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The Backward Reform of the Criminal Justice System in Korea*

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Abstract

Since the restoration of independence in 1945, Korea has witnessed enormous changes in many ways. The criminal justice system is one of them. Although there have been some fluctuations, the system has generally evolved from the crime control model to the due process model and from authoritarian policing to democratic policing. Recently, a new legislation has been enacted under the banner of prosecution reform. It was the current government who took the initiative of the legislation. The reform was made in the name of serving the people. The legislation went through formalities of statutory process. Seemingly it appears to be democratic. However, the reform constructed a criminal justice system that is possibly favorable to political power rather than ordinary people including political opponents. Contrary to what was alleged by the government, there is a high risk that the reform leads to a weird type of policing, socialistic stealth authoritarian policing.

KEYWORDS: Criminal justice system, policing, authoritarian, democratic, crime control, due process, model, stealth, prosecution reform, prosecutor, police, reform, investigation, Korea

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I. Introduction

If you want to build a state and become its king, probably the first thing you have to do is to gain control over the region. To gain the control, it is essential to have policing power. This is so in all forms of states, including modern states. States have many means of policing: regulations and

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administrative penalties, taxation and tax investigation, financial supervision, fair-trade commissions, intelligence agencies, military forces, etc. Among all policing means, the criminal justice system constitutes the fundamental structure of policing power, which consists of the police, the prosecution, and the court. Therefore, the relations among the three agencies, namely the structure of a criminal justice system, shows the characteristics of the policing power of the country with that system.[1)]

Although the Korean people had had their own traditional criminal justice system throughout their long history, Koreans introduced their modern legal system in the late nineteenth century. Witnessing various types of policing, the Korean people have walked fluctuating roads for the last century. After around 1910 when Koreans lost their sovereignty, imperial Japan forced its colonial rule on the Korean people and tried to change everything in the peninsula. Koreans reclaimed their sovereignty with the end of the Second World War. Since then, Koreans have had their own criminal justice system. However, there have been many inflection points along the path to the current system.

Policing is not the work of police stations exclusively. The way policing is conducted is very much related to the structure of a criminal justice system. The police, prosecutors, and the court constitute criminal justice agencies, and the distribution of power among these agencies is strongly related to the characteristics of the criminal justice system to which they belong. This paper presents different types of policing activities in relation to the criminal justice system and tries to identify the features of each type (II). With these findings, this paper considers whether there are any tendencies in the Korean criminal justice system, and then examines the recent reforms initiated by the current power elite (III). After this analysis, this paper concludes with concerns about the direction of the criminal justice system in Korea (IV).

1) Policing generally means the maintenance of order in a society, but this paper focuses on crime and order among others.

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II. Policing and the Criminal Justice System

1. The Philosophy of the Criminal Justice System

Thinking of a criminal justice system, we encounter a basic question: what is the *raison d'etre* of a criminal justice system, for what purpose does it exist, what value does it seek—what is the philosophy of the criminal justice system.

Legitimate punishment is based on true facts. However precise the application of the law might be, a criminal justice system fails if the facts the law applies to are not true. It is essential to find true facts in criminal procedures. The principle of factual truth ("*Prinzip der materiellen Wahrheit*" in German) is one pillar of the criminal justice system. This principle, however, leads to the aggressive notion that every criminal should be punished. The task of a criminal justice system based on this principle is to find criminal acts, identify the culprit, and punish the criminal.

The factual-truth principle pursues public order. However, while pursuing punishment of every criminal, it runs the risk of disregarding the rights of defendants and punishing innocent people. Here arises the principle of due process of law as the other pillar of the criminal justice system. This principle requires that the state must respect all legal rights granted to people. If the government does not follow legal procedures and infringes on human rights, it violates the principle of due process. Due process of law asks the state to minimize the risk of infringement of human rights. It pursues the protection of fundamental rights rather than strict law and order. Due process of law is a core and indispensable constituent of a democratic criminal justice system.

Factual truth and due process are the two pillars of the criminal justice system. However, they often conflict with each other, both theoretically and practically. Each principle stands at either end of a spectrum. Commentators and precedents[2] suggest the harmony of the two, but that is just a theoretical ideal rather than a practical solution. That's why actual criminal justice

2) Supreme Court [S. Ct.], 2007Do3061, Nov. 15, 2007 (S. Kor.); Constitutional Court [Const. Ct.], 2003Hun-Ka7, May 26, 2005, (2005 DKCC, 64) (S. Kor.).

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systems in the real world find themselves somewhere between the two pillars.

2. Models of the Criminal Justice System

1) Two Models

Various countries have various systems of criminal justice. Although microscopic analysis can help us to look at the details of a criminal justice system, macroscopic approaches are essential to understand the system on the whole. A macroscopic approach serves to abstract a model from concrete reality. Among these modeling efforts are Packer's models, which are very insightful in the evaluation of criminal systems. Packer proposed the crime-control model and the due-process model.[3] Even though he didn't intend for the models to correspond to reality or represent what the criminal process ought to be,[4] owing to the contrasting features of the two, they will serve as good tools to explain the characteristics of actual criminal justices systems and enables us to discern which is normatively superior.

2) Contrasting Features

The two models are somewhat theoretically polarized models, whose characteristics contrast with each other in many ways.

(1) Value System

The crime-control model takes public order as its underlying value. The model claims that the criminal process is "a positive guarantor of social freedom"[5] and that criminal sanction is necessary for the maintenance of "public order."[6] It is the proposition of the model that the repression of criminal conduct is the most important function to be performed by the criminal process.[7]

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3) Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964) [hereinafter Packer, *Models*].

4) *Id*. at 5.

5) *Id*. at 10.

6) Herbert L. Packer, The Limits of the Criminal Sanction 158 (1968) [hereinafter Packer, *Sanction*].

7) Packer, *Models*, *supra* note 3, at 9.

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The due-process model puts a high value on human rights. The model accepts the primacy of the individual and emphasizes the limitation of official power.[8] Power is vulnerable to abuse. Since the state has the potential temptation to subject individuals to coercive power, the criminal process should be controlled, and there should be safeguards against the abuse of power.[9]

(2) Focus

The crime-control model puts a primary emphasis on the efficiency of the criminal process. The process is required to efficiently operate to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crimes.[10] The model can be likened to an assembly line,[11] which fosters efficient crime control.

The due-process model would rather sacrifice efficiency to prevent state oppression of the individual because maximal efficiency means maximal tyranny.[12] Packer likened the model to an obstacle course, where each stage is designed to present formidable impediments to carrying the accused any further along in the process.[13]

(3) Fact Finding

The crime-control model pursues "factual guilt," trying to find out what actually took place in an alleged criminal event. The model believes that informal and nonadjudicative processes will reveal the truth[14] and that efficient police investigations and prosecutions can control crimes.[15] The model heavily relies on investigative and prosecutorial officers to find out what actually happened in an alleged criminal event, counting on their ability to elicit and reconstruct a tolerably accurate account of the factual

8) *Id*. at 16.

9) *Id*.

10) *Id*. at 10.

11) *Id*. at 13.

12) *Id*. at 16.

13) *Id*. at 13.

14) *Id*. at 14.

15) Kent Roach, *Four Models of the Criminal Process*, 89 J. Crim. L. & Criminology 671, 677 (1999).

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truth.[16] Considering the reality of limited law-enforcement resources, the model places a premium on speed and finality, which, it believes, are achieved by allowing expert administrations, the police and prosecutors, to screen out the innocent and secure the conviction of the rest as expeditiously as possible.[17] Most fact-finding is conducted by the police in the streets and in stations, not by lawyers and judges in the courts.[18] Since the center of gravity lies in the stage of administrative fact-finding by the police and prosecutors, the trial is not that important.[19]

The due-process model pursues "legal guilt," rejecting informal fact-finding processes. The model trusts formal, adjudicative, adversarial fact-finding processes with public hearings by an impartial tribunal and full opportunities for the accused to discredit the case against him.[20] The process in this model aims to protect the factually innocent as much as to convict the factually guilty.[21] Under the doctrine of legal guilt employed by this model,[22] an individual is not to be held guilty until the guilty determination is made in a procedural fashion by authorities acting within competencies.[23] Only those authorities aware of this guilt-defeating doctrine and willing to apply it can be viewed as competent to make the determination of legal guilt; impartial tribunals are such competent authorities, not the police and prosecutors, who lack such capacity and willingness.[24] Here the court stands at the center of the criminal process.[25]

(4) Investigative Power

Under the crime-control model, the police have broad investigative powers, such as search, arrest, and questioning.[26] Police interrogations are

16) Packer, *Models*, *supra* note 3, at 14.
17) Roach, *supra* note 15, at 677-78.
18) *Id*. at 678.
19) Packer, *Sanction*, *supra* note 6, at 162.
20) Packer, *Models*, *supra* note 3, at 14.
21) *Id*.
22) Roach, *supra* note 15, at 680.
23) Packer, *Models*, *supra* note 3, at 16.
24) *Id*. at 17.
25) Roach, *supra* note 15, at 680.
26) Packer, *Sanction*, *supra* note 6, at 177.

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widely allowed. They might be rejected as evidence when they spoil the reliability of the suspect's statements, but not on the grounds of due process. Coerced confessions can be ruled out, not because of infringement upon a suspect's rights, but because of the unreliability of a suspect's statements.[27] Pre-trial detention, being the rule, serves not only to ensure the accused's presence at trial, but also to prevent future crime and to persuade him to plead guilty at an early stage.[28] Arrestees are not allowed to contact lawyers, who would advise the guilty not to say anything, which would give undue benefit to the guilty.[29] According to the model, a lawyer's place is in court, and he or she should not enter a criminal case until the trial.[30] Judges and jurors should not be haunted by the ghost of the innocent man convicted because the police and prosecutors have the ability to screen out the factually innocent.[31]

The due-process model is willing to restrict the police in order to protect the rights of suspects, minimizing informal fact-finding in the streets or station-houses.[32] Police interrogations have many limits. The accused has the right to remain silent, the right to counsel, and the right against self-incrimination.[33] Illegally obtained evidence is widely excluded. Coerced confession is ruled out just because it is illegal, whether or not it is untrustworthy. Pre-trial detention is allowed only when absolutely necessary to ensure attendance at trial; it is not used to allow the police to develop their case.[34] The trial is concerned not with factual guilt, but with whether the prosecutor can establish legal guilt beyond a reasonable doubt on the basis of legally obtained evidence.[35] Not the police or prosecutors, but defense lawyers and judges are relied upon to uphold the standard of legal guilt.[36]

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27) *Id*. at 178.

28) *Id*. at 211-14.

29) Roach, *supra* note 15, at 678.

30) Packer, *Sanction*, *supra* note 6, at 203.

31) United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923); Roach, *supra* note 3, at 679.

32) Roach, *supra* note 15, at 681.

33) *Id*.

34) *Id*. at 681-82.

35) *Id*. at 682.

36) *Id*.

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(5) Arrest and Detention

The crime-control model gives the police wide discretion to arrest or detain suspects. The model assumes that the job of the police is to arrest people for the purposes of investigation and crime prevention.[37] Stopping a person on the street for questioning or even taking him to the station house is widely justified, as the model takes the accompanying invasion of personal freedom and privacy lightly.[38] Police efficiency determines under what circumstances and for how long a person may be stopped and held for investigation.[39] No hard and fast rules are laid down for how long the police can interrogate a suspect before a judicial decision.[40] Internal regulations are enough to check police authority, and laws to limit authority should provide loose outer limits so as to accommodate all possible cases.[41] The suspect should not be allowed to contact his family or friends and, most importantly, to consult a lawyer, because it is likely to diminish the prospect of the suspect cooperating with the interrogation.[42]

The due-process model asks for judicial determination for any kind of custody, including exigent circumstances where arrest by police discretion may be subject to *ex post* judicial review.[43] The arrestee must be brought before a judge without unnecessary delay, as soon as the committal proceedings are completed, and the police should not hold a suspect for the purpose of interrogation or investigation.[44] Anyone arrested has the right to test the legality of the arrest and the right to counsel.[45] Discretionary police power, seeking efficiency, is open to abuse, and some efficiency must be sacrificed for human dignity and rights.[46] The broad power of the police also creates a danger of discriminatory exercise, because police power is applied mostly to people like the poor or the uneducated, whose voices are

37) Packer, *Models*, *supra* note 3, at 25.
38) *Id*. at 24.
39) *Id*. at 25.
40) *Id*. at 32.
41) *Id*.
42) *Id*. at 31-32.
43) *Id*. at 26.
44) *Id*. at 33-34.
45) *Id*. at 34.
46) *Id*. at 27.

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weaker in society.[47] The model favors stringent external regulations like laws and judicial scrutiny.[48]

(6) Exclusion of Illegal Evidence

The crime-control model values the maintenance of public order and pursues factual guilt focusing on efficiency. This model is naturally reluctant to exclude incriminating evidence. Although investigatory agencies may violate some legal restrictions in collecting evidence, that evidence may still reveal something about the crime and is worthy of consideration. The model allows for the exclusion of illegally obtained evidence, not because of infringement of rights by investigatory agencies but because it may be unreliable, as in the case of tortured confessions. According to this model, suppression of evidence seems to simply give criminals a windfall.[49]

The due-process model values individual rights, focusing on the limitation of power. Illegally obtained evidence is to be excluded because of the very fact that the investigation violated the law. It is easy to imagine that statements might be extorted though illegal investigations like torture. However, physical evidence is not necessarily extorted or changed even when the search for or seizure of them is illegal. A pure due-process model seeks the exclusion of such evidence, too, because the model tries to protect procedural rights regardless of the evidential value.

3. Authoritarianism and Democracy as Political System

Authoritarianism is usually conceived of as the opposite of democracy. Although many efforts have been made to address the problem of "what democracy is . . . and is not,"[50] we are still far from a consensus on what constitutes "democracy."[51] A fairly robust definition of democracy, like Robert Dahl's polyarchy, says that democracy requires not only free, fair,

47) *Id*.

48) *Id*. at 26.

49) *Id*. at 25.

50) Phillipe C. Schmitter & Terry Lynn Karl, *What Democracy Is … and Is Not*, 2: 3 J. Democr. 75, 75-88 (1991).

51) Larry Jay Diamond, *Thinking about Hybrid Regimes*, 13: 2 J. Democr. 21, 21 (2002).

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and competitive elections, but also the freedoms which make these truly meaningful, such as freedom of organization and expression, alternative sources of information, and institutions to ensure that government policies depend on the votes and preferences of citizens.[52] In another definition, Joseph Schumpeter measures democracy by a minimalist standard that says it is a political system where the principal positions of power are filled through a competitive struggle for the people's vote."[53] Although the latter focuses on an electoral conception, contemporary applications of this electoral conception heavily overlap with Dahl's polyarchy because it also requires the civil and political freedoms necessary for political debate and electoral campaigning.[54]

Researchers have pursued the preconditions of democracy, and a number of domestic and international factors for democratic advancement have been presented.[55] The authoritarian category is too inclusive to define in one word. There are many types of authoritarian regimes and the classification of the types varies. One study found that an institutional attribute, the nature of the authoritarian regime in question, is an essential precondition of democracy.[56] This study distinguishes three modes of political power maintenance: hereditary succession (lineage), the actual or threatened use of military force, and popular election; these correspond to monarchies, military regimes, and electoral regimes respectively.[57] *Monarchies* are regimes where a person of royal descent has inherited the position of head of state in accordance with accepted practice and/or the constitution; *military regimes* are states where military officers are major or predominant political actors by virtue of their actual or threatened use of force; and *electoral regimes* are states where popular elections are held for parliament or the executive branch.[58] Electoral regimes can be classified

52) *See id*.

53) Joseph Schumpeter, Capitalism, Socialism, and Democracy 269 (2nd ed. 1947).

54) Diamond, *supra* note 51, at 21-22.

55) Axel Hadenius & Jan Teorell, Authoritarian Regimes: Stability, Change, and Pathways to Democracy, 1972-2003 1 (The Helen Kellogg Inst. for Int'l Studies ed. 2006).

56) *Id*.

57) *Id*. at 5.

58) *Id*. at 5-6. Magnus Bjørndal, Authoritarian Regime Type, Oil Rents and Democratic Transition 5-6 (2015) has similar classification.

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into at least three types: *no-party regimes*, where elections are held but only individual candidates compete in them, and no political parties are allowed; *one-party regimes*, where only one party takes part in elections, and no other party is allowed; and *limited multiparty regimes*, where candidates independent from the ruling power are able to participate in parliamentary or presidential elections.[59), 60)] In limited multiparty regimes, there is a degree of competition among candidates who either represent different parties or act as individuals, but this does not mean that the elections are necessarily free and fair, because the regime is after all a type of authoritarian regime and certain groups may be excluded or the process may favor one side in various ways.[61)] According to the study, different types of authoritarian regimes have different likelihoods of breaking down and of making the transition to democracy. The study found that a curvilinear (U-shaped) relationship exists between regime stability and level of democracy, and that multiparty regimes are more fragile than other regimes that are more obviously authoritarian or more fully democratic, and that multiparty regimes are more prone to transform into democracies than other authoritarian regimes.[62)] The reason why multiparty regimes are more amenable to incremental improvements to democracy is that they hold elections offering at least a degree of openness and contestation, and furnish at least some rudimentary political liberties, which are related to encouraged competition and broadened participation.[63)]

Another study finds that whether a state is authoritarian or democratic does not allow us to predict whether or not it will be developmental.[64)]

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59) Hadenius & Teorell, *supra* note 55, at 6-7.

60) The study researched many countries from 1972 to 2003 and tried regime classification by country and years. It classified Korea (South) as military traditional regime in 1972, military multiparty regime during 1978-1987, and democracy during 1987-2003. *See id*. at 27-31. It is generally acceptable, but some correction is needed. Former military general Park was the president during 1963-1979, and the current constitution amended in 1987 is most democratic. Hence the classification of 1972-1979, 1979-1987 and 1987-2003 would be more precise.

61) *Id*. at 7.

62) *Id*. at 23.

63) *Id*. at 23-24.

64) Tim Kelsall, *Authoritarianism, Democracy and Development*, 15 (DLP, The State of the Art Series, 2004).

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Although the proportion of authoritarian states in the world seems to have been on the decline since the end of the Cold War, the reality is somewhat different. Many countries adopted nominally democratic institutions that ironically helped strengthen authoritarian regimes.[65] Authoritarian leaders with long time horizons turn to courts to deal with the dysfunctions that plague such regimes.[66] Authoritarian politics are said to be shaped by two conflicts: conflicts between those who rule and those who are ruled and conflicts among those who share power. From the former comes the problem of authoritarian control and from the latter the problem of authoritarian power-sharing.[67] Key features of authoritarianism are shaped by the twin problems of power-sharing and control against the backdrop of the dismal conditions under which authoritarian politics take place, and to solve those problems, authoritarian politics easily resorts to violence.[68]

"Authoritarian" seems to be similar to "illiberal." However, these two concepts are not exactly same. Marlies Glasius distinguishes between authoritarian practices and illiberal practices in this way: authoritarian practices disable access to information and voices, while illiberal practices violate numerous human rights. Infringement of autonomy and dignity is the harm of the latter, while accountability sabotage is that of the former.[69] Even with this distinction between authoritarian practices and illiberal practices, there is considerable overlap between the two.[70] Considering the restriction of access to information and freedom of expression in authoritarian practices, they tend to infringe on human rights, which leads to illiberal practices. The police contribute to social order, which at the same time threatens individual interests such as liberty, privacy, property, and social interests.[71]

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65) Dawn Brancati, *Democratic Authoritarianism: Origins and Effects*, 17 Ann. Rev. Pol. Sci. 313, 314 (2014).

66) Scott Barclay, *Rule by Law: The Politics of Courts in Authoritarian Regimes by Ginsburg & Moustafa*, 43 Law & Soc'y Rev. 241, 242 (2009).

67) Milan W. Svolik, The Politics of Authoritarian Rule 2 (2012).

68) *Id*. at 2-3.

69) Marlies Glasius, *What Authoritarianism Is…and Is Not: A Practice Perspective*, 94: 3 International Affairs 515, 531 (2018).

70) *Id*.

71) Rachel A. Harmon, *The Problem of Policing*, 110 Mich. L. Rev. 761, 816 (2012).

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Within this potentially too simplistic dichotomy, democracy might be said to institutionalize uncertainty as elected leaders do not know *ex ante* the outcome of a dispute, whereas dictators do.[72] This shows democracy regards the process as important, while authoritarianism looks mainly at the results. As a matter of fact, few authoritarian regimes put up wicked banners. Rather, most authoritarian regimes put forward a rosy future as a cause while they are suppressing civil rights. The rosy future is a kind of substantive goal. Pointing to the illusionary goal, the regimes ignore various side effects such as violations of human rights, unfair economic and social policies, political monopolies, harsh criminal sanctions, and few procedural rights.

4. Authoritarian Policing and Democratic Policing

Considering what has been presented so far (cf. 1–3), it is evident that criminal justice systems and political systems are closely related and share many characteristics.

In democracy, accession to power is decided by people through elections, where the rights and freedom of ordinary people are important and even political leaders cannot disregard them. Man is not a means or a tool for society and his rights are not abandoned in the name of society. Procedures are as important as results. Under authoritarianism, in contrast, struggles among power elites decide accessions to power, and people, as the ruled, are not the subjects of rights but the objects of ruling. Pursuing public order as a substantive goal, authoritarianism easily disregards and infringes on human rights.

The factual-truth pillar of the criminal justice system emphasizes the punishment of serious criminals for the maintenance of public order, which is the very value of the crime-control model and which is also pursued by authoritarianism. The due-process pillar of the criminal justice system emphasizes the protection of human rights, which is the very value of the due-process model and which is also pursued by democracy.

Here we can find two sets of meaningful associations among the

72) Barclay, *supra* note 66, at 242.

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philosophy of the criminal justice system, and the models thereof, and the philosophy of political systems: the factual-truth principle, the crime-control model, and authoritarianism on the one hand, and the due-process-of-law principle, the due-process model, and democracy on the other. Each set shares its own characteristics. Policing within the former set may reasonably be called "authoritarian policing," and within the latter, "democratic policing."

Democratic policing pursues the protection of the constitutional rights of the ruled and tries to regulate the ruling power, in accordance with the *rule of law*. In contrast, authoritarian policing risks manipulating the rule of law while dismantling constitutional rights though *rule by law*.[73]

Democratic policing demands public scrutiny or external regulation of the police. Does the introduction of public scrutiny or external regulation increase crime rates? An American study on the reforms of 42 U.S.C § 14141, the most invasive regulation of modern American policing, found that the introduction of the provision was associated with a statistically significant uptick in some crime rates, but that this uptick was concentrated in the years immediately after the introduction and diminished over time.[74] This shows that external regulations might contribute to some temporary de-policing. However, this does not justify less regulation on policing. The increased crime rate was only a temporary uptick in certain crimes, which is not necessarily generalizable. In addition, as the study concludes, this may be the cost of ensuring that police officers abide by the law,[75] and we have to accept it if greater benefits are to come.

Human experience leads us to the conclusion that democratic policing is superior to and more desirable than authoritarian policing. The more a policing system is open, contestable, free (unrestricted), competitive, and participatory, the more democratic the system is. The contrasting features of the two models of the criminal justice system parallel features of authoritarian policing and democratic policing: the value of public order vs. human rights; a focus on efficiency vs. restrictions on power; factual guilt

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73) Lily Rahim, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore by Jothie Rajah*, 47 Law & Soc'y Rev. 697, 698 (2013).

74) Stephen Rushin, *De-policing*, 102 Cornell L. Rev. 721, 730 (2017).

75) *Id*. at 776.

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vs. legal guilt, informal investigations vs. formal trials; broad vs. limited investigative power; a reliance on police and prosecutors vs. courts and lawyers; in regard to arrest and detention, investigative discretion vs. stringent judicial regulation; lenient vs. harsh standards regarding illegal evidence; police or prosecutors vs. courts as the center of the process.

Thus, we can tell where an actual criminal justice system is located on the spectrum between the two policing types by identifying its features. With this authoritarian-democratic analysis tool, we will try to find tendencies toward either type in the Korean criminal justice system so far, if any, and will discuss where the system is going following recent reforms.

III. Korean Criminal Justice System

1. Tendencies So far

1) Periods

Looking back at the history of the Korean criminal justice system over the last century, this paper classifies it into three periods according to the rule's nature and four periods according to the system's characteristics.

The three-period classification is based on the identity of legislator: the colonial law system (1910–1945), the interim law system (1945–1954), and Korea's own law system (1954–). The Japanese colonial era began in 1910 and ended in 1945. In 1954, the Criminal Procedure Act was enacted after a preparation period. The act was amended several times and constitutes the current law.

The four-period classification is based on the system's characteristics: the extremely authoritarian period (1910–1945), the foundational period (1945–1972), the authoritarian period (1972–1987), and the democratic period (1987–). The characteristics of each period's system were formed not only by legislation, but also by many other factors including judicial decisions and the political environment. In 1972, the president granted himself more power through the enactment of the *Yushin* Constitution. The nationwide protest for democracy of 1987 resulted in a constitutional amendment. The 1987 Constitution is the current constitution and is regarded as the most human-rights-friendly constitution so far. However,

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1987 Constitution alone does not make the society or the criminal justice system fully democratic. Various legislative efforts and judicial decisions have worked together with changes in the political and cultural environment to greatly change the criminal justice system in Korea.

This paper does not discuss the details of all of the changes.[76] Rather, this paper analyzes changes in key areas of policing and the criminal justice system with a focus on recent situations.

2) Features by Area

(1) Arrest and Detention

Police and prosecutors in the colonial period had their own authority to arrest and detain suspects without judicial warrants.[77] After the repeal of the colonial system, the warrant system was first introduced by the interim government ordinances of 1948.[78] A police officer could apply for warrants to a judge, but only through a prosecutor. The police were not allowed to apply directly to a judge. A detainee could apply for a review of the legality of his detention. The warrant system was raised to a constitutional level with the enactment of the Constitution the same year.

Despite the introduction of the warrant system as an institution, the reality was somewhat gloomy. In many cases, suspects were first arrested without warrants and then warrants were applied for. In fact, most warrants were *ex post fac*to warrants.[79] The Criminal Procedure Act of 1954 tried to solve this problem with a provision that requires the submission of supporting evidence. In addition, prosecutors instructed the police to apply for *ex ante* warrants. But again, the police found a more expedient approach. Policemen took suspects to the police stations with their consent, made

76) For details, *see* Sang Won Lee, *The Influence of the Judiciary on the Criminal Legislation and Its Impact on the Transformation of Models: An Analysis of the Korean Experi*ence, *in* RELATIONSHIP BETWEEN THE LEGISLATION AND THE JUDICIARY 169 (2018). [hereinafter Lee, *Influence*]

77) Joseon hyeongsa ryeong[*Chosun* Criminal Decree], Act No. 11, Mar. 18, 1912, art. 12, 13, 15 (S. Kor.).

78) *See* Hyeongsa sosong beopui gaejeong [Amendment to the Criminal Procedure Law], Ordinance No. 176, Mar. 20, 1948 (S. Kor.); Hyeongsa sosong beopui bochung gyujeong [Supplement to the Criminal Procedure Law], Ordinance No. 180, Mar. 31, 1948 (S. Kor.).

79) Lee, *Influence*, *supra* note 76, at 184.

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interrogation reports, and then applied for warrants (ironically, *ex ante* warrants). Judges issued warrants based on documents only, without any hearings. While the proceedings were underway, suspects were waiting in a police station. This was essentially an arrest before a warrant because the consent was not informed or the suspect was intimidated by the superior status of the police. Voluntary accompaniment, as the police would describe it, was in fact involuntary forced arrest. Meanwhile, prosecutors grew stronger and stronger. The constitutional and statutory amendments made right after the military coup of 1961 made it clear that only prosecutors had the authority to grant warrants, not the police. Furthermore, judicial review of the legality of detention was repealed in 1973 after *Yushin*, which was a kind of palace coup.

The winds of change began to blow in the 1980s, after the *Yushin* regime ended. Judicial review of the legality of detention was revitalized and expanded by constitutional and statutory amendments in 1980 and 1987. In tandem with or leading the changes in the social and political atmosphere, the Supreme Court began to render brave decisions: voluntary accompaniment in policing was deemed illegal;[80] *ex ante* warrants after actual arrest were deemed illegal;[81] violent resistance to being forced by a policeman to a station does not constitute a crime.[82]

The warrant system went through a great reformation in 1995, when warrant hearings were introduced. Until then, judges decided whether to issue a warrant, based only on documents provided mainly by the police or prosecutors. Following a few more amendments to the system in 1995 and 2007, warrant hearings are now mandatory. Suspects enjoy full rights to appear before a judge when in custody.

(2) Exclusion of Illegal Evidence

Since its enactment in 1954, the Criminal Procedure Act has clearly maintained that involuntary confessions or statements are not admissible;[83]

80) Supreme Court [S. Ct.], 85Mo16, July 29, 1985 (S. Kor.).

81) Supreme Court [S. Ct.], 93Da35155, Nov. 23, 1993 (S. Kor.); Supreme Court [S. Ct.], 93Do958, Mar. 11, 1994 (S. Kor.).

82) Supreme Court [S. Ct.], 91Do453, May 10, 1991 (S. Kor.).

83) Hyeongsa sosong beop [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, *amended*

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This was incorporated into the Constitution in 1962. Judicial decisions did not consider involuntary confessions as inculpatory evidence, even before the act was enacted. At first, courts focused on credibility rather than admissibility but gradually changed their attitudes and excluded such confessions as inadmissible. But involuntary confessions were more often admitted than excluded until the 1980s, around the time of the authoritarian period. Prosecutors needed to prove voluntariness only after the defendant showed specific facts raising doubts as to the voluntariness of his or her confession. It is likely the unconscious presumption of voluntariness resided in the minds of judges at time.

Since the 1980s, and sometimes even before, under the authoritarian period, there have been judicial decisions that excluded involuntary confessions for their infringement on rights alone. It didn't matter whether the confessions are credible or not. Abandoning the presumption of voluntariness, the courts put the substantial burden of proof on the prosecution, demanding that the prosecution prove voluntariness when it was contested. Exclusion was expanded to cases where the prosecution did not force a confession, but the police had. Even if the defense consents to the admission of such confessions, they are still inadmissible.

The reality, however, did not change as much as the law. Torture by law-enforcement agents did not disappear. Between 1972–1987, under the authoritarian regime, many political dissidents were tortured in a systematic fashion. A sexual torture case in 1986 and a fatal torture case in 1987 provoked nationwide protest, which resulted in an amendment to the constitution. After that, torture cases drastically decreased. Of course, there have still been a few torture cases, but they were isolated crimes rather than systematic.

The debate over illegally obtained evidence has moved from a focus on physical evidence to statements. The Criminal Procedure Act made no clear provisions for exclusion except regarding confessions and statements. Most commentators claimed the rule applied to physical evidence. Courts had denied the application of the rule on the basis of immutability theory, which states that the nature and attributes of physical evidence are

by Act No. 16850, Dec. 31, 2019, art. 317, 316 (S. Kor.).

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immutable even when it is illegally obtained. At last, in 2007, the Supreme Court applied the exclusionary rule to physical evidence, ruling that illegally obtained physical evidence should be excluded on principle.[84] The Court acknowledged the potential for exceptions with the strict requirement that the illegality be trivial enough not to violate the substance of due process of law and that the exclusion of the evidence would be against justice. The decision also adopted the fruit-of-a-poisonous-tree doctrine. Meanwhile, the Criminal Procedure Act introduced an exclusionary rule in a 2007 amendment, which went into effect on January 1, 2008. Article 308-2 of the Act stipulates that evidence obtained in violation of due process of law shall be excluded.

Since then, the courts have applied this rule very strictly. Recently, the focus is moving to digital evidence. As digital evidence becomes more and more important in trial, a lot of new legal problems are causing difficulties. It has become of the utmost importance to secure the legality of the search and seizure of digital evidence. The Criminal Procedure Act was amended in 2011 with the goal of protecting privacy and personal information. The courts have been very rigid in this matter. Suspects enjoy the right to participate in the search and seizure process. The exclusionary rule strictly applies to every kind of evidence.

(3) Trial-Centered Procedure

The 2007 amendment to the Criminal Procedure Act revised a lot of provisions. It is no exaggeration to say that the amendment marked a milestone in the Korean criminal justice system. It changed the structure of trials and the relationship between prosecutors and the court.

For a long time, trials in Korea had heavily relied on documents gathered or made by investigatory agencies. The prosecution submitted all the investigative documents with the indictment at the time the case was forwarded to the courts. Evidence from the prosecution's side was placed on the desks of judges even before the first day of trial. Having been informed of the prosecution's story beforehand, judges first saw the defendants at trial with some level of bias.

84) Supreme Court [S. Ct.], 2007Do3061, Nov. 15, 2007 (S. Kor.).

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Noticing this problem, the judiciary tried to overcome it in many ways. With the amendment of the Court Rules in 1982, the judiciary declared the "indictment-only doctrine," banning the prosecution from submitting evidentiary documents together with the indictment. However, this was not enough to change all the traditional practices of document-based trials. The judiciary continuously made substantial and practical reforms, and the practice changed little by little. The 2007 amendment to the Criminal Procedure Act made drastic changes to trial procedure and gave an institutional foundation to them. Evidence was allowed to be submitted not with the indictment, but separately at trial. Instead of investigative documents, oral hearings in courtrooms became crucial to judicial decisions. Fact finding was no longer to be conducted in a judge's office room and based on investigative documents. Fact finding is now performed in an adversarial open courtroom through oral proceedings. While the traditional document-based trial resulted in substantial fact finding by the investigative agency, this new trial put the judge in the center of the fact-finding process. This is known as "court centralism."

(4) Right to Counsel

Since it was first established in 1948, the Constitution has maintained that any person has the right to counsel when arrested or detained. However, there was no clear provision for those who are not arrested or detained until 2007, when the Criminal Procedure Act clearly stipulated the right of suspects to have their counsels assist them during investigative interrogation and the right of lawyers to participate in interrogation. Actually, even before the amendment, the Constitutional Court had already acknowledged the right to counsel of those not arrested.[85]

The right to a public defender has been provided by the Criminal Procedure Act since its enactment in 1954. The right was raised to the constitutional level by the 1962 amendment to the Constitution. This right being a kind of claim right, further statutes are necessary in order for the right to be claimed in actual cases. Korea has expanded the sphere of protection and devised many schemes for public defenders. Now most

85) Constitutional Court [Const. Ct.], 2000Hun-Ma138, Sept. 23, 2004 (2004 DKCC, 75) (S. Kor.).

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criminal defendants enjoy the right to a public defender.

3) Direction of Changes

What happened in the Korean criminal justice system during the last century follows a clear direction. Putting the period between 1972–1987 aside, investigatory arrests and detentions have fallen under stricter and stricter judicial scrutiny, illegally obtained evidence has become more widely excluded, the court has moved to the center of the fact-finding process, suspects and defendants have enjoyed more procedural rights, and lawyers have become more important in the legal process. Underneath these changes flows the transition of value from public order to human rights. With all these features, the Korean criminal justice system has developed from an authoritarian policing system to a democratic one.

From authoritarian policing to democratic policing—the clear direction of the road the Korean criminal justice system has walked is praiseworthy, and many Koreans are proud of it.

2. Recent Reform

1) Legislation

Recently, in 2020, the Korean legislature passed three laws. They will be soon in effect. The National Assembly amended the Criminal Procedure Act and the Prosecutors' Office Act.[86] It also enacted the High-Ranking Officials Investigation Bureau Act.[87] Amendments to the two acts repealed the supervisory authority of prosecutors over police investigations and restricted investigations initiated by prosecutors to specific kinds of crimes designated by the act and its presidential decree. The new law is designed to establish a new agency that specializes in the crimes of high-ranking officials such as the president, congresspeople, judges, prosecutors, high-ranking police officers, etc.

86) These amendments were promulgated on February 2, 2020 and enter into effect on the date the presidential decrees set between six months and one year after the promulgation.

87) This Act was promulgated on January 14, 2020 and enters into effect on July 15, 2021.

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2) Risks and Problems

The "reform" achieved through these laws is the fruit of long-cherished desires for prosecution reform of the current government and its supporting groups. It is a success in that this reform deprives prosecutors of their power. Actually, prosecutors in Korea have been very powerful until now. Very much aware of the oppressively harsh colonial policing of the police-centered system, the lawmakers of the newly independent Korea tried to restrict police power by having prosecutors supervise them. During the authoritarian period between 1972–1987, especially during the *Yushin* regime, the government heavily relied on prosecutors to maintain its power. In this period, many dissidents were arrested and prosecuted. Prosecutors received more and more power in the criminal process. They had the authority to prosecute, which was their original job. They could conduct any investigation of their own and supervise police investigations, too. They were dispatched to many governmental organizations, which made prosecutors influential in areas other than the criminal process. Prosecutors have been criticized for having too much power. Actually, the transition so far[88] serves the demand for a restriction of their power. For example, the warrant hearings introduced in 1995 moved decisive power from prosecutors to judges in the area of custody. The departure from reliance on investigatory documents, in full bloom by the 2007 revision, moved the center of fact finding from prosecutors to judges. This restriction aligned well with the transition from an authoritarian system to a democratic one because it enhanced human rights, limited investigative powers, and rejected informal fact-finding processes.

Recent restrictions to prosecutors' power are considered applaudable by many. The proponents of the reforms, including the current government, argue that it is good for the people. This might be true. However, there is reasonable concern about risks and problems hidden in the reform.[89]

Firstly, it gives greater power to the police instead of restricting prosecutors. Separating investigation and prosecution, the reform prohibits

88) *See* III.1 of this paper above.

89) For more detailed discussion, *see* Sang Won Lee, *A Train named Prosecution Reform: Political Power and Bureaucratic Power, in* Law's Dilemmas 139, 141-75 (Jinsu Yune et al. eds., 2020).

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prosecutors from supervising the police during police investigations. The police can independently conduct investigations without any prosecutorial supervision. The police can even close cases if they think prosecution is not plausible. The reform succeeded in reducing prosecutors' power, but made the police stronger and more uncontrolled. This is quite the opposite of the direction the Korean criminal justice system has walked in. In extreme terms, at the end of the path along which the new reform is heading exists the police state, the kind of policing from which the founding fathers desperately tried to escape after regaining the sovereignty in 1945. The separation of investigation and prosecution does not guarantee democratic policing, rather it increases the risk of abuse of power owing to the lack of external oversight.

Secondly, the reform either made a wrong diagnosis or a wrong prescription. Under the pre-reform system, criticism of prosecutors was mainly targeted at their obedience to political power, especially to the president. Even proponents of the reform claimed that the political obedience was the main problem to be fixed. If this was the case, the prescription should have focused on how to guarantee that investigations and prosecutions are free from inappropriate political influence. If prosecutors are weak, as the reform intended to make them, they are more vulnerable to political influence. Yet there is no guarantee that the stronger police force is independent from political power. In addition, the High-Ranking Officials Investigation Bureau (hereinafter "the Bureau") has a high risk of falling under political influence. Considering the relatively small size of the organization and the highly political process of appointing the head of the Bureau, it will not be easy for the organization to maintain political independence. The reforms might fail to function as watchdogs over the police in the way that prosecutors had done so well. They may yet fall into a worse situation in trying to maintain political neutrality.

Thirdly, the reform might induce the dominance of political power over all the other social powers. Even though prosecutors have been criticized for acting too favorably to the ruling party, the ruling party could lose their ruling position and be subject to investigation; also, there have always been some prosecutors brave enough to investigate powerful politicians. Now that the reforms put the president under the Bureau's jurisdiction, they seem to guarantee neutral investigation institutionally. However,

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considering the potential influence of the president, it is hardly plausible for him to be neutrally investigated by the Bureau. In contrast, as prosecutors are under the jurisdiction of the Bureau, it is possible for the president to control the prosecutor who is trying to investigate him or his men and women by encouraging the Bureau to investigate the prosecutor. The Bureau also has the authority to have prosecutors transfer cases that are pending in both the Bureau and Prosecutors' Office to the Bureau. This means that the Bureau has an overriding authority in cases in which the Bureau and the prosecutor have overlapping authority.

With the establishment of the Bureau, the total capacity for investigation in Korea has increased: the Bureau, the police, and the prosecutors. It is not impossible for the reforms to equip the president with all three swords. However, being divided and weakened, the agencies may not be strong enough to attack powerful political figures. This increases the risk that political power alone prevails over all other powers and checks.

Fourthly, the reform actually does not have much to do with ordinary people. Prosecutors have typically focused on relatively big cases when they conduct investigations of their own, not on ordinary people who are usually subject to police investigation. Accordingly, it is often people with power who are intimately influenced by prosecutorial investigation. If prosecutors lose their power, powerful groups will be the main beneficiaries. Proponents of the reform seemed to argue that they proposed it for the people, but it is not clear how it will help the common people. Rather, ordinary people might have less protection against possible police abuse than before, when prosecutors had supervisory authority over the police.

3) What We Can See

(1) Allegedly Democratic Reform

Korea achieved democracy as it emerged from its authoritarian history. The criminal justice system has been moving from authoritarian to democratic. It doesn't seem plausible for reforms in Korea in the twenty-first century to be authoritarian. Actually, recent reforms were made by following legislative processes. The legislation was enacted by a majority decision of the National Assembly. The proposers of the reforms suggested the reform bills' purpose was democratic control over prosecutors' power.

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The reform purported to serve the people.[90] As such, it appeared to be democratic.

(2) Irony

However, by all measures, the recent reform seems to be more authoritarian than democratic. Looking at the aforementioned risks and problems (cf. B), it is hard to say that the reform will lead the Korean criminal justice system into a more democratic system of policing. On the contrary, it might lead the system back to more authoritarian policing. It might provide greater policing powers in total, with weaker scrutiny over policing. It might serve more of the interests of the political elite and fewer of the interests of ordinary people. It might provide more power to the political elite and less protection of human rights for the people. It might give broader discretionary room to the power elite while shrinking investigation and judicial review of them—all this pushes the system back to authoritarian policing.

Even the legislative process was somewhat far from a genuinely democratic one. Actually, in initiating the recent reform in Korea despite the strong objections of many professionals, scholars, and the opposition party, the ruling party made a clever deal with other minor parties. In exchange for their favorable votes, the ruling party seemed to give minor parties a carrot of possible access to more seats in the National Assembly through a new election rule. They tied the two different kinds of bills (the criminal system reform bills and the election bills) together and put them to a vote through a "fast track." The legislation succeeded despite the strong but vain objections of the opposition party. In substance, due process of law was trampled on.

It is quite ironic that this reform was initiated by the current liberal government. The power elite of the current government and its key proponents were those who had experienced harsh authoritarian policing. Many of them were the leaders of student movements calling for democracy. Many of them were arrested or oppressed by the then authoritarian government of 1972–1987. They were proponents of democracy. Actually,

90) *See id*. at 143-48.

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the development of Korean democracy owes a lot to them. Society has changed, and now they have the power. They became the members of the ruling party. Their thoughts, their actions, and their policies are expected to be more democratic than any other's.

(3) Stealth Authoritarianism

Traditional authoritarians usually deploy violence, disregarding laws and constitutions to eliminate checks on their power and perpetuate their rule. Their criminal justice system serves the ruling elite. It is overtly authoritarian. Even though the recent reform in Korea has an authoritarian hue, it is too much to say that it falls into this category.

The authoritarian color of the reform is somewhat new. If it presents a new form of authoritarian policing, is it a work of neo-authoritarianism? The term "neo-authoritarianism" was first used by Petracca and Mong[91] in reference to the political thought of Deng's modernizing China in the 1980s. This line of thought was professed by a reformist school that observed the negative correlation between authoritarianism and the rapid economic development in Taiwan, South Korea, and Singapore. They sought eventual democratization as an outcome of successful authoritarian capitalist modernization.[92] The characteristics of neo-authoritarianism are: (i) the economy is capitalistic and liberal; (ii) the state owns much of the means of production and participates in the capitalist economy through decentralized profit-oriented firms; (iii) civil and public institutions are tightly regulated or controlled by the state; (iv) the ruling elite maintain a network of technocratic experts; and (v) the ruling elite sustain their hegemony by mobilizing consent for the ideology of civilizational difference rooted in their group identity. Comparing these characteristics with the risks and problems of the reform above (cf. B), the reform is different from neo-authoritarianism in the sense that it has little to do with economic develop-

91) Mark P. Petracca & Mong Xiong, *The Concept of Chinese Neo-Authoritarianism: An Exploration and Democratic Critique*, 30-11 Asian Survey 1099-17 (1990).

92) Daniel Goh, *The Rise of Neo-Authoritarianism: Political Economy and Culture in the Trajectory of Singaporean Capitalism* 45 (Ctr. for Rsch. on Soc. Org. Working Paper Ser. No. 591, 2002).

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ment.[93] However, it shares some characteristics such as (iii) and (v).

Neo-authoritarianism has several offshoots, one of which can be found in liberal countries, where, combined with populism, the government does what it wants with its enthusiastic supporters on its back. It tends to take advantage of political divisions rather than national integration. Engaging in demagoguery, these neo-authoritarians often call opponents evil and attack them. The banner of justice and sweet words cover the eyes of people, which makes them blind to the authoritarian policing before their eyes. This unseen authoritarianism is smarter than ever and can be found everywhere, including in most democratic countries. Traditional authoritarianism is unlikely to survive in modern democratic countries, but this unseen or covert authoritarianism is not impossible. After the end of the Cold War, some authoritarian states arguably used nominally democratic institutions in order to maintain power and legitimacy.[94]

One commentator has proposed the term "stealth authoritarianism."[95] According to him, stealth authoritarianism serves as a way to protect and entrench power when direct oppression is not viable.[96] Stealth authoritarian practices allow incumbents to retain their seats even when the political preference of the electorate changes, undermining a core component of democracy: multiparty elections[97] and alterations in government power.[98] Stealth authoritarianism differs from traditional authoritarianism in many aspects, including: (i) that incumbent politicians sue journalists or media outlets for libel, instead of jailing or shutting them down; (ii) that they prosecute political opponents for violations of existing criminal laws, rather than imprison them without due process; (iii) that they employ seemingly legitimate and neutral electoral laws to create systematic advantages for themselves and raise the costs to the opposition of dethroning them; (iv) that they rely on judicial review, not as a check on their power, but to

93) *Id*. at 47.

94) Brancati, *supra* note 65, at 314.

95) *See* Ozan O. Varol, *Stealth Authoritarianism*, 100 Iowa L. Rev. 1673, 1678 (2015).

96) *Id*.

97) Leah Gilbert & Payam Mohseni, *Beyond Authoritarianism: The Conceptualization of Hybrid Regimes*, 46 Stud. Comp. Int'l Dev. 270, 271 (2011) (noting that "multiparty election is one of the centerpieces of democracy").

98) Varol, *supra* note 95, at 1679.

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consolidate power; (v) that they frequently enact democratic reforms and invoke rule-of-law rhetoric in order to deflect attention from anti-democratic practices.

It is astonishing to find that these properties of stealth authoritarianism might be well served by the recent reform in Korea, which will predictably strengthen the political elite, weaken the opposition, and insulate incumbents from meaningful challenges.

(4) Socialism

The lifelong history of the current group of elites bears a tint of socialism. Many of them lived their young lives under a military authoritarian regime. Any intellectual at that time could scarcely help falling into socialism or communism at least once. The miserable lives of laborers and the poor brought fire to the hearts of young intellectuals. They naturally came to recognize the dark side of capitalism and imperialism. They have fought for liberty and democracy. They have fought against the authoritarian government. They filled their hearts with justice. Sometimes they were jailed, but it was seen as a kind of trophy since they were there because they fought for justice. Proud of their fight for justice, they have a strong sense of moral superiority. They wanted to change society. Those who resisted the change were regarded as evil. This mindset might have made them who they are today. They pursue an equal society as an ideal goal and often close their eyes to due process. Socialism, while pursuing social justice, is prone to authoritarianism.

(5) Uncomfortable Truth

Underneath the recent reform of the Korean criminal justice system, shadows of socialism and stealth authoritarianism are looming, masked by democracy. This combination of forces might be called *socialistic stealth authoritarianism*, and it can be said that the reform imparts a tinge of *socialistic stealth authoritarian policing* on the Korean criminal justice system.

IV. Conclusion

Generally speaking, the Korean criminal justice system has developed

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from authoritarian policing to democratic policing. The battlefield so far has been dominated by conflicts between investigatory powers and defendants. Under the banner of law and order, the procedural rights of defendants have often been disregarded. With the democratization of society, Koreans opened their eyes widely to human rights. Practical battles over the criminal justice system have redirected substantial powers from investigators to the judiciary.

Recently, a reform of the criminal justice system was made. In contrast to its democratic pretext, the reform seems to take a kind of authoritarian approach to policing: *socialistic stealth authoritarian policing*. This is quite contrary to the desirable trend the criminal justice system had been following until now; it is a return to the past. I prefer to hope that my analysis is wrong and that the road Koreans have walked so far has not been altered by the recent reform.

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