Journal of Korean Law | Vol. 13, 175-217, June 2014

The Exclusion of Illegally Obtained Confessions, Electronic Communications and Physical Evidences in Korea*

*Kuk Cho***

Abstract

The 1987 Constitution of Korea explicitly stipulates the principle of due process in criminal procedures and provides very detailed Bill of Rights provisions regarding criminal procedural rights. This "constitutionalization of criminal procedure" has brought significant changes in the theory and practice of the Korean criminal procedure. Exclusionary rules are in the middle of this "revolution". The Korean judiciary and legislature that experienced the dark age of procedural rights under the long authoritarian rule chose to adopt the exclusionary rules as a useful tool to deter police misconduct.

Firstly, this paper starts by reviewing the terrible situation under the authoritarian regime of Korea and the legal change after democratization. Secondly, focusing on the landmark judicial decisions and legislations including the Criminal Procedure Code and the Communication Privacy Protection Act, it examines three categories of exclusions: the exclusion of incriminating statements obtained in the process of illegal arrest or interrogation, communications by illegal wiretapping and physical evidences obtained by illegal search-and-seizure. Finally, it analyzes the remaining issues regarding the aforementioned exclusionary rules.

---

* This Article is funded by the Seoul National University Law Research Institute in 2014. It is a total update with new additions of my previous publications, which was presented in the international conference hosted by the Research Institute on December 6th 2013.

** The Author is Professor of Law, Seoul National University School of Law. He received an LL.B. in 1986 and an LL.M. in 1989 from Seoul National University College of Law, Korea; an LL.M. in 1995 and a J.S.D. in 1997 from the University of California at Berkeley School of Law, U.S.A.; was a Visiting Scholar, University of Leeds Centre for Criminal Justice Studies, U.K. (1998); a Visiting Research Fellow, University of Oxford Centre for Socio-Legal Studies, U.K. (1998); a Member of the Police Reform Committee of the National Police Agency in Korea in 2003-2005; a Visiting Scholar, Harvard-Yenching Institute, U.S.A. in 2005-2006; a Member of Inspection Committee of the Ministry of Justice, Korea in 2005-2007; a Commissioner of the National Human Rights Commission, Korea in 2007-2010; and a Member of the Sentencing Committee of the Supreme Court, Korea in 2009-2011. Korean names in this article are given in the Korean name order, with the family name first. The names of the Korean authors who have published in English are given as they are in their publications. Contact: kukcho@snu.ac.kr

Key Words: exclusionary rule, confession, interrogation, wiretapping, search-and-seizure, Miranda, Massiah, Mapp

Manuscript received: Apr. 30, 2014; review completed: May 27, 2014; accepted: June 3, 2014.

I. Introduction

The 1987 Constitution of Korea,[1] which was a product of the nationwide June Struggle of 1987 that collapsed the iron fist regime and opened a new era of political democracy, explicitly stipulates the principle of due process in criminal procedures and provides very detailed Bill of Rights provisions regarding criminal procedural rights. This "constitutionalization of criminal procedure" has brought significant changes in the theory and practice of the Korean criminal procedure. Exclusionary rules are in the middle of this "revolution". The Korean Supreme Court and the Korean Constitutional Court, which were newly established by the 1987 Constitution, have been active in order to control the illegal misconduct of law enforcement authorities which prevailed under the authoritarian regime, excluding illegally obtained statements, electronic communications and physical evidences. Following the landmark judicial decisions, the National Assembly also incorporated exclusion rules in legislation.

Firstly, this paper starts by reviewing the terrible situation under the authoritarian regime of Korea and the legal change after democratization. Secondly, focusing on the landmark judicial decisions and legislations including the Criminal Procedure Code[2] [hereinafter "CPC"] and the Communication Privacy Protection Act [hereinafter "CPPA"],[3] it examines three categories of exclusions: the exclusion of incriminating statements

---

1) *See* Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art.12, 13 & 27 & 28 (S. Kor.), *available at* http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf *http://www.assembly.go.kr/english/laws/constitution/constitution2.html* (last visited Mar. 15, 2014).

2) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012 (S. Kor.).

3) *See* Tongsinbimil boho beob [The Communication Privacy Protection Act], Act No. 4650, Dec. 27, 1993, *amended by* Act. No. 12229, Jan. 14, 2014 (S. Kor.).

obtained in the process of illegal arrest or interrogation, communications by illegal wiretapping and physical evidences obtained by illegal search-and-seizure. Third, it analyzes the remaining issues regarding the aforementioned exclusionary rules.

II. Almost No Exclusion under the Authoritarian Regime

1. Brief History—Dark Age of Criminal Procedural Rights

During the period of the authoritarian regime starting from the rule of Rhee Syngman following liberation from the Japanese Occupation in 1945, democracy in South Korea was nominal. The following criticism of an American journalist in 1966 was valid during the whole period of the authoritarian regime: "Red roses don't bloom beautifully in the garbage can like South Korea." "Red roses don't bloom beautifully in the "Red roses don't bloom beautifully in the garbage can like South Korea."garbage can like South Korea."[4] From the standpoint of human rights, the period of authoritarian regime was no more than a "Dark Age," when the procedural rights of criminal suspects and defendants were nothing but meaningless rhetoric. Although the value of due process was written in textbook, it was overwhelmed by that of crime control in practice.

The Rhee Syngman government (1948-1960) did not purge pro-Japanese police officers who served the Japanese rule but guaranteed their position and even promoted them to maintain its authoritarian rule.[5] As "loyal dogs" for the government,[6] they used all kinds of illegal methods, which were applied to anti-Japanese liberation fighters, in order to suppress political dissidents as well as non-political criminal suspects. They also fabricated many cases. For instance, opposition congressmen, who were arrested for the suspicion of "pro-North fraction" by the military police in

4) Carl T. Rowan. "Red roses don't bloom beautifully in the garbage can like South Korea." 14 December 1966.

5) Gabje Cho, Specialists of Torture and Fabrication 11-12 (1987).

6) *Id*. at 11.

1949, were severely tortured.[7] Under the situation where even congressmen were illegally treated, it was inevitable that members of the general public were much easier victims of brutal police misconduct.[8] Kim Byoung Ro, Chief Justice of the Supreme Court, consistently criticized the authoritarian rule of the Rhee government in vain.[9]

During the rule of Park Chung Hee (1961-1979), who was a leader of the 1961 military coup, illegal police misconduct was systematically devised by the government. The Prosecutors' Office and the Judiciary were considered as the "Offices of the Judge Advocate General,"[10] and they gave up deterring police misconduct.

The Yushin regime, which bestowed Park a status of a *de facto* permanent President by the 1972 Constitution and suffocated the freedom of expression, was brazen in that it omitted the crucial Article to exclude involuntary confessions from the Constitution. Since the Yushin regime had proclaimed martial law, a great number of students, intellectuals, and opposing congressmen were arrested and tortured.[11] For instance, Lee Jae Oh, a congressman and former Minister of Special Affairs from 2010 to 2011, who was a leader of the democratization movement at that time, was a victim of cruel torture.

One of the most high-profile cases under Park's rule was that of the "People's Revolution Party Rebuilding Committee" (*inmin hyeokmyeong dang jaekeon wiwonhwei*), ("PRP").[12] As the anti-Yushin movement was getting stronger in 1974, the Korean Central Intelligence Agency (hereinafter KCIA) arrested and tortured alleged PRP members because they had allegedly pursued a communist revolution with connections to North Korea. Eight members were immediately executed just one day after their conviction was confirmed by the Supreme Court in 1975. For this

---

7) Gregory Henderson, Korea: The Politics of the Vortex 167-68 (1968).

8) *See* Won Soon Park, Vol.2, Documentary of the Barbaric Days 273-298 (2006).

9) Rhee Syngman was expelled by the April Revolution of 1960, which was driven by the public mass who became furious for the fraudulent presidential election of 1960 followed by cruel suppression on opponent demonstrators.

10) In Sup Han, Beyond the Authoritarian Criminal Law 28 (2000).

11) Park, *supra* note 8, at 330-344.

12) *See* Kuk Cho, *Transitional Justice in Korea: Legally Coping With Past Wrongs After Democratization*, 16 Pac. Rim L. & Pol'y J. 3, 592-93 (2007).

reason, this case has often been called "judicial murder."[13] Kim Ji Ha, who is a representative Korean poet, punished for his involvement with the PRP, said:

> "The torture given to me was to deprive me of sleeping. … My eyes became uncontrollably hot. … When my eyes were open, a phantom of my father without eyes appeared. … They deprived me of sleeping for one week. In the condition that sleeping was allowed, I came to consent with their accusation that I was a 'communist infiltrating the Catholics'."[14]

In non-political criminal cases as well, procedural rights were meaningless. Leaving out a great number of torture cases against adults, let me briefly introduce some alarming cases of tortured minors: A seventeen-year-old larceny suspect was beaten and forced to drink soapy water in 1964,[15] a twelve-year old boy who was arrested for the suspicion of pick pocketing was beaten unconscious in 1969,[16] a sixteen-year-old larceny suspect was forced to drink water through his nose in 1970,[17] and a twelve-year-old larceny suspect was beaten and forced to drink dirty water in 1975.[18]

The situation under the rule of Chun Doo Hwan (1980-1988), who was the leader of the 1980 military coup, was similar. Despite Article 11(6) of the 1980 Constitution to exclude involuntary confessions, it had a limited effect on police officers.

During the 1980s there were several highly profiled cases.[19] Those who violated the National Security Law were brutally tortured and accused of

---

13) Catholic Human Rights Committee, Judicial Murder: The Massacre of April 1975 164-65 (2001).

14) Moon Myung Huh, *Kim Ji Ha and his Age*, Dong-A Ilbo (July 23, 2013), http://news.donga.com/3/all/20130723/56603101/1.

15) *See* Park, *supra* note 8, at 399.

16) *Id.* at 416.

17) *Id.* at 421.

18) *Id.* at 427.

19) *See* Kuk Cho, *Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 Denv. J. Int'l L. & Pol'y 3, 378-79 (2002).

being "pro-enemy leftists." For instance, former Presidential Secretary Lee Tae Bok in 2002 and late Kim Geun Tae, former Minister of Health and Welfare from 2004 to 2005, who were then the leaders of the democratization movement,[20] and Kim Moon Soo, former Governor of the Gyeonggi Province from 2006 to 2014, who was then a leader of the labor movement, were brutally tortured when arrested for a violation of the National Security Law in the first half of the 1980s. All of them were victims of all kinds of torture including torture by electricity or water. In the popularly called "Burim case," college students in the city of Busan who organized a book club were arrested for a violation of the National Security Law in 1980, and were severely tortured.[21]

In 1986, Professor Kwon In Sook, then a labor movement activist, was sexually abused by a policeman when arrested, and in 1987 Park Jong Chul, a Seoul National University student, was suffocated in a bathtub by police after being illegally arrested for information about a student activist movement.

Besides political dissidents, ordinary people also had to go through the cruel investigation process. Let me introduce two of the most publicized cases. In 1981, Kim Si Hoon, a construction worker, was brutally tortured by the police and confessed to murder after being arrested. The real killer was arrested after Mr. Kim was given a fifteen-year imprisonment by the Kwangjoo High Court. After release, however, he became completely dejected.[22] The Koh Sook Jong case of 1981 was also notorious. Confessing to murder, she was severely tortured by the police and made a false confession. Although she was found not guilty in a trial and given monetary compensation, the psychological and physical effects were immense.[23]

---

20) The case of Kim Geun Tae was cinematized as "Namyoung-dong 1985" in 2012, attracting significant social attention. "Namyoung-dong" is the address of the Counter-Communist Branch of the Police where Kim was tortured.

21) This case was filmed as a film titled "Byunhoin" in 2013, attracting more than ten million audiences. "Byunhoin" means attorney, indicating late President Roh Moo Hyun in particular who then played a crucial role as a defense attorney in the case.

22) *See* Park, *supra* note 8, at 224-29.

23) *See* Cho, *supra* note 5, at 241-269; Park, *supra* note 8, at 229-231.

2. Almost No Judicial Control under the Meaningless Constitution

It is easily confirmed that during the period of the authoritarian regime, the Constitution was akin to the "Emperor's new clothes." The Constitutions under the authoritarian regime stipulated several provisions regarding procedural rights such as the right not to be tortured and the privilege against self-incrimination,[24] the right to counsel, [25] and the rule to exclude involuntary confessions.[26] The exclusion of confessions when "confessions whose voluntariness is doubtful for they are made under torture, battery, threat, deceit, after prolonged custody or *by* any other method", which was first introduced in 1954,[27] was maintained under the authoritarian rule except in the 1972 Constitution. However, these provisions were titular.

Illegal police practices including torture, illegal arrest and detention to obtain confession, were widespread in the criminal process. Beating, threatening, and torture by water or electricity were routinely applied to not only political dissidents but also ordinary criminal suspects. Hwang Ji

---

24) 1962 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 2 (Dec. 26, 1962) (S. Kor.); 1969 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 2 (Oct. 21, 1969) (S. Kor.); 1972 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 2 (Dec. 27, 1972) (S. Kor.); 1980 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 11 ¶ 2 (Oct. 27, 1980) (S. Kor.).

25) 1948 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 9 (July 17, 1948) (S. Kor.); 1952 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 9 (July 7, 1952) (S. Kor.); 1954 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 9 (Nov. 29, 1954) (S. Kor.); 1960 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 9 (June 15, 1960(S. Kor.); 1962 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 4 (Dec. 26, 1962) (S. Kor.); 1969 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 4 (Oct. 21, 1969) (S. Kor.); 1972 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 4 (Dec. 27, 1972) (S. Kor.); 1980 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 11 ¶ 4 (Oct. 27, 1980) (S. Kor.).

26) 1962 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 6 (Dec. 26, 1962) (S. Kor.); 1969 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 10 ¶ 6 (Oct. 21, 1969) (S. Kor.); 1980 Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 11 ¶ 6 (Oct. 27, 1980) (S. Kor.).

27) *See* Hyongsa sosong beob [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 309 (S. Kor.)

Woo, who is a representative Korean poet and who was punished for his anti-government activities by the Chun government, described his experience of torture as "surgical operation without anesthesia." [28)] He stated that:

> "Extreme torture is the existence of never-ending pains, making death a hope. The professional mind of the torture technicians is to give pain but not death as eternal rest. … As rest lies outside a medical record document, *truth generally lies outside interrogation dossiers*." [29)]

The Latin phrase, "*Confession est regina probationum*", which means "Confession is the Queen of evidence", prevailed in the criminal process. Law enforcement authorities obtained confession from suspects by any means and at any cost, eviscerating the confession rule.

Prosecutors gave up controlling police misconduct and even abetted the police. The judiciary did not take defendants' claims of being abused by the police seriously. Critical appeals from both academics and defense attorneys did not receive any substantial reaction in the criminal justice system. Although there were a few Supreme Court cases that excluded illegally obtained confessions,[30)] the Court did not listen carefully to the victims' outcries in most cases. It held:

> "The argument [of the defense attorney] is that the statements in the prosecutor-made interrogation dossiers are involuntary for they are made after prolonged custody, under torture, inducement, and coercion. *Reviewing the records*, however, there is no data that the statements are involuntary and unreliable." [31)]

Heavily relying on the records in the interrogation dossiers, the Court

---

28) Ji Woo Hwang, Naeui Jakpoom Naeui Yeki, DONG-A ILBO (Oct. 11, 1990)

29) *Id*. (emphasis added).

30) *See, e.g*., Supreme Court [S. Ct.], 81Do2160, Oct. 13, 1981 (S. Kor.); Supreme Court [S. Ct.], 84Do36, Mar. 13, 1984 (S. Kor.); Supreme Court [S. Ct.], 93Do1843, Sept. 28, 1993 (S. Kor.).

31) Supreme Court [S. Ct.], 80Do2579, Dec. 23, 1980 (S. Kor.) (emphasis added).

easily discarded defendants' allegations of police abuse. As a result, the evidentiary power of the prosecutor-made interrogation dossiers become almost invincible.

The Court also turned its face away from the reality of police misconducts.

> "It is especially rare that there exist such situations that make statements involuntary…*the voluntariness of statements are presumed*."[32)]

This decision actually freed prosecutors of the burden of proof and pulled down the principle of *in dubio pro reo* as well as the confession rule.

Besides, under the authoritarian regime, the Supreme Court consistently declined to exclude physical evidence obtained by illegal search-and-seizure procedures, providing the following rationale:

> "Even 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."[33)]

As a result, search-and-seizure proceeded with almost no restriction and the constitutional principle of warrant became meaningless.

III. Vitalization and Codification of Exclusionary Rules after Democratization

1. *"Constitutionalization of Criminal Procedure" after the 1987 Constitution*[34)]

The 1987 Constitution established a blueprint for the "constitutionalization

32) Supreme Court [S. Ct.], 82Do3248, Mar. 3, 1983 (S. Kor.) (emphasis added).

33) *See* Supreme Court [S. Ct.], 68Do932, Sept. 17, 1968 (S. Kor.); Supreme Court [S. Ct.], 87Do705, June 23, 1987 (S. Kor.).

34) *See* This part is an update of Cho, *supra* note 19, at 379-380.

of criminal procedure" in Korea. It has required that criminal procedure be under the control of the Constitution and has provided a detailed Bill of Rights to guarantee the procedural rights of criminal suspects and defendants.

First, Article 12 (1) and (3) of the Constitution have explicitly incorporated the principle of due process in criminal procedures. This is influenced by Amendments 5 and 14 of the United States Constitution.[35] According to the Constitutional Court, the principle is "to guarantee not only the legality of the procedure but also the legitimateness of the procedure."[36] The Court made sure that the principle of due process was a core value to penetrate and control all stages of criminal procedure, stating:

> The principle of due process requires that both the formal procedure described by the law and the substantial content of the law be reasonable and just…. In particular, it declares that the whole criminal procedure should be controlled from the standpoint of guaranteeing the constitutional basic rights.[37]

Second, the Bill of Rights in the 1987 Constitution provides very detailed provisions regarding criminal procedural rights, including strict requirements for obtaining judicial warrants for compulsory measures,[38] the right not to be tortured,[39] privilege against self-incrimination,[40] right to counsel,[41] right to be informed of the reason of arrest or detention,[42] right to request judicial hearing for arrest or detention,[43] exclusionary rule of

---

35) DONG WOON SHIN, CRIMINAL PROCEDURE LAW 7 (5th ed. 2014).

36) *See* Constitutional Court [Const. Ct.], 92Hun-Ka8, Dec. 24, 1992, (4 KCCR, 853) (S. Kor.); Constitutional Court [Const. Ct.], 90Hun-Ba35, July 29, 1993, (5-2 KCCR, 14-35) (S. Kor.).

37) Constitutional Court [Const. Ct.], 94Hun-Ba1, Dec. 26, 1996, (8-2 KCCR, 808) (S. Kor.).

38) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION OF THE REPUBLIC OF KOREA] art. 12 ¶ 3 & 16 (S. Kor.).

39) *Id.* art. 12 ¶ 2.

40) *Id.*

41) *Id.* art. 12 ¶ 4.

42) *Id.* art. 12 ¶ 5.

43) *Id.* art. 12 ¶ 6.

illegally obtained confession,[44] protection against double jeopardy,[45] right to a fair trial,[46] right to a speedy and open trial,[47] presumption of innocence,[48] and right to compensation for when the suspect and defendant is found to be innocent.[49]

These rights incorporated in the Constitution reflect the Korean people's desire to guarantee their human rights, which had been nominal under authoritarian regime. Mass media, the human rights movement, and academics strongly emphasized the importance of procedural rights.

Since then, the Korean criminal justice system has been reconstructed. During the reconstruction process, the courts have played a crucial role. Since the 1990s, the Korean Supreme Court and the Korean Constitutional Court have made a series of *legislative* decisions excluding illegally obtained statements of criminal suspects and defendants during interrogation even when an explicit legal provision was not available. The Legislature has also contributed to the reconstruction. In 1993 the CPPA was legislated to exclude communications obtained by illegal wiretapping. In 1995 the National Assembly ratified the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In 2007, the CPC was revised to stipulate a general provision of the exclusion of illegally obtained evidence.

In brief, since the 1987 Constitution requested that criminal procedure law play as a "concretely applied Constitution,"[50] Korean criminal procedure law has gradually transformed from a "legalist criminal procedure law" to a "constitutional criminal procedure law."[51]

---

44) *Id.* art. 12 ¶ 7.

45) *Id.* art. 13 ¶ 1.

46) *Id.* art. 27 ¶ 1.

47) *Id.* art. 27 ¶ 3.

48) *Id.* art. 27 ¶ 4.

49) *Id.* art. 28.

50) Jong Dae Bae et al., New Criminal Procedure Law 5 (2nd ed. 2009).

51) Shin, *supra* note 35, at 5.

2. *Adoption of* Miranda *and* Massiah

1) Judicial Activism to Bolster Rights to Silence and Counsel since the 1990s[52)]

In a series of landmark decisions in the 1990s, the Korean Supreme Court has strengthened the rights to silence and counsel. The first step was its 1992 decision in the popularly called "New 21st Century Faction" case, named after the title of the criminal organization the defendant belonged to. In the decision, the prosecutor did not inform the defendant of the right to silence before videotaping the interrogation.[53)] The Court excluded the defendant's confession by stating:

> "The right to silence is based on the privilege against self-incrimination. … The statements elicited without informing of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, *even if they are disclosed voluntarily*."[54)]

In 2001, the Court also held that the statements of suspects caught in the act should be excluded without informing them of their right to silence.[55)]

In these decisions, the Supreme Court recognized that the right to silence is the most crucial legal instrument to protect a suspect, particularly when the suspect is under interrogation without his/her counsel. The Court evidently rejected the traditional "voluntary test" to exclude confessions. It is certain that the Court adopted the rationale of the U.S. *Miranda* rule[56)] to exclude the statement and recognized Article 9(2) of the U.N. International Covenant on Civil and Political Rights.[57)] Notably,

---

52) This part is an update of Kuk Cho, *The Reformed Criminal Procedure of Post-democratization South Korea*, *in* LITIGATION IN KOREA 58, 69-71 & 80-82 (Kuk Cho eds., 2010); Cho, *supra* note 19, at 383-84.

53) *See* Supreme Court [S. Ct.], 92Do682, June 23, 1992 (S. Kor.). This case is popularly called the "New 21st Century Faction" case, named after the title of the criminal organization the defendant belonged to.

54) *Id.* (emphasis added).

55) *See* Supreme Court [S. Ct.], 2001Do229, Mar. 9, 2001 (S. Kor.).

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

57) The Article provides that "Anyone who is arrested shall be informed, at the time of

neither the Constitution nor the CPC had an explicit provision about the exclusion at that time, although both the Constitution and CPC stipulates the right to be informed of the reason for arrest or detention.[58)]

Second, in two National Security Act violation cases in the 1990s,[59)] the Supreme Court also made landmark decisions, which may be called the Korean version of the U.S. *Massiah* rule.[60)] For instance, in the decision of September 25, 1990, the defendants requested to meet with their attorney when they were detained, but the National Security Agency officers rejected their request. Then, the defendants were referred to and interrogated by the prosecutor. The Court held that the defendants' self-incriminating statements were illegally obtained for violating their right to counsel, and, thus, were excluded, holding as follows:

> "Article 12(4) of the Constitution provides people with the right to assistance from counsel when arrested or detained, accordingly, Articles 30 and 34 of the Criminal Procedure Code prescribe the right of suspects or defendants to appoint counsel and communicate with counsel when they are in custody. The right to counsel like this constitutes the nucleus of the constitutionally guaranteed right to assistance from counsel. . . . The limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be excluded, and the exclusion means a substantial and complete exclusion."[61)]

---

arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." *See* International Covenant on Civil and Political Rights art. 9 ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171. ICCPR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force at 23 March 1976, in accordance with Article 4.

58) Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 12 ¶ 5 (S. Kor.); Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 200 ¶ 2 (S. Kor.).

59) *See* Supreme Court [S. Ct.], 90Do1285, Aug. 24, 1990 (S. Kor.). This case is popularly called the "Legislator Seo Kyung Won Case"; Supreme Court [S. Ct.], 90Do1586, Sept. 25, 1990 (S. Kor.). This case is popularly called the "Artist Hong Seong Dam Case".

60) *See Massiah v. U.S.*, 377 U.S. 201 (1964).

61) *See* Supreme Court [S. Ct.], 90Do1586, Sept. 25, 1990 (S. Kor.); Hyongsa sosong beob

Both the Constitution and CPC provide the right to counsel.[62] In these two cases, the Court provided Article 309 of CPC as grounds to exclude the defendant's confession. The Article provides for the exclusion when "confessions whose voluntariness is doubtful for they are made under torture, battery, threat, deceit, after prolonged custody or *by any other method*." [63] It is assumed that the Court considered the violation of the right to counsel as falling under "any other method."

The Constitutional Court has also repeatedly confirmed that the right to counsel in criminal process is an "absolute right" of the defendant, so it cannot be limited "by *any* reason including national security, public order or public welfare."[64] A leading case as an example of this was the decision of January 28, 1992, where the Court reviewed the appeal of a National Security Act violation defendant. While he had a meeting with his counsel, the National Security Agency officers took a picture of the meeting and took a record of the meeting. The Court held that these acts were unconstitutional,[65] stating:

> "Counsels should figure out the situation of detained suspects or defendants and seek for proper countermeasures, explain the meaning of the suspected and accused facts to them, hear their opinions, and discuss measures, provide counsel's opinion about the method, degree, time, content of statements of the suspects or defendants and give guidance to them, teach the importance of the right to silence or the right not to make a signature and how to exercise it, make the suspects or defendants recognize that they may

---

[Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 30, 34 (S. Kor.).

62) Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 12 ¶ 4 (S. Kor.).

63) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 309 (S. Kor.) (emphasis added).

64) *See* Constitutional Court [Const. Ct.], 91Hun-Ma111, Jan. 28, 1992, (4 KCCR, 51) (S. Kor.); Constitutional Court [Const. Ct.], 92Hun-Ma144, July 21, 1995, (7-2 KCCR, 94) (S. Kor.); Constitutional Court [Const. Ct.], 2000Hun-Ma138, Sept. 23, 2004, (16-2(A) KCCR, 543) (S. Kor.) (emphasis added).

65) Constitutional Court [Const. Ct.], 91Hun-Ma111, Jan. 28, 1992, (4 KCCR, 51) (S. Kor.).

> be free of falsified crimes by exercising the right, inform them of the possibility of coercion, deceit, inducement, torture by the law enforcement authorities and teach them how to deal with them, recommend them not to make false confessions, frequently check improper investigation such as inducement, threat, benefit, or violence, and encourage, bestow courage to, console, advise the suspects or defendants when finding their anxiety, despair, worry, or bluff."

Here it may be confirmed that the Supreme Court and the Constitutional Court accepted Article 14(3) of the International Covenant on Civil and Political Rights.[66]

Third, in the decision of November 11, 2003, in a National Security Act violation case of Professor Song Doo Yul, an allegedly pro-North Korean-German dissident who was arrested and detained when he visited Seoul, the Supreme Court made another ground-breaking decision to recognize the right to have counsel *during* interrogation as a constitutional right of suspects.[67]

Neither the Constitution nor the CPC had an explicit provision for the right to have a lawyer present during interrogation at that time, although both provide the right to counsel in general.[68] Over this lack of a positive provision, law enforcement authorities did not allow defense counsel, retained by suspects, to attend interrogation sessions. However, the Supreme Court held:

> "Although the CPC has not provided a positive provision for the right to request the participation of a counsel during interrogation,

---

66) The Article provides that "In the determination of any criminal charge against him, everyone shall be entitled to … be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." *See* ICCPR art. 14 ¶ 3, Dec. 16, 1966, 999 U.N.T.S. 171.

67) *See* Supreme Court [S. Ct.], 2003Mo402, Nov. 11, 2003 (S. Kor.).

68) Daehanminkuk Hunbeob [Hunbeob] [Constitution of the republic of korea] art. 12 ¶ 4 (S. Kor.).

> … it should be interpreted that the right may be recognized by *analogical* interpretation of Article 34 of the CPC which allows for the right to meet and communicate with counsel, and law enforcement authorities may not reject the request."[69]

The Supreme Court also provided narrow exceptions not to permit counsel's participation in interrogation, that is, the participation may be restricted when it is "*objectively clear* when there is reason for probable cause" that the counsel would "obstruct interrogation" or "leak the secret of investigation."[70] It also stated;

> "There are no provisions to restrict detained persons' meeting and communication with their counsel in current laws. Therefore, detained persons should be guaranteed and allowed to meet and communicate with their counsel anytime during the interrogation by law enforcement authorities."[71]

Here the Constitutional Court showed its legal philosophy based on Article 5 of the Declaration of the Rights of Man and the Citizen of 1789, providing that "Nothing may be prevented which is not forbidden by law."

Reviewing the infringement of a non-detained suspect because of its singular right to counsel in a Public Office Election Act violation case,[72] the 6-to-3 opinion of the Constitutional Court on September 23, 2004 confirmed that the right to have counsel present during interrogation is a constitutional right of the suspect and approved the exceptions to the right provided by the Supreme Court in Professor Song Doo Yul's case. The Court also made it clear that a procedural right stipulated in the Constitution has a binding effect without a specific provision in a lower law.[73]

---

69) *See* Supreme Court [S. Ct.], 2003Mo402, Nov. 11, 2003 (S. Kor.)

70) *Id.* (emphasis added).

71) *Id.*

72) *See* Constitutional Court [Const. Ct.], 2000Hun-Ma138, Sept. 23, 2004, (16-2(A) KCCR, 543) (S. Kor.).

73) *Id.*

Miranda and *Massiah* are often considered to be politically liberal rules both in and out of Korea. Although they are being adopted by judges in Korea before the Legislature takes an initiative, the majority of Korean judges may not be regarded as politically liberal. They are rather conservative. Having experienced the long-time authoritarian rule, however, they have come to assume themselves to be controllers of the misconduct of law enforcement authorities and an initiator and guardian of due process values. This would be one of the reasons for the judicial activism that junior judges who spent their youth under authoritarian rule began to raise their voice in the judiciary. It is assumed that in all of the aforementioned decisions the Supreme Court did not have a big burden to exclude the defendants' statements, for they could be convicted upon untainted evidence.

2) Reallocation of the Burden to Prove the Voluntariness of Confessions

In 1998, the Supreme Court changed its previous opinion (1983) that the voluntariness of statements is presumed.[74] The Court held:

> "The reason why it is necessary to exclude involuntary confessions is not only because confessions obtained in situations where false statements are induced or forced do not accord to substantive truth and cause misjudgment, but also because irrespective of the truthfulness of the confessions, illegal or improper pressure violating basic human rights of the suspects to obtain confession should be deterred in advance. Therefore, when the voluntariness of the confession is in dispute, … prosecutors should get rid of the doubts regarding the voluntariness."[75]

In 2008, the Supreme Court reconfirmed this opinion, stating;

> "When the voluntariness of the suspect's confession recorded in prosecutors' dossiers is in dispute, … prosecutors should get rid of the doubts regarding the voluntariness. If prosecutors cannot, the

---

74) *See* Supreme Court [S. Ct.], 82Do3248, Mar. 3, 1983 (S. Kor.) (emphasis added).

75) *See* Supreme Court [S. Ct.], 97Do3234, Apr. 10, 1998 (S. Kor.).

> dossier should not be used as evidence to prove guilt. This rule also applies to situations where the suspect or his/her counsel reverses positions after admitting voluntariness."[76]

The Court made it clear that the voluntary statements are not presumed and prosecutors bear the burden to prove that confessions weren't forced. It is expected that this change will cause more exclusion of involuntary confessions.

3) The 2007 Revision of the Criminal Procedure Code and Following Issues

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

Before the revision, the right to counsel for arrested or detained suspects and defendants was already stipulated in the CPC.[77] The 2007 revision newly provides the right to have a counsel participate in interrogation.[78] Article 243-2(3) of the CPC provides:

> "Counsels participating in interrogation may express their opinion *after* interrogation by law enforcement authorities ends. Even during interrogation, however, they may present objections to improper interrogation methods and present opinions with approval of prosecutors or police officers."[79]

It is certain that counsel's presence prevents illegal interrogation. However, this is not enough. Except when improper interrogation occurs or with interrogators' approval, counsels may not interfere with the interrogation but simply sit with suspects. In most cases, as a result, when law enforcement authorities are interrogating, counsels may not give advice to suspects about whether or not to answer or what to say. They may give advice to suspects before interrogation begins or check the interrogation dossiers after interrogation ends. Suspects may not seek

---

76) *See* Supreme Court [S. Ct.], 2008Do1200, July 10, 2008 (S. Kor.).

77) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 89, 209 & 213-2 (S. Kor.).

78) *Id.* art. 243-2 ¶ 1.

79) *Id.* art. 242-2 ¶ 3 (emphasis added).

counsels' advice when interrogators cast questions that suspects and counsels did not expect, and so did not prepare for. In this context, the right to counsel is still limited.

Article 242-2(3) of the CPC provides that the right to have a counsel participate in interrogation may be restricted when there is "justifiable cause."[80] "Justifiable cause" will be interpreted following the exceptions previously provided by the Supreme Court in the Professor Song Doo Yul case,[81] which means probable cause that the counsel would "obstruct interrogation" or "leak the secret of the investigation."[82]

However, the Working Rules for Prosecutors' Cases,[83] which is made by the Ministry of Justice, extends exceptions to the right to have counsel participate in interrogation.

First, Article 9-2(3) of the Working Rules provides that even when the right has been exercised, interrogation may begin if counsel does not appear or cannot appear "in appropriate time."[84] There remains the problem of how to define "appropriate time" and there is a possibility that law enforcement authorities could weaken the newly introduced right by use of Article 9-2(3).

Second, Article 9-2(4) of the Working Rules provides the following situations as examples of "obstructing interrogation" or "leaking the secret of the investigation": (i) a counsel improperly intervenes or makes insulting language or behaviors, (ii) a counsel makes an answer instead of a suspect or induces a suspect to make a specific answer or reverse his/her previous answer, (iii) a counsel makes an objection improperly against Article 243-2, (iv) a counsel films, records or writes down the interrogation. Concerning the prohibition of (iv), the Rules allows a counsel to make "brief writings for refreshing their memory" in order to provide legal advice for the suspect.[85]

---

80) *Id.* art. 243-2 ¶ 1.

81) *See* Supreme Court [S. Ct.], 82Do3248, Mar. 3, 1983 (S. Kor.) (emphasis added).

82) *See* Supreme Court [S. Ct.], 2003Mo402, Nov. 11, 2003 (S. Kor.).

83) *See* Keomchalsageonsamu kyuchik [The Working Rules for Prosecutors' Cases], Ministry Decree, No. 766, Mar. 15, 2012.

84) *Id.* art. 9-2 ¶ 3.

85) *Id.* art. 9-2 ¶ 4.

Like Article 9-2(3), Article 9-2(4) also includes uncertain and vague terms such as "improper intervention", "improper objection" and "insulting language or behaviors." It intends to weaken the right to have counsel participate in interrogation by the prohibitions of (ii) and (iii) in particular.[86)]

Articles 9-2(3) and 9-2(4) of the Working Rules have not been challenged in either the Supreme Court or the Constitutional Court. However, in the decision of September 12, 2008,[87)] the Supreme Court showed its determination to help the newly introduced right to be firmly established in the criminal process. In this case, a police officer ordered a counsel to get out of the interrogation room, refusing the request of the counsel who insisted on sitting with a suspect. The Supreme Court held that the officer violated the right of counsel to participate in interrogation.

On the other hand, the 2007 revision provided the full version of *Miranda* rule.[88)] According to Article 244-3(1) of the CPC, 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 counsel participate in interrogation." The suspect's answer should be recorded either by his/her handwriting on the document or with his/her written approval of the document made by the investigative authorities.[89)]

After the 2007 revision of the CPC was made, the Ministry of Justice argued in its commentary of the revision that the requirements of the Miranda warnings do not apply when a suspect is "investigated"(調査) but when a suspect is "interrogated"(訊問). [90)] This interpretation presented

86) Bae et al., *supra* note 50, at 109; Shin, *supra* note 35, at 257.

87) *See* Supreme Court [S. Ct.], 2008Do794, Sept. 12, 2008 (S. Kor.).

88) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 244-3 ¶ 1 (S. Kor.).

89) *Id.* art. 244-3 ¶ 2.

90) Ministry of Justice, Revised Criminal Procedure code 126 (2007).

Article 200 of the CPC as its rationale, which provides, "Prosecutors or police officers may request suspects to appear and hear their statements when necessary for investigation."[91] According to the Ministry of Justice, "hearing statements" according to Article 200 is free from the requirements of Article 244-3(1).

Professor Shin Dong Woon criticizes this interpretation:

> "This opinion overlooks the 2007 revision of the CPC stipulated in Article 244-3(1) to substantially strengthen the right to silence. … Although there exists some linguistic difference between 'hearing statements' and 'interrogation,' it cannot work as grounds to weaken the suspect's right to defense. There is no difference between 'hearing statements' and 'interrogation' in that the law enforcement authorities obtain statements from suspects."[92]

In the decision of November 10, 2011,[93] the Supreme Court held that the Miranda warnings in Article 244-3(1) apply when the status of a suspect is recognized and "the status of a suspect is recognized when the law enforcement authorities begin to recognize the criminal suspicion of the object of the investigation and initiate investigation." This means that the Miranda warnings should be given to a person who has been given the status of a suspect in either 'hearing statements' or 'interrogation.'

3. The Exclusion in the Communication Privacy Protection Act of 1993 and its Limitation

In the first year of the Kim Young Sam government known as the "Civilian Government", the CPPA was legislated. Under the authoritarian regime, there was not a law to regulate wiretapping by the law enforcement authorities, so wiretapping was freely used without any restriction. President Kim Young Sam, who once was a political leader of the

---

91) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 200 (S. Kor.).

92) Shin, *supra* note 35, at 248.

93) *See* Supreme Court [S. Ct.], 2011Do8125, Nov. 10, 2011 (S. Kor.).

democratization movement and was put under illegal surveillance under the authoritarian regime, was now active to make the CPPA.[94)]

Article 3 of the CPPA provides that, "Without a grounds from the CPPA, CPC and the Military Court Act, anyone may not inspect letters, wiretap electronic communications, or record or eavesdrop on conversations between others" and Article 14(1) provides that, "Anyone may neither record undisclosed conversations between others nor eavesdrop on them by using electronic devices or mechanical means." In particular, Article 4 of the CPPA provides that, "the content of the letter obtained by illegal inspection and that of the electronic communications obtained by illegal wiretapping shall not be used ***in a trial or a sanction discipline process***."[95)] It is noteworthy that the exclusionary rule of Article 4 is very strong in that the evidence obtained by violating the CPPA shall not be used not only in a criminal trial but also in a civil trial or administrative sanction process.

In two National Security Law cases in 1999, the Supreme Court excluded the defendant's communication obtained by illegal wiretapping. The Court held that the telephone communications of the defendant whose name was not in the permission warrant issued by the court should not be used in a trial even though his telephone number was in the warrant,[96)] and that the recording of communications should not be used in a trial because the warrant only permitted wiretapping of electronic communications and inspection of letters.[97)] In another National Security Law case in 2002,[98)] the Court held that the telephone communications obtained by the permission

---

94) The background of this Act is an ironic political incident, which is popularly called a "Puffer Restaurant Case". Just before the presidential election, high-ranking public officials had a secret meeting for the illegal intervention of the election in a puffer restaurant in Pusan. They worked for the ruling Democratic Liberal Party's candidate, Kim Young Sam. The members of the Unification National Party led by Chung Joo Young, former CEO of the Hyundai Group, wiretapped the conversation in the restaurant to publicize it. Although Kim Young Sam was at a disadvantage for this incident, he reversed the situation by arguing he was a victim of illegal wiretapping.

95) *See* Tongsinbimil boho beob [The Communication Privacy Protection Act], Act No. 4650, Dec. 27, 1993, *amended by* Act. No. 12229, Jan. 14, 2014, art. 4 (S. Kor.) (emphasis added).

96) *See* Supreme Court [S. Ct.], 99Do2318, Sept. 3, 1999 (S. Kor.).

97) *See* Supreme Court [S. Ct.], 99Do2317, Sept. 3, 1999 (S. Kor.).

98) *See* Supreme Court [S. Ct.], 2000Do5461, Oct. 22, 2002 (S. Kor.).

warrant may be used to investigate and prosecute only the crimes that the warrant indicates.

Despite these positive changes, judges tend to issue warrants without strict scrutiny. According to the data submitted by the Daegu District Court to the National Congress in 2004, the judges of the Court approved all the requests for the "measure of communication restriction" in 2002.[99] Besides, the CPPA itself has two major exceptions for the warrant requirement for "measure of communication restriction": "exigent measure of communication restriction"[100] and "measure of communication restriction for national security."[101]

The "exigent measure of communication restriction" is allowed to check "conspiracy to threaten national security, the plan or the execution of serious crimes such as the crimes that are likely to cause death or severe bodily injury or organized crimes."[102] It allows the law enforcement authority thirty-six hours free from judicial review.[103] As a result, if the law enforcement authorities repeat the "exigent measure" for the period of less than thirty-six hours, the measure may be extended to be limitless with judicial control.

The "measure of communication restriction for national security" is allowed for *any* crimes when the chief of national intelligent agencies expects "substantial danger to the guarantee of national security" and requests the measure.[104] It is permitted by the President of Korea, free of the review of either the Judiciary or of the Legislature.

99) Maeil Shinmun, Oct. 5, 2004

100) *See* Tongsinbimil boho beob [The Communication Privacy Protection Act], Act No. 4650, Dec. 27, 1993, *amended by* Act. No. 12229, Jan. 14, 2014, art. 8 (S. Kor.).

101) *Id.* art. 7.

102) *Id.* art. 8 ¶ 1.

103) *Id.* art. 8 ¶ 2.

104) *Id.* art. 7 ¶ 1.

4. Adoption of Mapp

1) Judicial and Legislative Adoption of Discretionary Exclusionary rule in Search-and-Seizure in 2007[105]

Although the Supreme Court adopted *Miranda* and *Massiah*, the Supreme Court had consistently declined to exclude physical evidence obtained by illegal search-and-seizure procedures since 1968 until recently.[106] The Court clearly rejected the U.S. Fourth Amendment *Mapp* exclusionary rule.[107]

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 police misconduct in Korea.

Just before the 2007 revision of the CPC, which stipulated Article 308-2 of the CPC providing that "evidence obtained not through due process shall not be admissible,"[108] in November 15, 2007 the Supreme Court made an epoch-making decision to exclude illegally obtained physical evidence.[109]

In this case, Governor Kim Tae Hwan of Jeju Province was investigated for a violation of the Public Office Election Act. Law enforcement officers entered Kim Tae-Hwan's office to obtain evidence with a warrant, which limited the scope of search-and-seizure to the "items stored in the room" used by Kim Dae Hee, a special policy aide of Kim Tae Hwan. Law enforcement officers ran into Han Seok Dae, a secretary of Kim Tae Hwan, who carried confidential documents to the room, and seized the documents. The documents included criminal proof.

---

105) This part is an update of Cho, *supra* note 52, at 80-82.

106) *See* Supreme Court [S. Ct.], 68Do932, Sept. 17, 1968 (S. Kor.); Supreme Court [S. Ct.], 87Du705, June 23, 1987 (S. Kor.); Supreme Court [S. Ct.], 93Do3318, Feb. 8, 1994 (S. Kor.).

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

108) *See* Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 308-2 (S. Kor.).

109) *See* Supreme Court [S. Ct.], 2007Do3061, Nov. 15, 2007 (S. Kor.).

Following the Supreme Court's precedents, lower courts rejected the defense counsel's argument that the documents should be excluded. However, the Supreme Court overthrew the lower court's decision, stating:

> "The most effective and certain countermeasure to deter and control the search-and-seizure by law enforcement authorities, that does not abide by procedural provisions is to prohibit not only illegally obtained evidence but also its derivative evidence from being used for conviction." [110]

It is certain that the Supreme Court adopted the rationale of the U.S. *Mapp* rule. However, the Court did not adopt a mandatory exclusionary rule but a *discretionary* one. The majority opinion held that the illegally obtained evidence should not be "uniformly" excluded but could be excluded considering "all the circumstances regarding the procedural breaches in the evidence collecting process by the investigative authorities." [111]

Then, the majority opinion provided a standard for inclusion: "whether the procedural breaches by the investigative authorities violate substantial contents of due process."[112] Criticizing that this standard is too vague and strict, the concurring opinion provided a different standard: "whether the evidence collecting process ignores the spirit and meaning of the warrant principle, so the illegality of the process is so significant that the evidence should be excluded."[113] Literal phrases of both the majority opinion and the concurring opinion are abstract. The real difference is that the majority opinion emphasizes the principle of exclusion, while the concurring opinion criticizes the strictness of the majority opinion.

It is also noteworthy that unlike the concurring opinion, the majority opinion explicitly states that secondary evidence derived from first evidence obtained illegally should be excluded, considering "all the

---

110) *Id.*

111) *Id.*

112) *Id.*

113) *Id.* Concurring opinion by Justices Yang Seung Tae, Kim Neung Hwan & Ahn Dae Hee.

circumstances regarding the collecting process of the derivative evidence including dilution or severance of the causation between the first illegal evidence and the derivative evidence."[114] Here the majority opinion adopts the U.S. principle of "the fruit of the poisonous tree."[115]

The political background of this turning of the Supreme Court after a long time rejecting the *Mapp* rule since 1968 was that the 2004 Presidential Committee on Judicial Reform [*sabeopchedo kaehyeok chujin wiweonhoe*] submitted a bill for the revision of the CPC including the exclusionary rule after a period of heated discussions and debates, and the National Assembly was expected to pass the bill soon. The Supreme Court made the decision on November 15, 2007 and the National Assembly passed the bill on December 21, 2007. It is assumed that the Court did not want to lose the initiative for adopting the rule and it also intended to prepare a standard for the exclusion.

2) Relevant Rulings

The Supreme Court decision of March 12, 2009, which was a follow-up decision of the landmark decision of November 15, 2007, is also important.[116] The Court rejected the appeal of the prosecutors in the case of Governor Kim Tae Hwan, providing some important rules. First, the Court held that phrases in a warrant should be not be interpreted analogically in a manner disadvantageous to the targeted persons, but should be strictly interpreted from the viewpoint of the Constitution and the CPC, and thus "items stored in the targeted place" should not be interpreted as "items present in the targeted place." This ruling was to exclude the confidential documents carried by Han Seok Dae.

Second, the Court held that in principle a warrant should be presented to all the persons respectively whose names are on the warrant; so a warrant should also be presented to the person who carries the targeted items, even if it is presented to a supervisor in charge of the targeted place.

Third, the Court provided a very significant ruling regarding the burden of proof:

114) *Id.*

115) *Silverthrone Lumber v. U.S.,* 251 U.S. 385 (1920); *Nardone v. U.S.,* 308 U.S. 338 (1939).

116) *See* Supreme Court [S. Ct.], 2008Do763, Mar. 12, 2009 (S. Kor.).

> "For the court to recognize that despite the procedural violation made by law enforcement authorities the illegally obtained evidence may be exceptionally used to prove the guilt of the defendant, the prosecutor should prove that there exists concrete and special circumstances for such exceptions to apply." [117]

This ruling is a follow-up decision to the 1998 and 2008 decisions that the voluntariness of statements is not presumed and prosecutors bear the burden of proof.[118]

In 2013 the Supreme Court made two decisions not to exclude secondary evidence derived from first evidence obtained illegally. In a March 14 decision, [119] the Court held that the secondary result of a urine test with a court warrant is admissible although the first result of the urine test obtained by illegal arrest without a warrant is not admissible. In a March 28 decision, the Court also held that the defendant's confession, duly obtained in a court, is admissible although police illegally obtained the personal information of the defendant without a warrant and the contents of the first confession obtained in the illegal detention. [120]

After the adoption of *Mapp*, there remained a question of whether or not the illegally obtained evidence may be used with defendants or their counsel. In 2009 and 2010 the Supreme Court made it clear that the evidence should be excluded even if the defendants or their counsel had given consent to its inclusion.[121] The Court prevented law enforcement authorities from avoiding the exclusionary rule by getting consent.

5. New Structure of the Exclusionary Rules

Now the Korean criminal justice system has three codified exclusionary rules: Article 309 of the CPC to exclude incriminating statements obtained

---

117) *Id.*

118) *See* Supreme Court [S. Ct.], 82Do3248, Mar. 3, 1983 (S. Kor.); Supreme Court [S. Ct.], 97Du3234, Apr. 10, 1998 (S. Kor.); Supreme Court [S. Ct.], 2008Do1200, July 10, 2008 (S. Kor.).

119) *See* Supreme Court [S. Ct.], 2012Do13611, Mar. 14, 2013 (S. Kor.).

120) *See* Supreme Court [S. Ct.], 2012Do13607, Mar. 28, 2013 (S. Kor.).

121) *See* Supreme Court [S. Ct.], 2009Do11401, Dec. 24, 2009 (S. Kor.); Supreme Court [S. Ct.], 2009Do10092, Jan. 28, 2010 (S. Kor.).

by illegal interrogation, Article 4 of the CPPA to exclude communications by illegal wiretapping, and Article 308-2 of the CPC to exclude evidence obtained not through due process.

Article 308-2 of the CPC, which provides that "evidence obtained not through due process shall not be admissible,"[122] is a general provision for all exclusionary rules as well as a special provision for the exclusion of physical evidence by illegal search-and-seizure, which had no positive legal provision for exclusion. Whether to "violate substantial contents of due process" [123] will depend on judicial discretion.

Article 308-2 as a general rule is generally used to exclude illegally taken photos or videotapes, evidence obtained by illegal entrapment, blood samples obtained without a warrant and statements obtained by illegal "voluntary accompaniment" and so forth.

In 1999 the Supreme Court provided the standards for the legality of videotaping; "Warrantless videotaping is not illegal if it is done by generally permitted proper methods when crimes are on-going or just after a crime is committed, and it is urgently necessary to maintain evidence." [124] In 2007 the Court also provided that the legality of entrapment should be decided by total estimation of the nature and response of targeted crimes, the role of the inducer, the process and method of inducement, the criminal career of the defendant and the legality of inducement itself.[125]

In 2007 the Court excluded the blood sample of a defendant obtained without a warrant.[126] In this case, a police officer made a doctor take the blood of the defendant who lost consciousness after causing a car accident while driving under the influence of alcohol. In 2013 the Court also excluded the blood samples of defendants that were arrested illegally.[127] In this case, in the scene of a car accident police officers arrested the defendant without informing him of the reasons for his arrest and right to counsel,

---

122) Hyongsa sosong beob [Criminal Procedure Code], Act No. 341, Sept. 23, 1954, *amended by* Act. No. 11572, Dec. 18, 2012, art. 308-2 (S. Kor.).

123) *See* Supreme Court [S. Ct.], 2007Do3061, Nov. 15, 2007 (S. Kor.).

124) *See* Supreme Court [S. Ct.], 99Do2317, Sept. 3, 1999 (S. Kor.).

125) *See* Supreme Court [S. Ct.], 2006Do2339, July 12, 2007 (S. Kor.).

126) *See* Supreme Court [S. Ct.], 2009Do2109, Apr. 28, 2011 (S. Kor.).

127) *See* Supreme Court [S. Ct.], 2009Do2094, Mar. 14, 2013 (S. Kor.).

which is required by Article 200-5 of the CPC. Although the defendant rejected the request of the police officers to comply by doing a breathalyzer test, they told him that if did not comply, he would be detained. Then the defendant complied with the test, which showed the criminalizing figure. The blood sample that was taken from him in the hospital also proves it.

In 2011 the Supreme Court excluded the defendants' statements obtained by illegal "voluntary accompaniment," stating that "voluntary accompaniment" can be allowed only when police officers have informed defendants the right not to accompany or it is objectively and clearly recognized that defendants could have broken away from the accompaniment freely at any time. [128]

Article 308-2 will also influence the application of Article 309 of the CPC. Even after the Korean version decisions of *Miranda* and *Massiah*[129] were made, the traditional "voluntary test" to exclude confessions was not completely replaced. Article 308-2 clearly states that illegality, not voluntariness, is the standard to exclude confessions. It means that if confessions are obtained by illegal interrogation methods, they are presumed to be involuntary. Considering that Article 309 provides "confessions whose voluntariness is doubtful" shall be excluded, the "doubtfulness" is confirmed only when the investigative method during interrogation is found to be illegal.

V. New Issues of the Exclusionary Rules

1. Changed and Unchanged

Twenty years after the establishment of the 1987 Constitution to the 2007 revision of the Criminal Procedure Code, Korean criminal procedure has either strengthened or introduced new exclusionary rules to deter police misconduct. Although the legal surroundings of the Korean criminal justice system had totally changed, the old consciousness and illegal practice of the law enforcement authorities did not rapidly fade away. It

---

128) *See* Supreme Court [S. Ct.], 2009Do6717, June 30, 2011 (S. Kor.).

129) *See supra* text accompanying notes 53-71.

would be naive to expect that police misconduct suddenly disappeared after the exclusionary rules were adopted in the criminal justice system.

President Roh Tae Woo (1988-1993), who was a leader in the 1980 military coup with Chun Doo-Hwan but who was elected as President by a direct election based on the 1987 Constitution, promised to prohibit torture and guarantee human rights in the criminal process. During the period of the Roh government, as reviewed, a series of groundbreaking decisions were made by the Supreme Court. President Kim Young Sam (1993-1998), who once was a leader of the democratization movement, merged his Unified Democratic Party with the ruling Democratic Justice Party led by Chun Doo-Hwan and Roh Tae Woo under the authoritarian regime in 1990. President Kim Young Sam also criticized the criminal process, saying that torture and mistreatment by law enforcement authorities recurred, and emphasized that procedural rights of suspects should be guaranteed. The CPPA was legislated by President Kim's initiative. The number of the reports of torture decreased since this political democratization.

However, it has been repeatedly reported that National Security Law violators were mistreated in the National Security Planning Agency. For instance, Yoo Won Ho, who visited North Korea- accompanying a leading reunification movement activist named Reverend Moon Ik Hwan- without the government's permission in 1989, and Legislator Seo Kyung Won and his staff Bang Yang Kyoon, who visited North Korea without the government's permission in 1988, were severely hit and deprived of sleep during interrogation.[130] Reunification activists such as *Jamintong* (Self-reliance, Democracy, Reunification) and leftist activists such as *Sanomaeng* (Socialist Workers' League) were also harshly treated by the National Security Planning Agency in 1990.[131] However, the National Security Planning Agency's investigating officers were not investigated at all.

The mistreatment of non-political suspects still went on during the period of the Roh and Kim governments. The most highly profiled case happened in Pusan North Police Station in 1993. Two suspects were arrested under the suspicion of killing an eight-year-old girl. The eyes of the suspects were covered by a towel, their mouths were gagged, and they

130) *See* Park, *supra* note 23, at 275-78.

131) *Id*. at 275-78, 285-294.

were handcuffed and beaten by fist and by bat in the police station. Thanks to the efforts of a local newspaper and human rights lawyers led by Moon Jae In, who was an opposition candidate in the 2013 presidential election, the truth was revealed and the police officers were convicted.[132)]

In an interview with a magazine in 1994, Choe Hyung Woo, Minister of Internal Affairs under the Kim Young Sam government known as the "Civilian Government", surprisingly said that those who are arrested for their leftist thought may be deprived of sleeping by the National Security Planning Agency.[133)] His remark was an explicit sign that sleep deprivation was not considered illegal. While torture by electricity or water seemed to disappear after political democratization, lower level torture such as beating and sleep deprivation was widely used in both political and non-political cases.

President Kim Dae Jung (1998-2003), a representative victim of authoritarian rule sentenced to death under the Chun Doo Hwan rule, was very active in guaranteeing human rights in criminal procedures. President Roh Moo Hyun (2003-2008) was a leading human rights lawyer before becoming a politician. Since established in 2001, the National Human Rights Commission has actively worked to investigate the misconduct of law enforcement authorities. In 2003, the Ministry of Justice made the Rule for the Protection of Human Rights in Investigations.

However, illegal misconduct has lingered within the law enforcement agencies. Although the police have proudly considered themselves as a "stick for the people," they have often played as a "stick to brandish towards people." Let me introduce a few shocking cases.

In 2000, it was reported that a suspect under suspicion of selling drugs was taken to a mountain and put into a pit and threatened with being buried alive by police officers. In an interrogation room he was given the "wings breaking" torture,[134)] which was widely used during authoritarian rule.[135)] Probably the most serious misconduct in the history of the

---

132) *Id.* at 383-85.

133) *Id.* at 342.

134) By the "wing-breaking," the two arms of suspects are moved to their back and handcuffed, then lifted.

135) Chosun Ilbo, May 16, 2000 ; Hankyoreh, May 16, 2000, http://news.naver.com/

Prosecutors' Office occurred in 2002. A suspect of the murder of a gang boss died after being beaten by law enforcement officers in the Seoul Prosecutors' Office. The National Human Rights Commission found that suspects, including the deceased, were deprived of sleep, were beaten and were forced to drink water. They were also forced to do "Wonsan bombing",[136] which was commonly used during authoritarian rule. The officers and Hong Kyung Ryung, who as a prosecutor directed them to torture suspects, was convicted, and the Minister of Justice, Attorney General and Head of the Seoul Prosecutors' Office resigned.[137] "A prosecutor has become a monster to catch an organized criminal."[138] In 2010, the National Human Rights Commission filed a charge against police officers after investigating their severe torture of suspects in the Seoul Yangcheon Police Station, and they were convicted.[139] Their mouths were stuffed by paper tissues or towels, and suspects suffered from the "wing-breaking" torture,[140] which was widely used during authoritarian rule.

These shocking incidents revealed that illegal interrogation practices have surreptitiously survived although substantially decreased in contemporary Korean society.

2. Application of Exceptions to the Exclusion—Rule with Weak Teeth?

After the 2007 Supreme Court's decision and the 2007 revision of the CPC, the Supreme Court dealt with the exceptions to the search-and-seizure exclusionary rule and the "fruit of the poisonous tree" doctrine. The decision of March 12, 2009 is important.[141] In this case, an arrested robbery defendant made an incriminatory statement regarding victims in a police

---

main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=020&aid=0000003552

136) By the "Wonsan bombing," the two arms of suspects are moved to their back and their head is located on the floor, then suspects shore up their body by their head and toes. Wonsan is a city of North Korea.

137) CHANG WON PYO, JUNGEIEI JUCKDLE 278-284 (2014).

138) *Id.* at 278.

139) KI SOO LEE, HUWIJABAEKEI ERONGA SILJE 192-93 (2012).

140) By the "wing-breaking," the two arms of suspects are moved to their back and handcuffed, then lifted.

141) *See* Supreme Court [S. Ct.], 2008Do11437, Mar. 12, 2009 (S. Kor.).

car without being given the warning of the right to silence. Based on this statement, the police officer seized the victim's materials, including her bag in the defendant's residence. Later, being given the warning of the right to silence, the defendant voluntarily confessed his crime. The defendant admitted to his crime in trial.

In trial, the prosecutor argued that exceptions to the exclusionary rule are applicable. However, the Seoul Seobu District Court rejected it.[142] First, the Court excluded the defendant's statement in a police car for it was obtained without the *Miranda* warning. Second, the Court rejected the prosecutor's argument of "inevitable discovery exception"[143] that without the defendant' statement the seized materials could have been obtained based on the defendant's consent or by emergent search-and-seizure in Article 217(1) of the CPC. The Court also rejected the prosecutor's argument of a "good faith exception" [144] that the police officer had good faith that he could legally search and seize the defendant's residence by Article 217(1) of the CPC, for the defendant was under emergent arrest. The Court held that it is hard to find the defendant's consent when the requirements for Article 217(1) are not fulfilled either. Third, the Court excluded the victim's materials for they were tainted evidence derived from the illegally obtained statements. Deciding that the "taint" in the derivative evidence was not "purged", so "the purged taint exception"[145] was not applicable, the Court held the defendant guilty based on his admission in a trial.

However, this decision was overthrown by the Seoul High Court's

---

142) *See* Seoul Seobu District Court, 2008Kohap71, Jul. 10, 2008.

143) This exception originates from Nix. v. Williams, 467 U.S. 431(1984). The Court held that evidence obtained through the illegal police conduct might be admissible if it would "inevitably" have been discovered by other independent lawful means.

144) This exception originates from *U.S.* v. *Leon*, 468 U.S. 897 (1984). The Court held that evidence need not be excluded when police had obtained the evidence through objective good faith reliance on "a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 913.

145) His exception originates from Won Sun v. U.S., 367 U.S. 643 (1961). The Court stated that the applicability of the "fruit of the poisonous tree" doctrine is determined by "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

decision, deciding the victim's materials as derivative evidence should not be excluded.[146] Confirming the High Court's decision, the Supreme Court provided more specific standards than in its 2007 decision to decide whether to exclude "tainted fruits." It requested "comprehensive evaluation of all the circumstances regarding the collection of the first tainted evidence: the purpose of process-related provisions, the content, degree, reason of process violation, the possibility of avoiding the violation, the nature and violated degree of rights or legal interests that process-related provisions intend to protect, the causation between process violation and evidence collection, the willfulness or negligence of law enforcement officers, and all situations that additionally happened when collecting the derivative evidence."[147]

Then, the Supreme Court found "dilution or severance of the causation between the first illegal evidence and the derivative evidence"[148] in this case. The Supreme Court believed that the failure to give the *Miranda* warnings was a "mistake, not intentional"[149] and focused on the fact that in the subsequent interrogation the warning was given, and the defendant made confessions again with the aid of his counsel.[150]

The author stands by the Seoul High Court. First, it is very lenient to estimate that the failure of warning is simply a "mistake." Considering the *Miranda* warnings were well informed among the police community after the 1992 Supreme Court decision, it is reasonable to doubt either "mistake" or "good faith" of the police officer and to conclude that the failure to give the *Miranda* warnings was deliberate or reckless at least. It is assumed that the Supreme Court might refer to the U.S. Supreme Court's decision of *Oregon* v. *Elstad*,[151] which held that the second confession obtained after giving proper *Miranda* warnings was not tainted fruit on the grounds that it was derived from the first confession obtained without *Miranda* warnings. The main rationale was that the violation of the *Miranda* warnings was not

146) *See* Seoul High Court 2008No1954, Nov. 20, 2008.

147) *See* Supreme Court 2008Do11437, Mar. 12, 2009.

148) *Id*.

149) *Id*.

150) *Id*.

151) *Oregon v. Elstad*, 470 U.S. 298 (1985).

a violation of the Constitution itself.[152)] However, in Korea, it is a direct and grave violation of both the Constitution and the CPC for a police officer not to warn a suspect of his or her rights.

Second, it is very naïve to find "dilution or severance of the causation" in this case. Unless the victim's materials are excluded in this case, law enforcement authorities are likely to first elicit incriminatory statements from a suspect without giving the warning, and then give the warning later. This will weaken the right to silence substantially.

In this sense, the Supreme Court decision of March 12, 2009 foreshadows that the search-and-seizure exclusionary rule will not have strong teeth in practice, and that the Supreme Court will follow the conservative U.S. Burger-Rehnquist Court rather than the liberal Warren Court.

3. Should Interrogation Stop when the Right to Silence or Counsel is Invoked by Suspects?— "Duty to Submit to Questioning"?

Although the Korean Supreme Court established the Korean versions of *Miranda* and *Massiah*, there remains unclear parts of these decisions, that is, whether or not a custodial interrogation may be reinitiated once the suspect has invoked his right to remain silent or to have an attorney present at the interrogation. In practice, Korean law enforcement authorities do not stop questioning even after the suspects have invoked their rights. This practice has not been challenged in a trial yet.

Korean law enforcement authorities act as if a "duty to submit to questioning"(取調受忍義務) is imposed on suspects. Such a duty does not exist in the CPC at all, while it is stipulated in Article 198 (1) of the Japanese Criminal Procedure Code. This Japanese Article provides that "except in cases where the suspect is under arrest or in detention, the suspect may refuse to appear or, having appeared, may leave at any time." To read Article 198 (1) literally, the suspect's right to refuse to appear for

---

152) The U.S. Supreme Court in Michigan v. Tucker held that the Miranda requirements were not right against compulsory selfincrimination but merely "**prophylactic** rules" to protect that right; thus disregard of the Miranda rules did not constitute a core violation of the Fifth Amendment. Michigan v. Tucker, 417 U.S. 433 (1974) (emphasis added).

questioning and to leave apply only to those not under arrest or in detention. In actual practice, therefore, if suspects under arrest or in detention invoke their rights to silence, they are not allowed to leave the interrogation room; rather, they must be present and listen to questioning. The majority of Japanese academics have criticized that the "duty to submit to questioning" substantially forces suspects to answer despite the constitutional guarantee of the right to silence. Japanese law enforcement authorities have strongly adhered to the literal interpretation and the Japanese Supreme Court has not made a decision on this issue.[153)]

This is in salient contrast to *Miranda,* which makes it clear that suspects have an absolute right to silence and that all questioning must cease immediately when a suspect invokes his right to remain silent or right to counsel.[154)] The subsequent U.S. Supreme Court decisions of *Miranda* and *Massiah* also held that interrogation should stop once suspects have invoked their right to silence or counsel. For instance, the Court in *Edward* v. *Arizona* held:

> "An accused, such as a petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation *until* counsel has been made available to him, *unless* the accused himself initiates further communication, exchanges, or conversations with the police. ... when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further policeinitiated custodial interrogation even if he has been advised of his rights."[155)]

In *Minnick* v. *Mississippi*,[156)] the Court also held that once a suspect had invoked the Fifth Amendment right to counsel, police could not reinitiate interrogation unless counsel was present at the reinitiation, even if the

---

153) *See* Kuk Cho, *Japanese "Prosecutorial Justice" and Its Limited Exclusionary Rule*, 12 Colum J. Asian L. 1, 57-58 (1998).

154) *Miranda v. Arizona,* 384 U.S. 436, 444-45 (1966).

155) *Edward v. Arizona,* 451 U.S. 477, 484 (1981) (emphasis added).

156) *Minnick v. Mississippi,* 498 U.S. 146 (1990).

suspect had consulted with counsel.

Recently in *Montejo* v. *Louisiana*,[157] the Court modified its previous stern position by overruling *Michigan* v. *Jackson*.[158] Montejo was charged with first-degree murder and appointed court-ordered counsel, which he neither expressly requested nor denied. Later that day, while in prison, police read Montejo his *Miranda* rights and he voluntarily accompanied the police to the site where the murder weapon was located. While in the police car without counsel present, he wrote an inculpatory letter of apology to the victim's widow. At trial, the letter of apology was admitted over the defense's objections, and Montejo was convicted of first-degree murder and sentenced to death. The Supreme Court rejected the defense's claim that the letter should have been suppressed since Montejo stood mute at his hearing while the judge ordered the appointment of counsel. In *Berghuis* v. *Thompkins*,[159] it also established that the mere act of remaining silent is not sufficient to imply that the suspect has invoked his or her right to silence; only when a suspect unambiguously invoked his *Miranda* right to counsel should police cease questioning.

Although these two cases certainly weakened *Miranda* and *Massiah*, it has not changed that police are forbidden to initiate interrogation of a criminal defendant once he has clearly invoked his right to counsel.

In this context, the Korean versions of *Miranda* and *Massiah* do not have as strong a bite as the U.S. originals. As reviewed below,[160] state attorneys for the indigent are not available during police interrogation ***before*** prosecution. To most suspects, therefore, right to silence is the only weapon with which to confront law enforcement authorities. Because of the Korean law enforcement authorities' practices, however, suspects who have invoked their right to silence have to endure repeated questioning by the police during the period of their arrest or detention, and suspects who have invoked their right to silence also have to until their counsel arrives. In this

---

157) *Montejo v. Louisiana*, 556 U.S. 778 (2009).

158) "[*I*]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that policeinitiated interrogation is invalid." *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

159) *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

160) *See Berghuis v. Thompkins*, 560 U.S. 370 (2010).

situation, there is a high possibility for suspects to waive their rights to silence or counsel.

4. *Institutional Limit of the Right to Have a Counsel Participate in Interrogation*

As reviewed,[161] the "right to have a counsel participate in interrogation" was codified in the CPC in 2007. However, only in one percent of cases among all criminal cases do counsels participate.[162]

Private lawyers are not willing to participate in interrogation, for their participation does not get them additional charges in most cases. State-appointed attorneys for the indigent are available only to defendants ***after*** prosecution. During police interrogation ***before*** prosecution the right to have a counsel participate in interrogation can be enjoyed only by a small number of propertied suspects. The U.S. public defender system is not available in Korea. Although each regional Bar Association provides a duty solicitor for the indigent suspect, its coverage is very limited. It is also very rare for a duty solicitor to participate in interrogation.

As a result, most poor suspects have to go through interrogation alone and the gap between the rich and the poor in the enjoyment of the right to counsel gets bigger. It is a new task for the Korean criminal justice to reduce or remove this gap, depending on the public's recognition of the importance of the right to counsel and the budget for a new system for the indigent.

5. *Consent of One of the Parties of Electronic Communication*

Since the CPPA was legislated, the question has remained whether or not the consent by one of the parties of electronic communication can justify its interception. This question is raised in the two settings below; (i) law enforcement authorities secretly record their electronic communication

---

161) *See supra* text accompanying notes 77-82.

162) *See* Nullified attorney's right to participate in suspect interrogation, Beopryul Shinmoon, Dec. 7, 2012, http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=69887&kind=AE (last visited Oct. 31, 2013).

with others without a warrant, (ii) private persons secretly record their electronic communication with others.

Dealing with the second type of setting, the Supreme Court held that such interceptions are not illegal. In the decision of October 8, 2002, with an intent to file a charge for legal breach of the owner of a rival beauty parlor, the defendant instructed a person to call his rival and record their conversation. The Court held that the secret recording of telephone communication by one party of the communication is not illegal.[163] This decision was based on the concept that either party of electronic communication takes the risk that the other party may secretly record the communication.

This 2002 decision has been criticized, saying that secret recordings of electronic communications only by the consent of one party of the communication violates the non-consenting party's right to control his/her words, so it is illegal;[164] prohibited wiretapping is defined as obtainment of electronic communication without consent of a party, and a 'party' here includes all parties of the communication.[165]

The Supreme Court has not held that this decision is also applicable to the first type of setting. If so, law enforcement authorities may freely obtain electronic communication of suspects without judicial control. In the Decision of Oct. 14, 2010, the Court held that secret recording of mobile phone communication by police informant, who was imprisoned at that time and given the phone by the police, is illegal.[166]

6. Evidences Illegally Obtained By a Private Person

Traditionally exclusionary rules were to deter the misconduct of law enforcement authorities,[167] including Article 308-2 of the CPC to exclude evidence obtained not through due process and Article 309 of the CPC to

163) *See* Supreme Court [S. Ct.], 2002Do123, Oct. 8, 2002 (S. Kor.).

164) Bae et al., *supra* note 50, at 99.

165) Shin, *supra* note 35, at 457.

166) *See* Decision of Oct. 14, 2010, 2010 *Do* 9016 [Korean Supreme Court].

167) The U.S. Supreme Court has also taken the same position since Burdeau v. McDowell, 256 U.S. 465 (1921).

exclude statements obtained by illegal interrogation. Certainly, if private persons illegally collect evidence by cooperating with law enforcement authorities, their acts are regarded as law enforcement authorities' acts.[168)]

As reviewed,[169)] however, the CPPA prohibits ***anyone***, including private persons as well as law enforcement officers, from committing illegal inspection of letters, wiretapping electronic communications, and recording or eavesdropping on conversations between others. So evidence obtained by a private person who violates the CPPA shall be excluded. This shows that communication privacy is much more protected than basic rights in criminal procedures in Korea.

Recently there were a number of cases where a private person without cooperating with law enforcement authorities illegally collected evidence to use in litigation or to threaten people. This person will be punished by law. The issue here is whether the evidence may be used in a trial.

In the decision of September 30, 1997 the Supreme Court dealt first with this controversial issue.[170)] In this case, the defendant was accused of adultery by her husband.[171)] Nude photographs of the defendant, which her adulterer took with her consent, were seized by the police and submitted to the court. Her adulterer hid his intent to use the photos to blackmail her when taking them.

The Seoul District Court held that the photos should be excluded, for they violated the "core part of the right of personality of the defendant,"[172)] stating:

> "If photos of a person are taken against the person's will or while the person does not know that the photos are used for criminal activities, even taken by a private person and not by state authorities, they violate the person's right of personality or likeness seriously, and so should be excluded. It is a new violation of the

---

168) *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 614 (1989).

169) *See* Supreme Court [S. Ct.], 2001Do229, Mar. 9, 2001 (S. Kor.); Miranda v. Arizona, 384 U.S. 436 (1966).

170) *See* Supreme Court [S. Ct.], 97Do1230, Sept. 30, 1997 (S. Kor.).

171) Adultery is criminalized in Korea. *See* Kuk Cho, *Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, 2 J. KOREAN L. 1 (2002).

172) *See* Seoul District Court [Dist. Ct.], 96Ga-Hap5541, Apr. 9, 1997 (S. Kor.).

> person's fundamental right for state authorities to use the photos taken by a private person for an unjust purpose as evidence."[173]

This is the first judicial case in Korea excluding evidence improperly obtained by a private person. It is assumed that the Seoul District Court borrowed the concept of the "core part of the right of personality" from the German Federal Constitutional Court decision of 1973,[174] which excluded a conversation of tax fraud secretly recorded by private persons about the defendant.[175]

However, the Supreme Court quashed the District Court's decision.[176] The Supreme Court held:

> "All evidence related to the private areas of people should not always be prohibited to submit. Balancing between the public interests of effective prosecution and truth finding in the criminal process and the interests of individuals' private lives, the Court decides whether to permit the submission. The Court can avoid the violation of human dignity of the people by choosing a proper method of evidence investigation. It is easily confirmed that the photos in this case were taken with the defendant's consent, so the existence of the photos do not violate the defendant's right of personality or likeness. Even supposing that the adulterer had the intent to blackmail the defendant, the photos may not be regarded as having been taken involuntarily....Even if the submission of the photos may infringe the secrets of the defendant's private life; it is a

---

173) *Id.*

174) Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 31, 1973, 34 BVerfGE 238 (Ger.).

175) In this case, the defendant was accused of tax fraud by making other persons' real property price on contract lower than the actual price for tax purposes and of receiving the difference in cash from the owners. The owners secretly tape-recorded conversations between the defendant and themselves relating to the tax fraud, and subsequently submitted the tape to the police on their own initiative. *See* Kuk Cho, *"Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality*, 15 TEMP. INT'L & COMP. L. J. 1, 24-25 (2001).

176) *See* Supreme Court [S. Ct.], 97Do1230, Sept. 30, 1997 (S. Kor.).

limitation of the basic right that the defendant should endure."[177)]

In the decision of November 28, 2013,[178)] the Supreme Court reviewed the same issue. In this case, the defendant who was a public official of the City of Milyang, developed an election campaign for the Mayor of Milyag, which is a violation of the Public Election Law. Another official obtained the defendant's emails illegally by removing the protection system for emails, which were submitted to prosecutors. The Court held that the emails may be used to convict the defendant, pointing out that the defendant's crime is very serious, his emails have public elements, and the defendant consented to use them as evidence in a trial.[179)]

In these two cases, taking the balancing test, the Supreme Court did not completely block the chance in theory for excluding evidence improperly obtained by a private person. However, the Court is not expected to be eager to exclude such evidence. When a due process violation by a private person is taken much more seriously, the German Court's approach will be adopted in Korea.

VI. Conclusion

Under authoritarian rule, *Miranda*, *Massiah* and *Mapp* were totally alienated from the Korean criminal procedure. Very few academics and lawyers knew their meaning. Wiretapping was seriously abused without any restriction. Since democratization, exclusionary rules have been received one after another in Korea from across the Pacific, although they are often criticized as truth impairing and pro-criminal in their home country.[180)] The Korean judiciary and legislature that experienced the dark

177) *Id.*

178) *See* Supreme Court [S. Ct.], 2010Do12244, Nov. 28, 2013 (S. Kor.).

179) *Id.*

180) *See* Off. of Legal Pol'y & Dep't of Justice, *'Truth in Criminal Justice' Series Office of Legal Policy: The Law of Pretrial Interrogation*, 22 U. Mich. J. L. Reform 437, 535-36 & 618 (1989); Akhil Reed Amar, *Twenty-fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 Geo. L. J. 641, 644 (1996). *See generally* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995);

age of procedural rights under a long authoritarian rule chose to adopt the exclusionary rules as a useful tool to deter police misconduct, which has persistently lingered even after political democratization. The institutional surroundings of the newly established rules are still advantageous to law enforcement authorities. However, it is certain that the rules cannot be explicitly rejected by the law enforcement authorities. Now the police are officially requested to adjust themselves to these laws. Although the exclusionary rules alone cannot enhance the guarantee of an individual's procedural rights, they provide legal grounds for individual suspects to challenge police misconduct.

The groundbreaking legal reform after democratization does not automatically lead to a change in the behavior of law enforcement authorities. Even after the reform, law enforcement authorities tacitly praise "*Confession est regina probationum*" and emphasize the superiority of crime control over due process, seeking for a detour to avoid the exclusionary rules. They made administrative rules to limit the reach of judicial decisions and the 2007 revision of the CPC. They argue that the exceptions to the exclusionary rules should apply to their conduct. In this context, a new tension between crime control and due process in new legal circumstances has just begun.

JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993).