

Trends & Policies in Criminology and Justice

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The Present and Future of Participatory Systems in the Criminal Justice System: Focusing on the Right to Participate in Search and Seizure Procedures

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Keywords

Digital Evidence, Search and Seizure, Substantive Subject of Seizure, Right to Participate, Limitation on the Right to Participate



Summary

- The acceleration of the transition to a digital society in the 21st century has further increased the importance of the right to participate in the search and seizure process. The legal doctrine of the right to participate has been concretized through various Supreme Court precedents since the mid-2010s, and academic research on the subject has also become quite active.
- The right to participate is a unique legal doctrine that is being independently developed in South Korea. It aims to control investigative agencies' evidence collection through the 'personal participation' of the seized party or their attorney during the search and seizure process.
- In Korea, where public trust in investigative agencies is not high, the emphasis on this right to participate in search and seizure carries the symbolic meaning of strengthening the mechanisms for protecting citizens' fundamental rights. This is especially true when a suspect or their attorney directly participates in the search and seizure of digital evidence, as it allows for primary monitoring of the investigative agency's process. In this process, they can immediately raise objections if they determine that the agency is searching for irrelevant information during the search and selection stage.
- However, there is a need for a more critical examination of whether the current system of the right to participate, primarily conducted in the form of personal participation, is the most 'desirable' mechanism for protecting privacy rights and preventing collateral investigations (i.e.,

seizing evidence for a crime other than the one for which the warrant was issued).

- While the right to participate itself is meaningful in terms of controlling and monitoring investigative agencies, over-relying on the 'right to participate' to prevent privacy infringement during the search and seizure process may paradoxically create a gap in the guarantee of rights. It is necessary to accurately recognize the limitations, such as the right's limited effectiveness and the restricted number of suspects who can assert and exercise this right.
- Therefore, in the process of concretely discussing the system, policy should be designed comprehensively from the perspective of minimizing privacy infringement during the investigative agency's search and seizure, rather than focusing exclusively on the right to participate itself.

1 Background and Research Objectives

- The Criminal Procedure Act (CPA) regulates the right to participate in search and seizure; however, its provisions are vague, leading to much controversy regarding the guarantee of this right during the investigation stage. Regardless of the intent behind guaranteeing the right to participate in the search and seizure of digital evidence, debates over its practical effectiveness continue.
- This study aims to evaluate the participation right system in digital search and seizure procedures and propose policy alternatives. It will do this by analyzing current regulations, case law, and foreign examples, as well as conducting empirical research through expert interviews.
- Since there are numerous issues related to the right to participate in search and seizure, the scope of the research has been narrowed to issues that have recently been the focus of intensive discussion: (1) the suspect's right to participate, (2) the permissibility of discretion in limiting the right to participate, (3) the right to participate in the analysis process, (4) the right to participate in the search and selection process, (5) other detailed issues: The right of the bereaved family to participate, the right of the person in charge to participate, and the right to participate in the stage of deletion or disposal of irrelevant information.

2 Key Findings

○ **Current Status of the Right to Participate in Digital Evidence Search and Seizure in Germany, Japan, and the U.S.**

- Upon examining the search and seizure systems of Germany, Japan, and the United States,

no country was found to have a system for party participation during the investigation stage as prescribed in Article 219 of the Korean Criminal Procedure Act (CPA).

- Provisions similar to the right of party participation during the trial stage prescribed in Article 121 of the Korean CPA were identified in the Japanese Code of Criminal Procedure. However, the 'right of presence' (or right to attend) defined in Articles 113 and 114 of the Japanese CPA differs fundamentally from Korea's 'right to participate.'
- In the case of Germany, prior to the 2004 CPA amendment, Article 110 included provisions for the right of parties to participate in the inspection of documents and data storage media. However, this provision was repealed without specific reason, and discussions on this matter are now addressed only in case law. Following two rulings by the Federal Constitutional Court in 2005 and 2009 regarding the right to participate, this right is recognized in Germany only exceptionally, based on the principle of proportionality.
- The United States stipulates a system in federal law that is quite different from Korea's right to participate: (1) participation in preparing the inventory (Federal Rules of Criminal Procedure Rule 41(f)(1)(B)), and (2) provision of a copy of the warrant and a receipt for seized property (Federal Rules of Criminal Procedure Rule 41(f)(1)(C)).
- To selectively seize only crime-related electronic information from digital media, a process of search and selection is inevitable. In Germany and the U.S., aside from procedural controls, there are no ex-ante personal controls over this inspection by investigative agencies; instead, ex-post controls are applied, such as punishment if illegality is found in the investigative conduct.

○ Analysis of Expert Interviews

- Opinions were divided regarding who qualifies as a holder of the right to participate, and various views were presented on determining the subjects of this right. A majority of opinions suggested the need to establish clear criteria for participation rights through legislation.
- Responses were generally negative regarding guaranteeing the right to participate in the analysis process, as the analysis itself is mostly technical and mechanical, meaning that exercising the right often amounts to little more than mere observation. Furthermore, due to the generally lengthy duration of the analysis process, participating in the entirety is neither efficient nor practically beneficial. Investigative agencies also expressed concerns about the potential leakage of technologies applied in the process. The core issue is identified as whether it can be guaranteed that the investigative agency did not conduct a prior search or engage in technical manipulation after the analysis is complete, and the survey pointed out the need for measures to address this.

- There were no opinions denying the guarantee of the right to participate itself during the search and selection process. While some argued that exercising this right consumes too much time during the search and selection process, others suggested that participation by the rights holder—especially legal counsel—could actually shorten the time by ensuring only relevant information is searched.
- It was noted that regarding the search for relevant information during both on-site and off-site seizure processes, participation by legal counsel can protect the rights of the seized party by monitoring to ensure the seizure is conducted within the scope of the warrant. Although it is claimed that files must be opened to determine relevance to the crime in the case of electronic information, in practice, there are cases where attempts are made to search files that are clearly unrelated to the case based on their appearance, necessitating restriction through the attorney's participation.
- It was noted that difficulties in the investigation's progress may arise during the search and selection process regarding who should be designated as a participant—specifically, whether to recognize the right for both the defendant and the seized party if they are different individuals, and if so, how to coordinate their schedules.
- According to investigative agencies, participation in the stage of deleting or disposing of irrelevant information has little practical meaning, as it is generally handled by internal regulations or automatically deleted by programs. However, it was also pointed out that due to frequent personnel changes, deletion might be delayed, or paperwork might be processed while the data remains to be deleted later; consequently, there are frequent cases where investigative agencies retain irrelevant information instead of destroying it.

○ **Review of Issues: Interpretation of the Holder of the Right to Participate under Articles 121 and 219 of the Criminal Procedure Act**

- In the past, the courts and the Constitutional Court specified the suspect as the holder of the right to participate under Articles 219 and 121 of the Criminal Procedure Act (CPA). However, most precedents related to the search and seizure of electronic information have ruled that the opportunity to participate must be guaranteed to "the party subject to search and seizure (hereinafter 'person subject to seizure') or their defense counsel as prescribed in Articles 219 and 121 of the CPA."
- It is unclear whether this expression interprets the provision as applying to (1) a suspect who also holds the status of the person subject to seizure, or (2) the pure person subject to seizure regardless of whether they are a suspect. However, judging from the recent Supreme Court Decision 2021Do11170, which affirmed the participation right of the person subject to seizure while denying that of the suspect in a situation where the two were different, interpretation (2) appears to be reasonable.

○ Review of Issues: Substantive Subject of Seizure

- The first precedent regarding the 'substantive subject of seizure' was the Supreme Court en banc Decision 2016Do348, in which the Court viewed that if the data storage medium belongs to or is managed by the suspect, the suspect also corresponds to a substantive subject of seizure.
- In Supreme Court Decision 2021Do11170, the Court ruled that for a suspect to claim the right to participate regarding a data storage medium voluntarily submitted without the suspect's involvement, the suspect is required to possess actual control and management over the data storage medium and an exclusive right of management and disposal regarding the overall electronic information contained therein.
- Supreme Court Order 2016Mo587 identified a suspect who was merely a service user without actual control or management of the server (medium) as a substantive subject of seizure. It appears to be the stance of judicial precedent that if the starting point of the seizure was the electronic information rather than the medium from the very beginning, control and management of the medium are excluded, and only the exclusive right of management and disposal of the electronic information is considered.
- According to the majority opinion in Supreme Court en banc Decision 2022Do7453: (1) the most important factor to consider in the search and seizure process of electronic information is the facts of the crime that caused the search and seizure; (2) understanding the right to participate based on this premise aligns with warrant execution practice in that it allows for the concise and clear specification of the subject of the right; and (3) the concept of 'substantive subject of seizure' is an instrumental concept intended to prevent indiscriminate search and seizure by guaranteeing the participation right of a suspect with a substantive interest in cases where the person subject to seizure has no substantive interest in the alleged criminal facts and the seized articles, while principally regulating the right centered on the person subject to seizure. Therefore, the Court viewed that a substantive subject of seizure presupposes being a suspect in the facts of the crime that caused the search and seizure.

○ Review of Issues: Degree of Discretion in Limiting the Right to Participate

- According to Articles 121 and 219 of the current CPA and Article 42 of the "Regulation on Mutual Cooperation between Prosecutors and Judicial Police Officers and General Investigation Rules" (hereinafter "Investigation Rules"), the participation right of the person subject to seizure is guaranteed except when (1) the person subject to seizure expresses an intent not to participate, or (2) urgency is required.

- Neither the current CPA nor the Investigation Rules contain provisions serving as grounds to limit the participation right of a formal person subject to seizure. Instead, such a provision exists in Article 13, Paragraph 3 of the "Rules on Processing of Digital Evidence," which is an administrative rule (directive) of the National Police Agency. According to this regulation, police officers can determine "the participant and the scope of participation during search, seizure, and verification based on the relevance between the participant and the seized information, the content of the electronic information, and the degree of necessity for personal information protection," indicating that police officers have discretion regarding the right to participate.

○ Review of Issues: Right to Participate in the Analysis Process

- The courts guarantee the right to participate in the analysis process in principle, as it is included as part of the search and seizure process. However, the courts view that if the right to participate was guaranteed in the remaining processes excluding the analysis process, the failure to guarantee the right to participate in the analysis process does not constitute a grave illegality sufficient to render the entire search and seizure illegal.
- The courts consider circumstances where integrity was guaranteed through other procedural or technical measures rather than the right to participate, such as the fact that "concerns about distortion or damage of information were relatively low as the original server had already been returned during the file conversion and decryption work," or that "it does not appear that the omission of prior notice regarding decryption likely did not compromise evidence collection, as the digital storage media seized on-site were sealed under the signature of a third party and their hash values were preserved." Furthermore, it is also pointed out that "it is difficult to view the significance of the right to participate as relatively great, given that file conversion and decryption work are merely preparatory processes for the search rather than the process of searching for information related to the alleged crime itself."

○ Review of Issues: Strengthening the Right to Participate in the Search and Selection Process

- Article 42 of the Investigation Rules explicitly states that the participation right of the person subject to seizure and the defense counsel must be guaranteed, but specific guidelines regarding the meaning or method of such participation are actually lacking. In reality, current Investigation Rules and internal rules do not explicitly specify rights related to the participation of the person subject to seizure or the defense counsel.
- There is a high possibility that opportunities for the person subject to seizure or the defense counsel to submit opinions or raise objections during the search and selection

process will be guaranteed only limitedly, as there are no specific procedures. Although there is a provision that if the defense counsel or person subject to seizure presents an opinion, it must be recorded in the protocol, this is limited to content regarding "relevance to the electronic information." Aside from that, there is no specific content regarding the submission of opinions or raising of objections.

○ **Review of Issues: Right to Participate in the Deletion/Disposal Stage of Irrelevant Information**

- Considering that search and seizure is concluded when the specification of seized articles and preparation of the seizure inventory are completed, it is difficult to find a legal basis requiring the guarantee of the right to participate in the subsequent disposal stage. Also, given the characteristics of electronic information, it is not difficult for investigative agencies to retain copies without deleting them; thus, it is difficult to view that visually participating through physical presence guarantees complete deletion and disposal. Considering this, the practical benefit of guaranteeing the right to participate is not high.

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Policy Recommendations

○ **Interpretation of the Holder of the Right to Participate under Articles 121 and 219 of the Criminal Procedure Act**

- Comprehensively considering that (1) fairness in the warrant execution procedure is secured by guaranteeing the participation right of the person subject to seizure; (2) since the person subject to seizure is realistically the one undergoing the search and seizure and will be present at the scene, additional notification or waiting is unnecessary, enabling the minimization of investigation delays; (3) if the participation right is guaranteed for a suspect who is not the person subject to seizure, the fact of the investigation's initiation and progress may be exposed, creating a risk of loss or damage to potential evidence to be seized later; and (4) the person subject to seizure is the one who receives the presentation of the warrant and the delivery of the inventory under Articles 118 and 129 of the CPA, making the guarantee of the right to participate necessary as an effective prerequisite to substantially guarantee such procedures, it is valid to establish the subject of the participation right as the person subject to seizure.
- The suspect's right to participate should be excluded by excluding Articles 121 and 122 from the mutatis mutandis provisions of Article 219 of the CPA, and a provision for the participation right of the person subject to seizure should be newly established; however, regarding the concept of the person subject to seizure, it is necessary to consider the

characteristics of data storage media. This is because, in the case of data storage media, the person subject to seizure in relation to the storage medium and the person subject to seizure regarding the information may differ.

○ Substantive Subject of Seizure

- Similar to the attitude of judicial precedent, the person subject to seizure should principally be identified based on the medium. However, if it is clear that the person subject to seizure regarding the medium and the person subject to seizure regarding the electronic information are different, and only the person subject to seizure regarding the electronic information has a substantive interest in the search and seizure, the right to participate should be guaranteed even to the person subject to seizure regarding the electronic information. In this case, it is reasonable to determine whether one is the person subject to seizure regarding electronic information based on whether they possess the exclusive right of management and disposal regarding the overall information.
- It is appropriate to clarify only the purport that the participation right of the person subject to seizure—not the suspect—is guaranteed by excluding the investigation stage regulations from the trial stage party regulations and newly establishing a provision for the participation right of the person subject to seizure, and then allow the specific interpretation of the person subject to seizure to be accumulated and established by case law.

○ Degree of Discretion in Limiting the Right to Participate

- It is appropriate to revise the regulations in a way that guarantees the participation of the 'formal person subject to seizure' but limits the scope of participation, so as not to contradict the purport of guaranteeing the participation right of the formal person subject to seizure under higher laws such as the CPA or the Investigation Rules. In cases where the formal person subject to seizure is a victim, the necessity to guarantee participation in the search and selection process of electronic information is significantly low. If the victim, who is the formal person subject to seizure, participates only in the review process of the selected electronic information, the infringement of the fundamental rights of the suspect, who is the substantive subject of seizure, can be prevented.

○ Right to Participate in the Analysis Process

- Although the analysis process is not directly related to the purpose of guaranteeing the right to participate and there is little practical benefit from such a guarantee, guaranteeing the right to participate in this process is inappropriate because the side effects—such as the exposure of technical and analytical capabilities and the resulting contraction of investigations—are serious. However, it is necessary to devise technical and institutional

alternatives, such as strengthening technical measures to guarantee the integrity of the analysis process or allowing the exceptional retention of image files for reproduction during the trial process if verification of the analysis process is expected to be necessary.

○ **Strengthening the Right to Participate in the Search and Selection Process**

- It is necessary to allow the person subject to seizure or the defense counsel to sit in a position where they can substantially verify the progress of the process and to permit them to take notes. It is also necessary to explicitly grant the person subject to seizure or the defense counsel the opportunity to review the protocol and state their opinions after the investigation procedure is finished.
- It is necessary to stipulate that the defense counsel may separately submit opinions in writing before and after the search and selection process, and that these be bound in the investigation records. This is significant in that it specifies the procedural right to have the opinions of the person subject to seizure clearly remain as a record during the digital evidence selection process. It is necessary to allow the defense counsel to express their views by specifying the right to state opinions even during the procedure, and the effectiveness of the right to participate can be strengthened by providing opportunities to actively intervene in the procedure.
- It is necessary to clearly define the right to immediately raise objections against unjust search and seizure methods. This is reasonable in that it prevents the abuse of authority by investigative agencies and guarantees the right of the person subject to seizure or the defense counsel to respond immediately if unjust acts occur during the digital forensics procedure. It is necessary to strengthen the transparency and fairness of the investigation process by establishing a new provision making it mandatory for prosecutors or judicial police officers to record any statements of opinion or objections made by the person subject to seizure or the defense counsel in the protocol.

○ **Right to Participate in the Deletion/Disposal Stage of Irrelevant Information**

- Limiting the guarantee of the right to participate does not by any means imply that internal and external oversight regarding the deletion and disposal of irrelevant information is unnecessary. It means that a more rational and efficient system capable of realizing the principle of deleting and disposing of irrelevant information must be established. To this end, it is necessary to (1) build a systematic and transparent system capable of managing data deletion and disposal, and (2) introduce a regular audit system for the deletion and disposal process.

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Legal and Policy Responses to New Mechanisms in the Metaverse Era (II)

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Summary

- The first-year project in 2023 examined criminal law issues within the Metaverse and proposed improvement measures. In 2024, the focus was placed on examining issues in civil, commercial, and other legal areas within the Metaverse and suggesting improvement measures.
- This study identified key issues currently under discussion. In relation to the current Virtual Convergence Industry Promotion Act (Metaverse Promotion Act), it presented problems and improvement measures, as well as the basic direction for legislation, in preparation for the future enactment or amendment of laws concerning civil, commercial, and other legal areas related to the Metaverse.

1 Background and Research Objectives

- As the Metaverse connects with various aspects of daily life—including industry, the economy, and culture—discussions are underway regarding legal evaluations, civil and commercial areas, and copyright issues. Furthermore, with the circulation of virtual currency, there is a high probability of various legal issues arising from changes in the financial landscape.
- Issues that were previously undiscussed—ranging from inheritance and property rights under civil law to civil and commercial matters involving games and other legal areas—are increasingly coming to the fore. Given that asset transactions between users are possible within the Metaverse and that virtual assets such as NFTs are being utilized, in-depth discussion on these matters is timely and necessary.
- Accordingly, this study selected emerging issues in civil, commercial, and other legal areas related to the Metaverse, identified the current status and problems, and presented the basic direction for legislation.

2 Key Findings

- Regarding legal discussions in the field of civil law, this study analyzed property right disputes over digital assets in the Metaverse and private liability regarding Metaverse platforms. It also focused on the legal status and inheritance of virtual assets in the Metaverse environment, which has recently become a key issue.
- In the field of commercial law, the study analyzed the tortious acts of Metaverse users and the locus of liability for operators and their employees, presenting alternatives. It also provided an in-depth treatment of user protection measures for virtual assets within the Metaverse.
- In addition, the study analyzed corporate laws, financial business laws, and copyright laws related to the Metaverse. It also examined the key provisions of the recently enforced Virtual Convergence Industry Promotion Act and proposed measures for improvement.
- Furthermore, a survey on general perceptions of the Metaverse was conducted focusing on the Millennials and Generation Z, and a survey on perceptions of civil and commercial legal areas in the Metaverse environment was conducted focusing on experts and practitioners, diagnosing current problems and potential improvements.

[Table 1] Statistics on the Severity of Civil and Commercial Illegal Acts Perceived by Millennials and Generation Z

| Severity (Issue) | Mean | Standard Deviation | Min | Max |
|--|------|--------------------|-----|-----|
| Difficulty in Law Enforcement due to Anonymity | 8.68 | 1.738 | 1 | 10 |
| Forgery and Alteration | 8.18 | 2.156 | 1 | 10 |
| Personal Information Theft | 8.51 | 1.865 | 1 | 10 |
| Platform Monopoly | 8.15 | 1.969 | 1 | 10 |
| Copyright and IP Infringement | 7.96 | 2.100 | 1 | 10 |
| Insufficient Regulation on Virtual Asset Fraud | 8.56 | 1.830 | 1 | 10 |

[Table 2] Descriptive Statistics on the Severity of Criminal Offenses in the Metaverse Perceived by Experts

| Severity (Offense) | Mean | Standard Deviation | Min | Max |
|--|------|--------------------|-----|-----|
| Avatar Indecent Act by Compulsion | 8.41 | 1.620 | 2 | 10 |
| Avatar Quasi-Rape | 8.59 | 1.532 | 3 | 10 |
| Avatar Illegal Filming | 8.53 | 1.684 | 3 | 10 |
| Intimidation | 8.59 | 1.338 | 4 | 10 |
| Avatar Stalking | 7.99 | 1.884 | 2 | 10 |
| Production of Sexual Exploitation Material | 9.11 | 0.994 | 6 | 10 |
| Transmission of Obscene Messages | 8.64 | 1.305 | 4 | 10 |
| Avatar Defamation | 7.81 | 1.442 | 4 | 10 |
| Insult, Verbal Abuse | 8.20 | 1.444 | 3 | 10 |
| Fraud | 8.33 | 1.281 | 4 | 10 |
| Theft (Larceny) | 8.11 | 1.484 | 4 | 10 |
| Robbery | 7.98 | 1.575 | 3 | 10 |

[Table 3] Descriptive Statistics on the Severity of Civil and Commercial Illegal Acts Perceived by Experts

| Severity (Issue) | Mean | Standard Deviation | Min | Max |
|--|------|--------------------|-----|-----|
| Difficulty in Law Enforcement due to Anonymity | 8.43 | 1.557 | 3 | 10 |
| Forgery and Alteration | 7.98 | 1.706 | 3 | 10 |
| Personal Information Theft | 8.53 | 1.368 | 3 | 10 |
| Platform Monopoly | 7.78 | 1.754 | 3 | 10 |
| Copyright and IP Infringement | 7.81 | 1.794 | 1 | 10 |
| Insufficient Regulation on Virtual Asset Fraud | 8.50 | 1.441 | 3 | 10 |

- Furthermore, this study analyzed corporate laws, financial business laws, and copyright laws related to the Metaverse. It also examined the key provisions of the recently enforced Virtual Convergence Industry Promotion Act and proposed measures for improvement.

3 Policy Recommendations

- Since assets such as virtual real estate possess legal characteristics distinct from physical real estate, the study emphasized the necessity of a new legal framework to regulate them.
- Regarding the ownership of digital assets in the Metaverse, approaching the issue through existing civil law principles is insufficient to resolve problems; therefore, the need for establishing clear legal standards and supplementary measures was emphasized.
- The study expressed the need for continuous discussion on whether digital content linked to NFTs can receive intellectual property protection.
- Since contracts in the Metaverse—specifically smart contracts—have characteristics different from existing legal contracts, the study emphasized the need for new legal provisions to clarify the legal validity of smart contracts and presented policy directions.
- As the Metaverse is a space where various digital contents are created and traded, there is a very high possibility of legal disputes related to copyright and trademark rights. Therefore, the study presented the necessity for and measures to improve the protection of digital contents created in the Metaverse—such as 3D models, avatars, and designs—under copyright law.
- While emphasizing the need for clear legal definitions of digital assets, protection of ownership, and clear regulations on the legal validity of smart contracts, the study pointed out that legal mechanisms must be established to resolve intellectual property infringement issues occurring within the Metaverse.

4 Expected Policy Effects

- By presenting standards to resolve legal issues arising in civil, commercial, and other legal areas, this study is expected to foster growth in future Metaverse-related industries, the economy, corporations, and finance, and to contribute to the formation of a healthy culture.
- It is expected to contribute to the establishment of policies in civil, commercial, and other legal areas related to the Metaverse.