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The Role of the Public Prosecutor in Korea: Is He Half-Judge?

*Heekyoon Kim**

Abstract

Worthy of note is that the Korean prosecutors actually interrogated the suspects and the prospective witnesses like the French examining magistrate did. Furthermore, they reported the result to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter. We might be able to say that, in that sense, the Korean prosecutors might be considered half-judges. It was sometimes argued that the Korean prosecutors had been nearly promoted to the group of examining magistrate. All that happened was due to the practice that gives relatively high credit to the protocols of the prosecutors.

Now, the Judiciary Reform in Korea begins to consider the prosecutor just as the commander of the investigation and, at the same time, as the proper party in an open trial. It means that the true adversarial system will be introduced and tried here. I am curious to see how the prosecutorial office will react in this paradigm shift. Visibly, the prosecutors are well prepared for the change and it would be also a good thing for the prosecutor himself to stop working as the judge.

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I. Introduction

The following comment, though far from a result of an empirical survey, shows what ordinary people think what legal professionals are like:

[N]eutrality had been associated primarily with judges and was thought to describe a trait that distinguishes judges from lawyers. The emerging notion of prosecutorial neutrality recalls the traditional conception of prosecutors as “quasi-judicial” officers. It emphasizes the distinction between prosecutors and lawyers for private parties.¹⁾

To summarize roughly, the public does not care much about how the lawyers act in public or out of sight because they are believed to be no more than the surrogates for private parties. However, concerning the behaviors of the quasi-judicial officers or judicial officers, the tax payers expect much: they hope that a certain judge would be neutral and that a prosecutor would be nearly as neutral as a judge.

The Korean prosecutors have recently been the key target of the government-oriented reform project.²⁾ They have been considered one of the most powerful legal professions in Korea for more than a half century after the emancipation from the Japanese colonization. Reformers are complaining that the Korean prosecutors did not seem to be sufficiently neutral. They “have been criticized for their reluctance to investigate corruption cases involving powerful politicians or high-ranking government officials, or for their politically biased investigation of the cases.”³⁾ One notable commentator has gone even further. According to his description of the Korean prosecutors in general, as far as one is concerned about the prosecutorial office, the Korean society needs a revolutionary change rather than a simple reformation or remodeling. Here we follow his grotesque description of the Korean prosecutors, even though it is rather argumentative than scientific:

1) Bruce A. Green, *Prosecutorial Neutrality*, 204 WIS. L. REV. 837, 839-40 (2004).

2) The Korean judicial reform aimed to make the trial court the center for a fact-finding process. To do that, it was absolutely necessary to invite as much evidence as possible to be examined in an open court. Thus, the reforming effort was concentrated on redefining the admissibility of the transcription of a suspect’s statement as prepared by a public prosecutor according to the stricter hearsay rule.

3) Kuk Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea*, 30 DENV. J. INT’L. & POL’Y 377, 386 (2002).

In the past, [Korean prosecutors] have abused their mighty public power to please power-holders. For example, the prosecutors have indicated many political dissenters on charges of violating the National Security Law, which is designed to protect South Korea from the threat of North Korea The longstanding practice of misusing prosecutorial power to suppress political opposition has helped give Korean prosecutors a bad name.⁴⁾

I personally do not intend to defend the Korean prosecutorial office. Moreover, if Korean people do not trust the prosecutor's office, I believe that they might have sufficient reasons to feel that way. However, critical views do not automatically guarantee a new set of measures to enhance the neutrality of the Korean prosecutors. Our primary interest is not in adding skeptical comments on the existing system, but to give a clear idea of who is a Korean prosecutor and of what he is supposed to do according to the Korean Constitution and the Korean Criminal Procedure Code (hereinafter "CPC").⁵⁾ After a clear picture has been given, we can analyze why the prosecutorial work has been wrongfully distorted. Then, we may be able to find a solution for democratizing the prosecutorial office. In that sense, any comments and recommendations for creating a more democratic or neutral prosecutorial office should be based on the understanding of how the office presently works in Korea.

A second chapter will be focused on the regulatory scheme of Korea with regard to the public prosecutor's judicial powers. While carefully examining which powers are given to the prosecutors, we can possibly think about another interesting project — that is, to compare the Korean prosecutor with any functionaries the Westerners are familiar with. The Korean prosecutor is very similar to the English Justice of the Peace⁶⁾ (hereinafter "JP"), but there is a substantial difference between them. The Korean prosecutor is also basically doing the same things as the French *procureur de la République* [public prosecutor], but these two are not of the same class. Another interesting similarity is between the Korean prosecutor and the so-called examining magistrate.⁷⁾ All these comparisons will be discussed in the third chapter. In the

4) Jaewon Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 ASIAN-PAC. L. & POL'Y J. 45, 55-7 (2001).

5) See generally the Korean Criminal Procedure Code [hyeongsa sosongbeop] (Law No. 341, Sept. 23, 1954, last revised June 1, 2007 as Law No. 8496).

6) See generally JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE*, at Part I (1974).

7) For the definition of the magistrates in France, see e.g., GASTON STEFANI, *PROCEDURE PENALE* 37 (17d ed. 2001).

fourth chapter, I would like to return to the very real issue of why the Korean prosecutor has come to be the main target in the Korean judiciary reform project. I would also question whether or not it is really reasonable to attack the reliability of a document made by the Korean prosecutor. That issue will be fully discussed just prior to the final comment on the on-going judiciary reform in Korea.

II. The Role of a Korean Prosecutor

As is generally acknowledged in Korea, the prosecutor governs the entire criminal procedure. He has the right to open an investigation and to stop it. He “is in charge of criminal investigation,”⁸⁾ and the police are under his command.⁹⁾ Save some misdemeanors which are punishable by fines,¹⁰⁾ almost every crime has to be reported to the prosecutorial office.¹¹⁾ The police and private parties are prohibited to release any suspects without the prosecutor’s permission after the criminal accident has been recorded in the police file.¹²⁾ There is not any private prosecution¹³⁾ or any grand jury indictment.¹⁴⁾ Only the prosecutors have the right to inform the crimes to the trial court, whether it is a bench or jury trial.¹⁵⁾ Thus, in everyday practice, the

8) JAESANG LEE, NEW CRIMINAL PROCEDURE CODE [SHINHYEONGSA SOSONGBEOP] 97 (2007); *See also* CPC, *supra* note 5, at arts. 196-98.

9) *See id.* The French Criminal Procedure Code also states that the prosecutor “directs the activity of the judicial police officers and agents within the area of jurisdiction of his court,” C. PR. PEN. art. 41.

10) *See, e.g.*, “some minor offenses, which are punishable by fines of not more than 200,000 won (currently equivalent to about U.S. \$ 170) or detention for less than thirty days, may be brought by the chief of police before the court without a formal indictment,” Kuk Cho, *supra* note 3, at 381.

11) *See, e.g.*, “[W]hen a judicial police officer receives a complaint or accusation, he shall report the matter pertaining thereto promptly, to a public prosecutor,” CPC, *supra* note 5, at art. 238.

12) *See* “Only the prosecutor has the right to terminate any investigation,” JAESANG LEE, *supra* note 8, at 97; *See generally* CPC, *supra* note 5, at arts. 246-7.

13) *See id.* On the other hand, the French Criminal Procedure Code opens the possibility of civil action by stating that “[C]ivil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage directly caused by the offence,” C. PR. PEN. art. 2.

14) There is no provision regarding the grand jury indictment even in the recently promulgated Law on the Lay Participation in the Criminal Justice [Kukmineui Hyeongsajaipan Chamyeoe Gwanhan Beoplyul] (Law No. 8495, promulgated June 1, 2007).

15) With the promulgation of the Law on the Lay Participation in the Criminal Justice(hereinafter “LPCJ”), the

prosecutor is in the very center of criminal procedure.

He not only handles almost every crime that occurs in Korea, but the prosecutor also has the power to decide how to close criminal cases. If he closes a case not involved with any functionaries' misuse of administrative power,¹⁶⁾ the only remedy available for the criminal victims or harmed parties was the constitutional challenge. That sort of challenge had been so rapidly accumulated in the dockets of the Constitutional Tribunal that it was not considered an effective way to control the prosecutor's power. As a matter of fact, Korean "prosecutors retain full authority for both investigation and prosecution in Korea under a principle of monopoly."¹⁷⁾

The case in Korea is allegedly this:

The prosecutor is supposed to be involved in any stages from the primary investigation to the execution of the court's decision and can be defined as a governmental agent playing the active role in accomplishing the criminal justice. In other words, he directs and commands the police officers in investigation, solely decides whether or not to indict suspects, petitions, in an open court, strict application of a certain criminal act for those suspects, and finally, after the trial, manages the execution of sentences.¹⁸⁾

If we say that the prosecutors in general have enormous power in the criminal justice system, it is also true in Korea.

However, we need to think about and clarify one thing in order to correctly understand the role of a prosecutor in Korea — that is, whether or not he has the right to make a dossier, transcript, protocol or whatever, and certify it to the trial court. If the answer is in the positive, the Korean prosecutor is not basically different from the examining magistrate *proprement dit* in France, and our criminal procedure code can be said to be close to the Continental Inquisitorial system. If we say that the Korean prosecutor is just in charge of the investigation and, with the results of that investigation, simply represents the government in the trial, our system will be

defendant is given the right to a jury trial. *See generally* LPCJ at arts. 8, 13.

16) Before the recent revision, any challenge to the prosecutor's exclusive right of prosecution was possible in several crimes such as wrongful exercise of authority. However, it is now open to every crime. *See generally* CPC, *supra* note 5, at art. 260.

17) Kuk Cho, *supra* note 3, at 381.

18) JAESANG LEE, *supra* note 8, at 81.

described as adversarial.

The factor that distinguishes the inquisitorial system from the adversarial one is closely related to the prosecutor's pretrial examination. The United States' Supreme Court accordingly pointed out that:

English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.¹⁹⁾

The point is that, in the Continental Inquisitions process, several judicial officers may be involved with the fact-finding process and even certify some facts as evidence to the trial court. The Inquisition system is that "of criminal procedure in which the magistrate investigated, principally by interrogation of the accused; reduced the results of his investigation, including the testimony of the accused, to writing; and transmitted this dossier to the final sentencing court for a judgment which was based upon and effectively controlled by the dossier."²⁰⁾ To understand the Korean prosecutor, we need to locate prosecutors somewhere in the pretrial process and examine the nature of their job. Generally speaking, prosecutors are as nearly powerful as the *juge d'instruction* [investigating judge in France]. However, this is not the case in every country. In some countries, prosecutors are doing the jobs that could basically be assigned to the police.²¹⁾ The task that the Korean prosecutors are in charge of is surely related to connecting the police and the trial court. Not yet clear is whether they are closer to the police or to the court. Visibly, "[a]ll prosecutors' offices in Korea, which are as big and dignified as those of the courts, are located next to court buildings."²²⁾ However, this does not provide the answer to my question. It does not say that prosecutors are equal to judges. The point is whether the prosecutors are capable of replacing the judges as fact/evidence finders in the pretrial examination, and thus of governing the whole criminal procedure beside judges.

19) Crawford v. Washington, 124 S. Ct. 1354, 1359 (2004) (citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-374 (1768)).

20) JOHN H. LANGBEIN, *supra* note 6, at 21.

21) *See supra* note 6.

22) Jaewon Kim, *supra* note 4, at 55.

III. Who is the Korean Prosecutor?

Next, I would like to compare the Korean prosecutor with various types of judicial officers. They have different names and assignments. To compare them with the Korean prosecutor will help develop a clearer idea of who he is.

1. *Korean Prosecutor v. American Prosecutor*

Some argue that “the Korean prosecutors do not view their judicial role or function as subordinate to that of judge”²³⁾ and that “this mentality is ... incompatible with the adversarial system, which the Korean legal system presupposes.”²⁴⁾ Many commentators actively ascertain that Korea has an adversarial criminal procedure.²⁵⁾ In some aspects, they have reasonable ground to insist that.²⁶⁾ However, it is a different thing to say that the Korean prosecutors are supposed to do the same work as the American counterpart, just because Korea and the United States are both employing the so-called adversarial criminal system. In reality, the two countries’ prosecutors are not of the same kind. The American prosecutors seem rather bizarre in terms of police-prosecutor relations, and this is evident from simply comparing them with the French/Korean colleagues. The following description is about the difference between two groups of prosecutors face to face over the Atlantic:

The French prosecutor must be kept informed, at an early stage, of the existence and progress of the investigation. This permits the prosecutor to have more input into the direction and methods of investigation. If the offense is one that will probably not be prosecuted, the police may avoid wasting time and unnecessarily bothering the suspect, his or her associates, and witnesses. If the police are using questionable investigatory methods, the prosecutor may be able to intervene in time to protect both the rights of citizens and the admissibility of the evidence.²⁷⁾ In contrast to this “integrated” model, the

23) *Id.*

24) *Id.*

25) *See, e.g.,* YONGSEOK CHA & YONGSEONG CHOI, CRIMINAL PROCEDURE CODE [SHINHYEONGSA SOSONGBEOP] 62 (2d ed. 2004).

26) About the typical features showing that the Korean criminal procedure embodies the adversarial system, *see generally* JAESANG LEE, *supra* note 8, at 42-44.

police and prosecutorial functions in the United States seem to reflect a strict “division of labor” theory. American prosecutors are rarely involved in prearrest investigation decisions or in the arrest decision itself.²⁸⁾

If we are able to designate the French criminal procedure model as an “integrated” one, Korea has the same system as France. To understand the prosecutors role in Korea, all we have to do is just replace the word “French” with “Korean” in the above sentences. The Korean prosecutor works with the police under the “integrated” model. There is no theory of “divison of labor,” as far as we are concerned with pretrial activity. However, a difference from the French case is that there is no direct path from the police station to the judge in Korea.²⁹⁾ Save some minor offenses,³⁰⁾ all the results of criminal investigations are to be gathered in the prosecutorial office. There it is decided whether or not to take the case to the court. In that sense, Korea has a far more integrated model than France.

The situation being so, the fact that two nations, such as Korea and the U.S., both basically have an adversarial criminal system does not say much about the similarity of the prosecutors’ work in the two nations. As is generally taught in the Judicial Research Training Institute,³¹⁾ from the comparative point of view, the Korean prosecutor is rather an adherent to the French *procureur de la République*.

Prosecutors are historical products of the Continental criminal procedure governed by the Nation. The position of the prosecutor is very close to the so-called *procureur du roi* in the fourteenth century. Nonetheless the *procureur du roi* at that time was nothing more than an officer who was in charge of governmental lawsuits for procuring fines and forfeits. In 1808, the Napoleonean Criminal Instruction Code [le Code d’Instruction Criminelle] changed the name to the *procureur de la république*, and this was imported

27) In Korea, this sort of prosecutorial power is called the right to inspect the detention place. See CPC, *supra* note 5, at art. 198-2.

28) Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 557-58 (1990).

29) See generally MARY M. PREUMONT, *LA PROCEDURE DE COMPARUTION IMMEDIATE EN MATIERE PENALE* 33 (Bruxelles, 2001).

30) See *supra* note 10.

31) See generally JUDICIAL RESEARCH TRAINING INSTITUTE, *PROSECUTORIAL PRACTICE I* [GUMCHAL SILMU I] 3-5 (JRTI, 2005).

through Germany and Japan to our country.³²⁾

2. Korean Prosecutor v. French Prosecutor/French Examining Magistrate

To understand the nature of the French prosecutorial work, we have to juxtapose the prosecutor with the examining magistrate, and “[o]ne of the most distinctive institutions of French criminal procedure is that of the examining magistrate.”³³⁾ Without saying anything about small crimes and infractions, every serious crime should not directly reach the trial court. Two sorts of magistrates are supposed to handle the cases before trial.

Ces magistrats dont la situation est différente se différencient surtout par leurs fonctions. Le juge qui n’a pas le droit de poursuivre, ne peut se saisir lui-même d’une affaire pénale. De son côté, le [procureur de la République] qui a seulement le droit de poursuivre, n’a pas en principe le pouvoir d’effectuer des actes d’instruction. [These magistrates whose positions are different are supposed to do the different works. The investigating judge, who does not have the right to accuse, cannot take charge of any criminal case for himself. On the other hand, the public prosecutor who has exclusively the right to accuse cannot effectuate the acts of pretrial examination].³⁴⁾

The examining magistrate, which is called *juge d’instruction* in France, has been invented “for more direct and efficient judicial control over both police and prosecutorial discretion at the investigatory and charging stages”³⁵⁾ and it “combines the functions of police, prosecutor, investigating grand jury.”³⁶⁾ Certainly, “the French today make relatively little use of this procedure [of the examining magistrate].”³⁷⁾ Nevertheless, the basic structure of pretrial investigation remains undisturbed. There is on the one hand the *procureur de la république* who “receives complaints and denunciations and decides how to deal with them,”³⁸⁾ and “institutes or causes to be

32) JAESANG LEE, *supra* note 8, at 87.

33) Richard S. Frase, *supra* note 27, at 666.

34) GASTON STEFANI, *supra* note 7, at 37.

35) Richard S. Frase, *supra* note 27, at 666-67.

36) *Id.*

37) *Id.*

taken any step necessary for the discovery and prosecutions of violations of criminal law.³⁹⁾ Judicial police operations are carried out under the direction of the district prosecutor.⁴⁰⁾ On the other hand, there is an investigating judge who has the right to interrogation.⁴¹⁾

The same is basically true in Korea. There is a prosecutor who commands and directs the investigation. Furthermore, as is true in France, his investigating power is limited in certain aspects. He has to have the warrant of arrest or detention from the district judge who is assigned to issue the warrants for some periods. For officially gathering evidence and preserving it, he has to address the district judge.⁴²⁾ As is true for interrogating witnesses before trial, the article states that:

In case persons who are deemed likely to know facts that are indispensable for the investigation of crimes refuse to appear or make statements under the preceding Article, public prosecutors may request judges to interrogate them as witnesses only before the date of the first public trial day.⁴³⁾

All the proceedings, which include “attachment, investigation, verification, examination of witness, or expert opinion,”⁴⁴⁾ are called pretrial examination or simply *instruction* in French.

Les actes d’instruction. Ce sont les actes qui ont pour but la recherche et la réunion des preuves de l’infraction, qu’ils soient accomplis par les juridictions

38) C. PR. PEN. art. 40.

39) C. PR. PEN. art. 41.

40) C. PR. PEN. art. 12.

41) For the explication of the interrogation, *l’interrogatoire* in French, see generally GEORGES LEVASSEUR et al., DROIT PENAL GENERAL ET PROCEDURE PENALE 156 (13d ed. 1999).

42) See CPC, *supra* note 5, at art. 184, which states that:

“Article 184 (Request and Procedure for Preservation of Evidence)

(1) The public prosecutor, the defendant, a suspect, or his defense counsel may, when there are reasons which may make it difficult to use evidence unless it is preserved in advance, even prior to the date of the first public trial, request a judge to effect such measures as attachment, investigation, verification, examination of witness, or expert opinion.

(2) The judge who has received the request prescribed in the preceding paragraph has the same authority as a court or presiding judge has, regarding the disposition of such request.”

43) CPC, *supra* note 5, at art. 221-2.

44) CPC, *supra* note 5, at art. 184.

d'instruction ou même par des officiers de la police judiciaire. [The acts of examination. They are the acts which are means of searching or gathering the evidence of crime, and which are accomplished by the examining magistrate or even by the judicial police officers (hereinafter "OJP")].⁴⁵⁾

It is very important to figure out whether or not the Korean prosecutor has the right of examination. As is shown above, and as opposed to the examining magistrate, the French prosecutor does not have the right to do that. Neither does the Korean prosecutor. In other words, the initiative in the first step of criminal procedure is not in the hands of prosecutors but in that of the examining magistrate. In a certain sense, prosecutors and district judges or examining magistrates are cooperators, and the basic structure of the pretrial investigation in Korea or France consists of those two top positions. However, the prosecutor cannot be a judge in any event.

The result is that everything said or declared in the presence of the district judge can be qualified as evidence, but what is said to the prosecutor has to pass some sort of evidentiary rule, such as the hearsay rule, in Korea. That is the crucial difference between the roles of prosecutors and district judges. Article 311 makes this point clear by stating that:

Any protocol which contains statements made by the defendant or persons other than the defendant at a preparatory hearing or during public trial, and results of inspection of evidence by courts or judges may be used as evidence. The same shall apply to a protocol prepared pursuant to articles 184 and 221-2.⁴⁶⁾

However, worthy of note is that the Korean prosecutors actually interrogated the suspects and the prospective witnesses like the French examining magistrate did. Furthermore, they reported the result to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter.⁴⁷⁾ We might be able to say that, in that sense, the Korean prosecutors might be considered half-judges. It was

45) GASTON STEFANI, *supra* note 7, at 172.

46) CPC, *supra* note 5, at art. 311.

47) *See, e.g.*, "A public prosecutor or judicial police officer shall interrogate as to the necessary matters concerning the facts and conditions of the offense, and shall give the suspect an opportunity to state facts beneficial to himself," CPC, *supra* note 5, at art. 242.

sometimes argued that the Korean prosecutors had been nearly promoted to the group of examining magistrate.⁴⁸⁾

All that happened was due to the practice that gives relatively high credit to the protocols of the prosecutors. As is true in France, CPC in Korea gives full credit to the judges' records. However, the records made by the prosecutors have not been given full credit differently from what the magistrate has written down.⁴⁹⁾ Thus, the old article 312 said that the transcripts made by the prosecutors could be used as evidence in the trial court, but it specified certain conditions as following:

(1) A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor ... may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during public trial: Provided, that a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made in specifically trustworthy circumstances, regardless of the statement made at a preparatory hearing or during public trial by the defendant.⁵⁰⁾

To summarize roughly, “the person making the original statement” has to approve “the genuineness” of the protocol and there should be “specifically trustworthy circumstances” at the moment of making protocol. The CPC’s attitude toward the prosecutor’s protocol is very similar to that of the French Code regarding the police officer’s records. The French Code states that, in principle, the police officers’ records or reports “only have the value of simple information,”⁵¹⁾ but “in the cases where judicial police officers, judicial police agents or the civil servants and agents entrusted with certain judicial police duties have been granted by a special legislative provision the power to establish misdemeanours by official records or reports, proof of the contrary may only be brought in writing or through witnesses.”⁵²⁾

The wordings of the Korean and French Codes are not the same, but the fact is

48) President Noh also pointed out the abusive power of Korean prosecutors. *See, e.g., Are You Satisfied with Having Insulted the Prosecutorial Office*, OHMYNEWS (Seoul), Mar. 12, 2003.

49) CPC article 311 does not include the documents prepared by the prosecutors as one of the dossiers which are automatically qualified as evidence. *See CPC, supra* note 5, at art. 311.

50) CPC, *supra* note 5, at art. 312(1).

51) C. PR. PEN. art. 430.

52) C. PR. PEN. art. 431.

evident that two acts are not given full credit to the protocols or *procès-verbaux* made by the police and prosecutors.

3. *Conclusion*

At the very least, one thing is of no doubt: namely that the Korean prosecutor is very different from the American counterpart. At the same time, he is not one of the examining magistrates or investigating judges. Nor is the prosecutor a police officer. No one dares to say that. All that I can say with sufficient conviction is that the Korean prosecutor is located somewhere between the OJPs and the examining magistrate, or the police officer and the district judge, in terms of pretrial examination. This is in fact the point which ignites the judiciary reform in Korea.

IV. Judiciary Reform and the Prosecutorial Office

1. *Is the Prosecutor Half-Judge?*

A suspect says that he killed a victim, and a public prosecutor writes it down in a document and lets the suspect sign it. It mainly occurred in the investigation office operated by a public prosecutor. When the suspect is accused and summoned in the public court, the judge asks him whether he consented to the introduction of the protocol into evidence. If he says “yes,” there is no problem. If he says “no,” the foundation process begins. There the old article 312 comes into play and the judge, in most cases, asks the defendant who was a suspect when the transcription was made, whether the signature is his or not. If he says, “yes, that is mine,” it is proved that the statement was formally made.⁵³⁾ Then it can be, according to the Supreme Court of Korea (hereinafter “SCK”), legally inferred as fact that the statement was actually made and properly recorded by the prosecutor because the defendant’s signature is genuine.⁵⁴⁾ Traditionally, the SCK ruled likewise for several decades

53) The Korean law has invented a notion that the truthful making of a document consists of formal/truthful making and substantial/truth making. The fact that the signature in a document is truthful only guarantees the formal/truthful making. *See generally* JAESANG LEE, *supra* note 8, at 551.

54) *See* Decision of Sep. 23, 1994, SCK 94 Do 1853.

when the article 312 was at issue.⁵⁵⁾

How about the second requirement that the statement should be “made in specifically trustworthy circumstances”? The SCK did not care much about it, if only the formal and actual genuineness could be established.

The SCK’s ruling on December 16, 2004,⁵⁶⁾ has changed nearly everything. It no longer infers the actual genuineness of a transcription from the fact that the accused has signed it.⁵⁷⁾ Furthermore, it requires that the transcription should have been prepared and made “in specifically trustworthy circumstances” as the article says. What does this change mean? It means that the Korean Judiciary has decided to introduce more developed adversarial settings into the criminal procedure by imposing the stricter hearsay rule and by focusing the adversarial nature partly embodied in the CPC.

From the beginning of 2005, the paradigm shift can be clearly seen in the Korean legal circle. Even the Chief Justice has publicly demanded, “cast away investigating records!”⁵⁸⁾ The quarrel between the Judiciary and the Department of Justice has made much noise and everybody heard their sayings in newspapers and TV programs. To support the reform project, “[t]he presidential Committee on Judicial Reform was formed on January 18, 2005. This committee [was] focusing on accomplishing an even more democratic, fair, and efficient judiciary with more openness and transparency.”⁵⁹⁾

2. *Downfall of the Prosecutor*

To have an open and transparent criminal procedure, all the facts should be assessed and questioned in an open court. Regardless of what one said to the police officer at the scene, one has to have the right to deny it in court, and that is important. That issue was handled in the legislation and one legislator concluded that:

In fact, torture in the criminal process in Korea is well-known. The point is how to stop it. I believe that, first of all, we have to exclude the transcripts and

55) *See, e.g.*, Decision of Jun. 26, 1984, SCK 84 Do 748.

56) Decision of Dec. 16, 2004, SCK 2002 Do 537.

57) *See id.*

58) *Cast Away Investigating Records*, HANKOOK ILBO (Seoul), Sep. 20, 2006.

59) http://www.scourt.go.kr/scourt_en/jdc_info/jdc_reform/index.html (last visited Sep. 15, 2007).

protocols made by the police and the prosecutors as evidence. I acknowledge that a police officer or a public prosecutor can possibly interrogate persons to find out what really happened but to qualify their findings as evidence in the court is a totally different thing. I insist that the transcripts and protocols cannot be used as evidence without the consents of the defendants and their lawyers.⁶⁰⁾

Accordingly, the CPC article 312(2) states that “[a] protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the protocol.”⁶¹⁾ However, the legislator himself showed a more lenient attitude towards the prosecutor’s protocol by saying that:

Nonetheless, the human resources in the prosecutorial offices are better than those working in the police stations, so at least for accelerating the trial process, we need to approve the evidentiary power of the protocols that the prosecutors made.⁶²⁾

And more than fifty years have passed after the first promulgation of the CPC. In the mean time, the prosecutors’ protocols were widely acceted by the trial courts and the courts seemed to be ready to approve the results of the investigation without any scrutinized assessment. Otherwise, the percentage of the guilty in trial could not be so high, as some commentators have pointed out.⁶³⁾

The situation being so, the paradigm shift in 2004 is quite revolutionary to the point of view of the prosecutorial office. The recently amended CPC has made two big changes.⁶⁴⁾ One is to put off the interrogation of the defendant after all the takings of evidence.⁶⁵⁾ By doing that, the importance of the prosecutors’ protocols of the

60) DONGWOON SHIN, CRIMINAL PROCEDURE CODE [HYEONGSA SOSONGBEOP] 804, n.3 (3d ed. 2005).

61) CPC, *supra* note 5, at art. 312(2).

62) DONGWOON SHIN, *supra* note 60, at 804, n.3.

63) *See, e.g.*, “The percentage of acquittal is fluctuating between 0.4% and 0.6%,” SANGKI PARK et al., CRIMINAL POLICY [HYEONGSAJEONGCHAIK] 432 (7d ed. 2003).

64) First of all, the old article 312(1) has been replaced with a new one, which requires that the defendant himself should recognize in an open trial the correctness of the protocol prepared by the prosecutor, see CPC *supra* note 5, at art. 312(1).

65) CPC, *supra* note 5, at art. 296-2.

suspects' statements as evidence has been substantially lowered. The other is to attack the admissibility of the other protocols which are made in the course of interrogating the witnesses, victims, and all the third parties. In consequence, the newly amended article declares that:

A protocol which contains a statement of the person other than the defendant, prepared by a public prosecutor, may be introduced into evidence, on the condition that the statement is subject to cross-examination by the defendant or his lawyer, if it is made under the due process and method, and that the genuineness thereof is proved by the person making the original statement at a preparatory hearing or during public trial, or by objective proof such as videotapes: Provided, that it is proved that the statement was made in specifically trustworthy circumstances.⁶⁶⁾

All this means that the validity and the legality of the prosecutor's pretrial examination will be fully inspected by the trial court using the exclusionary rule of evidence. The article emphasizes not only "specifically trustworthy circumstances" but also "due process and method." Even though they are guaranteed, what is recorded in the prosecutor's protocol should be "subject to cross-examination." Looking at the wording of the article, we cannot help concluding that the Korean prosecutor is no longer as nearly powerful as the examining magistrate. In a certain sense, the position of the prosecutor can be compared to that of the English JP whose role was closer to the police than to the prosecutors.⁶⁷⁾ It might be possible that the trial court considers the protocol made by the prosecutor as records that "only have the value of simple information."⁶⁸⁾

66) CPC, *supra* note 5, at art. 312(4).

67) Historical research shows that the records made by the JPs have been treated as inconclusive, and their foundational requirements are basically same with the wordings in the article 312(4). See "Sir Matthew Hale's account, bearing the impress of his judicial experience, underscores how exceptionally the depositions of witnesses were used in evidence, and how inconclusive the written examination of the accused might be: These examinations and informations ... may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not. But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession," JOHN H. LANGBEIN, *supra* note 6, at 29.

3. Conclusion

The fact that the Korean prosecutor comes to be compared to the English JP means that a transition occurs from the “prosecutorial justice”⁶⁹⁾ to another paradigm. It is visibly clear that the prosecutor is coming down from the place of magistrate to that of a subordinate to the examining magistrate, i.e. district judge.

V. Conclusion

I repeat that the prosecutorial neutrality has been at issue in Korea. Certainly, the prosecutorial work has been much distorted. However, the problem is not in whether the prosecutors are neutral or not. It is more dangerous the fact that he has the power which is not legally given to him. Even if he is not an examining magistrate or district judge, he seems to have the right to “compile an authoritative written dossier recording his examinations of witnesses and accused.”⁷⁰⁾ But this is not at all desirable. For there was also not any means to stop the prosecutor’s misuse of power.

All the more horrible was that the courts themselves aggravated this problem by abandoning their duty of control. Now, the Judiciary Reform in Korea begins to consider the prosecutor just as the commander of the investigation and, at the same time, as the proper party in an open trial. It means that the true adversarial system will be introduced and tried here. I am curious to see how the prosecutorial office will react in this paradigm shift. Visibly, the prosecutors are well prepared for the change.

However, we also need to remember that the prosecutor is still a member of the magistracy. He is in the control tower and there, he has to do a lot of things. To stop working as the judge, it is also a good thing for the prosecutor himself. He has to now find a way of cooperating with the examining magistrate as one of two key players of the whole criminal procedure.

KEY WORD: prosecution, inquisitorial, justice of the peace, civil-law tradition, interrogation

68) *Supra* note 51.

69) Kuk Cho, *supra* note 3, at 386.

70) JOHN H. LANGBEIN, *supra* note 6, at 33.

Does It Matter Who Wrote It?: The Admissibility of Suspect Interrogation Record Written by Prosecutors¹⁾ in Korea

*Yong Chul Park**

Abstract

The role of prosecutors in Korean criminal system has been changing very rapidly. The vast amount of discretion in terms of enforcing laws has not only been reserved for judges but prosecutors as well. As enforcers of justice, prosecutors had long enjoyed corroborative kinship with judges rather than having productive tension with them. The very existence of “Suspect Interrogation Record” had been one of the tokens proving the friendly relationship between judges and prosecutors. Suspect Interrogation Record is a fruit of the interrogation. At the end of the interrogation, the suspect is supposed to sign on a paper written by the interrogating authority. With the help of Suspect Interrogation Record, prosecutors have had easy time getting convictions. As the dynamics between judges and prosecutors changes, the Record does not have the strong presence in Korean criminal trials anymore. This article endeavors the issue of the changing dynamics centering around Suspect Interrogation Record to see how the discussion the Record has evolved over the years.

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1) Section 1 of Article 312 of Korean Criminal Procedure Act (KCPA) [*hyeongsasosongbeop*] (Law No. 341, Sept 23, 1954, last revised March 31, 2005 as Law No. 7427) [*hereinafter* “KCPA”] terms it as “A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor.”

I. Introduction

Allowing defense counsel to cross-examine the testimony of prosecution witnesses was one of two great initiatives taken by the bench to enhance the reliability of the evidence in eighteenth-century criminal trials. The other response to the dangers that emerged from prosecutorial practice in this period was to devise rules of evidence that excluded certain problematic types of proof.²⁾

Following the examples established by many other civil law countries,³⁾ Korea has had a tradition of treating rules of evidence as a small part of criminal procedure.⁴⁾ Some countries prefer to position the evidence rules in civil law status and some in common law status.⁵⁾ Although it is obvious that Korea is one of civil law countries, heavily relying upon judges' discretionary power, it was implicitly noted that a lot of detailed aspects of evidentiary rules were considered better if they were unwritten because those aspects were assumed to be left to judges who would decide when the matters will reach the bench.

In Korea, the vast amount of discretion in terms of enforcing laws has not only been reserved for judges but for prosecutors as well. As enforcers of justice, prosecutors had long enjoyed corroborative kinship with judges rather than having productive tension with them. It would not be exaggerating to say that oftentimes judges helped prosecutors to prove their cases. Geared to work as supporting partners to prove prosecutions, judges were not exactly impartial umpires.

The very existence and usage of "Suspect Interrogation Record"⁶⁾ had been one of the tokens that prove the friendly relationship between judges and prosecutors. With

2) John H. Langbein, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 178 (Oxford University Press: 2003) [*hereinafter* LANGBEIN].

3) *See generally* SANG HYUN SONG, *INTRODUCTION TO LAW AND LEGAL SYSTEM OF KOREA* (1983).

4) There are no separate rules of evidence in Korea. The evidentiary rules are a part of KCPA. Article 307 throughout Article 318-3.

5) Yong Chul Park, *Devising a Korean Adversarial System Using Thoroughly Detailed Evidentiary Rules*, JSD Dissertation 137 (January 2006). [*hereinafter* PARK].

6) Article 312(Protocol Prepared by Public Prosecutor or Judicial Police Officer) of the KCPA defines "Suspect Interrogation Record" as "A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor." Since the definition itself is not clear enough to inform readers what the Protocol means, I use "Suspect Interrogation Record" instead.

the help of Suspect Interrogation Record, prosecutors have had easy time getting convictions. Then, what is so called “Suspect Interrogation Record”? Before anyone is being formally charged with a certain crime, he/she holds a status as a suspect under any sort of investigation.⁷⁾ Suspects, once they are in the custody of interrogating authority such as the police and the prosecutions, will be under “direct” interrogation by either investigating authority. Suspect Interrogation Record is a fruit of the interrogation. At the end of the interrogation, the suspect is supposed to sign on a paper written by the interrogating authority. Here, the meaning of “direct” interrogation is that the suspect would be left alone with virtually no assistance of counsel for questioning. You might wonder how such sort of practice could be possible in Korea where the right to counsel is constitutionally guaranteed.⁸⁾ The key to understand this awkward reality is that regardless of attorney presence during interrogation, the counsel is not allowed to interfere.⁹⁾ The object for interrogation is the defendant, not the counsel. Therefore in effect, Suspect Interrogation Record, in nature, has worked as a record of confession elicited without ample assistance of counsel. Suspect Interrogation Record became such a crucial tool for the prosecution to have a guilty verdict.

Consequently, it is not a surprise that one of the most crucial features of Korean evidentiary rules is that those rules revolve around a protocol called Suspect Interrogation Record. Basically, Suspect Interrogation Record is hearsay evidence, because firstly it fits virtually every aspect of the definition of hearsay although the definition only accords with commonly acceptable one of hearsay in the United States.¹⁰⁾ That is, the Federal Rules of Evidence of the United States (the FRE) provides that hearsay is “a statement,¹¹⁾ other than one made by the declarant¹²⁾ while

7) PARK, *supra* note 5 at 139.

8) Section 4 of Article 12 of Constitution of the Republic of Korea [*heonbeop*] provides:

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act..

9) Jin-Yeon, Chung, *Constitutional Contents and Limits to the Right of Counsel — With Special Reference to Interrogation of Suspect and Presence of Counsel*, SUNGKYUNKWAN LAW REVIEW, Volume 18-3, at 644-645 (2006).

10) A prominent prosecutor argues that any out-of-court statement against interest by the accused can be admissible as an exception to hearsay in the United States (Wan Kyu Lee, *The History and the Future of Evidentiary Rules in the Korean Criminal Procedure Act*, The 50th Anniversary Conference for Korean Criminal Law Association (2007), at 134) Obviously, such argument is flawed because only some of out-of-court statements against interest by the accused can be found admissible as long as it fits specific exceptions to hearsay.

testifying at the trial or hearing, to prove the truth of the matter asserted.” Still, the KCPA does not tell what hearsay means in Korea. However, considering where Suspect Interrogation Record sits, there should not be any doubt that the Record is a hearsay.

Because of the strong presence of Suspect Interrogation Record in Korean criminal trials, there could be a big chance that many wrongful convictions, if any, were made based upon the defendant’s own confession to a crime he/she did not commit. Such possibility of wrong conviction should not be overlooked and the history did not respond to leave provisions on Suspect Interrogation Record intact. This article endeavors to issue the changing dynamics centered around Suspect Interrogation Record to see how the discussion regarding the Record has evolved.

II. History toward Progression

As mentioned before, arguably Suspect Interrogation Record has been in the center of evidentiary rules partially because the matter is inevitably intertwined with hearsay evidence in the KCPA. Also, the Record had continued to give an edge to the prosecutions, because the function of it was a record of confession made while there was no presence of attorney. However, the existence of the Record faced many challenges and these challenges result in changes. The change in the KCPA regarding Suspect Interrogation Record started from the Korean Supreme Court’s taking a different position on that. From a different perspective, the historic shift toward having adversarial court system has forced the court to rethink their perspective on Suspect Interrogation Record over the years.

In this chapter, firstly I want to address the past in terms of law and court decisions on the Record. Secondly, how the transformation in court decision affected the changes in law will be explained. Thirdly, I hope to conclude this chapter by talking about some issues left to be desired for the future resolution.

11) FED. R. EVID 801(a) provides that a “statement” is (1) oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

12) FED. R. EVID 801(b) provides that a “declarant” is a person who makes a statement.

1. It Really Mattered Who Wrote It

1) Law Was Different Depending upon Who Wrote It

As noted, the admissibility of the Record was quite different depending upon who performed the interrogation.¹³⁾ The Section 1 of Article 312 of KCPA¹⁴⁾ provides that “a protocol which contains a statement of a suspect ..., prepared by a public prosecutor” may be admissible in court, if the suspect — then the accused acknowledged the genuineness of the Record “at a preparatory hearing or during the public trial” The Section continues saying that in case of the protocol is written by a public prosecutor, even if the defendant does not acknowledge or verify the genuineness of the statement “at a preparatory hearing or during the public trial” as long as there are “circumstances where the statement was made under such circumstances that is undoubtedly believed to be true” the statement would be admissible. It is believed that “such circumstances that is undoubtedly believed to be true” is equivalent to “special indicia of reliability” in the United States. That is, the KCPA cut a prosecutor some slack by providing a way to admit the Record prepared by her when the accused does not want the Record to be used in trial. However, still a lot of lingering questions would remain. What does it mean by “verification of genuineness of the statement”? What kind of accused would be willing to do such verification or acknowledgement? How can a public prosecutor prove that there is

13) See generally Kuk Cho, *The Admissibility and Verification of Genuineness of an Interrogation of a Suspect Made by Prosecutors — Confirmation of Prosecutorial Justice by Courts*, CRIMINAL CASE STUDY Vol. 9, THE KOREAN CRIMINAL CASE STUDY SOCIETY, PARKYOUNGSA (2001).

14) Article 312 (Protocol Prepared by Public Prosecutor or Judicial Police Officer) of the KCPA provides:

(1) A protocol which contains a statement of a suspect or of any other person, prepared by a public prosecutor, or a protocol containing the result of inspection of evidence, prepared by a public prosecutor or judicial police officer, may be introduced into evidence, if the genuineness thereof is established by the person making the original statement at a preparatory hearing or during the public trial: Provided, That a protocol containing the statement of the defendant who has been a suspect may be introduced into evidence only where the statement was made under such circumstances that it is undoubtedly believed to be true, regardless of the statement made at a preparatory hearing or during public trial by the defendant.

(2) A protocol containing interrogation of a suspect prepared by investigation authorities other than a public prosecutor may be used as evidence, only in case where the defendant who has been a suspect, or the defense counsel at a preparatory hearing or during public trial verifies the contents of the protocol

[This Article Wholly Amended by Act No. 705, Sep. 1, 1961].

“special indicia or reliability” in the Record when the accused denies the genuineness of the Record?¹⁵⁾

So far we have observed how the Record made by prosecutors was treated in the court, then what about Suspect Interrogation Report written by the police? Section 2 of Article 312 of the KCPA¹⁶⁾ provides that unless the accused does “verify the content of the protocol” such statement would never be admissible. In other words, there is no “special indicia of reliability” leeway where such statement can be found to be admissible in case the accused refuses to verify the content. Also, the verification should amount to admit the fact that the content of the Protocol was consistent with her intention. “Verifying the content” is a much stronger word than just acknowledging the genuineness of the statement provided in Section 1 of Article of KCP which was applied to the Record written by the prosecution. What would be the justifying explanation for such discrepancy between the Record written by the prosecution and by the police? The reason of differentiating the level of admitting the Record seems to be stemming out of the prosecutors’ superior status to the police.¹⁷⁾ Also, one convincing argument for the difference was that prosecutors are obliged to be objective pursuant to the law¹⁸⁾ therefore they are more trustworthy than the police in terms of not committing to any illegal means to elicit confession.¹⁹⁾

15) I try to answer to these questions in the later section of this Article.

16) Article 312 of the KCPA, *supra* note at 14.

17) Section 1 of Article 196 of the KCPA provides:

(1) Investigators, police administrative officials, police superintendents, police captains or police lieutenants shall investigate crimes as judicial police officers under instructions of a public prosecutor.

Also, Section 1 of Article 4 of Public Prosecutor’s Office Act provides:

(1) The public prosecutors shall have the following duties and authority as representatives of the public interest:

2. The direction and supervision of judicial police officials with respect to the investigation of crimes.

Professor Kuk Cho explains; “The investigative authorities are composed of two bodies. First, police are a subsidiary organ of the prosecution, lacking independent powers of investigation.” (Kuk Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea*, 30 DENV. J. INT’L. & POL’Y 377, 381 (Summer, 2002) [*hereinafter* CHO 1].

18) Section 2 of Article 4 of Public Prosecutor’s Office Act provides:

(2) In performing his duties, the public prosecutor shall observe political neutrality as a servant of the people and shall not abuse the powers bestowed upon him <Newly Inserted by Act No. 5263, Jan 13, 1997>.

19) See CHO 1, *supra* note at 17.

2) Acknowledging the Genuineness of the Record

There had been two ways of interpreting the acknowledgment of the genuineness of the Record provided in Section 1 of Article 312 of the KCPA, which was reserved only for the Record written by a prosecutor. The first one is so called “formal acknowledgment” where the defendant admits the fact that she signed the Record at the end of interrogation. The second one is referred to as “substantial acknowledgment” where the defendant verifies the content of the Record. The Supreme Court of Korea had been very firm in upholding a presumptive position in this acknowledgement area. That is, once formal acknowledgement was made by the defendant then substantial acknowledgment is presumed to have been made as well.²⁰⁾ Such theory of presumption was another way of giving leeway to the prosecutions, because formal acknowledgement was easy to obtain as long as the signature of the accused was on the Record.

On the other hand, pursuant to section 2 of Article 312 of the KCPA, to be able to admit Suspect Interrogation Record written by the police, the accused needs to do substantial acknowledgment. That is, the weight of admissibility was different depending upon who was the writer of the Record. It is common sense that no accused would be willing to give substantial acknowledgement for Suspect Interrogation Record written by the police. For that reason, in order to avoid any expected danger of Suspect Interrogation Record being excluded because it lacks admissibility due to the refusal from the defendant in terms of verifying the content of the Record, same interrogation had to be redone by prosecutors. Such tradition caused unnecessary workload for the prosecutors to redo all the interrogation process just to make another Suspect Interrogation Record by her.

2. New Chapter of Suspect Interrogation Record

1) The Change in Holdings

Abovementioned, in terms of having two-tier system — formal and substantial

20) Decision of Jun. 26, 1984, 84 Do 748 (Korean Supreme Court); Decision of Jun. 23, 1992, 92 Do 769 (Korean Supreme Court); Decision of May. 12, 1995, 95 Do 484 (Korean Supreme Court); Decision of Jul. 28, 2000, 2000 Do 2617 (Korean Supreme Court).

acknowledgment — with respect to verifying “the genuineness of the statement, as the close tie between the prosecutions and the court has been estranged or the Korean society has become more interested in approaching adversarial court system depending upon how people see it, the court’s firm stance on presumptive theory on Suspect Interrogation Record, which had been heavily criticized, began to soften up.

Finally, the Korean Supreme Court came down with a ruling²¹⁾ that even in a case of Suspect Interrogation Record written by a prosecutor, substantial acknowledgment by the accused is necessary to be able to admit such Record. With such ruling, the Court practically found that the Record written by a prosecutor would hold the same status as of the Record by the police. The change in a Supreme Court’ ruling startled the prosecutor’s office as well as subordinate courts because it practically meant that it became much easier for the defendant to wipe out the admissibility of the Record by simply refusing to verify the content of it. The inevitable discrepancy between the Court decision and the law demanded changes in the KCPA.

2) The Advent of New Criminal Procedure

In October 2003, Committee on Judicial Reform was established in the Supreme Court to revolutionize the legal system in Korea.²²⁾ The baton for judicial reform was passed onto Presidential Committee on Judicial Reform, which was formed in January 2004.²³⁾ A part of effort the Committee was committed to make was to change the law on Suspect Interrogation Record written by a prosecutor. The Committee recommended a new revolutionary measure which excludes the admissibility of Suspect Interrogation Record. However, this attempt faced a fierce resistance from the Prosecutors’ office and finally was rejected.

As a result, only a few changes regarding Suspect Interrogation Record being reflected in the review process, the new Korean Criminal Procedure Act was passed in the National Assembly of the Republic of Korea on April 30th, 2007. The new Section 1 of Article 312 of the KCPA confirms that there should be substantial acknowledgment to be able to admit Suspect Interrogation Record written by a

21) Decision of Dec. 16, 2004, 2002 Do 537 (Korean Supreme Court).

22) For information regarding history and activities of Presidential Committee on Judicial Reform, available at <http://www.pcj.go.kr/about008.asp> (last visited Sep. 15, 2007).

23) *Id.*

prosecutor. The new Section 2 of Article 312 of the KCPA continues to provide that one way of proving substantial acknowledgment in case the accused refuses to acknowledge the genuineness of content is by using videotapes which filmed the interrogation process.

3. Unfinished Business

In this chapter I want to address the issues which should be discussed and made to become real in the near future. Although the new version of the KCPA changes many aspects of evidentiary rules including Suspect Interrogation Record, it leaves much room for improvement.

1) Special Indicia of Reliability

Although the new KCPA reaffirms that the substantial acknowledgment is necessary for Suspect Interrogation Record written both by the prosecutions and by the police, proving special indicia of reliability, which is the next step of making admissibility decision, is still being left for interpretation. The Constitutional Court of Korea found that special indicia of reliability requirement in regard to Suspect Interrogation Record is constitutional, although some minority opinion added that there should be clarity in terms of how to prove special indicia of reliability.²⁴⁾ The new KCPA leaves much to be desired in that regard. It merely suggests that videotaping of the interrogation would be able to work as the means of proving that there was genuine acknowledgment by the accused during interrogation. At the end, special indicia of reliability decision are still being left to judges to make, which I think a remnant of inquisitorial court system.

2) Need of Defense Lawyer Presence

Abovementioned, lawyer's presence can be meaningful only when she can actually defend the client. At the moment, the role of defense lawyer is minimal. Although the newly made Section 1 of Article 243-2 of the KCPA provides that a

24) Decision of May 26, 2005, 2003 Hun-Ka 7 (Korean Constitutional Court)

lawyer can be present when the law enforcement interrogate suspects, the Section 3 of same Article only goes on to say that the lawyer participating in the interrogation is able to object when the interrogation method is unjust and she can opine upon the approval of the law enforcement personnel such as a police officer or a prosecutor.

It is true that you can hardly expect to be perfect from the outset. However, the fact that a defense lawyer cannot function as a direct channel for interrogation leaves a room for improvement. To be able to achieve the true meaning of assistance of counsel and presumption of innocence, the interrogation and questioning should be addressed to the counsel, not to the suspect. The law should be made toward that direction in the near future.

3) Is Suspect Interrogation Record Truly Necessary?

Originally, the members of Presidential Committee on Judicial Reform intended to wipe out the existence of Suspect Interrogation Record, because as mentioned above, they saw the Record obviously outweigh the demand for the right for fair trial bestowed to the accused.²⁵⁾ Although they failed to do so due to strong resistance from prosecutors, the attempt has led to a discussion that the Record itself is now useless because videotaped interrogation can be used to verify the content of Record pursuant to new Section 2 of Article 312 of the KCPA.

On the other hand, there might be no objection in admitting the Record as long as the right to counsel is being strictly guaranteed during suspect interrogation. If this were reality, the Record would not be such an attractive tool for the prosecutions to prove their cases because confession would not be elicited easily. Also, to begin with, confession should not be a vital form for getting convictions. That is, testimonial evidence such as the Record should not have too much weight in proving cases. Rather, real evidence such as DNA evidence, fingerprints, weapons used for the charged offense should be given more weight. Arguably, that will give a better chance for the defense to have a fair trial. In addition, as jury system will be in place for certain cases where the defendant want to have a jury trial,²⁶⁾ Suspect

25) For information regarding discussion on admissibility of Suspect Interrogation Record written by a prosecutor, available at http://news.naver.com/news/read.php?mode=LSD&office_id=086&article_id=0000021131§ion_id=102&menu_id=102 (last visited Sep. 27, 2007).

26) For the information on jury trial in Korea and the recent mock trial, available at <http://service.joins>.

Interrogation Record might not be a positive tool for the defendant. That gives one more reason that the Record should be gone out of the window in the near future.

4) Lack of Hearsay Provisions

Although the revised version of KCPA was a great attempt to transform the criminal court in Korea, it lacks many provisions on evidentiary rules. Specifically speaking, the new KCPA hardly adds any additional exceptions to hearsay.²⁷⁾ Even if it would be nearly impossible to elaborate exceptions as the Federal Rules of Evidence in the United States do given the fact that there has not been any historical background on hearsay, a meaningful attempt for equipping the evidentiary rules with hearsay exceptions would be necessary. This matter needs to draw more attention in the near future.

III. Conclusion

Giving a special treatment for Suspect Interrogation Record written by a prosecutor is a relic of inquisitorial system where judges and prosecutors work as one set in criminal justice system. However, the history of Record shows how court decisions affect the change in law even in a civil law country. The change was not made independently from how the society desires the way criminal justice system should work. Also, the judicial reform does not happen overnight. The change regarding the admissibility of Suspect Interrogation Record written by a prosecutor was the first step toward having a true adversarial system where the right of the accused can be guaranteed in more meaningful way. People's desire to have fairer criminal justice system will be fulfilled when both the prosecutions and the defense share level playing field.

KEY WORD: Suspect Interrogation Record, Special Indicia of Reliability, Formal Acknowledgment, Substantial Acknowledgment, Hearsay

com/news_asp/mt_article.asp?aid=2007091019173118876 (last visited on Sep. 28, 2007).

27) The only one added exception to hearsay is Section 2 of Article 318-2, where a videotaped interrogation of the accused or any other witness can be used to refresh his/her recollection for the matter. One limitation in using such a videotape is that tape should be shown only to the person who was filmed: it cannot be used to show anyone else.

Prosecutor, Police and Criminal Investigation in Korea: A Critical Review

Changwon Pyo*

Abstract

The criminal investigation procedure is carried out under the direction of prosecutors who dominate power to investigate and prosecute, in Korea. The written record of interrogation resided by a prosecutor during investigation process is accepted as strong evidence in court even without or against the defendant's verbal testimony in court, unless clear evidence of torture or deception is presented by the defense. Before prosecution of a case, police can detain a suspect for 10 days upon issuance of a court warrant requested by a prosecutor. After turned over to the prosecutors' office from the police, a suspect can be detained for 20 more days by the prosecutors' office for further investigation before prosecution is made.

The balance of power between the accuser and the accused is one of the basic conditions for seeking Justice and protecting human rights in criminal procedure. That critical balance is lost in Korea, where the prosecution is regarded as 'the Untouchables'. Checks and balances between the investigator and the prosecutor is lost as well in Korea, where the Prosecutor is the investigator, director of police investigation and the prosecutor at the same time.

On the other hand, lack of public trust in the police who maintains dinosaur-like national force and the unwashed bad images from the Japanese colonial rule and the military dictatorship era have not been allowing the police the power of criminal investigation.

Being one of the developed and advanced countries in Asia, Korea needs to establish balance in the criminal investigation procedure.

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I. General Situation of Criminal Investigation in Korea

In Korea, criminal investigation is widely accepted as the ‘accessory process’ of criminal prosecution, leaving prosecutors to monopolize the power involved in criminal investigation.¹⁾ As illustrated in the following figure,¹⁾ the criminal investigation procedure is carried out under the direction of prosecutors who dominate the power to investigate and prosecute in Korea. The written record of interrogation resided by a prosecutor during an investigation process is accepted as strong evidence in court. This is even without or against the defendant’s verbal testimony in court, unless clear evidence of torture or deception is presented by the defense. Before prosecution of a case begins, police can detain a suspect for 10 days upon issuance of a court warrant requested by a prosecutor. After being turned over to the prosecutors’ office from the police, a suspect can be detained for 20 more days by the prosecutors’ office for further investigation before prosecution is made.

The basic features of the Korean criminal investigation procedure can be summarized as the table below:

Table 1. basic features of the Korean criminal investigation procedure

1	While prosecutor is responsible for criminal investigation by law, police carry out and take responsibility of investigating 96% of all recorded criminal cases in reality. ²⁾
2	Prosecutor is involved in criminal investigation from the outset. ³⁾
3	Since prosecutor dominates the whole criminal investigation procedure, the balance of power between prosecution and defense is broken. ⁴⁾
4	‘Paper trial’ relying on documents presented by both sides is a normality, hence written testimonies and confessions made during prosecutor’s investigation take dominant status among all evidences. ⁵⁾

1) Bo-Hak Seo, *The Need For Rational Re-Distribution of Criminal Investigative Power Toward Its Neutralization*, Seminar Proceedings of Korean Society of Constitution (2002).

2) Bo-Hak Seo, *Investigative Power, Monopoly or Distribution? — A Review On The Request By The Police For Investigative Power —*, JOURNAL OF CRIMINAL LAW REVIEW, No. 12 (1999).

3) Criminal Procedure Law of Korea, §195 & 196; Criminal Police Code of Practice §2 ① rule that “Criminal Investigation is the duty and function of the prosecutor. Police officer must carry out investigation when directed by a prosecutor. The role of police officers below the rank of Inspector is limited to assist investigation under the direction of a prosecutor or police officer above the rank of Inspector.” Also, according to the Prosecutors’ Office Act §53, police officers must obey the orders from prosecutors.

4) While the criminal court takes adversarial system, the criminal investigation procedure follows inquisitorial

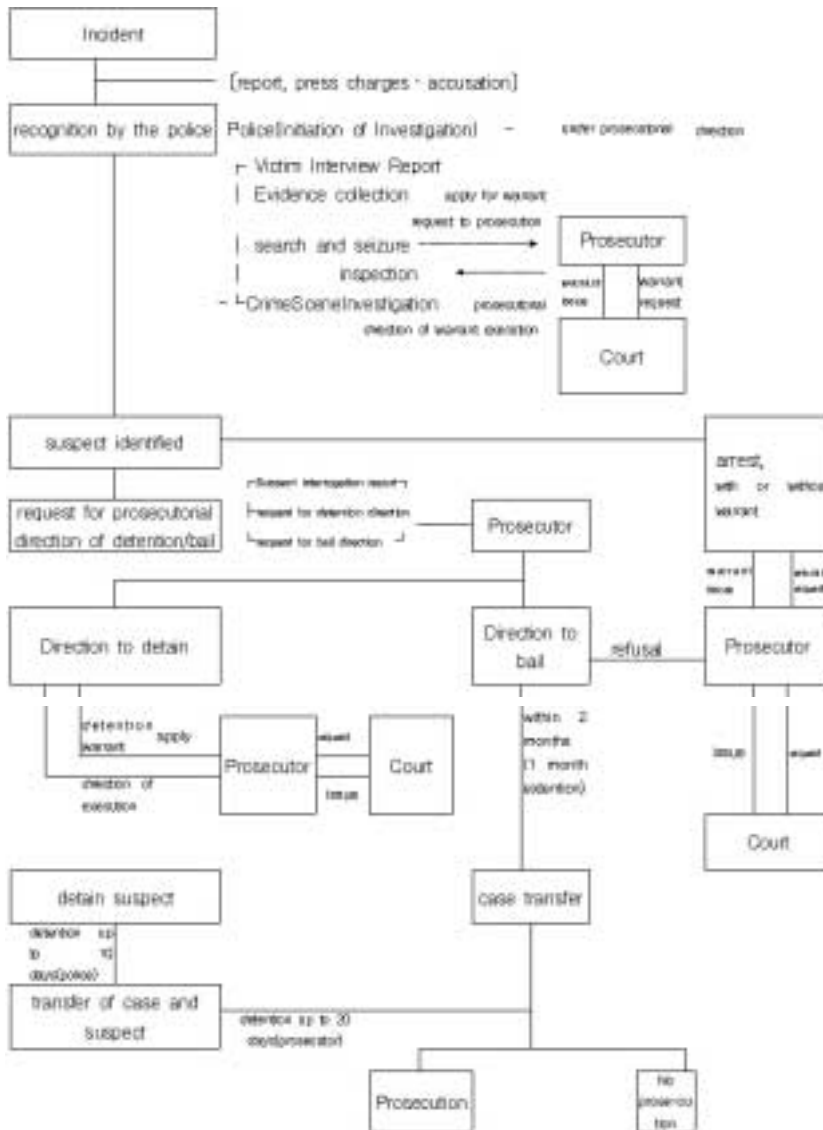


Figure 1. Criminal Investigation Process

principles allowing prosecutors much bigger power as inquisitors in Korea.

5) Criminal Procedure Law, §312.

Prosecutorial control of or interference with police investigation in Korea has 2 conflicting implications. While such a system makes direct judicial control over criminal investigation procedure difficult, close and constant quasi-judicial monitoring and control by a legal expert is possible. It is said that Korea follows Continental-European legal tradition. However, unlike other countries with Continental-European legal tradition such as Germany and France, the Prosecutors' office is a bureaucratic organization functioning totally out of judicial control in Korea. Prosecutors themselves carry out criminal investigation by directing and controlling their own subordinate officers just like police officers. Being investigating officers themselves, the Prosecutors' office and prosecutors have been pointed out as one of the prime human rights violators.

II. Problems Embedded in Korean Criminal Investigation Procedure

1. Breach of 'Equality Before Law' Principle

In Korea, prosecutors are widely regarded as 'the untouchables' or 'people above the law'. Until 1995, the Prosecutors' Office had operated "the rule of dealing with criminal cases involving officials belonging to the Ministry of Justice." This rule forces police officers to hand over Ministry of Justice officials, including prosecutors and their subordinate officers who have been involved in any criminal case, and the case to the Prosecutors' Office.⁶⁾ Although the rule itself was abolished in 1995, prosecutors are not and cannot be investigated by any one but prosecutors themselves when they are involved in criminal activities.⁷⁾ As a result, unless a suspect dies during an interrogation⁸⁾ or the parliament requests to set up 'Independent Prosecutor' to investigate a widely acknowledged corruption scandal, criminal investigation against a prosecutor is a rare incident like 'snow in Summer,' even

6) "The rule of dealing with criminal cases involving officials belonging to the Ministry of Justice" was abolished on the 10th March 1995.

7) Constitution of Korea §12 ③ says "Only Prosecutor can apply for court warrants"; Criminal Procedure Law § 195 and §196 gives prosecutors exclusive power of carrying out criminal investigation and of directing police investigation.

8) Joong-Ang Daily (2002. 11. 06).

when reports or accusations of crimes such as torture, abuse of power or bribery taking are made against them. In 2003, although a defense attorney openly claimed that he had been tortured some years ago by a prosecutor who is now the chief of a provincial prosecutors' office, no criminal investigation procedure had been initiated.⁹⁾ In 2002, the Independent Commission Against Corruption, which was set up to deal vigorously with corruption problems in public sector, investigated and collected substantial amount of evidence regarding a suspicion of huge amount of bribery taking by one of the top prosecutors. The Commission also sent the case to the Prosecutors' office for official criminal investigation and expected a legal action to follow according to the procedure written in Anti-Corruption Law. However, the Prosecutors' office decided not to take further actions regarding that case.¹⁰⁾

Moreover, it has been worried that not only prosecutors or officers working for the prosecutors but others who have personal ties or common interests with prosecutors may enjoy 'above the law privilege' just like their prosecutor friends.¹¹⁾ This public distrust in 'fairness' arises almost whenever criminal suspicions are made against people with power or money assuming they may be friends of the mighty prosecutors.¹²⁾

2. Possibility of torture or abuse of power : Extracting confession

Korean Constitution and Criminal Procedure Law prohibits torture as any other countries do. However, not only in the police but also in the prosecutors' office, have suspects died or been injured during interrogation aimed to extract confession. A judge argued that clause 312 of the Criminal Procedure Law, which provides interrogation reports to be made by a prosecutor with admissibility as evidence, is one of the reasons.¹³⁾ When a case lacks hard evidence but investigators have strong

9) Se-Gye Daily, "Prosecutor Wonchi Kim Ordered To Torture" (2003. 03. 15).

10) MBC "PD Note", 'Independent Commission Against Corruption — No Power to Investigate Corruption' (2002. 8. 27).

11) Se-Gye Daily, "Head of Criminal Organization Arrested by The Police, Set Free by The Incheon Prosecutors' Office" (1990. 11. 17); Hangeore Daily, "Sleazy Connection Between Powerful People and Criminal Organization Revealed" (1990. 12. 02).

12) Yeonhap News, "Prosecutors' Spear Could Not Get Through Samsung's Shield" (2005. 12. 14).

13) Chosun Daily, "Confession Made At the Prosecutor's Office Confirmed Admissibility and Evidentiality" (2003. 02. 20).

suspicion on a suspect, confession written in the prosecutor's interrogation report secures a conviction by the power of clause 312. Investigators, whoever it may be, are tempted to use any measure to extract confession out of the mouth of a suspect. Especially, since prosecutors participate in the criminal investigation procedure from the outset sharing suspicions with detectives, there is a high possibility of a case with a wrong start to end up with wrong conviction without proper judicial or prosecutorial interference.

3. Prosecutor: "The Monopolizer"

The super-powered prosecutor get even stronger with additional powers. A prosecutor is given absolute discretion in deciding whether or not to prosecute.¹⁴⁾ There is no 'committal for trial' which enables the court to review the legitimacy of a prosecution in Korean criminal justice process. No appeal is possible against a prosecutor's decision not to prosecute in most criminal cases, other than appealing to the superior prosecutor among its hierarchy.¹⁵⁾ Prosecutors forming a military-like bureaucratic hierarchy with strict ranks and chain of command structure occupy the whole criminal justice system except the court. Even the Director of probation service is a prosecutor and execution of court orders and collection of fines are prosecutors' job. If someone fails to pay the fine, a prosecutor orders a police officer to arrest and put the person in jail.¹⁶⁾ Cause 4 of The Prosecutor's Office Law declares the powers and duties of prosecutors as the following:

1. To carry out Criminal Investigation, Prosecution and presenting a criminal case at court.
2. To Direct and supervise police regarding criminal investigation.
3. To require the court to justly apply law.
4. To Direct and supervise the execution of court decisions.
5. To carry out, direct or supervise law suit or tribunal where the state is involved.

14) Criminal Procedure Law of Korea, §247.

15) Appeal to court against a prosecutor's decision not to prosecute is possible only in cases involving public official's abuse of power, according to Criminal Procedure Law of Korea, §260.

16) Criminal Law of Korea, §69.

6. Other powers given by other laws or regulations.

III. Attempts to Re-balance Power in Criminal Investigation

1. Request for Checks and Balances in the Criminal Justice System

Voices requesting reform in the ill-balanced criminal investigation procedure and the over-powered prosecutors' office have come out from various sectors of the society including academia, civil liberty groups and the press. Attempts to reform the Prosecutors' Office Act and to introduce permanent Independent Prosecutor and an independent investigating office exclusively dealing with accusations regarding government officials (including prosecutors) with high positions are among such efforts. However, each of such attempts has been confronted by fierce opposition from prosecutors and have been failed.¹⁷⁾

2. Police-Prosecutor Conflict

The most uncomfortable challenge for prosecutors and the strongest as well as the most persistent demand for re-balancing power in the criminal investigation system has come out from the police. The history of police-prosecutor conflict actually coincides with the history of Korea itself. The United States Military Authorities who had ruled Korea between the end of the Japanese colonial regime in 1945 and the establishment of Korean government in 1948 declared that criminal investigation should be carried out by the police while prosecution should be the job of the prosecutors through enactment of [Rule No. 20, Clause 1 a, 1945. 10.30]. Subsequent implementation of the [Order for Prosecutors No. 3, 1945. 12.29] even prohibited prosecutors to direct or intervene with police investigation in order to secure independent investigation by the police.¹⁸⁾

17) Changwon Pyo, *Division of Labor in Criminal Investigation Is The Short Cut To Protecting Human Rights*, THE KOREAN SOCIETY OF CRIMINOLOGY JOURNAL, Vol. 15, No.1, June (2003).

18) Dong-Un Shin, *A Historical Review On The Prosecutor's Power Of Directing Criminal Investigation (I) (II)*, SEOUL LAW REVIEW, Vol. 42, No. 1 · No. 2 (Seoul National University, 2001).

Legal professionals including prosecutors who had been accustomed to 'Prosecutor-led investigation system' of the Japanese colonial era were confused by and not satisfied with the new arrangement. The heavy use of former colonial police officers by the new police, in need of efficiency and effectiveness in the fighting against communists and establishing social order, added public worries and discontent on the autonomous police investigation. In the 1954, when the first Criminal Procedure Law of Korea was formulated, the question of 'who should be in charge of criminal investigation' became one of the hottest issues among lawmakers. During the parliamentary hearing held on the 9th January, 1954, the then Member of the Parliament Sang-Seob Um was recorded to say "Monopolization of power will result in 'fascio' and abuse of power ... 'prosecutors' fascio' is better than 'police fascio.' Hence, the power of criminal investigation is better given to prosecutors. However, in the future, we will have to proceed toward separating power of criminal investigation from power of prosecution."¹⁹⁾ The then Director of Prosecutors' Office Gyekman Han added "theoretically, it is right to leave criminal investigation function with the police and to allow prosecutors prosecution power only. In reality of Korean situation, however, putting police under prosecutor's control and combining criminal investigation with prosecution is right."²⁰⁾ Since then power struggle between the police and the prosecutors' office has continued and been used by political powers in the ruling of the society. The first President of Korea Seungman Lee²¹⁾ used police as if his own private servants, adopting a police officer as his son. In return, the police enjoyed almost limitless power leaving prosecutors ignored and daunted. General-turned-President Jeonghee Park²²⁾ who took power by military coup needed prosecutors' assistance to revise Constitution and laws in order to legitimize his military regime. Prosecutors utilized this opportunity to enlarge their power. Revising Constitution, the prosecutors added a new clause limiting application of warrant only to prosecutors. Revised Prosecutors' Office's Act allows no one but prosecutor to investigate officials belong to the Department of Justice and Prosecutors' Office.²³⁾ During the General Chun's rule,²⁴⁾ the police who blocked continuous civil unrests,

19) Changwon Pyo, *supra* note 17.

20) *Ibid.*

21) Seungman Lee was elected as the 1st President in 1948 and ousted by the '1960 Civil Revolution.'

22) President Jeonghee Park was assassinated by the Chief of Intelligence Agency in 26 October 1979.

23) T.S. Kim, et. al, *COMPARATIVE CRIMINAL INVESTIGATION SYSTEM*, 76 (Bak-Young-Sa, 2004).

students' resistances and labor struggles against the military regime, got close to the ruler whose brother was a police officer. The next General-turned-President Taewoo Roh whose brother in law was a prosecutor utilized prosecutors to suppress opposition leaders and to control conglomerates and companies. The police was put under prosecutors' even stricter control. Whenever attempts to secure independent investigation power are made by the police, prosecutors arrested high ranking police officers for charges such as corruption, consequently re-enforcing the public distrust in the police. In the 1997 Presidential election campaign, the opposition candidate Dae-Jung Kim, a well known dissident leader who had suffered from oppressive criminal justice organs and been sentenced to death for treason, included 'Independent Police Investigation' and 'Decentralization of the Police' in his list of public commitments for his presidency. He believed that that diversification of power and setting up a system of checks and balances between the police and prosecutors is one of the preconditions for democracy. Although Dae-Jung Kim won the election and became the President, his 2 criminal justice reform pledges of 'Independent Police Investigation' and 'Decentralization of the Police' did not come true. As soon as the President Kim's reform project began, the war between the police and prosecutors started. Accusations on each other, opinions for and against the reform project and conflicting views on the current Korean Criminal Justice System have offensively been expressed in the media from both the police and the prosecutors' office. Soon after the brother of the Police Chief was arrested by a prosecutor, suspicion on the corrupt deals involving the wife of the Director of the Prosecutors' Office was released to the media by anonymous police sources. Eventually, the President Kim had to issue a "Special Presidential Order" preventing both the police and the prosecutors from making any kind of talks or expressions regarding the issue of Criminal Investigation System Reform. As the police claimed the independent criminal investigation power is the precondition for decentralization of the police organization, the police decentralization process was stopped also. Similar happenings and process have been replayed during the Presidency of Moo-Hyun Roh who won the 5 years' term in the year 2002. It can be said that past Presidents and powerful politicians in Korea, conservative or progressive, tried to use and utilize

24) General Do-Whan Chun was the Chief Investigator of the late President Park's assassination and took power taking advantage of the chaotic and power-vacuum situation in 1980. In 1987, his friend General Roh succeeded the Presidency through election.

rather than to solve the deep rooted police-prosecutor conflict and left the Criminal investigation Procedure unbalanced.

IV. Conclusion

The balance of power between the accuser and the accused is one of the basic conditions for seeking Justice and protecting human rights in criminal procedure. That critical balance is lost in Korea, where the prosecution is regarded as ‘the Untouchables.’ Checks and balances between the investigator and the prosecutor is lost as well in Korea, where the Prosecutor is the investigator, director of police investigation and the prosecutor at the same time.

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Being one of the developed and advanced countries in Asia, Korea needs to establish balance in the criminal investigation procedure.

KEY WORD: Investigation, Police, Prosecutor, Power, Korea

Patent Litigation in Korea

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Abstract

For the past thirty years, the substantive laws of Korea in the filed of patent protection have developed very fast so that their statutory provisions are almost the same as those of advanced countries like the U.S.A. However, the reality of patent protection in Korea is somewhat different from the statutory provisions themselves. While the reality of patent protection depends upon the practice of patent litigation, the practice in Korea illustrates several problems and faces a few challenges.

10 years ago, the Patent Court was established in Korea. Although the Patent Court has been doing its job very well in general, the relevant industry is not satisfied with its non-obviousness test. Since the concept and criteria of non-obviousness is the most important in patent litigation, the Patent Court of Korea must try and provide a more clear and certain test to the industry so that the industry or potential inventors understand what level of inventiveness is required for patent protection. Given the fact that invalidity of a patent is raised often as a defense in patent litigation, a more clear and certain non-obviousness test is essential to lower patent disputes in the future.

Japan and Korea is still based on the two-tier litigation system: Although damages and injunctions against patent infringement is litigated in judicial courts, invalidity of patents should first be filed with the Intellectual Property Tribunal. The Patent Court may only take invalidity cases as a second trial court after the Tribunal. While ordinary judicial courts are not allowed to deal with the invalidity issues, the Patent Court are not allowed to deal with remedies such as damages or injunctions. Consequently, the patent right owners and alleged infringers will all have to go through two tier procedures for a long time with a lot of costs. The paper suggests that the two-tier system should now change.

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I. Introduction

Once a patent is issued, a patentee may bring a lawsuit against someone accused of patent infringement. Two procedures are available as legal relief: one, requesting injunctive remedy through a preliminary injunction action, and the other, claiming damages or seeking permanent injunction from the patent infringement. Unlike US patent law, patent infringement under Korea's patent law is a criminal offence subject to criminal procedures. More specifically, if the patentee brings forth an accusation to the public prosecutor's office, the prosecutor's office will file a criminal suit against the patent infringer, and when proven guilty, a person who infringes a patent right or exclusive license is liable to imprisonment not exceeding seven years or to a fine not exceeding 100 million Korean won.¹⁾

In many cases, there are two defenses to such a suit: one, the accused infringer may argue that the patentee's patent is invalid ("invalidity defense") and two, the accused infringer may argue that even if the patent is valid, the accused products do not infringe upon the patent ("non-coverage defense"). In relation to the invalidity defense, the Patent Act states that an invalidation trial must convene to invalidate a patent.²⁾ Even if the elements of novelty and inventive step are missing, a registered patent is considered valid and therefore, before the invalidation trial decision is finalized, even the courts cannot find a patent invalid in separate infringement proceedings. In this way, Korea's Patent Act is very different from that of the US, where the invalidity defense is allowed in an infringement suit. In relation to the non-coverage defense, alongside arguing that the defendant's product or service differs from the patented invention of the plaintiff, the Patent Act allows the defendant to opt for a "Trial to confirm the scope of a patent right" procedure to verify that their product/service is outside the scope of an existing patent right. In the following sections, substantive and procedural issues relating to patent dispute trials will be discussed.

1) Article 225 of the Patent Act.

2) Article 133 of the Patent Act.

II. Dispute Resolution through a Trial

1. The Significance of the Trial

Appealing a general administrative disposition usually requires only bringing a cancellation trial to the court, whereas appealing the decision of the Korean Intellectual Property Office (“KIPO”) requires the appellant to request a trial at the Intellectual Property Tribunal (“IPT”) before initiating a cancellation trial at the courts. This is due to the “administrative trial prerequisite principle”, which respects the decision of the KIPO and its examiners as their expert decision. Among these trials, however, it is doubtful that forcing the invalidation trial and the trial to confirm the scope of a patent right in a separate procedure from a court litigation procedure relating to patent infringement is really beneficial to the patentee and the interested party because these two trials are in essence in the form of an adversarial trial. Although in the past, the trials were allowed in the Supreme Court only after a decision by the Board of Appeals, a constitutional review request was made by the Supreme Court to challenge this procedure on the grounds that it violated the citizen’s right to trial according to law in presence of judges. While the Constitutional Court was reviewing the case, the Patent Act was amended to create the Patent Court of Korea as of March 1, 1998 and the Patent Court has got an exclusive jurisdiction over all appeals from the decisions of the IPT.

2. Invalidation Trial

An invalidation trial is a process to retroactively invalidate a patent right if a patent right violates certain invalidation circumstances set forth in each law upon the request of an interested party or examiner. The Patent Act, unlike that of Anglo-American law, requires all patent invalidation claims to occur in an invalidation trial. When the validity of a patent is in question as part of an infringement trial, the courts may suspend the proceedings of such trial until an invalidation trial is concluded.³⁾

Participation in a patent invalidation trial is limited to interested parties or the examiner. The scope of interested parties often becomes a main issue. In many cases,

3) Article 164 of the Patent Act.

the assignee of the patent right and the licensee of the patent are both considered interested persons as assigning and licensing a patent usually involves compensation.⁴⁾ Although the courts have sometimes ruled in the opposite that the licensee of the patent does not constitute an interested party, this excessively limits the scope of the interested party in a way that leaves an invalid patent right to be left unchallenged. There have also been precedents when an interested party loses its status during the trial, the parties (the interested party and the registered patentee) agreed to discontinue the proceedings or assign the rights to the patent.⁵⁾ This interpretation, however, also excessively limits the scope of the interested party by preventing possible invalidation of so-called weak patents, and as a result only discourages technical innovation.

The patentee may request a correction of the patent during the invalidation trial proceedings.⁶⁾ The IPT may conduct an *ex officio* trial examination without the request of the parties and also take the necessary evidence without request.⁷⁾ Grounds that have not been pleaded by a party or intervener in a trial may be examined; however, in such cases, the parties and interveners must be given an opportunity within a designated period to state their opinions regarding the grounds. The rationale behind allowing a statement is to prevent both unforeseen harm to the parties and also preserve an appropriate and fair trial.⁸⁾ In this view, the invalidation trial in essence is not a judicial proceeding — where the rights and obligations of the parties are adjudged strictly based on law — because it allows the patentee to correct their patent and the IPT to conduct *ex officio* trial examinations; it is rather a quasi-judicial proceeding where an efficient dispute resolution is provided through similar means.

4) Supreme Court Decision 82Hu30 delivered on 1984. 5. 29; For more information regarding design invalidation, see Supreme Court Decision 79Hu78 delivered on 1980. 3. 25.

5) Supreme Court Decision 89Hu2151 delivered on 1990. 10. 23; Supreme Court Decision 91Hu240 delivered on 1991. 11. 26.

6) Article 133 bis of the Patent Act.

7) Articles 157 through 159 of the Patent Act.

8) Supreme Court Decision 2003Hu1994 delivered on 2006. 2. 9.

3. Trial to Confirm the Scope of a Patent Right

A “trial to confirm the scope of a patent right” is a quasi-judicial trial where the IPT determines whether the allegedly infringing product falls under the scope of a patent right in a patent right dispute. The Patent Act states that a patentee or an interested party may request a trial to confirm the scope of a patent right.⁹⁾ The trial to confirm the scope of a patent right, similar to any other confirmation trial (Feststellungsklage), has both an active confirmation trial and a passive confirmation trial; the former is where the patentee actively sets the scope of their patent right and the latter is where the opposing interested party requests a confirmation on their working method’s non-infringement. The Patent Act also allows for multiple confirmation trials as the trials are instituted on a patent claim basis.

There are two difficult problems in relation to the trial to confirm the scope of a patent right: one, whether it is appropriate under this trial process to differentiate the scopes of two separately registered patent rights and two, how to determine the scope of a patent right in relation to an invalidation trial where all or part of a registered patent is publicly known or worked. On the first issue, it is questionable whether both an active trial to confirm the scope of a patent right (where the earlier registrant argues that the later registered patent infringes upon its patent) and a passive trial (where the later registrant argues that their patent does not infringe upon the earlier registered patent) are accepted. It has been held by courts that the latter (passive trial) falls under the procedural purpose of the trial to confirm the scope of a patent right,¹⁰⁾ whereas the former (active trial) does not because the same argument is dealt through the invalidation trial.¹¹⁾

The second issue is whether it is legal to invalidate the scope of a patent right not through an invalidation trial, but via a trial to confirm the scope of a patent right, when all or an integral part of an invention is publicly known or worked. The Supreme Court affirms that the scope of a patent right cannot be accepted¹²⁾ with regard to patent claims which are publicly known or worked at the time of filing the

9) Article 135 of the Patent Act.

10) Supreme Court Decision 91Hu1748 delivered on 1992. 4. 28; Supreme Court Decision 84Hu19 delivered on 1985. 4. 23; Supreme Court Decision 96Hu375 delivered on 1996. 7. 30.

11) Supreme Court Decision 95Hu1920 delivered on 1996. 12. 20.

12) Supreme Court Full Bench Decision 81Hu56 delivered on 1983. 7. 26.

patent application. Although some inconsistent cases exist,¹³⁾ the Supreme Court generally denies the scope of a patent right not only when an invention is exactly identical to a “publicly known or worked invention” (thus lacks novelty),¹⁴⁾ but also when an invention was easily created by a person with ordinary skill in the art on the basis of a “publicly known or worked invention” (thus lacks inventive step).¹⁵⁾ An interesting point is that the court denies that the defendant’s invention lies within the scope of the plaintiff’s patent right not because it is identical or easily created from a publicly known or worked invention or in itself invalid, but upon the argument that the defendant’s invention merely utilizes a publicly known or worked invention.¹⁶⁾ In other words, although you cannot invalidate an invention lacking inventive step in a trial to confirm the scope of a patent right (unlike an invalidation trial), you can confirm that a patent claim that is easily created from a publicly known or worked invention, does not lie within the scope of a right in question. The important question is whether this “publicly known or worked invention” defense can also be used in civil or criminal suits as is in the trial to confirm the scope of a patent right.

4. Appealing a Decision

Appealing the IPT’s invalidation decision or trial to confirm the scope of a patent right is through the Patent Court of Korea.¹⁷⁾ Although the Patent Court is similar in many ways to the United States Court of Appeals for the Federal Circuit (“CAFC”), they differ immensely in that the Patent Court does not have jurisdiction in regular civil cases such as claims for damages in patent infringement, whereas the CAFC even acts as the appellant court in such cases. Before the Patent Act was amended on January 5, 1995, decisions by the KIPO Board of Appeals were to be appealed in the Supreme Court. The Supreme Court, determining that the Board of Appeals system is unconstitutional, requested a constitutional review on August 25, 1993. The Board of Appeals system was argued to be unconstitutional in that 1) a non-judicial “board”

13) Supreme Court Decision 91Ma540 delivered on 1992. 6. 2.

14) Supreme Court Full Bench Decision 81Hu56 delivered on 1983. 7. 26.

15) Supreme Court Decision 2002Hu2037 delivered on 2004. 4. 27; Supreme Court Decision 99Hu710 delivered on 2001. 10. 30.

16) Supreme Court Decision 2002Hu2037 delivered on 2004. 4. 27.

17) Article 186 of the Patent Act.

acts as the final court that deals with questions of fact, violating Article 27 Section 1 of the Constitution of Korea (“All citizens shall have the right to be tried in conformity with the law by judges qualified under the Constitution and the law”), 2) finalizing the facts of a patent trial occur at the board of appeals rather than the judicial branch, violating the Separation of Powers doctrine and 3) administrative trials are allowed in the High Court where as patent trials are denied High Court hearings, violating the right to equality.

The Constitutional Court made an “unconformable to constitution” decision, in that although the Board of Appeals system violates the constitutional right to trial, the right to equality and the provisions relating to the Separation of Powers doctrine,¹⁸⁾ the system is deemed “unconformable to constitution,” so as to limit the repercussions and confusion of rendering the half century old Board of Appeals system unconstitutional and also because the July 27, 1994 amendment to the Court Organization Act and the January 5, 1995 amendment to the Patent Act will allow for the Patent Court to replace the Board of Appeals system on March 1, 1998 henceforth.¹⁹⁾

The July 27, 1994 amendment to the Court Organization Act stipulates that a special High Court level Patent Court shall be established on March 1, 1998. The KIPO, on a different end, integrated the existing examination board and Board of Appeals into a new IPT and the appeals to this tribunal shall be lodged to the Patent Court. In this context, the Patent Court replaces the Board of Appeals as the judicial body that determines questions of fact in order to protect the right to trial. In determining question of facts in patent trials that require highly technical and professional knowledge, the Patent Court, however, is to have a Technical Examiner participate in the trial and state opinions during the judging process (Court Organization Act Article 54bis). The Technical Examiner system is similar to the Technical Judge system of Germany’s Federal Patent Court in that a technical professional participates in trial, but differs in that the former can only submit an advisory opinion and cannot render a final decision. This is more or less similar to Japan’s Appeal Examiner system and in this sense the Technical Examiner system is a creative hybrid of Germany’s Technical Judge and Japan’s Appeal Examiner

18) Articles 11(1), 27(1), 37(2), 101(1) of the Constitution of the Republic of Korea.

19) Constitutional Court Order 92HunGa11 delivered on 1995. 9. 28.

system.

III. Requirements of Patent Registration and the Scope of Protection

1. Standard to Determine “Inventive Step”

If a claimed invention or filed invention falls exactly upon a single prior art, the invention is construed as lacking novelty, whereas if the constituent elements of the invention derive from two or more prior art materials, the novelty of the invention is affirmed. In such case, the inventive step element may be denied if a person with ordinary skill in the art to which the invention pertains could easily have made the invention.

On determining inventive step, the courts have generally placed a person with ordinary skill in the art to which the invention pertains as the standard and the time of the filing as the controlling date. When comparing a filed invention to a prior art, if the former has difficulty in its element, remarkability in its effect and uniqueness in its purpose, the inventive step element is confirmed.²⁰⁾ Specifically speaking, the standard of “difficulty in its element, remarkability in its effect and uniqueness in its purpose” should be whether or not a person of ordinary skill in the art to which the invention pertains can easily predict the invention, but in actual practice, if the “difficulty in its element, remarkability in its effect and uniqueness in its purpose” of the filed invention can be found when comparing the filed invention with the prior art material, the invention is considered to have the element of inventive step. There are, however, some differences to consider in each field. For example in the fields of machinery, car manufacturing, electricity, electronics and communications, the difficulty in its element is important, whereas in medicine, chemistry and biotechnology, remarkability in its effect is relatively more significant.²¹⁾

20) Supreme Court Decision 2000Hu3234 delivered on 2002. 8. 23; Supreme Court Decision 97Hu2156 delivered on 1999. 3. 12; Supreme Court Decision 96Hu2364 delivered on 1998. 4. 24; Supreme Court Decision 2000Hu99 delivered on 2002. 8. 23; Supreme Court Decision 2001Hu2658 delivered on 2002. 6. 28; Supreme Court Decision 2000Hu3234 delivered on 2002. 8. 23.

21) Dongsoo Han, *Non-obviousness Test for Inventions* [Patent Court Decision 2006Heo6099 delivered on

In the event where a one single prior art exists, determining inventive step through directly comparing the elements, effect and purpose of the two would yield the same results as determining whether a person with ordinary skill in the art to which the invention pertains could easily have made the invention because only the one prior art is compared to the filed invention. When, however, two or more prior arts exist and the filed invention is derived from combined elements from multiple prior arts, it is questionable to state that determining “a person with ordinary skill in the art to which the invention pertains could easily have made the invention” can be achieved through determining the “difficulty in its element, remarkability in its effect and uniqueness in its purpose.” This is because if you directly compare a prior art and a filed invention on a one-to-one basis when several prior arts exist, inventive step may be denied when “a person with ordinary skill in the art to which the invention pertains” can make and easily could have made the invention, even if “difficulty in its element, remarkability in its effect and uniqueness in its purpose” are established. Also, if a patent examiner or the courts comprehensively compares the filed invention with prior art in light of the differences in element, effect and purpose, this may result in the court’s failure or neglect to adjudge whether a professional in the technical field can easily combine or utilize two or more prior arts in the invention. Especially regarding software inventions, because software methods involve not only software technology, but also business methods or other non-software technologies, comparisons occur among more than two prior arts and in doing so, comparing only the differences in element, effect and purpose falls short in determining inventive step.

2. A Prior Art’s Teaching, Suggestion and Motivation

As stated above, when two or more prior arts exist, it is not easy to compare the differences in element, effect and purpose. Even if the differences are found, it is even a more difficult and subjective decision when determining inventive step. Thus, practice of the patent office and court decisions to determine whether a person with ordinary skill in the art to which the invention pertains can make and easily could

2007. 4. 6], in 2007 SECOND QUARTER PATENT COURT RESEARCH GROUP ON INTELLECTUAL PROPERTY LITIGATION PRESENTATION REFERENCE (May 28, 2007), at 9.

have made the invention often rely on examining any teaching, suggestion and motivation of combining prior arts. An interesting point is that many Patent Court decisions affirm inventive step by finding no teaching, motivation and suggestion from prior art would allow for a person with ordinary skill in the art to which the invention pertains to easily create an invention, despite a possible lack in inventive step when only looking at element, effect and purpose.²²⁾ Examining whether teaching, motivation and suggestions from prior art allowed a person with ordinary skill in the art to which the invention pertains to easily create an invention seems valid and appropriate because the lawmaker's intent of the Patent Act regarding inventive step is to issue patent rights as an incentive for inventions that contribute to technological advancement. It is inconvenient, however, that a specific criterion does not exist to determine how specific the teaching, suggestions and motivations need to be in order to decide if it is easier to combine the elements of prior arts. In other words, a more specific analysis and criterion must be provided to negate inventive step; whether teaching, motivation or suggestion that require combining the elements of prior arts needs to be specifically expressed in the prior art or, even if the teaching, motivation or suggestion is not specifically expressed in the prior art, a person with ordinary skill in the art to which the invention pertains can easily create an invention through the teaching, motivation or suggestion.

In the US, where much discussion and court decisions exist, the US Federal Court has adopted the TSM test (teaching, suggestion, or motivation test) in order to prevent the dangers of hindsight; an invention that was difficult for a person with ordinary skill in the art to which the invention pertains to create during the patent registration, in hindsight could be deemed easy to create during the trial or examination stage, thus negating inventive step. For the past decade, however, the CAFC has tightened the standards of the TSM test. The court, for example, has ruled that although suggestion from a prior art is found, if the suggestion still requires extensive and excessive experiments to create the invention, inventive step cannot be denied.²³⁾ The courts have also stated the Patent & Trademark Office has the burden

22) Patent Court Decision 99Heo2464; Patent Court Decision 2002Heo1508; Patent Court Decision 2004Heo7388; Patent Court Decision 2004Heo7890; Patent Court Decision 2002Heo2983; Patent Court Decision 2005Heo4263; Patent Court Decision 2005Heo3512; Patent Court Decision 2004Heo3942.

23) *In re Bell*, 991 F.2d 781 (Fed. Cir. 1993); *In re Deuel*, 51 F.3d 1552, 1559 (Fed. Cir. 1995).

to prove that it placed the rationale behind denying non-obviousness on record, and thus cannot simply rely on the examiner's conclusion to reject non-obviousness because of a "prior art's hint or suggestion."²⁴⁾

The CAFC is criticized for tightening the standards of the TSM test, thus loosening the boundaries of inventive step, which resulted in the excessive issue of patents. Amidst the criticism, the Supreme Court made some adjustments to the TSM test. In *KSR International Co. v. Teleflex Inc.* the Supreme Court held that the CAFC's application of the TSM test was too stringent and that the test must be applied more flexibly to uphold the fundamental principle of determining obviousness.²⁵⁾ The Supreme Court's decision was that it is more reflective of the basic notion of inventive step to deny an invention of non-obviousness when the invention used in a certain industry can easily be modified due to demand in design or other market demands, by a person having ordinary skill in the art to which said subject matter pertains. In other words, even though prior art documents do not explicitly show the teaching or motivation to combine two prior art references, if a person having ordinary skill in the art to which said subject matter pertains can easily combine the prior art references considering market demand, the invention can be rejected on grounds of obviousness. The Supreme Court's adjustment to the TSM test has led to an increased rejection on behalf of the CAFC on grounds of obviousness.²⁶⁾

3. Patent Invalidation and Abuse of Rights

Although the Patent Act, in essence, only negates the effects of a patent right through a patent invalidation trial, the courts have allowed the "publicly known or worked invention" defense — where the defendant argues that the allegedly infringing product derives from a publicly known or worked invention — to prove that their invention does not fall under the scope of the plaintiff's patent right.²⁷⁾ A question arises whether this defense can also be used in civil or criminal proceedings,

24) *In re Sang-Su Lee*, 277 F.3d 1338, at 1343-1346 (Fed. Cir. 2002).

25) *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007).

26) *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157 (Fed. Cir. 2007).

27) Supreme Court Decision 2002Hu2037 delivered on 2004. 4. 27; Supreme Court Decision 99Hu710 delivered on 2001. 10. 30.

where infringement of rights is argued.

There are two types of proceedings in infringement litigations: preliminary injunction proceedings, where a temporary injunction against the infringement is sought, and main proceedings, where a permanent injunction action against the infringement or a claim for damages is sought. The Supreme Court has ruled in favor of the original decision to dismiss a temporary injunction motion because the need to enjoin an invention does not exist when an invention that includes a “publicly know and worked” technology perceivably cannot win in the main proceedings.²⁸⁾ Although precedent that grants a temporary injunction against the infringement of rights exists,²⁹⁾ where the invention in question has novelty but is perceived to possibly lack inventive step, it is interpreted that the Supreme Court can deny the motion because the patent right may be invalidated through the lack in inventive step.³⁰⁾

During the main proceedings on patent infringement, the Supreme Court has ruled that “even before the patent invalidity trial is finalized, the court may determine whether a negating factor exists, and filing a motion seeking an injunction or damages when a patent right is clearly invalid is construed as an abuse of rights.”³¹⁾ In the same theoretical background in the recent case relating to a printer’s photo-sensitive drum, the Seoul High Court has dismissed the claim of injunction and damages in that when the patent/invention in question is clearly invalid due to lack of inventive step, claiming such injunction and damages is an abuse of rights.³²⁾

Comparing with the above Supreme Court decisions on the trial to confirm the scope of a patent right and the preliminary injunction case, it is valid to strike down motions for injunction and damages when a patent right lacks inventive step even in the main proceedings on infringement of rights cases. This is because there is no reason for the Patent Act to allow incentives to inventions lacking in inventive step, and allowing for injunctions and damages based on a patent right lacking in inventive step prevents the public and competitors from using publicly know and worked

28) Supreme Court Decision 92Da40563 delivered on 1993. 2. 12; Supreme Court Order 93Ma2022 delivered on 1994. 11. 10.

29) Supreme Court Order 91Ma540 delivered on 1992. 6. 2.

30) Supreme Court Decision 92Da40563 delivered on 1993. 2. 12.

31) Supreme Court Decision 2000Da69194 delivered on 2004. 10. 28.

32) Seoul High Court Decision 2003Na8802 delivered on 2005. 1. 25.

inventions. Leaving an invalid patent right that lacks inventive step to be exercised goes against the Patent Act's purpose and harms free competition, thus constitutes an abuse of rights, and therefore its exercise must be denied. Because software patents have the highest registration rate and thousands of patent/inventions are involved in one single IT product,³³⁾ especially for software patents that lack novelty or inventive step, must the motion for temporary injunction be denied and the injunction and damages be dismissed on grounds of abuse of rights.

In the same light, can the “publicly known or worked” defense also be invoked in criminal trials?³⁴⁾ If an invalidation decision is finalized, thus retroactively invalidating the patent right, an infringement suit can no longer exist.³⁵⁾ The Supreme Court as an interpretation of law has decided even before the invalidation decision that publicly know and worked inventions cannot fall under the scope of a patent right. This interpretation is also applied in criminal cases, and thus if all or part of a patent's scope is publicly known, the patent infringement suit is denied.³⁶⁾

4. The Patent Right's Scope of Protection

In essence, the protected scope of a patent right is fixed on what is written in the patent claim(s) section, and in the patent claim(s) “the matter for which protection is sought in one or more claims”, or “claim(s),” must be concisely and clearly stated.³⁷⁾ Therefore, the “all elements rule” — the elements of the patent claim(s) must all be present in the allegedly infringing product, or manufacturing process thereof, to constitute an infringement — governs patent right infringement as the basic standard. However, if the all elements rule is applied too strictly, a slight modification or improvement can lead to circumventing infringement, and ultimately the patent right

33) Carl Shapiro, *Navigating the Patent Thicket: Cross-Licenses, Patent Pools, and Standard Setting*, in *INNOVATION POLICY AND THE ECONOMY* (Adam Jaffe et al. eds., 2001).

34) For additional information, find Supreme Court Decision 92Do3354 delivered on 1993. 11. 12 in relation to denial of design infringement.

35) Article 420(6) of Criminal Procedure Act, for additional information, see Supreme Court Decision 93Do839 delivered on 1996. 5. 16 in relation to denial of trademark infringement. Supreme Court Decision 90Do2636 delivered on 1991. 1. 29 has been vacated.

36) Supreme Court Decision 82Do2834 delivered on 1984. 5. 29; Supreme Court Decision 86Do1147 delivered on 1986. 12. 9; Supreme Court Decision 2005Do4341 delivered on 2006. 5. 25.

37) Articles 42 and 97 of the Patent Act.

cannot be protected. To prevent this result, the doctrine of equivalents, an Anglo-American interpretation of law, was introduced and used by the Supreme Court.³⁸⁾

The doctrine of equivalents states that even though the allegedly infringing product is not completely identical to the literal elements of the patent claims, if the allegedly infringing product ① has a substantially identical process, ② acts through a substantially identical function and ③ yields substantially identical results, the patent infringement is affirmed. In determining equivalence by comparing difference in elements of the infringing device and the claimed invention, the standard is whether a person with ordinary skill in the art to which the invention pertains could have easily substituted the claimed invention with an equivalent device. Although the concept of easiness in substitution is not the same as inventive step, determining easiness ultimately derives from the degree of inventive step. Inventions that have strong inventive step — basic inventions or pioneer inventions — in a broad sense are accepted as substantially identical or equivalent devices, whereas improvements are only accepted in a narrow scope. Therefore, the doctrine of equivalents must discreetly and selectively be applied to devices pertaining to industries, such as the software industry, where inventions are usually created by modifying existing devices. The courts seem to concur with this necessity.

In a case where an injunction applicant owns the patent right to “the method of providing game service via telecommunications devices,” the applicant argued that the respondents SK Telecom and LG Telecom have infringed its patent right by providing game services using the Wireless Application Protocol (WAP) method. The Seoul District Court dismissed the temporary injunction motion citing that despite the applicant’s ownership of a valid non-obvious patent/invention, (1) the game service provided by the respondents via LAN cannot be seen as an equivalent substitute to the applicant patent/invention’s notion of the internet, (2) the respondent’s WAP server is not an equivalent means to the applicant’s server, and (3) the applicant’s patent/invention and the respondent’s game service differ in its elements.³⁹⁾

Also, when the patent applicant or patentee intentionally reduces the scope of

38) See Supreme Court Decision 97Hu2200 delivered on 2000. 7. 28; Decision 98Hu522 delivered on 2001. 8. 21.

39) Seoul District Court Order 2001KaHap3105 delivered on 2002. 3. 21.

patent claim(s), they are estopped from citing the doctrine of equivalents for the purpose of broadening the scope of their patent claim(s).⁴⁰⁾

IV. Remedies in Patent Infringement

1. Reevaluating the Injunction System

We have already discussed how the “publicly known or worked invention” defense and the “lack of inventive step” defense are effective defenses in temporary injunction trials and permanent injunction motions during a patent infringement litigation. If a patent/invention lacks inventive step, the patent infringement does not exist and is thus theoretically valid and realistically sound in dismissing a temporary injunction or permanent injunction motion. However, it is a difficult problem under the current law to dismiss an injunction motion when a patent has inventive step, thus valid, and infringed.

Injunctions are means of remedy in protecting exclusive rights such as real rights. Although rights to remove interference and rights to prohibit infringements are not granted in the Civil Act or the Copyright Act, the courts have consistently granted satisfactory remedy for infringement on personal rights.⁴¹⁾ Unless infringement on property rights or personal rights is clear, the courts have denied injunctions against business disruptions⁴²⁾ and environment pollution.⁴³⁾ Even in reviewing domestic theories on injunction claims, it is the majorities’ opinion that although a legislative action may exist for allowing injunctions in relation to the Monopoly Regulation and Fair Trade Act, there is no need to allow for injunction as general remedy to all

40) Patent Court Decision 2001Heo5992 delivered on 2002. 8. 30; Supreme Court decision 2003Da1564 delivered on 2004. 11. 26.

41) Supreme Court Decision 93Da40614,40621 delivered on 1996. 4. 12.

42) Seoul District Court Order 2002KaHap2377 delivered on 2002. 10. 15; Seoul District Court Order 2002KaHap1031 delivered on 2002. 10. 24.

43) Supreme Court Order 94Ma2218 delivered on 1995. 5. 23. However, the lower courts of Japan, who share a similar legal system, have allowed for injunction on grounds of pollution(Osaka High Court Decision delivered on 1975. 11. 27.): redirected from Jinsoo Yoon, *Allowing injunctions for infringement on environmental right*, in 23 COMMENTARY ON SUPREME COURT DECISIONS, at 9 (1995).

illegal acts by interpretation of law because the Civil Act allows for the right to remove interference, and ample precedent from judgments on personal rights and exists.⁴⁴⁾

In the case of infringement on personal rights, the Supreme Court allows the right to injunction because personal rights in its essence cannot be protected only with awarding monetary damages and a reputation restoration disposition.⁴⁵⁾ Also, because infringement on personal rights tends to be continuous and recurring, unlike onetime illegal acts such as car accidents, only through preemptive injunctions can the benefit and protection of law be possible. Thus, the primary reason behind allowing injunctions for infringement of personal rights is not because personal rights have the characteristics of an absolute right, but because it is the most efficient and satisfactory remedy due to the characteristics of personal interest. This can be evidenced in the reading of statutes.⁴⁶⁾ Therefore, although the Civil Act is silent on allowing injunctions against illegal acts, the courts should allow injunction motions if an illegal act is recurrent and monetary compensation is not enough to protect the necessary interests governed by law.

In the same sense, despite that a statute provides for an injunction, the court must be able to deny the motion when protecting the interest of a patent is not desirable due to the purpose of the law or the public's interest. Looking closely at the Civil Act's provisions on property, the owner's right to property, though exclusive in nature, does not automatically grant the right to remove interference. In cases regarding legal superficies, the owner of the land cannot exercise the right to remove interference against the owner or occupant of the building (removal of building), and can only claim rent.⁴⁷⁾ The Supreme Court, stretching this notion even further, stated that although legal elements of legal superficies are not met, the owner of the land

44) For more discussion, find Jaehyung Kim, *Property Right and Environmental Protection: Focusing on the meanings and functions of Civil Act article 217*, 276 PERSONAL RIGHTS AND JUSTICE, at 22-43 (1999).

45) Supreme Court Decision 93Da40614,40621 delivered on 1996. 4. 12.

46) Constitutional Court Order 99HunBa77 delivered on 2001. 9. 27. describes the Unfair Competition Prevention and Trade Secret Protection Act as a restrictive legislation rather than an empowering legislation, supporting this interpretation of law that the injunction clause of the Unfair Competition Prevention and Trade Secret Protection Act is not due to an absolute right but for protective reasons.

47) Articles 305 and 366 of Civil Act, Articles 10 and 12 of Provisional Registration Security Act, Articles 3 and 6 of Act on Stumpage for a similar reason also limit the land owner's right to dispose of stumpage.

cannot exercise their right to remove interference under the notion of “customary legal superfluities.”⁴⁸⁾ The reasoning behind the Civil Act and Supreme Court decision to deprive the owner of the right to remove interference and injunction under legal superfluities is not only because of inferring implied consent but also because it is not in the interest of the litigants and the public to do so and more reasonable to allow only for claiming damages through rent.

Although the Patent Act also limits patent rights in a similar way as legal superfluities,⁴⁹⁾ it is difficult to state that it is possible to deny an injunction when the requirements for injunction are met. Some state that injunctions must always be granted because compared to property right, a patent right is socially beneficial in that it promotes inventions.⁵⁰⁾ It is undeniable that the Patent Act limits the court’s powers in judging the legality of an injunction motion. Although the concept of injunction has sprouted from the law of equity and thus in essence should, at least in the US, be subject to flexibility in judgment, most CAFC decisions that confirm the existence of infringement have automatically led to granting injunctions.⁵¹⁾ However, in response to the inherent dangers of abuse of software patents, the Supreme Court has re-established the principle that the effects on the litigants as well as to the public good must all be considered as a whole when ordering an injunction.⁵²⁾

2. Injunction Motions by Patent Trolls

Although *eBay v. MercExchange*⁵³⁾ is significant in that the US Supreme Court reaffirmed the four elements of an injunction, it is unclear whether all injunction requests by a patent troll are to be denied or what type of software patent abuse should be regulated. In other words, there is a need to define a standard that

48) Supreme Court Decision 94Da61731 delivered on 1995.4.28; Supreme Court Decision 91Da21701 delivered on 1991. 9. 24.

49) Articles 103, 107 and 138 of the Patent Act.

50) F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, in 805 MINN. L. REV. 697 (2001); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

51) *eBay, Inc. v. MercExchange, LLC*, 401 F.3d 1323 (Fed. Cir.).

52) *eBay, Inc. v. MercExchange, LLC*, 126 S.Ct. 1837, 164 L.Ed.2d 641 (Sup. Ct., 2006).

53) *LLC*, 126 S.Ct. 1837, 164 L.Ed.2d 641 (Sup. Ct., 2006).

specifically denotes when an injunction is dismissed even if a patent infringement exists as universities or private inventors that do not exploit their patent/invention to run a business are in certain situations allowed injunctions. Moreover, given the fact that the requirements for injunctions under the US and Korean laws are different from each other, the US Supreme Court's decisions do not directly help interpret our Patent Act. For Korea's Patent Act which empowers the patentee the right to injunction upon an infringement, the courts can dismiss an injunction only in cases of patent right abuse even when the patentee proves an infringement of patent right. However, the US Supreme Court's decision is honorable in that it does not automatically allow an injunction order without reviewing the effects to not only the concerned parties, but also the public. Following this interpretation is of great value to Korea's Patent Act. In other words, if the Patent Act allows for an abuse of patent rights defense in patent infringement cases, the theoretical support would be the consideration of effects on the competitors including the litigants, on social interest and purpose of the Patent Act as a whole. Mentioned above is an example of dismissing an injunction motion on grounds of patent right abuse of an obvious patent.⁵⁴⁾ It is a difficult question to determine whether an abuse of patent right is allowed besides a patent that lacks inventive step.

When an abuse of patent violates the Monopoly Regulation and Fair Trade Act, it is subject to a notification by the Fair Trade Commission and is liable for damages. It may also be subject to Adjudication for the Grant of a Nonexclusive License or Trial for Granting a Nonexclusive License under the Patent Act. In all other abuse of patent cases, the injunction must be dismissed. In the past, the Patent Act once deemed a faulty patent as an abuse of patent right and ordered compulsory licensing or cancellation of the patent right.⁵⁵⁾ For an unknown reason, the 1973 Patent Act's abuse of patent right provision has been deleted, but the 1973 provision is evidence of the existence of the abuse of patent doctrine, and can be interpreted as applying also to today's Patent Act.

An abuse of patent right can exist not only in the passive exercise of a patent right but also in an active exercise. An active abuse of patent right is when one agrees to a patent licensing agreement with a third party and disrupts the production and

54) Seoul High Court Decision 2003Na8802 delivered on 2005. 1. 25.

55) Article 52 of the 1973 Patent Act (Amended 1973. 12. 31, Legislation 2658).

business by arguing an illegal extension of the patent right.⁵⁶⁾ An important question is what the elements are to constitute an abuse of patent right. Because there are no court findings on this matter, the Fair Trade Commission's "Guidelines of reviewing undue exercise of intellectual property rights" to the Monopoly Regulation and Fair Trade Act is a potential standard. Of course, the abuse of patent rights are not limited to the examples set out in the Fair Trade Commission's Guideline, so there are additional specific cases where the abuse of patent right is determined.

Patent trolls exercising patent rights that lack inventive step in order to stop others from producing goods are considered an abuse of rights as they are exercising a right that does not fall under their scope of protection in order to hinder others from production and business.⁵⁷⁾ However, considering that it is realistically difficult to clearly define the notion of a patent troll, it cannot be presumed an abuse of rights when a patent troll exercises a valid patent right. Therefore, even if a patentee does not engage in direct business activity, but receives license fee from a third party, they cannot automatically be pinned as a patent troll, and their claim to damages and injunctions cannot be seen as an abuse of rights. However, if a patent right is acquired without the purpose of providing commercial services, manufacturing products, or research and development, but for the sole purpose of receiving excessive license fees and damages using the injunction as a threat, abuse of rights may be allowed. However, although using an injunction to hinder one's production and business constitutes an abuse of patent right, it is not always an abuse of patent right to claim damages. Therefore, both damages and injunction claims must be dismissed for patent rights that lack inventive step, but damage claims for infringement of a valid patent should be accepted.

KEY WORDS: patent, invalidity, patent court, non-obviousness, infringement

56) Korea's Patent Act of 1973 article 52(2) clause 6 and US Patent Act 35 USC Sec. 271(d).

57) Seoul High Court Decision 2003Na8802 delivered on 2005. 1. 25. stated that it is an abuse of patent right to lodge a claim for damages or injunction based on an obvious invention, although the patentee cannot be deemed a patent troll.

Korean Legislations and Related Legal Instruments in the WTO Anti-Subsidy Jurisprudence

*In Yeung J. Cho, Esq.**

Abstract

The purpose of this note is to survey certain Korean legislations the WTO compatibility of which were tested in the recent WTO anti-subsidy cases involving Korea and Hynix. The Hynix proceedings originated from the imposition by the U.S. Department of Commerce of countervailing duties on Hynix DRAMS on the basis that the Government of Korea had subsidized the chipmaker in contravention of Korea's international obligations. In its final published determination, the DOC considered various Korean legislations pursuant to which it determined the Korean government could entrust or direct Hynix's lenders and the banking sector of Korea more in general to provide preferential financing aimed at Hynix. The note critically appraises the DOC findings on each of the legislations and the Panel and, where appropriate, Appellate Body treatment of them in the subsequent WTO dispute settlement context. In addition to the legislations involved, the note probes certain legal instruments considered by the DOC as proof of GOK direction or entrustment involving Hynix's creditors. The note ends with certain policy suggestions in connection with the legal instruments.

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I. Introduction

The purpose of this note is to survey certain Korean legislations the World Trade Organization (“WTO”) compatibility of which were addressed in the recent WTO anti-subsidy cases involving Korea and Hynix Semiconductor Ltd. (“Hynix”), one of the world’s largest semiconductor producers based in Korea. These legislations were introduced and enacted in the aftermath of Korea’s financial crisis in 1997. For the ensuing survey, the factual background and chronology of the Hynix WTO proceedings, coupled with an analysis of the relevant WTO treaty provisions and case law, will be first looked at. This will be followed by a discussion of the Panel and, where appropriate, Appellate Body treatment of the legislations involved and then by a probe into related legal instruments.

1. Background

The countervailing duties (“CVD”) disputes between Korea and the U.S. in respect of Hynix arose from a CVD investigation by the U.S. Department of Commerce (“DOC”) on imports of Dynamic Random Access Memory Semiconductors (“DRAMS”) from Korea. The DOC imposed countervailing duties after it determined that Hynix had received massive subsidies from the Government of Korea (“GOK”) in the form of financial contributions by its creditors.¹⁾ Specifically, the DOC determined that the financial contributions for Hynix were provided by a number of banks with GOK ownership or control, as well as by a host of private financial institutions that were “entrusted or directed” by the GOK to do so.

Korea subsequently contested before a WTO Panel the consistency of the *Decision Memorandum* with, among others, the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”). It thus argued in *US DRAMS* that the participation of private lenders in the financial restructuring of Hynix was solely based on commercial considerations and therefore fell outside the disciplines of the

1) U.S. Department of Commerce, *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003), available at wais.access.gpo.gov (hereinafter “Decision Memorandum”).

SCM Agreement.²⁾ The *US DRAMS* Panel was overall receptive to the claims of Korea and consequently ruled that the USDOC had failed to establish a sufficient evidentiary basis to impose countervailing duties on imports of Hynix DRAMS.³⁾ Korea's triumph at the Panel level, however, was dealt a blow when, as will be seen shortly, the WTO Appellate Body reversed the Panel in June, 2005 by ruling that the US Panel had erred with respect to several legal issues including, *inter alia*, its interpretation of the terms "direction" and "entrustment" as envisaged under the SCM Agreement.⁴⁾

2. The Concept of Direction and Entrustment in WTO Jurisprudence

1) Treaty Provision — Article 1.1(a)(1) of the SCM Agreement

In the WTO context, the law of subsidies is codified and regulated under the SCM Agreement. SCM Agreement Article 1.1 provides that a subsidy shall be deemed to exist where there is a "financial contribution" that confers a "benefit." Article 1.1(a)(1) further provides that there is a "financial contribution" by "a government or any public body within the territory of a Member" (collectively referred to as "government" in the SCM Agreement) where:

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (e.g.

2) Panel Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea* (WT/DS296/R), 21 December, 2004, available at <http://docsonline.wto.org> (hereinafter "US DRAMS").

3) In a parallel proceeding involving the European Communities (Panel Report, *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (WT/DS299/R), 21 January, 2005, available at <http://docsonline.wto.org> [hereinafter "EC DRAMS"]), a separate WTO Panel decided that the EC had not erred in finding at least some of the restructuring programs of Hynix, which were undertaken subsequent to the Korean financial crisis in 1997-98, as violative of the SCM Agreement.

4) Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea* (WT/DS296/AB/R), 27 June, 2005, available at <http://docsonline.wto.org> (hereinafter "DRAMS AB Report").

- fiscal incentives such as tax credits) [footnote omitted];
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

Article 1.1(a)(1) subparagraphs (i) to (iii) thus contemplate three specific instances that may be considered to constitute a *direct* financial contribution by a government. Subparagraph (iv) adds that such financial contribution may also exist *indirectly* where the government has entrusted or directed a private body to carry out a type of the financial contributions listed in subparagraphs (i) to (iii). In other words, in the framework of the SCM Agreement, a financial contribution will be deemed to be present where the government or a public body itself provides a financial contribution, or where the government entrusts or directs a private body to do the same.

2) Appellate Body Analysis of Article 1.1(a)(1)

In the *DRAMS AB Report*, the Appellate Body attempted to distil the meaning of the terms “directs and entrusts.” At the outset of its analysis, the Appellate Body noted that under Article 1.1(a)(1) of the SCM Agreement, no product may be countervailed in the absence of a financial contribution, since a “financial contribution” by a government or public body is an essential component of a “subsidy” in the sense envisaged by Article 1.1(a)(1). Furthermore, the Appellate Body made it clear that situations involving purely private conduct — that is, conduct that is in no way attributable to a government or any emanation thereof — cannot constitute a “financial contribution” under the SCM Agreement.⁵⁾

In constructing the concept of “entrusts” and “directs,” the Appellate Body noted that the term “entrusts” connoted the action of assigning responsibility to a person for

5) *DRAMS AB Report*, paras 106-107.

a task or an object.⁶⁾ In the Appellate Body's view, "delegation" (the word used by the *US DRAMS* Panel to allude to entrustment) may well be a formal or informal means by which a government imparts responsibility to a private body to carry out a governmental function. Yet the Appellate Body went on to find that, in addition to acts of delegation, there may be other formal or informal means by which a government could entrust a private body. Accordingly, the Appellate Body found the Panel holding limiting the scope of "entrusts" to acts of "delegation" to be overly narrow.

As for the term "directs," the Appellate Body noted that the requirement under paragraph (iv) that the private body be directed "*to carry out*" a government function meant that an act of directing implied the existence of authority on the part of the person or entity that "directs" vis-à-vis the person or entity so directed.⁷⁾ In the context of paragraph (iv), the Appellate Body stated that a "command" (the term used by the Panel below interchangeably with direction) would undoubtedly be one form or method by which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv). Aside from issuing formal commands, however, governments are likely to employ other subtle and less coercive means to exercise authority over a private body. Thus, as with "entrusts," the Panel's interpretation of the term "directs" that was limited to acts of "command" was found to be restrictive in scope. From the preceding analysis, the Appellate Body concluded that not all government acts would necessarily amount to entrustment or direction. As agreed upon by the United States and Korea alike, the Appellate Body took the view that a "mere policy pronouncement" by a government or any legitimate or inadvertent act of market regulation by public authorities would not, by itself, be equated with entrustment or direction for purposes of Article 1.1(a)(1)(iv).⁸⁾

II. Legislations Surveyed

In its *Decision Memorandum*, the DOC considered various Korean legislations pursuant to which it determined the Korean government could entrust or direct

6) *Id.*, para 110.

7) *Id.*, para 111.

8) *Id.*, para 114.

Hynix's lenders and the banking sector of Korea more in general to provide preferential financing aimed at the troubled chipmaker. These legislations included Prime Minister's Decree No. 408 on the Responsible Management of Financial Institutions and the Guarantee of Transparency in Financial Administration ("Prime Minister's Decree No. 408"), the Public Funds Oversight Act, and the Corporate Restructuring Promotion Act. According to the DOC, each of these legislative measures was ambiguous enough in wording and contents to enable the GOK to seize control of the Korean banking system in support of Hynix. In what follows, each of the legislations and the Panel treatment of them in the abovementioned WTO disputes, among others, will be considered in turn. Critical commentary will be attempted as appropriate in the process.

1. Prime Minister's Decree No. 408

With respect to the Prime Minister's Decree No. 408, the DOC determined in its *Preliminary Determination* that:

For instance, the *Prime Minister's Decree* at Article 5 states that the financial supervisory agencies can request cooperation from financial institutions for the purpose of the stability of the financial market, or to attain the goals of financial policies. As noted above, the financial system in the ROK has been going through a crisis that could be the type of situation in which this exception would be applied. A further exception that would allow GOK influence over the banks is included in Article 6 of the *Prime Minister's Decree*. Article 6 states that the Minister of MOFE and KDIC shall, *unless they exercise their rights as shareholders of any of the Financial Institutions*, procure that the Financial institution, which was invested by the {GOK} or KDIC, can be operated independently under the direction of the Board of Directors thereof" (emphasis added). As noted above, because the GOK is part-owner in many commercial banks, an exercise of its shareholder rights could allow the GOK an opportunity to become involved in the operations of the banks.⁹⁾

9) US DOC, *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 16766 (April 7, 2003), available at wais.access.gpo.gov

The DOC thus focused on Articles 5 and 6 of Prime Minister Decree No. 408 as proof of GOK direction or entrustment of Hynix's creditors. Yet the Panel was not persuaded by the agency's analysis of the decree.

In the DOC's view, Article 5 could be a potent tool for the financial supervisory authorities in requesting cooperation from financial institutions. From the Panel's perspective, however, such a request for co-operation could not objectively be adjudged to be evidence of affirmative acts of delegation or command.¹⁰⁾ This is because, in principle, requesting co-operation in a certain matter would be distinct from affirmatively directing or entrusting a private body for the purpose of providing a countervailable subsidy. In terms of evidence, moreover, the Panel noted that the DOC failed to adduce any evidence that Article 5 had been invoked or actually exercised in a way that enabled the GOK to entrust or direct non-public intermediaries. Instead, the DOC merely asserted that a financial crisis "could be the type of situation in which [Article 5] would be applied." As such, the Panel found the DOC analysis to be a mere hypothesis and hence insufficient in terms of probative value to establish positive acts of delegation or command by the GOK under Article 5.¹¹⁾

As for Article 6 of Prime Minister Decree No. 408, the Panel noted that the DOC's analysis primarily pertained to the legal authority of the GOK to intervene in the activities of government-owned banks through its shareholding clouts. Yet, as such analysis did not necessarily entail affirmative acts of delegation or command, the Panel rejected it as objective proof of GOK direction or entrustment in relation to Hynix.¹²⁾

In the end, the Panel made it clear that evidence regarding simple exercise of shareholder rights by a government may not underpin a finding of entrustment or direction under Article 1.1(a)(1) of the SCM Agreement.

(hereinafter "*Preliminary Determination*"), at 16774.

10) According to the *US DRAMS* Panel, "[i]t follows from the ordinary meanings of the two words 'entrust' and 'direct' that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction)". *US DRAMS*, para. 7.31.

11) *US DRAMS*, para 7.76.

12) *Id.* para 7.77.

1) Comments

Prime Minister Decree No. 408 was promulgated on November 13, 2000 in the midst of, as will be seen below, a sea change in the financial regulatory regime and milieu of Korea in the aftermath of the liquidity crisis in 1997. The chief purpose of the Decree was to prohibit undue involvement of government officials in the management operations of Korean banks.¹³⁾ The decree specifically bars government officials working in MOFE and FSC, among others, from meddling with the fiscal operations of all banks whether they are commercial or specialized.¹⁴⁾

In the context of WTO dispute settlement, the Decree was also considered in *Korea-Measures Affecting Trade in Commercial Vessels*.¹⁵⁾ In that case, the EC claimed that while Article 6 of the Decree purports to guarantee the independence of banks in which the Government of Korea has ownership, Article 5 specifically requires these banks to co-operate with the GOK “for the purpose of stability of the financial market” and “to attain the goals of financial policies.” Under the decree, governmental instructions to these ends can be given orally or by telephonic means.

As maintained by Korea, on the other hand, a government is obliged to enforce financial policies related to ensuring stability of the fiscal markets. Financial institutions, in return, are expected and, on occasion, statutorily required to comply with legitimate public policies aimed at normalizing the markets. Seen in this context, Article 5 of the Prime Minister’s Decree was but a legislative provision authorizing the Government of Korea to adopt and implement financial policies. Unlike the EC claim, moreover, the Decree was enacted to ensure independence of the banks in which the GOK came to acquire an ownership stake. In this regard, Korea pointed out that the Prime Minister’s Decree embodied the commitment of the Government of Korea to the IMF that:

In the interim [i.e., pending re-privatization of government-owned commercial

13) The decree was published in the Korean official gazette (Instruction No. 408, November 2000, to be effective immediately).

14) Violations of this order are sanctioned under the Government Officials Act that penalizes disregarding orders from superiors. See Hynix, *Initial Arguments on the Directed Credit Issue in DRAMs from Korean — CVD Investigation* (March 2003), at 27-28.

15) Panel Report, *Korea-Measures Affecting Trade in Commercial Vessels* (WT/DS273/R), 7 March, 2005, available at <http://docsonline.wto.org> (hereinafter “*Korea Shipbuilding*”), paras 7.389-7.393.

banks], banks will be operated on a fully commercial basis and the government will not be involved in the day-to-day management of the banks.¹⁶⁾

The decree, accordingly, was never meant to be an apparatus for governmental control of the banking and financial sector in Korea.

From the Shipbuilding Panel's standpoint, there was no hint or suggestion in the Decree itself that it was intended to confer on the government any power to compel reluctant banks to participate in corporate restructuring. Rather, the primary aim of the Decree was ensuring the stability of the financial markets as envisaged in Article 1.¹⁷⁾ Article 1 provides that the basic rationale for the Decree is to "procure that the Government shall go through objective and transparent formalities in *establishing financial policies or conducting supervision over financial institutions*, and to exclude unfair outside intervention in management of financial institutions, etc. so that financial institutions, etc. can operate their businesses more independently, taking more responsibility."¹⁸⁾ The Panel further noted that pursuant to Article 5.1 of the Decree, "[i]f the Financial Supervisory Agencies request cooperation or assistance of Financial Institutions, etc. *for the purpose of stability of the financial market*, etc. (excluding the request for data in relation to routine management activities), such request shall be made in writing or through a meeting."¹⁹⁾ Even though Article 5.2 provides that in cases of urgency such request may be made orally or by phone, it further provides that "[i]n this case, the Financial Supervisory Agencies shall notify such request to the relevant Financial Institutions, etc. in writing without delay."²⁰⁾ Upon review of the legislative texts, the Panel concluded that pursuant to the Decree, the GOK could, at least in certain circumstances, induce private banks to carry out actions related to securing and maintaining stability in the financial markets. In the view of the shipbuilding Panel, however, the EC failed to establish that such "stability" was linked to the corporate restructuring of shipyards,

16) Annex to Korea's 13 November 1998 Letter of Intent to the IMF as quoted in *Id.*

17) In this respect, the *Korea-Shipbuilding* Panel found it "difficult to conceive of any country that does not have a legislative or regulatory framework enabling the government to intervene in the market for the purpose of maintaining financial stability". *Id.* footnote 225.

18) *Korea-Shipbuilding*, para 7.39 (emphasis original).

19) *Id.* (emphasis original).

20) *Id.*

if at all.

In the final analysis, the Panel opined that “the issue of entrustment or direction does not have to do with a government’s power, in the abstract, to order economic actors to perform certain tasks or functions. It has instead to do with whether the government in question has *exercised* such power in a given situation subject to a dispute.”²¹⁾ In this regard, not unlike the DRAMS Panel, the Panel noted that EC failed to proffer any evidence that the Prime Ministerial Decree No. 408 was in fact relied on, invoked or used by the GOK for the purpose of directing or entrusting private bodies in a restructuring context. Accordingly, in and of itself, the Prime Ministerial Decree No. 408 could not amount to evidence of GOK entrustment or direction with respect to any private intermediary. To sum up, with respect to the Prime Ministerial Decree, both the *DRAMS* and *Shipbuilding* Panels did not consider it as concrete proof of GOK direction or entrustment of any private entity in contravention to the SCM Agreement.

2. *Public Funds Oversight Act*

Another piece of Korean legislation probed by the USDOC in their CVD investigation of Hynix was the Public Funds Oversight Act (“PFOA”). With respect to the PFOA, the US determined that:

The DOC also found that the GOK was able to leverage its control of the financial sector to assist Hynix through enactment of the Public Fund Oversight Act. This law required Korean private banks to sign contractual commitments with the government (Memoranda of Understanding or MOUs) in exchange for the massive recapitalizations they received from the government. These MOUs provided the government with a contractual right to intervene in the day-to-day business and credit decisions of Korean banks. The MOUs specify financial soundness, profitability, and asset quality targets, and include a detailed plan for implementation ...

In particular, MOUs allowed the GOK to require that the bank management be changed or the bank be restructured such that employees can be fired, the bank

21) *Id.* para 7.392 (emphasis original).

can be restructured, or the KDIC can order that the bank be merged with another healthier bank. Many of Hynix's creditors, suffering from capital shortages and seriously over-exposed with respect to Hynix, had no choice but to accept the strict requirements of the MOUs. These legislatively-mandated contractual agreements provided the GOK with substantial control in directing credit to Hynix.²²⁾

The DOC thus found that the use of MOUs allowed the GOK to set various financial targets, and review their implementation. The Panel, however, found that the DOC gave undue weight to these MOUs. From the Panel's standpoint, even assuming *arguendo*²³⁾ that the DOC was correct in determining that the GOK had relied on the MOUs to become "directly involved in the fiscal operations of the bank," the DOC failed to adduce any evidence that such involvement in fact exceeded ensuring compliance with the applicable targets, or otherwise resulted in government entrustment or direction of a private proxy. Accordingly, the DOC treatment of the PFOA could not be considered as establishing an affirmative act of delegation or command by the Korean government with respect to any Hynix creditor.²⁴⁾

1) Commentary

In the wake of the liquidity crisis in 1997 that left the whole country paralyzed, the Government of Korea came to acquire temporary equity ownership in several banks with no previous affiliation or ties to it.²⁵⁾ In the process, the GOK entered into MOUs with certain banks in which the injection of public funds bestowed on the GOK a majority ownership.²⁶⁾ In a written submission to the EC, the GOK went through the rationale for the MOUs in the following vein:

In the aftermath of a serious financial crisis, the GOK needed to inject public

22) *The First Written Submission of the U.S. in US DRAMS* (May 2004) (hereinafter "*U.S. First Written Submission*"), paras 82-83.

23) Meaning "for the sake of argument".

24) *US DRAMS*, para 7.78.

25) See Statement by Korea in *US DRAMS*.

26) The injection was mostly done through Korea Depository Insurance Company ("KDIC").

funds into certain commercial banks. This need for the GOK to become a substantial shareholder in various banks, however, has not changed the day-to-day management of those banks. The GOK enacted laws and regulations to guarantee the independence of the banks. In doing so, the GOK has been working to strengthen bank independence and to build firewalls to prevent any improper government interference in the day-to-day decisions of the banks. That is why there are explicit rules prohibiting government officials from interfering with banks' lending decisions. That is also why there are explicit rules holding bank officials responsible for loan decisions that do not have a commercial basis.

[...] These MOUs do not allow the GOK to control the day-to-day decisions of the banks. Rather, the MOUs provide a framework for evaluating broader performance measures at the banks. Once the MOU is executed, as long as the banks maintain their operational goal, the GOK is prohibited from getting involved in the day-to-day operation, and in November 2000, such decision was formally instituted by the Prime Minister's Decree.²⁷⁾

As the above demonstrates, the aim of the MOUs was not to confer on the GOK any decision-making power concerning individual credit decisions, but to ensure non-interference by the government in the decision making process of the bank involved. In addition, at the core of the post-1997 reform was the recognition that independent supervision, not government direction, was in order for all financial sectors.²⁸⁾ To this end, an independent FSC was created to consolidate and improve supervision of financial institutions. Prior to the 1997 crisis, supervision of these institutions was mainly in the hands of the Minister of Finance and Economics ("MOFE"). Starting in 1998, regulatory control sifted away from MOFE to FSC and to other independent regulatory agencies including the Final Supervisory Services ("FSS"), the supervisory arm of FSC.²⁹⁾

27) Government of Korea, *Additional rebuttal comments of the Government of Korea on the Commission's provisional determination in the anti-subsidy investigation concerning imports of DRAMs from Korea* (May 2003), at 9.

28) Hynix, *Initial Arguments on the Directed Credit Issue in DRAMs from Korean — CVD Investigation* (March 2003), at 28-29.

29) FSC took the lead in evaluating banks, and ordering failed banks to close. The FSC also acted to begin the

3. *The Corporate Restructuring Promotion Act*

The last legislation considered by the U.S. in their CVD proceeding was the Corporate Restructuring Promotion Act (CRPA). With respect to the CRPA, the USDOC found that:

[d]ecisions made by the October Creditors' Council were subject to the newly enacted CRPA. Under this Act, banks holding 75 per cent of a company's debt may set the financial restructuring terms for all of a company's creditors. Hynix' government-owned and controlled creditors accounted for a substantial majority of [Hynix's] outstanding debt at that time, an amount sufficient to set the terms for all banks ...³⁰⁾

In the DOC's view, within the framework of the CRPA, the GOK could coerce Group C creditors (that is, private creditors) into taking part in the October 2001 restructuring of Hynix because this particular group was at the whim of the Creditors' Council which in turn was dominated by Group A and B creditors (owned or controlled by the GOK).³¹⁾

According to the Panel, there were two main issues to be considered in respect of the CRPA. The first issue was whether the DOC could properly have found that the Creditors' Council was in fact controlled by Group A and B creditors by virtue of holding at least 75 percent of the voting rights. The second issue was whether there was a proper evidentiary ground to sustain the DOC finding that Group C creditors were constrained by decisions of the Creditors' Council lacking, as a result, any meaningful ability to make volitional commercial decisions.³²⁾

As for the first issue, the Panel found a disparity between the pertinent record evidence and the DOC finding that groups A and B held at least 75 per cent of the

process of developing and implementing stricter prudential regulations, and creating a new watchdog agency (i.e. FSS) to implement these new regulations and policies.

30) *Decision Memorandum*, page 54.

31) The DOC found that the financial contributions for Hynix were provided by public bodies (Group A creditors including Korea Development Bank ("KDB")), by a number of private, yet GOK owned or controlled banks (Group B Creditors including Korea Exchange Bank), and by private entities (Group C creditors including Kookmin). See *US DRAMS*, para 7.8.

32) *US DRAMS*, paras 7.80-7.89.

votes.³³⁾ Accordingly, the DOC finding was found devoid of substantial evidentiary grounds.³⁴⁾

As for the second issue, the gist of the USDOC's contention was that "the terms on which these creditor banks terminated their relationship with Hynix were dictated by the banks that mattered in this case, namely the large government-owned and controlled creditors."³⁵⁾ In respect of this particular finding, the Panel paid close heed to the fact that creditors were given three options³⁶⁾ to choose from, and that four creditors³⁷⁾ from Group B and C had exercised their appraisal rights pursuant to the third option crafted by the Creditors Council. In addition, the Panel criticized the DOC for overlooking the record evidence that, under the terms of the CRPA, the dissenting creditors were entitled to decline the terms of payment and "buy out" price put forward by the Creditors' Council if they were unreasonable or otherwise deemed unacceptable.

On the basis of these considerations, the Panel rejected the US determination that the government-owned and controlled creditors could dictate the terms of the October 2001 restructuring of Hynix.

1) CRPA (EC)

In *EC DRAMS*, the Panel noted the EC finding that the CRPA had been enacted in August 2001 with a view to streamlining corporate restructuring through a majority voting procedure. Before the enactment of the CRPA, corporate restructuring in Korea was based on private agreements entered into between the

33) According to a document prepared by the US Embassy in Seoul at the request of the DOC, those "institutions where [GOK] is the first shareholder" held 63.3 per cent of the voting rights. Furthermore, during the US DRAMS proceeding, the US reported that the share of the Creditors Council vote held by Group A and B creditors at the time of the October 2001 restructuring was "above 65 [per cent]." *US DRAMS*, para 7.81.

34) *Id.*

35) *Id.* para 7.82.

36) Each creditor could choose from the following three options: (1) extend new loans, convert a majority of their debt to equity, and extend maturities on the remainder; (2) refuse to extend new loans, convert a smaller portion of their debt to equity, and forgive the remainder; or (3) exercise appraisal rights against their outstanding debt based on the liquidation value of the company, as determined by an independent auditor, and walk away. *See Decision Memorandum*, at 20.

37) They are Korea First Bank, Kwangju Bank, Kyungnam Bank, and HSBC.

distressed company and their creditor banks. At the time of the October 2001 Restructuring Programme, on the contrary, the Panel found that a government-driven policy entrenched in the framework of the CRPA had “considerably circumscribed the options of dissenting creditors.”³⁸⁾

2) Appellate Body Findings

As noted above, the USDOC found in the case below that, under the CRPA, creditors holding three-fourths of a firm’s outstanding debt could set and foist the terms of restructuring on all of that firm’s creditors. During the Panel proceeding, Korea disputed this DOC finding by adducing evidence that, under Article 29 of the CRPA, three creditors of Hynix had actually exercised their mediation rights for the purpose of being “bought out by other creditors at a price determined through mediation.”³⁹⁾ The Panel was receptive to the claims of Korea under the CRPA based on said evidence. The Appellate Body, however, reversed the Panel finding by noting that the evidence at issue was not part of the universe of evidence before the USDOC (that is, it was non-record evidence). As a result, the Appellate Body found the Panel to have failed in undertaking “an objective assessment of the matter before it” as required under the pertinent provisions of the Dispute Settlement Understanding.⁴⁰⁾

3) Comments

Enacted in August 2001,⁴¹⁾ the CRPA is a Korean law providing a statutory framework for corporate restructurings and out-of-court workouts under a creditor financial institutions’ council.⁴²⁾ Under the CRPA, the main creditor bank, “which is chosen *by the creditors themselves* without direction or control by the GOK” runs the

38) *EC DRAMS*, para 7.12.

39) *DRAMS AB Report*, para 171.

40) *Id.*, para 179.

41) The CRPA was initially enacted as a temporary, stop-gap measure and expired at the end of 2005. On 3 August, 2007, the CRPA was re-enacted with validity period until 31 December, 2010.

42) See Clearly and Gottlieb, *Restructuring News Letter* (December, 2004), available at http://www.cgsh.com/files/tbl_s47Details%5CFileUpload265%5C302%5CCGSH_Restructuring_Newsletter_Dec_2004.pdf.

creditors' council and spearheads the corporate restructuring efforts.⁴³⁾ In the event of discord among the creditors, a Creditor Financial Institutions Mediating Committee (“Committee”) consisting of private experts in corporate restructuring, can be set up to serve as a mediator.⁴⁴⁾

Any role for government under the CRPA?

Under the CRPA, no statutory authority is conferred on any government agency. In addition, mediating or observing functions under the Act exclusively belong to the Committee, not to any public authority. Article 31 of the CRPA provides that a Committee, which is made up of seven professionals, may be formed for the purpose of implementing the effective reorganization of the distressed company and for ironing out or mediating differences in opinion within the creditors group.

Furthermore, the government has no role to play in enforcing the CRPA or any decisions made thereunder by the Creditor’s Council. In terms of minority protection, any creditor financial institution that takes issue with the Committee’s decision can subsequently seek mediation or judicial review.⁴⁵⁾

4. Further Note on Legislation in the Context of Financial Reform

In their respective final determinations, the U.S. and E.C. both determined that technically insolvent, yet viable companies such as Hynix should have been allowed to go bankrupt.⁴⁶⁾ At least the Panel in *US-DRAMS* questioned the wisdom of this common finding by taking the view that, unlike what the DOC had found, certain of

43) Hynix, *Case Brief in DRAMS from Korea — CVD Investigation* (May 2003), at 14 (emphasis original).

44) See generally GOK, *Supplemental Questionnaire Response in the DOC CVD investigation of Hynix* (2003), at 59-66.

45) In respect of mediation rights, Article 29(5) of the CRPA provides:

“[w]here the consultation under paragraph (4) is not attained, the mediation committee under Article shall make a decision on the price of purchase or redemption of claims and conditions thereof. In such case, the mediation committee shall take into consideration the price computed by an accounting specialist selected under a consultation between the council and opposing creditors by evaluating the value of the relevant enterprise with insolvency signs and the possibility for implementing the agreement, as well as the situation of funds of purchase institutions”.

46) For instance, the EC stated that: “(t)he European Communities does not consider that what happened to Hynix happened according to the normal application of generally applicable bankruptcy laws” See para. 556 of the *First Written Submission* of the EC in *EC DRAMS*.

Hynix's creditors were not directed or entrusted by the Korean government to financially prop up Hynix. Yet the Appellate Body subsequently reversed this Panel ruling reinstating thereby the initial U.S. view on the issue. In so doing, the Appellate Body seems to have implicitly acknowledged and endorsed the notion that the proper antidote for ailing companies even with reasonable prospects of viability such as Hynix,⁴⁷⁾ was the U.S.-style liquidation, rather than any form of corporate restructuring. However, it is suggested that such proposition is troubling for the following reasons.

First, the problem with such view is that it does not accurately reflect or accord with what happened in Korea in terms of corporate restructuring subsequent to the financial crisis in 1997.⁴⁸⁾ Especially in respect of restructuring *chaebol*,⁴⁹⁾ Korea has heavily relied on corporate reorganization and out-of-court workout procedures, rather than liquidation. More specifically, among the firms that went insolvent in 1997, the vast majority of the top thirty *chaebol* entered into the corporate reorganization procedure. With the introduction of a government-initiated out-of-court workout procedure in 1998, the workout program gained extra momentum and became the most prevalent form of restructuring for large *chaebol*. By 1999, most of the new bankruptcies (in terms of assets) were now handled through out-of-court procedures.

In this connection, it is also noted that Korean bankruptcy law generally favours corporate reorganization over liquidation. As Mikyung Yun alludes to: "Between corporate reorganization and composition, the former is favored to the latter. This is apparent from the priority the court gives to corporate reorganization. Once a corporate reorganization is approved, application for composition or bankruptcy cannot be filed. Further, application for corporate reorganization overrides

47) In this regard, Citibank, Hynix's financial consultant during 2001, stated that "it decided to stay involved with Hynix because it *could get a better recovery value if they stayed involved with Hynix for the long haul*. Moreover, Citibank still thought Hynix could be a viable going concern, which is why Citibank decided to invest more funds as part of the October restructuring According to Citibank officials, although its investment decisions in Hynix did not work out, Citibank made its decisions to invest following Citibank's standard investment procedures and based completely on commercial considerations". Korea, *First Written Submission in US DRAMS* (April, 2004) (hereinafter "*GOK First Written Submission*"), para. 534 (emphasis original).

48) See Haggard, Lim and Kim, et al. *Economic Crisis and Corporate Restructuring in Korea* (2003), at 211-16.

49) A "chaebol" is a Korean term for a conglomerate of several companies clustered around a single holding company.

composition, even if the latter has already been applied for or is in process.”⁵⁰⁾ The same point is reinforced by James L. Garrity and Karen P. Ramdhanie when they state that: “... in Korea the perception continues that bankruptcy and, to a lesser extent, reorganization are socially unacceptable.”⁵¹⁾

Second, the US view that “technically insolvent” companies should be liquidated, rather than restructured or reorganized as in the case of Hynix is problematic in that it accords undue supremacy to one form of corporate reorganization over another.⁵²⁾ Also, in the absence of any definitive determination or pronouncement at an international level that Korea’s choice of corporate restructuring or out-of-court workout as the prime vehicle for revamping large conglomerates was incompatible *per se* with established international norms or legal obligations, such view lacks legal coherence and force. In this regard, it is noted that corporate reorganization in Korea in general and the CRPA in particular were modelled after the “London Approach” to corporate work out procedures. This particular approach to management normalization was recommended to Korea by the IMF as a way of trailblazing reform in the wake of Korea’s liquidity crisis.⁵³⁾ As Korea pointed out in the *US DRAMS* proceeding:

Partly because of the cumbersome nature of Korea’s bankruptcy laws, the Korean government has often employed a restructuring process that is outside the judicial system known as the London Approach. Developed in the United Kingdom over the last 25 years as a non-statutory market-led system for corporate workouts, the London Approach has been widely used in the United Kingdom since the early 1990s to rejuvenate distressed companies. The London Approach has been useful for solvent companies facing a cash flow

50) Mikyung Yun, *A Primer on Korean Bankruptcy Law*, Am. Bankruptcy Inst. J. (June 1999).

51) James L. Garrity and Karen P. Ramdhanie, *Korean Bankruptcy Law: the Heavy Duty Hypothetical Applied*, New York L. J. of Int. & Comp. L. (1997), at 281.

52) In addition, what is problematic with such US-EC view is that “under such theory, a reasonable investor only looks at narrow financial indicators. This view thus precludes a reasonable investor from considering broader economic factors. The US view also precludes a reasonable investor from having a different perspective as an “inside investor.” For example, under their view, a bank that has a large amount of outstanding debt is not allowed to consider the effect of a new loan on the probability of recovering the existing loan. Given the rather narrow focus of the U.S.-style “reasonable investor,” that investor is almost applying a *per se* rule.” See Korea, *Answers to the Panel Questions* (July 2004) in *US DRAMS*, at 5.

53) The “London Approach” has been implemented in several countries with less developed bankruptcy systems

crisis and is voluntary. As described by Michael Smith of the Bank of England, “The London Approach ... is flexible framework which enables banks and other interested parties to reach well-based decisions about whether and on what terms a company in financial difficulty might be allowed to survive.” The London Approach has been used in corporate restructuring in Korea because of its advantageous features, such as flexibility, and because it avoids an actual bankruptcy for the distressed firms. An additional advantage is that the approach leads to fewer workers being laid off and hence a lower rate of unemployment than would otherwise be the case.⁵⁴⁾

Hence, just because Korea chose a particular restructuring model provides no ground or reason to “condemn this approach to corporate workouts, which was deemed a more efficient and less costly alternative to traditional bankruptcy proceedings.”⁵⁵⁾

III. Related Legal Instruments - Securities Prospectuses

In addition to the legislations considered above, in support of its finding that Korea could and indeed did influence the lending behavior of privately held banks, the USDOC considered the conduct of Kookmin Bank. According to the US, this particular bank, which had less than 10 percent government ownership,⁵⁶⁾ admitted in sworn disclosure documents to the U.S. Securities and Exchange Commission (“SEC”) that its lending decisions could be subject to government influence. More specifically:

(I)n September 2001, Kookmin Bank and Housing and Commercial Bank (two Hynix creditors that were merging to form the New Kookmin during the period of investigation) filed a prospectus with the SEC. Kookmin

where “voluntary workouts organized by creditors often preserve more value for the creditors than forced bankruptcies and liquidation of the debtor’s assets”. See para. 336 of *GOK First Written Submission*.

54) Robert F. Emery, *Korean Economic Reform* 140 (2001), quoted in *Id.*, at 567.

55) *Id.*

56) During the period of DOC investigation, Kookmin was 65% foreign owned.

acknowledged in the Risks Relating to Government Regulation and Policy Section of this prospectus:

The Korean government promotes lending to certain types of borrowers as a matter of policy, which New Kookmin may feel compelled to follow In addition, the Korean Government has, and will continue to, as a matter of policy, attempt to promote lending to certain types of borrowers. It generally has done this by identifying qualifying borrowers and making low interest loans available to banks and financial institutions who lend to those qualifying borrowers. The government has in this manner promoted low-income mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with New Kookmin's credit review policies. However, we cannot assure you that government policy will not influence New Kookmin to lend to certain sectors or in a manner in which New Kookmin otherwise would not in the absence of the government policy.

In June 2002, Kookmin made another submission to the SEC in anticipation of the issuance of American depository shares (ADS s) coordinated by Goldman Sachs. This submission contained language virtually identical to the first prospectus:

The Korean government promotes lending to certain types of borrowers as a matter of policy, which we may feel compelled to follow. The Korean Government has promoted, and, as a matter of policy, may continue to attempt to promote lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programs for troubled corporate borrowers and by identifying sectors of the economy it wishes to promote and making low interest loans available to banks and financial institutions who lend to borrowers in these sectors. The government has in this manner promoted low-income mortgage lending and lending to high technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with our credit review policies. However, government policy may influence us to lend to certain sectors or in a manner in which we would not in the absence of the government policy.⁵⁷⁾

According to the US submission, all companies entering the U.S. securities

markets are required to file a prospectus regardless of nationality. The purpose of such prospectus is to warn prospective investors of all material risks associated with their contemplated investment. According to the US, the SEC mandates the use of “plain English” in the issuance of prospectuses. Namely, prospectuses are to be drafted in such a way that all risk factors are articulated in a “clear, concise and understandable” manner.⁵⁸⁾ In deference to this SEC approach, the DOC undertook its review of the Kookmin prospectuses on a “plain reading” of the language used therein.⁵⁹⁾

The Panel, however, was not persuaded that a plain reading of the two Kookmin prospectuses somehow bore out GOK entrustment or direction in respect of any Hynix creditor. Rather, a plain reading of those documents indicated that “the GOK has sought to promote lending to certain types of borrowers, and that it had done so by requesting banks to participate in remedial programmes, and making low interest loans available to them” as appropriate.⁶⁰⁾

According to the Panel, what was plain in the prospectuses was that the GOK pursued certain fiscal policies by means of requests to banks to provide low interest loans. In the Panel’s opinion, such conduct entailed a legitimate form of government prudential policy, as opposed to an affirmative act of delegation or command within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Accordingly, an objective and impartial investigating authority could not have found that the language of the two Kookmin prospectuses reasonably evidenced GOK entrustment or direction for the benefit of Hynix.⁶¹⁾

In addition to the Kookmin prospectuses, USDOC considered Form 20-F submitted to the SEC by Woori Finance Holdings Co. (“WFHC”) in September 2003 in their first CVD administrative review on Hynix DRAMS.⁶²⁾ Woori Bank, which is a subsidiary of WFHC, participated in the May 2001 restructuring measure (by purchasing convertible bonds) and in the October 2001 restructuring program (in the

57) *U.S. First Written Submission*, paras 70-71 (emphasis original).

58) *US DRAMS*, para 7.163.

59) *Id.*

60) *Id.*, at 7.164.

61) *Id.*

62) U.S. Department of Commerce, *Issues and Decision Memorandum for the Final Results in the First Administrative Review of the Countervailing Duty Order on DRAMS from Korea*, 71 FR 14174 (March 21, 2006), available at wais.access.gpo.gov (hereinafter “*First CVD Review*”).

form of new loans and debt swapped for equity) of Hynix.⁶³⁾

In respect of GOK pressure to lend to certain strategic industries, WFHC's Form 20-F included a statement to the effect that:

The KDIC, which is our controlling shareholder, is controlled by the Korean government and could cause us to take actions or pursue policy objectives that may be against your interests. The Korean government, through the KDIC, currently owns 86.8% of our outstanding common stock. So long as the Korean government remains our controlling stockholder, it will have the ability to cause us to take actions or pursue policy objectives that may conflict with the interests of our other stockholders. For example, in order to further its public policy goals, the Korean government could request that we participate with respect to a takeover of a troubled financial institution or encourage us to provide financial support to particular entities or sectors. Such actions or others that are not consistent with maximizing our profits or the value of our common stock may have an adverse impact on our results of operations and financial condition and may cause the price of our common stock and ADSs to decline⁶⁴⁾

WFHC's 20-F further states in terms of risks relating to government regulation:

The Korean government promotes lending and financial support by the Korean financial industry to certain types of borrowers as a matter of policy, which financial institutions, including us, may decide to follow. Through its policy guidelines and recommendations, the Korean government has promoted and, as a matter of policy, may continue to attempt to promote lending by the Korean financial industry to particular types of borrowers. For example, the Korean government has in the past announced policy guidelines requesting financial institutions to participate in remedial programs for troubled corporate borrowers, as well as policies identifying sectors of the

63) Hanvit Bank, the predecessor of Woori Bank, received a capital injection of 2.7644 trillion KRW from the KDIC, a government-affiliated organization, in the form of stock holding. Later, all of the KDIC shares were transferred to WFHC in April 2001, and the bank became a subsidiary of WFHC. As of 2001, WFHC was 100 percent owned by the KDIC, and the KDIC indirectly held full ownership of the bank through the holding company. Hanvit Bank changed its name to Woori Bank in May 2002.

64) *First CVD Review*, at 54531.

economy it wishes to promote and making low interest funding available to financial institutions that lend to these sectors. The government has in this manner encouraged low-income mortgage lending and lending to small- and medium-sized enterprises and technology companies. We expect that all loans or credits made pursuant to these government policies will be reviewed in accordance with our credit approval procedures. However, these or any future government policies may influence us to lend to certain sectors or in a manner in which we otherwise would not in the absence of that policy.⁶⁵⁾

According to the USDOC, WFHC's SEC disclosure was a smoking-gun proof of GOK control of GOK-owned or controlled banks with respect to their lending decisions involving Hynix in that such filing is "subject to stringent transparency rules designed to protect investors, and the veracity of the accompanying statements entails serious litigation and liability risk for the company."⁶⁶⁾

Interestingly, WFHC's 20-F was also considered in Japan's recent CVD investigation involving Hynix.⁶⁷⁾ In that case,⁶⁸⁾ in light of this disclosure document and others, the Japanese Minister of Finance ("MOF") found it probable that the policy of GOK could influence the credit decisions of commercial banks. Especially where the GOK is the controlling shareholder, the MOF determined, the GOK could cause the bank to pursue certain policy objectives that might collide with the interests of non-government stakeholders. Based on these facts on the record, the MOF found a legal framework in Korea under which the government could lord it over individual banks and their lending activities.⁶⁹⁾

65) *Id.*

66) *Id.*, at 54531.

67) The Final Determination with respect to the Investigation under Article 7, Paragraph 6 of the Customs Tariff Law (Law No. 54 of 1910) (Ministry of Finance Notification No. 352 of August 4, 2004) on DRAMS from the Republic of Korea (hereinafter "*MOF Final Determination*") announced in Cabinet Order No. 13 and Ministry of Finance Notice No. 35, published respectively in Issue No. 4264 and Special Issue No. 17 of the Official Gazette dated 27 January 2006.

68) Japan launched an anti-subsidy investigation against the GOK and Hynix in August 2004 and issued a final affirmative determination in early January, 2006 making it Japan's first countervailing duties.

69) *Id.* paras 85-87.

1. Appellate Body finding on the Kookmin Prospectuses

During the Appellate Body proceeding, the U.S. contended that the Panel had employed a “piecemeal approach” to analyzing the DOC finding on direction and entrustment as exemplified by the Panel treatment of the Kookmin prospectus.⁷⁰⁾ In the Appellate Body’s view, on the basis of the admission by Kookmin Bank that “government policy” might lead it to extend loans that it otherwise might not offer, and also given the existence of an ongoing GOK policy to save Hynix,⁷¹⁾ the Panel should have considered, as did the USDOC, whether the Kookmin Bank prospectuses could be considered relevant in the context of the totality of all evidence,⁷²⁾ rather than in isolation or by itself.⁷³⁾

2. Comments on the Kookmin Prospectus

As has been noted, the US DRAMS Panel refused to consider the Kookmin Prospectus as tangible proof of GOK direction or entrustment of Hynix creditors. The Appellate Body, on the other hand, castigated the Panel for not strictly following the holistic approach of the DOC to record evidence whereby the prospectus was to be evaluated as but an element of the universe of evidence before the agency. Yet what the Appellate Body failed to observe in this regard is that despite Kookmin’s issuance of the prospectus in September 2001, Kookmin, in fact, did not participate in the October 2001 restructuring of Hynix by refusing to extend any additional new loans. As such, in so far as the October restructuring is concerned, Kookmin’s actual

70) *DRAMS AB Report*, para 20.

71) For instance, in its published determination, the DOC stated:

[t]he GOK had a policy to prevent Hynix’ failure. The GOK attached such great importance to Hynix’ survival because it feared that the company’s collapse would have serious repercussions for the ROK’s corporate, labour and financial markets, and because Hynix was part of an industry sector considered to be of ‘strategic’ importance to the GOK. *Decision Memorandum*, at 37.

72) In this respect, the Appellate Body noted that:

(R)equiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence. *DRAMS AB Report*, para 150.

73) *Id.*, para 155.

actions belie the DOC determination that the prospectus constituted “direct evidence of an explicit and affirmative command by the GOK to Hynix creditors.”⁷⁴⁾

In the WTO dispute settlement context, the Kookmin prospectus was also considered in *Korea-Shipbuilding*. In that case, Korea contended that Kookmin’s statement in the prospectus pertained to GOK promotion of low-income mortgages and lending to technology companies, not to the shipbuilding sector. In support of this claim, Korea submitted a letter from Kookmin’s lawyers⁷⁵⁾ explaining that the prospectus “does not state, nor was it intended to imply, that the Korean government exercises control over the banking sector generally or over bank lending decisions either generally or with respect to particular borrowers such as Hynix.”⁷⁶⁾

In reviewing the prospectus language itself, the shipbuilding Panel accepted Korea’s claim that it was actually made in respect of GOK promotion of low-interest mortgages and loans to technology firms. In the view of the Panel, therefore, the prospectuses did not prove that Kookmin was led or coerced by the government into the restructuring of shipyards. In addition, the Panel pointed out that the prospectus referred to GOK “requesting” banks to take part in remedial measures for distressed corporations. In the absence of any other probative material, the Panel opined, a mere government “request” will not amount to entrustment or direction, since such request lacks the requisite elements of delegation or command.⁷⁷⁾

IV. Conclusion — Implications

According to the FSS, a total of eight Korean corporations are listed on the New York Stock Exchange (“NYSE”) as of March, 2007.⁷⁸⁾ They are: POSCO, SK Telecom, Korea Telecom, Kookmin Bank, WFHC, LG Philips LCD, Shinhan Financial Holding Group (“SFHG”), and Korea Electric Power Corporation. The number of financial institutions among these NYSE traded Korean entities is three consisting of Kookmin, arguably the largest commercial lender in Korea,⁷⁹⁾ WFHC

74) *First Written Submission of the GOK in US DRAMS*, para 439.

75) The law firm of Cleary Gottlieb.

76) *Korea-Shipbuilding*, para 7.396.

77) *Id.* para 7.397.

78) FSS, *Press Release* (March 2007), available at [http:// www.fss.or.kr](http://www.fss.or.kr).

and SFHG the respective subsidiary banks of which form the Big Four together with Kookmin and Hana Bank.⁸⁰⁾

As has been noted above, Kookmin and WFHC stated in their respective SEC disclosures that government influence can shape the contours of their lending decisions. As for Shinhan Bank, which forms part of SFHG, the EC has recently determined in the context of Hynix's October 2001 restructuring programme that the GOK was capable of wielding "considerable influence" over the bank as its largest shareholder holding more than 18% equity stakes.⁸¹⁾ Given the status and size of these financial institutions, it should come as no surprise that the banking and financial sector of Korea can be considered susceptible to governmental pressure and control in the eyes of international investors, particularly in the area of lending policy related to technology firms.⁸²⁾

Aside from the commercial banks, the U.S. has expressed concerns about the role played by policy lending banks in government support of selected Korean industries. In the view of the U.S., the participation of these banks, among which the KDB in particular, in the Hynix restructuring signaled GOK support for the ailing chipmaker.⁸³⁾ Determined to be a public body by the US and EC trade remedy authorities alike,⁸⁴⁾ the KDB has been active in its support to "foster technology-

79) Bloomberg News, *South Korea's Biggest Lender Gets Bigger*, available at <http://www.dbs.com/newsroom/2002/press020326.html>.

80) See Moon Ihlwan, *South Korea — A Great place to be a Bank*, available at http://www.businessweek.com/magazine/content/05_45/b3958131.htm.

81) European Council, *COUNCIL REGULATION (EC) No 584/2006 of 10 April 2006 amending Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea*, available at europa.eu.int/eur-lex/en/oj, recital 20.

82) In connection with possible GOK direction of credit for Korean financial institutions, the DOC recently took the view that, in 2004, "GOK influence may have been directed at LG Card", a credit card company operating in Korea. This view was based upon Kookmin's SEC filing that "in light of the financial market instability in Korea resulting from the liquidity problems faced by credit card companies during the first quarter of 2003, the Korean government announced temporary measures intended to provide liquidity support to credit card companies". See DOC, Issues and Decision Memorandum for the Final Results in the Second Administrative Review of the *Countervailing Duty Order on Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 72 FR 7015 (February 14, 2007), available at wais.access.gpo.gov, at 25.

83) *First CVD Review*, at 54532.

84) For example, KDB was determined by the USDOC to be a public body because: 1) its shares are wholly owned by the GOK, 2) the bank's purpose is to supply and manage major industrial funds with a view to promoting

intensive industries including semiconductors.”⁸⁵⁾ In respect of Hynix, the KDB participated in both the May and October 2001 remedial measures while implementing a bond-purchase program which was found *de facto* specific to Hynix and Hyundai Group in general.⁸⁶⁾ With respect to the KDB, the US Trade Representative (“USTR”) noted in their recent annual report that:

More specifically, the U.S. Government has expressed concerns about the role played by the government-owned Korea Development Bank (KDB) in supporting certain Korean industries. Historically, the KDB, which as a government-owned entity is not necessarily bound by the same constraints as commercial institutions, has been one of the government’s main sources for policy-directed lending to favored industries. U.S. industries have reported that lending and equity investments by the KDB have contributed to overcapacity in certain Korean industries. The U.S. Government will continue to monitor the lending policies of the KDB and other government-owned or affiliated financial institutions.⁸⁷⁾

Lessons for Korea here would be, first of all, minimizing “government intervention that impedes commercialization.”⁸⁸⁾ In this respect, the Korean government might find it necessary to completely privatize the commercial banks in which it had acquired an ownership stake to varying degrees in the aftermath of the 1997 crisis, since such privatization will signal an affirmative step towards

the overall well-being of the Korean economy; 3) the government is heavily involved with its day-to-day management. See *Decision Memorandum*, p. 16.

85) Available at <http://www.kdb.co.kr>. In this respect, Article 18.2 of the KDB Act provides in pertinent part that the KDB may “lend funds which are to be employed in the development of high-technology for major industries”

86) Referring the KDB Fast Track/Debenture Program. The EC determined the program to be *de facto* specific to Hynix in the meaning of Article 3(2)(c) of the basic Regulation because: i) the program was predominantly used by Hyundai Group companies including Hynix; ii) Hynix had used more than 40 percent of the funds available under the program. See European Council., *COUNCIL REGULATION (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea*, available at europa.eu.int/eur-lex/en/oj/, recital 65.

87) USTR, *The National Trade Estimate Report on Foreign Trade Barriers* (2007), at 362.

88) Thomas Byrne, *The Korean Banking System Six Years after the Crisis*, available at <http://www.keia.org/2-Publications/2-2-Economy/Economy2004/Byrne.pdf>.

remedying the unfortunate perception that the GOK is still tinkering with the lending decisions of privately held commercial lenders.⁸⁹⁾ In respect to the policy lending banks, there have been recent press reports that talks are under way to turn the KDB into a holding company and then have it privatized eventually in due course.⁹⁰⁾ If implemented, these steps will certainly go a long way towards transforming the image of the KDB as an executor *par excellence* of GOK financial policies and economic mandates.

KEY WORD: Hynix, Corporate Restructuring, Korean Liquidity Crisis, World Trade Organization

89) A prime example here would be Korea Exchange Bank, the lead bank on Hynix's Creditors Council. During the period of DOC investigation, the KEB was majority owned by the GOK. In 2004, however, Lone Star, a private equity fund in Texas, U.S., became the bank's majority shareholder by purchasing 51 percent of KEB shares.

90) Available at <http://news.mk.co.kr/newsRead.php?year=2007&no=117642>.

[Student Note]

The Role of Women in Korean Divorce Law

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Article 10 of the Korean Constitution guarantees that all citizens are equal in the eyes of the law and that discrimination based on sex is prohibited.¹⁾ However, traditional Confucian ideals that comprise the customs of South Korea often conflict with this Constitutional aim. Although family law has transformed greatly throughout the history of South Korea, the principle of sex equality in the law of divorce was disregarded for many centuries. This essay will examine the evolution of sex equality in South Korean Divorce Law.

Prior to the introduction of Confucianism, South Korean families were governed by matrilocal households. During the Three Kingdom Period, a newly married couple resided in the wife's home after the wedding. The husband joined the wife's family and the children of the marriage were reared in the maternal family home.²⁾ This system was considered to be practical for multiple reasons. First, both sons and daughters were entitled to equal share of the family inheritance. This required that the daughter be able to inherit land, since movable items often did not comprise an equitable share of the family assets.³⁾ Second, the husband received economic favors from the wife's family as a result of joining their family. Finally, the ability of the wife to inherit from her family equalized the power in the marriage and prevented her from being in a disadvantaged economic position.⁴⁾ These principles of equality among the sexes gave the woman a more secure position in marriage, divorce, and widowhood. By allowing a wife to inherit her family's property, she was economically capable of leaving her husband. A woman who sought to divorce her husband was not left to move out of her home, since her home had remained with her own family. Additionally, the matrilocal family setting ensured that she would not be

1) Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, in 12 COLUM. J. ASIAN L. 125, 126 (Fall 1998). (Citing: "Article 10 of the Korean Constitution stipulates: 'All citizens shall be equal before the law, and there shall be no discrimination in political, economic, civil or cultural life on account of sex, religion, or social status'.")

2) *Id.* at 130.

3) *Id.* at 132-33 (Stating: "Many of the objections towards adopting the Confucian model not only stemmed from peoples' sentimental values, but also from their recognition of the potential practical problems it would raise, especially economic ones. Inheritance documents of the Dynasty clearly show that well into the seventeenth century daughters inherited the same share of property as their brothers regardless of whether they were married or not ... 'If the daughter moved into her husband's house, she could not take land but would have to be apportioned to her share of the inheritance in the form of slaves, clothes, daily utensils or perhaps some income from her family's land'.")

4) *Id.*

subject to mistreatment by her husband, since her male family members were there for her security.

Although there were many societal advantages to this matrilocal system, there was great political pressure placed on the South Koreans to adopt a male dominated Confucian family system. Yet the transition to a patrilocal marriage system, modeled on the Chinese system, was resisted for decades.⁵⁾ Finally, during the eighteenth century, the Chinese Confucian family system prevailed in South Korea.⁶⁾

The introduction of the Confucian family system in South Korea brought about many drastic changes in women's positions in marriage and divorce law. "According to Confucian tenets, a woman could be divorced for any one of seven reasons: 'failing to produce a son, gossiping, stealing, jealousy, loose conduct, disease, or unfiliality toward her parents-in-law' Only in cases where the woman had no place to go, had faithfully passed the three year mourning period for her parents-in-law, and had improved her in-law's household, could the husband not expel his wife."⁷⁾

The Confucian family law system implemented male family headship and a family register system that required a woman to leave her own family and join her husband's family legally as well as actually.⁸⁾ The family register system makes the male head of the family responsible for exercising the legal rights of the other family members. Therefore, women are not in an ideal position to bring their legal claims in the judicial sphere.

The Confucian system of law and societal norms modeled after the Ming Dynasty in China remained in place for centuries.⁹⁾ When Korea gained its independence from

5) *Id.* at 131.

6) *Id.* at 134.

7) *Id.* at 129.

8) Kay C. Lee, *Confucian Ethics, Judges, and Women: Divorce under the Revised Korean Law System*, in 4 PAC. RIM L. & POL'Y J. 479, 484 (May 1995) (Stating: "The family law still requires women to abandon their own family register upon marriage and enter into the husband's family register. Coupled with the Confucian male headship system which recognizes only the male head of the family as its legal representative, the registration law makes it nearly impossible for women to assert legal rights within the family and in their relations with the outside world. This patrilineal system significantly limits the women's right to property, since most property and business dealings are delegated to men, who tend to acquire the titles to property, which are exempt from division upon divorce.").

9) *Id.* at 485 (Koreans followed customary law handed down by the ancestors as examples of behavior until the

colonial Japan, it drafted a Constitution based on Western legal philosophies. “Article 10 of the Korean Constitution stipulates: ‘All citizens shall be equal before the law, and there shall be no discrimination in political, economic, civil or cultural life on account of sex, religion, or social status’. And Article 34 states: “Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes’.”¹⁰⁾ Additionally, “the constitution provides special protection to women by requiring the government to affirmatively promote the welfare and rights of women.”¹¹⁾

Although the more westernized Korean Constitution was adopted by the National Assembly in 1948, transitioning away from inequality among the sexes in the family law sphere was delayed.¹²⁾ Many of the inequitable Confucian principles regarding the family remained despite the new Constitutional Provisions to the contrary. However, movements to revise the family law system in Korea and gain conformity with the principles of equality outlined in the Korean Constitution led to the revision of the Korean Family Law system. This movement was brought about largely by Korea’s first female attorney, Dr. Lee Tai Young.¹³⁾ After the completion of her studies at the Seoul National University College of Law, Dr. Young organized multiple women’s groups in South Korea including “The Women’s Legal Counseling Center”, the “YWCA”, and the “Women’s Issues Research Center”.¹⁴⁾ In 1957, Dr. Young convinced her husband, National Assemblyman Chyung Yil Hyung to introduce a family law code she had drafted for the consideration of the National Assembly.¹⁵⁾ She gained the consideration of the National Assemblymen by publicly noting the importance of women voters to their election.¹⁶⁾ A few years later, in 1960,

Yi Dynasty (1392-1910 A.D.) imported a body of formal law from Ming China. The Ming Dynasty Code of China closely followed the basic tenets of Confucianism.).

10) Cho, *supra* note 1, at 126.

11) Lee, *supra* note 8, at 486.

12) Cho, *supra* note 1, at 126.

13) *Id.* (“The family law’s systematic discrimination of women has sparked a long protracted struggle to reform its contents. Largely under the vision of Korea’s first woman lawyer, Dr. Lee Tai Young, leaders of the family law revision movement have argued that Korea’s family law must be consistent with the principles of the Korean Constitution. Opponents of the revision, however, have maintained that the traditional Korean ways of governing man-woman relationships must not be discarded for Western-style innovations.”)

14) *Id.* at 145-46.

15) *Id.* at 146.

16) *Id.*

a family law code was passed.¹⁷⁾

Although the code predominantly reflected patriarchal principles of family law, there was some consideration for Dr. Young's proposals.¹⁸⁾ For example, a woman's consent was deemed to be requisite for a lawful marriage.¹⁹⁾ Additionally, women gained the right to bring legal disputes in a court of law without the permission of the male head of family.²⁰⁾ Further, women gained the right to own property free from their husband's management.²¹⁾ Most importantly, adultery on the part of the husband became grounds for a woman to petition for divorce.²²⁾ The earlier revision of the Criminal Code only allowed adultery to be considered criminal or grounds for divorce if committed by a woman.²³⁾

The movement towards equality in the Korean Family law had just begun. In 1962, the All Women's Federation proposed a change of the inheritance laws of South Korea.²⁴⁾ Additionally, the group petitioned for the establishment of a specialized family court, arguing that the sensitive nature of family law dictated a necessity for privacy of a specialized court.²⁵⁾ Shortly thereafter, the Family Court Procedure Act was revised to require all cases pertaining to domestic matters to be heard in the family court.²⁶⁾ "Its proclaimed purpose was to promote harmony and cooperation in the family based on individual dignity and equality between the sexes as mandated by the Constitution."²⁷⁾ In addition to the family court, a mandatory mediation service was established.²⁸⁾

17) *Id.*

18) *Id.*

19) *Id.* at 148.

20) *Id.*

21) *Id.*

22) *Id.*

23) *Id.* at 145.

24) Lee, *supra* note 8, at 486 ("In 1962, the All Women's Federation petitioned for an amendment of the inheritance laws and the establishment of a family court. The women representing the various organizations argued that 'family matter should be heard in secret hearings in which the parties may reconcile or reach an amicable settlement by appealing to the moral principles, compassion, and experience of the learned professionals in the educated, psychological, sociological, and medical fields.'").

25) *Id.*

26) *Id.* at 487.

27) Cho, *supra* note 1, at 151.

28) *Id.* ("As part of the procedure toward settling family disputes, a mandatory mediation process was enacted

The Women's Reform Movement was interrupted shortly thereafter by President Park, who disbanded all women's organizations and dismissed the National Assembly.²⁹⁾ However, a group called the Pan Korean Women's Group, remained intact despite the prohibition on women's organizations. This group drafted further revisions to the Family Code to be presented to the National Assembly when it was scheduled to reconvene.³⁰⁾ Due in part to the need to alter the preference for sons, since the desire to have sons rendered the two child per family limitation impracticable, the Government of South Korea decided that the family law needed alteration to reflect sex equality consistent with the Korean Constitution.³¹⁾ A revised version of the Family Law provisions of the Korean Civil Code was passed in 1977 based in part on the draft presented to the Assembly members by the Pan Korea Women's Group.³²⁾

Some of the changes presented in the 1977 revision included the requirement that the family court confirm that both parties agreed to a divorce, a widow's inheritance was increased to an amount equal to that of the eldest son, and unmarried daughters became entitled to receive a portion of the family inheritance equal to that of sons.³³⁾ Most importantly, property with an unclear title of ownership acquired after the marriage was required to be divided equally among the spouses in divorce.³⁴⁾ Prior to that revision, unclearly titled property was considered to be property of the husband.³⁵⁾ Additionally, both parents were given the right to make parental decisions and exert authority over the children.³⁶⁾ Prior to the revision, only the father was

and Lee was made one of the first members of the mediation committee.)

29) *Id.* at 151.

30) *Id.* at 153 (With President Park's prohibition of all discussions on constitutional reform and the Korean Central Intelligence Agency's declaration that the Pan Korea Women's Group activities violated that prohibition, the Pan Korea Women's Group decided to halt further formation of local branch organizations and the holding of campaigns in public. Yet, the Group's leaders continued to meet with legal scholars to complete a draft of an amendment to the family law by September 20, 1974, the date the National Assembly was scheduled to reconvene ... Because the Pan Korea Women's Group did not have the power to introduce a law on the floor of the National Assembly, leaders of the Group met privately with Assembly members to garner their support.)

31) *Id.* at 154.

32) *Id.* at 155.

33) *Id.* at 156.

34) *Id.*

35) *Id.*

36) *Id.*

allowed these rights.³⁷⁾

Although the American family law system varies from state to state, the trend is to divide any property purchased during the marriage equally between the parties without reference to the individual spouses contributions. Often, married women who are not members of the workforce are entitled to alimony, or spousal support payments from the husband, in a divorce. Additionally, child support payments are required in order to ease the financial burden on the parent who gets custody.

Following the 1977 revision to the family code, the divorce rate has steadily increased in South Korea.³⁸⁾ Women's groups continued to lobby for the elimination of the remaining discriminatory family law provisions.³⁹⁾ In 1989, Another Revision of the Family Law was adopted.⁴⁰⁾ This revision became effective on January 1, 1992 and is currently the version in practice in South Korea.⁴¹⁾ While it still contains many discriminatory provisions by Western standards, it is a vast improvement in the sphere of sex equality from the previous Confucian traditions of family law.⁴²⁾

The Korean Civil Code provides for two kinds of divorce. One is 'divorce by agreement' and the other is 'judicial divorce on grounds for divorce'. Article 834 of the Korean Civil Code provides, 'The husband and wife may divorce by mutual consent' Article 840 of the Korean Civil Code provides: Husband or wife may apply to the Family Court for a divorce in each case mentioned in the following Subparagraphs: (1) If the other spouse has committed an act of unchastity; (2) If he or she has been deserted maliciously by the other spouse; (3) If one spouse has been extremely maltreated by his or her lineal ascendants; (4) If one spouse's lineal ascendant has been extremely maltreated by the other spouse; (5) If the life or death of the other spouse has been unknown for three years; and (6) If there exists any other cogent reason for which it is difficult for him or her to continue the marriage."⁴³⁾

37) *Id.*

38) Lee, *supra* note 8, at 490.

39) Cho, *supra* note 1, at 163.

40) *Id.* at 164.

41) *Id.* at 164.

42) Mi-Kyung Cho, *Korea: the 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. LOUISVILLE J. FAM. L. 431, 431-32 (1994-1995).

43) *Id.* at 438-39.

Prior to the 1990 revisions, a judicial divorce was only granted to an innocent spouse. Only innocent spouses could claim damages in a divorce proceeding.⁴⁴⁾ Damages could be sought for both mental distress and division of property.⁴⁵⁾ Article 839-2 of the Korean Civil Code States:

“(1) One of the parties who has been divorced ... may claim a division of the property against the other party; (2) If no agreement is made for a division of property as referred to in Paragraph (1), or it is impossible to reach an agreement, the Family Court shall, upon request of the parties, determine the amount and method of division taking into consideration the amount of property realized by the co-operation of both parties and other circumstances.”⁴⁶⁾

However, only an innocent party can claim damages, so if a wife is not innocent of the marital default, then she is not entitled to compensation, division of property and may even be required to pay her husband damages.⁴⁷⁾ Yet the Family Court in Korea is transitioning toward equitable judgments in divorce law. For example, in the judgment rendered by the Seoul Gajong Bopwon, the Korean Family Court, awarded a wife fifty percent the marital property. Although this was an extremely rare outcome, the court found that since the husband was still in his medical training at the time of the marriage, all of the property accumulated during the marriage was to be divided.⁴⁸⁾ Again the court split the marital property evenly in a case where the wife had not only performed the domestic duties, but was the primary financial provider for the family.⁴⁹⁾ Yet the court has also determined that some mitigating circumstances may actually serve to reduce the award to the wife. In one case, the court held that the taking of family funds, frequently leaving the home and being unchaste was grounds for an award reduction.⁵⁰⁾

However, as the Court has progressed under the new revisions to the Civil Code,

44) *Id.* at 439.

45) *Id.* at 440.

46) *Id.*

47) *Id.*

48) Cho, *supra* note 8, at 498.

49) *Id.*

50) *Id.* at 499.

more equitable remedies have been issued by the courts. For example, the court has recently determined that, “even a wife who is at fault is entitled to some amount of marital property.”⁵¹⁾ Additionally, the court decided in one case that a wife’s homemaking services were worth as much as thirty percent of the marital property.⁵²⁾

Child Custody under the Korean Family Law is also an area that has seen some equitable revision. Prior to the revisions, the father was the always the recipient of the children following a judgment of divorce, unless the couple had come to an alternative arrangement by agreement.⁵³⁾ Additionally, regardless of the custodial parent of the child, the father remained the parental authority for any decisions to be made regarding the child.⁵⁴⁾

Another move towards a non-discriminatory family law system granted by the 1990 revision was the introduction of the idea of visitation rights. “Article 837-2 of the Korean Civil Code provides, ‘A father or mother, who does not bring up directly his or her own child or children, shall have the right to interview and negotiation’.” This concept is new in Korean Family law. Prior to the 1990 revision, a mother could not visit with or negotiate over the handling of her child.⁵⁵⁾

However, the 1990 revision amended this law. “Now when, ‘parents are divorced, the person who is to exercise the parental authority, shall be determined by an agreement between the father and the mother, and if it is impossible to reach an agreement, or they fail to reach an agreement, the Family Court shall determine it upon a request of the parties’.”⁵⁶⁾ Although the law has changed to allow the mother to attain custody in some circumstances, the determination of child custody is often determined by the economic status of the parent. This is a criterion that is difficult for

51) *Id.* at 498.

52) *Id.*

53) *Id.* at 501 (“The historic revision of Korean family law requires a couple to jointly determine the question of child custody upon divorce. Prior to the revision, the father automatically claimed child custody, unless he waived this right. Moreover, even if the father waived his right to child custody, he remained the sole parental authority “chinkwon”. Thus, the mother was compelled to defer to the remote father’s decision on all matters regarding the selection, registration, and transfer of the child’s school; a child’s marriage before reaching the legal age for marriage; management and disposal of the child’s property; and any other matters related to the child’s education, health and welfare.”).

54) *Id.*

55) Cho, *supra* note 42, at 442.

56) *Id.* at 443.

women to overcome based on the limited division of property and non-domestic job skills. For example, the Seoul Gajong Bopwon awarded a husband custody of the children regardless of the husband's fault causing the divorce. The court noted the decision as being based on the fact that the children had resided with the father during the separation and that he was more financially stable than his wife.⁵⁷⁾ In another case, the court held that a father possessing a greater economic capability was entitled to custody regardless of his fault in the divorce and his history of domestic violence.⁵⁸⁾

Additionally, children of divorce in South Korea are subjected to unfair social stigmatism. "Social stigma and discrimination against single mothers and nonmarital children has forced unmarried mothers in South Korea to relinquish their newborns for adoption."⁵⁹⁾ Although the changes to the Korean Family Law Code may have improved the situation for women seeking a divorce in South Korea, the increased frequency of divorce as a result of these changes leaves many children subjected to this type of labeling. In the United States, children are less stigmatized by divorce due to the increased social acceptance of single parenthood in American culture. However, until South Korean culture alters its outlook on single parenthood, children in South Korea will be victimized for their parents' mistakes.

In the United States, custody is commonly awarded to the mother of the children with the father having visitation rights or temporary custody. American courts occasionally diverge from this trend depending on the circumstances. For example, if a mother is deemed by the courts to be unfit, custody is more likely to be awarded to the father. However, proving a mother's unfitness is often a difficult task in American family law. Further, financial concerns pertaining to the maintenance of children are rarely considered by the American family law courts since the spouse not in custody of the children is required to make child support payments in order to mitigate these expenses.

57) *Id.*

58) *Id.*

59) Solangel Moldonado, *Discouraging Racial Preferences in Adoptions*, in 39 U.C. DAVIS L. REV. 1415, 1432 (April 2006); see also David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Buying, Trafficking, Kidnapping, and Stealing of Children*, in 52 WAYNE L. REV. 113, 127 (Spring 2006), (stating: "As South Korea has developed economically, the primary cause of relinquishments has become the social stigma associated with single motherhood.")

Additionally, the revision included the idea of prenuptial agreements. Article 829 of the Korean Civil Code states, “If a husband and wife have not, prior to the formation of marriage, entered into a contract.”⁶⁰⁾ This is particularly important since the acceptance of a prenuptial agreement gives a woman flexibility in determining the outcome in the event of a divorce. Prior to consenting to marry a man, a woman, in theory, could prearrange property settlements and custody issues if divorce resulted. Further, a woman no longer could be pressured into marriage by her family since the revised 1977 revision of the Civil Code provides that men and women over the age of twenty years no longer need parental consent to marry.⁶¹⁾ Also, “[a] marriage in Korea is formed by an expression of the common consent by the parties and a report submitted to the Family Register.”⁶²⁾ Therefore, a Korean woman can equalize her rights by refusing to marry in the absence of an equitable prenuptial agreement. Like the family law of the United States, prenuptial agreements can be used to ensure a particular outcome in the event of divorce.

Although many changes have been made to decrease sex discrimination in the Family law system of South Korea, there are still many issues that arise from the Confucian traditions harbored in the Korean society. The revision of the Korean Civil Code to increase its conformity with Article 10 of the Korean Constitution has greatly increased the status of women in Korea. The Family Court in Korea has made great strides to render judgments equitably, although Confucian tendencies still influence the rights of women in property settlement and child custody decisions.

60) Cho, *supra* note 42, at 437.

61) Cho, *supra* note 1, at 155.

62) Cho, *supra* note 42, at 438-39.