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Trends & Policies in Criminal Justice

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Criminal Justice Reforms to Enhance Fairness and Civil Rights: a study on rationalizing evidence examination for impartial fact-finding in criminal cases

Introduction

The fairness and persuasiveness of the trial result depend on how objective the fact-finding was made in trial. The rational fact-finding is a prerequisite for guaranteeing the fundamental rights of the parties in trial and finally determines the public trust in the criminal justice system. As such, the finding of "substantial truth" is the ultimate goal of criminal proceedings in the civil law system. However, that does not mean that this issue is limited to criminal cases. Furthermore, it is also a problem raised equally in all administrative and criminal procedures that have a significant impact on the fundamental rights of citizens not only in juvenile delinquency proceedings, but also military trial proceedings. Indeed the fact-finding in criminal proceedings have an important meaning not merely in the trial, but also in the investigation by polices and prosecutors, in which are to collect evidences. In this sense, it is not so hard to understand, why in the civil law system the principle of mandatory investigation and mandatory prosecution by police and prosecutors are stipulated and the obligation is imposed on the prosecutors to collect any evidences, which could be not only in unfavorable, but also favorable to the defendant (so-called "Verpflichtung zur Objektivität"). The finding of "substantial truth" is not just a duty of the judges, but also the prosecutors. The prosecutors belong indeed to the executive branch on the one side, but are as such the judicial body (so-called "Rechtspflege", which is not the same meaning of the judiciary) on the other side. They have the same obligation to find the substantive truth in a cases as such judges and are allowed to prosecute a case only if they built confidence in proving the guilty beyond reasonable doubt as much as the judge might be required for conviction

based on their confidence that the defendant's guilty is proved beyond reasonable doubt.

Research Methods

- This study examined literature, previous research and other materials.
- It reviewed the amended evidence act.
- The research also closely looked into amendments of criminal procedures stipulated in laws other than the criminal procedures act.

Results

1. Necessity of the Reorganization of the Criminal Procedure Act – Independence of Investigation under the Act

(1) Under the accusatorial criminal procedure system, the obligation to find substantive facts in an objective and fair manner falls not only on judges and jurors, but also on prosecutors. As early as during investigation, the obligation directly derives from the state's burden of proof, the principle of presumption of innocence, and the prosecutors' obligation to objectivity which is imposed at the investigation stage. In other words, as the prosecution should decide whether to indict a person from a neutral position just like a judge decides whether a person is guilty or not.

(2) The current Criminal Procedure Act places "Investigation" under Part II "Court of First Instance." This structure may be congruent to the pretrial judge system before the introduction of the prosecution system in Korea or the investigating (pretrial) judge system currently in place in civil law countries. It, however, does not harmonize with Korea's current criminal procedure system.

(3) Under the current Criminal Procedure Act, the section on "Evidence" under Chapter III "Trial" of Part II "Court of First Instance" stipulates admissibility of evidence is subject to the judge's own decision under the "No Evidence No Trial" principle. However, as mentioned in (1), (unlike in a criminal procedure system where judges preside over investigation), admissibility of evidence is an issue related to investigative methods ("evidence should not be collected using illegal means."). Thus, it should be stipulated as a part of code of conduct for prosecutors. If so, it would be possible to understand the meaning of "inadmissibility" of illegally collected evidence or forced confessions in "trials" in connection with investigation.
Furthermore, the provisions may lay the foundation for making a prosecutor hold accountable for hindering judges and jurors from forming their opinions by illegally collecting evidence in violation of their code of conduct.

(4) About hindering judges or jurors from forming conviction, publication of facts of suspected crime (Article 126, Criminal Act) cannot be reduced to disclosure of confidential information or violation of suspects' human rights. Such publication undermines objective fact-finding by judges or jurors.

2. Improvement of Rules of Evidence for Objective and Fair Fact-finding

Judges' and jurors' opinions should be freely formed based on evidence (no evidence, no trial). Therefore, determining what evidence should be produced in a trial holds great significance for the objectiveness of judges' and jurors' opinions (presentation of evidence itself might cause making preconceptions or prejudices in judges and jurors).

(1) Admissibility of evidence in a trial and the method of the production are determined based on which of the basic criminal justice principles prevail; the principle of ex officio investigation, the principle of immediacy, the principle of oral proceedings, or the principle of presumption of innocence.

(2) For example, no objection to the court's decision to disclose evidence represents criminal procedures in a fairly court-centered system, but it does not necessarily derives from the principle of ex officio investigation. Likewise, these elements also indicate a court-centered criminal justice system; an objection to the court decision of admissibility of evidence is allowed only on the ground that the decision is against the law (Proviso, Article 135-2, Regulation on Criminal Procedure); evidence admissibility is a pre-judgment procedure; and the criminal procedure act does not have a provision on immediate complaint against such decision. For this reason, an objection to admissibility is not allowed (Article 403 (1)).

⑶ In addition, Article 312 (Protocol, etc. Prepared by Prosecutor or Senior Judicial Police Officer), Article 313 (Statement, etc.) and Article 316 (Statement of Hearsay) grant admissibility to hearsay evidence as long as it satisfies certain requirements, and allow the prosecution to produce the evidence during a trial. Not to mention the controversy over whether these provisions provide for an exception to the principle of immediacy or an exception to the hearsay rule, such evidence is highly likely to instill preconceptions and prejudices in judges and jurors once it is produced, even if it become inadmissible later in the trial. For this reason, caution is required when determining whether such evidence can be produced in a trial.

⑷ The right to cross examination of suspects and defendants and the right to counsel, especially, the right to represent with counsel during investigation under the accusatorial criminal procedure system, are crucial for (other than protecting suspects' and defendants' right to defense) preventing distortion of substantive facts during investigation, and allowing for regulatory control of free examination by judges and jurors during trials through cross-examination. For this reason, many have questioned whether it is justifiable to grant admissibility to investigation reports by police on suspects' or defendants' statements made in absence of their counsels as long as they meet certain requirements, or allow the prosecution to produce such evidence during trials.

⑸ The provisions on the hearsay rule of the Criminal Procedure Act provide about who made the statements, and begin with the statements made by suspects or defendants. The provisions which grant admissibility to documents in place of statements in exceptional cases, have been criticized many times for containing elements based on principles other than the hearsay rule. While both hearsay statements and documents on hearsay constitute hearsay evidence, in order to ensure the consistency of the structure and clarify the principle-exception relationship between the provisions, it seems better to put the provisions on hearsay evidence before the provisions on typical exceptions to the hearsay rule, followed by the provisions on the protocol concerning interrogation of a suspect.

⑹ The admissibility of investigation reports concerning interrogation of a criminal suspect has been the most divisive issue among the co-authors, and one of the most prominent point of interest in the current discussions on the adjustment of investigative powers. The law applies different requirements for the admissibility to investigation reports prepared by a prosecutor and by police. Some argue that the difference cannot be justified because the prosecutor is invested with more power over investigation than the police. However, the issue of investigation reports concerning interrogation of a criminal suspect cannot be discounted as a simple issue. In the current court practices where it is customary for courts to render judgments based on investigation reports which are generally work as a written "confession" of the suspect or the defendant. In this regard, such practice cannot be harmonized with the exclusion of confessions or corroborating rule of the confession. Furthermore, under the current law, a investigation reports concerning interrogation of a criminal suspect is granted admissibility in certain cases. Once it is produced in a trial (even if the defendant denies the statement during the trial), it instills preconceptions in judges and jurors and undermines the objectiveness and fairness of fact-finding. While proposing to secure more non-statement evidence in order to improve the efficiency of investigation, investigative institutions highlight the importance of investigation reports, arguing that it may be the only evidence available for maintaining an indictment (although, one could ask whether indicting a person based on such investigation reports constitutes an abuse of the prosecutorial power). In addition, some judges prefer documentary evidence to statement of person concerned despite the principle of oral proceedings under the Criminal Procedure Act (Article 37), thereby putting more value on the economy of litigation. In the short term, it may be acceptable to listen to the voices from the field and introduce stricter requirements for the admissibility of investigation reports by a prosecutor on par with those applicable to reports prepared by a judicial police officer. However, in the long term, it should be considered that denying the admissibility of investigation reports, given that it is effectively used as a written confession in trials. However,

the co-authors are divided over the issue, and decided not to draw the conclusion in this paper.

(7) The voluntary statement, along with its consistency, determines the probative value and credibility of a statement. For this reason, it has great influence on the free examination of evidence by judges and jurors. Voluntary statement takes on even more significance in cases where between witnesses or between witnesses and defendants provide contrasting statements, statements are the only evidence produced to the court, or they determine the outcomes of the trial. Article 317 of the Criminal Procedure Act stipulates that statements are not admissible as evidence unless they are made voluntarily. In cases where a person is required to make a statement regarding an investigation report prepared by a prosecutor (Article 312 (1) and (2)), an investigation report concerning interrogation of a person other than the defendant (Article 312 (4)), or any other statement (Article 313 (1)), and the statement by the person who cannot appear before the court at a preparatory hearing or a trial and is required to prepare, the relevant investigation reports and documents are admissible as evidence (Article 314). The hearsay statements (Article 316) stipulates the Supreme Court held that a "particularly reliable state" means the cases where there exists little room for falseness in making the statement, and there exists concrete and external circumstances that guarantee the reliability and voluntariness of the statement." Then, one could question the relationship between the voluntariness of a statement under Article 317 and voluntary statement "in a particularly reliable state." In addition, the voluntariness of a statement constitutes a principle to which Article 309 (Probative Value of Confession Caused by Duress, etc.) and the provisions requiring "a particularly reliable state" which serve as exceptions. Then, one could ask whether it is appropriate to place Article 317, which provides for the voluntariness of a statement, behind the said provisions.

3. Appropriateness of Other Evidentiary Rules

Apart from the Criminal Procedure Act, provisions on criminal procedures are scattered across special statutes, which has been a source of great confusion in applying the laws. Furthermore, as evidence takes on more significance for fact-finding in the field of forensics, it raises a question whether such statutory structure is consistent with the basic principles of the Criminal Procedure Act.

(1) If statements of suspects and witnesses are recorded electronically either voice or video recording, only for the purpose of ensuring due process and protecting human rights, then, the use of the video recordings must be restricted to the cases where such materials are needed to ensure due process and prove the voluntariness of statements. Therefore, video recordings should be used only for substantial authentication of statements or proof of voluntariness, which can be considered as one of the "particularly reliable states," as is the case with the current provisions of the Criminal Procedure Act.

(2) The laws do not contain any provision capable of eliminating possible errors in expert opinions regarding DNA evidence. Therefore, a careful review is required to determine whether rebuttable presumption of infallibility is sufficient.

(3) In addition, if digital evidence must be formally authenticated by identifying the author under the current laws, the laws need to contain separate provisions stipulating the requirements for formal authenticity designed for digital formats.

(4) Two other sources of evidence are currently being discussed: wiretapping and entrapment. ① As for wiretapping, if the court does not have any means of ex post control of emergency communication-restricting measures, it may undermine the significance of the fruit of the poisonous tree doctrine. ② As for entrapment, even though an increasing number of countries adopt entrapment, it could not be ignored that the concerns about possible violation of human rights still remain.

4. Objective Fact-finding by Judges and the Jury

Under the inquisitorial criminal procedure system, judges and jurors inquire whether indicted facts are consistent with substantive truths. However, humans do not possess the cognitive capability to ascertain truths with absolute certainty and conviction of guilt is bound to be relative. The best we can hope for is to set forth a number of procedural preconditions to ensure that judges and jurors can form their opinions without preconceptions.

Such preconditions should include the following; ① The law should stipulate which evidence is allowed to be produced before the court, so that inadmissible evidence would not create preconceptions or prejudices (see Chapters 2 and 3); ② The lowest level of proof for conviction should be defined (proof beyond a reasonable doubt) based on the principle of presumption of innocence; ③ Finally, conviction of guilt should not be formed based on statistical probability of whether a defendant is guilty, but it should be formed by eliminating, one by one, the possibilities that a defendant may be innocent. It could be concluded that the guilt of a defendant could be proven beyond a reasonable doubt only when all such possibilities have been eliminated.

In addition, the principle of presumption of innocence presupposes a principle regarding allocation of burden of proof; a person with a reasonable doubt regarding a defendant's guilt is not required to give any reason for his/her opinion to a person without such a reasonable doubt, while the latter should provide the former with the reason why he/she does not reasonably doubt the defendant's guilt.

Despite its historical origin, the principle of free examination of evidence has gone through substantial changes in contemporary societies. The principle has become the target of many criticisms, and the current emphasis is placed on the "restriction" of judge's "freedom."

Then, regulatory means are required to prevent the "freedom" of judges and jurors from turning into arbitrariness disguised as discretion. Above all, it is needed to ensure that judges and jurors form their opinions in transparent processes rather than out of "black boxes." Such means include: disclosure of lower-instance court judgments, judges' obligation to provide detailed reasons for judgments, and verification of evidence at appellate levels.

Policy Recommendations

- An independent organization related to the investigation is necessary.
- The court-centered trial process should be improved.
- In the field of evidence law, it seems to be needed to improve court- and investigative-centered procedures.
  - For example, abolishing or limiting the ability of evidence in the suspect investigative report, which is used as a confession record.
- It is necessary to secure a means to correct the possibility of errors in modern science and technology in the investigation process.
- Since the evidence of testimony has a very high risk of being distorted, it is necessary to carefully examine the circumstances of the accused victim's conduct (for example, whether the consistency of the witness's statement can be the only evidence of guilty) or collateral by material evidence.

Expected Effects of the Policies

- This study is expected to contribute to the revision of the Criminal Procedure Act, as it contains various views on the Criminal Procedure Act.
- In addition, the investigation of various foreign legislation included in this study is expected to contribute to the revision of the Criminal Procedure Act.

Major Keywords

Evidence beyond reasonable doubt, The rule of evidence, Hearsay evidence, Written records of suspect interrogation by the police