

# THE MEASURE OF SECURITY IN KOREA

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## I . INTRODUCTION

Since Klein proposed the measure of security as one of the criminal sanctions in the end of 18 C, it has been developed and reformed in both practical and theoretical aspects. Nowadays it plays an important role in many countries, including Europe and U.S.A..<sup>2)</sup>

In Korea, the measure of security has been practiced through the several laws since the 1950's. Especially 'Social Safety Law(社會安全法)', in 1975 prescribes 'the measure of

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2) But the kinds of the measure of security are different, according to the countries. In Europe, including Germany, France, Austria, Italy, Swiss and Denmark, the Treatment in Custody has been developed, while the Treatment in Society has been developed in U.S.A.. For example, the Massnahme der Besserung und Sicherung of Germany is the case of the one and Probation and Parole of U.S.A. is the model of the other. It goes without saying that both have influenced each other till now.

safety' against the ideological criminals and 'Social Protection Law(社會保護法)」 in 1980 provides the several types of the measure of security against the habitual criminals and the repeated offenders. In addition to them, probation and parole were also put in practice by 'Protection and Surveillance Law(保護觀察法)」 in 1988. Therefore it is out of the question that the measure of security is the important part of the criminal sanctions in Korea nowadays.

This article is written for explaining all kinds of the measure of security in Korea and predicting the future trends of it. Hence the main subjects of this article are two ; one is about the historical development of the measure of security in Korea (Chap. 3) and the other is about the prospect of it in the future (Chap. 4). And also, before telling the main subjects, the exact definition of the measure of security is elucidated (Chap. 2).

## II. The Definition and Kinds of the Measure of Security

### 1. The Definition of the Measure of Security used in this Article

This article defines the measure of security as follows ; "the coercive measure that is constructed and practiced on the level of society for the purpose of repressing and preventing the crime, besides punishment." Therefore the elements of this definition are four ; (a) the purpose of it is repressing and preventing the crime, (b) it is constructed and practiced on the level of society, (c) it is different from the traditional punishment, (d) it is the coercive measure.

### 2. The Kinds of the Measure of Security that has been practiced in Korea

In Korea, there has been several measures, which can be named the above-mentioned measure of security. The list of them is as follows.<sup>3)</sup> They are in the order of time.

(a) 'The Measure of Protection' provided by 'Juvenile Law(少年法)」 (From 1975 To Now).

3) Strictly speaking, the conscription into the Corps of National Land Development(國土建設團) in 1961 and the training in Purification(三清教育隊) in 1980 are included in the abovementioned measure of security. But they are special cases, executed in the state of national emergency. Therefore they are not investigated in this paper.

(b) 'The Custody into the Prostitute Asylum' based on 'Antiprostitution Law(淪落行爲等防止法)', (From 1961 To Now).

(c) 'The Custody into the Vagrancy Asylum' based on the instructions of the Administration (From 1975 To Now).

(d) 'The Custody of Social Safety' provided by 'Social Safety Law(社會安全法)', (From 1975 To 1989).

(e) 'The Custody for Protection' provided by 'Social Protection Law(社會保護法)', (From 1980 To Now).

(f) 'The Custody for Medical Treatment' provided by 'Social Protection Law(社會保護法)', (From 1980 To Now).

(g) Probation and Parole ; there have been several laws, which provide probation and parole, for example, 'Social Protection Law(社會保護法)', (From 1980 To Now), 'Safety and Surveillance Law(保安觀察法)', (From 1989 To Now) and 'Protection and Surveillance Law(保護觀察法)', (From 1988 To Now).

### III. The Historical Development of the Measure of Security in Korea

#### 1. Prologue

There were several criminal sanctions similar to 'the measure of security' in Korea before independence from Japan. At the first, 'Chosun Reformatory Order(朝鮮感化令)', in 1923 endowed a governor-general with the right to confine the juvenile delinquent to the reformatory. Next, the prosecutor could inspect the person violating 'Public Peace Law(治安維持法)', in the society while suspending prosecution, based on 'the Instruction of the Measure of Suspension against the Political Criminal(思想犯人留保處分取扱規定)', in 1932.<sup>4)</sup> It is estimated that the one is the pioneer of the treatment in custody and the other is the seed of the treatment in society.

But I think that the measures of security being practiced in Korea after independence are influenced by ones of western countries more than ones before independence. Namely they are modelled on the measure of security of Germany or the probation and parole of

<sup>4)</sup>The instruction was amended in 1936 and its name was changed to [the Probation and Parole Instruction of Chosun Political Criminal(朝鮮思想犯保護觀察令)]

America. So I summarize the history of the measure of security, which has been practiced in Korea after independence.

## 2. Trend (1) -- The Enlargement of Objects --

### (1) The Juvenile delinquent, the Prostitute and the Vagrancy

The measure of security was imposed on the juvenile delinquent, the prostitute and the vagrancy in 1950's and 1960's. First [Juvenile Delinquency Law] in 1958 provided several types of the measure of security imposed on the juvenile delinquent. Namely it provided not only the treatment in custody, but also the treatment in society. Next, some prostitute asylums appeared in that period. The Ministry of Health and Social Affairs reported that there were nine prostitute asylums called 'The House of Sisters(姉妹院)' in 1953. They became lawful when [Antiprostitution Law] was legislated in 1961. Lastly, vagrancy asylums were prosperous in that period. By the official statistics, it was reported that there were forty-three Houses from 1955 to 1956.

### (2) The Ideological Criminal

Ideological criminals became the target of the measure of security when [Social Safety Law] was enacted in 1975. The enactment of the law has three important meanings in the history of the measure of security in Korea. First, it was legislated after Constitution 1972 had provided the article to admit the measure of security. That is to say that the law was influenced and backed by Constitution 1972. Therefore it was maintained that it had the constitutional justification. Second, it was equipped with the western's theory. Namely, it modelled the western institution in the name and form at least, though the reality didn't agree with the name. Third, the object of the law had been different from the others in nature. Namely the ideological criminal has his own justification, though the juvenile delinquent, the prostitute and the vagrancy can not justify himself at any way. So the one has struggled against the dominant class of society, but the others haven't been able to do. Therefore it is estimated that the measure of security was afforded the basic condition and background of the continuing development through including ideological criminals into it's object in spite of strong resistance.

## (3) The Common Criminal and the Madman

It is of no doubt that "Social Protection Law" in 1980 is the most similar to the western law of the measure of security. Its objects consist of two groups : one is the common criminal and the other is the madman. Namely It imposes the measure of security upon the habitual or repeated criminal and the criminal who is judged insane. What can be said with reference to the objects of the law are two. First, the measure of security can be admitted as the independent and general criminal sanction, including common criminals into its object. Second, it is corresponding to the contents of "Criminal Law" that "Social Protection Law" attacks not only common criminals but also madmen.<sup>5)</sup> We need to notice that "Criminal Law" divides its objects into two groups as "Social Protection Law" does. Namely the anti-social behaviors attacked by "Criminal Law" are crime and madness. Therefore the attitude of "Social Protection Law" corresponds to the attitude of "Criminal Law" in the whole. That means that the measure of security holds a position as one axis of the criminal sanction system, the another part of which is punishment.

## (4) Evaluation

Summarizing the above-mentioned facts, we find that the objects of the measure of [ table 1 ]

1950's	1960's	1970's	1980's
Juvenile Delinquency		Ideological Criminal	Common Criminal
Prostitute			
Vagrancy			Madman

security have been extended as [table 1] follows.

From [table 1], we can set up several statements about the order of the extension as

5) [Drug Law] in 1957 and [Mental Pharmaceuticals Law] in 1979 provided the custody of drug addict. But their objects were only drug addicts and they were seldom executed. Therefore it is admitted that the measure of security for madmen was started in Korea in 1980.

follows.

(a) The measure of security functioned in the brim of social conflict at first but its stage has been extended to the core of it gradually. In 1950's and 1960's, the measure of security was imposed upon the reserve group of social resistance, for example, the juvenile delinquent, the prostitute and the vagrancy. After that, the special group of social resistance - the ideological criminal - was included into the object of the measure of security in 1970's. At last the most typical and representative group of antisociety - the criminal and the madman - became the object of the measure of security in 1980's.

(b) The order of extension is from weak group to strong group. 'Weak' group means the group that has few weapons for defending itself or is liable to be criticized from the main group of society. In my opinion, the juvenile delinquent, the prostitute and the vagrancy are hardly equipped with the means of vindicating themselves. And then the social consensus of criticizing the ideological counterforce is made up very easily because of the cultural atmosphere of anti-Communism. Compared to that, the common criminal has its own striking power to the main group of society, even though the degree of being criticized is high. So far as the madman is concerned, we don't criticize him but sympathize with or avoid him, even though he has no ability to exculpating himself.

### 3. Trend (2)-The Introduction of the Treatment in Society -

#### (1) The Treatment in Custody

The measure of security in Korea began with the form of the treatment in custody at first. The custody into the juvenile detention home, the custody into the prostitute asylum, the custody into the vagrancy asylum and the custody for social safety are all the cases. And also this attitude of legislation was accepted in [Social Protection Law] in 1980. Namely the custody for protection and the custody for treatment are the kinds of the treatment in custody.

#### (2) The Treatment in Society for the Juvenile Delinquent

##### (2-1) Probation and Parole of [Juvenile Delinquency Law]

[Juvenile Delinquency Law] in 1963 is the first law, into which the treatment in society

was introduced. The law is the amended law of [Juvenile Delinquency Law] in 1958 by The Council For National Rebuilding(國家再建最高會議), which played the role as The National Assembly after the Revolution in 1961.<sup>6)</sup> The law provided six kinds of the measure of security and the sixth was 'Probation and Parole'.

But it was usually used together with the first measure, which is 'Consignment to Parents'. Therefore it is estimated that it is not the full-scale treatment in society but the measure in the first stage, because the implementation of it was not the duty of the official but the work of the civilian.

#### (2-2) Suspension of Indictment for Proper Guidance(善導條件附 起訴猶豫)

The public prosecutor keeps the right of indictment exclusively to himself in Korea. And also it is left to his discretion. Suspension of Indictment for Proper Guidance was formed under such system. Suspension of Indictment for Proper Guidance is similar to probation. But it is imposed by not the judge but the public prosecutor. Namely it is the probation imposed by the public prosecutor. It was executed experimentally in Gwangju in 1978 and extended to the whole country, after the 88th instruction of Ministry of Justice in 1981 - 'Indicator for Proper Guidance of Juvenile Delinquent'.

#### (2-3) Probation and Parole in [Protection and Surveillance Law]

As [Protection and Surveillance Law] was legislated in 1988, probation and parole were implemented in full-scale. The law provided probation and parole for juvenile delinquent and the institute of probation and parole was established for executing protection and surveillance.

[Juvenile Delinquency Law] was also amended under the influence of [Protection and Surveillance Law]. Namely [Juvenile Delinquency Law] provided two kinds of probation and parole. One is short-term and the other is general.

#### (3) The Treatment in Society for Adult Criminals

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6) [Juvenile Delinquency Law] has passed through three stages as follows ; (a) the first stage -- the law in 1958 provided only the Treatment in Custody and Probation or Parole was not included in the law. (b) the second stage -- the law in 1963 and the law in 1977 provided Probation and Parole, but it was seldom executed. (c) the third stage -- the law in 1988 was the amended law, corresponding to legislating [Protection and Surveillance Law] in 1988.

### (3-1) Probation and Parole of [Social Safety Law] and [Safety and Surveillance Law]

[Social Safety Law] in 1975 provided not only the custody for safety but also probation and parole. But the law was administered only centering around the one and the other was seldom imposed. That is, probation and parole have little more than a mere name in the law. However when the law was repealed and [Safety and Surveillance Law] was legislated instead of it in 1989, the situation was changed, because [Safety and Surveillance Law] provided only probation and parole - namely the custody for safety was abolished in the law. Therefore we can say that probation and parole were adopted as the main means of the measure of security to the ideological criminal through [Safety and Surveillance Law] in 1989

### (3-2) Probation and Parole of [Social Protection Law]

[Social Protection Law] in 1980 provided probation and parole for common criminals and madmen committing a crime. But they were seldom imposed. And also the number of parolee has been small after the law was amended in 1989.

### (4) Evaluation

Summarizing the above-mentioned facts, we can conclude that treatment in society has been used more and more in Korea but the tempo of increase is slow. Treatment in society has been imposed mostly to the juvenile delinquent and it's program is also in the first stage.

## 4. Trend (3) -- Formalization --

### (1) The Preparation of Legal Foundation

Nowadays most kinds of the measure of security are based on law in Korea. But it was different in the past. For example, there was no law justifying the custody into the prostitute asylum and the custody into the vagrancy asylum in 1950's. [Antiprostitution Law] was legislated in 1961. And also it was the instruction 410 in 1975 that legitimized the Custody into the Vagrancy Asylum. At anyway we can find the trend that the legal foundation of the measure of security has been prepared and built up gradually in Korea.

## (2) The Introduction of the Western Legal System

As is stated above, the measure of security has been introduced into Korea from the western country. Especially the treatment in custody was made in imitation of Germany's and the treatment in society was modelled after U.S.A's. Therefore the form and content of the measure of security has approached to the western countries'. It is a matter of common knowledge that the measure of security is restricted strictly as punishment in the Germany and U.S.A.. The mechanism of restriction are two ; one is that not the Administration but the judicature has the right to impose the measure of security and the other is that the principles<sup>7)</sup> similiar to "nullum crimen nulla poena, sine lege" are applied to the measure of security. And also such basic rules have been accepted in Korea gradually, though it isn't perfect yet.

## IV. The Prospect of the Measure of Security in Korea

### 1. The Measure being substitute for Punishment

Nowadays most kinds of the measure of security are imposed and executed together with punishment accumulatively in Korea, except for two cases ; the Custody for Protection of [Juvenile Law] and the Custody for Treatment of [Social Protection Law]. Namely after the object serves his full time in the prison, he has to serve the measure of security in addition to it. Therefore the criticism is brought up that the measure of security is another punishment.

As the result, it is contended that the measure of security should be substitute for punishment. And also such contention has been accepted and advocated more and more. I have the prospect that the measure of security will be executed before punishment and substitute for it in the near future, as the treatment in custody is concerned.

### 2. The Continual Enlargement of the Treatment in Society

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7) To cite an example, there is the fundamental rule of proportion(Grundsatz der verhältnissmasigkeit).

As is stated above, the essence of the measure of security is the treatment in society. The most affirmative estimation of the measure of security lies in substituting imprisonment with probation and parole. Because of that, the measure of security is valued as the progressive criminal sanction. Therefore it is appreciated affirmatively that Probation and Parole have been developed and enlarged in Korea. And also I anticipate that the treatment in society will be enlarged continually in Korea. Namely probation and parole will be the main measure to the adult criminal, let alone the juvenile delinquent.

### 3. The Introduction of the Social Relief

The measure of security has two kinds of conflicting assignment ; one is to surveil the object and the other is to give aid to him. Therefore if the one is stressed, the measure will be oppressive and if the other is stressed, it will be emancipative. Critically speaking, the one has been stressed more than the other in Korea until now. Then the point of stress has to be transferred from the one to the other from now on. And so the measure of security has to be approached to social work or social relief.

As a matter of fact, social relief is the best criminal policy. Social relief is the policy to rehabilitate the criminal through giving aid to him, without coercing him into adaptation. Namely it's assignment is only to help the criminal and so it is administered on the ground of his voluntariness. On the contrary, the essential assignment of punishment is to oppress the criminal coercively. Then the measure of security has to be between punishment and social relief. I anticipate that it will be so.

## V. Conclusion

The above-mentioned facts can be summarized as follows ; (a) From 1945 to now, the objects of the measure of security have been extended in Korea and the order of extension is from weak group to strong group. (b) The kinds of the measure of security have been diversified and the means of it has been also abundant. For example, the treatment in society has been enlarged and developed. (c) The measure of security has been formalized. Namely the legal foundation of it has been built up gradually and the content of the law has been approached to the western countries'. (d) I have the

prospect that probation and parole will be enlarged continually and the measure of security will be executed before punishment and substitute for it, as the treatment in custody is concerned. (e) I anticipate that the measure of security will be between punishment and social relief and be approached to social relief.