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# Prosecutor, Police and Criminal Investigation in Korea: A Critical Review

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## Abstract

*The criminal investigation procedure is carried out under the direction of prosecutors who dominate power to investigate and prosecute, in Korea. The written record of interrogation resided by a prosecutor during investigation process is accepted as strong evidence in court even without or against the defendant's verbal testimony in court, unless clear evidence of torture or deception is presented by the defense. Before prosecution of a case, police can detain a suspect for 10 days upon issuance of a court warrant requested by a prosecutor. After turned over to the prosecutors' office from the police, a suspect can be detained for 20 more days by the prosecutors' office for further investigation before prosecution is made.*

*The balance of power between the accuser and the accused is one of the basic conditions for seeking Justice and protecting human rights in criminal procedure. That critical balance is lost in Korea, where the prosecution is regarded as 'the Untouchables'. Checks and balances between the investigator and the prosecutor is lost as well in Korea, where the Prosecutor is the investigator, director of police investigation and the prosecutor at the same time.*

*On the other hand, lack of public trust in the police who maintains dinosaur-like national force and the unwashed bad images from the Japanese colonial rule and the military dictatorship era have not been allowing the police the power of criminal investigation.*

*Being one of the developed and advanced countries in Asia, Korea needs to establish balance in the criminal investigation procedure.*

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## I. General Situation of Criminal Investigation in Korea

In Korea, criminal investigation is widely accepted as the ‘accessory process’ of criminal prosecution, leaving prosecutors to monopolize the power involved in criminal investigation.<sup>1)</sup> As illustrated in the following figure,<sup>1)</sup> the criminal investigation procedure is carried out under the direction of prosecutors who dominate the power to investigate and prosecute in Korea. The written record of interrogation resided by a prosecutor during an investigation process is accepted as strong evidence in court. This is even without or against the defendant’s verbal testimony in court, unless clear evidence of torture or deception is presented by the defense. Before prosecution of a case begins, police can detain a suspect for 10 days upon issuance of a court warrant requested by a prosecutor. After being turned over to the prosecutors’ office from the police, a suspect can be detained for 20 more days by the prosecutors’ office for further investigation before prosecution is made.

The basic features of the Korean criminal investigation procedure can be summarized as the table below:

**Table 1. basic features of the Korean criminal investigation procedure**

1	While prosecutor is responsible for criminal investigation by law, police carry out and take responsibility of investigating 96% of all recorded criminal cases in reality. <sup>2)</sup>
2	Prosecutor is involved in criminal investigation from the outset. <sup>3)</sup>
3	Since prosecutor dominates the whole criminal investigation procedure, the balance of power between prosecution and defense is broken. <sup>4)</sup>
4	‘Paper trial’ relying on documents presented by both sides is a normality, hence written testimonies and confessions made during prosecutor’s investigation take dominant status among all evidences. <sup>5)</sup>

1) Bo-Hak Seo, *The Need For Rational Re-Distribution of Criminal Investigative Power Toward Its Neutralization*, Seminar Proceedings of Korean Society of Constitution (2002).

2) Bo-Hak Seo, *Investigative Power, Monopoly or Distribution? — A Review On The Request By The Police For Investigative Power —*, JOURNAL OF CRIMINAL LAW REVIEW, No. 12 (1999).

3) Criminal Procedure Law of Korea, §195 & 196; Criminal Police Code of Practice §2 ① rule that “Criminal Investigation is the duty and function of the prosecutor. Police officer must carry out investigation when directed by a prosecutor. The role of police officers below the rank of Inspector is limited to assist investigation under the direction of a prosecutor or police officer above the rank of Inspector.” Also, according to the Prosecutors’ Office Act §53, police officers must obey the orders from prosecutors.

4) While the criminal court takes adversarial system, the criminal investigation procedure follows inquisitorial

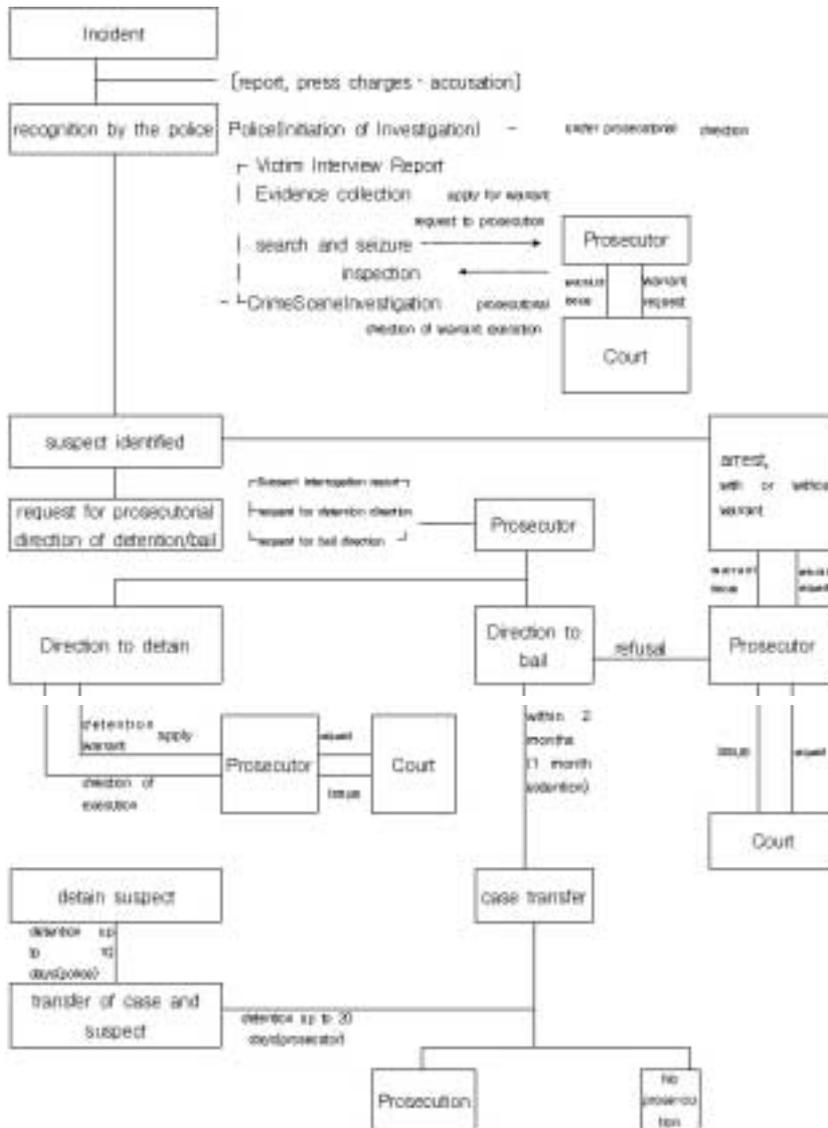


Figure 1. Criminal Investigation Process

principles allowing prosecutors much bigger power as inquisitors in Korea.

5) Criminal Procedure Law, §312.

Prosecutorial control of or interference with police investigation in Korea has 2 conflicting implications. While such a system makes direct judicial control over criminal investigation procedure difficult, close and constant quasi-judicial monitoring and control by a legal expert is possible. It is said that Korea follows Continental-European legal tradition. However, unlike other countries with Continental-European legal tradition such as Germany and France, the Prosecutors' office is a bureaucratic organization functioning totally out of judicial control in Korea. Prosecutors themselves carry out criminal investigation by directing and controlling their own subordinate officers just like police officers. Being investigating officers themselves, the Prosecutors' office and prosecutors have been pointed out as one of the prime human rights violators.

## **II. Problems Embedded in Korean Criminal Investigation Procedure**

### *1. Breach of 'Equality Before Law' Principle*

In Korea, prosecutors are widely regarded as 'the untouchables' or 'people above the law'. Until 1995, the Prosecutors' Office had operated "the rule of dealing with criminal cases involving officials belonging to the Ministry of Justice." This rule forces police officers to hand over Ministry of Justice officials, including prosecutors and their subordinate officers who have been involved in any criminal case, and the case to the Prosecutors' Office.<sup>6)</sup> Although the rule itself was abolished in 1995, prosecutors are not and cannot be investigated by any one but prosecutors themselves when they are involved in criminal activities.<sup>7)</sup> As a result, unless a suspect dies during an interrogation<sup>8)</sup> or the parliament requests to set up 'Independent Prosecutor' to investigate a widely acknowledged corruption scandal, criminal investigation against a prosecutor is a rare incident like 'snow in Summer,' even

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6) "The rule of dealing with criminal cases involving officials belonging to the Ministry of Justice" was abolished on the 10th March 1995.

7) Constitution of Korea §12 ③ says "Only Prosecutor can apply for court warrants"; Criminal Procedure Law § 195 and §196 gives prosecutors exclusive power of carrying our criminal investigation and of directing police investigation.

8) Joong-Ang Daily (2002. 11. 06).

when reports or accusations of crimes such as torture, abuse of power or bribery taking are made against them. In 2003, although a defense attorney openly claimed that he had been tortured some years ago by a prosecutor who is now the chief of a provincial prosecutors' office, no criminal investigation procedure had been initiated.<sup>9)</sup> In 2002, the Independent Commission Against Corruption, which was set up to deal vigorously with corruption problems in public sector, investigated and collected substantial amount of evidence regarding a suspicion of huge amount of bribery taking by one of the top prosecutors. The Commission also sent the case to the Prosecutors' office for official criminal investigation and expected a legal action to follow according to the procedure written in Anti-Corruption Law. However, the Prosecutors' office decided not to take further actions regarding that case.<sup>10)</sup>

Moreover, it has been worried that not only prosecutors or officers working for the prosecutors but others who have personal ties or common interests with prosecutors may enjoy 'above the law privilege' just like their prosecutor friends.<sup>11)</sup> This public distrust in 'fairness' arises almost whenever criminal suspicions are made against people with power or money assuming they may be friends of the mighty prosecutors.<sup>12)</sup>

## *2. Possibility of torture or abuse of power : Extracting confession*

Korean Constitution and Criminal Procedure Law prohibits torture as any other countries do. However, not only in the police but also in the prosecutors' office, have suspects died or been injured during interrogation aimed to extract confession. A judge argued that clause 312 of the Criminal Procedure Law, which provides interrogation reports to be made by a prosecutor with admissibility as evidence, is one of the reasons.<sup>13)</sup> When a case lacks hard evidence but investigators have strong

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9) Se-Gye Daily, "Prosecutor Wonchi Kim Ordered To Torture" (2003. 03. 15).

10) MBC "PD Note", 'Independent Commission Against Corruption — No Power to Investigate Corruption' (2002. 8. 27).

11) Se-Gye Daily, "Head of Criminal Organization Arrested by The Police, Set Free by The Incheon Prosecutors' Office" (1990. 11. 17); Hangeore Daily, "Sleazy Connection Between Powerful People and Criminal Organization Revealed" (1990. 12. 02).

12) Yeonhap News, "Prosecutors' Spear Could Not Get Through Samsung's Shield" (2005. 12. 14).

13) Chosun Daily, "Confession Made At the Prosecutor's Office Confirmed Admissibility and Evidentiality" (2003. 02. 20).

suspicion on a suspect, confession written in the prosecutor's interrogation report secures a conviction by the power of clause 312. Investigators, whoever it may be, are tempted to use any measure to extract confession out of the mouth of a suspect. Especially, since prosecutors participate in the criminal investigation procedure from the outset sharing suspicions with detectives, there is a high possibility of a case with a wrong start to end up with wrong conviction without proper judicial or prosecutorial interference.

### 3. Prosecutor: "The Monopolizer"

The super-powered prosecutor get even stronger with additional powers. A prosecutor is given absolute discretion in deciding whether or not to prosecute.<sup>14)</sup> There is no 'committal for trial' which enables the court to review the legitimacy of a prosecution in Korean criminal justice process. No appeal is possible against a prosecutor's decision not to prosecute in most criminal cases, other than appealing to the superior prosecutor among its hierarchy.<sup>15)</sup> Prosecutors forming a military-like bureaucratic hierarchy with strict ranks and chain of command structure occupy the whole criminal justice system except the court. Even the Director of probation service is a prosecutor and execution of court orders and collection of fines are prosecutors' job. If someone fails to pay the fine, a prosecutor orders a police officer to arrest and put the person in jail.<sup>16)</sup> Cause 4 of The Prosecutor's Office Law declares the powers and duties of prosecutors as the following:

1. To carry out Criminal Investigation, Prosecution and presenting a criminal case at court.
2. To Direct and supervise police regarding criminal investigation.
3. To require the court to justly apply law.
4. To Direct and supervise the execution of court decisions.
5. To carry out, direct or supervise law suit or tribunal where the state is involved.

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14) Criminal Procedure Law of Korea, §247.

15) Appeal to court against a prosecutor's decision not to prosecute is possible only in cases involving public official's abuse of power, according to Criminal Procedure Law of Korea, §260.

16) Criminal Law of Korea, §69.

6. Other powers given by other laws or regulations.

### **III. Attempts to Re-balance Power in Criminal Investigation**

#### *1. Request for Checks and Balances in the Criminal Justice System*

Voices requesting reform in the ill-balanced criminal investigation procedure and the over-powered prosecutors' office have come out from various sectors of the society including academia, civil liberty groups and the press. Attempts to reform the Prosecutors' Office Act and to introduce permanent Independent Prosecutor and an independent investigating office exclusively dealing with accusations regarding government officials (including prosecutors) with high positions are among such efforts. However, each of such attempts has been confronted by fierce opposition from prosecutors and have been failed.<sup>17)</sup>

#### *2. Police-Prosecutor Conflict*

The most uncomfortable challenge for prosecutors and the strongest as well as the most persistent demand for re-balancing power in the criminal investigation system has come out from the police. The history of police-prosecutor conflict actually coincides with the history of Korea itself. The United States Military Authorities who had ruled Korea between the end of the Japanese colonial regime in 1945 and the establishment of Korean government in 1948 declared that criminal investigation should be carried out by the police while prosecution should be the job of the prosecutors through enactment of [Rule No. 20, Clause 1 a, 1945. 10.30]. Subsequent implementation of the [Order for Prosecutors No. 3, 1945. 12.29] even prohibited prosecutors to direct or intervene with police investigation in order to secure independent investigation by the police.<sup>18)</sup>

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17) Changwon Pyo, *Division of Labor in Criminal Investigation Is The Short Cut To Protecting Human Rights*, THE KOREAN SOCIETY OF CRIMINOLOGY JOURNAL, Vol. 15, No.1, June (2003).

18) Dong-Un Shin, *A Historical Review On The Prosecutor's Power Of Directing Criminal Investigation (I) (II)*, SEOUL LAW REVIEW, Vol. 42, No. 1 · No. 2 (Seoul National University, 2001).

Legal professionals including prosecutors who had been accustomed to 'Prosecutor-led investigation system' of the Japanese colonial era were confused by and not satisfied with the new arrangement. The heavy use of former colonial police officers by the new police, in need of efficiency and effectiveness in the fighting against communists and establishing social order, added public worries and discontent on the autonomous police investigation. In the 1954, when the first Criminal Procedure Law of Korea was formulated, the question of 'who should be in charge of criminal investigation' became one of the hottest issues among lawmakers. During the parliamentary hearing held on the 9th January, 1954, the then Member of the Parliament Sang-Seob Um was recorded to say "Monopolization of power will result in 'fascio' and abuse of power ... 'prosecutors' fascio' is better than 'police fascio.' Hence, the power of criminal investigation is better given to prosecutors. However, in the future, we will have to proceed toward separating power of criminal investigation from power of prosecution."<sup>19)</sup> The then Director of Prosecutors' Office Gyekman Han added "theoretically, it is right to leave criminal investigation function with the police and to allow prosecutors prosecution power only. In reality of Korean situation, however, putting police under prosecutor's control and combining criminal investigation with prosecution is right."<sup>20)</sup> Since then power struggle between the police and the prosecutors' office has continued and been used by political powers in the ruling of the society. The first President of Korea Seungman Lee<sup>21)</sup> used police as if his own private servants, adopting a police officer as his son. In return, the police enjoyed almost limitless power leaving prosecutors ignored and daunted. General-turned-President Jeonghee Park<sup>22)</sup> who took power by military coup needed prosecutors' assistance to revise Constitution and laws in order to legitimize his military regime. Prosecutors utilized this opportunity to enlarge their power. Revising Constitution, the prosecutors added a new clause limiting application of warrant only to prosecutors. Revised Prosecutors' Office's Act allows no one but prosecutor to investigate officials belong to the Department of Justice and Prosecutors' Office.<sup>23)</sup> During the General Chun's rule,<sup>24)</sup> the police who blocked continuous civil unrests,

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19) Changwon Pyo, *supra* note 17.

20) *Ibid.*

21) Seungman Lee was elected as the 1st President in 1948 and ousted by the '1960 Civil Revolution.'

22) President Jeonghee Park was assassinated by the Chief of Intelligence Agency in 26 October 1979.

23) T.S. Kim, et. al, *COMPARATIVE CRIMINAL INVESTIGATION SYSTEM*, 76 (Bak-Young-Sa, 2004).

students' resistances and labor struggles against the military regime, got close to the ruler whose brother was a police officer. The next General-turned-President Taewoo Roh whose brother in law was a prosecutor utilized prosecutors to suppress opposition leaders and to control conglomerates and companies. The police was put under prosecutors' even stricter control. Whenever attempts to secure independent investigation power are made by the police, prosecutors arrested high ranking police officers for charges such as corruption, consequently re-enforcing the public distrust in the police. In the 1997 Presidential election campaign, the opposition candidate Dae-Jung Kim, a well known dissident leader who had suffered from oppressive criminal justice organs and been sentenced to death for treason, included 'Independent Police Investigation' and 'Decentralization of the Police' in his list of public commitments for his presidency. He believed that that diversification of power and setting up a system of checks and balances between the police and prosecutors is one of the preconditions for democracy. Although Dae-Jung Kim won the election and became the President, his 2 criminal justice reform pledges of 'Independent Police Investigation' and 'Decentralization of the Police' did not come true. As soon as the President Kim's reform project began, the war between the police and prosecutors started. Accusations on each other, opinions for and against the reform project and conflicting views on the current Korean Criminal Justice System have offensively been expressed in the media from both the police and the prosecutors' office. Soon after the brother of the Police Chief was arrested by a prosecutor, suspicion on the corrupt deals involving the wife of the Director of the Prosecutors' Office was released to the media by anonymous police sources. Eventually, the President Kim had to issue a "Special Presidential Order" preventing both the police and the prosecutors from making any kind of talks or expressions regarding the issue of Criminal Investigation System Reform. As the police claimed the independent criminal investigation power is the precondition for decentralization of the police organization, the police decentralization process was stopped also. Similar happenings and process have been replayed during the Presidency of Moo-Hyun Roh who won the 5 years' term in the year 2002. It can be said that past Presidents and powerful politicians in Korea, conservative or progressive, tried to use and utilize

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24) General Do-Whan Chun was the Chief Investigator of the late President Park's assassination and took power taking advantage of the chaotic and power-vacuum situation in 1980. In 1987, his friend General Roh succeeded the Presidency through election.

rather than to solve the deep rooted police-prosecutor conflict and left the Criminal investigation Procedure unbalanced.

#### **IV. Conclusion**

The balance of power between the accuser and the accused is one of the basic conditions for seeking Justice and protecting human rights in criminal procedure. That critical balance is lost in Korea, where the prosecution is regarded as ‘the Untouchables.’ Checks and balances between the investigator and the prosecutor is lost as well in Korea, where the Prosecutor is the investigator, director of police investigation and the prosecutor at the same time.

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