

# **A Comparative Study on the Criminal Justice Structures of South and North Korea**

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## **I. Introduction**

Criminal justice is a field of study that deals with crime and analyzes the process and agencies of its control. This paper was prepared in order to answer the question, "How do the criminal justice systems of South Korea and North Korea<sup>1)</sup> function based on the different political system, i.e., the liberalist and the socialist system?" Through a comparative study between the two, we can find out how the quite different political ideologies impact on the respective criminal justice systems. This kind of study will be a step toward pursuing a reunification model for the two different legal cultures, which has been developed without contact with each other since World War-II.

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1) For brevity, the Republic of Korea (ROK) is referred to as South Korea and the Democratic People's Republic of Korea (DPRK) is as North Korea.

## Outside Influence

The modern legal system of South Korea was influenced by those of Japan, Germany (formerly West Germany), and the United States in general. Especially in the field of criminal justice, the German theory of penal law made a strong impact on the interpretation of the Korean penal code, and the pressing issues around criminal procedures raised by German and American scholars were reviewed in depth.<sup>2)</sup> The legal system of North Korea, on the other hand, was affected by Russia (formerly the Soviet Union) and mainland China. The impact of Russia was dominant in the period from 1945-1958; China's influence grew during the period from 1958-1960; and then the Chucheism (self-reliance) has been emphasized since 1960.<sup>3)</sup>

## Goals of the Criminal Justice System

The goal of the criminal justice system in South Korea is to preserve the idea: "the sovereignty of the country resides in the people," and to strengthen "the free and democratic basic order." Also it functions to protect society from criminals and therefore to protect the legal interests and the human rights of individuals. The criminal justice system of North Korea serves to protect "the sovereignty in the nation" and "the socialist system," and to safeguard the privacy and human rights of the people and to make them law-abiding people.<sup>4)</sup> Both systems recognize

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2) For the amendment process of the Court Organization Act after World War-II, see Chulsoo Kim, *Panryegyojae Hunbup* [Textbook for the Case of Constitutional Law] (Casebook Series, No. 3) (Seoul: Bupmunsa, 1977), at 49-50 (Korean).

3) For details, see Koojin Kang, *Bukhanbueui Yeunku* [A Study on the North Korean Law] (Seoul: Pakyoungsa, 1975), at 9-69 (Korean).

4) *Chosunminjujuewuinminkongwhaguk Hyungsasosongbup* [The Criminal Procedure Act of North Korea] (Enacted by Decision No. 12 of the

that the social defense, the protection of legal interests and the safeguard for human rights are the basic functions of criminal law, along with the positive role of general and specific deterrence as well. However, there are some differences between the two in terms of goals, measures, and effectiveness. The promotion of human rights is a more important issue in South Korea based on the state of freedom and individualism, whereas in North Korea, a totalitarian state, the social defense is more important.

## II. Structure of the Criminal Justice System

In South Korea, the independence of the judiciary is especially meaningful under the system of checks and balances among separated powers, i.e., the legislative, administrative and judicial powers. In North Korea, it seems that the independence of judicial power is not working properly in the field of personnel administration and judicial services,<sup>5)</sup> even though it is expressly provided in the constitution.<sup>6)</sup> Both criminal justice systems consist of such components as police, prosecution, courts, and corrections.

### Investigating Officer

In South Korea, the power of criminal investigation is invested in the

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Standing Committee for the Top People's Council on Jan. 15, 1992), arts. 1, 5 (Korean) [hereinafter *the Criminal Procedure Act of North Korea (1992)*].

5) "Bukhaneui Sabupjedo [the Court System in North Korea]," Chosunilbo (Oct. 13, 1991, Sunday), at 18 (Korean).

6) Chosunminjujuewuinminkongwhaguk Hunbup [the Constitution of North Korea] (Adopted by the 1st meeting of the 10th Conference of the Top People's Council on Sep. 15, 1998), art. 160 (Korean) [hereinafter *the Constitution of North Korea (1998)*].

general and special police officer under the control of the National Police Agency as a subdivision of the Ministry of Government Administration and Home Affairs, and in the general and special police officer and the public prosecutor belonging to the Public Prosecutor's Office under the Ministry of Justice.<sup>7)</sup> In North Korea, the investigation power is given to the criminal investigator, the preliminary examiner and the public prosecutor.<sup>8)</sup> It is similar in that the public prosecutor has the authority to take direct action to investigate criminal affairs or to direct and supervise the investigating officer.

### Public Prosecutor

The public prosecutor's office in South Korea consists of the Supreme Public Prosecutor's Office, the High Public Prosecutor's Office, the District Public Prosecutor's Office and the District Public Prosecutor's Branch Office, which all belong to the Ministry of Justice, and the Military Prosecutor's Office which belongs to the Ministry of National Defense.<sup>9)</sup> The public prosecutor's office of North Korea consists of the Central Public Prosecutor's Office, the Provincial/Direct Control City Public Prosecutor's Office, the City/District/County Public Prosecutor's

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7) Hyungsasosongbup [the Criminal Procedure Act of South Korea] (Enacted by Act No. 341 on Sep. 23, 1954; amended by Act No. 5454 on Dec. 13, 1997), arts. 195-197 (Korean) [hereinafter *the Criminal Procedure Act of South Korea (1997)*]; Gumchalchungbup [the Public Prosecutor's Office Act of South Korea] (Wholly amended by Act No. 3882 on Dec. 31, 1986; amended by Act No. 5430 on Dec. 13, 1997), art. 47 (Korean) [hereinafter *the Public Prosecutor's Office Act of South Korea (1997)*].

8) The Criminal Procedure Act of North Korea (1992), arts. 8-9, 74.

9) The Public Prosecutor's Office Act of South Korea (1997), arts. 2-3; Gunsabupwonbup [the Military Courts-Martial Act of South Korea] (Wholly amended by Act No. 3993 on Dec. 4, 1987; amended by Act No. 6290 on Dec. 26, 2000) arts. 36-42, 47 (Korean) [hereinafter *the Military Courts-Martial Act of South Korea (2000)*].

Office and the Special Public Prosecutor's Office.<sup>10)</sup> There is a quasi-prosecutorial organization, the Supervising Committee for Legal Affairs, both in the central and local government.<sup>11)</sup> The two Koreas have the same principle of identity of public prosecutors. In South Korea, the Public Prosecutor General is not responsible for the Minister of Justice or the National Assembly during his term of office. However, the Director of Central Public Prosecutor's Office in North Korea is responsible for the Top People's Council and a Standing Committee for the Top People's Council.<sup>12)</sup> The public prosecutor of both Koreas has the authority to investigate and prosecute. The prosecutor of South Korea has the authority as a representative of the public interests and that of North Korea as a guardian. In South Korea, the qualification for public prosecutor is determined by an Act of the National Assembly.<sup>13)</sup> Also the appointment, assignment, and extension of the age limit for advancement level of the public prosecutor are made by the President upon the proposal of the Minister of Justice.<sup>14)</sup> In North Korea, no special qualification for public prosecutor is required, and the appointment of public prosecutor is made by the Central Public Prosecutor's Office.<sup>15)</sup> There is no such system as exclusion, challenge and refraining of public prosecutor in South Korea. However, the public prosecutor in North Korea may be excluded from the exercise of his duties, and he may be made the subject of an application for challenge, and he may refrain from passing on the matter of certain case for the purpose of fair trial.<sup>16)</sup> No prosecutor or judge in South Korea may be

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10) The Constitution of North Korea (1998), art. 147.

11) *Id.* art. 18.

12) *See Id.* art. 152.

13) *See* the Public Prosecutor's Office Act of South Korea (1997), arts. 27-30.

14) *Id.* arts. 34, 39, 42(3), etc.

15) The Constitution of North Korea (1998), art. 149.

16) The terms of refraining, exclusion and challenge can be found at the arts. 34, 36, 37, 40, etc. of the Criminal Procedure Act of North Korea (1950); *see also* the Criminal Procedure Act of North Korea (1992), arts. 21, 25, 27-29.

removed from office except by impeachment or a sentence of imprisonment (without prison labor or heavier punishment), nor shall he be suspended from office, have his salary reduced, or suffer any other unfavorable treatment, except by disciplinary action.<sup>17)</sup> There is no such regulation in North Korea.

### Defense Counsel

Any person who is suspected of a crime has the right to assistance of counsel for his legal defense in both Koreas. In South Korea, the right to appointment of defense counsel is recognized at the stage of investigation. In North Korea, the defense counsel can be appointed after the determination of criminal liability at the stage of preliminary examination. One similarity between the two is that a counsel shall be appointed from among attorneys-at-law, and a counsel who is not an attorney-at-law may be appointed in a certain case. In South Korea, a special defense counsel may be appointed among the persons who are not attorneys-at-law in special circumstances provided that any court, other than the Supreme Court (the appeals court), may permit exceptions.<sup>18)</sup> A defense counsel in North Korea is appointed broadly among persons who are close relatives of the suspect or the defendant, the representative of organization belonging to, and special persons approved by public prosecutor or court.<sup>19)</sup> In both Koreas, the court appoints a defense counsel where necessary. In South Korea, the court appoints a state counsel ex officio or by a request of the suspect or the defendant

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17) The Public Prosecutor's Office Act of South Korea (1997), art. 37; Bupwonjojikbup [the Court Organization Act of South Korea] (Wholly amended by Act No. 3992 on Dec. 4, 1987; amended by Act No. 6408 on Jan. 29, 2001), art. 46 (Korean) [hereinafter *the Court Organization Act of South Korea (2001)*].

18) The Criminal Procedure Act of South Korea (1997), arts. 31, 386.

19) The Criminal Procedure Act of North Korea (1992), arts. 169-170.

in some criminal cases provided there is no defense counsel.<sup>20)</sup> In North Korea, the public defender is appointed by the Bar Committee in all criminal cases where the accused has no defense counsel.<sup>21)</sup> Certain qualifications for an attorney-at-law are required in both Koreas. A South Korean citizen who has completed the required curriculum of the Judicial Research and Training Institute after passing the Korean bar examination and who is entitled to be a judge or a public prosecutor is qualified for an attorney-at-law in South Korea. Any lawyer who intends to establish a legal practice must register his name with the Korean Bar Association.<sup>22)</sup> A North Korean citizen, who is a law specialist, a worker in the field of law for not less than 5 years, and a specialist in several fields who has passed the bar examination after a short period of legal training, is qualified as an attorney-at-law by the approval of the Central Committee for the Chosun Bar Association.<sup>23)</sup> There seems to be no real case,<sup>24)</sup> even though it is prescribed by law, that

20) The Criminal Procedure Act of South Korea (1997), arts. 33, 214-2(9), 282-283, 438(4); Sawhoebohobup [the Social Protection Act of South Korea] (Enacted by Act No. 3286 on Dec. 18, 1980; amended by Act No. 5179 on Dec. 12, 1996), art. 21(2) (Korean) [hereinafter *the Social Protection Act of South Korea (1996)*]; the Military Courts-Martial Act of South Korea (2000), art. 62.

21) The term of public defender can be found at Gongsunbyunhoineui Bosue Gwanhan Gun [the Enforcement Ordinance of the Payment for Public Defender of North Korea] (Enacted by Ordinance No. 26 of the Dept. of Justice on Jan. 20, 1947, etc.) (Korean) (quoting Office of Judicial Administration, Bukhaneui Saeroun Byunhosajedo [the New Lawyer System of North Korea], A Judicial Policy Material for the Reunification of Two Koreas, 95-III, Seoul: Office of Judicial Administration, 1995, at 68, 155); the Criminal Procedure Act of North Korea (1992), art. 172.

22) Byunhosabup [the Attorney-at-law Act of South Korea] (Wholly amended by Act No. 6207 on Jan. 28, 2000), arts. 4, 7 (Korean) [hereinafter *the Attorney-at-law Act of South Korea (2000)*].

23) Chosunminjujuewuinminkongwhaguk Byunhosabup [the Attorney-at-law Act of North Korea] (Enacted by Decision of the Standing Committee for the Top People's Council on Dec. 23, 1993), arts. 20-22 (Korean) [hereinafter *the Attorney-at-law Act of North Korea (1993)*].

any foreign attorney-at-law who is authorized the qualification of an attorney-at-law in a certain case may establish a legal practice in either of the two Koreas, based on the principle of mutual legal practice.<sup>25)</sup> In both Koreas, the counsel performs his duties as a defense counsel for the suspect or the accused and as a guardian for the public interests. Comparatively speaking, it seems that the role of the former is more important than that of the latter in South Korea as a state of freedom and individualism, whereas the latter is more heavily weighted in a totalitarian state such as North Korea.

## Courts

The courts in South Korea related to criminal cases are classified as follows: the Supreme Court, the High Court, the District Court, the Family Court and the Military Courts-Martial.<sup>26)</sup> In North Korea, there are such criminal courts as the Central Court, the Provincial/Direct Control City Court, the People's Court and the Special Court.<sup>27)</sup> In South Korea, to be appointed as a judge, one must be an attorney-at-law,<sup>28)</sup> whereas in North Korea, such is not the case.<sup>29)</sup> Court personnel are selected based on the appointment system in South Korea, but in North

24) Office of Judicial Administration, *supra* note 21, at 87.

25) The Attorney-at-law Act of South Korea (2000), art. 6.; The Attorney-at-law Act of North Korea (1993), art. 23.

26) Daehanminkuk Hunbup [the Constitution of South Korea] (Enacted on July 17, 1948; wholly amended on Oct. 29, 1987), arts. 101(2), 110 (Korean) [hereinafter *the Constitution of South Korea (1987)*]; the Court Organization Act of South Korea (2001), art. 3(1); the Military Courts-Martial Act of South Korea (2000), art. 1.

27) The Constitution of North Korea (1998), art. 153.

28) The Court Organization Act of South Korea (2001), art. 42.

29) The Constitution of North Korea (1998), art. 66; Chosunminjujuewuinminkongwhaguk Jaepansogusungbup [the Court Organization Act of North Korea] (Enacted by the Top People's Council on Jan. 10, 1976), art. 15 (Korean) [hereinafter *the Court Organization Act of North Korea (1976)*].

Korea, they are selected by appointment and election.<sup>30)</sup> In South Korea the judgment authority of courts is exercised by a single judge or a collegiate panel of court,<sup>31)</sup> while in North Korea it is by a collegiate panel.<sup>32)</sup> In South Korea a criminal case in question may be reviewed three times by three levels of courts, but two times by three levels of courts in North Korea.<sup>33)</sup>

### III. Process of the Criminal Justice System

The criminal justice process in both Koreas consists of general proceedings such as investigation, prosecution, pretrial, trial, appeal, extraordinary remedy, and correction, in addition to special proceedings that include juvenile and military justice processes.

#### Investigation

In South Korea, when there is a suspicion that an offense has been committed, the public prosecutor and the police officer investigate suspects under the instructions of a public prosecutor, ascertaining the facts of offense and evidence. Investigation with voluntary participation is more desirable than investigation by compulsory measures, as a general rule.<sup>34)</sup> A police chief has the person accused of a petty offense

30) The Constitution of North Korea (1998), arts. 91<sup>1</sup>2, 110<sup>1</sup>3, 134<sup>5</sup>, 154, 155; the Court Organization Act of North Korea (1976), arts. 12, 14.

31) The Court Organization Act of South Korea (2001), art. 7.

32) The Constitution of North Korea (1998), art. 157; the Criminal Procedure Act of North Korea (1992), art. 202; the Court Organization Act of North Korea (1976), arts. 31, 36-39.

33) The Criminal Procedure Act of North Korea (1992), arts. 181, 184, 255, 273, 276, 289; the Court Organization Act of North Korea (1976), arts. 36-38.

34) The Constitution of South Korea (1987), arts. 12(1), (3), 16; the Criminal

undergo, without delay, a summary trial by a judge belonging to the District/District Branch Court or the City/County Court as a disposition of criminal investigation.<sup>35)</sup> The public prosecutor may otherwise decide whether to prosecute or not.<sup>36)</sup> In North Korea, the criminal investigator

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Procedure Act of South Korea (1997), arts. 199(1), etc.

- 35) A judge may impose a fine not exceeding 200,000 won, detention or minor fine to the defendant under the summary proceedings. See the Court Organization Act of South Korea (2001), art. 34(1)3, (3); Zukgyulsimpane Gwanhan Julchabup [the Act on the Proceedings for Summary Judgments] (wholly amended by Act No. 4131 on June 16, 1989; amended by Act No. 5153 on Aug. 8, 1996), arts. 2, 3 (Korean) [hereinafter *the Act on the Proceedings for Summary Judgments (1996)*].
- 36) A public prosecutor may decide not to initiate a prosecution after considering the case as follows: ① No prosecution based on no suspicion, innocence or the deficiency of prosecutorial right. See Gumchalsagunsamugyuchik [the Ordinance on Public Prosecutor's Affairs of South Korea] (Wholly amended by Ministry of Justice Ordinance No. 436 on Dec. 31, 1996; amended by Ministry of Justice Ordinance No. 463 on July 3, 1998), art. 69(3) (Korean) [hereinafter *the Ordinance on Public Prosecutor's Affairs of South Korea (1998)*]. ② Suspension of indictment. See The Criminal Procedure Act of South Korea (1997), art. 247(1); the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 69(3). ③ Suspension of prosecution. See The Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 73. ④ Withholding of prosecution. See Gukgaboanbup [the National Security Act of South Korea] (Wholly amended by Act No. 3318 on Dec. 31, 1980; amended by Act No. 5454 on Dec. 13, 1997), art. 20(1) (Korean); the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 78. ⑤ Commitment to other jurisdiction. See The Criminal Procedure Act of South Korea (1997), arts. 256, 256-2; the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 81(1). ⑥ Transfer juvenile protection cases to the competent jurisdiction. See Sonyunbup [the Juvenile Act of South Korea] (Wholly amended by Act No. 4057 on Dec. 31, 1988; amended by Act No. 4929 on Jan. 5, 1995), arts. 3, 49(1) (Korean); the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 83(1). ⑦ Transfer family protection cases to the competent jurisdiction. See Gajungpokryukbumjoeui Cheobul Dunge Gwanhan Teukryebup [the Special Act on the Punishment of Family Violence Crime of South Korea] (Enacted by Act No. 5436 on Dec. 13, 1997;

begins the investigation when evidence of crime is detected. A preliminary examiner investigates the case in question and then makes such a concluding disposal of preliminary examination as the filling out of a written indictment, a dismissal of case and a suspension of preliminary examination under the instructions of a public prosecutor. It is characteristic in North Korea that there are two different levels of investigation, i.e., the investigation in a narrow sense and the preliminary examination, and that the compulsory measures may be made without warrant issued by a judge through due process of law.<sup>37)</sup>

## Prosecution

In South Korea, with a few exceptions, the criminal prosecution begins by the filing of a written indictment with a competent court through the public prosecutor.<sup>38)</sup> Here the documents or any other articles, except for the documents provided by law, which may cause the court to create presupposition on the case shall not be attached to and their contents shall not be quoted in the indictment.<sup>39)</sup> A request for the summary order may be made in writing by the public prosecutor in such crimes as shall be punished with fine, minor fine and confiscation.<sup>40)</sup> In

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amended by Act No. 6151 on Jan. 12, 2000), art. 11 (Korean); the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 83 (1).

37) See The Criminal Procedure Act of North Korea (1992), ch. IV Investigation and Preliminary Examination.

38) The Criminal Procedure Act of South Korea (1997), arts. 254(1), 246; the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 61(1).

39) Hyungsasosonggyuchik [the Regulation on Criminal Procedure of South Korea] (Enacted by the Supreme Court Regulation No. 828 on Dec. 31, 1982; amended by the Supreme Court Regulation No. 1664 on July 15, 2000), art. 118 (Korean) [hereinafter *the Regulation on Criminal Procedure of South Korea (2000)*].

40) The Criminal Procedure Act of South Korea (1997), arts. 448(1), 449; the Ordinance on Public Prosecutor's Affairs of South Korea (1998), art. 65(1).

North Korea, such disposition as prosecution, remand to preliminary examination, suspension of prosecution, cultural disposition and dismissal of case may be made by the public prosecutor after reviewing the written indictment and the record of the case rendered from the preliminary examiner. The written indictment and the record of the case are transferred to a competent court when the prosecution is instituted. The indictment may be here rewritten or amended by the public prosecutor, if necessary.<sup>41)</sup> The two Koreas have adopted the doctrine of prosecution only by the public prosecutor as a state agency. The remedies for any complainant or accuser who is dissatisfied with a public prosecutor's disposition not to prosecute are an appeal of ruling with the competent prosecutor's office,<sup>42)</sup> a request for ruling,<sup>43)</sup> and a petition relating to the constitution<sup>44)</sup> in South Korea. No such legal remedy can be found in North Korea.

### Pretrial

In South Korea, a competent court prepares a public trial. The preparation for public trial involves such procedures as the serving of the indictment copy, the notice of defense counsel selected ex officio, the fix, notice and summons of the first trial date, the change of public trial date,

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41) See The Criminal Procedure Act of North Korea (1992), ch. V Proceedings by Public Prosecutor.

42) The Public Prosecutor's Office Act of South Korea (1997), art. 10.

43) The Criminal Procedure Act of South Korea (1997), arts. 260-265; Hyungbup [the Criminal Act of South Korea] (Enacted by Act No. 293 on Sep. 18, 1953; amended by Act No. 5454 on Dec. 13, 1997), arts. 123-125 (Korean) [hereinafter *the Criminal Act of South Korea (1997)*].

44) The Constitution of South Korea (1987), art. 111(1); Hunbupjaepansobup [the Consitutional Court Act of South Korea] (Enacted by Act No. 4017 on Aug. 5, 1988; amended by Act No. 5454 on Dec. 13, 1997), art. 68(1) (Korean) [hereinafter *the Consitutional Court Act of South Korea (1997)*].

the reference to public offices and the investigation and submission of evidence before the date of public trial.<sup>45)</sup> In North Korea, the criminal case brought by the public prosecutor may be rendered to the court by the decision of the Preparatory Council for Trial, returned to the prosecutor, or dismissed. The applicable provisions of pertinent laws may be altered. Only the public prosecutor in North Korea may lodge an appeal to the higher court. The case in question, after the institution of public prosecution, is resolved in court. The preparatory procedure for a public trial involves a service for the copy of decision or indictment, the notice of trial date, the decision on application and opinion before trial, and so on.<sup>46)</sup> There is some possibility in North Korea to have presupposition on a case especially in the process of Preparatory Council for Trial.

## Trial

The principles of criminal trial in both Koreas are as follows: i.e., public trial, speedy trial, oral argument, direct hearing, etc. They are also similar in that a retrial should be conducted if any alteration in the competent court was made after opening the public trial. The procedures for trial date is as follows: In South Korea, the identification question, the statement of prosecutorial essentials by the public prosecutor, the statement of facts beneficial to the defendant, the examination of the defendant, the examination of evidence, the statement of the public prosecutor's opinion, the final statement by the defendant and defense counsel, the consensus of trial decision, and the pronouncement of

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45) The Criminal Procedure Act of South Korea (1997), arts. 73-74, 76, 266-270, 272-274, 291, 311; the Regulation on Criminal Procedure of South Korea (2000), arts. 16-17, 123, 125.

46) See The Criminal Procedure Act of North Korea (1992), ch. VII Decision, sec. 2. Pretrial.

decision;<sup>47)</sup> In North Korea, the identification question, the notification of defendant's right, the statement of indictment by the court clerk, the examination of defendant, the examination of evidence, the closure of trial on fact, the final plea by prosecutor, defense counsel and defendant, and the pronouncement of decision.<sup>48)</sup> They are similar in that both criminal trials consist of such procedures as opening, fact-finding and the pronouncement of decision in general.

### Appeals and Extraordinary Remedy

In South Korea, there are such proceedings of appeal as the appeal from a judgment by a trial court of first instance to the higher level court, the re-appeal from a judgment by the court of second instance to the Supreme Court, the appeal against a ruling by a court of first instance to the higher level court, and the re-appeal against a ruling by a court of appeal or the High Court to the Supreme Court. There are also special proceedings of trial such as the reopening procedure and the extraordinary appeal.<sup>49)</sup> In North Korea, there are such appeal proceedings as the appeal lodged by a defendant, a defense counsel or a claimant for damage compensation, and the appeal raised by a public prosecutor. There are also such special proceedings as the reopening procedure and the extraordinary appeal as well.<sup>50)</sup> The appeal system

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47) The Criminal Procedure Act of South Korea (1997), arts. 42-43, 146-168, 284-306; the Regulation on Criminal Procedure of South Korea (2000), arts. 127-151.

48) The Criminal Procedure Act of North Korea (1992), arts. 14, 210-237, 242-258.

49) See The Criminal Procedure Act of South Korea (1997), part III Appeals, chs. I Common Provisions, II Appeal from Judgment by Trial Court, III Appeal to the Supreme Court, IV Appeal from Ruling; part IV Special Proceedings of Trial, chs. I Reopening Procedure, II Extraordinary Appeal.

50) See The Criminal Procedure Act of North Korea (1992), chs. VIII Decision

shows the similarities between two Koreas in the fact that the appeal may be lodged against an unsatisfactory judgment to the higher level court on the grounds of a grave mistake of fact, the violation of law and an excessive amount of punishment. No penalty more severe than that imposed by an original judgment shall be pronounced where the appeal has been lodged by, or for the benefit of, the defendant. However, the structure of appeal, the persons entitled to lodge an appeal, and the court of appeal shows the difference between the two. They are similar in that a request for the reopening procedure may be made when a serious error of fact, on which the original judgment was based, has been proved. But the structure of the reopening procedure, the persons entitled to request the reopening procedure, and the court of jurisdiction over reopening procedure are different. The procedure of extraordinary appeal is similar between the two Koreas in that it may be lodged after a judgment has become binding and when a violation of Acts and subordinate statutes has been discovered, however, the sphere of investigation for an extraordinary appeal, the persons entitled to request the extraordinary appeal, and the effect of a judgment in the extraordinary appeal are different.

### Execution of Decision

In South Korea, a decision is executed after it has become final except as otherwise provided in an Act,<sup>51)</sup> but in North Korea it is

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of 2d Instance, IX Extraordinary Appeal and Reopening Procedure.

- 51) The Criminal Procedure Act of South Korea (1997), art. 459. When a court pronounces a fine, minor fine or additional collection on a defendant, the court may order the provisional payment of such money upon request of a public prosecutor or ex officio, if it will be impossible or difficult to execute the judgment after becoming finally binding. There are some exceptions in the case of immediate appeal and quasi-appeal. See *Id.* arts. 334, 410, 416(4), 419.

executed only after it has become final.<sup>52)</sup> In South Korea, the public prosecutor of a public prosecutor's office corresponding to the court, which rendered the decision (except in a trial of such nature that a court or a judge should direct it),<sup>53)</sup> directs the execution of the decision. In North Korea, a decision is executed by the Social Defense Agency, or an enforcement officer, under the direction of the presiding judge who rendered the decision and under the scrutiny of a public prosecutor.<sup>54)</sup> In South Korea in cases where the death penalty is called for, it is executed by the order of the Minister of Justice or the Minister of National Defense,<sup>55)</sup> while in North Korea it is possible with the approval of a Standing Committee for the Top People's Council.<sup>56)</sup>

### Incarceration

In South Korea incarceration imposed includes imprisonment for life, imprisonment without prison labor for life, imprisonment for a limited term, imprisonment without prison labor for a limited term, and detention.<sup>57)</sup> In North Korea, there is only labor-reclamation punishment

52) The Criminal Procedure Act of North Korea (1992), art. 294.

53) The execution of detention warrant may be directed by a presiding judge, a commissioned judge or a requisitioned judge in case of urgency. The presiding judge may cause a court administrative officer or clerk to execute the warrant of seizure or search in case of need. The presiding judge may also take necessary measures to prevent the defendant from leaving court and to maintain order in court. The returning or restoration of property, obtained through crimes against property and under seizure, to the injured party shall be pronounced. See The Criminal Procedure Act of South Korea (1997), arts. 81(1), 115(1), 281(2), 333.

54) The Criminal Procedure Act of North Korea (1992), arts. 295-296.

55) The Criminal Act of South Korea (1997), art. 66; the Criminal Procedure Act of South Korea (1997), arts. 463-469; Gunhyungbup [the Military Criminal Act of South Korea] (Enacted by Act No. 1003 on Jan. 20, 1962; amended by Act No. 6290 on Dec. 26, 2000), art. 3 (Korean); the Military Courts-Martial Act of South Korea (2000), art. 506.

56) The Criminal Procedure Act of North Korea (1992), arts. 296-298.

(for not less than 6 months nor more than 15 years),<sup>58)</sup> which is similar to South Korea's imprisonment for a limited term (for not less than 1 month nor more than 15 years). The former is executed by the Social Defense Agency at a correctional institution after the notice of final decision from a presiding judge. The latter is executed through a warrant of penalty execution issued by a public prosecutor at a correctional institution.

### Qualifications Penalties

The deprivation of qualifications in South Korea is similar to the deprivation of suffrage (for not more than 4 years) and the deprivation of qualifications in North Korea. The suspension of qualifications (for not less than 1 year nor more than 15 years) in South Korea is similar to that of North Korea (for not more than 3 years). In South Korea, the term of deprivation is calculated from the day the final decision of principal penalty is made in the case of qualifications deprivation accompanying death penalty, and imprisonment with or without prison labor for life, and the term of qualifications suspension accompanying the imprisonment with or without prison labor for a limited term is as well. The term of qualifications-suspension sentence as an alternative penalty is calculated from the day of final decision, but in the case that both an imprisonment and a suspension of qualification have been concurrently imposed, the term of suspension is calculated from the day the execution

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57) See The Criminal Act of South Korea (1997), arts. 42, 46, 57, 67-68, 83-86; the Criminal Procedure Act of South Korea (1997), arts. 321(2), 470-471, 482.

58) See Chosunminjujuewuinminkongwhaguk Hyungbup [The Criminal Act of North Korea] (Enacted by Decision No. 2 of the Standing Committee for the Top People's Council on Feb. 5, 1987), arts. 24-25 (Korean) [hereinafter *the Criminal Act of North Korea (1987)*]; the Criminal Procedure Act of North Korea (1992), arts. 258, 295<sup>1</sup>, 299-302.

of imprisonment is completed or remitted.<sup>59)</sup> In North Korea, where the deprivation of suffrage or qualifications and the suspension of qualifications are imposed, in addition to other punishment, the term is calculated from the day the execution of a labor-reclamation punishment is completed.<sup>60)</sup>

### Property Penalties

In South Korea property penalties include fine, minor fine and confiscation of property, while in North Korea there is only the confiscation of property. Confiscation in South Korea is similar to confiscation of property in North Korea. However, for the former it is an additional or principal penalty, and for the latter is only an additional penalty. In South Korea, the property of a criminal, or that which was acquired by a person other than the criminal with the knowledge of its nature after commission of a crime, may be confiscated in whole or in part if it has been used in the commission of the crime, produced by means of criminal conduct and received in exchange for the crime. The equivalent price thereof may be collected when confiscation is impossible. The confiscated property in a certain case may be destroyed, disposed of, or sold at a public auction.<sup>61)</sup> In North Korea, all property, except that which is required for the necessities of life for family members of the criminal, is confiscated as an additional punishment for the death penalty.<sup>62)</sup>

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59) The Criminal Act of South Korea (1997), arts. 43-44.

60) The Criminal Act of North Korea (1987), arts. 26, 30.

61) The Criminal Act of South Korea (1997), arts. 45, 47-49; the Criminal Procedure Act of South Korea (1997), arts. 332, 472, 477-481, 483-487, 492-493.

62) The Criminal Act of North Korea (1987), arts. 27-29; the Criminal Procedure Act of North Korea (1992), arts. 298, 305.

## Stays and Remittal of Execution

The execution of the death penalty, imprisonment and the order of trial costs may be stayed in the cases provided by an Act in South Korea,<sup>63)</sup> and the execution of the death penalty and a labor-reclamation punishment may be suspended in North Korea.<sup>64)</sup> The applied range for the former is wider than that of the latter. In South Korea, the execution of punishment is remitted when a law is changed after the sentence for a crime committed under the previous law has become final and such act thereby no longer constitutes a crime, when the period of prescription for execution is completed after a final judgment, or when special amnesty is granted.<sup>65)</sup> In North Korea, the execution of punishment is remitted when a special amnesty or a general amnesty is granted after the judgment of guilty has been made final. The execution of remaining sentence may be remitted by the recommendation of a correctional institution and by the examination and decision of competent court when a half term of punishment has passed, which is a judicial disposition that has the determinate effect on the termination of sentence.<sup>66)</sup> This is different from parole in South Korea, which is granted as a provisional release by the administrative disposal of the Minister of Justice through an examination of the Parole Review Board to a person under the execution of imprisonment who has behaved himself well and has shown sincere repentance.

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63) The Criminal Procedure Act of South Korea (1997), arts. 469-472.

64) The Criminal Act of North Korea (1987), art. 23; the Criminal Procedure Act of North Korea (1992), arts. 299-301.

65) The Criminal Act of South Korea (1997), arts. 1(3), 77-79; Samyunbup [the Amnesty Act of South Korea] (Enacted by Act No. 2 on Aug. 30, 1948), art. 5(1)<sub>2</sub> (Korean).

66) The Criminal Act of North Korea (1987), arts. 39-40.

## Requests

Request procedures in South Korea include application for exemption of the whole or part of trial costs, request for doubt on the interpretation of decision, and a request for objection to improper execution by a public prosecutor.<sup>67)</sup> In North Korea there are a request against the execution of a judgment or a ruling and a request for objection to the execution of an enforcement officer.<sup>68)</sup>

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(국문요약)

## 남북한 형사사법의 구조비교

최 병 문\*

이 글은 범죄통제를 위한 체계이자 절차인 형사사법이 다른 체제하에서, 즉 자유주의 국가인 남한과 사회주의 국가인 북한에서 각각 어떻게 운영되고 있는가? 라는 의문에 답하기 위한 것이다.<sup>69)</sup> 사회주의 체제인 북한의 형사사법제도와 자유주의 체제인 남한의 그것을 비교해봄으로써, 다른 이념이 형사사법제도에 실제로 어떤 차이를 가져오는지 알 수 있게 된다. 남북한 형사사법제도에 대한 비교연구는 해방 후 이질적으로 형성되어온 남북한 법률문화의 동질화 작업의 하나로서, 이질적인 양 모형의 통합을 위한 제3의 모형 개발을 위한 기초작업이 될 수 있다.

남한의 법과 제도는 일본, (구)서독, 미국의 영향을 많이 받았다. 특히 형사사법제도면에서 실체법에서는 독일법의 영향을, 절차법에서는 독일법과 미국법의 영향을 많이 받았다. 북한의 법과 제도는 (구)소련과 중국의 영향을 많이 받았다. 1945년부터 1958년까지는 소련의 영향이 지배적이었다가, 1958년부터 1960년까지는 중국의 영향이 증가하였고, 1960년 이후에는 북한의 주체성이 강조되고 있다.

남한 형사사법의 목적이 「국민주권」과 「자유주의」제도를 지키고 범죄로부터 사회를 방위하며 법익과 인권을 보호하는데 있다면, 북한 형사사법의 목적은 「국가주권」과 「사회주의」제도를 지키고 인민의 사생활과 인권을 보장하며 인민을 준법교양시키는데 있다. 남북한의 경우 모두 형사법의 사회보전적·법익보호적·인권보장적 기능과 형사제재의 특별예방적·일반예방적 기능을 인정하고 있지만, 그 목표, 수단, 실효성 등에서 차이가 있다. 상대적으로 비교하

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69) 「대한민국」(Republic of Korea; ROK)은 남한으로, 「조선민주주의 인민공화국」(Democratic People's Republic of Korea; DPRK)은 북한으로 적는다.

면, 남한이 자유개인의 국가관에 의해 개인의 인권보장이 중시된다면, 북한은 전체주의 국가관에 의해 사회방위가 더 중시되는 체계라고 할 수 있다.

남한은 국가권력을 입법권·행정권·사법권으로 나누어 서로 견제·균형을 유지하고자 하므로 사법권의 독립이 중요한 의미를 갖는다. 북한은 재판의 독립을 헌법에 규정하고 있지만, 실제로 인사나 업무면에서 사법권의 독립이 인정되지 않는다고 평가된다.

남북한의 형사사법을 구성하는 요소에는 경찰, 검찰, 법원, 교정 등이 있다. 남한은 행정자치부의 경찰청소속 일반사법경찰관리, 법무부의 검찰청소속 일반사법경찰관리, 특별사법경찰관리, 검사에게 수사권이 있다. 북한은 수사일군, 예심원, 검사에게 수사권이 있다. 남북한은 검사가 직접 수사하거나 다른 수사기관을 지휘·감독하는 점이 비슷하다.

남한의 검찰기관에는 법무부 소속의 대검찰청, 고등검찰청, 지방검찰청, 지방검찰청지청과 국방부 소속의 軍檢察部가 있다. 북한의 검찰기관에는 중앙검찰소, 도(직할시)검찰소, 시(구역)·군검찰소, 특별검찰소가 있다. 그리고 중앙과 도, 시·군에 準검찰기관의 성격을 가지는 법무생활지도위원회가 있다. 남북한은 검사동일체인 점은 비슷하다. 그러나 남한은 검찰총장이 임기 중에 법무부장관이나 국회에 책임을 지지 않지만, 북한은 중앙검찰소장이 최고인민회의, 최고인민회의 상임위원회에 책임을 지는 점이 다르다. 남북한의 검사가 수사권과 공소권을 가지는 점은 비슷하다. 그러나 남한의 검사는 공익의 대표자로서의 권리를 가지지만, 북한의 검사는 감시자로서의 권리를 가진다. 남한은 검사의 자격을 법률로 정하고, 대통령이 법무부장관의 제청을 받아 검사의 임면·보직·직급정년연장 등을 행하지만, 북한은 특별한 자격을 요하지 않고, 중앙검찰소가 임면한다. 남한은 검사의 제척·기피·회피제도가 없지만, 북한은 공정한 재판을 위해 검사의 배제·배제신청·자퇴제도가 있다. 남한의 검사는 법관과 마찬가지로 탄핵 또는 금고 이상의 형을 받거나 징계처분에 의하지 아니하면 파면, 停職 또는 감봉의 처분을 받지 않도록 규정하고 있지만, 북한은 관련규정이 없다.

남북한은 범죄혐의자의 방어권 보장을 위해 변호인의 도움을 받을 권리를 인정하는 점은 비슷하다. 그러나 남한은 수사단계에서부터 변호인선임권이 인정되지만, 북한은 예심단계에서 형사책임추궁결정 이후부터 인정되는 점이 다

르다. 남북한은 변호사 뿐만 아니라 변호사 아닌 자도 변호인으로 선임할 수 있는 점은 비슷하다. 그러나 남한은 대법원(상고심) 이외의 법원이 특별한 사정을 고려하여 허가한 경우에 한하여 예외적으로 인정되지만, 북한은 피심자·피소자의 近親者, 소속단체의 대표자, 검사·재판소의 승인을 받은 자 등으로 넓게 인정되는 점이 다르다. 남북한은 필요적 변호사건에서 법원이 변호인을 선임하는 점은 비슷하다. 그러나 남한은 법원직권이나 피의자·피고인의 청구에 의해 일정한 경우에 국선변호인을 선임하지만, 북한은 변호인 없이 기소된 모든 형사사건에서 해당 변호사위원회에 의뢰하여 공선변호인을 선정하는 점이 다르다. 남북한은 변호사가 되기 위하여 일정한 자격을 요구하는 점은 비슷하다. 즉 남한의 변호사는 사법시험에 합격하여 사법연수원을 마쳤거나 판사·검사의 자격이 있는 남한의 국민으로서 「대한변호사협회」에 등록된 자이고, 북한의 변호사는 법률전문가, 5년이상 법부문에서 일한 자, 단기 법률교육을 받고 변호사시험에 합격한 각 분야의 전문가인 북한의 공민으로서 「조선변호사회 중앙위원회」의 자격심사를 거친 자이다. 남북한은 일정한 경우에 「외국변호사」가 상호주의 원칙 하에 국내 변호사자격을 취득하여 개업할 수 있는 규정을 두고 있지만, 아직까지 실제로 적용된 적은 없는 것 같다. 남북한의 형사변호인은 범죄혐의자의 보호자로서의 지위와 공익적 지위를 가지는 점은 비슷하지만, 상대적으로 비교하면, 남한은 자유개인의 국가로서 전자가 중시되고 북한은 전체주의 국가로서 후자가 중시되는 체계라고 할 수 있다.

남한의 형사재판기관에는 대법원, 고등법원, 지방법원, 가정법원, 군사법원이 있고, 북한의 재판기관에는 중앙재판소, 도(직할시)재판소, 인민재판소, 특별재판소가 있다. 남한은 변호사 자격이 있어야 법관이 되지만, 북한은 변호사 자격이 없어도 된다. 법원구성원의 선임방법은 남한은 임명제이지만, 북한은 선거제와 임명제가 있다. 재판부의 구성은 남한은 단독제와 합의제가 있지만, 북한은 합의제이다. 심급관할은 남한은 3급 3심제가 원칙이지만, 북한은 3급 2심제가 원칙이다.

남북한의 형사사법 절차에는 수사, 공소제기, 공판준비, 공판, 상소, 비상구제, 재판집행, 교정 등의 일반형사절차와 少年사법절차, 軍사법절차 등의 특별형사절차가 있다. 남북한 형사사법은 범죄통제라는 면에서 공통점이 많지만, 해방 후 자유주의와 사회주의라는 다른 이념에서 비롯된 차이점도 많이 발견된다.

# Multilateral Diplomacy of the ROK : Some Strategies for Positive Peace on the Korean Peninsula

Mane Heo\*

## I . Introduction

One may clearly understand how difficult it has been to bring about peaceful change on the Korean Peninsula. The Korean Peninsula has been at war both technically and politically since the Korean War ended in July, 1953. As Herman Kahn said, many issues that have historically caused international conflicts and, in particular, territorial ones, have disappeared. With a few exceptions, territorial and political issues have now settled down. The Korean Peninsula is a case in point. The Republic of Korea(ROK) and the Democratic People's Republic of Korea(DPRK) have failed to bring about peaceful change<sup>1)</sup> concerning the hostile relationship in which both parties have enjoyed only negative peace and not positive peace.

Positive peace in this paper refers to a state of peace which is devoid of spiritual fears as well as physical violence. In this state of peace, there is virtual absence of wars or violent confrontations, and one can enjoy stability of mind. Positive peace, as indirectly compared by Raymond Aron, is different from the peace of hegemony and empire.<sup>2)</sup>

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1) See further explanations on peaceful change, Hans J. Morgenthau, 4th edition,, (New York: Alfred A. Knopf ,1967), pp.418-437.