

# The 2007 Revision of the Korean Criminal Procedure Code\*

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## Abstract

*The Judicial Reform Committee [JRC] was organized under the Supreme Court on October 28, 2003, which submitted final recommendations for the revision of the Criminal Procedure Code [CPC] on the last day of 2004. On December 15, 2004, the Presidential Committee on Judicial Reform was established to implement the 2004 recommendations of the JRC, and submitted a bill for the revision of the CPC after a period of heated discussions and debates. On December 21, 2007, the bill passed in the National Assembly. The 2007 revision of the CPC was made as a comprehensive solution for the task. The introduction of the jury trial by the 2007 Act for Civil Participation in Criminal Trials in 2007 was also a drastic change to the Korean criminal justice. It was a result of both the rapid growth of political democracy and the distrust of judicial integrity. It will strengthen the democratic legitimacy of the justice system, enhance its transparency, and bring about people's trust in and respect to the system. This twenty year old reform after the 1987 Constitution may be called the Korean "criminal procedure revolution."*

## I. Introduction

The new 1987 Constitution, which followed the nationwide June Struggle of 1987 which toppled the authoritarian regime, brought a significant change

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\* Regarding the legal provisions and judicial decisions before the 2007 revision of the Korean Criminal Procedure Code, see the Author's two previous articles, *Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY, Vol. 30, Issue 3 (2002 Spring); *The Ongoing Reconstruction of Korean Criminal Justice System*, SANTA CLARA JOURNAL OF INTERNATIONAL LAW, Vol. 5, Issue 1 (2006).

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in the theory and practice of Korean criminal procedure. Explicitly expressing the idea of due process in criminal procedure,<sup>1)</sup> the Bill of Rights in the Constitution has become a living document.<sup>2)</sup> The 1988, 1995 and 2007 revisions to the Criminal Procedure Code<sup>3)</sup> [hereinafter “CPC”] have also strengthened the procedural rights of criminal suspects and defendants and have reconstructed the entirety of criminal procedure. Further, the newly established Constitutional Court and the Supreme Court have made important decisions.

Following the constitutional request, the CPC was revised in 1988 and 1995. Many more calls for guaranteeing procedural rights and enhancing efficiency in criminal procedure have been made since the Roh Moo-Hyun government was established on February 25, 2003. Following an agreement between the President and the Chief Justice on the issue of judicial reform, the Judicial Reform Committee [*Sabeopkaehyeok wiweonhoe* hereinafter JRC] was organized under the Supreme Court on October 28, 2003,<sup>4)</sup> which submitted final recommendations for the revision of the CPC on the last day of 2004. On December 15, 2004, the Presidential Committee on Judicial Reform [*Sabeopchedokaehyeok chujinwiweonhoe*, hereinafter PCJR]<sup>5)</sup> was established to implement the 2004 recommendations of the JRC, and submitted a bill for the revision of the CPC after a period of heated discussions and debates. On December 21, 2007, the bill passed in the National Assembly. The purpose of this paper is to briefly review the main points of the revised Korean criminal procedure system.

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1) See THE CONSTITUTION OF THE REPUBLIC OF KOREA [*heonbeop*] art. 12(1), (3).

2) See Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 73-75 (1997).

3) See generally The Korean Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, last revised Dec. 21, 2007 as Law No. 8730) [hereinafter “CPC”].

4) Judicial Reform Committee Home Page, [http://www.scourt.go.kr/information/jud\\_rfrm\\_comm/mtng\\_status/index.html](http://www.scourt.go.kr/information/jud_rfrm_comm/mtng_status/index.html).

5) Presidential Committee on Judicial Reform Home Page, <http://www.pcjr.go.kr> (last visited Apr. 15, 2006).

## II. Arrest and Detention

### 1. Reshaped Judicial Warrant System for Custody

The CPC provides for two types of warrants that authorize the custody of persons: arrest warrants and detention warrants. A “detention warrant” for suspects is a conventional warrant, which has stricter requirements and longer periods of validity than an arrest warrant. Upon prosecutors’ request,<sup>6)</sup> judges will issue a detention warrant if the suspect or defendant has no domicile or if there is “probable cause” to believe that the suspect or defendant may destroy evidence or attempt to escape.<sup>7)</sup>

The “arrest warrant” was introduced by the 1995 revision of the CPC. If there is “probable cause” to believe that a suspect has committed a crime and will not cooperate with the investigative authorities’ request to come to the police station, the authorities can arrest the suspect with a warrant issued by a judge.<sup>8)</sup> Three exceptions to the warrant requirement are: (i) emergency arrests exceptions,<sup>9)</sup> (ii) flagrant offenders exceptions,<sup>10)</sup> and (iii) semi-flagrant offenders exceptions.<sup>11)</sup>

The 2007 revision of the CPC includes a new provision to prevent the

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6) CPC, *supra* note 3, arts. 202, 203 (providing that, as with arrest warrants, only the public prosecutor may request the issuance of a detention warrant).

7) *Id.* arts. 70, 201(3).

8) CPC, *supra* note 3, art. 200-2(1) (providing that only the prosecutor may request the issuance of a warrant, and that police officers can only submit a request for the issuance of a detention warrant to the prosecutor and not directly to a judge). If suspects have been arrested without a warrant, “without delay” a prosecutor should request the issuance of a detention warrant to a judge and a police officer should submit the request of the issuance of the warrant to a prosecutor. CPC, *supra* note 3, art. 200-4(1). A detention warrant should be filed within forty-eight hours, and if it is not, the suspect must be released immediately. *Id.*

9) KOREAN CONST., *supra* note 1, art. 12(3); CPC, *supra* note 3, art. 200-3(1). This exception is available if there is “probable cause” to believe that the suspect may destroy evidence or attempt to escape.

10) KOREAN CONST., *supra* note 1, art. 12(3); CPC, *supra* note 3, art. 212.

11) CPC, *supra* note 3, art. 211(2), which covers:

(i) persons being pursued as an offender with hue and cry; (ii) persons carrying criminally acquired goods, weapons, or other objects which apparently appear to have been used for the offense; (iii) persons who bearing on their bodies or clothing conspicuous traces of the offense; and (iv) persons who flee when challenged.

abuse of emergency arrests. Before the revision, the CPC required that the detention warrant, but not the arrest warrant, be filed with the court. In the case of an emergency arrest, therefore, a warrantless arrest without any judicial control was legitimized for forty-eight hours.

The 2007 revision set new rules. Now, if prosecutors, without requesting the issuance of a detention warrant, have released a suspect who was arrested without an arrest warrant, they must report the identity of the suspect, the date and place of the arrest and the reason for the arrest to the court.<sup>12)</sup> Similarly, if police officers, without requesting of the issuance of a detention warrant to a prosecutor, have released a suspect who was arrested without an arrest warrant, they must report this release to a prosecutor.<sup>13)</sup>

## 2. *Mandatory Judicial Hearing before Issuing a Detention Warrant*

Before the 2007 revision, the preliminary hearing system for issuing a detention warrant operated only upon the request of a suspect or his/her lawyer.<sup>14)</sup> This system was criticized as violating Article 9(3) of the International Covenant on Civil and Political Rights,<sup>15)</sup> which the Korean government ratified in April 1990. Article 9(3) requires a mandatory and immediate preliminary hearing, stipulating that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge.”<sup>16)</sup>

The 2007 revision of CPC makes this judicial hearing *mandatory*.<sup>17)</sup> A judge who has received prosecutor’s request for the issuance of a detention warrant should initiate the hearing without delay,<sup>18)</sup> and then decide whether or not to grant the request. Prosecutors and defense counsels are entitled to present their opinions during the hearing.<sup>19)</sup>

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12) *Id.* art. 200-4(4).

13) *Id.* art. 200-4(6).

14) CPC, *supra* note 3, art. 201-2(1).

15) *See generally* G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). The Korean government made a reservation of Articles 14-5, 14-7, 22.

16) *Id.*

17) CPC, *supra* note 3, art. 201-2(1).

18) *Id.*

19) *Id.* art. 201-2(4).

### 3. *Strengthened Habeas Corpus*

Before the 2007 revision of the CPC, Article 214-2 of the CPC provided that *habeas corpus* 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.”<sup>20)</sup> In a decision made on August 27, 1997, however, 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.<sup>21)</sup> The Court stated that, considering Article 12 (6) of the Constitution, Article 214-2 of the CPC must not be interpreted in a way that it deprives the suspect arrested without a warrant of the right to *habeas corpus*.

Following this decision, the 2007 revision removed the terms “with a warrant”<sup>22)</sup> from Article 214-2. Now, all arrested or detained persons, with or without a warrant, have a right to *habeas corpus*. If the arrested or detained suspect believes that the arrest or detention was illegal or inappropriate, or that there has been a significant change in circumstances, he or she may request the court to examine the legality or appropriateness of the arrest or detention. Within forty eight hours of receiving the request, the court must examine the suspect and make a decision regarding whether to release the suspect.<sup>23)</sup>

The *habeas corpus* outlined in the CPC applies to persons arrested or detained by investigative authorities. Previously, *habeas corpus* had not been available to persons under custody of medical facilities, social welfare facilities by administrative authorities or private persons. In 2007, however, the National Assembly passed the Habeas Corpus Act to expand *habeas corpus* to such persons.<sup>24)</sup> This represented a long-awaited resurrection of Article 10(5) of the 1962 Constitution,<sup>25)</sup> which stipulated the right of *habeas corpus* in cases

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20) KOREAN CONST., art. 12 (6); CPC, art. 214-2 (emphasis added).

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

22) CPC, *supra* note 3, art. 214-2(1).

23) CPC, *supra* note 3, art. 214-2(4).

24) The Habeas Corpus Act [*insinbohobeop*] (Law No. 8724, Dec. 21, 2007).

25) THE CONSTITUTION OF THE REPUBLIC OF KOREA [*heonbeop*] (Dec. 26, 1962, Constitutional Law No. 6), art. 10(5).

where liberty was violated by private persons but which was soon omitted in the 1969 revision of the Constitution.

## II. Interrogation

### 1. Bolstered Rights to Silence and Counsel

In a series of landmark decisions, the Korean Supreme Court has bolstered the rights to silence and counsel since democratization. First, in 1992, the Supreme Court excluded a criminal defendant's confession by adopting the rationale of the U.S. *Miranda* rule<sup>26)</sup> and applying it to statements elicited without informing of the right to silence in interrogation.<sup>27)</sup> Notably, the CPC did not have an explicit provision about such exclusion at the time. In two National Security Act violation cases in the 1990s,<sup>28)</sup> the Supreme Court held that the defendants' self-incriminating statements were illegally obtained since they violated their right to counsel and, thus, were excluded. Third, in a decision on November 11, 2003 involving a purported National Security Act violation by 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 recognized the right to have counsel *during* interrogation as a constitutional right of suspects,<sup>29)</sup> even though neither the Constitution nor the CPC had an explicit provision for the right to have a lawyer present during interrogation at the time. Reviewing the infringement of a non-detained suspect's right to counsel in a Public Office Election Act violation case, a 6-to-3 majority of the Constitutional Court on September 23, 2004 also confirmed that the right to have counsel present during interrogation is a constitutional right of the suspect.<sup>30)</sup>

The 2007 revision of the CPC codifies all the aforementioned decisions.

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26) *Miranda v. Arizona*, 384 U.S. 436 (1966).

27) See Decision of Jun. 23, 1992, 92 Do 682 [Korean Supreme Court].

28) See 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."

29) See Decision of Nov. 11, 2003, 2003 Mo 402 [Korean Supreme Court].

30) See Decision of Sep. 23, 2004, 2000 Heon Ma 138 [Korean Constitutional Court].

Article 244-3 of the CPC provides the *Miranda* rule.<sup>31)</sup> Prior to interrogation, investigative authorities should inform a suspect that (i) a suspect can choose not to make any statements or refuse to respond to specific questions; (ii) no disadvantage shall be given to a suspect even if he or she chooses not to make a statement; (iii) anything a suspect says after waiving the right to silence may be used as incriminatory evidence against the suspect in court; (iv) a suspect has a right to counsel including a right to have the counsel present during interrogation. Article 243-2 of the CPC provides the right to counsel during interrogation,<sup>32)</sup> but it may be restricted when there is “justifiable cause.”<sup>33)</sup> The extent of “justifiable cause” will be decided based on the 2003 Supreme Court decision in the Professor Song Doo Yul case.<sup>34)</sup>

## 2. Newly Introduced Tape Recording of Interrogation

Before the 2007 revision of the CPC, it contained no provision about the evidentiary power of videotapes recorded during interrogation. Formerly, such videotapes were rarely used in practice by investigative authorities.

Things have changed as nowadays videotaping is recognized by law enforcement authorities to be quite useful in preventing disputes over the admissibility and accuracy of defendants’ statements during interrogation. Prosecutors were encouraged by the mandatory videotaping experiments in some countries,<sup>35)</sup> And they came to consider videotaping of interrogations as the best method of restoring public confidence in them. Further, such videotapes were seen as ways of avoiding potentially damaging cross-examination targeted at police officers or prosecutors regarding what exactly

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31) See CPC, *supra* note 3, art. 244-3(1).

32) *Id.*, art. 243-2(1).

33) *Id.*

34) See *supra* text accompanying note 29.

35) 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.).

occurred in an interrogation room and as a means to back up the evidentiary power of prosecutor-made interrogation dossiers. However, defense attorneys have expressed concern that videotaping may simply provide legitimacy to interrogations.

Prosecutors' request to insert into the CPC a provision regarding the evidentiary power of videotapes recorded during interrogation was accepted by the PCJR. The original draft of the PCJR gave the videotapes secondary evidentiary power.<sup>36)</sup> However, concerned that such videotapes might provide juries and judges with prejudice that would work to heighten incrimination of defendants, the National Assembly rejected the draft, providing instead that videotapes may be used only "when it is necessary to refresh the memory of a suspect or a witness" in a trial or a preparatory procedure for a trial.<sup>37)</sup> The videotapes are not allowed to be watched by a judge but only by a suspect or a witness.

The original draft of the PCJR required a suspect's or his counsel's consent for such videotape recording, but the requirement was ultimately removed by the National Assembly.<sup>38)</sup> Therefore, even if a suspect objects, the investigative authorities may record an interrogation, so there are concerns that this practice may violate the right to silence.

### 3. *Recording of Investigation Process*

The 2007 revision of the CPC also mandates investigative authorities to record the arrival time of a suspect, the time an investigation began and ended, and other matters necessary to supervise the investigation process.<sup>39)</sup> These other matters may include specific times of recess, the time a suspect ate

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36) Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 312-2 (1). The draft set a requirement for the admissibility of videotapes as follows: (i) the defendant denies during trial what they stated during interrogation to prosecutors or police officers, and (ii) other pieces of evidence, such as the statements of prosecutors, police officers, or other participants in a preliminary hearing or a trial, are difficult to prove or not probative of the truth.

37) CPC, *supra* note 3, art. 318-2(2).

38) Unlike the tape recording of an interrogation of a suspect, the tape recording of the statements of non-suspects requires their consent. See CPC, *supra* note 3, art. 221(1).

39) CPC, *supra* note 3, arts. 244-4(1), 244(2).



a meal, and the time a suspect made a document by his or her own writing. The investigative authorities are required to orally read such records for the suspect or have the suspect read them.<sup>40)</sup> This new system is designed to make the investigation process more transparent.

### III. Widened Appeal to the Court against Non-Prosecution

The CPC provides a system to appeal to the High Court against non-prosecution. Before the 2007 revision, the scope in which the appeal was available was limited to three crimes by governmental officers: the crime of abuse of power, the crime of illegal arrest and detention, and the crime of battery and cruel treatment.<sup>41)</sup>

The 2007 revision expands the scope of this system to make such appeals available to all crimes. The complainants who do not agree with non-prosecution may request that the High Court review the appropriateness of the non-prosecution.<sup>42)</sup> Before making such a request to the court, the complainants should request that the Prosecutors' Office review the non-prosecution.<sup>43)</sup> If the High Court finds inappropriateness in non-prosecution, prosecutors must initiate prosecution.<sup>44)</sup>

### IV. Pre-trial Procedure

#### 1. Expanded Pre-trial Discovery

Article 35 of the CPC states that "defense counsel may review and copy the relevant documents or evidence after the prosecution is filed." Even before the 2007 revision of the CPC, two Constitutional Court decisions made strides

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40) *Id.* art. 244-4(2).

41) See The Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, revised July 19, 2006 as Law No. 7965), art. 260.

42) CPC, *supra* note 3, art. 260(1).

43) *Id.* art. 260(2).

44) *Id.* art. 262(6).

toward adopting a “pre-trial discovery” system.

In a decision on November, 27, 1997, the 7-to-2 majority of the Constitutional Court held in a National Security Act violation case that it is unconstitutional for prosecutors to prevent defendants and their attorneys from accessing the investigative records kept by prosecutors before a trial is open and after prosecution is filed.<sup>45)</sup> The Court also 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.”

Following the 1997 decision, the 2007 revision provides for a pre-trial discovery system. Defendants or their attorneys may request that prosecutors allow them to review or copy the documents or materials that prosecutors have kept *after* filing prosecution,<sup>46)</sup> which include the documents that prosecutors will submit as evidence to the court, the documents that include the names and out-of-court statements by planned witnesses for the prosecution, and exculpatory documents for the defense.

Prosecutors may deny or limit such discovery when there exist concrete concerns regarding potential endangerment of national security, elimination of evidence, threatening of witnesses, or creation of obstacles to investigation.<sup>47)</sup> If the request is denied, or the scope of review and copy is limited by the prosecutor, defendants or their attorneys may appeal to the court to review the prosecutor’s decision.<sup>48)</sup> If the request is accepted by the court, the court may order prosecutors to provide the documents to the defendants or their attorneys.<sup>49)</sup>

It is necessary to note that this new pre-trial discovery is not available for documents or materials that investigative authorities have kept *before* prosecution is filed. So defendants or their attorneys may not review or copy the documents or materials made by the investigative authorities before prosecution is filed.

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45) See Decision of Nov. 27, 1997, 94 Heon Ma 60 [Korean Constitutional Court].

46) CPC, *supra* note 3, art. 266-3(1).

47) *Id.* art. 266-3(2).

48) *Id.* art. 266-4(1).

49) *Id.* art. 266-4(2).

In a March 27, 2003 decision, however, a 5-to-4 majority of the Constitutional Court extended the above 1997 decision to a fraud case in which a judicial *habeas corpus* hearing for the suspect was to be held *before* prosecution was filed,<sup>50)</sup> even though Article 35 of the CPC applies only after prosecution has been initiated. The majority stated that despite the text of the Article, if the defense attorneys were not allowed to access to the investigative records, they could not sufficiently defend their client in the *habeas corpus* hearing.

Prosecutors may make use of pre-trial discovery *only when* the defendants or their attorneys have presented an argument that the defendant was not in the crime scene or he/she is insane in a court proceeding or preparatory procedure for a trial.<sup>51)</sup> The scope of the discovery available to prosecutors is narrower than that available to the defense.

## 2. Newly Established Pre-trial Preparatory Conference

The 2007 revision established a new pre-trial preparatory conference for expeditious and effective trials. Presiding judges may open this procedure at their discretion.<sup>52)</sup> Once opened, prosecutors, defendants, and defense attorneys have a duty to cooperate throughout the procedure.<sup>53)</sup> Each party may submit a summary of its factual or legal argument as well as its plan for proving its arguments to the court, and a presiding judge may order each party to submit the summary and the plan.<sup>54)</sup> The court should send the documents that a party has submitted to the court to the other parties to the case.<sup>55)</sup>

In the pre-trial preparatory conference the court may take one of the following actions: clarify the accused criminal fact and the applied legal provisions, allow alterations or amendments to the facts and provisions, arrange the issues of the case, allow the request of evidence, clarify the

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50) See Decision of Mar. 27, 2003, 2000 Heon Ma 474 [Korean Constitutional Court].

51) CPC, *supra* note 3, art. 266-11(1).

52) *Id.* art. 266-5(1).

53) *Id.* art. 266-5(3).

54) *Id.* art. 266-6(1), (2).

55) *Id.* art. 266-6(3).

contents of the argument regarding the requested evidence, decide whether to admit evidence, and decide the appropriateness of a request to review or copy documents and so forth.<sup>56)</sup>

## V. Trial

### 1. Newly Arranged Trial Process

The 2007 revision changes the anatomy of a courtroom. Before the revision, the prosecutor and defense attorney sat facing each other, while the defendant was separated from his or her counsel and located in front of the bench facing the judges. This setup implied that the defendant was not an adversarial party equal to prosecutor and that the defendant was no more than the object of the trial. It also prevented the defendant from consulting with his or her counsel. The 2007 revision moves defendant's seat next to that of his or her defense attorney.<sup>57)</sup>

The 2007 revision stipulates two leading principles for trial process. The first is "the principle of concentrated trial" to prevent the delay of trial.<sup>58)</sup> According to the principle, except in the case of unavoidable circumstances a trial should be consecutively open everyday if more than two days are necessary for the trial.<sup>59)</sup> The second is "the principle of oral pleadings."<sup>60)</sup> This principle is meant to overcome the phenomenon of "trial by dossiers" in which truth-finding depends heavily on the dossiers submitted by parties rather than on cross-examinations by the parties in the courtroom.

The 2007 revision mandates that the prosecutor make an oral statement of the criminally accused fact and applied legal provisions at the beginning of a trial,<sup>61)</sup> before the revision, such a reading was not mandatory. The revision also mandates that the defendant make a statement regarding whether he or

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56) *Id.* art. 266-9.

57) *Id.* art. 275(3).

58) *Id.* art. 267-2(1).

59) *Id.* art. 267-1(2).

60) *Id.* art. 275-3.

61) *Id.* art. 285.

she admits the accused facts after the prosecutor makes his or her opening statement.<sup>62)</sup> The defendant does not have to make such a statement if he or she wishes to exercise the right to silence.<sup>63)</sup> If the defendant admits the accused crime, the case goes through a brief investigation of evidence and moves to the sentencing process.

The 2007 revision makes the questioning of a defendant available only after the investigation of evidence.<sup>64)</sup> Before the revision the questioning of a defendant was initiated by the prosecutor and defense attorney consecutively before the investigation of evidence. This procedure was criticized for making the focus of trials mainly the statements of defendants rather than evidence. Article 296-2 of the CPC, thus, moves such questioning after the investigation of evidence. So the statements of a witness or a victim or the results of scientific investigations, for example, will be examined before the defendant is questioned. If a presiding judge permits it, however, the question may be given to the defendant even before the investigation of evidence.<sup>65)</sup>

The 2007 revision adopts a sanction system to ensure the attendance of a witness during a trial. Article 150-2 imposes “a duty of reasonable efforts to make a witness attend in a trial” on the party who has requested the witness.<sup>66)</sup> Article 151 provides much heavier sanctions on witnesses who do not attend for no justifiable reason. Such a witness must pay the trial costs resulting from his or her non-attendance, and a fine of up to 5,000,000 Won (currently equivalent to about U.S. \$3,600) may be imposed on him or her.<sup>67)</sup> If the witness does not attend for no justifiable reason despite these sanctions, he or she may be put into jail for up to seven days.<sup>68)</sup>

The 2007 revision also changes Article 316 to allow investigators’ witnesses to testify regarding statements made by a defendant during interrogation when such statements were made under especially reliable circumstances.<sup>69)</sup>

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62) *Id.* art. 286(1).

63) *Id.* The presiding judge should inform the defendant of the right to silence. *Id.* art. 283-2(2).

64) *Id.* art. 296-2.

65) *Id.*

66) *Id.*, art. 150-2(2).

67) *Id.* art. 151(1).

68) *Id.* art. 151(2).

69) *Id.* art. 316(1).

The scope and admissibility of the witness of investigators, however, is not specified. These will be provided in the future by courts' decisions interpreting this change.

There exists a tension between Article 316 and current judicial decisions. The Supreme Court has held that a police officer's testimony that a suspect had confessed during interrogation is not admissible if the suspect denied his or her statement during interrogation.<sup>70)</sup> Article 312(3) of the CPC has provided that the dossiers made by police officers shall not be used as evidence if defendants or their attorneys contest the contents of<sup>71)</sup> the dossiers as not matching what the defendants stated during interrogation.<sup>72)</sup> Recognizing the coercive nature of police practices in interrogation rooms, the Supreme Court was, at the time of the aforementioned decision, trying to prevent investigative authorities from circumventing Article 312(3) of the CPC.

## 2. Newly Introduced Jury Trial for Serious Felony Cases

In June 1, 2007, the Act for Civil Participation in Criminal Trials was legislated in the National Assembly, and it became effective as of January 1, 2008.<sup>73)</sup> It adopted a jury system that Koreans have never experienced throughout their history.

The scope of felonies that the new trial system applies to is mainly limited to murder, manslaughter, rape, robbery, bribery, kidnapping and narcotic crimes.<sup>74)</sup> The defendants are given the option of waiving a trial with lay participation,<sup>75)</sup> and courts are to check if defendants wish to waive it.<sup>76)</sup> Professional judges have the discretion to exclude lay participation, in

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70) See, e.g. Decision of May 8, 1979, 79 Do 493 (Korean Supreme Court); Decision of Aug. 28, 2002, 2002 Do 2112 (Korean Supreme Court).

71) For more detailed discussion regarding the jury trial, see the Author's another article that will be published in 2009. Kuk Cho, *The Newly Introduced Criminal Jury Trial in Korea: A Historic Step Toward "Justice By People,"* AUSTRALIAN JOURNAL OF ASIAN LAW, Vol. 10, Issue 2 (2009).

72) See CPC, *supra* note 3, art. 312(3).

73) The Act for Civil Participation in Criminal Trials [*kukmin eui hyeongsachaepan chamyeo e kwanhan beopryul*] (Law No. 8295, June 1, 2007).

74) *Id.* art. 5(1).

75) *Id.* art. 5(2).

76) *Id.* art. 8.

particular when jurors, juror candidates, or their families or relatives may possibly face danger to life, liberty or property; when an accomplice of the defendant refuses to be tried by jurors.<sup>77)</sup> Judges' decisions to exclude lay participation are subject to appeal.<sup>78)</sup>

The number of jurors used varies according to the case. The number is nine in cases where capital punishment or life imprisonment may be given to the defendant; five in cases in which the defendants admit to being guilty; and seven in all other cases.<sup>79)</sup> Judges can conduct voir dire to check the entitlement and capability of the juror candidates. Prosecutors, defendants, or defense counsels can ask judges to conduct voir dire, and judges can choose to allow prosecutors or defense counsels to conduct voir dire themselves.<sup>80)</sup> Both "challenge for cause" and "peremptory challenge" are available to prosecutors and defense counsels.<sup>81)</sup>

Different from bench trial cases,<sup>82)</sup> the pre-trial preparatory conference introduced by the 2007 amendment of the Criminal Procedure Code should be held in cases involving a jury trial.<sup>83)</sup>

The verdict process combines the U.S. and German systems to reduce the possibility of a "hung jury." At first, the verdict process starts similar to that in the U.S.: without the participation of the judge, jurors discuss the guilt of the defendant and make a verdict by unanimous opinion.<sup>84)</sup> If half of the jurors agree, the jurors can choose to hear the judge's opinion.<sup>85)</sup> If the jurors cannot reach the verdict, they should hear the judge's opinion. Then the judge and the jurors discuss the guilt of the defendant together and the jurors render a verdict according to a majority opinion of the jurors without the presence of the judge.<sup>86)</sup> In that the judge's opinion can work as an important factor in the verdict process, the verdict process shares similarities to that in Germany. In

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77) *Id.* art. 9(1).

78) *Id.* art. 9(3).

79) *Id.* art. 13(1).

80) *Id.* art. 28(1).

81) *Id.* arts. 28(3), 30.

82) *See* CPC, *supra* note 3, 266-5(1). *See supra* text accompanying notes 52-56.

83) The Act for Civil Participation in Criminal Trials, art. 36(1).

84) *Id.* art. 46(2).

85) *Id.*

86) *Id.* art. 46(3).

these two phases where the judge's opinion can be presented, the judge should not make his statement of guilty or not guilty.<sup>87)</sup> There is neither guilty plea nor arraignment system in Korea. Thus the defendants who confess may have a jury trial and the verdict process is not waived in that case.

Another German-influenced trait involves when jurors discuss the sentence together with the judge and submit their opinion to the judge if the defendant is found guilty.<sup>88)</sup> The 2007 Act requests the presiding judge to explain to the jurors the scope of punishment and the conditions for sentencing before the discussion regarding sentence.<sup>89)</sup> However, it is silent on the issue of how to decide the sentence. Jurors may vote and submit their majority opinion to the judge or each juror may express his/her opinion without vote.

The jurors' opinion concerning guilt and sentencing does *not* bind the judge's ultimate decisions regarding guilt and sentencing.<sup>90)</sup> Despite the recommendatory effect of the jurors' opinion, however, it can reasonably be anticipated that judges will not disregard it easily. The Administration Bureau of the Supreme Court strongly recommends that judges respect jurors' opinions, if and whenever possible.<sup>91)</sup> It is noteworthy that the verdict can be appealed by either party,<sup>92)</sup> so unlike the U.S. jury system, the prosecutor can appeal a not-guilty verdict entered by the jury.

## VI. Evidence Law

### 1. Adoption of Discretionary Exclusionary Rule in Search-and-Seizure – Korean Version of Mapp

Before the 2007 revision of CPC, neither the Constitution nor the CPC

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87) The Rules for Civil Participation in Criminal Trials [*kukminewi hyeongsachaepanchamyeo e kwanhan kyuchik*] (The Supreme Court Rules No. 2107, October 29, 2007), art. 41(5).

88) The Act for Civil Participation in Criminal Trials, art. 46(4).

89) *Id.*

90) *Id.*, art. 46(5).

91) *Beopweonhaengcheongcheo* [The Administration Bureau of the Supreme Court], *KUKMINCHAMYEOCHAEPAN EUU IHAE* [UNDERSTANDING OF TRIALS WITH CIVIL PARTICIPATION] 142(2007).

92) CPC, arts. 226, 401.



contained a provision regarding the exclusion of illegally obtained physical evidence. Although the Supreme Court adopted *Miranda* and *Massiah*,<sup>93)</sup> the Court had consistently declined to exclude the physical evidence obtained by illegal search-and-seizure procedures, providing the following rationale, “[e]ven though the procedure of seizure was illegal, the value as evidence does not change because the procedure did not affect the quality and shape of the substance itself.”<sup>94)</sup> The Court clearly rejected the U.S. Fourth Amendment *Mapp* exclusionary rule.<sup>95)</sup>

Academics and defense attorneys argued that unless illegally-obtained evidence is excluded, the constitutional requirement for the search-and-seizure warrant is left without any teeth. There are no other effective remedies for illegal police misconduct in Korea. Criminal or civil liability and internal discipline have not proven effective in deterring the police misconduct in Korea.

Responding to these criticisms, the 2007 revision included Article 308-2, which provides that “evidence obtained not through due process shall not be admissible.”<sup>96)</sup> Before the 2007 revision of CPC, on November 15, 2007 the Supreme Court also made a decision to exclude illegally obtained physical evidence.<sup>97)</sup> The Court held that the illegally obtained evidence should not be automatically excluded but could be excluded considering all the circumstances regarding the illegality of the investigation. The Court, thus, adopted a *discretionary* exclusionary rule rather than a mandatory one. The majority opinion of the Court also provided a standard to determine whether to exclude such a evidence: Illegally obtained evidence should be excluded in principle, but it may, in exceptional circumstances, be admissible when the violation made by investigative authorities does not infringe upon the “substantial contents of the due process.” This standard itself is still abstract. The degree of the illegality and the intent of the investigative officer may be considered in applying the standard in a case.

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93) See *supra* text accompanying notes 48-51.

94) See Decision of Sept. 17, 1968, 68 Do 932 (Korean Supreme Court); Decision of June 23, 1987, 87 Do 705 (Korean Supreme Court); Decision of Feb. 8, 1994, 93 Do 3318 (Korean Supreme Court).

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

96) CPC, *supra* note 3, art. 308-2.

97) See Decision of Nov. 15, 2007, 2007 Do 3061 [Korean Supreme Court].

It is also noteworthy that the majority opinion explicitly states that secondary evidence derived from the first evidence obtained illegally should be excluded. Here the Court explicitly adopts the U.S. principle of “the fruit of poisonous tree.”<sup>98)</sup>

## 2. *Intact Strong Evidentiary Power of Prosecutor-made Dossiers*

Article 312 (1) of the CPC has given exceptionally strong evidentiary power to the prosecutor-made dossiers even if they are hearsay.<sup>99)</sup> Before the 2007 revision, it provided that interrogation dossiers, which can include defendants’ statements or confessions, may be admissible at trial (i) if they contain a defendant’s signature and were made by prosecutors, and (ii) “if there exist special circumstances which make the dossiers reliable,” *without* cross-examination of the interrogators *even if* the defendants contend that the contents of the dossiers do not match what they stated during interrogation.<sup>100)</sup> Assuming that interrogation by prosecutors itself may fulfill the requirement of “special circumstances which make the dossiers reliable,” the Supreme Court recognized the legitimacy of Article 312 (1).<sup>101)</sup> Thus, prosecutors enjoyed a significant evidentiary advantage.

However, Article 312 (1) was strongly criticized because it made it extremely difficult for defendants to escape guilty verdicts at trial once they made self-incriminating statements in front of prosecutors. The disadvantage to defendants was especially serious considering that, until the Professor Song cause of 2004,<sup>102)</sup> they had not been allowed to have a lawyer during interrogation. A number of scholars and defense attorneys strongly criticized the Article as making the prosecutor a *de facto* judge, and as making

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98) *Silverthorne Lumber v. United States*, 251 U.S. 385(1920); *Nardone v. United States*, 308 U.S. 338 (1939).

99) CPC, *supra* note 3, art. 312(1). To contrast, the CPC provides different status to the dossiers made by police officers. The dossiers made by police officers shall not be used as evidence if the defendants or their attorneys contend that the contents of the dossiers do not match what the defendants stated during interrogation. *See Id.* art. 312(3).

100) The Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, revised July 19, 2006 as Law No. 7965), art. 312(1)

101) *See* Decision of Mar. 8, 1983, 82 Do 3248 [Korean Supreme Court]; Decision of Jun. 26, 1984, 84 Do 748 [Korean Supreme Court].

102) *See supra* text accompanying note 29.

defendants' statement in front of prosecutors in an interrogation room *de facto* testimonies in a trial.

The JRC under the Supreme Court in its final recommendations on December 31, 2004 stated that Article 312 (1) is so dossier-oriented that it infringes upon defendants' right to cross-examination, thus calling for its revision. On April 15, 2005, responding to the above criticism of Article 312 (1) and following the recommendations of the JRC, the PCJR submitted its first draft to revise the Article to prohibit prosecutors' interrogation dossiers from being admissible at trial *unless* the defendants agree to the use of them. At the same time, the draft allows police officers or prosecutors who interrogate defendants to testify against the defendants when the defendants deny what is recorded in the dossiers. The intention of the PCJR was to abolish the phenomenon of "trial by dossiers" wherein truth-finding was made heavily dependent on the dossiers made by prosecutors rather than on the cross-examinations by the parties in front of judges in a courtroom. This intention came from the 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 objections from prosecutors even while it attracted praise from defense attorneys and academics. Prosecutors criticized that the draft allowed defendants to easily invalidate their confession or statement in the interrogation room later in a trial, thus incapacitating prosecutors in their fight against crime. They were very uncomfortable that they might be called as a witness to testify regarding defendants' statements and to be cross-examined by defense attorneys. They were also unsatisfied with the draft because it seemed to undermine their status as "semi-judge" and made them no more than an adversarial party.<sup>103)</sup>

While the debate was still ongoing, the Constitutional Court, in a decision on May 26, 2005, reviewed the constitutionality of Article 312 (1).<sup>104)</sup> The 5-to-4 opinion of the Court held the requirement of "special circumstances which make the dossiers reliable" to be constitutional. However, 6 out of the 9 Justices recommended that the vagueness of the requirement be removed. In particular, four Justices in their dissenting opinion stated that such a special

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103) See CHOSUN ILBO, Jan. 16, 2005; DONG-A ILBO, Jan. 16, 2005; HANKYOREH SHINMUN, Jan. 16, 2005.

104) See Decision of May 26, 2005, 2003 Heon Ka 7 [Korean Constitutional Court].

evidentiary power given to the prosecutor-made dossiers may be allowed *only when* “procedural transparency of the interrogation by prosecutors is reinforced and the defense attorney’s participation in the interrogation is guaranteed.”

The hot debate over Article 312 (1) ended in a compromised way. The first draft did not get strong support either from judges, who were afraid that it could make trials much more complex and lengthy, or from the public, who were afraid that it could free criminals who have changed their minds after already confessing in front of prosecutors.

Then the PCJR submitted a new draft on July 18, 2005 which kept the evidentiary power of the prosecutor-made interrogation dossiers alive but imposed stricter requirements.<sup>105)</sup> The National Assembly revised the new draft to make the 2007 revision, which provides for two tracks to achieve admissibility of the prosecutor-made interrogation dossiers. First, in cases where the defendants admit in a preliminary hearing or a trial that the dossiers are recorded as the defendants have stated, the dossiers are admissible (i) if they are made by legal process and method, and (ii) if it is proven that they are made under especially reliable circumstances.<sup>106)</sup> Second, in cases where the defendants do not admit in a preliminary hearing or a trial that the dossiers are recorded as the defendants have stated, the dossiers are admissible (i) if they are made by legal process and method, (ii) if it is proven by objective method, such as audio recording, that the dossiers are recorded as the defendants have stated, and (iii) if it is proven that they are made under especially reliable circumstances.<sup>107)</sup>

It is not clear what the meaning of “especially reliable circumstances” is here. Although the PCJP explicitly specified the “presence of their attorney during interrogation” as an example of “especially reliable circumstances” in its draft, this was ultimately omitted in the final version.<sup>108)</sup> Prosecutors will keep making efforts to include self-incriminating statements of defendants in

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105) Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 312(1).

106) See CPC, *supra* note 3, art. 312(1).

107) *Id.* art. 312(2).

108) Presidential Committee on the Judicial Reform, Bill for the Revision of the Criminal Procedure Code, art. 312(1).

prosecutor-made interrogation dossiers and will argue that the dossiers should be admissible without cross-examination in court even if they have been made without the presence of defense attorney.

## VII. Victim Protection

Expanding protective systems for sexual violence victims in the Act for the Punishment of Sexual Assault Crimes and Protection Victims of 1993,<sup>109)</sup> the 2007 revision of the CPC provides that a court may allow “a person who has a reliable relationship with a crime victim” to sit with the victim during trial in cases where it may cause the victim significant anxiety or tension to be questioned as a witness.<sup>110)</sup> The Court should have “a person who has a reliable relationship with the victim” sit with the victim in cases where the victim is under thirteen years old or has physical or mental disability.<sup>111)</sup> These protective systems also apply to the investigation procedures employed by investigative authorities to question such victims.<sup>112)</sup>

The 2007 revision also establishes a video transforming system to protect vulnerable crime victims. When examining underage victims about sexual violence crimes, the court may use video or closed-circuit television facilities to ensure that they do not have to face their offender during the examination.<sup>113)</sup> Questioning by the use of video or closed-circuit television facilities may also be available for victims of non-sexual violent crimes where they have significant difficulties confronting the offender due to the nature of the crime or the age, psychological or physical status of the victim.<sup>114)</sup>

The 2007 revision strengthen the victim’s right to make a statement during a trial. In the previous system, only the victim had such a right. Now the right is also given to the victim’s agents including his or her spouse, relatives,

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109) The Act for the Punishment of Sexual Violence Crimes and Protection of Victims [*Seongpokryok beomjoe eui cheobeol mit pihaeja boho deung e kwanhan beopryul*], Law No. 8059 of 2006, Law revised on October 27th, 2006, as Law No.8059.

110) CPC, *supra* note 3, art. 163-2(1).

111) *Id.* art. 163-2(2).

112) *Id.* art. 163-2(2).

113) *Id.* art. 165-2.

114) *Id.* art. 165-2.

brothers and sisters.<sup>115)</sup> When a court questions the victim or his or her agents, it should give them a chance to speak his or her opinion about the degree and consequences of damage caused by the crime as well as the punishment of the defendant.<sup>116)</sup> Victims' statements as witnesses at trial may not be disclosed by the court to protect his or her privacy or safety.<sup>117)</sup> The 2007 revision also provides victims' right to review or copy court documents.<sup>118)</sup>

## VIII. Conclusion

The 1987 Constitution has provided a new perspective for the constitutionalization of criminal procedure. The main point of issue and most compelling task of reforming criminal justice after democratization was to vitalize the procedural rights in criminal process, deter police misconduct, effectuate the trial process, and protect victims' privacy. The 2007 revision of the CPC was made as a comprehensive solution for the task. The introduction of the jury trial by the 2007 Act for Civil Participation in Criminal Trials in 2007 was also a drastic change to the Korean criminal justice. It was a result of both the rapid growth of political democracy and the distrust of judicial integrity. It will strengthen the democratic legitimacy of the justice system, enhance its transparency, and bring about people's trust in and respect to the system. This twenty year old reform after the 1987 Constitution may be called the Korean "criminal procedure revolution."<sup>119)</sup>

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115) *Id.* art. 294-2(1).

116) *Id.* art. 294-2(2).

117) *Id.* art. 294-3(1).

118) *Id.* art. 294-4(1).

119) See Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 16-18 (1988) (stating that there were three themes in the U.S. "criminal procedure revolution" led by the Warren Court: (i) pursuit of equality, which is the effort to stamp out not only racial discrimination but also to insure fair treatment for rich and poor alike, (ii) concern with the dangers of unchecked executive power and reinforcement of adversarial procedure and (iii) a preoccupation with practical implementation beyond declaring new rights).