The Basic Features of the First Korean Sentencing Guidelines

Similar to other countries, the Republic of Korea has encountered problems in sentencing such as leniency, disparity, and instances where sentencing was not based on clear and sound reasoning. Historically, judges have exercised much discretion in sentencing, especially in dispositional decisions. Although judges do not have the authority to grant a parole release and most defendants serve out most of their sentences (usually 85 percent or more), the comparatively broad nature of statutory sentencing ranges of major crimes allows for considerable discretion. The system in which all judges are appointed as career judges has drawn criticism in its failure to reflect common sense in sentencing. More specifically, leniency shown in sentencing cases involving white collar crimes committed by CEOs of major conglomerates, bribery, and sex offenses have all contributed to growing public distrust of the criminal justice system.

Through diligent comparative research, the Commission has tried to ascertain the most appropriate sentencing guidelines scheme. Heated debates have raged regarding this issue, with the majority of prosecutors, including two serving as commissioners, arguing for more comprehensive guidelines in order to avoid future problems and improve their effectiveness. Finally, in July 2008, the Commission decided on a gradual approach modeled after the U.K. system rather than the more comprehensive grid model. Therefore, the first guidelines encompass only seven crime categories, including murder, rape, robbery, and perjury.

Although the guidelines have drawbacks, they are an important first step in Korean sentencing reform. Because sentencing reform matters are so broad and of such vital importance, as well as to some extent universal, I believe that sharing insights in these areas with other countries is necessary.

I. Historical Background of Korean Sentencing Reform

In August 2003, the President of the Republic of Korea and the Chief Justice of the Supreme Court agreed to establish the Judicial Reform Commission (JRC) to instigate general reform of the criminal justice system and thereby enhance public trust in the system. Some salient features included the introduction of the merits of adversarial procedure, lay participation in the criminal justice system, and the reduction of unwarranted disparities in sentencing. In 2004, JRC proposals included necessary reform in sentencing and resulted in the establishment of the Presidential Commission for Judicial Reform (PCJR) in December 2004.

Subsequently, to address the problems in sentencing, the PCJR recommended establishing a sentencing commission and sent the proposal to the National Assembly. Although there was strong argument for establishing the commission as an independent body outside the judiciary, the National Assembly nonetheless decided to establish the sentencing commission within the judiciary. The National Assembly introduced the sentencing commission through a revision of the Court Organization Act. As of May 2, 2007, in accordance with a requirement that it promulgate the first guidelines within two years of the enforcement date of the Act, the new Korean Sentencing Commission began to set up the sentencing guidelines.

II. Some Sentencing Problems in Korea

A. Leniency

Among the Korean public, there is a strong feeling that sentencing tends to be too lenient. In the Commission’s 2007 survey, 59.2 percent of those surveyed (1,000 people) reported that they believe leniency exists in sentencing. That percentage rose to 72.5 in specialist groups (2,294 people) made up of judges, prosecutors, defense attorneys, and criminal law professors. In many cases, judges set sentences below the minimum prison term. For example, the minimum statutory prison term for a typical rape is at least three years’ imprisonment. But according to the Korean penal code, in the presence of extenuating circumstances in any case, judges have the discretion to lower the sentence. In these situations, pursuant to Penal Code Article 55, the prison term shall typically be reduced by one half. This type of general mitigation article exists in both Korea and Japan, giving judges substantial discretion in sentencing.

Judges also have significant discretion in dispositional decisions. In cases where a sentence of imprisonment does not exceed three years and there are mitigating circumstances, the judge can suspend the execution of sentence (some restrictions apply in cases where criminals have a serious criminal history). Concerning the abovementioned
what is known as there are significant unwarranted disparities.4
cent of the public and 63.3 percent of specialist groups
exist between judges. According to the survey, 73.9 per-
disparities and disparities between judges, the Commis-
Although few official statistics are available on regional
ences up to imposing a suspended sentence even in certain
serious cases.
article 55, statistics show that judges use their power, in the
presence of extenuating circumstances, to mitigate sen-
tences up to imposing a suspended sentence even in certain
serious cases.

B. Disparity

Although few official statistics are available on regional
disparities and disparities between judges, the Commis-

C. The So-Called Jeon-kwan-ye-woo Phenomenon

A unique phenomenon in Korea in regard to sentencing is
what is known as Jeon-kwan-ye-woo. The term Jeon-kwan
means former judges and prosecutors and ye-woo means special consideration given to a select few. Therefore, Jeon-kwan-ye-woo in effect means that incumbent judges and prosecutors tend to give special consideration to cases that are handled by Jeon-kwan. Although most judges and pros-
cutors strongly deny the existence of this type of practice,
many believe this phenomenon is a reality. Hence, clients tend to engage the services of legal counsel who were formerly judges and prosecutors. This phenomenon is one of the reasons for the Korean public’s deep-rooted distrust in the criminal justice system.

This phenomenon may be closely related to the selection
and training process of judges and prosecutors in Korea. Everyone who passes the National Bar Exam in Korea enters a two-year training program at the Judicial Research
and Training Institute (JRTI) operated by the Supreme
Court. After successful completion of this program, gradu-
ates are certified as legal professionals; of these, a small
percentage are appointed by the President or Chief Justice
to the position of prosecutor or judge. Others can elect
to become defense lawyers or pursue another legal profession.
In other words, every lawyer is an alumnus of the JRTI,
making up a relatively elite and somewhat closely knit body,
due to the small number of applicants who pass the
National Bar Exam. Up until only a few years ago the cutoff
was 300 applicants; the system has since been modified to
pass about 1,000 annually. Moreover, most judges and pros-
cutors tend to resign their positions in their 40s or 50s
to work as private attorneys. Therefore, people believe that
the Jeon-kwan might have strong ties to incumbent judges
and prosecutors even after their resignation, increasing the
possibility of favorable outcomes in their cases.

In 2008, the National Assembly passed the Establish-
ment and Management of the Law School Act, thereby
introducing the American-style law school system to
Korea. The country currently has twenty-five accredited
law schools that began operation in 2009; however, the
National Bar Exam system will remain in effect until 2017.
In 2012, law school graduates will take a new form of the
Bar and those who pass the new Bar will not have to go
through the JRTI program. This law school system may
eliminate the Jeon-kwan-ye-woo phenomenon. However,
some National Assembly representatives believe that
unless the system of appointing judges straight out of law
school or the JRTI is abolished, the phenomenon may
persist. Thus, they have proposed a bill that will require
lawyers to have a minimum of fifteen years of legal
experience before they can be appointed as judges.

III. The Creation of the Korean Sentencing
Commission

A. Revision of the Court Organization Act

In December 2006, the Korean National Assembly revised
the Court Organization Act (COA) in order to establish the
Sentencing Commission. This revision took effect on April
27, 2007 (translations of the twelve related articles can be
found in the appendix at the end of this article). Although
the Commission is located in the judiciary, it is charged
with independently performing its function within its
authority.1 The COA has delegated to the Commission
many important roles, including setting and revising the
sentencing guidelines and studying sentencing policy. The
Commission’s goal is to ensure fair and objective sentenc-
ing in which the people can be confident, taking into
account the sound common sense of the people.

B. Main Contents of the Revision

1. Establishment of the Sentencing Commission The
Sentencing Commission shall be established in the
Supreme Court in order to ensure fair and objective sen-
tencing that the people can trust, taking into account the
sound common sense of the people.6 However, the Com-
mission shall independently perform the work within its
authority.7 Therefore, even though the Commission is
within the judiciary, it is for the most part an independent
body and is not under the control of the Chief Justice.

2. Composition of the Commission8 The Commission
has thirteen commissioners, including the chairperson and
one standing commissioner, who serve two-year
terms. The Chief Justice appoints all commissioners,
including the chair. According to the COA, the Committee
comprises one chairperson, four judges, two public prose-
cutors (who are recommended by the Minister of Justice),
two defense attorneys (who are recommended by the pres-
ident of the Korean Bar Association), two law professors,
and two people with expertise and experience in this area.
The commissioners can be reappointed. In light of the fact
that the Chief Justice has sole authority in appointing the
commissioners and that judges have four seats in the
Commission, it may be fair to say that the composition of
the Commission is somewhat judiciary dominated. The
current chair, Kyu-hong Lee, is also a former Justice.

3. Setting of Sentencing Guidelines9 The commission
shall set or revise specific and objective sentencing
guidelines in order to help judges decide on rational sentencing. To this end, the Commission shall comply with the following principles:

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

2. The general prevention of crimes, the prevention of recidivism of the defendants, and their rehabilitation shall be taken into consideration.

3. As long as there is no difference between the same kind of crimes and similar kind of crimes in the sentencing factors, they shall not be treated disparately in their sentencing.

4. The defendants shall not be discriminated in sentencing on the grounds of their nationalities, religions, consciences, social status, and so forth.

The COA also illustrates matters the Commission shall take into account. They are as follows:

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

4. The Effect of Sentencing Guidelines The sentencing guidelines shall not have binding power over judges. Judges shall respect the sentencing guidelines when deciding on the type of punishment and in determining the length of the sentence. If the judge decides to depart from the guidelines, he or she shall state the reasons in writing.

5. Assistant Bodies The Commission has two assistant bodies: the expert counsel’s group and the general secretariat body. The former is composed of less than fifteen members who are judges, prosecutors, defense lawyers, and professors, as well as one chief special adviser who is a judge. The expert counsel’s main role is to draft the sentencing guidelines and to do necessary research on a part-time basis. The groups are divided into three divisions: the General Management Team, Team 1, and Team 2.

The general secretariat body helps the Commission perform its duties and provides working-level assistance. The secretariat is headed by the Chief of the Secretariat Office (who is currently a judge) and has three divisions: Planning & Administration, Information Research, and Statistics & Analysis. Figure 1 illustrates the organization of the Commission.

6. Publication of the Annual Report The Commission shall publish an annual report, in which the results of the relevant year are recorded along with its agenda for the following year. This annual report shall be presented to the National Assembly.

IV. Main features of the Korean Sentencing Guidelines

A. Resolution of the Korean Sentencing Commission Regarding the Basic Framework of the Sentencing Guidelines

The content of the resolution is as follows:

- The Commission is to establish multiple sentencing guidelines that respectively apply to certain types of crimes.

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Figure 1

The Organization of the Korean Sentencing Commission

- Chairperson
- Commissioners (13)
- Expert Counsel
- General Secretariat
- Planning & Administration
- Information Research
- Statistics & Analysis

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

B. Adopting the Gradual Approach and Narrative Model in Making Guidelines
The Korean Sentencing Commission resolved to pass the first sentencing guidelines on April 24, 2009. The new guidelines became effective on July 1, 2009, through promulgating periods. As previously mentioned, the first sentencing guidelines encompass only seven crime categories. The sentencing guidelines for each of the seven crimes are described on separate sentencing range sheets. After many thorough debates, the Commission adopted the gradual approach modeled after the Sentencing Council in the United Kingdom.

In my opinion, a comprehensive guidelines scheme may be a more efficient way to achieve these sentencing goals, because the gradual approach will require an extensive period of time to complete the guidelines. In addition, partial guidelines, as professor Andrew Ashworth has noted, have some drawbacks. For example, it is very difficult to design comprehensive correctional policies and to rank the major offenses.

The Commission compared the narrative guidelines system with the grid guidelines system to determine which would better serve the Korean sentencing guidelines. One of the major issues in designing the guidelines is whether to calculate each selected sentencing factor. Some commissioners argued that to achieve more transparency it is necessary to calculate the gravity of each respective crime category (e.g., sexual crime, property crime, bribery).

Although the Commission refused the mathematical way of weighting the factors, the Commission selected sentencing factors in each crime category and subdivided these into two groups according to their gravity. The first group is called special sentencing factors and is subdivided into special aggravating factor and special mitigating factor. The other group is called general sentencing factors and is also divided into two subcategories. The special sentencing factors receive more weight than the general factors. Differences will be detailed subsequently.

C. Advisory Sentencing Guidelines
As mentioned previously, application of the sentencing guidelines is not mandatory but must be respected by the judges in rendering their decisions. The reasons for departing from the guidelines must be provided in the decisions.

Either the prosecutor or the defendant can appeal the sentence in all cases. Departing from the guidelines should be of concern to the judge(s) at the district court level because either the prosecutor or the defendant can in all cases appeal a sentence to a higher court. In the case of an appeal, the appeal court may examine the appropriateness of the departure.

D. Applied to Adult Criminal Cases Tried in Typical Procedure
The new sentencing guidelines in Korea apply only to adults who are 20 years old or older at the time of the indictment and are applied only to cases in typical procedure, one of two kinds of criminal procedure in Korea. In the other kind, summary procedure, the maximum penalty is a fine and the guidelines are not applied. In principle, the prosecutors have authority to decide whether to handle a case through summary procedure; a major portion of cases are resolved in this manner.

To date, the Korean justice system has no guidelines for the death penalty in certain serious crimes. Sentencing the death penalty is entirely at each judge’s discretion.

E. Reduce the Influence of Criminal History Factors
As in most U.S. jurisdictions’ guidelines, including the federal guidelines, criminal history is used as the horizontal axis on the sentencing grids. Criminal history thus has a significant effect on the sentencing factors.

In drafting the new guidelines in Korea, expert counsels have engaged in considerable debate regarding whether criminal records should be treated as an important factor. One adviser asserted that in principle the Commission should not consider the criminal history of the offender as a sentencing factor because it is not directly related to the crime in question. He argued that deciding on a more severe punishment on the basis of crime committed in the past would go against the principle that the offender should be punished on the basis of the criminal act itself. However, most advisers agree that criminal records should always be considered in the
guidelines; furthermore the COA itself states that the judge should take criminal history into consideration.

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

F. Mainly Descriptive Sentencing Ranges

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

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

G. Lack of Interaction Between the Commission and the National Assembly

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

V. The Process of Applying Sentencing Guidelines

A. The Process to Decide on a Specific Sentencing Range

As illustrated in Figure 2, the application process consists of four steps. The first step is to decide the type within each crime category. The second step is to apply the appropriate sentencing range and the third step is to determine the actual sentence term. The last step is to decide whether to suspend the sentence.

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

Each type within a crime category has basically three ranges—the mitigated range, the basic range, and the aggravated range. This categorization of murder cases is decided according to the motive. If the motive for murder is eligible for lesser sentences in regard to the circumstances, the case falls into the first type. If the motive is a censurable one, the case falls into the third type. In other words, in murder categories, the motive is a type-deciding factor. Figure 3 shows the three sentencing ranges for each type.

Once the type is decided, the next step is to verify the existence of selected sentencing factors. See Figure 4 for sentencing factors for murder.

Initially, the judge decides the specific sentencing range after considering the special sentencing factors. If
there are multiple special sentencing factors, the evaluation rules are as follows:

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

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

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

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

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

B. Dispositional Decision

The Commission promulgated the dispositional guidelines for each crime category, separating the factors into important and general categories (see Figure 5). If there exist two negative important factors or the important negative factors exceed the positive factors by more than two, in principle, detention (incarceration) may be recommended. In an adverse situation, suspension of detention is recommended. But even in these situations, if there are many general factors, the judge has the discretion to impose imprisonment after considering the situation as a whole.
C. Multiple Offender Guidelines

Korean Penal Code (KPC) articles 37–40 show the basic rules on multiple offenses. Article 38 shows the details of how to apply multiple offender rules when multiples offenses are adjudicated simultaneously. Under the KPC, multiple offender rules are different from the multiple offender rules of common law jurisdictions: The concepts of concurrent execution and consecutive execution do not exist. Judges in Korea decide on a sentence following the multiple offense rules and have no discretion in selecting to impose concurrent or consecutive execution. In addition, according to the KPC, imprisonment or imprisonment with prison labor shall be either for life or for a limited term, and the limited term shall be from one month to fifteen years. This limited term can be extended to twenty-five years. Therefore, in even the most serious cases, if the judge selects imprisonment for the crime, the term cannot exceed the twenty-five-year limit in any aggravated situation.

According to the new sentencing guidelines, if the defendant receives multiple convictions and if sentencing guidelines exist for each conviction, then multiple offender guidelines can be applied. The process in which these guidelines are applied differs from that of the KPC. First, in order to apply multiple offender guidelines, the judge must decide on the principal offense, which is the most serious offense according to the statute. But in case the sentencing guidelines range of the more serious offense (according to the statute regulations) is lower than the less serious offense, the latter then becomes the principal offense.

According to multiple offender rules, the guideline considers only three respective serious convictions. If an offender has two convictions, half of the maximum of the lesser serious conviction will be added to the maximum of the principal offense. If an offender has three or more convictions, half of the maximum of the second serious conviction and one third of the third serious conviction will be added to the maximum range of the principal offense. For example:

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

Three or more convictions: Assume that the sentencing guidelines for murder is 8–11 years, the sentencing range for rape cases is 3–6 years, and the range for perjury is 10 months–3 years. The principal offense is murder. According to the multiple guidelines, the final sentencing range will be 8–15 years, because half of the maximum for rape (3 years = 1/2 × 6 years) and one third of the maximum for perjury (1 year = 1/3 × 3 years) shall be added to the maximum for murder (11 years).

If an offender has more than three convictions, only up to three serious convictions shall be considered.

VI. Some Remaining (Unsettled) Issues

A. The Quest for an Efficient Monitoring System

In order to efficiently monitor compliance with the guidelines, some special advisers including this author proposed the use of a unified worksheet. I suggested that the Commission design the worksheets for use by the courts, the prosecutor’s office, and the police. I also argued that the Commission should develop a database system to electronically log any sentencing information. This suggestion has not
been accepted; therefore, the judiciary and the prosecutor’s office will have to develop their own monitoring system, an option that will most likely result in much inefficiency. In my view, this topic will require further discussion.

In 2007, the Sentencing Reform Task Force of the Supreme Public Prosecutor’s Office (SPPO) developed the Prosecutorial Guidelines System (PGS). As the team leader, I proposed that prosecutors input various sentencing factors through the Intranet and search the results through the accumulated database. Because prosecutors recommend specific sentences to judges for careful consideration in all cases, it is necessary for the SPPO to provide general guidelines for prosecutors. Although it is still a pilot program with sentencing information accumulated for only a small percentage of all cases, the PGS can provide general information regarding sentencing. The team developed input factors in more than thirty crime categories in addition to search terms and conditions. Using these search terms and conditions, prosecutors can refer to specific sentencing trends. These terms and conditions include the crime, the amount of property damage, the amount of bodily harm, and the district where the crime was committed. Users can also gain access to other information, such as the ratio of imprisonment to non-imprisonment and, in the case of imprisonment, average and median prison terms or specific terms.

B. Who Should Investigate the Sentencing Factors and Prepare the Pre-Sentence Report?

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

One feature of the Korean criminal justice system is that it does not differentiate between fact finding procedure and sentencing procedure. That is why during trial procedure each party (prosecutors and the accused) presents not only evidence related to a guilty or not-guilty decision but also materials related to sentencing.

The Korean judiciary’s position about this issue is that court officers (not probation officers) should prepare the pre-sentencing reports for the judges. Until now, no such court officers have been appointed to perform this task, so the Supreme Court has taken it upon itself to explain to some National Assembly (or Parliament) members the necessity of these new appointments. In response, a bill has been suggested to the law commission of the National Assembly stipulating that the newly appointed sentencing investigating officers can investigate sentencing factors in some criminal cases.

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

The Korean Probation Organization is assigned to the Ministry of Justice but has operated independently from the prosecution. Nevertheless, the judiciary has argued that because the organization is a branch of the Ministry, its closeness to the prosecution renders the neutrality of the pre-sentencing reports questionable.

C. Alleviating the Judiciary-Dominated Atmosphere

Although the composition of the commissioners and special advisers is diverse, the structure of the Commission is somewhat judiciary dominated: the Chief Justice appoints all commissioners, the chair is a former Justice, the Chief Special Adviser and the Chief of the Secretariat are both incumbent judges, and so forth. Because this factor might undermine the neutrality of the commission, some commissioners and special advisers have requested that judicial influence in the Commission be reduced.

VII. Conclusion

According to the Court Administrative Office of the Korean Supreme Court, from July 1 to the end of 2009, a total of 2,920 cases have fallen under the first sentencing guidelines. The compliance rate of judges was 89 percent and the disparity rate reportedly has been reduced. However, detailed statistics about regional and inter-judge disparity have not been made available. The courts may keep this information for their internal records, but they are reluctant to disclose it because they believe that most disparities are not serious enough to have caused any problems and, if disparities do occur, think they can be fully defended. Furthermore, the courts are concerned that members of the general public may form incorrect or faulty opinions if this information were to be made available. Neither the Commission nor prosecutors can fully analyze these disparities because judges do not provide sentencing worksheets detailing the sentencing process.

The second Commission is considering the promulgation of individual guidelines during its term in respect to fraud, theft, forgery, kidnapping, drug crimes, obstruction of performance of official duties, and food-related crimes that result in serious harm to the public.

The Korean legal system is based on the Continental legal system. To my knowledge, Korea is the first country based on this type of legal system that has elected to achieve sentencing reform through a sentencing commission. In my view, our efforts in Korea in this regard may be of relevance to European countries. After many heated debates, the Korean Sentencing Commission decided to follow the narrative and gradual approach in designing the sentencing guidelines. Many unsettled issues remain in deciding what measures are efficient and appropriate in accomplishing sentencing goals. The Korean Sentencing Commission has taken the first step toward more transparent and objective sentencing. Sentencing reform issues
have become universal in the criminal justice system. Sharing insights through international cooperation is not only necessary but also crucial to successful reform.

Appendix

**English Translation of Section 8 of the Court Organization Act**

**Article 8-2 (Establishment of Sentencing Commission)**

(i) The Sentencing Commission (hereinafter referred to as the Commission) shall be established in the Supreme Court in order to ensure fair and objective sentencing in which the people can be confident that it takes into account the sound common sense of the people.

(ii) The Commission may set and change the sentencing guidelines and study and deliberate on sentencing policy.

(iii) The Commission shall independently perform the work under its authority.

**Article 8-3 (Composition of Commission)**

(i) The Commission shall be composed of 13 members including one chairman and a standing member from among the members not serving as chairman.

(ii) The chairman shall be appointed or commissioned by the Chief Justice from among persons who have held the positions falling under one of the following for not less than 15 years:

1. Judges, prosecutors and attorneys-at-law;
2. Persons who have been in charge of legal affairs while working for the State, local governments, national and public enterprises, government-invested institutions provided for in the provisions of Article 2 (1) of the Framework Act on the Management of Government-Invested Institutions and other corporations; and
3. Professors at the assistant level or higher who have taught law in accredited universities.

(iii) The Chief Justice shall appoint as members of the Commission according to the following distribution:

1. Four judges;
2. Two prosecutors who are recommended by the Minister of Justice;
3. Two attorneys-at-law who are recommended by the President of the Korea Bar Association;
4. Two professors of law; and
5. Two persons of profound learning and experience.

(iv) The terms of office for the chairman and the members shall be two years and may be reappointed or recommissioned.

(v) When any member is deemed unable to perform his duty for inevitable reasons or when any member is deemed unfit to maintain his qualification as a member on the grounds of violating his duty, they may be dismissed by the Chief Justice. Furthermore, if any member resigns from his or her position as judge or prosecutor, he shall be dismissed from the Commission.

**Article 8-4 (Duties of Chairman)**

(i) The chairman shall represent the Commission and exercise overall control of the work of the Commission.

(ii) Where the chairman is unable to perform his duties on the grounds of inevitability, any standing member or any member who has been previously selected by the chairman shall act on behalf of the chairman in performing the latter’s duties.

**Article 8-5 (Meetings of Commission)**

(i) The commission shall convene the Commission’s meetings and preside over the meetings.

(ii) The Commission shall resolve with the consent of a majority of its registered members.

**Article 8-6 (Establishment of Sentencing Guidelines)**

(i) The Commission shall set or change specific and objective sentencing guidelines in assisting judges to render rational sentencing decisions.

(ii) The Commission shall comply with the principles falling under each of the following subparagraphs when it sets or changes the sentencing guidelines:

1. The quality of crimes, the circumstances of crimes, and the extent of the responsibilities of defendants shall be reflected;
2. The general prevention of crimes, the prevention recidivism of the offenders and their rehabilitation shall be taken consideration;
3. As long as there is no difference between the same kind of crimes and the similar kind of crimes in the sentencing factors, they shall not be differently handled in the sentencing of them; and
4. Sentencing shall not discriminate against offenders due to their nationality, religion, conscience, social status, etc.

(iii) The Commission shall take into account the matters falling under each of the following subcategories when it sets and changes the sentencing guidelines:

1. The type and the statutory punishment of crimes;
2. Circumstances that may aggravate or mitigate the seriousness of crimes;
3. The age, character and conduct, intelligence and environment of defendants;
4. The relationship to the victim(s);
5. The motives, means and results of the crime;
6. The circumstances after crime;
7. Criminal record; and
8. Other factors relevant to fair and rational sentencing.
(4) The Commission shall disclose the sentencing guidelines.

Article 81-7 (Effect, etc. of Sentencing Guidelines)
(1) Judges shall respect the sentencing guidelines when deciding on the type of punishment and length of punishment; the sentencing guidelines shall not be legally binding.

(2) When there is a departure of the sentencing guidelines, the court shall state reasons for departure in writing: Provided, that the same shall not apply to a case where the court hands down any judgment according to summary procedure or fast-track judgment.

Article 81-8 (Cooperation between Agencies Concerned)
(1) The Commission may, if it is deemed necessary, enlist the cooperation and opinions of public officials concerned or experts. The Commission can also request state organs, research institutes and organizations, and experts to submit data and their opinions.

(a) The Commission may, if it is deemed necessary to perform its work, ask the heads of state organs concerned, research institutes and organizations, etc. to send public officials and employees under their charge.

(b) The Commission shall have a secretariat body assigned to help in its duties and provide working-level assistance.

Article 81-9 (Clerical Work Body)
The Commission shall have a secretariat body assigned to help in its duties and provide working-level assistance.

Article 81-10 (Publication of Annual Report)
The Commission shall publish its annual report, in which its accomplishments and agenda for the following year are detailed and shall present it to the National Assembly.

Article 81-11 (Confidential Obligation)
(1) The chairman of the Commission, the members of the Commission and the officers and employees of the secretariat body shall be prohibited from releasing confidential information while serving on the Commission as well as after resignation.

(2) The chairman and the members who are not public officials shall be regarded as public officials in the application of the penal provisions provided for in the Criminal Act and other Acts.

Article 81-12 (Delegation Provisions)
(1) Necessary matters concerning the organization of the Commission other than the matters that are not prescribed by this Act shall be prescribed by the rules of the Supreme Court.

(2) Necessary matters concerning the operation of the Commission other than the matters that are prescribed by this Act shall be prescribed by the resolution of the Commission.

ADDENDA <Act No. 8270, Jan. 26, 2007>
(1) (Enforcement Date) This Act shall enter into force three months after the date of its promulgation. Provision:

preparations for establishing the Committee may be made prior to the date on which this Act enters into force.

(a) (Time for Setting First Sentencing Guidelines) The Committee shall set the first sentencing guidelines provided for in the amended provisions of Article 81-6 within two years after the enforcement of this Act taking into account the people’s concerns and the frequency in the occurrence of crimes, etc.

Notes
1. Pursuant to the Penal Code article 72, the administrative authority exercise parole releases. The Parole Board is based in the Ministry of Justice.

2. The PCJR completed its activities in December 2006; details of its activities can be found at http://pcjr.pa.go.kr/about006.asp. Unfortunately, the documents are not provided in English.


4. Id. at 165.

5. COA art. 81-1, ¶ 3. The Web site for the Commission is http://www.scourt.go.kr/information/yang/desc/yang_01/index.html. Documents about the guidelines and Commission activities are provided there only in Korean.

6. COA art. 81-2, ¶ 1

7. COA art. 81-2, ¶ 3

8. COA art. 81-3

9. COA art. 81-6.

10. See COA art. 81-7.

11. COA art. 81-10.


13. Article 38 states as follows: paragraph 1

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

1. In the event punishment specified for the most severe crime is the death penalty or life imprisonment or imprisonment without prison labor for life, the punishment provided for the most severe crime shall be imposed;

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

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

paragraph 2

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


15. This version was originally translated by the Korean Legislation Research Institute and is not an official translation; I have made significant modifications to the translation.