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The Discovery of Criminal Evidence in South Korea*

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Abstract

In 2008, as part of a judicial reform, a so-called law school system was introduced and the participatory trial in which citizen participants serve as jurors was implemented in South Korea. With the implementation of the new participatory trial, there has been a major reform in the Criminal Procedure Act which includes the discovery of evidence. The discovery of evidence refers to a system in which litigant parties present their evidence to their opposing parties prior to the public trial. This article provides an analysis of the discovery of evidence and addresses issues concerning this new system.

In this article, I emphasize that the discovery of evidence is a system that ensures a fair trial, not just a procedure in which the prosecutors and defendants fight and struggle against each other. I also stress that the discovery of evidence is a premise for success of the new participatory trial in Korea and that it is oriented toward the concentrative examination. In addition, I provide a chronological review of the revision processes in the Criminal Procedure Act and suggest that the discovery of evidence is a full recovery of the counsel's right to examine and copy all the relevant documents, articles, and papers relating to witnesses.

I also provide an overview of the current discovery of evidence in South Korea by describing the discovery of evidence processes both for counsels and prosecutors, and an explanation on the decisions of the Constitutional Court and the Supreme Court when the prosecutor does not execute the court's order. Finally, I point out several issues derived from the misunderstanding of the discovery of evidence and urge a revision in the law.

KEY WORDS: discovery of criminal evidence, participatoral trial in South Korea, indictment without attached documents rule, counsel's right to examine evidence, revision of criminal procedure Act

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I. Introduction

There has been a major change in the administration of justice in South Korea since 2008. As part of a judicial reform a so-called law school system has been introduced[1] and the participatory trial in which citizen participants serve as jurors has been implemented (Act for Civil Participation in Criminal Trials,[2] art.2(2)). With the implementation of the participatory trial, there has been a major reform in the Criminal Procedure Act in South Korea.[3] As jurors began to participate in criminal trials, a concentrative examination system was introduced (the Act, art. 267-2). To prevent the jurors' presupposition on a case, an examination of evidence is carried out prior to an examination of the defendants in the trial (the Act, art. 290, 296-2). An examination of evidence centers around the issues raised during the preparatory proceedings prior to a trial. In accordance (the Act, art.287), discovery of evidence has been incorporated into the Korean Criminal Procedure (the Act, art. 266-3, 266-4, 266-11).

Discovery of evidence refers to a system in which litigant parties present their evidence to their opposing parties prior to the public trial. Discovery of evidence cannot be allowed if a lawsuit is considered a game or joust in which counsels for each side fight for their clients. From the perspective of a sporting theory of justice, litigants should capitalize on their own legitimate trial tactics in order to further their own interests. It makes no sense for a litigant to present his own evidence to the opposing party.

A criminal trial, however, is not just a procedure in which the prosecutors and defendants fight and struggle against each other. In a public trial, prosecutors and defendants should persuade the court and jurors on an equal footing. A trial should be conducted in a setting in which

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1) English translations of the laws stated in this article are available at http://elaw.klri.re.kr/kor_service/main.do?token=

2) *Gukminui hyeongsajaepan chamyeoe gwanhan beobryul* [Act for Civil Participation in Criminal Trials], Act. No. 8495, June 1, 2007, art.2(2) (S.Kor.) [hereinafter korPTA].

3) *Hyongsasosongbeob* [Criminal Procedure Act], Act. No. 341, Sept. 23, 1954 (S.Kor.) [hereinafter the Act].

two parties have a right to a fair trial. The court should be responsible for preventing each party from making surprise attacks on their opponents during the trial. In addition, it is the court's duty to help jurors return to their daily jobs as soon as possible by organizing relevant issues through the discovery of evidence procedure.

II. Establishment of the Criminal Procedure Act and the Introduction of Indictment Without Attached Documents Rule

The discovery of evidence system that started in 2008 actually has a long history. The Korean Criminal Procedure Act was established in 1954 right after the Korean War (1950-1953).[4] The Korean Criminal Procedure Act was based on the Japanese Criminal Procedure Act of 1923 that was grounded on the German inquisitorial system.

When the Korean Criminal Procedure Act was first established, public prosecutors handed in investigatory documents along with the indictment to the court. Defense counsels were able to request an inspection and copy of all the documents and articles handed in to the court, and they were able to do this without having to deal with prosecutors. In reality, a full discovery of evidence was implemented at that time.

Major revisions were made to the Korean Criminal Procedure Act in 1961 and 1963. The core of the revision was the enforcement of an adversary system that was characterized by the hearsay rule (the Act, art.310-2) and cross-examination (the Act 161-2). No changes were made, however, regarding the procedure in which all the investigatory documents along with the indictment were sent to the court. At that time the enforcement of an adversary system was carried out without a jury system. Eventually the enforcement of an adversary system reduced the administrative workload of the court and strengthened the public prosecutor's power to indict.

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4) See Dong Woon Shin, *Jeajeonghyongsasosongbeobui Seonglipgyoungwe* [The Establishment Process of Korean Criminal Procedure Act in 1954], *22 HYONGSABEOBYEONGU* [Kor. Criminal L. Assoc.] 159, (2004 Winter).

In 1982, for the first time in history, the Regulations on Criminal Procedure were established in South Korea. The Supreme Court set up important rules which were unique to criminal procedures. Until then the court had issues with public prosecutors' practices. According to the adversary system, a prosecutor as a party is required to organize issues and submit evidence in sequence. However, it was the custom that the public prosecutor submit the indictment and investigatory evidence simultaneously. Because of this custom, the court had to organize the issues and evidence that were initially assigned to prosecutors.

The Supreme Court implemented the Indictment Without Attached Documents rule as part of the Regulations on Criminal Procedure[5] (the Regulations, art. 118(2)). According to the new Indictment Without Attached Documents rule, prosecutors were required to submit only the written information when indicting. With this new rule, any documents or articles which may cause the court to create presupposition on a case were prohibited from being attached to the indictment. Consequentially the attachment of investigatory evidence became prohibited. Because of the Indictment Without Attached Documents rule, prosecutors had to organize documents and submit evidence that corresponded to each issue (the Regulations, art. 132-3). This significantly reduced the court's administrative burdens and ensured a rather objective status that prevented the issue of presupposition.

The new rule, however, caused serious problems that no one anticipated. Due to the new Indictment Without Attached Document rule, a prosecutor submitted only the indictment without any other investigatory evidence. As a result, defendants and their counsels had no way of inspecting and copying investigatory documents and articles. The new law prohibited a prosecutor from sending in documents to the court. As a result, a counsel had to request the inspection and copying of investigatory documents and articles from a prosecutor. Discovery of evidence became a matter of prosecutorial discretion. As a result, prosecutors would not easily grant access to the discovery of evidence to the defense in important cases. In essence, the introduction of the Indictment Without Attached

5) *Hyongsasosonggyuchik* [Regulations on Criminal Procedure], Supreme Court Regulations No. 828, Dec. 31, 1982 (S.Kor.) [hereinafter the Regulations].

Documents rule holds the same meaning as deprivation of a defendant's right to request the discovery of evidence.[6)]

The Indictment Without Attached Documents rule played an important role in ensuring the exclusion of the court's presupposition on the case under the adversary system. However, the new rule had serious flaws as it does not fit into the old structure of trial procedure in South Korea. A public trial that followed the German model consisted of an opening statement, examination of the defendant, and examination of evidence. In the past, a counsel prepared for an examination of a defendant with the investigatory documents and articles obtained from the court. However, with the new Indictment Without Attached Documents rule, it was impossible for a counsel to access the relevant evidence before a prosecutor submitted evidence for an examination of evidence. In other words, counsels could no longer provide substantial and effective defense during the examination of a defendant.

This serious problem was caused by an awkward integration between the German inquisitorial system and the American adversary system. The constraint on defendants' rights to defend themselves is a serious issue from a counsel's perspective. It is not easy, however, to resolve this issue, as the adversary system is viewed as a sporting theory of justice.

III. Introduction of the Participatory Trial and the Reform of Criminal Procedure Act

As part of judicial reform that started in 2004, South Korea in 2008 finally allowed citizen participation in criminal trials. The participatory trial was aimed at raising democratic legitimacy and confidence in the judicial process in South Korea (korPTA, art. 1). Korean participatory trials have a similar structure to those in the American system. The jury, which can consist of a maximum of nine people, is independent of the three judges in the court (korPTA, art. 13, 39). However, the verdicts and opinions of the

6) *See* Dong Woon Shin, Gonpanjulchae Itseoseo Pigoinui Bangeogwonbojang [Rethinking the Defendant's Right to Defense in the Trial Court Proceeding], Vol. 44 No. 1, *SEOULDAEHAKGYO BEOPHAK* [SEOUL L.J.] 141 (2003).

jury only have an advisory effect on the court (korPTA, art.46(5)). It is the judges' duty to make the final decision in the Korean version of the participatory trial.

The introduction of the participatory trial means a significant change in Korean criminal procedure as citizens participate in criminal trials, recommend verdicts of guilty or not guilty, and provide opinions on sentencing. In other words, it is a completely new system that people in South Korea have never experienced before. Active citizen participation is crucial in the successful settlement of a participatory trial. To achieve this goal, trials need to be conducted speedily so that jurors can return to their daily jobs as soon as possible.

The revised Criminal Procedure Act was implemented in 2008. The new Criminal Procedure Act enforces the adversary system, concentrative examination, the principle of oral pleading, and the principle of substantial public trial in order to support the implementation of the participatory trial. To prevent the jurors' presupposition on a case, the order of trial date was rearranged so that the opening statement (the Act, art. 285, 286, 287), the examination of evidence (the Act, art.290), and the examination of the defendant (the Act, art. 296-2) can take place in sequence. The preparatory proceedings prior to the trial (the Act, art. 266, etc.) were set in place and the discovery of evidence system was introduced (the Act, art. 266-3, 266-4, 266-11).

The goals of the Korean discovery of evidence system are as follows. First, it aims at enforcing the adversary system by minimizing procedural and substantive inequities. Second, it aims to guarantee a fair trial to defendants who have relatively weak protections compared to prosecutors. Technically, the introduction of the discovery of evidence system is not something new. Rather, it implies restoring to the original state. Finally, the discovery of evidence system serves as a mechanism that allows a concentrative examination that can promote participatory trials.

IV. Discovery of Evidence on Behalf of the Defendant

The discovery of evidence system in South Korea can be divided into two categories: the discovery of evidence on behalf of the defendant (the

Act, art. 266-3, 266-4) and the prosecutor's discovery of evidence (the Act, art. 266-11). Discovery of evidence is carried out either by an inspection or by copying of documents and articles. I will first discuss the discovery of evidence on behalf of the defendant.

Discovery of evidence is based on the full discovery principle. Any documents or articles that are likely to have an influence on the admission of indicted facts or sentencing are subject to the discovery of evidence. Even documents and articles relating to the weight of evidence are subject to discovery of evidence. Documents and articles relating to arguments made by the defendant or defense counsel on matters of law and fact are also subject to discovery of evidence (the Act, art. 266-3(1)).

Objects for discovery of evidence include a variety of documents and articles. For a substantial discovery of evidence, a list of evidence needs to be provided. Public prosecutor, judicial police official, and other person whose duties are involved in an investigation are responsible for making a complete list of documents and articles that are related to or produced during that investigation (the Act, art. 198(3)). The law states that no public prosecutor shall refuse to allow a defendant or defense counsel to inspect or copy a list of documents and articles (the Act, art. 266-3(5)).

Individual evidence can be categorized into documents, articles, and papers relating to witnesses. Documents refer to written statements. Articles refer to all the tangible evidence. Papers relating to witnesses describe the names of persons whom the public prosecutor plans to produce as witnesses and their involvement in the case (the Act, art. 266-3(1)ii). The initial bill of the revised Criminal Procedure Act prepared by the government in 2005 included as evidence statements that were expected to be produced by a prosecutor's witness. However, during deliberation in the National Assembly, anticipated testimony was removed from the papers relating to witnesses on the basis that, if informed in advance of what a government witness will say, the defendant may take steps to bribe or frighten that witness into giving perjured testimony or absenting themselves.[7)]

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7) *See* Dong Woon, Shin, *Hangukgwa Ilbonui Juenggeogaesijeado Bigyoyeongu* [A Comparative Study on the Discovery System of Criminal Evidence of Korea and Japan], Vol.53 No.3 *SEOULDAEHAKGYO BEOPHAK* [SEOUL L.J.] 285 (2012. 9.).

The procedure for discovery of evidence on behalf of defendant is as follows. First, the defendant or defense counsel has to request the discovery of evidence from the prosecutor (the Act, art. 266-3(1)). It is the prosecutor's responsibility to accept the defense's request for discovery of evidence. However, if it is deemed that there are reasonable grounds to disallow inspection, copying, or delivery of papers relating to witnesses, such as national security, the need to protect witnesses, the likelihood of destruction of evidence, or specific grounds under which it is anticipated that the investigation into related cases is likely to be hindered, the public prosecutor may refuse to allow or may place a limitation on the inspection or copying of documents and articles or the delivery of papers relating to witnesses (the Act, art. 266-3(2)). Notwithstanding the abovementioned conditions, no public prosecutor can refuse to allow inspection or copying a list of documents and articles (the Act, art. 266-39(5)).

When a public prosecutor refuses to allow a defendant or defense counsel to inspect or copy documents and articles or to have papers related to witnesses delivered, or places a limitation thereon, the defendant or defense counsel can make a motion to the court to allow to inspection or copying of such documents and articles or to have papers relating to witnesses delivered (the Act, art. 266-4(1)). The court may order the public prosecutor to allow a defendant or defense counsel to inspect or copy documents and articles, or have them deliver papers related to witnesses, taking into consideration the type and degree of harm that may be caused by such allowance, the defendant's needs in defending the case, the necessity for a speedy trial, and the importance of such documents and articles (the Act, art.266-4(2)). The prosecutor cannot make an appeal to a higher court. This relates to the limitation of the detention period. The Korean Criminal Procedure Act limits the detention period for the first instance, the appellate instance, and the final instance to a maximum of six months each (the Act, art.92). This prevents the case from being protracted and ensures that the defendant's right to self-defense is not constrained. If an appeal by the prosecutor on the court's decision on discovery of evidence is allowed, there may be trials that require more than six months.

A prosecutor needs to follow the court's decision on the discovery of evidence. If the public prosecutor does not comply with the court's ruling concerning the inspection, copying, or delivery of papers relating to

witnesses without delay, he cannot make a motion for admission of relevant witnesses and documents as evidence (the Act, art. 266-4(5)). However, at the beginning of the implementation of the discovery of evidence system, there was an incident in which the prosecutor refused to carry out the court's order on the grounds that defendants might take an inappropriate advantage of the evidence when discovery of evidence was granted.

However, the Constitutional Court of Korea ruled that the prosecutor's refusal of the court's order was unconstitutional.[8] The Supreme Court of Korea decided that a trial without discovery of evidence leaves a reasonable doubt, as evidence favorable to the defendant could not be adequately examined.[9] Since then no case of a prosecutor's refusal to the demand for discovery of evidence has been reported. This indicates that the discovery of evidence system has stabilized in South Korea.

V. Prosecutor's Discovery of Evidence

When a defendant or defense counsel makes an assertion concerning a matter of law or fact in a trial or a preparatory hearing, such as non-existence at the scene, insanity, or mental retardation, the public prosecutor may demand that the defendant or defense counsel allow inspection or copying of documents and articles (the Act, art. 266-11(1)). The defendant has to accept the prosecutor's request unless the prosecutor refuses the defendant's request for the discovery of evidence (the Act, art.266-11(2)). If a defendant or defense counsel rejects the demand of the prosecutor, the public prosecutor can move that the court allow inspection or copying of such documents and articles or have the defense deliver papers related to witnesses (the Act, art. 266-11(3)). If a defendant or defense counsel does not comply with the court's ruling concerning the inspection and copying of documents and articles or delivery of papers related to witnesses without delay, the defense cannot make a motion for admission of relevant

8) Constitutional Court [Const. Ct.], 2009Hun-Ma257 (consol.), Jun. 24, 2010, (22-1 Ha KCCR, 621) (S.Kor.).

9) Supreme Court [S. Ct.], 2012Do1284, May 24, 2012, (2012 Ha, GONG, 1189) (S.Kor.).

witnesses and documents as evidence (the Act, art. 266-11(4), 266-4(5)).

There are two aspects of the prosecutor's discovery of evidence that need further discussion. First, the request for discovery of evidence is acknowledged not only in the preparatory proceedings prior to trial but also in the public trial. According to the government bill submitted to the National Assembly in 2005, the request for discovery of evidence can only be made during the preparatory proceedings prior to trial. However, after deliberation in the National Assembly, it was changed so that a public prosecutor can request discovery of evidence regarding an assertion made by a defendant or defense counsel concerning a matter of law or fact during a public trial.[10)]

The other issue concerns the range of a prosecutor's discovery of evidence. The current Criminal Procedure Act states that "when a defendant or defense counsel makes an assertion concerning a matter of law or fact in a trial or a preparatory hearing, such as non-existence at the scene, insanity, or mental retardation, the public prosecutor may demand the defendant or defense counsel to allow inspection or copying of documents and articles." For a defense counsel, the term "such as" implies that a prosecutor can make a demand only when those assertions that were explicitly listed in the statements are involved in the case. Prosecutors, however, argue that those cases listed in the statements merely represent a small number of examples and that the request for discovery of evidence can be made based on other assertions. No court decision has been made regarding this issue yet.[11)]

VI. Suggestions for the Current Discovery of Evidence System

The discovery of evidence that was incorporated into the Criminal Procedure Act underwent several changes during the deliberation process at the National Assembly. First, with regard to the delivery of papers

10) See Shin, *supra* note 7, at 271.

11) See Dong Woon Shin, *Shinhyongsasosongbeob* [New Criminal Procedure Act], 5th ed., *BEOBMUNSA*, 859 (2014).

related to witnesses, statements about an anticipated testimony by a witness were deleted. Second, discovery of evidence can be conducted not only in the preparatory proceedings prior to trial but also in the public trial. Finally, changes have been made in the expression of the range of the public prosecutor's discovery of evidence. Depending on interpretation, the range of discovery of evidence can be extended significantly. Discussions for each change are provided in the next section.

First I will examine the request for discovery of evidence in a public trial. Discovery of evidence originally meant that each party shows their evidence to each other prior to a public trial. It was a mechanism for each party to organize their issues in advance so that the trial can proceed effectively on the trial date. By organizing all the issues, each party can prevent surprise attacks such as new assertions or motions.

However, Korean lawmakers allowed that the request for discovery of evidence can be made even on the trial date. To understand this decision better, we need to approach from the historical context of Korean Criminal Procedure. In the early days of the Korean judicial system, defense counsels could inspect and copy every piece of evidence prior to a public trial. However, since the implementation of the Indictment Without Attached Documents rule, the defense's right to inspect and copy became extremely limited. With the new discovery of evidence system set in place, a right to fully inspect and copy documents and articles has been restored. From a defense counsel's perspective this new system is a full restoration of the defendant's right to self-defense. The defendant's right to self-defense should be assured not only during the preparatory proceedings prior to the trial but also during the public trial. From this perspective, allowing a request for discovery of evidence on a trial date may look reasonable.

If the adversary system is understood superficially, people may think that the right to demand the discovery of evidence that is given to the defendant should be equally granted to the prosecutor as well. With this logic, the Legislation and Judiciary Committee in the National Assembly warranted the right to demand the discovery of evidence to prosecutors.[12] Now prosecutors can request discovery of evidence during the preparatory

12) See Shin, *supra* note 7, at 279.

proceedings prior to trial or during the public trial whenever the defendant makes an argument favorable to the defense.

However, allowing a request for discovery of evidence on the trial date violates the whole purpose of the discovery of evidence system. The current Criminal Procedure Act emphasizes concentrative examination in the participatory trial system. Allowing a demand for discovery of evidence in a public trial will cause a serious delay in the trial, as the opposing party needs to decide whether to accept the request. Further delay will occur if the request is denied, as the court will need to make the final decision. The request for discovery of evidence itself can be used as means of surprise attack. This can undermine the concentrative examination that was designed to help jurors construct beliefs accurately through a thorough hearing. This also violates the current Criminal Procedure Act that prohibits a motion for new evidence after the preparatory proceedings prior to trial.

The second discussion concerns the omission of anticipated testimony of a witness from the papers relating to witnesses and the range of a prosecutor's discovery of evidence. The controversy surrounds the interpretation of the adversary system. The discovery of evidence system was first initiated when there was a huge gap between the two parties in their evidence-collecting capabilities. By presenting each party's evidence, vulnerable members of society can receive a fair trial. A prosecutor can use the court's warrant to collect evidence by force. Naturally the discovery of evidence should focus on assuring the defendant's right to self-protection.

Discovery of evidence regarding the anticipated testimony of a witness is crucial in assuring a defendant's right to self-defense. To conduct an effective cross-examination, a defendant needs to know what a government witness will say. It is a safety device that guarantees a fair trial for defendants. The same approach should be taken concerning a prosecutor's discovery of evidence.

A prosecutor's discovery of evidence is granted because it can prevent an unnecessary delay in a trial. It is also a safety net that enables concentrative examination. It is a superficial understanding of the adversary system to think that defendants have the same obligations as prosecutors in terms of discovery of evidence. It simply overlooks the principle of a fair trial.

The discovery of evidence system in South Korea started in 2008. It is a safety device that guarantees the right to a fair trial. It is also critical in executing the concentrative examination that is enforced through participatory trial. Both the prosecutor and defense counsel need to have a better understanding of the new discovery of evidence system. Hopefully, new legislative measures will be taken in the National Assembly in the near future to address the outstanding issues concerning discovery of evidence in South Korea.