

# The Basic Features of the First Korean Sentencing Guidelines

Hyungkwan Park<sup>1</sup>

## I. Introduction: Historical Background of Korean Sentencing Reform

In August of 2003, the President of the Republic of Korea and the Chief Justice of the Supreme Court agreed to set up a Judicial Reform Committee(JRC) in order to reform in general the criminal justice system. The main goals were focused to enhance public trust in the criminal justice system. The introduction of the merits of adversarial procedure, laymen participation in the criminal justice system and reducing unwarranted disparities in sentencing were some important topics. In 2004, the JRC proposed many recommendations including necessary reform in sentencing. In December of 2004, in order to implement the recommendations of the JRC, the Presidential Committee for Judicial Reform(PCJR) was established.

Like other countries around the world, Korea has encountered problems in sentencing such as leniency, disparities, and instances where sentencing was unclear in the reasoning behind it. To overcome these problems, the PCJR selected

---

<sup>1</sup> Senior Public Prosecutor, Professor of the Legal Research & Training Institute(LRTI) of the Ministry of Justice of Korea

an option to establish a sentencing commission and sent the proposal to the National Assembly. Although there was a strong argument for the Commission to be established as an independent body outside the judiciary, the National Assembly nonetheless decided to establish the Sentencing Commission within the judiciary. The National Assembly introduced the sentencing commission as a form of the Revision of the Court Organization Act. Beginning on May 2nd of 2007, the new Korean Sentencing Commission started to set up the first sentencing guidelines. The law requires that the Commission should promulgate the first guidelines within 2 years from the enforcement date of the new act.

The Commission through diligent comparative research efforts, has tried to ascertain the most appropriate sentencing guidelines scheme. There have been heated debates regarding this issue. The Prosecution has asserted that the Commission should make the guidelines more comprehensive in order to avoid future problems and make them more effective. Finally, the Commission decided not to follow the '*the grid model*', rather it decided on a gradual approach like the United Kingdom's model. Therefore, the first guidelines only encompass 7 crime categories including murder, rape, robbery, perjury, etc.

Although there will be some drawbacks in the guidelines, it is apparent that Korea should take the first step to reform sentencing problems. Sentencing reform

matters are so broad, important, and to some extent universal, that sharing insights in these areas with other countries is necessary.

## **II. Some Sentencing problems in Korea**

### **1. Leniency**

In Korea, there is a strong sense that sentencing may tend to be too lenient. According to the commission's survey in 2007, 59.2 percent of the public(1,000 persons) answered that leniency exists in sentencing.<sup>2</sup> That percentage rose to 72.5 in specialist groups(2,294 persons) made up of judges, prosecutors, defense attorneys and criminal law professors. In many cases judges gave lenient sentences below the minimum prison term. For example, in rape cases, the minimum statutory prison term for a typical rape is at least 3 years imprisonment. But according to the Korean penal code, judges have the discretion to lower the sentence in any case in consideration of any extenuating circumstances and in that situation, normally the prison term shall be reduced by one half(penal code art. 55). This type of general mitigation article exists in Korea and Japan. It has been said that this legislation is unique and gives the judge substantial discretion in sentencing.

---

<sup>2</sup> *The Annual Report of 2007*, the Korean Sentencing Commission(2008). p164

Judges also have significant discretion in dispositional decisions. In cases where a sentence of imprisonment does not exceed three years and there are mitigating circumstances, the judge can suspend the execution of sentence (there are some restrictions in the cases where criminals have a serious criminal history). In regard to the above mentioned article 55, this allows for judges to decide on a suspension even in serious cases. Statistics shows these trends.

## **2. Disparity**

Even though there are few official statistics about regional disparities and disparities among judges, the Commission's survey of 2007 indicated that substantial disparities exist among judges. 73.9 percent of the public and 63.3 percent of the specialist groups believe there has been inconsistency in sentencing and there are significant unwarranted disparities.<sup>3</sup>

## **3. So called '*Jeon-kwan-ye-woo*' Phenomenon**

---

<sup>3</sup> *ibid*, p165

A unique phenomenon in Korea regarding sentencing problems is the so called '*Jeon-kwan-ye-wod*'. '*Jeon-kwan*' means 'former judges and prosecutors' and '*ye-wod*' means giving special consideration to certain people. Therefore, '*Jeon-kwan-ye-wod*' in effect means that incumbent judges and prosecutors give special consideration to those cases that are handled by '*jeon-kwan*'. Though most judges and prosecutors strongly deny the existence of this type of practice, many people believe this phenomenon does exist. Therefore, there is a tendency for clients to engage the services of legal counsel who are former judges and prosecutors. This phenomenon is one of the reasons for the public's deep rooted distrust in the criminal justice system.

This phenomenon may be closely related to lawyer selection and the education system in Korea. In Korea, everyone who passes the national bar exam enters a 2 year training program at the Judicial Research and Training Institute(operated by the Supreme Court). After successful completion, each graduate is either appointed (by the President or Chief Justice) to the position of prosecutor or judge, if not he can elect to become a defense lawyer or pursue another legal profession. In other words, every lawyer is an alumnus of the JRTI, making up a relatively elite and somewhat closely knit body in society due to the small number of applicants who pass the national bar exam. Up until only a few years ago there was a cut off of 300 applicants; the system has been changed to allow 1,000 annually. There is also a

tendency for most judges and prosecutors to resign their positions in their forties or fifties to work as private attorneys. Therefore people believe the *jeon-kwan* might have strong ties to incumbent judges and prosecutors even after their resignation which can lead to a possible favorable outcome in their cases.

### **III. The Creation of the Korean Sentencing Commission**

#### **1. Revision of the Court Organization Act**

In Dec. of 2006, the Korean National Assembly revised the Court Organization Act("COA") in order to establish the Sentencing Commission. This Act took effect on April 27 of 2007. The Commission was established within the judiciary despite some assertions it should not be an organ of the judiciary. Though the commission is located in the judiciary, it shall independently perform its function within its authority.<sup>4</sup> There are only 12 articles regarding reform in the COA. The Act delegates many important roles related to setting sentencing guidelines to the Commission. Some of which include setting and revising the sentencing guidelines and studying sentencing policy. The goal of the Commission is to ensure fair and objective sentencing in

---

<sup>4</sup> COA art. 82-1, para.3.

which the people can be confident, taking into account the sound common sense of the people.

## **2. Main Contents of the Revision**

- Establishment of the Sentencing Commission

The Sentencing Commission shall be established in the Supreme Court in order to ensure fair and objective sentencing that the people can trust, taking into account the sound common sense of the people.<sup>5</sup> However, the Commission shall independently perform the work within its authority.<sup>6</sup> Therefore even though the Commission is within the judiciary, it is almost an independent body and is not under the control of the Chief Justice.

- Composition of the Commission<sup>7</sup>

In the Commission, there are 13 commissioners including the Chairperson and one Standing commissioner. They serve 2 year terms. The Chief Justice appoints all

---

<sup>5</sup> COA art. 81-2, para.1

<sup>6</sup> COA art. 81-2, para.3

<sup>7</sup> COA art. 81-3

commissioners including the Chair. According to the act, there is 1 chairperson, 4 judges, 2 public prosecutors(who are recommended by the Minister of Justice), 2 defense attorneys(who are recommended by the president of the Korean Bar Association), 2 law professors, and 2 persons with expertise and experience in this area. The commissioners can be reappointed. The fact that the Chief Justice has sole authority in appointing the commissioners and that judges have 4 seats in the commission, it might be fair to say the commission's structure is a somewhat judiciary dominated one. The current Chair is also a former Justice, Honorable Kyuhoong Lee.

- Setting of sentencing guidelines<sup>8</sup>

The commission shall set or revise specific and objective sentencing guidelines in order to help judges decide on rational sentencing. In achieving this, the commission shall comply with the principles as follows;

1. The quality of the crime, the circumstances of the crime, and the extent of the responsibilities of defendants shall be reflected.

---

<sup>8</sup> COA art. 81-6.



2. The general prevention of crimes, the prevention of defendants from committing crimes again and their rehabilitation shall be taken into consideration.
3. As long as there is no difference between the same kind of crimes and similar kind of crimes in the sentencing factors that have to be taken into account, they shall not be treated disparately in their sentencing.
4. The defendants shall not be discriminated in sentencing on the grounds of their nationalities, religions, consciences, social statutes, etc.

The COA also illustrates matters the commission shall take into account. They are as follows;

1. The type and the statutory punishment of the crime
2. The circumstances that may aggravate or mitigate the seriousness of crimes
3. The age, character and conduct, intelligence and environment of defendants
4. The relationship to the victim(s)
5. The motive, means, and result of the crime
6. The circumstances after the crime
7. The criminal history
8. Other matters pertinent to rational sentencing

- The effect of sentencing guidelines<sup>9</sup>

The sentencing guidelines shall not have binding power over the judges. Judges shall respect the sentencing guidelines when they decide the kinds of punishments and determine the duration of the sentence. But, when the judge wants to depart from the guidelines, he or she shall state the reasons in writing.

- Assistant Bodies

To assist the Commission, two bodies exist within the Commission. One is the special advisor's group and the other is the general secretariat body. The special advisor body is composed of less than 15 members who are judges, prosecutors, defense lawyers, professors, including one chief special advisor who is a judge. The special advisor's main role is to draft the sentencing guidelines and to do necessary research on a part time basis. The groups are divided into three divisions: the General Management Team, Team 1 and Team 2.

The general secretariat body is to assist the Commission's performance and provide working - level assistance. The secretariat is headed by the Chief of the Secretariat

---

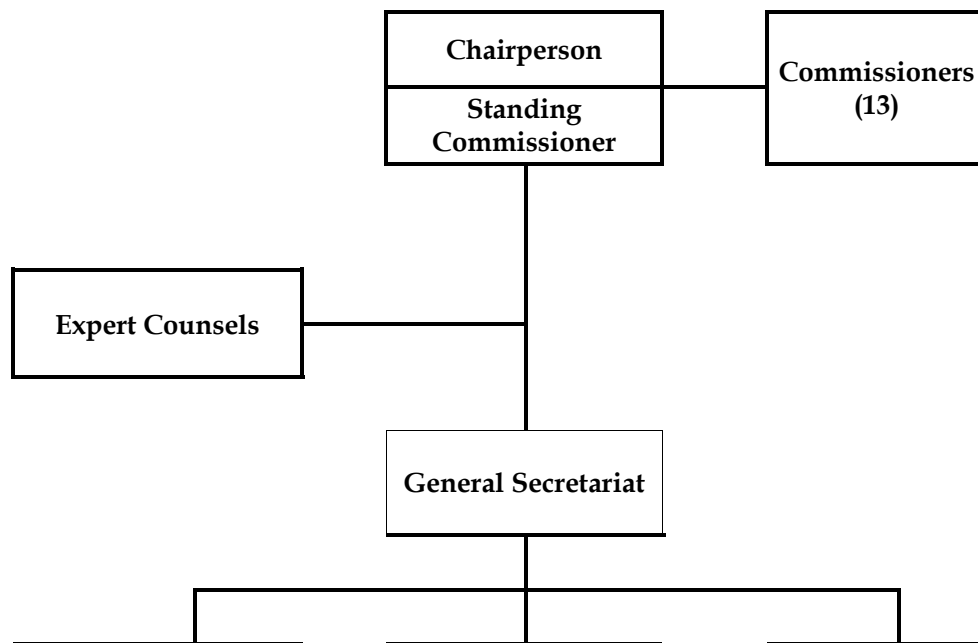
<sup>9</sup> See COA art. 81-7.

Office(who is currently a judge) and has three divisions: Planning & Administration, Information Research, and Statistics & Analysis. Exhibition 1 illustrates the organization of the Commission.

- Publication of the Annual Report<sup>10</sup>

The commission shall publish the annual report every year, in which the results of the relevant year are recorded along with its agenda for the following year. This annual record shall be reported to the National Assembly.

**[Exhibition 1] The Organization of the Korean Sentencing Commission**



<sup>10</sup> COA art. 81-10.

**Planning &  
Administration**

**Information  
Research**

**Statistics &  
Analysis**

#### **IV. Main features of the Korean Sentencing Guidelines**

##### **1. Resolution of the Korean Sentencing Commission regarding the Basic Framework of the Sentencing Guidelines.**

The content of the resolution are as follows:

- The Commission is to establish multiple sentencing guidelines which respectively apply to certain types of crimes.
- The Commission is to set the sentencing guidelines starting with crimes that occur frequently and crimes subject to public concern. In this regard, types of crime that the Commission has decided to review first are homicide, sexual offenses, bribery, perjury and slander(false accusation), embezzlement and misappropriation, and robbery.
- The Commission is to suggest an appropriate sentencing range for each type of crime after its categorization.
- The Commission is to propose sentencing factors based on the characteristics of the crimes and provide assessment principles.

## 2. Adopting the Gradual Approach and Narrative Model in making guidelines

The Korean Sentencing Commission resolved to pass the first sentencing guidelines on April 24<sup>th</sup> of 2009. The new guidelines became effective on July 1<sup>st</sup> through promulgating periods. As shown above, the first sentencing guidelines encompass only 7 crime categories. Each sentencing guidelines for 7 crimes has its own sentencing range sheet. After many thorough debates, the Commission adopted the gradual approach following the United Kingdom Sentencing Council's approach.

In my perspective, a comprehensive guidelines scheme may be more efficient to achieve these sentencing goals, because with the gradual approach it will take an extensive period of time to complete the guidelines. In addition, partial guidelines, as professor Andrew Ashworth has noted,<sup>11</sup> have some drawbacks. It is very difficult to design comprehensive correctional policies and to rank the major offenses.

The Commission compared the narrative guidelines system and the grid guidelines system. One of the major issues in designing the guidelines is whether to calculate each selected sentencing factor. Some commissioners argue that to achieve more transparency it is necessary to calculate the gravity of respective sentencing factors.

---

<sup>11</sup> Andrew Ashworth, *Sentencing and Criminal Justice*, Cambridge (4<sup>th</sup> ed. 2005), p385

We found that the United Kingdom's guidelines system(i.e., *'tariff system'*) did not calculate sentencing factors but, the U.S. federal sentencing guidelines do weigh the major sentencing factors. The majority of Korean sentencing commissioners are opposed to the federal sentencing guideline's methodology.

Though the Commission refused the mathematical way of weighing the factors, the Commission selected sentencing factors in each crime category and subdivided these into two groups according to their gravity. The first group is called 'special sentencing factors' and is divided into 'special aggravating factor' and 'special mitigating factor'. The other group is called 'general sentencing factors' and is also divided into two subcategories. The special sentencing factors receive more weight than the general factors. Detailed differences will be explained below.

### **3. Advisory Sentencing Guidelines**

As mentioned above, the sentencing guidelines are not mandatory but must be respected by the judges in rendering their decisions. The reasons for departing from the guidelines must be provided in the decisions.

Either the prosecutor or the defendant can appeal the sentence in all cases, Departing from the guidelines may be of concern to the judge(s) at the district court

level as either the prosecutor or the defendant can appeal a sentence in all cases to a higher court. In the case of an appeal, the appeal court may examine the appropriation of the departure.

#### **4. Applied to Adult Criminal Cases tried in Typical Procedure**

The new sentencing guidelines only apply to adults who are 20 years old or over at the time of the indictment. It is also applied to cases in typical procedure. In Korea, in criminal procedure there are two kinds, one is summary procedure and the other is typical procedure. In summary procedure, the maximum penalty is a fine and many cases are resolved through this procedure. The guidelines will not be applied in this procedure. In principle, the prosecutors decide whether to handle a case through summary procedure.

As of yet, there are no guidelines for the death penalty in certain serious crimes. It is up to the judge whether to impose the death penalty.

#### **5. Reduce the Influence of Criminal History Factors**

In most American jurisdiction's guidelines including the federal guidelines, criminal history is used as a horizontal axis on the sentencing grids. It thus has a significant role among the sentencing factors.

In drafting the new guidelines, there has been debate among the special advisors as to whether criminal records should be treated as an important factor. One advisor asserted that in principle the Commission should not consider the criminal history of the offender as a sentencing factor because it is not directly related to the crime in itself. He argues that deciding on a more severe punishment on the basis of crime committed in the past would go against the principle 'the offender should be punished on the basis of the criminal act itself'. However, most advisors agree that criminal records should always be considered in the guidelines. Furthermore, the act also states that the judge should take criminal history into consideration.

Judges serving as special advisors proposed that the gravity of criminal records should not be given too much consideration. I and another special advisor proposed to follow the American model in dealing with criminal records but the Commission decided to follow the judges' position. That is why in the guidelines, criminal history factors are treated as merely one of the sentencing factors and are neither decisive nor influential.



## **6. Mainly Descriptive Sentencing Ranges**

The Commission implemented a data analysis on about 43,000 selected cases that have already resulted in a conviction. In principle, sentencing ranges of the guidelines reflect a 70-80 percent range of the actual sentence. But in some crime categories such as bribery and sexual offense, the Commission has attempted to raise descriptive ranges as public complaint continues against lenient past sentencing practices.

In order to analyze past sentencing practice, the Commission implemented sentencing data research on Past Final Judgment Cases. The purposes of conducting Sentencing Data Research were: 1) to analyze sentencing problems and their causes nationwide; and 2) to collect the basic data for establishing sentencing guidelines. The research period was from November 19, 2007 to March 28, 2008. Sentencing documents of convicted offenders during the past three years(March 1, 2004 - February 28, 2007) including appeal cases from trial judgments were studied. The total number of cases was 44,015. The Commission established sentencing guidelines based on the sentencing data analysis result. Research Sources are criminal records and written judgments(including pre-sentencing reports and all documents related to the convicted cases).

## **7. Lack of Interaction between the Commission and the National Assembly**

Unlike other nations, the Korean National Assembly does not exercise any role in the process of promulgating the sentencing guidelines. According to the COA, the Commission has only a legal obligation to hand in the annual report to the National Assembly. In many jurisdictions around the world, Parliament(or Congress) interacts with the Sentencing Commission on many levels. In some jurisdictions, Parliament gives directives to the Sentencing Commission while in other jurisdictions it can approve the sentencing guidelines. Therefore, in Korea, some experts assert the National Assembly should have the authority to review and approve the sentencing guidelines.

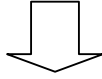
## **V. The Process to Apply Sentencing Guidelines**

### **1. The process to decide on a specific sentencing range**

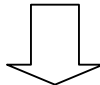
The application process consists of 4 steps. The first step is to decide the type within each crime category. The second step is to apply the appropriate sentencing range and the third step is to determine the actual sentence term. The last step is to decide whether to suspend the sentence or not. Exhibit 2 shows this process.

## [Exhibition 2 ] Sentencing Guidelines Application Process

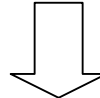
**1. Determination of crime category**



**2. Application of the sentencing range**



**3. Determination of the actual sentence**



**4. Determination of suspension of sentence**

Using the murder guidelines, the following is a brief explanation of the basic process of applying the guidelines. In Korea, murder is not categorized into first degree murder and second degree murder. According to the penal code, the sentencing range for murder is capital punishment or life imprisonment and not less than 5 years imprisonment.

Each type has basically 3 ranges such as the mitigated range, basic range and aggravated range. This categorization of murder cases is decided according to the motive. If the motive for murder is eligible for lesser sentences in regard to the

circumstances, the case falls in the first type. If the motive is a censurable one, the case falls in the third type. Therefore, in murder categories, the motive is a type-deciding factor. Exhibition 1 shows the 3 sentencing ranges for each type.

Once the type is decided, the next step is to verify the existence of selected sentencing factors.

**[Exhibition 3] the sentencing guidelines range of murder**

	Mitigated range	Basic Range	Aggravated Range
First type	3 – 5 years	4 - 6 years	5 - 7 years
2 <sup>nd</sup> type	6 - 9 years	8 - 11 years	10 - 13 years
3 <sup>rd</sup> type	8 - 11 years	10 - 13 years	12 - 15 years, life imprisonment, capital punishment

**[Exhibition 4] Sentencing Factors for Murder**

- Special sentencing factors

	mitigating factors	aggravating factors
factors related to the offense characteristics	▪ preventive act, but exceeding normal limit	▪ premeditation ▪ vulnerable victim

	<ul style="list-style-type: none"> <li>▪ weak intention</li> <li>▪ strong provocation by the victim</li> </ul>	<ul style="list-style-type: none"> <li>▪ defiles the corpse</li> <li>▪ using cruel method</li> <li>▪ in the case where the victim is one's own or the spouse's lineal descendant</li> </ul>
factors related to the offender characteristics	<ul style="list-style-type: none"> <li>▪ deaf-mutes</li> <li>▪ mental deficiency</li> <li>▪ voluntary surrender</li> <li>▪ victim side petition for lesser punishment</li> </ul>	<ul style="list-style-type: none"> <li>▪ no regret(not including the denial of the conviction)</li> <li>▪ strong recidivism</li> </ul>

○ general sentencing factors

	mitigating factors	aggravating factors
factors related to the offense characteristics	<ul style="list-style-type: none"> <li>▪ minor role</li> <li>▪ mediate provocation by the victim</li> </ul>	<ul style="list-style-type: none"> <li>▪ discard the victim's body</li> </ul>
factors related to the offender characteristics	<ul style="list-style-type: none"> <li>▪ considerable reparation</li> <li>▪ mental deficiency(by negligence of the criminal itself)</li> <li>▪ sincere regret</li> </ul>	<ul style="list-style-type: none"> <li>▪ recidivism</li> <li>▪ similar prior criminal conviction</li> </ul>

At first, the specific sentencing range is decided after considering the special sentencing factors. If there are multiple special sentencing factors, the evaluation rules are as follows;

- 1) Factors related to the offense characteristics receive more weight than same number of those factors related to the offender characteristics.
- 2) Factors related to the offense characteristics act and factors related to the offender characteristics receive the same weight respectively within each group.
- 3) In case the specific ranges are not determined by rules 1 and 2, the judge can decide the sentencing range after considering all special sentencing factors.

After evaluating special sentencing factors, if more weight is given to the aggravating factors, the aggravating sentencing range will be selected. If more weight is given to the mitigating factors, then the mitigating sentencing range will be selected. In other cases the basic sentencing range is selected.

There is a special adjustment to the sentencing range. If special aggravating factors outnumber special mitigating factors by more than 2, the maximum of the aggravating sentencing range is extended by half. On the contrary, if the special mitigating factors outnumber the special aggravating factors by more than 2, the minimum of the mitigating sentencing range is reduced by half. Once the sentencing

range is selected, then the judge can sentence a specific term for the convicted criminal in consideration of the general sentencing factors.

In case the sentencing range does not correspond with the range set according to the statutes, the latter range will prevail.

**2. Dispositional decision**

The Commission promulgated the dispositional guidelines for each crime category. According to the guidelines, the factors are categorized into the important and general factors.

If there exist 2 negative important factors or the important negative factors exceed the positive factors by more than 2, in principle, detention (incarceration) may be recommended. In an adverse situation, suspension of detention is recommended. But even in these situations, if there are many general factors, the judge has the discretion to impose imprisonment after considering the situation as a whole.

**[Exhibition 5] dispositional guidelines in attempted murder**

		negative factor	positive factor
important	factors related to	-planning	-effort to stop the accomplice

factor	recidivism	-especially reproachable motive -similar serious criminal record(within 10 years)	crime -special mitigating motive -voluntarily gives up committing crime - strong provocation by the victims - no criminal record
	other factor	-serious injury -no reparation	- no or mild injury -victim's petition for lesser punishment
general factors	factors related to recidivism	- serious criminal records more than 2 times - very weak ties with the local society - drug or alcohol addiction - possession of dangerous weapons - cruel criminal act - no regret - no acquaintance with the victim	-strong ties with the community - voluntary confession - sincere regret -no serious crime records - old age -provocation by the victim(s)
	others	- major role in crime - destroy the evidence or such attempt	- minor role - transport the victim(s) after committing crime - worse health condition



			- serious damage to the offender's family from the detention of the offender
--	--	--	--

### 3. Multiple offender guidelines

The Korean Penal Code(KPC) articles 37 - 40 show the basic rules on multiple offenses. Article 38 shows the details how to apply multiple offender rules when multiples offenses are adjudicated at the same time.<sup>12</sup> Under the KPC, multiple

---

<sup>12</sup> Art. 38states as follows;

para.1.

When multiple crimes are adjudicated at the same time, punishment shall be imposed in accordance with follow classification.

1. In the event punishment specified for the most sever crime is death penalty or life imprisonment or imprisonment without prison labor for life, the punishment provided for the most sever crime shall be imposed;
2. In the event the punishment specified for each crime are of the same kind, other than a death penalty or imprisonment for life or imprisonment without prison labor for life, the maximum term or maximum amount for the most severe crime shall be increased by one half thereof, but shall not exceed the total of the maximum term or maximum amount of the punishment for each crime. But, minor fine and confiscation can be consecutively added with other minor fine and other confiscation respectively.

offender rules are different from the multiple offender rules of common law jurisdictions. In the KPC, there is no such concept such as concurrent execution and consecutive execution. Judges in Korea decide on a sentence following the multiple offense rules and have no discretion in selecting to impose concurrent or consecutive execution. In addition, according to the KPC, imprisonment or imprisonment with prison labor shall be either for life or for a limited term, and the limited term shall be from one month to fifteen years. This limited term can be extended to 25 years. Therefore, in case of even the most serious cases, if the judge selects imprisonment for the crime, the term cannot surpass the 25 year limit in any aggravated situation.

According to the new sentencing guidelines, if the defendant receives multiple convictions and if sentencing guidelines exist for each conviction, then multiple offender guidelines can be applied. The process in which these guidelines are applied differs from that of the KPC. First, in order to apply multiple offender guidelines, one must decide on the principal offense. Basically, the principal offense

---

3. In the event the punishments specified for each crime are of different kind other than imprisonment for life or imprisonment without prison labor for life, they shall be imposed together.

para.2.

In regard to each subparagraph of the preceding paragraph, imprisonment and imprisonment with prison labor shall be regarded as the same kind of punishments and punishment shall be done with imprisonment.

is the most serious offense according to the statute. But in case the sentencing guidelines range of the more serious offense(according to the statute regulations) is lower than the less serious offense, the latter then becomes the principal offense.

According to multiple offender rules, the guideline considers only 3 respective serious convictions. If there are 2 convictions, half( $1/2$ ) of the maximum of the lesser serious conviction will be added to the maximum of the principal offense. If there are 3 or more convictions, half( $1/2$ ) of the maximum of the second serious conviction and the a third( $1/3$ ) of the third serious conviction will be added to the maximum range of the principal offense.

- 2 convictions

Assume that the sentencing range for murder is 8 -11 years and rape 3 - 6 years. The principal offense is murder. According to the multiple guidelines, the final sentencing range will be 8 -14 years, because half of the maximum for rape(3 years =  $1/2 \times 6$ years) shall be added to the maximum of the murder(11years).

- 3 or more convictions

Assume that the sentencing guidelines for murder is 8 -11 years, a rape case's sentencing range is 3 - 6 years and perjury case's sentencing range is 10 months – 3 years. The principal offence is murder. According to the multiple guidelines, the final sentencing range will be 8 -15 years, because half of the maximum for rape(3 years =  $1/2 \times 6\text{years}$ ) and  $1/3$  of the maximum for perjury(1 years =  $1/3 \times 3\text{ years}$ ) shall be added to the maximum of the murder(11years).

If there are more than 3 convictions, only up to 3 serious convictions shall be considered.

## **VI. Some Remaining(Unsettled) issues.**

### **1. The Quest for an Efficient Monitoring System**

In order to efficiently monitor compliance of the guidelines, some special advisors including myself proposed the use of a unified worksheet. I suggested that the Commission design the worksheets and each court, prosecutor's office, and the police utilize them. I also argued that the Commission should also develop a database system to electronically log any sentencing information. But, this

suggestion has not been accepted. Therefore, the judiciary and the prosecutor's office should develop its own monitoring system. This will result in much inefficiency. In my perspective, further discussion will ensue regarding this topic.

## **2. Who Should Investigate the Sentencing Factors and Prepare the Presentence Report?**

One of the heated issues regarding implementation of the new sentencing guidelines is who investigates(or gathers) the sentencing factors. Korea like in Japan, the prosecutors(also police officers) investigate all sentencing factors(aggravating and mitigating factors). Thereafter, Korean prosecutors send the documents including the results of the sentencing investigation to the courts(typically, this information is included in the protocol along with the statement of the accused or victims). It is rare for probation officers to prepare pre-sentencing reports.

One feature of the Korean criminal justice system is that there is no differentiation between fact finding procedure and sentencing procedure. That is why during trial procedure each party(prosecutors and the accused) hands in not only evidence related to a guilty or not-guilty decision but also materials related to sentencing.

The Korean judiciary's position about this issue is that court officers(not probation officers) should prepare the presentencing reports for the judges. Until now, there

have not been any such court officers to perform this task and the Supreme Court has taken it upon itself to explain to some National Assembly(or Parliament) members the necessity of these new appointments. Therefore a bill has been suggested to the law commission of the National Assembly in which the newly appointed so called 'sentencing investigating officers' can investigate sentencing factors in some criminal cases.

Many prosecutors think that prosecutors should gather the sentencing factors as they have in the past and if a situation arises that a more thorough investigation of sentencing factors is necessary, the probation officers will take charge of that assignment.

The Korean Probation Organization is assigned to the Ministry of Justice but has operated independently from the prosecution. Nevertheless, the judiciary argues that if probation officers prepare all presentencing reports, they cannot be objective owing to the fact that the organization is a branch of the Ministry.

### **c. Alleviating the Judiciary Dominated Atmosphere**

Though the composition of the commissioners and special advisors is diverse, many facts make the Commission's structure a somewhat judiciary dominated one(e.g., the

Chief Justice appoints all commissioners, the Chair is a former Justice, the Chief Special Advisor and the Chief of the Secretariat are both incumbent judges, etc). This might undermine the neutrality of the commission. Some commissioners and special advisors have requested that this atmosphere be lessened.

## **VII. Closing**

The Korean legal system is based on the continental legal system. From my knowledge, Korea is the first country based on this type of legal system to adopt the sentencing commission idea of achieving sentencing reform. In my view, our efforts in Korea in achieving this may be of relevance to these countries.

Through heated debates, the Korean Sentencing Commission decided to follow the narrative and gradual approach in designing the sentencing guidelines. And there are many unsettled issues in deciding what measures are efficient and appropriate to accomplish the sentencing goals. The Korean Sentencing Commission has taken the first step towards more transparent and objective sentencing.

Sentencing reform issues has become a universal one in the criminal justice system. Sharing insights through international cooperation is not only necessary but crucial to successful reform.

