South Korea

Criminal Procedure

In the absence of martial law or emergency decrees, both of which historically had been exercised by the government and provisions for which remained in the 1987 Constitution, criminal procedure in other than political cases followed a set format. Both public prosecutors and the police were authorized to conduct investigations of criminal acts. Public prosecutors were under the direction and supervision of the Office of the Supreme Prosecutor General; the supreme prosecutor general was appointed by the president. In 1990 there were four branches of the Office of the High Prosecutor General and fourteen district offices. Theoretically, police authority to investigate criminal acts was subordinate to the direction and review of the prosecutors. Also, the arrest of a suspect required a judicial warrant except in cases of flagrante delicto or when it was believed that the suspect would flee or commit the act again. The request for a warrant could be made only by the prosecutor.

After an arrest, the suspect had to be transferred to the public prosecutor within ten days and indicted within ten days of the prosecutor's gaining custody. The judge was permitted to extend detention another ten days', the suspect could request court review of the legality of detention.

The public prosecutor initiated legal action. The name of the accused, the alleged crime, the alleged facts of the case, and the applicable laws were stated in the indictment. The prosecutor had significant discretionary power to decide not to bring the case to court based on his interpretation of the law and evidence, or in consideration of a suspect's age, character, motive, or other circumstances, even though a crime had been committed.

Prosecutors normally indicted only when they accumulated what they considered overwhelming evidence of a suspect's guilt. The courts, historically, were predisposed to accept the allegations of fact in an indictment. This predisposition was reflected in both the low acquittal rate--less than 0.5 percent--in criminal cases and in the frequent verbatim repetition of the indictment as the judgment. The principle of "innocent until proven guilty" applied in practice much more to the pre-indictment investigation than to the actual trial.

During the 1980s, there was a dispute within the legal system over the judiciary's power to check prosecution. The prosecution and judiciary differed over whether or not the law gave the judiciary grounds to arraign suspects before issuing warrants. The judiciary tried repeatedly in the 1980s to institutionalize this right and in 1989 asserted it in a proceeding. The judiciary was not able to compel the prosecution to accept this view, however.

At the prosecutor's discretion, a case could be brought before the court by summary indictment if the offense were punishable by fines. In such a case, the judge gave a summary judgment without holding a public hearing. The accused could request an ordinary trial.

Once indicted, the accused had the right to be released on bail. Exceptions could be made if the offense were punishable by death, life imprisonment, or imprisonment over ten years; if the defendant were a recidivist; if there were suspicion that the defendant would destroy evidence; or if there were reasonable grounds to suspect that the defendant would flee; or if the residence of the defendant were unknown. In 1989 bail was granted in a National Security Act case for the first time.

The constitutional right to representation by an attorney was not interpreted as applying to the investigation and interrogation phases. In National Security Act cases, access to counsel was regularly denied during the investigation phase. In 1989 lawyers sought court orders granting access, but neither the ANSP nor the Prosecutor General's Office felt compelled to comply when the National Security Act was involved.

There was no jury system. Cases that involved offenses punishable by the death penalty, life imprisonment, or imprisonment for not less than one year were tried by three judges of a district or branch court. The remaining cases were heard by a single judge. Political and criminal cases were tried by the same courts; military courts did not try civilians except under martial law.

At least five days before trial, the defendant was served a copy of the indictment. The defendant had to be represented by counsel if the offenses were punishable by death or imprisonment for more than three years. The court appointed defense counsel if the defendant was unable to do so because of age, mental capacity, poverty, or other handicaps that might impair choice or communication.

Hearings generally were open to the public. If danger to national security or prejudice to public peace or good morals were involved, the judge could close the proceedings. Charges against defendants in the courts were declared publicly. Trial documents, however, were not part of the public record. In lengthy and complex indictments, the relationship between specific alleged actions and violations of specific sections of the penal code could become unclear. In cases involving a mixture of political and criminal charges, this situation at times led to charges of unfair proceedings. A defendant had the right to remain silent and free from physical restraint in the courtroom. Judges generally allowed considerable scope for the examination of witnesses.

Either the defendant or the prosecutor could appeal a judgment on the basis of law or fact. Appeals could result in reduced or increased sentences. A Constitution Court was established in 1988 to relieve the burden on the Supreme Court (see The Judiciary , ch. 4). When the constitutionality of a law was at issue in a trial, the Supreme Court requested a decision of the Constitution Court. The president, chief justice, and the National Assembly each named three members of the nine-member Constitution Court.

The Supreme Court retained the power to make final review of the constitutionality or legality of administrative decrees, regulations, or actions when at issue in a trial. Grounds for an appeal to the Supreme Court were limited by the Code of Criminal Procedure to violation of the

Constitution, law, or regulation material to the judgment; abolition, alteration, or pardon of penalty; a grave mistake in factfinding; or extreme impropriety in sentencing. An interpretation of law in an appeal had binding effect on the inferior court only when the case was remanded. In other cases, however, a decision of the Supreme Court only had persuasive effect.

Judges were trained professionally and were among the best products of one of the toughest education systems in the world. The qualifications for a judge were the completion of two years of courses at the Judicial Research and Training Institute after passing the national judicial examination, or the possession of qualifications as a prosecutor or an attorney. Judges were members of a tiny elite; the institute had only 3,692 graduates from 1949 to 1988. In 1988 there were only 940 judges, 668 prosecutors, and 1,593 practicing attorneys. There were additional requirements for higher positions: fifteen years of legal experience for the chief justice and justices of the Supreme Court; ten years of experience for the chief judge of an appellate court, the chief judge of a district court, the chief judge of a family court, and the senior judge of an appellate court; and five years of experience for the judge of an appellate court, the senior judge of a district court, and the senior judge of a family court. South Korea's president, with the consent of the National Assembly, appointed both the chief justice and, upon the recommendation of the chief justice, the other justices of the Supreme Court. Under the 1987 Constitution and the Court Organization Law, lower justices were appointed by the chief justice with the consent of the Conference of Supreme Court Justices.

Historically, the executive branch exercised great influence on judicial decisions. However, there were some indications of increased judicial independence in 1989. In a number of cases, the Constitution Court found that the government had violated the constitutional rights of individuals. Moreover, the Supreme Court invalidated the results of the elections for two National Assembly seats, citing election law violations by victorious ruling party candidates.

Penal administration was controlled and supervised by the Ministry of Justice. There were four detention facilities (for unconvicted detainees), twenty-seven correctional institutions, ten juvenile training institutes, and four juvenile classification homes. Conditions in correctional institutions were austere and particularly harsh in winter. Discipline was strict. Prisoners who broke rules or protested conditions sometimes were physically abused. Under normal circumstances, however, convicts were not physically punished. Most accusations of mistreatment involved persons detained or awaiting trial in detention facilities, rather than those who were already convicted and serving their sentences in prison. Visitation was strictly limited to legal counsel and immediate families. Mail was subject to monitoring and occasional censorship. There was no significant difference in the treatment of prisoners on the basis of wealth, social class, race, or sex. The treatment of political prisoners could be better or worse than that of regular prisoners. On some occasions, special provisions were allowed for political prisoners, and as late as 1989 it also was alleged by human rights activists that political prisoners sometimes were subjected to sleep deprivation and psychological pressure.

There were a number of probationary devices that permitted police to supervise suspected or convicted criminals, including deferral of prosecution and suspension of sentence. These measures increased judicial flexibility and were often used to show clemency. Probationary devices also had frequently been used to ensure that released political offenders behaved in a manner acceptable to the government. Criminals who showed repentance regularly were freed in amnesties, often linked to holidays. Amnesty often was declared to showcase the beneficence of the state in forgiving criminals.

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Three excellent sources on the South Korean armed forces are Edward A. Olsen's "The Societal Role of the Republic of Korea Armed Forces" in

The Armed Forces in Contemporary Asian Societies; Eugene Kim's "The South Korean Military and Its Political Role" in *Political Changes in South Korea* and Young Woo Lee's insightful article "Birth of the Korean Army, 1945-50" in *Korea and World Affairs*. The *Asian Defence Journal* often has comparative analyses of the military capabilities of the North Korean and South Korean armed forces. Larry A. Niksch's "The Military Balance on the Korean Peninsula" in *Korea and World Affairs* and Richard L. Sneider's *The Political and Social Capabilities of North and South Korea for the Long-Term Military Competition* provide useful information on the Korean arms race. Dae-Kyu Yoon's *Law and Political Authority in Korea* is an excellent and detailed study of the interaction of law and politics in South Korea. Two books by South Korean army officers, Colonel Lee Suk Bok's *The Impact of United States Forces in Korea* and Brigadier General Taek- Hyung Rhee's *U.S.-ROK Combined Operations* provide the South Korean perspective on United States-South Korean military relations. English-language sources on national security issues are published regularly by the Seoul government, South Korean universities, and two daily newspapers, *Korea Herald* and *Korea Times*. The Ministry of National Defense publishes an annual *White Paper* that provides a comprehensive examination of military organization, defense spending, and training in the South Korean armed forces. The National Police Headquarters annually publishes *Korean National Police*, a pictorial and textual description of that organization. Manwoo Lee, Ronald D. McLaurin, and Chung-in Moon's (eds.), *Alliance under Tension: The Evolution of South Korean-U.S. Relations* is another useful source.

The subversive activities of North Korea in South Korea and abroad and the causes for increased domestic violence in South Korea in the 1980s are discussed in official reports published by the United States Department of State and the Committee on Foreign Affairs of the United States House of Representatives. *The Bombing of Korean Airlines Flight KAL-858*, by the United States House Committee on Foreign Relations, provides a comprehensive examination of North Korea's past use of and capabilities for future acts of terrorism targeting South Koreans. Donald N. Clark's *The Kwangju Uprising* examines aspects of the Kwangju incident following Chun Doo Hwan's December 1979 coup. Selig S. Harrison's *The South Korean Political Crisis and American Policy Options* discusses the goals of radical organizations in South Korea in the mid-1980s. For information concerning the history of the Korean legal system, Chun Bong Duck, William Shaw, and Choi Kai-Kwon's *Traditional Korean Legal Attitudes* should be consulted. Articles in the *Far Eastern Economic Review* and *Asian Survey* should also be consulted. (For further information and complete citations, see Bibliography.)

Data as of June 1990

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