

The Korean Hearsay Rule and the Protocol

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The Confrontation Clause guarantees to the accused a process not a product.**

Abstract

Later in the course of the democratic reformation of the justice system, the Judiciary, supported by the civil rights groups and a majority of the legislators, tried to limit prosecutorial and police power. More precisely, they opposed the "dossier-building" practice in the pre-trial stage that the prosecutor dominates. Thus they decided to control it. The best way would be to deny protocols' admissibility and to encourage the parties to offer more live testimonies. The rule against hearsay basically guarantees this paradigm shift. The amendment also opened the way for calling those who heard the suspects' statements'. But trial judges prefer to read protocols in office in preparation for trials. The videotape is not even in the list of substantial evidence.

Certainly, the protocols containing PIS have lost their authoritative voice. They must have been prepared properly, be reliable, genuine, correct, and made in a particularly reliable situation. Furthermore, the testifier must be available for cross-examination from a defense counsel. All these requirements make the prosecution increasingly more dependent on protocols made with suspect parties' admissions.

The most popular evidence still seems to be a protocol with party admission. Videotapes are prepared for supporting its admissibility not for substantial evidence. In the Korean criminal process, this sort of protocol itself flows as if it is something that reveals the truth. Roughly speaking, the Korean criminal process is similar to that of the French one of which Professor Langbein has given an interesting description.

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** Jerome C. Latimer, *Confrontation after Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 328 (2006).

I. Introduction

Americans understand what the rule against hearsay is as do Koreans. The Korean Criminal Procedure Code (hereinafter “CPC”) outlines the hearsay rule and its exceptions. Korean scholars and practitioners are familiar with the history and development of that typical Anglo-American evidentiary rule. In the criminal trial in Korea, judges and lawyers frequently discuss it.

However, it seems that people designate different objects even though employing the same terms. Koreans refer to the hearsay rule and the right of cross-examination but have no specific interest in the famous case, *Crawford v. Washington*.¹⁾ Korea still uses the dossier, which has been used in the typical Continental inquisitorial process, as substantial evidence even though the rule against hearsay is often announced as one of evidentiary rules.

This article provides focuses on reporting the development of the rule in Korea (II) and explaining why the rule against hearsay mattered in the Korean Judicial reform, which resulted in the amendment of the CPC in 2007. A sketch of the two years’ practice after that reform follows (III) and concludes with commentary on the ongoing struggle between the Judiciary and the Prosecution for getting the initiative and discretionary power in the pre-trial fact-finding process (IV).

II. The General Feature of Korean Hearsay Rule

1. Code of Criminal Procedure

The CPC was promulgated in 1954 and amended more than ten times including the extensive revision in 2007.²⁾ Since Korea does not have any specific Code on Evidence, CPC also provides 15 articles about criminal

1) *Crawford v. Washington*, 541 U.S. 36 (2004).

2) See generally JAESANG LEE, SINHYEONGSASOSONGBEOP [NEW CRIMINAL PROCEDURE LAW 15-20] (2008).

evidentiary rules and exceptions under the title of Evidence.³⁾ Worthy of note is that about half of those articles regard the rule against hearsay and its exceptions.⁴⁾ More specifically, article 310-2 announces the hearsay rule by saying:

Except as provided for in Articles 311 through 316, any document which contains a statement in place of the statement made at a preparatory hearing or during public trial, or any statement the import of which is another person's statement made outside preparatory hearing or at the time other than the public trial, shall not be admitted as evidence.⁵⁾

Accordingly, articles 311 to 316 provide the foundational requirements for several exceptions written or spoken.⁶⁾ Written hearsay statements may be admitted as evidence if they fall within the category provided by the articles from 311 to 315.⁷⁾ On the other hand, spoken statements are admissible through article 316 which states:

Oral testimony given by a person other than the defendant at a preparatory hearing or during a public trial, the import of which is the statement of a person other than the defendant, shall be admitted into evidence only when the maker of the original statement is unable to testify because he is dead, ill, or resides abroad, his whereabouts is not known, or there is any other similar reason, and only if it is proved that the statement was made in a particularly reliable situation.⁸⁾

3) See HYEONGSASOSONGBEOP [CRIMINAL PROCEDURE CODE (CPC)], art. 307-318(3).

4) See CPC, art. 310(2)-316.

5) CPC, art. 310(2).

6) See CPC art. 311-16.

7) See CPC art. 311-15.

8) CPC, art. 316.

2. Practical Matters Regarding the Rule against Hearsay

In Korea, the hearsay rule is a well-known subject, and scholars and practitioners are sufficiently informed of Roberts, *Crawford* and even Davis v. Washington.⁹⁾ The highly competitive bar exams are full of hearsay essay questions which applicants must answer and thus need to be familiar with the basic concepts of the FRE and some of its legislative history. Korea is one of the most loyal followers of the rule against hearsay which took form “between 1675 and 1690”¹⁰⁾ in England. As a consequence, the Korean legal circle paid close attention to *Crawford* and not surprisingly, several articles ventured to analyze the aftershock caused by the ruling on legal practice in the United States.¹¹⁾

However, the *Crawford* conclusion regarding Confrontation could not be applied or cited in Korea because the Korean Constitution does not guarantee the right of Confrontation for the criminal defendant. It guarantees the right against self-incrimination¹²⁾ and that of due process,¹³⁾ but it does not include the meaning of Confrontation that *Crawford* rediscovered. Rather, the CPC permits law enforcement personnel to use confrontation as one of the possible ways for finding the truth as shown by article 245 which states that “[a] public prosecutor or judicial police officer may, if necessary to determine the facts, confront the suspect with other suspects or testifiers,”¹⁴⁾ but it is not mandatory.

9) Davis v. Washington, 547 U.S. 813 (2006). About the meaning of the Davis conclusion, see generally Thomas Y. Davies, *Not the “Framer’s Design”*: How the Framing Era Ban against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Original Confrontation Clause, 15 J.L. & POL’Y 349 (2007).

10) 5 WIGMORE, EVIDENCE § 1364, at 16 (3d ed. 1940) (“No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the [rule against hearsay] doctrine takes place”).

11) See generally Taesup Geum, *The Tendency of the United States Supreme Court’s Cases after Crawford*, in HYUNGSASOSONGEUI YIRONGWASILMU [THEORY AND PRACTICE OF CRIMINAL TRIALS], 1-15 (2010).

12) See DAEHANMINKUK HUNBEOB [CONSTITUTION] art. 12(2) (1987) translated at <http://english.court.go.kr/home/english/welcome/republic.jsp> (last visited Nov. 13, 2009).

13) See CONSTITUTION art. 12(1).

14) CPC, art. 245 .

Another reason that the Korean legal circle is not deeply interested in the *Crawford* revolution is that the testimonial statements by out-of-court declarants are not considered such important evidence that the government officials need to make efforts to prepare them as one of the hearsay exceptions. If a police officer made an investigation report and cannot come to the court “because he is dead, ill, or resides abroad,”¹⁵⁾ the article stating the hearsay exception of the police report comes to play. According to that article, the court may accept that report as substantial evidence if it finds that “the statement was or preparation [of that report] was made in a particularly reliable situation.”¹⁶⁾ However, that report admitted as evidence would not be a critical weapon for the prosecution because its evidentiary weight would depend on, as a matter of practice, judicial discretion.¹⁷⁾ Any reasonable judge will not condemn a defendant solely on the basis of the police report the producer of which has disappeared. Other hearsay exceptions are similarly treated in which hearsay declarants are absent from public trial. These sorts of exceptions merely strengthen the conviction that fact-finders have already reached through live testimonies and review of the protocols made by law enforcement personnel, which are basically regarded as relevant and convincing evidence in Korea. Live testimony is not at issue so discussion is unnecessary.

3. *Protocols by Law Enforcement Personnel*

A testifier might say, “I saw the suspect at the crime scene. Since I was just a few meters distant from there, I am sure that it was the suspect who killed the victim.” Hearing this information from a testifier, law enforcement personnel such as a police officer or a public prosecutor decides to indict the suspect and prepares documents called protocols. Sometimes, however, a witness “turn[s] coat”¹⁸⁾ in the trial and denies what

15) CPC, art. 314.

16) CPC, art. 314.

17) See *infra* note 65.

18) Jennifer L. Hiliard, *Substantive Admissibility of a Non-Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View*, 32 VILL. L. REV. 471, n.5 (1987) (“A turncoat

he has told in the investigation stage or even the fact that he has told anything to the officer. Then the law enforcement personnel may have a very realistic option, which is to present the protocol as substantial evidence. The protocols can be also made with the suspects' inculpatory statements and are sometimes admissible as evidence even though the defendant later changes the statement.¹⁹⁾

In these cases, the testifier's statement is somewhat close to, by nature, the Prior Inconsistent Statement under the FRE 801(d)(1) and that of the suspects to the party admission under 801(d)(2). Both are excluded, in the Federal courts, from the hearsay definition²⁰⁾ and admissible as substantial evidence if they meet some foundational requirements.²¹⁾

In Korea, the protocols containing the PIS and the party admission are defined as hearsay²²⁾ and their admissibility normally depends on whether they are qualified as an exception.²³⁾ Then why does the CPC consider the suspects' and testifiers' statements as hearsay and tries to check their admissibility in terms of hearsay exceptions? To understand this, a bit of historical research is needed.

1. Historical Narrative

The French *Code d'Instruction Criminelle* (hereinafter "CIC") was a very important model in the development of the Japanese and Korean Criminal Procedures.²⁴⁾ From the ordinance of Villers-Cotterets in 1532 to the CIC,

witness is a witness who has on some prior occasion told a different story than that to which he is testifying on the stand").

19) See CPC art. 312.

20) See Fed. R. Evid. 801(d).

21) See *id.* ("A statement is not hearsay if (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition [...and] (2) The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity").

22) See CPC art. 310-2.

23) See CPC art. 312.

24) See, e.g., WANKYOO LEE, HYEONGSASOSONGBEOP YEONGOO [A STUDY ON THE CRIMINAL PROCEDURE LAW] 182 (2008) ("Japan has introduced the modernized European system in the

the French criminal justice prepared a system in which a neutral judge or a surrogate examined the suspect and the testifier for making a type of evidence called a dossier or protocol.²⁵⁾ The Code gave that power to the *juge d'instruction* in 1808 which is still true and continues in the modernized *Code de la Procedure Penale* in France.²⁶⁾

In the nineteenth century, the Japanese government extensively copied the so-called French system of pre-trial investigation, *information preparatoire*, into their proper code²⁷⁾ because, at that time, it was regarded as the most advanced and civilized method of prosecution.²⁸⁾ Thus the Japanese version of the *juge d'instruction* was invented and endowed with the right to interrogate suspects and witnesses, and more importantly, to make dossiers admissible as evidence later in a public trial.²⁹⁾

When Japanese troops conquered the Korean peninsula, they came with their codes. Japanese codes became effective through the Ordinance of Chosun (hereinafter "Ordinance"), which ordered that the Japanese code should be equally applied in the Korean courts.³⁰⁾ Accordingly, Koreans were supposed to follow the French model of criminal prosecution. However, one of the most important differences between the Korean model and the Japanese/French one was that the *juge d'instruction* might delegate his work to a police officer or a prosecutor according to articles 12 to 13 of

era of Meiji and promulgated the Criminal Instruction Law which was similar to the *Code d'Instruction Criminelle* in 1880").

25) See generally JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 223-39 (1974). Since the *juge d'instruction* produces a dossier, I will call the document made by a prosecutor or a police officer as a protocol. The Korean Legislation Research Institute officially translates "joseo" in Korean as "protocol" in English rather than "dossier." See <http://elaw.klri.re.kr/> (last visited September 19, 2010).

26) See C. PR. PEN. § 120.

27) About the French CIC's influence upon the Meiji Japan, see MYUNGSEON NOH & WANKYOO LEE, HYEONGSASONGBEOP [CRIMINAL PROCEDURE LAW] 43, n.47 (2009).

28) LEE, *supra* note 2, at 13 ("This CIC has been called as the reformed Criminal Procedure Law because of its freshness. It was also regarded as a democratic law and deeply affected the European criminal procedure).

29) See Keiji soshoho [Code of Criminal Procedure], Law No. 75 of 1922, art. 56.

30) Ordinance Article 1(10) reprinted in SUPREME PROSECUTION SERVICE, MATERIALS FOR THE LEGISLATION AND AMENDMENT OF THE CRIMINAL PROCEDURE LAW 42 (Supreme Prosecution Office, 1997).

the Ordinance.³¹⁾

Originally, the CIC was designed to protect the fundamental rights of the suspect, and that is why the investigative role was conferred to one of the magistrates who had received intensive legal training.³²⁾ The problem was that if a judge conducted the entire investigation, it would become inevitably slow and ineffective.³³⁾ Thus the idea that some investigative powers could be delegated to law enforcement personnel had been adopted in France and Japan. Such delegation was called the *commission rogatoire* in French.³⁴⁾ The Japanese colonial government further thought it would be more effective to use police and prosecutorial resources, specifically in Korea, than to require the Japanese *juge d'instruction*, who did not understand Korean, be responsible for the entire prosecution of Korean criminals. Consequently, policemen and prosecutors came to play the role of *juge d'instruction* in Korea. In other words, they could make protocols which were admissible as evidence in trials.³⁵⁾

In Japanese criminal procedure, the admissibility of the protocols was widely accepted, but the right to interrogate suspects and to produce them was mainly conferred to the judge. The *commission rogatoire* to the police officer and the prosecutor was limited, so it was fairly safe to admit the judges' dossiers as evidence in a public trial. However, in colonized Korea, the problem was that the police officers and prosecutors played the role of *juge d'instruction*, and

31) See LEE, *supra* note 24, at 295-96.

32) See, e.g., Honorable Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L COMP. L.J. 87, 105 (1999) ("The model is structured upon the employment of a single judge who is neutral, impartial, and dedicated to the investigation of crime in order to promote the ends of justice").

33) See *id.* at 89 ("High on the list of complaints are the slowness and complexity of the process").

34) See, e.g., C. PR. PEN. art. 81 ("Si le juge d'instruction est dans l'impossibilité de procéder lui-même à tous les actes d'instruction, il peut donner commission rogatoire aux officiers de police judiciaire afin de leur faire exécuter tous les actes d'information nécessaires dans les conditions et sous les réserves prévues aux articles 151 et 152.").

35) Ordinance Article 12 reprinted in SUPREME PROSECUTION SERVICE, *supra* note 30, at 43-4.

their protocols were equally admissible.³⁶⁾

After being remancipated from Japanese occupation, Koreans were unable to introduce modernized criminal procedures with their very limited personal and material resources. Japanese law had been effective in Korea for about nine years. Meanwhile, legal intelligence was devoted to making Korean criminal procedure law.³⁷⁾ In terms of official protocols, the conclusion was two-fold: Korean prosecutors might continue to make protocols as the *juge d'instruction* of France did, and police officers' protocols would lose evidentiary weight because much abuse of power had already been experienced during the Japanese occupation.

Judicial torture is an open secret in Korea. What we have to do for completely rooting it out is this: to negate the admissibility of the protocols made by the police officers and prosecutors. We may allow them to search evidence in the criminal investigation process. Nonetheless, the judicial torture will not stop unless we prohibit them from offering the protocols as evidence. The trial court should accept the protocol of the law enforcement personnel on the condition that the defendant or the defense counsel does not oppose to its admissibility. Otherwise, the protocol may not be regarded as evidence against the defendant, which is the best policy that we have to employ. However, some argued that, even though it was the best way for protecting the right of the defendant, it would possibly delay the trial, which would be another problem. Thus it has been agreed that we should admit the prosecutor's protocol as evidence but should not accept the police officer's protocol if the defendant opposed to its admissibility. Now, what the suspect tells the police officer or his confession in the police station will be a sort of script written on the blackboard so the defendant may easily erase it by denying "the contents of the protocols in a preparatory hearing or a

36) LEE, *supra* note 24, at 185-86.

37) About the legislative history of the Korean criminal procedure law, see generally Dong-Woon Shin, *An Establishment Process of Korean Criminal Procedure Act of 1954*, HYUNGSABEOP YEONGU [A STUDY ON THE CRIMINAL LAW], vol. 22, 2004.

trial.” By doing that, we are able to reduce the judicial torture done in the police station, even if we may not totally terminate it.³⁸⁾

The newly promulgated criminal procedure code in 1954 adhered to the above discourse and thus, the conclusion was that the prosecutor’s protocol was normally admissible and that of the police officer was not if it contained the suspect’s statement. Article 312 stated:

A protocol which contains a statement of a suspect or other people prepared by a public prosecutor or a police officer [...] may be introduced into evidence, if the genuineness thereof is established by the defendant or other people making the original statement at a preparatory hearing or during a public trial. However, a protocol prepared by any investigative institution other than a public prosecutor for examination of a suspect is admissible as evidence, only if the defendant, who was the suspect at the time of making statement, or his defense counsel admits its contents in a preparatory hearing or a public trial.³⁹⁾

No reference to the rule against hearsay exists in this article indicating a lack of concern about the rule. In this first version of CPC, the word “hearsay” itself did not exist. The above article rather gave the prosecutor the right to make protocols and use them as substantial evidence, which was the prerogative of the *juge d’instruction*.⁴⁰⁾ The sole foundational qualification for protocols was that their “genuineness [be] established by the defendant or other people making the original statement at a preparatory hearing or during a public trial.”⁴¹⁾ Genuineness meant that the protocol was the same one that the suspect had seen in the course of interrogation conducted by the prosecutor according to article 244 which stated:

38) SUPREME PROSECUTION SERVICE, *supra* note 30, at 404.

39) CPC, art. 312.

40) *See supra* note 34.

41) CPC, art. 312 (1954).

- (1) The statement of a suspect shall be entered in the protocol.
- (2) The protocol of the above paragraph shall be made available to the suspect for inspection or shall be read to him.
- (3) If the suspect states that there is not any miss-writing in the protocol, the suspect shall be required to affix his seal between pages of the protocol, and print his name and affix his seal or write his signature thereon.⁴²⁾

Korean investigators conduct a process called “suspect interrogation.”⁴³⁾ Both under the first CPC and now, interrogation results must be recorded in a document called “suspect interrogation protocol” and was automatically admissible under article 312 in the first CPC because the suspect himself has signed it after verifying the contents. Consequently, article 312 was established to check the authenticity of the protocol.

Furthermore, the article not only stated the admissibility of a protocol but that of “a thing”⁴⁴⁾ procured by law enforcement personnel, so “genuineness” did not have anything to do with the hearsay rule which governed statement evidence.

Compared to the suspect’s statement, the testifier’s statement was not prescribed to be recorded in protocols,⁴⁵⁾ but police officers and prosecutors normally made protocols with their statements. In that situation, the same article applies, and the genuineness of the protocol should be established by the testifier. Article 312 was supposed to apply to various situations in which pre-trial investigators conducted interrogations.

In contrast, if police officers made protocols with suspects’ statements, the protocols could not be used to prove guilt if they contested its admissibility which was provided in the second phrase of article 312.

42) CPC, art. 244 (1954).

43) It is still true in Korea. See CPC, art. 242 (2009).

44) CPC, art 312 (1954).

45) See, e.g., CPC, art 245 (1954). However, a police officer must prepare a testifier interrogation protocol according to Article 18(2) of Judicial Police Officers Performance Rules, legislated on December 31, 1959.

2. Introduction of the Hearsay Rule

Later in 1960, the first and a very important democratic revolution swept the Korean peninsula resulting in the introduction of adversarial criminal procedure into the CPC.⁴⁶⁾ Thus, an amendment has inserted article 310-2, entitled “the rule against hearsay,”⁴⁷⁾ just before the provisions regulating various protocols’ admissibility. Accordingly, article 310-2 made the same protocols as the hearsay exceptions. The new version of article 312 regulating one of the protocols states:

A protocol which contains a statement of a suspect ... prepared by a public prosecutor ... may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during a public trial: Provided that a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made in a particularly reliable situation.⁴⁸⁾

Close reading of the second part of the article brings to light its similarity to the foundational requirement applied to typical hearsay exceptions in the FRE.⁴⁹⁾ Of course, the article does not require that the suspect’s statement itself be reliable but the situation in which he states anything to the prosecutor be so. Nonetheless, in Korea, this requirement is considered closely related to “reliability” as one criterion applying to typical hearsay exceptions.⁵⁰⁾

46) LEE, *supra* note 2, at 16.

47) CPC, art. 310-2 (1961).

48) CPC, art. 312 (1961).

49) See, e.g., Fed. R. Evid. 807 (“A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule”) (emphasis added); WANKYOO LEE, *supra* note 24, at 194 (“In the amendment of 1971, the provisions regarding Evidence have been modified according to the viewpoint of the rule against hearsay”).

50) LEE, *supra* note 2, at 565 (“Article 312 is regulating one of hearsay exceptions on the basis of reliability and necessity”).

In reality, the article was established, under the influence of the American and Japanese scholarship on Evidence law, to limit the prosecutor's right to make evidence.⁵¹⁾ The problem, however, was that the wording was unclear or ambiguous, especially, the expression "genuineness."⁵²⁾ As stated before, genuineness was interpreted as "authenticity" in the original version of the CPC.⁵³⁾ As a practical matter, a defendant might not be able to deny the authenticity of the protocol because he had already seen it and signed it. Therefore, the genuineness requirement would not be an obstacle for the prosecution to overcome. In contrast, if someone interpreted genuineness differently, it might be similar to the word "exactness" or "correctness" in Korean,⁵⁴⁾ and the consequence would be different. Since Article 312 was established after the announcement of the hearsay rule, "genuineness" probably should be interpreted as "correctness."⁵⁵⁾ In other words, the issue would be whether the out-of-court statement of a suspect was "correctly recorded in the protocol."⁵⁶⁾ Actually, it was agreed that article 312 was an instrument with two means of assessing the admissibility of a prosecutor's protocol: one from determining its correctness, the other from questioning the reliability of the situation in which it had been produced.⁵⁷⁾

The same comment could be made for the protocols made by police officers and prosecutors with testifiers' statements. Their genuineness should be established by the saying of the testifier who was on the witness stand in a later trial. In that situation, genuineness was more likely to be

51) Japan has introduced the rule against hearsay from the States and Korea copied the Japanese hearsay rule into its CPC in 1961. See LEE, *supra* note 24, at 194-95.

52) About the meaning of "genuineness" see generally *id.* at 191-94.

53) See *id.* at 298 n.28 ("Interpreting genuineness as authenticity was the general tendency and practice in the Fifties").

54) Supreme Court [S. Ct.], *84do748*, Jun. 26, 1984 (S. Korea) ("Genuine also means that the suspect's statement was correctly recorded in the protocol").

55) This attitude was called as "actual genuineness theory" in Korea. See, e.g., LEE, *supra* note 24, at 299.

56) See *supra* note 54.

57) See, e.g., Bohak Seo, *Constitutionality of Article 312(1) of CPC and Problems in the Public Trial*, 22 HYUNGSABEOP YEONGU [A STUDY ON THE CRIMINAL LAW] 300 (2004) ("Reliability is the additional requirement for the protocol to be admitted as evidence").

“actual genuineness”⁵⁸⁾ or “correctness” because the testifier did not always have a chance to check the protocol’s contents.⁵⁹⁾ If the testifier said in a public trial, “OK. It is genuine,” it might mean that it correctly reported his saying in the pre-trial stage. Moreover, if the legislator put “genuineness” as one of the foundations for a hearsay exception, the best explanation must be that “genuineness” in the article was supposed to mean “correctness” rather than “genuine.”

3. Before 2004

The Korean court set forth two different scrutinies. In party admission cases, for over 40 years since 1961, the Korean courts did not try to disparage prosecutors’ protocols.⁶⁰⁾ Therefore, they concluded that if the suspect’s signature was genuine, the protocol’s actual genuineness or correctness was legally inferred and it could be used as evidence.⁶¹⁾

On the other hand, they applied stricter criteria to the genuineness of the protocol containing the witnesses’ statements and stated:⁶²⁾

The mentioned protocol is not admissible because the witness denies the actual genuineness of the protocol by saying that the protocol does not correctly report what he has stated.⁶³⁾

In other words, the court checked only the authenticity of the protocol made with the defendant’s statement while requiring more than that for the protocol with the testifier’s statement. The result was that increasing numbers of prosecutors wrote down suspects’ statements or even

58) See *supra* note 55.

59) See, e.g., CPC, art. 245 (1961).

60) See, e.g., Kuk Cho, *The Admissibility of the Prosecutor’s Protocol and the Video-Taped Product*, 107 JESTIS 172 (2008) (“The prosecutor’s protocol has had a great power in the Korean criminal procedure for a long time”).

61) See S. Ct., 84Do748, June 26, 1984 (S. Kor.); S. Ct., 98Do980, Feb. 28, 1997 (S. Kor.); S. Ct., 99Do128, June 27, 2000 (S. Kor.); S. Ct., 2001Do1049, June 29, 2001 (S. Kor.).

62) See, e.g., LEE, *supra* note 24, at 300. (“A stricter scrutiny has been applied to the prosecutor’s protocol with testifier’s statements from the early Eighties”).

63) S. Ct., 95Do1761, Oct. 13, 1995 (S. Kor.).

concentrated on plausibly elaborating the protocols to support their suspicions against the suspects.⁶⁴⁾

Those 40 years generally match the era in which get-tough policies gained popularity. During this time period, the rate of acquittal in public trials was less than 1%, and it was said that trial courts mainly followed the prosecutor's conviction.⁶⁵⁾

Since then, the democratic party has regained power and ignited the so-called Judicial reform.⁶⁶⁾ Under the presidencies of Daejung Kim and Mu-hyun Noh, many committees have convened, and the legal circle expected real changes in criminal justice. Finally the SCK, composed of more democratic justices, cast real doubt about the admissibility of prosecutors' protocols.

We should say that a protocol which contains a statement of a suspect [...] by a public prosecutor may be introduced into evidence, if it satisfies that the signature marked on it is genuine and that it correctly copies what was said to the prosecutor. Likely interpreting would be appropriate to the fact-finding principle through public trial with direct hearings and oral arguments. Thus we are obliged to change our opinions which stated that the genuineness of the protocol was assumed as a matter of law from the fact that the signature was genuine.⁶⁷⁾

Presently, the court requires that a protocol's genuineness should be determined from an in-court announcement by the defendant. If the defendant says that the prosecutor has not correctly copied his words into the protocol, the prosecutor cannot make it admissible unless he shows the

64) *See, e.g.* Seo, *supra* note 57, at 303 ("Prosecutors try to get the confession from the suspect").

65) *See, e.g.*, Cho, *supra* note 60, at 173-74. To make it worse, the courts rarely tried to exclude the prosecutor's protocol on the basis of the so-called "reliability test" as set forth in the final sentence of article 312(1). *See also* Seo, *supra* note 57, at 297.

66) About the history of the Korean Judicial Reform *see generally* http://eng.scourt.go.kr/eng/judiciary/judicial_reform.jsp (last visited on Sept. 8, 2010).

67) S. Ct., 2002Do537, Dec. 16, 2004 (S. Kor.).

correctness with “objective proof.”⁶⁸⁾ The new requirement was amazing because it was the first time that the court decided to employ any sort of strict scrutiny regarding the admissibility of protocols reporting suspects’ admissions. From that moment, tension between judges and prosecutors was perceived by the media, the legal circle, commentators, and citizens.⁶⁹⁾ The quarrel between the Judiciary and the Department of Justice has drawn widespread attention; nearly all newspapers and TV hearings reported the conflict between the two powers. To support the reformative action ignited by the decision, “[t]he presidential Committee on Judicial Reform was formed [...] and focus[ed] on accomplishing an even more democratic, fair, and efficient judiciary with more openness and transparency.”⁷⁰⁾

III. Korean Judicial Reform from 2004

1. Development

As stated previously, protocols have been understood, at least from the second amendment of the CPC, as an exception to the hearsay rule. Before 2004, few scholars discussed the subject which was nonetheless very difficult to understand. After 2004, nearly everyone needed to know something about the rule against hearsay in order to participate in floor discussions at seminars and forums. The author was then a rookie having just completed a dissertation on *Crawford* in March 2005, and many people asked him to explain what happened in the United States after *Crawford*. Many American professors and practitioners were also invited to small and large meetings both in the Supreme Court and the Supreme Prosecution Service. Korean judges who have spent some sabbatical years in American law schools as visiting scholars came to be a *Robespierre* or *Danton, revenant*

68) Yeongki Hong, *Methods of Establishing the Actual Genuineness of the Prosecutor’s Protocol with the Suspect’s Statements*, 21 HYUNGSABEOP YEONGU [A STUDY ON THE CRIMINAL LAW] 234 (2009).

69) About the aftermath of the decision see SUNSOO KIM, REPORT ON THE JUDICIAL REFORM 245-47 (2008).

70) http://eng.scourt.go.kr/eng/judiciary/judicial_reform.jsp (last visited on Sept. 8, 2010).

des Etats-Unis, in this revolutionary era. The judges basically emphasized the rule against hearsay; whereas, the prosecutors preferred talking about its exceptions because they needed to proffer protocols as evidence. In order to support either side of the arguments, many research resources have been poured into the Common Law rule against hearsay⁷¹⁾ and the trial of Sir Walter Raleigh.⁷²⁾

Not only in university discussions but in daily criminal procedures, the rule against hearsay and its exceptions was extensively mentioned. One of the most important issues from 2004 to 2007, during which the amendment to the CPC was proposed after being elaborated by the Presidential Committee on Judicial reform and passed into law in the Assembly, was whether to justify the protocol's hearsay exception.⁷³⁾ Initially, the judiciary gathered opinions from the trial benches across the peninsula and urged the prosecution service not to try to make protocols hoping that the courts would accept them as substantial evidence.⁷⁴⁾ Responding to this blow, the prosecutors answered: 'OK. No more protocols. But we will videotape all the investigatory process from the suspect's entering into the room to his departure. Accept them as evidence.'⁷⁵⁾ On this proposition, the judiciary was confused. They could not agree to the admissibility of the protocol but, at the same time, it was out-of-the question to play the videotapes containing the suspect's inculpatory statement in court.⁷⁶⁾ For if it were allowed, the court would be the place for watching the suspect's confession through screen.⁷⁷⁾ Finally the trial judges changed attitudes towards protocols and dissuaded their representatives from trying to completely

71) See generally DONGUN CHA, *CRIMINAL EVIDENCE LAW I* (2007).

72) About the discussion of the Raleigh case see Heekyoon Kim, *Crawford Case: Rediscovery of the Confrontation Right of the Criminal Defendant*, 586 BUPJO [THE JUDICIARY JOURNAL] 149-50 (2005).

73) See, e.g., KIM, *supra* note 70, at 246.

74) About the "Judiciary's Evidence Law draft(Oh Kidoo draft)" see LEE, *supra* note 25, at 217.

75) About the prosecution's effort to introduce a videotape as evidence see Cho, *supra* note 60, at 176; Jongryul Kim, *A Study on Video Recording and a Development of Prosecution's Investigation*, 8 HYUNGSABUPEUI SINDONGHYANG [NEW PARADIGM OF CRIMINAL STUDY] 81 (2007).

76) See Cho, *supra* note 61, at 176.

77) See Kidu Oh, *Application of the Revised Criminal Procedure Law*, 103 JUSTICE 95 (2008).

eliminate them from criminal trials.⁷⁸⁾ The representatives did not even imagine that trial judges were in favor of using protocols as trial evidence. But the truth was that judges were also very accustomed to the trials using written information prepared by their colleagues, i.e., the prosecutors.⁷⁹⁾

The first draft of the Committee has provoked the opposition from the prosecution and moreover, trial judges accustomed to the trials using protocols pointed that it would result in increasing workload.⁸⁰⁾

2. *Compromise*

1) *Protocols with the Suspect's Statements*

A compromise was reached after extensive debate. The conclusion was this: 1. Prosecutors produce protocols as they did 2. Protocols are not admissible unless defendants confirm their genuineness by stating that the prosecutor correctly copied the statements; 3. If the defendant denies the genuineness, prosecutors need to prove it through scientific methods, for example by showing the videotape captured at investigation.⁸¹⁾

Nonetheless, prosecutors cannot proffer videotapes as substantial evidence because they are not legally admissible.⁸²⁾ If prosecutors want to report the suspects' statements in court, they may, first of all, use the protocol⁸³⁾ which should have been "prepared in compliance with due process and proper method"⁸⁴⁾ and that "the defendant [admits] in his pleading in a preparatory hearing or a public trial that its contents [be] the

78) See KIM, *supra* note 69, at 266 ("The Supreme Court changed their positions and proposed the idea that the prosecutor's protocol may be admitted as evidence if it satisfied some requirements"); LEE, *supra* note 24, at 222.

79) See *id.* at 266-67; See also Cho, *supra* note 60, at 178.

80) DONGWOON SHIN, *NEW CRIMINAL PROCEDURE LAW* 919 (2008).

81) See KIM, *supra* note 69, at 276-77.

82) See, e.g., Cho, *supra* note 60, at 184-85 ("The advisory note to the amendment of 2007 clarified that "a videotape should not be used as substantial evidence").

83) It is not the prosecution's duty to proffer the protocol. In that case, the trial court should find the truth on the basis of the in-court statement by the defendant not of the videotape. See *id.* at 187.

84) CPC, art. 312(1).

same as he stated.”⁸⁵) In addition, the court needs to agree that “the statement recorded in the protocol was made in a particularly reliable situation.”⁸⁶) All these should be satisfied for the protocol to be admissible.

The general purpose of the article was to block the flow of the evidence that the prosecutor transmits. The reformatory force seemed to hurt the prosecutor’s power. Nonetheless, the prosecution has preserved one more option to report suspects’ statements in court:⁸⁷) to summon the police officer or prosecutor who has heard the suspect’s admission in the investigation room. The revised article 316 states:

If a statement made by a person other than a defendant (including a person who interrogated the defendant as a suspect before the institution of public prosecution or who was involved in such interrogation; hereafter the same shall apply in this Article) in a preparatory hearing or a trial conveys a statement of the defendant, such statement is admissible as evidence only if it is proved that the statement was made in a particularly reliable situation.⁸⁸)

However, this article’s influence would be limited in two regards. The prosecution would bear the risk of having its investigating prosecutor or police officer prosecuted.⁸⁹) Furthermore, the investigator’s statement that the suspect has confessed in front of him may not be used as supporting evidence for the correctness of the protocol. In other words, the statement itself would not be categorized as one of the “scientific methods”⁹⁰) for proving the actual genuineness of the protocol. As recently stated by the trial court in Pusan:

85) CPC, art. 312(1).

86) CPC, art. 312(1).

87) See KIM, *supra* note 69, at 277.

88) CPC, art. 316(1).

89) See, e.g., KIM, *supra* note 69, at 253 (“Investigating prosecutors were against article 316 because they would be summoned to the court as a simple witness”); Cho, *supra* note 60, at 177.

90) CPC, art. 312(2).

The statement of the person who interrogated the suspect may not be regarded as “scientific methods.”⁹¹⁾

The court will not call the investigators who heard the parties’ admissions for determining the protocols’ admissibility, but will call them in cases in which a protocol is not prepared or offered as evidence. Then article 316(1) comes into play. However, it is not a good option for the prosecution because, as just stated, the investigator will be a simple witness equally vulnerable to a counter-attack from the defense. Prosecutorial practice will therefore be increasingly dependant on making and presenting protocols as evidence with videotapes supporting their genuineness, which leads to the conclusion that protocols are still the center of the fact-finding process in public trials which is evident in observing legal practice since the amendment.⁹²⁾

Trial judges ask the defendant about the genuineness of the protocol. Or they verify its genuineness by watching the videotape. If the defendant confirms its authenticity, judges conduct the so-called reliability test. However, in most cases the protocol will be held as admissible.⁹³⁾ If the defendant says it’s not genuine and there is no videotape, the judges will drop the protocol. The prosecution may not call those who interrogated the suspects, because their testimony does not have any evidentiary power in situations in which the defendant has already denied the protocol’s genuineness.

On the other hand, if the prosecution did not make a protocol or decided not to proffer any protocol,⁹⁴⁾ the situation would be a bit different. Certainly, they may call the person who interrogated the suspect. In that case, his statement should be compared to the live testimony of the defendant. In other words, the prosecution may not guarantee the victory.

91) Pusan High Court, 2008no131, Apr. 15, 2008 (S. Kor.).

92) Wankyoo Lee, *The Trial Practice after the Amendment and Some Proposals*, 15 HYUNGSABOEPEUI SINDONGHYANG [NEW PARADIGM OF CRIMINAL STUDY] 133 (2008) (“The reality is that [prosecutors] offer the protocols as evidence and judges read them in their office for finding the truth”).

93) *See supra* note 65.

94) A prosecutor must record the result of the interrogation with a suspect but it is not his duty to proffer it as evidence to the trial court. *See, e.g.,* Cho, *supra* note 60, at 187.

The possibility exists that one of the investigating prosecutors may bear the risk of being prosecuted for perjury. That is why the protocol still plays the most important role in practice as it did in the past.⁹⁵⁾

Trial judges are also not opposed to conducting criminal trials using protocols. They do not have much time to allow many participants to come and relate conflicting versions,⁹⁶⁾ and they need to get a succinct report of what happened in the pre-trial stage.⁹⁷⁾ These concerns make them especially dependant upon protocols which is of primary importance in Korea.⁹⁸⁾ Some reformers have tried to eliminate them, but the truth is that they “have survived”⁹⁹⁾ as one commentator has quipped.

2) *Protocols with the Testifier's Statements*

In contrast to protocols concerning defendants, reformers have succeeded in controlling the other type of protocol which contains the PIS by the testifier. A relatively strict foundational barrier had been established during the Eighties.¹⁰⁰⁾ In addition, the final article provided a multi-prong test by stating:

A protocol in which a public prosecutor or a judicial police officer recorded a statement of any person other than the defendant is admissible as evidence, only if it was prepared in compliance with the due process and proper method, it is proved by a statement made by the original stater on a preparatory hearing or a trial, a video-recorded product or any other scientific methods that the contents of the protocol are the same as what he stated before the public prosecutor or judicial police officer, and the defendant or his defense counsel has an opportunity to examine the original stater in relation to its contents in a preparatory hearing or a trial: Provided, That it is admissible only when it is proved that the

95) *See id.* at 189.

96) *See, e.g.,* Lee, *supra* note 92, at 132-33; Cho, *supra* note 60, at 187.

97) *See* Lee, *supra* note 92, at 139-40.

98) *See, e.g.,* Hong, *supra* note 68, at 244.

99) Cho, *supra* note 60, at 178.

100) *See supra* note 62.

statement recorded in the protocol was made in a particularly reliable situation.¹⁰¹⁾

Even if the protocol may be regarded as correct and reliable, it is not automatically admissible as evidence because the defendant's counsel must have a chance of cross-examining "the original stater in relation to its contents in a preparatory hearing or a trial."¹⁰²⁾ The reformers' purpose was very clear, which was to copy the FRE 801(d)(1) which requires that turn-coat witnesses be cross-examinationed:

The amendment has clarified on the theoretical basis of [*Crawford*] that giving an opportunity of cross-examination was one of the foundational requirements for the protocol containing a testifier's statement to be admitted as evidence.¹⁰³⁾

Certainly, the amendment's situation is different from the *Crawford* case because the concern here is the out-of-court hearsay declarant. Nonetheless, the reformers' objective to control protocols' admissibility through the reliability test and the cross-examination requirement seems to be successful. Legal practice proceeds as follows.

To start, trial judges ask the witnesses, i.e. the original testifiers, whether the protocols correctly report their statements. If they deny them, the prosecution must prove the correctness by "a video-recorded product or any other scientific methods."¹⁰⁴⁾ Even if the testifiers reply in the positive, the judges permit the defendants' counsel to cross-examine the witness concerning the contents of the protocol. Upon completion of these steps, the judges have discretionary power on the admissibility of the protocol, which is regulated in the final sentence of Article 312(4). Likely, it became too difficult for the prosecution to offer the witness's PIS as evidence.

If the testifier denies the genuineness of the protocol, the situation

101) CPC, art. 312(4).

102) CPC, art. 312(4).

103) NATIONAL COURT ADMINISTRATION, NOTES ON THE REVISED CRIMINAL PROCEDURE CODE 137 (2007).

104) CPC, art. 312(4).

becomes even tougher for the prosecution. Proffering the videotape as evidence is prohibited,¹⁰⁵⁾ and, even more challenging, the prosecution may not introduce the live testimony of the police officer who has heard the witness' statement. For example, the SCK has supported the conclusion reached by the appellate court:¹⁰⁶⁾

If [the original testifier] says that she does not remember what she has talked [sic] to the police officer, the protocol made by that officer is not admissible as evidence because it is denied that "the contents[...] are the same as what [she] stated before the police officer." In the same context, the live testimony of a police officer who has heard the witness' statement is not either admissible.¹⁰⁷⁾

If the prosecution has not made a protocol with the testifier's statements,¹⁰⁸⁾ the testifier may be called as a witness creating a court-centered trial with live testimonies. In such a trial, defendants may invoke their rights to cross-examine or confront the witnesses, and the rule against hearsay truly comes to govern a public trial. In other words, the protocols draw back and live testimonies cause resonance in the trial.

3. Comment

This article has discussed four different types of protocols. Of these, a protocol made by the police officer with the suspect's statement is not admissible if the defendant, who was then the suspect, does not agree to its admissibility.¹⁰⁹⁾ The following table shows different laws regulating the admissibility of the other three protocols.

105) See Seoul High Court [Seoul High Ct.] 2008no606, July 11, 2008 (S. Kor.).

106) See S. Ct. 2008do6985, Sept. 25, 2008 (S. Kor.).

107) See *supra* note 105.

108) The prosecution is not required to record the interrogation result with a testifier in the protocol.

109) See CPC, art. 312(3) ("A protocol prepared by any investigative institution other than a public prosecutor for examination of a suspect is admissible as evidence, only if [...] his defense counsel admits its contents in a preparatory hearing or a trial").

Year	1954		1961-2004		2007	
	Protocol 1	Protocol 2	Protocol 1	Protocol 2	Protocol 1	Protocol 2
Maker	Prosecutor	Prosecutor Police officer	Prosecutor	Prosecutor Police officer	prosecutor	Prosecutor Police officer
Declarant	Suspect	Testifier	Suspect	testifier	suspect	testifier
Nature	Dossier	Dossier	Hearsay	hearsay	hearsay	hearsay
Admissibility (principle)	Admissible	Admissible	Not admissible	Not admissible	Not admissible	Not admissible
Foundation requirement	Authenticity	Authenticity	Correctness Reliability (court was lenient)	correctness	Correctness reliability	Correctness Reliability Cross- examination

As is shown in the table, Korean legislators have been trying to limit protocols' admissibility with the result that some protocols have survived and some have not.

While trying to find the historical narrative of the rule against hearsay, the *Crawford* court roughly summarized two different legal traditions: the common-law tradition and the Continental one. It is said that "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."¹¹⁰ The court also accused "the civil-law practice [in which] justices of the peace or other officials examined suspects and witnesses before trial ... [and] certifi[ed] the results to the court."¹¹¹ According to the *Crawford* court, the Korean model of the pre-trial investigation was very close to the civil-law one. It is inquisitorial because it has copied the "[c]ontinental Inquisitions-prozess [...] in which the magistrate investigated, principally by interrogation of the accused; reduced the results of his investigation, including the testimony of the accused, to writing; and transmitted this dossier to the final sentencing court for a judgment which was based upon and effectively controlled by the dossier."¹¹² The sole

110) 3 W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 373-374 (1768), reprinted in *Crawford*, 124 S. Ct. at 1359.

111) *Id.* at 1359-60.

112) LANGBEIN, *supra* note 25, at 21.

difference was, in Korea, that the prosecutor and the police officers had the authoritative initiative in finding evidence before trial in lieu of the *juge d'instruction*, i.e., investigating magistrate *proprement dit*.

Later in the course of the democratic reformation of the justice system, the Judiciary, supported by the civil rights groups and a majority of the legislators, tried to limit prosecutorial and police power.¹¹³⁾ More precisely, they opposed the “dossier-building”¹¹⁴⁾ practice in the pre-trial stage that the prosecutor dominates.¹¹⁵⁾ Thus they decided to control it. The best way would be to deny protocols’ admissibility and to encourage the parties to offer more live testimonies.¹¹⁶⁾ The rule against hearsay basically guarantees this paradigm shift. The amendment also opened the way for calling those who heard the suspects’ statements’.¹¹⁷⁾ But trial judges prefer to read protocols in office in preparation for trials.¹¹⁸⁾ The videotape is not even in the list of substantial evidence.¹¹⁹⁾

Certainly, the protocols containing PIS have lost their authoritative voice. They must have been prepared properly, be reliable, genuine, correct, and made in a particularly reliable situation. Furthermore, the testifier must be available for cross-examination from a defense counsel. All these requirements make the prosecution increasingly more dependent on protocols made with suspect parties’ admissions.

The most popular evidence still seems to be a protocol with party admission.¹²⁰⁾ Videotapes are prepared for supporting its admissibility not for substantial evidence. In the Korean criminal process, this sort of protocol itself flows as if it is something that reveals the truth. Roughly speaking, the Korean criminal process is similar to that of the French one of which Professor Langbein has given an interesting description.

113) See Cho, *supra* note 60, at 189.

114) LANGBEIN, *supra* note 25, at 23.

115) See Cho, *supra* note 60, at 189.

116) See Hong, *supra* note 68, at 228.

117) See CPC, art. 316(1).

118) See Lee, *supra* note 92, at 133.

119) See, e.g., NATIONAL COURT ADMINISTRATION, *supra* note 103, at 51; Hong, *supra* note 68, at 236.

120) See *supra* note 60.

The dossier commenced with the examiner's preliminary inquiry, picked up the repeated submissions of the procureur [...] then became the record of the judge's examinations and his deliberations with his advisory council [...] The dossier was the thread of physical continuity in a procedure ever more complex, with its multiple stages conducted over stretches of time by a variety of officials.¹²¹⁾

IV. Conclusion

Allegedly, one of the important agendas of the Korean Judicial reform was to realize "the principle of court-centeredness"¹²²⁾ and to strengthen the rule against hearsay by limiting admissible exceptions. However, the rule in Korea is not that of Walter Raleigh or *Crawford* because what nearly always mattered in Korea was not out-of-court statements by absent witnesses but the out-of-court admission, confession, or testimonies of the defendant or the testifiers who should be present in the court. In other words, the rule against hearsay was mainly used in evaluating the *ex parte* protocols in which the suspect or the testifiers stated the inculpatory facts. The right of confrontation against the absent hearsay declarant has never been an issue in Korea. The aftershock of *Crawford* was extremely faint.

Certainly, the development of the American hearsay rule, including *Crawford*, is being copied in a certain article which, for example, regulates the PIS of the present witness.¹²³⁾ However, cross-examination is not employed to guarantee the defendant's basic right to fair trial but to support the admissibility of the *ex parte* protocol.

What the Korean legal system must confess is that the French style dossiers are still used even though the rule against hearsay is frequently announced. The prosecution's protocol with the suspects' statement is primarily guiding all criminal process, and therefore, the protocols'

121) LANGBEIN, *supra* note 25, at 251.

122) KIM, *supra* note 69, at 247.

123) *See supra* note 103.

producer dominates the pre-trial and in-trial fact-finding projects.¹²⁴⁾ Legislators have tried to devalue it using the rule against hearsay. But in practice, this effort has failed because the protocol itself is deeply rooted in our everyday criminal process; it is familiar and seems more efficient and productive and less time-consuming than in-court live testimony or videotape.¹²⁵⁾ The French invented the protocol, the Japanese introduced it to Korea, and the Korean legal system has played with it too much making it difficult to discard in the near future.

KEY WORDS: rule against hearsay, dossier, protocol, *Crawford*, adversarial

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124) *See supra* note 60.

125) *See, e.g., Lee, supra* note 92, at 129.


