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The Ongoing Reconstruction of The Korean Criminal Justice System

Kuk Cho*

I. Introduction

The Korean criminal justice system has been rapidly changing since democratization. The authoritarian regime, which valued “crime control” over “due process” in regard to criminal procedure, ended thanks to the June Movement of 1986. The 1987 Constitution, as a product of democratization, provides a blueprint for a new criminal procedure. Explicitly stipulating the “due process” value,¹ the Bill of Rights in the Constitution provides very detailed provisions regarding criminal procedure.² The 1988 and 1995 amendments to the Korean

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1. The Constitution of the Republic of Korea (*heonbeop*) art.12(1)(3), last revised Oct. 29, 1987 as Constitution No. 10.
2. For instance, included in the Bill of Rights are strict requirements for obtaining judicial

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Criminal Procedure Code have also strengthened the procedural rights of criminal suspects and defendants.³ Since then, procedural rights in criminal procedure have been taken seriously, and momentous changes in the theory and practice of criminal procedure have been observed.⁴ More recently, since the Roh Moo-Hyun government was launched in February 25, 2003, the Korean criminal justice system has been asked to change more drastically. The Judicial Reform Committee under the Supreme Court and its subsequent task force organization, the Presidential Committee on the Judicial Reform, have actively worked to increase civil participation in criminal trials and to reform evidence law. Also the National Assembly has been discussing how to reallocate the investigative power between the Supreme Prosecutors' Office and the National Police Agency.

This article outlines the ongoing reconstruction of the Korean criminal justice system and examines the major issues involved. First, it starts with a review of the landmark decisions by the Korean Supreme Court and the Korean Constitutional Court to strengthen the procedural rights in the criminal process. Second, it reviews the bill submitted by the Presidential Committee on judicial reform, in 2005, to adopt the civil participation system in criminal trials. Third, it explores how the laws of evidence have changed since submitted by the Presidential Committee on judicial reform, in 2005, focusing on the admissibility of the

warrants for compulsory measures, the right not to be tortured, privilege against self-incrimination, right to counsel, right to be informed of the reason for arrest or detention, right to request judicial hearing for arrest or detention, exclusionary rule of illegally obtained confession, protection against double jeopardy, right to fair trial, right to speedy and open trial, presumption of innocence, and right to compensation for the suspect and defendant found innocent. The Korean Constitution, arts. 12, 13(1), 16, 27.

3. The 1995 amendment of the Criminal Procedure Code newly introduced the preliminary hearing system for issuing a detention warrant. Before issuing a detention warrant, the judge, upon his/her own initiative, can schedule a hearing for a substantial review of the necessity of the detention of the suspect, arrested or not, in which the suspect must participate. Korean Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, last revised Oct. 16, 2004 as Law No. 7225), art. 201(3). Before 1995, there was no hearing system. Rather, the judge issued the detention warrant after reviewing only the documents referred by the prosecutor. Because of strong resistance from the investigative authorities, however, the new system was revised in 1997 to work only upon the request of the suspect or his/her lawyer. The Criminal Procedure Code also provides habeas corpus for the arrested or detained suspect to review the legality and properness of the arrest or detention. The 1997 amendment established a bail system for suspects who have requested habeas corpus. Korean Criminal Procedure Code, art. 201(4), 214. Although it is limited because it is not available for suspects who have not requested habeas corpus, it is certainly an important advancement.
4. See Kuk Cho, *Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L L. & POL'Y 377 (2002), outlining the Korean criminal procedure after democratization.

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prosecutor-made dossiers and videotapes recorded during interrogation. Finally, this article reviews the recent dispute between the Supreme Prosecutors' Office and the National Police Agency to reallocate the investigative power between them.

II. Taking Procedural Rights Seriously

A. *Judicial Decisions to Adopt Miranda, Massiah and McNabb-Mallory*

Under the new Constitution, criminal procedural rights have been taken very seriously. However, more attention needs to be given to a series of legislative decisions by the Supreme Court, which may be called the Korean version of *Miranda*, *Massiah* and *McNabb-Mallory*.

First, in the decision of June 26, 1992, the Korean Supreme Court made a landmark decision, which is often called the "New 21st Century Faction" case, named after the title of the criminal organization the defendant belonged to. It held that "statements elicited without informing [the suspect] of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, even if they are disclosed voluntarily."⁵ The Court excluded the defendant's confession by adopting the rationale of *Miranda* to exclude the confession, although the Criminal Procedure Code does not have an explicit provision about the exclusion.

Second, in two National Security Act violation cases in the 1990s,⁶ the Supreme Court also made landmark decisions, which may be called the Korean version of *Massiah*. In these cases, the defendants requested to meet with their attorney when they were detained but the National Security Agency officers rejected their request. Then the defendants were referred to and interrogated by the prosecutor. The Court held that "the limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be excluded, and the exclusion means a substantial and complete exclusion."

The Constitutional Court has also repeatedly confirmed that the right to counsel in the criminal process is an "absolute right" of the defendant, so it cannot be

5. Decision of June 23, 1992, 92 Do 682 [Korean Supreme Court].

6. Decision of Aug. 24, 1990, 90 Do 1285 [Korean Supreme Court]. This case is popularly called the "Legislator Seo Kyeong-Weon Case." Decision of Sept. 25, 1990, 90 Do 1586 [Korean Supreme Court]. This case is popularly called the "Artist Hong Seong-Dam Case." Regarding the National Security Act, see generally Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?*, 15 B.U. INT'L L.J. 173 (1997).

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limited “by **any** reason including national security, public order or public welfare.”⁷

Third, in the decision of November 11, 2003, in a National Security Act violation case of Professor Song Doo Yul, an allegedly pro-North, left-wing Korean-German dissident who was arrested and detained when he visited Seoul, the Supreme Court made another ground-breaking decision to recognize the right to have counsel **during** interrogation as a constitutional right of suspects.⁸

Neither the Constitution nor the Criminal Procedure Code has an explicit provision for the right to have a lawyer present during interrogation, although both provide the right to counsel in general. On such a ground, law enforcement authorities had not allowed defense counsel retained by suspects to attend interrogation sessions until recently. Even if suspects are represented by counsel, they are left without any professional aid in a critical stage of criminal procedure. A majority of criminal law scholars and defense attorneys have argued for revising the Criminal Procedure Code to stipulate the right to have counsel during interrogation. In 1999, the National Police Agency issued a rule that allows defense counsel to participate in police interrogation. After a murder suspect was tortured to death during interrogation in the Seoul District Branch of the Supreme Prosecutors' Office in 2002, the Ministry of Justice also set up a similar rule. However, both rules carry no legally binding force because they are no more than administrative rules for law enforcement authorities. Furthermore, a number of exceptions disallowing counsel's participation are stipulated in the rules, and, in practice, counsel's participation in interrogation was nominal.

In these circumstances, the Supreme Court made another legislative decision. It held that neither the Constitution nor the Criminal Procedure Code provides any implication to prohibit counsel's participation, so the participation should be allowed from the standpoint of “due process” principles. Even without an explicit provision to guarantee the right to have counsel present during interrogation, the right can be recognized by analogical interpretation of Article 34 of the Criminal Procedure Code which allows for “the right to meet and communicate [with] counsel.” The Court also provides much narrower exceptions not to permit counsel's participation in interrogation that is the participation may be restricted **only when** there is probable cause that the counsel would “obstruct interrogation”

7. Decision of Jan. 28, 1992, 91 Hun Ma 111 [Korean Constitutional Court]; Decision of July 21, 1995, 92 Hun Ma144 [Korean Constitutional Court]; Decision of Sept. 23, 2004, 2000 Hun Ma 138 [Korean Constitutional Court] (emphasis added).

8. Decision of Nov. 11, 2003, 2003 Mo 402 [Korean Supreme Court].

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or “leak the secret of investigation.” Since this decision, the lower courts have excluded defendants’ statements that were elicited without their counsel’s participation in interrogation.

Taken together, the 1992 “New 21st Century Faction” decision and the 2003 decision fully implement *Miranda* in Korea. Reviewing the infringement of a non-detained suspects’ right to counsel in a Public Office Election Act violation case, the six to three opinion of the Constitutional Court in September 23, 2004 also confirmed that the right to have counsel present during interrogation is a constitutional right of the suspect.⁹ On July 18, 2005, the Presidential Committee on the Judicial Reform (which was established on December 15, 2004) submitted a bill for the revision of the Criminal Procedure Code to stipulate the right to have counsel during interrogation.¹⁰

Fourth, in the decision of June 11, 2002, the Supreme Court held that, in a bribery case, the dossiers including the defendant’s statement should be excluded because they were obtained via an illegal “emergency arrest” that did not fulfill the requirements of warrantless arrest in Article 200-3 (1) of the Criminal Procedure Code.¹¹ This decision may be called a Korean version of the *McNabb-Mallory* rule.¹² This decision is to deter the abuse of “emergency arrest” by law enforcement authorities, which is virtually free of judicial review for forty-eight hours.

As seen above, *Miranda* and *Massiah* have been received in Korea from across the Pacific although they are often criticized as truth-impairing and pro-criminal in their home country.¹³ *McNabb-Mallory* has also been adopted in Korea, despite its substantial revision by the enactment of the Omnibus Crime Control and Safe Street Act of 1968 in the United States.¹⁴ Although the Supreme Court has not adopted the Fourth Amendment *Mapp* exclusionary rule of the United States,¹⁵ the

9. Decision of Sept. 23, 2004, 2000 Hun Ma 138 [Korean Constitutional Court].

10. Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 244-4 (2004) (S. Korea).

11. Decision of June 11, 2002, 2000 Do 5701 [Korean Supreme Court].

12. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

13. See OFF. OF LEGAL POL’Y, DEP’T OF JUSTICE, ‘Truth in Criminal Justice’ Series Office of Legal Policy: The Law of Pretrial Interrogation, 22 U. MICH. J.L. REFORM 437, 535-36, 618 (1989); Akhil Reed Amar, Twenty-fifth Annual Review of Criminal Procedure: Foreword: Sixth Amendment First Principles, 84 GEO. L.J. 641, 644 (1996). See generally Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857 (1995); JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993).

14. 18 U.S.C. § 3501 (2005).

15. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Presidential Committee on Judicial Reform, on July 18, 2005, submitted a bill for the Revision of the Criminal Procedure Code to generally accept the exclusionary rule by providing “evidence obtained not through due process shall not be admissible.”¹⁶

B. Other Judicial Decisions about Procedural Rights

Let us review other important decisions by the Constitutional Court and the Supreme Court to strengthen the procedural rights of suspects/defendants.

1. Invalidating the Excessively Lengthy Detention Period of the National Security Act

In the decision of April 14, 1992, the unanimous opinion of the Constitutional Court held the fifty day detention period under Article 19 of the National Security Act to be excessively lengthy, and thus unconstitutional.¹⁷ It stated:

Because the prerequisites of articles 7 and 10 of the National Security Act are not particularly complicated and collection of evidences is not so difficult, the extension up to fifty days by article 19 of the National Security Law for the crimes of articles 7 and 10 . . . is to balance wrongly the mutually conflicting relation between the state’s power of punishment and the nation’s basic rights, and permit unnecessarily long detention, then apparently violate the principle of prohibition of excessiveness in article 37(2) of the Constitution, which is a principle to restrict basic rights, and infringe personal liberty of

16. Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 308-2 (2004) (S. Korea). The Constitution and the Criminal Procedure Code already provide explicit legal provisions regarding the exclusion of an involuntary confession. Article 12(7) of the Constitution provides for the exclusion of involuntary confessions made under torture, battery, threat, deceit or after prolonged custody. Following Article 12(7), Article 309 of the Criminal Procedure Code also provides an exclusionary rule for confessions whose voluntariness is doubtful.
17. A suspect in a National Security Law (NSL) case had to endure a very long pretrial detention. The NSL creates an exception to the period of detention mandated by the Criminal Procedure Code. According to the Code, a suspect may be detained for up to forty-eight hours, or even seventy-two hours before a warrant is issued. The police may then further detain the suspect for ten days after the warrant is issued. The prosecutor may detain the suspect for another ten days before indictment and extend the detention up to a maximum additional ten days with a judge’s permission. The Korean Criminal Procedure Code, arts. 203-205. The NSL adds a maximum additional twenty days to the detention periods delineated in the Criminal Procedure Code. Article 19 of the NSL allows a judge to grant an extension of the detention period to the police, and further allows a judge to grant two additional detention extensions to the prosecutor. National Security Act (*kukgaboanbeop*), Law No. 3318 (1980), last revised Dec. 13, 1997 as Law No. 5454 (1994), art. 19. In NSL cases, the practice is to grant almost automatic extensions. Thus, suspects in NSL cases are usually detained for up to fifty days before indictment.

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the suspect, *in dubio pro reo* and right of speedy trial.¹⁸

The Court came to recognize the excessiveness of Article 19 of the National Security Act, which had been justified in the name of national security under the authoritarian regime. Although the Court has been very reluctant to declare the Act itself unconstitutional, it was certainly willing to correct severe procedural hardship.

2. Bolstering the Right to *Habeas Corpus*.

Both the Supreme Court and the Constitutional Court have rendered significant decisions about the right to *habeas corpus*.

First, in the decision of August 27, 1997, the Supreme Court held that a suspect arrested *without* a warrant also has a right to request a judicial hearing to review the appropriateness of the arrest.¹⁹ Article 214-1 of the Criminal Procedure Code provides that the *habeas corpus* system is available for arrested or detained suspects *with* a warrant, while Article 12(6) of the Constitution provides that “*everyone* has a right to request judicial hearing when arrested or detained.”²⁰ The Court stated that, considering Article 12(6) of the Constitution, Article 214-1 of the Criminal Procedure Code must not be interpreted in a way that deprives the suspect arrested without warrant of the right to *habeas corpus*.

Second, in the Development Restriction Area Act violation case of March 25, 2004, the 6-to-3 opinion of the Constitutional Court held the prosecutor’s practice of “blitz prosecution” to be unconstitutional.²¹ Article 214-1 of the Criminal Procedure Code provides that the *habeas corpus* system is available for arrested or detained suspects *before* prosecution, without mentioning if the system is available for the accused persons after prosecution. Prosecutors often use a procedural tactic of filing a prosecution immediately to remove suspects’ standing for the judicial hearing when suspects request the hearing. The Court pointed out that “the blitz prosecution” is a one-sided action by a prosecutor who has no authority in deciding the constitutional legitimacy of the warrant, so it deprives the suspect who has requested the judicial hearing of “procedural opportunity” to have his case reviewed by the court.”²² Finally, in September 2004, the National Assembly

18. Decision of April 14, 1992, 90 Hun Ma 82 [Korean Constitutional Court].

19. Decision of Aug. 27, 1997, 97 Mo 21 [Korean Supreme Court].

20. Korean Constitution, art. 12 (6); Korean Criminal Procedure Code, art. 214-1 (emphasis added).

21. Decision of March 25, 2004, 2002 Hun Ba 104 [Korean Constitutional Court].

22. *Id.* The Court did not invalidate Article 214-1 itself because the invalidation may stop the judicial hearing system itself.

revised the Criminal Procedure Code to prohibit “blitz prosecution.”²³

3. Steps toward Pre-trial Discovery

In two Constitutional Court decisions, strides have been made toward adopting “pre-trial discovery” system. In the decision of November, 27, 1997, the seven-to-two opinion of the Constitutional Court held, in a National Security Act violation case, that it is unconstitutional for prosecutors to prevent the defendants and their attorneys from accessing the investigative records kept by prosecutors before a trial is open after prosecution is filed.²⁴ Article 35 of the Criminal Procedure Code states that “defense counsel may review and copy the relevant documents or evidence after the prosecution is filed.” Prior to the decision, prosecutors had refused to allow defense attorneys to access the records, arguing that access is possible only after a trial is open because access before the trial would weaken prosecution’s cases. The Court held that “[t]he defense attorney’s access to the investigative records kept by prosecutors is indispensable to maintain the substantial equality between parties and materialize fast and fair trial. Excessive limitation on the access violates the defendant’s right to fast and fair trial and right to counsel.”²⁵

It stated that counsel’s right to access the investigative records may be limited only when “there exist concerns of leaking national secrets, eliminating evidence, threatening witnesses, violating privacy or causing conspicuous obstacles to investigation.”

In the decision of March 27, 2003, the five-to-four opinion of the Constitutional Court extended the above 1997 decision to the setting of a fraud case where a judicial habeas corpus hearing for the suspect was about to be held, even *before* prosecution was filed,²⁶ even though Article 35 of the Criminal Procedure Code applies only after prosecution. The court stated that despite the words of the Article, if the defense attorneys are not allowed to access to the investigative records, they cannot sufficiently defend their clients in the habeas corpus hearing.

On July 18, 2005, the Presidential Committee on Judicial Reform submitted a bill for the revision of the Criminal Procedure Code to adopt a new pre-trial discovery system. It allows defendants or their attorneys to request that prosecutors review or copy relevant documents or evidence that prosecutors

23. Korean Criminal Procedure Code, art. 214-2 (3).

24. Decision of Nov. 27, 1997, 94 Hun Ma 60 [Korean Constitutional Court].

25. *Id.*

26. Decision of March 27, 2003, 2000 Hun Ma 474 [Korean Constitutional Court].

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traditionally kept for themselves.²⁷ If the request is denied, or the scope to review is limited by the prosecutor, defendants or their attorneys may appeal to the court to review the prosecutor's decision.²⁸

C. Conclusion

The Korean judiciary has moved away from the traditional notion that it is not the judiciary's job to discipline law enforcement authorities, either prosecutors or police officers, and the belief that the judiciary needs to restrain itself from doing legislative work. The above decisions by the Supreme Court and the Constitutional Court show that the judiciary now see themselves as having a disciplinary and regulatory role regarding the illegal or improper misconduct of law enforcement authorities, and it is willing to make legislative decisions when procedural rights matter. In this sense, the decisions of the two superior courts may be called a Korean version of the US "criminal procedure revolution" propelled by the Warren Court. This change results from the vigorous efforts of Korean defense attorneys who bravely fought against the authoritarian regime.

III. Reform toward Criminal Trial with Citizens' Participation

A. Trial Solely by Professional Judges

Defendants in Korea are found guilty and given a sentence exclusively by a professional judge because the Korean criminal justice system adopts neither the US jury system nor the German mixed judge system [Schöffengericht]. Although a few academics argued for the adoption of a citizens' participation system in a trial—emphasizing civil participation in a trial is an essential of political democracy—both Korean judges and prosecutors, before and after democratization, were very reluctant to listen to them until very recently. Judges and prosecutors believed that civil participation would not only cost a lot but would also result in the distortion of justice because of the "cronyism" of Korean society. The O.J. Simpson case in 1995 was often cited to ridicule the absurdity of a trial by jury. In addition it is also argued that civil participation in a trial would be unconstitutional because Article 27 of the Constitution stipulates "the right to be tried *by judges* qualified under the Constitution and relevant Acts,"²⁹ not by lay

27. Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 266-3 (2004) (S. Korea).

28. *Id.* at art. 266-4.

29. Korean Constitution, art. 27(1) (emphasis added).

citizens. Defense attorneys and the public were not aware of the implication of civil participation in trials until recently because most of their attention was focused on the guarantee of the procedural rights of suspects and defendants.

However, a number of complaints about the judiciary have arisen. First, judges have been criticized for being selected based upon their examination score. Second, judges are said to monopolize the powers of both finding a defendant guilty and later deciding a proper sentence. Third, judges are accused of not making proceedings friendlier to citizens so that they can understand the proceedings. There is an allegedly tacit custom inside the judiciary where attorneys who have just resigned from the bench are more likely to get a favorable decision from the bench. It is called a “courteous treat” (*Cheonkwon Yewoo*) for those attorneys. Under these circumstances, civil participation in trials has been gradually recognized as a meaningful and effective solution.

B. First Step towards “Criminal Justice of and by the People”

1. The Recommendations of the Judicial Reform Committee under the Supreme Court

More calls for civil participation in trials have been made since the Roh Moo-Hyun government, which calls itself the “Government of Participation,” was established in February 25, 2003. Following an agreement between the president and the chief justice on the judicial reform, the Judicial Reform Committee was created and organized under the Supreme Court on October 28, 2003.³⁰ The Judicial Reform Committee submitted final recommendations on the last day of 2004, after one year of heated discussion and debate. The judiciary became very supportive in adopting a civil participation system because it thought the new system might free the judiciary from criticism by sharing responsibility about trials with laymen.

The majority of the Committee agrees that civil participation in a trial is not unconstitutional as long as professional judges take a substantial part in the trial. The recommendations are summarized as follows:

First, “criminal justice of and by people” needs to be established without a delay beyond “criminal justice for people.” Trials with civil participation will strengthen the democratic legitimacy of the justice system, enhance the

30. Judicial Reform Committee Home Page, http://www.scourt.go.kr/information/jud_rfrm_comm/mtng_status/index.html.

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transparency of the system, and bring about people's trust in and respect to the system.

Second, the bill for trials with civil participation shall be prepared to make the new trial system active from 2007. "The Committee for Civil Participation in Justice" shall be organized in 2010 to evaluate the new trial system. The opinion of participatory citizens remains *recommendatory* during the five years from 2007 to 2012. It will become *mandatory* after 2012.

Third, during the first five years from 2007 to 2012, trials with civil participation apply to felony cases unless the defendants object, and the number of such trials needs to be limited to about one to two hundred cases per year. The extension of trials with civil participation to other crimes will be considered after reviewing the five years.

Fourth, three professional judges and five to nine participatory citizens work together in the trial with civil participation.

Fifth, participatory citizens are selected by using the electoral register or national ID data, and are put in a review process.

Sixth, the method of verdict in the new trial system needs to be a mixture of the Anglo-American jury system and the Continental mixed judge system. With professional judges' instruction and guidance, participatory citizens discuss whether the defendant is guilty or not. If they find the defendant is guilty, they can submit their opinion about sentence.

2. The Bill for the Civil Participation in Criminal Trials Act Prepared by the Presidential Committee on the Judicial Reform

On December 15, 2004, the Presidential Committee on the Judicial Reform³¹ was established to materialize the recommendation of the Judicial Reform Committee. On May 16, 2005, the Presidential Committee submitted a bill for the Civil Participation in Criminal Trials Act during the first five years from 2007 to 2012, and the Bill is currently being reviewed in the National Assembly and expected to pass in the end of 2006. Let us review the basic characteristic of the Korean jury trial in the bill.

First, the participatory citizens are termed "jurors" [*Baesimwon*].³² There was a debate when the bill was prepared if the title of "citizen judge" [*Simin Pansa*] was

31. Presidential Committee on Judicial Reform Home Page, <http://www.pcsr.go.kr> (last visited Dec. 9, 2006) (website is in Korean).

32. Presidential Committee on the Judicial Reform, Bill for the Civil Participation in Criminal Trials Act, art. 2 (2005) (S. Korea).

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to be given to them. The professional judges did not want the participatory citizens to have the title of “judge,” but civil movement organizations, defense attorneys and prosecutors argued the title should be given to the citizens.

Second, the new trial system applies is mainly limited to murder, manslaughter, rape, robbery, and bribery felonies.³³ The defendants are given a right to waive the trial with civil participation, and the court should check with the defendants to see if it is waived.³⁴

Third, professional judges have the discretion to exclude civil participation, in particular when jurors, juror candidates, or their families or relatives may face the possible danger to their life, liberty or property; an accomplice of the defendant refuse to be tried by jurors. Appeal is allowed to the judges’ decision to exclude civil participation.³⁵

Fourth, the number of the jurors is different according to the cases. It is nine in the case that capital punishment or life imprisonment may be given to the defendant; five in the case that the defendants admit being guilty; and seven in all other cases.³⁶

Fifth, the jurors are allowed to ask the presiding judge to ask a certain question to the defendant or the witness, and to take notes during the trial with permission of the judge.³⁷ The Presidential Committee intends to reduce the possibility of a “hung jury” and enhance the accuracy of the verdict.

Sixth, the verdict process is a combination of the US system and the German system. At first, without the participation of the judge, jurors discuss the guilt of the defendant and make a verdict by unanimous opinion. If half of the jurors agree, the jurors can hear the judge’s opinion. If the jurors cannot reach a verdict, the judge and jurors discuss the guilt of the defendant together. Then the jurors, without the presence of the judge, make a verdict based upon the majority opinion of the jurors. If the defendant is found guilty, jurors discuss the sentence with the judge and submit their opinion. The opinion of the jurors about guilt and sentence does *not* bind the judge’s decision about guilt and sentence. The verdict is not to be read, but to be written down in a trial.³⁸

33. *Id.* at art. 5.

34. *Id.* at art. 8.

35. *Id.* at art. 9.

36. *Id.* at art. 13.

37. *Id.* at art. 56.

38. Presidential Committee on the Judicial Reform, Bill for the Civil Participation in Criminal Trials Act, art. 72 (2005) (S. Korea).

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C. Conclusion

Citizens' participation in a trial has never been experimented with in the history of the Korean criminal justice system. The characteristics of the Korean jury trial—including the scope of the crimes to which a jury trial applies, the method and process of verdict and the effect of jurors' opinion in a verdict — are certainly different from those of other countries. However, a jury trial will certainly change the fundamentals of the criminal trial, modifying the role of the judge, the trial strategy of both prosecutor and defense attorney, and the evidentiary rules. The experiment during the first five years will be very valuable in building the new basis of Korean criminal trials.

The task of the Korean "criminal procedure revolution" in its initial stage was to vitalize the procedural rights in the criminal process and deter police misconduct. The purpose of the second stage is to give judicial authority back to the people, to strengthen the legitimacy of the justice system, and to enhance the transparency of the system. Although there is a possibility that the Bill for the Civil Participation in Criminal Trials will be delayed in passing because of a political confrontation between the ruling liberal Uri Party and conservative Grand National Party, since late 2003, the second stage of the "revolution" has begun in Korea.

IV. Reshuffling Evidence Law Regarding Prosecutor-Made Dossiers and Videotapes

A. Prosecutor-Made Dossiers

1. Exceptionally Strong Evidentiary Power

Article 312(1) of the Criminal Procedure Code gives exceptionally strong evidentiary power to prosecutor-made dossiers even if they are hearsay.³⁹ It provides that the interrogation dossiers, which include the defendant's statement or confession, may be admissible in a trial, first, if they are signed by the defendant and made by prosecutors, and, second, "if there exist special circumstances which make the dossiers reliable," the dossiers are admissible *without* cross-examination of the interrogators *even if* the defendants contend the contents of the dossiers do

39. Criminal Procedure Code, art. 312(1) in contrast provides different status to dossiers made by police officers. The dossiers made by police officers shall not be used as evidence if the defendants or their attorneys contend the contents of the dossiers do not match what the defendants stated during interrogation. See *id.* at art. 312(2).

not match what they stated during the interrogation.⁴⁰ Assuming the interrogation itself by prosecutors may fulfill the requirement of “special circumstances which make the dossiers reliable,” the Supreme Court has recognized the legitimacy of Article 312(1).⁴¹ Thus, prosecutors have enjoyed this evidentiary advantage, emphasizing the National Assembly intended to make them “semi-judges.”

However, Article 312(1) makes it extremely difficult for the defendants to avoid a guilty decision in a trial once they have made self-incriminating statements in front of prosecutors. The disadvantage to the defendants is especially serious, considering that before the Professor Song case of 2004 defendants had not been allowed a lawyer during interrogation.⁴² A number of scholars and defense attorneys have strongly criticized that the Article makes the prosecutor a *de facto* judge, and make defendants’ statement in front of prosecutors in an interrogation room *de facto* testimonies in a trial.

2. Efforts to Make Prosecutors an Adversarial Party, not “Semi-Judge”

The Judicial Reform Committee under the Supreme Court, in its final recommendations on December 31, 2004, stated that the current provisions in the Criminal Procedure Code are so dossiers-oriented that they infringe on the defendants’ right to cross-examination, and need to be revised.

On April 15, 2005, accepting the above criticism on Article 312(1) and following the recommendation of the Judicial Reform Committee, the Presidential Committee on Judicial Reform submitted its first draft to revise the article so that the interrogation dossiers made by prosecutors are inadmissible in a trial *unless* the defendants agree to the use of them. At the same time, however, the draft allows police officers or prosecutors who interrogated the defendants to testify against the defendants when the defendants deny what is recorded in the dossiers. The intention of the Committee was to abolish the phenomenon of “trial by dossiers” where truth-finding is largely limited to the dossiers made by prosecutors, not on the cross-examinations by the parties in front of judges in a courtroom. It comes from an idea that the status of prosecutors as “semi-judges” should be dismantled and prosecutors should be an adversarial party in every sense.

However, the draft caused strong objection from prosecutors although it attracted praise from defense attorneys and academics. Prosecutors criticized the

40. *Id.* at art. 312(1).

41. Decision of March 8, 1983, 82 Do 3248 [Korean Supreme Court]; Decision of June 26, 1984, 84 Do 748 [Korean Supreme Court].

42. Decision of Nov. 11, 2003, 2003 Mo 402 [Korean Supreme Court].

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draft as allowing defendants to easily invalidate their confession or statement in the interrogation room later in a trial, thus incapacitating prosecutors to fight against crime. The prosecutors were very uncomfortable that they might be called as a witness to testify regarding the defendant's statements and be cross-examined by defense attorneys. They were also unsatisfied with the draft article because it might undermine their status of "semi-judge" and make them no more than an adversarial party.⁴³ Prosecutors in the Seoul District Branch of the Supreme Prosecutors' Office even held a meeting to criticize the draft and distributed a public statement against it. Even the opposing political party joined the criticism, arguing that the draft is a "conspiracy" to weaken the powers of prosecutors who are not cooperative with the Roh government. Then, heated debate proceeded both inside and outside of the Presidential Committee on the Judicial Reform.

While the debate was going on, the Constitutional Court, in the decision of May 26, 2005, reviewed the constitutionality of Article 312(1).⁴⁴ The five-to-four opinion of the Court held the requirement of "special circumstances which make the dossiers reliable" constitutional. However, six out of nine Justices recommended removing the vagueness of the requirement. In particular, four Justices, in their dissenting opinion, stated that special evidentiary power may be given to the prosecutor-made dossiers *only when* "procedural transparency of the interrogation by prosecutors is reinforced and the defense attorney's participation in the interrogation is guaranteed."

3. Conclusion

The hot debate over Article 312(1) ended in a compromised way. The first draft neither got strong support from judges (afraid it could make trials more complex and lengthy), nor from the public (afraid it could free criminals who have changed their mind after they confessed in front of prosecutors).

The Presidential Committee confirmed a new draft on July 18, 2005 which keeps the evidentiary power of the prosecutor-made interrogation dossiers alive but imposes stricter requirements. In particular, it specifies the requirement of "special circumstances which make the dossiers reliable," following the Constitutional Court's recommendation. Article 312(1) of the new draft provides that prosecutor-made interrogation dossiers, which include defendant's statements, may be

43. See CHOSUN ILBO, Jan. 16, 2005; DONG-A ILBO, Jan. 16, 2005; HANKYOREH SHINMOON, Jan. 16, 2005. Prosecutors further argued that a plea bargaining system should be adopted to compensate for the difficulties that they could face in trials if the draft would be passed in the National Assembly.

44. Decision of May 26, 2005, 2003 HunKa 7 [Korean Constitutional Court].

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admissible in a trial first if they are made by legal process and method, second if it is proven by the defendants' admission in a preliminary hearing or a trial or by an objective method such as videotaping that the dossiers are recorded as the defendants have stated, and third if it is proven that they are made under especially reliable circumstances, like the presence of the defendant's attorney during an interrogation.⁴⁵

On the other hand, Article 316(1) of the draft provides that the testimony of investigators, either prosecutors or police officers, regarding the defendant's statements may be admissible in a preliminary hearing or a trial. The new bill is currently being reviewed in the National Assembly and expected to pass in the end of 2006.

Under the new bill, prosecutors are given two options to rebut the defendants' denial of what they stated in an interrogation room. They probably prefer Article 312(1) because it would be an unimaginable insult for them to be cross-examined by defense attorneys. The initial plan of the Presidential Committee failed. However, it is certainly an important advancement to establish much stricter requirements to admit the prosecutor-made interrogation dossiers as evidence in trials, which renders the interrogation process more transparent and more reliable.

B. Videotapes

There has been no provision about the evidential power of the videotapes recorded during interrogation in the Criminal Procedure Code. Until recently the videotapes have been considered evidential hearsay and they have rarely been used in practice by law enforcement authorities. The Supreme Court has considered videotapes the same as the interrogation dossiers.⁴⁶

Things have changed since videotaping was recognized by law enforcement authorities to prevent disputes over the admissibility and accuracy of the defendants' statements during interrogation. In particular, the Department of Scientific Investigation in the Supreme Prosecutors' Office has been very active in emphasizing the effectiveness of videotaping, and, in 2004, recommended the Ministry of Justice and the Prosecutor General to adopt it. Prosecutors were

45. Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 312(1) (2005) (S. Korea). The admissibility of the dossiers made by police officers remains same as the current Article 321(2) of the Criminal Procedure Code, although the police wanted to make the police-made dossiers have the same evidentiary power as the prosecutor-made dossiers.

46. Decision of June 23, 1992, 92 Do 682 [Korean Supreme Court]; Decision of Sept. 3, 1999, 99 Do 2317 [Korean Supreme Court].

encouraged by the mandatory videotaping experiments in other countries.⁴⁷ Videotaping may result in increased costs due to purchasing video equipment, altering interrogation rooms, and training investigative officers. However, the costs of losing the evidentiary power far outweigh the costs of videotaping, considering videotaping of interrogation as the best method of restoring public confidence in confessions and avoiding cross-examination against police officers or prosecutors. Videotapes are also an alternative means to save the evidentiary power of the prosecutor-made interrogation dossiers. However, defense attorneys are concerned that videotaping may simply provide legitimacy to the brutal interrogations unless it is conducted under strict requirements.

The Presidential Committee accepted the prosecutors' request to stipulate the provisions regarding the evidential power of the videotapes recorded during interrogation in the Criminal Procedure Code. The July 18, 2005 draft provides the provision with strict requirements of the admissibility of videotapes. The first set of requirements concern the admissibility of the videotapes. The defendant must deny in a trial what they stated during interrogation by prosecutors or police officers. Other methods of ascertaining the truth — such as statements made either by the prosecutors, police officers or other participants in a preliminary hearing or a trial — are difficult to prove the truth.⁴⁸ When the first requirements are satisfied, this means that the videotaping should be used as a *secondary* source to find the truth.

The second set of requirements are that (i) the videotapes are made by legal process and method, (ii) it is proven by the defendants' admission or the statements of prosecutors, police officers or other participants in a preliminary hearing or a trial that the videotapes are objectively recorded, and (iii) it is proven that they are made under especially reliable circumstances, for instance, with the presence of their attorney during interrogation.⁴⁹ The second set of requirements are similar to the requirement of the admissibility of the prosecutor-made interrogation dossiers.

47. 725 ILL. COMP. STAT. ANN. 5/103-2.1(b) (LexisNexis 2005); D.C. Code Ann. §5-133.20 (2005); Me. Rev. Stat. Ann. tit. 25, §2803-B(1)(K) (West 2005); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005); The Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, para. 11.5 (a) (1984) (U.K.); Crimes Act of 1914, art. 23V (Austl.); Crimes Act of 1900, art. 424A (N.S.W. Inc. Acts); Police Administration Act of 1978, art. 139-43 (N. Terr. Austl. Laws); Summary Offenses Act of 1953, art. 74C-G (S. Austl. Acts); Crimes Act of 1958, art. 464H-J (Vict. Acts); Jurisdiction and Criminal Procedure Act of 1992, ch. LXA (W. Austl. Stat.).

48. Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 312-2 (1) (2005) (S. Korea).

49. *Id.* at art. 312-2(2).

The bill is currently being reviewed in the National Assembly and expected to pass in the end of 2006. Video-taping the interrogation is quite a new concept in the Korean criminal justice system. It would present a double-edged sword because while it makes the interrogation process transparent and prevents law enforcement authorities from misconduct, and allows fact-finder to see exactly what occurred in the interrogation room, the problem is that it provides the jury and the judges with a prejudice that incriminate the defendants. Korean law enforcement authorities have swiftly begun to apply the new technique, establishing special interrogation rooms with videotaping facilities. It is worthy to observe what the new technique will bring to the Korean criminal justice system.

V. Reallocation of the Investigative Power between Prosecutors and Police Officers

A. Prosecutors' Dominance over Police Investigation Is Legally Guaranteed

Korean prosecutors have a duty to investigate crimes and prosecute criminals. They can either direct the police investigation or investigate a crime themselves with the investigative officers of the Supreme Prosecutors' Office. The Supreme Prosecutors' Office has about 4,600 officers — roughly one-third the size of the National Police Agency. Since the Criminal Procedure Code was enacted in 1954, prosecutors have enjoyed their superior position to police officers because the prosecutors are given legal authority to direct and supervise crime investigations carried out by the police. Article 196 of the Code provides “police officers shall investigate crimes with direction of prosecutors,” and Article 53 of the Supreme Prosecutors' Office Act also provides “police officers shall obey the orders issued by prosecutors.” Prosecutors can not only request police officers to supplement the investigation *after* the police investigation is completed, but can also intervene in a police investigation and stop the police investigation. Prosecutors can order the investigation transferred even *before* the investigation is finished by the police. Thus, prosecutors are called “supervisor of investigation.”

In 1954, the National Assembly intended to give prosecutors control over police officers, because most of them had served under the Japanese when the Japanese ruled Korea as a colony. Most of those officers had no respect for human rights. For this same reason, as reviewed in chapter IV, the dossiers made by police officers have very weak evidentiary power.⁵⁰ The police under the authoritarian

50. Criminal Procedure Code art 312(2). See *supra* note 39.

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regime were criticized for brutality and corruption. They had obviously weak grounds to try and argue for their independence from prosecutors' control in crime investigations. The police misconduct continued even after the authoritarian regime ended.

Recently, since democratization, prosecutors have become a major target of criticism because they have abused their authority and discretion both in investigations and in prosecutions—especially in some high profile corruption cases. This has fostered public distrust in the prosecutors. The “special prosecutor” system, which is independent of the public prosecutor system, has been introduced several times by the National Assembly as a means to check politically motivated concealment, distortion, to curtail prosecutorial investigations and reinforce the political neutrality of the prosecutorial authority. In addition, one shocking incident cast doubt on the integrity of prosecutors: a murder suspect was tortured to death by investigative officers with acquiescence of a prosecutor in the Seoul District Branch of Supreme Prosecutors' Office in 2002.

On the other hand, since democratization, police autonomy may be warranted. The police have openly complained about their subservience to prosecutors. There have been attempts to be granted more autonomy in investigating crimes. Several elite police officers, who graduated from National Police University, have led the campaign for independence from prosecutors. Accepting the criticism about the police, the police have taken steps to reform their investigative system and to strengthen the integrity of the police.

President Kim Dae-jung pledged to give the police autonomous power in investigating less serious crimes when he was a presidential candidate in 1997. However, his government dropped the matter after facing strong objection from the Prosecutor's Office.

B. Reallocation of the Investigative Power

It was not until in 2004, under the current Roh Moo-Hyun government, that a joint committee was organized by the Supreme Prosecutors' Office and the National Police Agency to reallocate the investigative power between prosecutors and police officers. Different from its predecessors, the Roh government is serious and determined to solve this troublesome issue.

The joint committee, comprised of both the Supreme Prosecutors' Office and the National Police Agency, agreed that (i) in practice, police officers currently initiate and have authority to initiate an investigation without prosecutors' direction; (ii) police officers need to be given more autonomy to proceed with

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investigation; and (iii) prosecutors should check on an investigation in the *final* stage of investigation because it is essential for a successful prosecution.

However, major unsolved issues remain for the committee. The first issue is whether it is necessary to explicitly provide a “general” legal provision granting the police the power to investigate crime in the Criminal Procedure Code. The Supreme Prosecutors’ Office argues that it is unnecessary because police officers already have investigative power based on some specific provisions of the Code. More importantly, such a provision polarizes the power of investigation, confusing the orderly mechanism of law enforcement authorities. The National Police Agency contends such a provision is the minimum necessary to clearly confirm the investigative powers of police officers.

The second issue is whether or not the prosecutorial supervision over the investigation by police officers is still necessary, and if so, to what extent prosecutors may direct police officers. Although the Supreme Prosecutors’ Office agrees the extent and method of the prosecutorial supervision needs to be changed, it contends the supervision itself must remain untouched, arguing that supervision is essential to assure the legality of police investigation. Prosecutors are concerned that the centralized state police, without the prosecutorial supervision, could become a super power and use their investigative power both excessively and improperly.

The National Police Agency argues that it is time to abolish prosecutorial intervention in the police investigation, and that it is time to reconstruct the relationship in the crime investigation between two authorities as “equal and cooperative,” not “superior-inferior.” They also contend that the new relationship, where there would be no prosecutorial supervision, will make the police investigation more responsible, the fight against crimes more simplified, and will bring in a fair competition between two authorities for the fight against crime to remove any possible concealment, distortion, or curtailment of investigation.

Although the joint committee did not reach full agreement, every issue concerning investigative power was examined, and they submitted a few drafts for the Criminal Procedure Code. Currently, both the Presidential Office and the National Assembly are reviewing this thorny issue very seriously and exercising great caution to avoid any objection from either authority. Both the Supreme Prosecutors’ Office and the National Police Agency are lobbying desperately in an attempt to receive favorable results.

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C. Conclusion

The tension between these two powerful law enforcement authorities is rising. They are even showing hostility to each other. It is too hasty to predict how this tricky project to reallocate the investigative power between the two will conclude. However, it appears certain that police officers will be granted more autonomy in crime investigations than they had before. Although it is certainly important, as prosecutors argue, to deter police misconduct and to maintain the legality of police investigations, it is doubtful that prosecutors — which are essentially law enforcement authority — have been doing the job seriously and effectively. Although it is true, as the police contend, that too many powers have been given to prosecutors; the old problems of the police still remain. Regardless of the official rationales and rhetoric given by each side, the essence of the tension is a power struggle. The best resolution would be to establish a new system of checks and balances between the two authorities. That would achieve the effectuation of both the autonomy and legality of police investigation.⁵¹

VI. Conclusion

The Korean criminal justice system is in the process of total reconstruction. The judicial decisions and the new legislation provide a new setting where all members in the criminal justice system have to adjust. They are basically oriented toward strengthening the defendants' procedural rights, bestowing democratic legitimacy to the system, and weakening the prosecutors' position. Judges are satisfied with the new system because they can still play a central role in trial and supervise the misconduct of all law enforcement authorities while they share their responsibility with the jury. Defense attorneys are happy about more procedural rights and stricter evidence law in the new system. Prosecutors are gloomy because their dominant status in criminal process tends to be limited in several

51. I personally, as a member of the joint committee, submitted a draft for the Criminal Procedure Code, providing that (i) a "general" legal provision for the police power of investigation is necessary to remove the gap between law and reality, while prosecutors as lawyers have to be given authority to make general rules regarding investigation to remove possible confusion and contradiction in the investigation; (ii) it is too early to remove all the prosecutorial supervision over the police investigation, but the prosecutorial intervention in the police intervention before the final stage of investigation needs to be limited to that of a certain category of serious felonies such as homicide, narcotics related crimes, organized crimes, national security related crimes and governmental officers' crimes. While it has been considered as a realistic alternative by the President's Office, the National Assembly and mass media, my compromising suggestion was not welcomed either by the Supreme Prosecutors' Office or the National Police Agency.

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aspects. Police officers are hopeful because there is possibility of the change of their legal authority and power.

The reconstruction might seem “liberal.” It would be more correct, however, to say that the reconstruction is to upgrade the Korean criminal justice system to the level of contemporary democratic countries, and to neutralize a system that has been overwhelmed by the crime control value for the past decades. Several bills to reconstruct the Korean criminal justice system are currently stuck in the National Assembly because of political confrontation around other more urgent national issues — including transition of wartime operational control of Korean troops and the rising problems with North Korea’s nuclear program. Even though the bills failed to pass in 2006, they will not simply be tossed aside into a bin but will certainly be put up again for review by the National Assembly after 2007.