Comparison of the Legal System between North and South Korea (II)

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IV. Theory of Crime and Punishment

In contrast to the Chinese Communists, the North Korean regime seems to have considered it to be more effective in ruling the people and guiding them in accordance with the communist line to have a comprehensive criminal code. On March 3, 1950, the fifth meeting of the Supreme People’s Assembly of the DPRK adopted a Penal Code and a Code of Criminal Procedure, and both of the codes were put into effect April 1, 1950. With

regard to its over-all structure, the Penal Code is very similar to the Russian Socialist Federated Soviet Republic (RSFSR) Criminal Code of 1926 which was in force in the RSFSR at the time of promulgation of the North Korean Penal Code. Since many of the Korean Communist Laws have been taken directly from Soviet law, this similarity in structure is not unnatural.

Certainly, the North Korean jurists are not hesitant to accept the fact that the Penal Code is modeled after that of the Soviet Union(1) and thus a product of the Korean emulation of Soviet behaviour. Nevertheless, it must not be overlooked that they do emphasize the North Korean people's own experience of intensive struggle with various crimes, as well as the historical particularity and independency of their legal system. Careful reading of all parts of the Penal Code seems to show a certain divergence from the Soviet pattern and there is some indication to suggest that certain notions in the penal legislation of North Korea reflect some of the traditional heritage of Korean legal culture. For example, the Penal Code of the DPRK has incorporated the basic Korean moral conception of filial duty. When a person kills; or bodily injures his or his spouse's lineal ascendant, the punishments is aggravated, compared with the usual case of homicide or bodily injury.(2)

Why the codification of criminal law and procedure was made at the early stage of the Communist Korean regime, in contrast with the fact that the Communist Chinese system is not yet represented by a comprehensive criminal code or a code of criminal procedure, is not clear. However, we may suggest two possible reasons: one is that the Soviet-controlled leadership established during 1945-50 obviously emphasized, or perhaps were compelled to emphasize, the wholesale displacement of the so-called Japanese imperialist remnants by the advanced Soviet culture (This emphasis was embodied in the slogan "Learn from the Soviet Union"), (3) and thus ironically the revival of the sense of Korean cultural identity; the other is that, judging from the experience of past Japanese domination, Korean Communist leaders must have believed that enactment of a comprehensive criminal code would better help them to rule the people effectively.

(2) Compare Articles 113 and 121 with Articles 112 and 125 of the Penal Code of the DPRK.
Unlike Red China during the period of 1953-57, there appears no evidence that any Soviet legal experts had come to help the Korean understand the Soviet laws, nor that the lawmaking effort was to be undertaken with their aid. Recalling the fact that many Soviet-Koreans who had been grown up and educated in Russia returned in the van of the Red Army, however, it is reasonable to assume that these Soviet-Koreans were active in adopting and developing a Soviet-style legal system.\(^{(4)}\)

In fact, some of these Soviet-Koreans occupied powerful positions (although nominally of second rank) in the Party, police, army and administrative apparatus.\(^{(5)}\) In this connection, it has already been mentioned there were several Soviet-Koreans who held positions of legal importance at the early stage of the Pyongyang regime.\(^{(6)}\) At this point, one may recall that the North Korean Constitution promulgated on September 8, 1948 was largely based upon the Stalinist Constitution of 1936.\(^{(7)}\) In addition, there is evidence to suggest that during the three years of Red Army occupation, even before the formal proclamation of the DPRK on September 9, 1948, a committee was organized in order to draft a penal code, a code of criminal procedure, a civil code, and a code of civil procedure. And there is also evidence to support that by the beginning of March of 1948, the draft of the Penal Code was already completed.\(^{(8)}\) Therefore it is most likely that the above draft of the Penal Code had been used as a guideline for the agencies of law enforcement and thus had in effect *de facto* for two years before its formal promulgation on March 3, 1950.

At any rate, the North Korean jurists assert that the adoption of the Penal Code in 1950 had tremendous political and legal significance.\(^{(1)}\) It is this Penal Code that was designed to protect the rights and interests of the laboring people for the first time throughout the

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\(^{(6)}\) See Kang, Law in North Korea, supra Chapter III, 13a, at 66-68.

\(^{(7)}\) See *id.*, 62; and Pak, *Government Structure*, *infra* Conclusion, note 8a, at 26.

Korean history; (2) the Penal Code guarantees not only the unity of the Republic’s criminal policy but also the efficient struggle against various kinds of crime. This is because the Penal Code fundamentally has foreseen the danger of a crime to the people’s sovereignty and has generalized the experiences of the people’s courts in their struggle against crimes during the period of the so-called “peaceful construction” (1945-1948); (3) it promotes the revolutionary vigilance of the citizens in the course of their struggle against counter-revolution and plays an educational role in leading such class of the people who tell behind the new order and discipline; (4) the appearance of the Penal Code means the complete abolition of all the piecemeal penal legislation enacted and promulgated by the people’s sovereignty until 1950; (5) it especially systematizes the penal norm as to crimes against the state and subjects the administration of justice in the Republic to the (legal restraints of) penal norm as well as to the democratic legal consciousness, whereas justice in the Republic before the promulgation of the Penal Code was solely led by democratic legal consciousness.\(^9\)

When compared with the Penal Code of the Republic of Korea, several different characteristics of importance appearing in the criminal law of the DPRK are: (1) The aim of the criminal law is expressly specified in the Penal Code itself; (2) the concept and the scope of the object protected by criminal law (that is, the socialist social relationship) are categorically defined; (3) the positive role and significance of punishment are clearly declared, and the combination of coercion and education is attempted in the process of application of punishment; (4) the participation of public opinion in the struggle against crime is emphasized; (5) the masses’ surveillance of crime and the solution of criminal cases by the people’s autonomy are encouraged; (6) the predominant jurisprudential approach to the material elements of crime takes the view that a comprehensive analysis of an act alleged to be criminal can only be achieved by examining four aspects of the act involved: the object of the act, the objective side of the act, the subject of the act, and the subjective side of the act.\(^10\)

Although the DPRK Penal Code is largely based on the RSFSR 1926 Criminal Code,

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(9) Sim, A Commentary, supra note 1, at 51–52.
(10) In contrast with this, the majority view in such civil law countries as Germany and the ROK holds in order to declare an act crime that we have to consider three aspects of the act; the constituent element (Tatbestandmässigkeit) of the act; unlawfulness of the act (Rechtswidrigkeit); and fault (Schuld) of the actor.
one must have in mind that at points the North Korean drafters did not slavishly imitate the latter code, as originally enacted. To be sure, careful reading of the two Codes will reveal certain differences both in terminology and content, together with great similarities. Many of these differences turn out to be the reflection of changes that were introduced into the 1926 RSFSR Code itself by specific legislative enactments in the 1920's, 1930's and 1940's, and by the development of Soviet legal science in those decades. From this fact, it is therefore reasonable to assume that the North Korean drafters of the Penal Code were well aware of the extent the 1926 RSFSR Code had been obsolete for almost a quarter of a century in many of its provisions and in much of its terminology, mostly because of the changes that had been made in that code.

Some of other notable differences between the DPRK and the ROK Penal Code are revealed in Article 10 of the DPRK Code, which states that punishment shall be applied to a person who is guilty of committing a crime which is defined by Article 7 as a socially dangerous punishable act; in Article 5, which states that a person who commits a crime shall be responsible in accordance with the law prevailing at the time of the commission of the crime; and in Article 6, which states that a law eliminating the punishability of an act or reducing the criminal responsibility for it, shall also apply to acts committed before its promulgation. Thus, the social danger of the person alone is not enough, under the Korean Code, to justify the imposition of criminal punishment; there must also be a crime, that is, a (socially dangerous) punishable act prescribed by the law prevailing at the time of the commission of such act.\(^{(11)}\)

In addition to the above differences in content from the 1926 RSFSR Code, the DPRK Code also reveals certain differences in the use of legal terminology. The Korean Code, for example, does not contain in itself such term "counterrevolutionary" as used by the 1926 Soviet Code, but rather uses the term "anti-state." The same can be also said of the term "counterrevolutionary crimes." While the RSFSR Code of 1926 contains a chapter specifying the so-called "counterrevolutionary crimes," the Korean Code denominate the

\(^{(11)}\) The significance of this principle of law, however, is greatly undermined by the very fact that the DPRK Penal Code accepts the so-called doctrine of analogy (Article 9). As a result, the social danger of an act is sometimes enough to justify the imposition of criminal sanction, even in the absence of any law prescribing such act as punishable. In connection with this should be noted Article 79 of the DPRK Code, which makes punishable "vigorous persecution or suppression of the Korean people's national liberation movement carried on by a responsible or secret agent during the Japanese rule (1910–1945)."
same kind of crimes in substance as "Crime Against the State (Sovereignty)." (12-13) In connection with this should it be noted that it was not until the 1958 legal reform that the Soviet Code finally eliminated the phrase "counterrevolutionary crimes" and substituted the term "state" (i.e. anti-state) for it. It is also of some interest that the Korean Code never uses the term "measure of social defense of a judicial-correctional nature" but sticks to the term "punishment." In contrast, "measure of social defense of a judicial-correctional nature" was the 1926 RSFSR Code's euphemism for criminal sanction imposed by a court; the term "punishment" was not used at all. (14)

In any event, one of the most important differences of the DPRK Code from the ROK Code is reflected in its Article 9 which provides for the so-called doctrine of analogy. Under the ROK Penal Code (Article 1) and Constitution (Article 11), the scope of criminal law is limited to punishment for acts specifically proscribed by laws in force at the time of their commission under the so-called principle of *nullam crimen, nulla poena, sine lege*. In contrast, Article 9 of the DPRK Code provides as follows:

> If any criminal act is not directly provided for by the present Code, the basis and limit of the criminal responsibility therefore shall be determined by application of those articles of the Code which provides for the crimes most similar to it in importance and nature.

It is interesting to note that the 1960 RSFSR Criminal Code has finally eliminated the notorious doctrine of analogy from Soviet law (although strong traces of it reappear in the Statute on Comrade's Courts, which is considered to be outside of criminal law), whereas the North Korean Code still retains such doctrine.

Apart from the differences in content, the comparison of the Korean Penal Code with the ROK Code also suggests some differences in style, that is, in the arrangements of the chapters of the Codes. The Special Part of the DPRK Code, has the following table of contents:

1. Crimes Against State Sovereignty (Articles 61-81)
2. Crimes Against State Administration (Articles 82-102)
3. Crimes Against State, Social and Cooperative Property (Articles 103-111)
4. Crimes Against the Person (Articles 112-146)

(12-13) See Articles 61-81 of the DPRK Penal Code.
5. Crimes Against the Property of Citizens (Articles 147-167)
6. Crimes Involving Violation of Labor Legislation (Article 168-177)
7. Official Crimes (Articles 178-193)
8. Economic Crimes (Articles 194-217)
9. Crimes Against the Administrative Order (Articles 218-258)
10. Crimes Against the Social Security and the Health of the People (Articles 259-264)
11. Military Crimes (Articles 265-301)

In contrast, the ROK Code has an entirely different arrangement of chapters. First of all, the names of chapters are entirely different. Further, the number of chapters contained in the ROK Code is 42, showing that it far exceeds the number of chapters found in the DPRK Code. Especially, the character of the chapters found in the ROK Code witnesses itself to a great diversity: This is to say that the ROK Code classifies its chapters more scrupulously in accordance with the legal interests it intends to protect than the DPRK Codes. These differences in the arrangement of chapters of the two Codes seem to suggest the different attitudes of the two Codes toward the protection of personal rights as contrasted with protection of the system of political administration and the state or social property. When compared with the DPRK Code, the ROK Code seems to show more concern with the protection of personal rights, insofar as the arrangement of chapters in the Code is involved. In this connection, Professor Harold J. Berman points out that the arrangement of chapters of the Code and the inclusion of a particular provision within one chapter or another are more than matters of style; they affect the interpretation of the law and express a policy binding upon the courts in individual cases.

In view of the dissimilarities existing between criminal law in North and South Korea, it will be necessary to comment further on fundamental principles of the criminal law of the DPRK.

It goes without saying that the Penal Code of the DPRK implements the fundamental principle of the so-called socialist criminal law, that is, the principle of protection of socialist society through introduction of a strong class-oriented legal system. The Communist Koreans, like all Marxist-Leninist oriented jurists, have put great emphasis upon the political and philosophical foundation of their social structure. That society is characteristically class-oriented and law and an instrument of the ruling class is given as its primary task the protection of the ruling class and its vanguard the Korean Workers'
(Communist) Party. And, at the same time, the class nature of crime and of criminal law is given particularly great emphasis in connection with the orthodox Marxist theory of the historical function of legal institution.\(^{(15-20)}\)

Crime is a dangerous....act to the interest of the ruling class ... Therefore, the history of crime may be correctly understood only in connection with the history of class struggle.\(^{(21)}\)

The criminal law of the Republic serves the Korean people as an instrument for the conduct of class struggle.\(^{(22)}\)

As already been indicated, North Korean Penal Code shows ample hint of Soviet inspiration. Thus, the gist of the North Korean system is concern for the welfare of the group rather than for the protection of the individual. Accordingly, the Penal Code of the DPRK, like the RSFSR Codes of 1922 and 1926, puts main emphasis upon the “social danger” theory of punishment, rather than the traditional “fault” theory of continental law. Likewise, the North Korean system accentuates the “reformative” over the “retributive” approach to punishment. Except for political criminals, its overwhelming objective is the lawbreaker’s prompt and profitable return to society, or ideally his rehabilitation at the hands of his fellow workers with no imprisonment at all. Thus the death sentence is declared by North Korean jurists to be exceptional and temporary in character,\(^{(23)}\) although under the present dictatorial regime of Kim Ilsong it is applied with considerable frequency.

Further, the North Korean law graduates the harshness of punishment according to a hierarchy of values peculiar to the socialist system. Thus, theft or damage to state or cooperatively owned property is considered more serious than the same acts committed against privately owned property.\(^{(24)}\) Also, the malicious avoidance to perform obligatory and productive labor which constitutes a social or national task is a crime.\(^{(25)}\) Finally, the North Korean law, like the Soviet law, creates some new crimes relating especially to socialism, notably to state economic planning. Officials directing public corporations are subject not only to dismissal for failure to meet their quotas, but to criminal penalties as well, and such penalties apply as well to officials who produce the quantity but not the

\(^{(15-20)}\) Sim, A Commentary, supra note 1, at 7 and 91.
\(^{(21)}\) Id., 91.
\(^{(22)}\) Id., 6.
\(^{(23)}\) Id., 242.
\(^{(24)}\) Compare Articles 103 and 104 with Article 147 of the DPRK Penal Code.
\(^{(25)}\) Id., Art. 197.
quality required by the plan.\(^{(26)}\)

North Korea's criminal law scholars do not hesitate to exhort that all of these features of their criminal law are based on the Soviet penology. Ample references are made to the "social danger" theory as the basis of their Penal Code. There is even the same kind of introductory article in the North Korean Penal Code as appearing in the Soviet codes, declaring its purpose to be the protection of the DPRK (namely, its ruling system) from all kind of criminal infringements.\(^{(27)}\) The Soviet codes' emphasis upon social danger as a requisite for punishment is adopted by the North Korean penal code without modification. North Korean jurists vigorously defend the pre-1958 Soviet punishment "by analogy" as having special significance in their society.\(^{(28)}\) To sum up, the Soviet influence on criminal law in North Korea is very substantial on the whole. Though it is not clearly stated, differentiation has been made between the people's enemy and the backward elements among the people. It is widely known that during the most severe period of Stalin's terror when he was attempting to force peasants into collective farms, he decreed the liquidation of the kulaks as a class. The archives captured at Smolensk by the German armies and extensively studied in the United States show that there was no fixed definition of a "kulak".\(^{(29)}\) In consequence, "enemies" who were punished without regard to what they did individually were identified with widely varying standards in those days of the Soviet Union. Russian Communists seem to have adopted the same approach. But, apparently influenced by the Chinese practice, they seem to have gone farther to reach into all types of activities. Thus "backward elements among the people and enemies" are not predetermined concepts as different classes of people: A careful study of Russian practice clearly shows that one and the same individual may be considered as a member of "the people" on one occasion but be stigmatized as an "enemy" on another. The key to classification is the nature and character of the crime committed.\(^{(30)}\) Generally

\(^{(26)}\) Id., Art. 200.

\(^{(27)}\) Id., Art. 1.


speaking, those who are guilty of committing "counter-revolutionary activities which are directed against the authority of the regime" are to be stigmatized as enemies.\textsuperscript{(31)} Dictatorial measure and severe punishment are to be meted out without leniency to these "enemies". On the other hand, against the backward elements of laboring "people" who are defined as those who commit minor offenses owing to the lack of proletarian legal consciousness and the possession of remnant of outworn thoughts, punishment should be regarded as nothing but an educational process by which the criminals are doctrinated into desirable citizens of Communist society.\textsuperscript{(32)}

From the above fundamental principles, many other important secondary principles and characteristics of the criminal law and criminal policy of Communist Korea are to be inferred. First of all, the Penal Code defines crime as any acts or omissions that socially endanger or infringe upon whatever interest is deemed to be essential to the preservation of power in the ruling class.\textsuperscript{(33)} Conversely, acts which do not fall under these conditions, and \textit{a fortiori} acts which are not directed against the regime itself, even though they formally contain the indicia of an act provided for by the Special Part of Penal Code, are not to be regarded as crimes or to be punished.\textsuperscript{(34)} For instance, a person who pilfers a small amount of property of another (as distinct from property of state or public organs) may not necessarily be punished, because such an act sometimes fails to give rise to harmful result to society as a whole, and thus does not represent a social danger.\textsuperscript{(35)}

\section*{V. Important Aspects of Criminal Procedure}

This chapter is primarily concerned with presenting the general framework in which the criminal process in North Korea operates in accordance with the Criminal Procedure Code. Therefore, we will discuss only the important aspects of the criminal procedure.

At the outset of this chapter, however, it is necessary to make it clear that in North Korean criminal process, there has always been a difference between theory and practice.

\textsuperscript{(32)} \textit{The Commentary}, 236.
\textsuperscript{(33)} Penal Code of the DPRK, Art. 7.
\textsuperscript{(34)} \textit{Id.}, Art. 8.
\textsuperscript{(35)} Sim, \textit{A Commentary}, note 1, at 104.
especially after the limitation of Flying Horse Movement in 1958. A few examples will suffice to support this general observation: Although the Constitution (Article 86) as well as the Court Organization Law (Article 10) prescribes that cases should be tried in public as a principle, there seem to exist numerous occasions where this principle was violated. Although the Criminal Procedure Code requires at no place confession of the accused as prerequisite to conviction, pressures on the accused to confess is quite strong in view of the official line, "Leniency for those who confess and severity for those who resist." Especially the newly emphasized mass line and mass viewpoint during the Flying Horse Movement must have widened the discrepancy between the formal process anticipated by the Criminal Procedure Code and the currently operating system of criminal adjudication. Those drastic methods of on-the-spot investigation, trials and execution of sentence, and integration of court hearings with mass debate fully utilized during the Flying Horse Movement had no statutory basis but nevertheless, were hailed by the Korean Communists as techniques of "guaranteeing accurate settlement of the case involved." Therefore, one who studies criminal process in North Korea should be careful not to confuse its theory with the actual practice but always to try to understand the theory in connection with its practice.

The DPRK Code of Criminal Procedure establishes a system of preliminary investigation, conclusion to indict, trial, judgment and appeal, similar in its broad outlines to that of the Soviet Union. Thus, criminal procedure in North Korea is divided in the parts which follow into eight stages: (1) initiation of criminal proceeding; (2) inquiry; (3) pretrial investigation; (4) transmission to court; (5) preparatory administrative session; (6) judicial session proper (trial); (7) appellate review; and (8) execution of the judgment.

Like the Soviet system, one of the most important characteristics of North Korean criminal procedure, when compared with the criminal procedure in the Republic of Korea, lies in the great emphasis placed upon pretrial investigation and upon the active participation of the court in the trial itself. More stress is placed upon the "inquisitorial" features of the procedure, while its "accusatory or adversary" features are less emphasized. Here North Korean law is founded on the same footing as Soviet law and thus may be traced back to the continental European tradition.\footnote{1}  

\footnote{1} Harold J. Berman, \textit{Justice in the USSR} (New York: Random House Inc., 1963), 302.
A preliminary examination is held, in which pretrial investigator interrogates the accused and examines evidence prior to drafting the conclusion to indict, a document in which the charges and the evidence against the accused are stated in detail. Furthermore, a court is authorized to take the initiative in instituting criminal cases,\(^2\) in setting the case for trial without the prior intervention of any other agency, and in informing the accused of the charge against him. Complaints, written or oral, may be filed with a judge by a citizen or an organization, and the judge is obliged to decide on the merits of the complaints.\(^3\) Examination of a case by the court may be called to order and continue even in the absence of a procurator.\(^4\) If a court deems that the case under consideration is not sufficiently clear, it may postpone examination of the case and acquire new evidence upon its own initiative.\(^5\) As for the procurator, he must, in his oral argument, make a speech in favor of the innocence of the accused, in the event that in his opinion the accused’s guilt is not proved.\(^6\)

It is particularly noteworthy that the Code of Criminal Procedure includes some provisions similar in substance to the procedural bill of rights which could be found in the 1923 RSFSR Code.\(^7\) No one may be subjected to arrest or detention except in cases provided for by laws and decrees and in accordance with the procedures established by laws and decrees (Article 6). Wherever a procurator discovers that within his jurisdiction someone is illegally arrested or kept under detention either in violation of the legal procedure or for more than a term provided for by law, he must release that person immediately (Article 7). A court’s decision or ruling in a civil case which has already taken effect is to be binding on a court conducting an inquiry in criminal proceedings as to the question whether or not an event has taken place, but not with regard to the question of the guilt of the accused (Article 11). The examination of cases in all courts must be public, except

\(^2\) Code of Criminal Procedure of the DPRK, Arts. 74 and Sec. 3 of 78.
\(^3\) Id., Arts. 76 and 77.
\(^4\) Id., Art. 185.
\(^5\) Id., Art. 209.
\(^6\) Id., Art. 213.
\(^7\) According to Professor Hazard, the Part I of the 1922 RSFSR Code of Criminal Procedure, which was later revised in 1923, sounded like the bill of rights which had been promised. John N. Hazard, *Settling Disputes in Soviet Society* (New York: Columbia Univ. Press, 1960), at 309. The revised 1923 RSFSR Code showed itself to be primarily an amendment of the 1922 version (see id., 355-364) and continued to be in force until 1960. Under the 1923 revision, the Part I of the 1922 code was not substantially changed and hence there is no difference in substance between the two codes, insofar as their Part I is concerned.
when state secrets, public morals or the personal privacy requires closure of the courtroom. (However, the judgment of courts in all cases must be always proclaimed publicly (Article 16). Persons who do not have command of the Korean language have the right to an interpreter in the course of proceedings (Article 19). An accused has the right to receive the conclusion to indict within 72 hours prior to the opening of the session proper (trial). A record is required at all stages of the procedure, including a statement of the substance of any testimony, signed by the witness concerned (Articles 60-63). Within three days after the record has been drawn up, the parties who participated have the right to request the court to correct the record, indicating its incorrectness and incompleteness, and the court is required to decide the merits of the objection (Article 64).

When strictly compared with the current system of criminal process in the Soviet Union, however, there nevertheless appear several significant differences in the North Korean system. Perhaps the cause for these difference may be twofold: One cause lies in the fact that the North Korean Code of Criminal Procedure of 1950 is mainly modeled on the RSFSR Code of Criminal Procedure, which was originally enacted in 1926 and continued in force until 1960. Although the Former Code could build upon the changes introduced into the latter code in the interim, especially upon principles established by the RSFSR Law on Court Organization, it was chronologically impossible for the former Code to reflect the reforms made in the latter Code after Stalin's death in 1953 including, above all, the all-union Fundamental Principles of Criminal Procedure in 1958. The other cause, on the other hand, may be attributable to the lack of interests in the 1958 Soviet legal reform on the part of the leaders of Pyongyang regime on the eve of growing Chinese influence in North Korea. (8)

In any event, among the many different features of the North Korean system from the current Soviet system of criminal procedure, some significant differences may be pointed out as follows:

(1) Under the 1960 RSFSR Code of Criminal Procedure, detention and investigation by the agencies of state security are governed by the same rules that govern detention and investigation by the agencies of ministries of internal affairs or other agencies of inquiry and by the investigators of the procuracy and of the police namely, the rules laid down

(8) For the detail of this, see Kang, Law in North Korea, supra Chapter III, note 13a, at 107 122.
by the Code itself (cf. Article 117, 125, 127). In contrast to this, the North Korean system of detention and investigation remains to be similar to that which had prevailed in the Soviet Union prior to its legal reform in 1958. In other words, the North Korean system of detention and investigation is still based on dualism; as will be shown later, the rules established by the Code of Criminal Procedure govern only detention and investigation by the regular police or other agencies of inquiry and by the investigators of the procuracy, whereas inquiries, arrests and investigations by the state security agencies (that is, the political police belonging to the Social Security Bureau of the MSC,) are governed by the so-called “special statute.” Under the present circumstances where such special statute seems to have never been published, the North Korean courts and procuracy appear to have no control over inquiries, arrests, and investigations by the powerful political police.

(2) While the 1958 USSR Fundamental Principles of Criminal Procedure limits the length of confinement of accused persons during preliminary investigation to two months, in some cases six months, and in exceptional cases, with the permission of the Procurator-General of the USSR, nine months (Article 34; contained in the 1960 RSFSR Code of Criminal Procedure as Article 97), under the Korean Code the period of arrest of accused persons during pretrial investigation can be extended indefinitely by the permission of the Procurator-General of the DPRK.

(3) With regard to the right to counsel during preliminary investigation, the 1958 USSR Fundamental Principles of Criminal Procedure (Article 22) provides that defense counsel is permitted to appear in the preliminary investigation at the moment that the investigation decides that he has taken all the necessary measures of investigation preliminary to his conclusion to indict. At that moment the investigator is required to show the accused all the materials of the case......that is, the entire record of the preliminary investigation. In contrast, under the Korean Code of Criminal Procedure counsel are excluded

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(12) Further, under Article 47 of the 1960 RSFSR Code of Criminal Procedure, the accused must then be informed of his right to defense counsel, who may the reupon consult with the accused alone and may examine the materials of the case. Defense counsel may challenge the investigator or other officials in the case(procurator, experts, interpreters). He may also petition for supplementary investigation. When the case is transferred from the investigator to the procurator, for his approval of the investigator’s conclusion to indict, defense counsel
entirely from the pretrial investigation. Only after the conclusion to indict is finally issued and a trial ordered does the right to counsel attach.\(^{(13)}\)

(4) While the RSFSR Code imposes some restriction upon the value of confession, the Korean Code does not. In other words, whereas the current RSFSR Code (Article 77) provides that an acknowledgement of guilt by the accused may not serve as a basis of the accusation unless it is confirmed by the totality of proofs in the case, the Korean Code still gives the court the power though not the duty to dispense with further proof in any case if the accused admitted his guilt.\(^{(14)}\)

(5) Whereas several rules of law established by the 1960 RSFSR Code of Criminal Procedure,\(^{(15)}\) reflect a repudiation of the theory now attributed to Vyshinsky....that the confession is the regina probationum, "the queen of the evidence," and a departure from the heavy reliance on confessions that was characteristic of Soviet criminal procedure during the Vyshinsky era, the North Korean system does not put such increased emphasis on objective proof. The North Korean attitude is rather similar to the Soviet attitude that had prevailed during the Vyshinsky era. Unlike the RSFSR Code (Article 77), the DPRK Code of Criminal Procedure does not have such provision that a confession be confirmed by other evidence. Further, it does neither prohibit against leading question in the investigation, nor limits the value of hearsay evidence.

More significantly, the Korean Code does not have such provision as contained in the RSFSR Code (Article 71), which states that no evidence shall have a previously established force. As in the case of Communist China, the official attitude toward the value of confession in North Korea is drastically expressed in the slogan of "leninicity for those who confess and severity for those who resist." Undoubtedly, pressures on accused persons to confess is quite strong in view of this official line.\(^{(16)}\)

(6) While the 1958 USSR Fundamental Principles of Criminal Procedure has introduced

\(^{(14)}\) Id., Art. 195.
\(^{(15)}\) RSFSR Code of Criminal Procedure, Articles 77, 183, 72-82, 184-194, 288-290, 83-86, 291, 71 and 74. For the details, see Berman and Spindler, Soviet Criminal Law and Procedure, supra note 9, at 92.
\(^{(16)}\) Kang, Law in North Korea, supra Chapter III, note 13a, at 405.
the institutions of social accuser and social defense counsel (Article 41) and these persons appear in the trial as representatives of "social organizations" as distinguished from "state organizations," the North Korean system does not allow such popular participation in Criminal proceedings.

In contrast to the several dissimilarities between the Soviet and North Korean systems of criminal procedure so far discussed, mention should be also made of one of the most striking similarities between the two systems. Where the comparison of the two systems reveals the most drastic similarity is in the strong emphasis placed on the educational role of criminal procedure. Above all, as in the case of the Soviet trial, the informality and flexibility of trial in North Korea help strengthen the educational concept of adjudication. In this connection, Article 5 of the Law on Court Organization states:

By all its activities the court shall educate citizens in the spirit of loyalty to the Motherland and in the spirit of exact and undeviating execution of laws and decrees, of a protective attitude toward state property, of faithfulness to state and social duty, and of respect for the democratic social order.

In applying measures of punishment, the court shall not only chastise criminals but also have as its purpose their correction and re-education.

Similar, Article 27 of the Penal Code impliedly states that the aim of application of punishment must be educational. Probably the most crucial provision bearing upon the educational function of the court is its power to initiate criminal proceedings itself in certain cases. In this connection it may also be noted that the procurator has the power to institute a civil suit in a criminal case in order to protect public interests.

(17) According to Professor Berman, such social organization include Communist Party organizations, Komsomol (Young Communist League) organizations, trade unions, the "collective" of members of a collective farm, the "collective" of students, faculty and staff of an educational institutions, and other groups whose membership is voluntary and which are technically not part of the state apparatus. Any social organization may petition to have its representative appear in any criminal case, either as social accuser or as social defense counsel. For the details, see Berman and Spindler, Soviet Criminal Law and Procedure, supra Note 9, at 97-99.

(18) Professor Berman calls this "parental" concept of law. See Harold J. Berman, Justice in the USSR, supra Chapter I, note 1, at 363 ff.

(19) Kang, Law in North Korea, supra Chapter III, note 13a, at 384-405.

(20) Cf. Article 3 of the 1958 USSR Fundamental Principles of Court Organization (identical with Article 3 of the 1960 RSFSR Law on Court Organization).


(22) Research Center of Economics and Jurisprudence, Academy of Science of the DPRK, Choson...
181-182 of the Code of Criminal Procedure which provide the duty to explain to the accused his rights constitute also similar statements of an educational concept of law. When strictly compared with the 1960 RSFSR Code, those provisions contained in the North Korean Code that are designed to realize the educational function of criminal proceedings appear to be less clear and less detailed.

Nevertheless, one cannot deny that on the whole, both of the Korean and RSFSR Codes are equally characteristic of basic emphasis on the educational role of criminal procedure, therefore giving a distinctive significance to the informality and flexibility of trial procedure.

In contrast to the similarities and dissimilarities existing between North Korean and Soviet criminal procedures so far discussed, it is necessary to mention about some obvious parallels found between North Korean and Communist Chinese criminal processes. In basic assumptions and practices, both systems take it for granted that interests of state should prevail over those of individuals. Thus under the both systems the accused person is regarded as not the subject but object of the proceedings and thus obliged to elicit the truth about his case; he is not to be presumed innocent; he is the best source of evidence, and is interrogated according to inquisitorial procedures likely to elicit his confession, and the pressures on the accused person to confess is quite strong in view of the official line “leniency for those who confess and severity for those who resist.” Further, North Korean courts, like the Chinese courts, are urged to deeply penetrate the masses in order to indoctrinate and persuade them to accept the Party ideology; they are also urged to make greater use of persuasion and social pressures in administering justice. Especially, it has already been mentioned that the legal development in North Korea during the Flying Horse Movement reflected many features of China’s legal science after 1957. Thus during this movement, North Koreans development the policy of “mass line” as one of the most prominent characters of people’s justice. Insofar as criminal process is concerned, a great emphasis was placed on the importance of relying on the masses for on-the-spot examination of case, the importance of cooperation between law enforcement agencies and the importance of educating the mass by integrating court hearings with mass debate.

VI. Conclusion

The unavailability of sufficient information makes it difficult, at present, to draw definite conclusions regarding legal developments within North Korea since 1945. Material is particularly scarce on such significant questions as to the relatively important aspects characteristic of North Korean administration of justice, the role and function of judiciary, or the power relationship within governmental organizations and the Korean Workers' Party. Nevertheless, certain general observations seemed feasible in the light of existing data. In connection with this, it is to be noted that comparison of the North Korean legal system with that of the Republic of Korea may not be comprehensive if one fails to view the legal developments within North Korea in terms of whether or not North Koreans have emulated previous Soviet practice or have paralleled contemporary events in the Soviet Union and Communist China. In view of the fact that both Soviet Union and Communist China have exerted a great influence upon the formation and maintenance of Pyongyang regime, it is reasonable to assume that North Koreans looked to the Soviet and the Chinese law for possible improvements of their national law, if it ever existed. Accordingly, one may well be tempted to, in this context, analyze the Soviet and the Chinese impacts upon the North Korean law.

In overwhelming measure, North Korean legal institutions have been modeled after those of Soviet Union. By virtue of its military occupation, the Soviet Union was able to successfully establish in North Korea a Communist regime subservient to Moscow. With Soviet power at its disposal, the so-called Korean Workers' Party was able to a short time to consolidate its position and power, and apply the manipulative political technique and legal forms which has evolved in the Soviet Union over a period of roughly two decades.

By making use of Soviet experience, North Korea could repeat much of the Soviet development pattern in a much more shorter period. Thus, by 1948 North Korea already had a formal state structure like that specified in the USSR Constitution of 1936. Similarly, several branches of law, criminal and civil as well as labor relations, are patterned on those of the Soviet Union. The Penal Code Criminal Procedure Code, both promulgated on March 3, 1950, and Law on Court Organization of March 1, 1950 are, respectively, in conspicuous similarity with the RSFSR Criminal Code of 1926, the 1923 Code of
Criminal Procedure of the RSFSR, and the 1938 Law on Court Organization of the USSR and the Union Republics.\(^1\) Notwithstanding this basic resemblance of the North Korean legal institutions to those of the Soviet Union, there still exist certain differences, deviations, and variations, which were explained to a certain extent in the preceding chapters.

Despite the dominant influence of the legal pattern upon North Korea, we cannot overlook, at the same time, some of the Chinese impact thereupon. Insofar as China’s post-1957 rejection of the Soviet model of the liberalized legal process is concerned, Koreans took the same position. It is worth observing that when the Soviet Union undertakes to rationalize its criminal law and to clarify some of its prescriptions, abolishes the doctrine of analogy, and requires publication of all national laws and decrees of general consequence, Korean communists declined to take such actions, as the Red China did. Similarly, when the Soviet regime establishes the procurator’s substantial supervision over investigation by the state security agencies, significantly extends the right to counsel prior to trial, enhances the role of public trial, and inveighs against party interference with the adjudication of individual cases, Korean Communists did not follow these Soviet examples, as the Chinese did not\(^2\); instead, they emphasized the thoroughfulness of preliminary investigation and hence the political and educational effects of court adjudication upon the masses. They continue to stick to the idea that defense counsel are not supposed to protect the interests of the accused, whenever they are in conflict with the interests of the Party. They officially advocate that law is an instrument of state policy, that is, Party policy and thus judges should be subject to Party policy in exercising judicial authority. Judges and procurators are encouraged to go down deeply into the masses, and to do on-the-spot examination of case. They are further urged to render their decisions in accordance with the so-called “mass line.”

Besides the above points of importance, there exist further obvious similarities between

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\(^1\) It is also notable that North Korean economic institutions have been modeled after the experience of the Soviet Union. Even the existence of a private sector in economy, carefully regulated by the state, had much the same characteristics as the NEP period in the USSR. However, the development of North Korean economic institution took more slowly than the political and legal, particularly in the fields of trade and agriculture. While the adoption of Soviet political and legal models was almost completed by 1950 before the Korean War broke out, the Sovietization of the economy did not come to completion until 1958, the private sector having by then been reduced to insignificant proportions.

the North Korean and mainland Chinese legal systems. Many of these similarities appear to be derived from the great extent to which the basic value-judgment underlying both systems has always preferred the interests of the state in comparison with those of the individual. Both legal systems, first of all, are marked by an authoritarian heritage. Both systems are supposed to serve authoritatively defined goals for transforming the social and economic structure of society on the basis of Marxist-Leninist ideologies. Both systems regard the law of crime and punishment as a major instrument for crushing individual dissent against the regime and for disciplining and educating the bad elements of society to pursue those goals.

Thus, as in the case of Communist China, it is assumed in North Korea today that the accused person is not the subject but object of the proceedings and hence obliged to elicit the truth about the case and should not be presumed innocent; that he is also best source of evidence and can be detained as long as the authority feels that more evidence can be elicited from interrogating the accused; that the accused should be interrogated in such an inquisitorial manner as to induce his confession; and that confessions, if not required by law, are at least preferable in view of the persistent official line of “leniency for those who confess and severity for those who resist.” And, like the Chinese counterparts, North Korean courts are urged to combine methods of persuasion with methods of compulsion in administering justice. All these features of North Korean criminal process certainly reflect the influence of the Chinese system as well as the traditional Korean legal heritage. Further, the substantive criminal law of the Pyongyang regime that is of indefinite application, that is, status-oriented and hence discriminates against certain segments of population (namely, the people’s enemy), and that permits proscriptions to be applied both by analogy and retro-actively can be said to rest on also contemporary Chinese principles as well as upon Korean tradition. It is especially noteworthy that the legal development in North Korea during the Flying Horse Movement reflects many characteristics of the China’s legal scene after 1957. Like the Chinese, the North Koreans developed the policy of “mass line” as one of the most prominent features of people’s justice and put great emphasis on the importance of the cooperation between law enforcement agencies, masses’ direct participation in the judicial proceedings, on-the-spot examination of case, and so forth.

At any rate, one cannot deny that implicit in the law in North Korea today is the con-
cept of socialist law, which in basically rooted upon Marxism-Leninism-Stalinism. To be sure, the North Korean jurists take it for granted that law and state will ultimately wither away of themselves. However, they do not forget to emphasize that at the present stage these institutions are to be strengthened and given a special significance; this conception of law is in fact very similar to that of the Soviet Union during the reign of Stalin. Thus, law in North Korea is held to have a positive role in assisting the Korean Communists in building their "socialist" society. Since it is a constructive force for establishing a new order and new society, law is still considered necessary in the period of transition to communism. Therefore, it may be certainly said that the Pyongyang regime is not likely to stop resorting to the legal process, whether it is used in the traditional sense or not, in order to resolve their political, social and economic conflicts arising therein, as long as they believe that the law of the regime is "one of the most powerful and efficient weapons that the people hold in their hands" for the purpose of conducting the struggle against such conflicts.\(^{(2a)}\)

I would like to say in conclusion that the law in North Korea is essentially characteristic of what may be called Stalinist law. Following the words of professor Berman\(^{(3)}\), a system of law and a system of force or terror exist side by side in North Korea, as was the situation in the Soviet Union prior to the death of Stalin in 1953. There are certain areas into which law penetrates only slightly. This is especially true for the cases involving "crimes against state sovereignty" specified in Articles 65-81 of the Penal Code. The Supreme Court has the original jurisdiction over these crimes as a court of first instance, as well as over the official crimes committed by the representatives of the Supreme People's Assembly, members of the Cabinet, representatives of the provincial people's committees, and judges of the people's courts at all level.\(^{(4)}\) As a consequence, the chances of ordinary appeals for these crimes are not allowed. The defendants convicted of these crimes by the Supreme Court are permitted only to lodge "one extraordinary appeal" to the Plenary Session of the Supreme Court.\(^{(5)}\) Further, Article 86 of the North Korean

\(^{(2a)}\) Hyon-sang Sim, Choson Hyongpop Haesol (Ch'ongch'ik) (A Commentary on the Korean Criminal Law (General Part) (Pyongyang: State Publishing House, 1957), at 6.

\(^{(3)}\) Berman, Justice in the U.S.S.R., supra Chapter I, note 1, at 8.

\(^{(4)}\) Research Center of Economics and Jurisprudence, Academy of Science of the DPRK. Chosen Minjujuui Inmin Kongwhaguk Kukkasahoi Chedo (State and Social System of the DPRK) (Pyongyang: Academy of Science Publishing House, 1963), 174; see also Law on Court Organization of the DPRK, Article 51.

\(^{(5)}\) Law on Court Organization of the DPRK, Art. 59 and Code of Criminal Procedure, Art. 246.
Code of Criminal procedure dictates the pretrial investigation of these crimes to be exclusively conducted by the agencies of state security (emphasis supplied). Even the procuracy, a watchdog of the socialist legality, is not allowed to institute pretrial investigation of these crimes by its own initiative. Since the agencies of state security virtually includes the institution of the state secret police” in North Korea today, the fate of these politically important criminals thus appears to depend upon the discretion of the secret police. Besides this, the Code of Criminal Procedure states that “the procedure for approval of the arrest of those suspected of having committed crimes against state sovereignty shall be regulated by a special statute.” (Note of Article 83, emphasis added). Insofar as all the available sources of information indicate so far, at no time this special statute has been published. In addition, the Korean communists seem to fail to provide any specific rules governing how the state security agencies should conduct the investigation of political crimes. As a result of this, the courts and procuracies have no control over inquiries, arrests and investigations by the state security agencies. Especially, the procedure for the arrest to those suspected of having committed crimes against state sovereignty seems not subject to the approval of procuracy. It is also very doubtful if the several procedural guarantees prescribed by the Code of Criminal Procedure apply to the cases of these political crimes while they are investigated by the state security agencies.

Briefly, a person who is suspected of antagonism to the regime is placed in a very dangerous position vis-à-vis the law enforcement agencies in North Korea today. He may be picked up by the secret police, held incommunicado for a long period of time, investigated secretly and harshly by the state security agencies. There is also another possibility that he may be secretly tried in the name of protection of state secrets and sentenced to either death of correctional labor......without benefit of defense attorney and without chance of ordinary appeal. For instance, this seems to have happened during the so-called period of “Concentrated Guidance and Inspection” from the end of 1950. During this Period, according to an account of a defector from North Korea, about 9,000 people were put to death in purge trials as counterrevolutionaries. Their apparent sin was nothing more than to have opposed the leadership of the Party and Kim Il-song. Judging from this

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Footnotes:

(6) For the detail of this, see Kang, Law in North Korea, supra Chapter III, note 13a, at 375-382.
(7) See supra Chapter V. Important Aspects of Criminal Procedure.
(8) Law on Court Organization of the DPRK, Art. 10.
(8a) See Pak Tong-un, Pukkan T’ongch’i Kiguron (The Government Structure in North Korea)
example, one can easily understand the extent to which the system of terror might be utilized to silence the opposition to the regime. Insofar as this example is concerned, the use of terror has been almost as prominent under North Korea’s Kim Il-song as it was in the case of great purge trials of the late 1930’s under the reign of Stalin.

In contrast with the above areas, there are other areas which are on the whole governed by relatively well defined legal criteria. For example, crimes such as theft, assault, bodily injury or homicide, civil actions between state enterprises for breach of contract, disputes over family matters and rights over inheritance, worker’s complaints against illegal treatment by management, and many other types of conflict within the social order, are generally resolved publicly by socially accepted procedures and legally established norms. To put it shortly, the system of terror is practiced upon the so-called people’s enemies, counterrevolutionaries, and those who are subject to the proletarian dictatorship. By contrast, the system of law is supposed to be administered upon those backward elements among the people who commit ordinary crimes because of their lack of socialist consciousness. With regard to this principle, Premier Kim is reported to have said that “We should apply the system of (proletarian) dictatorship, without any leniency, upon those who deserve receiving such system, but we should clearly distinguish from them those who are not subject to the (proletarian) dictatorship and thus draw the majority of the laboring masses closely around the Party.” This dichotomy of law and terror may well be explained by the nature of the North Korean premier’s dictatorial leadership. His pattern of consolidating leadership and power has been strongly in the style of Stalin. The “cult of personality” toward him reigns unchallenged in North Korea today almost to the same degree, if not higher, to which it is practiced in Communist China. As long as Kim Il-song therefore remains to be a Stalin in the East, the flexible quality of earlier Soviet laws will be much more preferred to be retained in the North Korea laws. As long as Kim Il-song himself

(Seoul, Korea University Press, 1964), 74.


(11) Interestingly enough, Professor Lee Chong-sik even asserts that the “cult of personality” dominates in North Korea today far beyond the degree to which it is practiced in the People’s Republic of China. See id., at 119.
feels this dichotomy of law and terror to be more convenient to further maintain his power, he is not likely listen to any law reform tending toward the elimination of terror. Then it will be safe to conclude that the law in North Korea is and will remain to be, in the foreseeable future, essentially in the pattern of pre-Khrushchev Stalinist law. Addressing the National Conference for judicial and Procuratorial Workers convened in April, 1958, Kim Il-song himself declared:

The law is nothing but an express form of the politics. The law can be neither understood nor enforced without knowing the politics. The law in our country is an instrument of state policy. Since our state policy is our Party policy, those who do not understand our Party policy cannot serve in the legal profession of our country.....by this I mean that you ought to accurately interpret and apply the law solely according to the class viewpoint required -by our Party, to put it otherwise, according to the viewpoint of proletarian dictatorship. Since our law itself exists in order to protect and realize the Party policy and hence to comply with the guideline of the Party.\(^\text{(12)}\)

In this connection, it can be further pointed out that while there has been a tendency toward the elimination of political terror in Soviet law reform since the Stalin's death in 1953, this has not been the case in North Korea: First, while in Soviet Union the Special Board of the Ministry of Internal Affairs which had been the chief instrument of terror was abolished in 1953,\(^\text{(13)}\) Pyongyang still has in its hand the North Korea's comparable organ, namely the social safety Bureau of the Ministry of Social Safety.

Second, in contrast to the fact that the Soviet security police were deprived of the power to conduct investigations of crimes under their own special rules without supervision by the procuracy,\(^\text{(14)}\) it has already been mentioned that the DPRK Criminal Procedure Code still grants the North Korean security police or inspectors of the agency of state security (namely, the secret police) the exclusive power to conduct investigations of cases involving crimes against the state sovereignty. Further these security police are not subject to any supervision by the procuracy, and thus conduct investigations of crimes under their


\(^{(13)}\) Berman, *Justice in the U.S.S.R.*, supra Chapter I, note 1, at 70.

\(^{(14)}\) Id.
own special rules.

Third, while the post-Stalin Russia repealed the special procedure which permits persons charged with the most serious anti-state crimes to be tried secretly, in absentia, and without counsel, in some cases the North Korean practice seems to resort to such procedure in violation of legally established rules, insofar as the communist leadership in Pyongyang believes that the safety of the regime is endangered. For example, the widely known purge trial of Pak Hon-yong, the leader of the South-Korean faction, was apparently held in secret, primarily because of his considerable political influence among the North Korean people.\(^{(15)}\)

Fourth, while the Soviet law underwent substantial liberalization after Stalin's death, this cannot be said of the North Korean law. For example, whereas the Soviet Union significantly extended the right to counsel prior to trial, the North Korean communists inacted to do so. And while the former totally eliminated the doctrine of analogy, whereby a person who committed a socially dangerous act not specifically made punishable by law could be sentenced by a law proscribing an analogous act, the latter still retain the same doctrine in their Penal Code, contending that such doctrine is essential to the system of (revolutionary) socialist legality.\(^{(16)}\)

Fifth, whereas the 1960 Criminal Code of the RSFSR expressly denies retroactive effect of a law establishing the punishability of an act or increasing the punishment for it.\(^{(17)}\) the North Korean code does not eliminate the possibility of retroactive application of criminal proscription by virtue of its exceptionary rule manifested by its Articles 17 and 60, even though the latter code declares non-retroactivity as a general principle.\(^{(18)}\)

Sixth, in contrast to the fact that in the Soviet Union, the law permitting punishment of relatives of one who deserts to a foreign country from the armed forces......though they

\(^{(15)}\) See Pakkan Ch'onggam  '45-68 (General Yearbooks on North Korea, 1945-1968) (Seoul: Research Center of Communist Bloc Problems, 1968), 172.


\(^{(17)}\) Article 16.

\(^{(18)}\) For the detail of this, see Kang, Law in North Korea, supra Chapter note 13a, at 278-283.
knew nothing of the desertion was abolished, the North Korean law still favors to have such system. 

Seventh, while in the USSR the Vyshinsky theory of state and law which was linked with Stalin’s terror has been seriously attacked and has undergone critical debates in the 1960’s, the DPRK still sticks to the Vyshinsky jurisprudence, probably because Pyongyang leaders feel such jurisprudence to be convenient and flexible to impose Stalinist-type terror upon their people. Thus, the official attitude of the DPRK toward the basic conception of law is usually expressed in the following terms: law is reflective of the social and economic system of a society which it purports to govern, and hence nothing but an express form of politics; law cannot exist beyond the realm of a certain social, economic system and class struggle: and law is and should be a weapon for the proletarian dictatorship to defend the socialist system and preserve the socialist achievements. This fundamental attitude toward law then logically gives rise to such a theory that all the actions directed against the socialist system and achievements and detrimental to the proletarian dictatorship should be made punishable. This kind of theory is well expressed in Article 7 of the DPRK Penal Code, which states “A punishable act committed through intent or negligence which has social danger infringing upon the DPRK and the legal order established therein shall be deemed a crime.”


(20) See the DPRK Penal Code, Art. 70, especially Section 2 thereof.
[國文要約]

韓國과 北傀의 法的體系의 比較

姜 求 賢*

I. 緒 説

우선 本稿에서는 우리 大韓民國과 北傀의 法的制度로 개별적으로 비교・考証함으로써 北傀地域에 實際적으로 要效性을 갖고 있는 法이 점차한 것인가를 제시해 보고자 한다. 자료의
부족 및 연구시간의 制限 등으로 北傀의 憲法, 司法機構, 刑法 및 刑事訴訟法 등의 부분만
을 개략적으로 다루게 되었고, 北傀 民事法 및 勞動法 부분의 연구에 대하여는 부분이 후일
의 과업으로 미루게 되었음을 밝혀 놓다.

본고의 結論 부분에서는 北傀法에 대한 소련과 中共의 영향에 입금하였다. 北傀地域의
정착한 이해를 위하여는 우리는 항상 北傀와 그 의존의 바탕으로 삼고 있는 中・蘇連國의 北
韓에서의 역할에 주의하지 않으면 안된다.

이러한 의미에서 필자는 北傀法制度의 주요 線索에 대한 比較的 考察을 둘어하여 어떻게
北傀地域에 共產主義體系——구체적으로는 中・蘇의 그것이——가 流入・適用되게 되었는가
하는 점의 問題성을 제시하고자 하는 바이다.

II. 北傀憲法의 基本特性

皮相적으로만 관찰하면 北傀憲法은 全族 民主主義의 基本法이 갖추어야 할 基本적인 조
건들을 제법 구비한 것처럼 보인다. 그것은 明文으로 主權은 人民에게 있으며, 人民이 그
主權을 行使하는 代議機関으로서 人民會議라는 制度를 두며, 形式的으로는 三權을 分立, 行
政府의 存立을 立法府의 信任에 의존하게 하는 反面, 司法府의 職務을 보장하는 등의 规定
은 두고 있기는 하다.

* 서울民事法判事

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그러나 이러한 혼동은 「憲法規定」의 運營實際는 法文의 文句와는 관이한 것은 두 말할 필요도 없다. 이것은 오늘날의 북한에 있어서 소위 労動黨이 絕對의 獨裁者로서 憲法에 포함한 모든 것을 마음대로 지배하고 있기 때문이다. 政府組織이나 機関은 労動당의 전력을 기 점적으로 수행하는 党 소속 業務機關의 지위로 轉換하였으며, 労動黨 이외의 政黨이나 社會 團體는 労動黨의 존립을 강화하기 위한 율리의 기구에 불과하다.

III. 司法機構

北韓憲法 제 88 조에 의하면 「判사는 재판에 있어서 독립적이며 法院의 명령에만 복종한다」라고 规定하여, 大韓民國 憲法 제 98 조가 사용하고 있는 法文과 거의 비슷한 내용으로서, 憲法上으로 司法権 獨立을 보장하고 있는 것이 보인다. 그러나 우리가 北韓法을 연구함에 있어서 향상 주의하지 않으면 안될 점은 공산주의자들 이 사용하는 法文이 우리의 그것과 비슷하다고 하여 이를 額面 그대로 받아들이는 안된다는 것이다. 아무리 美麗의 管轄하라도 共產主義 社會 안에서의 그 운용이 실제는 끝이할 수 있기 때문이다. 따라서 北韓司法府의 獨立이 보장되어 있으나의 여부는 法文이나 法理論에서 연락하기 보다는 오해 다른 source에서 찾지 않으면 안된다.

1. 人民裁判所：우리의 法院組織과는 발기 北韓의 「裁判소구성법」은 재판소의 일부에 관하여 故 민법의 规定을 두고 있는 바, 동법 제 3 조 및 제 6 조를 종합해 보면, 결국 재판소의 일부는 독립하므로 공산주의 국가에서 묶추어 보아야 할 때에 근거라고 한다.

2. 檢察機關：北韓의 檢察기관체계는 최고검찰소, 遞檢찰소, 地檢査소 및 特別検査소로 구성되고 있다. 검사 임명의 전문은 최고검찰소, 검사총장은 최고인민회의에서 임명되고 그 이외의 검사는 모두 검사총장이 임명하도록 되어있다. 검사임명의 각각에 있어서는 判事의 경우와 마찬가지로 法律에 대한 基礎的な 知識을 그다지 중요시하지 아니하고, 다만 黨에 대한 충성심이 강한 자를 요구하고 있다. 다만 北韓의 법 제85조에 의하면 日帝時代에 判・ 檢事로서 動作한 者는 判事 또는 檢사로 될 수 없다고 규정하고 있다.

北한 검찰기관의 임무와 기능 중 독특한 것이라고 볼 수 있는 것은 그것의 소위 「검사기능」이다. 검찰의 검사기관 중 중요한 것은 소위 「一般監視」 기능으로서 이와 관련하여 北韓憲法 제90조 및 제91조에 「檢察官, 各省(우리의 行政各部에 해당됨)과 그 속속기관, 行政, 警務 및 모든 공민이 法務를 確認하고 理解하게 운수하고 검사하는가를 감독하며, 검사는 各省의 行政・規制 및 地方主權 機関의 決定과 指示가 憲法・法令 및 內閣의 決定과 命令에 적응하 는가 하는 여부를 검사한다」라고 규정하고 있다.

3. 辦護士의 役割：北한에 있어서는 변호사가 단독으로 사건을 受任하여 獨自의으로 이들
처리하는 것은 허용되지 아니한다. 우리 한국의 변호사회와는 성질이 다른 변호사회라고 불리우는 조직이 북한에도 있는 바, 이 변호사회가 주체가 되어 모든 활동을 수행하고 있다.

특히 금융주주들의 이론에 의하여 변호사가 형사 사건에 있어서의 피고인의 배리인이라 보다는 오히려 독립된 당사자로서 피고인의 요구대로 소송을 수행해서는 안된다고 한다. 그의 파업은 법원이 정착한 재판을 내릴 수 있도록 이를 도와주는데에 있으며, 피고인을 위하여 사실을 낭조하거나 증거를 조작하여 법원을 기만해서는 안된다고 한다.

IV. 犯罪의 刑罰의 理論

北緬는 1950 년 3 월 3 일에 그들의 「刑法」(全文 301 條)을 제정하였는 바, 이는 1926 년의 傳統 刑法典을 근거로 그대로 모방한 것이다.

특히 형법법은 法律의 목적이 무엇인가를 밝히는 明文의 규정을 두고 있다.

(1) 形罪 項目법은 形法的 聲明이 무엇인가를 밝히는 明文의 규정을 두고 있다.

(2) 形法이 보호하고자 하는 大衆의 委託와 민형가 모발적으로 「社會主義의 社會關係」라
는 개념에 갈락된다.

(3) 形冊의 作業者 役割(目的)에 대한 影響의 规定을 두며, 形冊具體化 과정에 있어서 「強
制」와 「教義」의 양 요소를 결합시키고자 한다.

(4) 犯罪 預防을 촉진하기 위한 大衆의 聲明을 조작한다.

(5) 委託報単在的 감시에 의한 犯罪의 警告과 阻止이라는 수단을 사용하며, 人民들 자신
에 의한 形冊事件的 警告을 전장한다.

(6) 北緬에서의 構成이 犯罪構成 三元論(階段, 委託 및 作業)을 취함에 반하여 北緬에서
는 犯罪構成 四元論을 취하고 있는 것 같다. 卒 과ylan 委託者에 의하여 犯罪구성 요건은
 기본적 전수적 구성요소로서 ① 소여 形冊의 競争 ② 소여 犯罪구성 요건의 委託적 警告
③ 소여 形冊의 作業 및 ④ 소여 犯罪구성 요건의 委託적 警告을 포함하고 있다고 한다.

V. 刑事訴訟의 主要特性

北緬는 1950 년 3 월 3 일에 그들의 「刑事訴訟法」(全編 281 조, 1954 년 6 월 15 일에 개정)
을 제정하였는 바, 이는 1923 년의 傳統 形事訴訟법을 모방한 것이다.

북緬 형사訴訟법은 우리 제도와 비교하였을 때 가장 강하게 나타나는 차이점은 전자가 공관
전 무사단계, 특히 소위 예심을 극히 중요시하며,法院이 職權의로 事件解決에 적절적으로 참여한다는 것이다. 그러하여 北国の 條件소송결차는 단력적이거나 당사자주의적이기 보다는 形式의 札間主義의이라고 본 수 있다.

VI. 結 論

北国の 政治的 및 법적 제도는 민간한 정도로 소련 제도의 영향을 받았다. 제 2차 베건 직후 북한 지역을 제외로 긴결한 소련이 그의 세계 공신화 정책에 따라 북한에 소련의 비밀의 일관된 작전을 전달한다. 공산主義 政權은 수십년간이 있었을 때 기회가 상당할 수 있는 일이다. 따라서 소련 정부의 지원하에 운동한 소위「朝鮮労働黨」이 제발리 그의 경제적 위기와 원력을 확보하고, 이에 약 20 년 이상 소련 영토에서 발견되어 중 정치적 기술과 法律의 形式을 매우 많 은 기간에 북한 지역에 移植하려고 하였음도 이해할 만한 일이다.

그러하여 북한 공산주의자들은 소련의 과거 경험을 이용함으로써 단기간내에 소련의 발전 과정을 북한지역에 소화시켰다고 본 것이다.

그 결과 1948 년에 이르러서는 북한 공산주의자들은 1936 년의 소련 혁명(소위 스탈린 혁명)에 규정된 것과 같은 형식의 국가구조를 이미 갖추게 되었다. 나아가 북한의 민사, 형사 및 노동관계를 규율하는 4 법안체계도 소련의 그것을 따르게 되었다.

북한법에 대한 소련의 지역적 영향에도 불구하고, 우리는 동시에 北朝鮮에 대한 中共의 영향을 보고하는 것은 분명하다. 최소한 中共이 1957 년 이후 소련法制의 自由化 傾向(tendency toward liberalization)을 거부했다고 보는 한, 北朝鮮共産主義者들은 같은 입장은 취했기 때문이다.

즉 소련 共産主義者들은 1933 년 스탈린이 사망한 이후 그들의 刑法를 합리화하여 그 규정의 내용을 명확히 하고 소위 類推解決의 原則 doctrine of analogy를 채택하며 일반적 으로 중요한 法典의 복습을 法의으로 義務化하였을 때, 北朝鮮 中共과 마찬가지로 소련의 뒤를 따르지 않은 사실은 주목할 만한 일인 것이다.

나아가 소련경찰이 소위 國家安全機構(State Security Agencies)에 대한 檢事(procurator)의 수사감독권을 실질적으로 확보하고, 被告人과 辯護人로의 助力を 받을 權利를 공공권에까지 확장시키고, 開庭裁判의 의식을 확대하며, 『공산』당의 具體의 事件에 대한 간접적 배제하는 조치를 취한 대에 대하여, 北朝鮮共産主義者들은 中共과 마찬가지로 소련의 이러한 조치를 뒤따르 지 않았다. 오히려 北朝鮮共産主義者들은 刑事訴訟을 점차히 함으로서 소위 人民全體에 대한法院判決의 政治的 및 教育의 效果를 계속 강조하였다.

그들은 또한 (労働黨)의 이익과 피고인의 이익이 상호 충돌할 때에는 언제든지 辯護人로 稱告人의 이익을 옹호해서는 안된다는 입장을 계속해서 취하고 있다. 그들은 公式的으로 주-
장하기로 법이란「國家政策」 즉「黨의 政策」을 수행하기 위한 수단에 불과하며, 따라서 판사는 司法權을 행사함에 있어서「당의 政策에 복종하지 않으면 안된다」라고 한다. 판사의 견지는 人民大衆 속에 기게 되며, 특히 사전의 처벌조사 및 해경을 할 것이 요구된다.

그들은 또한 소위「군중노선」에 의거하여 모든 결정이나 판단을 내릴 것이 요구되는 것이 다. 위에서 말한 중요한 점이지 않아도 북한과 러시아의 법적제도란에는 상호 유사한 점이 많아 있다. 이러한 유사점은 대부분의 경우 이 양자가 개인의 이익보다는 국가이익을 우선 시켜야 한다는 가치판단에 의하여 나온 것이다.

북핵과 中共의 法의 制度는 무엇보다도 먼저 權威主義의 견해에 의하여 특징지어지며, 따라서 소위 마르크스・레닌주의의 理念에 따라 社會共同體의 社會的 經済的 設織을 풍부시키기 위하여 철도의 근로에 정착된 作業에 통제해야 할 것이라고 한다. 그러한 목표의 실현을 위하여 北朝鮮和 中共은 法律 특히 刑事法이란 政府에 대한 관리의 민주를 분쇄하기 위한 주요한 수단이며, 또한 社會共同體의 危険분자를 慶緖하고 教化하기 위한 중요한 무기라고 하는 점에 관하여 같은 견해를 취하고 있다.

특히 주목할 만한 일은 북한의 소위「千里馬運動」기간중의 법적발견이 1957년 이후 中共에 나타나고 있는 법적 발전의 여러 특징을 많이 반영하고 있다는 것이다. 즉 中共과 北朝鮮 共産主義者들은 소위 그들의「人民司法」(people's justice)의 특출난 성과의 하나로서 소위「法制路線」(mass line)의 정책을 발전시켰고, 따라서 法律執行機關의 規則을 協助하여 北朝鮮의 제판결과에 대한 적절적인 관리, 案件의 原告조사 및 处理 등을 크게 강조하게 된 것이다.

여명도, 우리는 오늘날 북한의 法에 介入하고 있는 기본요소가 마르크스주의・레닌주의・스탈린 주의에 기초하고 있는 사회주의 법을 공인할 수 없다. 북한인 북한의 法학者들은 국가와 범죄 공격에 가하는 스스로를 통楽しけ고 말 것이라는 견해를 취하고 있다.

그렇에도 불구하고 그들은 구건이, 임단계에 있어서는 위의 두 제도는 계속 강화되어야 하며 특수한 역할을 수행해야 되고 강조하기를 절망이다. 이러한 북한 법학자들의 法概念은 스탈린 지배하에 소련에서 유명하던 법개념과 유사한 것이다. 그러하여 北朝鮮共産主義者들은 의학적 북한의 法은 그들의「社會주의」 사회건설을 도와주는 적극적인 역할을 수행하여야 된다고 한다. 그들은 의학적 法이란 새로운 社会秩序과 새로운 社会를 창착하기 위한 社會적 견해로서 공산주의의 社會로 넘어가기 위한 過渡期의 段階에 있어서는 法이란 아직 필 요한 존재라는 것이다.

그러므로 北朝鮮의결과는 그들이 법을 소위「人民이 그들을 존중하여 그 효용 있는 가장 적절 하고도 효과적인 무기」라고 믿는 한, 그들이 北朝鮮 지역에서 일어나고 있는 정치적 경제적 및 社會적 矛盾을 우선 法의 건재의 이론 밑에서 (一그것이 우리가 파악한 法의 範疇와 

韓國과 北朝鮮의 法的體系의 比較
같은지의 여부는 차치하고서) 해결하려고 명분을 찾을 가능성이 많은 것이다.
결론적으로 말해서 북한의 정책은 본질적으로 스탈린 정책이라고 부르는 그의 여러 특징을 갖추고 있다고 볼 것이다.
이러한 결론과 관련하여 1958 년 4 월 평양에 소집된 북한 '판・檢事 全國會議'에서 행한
김일성의 연설중의 다음 구절을 읽어하는 것은 의미있는 일이다.

"법안은 정치적 의무적 조건이 불가능하다. 법안을 정치를 얻지 못하고서는 결코 이해되거나 집행될 수 있는 것이 아니다. 우리 나라의 정은 국가정책을 수행하기 위한 수단에 불과하다. 우리 사회적 정책은 곧 당의 정책이기 때문에 우리 당의 정책을 이해하고 통하는 자들만이 우리나라의 사법일뿐
이 될 지적이 없음시다.……내가 이러한 말을 하는 것은 여러분의 정을 해석・적용할 때 우리 당이 요구하고 있는 계급적인 관점, 다시 말해서 프롤레타리아 독재의 관점에 의해서 정확히 해석하라는 말씀이다. 우리 국민과 당의 정책을 옹호하고 실천시키기 위해서 존재하는 것인 한 법을 정확히 집행한다는 것은 곧 당의 정책을 정확히 집행한다는 것으로서 당의 지도에 특종한다는 말씀 되겠을
다.