great disgrace to their face. The question is whether these were single incidents or whether they were only the tip of the iceberg, the bigger part of which was hidden under water.[80] In any case, the public outcry against the kinds of practice was such that now the nationwide serious "judicial reform" is about to be undertaken, although its directions and contents are not fully known yet. If this type of unethical practice is not rectified, representation by a mere lawyer will become meaningless when the other party hires a recently retired judge. A similar problem arises in case of prosecutorial discretion practice.

Disciplinary Measures

A judge can be subject to disciplinary measures if she commits a serious breach of duties or has been negligent in performance of the duties. Disciplinary measures may also be taken against a judge who has degraded oneself or maligned the dignity of the court. Disciplinary measures are divided into three kinds: suspension from office, a reduction in remuneration, and a reprimand. Suspension involves an unpaid leave of between one month and a year. Reduction in remuneration involves a pay cut of one-third for the same period. Reprimands are delivered in writing. Discipline of judges is up to the Judges Disciplinary Committee established in the Supreme Court (Article 48 Court Organization Act). A resolution of the Committee requires a quorum of a majority of all the members and the consent of a majority of the members present.

Code of Conduct

Judges and court officers shared the need to raise people's trust in the judiciary and to strengthen their ethical attitudes. As a result of their effort, the ethics audit office was formed in the Court Administration Office in 2006, the code of ethics for judges was more specified and the code of conduct for judges and court officers was developed.[81] Property registration requirements were strengthened and ethical education using previous cases was expanded. Special audits were conducted in structurally vulnerable areas to prevent ethical violation in advance. An Inspector General for Judicial Ethics is responsible for all the activities and measures with regard to enhancing overall judicial ethics. The ethical

[80] See Choi, Dai-Kwon, "The Judicial Functions and Independence of the Judiciary in Korea" *Seouldae Bophak (Law Journal of Seoul University)*, Vol. 40 No. 2 (1999), pp. 63.
[81] Judicial Code of Conduct of the Republic of Korea (the Rules of Supreme Court), enacted on June 23, 1995; revised on June 11, 1998; revised on May 25, 2006.

environment will be constantly improved through special audits and persons who violate ethical codes of conducts will be strictly held accountable for their wrong doings. In this way, courts will lay the foundation to become trustworthy and even respectable institutions.

The Sentencing Commission since 2007

The Sentencing Commission was created in accordance to the provisions of the Court Organization Act amendment of 2007, especially in order to attack the problematic practice of *Junkwan Yewu*. The Commission was established under the Supreme Court in May 2007 to implement fair and objective sentencing practices to strengthen public trust toward the judiciary. The Sentencing Commission is an independent agency of the judicial branch of the government. The principal purposes of the Commission are to establish and revise sentencing guidelines and to analyze, research and collect information of the related policies. The sentencing guidelines are not mandatory but must be respected by the judges in rendering decisions. Reasons for departing from the guideline must be provided in the decisions. The Commission is comprised of 13 members including the Chairperson and one Standing Commissioner. The Chairperson is appointed by the Chief Justice among those with 15 years of legal experience. The Chief Justice appoints the Commissioners among those who are engaged in professional legal sector such as judges, public prosecutors, lawyers, etc. Public prosecutors and lawyers require recommendation from the Minister of Justice and the President of the Korean Bar Association respectively. A commissioner serves a two-year term and can serve multiple terms. The sentencing guidelines, which are open to the public, may not be legally binding but must be respected by the judges in rendering decisions as which to the category and period of sentencing should be involved. The General Secretariat Office of the Commission provides the necessary administrative support and assistance. Phase 1 of the Sentencing Commission which ended on May 2009 established sentencing guidelines on the following type of crimes: homicides, bribery, sex crimes, perjury, slandering (false accusation), embezzlement, misappropriation, and robbery. These guidelines have been applicable from July 1, 2009 to all cases that are indicted. On May 7, 2009 launching of Phase 2 took place. During Phase 2, the Commission has devoted its efforts toward precise application of the pronounced guidelines and prepare to set sentencing guidelines for other types of crimes other than those types mentioned in the course of Phase 1. Despite the lack of the legal effect of sentencing guidelines, from July 1 through December 31, 2009 it has been reported that the sentencing guidelines were respected in 89.7% of a total of 2920 cases that belong to 8 types of crimes applied by sentencing guidelines.[82] Before the introduction of the sentencing guidelines judges have often been too lenient with politicians, bureaucrats and businessmen accused of bribery, influence peddling, embezzlement, and other forms of corruption. As the Supreme Court insisted, the goal of sentencing guidelines has been to restore the public trust in the justice system.

[82] See Internet Newspaper 'Ohmynews' of 28 February 2010.

4.19 Other Court Staff

Court Officials

Court officials work in various fields including judicial administration, technical examination, library custody, interpretation, facilities, industrial management, and health. Judicial administration field can further be divided into subfields such as court affairs, registration affairs, information technology, statistics, stenography, and bailiff duties. The court officials working in subfield of court affairs range from Grade I through Grade IX. The court officials engaged in court affairs assist judges with court proceedings. They take charge of recording court activities, keeping court records, issuing various certificates proving litigious matters, and serving documents. They also handle non-litigious matters such as registration, family registration, deposit, etc. Court officials dealing with court affairs are appointed after passing an open competitive examination. They can be promoted to higher posts if they serve at one post for a fixed period of time, with the exception of posts in grade V and grade VII, which require passing an examination for promotion thereto. In general, the court officials are appointed by the Chief Justice. However, a portion of the Chief Justice's power to appoint court officials is delegated to the chiefs of the institutions to which the court officials belong.

Marshals

Marshals are independent, extra-judicial officers affiliated with the District Courts. They are engaged in the execution of judgments and the service of documents. Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. However, the marshals receive fees not from the court, but from the party concerned. The chief judge of a District Court appoints the marshals from among the persons who have served as public officials for a specified period of time in the courts or public prosecutor's offices.

4.20 Litigation Costs

Basic Principles

The legislature has the power to decide what expenses can be recovered as costs in a lawsuit. In criminal cases there is no reimbursement of any litigation costs, while in the other cases there are statutory rules and regulations. According to Civil Procedure Act, the general rule in the Korean civil procedure system is that the losing party to a court action will be ordered to pay the litigation costs of the winning party, up to a statutory limit (Article 89 of Civil Procedure Act). Every final judgment must contain a decision on the costs of proceedings. If in final judgment the amount of reimbursement is roughly described, the winning party can bring a separate lawsuit to recover the litigation costs (Article 165 of Civil Act).

In practice the court has discretion as to whether costs are payable by one party to another. If the court renders a judgment in favour of only a part of the claim, the court may determine the percentage of the costs to be borne by each party. Litigation costs in Korea consist of "court costs" (filing fees and court disbursements), "out-of-court costs" (parties' costs) and "lawyers' fees."[83] Filing fees and lawyer's fees are statutorily provided in Korea. Article 2 (1) of Civil Action Filing Fees Act provides that if the litigated amount is more than Korean won 10 million and less than Korean won 100 million, the filing fee is "litigated amount x 45/10,000 + 5,000." Filing fees payable depend on the initial value of the claim. For example, the filing fees for a claim of Korean won 50,000,000 are amounting to Korean won 230,000 (225,000 + 5,000). Payment of filing fees is made by affixing revenue stamps ('*Injidae*'). Attorney's fees may, within limits prescribed by the Supreme Court Rules, be included in the calculation of the litigation costs. In practice, full recovery of the actual attorney's fees is, therefore, almost impossible. According to Article 92-2 of Civil Procedure Act and the Supreme Court Rule (Rule on Calculation of Attorney's Fee in Litigation Costs of 12 March 2009), merely 8% of the litigated amount can be calculated as attorney's fees. In practice, there is really a big gap between actual lawyers' fees and the fixed amount of lawyers' fees recoverable under the Supreme Court Rule. Recoverable expenses regarding litigation costs are relatively diverse by statutes. For example, Security Class Action Act and Securities and Exchange Act provide the reimbursement of "full" litigation costs (e.g. Article 193-13 (6) of Securities and Exchange Act), while Commercial Act provides the reimbursement of "reasonable or appropriate costs." (Article 405 (1) of Commercial Act)

Problems of Litigation Costs Regarding Access to Justice

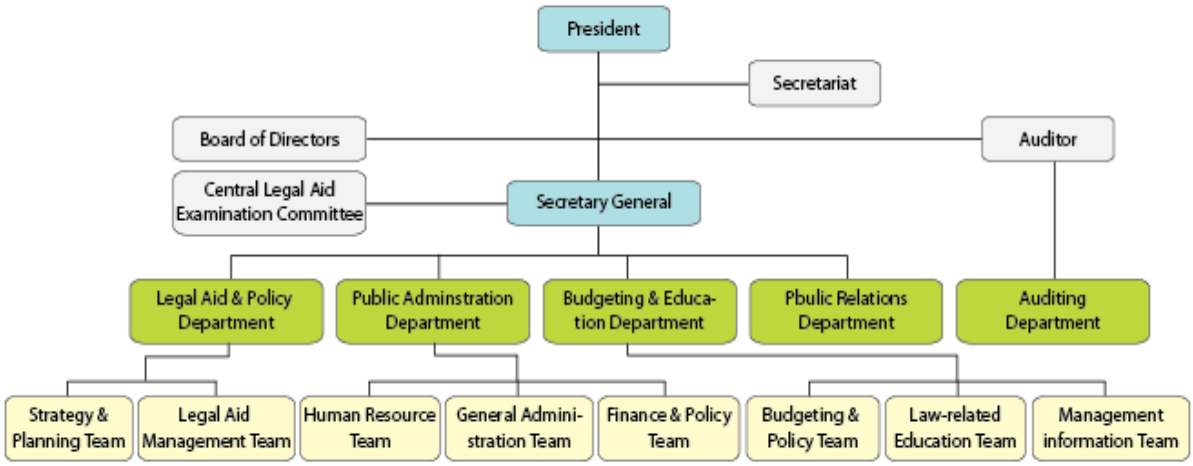
It has been sometimes pointed out that litigation costs hinder access to justice by increasing the risks of litigation, both setting up the risk of having to pay both sides' costs in the event of losing the case. It is necessary to set proportionate litigation costs in order to promote access to justice. Access to justice is problematic not only in ordinary civil cases but also in class actions, recently introduced in some fields of Korean law. Class actions in Korea are likely to impose a huge financial burden on lead plaintiffs or lead counsels. First of all, they have to incur filing fees. The Securities Class Action Act does not provide for a flat rate; instead, the filing fees are, in principle, determined according to the amount of damages claimed as in ordinary lawsuits. This amount is too large as to discourage filing of a class action. Another financial burden are expenses which must be paid in advance. The Securities Class Action Act requires the plaintiff to post security to cover damages the company might suffer, just as provided in a derivative suit. In addition, the plaintiff must pay in advance the costs incurred in the court's notice to the public and appraisal process in the lawsuit. In general, the costs incurred in a class action are borne by the attorney, and they are compensated by the contingent fee arrangement if the plaintiff prevails. Taken together, the initial investment which attorneys have to make to file a class action is too large to encourage filing a class action.

[83] See Chon, Byung Seo, "Sosongbiyoung-ui budam-e gwanhan yakgwan-ui geomto (A study on litigation costs)" *Minsasosong (Journal of Civil Procedure)* Vol. 13 No. 2 (2009), 147-177.

Legal Aid System

Expensive litigation costs hinder access to justice. As costs of litigation rise, it is more necessary to develop legal aids system. The legal aids system in Korea is mainly carried out by the Korea Legal Aid Corporation (KLAC), a public organization, and several private organizations such as the 'Korea Legal Aid Center for Family Relations,' '*Chamyeoyeondae* (Peoples Solidarity for Participatory Democracy)', the Korea Bar Association and consumer groups such as '*Minbyun* (Lawyers for a Democratic Society).' KLAC is a public institution which provides legal aid such as legal counselling, or representation in court for individuals who cannot afford to hire a lawyer. Prescribed by the Legal Aid Act[84] (Article 8) of 1987, the KLAC was found in 1987 as a private, non-profit corporation, which was funded by the government and supervised by the Ministry of Justice. The KLAC currently as of May 2010 has 18 district offices and 38 branch offices throughout the nation. The KLAC began to handle criminal cases since June 1996, though at the beginning stage it handled merely legal counselling regarding civil cases. According to the annual report of the KLAC the number of free legal advices is 3,372,301 in 2008, and the number of criminal matters as legal aid cases is 25,952 in 2008. The number of legal representation in civil, family, and administrative matters is 98,853 in 2008. The statistics indicate a significant growth in the number of cases handled by the KLAC. The representation in lawsuits by the KLAC is limited to people whose gross monthly income before deduction is under Korean won 2.6 million (about US$2,500). Farmers, fishers, foreign workers, veterans, low ranking government officials and military personnel are also eligible for such representation (Article 7 of Legal Aid Act). These days the KLAC plays a great role in the legal aid system in Korea. The organization of the KLAC is as follows:

[Figure 6: Organization of Korea Legal Aid Corporation]



[84] Law No. 3862 of 23 December 1986 taking into effect from 1 July 1987, the most recent revision through Law No. 9717 of 28 November 2009.

Meanwhile, the court-assigned defence counsel program for criminal cases and civil litigation assistance program are also part of legal aid system. The Criminal Procedure Act stipulates that, if there is no defence counsel, trial judges shall appoint a defence counsel *ex officio* in certain cases where the defendant is a minor, seventy years of age or over, deaf or mute, or suspected of mental disorder (Article 33). The Criminal Procedure Act also provides that public trials shall not be conducted without a defence counsel where the offense charged is punishable with death or imprisonment for a minimum period not less than three years (Article 282). The court may appoint counsel at its discretion to an indigent defendant only if he or she makes such request (Article 33). The total number of cases in which court-appointed counsel represent criminal defendants in 2009 was 70,322 (77,921 persons) which amounted to about 29.5% of all criminal cases (238,382) during that year.[85] Although these figures imply that the court-appointed counsel system carries with it some degree of significance, the actual performance of that counsel has frequently been criticized as too perfunctory.[86] This type of court-appointed counsel is therefore called so-called "*Duleory Byunhosa* (attorney as a foil)," who instead of sufficiently representing the client complete simply their duty nominally. Such a nominal representation is certainly attributed to the low legal fees as well as the lack of devotion resulting from the shortage of a true public-interest consciousness among lawyers. According to the report of Court-Martial, the number of guilty verdict in the court-appointed counsel cases is 221 in 2005, 245 in 2006, 311 in 2007, 274 in 2008, and 102 in 2009 (the total of number is 1,153). In contrast, the number of guilty verdict in normal counsel cases is 74 in 2005, 55 in 2006, 56 in 2007, 50 in 2008 and 16 in 2009 (the total of number is 251). The rate of guilty verdict in ordinary counsel cases amounts to about 25% of all of the court-appointed counsel cases.[87]

Conclusion

The judiciary is the final stronghold to guarantee fundamental rights of the people, the only non-political organization to check the administrative and legislative powers, and the guardian of the constitutional state. However, the history of the Korean judiciary showed the challenges in achieving judicial independence. In the 1960s and 1970s the threats to judicial independence took the form of intimidation of individual judges who were not cooperative enough with the administration. A typical example was the practice of letting police detectives follow target judges closely to turn up any possible irregularity or improper behaviour so as to later on embarrass, intimidate, or criminally charge them. A particular incident of this kind in 1971 led a large number of judges, especially young ones, nation-wide to rallying to the cause of judicial independence. They had threatened to resign en masse in protest of the government's practices which they saw as impairing judicial independence. That episode, the so-called "judicial crisis," came to the end with the withdrawal of the

[85] See Ministry of Court Administration, *Sabeop yeongam (Judicial Yearbook)*, 2009.
[86] See Kim, Jae Won, "Emerging Legal Aid Activities in South Korea" *Dong-A Beophak (Journal of Dong-A University Law School)* No. 30 (2002), 85-103.
[87] Source: unpublished report of Representative Lee Han-Sung from the Court-Martial at the National Assembly in 2009.

resignation at the persuasion of their senior judges and with the show of conciliatory gestures by the government.[88]

Often cited as an example of the misuse of capital punishment, the so-called *Inhyeokdang* (People's Revolutionary Party) incident of 1975 is also an example of "court murder." In that incident, eight dissident activists were framed as North Korea collaborators, summarily sentenced to death by the court-martial and the Supreme Court, and hastily executed.[89] Thirty-two years later, on 21 January 2007, the Seoul Central District Court acquitted the 8 dissidents of treason.[90]

Although since the 1987 Democratization the present Constitution and the justice system secure judicial independence substantially, it can be maintained only with a mature citizenship that demands protection of human rights. In this context, the actual practice in the judiciary has a critically important meaning in Korea's democracy. The Korean practice in the judiciary shows both strong and weak points. Despite the short history of democracy in Korea, the fruit of firm efforts to protect the democracy under the past dictatorship regime has supported the role of the judiciary.

Now, instead of the danger from outside, the Korean judiciary is faced with the danger from inside. Most of all, the practice of "*Jeonkwan Yewu*" described above in Section 4.18 (affording preferential treatment during litigation to recently retired judges) is undermining the *appearance* of impropriety and the public trust in the judiciary. Another complaint is against the career judge system is that judges are young and inexperienced. This is exacerbated by the involuntary early retirement of experienced judges as the number of available positions along the upward hierarchy diminishes.[91] . In addition to the loss of judicial expertise accompanying

[88] See Kim Tschol-Su, *Honbophak ha (Constitutional Law Vol. 2)*, Jihaksa, Seoul, 1972, pp. 940-953.

[89] The posthumously acquitted 8 individuals were executed 18 hours after the Supreme Court sentenced to death on 8 April 1975. Thus the day of their death was henceforth known as 'the black day in the Korean courts' history' or 'the day of court murder.' See, Cho, Byung-Sun, "South Korea's changing capital punishment policy. The road from de facto to formal abolition", 10 *Punishment & Society* 171 (2008), 177.

[90] In December 2005, a Seoul Central District Court ordered a retrial of the case after a presidential truth commission found no evidence that the eight defendants were guilty, and that the students were also tortured into making false confessions. The commission also found official documents showing that the government had issued orders to execute the activists hours before the Supreme Court announced its verdict. Since the announcement of commission on Sept 11, 2002, relatives of the victims had demanded a retrial for years, claiming that the state intelligence agency framed the suspects with false charges. An internal National Intelligence Service (NIS) probe also concluded that its predecessor, the Korea Central Intelligence Agency, manipulated two cases involving *Inhyok-dang* on the orders of former President *Park Chung-Hee*, who was facing increasing demonstrations from activists and college students against his dictatorship. The report of the truth commission was summarized in *Chosun Ilbo* (*Chosun* Daily Newspaper) of Sept 12, 2002. In its ruling, the Seoul Central District Court cleared the executed dissidents of all charges, including violation of the National Security Law and the Anti-Communism Law and treason charges for plotting to overthrow the government. The court concluded that the prosecution's interrogation records and the defendants' written testimonies could not be held accountable as evidence, since intimidation, coercion and other forms of mistreatment are suspected to have been made against the detained. The court also said that the prosecution failed to prove that the defendants were involved in organized actions in a plot to overthrow the government. See, Cho, Byung-Sun, "South Korea's changing capital punishment policy. The road from de facto to formal abolition", 10 *Punishment & Society* 171 (2008), 177.

[91] On average, a judge in South Korea retires from her or his judicial position in less than twenty years of service from the initial appointment. As of 2008, the average age of newly appointed judges was 29.0 years of age; for a period from 1990 to present, the average age of newly appointed judges is approximately 30 years of age. The Office of National Court Administration, *Past, Present and Future of the Judiciary*, Judicial Development Fund Inc, December 2008, at 249 [available only in Korean].

such early retirement, as these retired judges go into private practice, it enhances the risk of Jeonkwan Yewu.

The final important problem to be solved quickly is the large docket of the court. South Korean courts at practically all levels, including the Supreme Court, have an overwhelmingly large size of workload or are faced with excessive number of cases.[92] As of August 2008, the number of judges across the nation was 2,352. The applicable law in this regard of the Act on the Number of Judges at Respective Courts (Law No. 8412, as enacted in 2007) and the applicable Rule (Supreme Court Rule No. 2222) provide that the number of judges will increase to 2,844 by the year 2010. A distinct way to cure this problem will be to increase the number of judges including creating a new appellate division at the High Court level or increasing the number of Supreme Court Justices.

The South Korean judiciary has established and enjoyed its independence. However, recently the independence of the courts has assumed a serious dimension, because the present conservative Lee Myung-Bak administration has tried to exercise its influence over the courts. On March 24, 2010, the governing Grand National Party (GNP) presented seven reform bills on the judiciary to the National Assembly.[93] The reform bills have been motivated by a series of somewhat progressive court rulings on politically sensitive issues. Seoul District Court acquitted Kang Ki-Gab, a lawmaker of the minority Democratic Labour Party, of charges of violent behaviour at the National Assembly in January 2010. Several district courts ruled in favour of unionized teachers who issued statement opposing state policies and participated in anti-government rallies. Another court ruling cleared MBC TV's staff of defamation charges for allegedly falsely reporting about the dangers of mad cow disease in the U.S. beef. Such rulings ignited ideological conflicts between conservative and progressives. One of bills is planning to create a personnel management committee for judges. Opposition parties accused the GNP of attempting to interfere in judicial affairs by allowing the Minister of Justice to appoint some of the committee members. Another striking point is the GNP's proposal to set up a sentencing guidelines panel under the presidential office. This raised concerns that such a panel might violate the fundamental principle of democratic check and balance among three branches of government. Another GNP proposal is to increase the number of Supreme Court Justices from the current 14 to 24, fearing that the executive branch might increase its voice over the judiciary by appointing more pro-government justices. However, the proposals have been criticized for trying to exert influence on the judiciary, so that judges may make rulings to the taste of the conservative government in politically sensitive cases. It remains to be seen what will become of these proposals.

[92] In 2008, the District Courts with 1,910 judges in eighteen facilities across the nation heard approximately 18,243,000 cases; the High Courts with 303 judges in five facilities across the nation heard approximately 43,000 cases; and the Supreme Court with the Chief Justice and thirteen Justices including the Minister of the Office of National Court Administration, and also with 80 research judges, heard approximately 31,000 cases. See Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp); The 2008 Introductory Book of the Supreme Court of Korea.pdf (available at http://eng.scourt.go.kr/eng/ resources.jsp).

[93] On the government blueprints of judicial reform in detail, see e.g. Korea Times of 29 March 2010.

5. Civil and criminal judgement enforcement

5.1 Types of Enforcement

Civil

A civil execution procedure includes a procedure of compulsory execution as well as a procedure of foreclosure. In the past, the provisions of civil execution formed a part of the Civil Procedure Act. However, with the introduction of the new Civil Procedure Act, the provisions on civil execution have been separated to constitute the Civil Execution Act.[94] The Civil Execution Act contains a vast number of new provisions aimed at improving execution procedure.

Criminal

In Korea, prosecutors direct and supervise the execution of all criminal judgments, e.g., direction and supervision of the execution of arrest warrants, search or seizure warrants and final criminal judgments. This was designed based upon the belief that the appropriateness of warrant execution and the protection of individual rights in connection with such execution could be secured best by entrusting those duties to the prosecutors who represent the public interest.

Administrative

Once a judgment to revoke an administrative action or decision is finalized, the action or decision becomes ineffective with no other procedure required. In this case, the administrative office concerned cannot take the same administrative action against the same person based on the same reason. There is room for the same action to be taken basing different reasons. Once a judgment to confirm the revocation or invalidation of the action concerned is made, the responsible administrative office should take an administrative action as the judgment says (Article 30 Administrative Litigation Act).

Labour

As explained above in section 4.4, the Labour Relation Commission hears labour cases regarding dispute settlement (mediation and arbitration procedure) between a registered trade union and an employer. Individual labour disputes are settled by the Labour Relations Commission or the Civil Court. In case of a possibly unjustified dismissal, the employee can file a criminal case or a civil case with the Labour Relation Commission. If any of the parties object to the dispute settlement proposal by the Labour Relation Commission, the case would be referred back to the ordinary courts' procedures, civil or administrative. The administrative Court has the right to hear labour cases on disciplinary measures against civil servants. Usually individual labour disputes are settled by the Civil Court.

[94] Law No. 9525 of 25 March 2009 taking into effect from 26 September 2009.

Thus, the enforcement of labour case judgment is the same as the enforcement of decisions of the Administration Court, Criminal Court or Civil Court.

5.2 Organisation

There is no independent organization for the enforcement of court decisions. The District Courts are responsible for the civil execution, while the District Public Prosecutor’s Office supervised by the Ministry of Justice is responsible for the criminal execution. In the civil execution, the marshals who are independent, extra-judicial officers affiliated with the District Courts, are engaged in the execution of judgments and the service of documents. Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. The chief judge of a District Court appoints the marshals from among the persons who have served as public officials for a specified period of time in the courts or public prosecutor's offices. Those sentenced to imprisonment, imprisoned for the non-payment of fines or held in remand custody are executed under the responsibility of the Ministry of Justice. The prison administration covers closed and open prisons.

5.3 Model

The Civil Execution Act contains a vast number of provisions on civil execution procedure. In the civil execution, the marshals who receive fees not from the court, because they are not public officials in a strict sense of the word, but from the party concerned, are also responsible for the enforcement of civil execution. However, in the enforcement of criminal sentence, the court usually does not participate in the enforcement process. Enforcement of the criminal sentence is under the direction of a public prosecutor assigned to the public prosecutor’s office corresponding in jurisdictional territory to the court which entered the adjudication.

5.4 Tasks and Functions

Civil Execution Procedure

The Civil Execution Act contains a vast number of new provisions aimed at improving execution procedure. Compulsory execution is the procedure whereby the creditor obtains a satisfaction of his/her claim, with the assistance of the state, from the property of the debtor who does not voluntarily perform his/her obligation even though the judgment has been rendered against him/her. Authorities other than the judgment, such as a payment order, or a notarial deed can also be a basis for execution. The property of the debtor, which is subject to execution, includes real property, ships, automobiles, construction equipment, aircraft, movable property, and bonds. It is the court that enforces the compulsory execution on most property. However, in case of movable property, the marshal

enforces the compulsory execution. The most frequently used compulsory execution is execution sale of real property whereby the court seizes and sells real property of the debtor by an open tender. The proceeds are distributed among creditors. Foreclosure is a legal proceeding instituted by the lender (the mortgagee) to force a sale of the mortgaged property in order to satisfy the unpaid debt secured by the property. The procedure of foreclosure is similar to that of execution sale of real property.

Statement of Property, Debt Defaulter Roster, and Property Inquiry

These methods are devised to secure the effectiveness of compulsory execution as well as to enable the judgment creditor to easily obtain satisfaction of his/her claim. In the event that a debtor does not discharge a pecuniary obligation and it is difficult to ascertain the property of the debtor, the creditor who is entitled to motion for compulsory execution, may request the court to order the debtor to tender a list of property, which clearly specifies property in his/her possession. If the debtor fails to comply with the court's order or tenders a false list of property, he/she is subject to imprisonment, fine or confinement. If the debtor does not discharge his/her obligation within six months after a monetary judgment becomes final and conclusive, fails to comply with the court's order to tender a list of property, or tenders a false list of property, the creditor may request the court to enter him/her in the debt defaulter roster. When the debtor is listed in the debt defaulter roster, such information is provided to financial institutions and the debtor may face difficulty in carrying on future credit transactions. The Civil Execution Act introduces a new method through which inquiries about the debtor's property can be made. If the debtor fails to comply with the court's order to tender a list of property, or tenders a false list of property, the creditor may request the court to make inquiries about the debtor's property. The court, pursuant to the creditor's request, makes inquiries at the institutions, which keep information on the debtor's real property or financial assets in the form of electronic data, and orders them to submit such information. The creditor, then, can make use of information submitted by the institutions and move to the execution stage.

Provisional Attachment and Provisional Disposition Procedure

If the debtor hides or disposes of his/her property before the compulsory execution procedure is commenced, the creditor is obstructed from obtaining satisfaction of the claim. To prevent such attempts and to secure the debtor's property, the court may order provisional attachment or provisional disposition, pursuant to the creditor's request. If it is necessary to preserve the execution of the monetary claim, the court may order the debtor's property to be put under provisional attachment. Provisional disposition may be granted for the purpose of setting the temporary state of affairs in regard to disputed legal relations or preserving the execution in regard to the claim for delivery of specific immovable or movable property.

The Prison System (Correctional Institution System)

The Korean government has been established in 1948 and enacted Penal Administration Act in 1950. This Act was revised in 1961 to fortify the function of rehabilitation. In that amendment, the name of Penal Facility changed from ‘prison’ to ‘correctional institution.’ Since then the correctional institution authorities has introduced many kinds of advanced

inmate treatment systems to strengthen the rehabilitation of prisoners through the revision of the Penal Administration Act several times. In central organization, the general control belongs to the Direct General of Correction Bureau, attached under the Minister of Justice. 4 Regional Correctional Headquarters were established on November 1, 1991, for the purpose of improving management and supervising 44 correctional institutions throughout the nation. 44 correctional institutions consist of 26 Correctional Institutions (1 Branch), 2 Juvenile Correctional Institutions, 1 Women's Correctional Institutions, 1 Open Correctional Institution, 8 Detention Centers, and 3 Branch of Detention Centers. Accommodation and management in the detention center are for the criminal suspects and criminal defendants who have been subject to the execution of an arrest warrant. Exemplary inmates selected from each correctional institution can be transferred to the Open Correctional Institution where self-governing system is practiced. Moreover, the work release system has been put into force that allows inmates to be employed outside the institution. This system is designed to cultivate skills for adaptation to society prior to release. In accordance with the amendment of the Penal Administration Act (December 12, 1996), the pre-existing Parole Examination System was abolished and new Parole Examination Committee was initiated under the Minister of Justice. The Committee chaired by the Vice-Minister of Justice examines whether prisoner is eligible for parole and submits its report to the Minster of Justice. Paroled prisoners may be placed under the supervision for the remainder of their original sentence. If the paroled prisoner commits a new offence during this period, the court must decide whether or not the prisoner is to be returned to prison to serve the remaining period. Loss of parole is also possible for behavioural infractions. In this case the decision is made by the Committee.

5.5 Relations

Especially in case of civil matters, cases are annually increasing and an efficient trial has limitation in responding to the increasing number. In this respect, the judgment enforcement cannot guarantee the social integration, but intensify the social conflicts. Thus, in addition to trials and its enforcement, dispute resolving methods like mediation and arbitration need to be vitalized so that people can have various ways to resolve their disputes and judges can be relieved from their heavy workload.

5.6 Process

Enforcement of Civil judgment

The enforcement process is relatively simple by the relevant laws. In civil enforcement, if the voluntary enforcement without outside intervention fails, a party with a court judgment may then seek the process according to the Civil Execution Act. Enforcement of civil judgments is governed by the Civil Execution Act, which became effective as of July 1. 2002. Previously, this act was only a part of the Civil Procedure Act. A final judgment is eligible for enforcement. Also the provisional enforcement order by the

court, or foreign judgments recognized by the Korean court are eligible for enforcement. It is only a performance claim that is qualified for enforcement. A monetary claim is enforced through seizure and sale of a debtor's nonexempt property at public auction. Claims other than that are enforced in other various forms. A claim for delivery of movables or immovables is executed by a court-appointed marshal. A claim for performance other than giving something is executed by either substitutional execution[95], when it can be performed by a third party, or indirect compulsory performance[96], when it should be performed by a debtor herself.

In Korea, the fundamental difference between general mediation [97] and litigation procedures (including arbitration) is in the enforcement mechanisms. The arbitration procedures are institutionalized in Korea whereby the arbitral awards rendered by a committee (for example Korean Commercial Arbitration Board) are analogous to judgment of the court that is fully enforceable. The arbitration is sometimes almost as same as statutory conciliation. If the conciliation procedures are institutionalized by the governmental agencies, that is called statutory conciliation. A kind of this statutory conciliation is civil conciliation proceedings above mentioned. The difference between general mediation and statutory conciliation is in the enforcement procedure where a settlement agreement made at the statutory conciliation has the same effect as a judicial compromise making it readily enforceable unlike its counterpart made at a mediation which has no such effect.

Enforcement of Foreign Judgment

Judgments rendered by a foreign court should be recognized in order to be enforceable in Korea.[98] The following requirements are to be met for the recognition (Article 217 Civil Execution Act). In the first place, a foreign judgment needs to be final and conclusive in order to be recognized and enforced by Korean courts. It is final when there is no possibility of further appeal within civil procedure. Whether or not this requirement of finality has been met is determined on the basis of the foreign law by which the decision was rendered. Secondly, the international jurisdiction of the foreign court is required. This is determined in light of the acts and subordinate statutes of Korea, or to the treaties. According to the spirit of Article 2 of the International Private Law Act, the substantial relationship between the case and the forum is the major standard by which an international jurisdiction is measured. In considering the substantiality of the relationship, the court should consider not only private interests such as fairness, convenience, and predictability of the litigating parties, but also public interests such as adequacy, swiftness,

[95] Substitutional execution is a way of execution by the third party. The debtor, however, is subject to all the costs incurred in the above process (Article 260 of the Civil Execution Act).

[96] For general explanation on recognition and enforcement of foreign judgment, see Lee, Sung Hoon, "Foreign Judgment Recognition and Enforcement System of Korea", *Journal of Korean Law*, Vol. 6 No. 1, 2006, p. 110.

[97] For mediation, an agreement between parties to resolve their disputes through mediation is not required. In mediation, the mediator's role is primarily to encourage open communications by helping the disputants identify the specific areas of dispute and agreement and ultimately reaching a negotiated settlement. Therefore, the settlement agreement between parties made at mediation is not readily enforceable.

[98] See generally, Kwon, Youngjoon, "Litigating in Korea: A General Overview of the Korean Civil Procedure" , *Journal of Korean Law*, Vol. 7 No. 1 (2007), p. 108.

efficiency of the trial as well as the efficacy of the judgment.[99] Thirdly, lawful service of a summons or a document is needed. A defeated party should have received, pursuant to a lawful method, a service of a summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend himself (excluding the case pursuant to a service by public notice or similar service). When she responds to the lawsuit even without being served, this requirement is deemed to have been satisfied. Fourthly, the foreign judgment should not violate good morals and other social orders. This is to prevent a foreign judgment from being recognized and enforced in contravention of the public policy in Korea. What constitutes the violation of good morals and other social orders is left at the discretion of the competent court. There was an interesting lower court decision that dealt with the acceptability of the punitive damage award by the U.S. court.[100] According to this decision, the court stated that the punitive damage award with its function of criminal sanction might violate good moral and social orders in Korea where only compensatory damage for torts is allowed. Subsequently, the court recognized only half amount of the award. Finally, there is a requirement of reciprocity. The foreign judgment will be recognized and enforced only when the Korean judgments are recognized and enforced under the same or more lenient condition in the concerned nation.

5.7 Mechanisms

Administrative

There are three different types of budget for correctional administration: first, national general account, secondly, special accounts for prison industry based on an autonomous accounting method and thirdly, national assets special account for construction of judicial facility such as correctional institution and prosecutor’s office.

Oversight and Inspection

Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. This provides effective oversight in most cases.

Conclusion

The enforcement of civil and criminal judgments is not an issue of concern in the context of legal reform in Korea, because the enforcement of court judgments itself has always been undertaken in a timely fashion. Instead, the concerns of crime victims have increasingly been taken into consideration. The number of criminal offences is rising and with it the

[99] Decision of the Supreme Court of Jan. 27, 2005, 2002 Da 59788.
[100] The East Branch of Seoul District Court, 93Gahap19069, decided on Feb. 10. 1995. This case was appealed and re-appealed afterward. However, the Seoul High Court (95Na14840, decided on Sep. 18. 1996) and the Supreme Court (96Da47517, decided on Sep. 9. 1997) upheld the decision by the court of first instance, without touching on the issue of the acceptability of the punitive damage award in the context of Korean tort law.

number of victims of crime. Crime control policy or criminal enforcement policy therefore is to be considered not only with regard to the repressive measures against offender, but also in regard to the protection of the victim against future crimes.

Since 1980, a comprehensive victim protection program with regard to the criminal enforcement has been proposed and advocated by social groups to the public.[101] Victims who have suffered financial losses in criminal crimes may request that their damages be compensated in the criminal trial proceedings. As a result, the victim may seek compensation according to Victim Compensation Act without having to file a separate civil action. However, such damages shall be restricted to physical damage, theft and fraud and other damage to the assets in order not to hinder the original objective of criminal trial proceedings. The Revised Criminal Procedure Act of 2007 also seeks to make institutional improvement to protect the rights and interests of the victim through the system of petition for adjudication as well as the rights of victim to make a statement in court. A victim of a crime has a right to make statements and the court shall, upon receiving a petition from a victim of a crime or his legal representative admit such a victim as witness for examination (Article 294-2 Criminal Procedure Act). The victim may file an application for inspection or copying of the litigation record with the court (Article 294-2 Criminal Procedure Act). Special measures have also been regulated to protect the victims of crime. Victims of sexual violence crimes such as rape may request to testify without the public in attendance (Article 294-3 Criminal Procedure Act). In other words, notwithstanding the general openness of trial proceedings, they can be closed when victims of sexual crimes testify. In the event it is recognized that the victim may not deliver full testimony with the defendant in the presence, the presiding judge may order the defendant or the third party to leave the court (Article 297 Criminal Procedure Act). The court may, if deemed that the victim is likely to feel severe uneasiness or tension in light of the age of the witness, his/her physical or mental state, or any other circumstances, allow a person has reliable relationship with the victim to sit in company with the victim (Article 163-2 Criminal Procedure Act).

[101] Especially the Act for the Punishment of Sexual Violence Crimes and Protection of Victims (Law No. 8059 of 2006, last revised on Oct. 27, 2006, as Law No. 8059) introduced an expanding protective system for sexual violence victims.

6. Lawyers and other legal services

6.1 Organisation

For most of its modern history, Korea has had a severely restricted legal services market. The very conception of a private legal profession was suspect under classical Confucian thought. The Japanese colonial state emphasized legal training to produce bureaucrats, and the judicial exam was primarily designed to produce prosecutors and judges for the state apparatus. As mentioned in Chapter One, this was successful for a certain conception of law appropriate to the developmental state. But it has come under severe pressure in Japan (as well as Japan) in recent decades.

Lawyers are organized into bar associations at a municipal level. There are 14 throughout the country. The Seoul Bar association is the biggest, with more lawyers than all the rest combined. The Korean Bar Association is an umbrella of these municipal bar associations, in which membership is mandatory. The Bar associations organize the profession, lobby on its behalf, and manage a system of free legal aid for indigent defendants.

During the period of constraint on the profession, most practicing lawyers were in fact retired prosecutors and judges. Sometimes these professionals retired because someone of equal lower rank has reached a higher position and it would be unseemly to stay as a subordinate given strict seniority norms. In other cases the motive is simply to earn the lucrative fees available to the private bar.

The legal profession began to expand in 1981, when the Chun regime announced its decision to raise the quota of persons from 100 to pass the JRTI exam to 300. This meant that for the first time, there were significantly more graduates of the JRTI than were needed in the courts and prosecutors. Since liberalization began in 1987, the size of the bar has taken another leap and has now reached over 1000 graduates per year. The effect of this change is that the population per attorney has dropped to about 8000 persons for every attorney, and 5000 per legal professional (including judges and prosecutors). While still high in comparative terms, Korea is no longer such a complete outlier within the OECD.[102]

As pass rates grow, legal practice moves away from its traditional monopoly areas and penetrates new areas of social life. Competition among lawyers creates incentives to expand litigation and legal modes of social ordering elsewhere. Regulation of the legal profession can, therefore, be seen as the linchpin reform of legal institutions, whose particular modalities will create a class of powerful interested parties that influence substantive legal developments elsewhere.

One of the recent developments is the emergence of very large firms that do full-service corporate law work. The four largest are Kim and Chang, Lee and Ko (Plaza Law Firm), Bae, Kim and Lee (Pacific Law Firm), and Shin and Kim

[102] South Korea has 17.6 individuals who are licensed to practice law out of 100,000 as of 2008. The U.S. has 376.3 out of 100,000 as of 2006; Germany has 154.6 out of 100,000 as of 2004; and France has 72.8 out of 100,000 as of 2004. The Office of National Court Administration, *Past, Present and Future of the Judiciary*, Judicial Development Fund Inc, December 2008, at 251 [available only in Korean].

(Sejong Law Firm). These were the first four firms to have over 100 attorneys. These firms have branched out beyond Seoul and many have offices in China, as well as lawyers who can handle legal matters in various languages. These firms also work with accountants, patent lawyers and other professionals who are not strictly speaking members of the legal profession.

Besides the practicing attorney, the Japanese model features a number of quasi-legal professionals who are allowed to conduct some legal work. These include judicial scriveners, who play a role somewhat like the French *notaire* but also provide legal advice in certain matters that does not involve going to court. There are also patent agents and tax agents who help with filings before government bureaucracy. Each of these quasi-legal professions has its own professional association.

6.2 State Regulation

A Lawyer's Act, first adopted in 1949, provides the basis for the regulation of the legal profession. Until 1982, registration of lawyers was carried out by the Ministry of Justice, but in that year the Lawyers Act was amended to transfer it to the Korean Bar Association. The government has thus reduced its direct role in the regulation of the profession.

The Lawyer's Act has been modified periodically over time. In 2000, for example, a requirement that lawyers spend some time each year on pro bono activities was introduced.

6.3 Lawyers

Lawyers are involved in all kinds of cases, including criminal, civil, administrative and family law cases. Most lawyers work in civil area.

Role in criminal cases

The scarcity of lawyers in Korea led to a relatively small number who specialized in criminal defence. The high rates of confession have meant that in practice, most lawyers have not played an active role in an adversarial sense. This has changed somewhat with the emergence of the activist legal profession. In addition, major legal reforms in the past two decades have empowered counsel in criminal cases.

The 1987 Constitution provides for a right to counsel (Art. 12(4)). The Korean Supreme Court and Constitutional Court have both issued decisions that provide some content to the right. In 1990, the Korean Supreme Court excluded confessions extracted in interrogations under the National Security Act when the defendants request for counsel had been rejected by investigators. In 2003, the Supreme Court issued an important decision to recognize a right to counsel *during* interrogation, which had not been the previous practice. [103] The Constitutional Court has also made similar

103 *See* Decision of November 11, 2003, 2003 Mo 402 [Korean Supreme Court].

decisions.[104] Subsequent amendments to the Criminal Procedure Code confirmed these decisions.

Similar court decisions helped to guarantee the right of defence counsel to the investigative records kept by prosecutors. This helped to empower the defence counsel relative to the prosecution, and deliver on the promise of a truly adversarial system in Korea.

While there is no public defender system, there is some provision for state appointment of private counsel in some cases. In these cases, lawyers are paid by the state. A trial cannot proceed in the absence of defence counsel when the defendant has been charged with an offense punishable by the death penalty or a prison sentence of more than three years. The trial judge must also appoint counsel for defendants who are minors, seventy years or older, suspected of mental illness, or indigent.

Role in civil cases

The Korean Civil Procedure Act, first adopted in 1960, regulates the structure of civil proceedings. It was extensively reformed in 2002 to concentrate the trial; previously, civil trials had involved an extensive set of appearances. There is no requirement to have a lawyer in civil cases. Conversely, the court can allow certain categories of non-lawyers (relatives or associates) to assist in representation for claims below a certain level. In many cases, people represent themselves without a lawyer. (A small claims procedure allows parties to introduce complaints orally, and so minimizes the need for lawyers.)

The lawyer's role is to assist the party with all phases of the civil procedure, including filing a complaint or an answer, participating in pre-trial conferences at which conciliation is often attempted, and then representing the party throughout the trial.

6.4 Education and Training of Lawyers

In the 1960s, legal education was carried out at the Seoul National University Graduate School of Law. However, as part of the Yushin reforms of President Park Chung hee, Korea adopted the JRTI in 1973. The JRTI system was modelled on that of Japan.

The centrepiece of the Japanese-Korean system of the legal profession is twofold. First, undergraduate legal training is widely available, and produces graduates who take a variety of jobs in business and government. It is quite a prestigious major and so may be helpful in spreading general idea of legality throughout the economic system. Most of the faculty are *not* themselves practicing lawyers, but academic specialists who work in the traditional civil law mode. Lectures, rather than interactive discussion, are the norm in legal education, with little emphasis on practical skills.

The second component is a specialized examination to enter a judicial training institute managed by the Supreme Court. (In Korea this was the Judicial Research and Training Institute.) This institute provided a

104 *See* Decision of September 23, 2004, 2000 Heon Ma 138 [Korean Constitutional Court].

shorter training and internship period (formerly two years) targeted at those who will actually serve in the courts: prosecutors, lawyers and judges. Traditionally, it was more prestigious to become a prosecutor or judge than lawyer. In recent years, however, some of the top graduates now join large corporate law firms that are expanding in Korea.

In substance, legal education and the judicial examination focused on the traditional "six codes" of the Japanese version of the civil law tradition. (The six codes are constitutional, civil, commercial, and criminal law, as well as civil and criminal procedure). The emphasis in the judicial examination has been on memorization. In turn, the system has produced criticism that it does not test the practical attributes needed to be a successful legal professional.

This exam to enter the JRTI had two components, a written part and an oral part. It operated as a quota system. For most of the period after the system was introduced the quota was less than 100 total passers per year, barely enough to provide for the needs of the ministry of justice and courts. The population of lawyers was probably the smallest per capita of any industrialized society. The result was a severely restricted legal profession. In turn this made it quite difficult to find a lawyer. Much of the alleged Korean aversion to litigation can be understood in institutional terms: if legal services are rationed, they will be expensive and difficult to find, and so parties will have to turn to non-legal alternatives to order their lives.

Because the few lawyers who passed the bar were guaranteed high incomes, there was tremendous pressure to pass the exam. People spent many years studying for the exam, a large waste of human capital, and multiple sittings are required. The overall rate of passage from 1949-1980 was only 1.7% (Yoon 2004). The average applicant passes after seven attempts, and so is in his or her late 20s by the time of entry into the profession.

But of particular interest here are the proposals to adopt American-style legal education in Korea — graduate law schools that prepare students for a nationally administered bar exams. These proposals, not surprisingly, were advanced by academics, and opposed by those judges who controlled the JRTI. Initial efforts to pass these reforms met stiff opposition in the judiciary and Ministry of Justice and failed, and a subsequent proposal languished at the Ministry of Education. However, in the early 21st century, reformers were able to leverage the similar legal education reforms in Japan to adopt a new system. In June 2003 the Ministry of Education announced a general plan to adopt graduate law schools, and this was furthered by the report of the Presidential Commission on Judicial Reform in October 2004. This became a reality with the Law School Act, adopted by the National Assembly in June 2007. The system is similar to, but distinct from the Japanese system.

From April 2009, 25 new graduate law schools opened in Korea (out of 41 that applied). A substantial number (11) were set up at universities *outside* Seoul and its environs, reflecting a political push by the then-ruling Uri Party to move development outside the capital city. Regional distribution was important politically, given the dominance of Seoul in general, and President Roh himself wanted a balance of no more than 60% of the schools in Seoul. Because of the political need for regional balance, not all excellent universities in Seoul were able to obtain licenses for the new school. The geographic distribution of schools will likely affect

downstream politics. Some regional schools have significant support in the National Assembly, and so will not be easily eliminated in downstream consolidation; if such is needed (there are currently major pressures to consolidate the number of schools in Japan.)

The Ministry of Education fought for jurisdictional control in the legislative process, and retains primary power of accreditation of the new schools through its Legal Education Committee. Though its membership consisted of 11 members, of which only four came from the traditional three corners of the legal profession. However, a 2/3 vote rule gave them a veto. The schools will be evaluated four years after opening, and every five years thereafter.

Each university that opened a new school had to close its undergraduate law faculty; in turn, some schools did not set up a graduate school and so are able to retain the undergraduate faculty. The basic model adopts some institutional structures from the United States, where law is only a subject of graduate study and not undergraduate study for the most part. Each student would have to take the full three year course, with no two year option available, in contrast with the Japanese system. The law requires a small student-faculty ratio, with 90 minimum credit hours required for graduation. There are legal research and writing requirements as well as skills training and moot court requirements.

Law schools are only allowed to admit an approved number of students, with the national total being 2000 students. The largest number (150) will be at Seoul National University, traditionally the pinnacle of the Korean educational system. Six other schools will have 120 students per class, and three others 100 each. All the others will be 80 students or less, with the smallest schools having 40 students per class.[105] This limited overall pool of students will, it is hoped, allow the bar passage rate to climb significantly, as the bar exam will be limited to the graduates of the new schools. This is a significant transformation to the system of legal education in South Korea.

The new schools required collateral institutions as well. Unlike Japanese law schools, which retain the tradition of individual entrance exams, Korea adopted a national Law School Entrance Examination Test (LEET), administered for the first time in Fall 2008. Reflecting the importance of exam integrity, the exam questions are written by a committee that is sequestered for several days before the exam each August.

Still, observers expect continued reforms to be needed. While the students themselves are a diverse lot, the faculty are primarily the traditional ones who taught in the undergraduate programs. Faculty have heavy burdens in the interim period, while the last undergraduate students finish their courses: faculty must teach at both levels. The new law requires 20% of faculty to have had a career in law firm, public prosecutor’s office or in the courts, so there has been some effort to hire practitioners. But it remains to be seen whether the new system will address the goals of producing law graduates who are suitable for the needs of the Korean market.

[105] Korea, SungKyunkwan and Yonsei Universities in Seoul, and Chonnam, Kyoungpook and Pusan Universities outside Seoul will each have 120 students. Ehwa, Hanyang and Chungnam Universities will have 100 each.

There are likely to be economic challenges as well. Retaining the undergraduate faculty, which was sizable, for the reduced number of law school students, will pose significant financial challenges to universities. This is true notwithstanding the much higher tuition levels. Some universities recognized this and decided not to apply, and have now risen in the hierarchy of undergraduate law programs, with the elite schools now out of the picture. This may prove to be the better strategy in the mid-term. Another economic concern arises from the high tuition cost, which has been criticized as putting legal education outside the reach of poor people.[106]

Another development that has been driven by the market has been the effort of some people to bypass the highly restrictive bar. Some South Koreans take an LLM degree in the United States, and, if they can pass the bar exam in one American jurisdiction, are able to return to Seoul to work as "legal consultants" in the law firms. Virtually every major law firm now has a stable of such foreign trained consultants.

6.5 Disciplining Lawyers

Lawyers are subject to the rules in the Lawyers Act, as well as ethics rules promulgated by the Bar Association. Until 1993, discipline was handled by the Ministry of Justice. In that year, the Lawyers Act was amended to empower the legal profession to become more self-regulating. The Association has established a Disciplinary Committee to take disciplinary action against any member who violates the Lawyers' Act, the by-law of the Korean Bar Association and/or the local bar associations, or who conducts themselves in a manner detrimental to lawyer's dignity. The rulings of these disciplinary cases have been published since 1998.

6.6 Dispute Resolution

[See Sec. 4.4 above]Conclusion

The Korean legal profession has emerged from being a kind of afterthought to a major source of innovation. The traditional system became the focus of other critiques as well. The low pass rate was one focus. Prospective lawyers would waste years of study preparing for the bar exam, taking it many times. Many repeat takers, of course, would never pass. The system thus wasted a good deal of human capital.

One problem with the Korean legal profession, mirroring broader issues in Korean society, is excessive concentration in the capital city of Seoul. As Korea has developed, the capital and its environs have become ever more desirable to live in, but the counter effect is that many rural areas are poorly served by law and other services. A 2007 report indicated that over

[106] Chan-Gui Choi, 'Law School, A Party for the Privileged Class,' *Legal Journal* 378 (2007).

half of Korean counties and cities had no lawyer.[107] As mentioned above, there are more lawyers in Seoul than the rest of the country combined, and no head of the Korean Bar Association has ever come from outside Seoul. The general lack of lawyers, especially in the rural areas, is has led many Koreans to represent themselves *pro se* (without a lawyer). This effectively means there is no right to counsel for many Koreans, though the legal aid system described in Sec. 4.20 supra does provide some support for many.

The practice of retirement from poor-paying but high-status judicial positions to the lucrative private bar has also led to controversy. Seniority norms and personal connections mean that former judges who argue cases before the same court they used to serve in will generally be deferred to by their former colleagues on the court.[108] These ex-judges and ex-prosecutors are then sought out by clients, inducing more judges to leave. There have been pressures to reduce the practice, especially in the wake of scandals involving referrals by court staff to ex-judges and prosecutors now in the private bar. It has been argued that the code of judicial ethics should be modified to restrict such retirements or require recusals, but nothing has been achieved in this regard. Roh Moo hyun, however, has made merit and not seniority the basis of appointments in both the judiciary and prosecutors' offices, and this can be seen in one sense as an attack on Confucian norms.

One of the most dramatic developments is the increasing role of women in the legal profession in Korea. The percentage of female passers of the bar exam has risen dramatically in recent years, and now approaches 25 percent. Women are entering the judiciary, and the appointment of Minister of Justice Kang Kum-Sil is another benchmark. This is bound to have a major impact on the practice of law in a traditionally patriarchal society. Again, Korea is only one among many societies experiencing such a transformation.

[107] Solidarity Council of Legal Scholarship, Labor Group, Civil group and Human Right Group, Pamphlet for Public Debate for Law school System That Annual 3000 Lawyer, (2007) pp. 28.

[108] This practice is known as *junkwanyewu* in Korean.

7. Justice sector reform

Reform has been a buzzword in Korean politics since 1987, and the legal system has been affected. An initial burst of institutional changes, such as an increase in the numbers of lawyers, has also been accompanied by major rounds of negotiated reform packages adopted by high profile commissions. The courts have also been a direct source of change, as constitutional decisions have affected the shape of the legal system itself.

7.1 Initiation

The legal system became a target of reformers in the 1990s. Many of the proposals reflected long-standing criticisms from academics that the system was too remote from the population. In this regard, the importance of academic commentators should not be underestimated, as many of the reforms that eventually emerged had been proposed for many decades.

In addition, a phenomenon of activist lawyers emerged in the 1980s and 1990s, centred around a group of lawyers called *Minbyeon.* Minbyeon lawyers sought to use the law to advance social change, and took up causes related to democracy and economic reform. The courts became a vehicle for the expansion of participation in society. The lawyers directly involved in activist causes also sought to transform the legal system itself, and so were active players.

The ideas of academics and activist lawyers, whoever, would not have come to fruition unless they fit the broader political context. One factor driving legal reform was broader attempts to reform the Korean state, to move beyond the legacy of government control that had operated during the high growth period. Under the Kim Young Sam administration, major programs of administrative reform were introduced as part of a globalization initiative. Kim set up a Globalization Committee to make recommendations as to how to transform the Korean state. The state transformation projects were continued by Kim Dae Jung.

One part of the emphasis was on reduction of corruption and diversification of the economy away from the chaebol industrial conglomerates. Administrative reform involved reorganisation and consolidation of the bureaucracy and administrative law reforms that expanded citizen recourse and made government decision-making more transparent. A massive review of regulation was undertaken using cost-benefit analysis, with more than 40% of government regulations removed (Kim 2000: 149).

It was in this context that the major proposals for legal institutional reform got under way. Without the political leadership of various reformist presidents, it is difficult to image how reform could have been achieved. But the initial impetus came from academics, from civil society activists, and others.

Beyond the macro level reforms that received a good deal of public attention, there were many smaller reforms that had an important impact. Special divisions of the court system were established in Seoul to handle international disputes and special disputes such as patent and securities law. 1994 amendments to the Administrative Litigation Law established a designated administrative court of first instance and made it easier to sue by abolishing the requirement that administrative plaintiff exhaust administrative remedies before bringing suit. New appeals mechanisms were set up inside the government and an Administrative Procedure Act ("APA") was passed to facilitate public challenges to the state. These reforms established procedural requirements for government bodies, requiring pre-publication notice of proposed rules and statutes, and setting a presumption against the use of administrative guidance. Another crucial reform that interacts with and contributes to increased administrative litigation is the 1994 Law on Disclosure of Information. This law allows citizens to access government information for the first time in Korean history, and gives citizens more information on which to base their complaints against abuse of administrative authority.

These changes in state-society relations led to a new judicialization of politics. Civil society NGOs became increasingly important actors, using the law to challenge various traditional structures. They became involved in administrative litigation as well as monitoring corporate behaviour.

The 1997 crisis placed new pressures on the Korean legal system. Bankruptcies skyrocketed, and demand for court-supervised corporate reorganisation placed extra burdens on the Korean judicial system. Multilateral financial institutions apparently pressured Korea to adopt a special bankruptcy court, but this recommendation was not adopted.

The administration of Kim Dae Jung saw new impetus for legal institutional reform. It was only with the presidency of Roh Moo Hyun (2003-2008) that the broadest reforms were finally realized.

In short, there were several tracks of reform: internal reforms in the court and legal system that were being adopted continuously throughout the 1990s, specific reforms advocated by the international financial institutions, and major rounds of system-wide reform, proposed under a series presidential commissions.

7.2 Responsibility

The Presidential Commission on Globalization under Kim Young Sam produced a wide ranging series of recommendations, and focused in part on the need for "globalization of legal services and legal education." New ideas such as the introduction of US-style graduate legal education and a jury system were discussed extensively. The Commission's report included a proposal to increase the quota of bar passers from 300, by steps up to 1000 in the year 2000. The media followed with intensive coverage of shortcomings of the current system. The proposal, however, generated significant backlash. While the bar opposition was predictable, the opposition of the Supreme Court was fatal to many aspects of the reform. The proposal to expand the bar was indeed adopted, but other reforms were put aside for the moment.

The ideas to more radically transform the justice sector remained in place, however. As time went on, the legal reform pressure continued. Under President Kim Dae Jung, the Committee for Propelling Judicial Reform was established in May 1999 with representation of the various interest groups and agencies, such as judges, the ministry of justice, legal academics and the bar. It produced a report recommending some significant changes, thought the Supreme Court continued to be a barrier.

With the election of Roh Moo Hyun in 2003, reform received a new impetus. Roh had a populist streak, and sought to undermine cozy business-government relationships. He also sought to push legal reform. He was supported in this effort by civil society, which emphasized the expansion of the legal profession to serve consumer interests as well as civil society.

Crucially, the Supreme Court became supportive, which had not been the case in the mid-1990s. This was partially due to a change in leadership of the Court; the Chief Justice in the 1990s had been opposed, but the Chief in place in 2003 had a different view, seeing the possibility for enhancing judicial legitimacy through reform. But it also reflected the fact that Japan had already moved ahead with its reforms. Korean reformers were able to use this fact to mobilize support for change: Japan has special weight in that both American and German educated lawyers have some sense of familial relationship with the Japanese legal system. In addition, the strong pressure from the Blue House was crucial. A Judicial Reform Committee was constituted under the Supreme Court in October 2003.

7.3 Design

A distinctive feature of legal reform in Northeast Asia is the use of deliberative committees to produce recommendations for reform. These committees have representation from the three pillars of the legal profession (lawyers, prosecutors and judges) as well as citizens, media and business. The most ambitious reforms were proposed by the Supreme Court's Judicial Reform Committee. The design reflected long-standing calls for reform, informed by the experience of several other countries, and reflecting much debate and discussions. After one year of vigorous discussion and research, the JRC submitted its final recommendations to President Roh Moo-hyun at the end of 2004. It made five recommendations: (1) it recommended a re-organisation of the court system by creating "appellate divisions of the last resort for certain cases in High Courts to alleviate the workloads of the Supreme Courts;" (2) the appointment of some judges from the ranks of experienced attorneys and prosecutors, to get more experience into the courts ; (3) the establishment of three-year graduate level law schools; (4) the adoption of a system of citizen participation in the trial process as lay judges; and (5) the reform of the judicial process by expediting certain minor criminal cases and payment of fines as well as instituting methods that would better protect the rights of accused and victims during criminal proceedings.

7.4 Review

President Roh then established a Presidential Committee on Judicial Reform to review and implement the 2004 JRC recommendations. The process itself was widely broadcast, with open meetings and vigorous discussion of various proposals. In May 2005, the Presidential Committee made public its decisions. Of the five recommendations made by the JRC in December 2004, the Presidential Committee formally recommended three to the National Assembly, Korea's parliament, for immediate approval, including a graduate level law school system and civil participation in criminal trials were included. The Presidential Committee also prepared draft legislation for specific reforms. The content of the legislation basically reflected the proposals designed by the Judicial Reform Committee.

There was, however, significant opposition. The prosecutors strongly opposed proposed amendments to the Criminal Procedure Act that would have removed automatic acceptance of prosecutorial investigation records as evidence. Under the reform proposal those records would be evaluated like any other piece of evidence. Prosecutors' succeeded in introducing a provision at the Presidential commission stage, subsequently adopted by the National Assembly, to ensure that investigation evidence would be automatically admitted if verified by video or photo showing the scene. In addition, some of the reforms were seen as being insufficiently aggressive. Law professors and civic groups reacted strongly against the retention of a relatively low quota for entrants to the profession. Still, the remarkable introduction of such major reforms makes the Roh administration a key juncture in legal reform. The National Assembly adopted the reforms after some debate.

7.5 Implementation

Most major reforms have been adopted by the National Assembly by statute. Each reform then goes through its own process of implementation. In the case of legal education, for example, a Legal Education Committee was established under the Ministry of Education to supervise the creation of the new law school system. Like other such committees, this one involved not only those directly affected by implementation (law professors, members of the legal profession, but a senior bureaucrat and members of civil society). In the case of internal reform of the courts, implementation is up to the Courts and the Ministry of Court Administration.

7.6 Evaluation

Again, each reform is evaluated in a slightly different process. The new law schools are to be evaluated by a committee under the Korean Bar Association. This Committee's reports will inform the ministry of Education in its supervisory power over schools. The Supreme Court has an extensive program of evaluating reforms in the judiciary. In the case of the new system of lay participation, the statute calls for a review of the

reform five years after implementation, so there will likely be new proposals for reform at the end of the trial period.

It is important to note that civil society in Korea plays an important role in evaluating reform. Non-governmental organisations have court-watch programs, and are deeply engaged in the legal process. Hence they are in a good position to provide information to policymakers on the actual performance of the judicial reforms. The bar associations, as well, have taken on a role of evaluating specific reforms. The efforts of these groups then feed back into the political process, either through legislative politics, or more frequently through intervention with the powerful executive branch.

7.7 Remedies

Reform in South Korea has been an iterative and recursive process. Proposals circulate for many years before adoption; once adopted there is a continuous process of evaluation, and in some cases corrective reform. The political system plays a role here. The election of conservative president Lee Myung-bak in 2008 has led to a slowing of the process of judicial reform, and has caused some concern among activist lawyers. Yet the institutional reforms have come so far that many are quite irreversible. No doubt there will be a good deal of tinkering with some of the reforms as the process goes forward for many years to come.

7.8 Oversight

Justice sector reform in Korea has been a complicated process. Because of the scale of the transformations, and the links between legal reform and other more obviously political reforms, there has been some attention and oversight of the process from the broader political system. As the law has become more prominent and the legal consciousness of the citizenry has developed, it is natural that there are greater calls for a more accountable and responsive political system.

The Parliament

Historically, politics in Korea has been centred around the executive branch, with parliament playing a role as an arena for politics rather than an independent overseer of policy. However, this dynamic changes somewhat during periods of divided government, such as those that marked the tenure of Presidents Kim Dae Jung and Roh Moo-hyun. At times, the National Assembly has been a locus of blocking judicial reforms. For example in the 1990s, the leader of the conservative party Lee Hoi-Chang was a former judge and lawyer who himself represented many of the entrenched interests in blocking reform. In more recent years, the National Assembly has become a site of passing reform proposals. In general, the Korean parliament is *not* major source of policy initiatives, which tend to come from the executive or from civil society. Parliament has thus been largely reactive

in the legal reform process, responding to pressures and initiatives from outside.

Parliamentary committees

A judicial affairs committee in the National Assembly provides some oversight of justice sector reform and operations. It has not, however, been particularly active in the major reform episodes of the past two decades.

The Ombudsman

From 1997-2008, Korea had an independent office of the ombudsman, that has now become part of the broader Counter-Corruption and Civil Rights Commission. The office has focused on providing individual level remedies, and not played a systematic role in legal reform. However, individual ombudsmen have played a role through non-governmental organisations. And the Ombudsman's office can itself be considered part of the machinery of responsive government, designed to enhance the protection of the citizenry.

Local and Provincial Government

Local and provincial government are relatively underdeveloped in Korea, and have played no systematic oversight in reforms. However, the general concern about concentration of power and legal activity in Seoul has led the localities to push for a more decentralized justice system. These politics are mostly played out through the National Assembly. One example has been the push for new law schools to be located all around the country, an example of successful political influence into the legal reform process. This particular development is welcome, given the over-concentration of Korean society in Seoul.

Central Government

The central actors in Korea's judicial reforms have been elements of the central government. Besides the Courts, the Ministry of Justice has played a crucial role in organizing earlier discussion on reform proposals and trying to shepherd them through the process. In the most substantial instance of reform, that achieved under President Roh, it was the Supreme Court and the Presidency that played the leading role, with the Ministry sidelined somewhat. Nevertheless, the Ministry will play an ongoing role in monitoring reforms. In addition, the Ministry of Education has assumed a strong role in the legal education reform. This represented a compromise after bureaucratic struggles to play a role in legal education.

Conclusion

The process of leading justice sector reform has reflected the profound influence of non-governmental organisations, including the bar and law professors, who have struggled to shape reform. Academics have also played a leading role. But social pressure alone has not been sufficient. Instead, two key institutions were required for major reforms to issue: the Supreme Court and the President. Even with presidential leadership, such as

exhibited by Kim Dae Jung in the 1990s, reforms could not progress without the cooperation of the Supreme Court, which then played a leading role in constituting the Judicial Reform Committee. Only when *both* the Supreme Court and presidency were aligned on the need for reform could reform actually progress in South Korea.

One feature of the reform process worth noting is the public nature of the reform debates. The fact that the Presidential Committee held an open process not only meant that legal reform could be monitored by the relevant groups and the interested public, but also that it became an issue of broader social importance. The media covered the discussions in detail and so the process helped to build political support for the reforms. In addition, the fact that most of the key players were involved in the committee structure meant that every major institution could contribute. Overall, then, Korean legal reform has reflected a responsive process in which elite institutions and civil society had a voice.

It is worth reflecting how this remarkably successful reform project has occurred, and whether the conditions present in Korea might generalize elsewhere. As the impetus for many of the reforms came from civil society, the presence of the United States as a kind of reference society was important. Many of the activists had spent time in the United States, and had in their minds a vision of a role for law in social change (Ginsburg 2007). The particular political configuration of rapid democratization, accompanied by generational change among judges and lawyers, no doubt played a role. The politics of national executives has been mentioned as a crucial factor, sometimes constraining and other times facilitating rapid legal reform. And ultimately, a cultural factor may be relevant. Korea is a hyper-dynamic society in which the latest global developments spread quickly. As legal reform became identified with modernization of the political economy, it became perhaps inevitable that it would become popular.

8. Conclusions

8.1 Strengths and Weaknesses

Korea provides a fascinating environment to observe the dynamics of legal reform in a democratizing society. In comparative terms, the process of judicial reform in Korea has made remarkable achievements in a short period of time. Since 1987, the Korean legal system has undergone systemic changes that have increased its visibility, role, and political profile. The old equilibrium of little litigation, extensive bureaucratic discretion, and personalism served the interests of the state bureaucracy, business, and military government. Authoritarian rule was insulated from public scrutiny and challenge, business was able to secure protected markets, and disputes were suppressed. Political change, beginning in 1987, contributed to a more legalistic environment and appears to be the seeds of a shift toward the rule of law. These reforms in the legal system have encouraged more litigation, creating new interests that support continued openness. As government is less able to cut deals below the table, new groups are able to use litigation to advance social agendas.

The new environment has produced a politics of legal reform. Legal institutions compete among themselves for status and prestige within an environment in which public demands are higher than ever. The political competition that has transformed Korea since 1987 has also led to competition among legal institutions, with various institutions competing to define the public debate. At the same time, legal institutions have become the locus for broader political struggles. The political process of producing reform has been quite transparent, and interest groups have had some say in the process.

Democratization has improved the status of judges and hurt that of prosecutors. It has led to expansion of the legal profession, which is likely to impact the society in as-yet-unanticipated ways. As actors compete for status and resources in this changed milieu, international institutions and norms become ammunition in the political battles both within and among legal institutions.

One of the key strengths of Korean legal and judicial reform has also been a weakness, namely that it has depended in large part on political pressure that is quite contingent. When reformist presidents are in office, reforms move ahead; when conservatives are in power, reforms may stall.8.2 Challenges and Controversies

This is only natural in a democratic society. Yet it has led at times to certain incoherencies in the reform process. Timing, it is said, is

everything in politics, and this seems to be a lesson of the Korean experience of legal reform.

The increasing prominence of law in Korean society has led inevitably to more political conflicts being carried out in the courts. This has led to conflict among legal institutions. The prosecutors, for example, are believed by many to have political motives in some of their prosecutions, but the courts seem willing to limit their reach. For example, in recent months an opposition member of the National Assembly was accused of assault and destruction of public assets in connection with actions taken in the parliament. (The Korean National Assembly is not infrequently the scene of physical violence.) He was found not guilty by the court. In another case, families of victims who died in a conflict with police, for which no prosecution was made, challenged the non-prosecution in court and were allowed access to the investigation materials. The court also rejected the prosecution of a television program charged with defamation of public officials during the so-called US beef controversy. There are many other examples. The public nature of these disputes both highlights interest in the law; at the same time it might threatens its legitimacy if law becomes perceived as politics by other means.

8.3 Current Reforms

One issue that remains controversial is *Jeonkwan Yewu*, the practice of retirement of judges and prosecutors to the practicing bar, as described above in Section 4.18. This has its origins in the limited size of the bar in the pre-reform period. Even if there is no actual distortion in the justice system that results from ex-judges appearing before their own former colleagues, there is to some extent an appearance of impropriety and there are likely to be moves to reform this practice.

8.4 Issues for Future Reform

One of the issues likely to be a continued topic of debate in Korea is the size of the bar. Reformers were unsuccessful at removing the quota on bar passage and letting the number of lawyers be determined by the market. But the presence of legal consultants who have been certified in another jurisdiction has allowed some market responsiveness for high-end corporate law work. The lower tiers of the legal profession that would provide services to individual Koreans who need criminal and civil representation remain quite limited in numbers. So there are pressures for expanding the bar, but these run right up against the Bar Association, which is fighting to reduce the number of bar passers. This issue is likely to remain alive for some time. Despite claims to the contrary by lawyers, the size of the legal profession remains low in comparative terms, but switching to a market model of entering the profession will be a major political challenge.

For further reading on the reform process, see Cho (2010), Yoon (2010), Ginsburg (2004) as well as other sources cited in the references.

References

Cho, Byung-Sun, “Juvenile Delinquency and Juvenile Justice System in Korea” *Beophak Nonjip (Journal of Cheongju University Law College)*, Vol. 16 (1999), pp. 81-134.

Cho, Byung-Sun, “Reform Trends of Criminal Procedure in South Korea: Transition to Constitutional Guarantee of Human Rights” *Miguk Heonbop Yeongu (Study on the American Constitution)*, Vol. 17 No. 2 (2005), pp. 41-76.

Cho, Byung-Sun, “Reform Trends of Criminal Procedure in South Korea: Transition to Globalization and Rule of Law” *Cheongdai Hagsul Nonjip (Journal of Cheongju University)*, Vol. 6 (2005), pp. 31-105.

Cho, Byung-Sun, “‘Confucian Legacy’ in Korean Criminal Justice: An Example of the Capital Punishment Dialogues” *Cheongdai Hagsul Nonjip (Journal of Cheongju University)*, Vol. 8 (2006), pp. 23-52.

Cho, Byung-Sun, “South Korea’s changing capital punishment policy. The road from de facto to formal abolition”, 10 *Punishment & Society* 171 (2008), 177.

Cho, Kuk, “The Unfinished “Criminal Procedure Revolution” Post-democratization South Korea”, 30 *Denv. J. Int'l L. & Pol'y* 377 (2002).

Cho, Kuk, “The 2007 Revision of the Korean Criminal Procedure Code” ” *Journal of Korean Law*, Vol. 8 No. 1, 2008, pp. 18.

Cho, Kuk. 2010. *Litigation in Korea.* Edward Elgar Press.

Choi, Dai-Kwon, “The Judicial Functions and Independence of the Judiciary in Korea” *Seouldae Bophak* (Law Journal of Seoul University), Vol. 40 No. 2 (1999), p. 54.

Choi, Dai-kwon. 1980.”The Development of Law and Legal Attitudes in Korea.” In Bong Duck Chun, William Shaw, Dai-kwon Choi, Traditional Korean legal attitudes. Berkeley: Institute of East Asian Studies.

Cohen, J., Baker, E., "US foreign policy and human rights in South Korea", in Shaw, W. (Eds.), *Human Rights in Korea: Historical and Policy Perspective*, Harvard University Press, Boston, MA, 1991.

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

Ginsburg, Tom (ed.), *Legal Reform in Korea*, Routlege Curzon, NewYork, 2004.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies*. New York: Cambridge University Press.

Ginsburg, Tom. 2007. “Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan.” In Terrence Halliday, et al., eds, *Fighting for Freedom.* Oregon: Hart Publishing. pp. 45-63.

Ginsburg, Tom. 2009. “The Constitutional Court of Korea.” In Andrew Harding and Peter Leyland, eds. New Courts in Asia. New York: Routledge Press.

Han, In Sup, “A Dilemma of Public Prosecution of Political Corruption” in Yoon, D. K. (ed), *Recent Transformations in Korean Law and Society*, Seoul National University Press, Seoul, Korea, 2000, p. 367.

Kim, Heekyoon, “The Role of the Public Prosecutor in Korea: Is He Half-Judge?” *Journal of Korean Law*, Vol. 6 No. 2, 2007, pp. 163.

Kim, Pan Suk. 2000. “Administrative Refrom in The Korean Central : The Dae Jung Kim Administration.” *Public Performance and Management Review* Vol. 24 No. 2, pp. 145-60.

Kim Tschol-Su, *Honbophak ha (Constitutional Law Vol. 2)*, Jihaksa, Seoul, Korea, 1972.

Kwon, Youngjoon, “Litigating in Korea: A General Overview of the Korean Civil Procedure” , *Journal of Korean Law*, Vol. 7 No. 1 (2007), p. 108.

La Porta, Rafael, et al. 1998. “Law and Finance” Journal of Political Economy 106: 1133-1155.

Lee, Hee-Jung, “The Structures and Roles in Judicial Review of Administrative Litigation in Korea” , *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 43.

Lee, Jang-Han, “The Korean Military Justice System” 1986 *Army Law* 37 (1986).

Lee, Sung Hoon, “Foreign Judgment Recognition and Enforcement System of Korea”, *Journal of Korean Law*, Vol. 6 No. 1 (2007), p. 110.

The Office of National Court Administration, *Past, Present and Future of the Judiciary*, Judicial Development Fund Inc, December 2008.

Park, Yong Chul, “Does It Matter Who Wrote It? The Admissibility of Suspect Interrogation Record Written by Prosecutors in Korea”, *Journal of Korean Law* Vol. 6 No. 2 (2007), p. 180.

Park, Sang Ki et al., *Hyeongsa Jeongchaik (Criminal Policy)*, Hanguk Hyeongsa Jeongchaik Yeonguwon (The Korea Institute of Criminology Press), 7d ed. 2003, Seoul.

Pyo, Chang-Won, “Policing: the past”, *Crime & Justice International*, Vol. 17 No. 50, p. 5.

Pyo, Changwon, “Prosecutor, Police and Criminal Investigation in Korea: A Critical Review” *Journal of Korean Law* Vol. 6 No. 2, 2007, p. 191.

Rhee, Woo-young, “Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication in the Republic of Korea”, *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 17.

Rhee, Woo-young, “Judicial Appointment in the Republic of Korea from Democracy Perspective” *Journal of Korean Law*, Vol. 9, 2009, p. 53.

Reichel, P.L., *Comparative Criminal Justice system: A Topical Approach*, Prentice-Hall, Upper Saddle River, NJ, 2002.

Ryuichi, Hirano “Diagnosis of the Current Code of Criminal Procedure”, 22 *Law in Japan: An Annual* 129, 133 (1989).

Yoon, Dae-kyu. 2004. “The Paralysis of Legal Education in Korea” in Tom Ginsburg, ed., Legal Reform in Korea. New York: Routledge Press.

Yoon, Dae-kyu. 2010. *Law and Democracy in South Korea.* Seoul: IFES Press.

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Constitutional Court of Korea http://english.ccourt.go.kr/

Ministry of Justice, Republic of Korea
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