

# Expansion and Development of the Right to Counsel in Korea\*

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## Abstract

*This paper aims to review how the right to have counsel has been established in the Korean criminal procedures, and also it is aimed at taking a view of expanded and developed procedure through revision processes of law since then. This paper deals with the history and current contents of criminal proceedings, including the direction of improvement, centering on the symbolic and core rights of counsel and defendant in order to secure and stand on their defendant's right to have counsel. About the censoring the documents and other stuff received by a suspect during an interview with an attorney, it is required to stipulate rational reasons for doubt in order not to infringe suspect's right to interview with attorney and exchange information. The right to interview and exchange information shall be given to a suspect taken to an investigation institution in the form of voluntary traveling shall be considered. As for attorney's right to participation in suspect interrogations, it is required to carry out institutional improvement in which the restrictions on participation that have been stipulated in an excessively abstract manner is concretized.*

KEY WORDS: right to counsel, attorney's right, right to interview, right to participation, suspect interrogation, right to duplication of documents, criminal procedure code

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## I. Introduction

As the state has monopolized the punishment power on the basis of social contract theory, and the procedure of criminal cases has been entrenched in the offensive and defensive structure between the state with

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relatively strong power and individuals without such power, the right to have counsel, which can be a measure to correct the imbalance of power in the procedures in criminal cases, has positioned itself as a key content for realization of due process of law in order to secure the justice in criminal proceedings. In reality, the right to have counsel plays an important role in the aspect of protection and guarantee of human rights, as well as the realization of substantial and procedural equality focused on the principles of equality of arms and fair trial. Accordingly, it is no exaggeration to say that the degree of institutional guarantee with regard to securing the institutional range and substantial effectiveness of the right to have counsel, in a criminal proceedings of a country, is the yardstick with which the level of human rights guarantee and the degree of adherence to the principles of constitutional state can be evaluated.

This paper aims to review how the right to have counsel has been established in the Korean criminal procedures in such a relatively short history, and also it is aimed at taking a view of expanded and developed procedure through revision processes of law since then. By the way, this paper is not designed to take a view of overall institutions regarding the counsel in criminal proceedings, but deal with the history and current contents of criminal proceedings, including the direction of improvement, centering on the symbolic and core rights of counsel and defendant, so that the defendant's right to have counsel can be secured and realized. On the basis of those discussions and premises, this paper will first deal with the historical background of the introduction of counseling system in Korea and the meaning and necessity of the right to have counsel.

## **II. Introduction and development of counseling system in Korea**

This chapter is designed to summarize the process in which the counseling system was introduced in Korea, and how the counseling system has been developed, concentrating on the historical materials. Above all, with regard to the introduction of counseling system, the explanation will be given by dividing the eras into the last period of Joseon Dynasty where the first modern legislation was carried out, the colonial

period when the Japanese criminal proceedings were applied, and the period when Republic of Korea was established and the Constitutional Law and Criminal Procedure Act were enacted. And as for the development process since then, this chapter will explain the contents related to the changes in revision processes after enactment of Korean criminal proceedings, including the contents that have been newly incorporated.

### *1. Introduction of counseling system*

#### *1) Last period of Joseon Dynasty*

The official counseling system<sup>1)</sup> based on the laws in Korea began with the Attorneys-at-Law Act, which was issued by the Korean Empire Government in 1905.

In Article 1 of the same act, a lawyer was defined as “a person who makes a living by carrying out representative acts or exercising the right of defense in a court of justice as a civil litigation lawyer or a criminal defense lawyer”, so that this article introduced the counseling system in which a criminal defendant was represented and defended by a lawyer in a trial. And according to Article 15 of the same act, when a defendant, who had committed a crime that deserved more than 5-year prison sentence, did not hire a lawyer, the court could force the defendant to appoint a lawyer by virtue of its authority, so it may be said that the public defender system, as well as a private defender system, was recognized as a legal procedure at that time.

However, it was prescribed in Article 19 of the same act that “a lawyer’s legal activities are not allowed until a criminal case has gone through a screening”, so that we may know that the lawyer’s scope of activity was considerably restricted because activities of a lawyer was not acknowledged at an investigation stage, but the activities of a lawyer were acknowledged only during the duration of trial.

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1) Even during the Joseon Dynasty, there were private individuals who made their living by preparing documents related to litigation or representing those persons concerned. Such people were called ‘Ojibu(外知部)’. However, their livelihood had no basis upon any legal institution, and was actually subject to penal punishment since such acts of private advocacy were considered illegal.

## 2) *Japanese colonial period*

After Daehan Empire was forcibly annexed to Japan in 1910, the Japanese criminal Procedure Act (enacted in 1890) was applied to this country according to the laws and regulations, so that defendants were allowed to designate a counsel after a defendant had gone through a preliminary procedure and indictment on the basis of the same law (Article 179). And at that time, the court could appoint a state-appointed attorney (in this case a person who was not an attorney could be engaged in the case) for the sake of defendant, if the defendant was under 15, or a woman, or a deaf-mute, or if it was suspected that the defendant was suffering from a psychic disturbance or deliriousness, including the case where the court acknowledged that the defendant needed a counsel due to the characteristics of the case.<sup>2)</sup> And then, in 1922, the range of defendants, who were supposed to be represented by an attorney, included the defendants aged under 20 and over 70. However, the application scope of compulsory defending case was considerably reduced in comparison with the past due to the regulation of the “Joseon Criminal Offense Ordinance stipulating “the regulation of criminal procedure code regarding compulsory defending cases shall be applied only to the cases that deserves death penalty, life imprisonment, and imprisonment without labor”, despite no changes in the Japanese law.<sup>3)</sup> The tendency to reduce the scope of compulsory defending cases in Joseon continued in the manner of overall abolition of such cases related to several crimes, or when a court admitted an exception for such cases ‘owing to unavoidable circumstances’ (Article 24 of Wartime Special Criminal Procedure Ordinance in Joseon), as the social condition was interlocked with the Second World War.

## 3) *Formation of Korean government and enactment of criminal procedure act*

According to Article 9 of Constitution, which was enacted when the Korean government was established in 1948, the right of suspects under

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2) According to the laws of the time, the presence of a counsel was mandatory in such cases where the accused was charged with a crime punishable by death, life imprisonment, imprisonment with labor, or imprisonment without labor.

3) According to the preparatory works of this legislation, this was due to the fact that the number of attorneys in Joseon was insufficient to attend to all felony cases.

arrest or defendant to be helped by an attorney was guaranteed as a constitutional right by prescribing that “when a person is arrested or detained, he or she has the right to be helped by an attorney and the right to request the court to examine whether the legitimacy is guaranteed.” And then, in the constitutional amendment in 1962, the right to be represented by a state-appointed attorney was acknowledged as a constitutional right as the Clause 4, Article 10, which was an additional provision for the right to have counsel, stipulated that “However, if a criminal defendant cannot hire an attorney, the state may provide a counsel according to the provision stipulated in the law”. The current constitutional law maintains the contents in Clause 4 of Article 12.

On the other hand, the Criminal Procedure Code, which was enacted for the first time in Korea stipulated in Article 30 that “a defendant or suspect may hire an attorney” regardless of whether to be arrested or not, so that the counseling system could be adopted completely. Therefore, the cases where a state-appointed attorney should be appointed included when the defendant was underage, or over 70, or a deaf-mute, or the defendant was suspected to be have a mental and physical disorder, or was not able to hire an attorney due to poverty. And if the legal penalty corresponded with a death penalty, life imprisonment or more than 3-year prison labor or imprisonment without labor, it was defined as a compulsory defending case.

## *2. Development of counseling system*

Looking into the counseling system introduced by the Criminal Procedure Code enacted in 1954, we may find out that all the defendants in military criminal cases could hire a state-appointed attorney as the court-martial act stipulated that “when a defendant has no counsel, the court-martial shall appoint a public defender on the basis of official authority”, which was incorporated into the amendments in 1962. And the revision of Criminal Procedure Code in 1980 enabled suspects under arrest to hire a state-appointed attorney when going through a review on arrest legality. In addition, according to the introduction of arrest system in 1995, the scope of system could expand gradually as the appointment of public defender for “a suspect under arrest or detention” was acknowledged.

According to the revision of Criminal Procedure Code in 2006 and 2007, the state-appointed defense counsel system was improved and expanded extensively, and there had been a significant promotion in the rights of counsels. Above all, in order to secure the validity of the state-appointed defense counsel system, the reason of appointment was readjusted, in which the appointment based on the state authority was established as a basis (Clause 1 of Article 33), and the appointment based on application (Clause 2 of the same article) and the appointment based on discretion (Clause 3 of the same article) were prescribed as a supplementation. And also, when a suspect for whom an arrest warrant had been issued had no counsel during the interrogation, the district judge could appoint a counsel by official authority (Clause 8, Section 2 of Article 201), so that the broad expansion of the system focused on securing personal liberty could be achieved.

According the revision in 2007, when the procedure of trial preparation was introduced, it was allowed to appoint a public defender during preparation of a trial by stipulating that “if there is no counsel related to a case of which the period of preparation of trial is designated, the court shall appoint a counsel by official authority (Clause 4, Section 8 of Article 226). And regarding the rights of counsel, the limitless access to the suspect and the right to participate in questioning of suspect was specified in the law by inserting a new provision in Section 2, Article 243 of the Criminal Procedure Code.<sup>4)</sup> In addition, the newly added Section 3 of Article 266 stipulated the counsel’s right to inspection and copy of the documents kept by the prosecutor after public prosecution. The detailed explanation and specific discussion regarding the above mentioned contents will be dealt with in Chapter IV.

### III. Significance and necessity of the right to have counsel

In this chapter, we will review what the right to have counsel implies in

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4) As will be mentioned later on, the attorney’s right to participate in the interrogation of a criminal suspect had already been acknowledged on the basis of academic theories and judicial precedents before the revision of the law.

the criminal procedure and how it can be developed into specific systems. In addition, we need to examine what substantial significance such rights to have counsel have for criminal suspects or defendants in the viewpoint of necessity.

### *1. Significance of the right to have counsel*

#### *1) Legal basis and significance*

Clause 4, Article 12 of Korean constitution stipulates that “Anyone who is under arrest or detention has the right to have counsel. However, if the criminal defendant is not able to hire a counsel, the state shall appoint an attorney according to the provision prescribed in the law.” The suspects or defendants under restriction of human body have the constitutional right to be helped by a lawyer according to the provision which has become effective through the 5th amendments of Constitutional Law in 1962, including the original Constitutional Law. And Clause 5 of the same article of the Constitution Law revised in 1987, which is currently in effect, stipulates that “No one can be arrested or detained without being notified of the reason of arrest or detention and the right to have counsel. The person under arrest or detention, including others such as family members designated by the law, shall be notified of the reason, date and place without delay.” So, the system has been complemented, through which the person concerned can recognize the constitutional right to have counsel and human rights can be guaranteed substantially.

On the other hand, even though the right to have counsel is limited to the ‘suspect or defendant under arrest or detention’ in the Constitution, the Criminal Procedure Code stipulates from the time of legislation that all ‘suspects and defendants’ may hire a counsel without any requirements regarding arrest or detention (Clause 1 of Article 30). In addition, the law stipulates that “the legal representative, spouse, lineal relatives and siblings of dependant or suspect may appoint an attorney independently” (Clause 2 of the same article), so that the law has expanded the range of main agents who can exercise the right to have counsel up to close relatives, as well as the suspect or defendant directly involved. In association with the state-appointed defense counsel system, in which the state provides a criminal defendant who cannot hire an attorney with an attorney, the Criminal Procedure Code has

prepared a legal basis in order to allow attorneys to exercise the right to aid second-class citizens and others, who may not be helped by counsels, by stipulating specific contents regarding appointments of attorney, such as ① the appointment based on the state authority, which embraces all the compulsory defending cases including detention or severe sentence, as well as the age-related or disability-related problems, and ② the appointment based on the request of defendant due to economic circumstance, and ③ the appointment based on discretion focused on protection of defendant's rights.

2) *Subjects of rights – whether to include foreigners or not*

There is no doubt that anyone who has the citizenship of Korea can be the subject of the rights to have counsel, which is ensured by law. However, when we say 'anyone can have the right to have counsel', there might be a debate about whether the term 'anyone' includes foreigners, and especially, it is questionable when a foreigner can be acknowledged as a subject of right to be helped by a state-appointed attorney.

Regarding the theoretical issue about whether a foreigner can be a subject of basic right prescribed in the Constitution, there is a negative attitude to the theory that foreigners have the basic right. But in general, there have been affirmative positions for the right of foreigners<sup>5)</sup> which is regarded as inherent and natural right of man. When reviewing whether a foreigner may have the right to have counsel from this viewpoint, the right to counsel itself may be regarded as a procedural basic right in the scope of Criminal Procedure Code. And if we think the reason why such rights shall be acknowledged lies in the human rights protection and a fair trial, such basic rights shall be interpreted as a basic right to ensure the natural right, so that it is thought that such rights shall be applied to foreigners in principle.<sup>6)</sup> From a practical standpoint, we may expect that most foreigners have difficulty in communication and are utterly ignorant of our criminal law system. So, it is expected that they cannot but get into a big trouble in exercising the defense right in a criminal trial without an aid of attorney.

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5) NAK-IN SUNG, HEONBEOPHAK [Constitutional Law] (11<sup>th</sup> ed.), 355 (2011).

6) According to the decision of the Korean Constitutional Court, foreigners as a principle also enjoy subjective constitutional rights and are capable of filing constitutional petitions. See Constitutional Court, 93Hun-ma120, Dec. 29, 1994.



Accordingly, it is clear that they need to have the right to counsel.<sup>7)</sup>

### 3) Notification system related to the right to counsel

#### (1) Notification of criminal detainee

As mentioned above, the provision mandating that the suspects or detainee shall be informed of the right to counsel when they are arrested or detained has been incorporated into the current Constitution, however, the notification of the right to counsel when they are arrested has become compulsory since the first legislation of Criminal Procedure Code. In short, Article 72 of the first Criminal Procedure Code stipulated that “No defendant can be detained without being notified of gist of the fact constituting a crime and right to counsel, including being given a chance to make an excuse. And the current Criminal Procedure Code has maintained almost the same provision, except for the addition of ‘the reason of arrest’ in the notification. Even in the case of arrest based on Section 5 of Article 200 of the same code, the same content of shall be included.

On the other hand, Article 87 of the same code stipulates the compulsory notification system for a practical aid of an attorney by prescribing that “when a defendant who has an attorney has been arrested, the attorney shall be informed of the case title, date and place of arrest, outline of the criminal fact, reason of arrest and the purpose to hire an attorney immediately in written form, and when a defendant who has no attorney has been arrested, the legal representative, spouse, lineal relatives or siblings who have been designated by the defendant shall be informed of the same contents mentioned above immediately in written form”(this content is applied to a suspect according to Section 6, Article 200 of the same code). As for the notification system prescribed in the current law, firstly, in the case where there is no counsel for the defendant or suspect at the time of arrest, the persons to be notified are limited to the legal representative, spouse, lineal relatives and siblings of the detainee, which implies that there is a risk that the exercise of right to counsel may be infringed due to the narrow range of notification recipient. Considering the criticism, Article 51 of Rules on Criminal Procedure has been made to

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7) Hun-hee Han, *Review on Counseling System in Criminal Procedure* (2012) (Ph.D dissertation, Konkuk University) (in Korean), 78.

complement the system by stipulating that a person who is designated by the detainee may be informed of such contents if there is no one to be informed according to the law. And secondly, the current law has adopted a written notification as the method of notification, and the conventional rules of criminal procedure stipulated that the notification should be carried out in written form within 3 days. However, in the modern society, in which rapid means of communication such as telephone, e-mail and text messages have been developed, the notification in written form that takes relatively long time may be regarded as an unsuitable and inefficient method by receivers. In order to secure an effective defense for a detainee, the faster hiring and activities of counsel is required, so that the Rules on Criminal Procedure revised in 1996 stipulates that the written notice shall be delivered at least within 24 hours. And in the case where it is required to notify rapidly, the method is complemented by adopting a procedure in which a written notice is delivered after notifying the person concerned through 'telephone or other communication instruments like a fax'. However, there seems to be a necessity to complement such systems so as to prepare a substantial means of communication that may ensure the delivery to recipients without delay in all cases, in respect that it is not clear who is the main agent who judges 'whether the notification shall be implemented rapidly' and most detainees need an immediate aid in reality.

## (2) Notification system for request of appointment of attorney

Article 90 and 209 of the current Criminal Procedure Code has established a request system for appointment of attorney and made the person who has received the request to notify the fact in order to ensure the right of arrested suspects or defendants to counsel substantially. The system, which has existed since the original Criminal Procedure Code, allows the arrested suspects and defendants to request the court, prison governor, chief of detention center, or a deputy, to appoint an attorney. So, the court, prison governor, chief of detention center, who have received the request shall notify an attorney designated by the defendant of the purpose of request. This is a system that enables the detainee to exercise the right to appoint an attorney by him/herself.

## 2. *Necessity of attorney's aid in a criminal procedure*

### 1) *Realization of due process of law*

#### (1) Due process of law and aid of attorney

It is the core content of the rule of law in a law-governed country that the Constitution and laws acknowledge human dignity and value and take the human rights guarantee as a basic operational principle.<sup>8)</sup>

In short, the nation's trust and respect of laws in a criminal proceedings is based on the human dignity, so that the due process of law, in which the criminal judicature recognizes the human dignity and value and the punishment power of state shall be implemented in a procedure that ensure the basic rights of criminal defendant, shall be a guidance ideology in criminal proceedings. The primary necessity of the right to counsel is derived from the fact that the important contents of the due process of law prohibit treating defendants as a simple object of proceedings, and accordingly the defendants must be able to exercise the defense right as an independent body in a proceedings.

In a criminal suit procedure, it is generally required to get assistance from a third party in order to ensure the autonomous statutory position and exercise a proper defense right, which depends on the role of attorney. Especially, a suspect in a stage of investigation carried out by an investigation institution holding a prominent position, or a detainee whose activity is restricted due to the detention in the process of investigation or trial cannot but be placed in a disadvantageous position when trying to collect materials that can be used for self-vindication or self-defense without a counsel.

The fact that the necessity of the right to counsel is preferentially connected to the due process of law may be derived from an interpretation of constitutional provision, which specifies the right to counsel. In other words, the right of detainee to counsel is specified in the Constitution by stipulating the phrase, 'at the time of arrest or detention', which does not refer to all criminal defendants. A compulsory detention is the most

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8) JAE-SANG LEE, HYEONGSASOSONGBEOP [Criminal Procedures] (9<sup>th</sup> ed.), 27 (2012).

effective disposition against a suspect, which can be carried out only by the government, so that it can be the biggest infringement of defendant's right, as well as the most attractive illegal behavior of the government. Accordingly, investigation institutions shall conform to the legal procedure in respect that it is difficult to avoid an illegal disposition or recover from the damage. And the right to counsel shall be essentially ensured in the procedure. Such points have been reflected in the current Constitution, so that we may accept that the right of detainee to counsel is recognized at the constitutional level.

(2) Principle of fair trial and aid of attorney

The due process of law in a criminal procedure is focused on allowing a criminal defendant to receive a fair trial. The principle of fair trial refers to a trial presided by an independent judge, who ensures the human dignity and basic human rights, sticking to the ideology for justice and fairness. The fairness in procedure may be defined as a substantial factor to gain confidence and a ground rule which is inherent in the principle of law-governed country.<sup>9)</sup>

In order to secure a fair trial, it is required to form a fair court, allow suspects and defendant to participate in the procedure as a party with active and autonomous position, and ensure the self-defense right of a suspect or defendant. It is useless to give a long explanation about the necessity of a counsel who will protect a suspect or defendant in order to ensure the right of person concerned to participate in the procedure. And in order to gain a substantial right of defense, there shall be activities of an attorney who can collect information or do other things on behalf of the suspect or defendant. Especially, when considering the fact that the former criminal procedure has changed into new a criminal procedure focused on the adversary system through the revision of Criminal Procedure Code in 2007, we may say that the importance of fair trial principles, which is related to realization of due process of law and the right to counsel to realize a fair trial structure, has become bigger than ever.

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9) Id., at 28.

## 2) *Realization of weapon equality principle*

In the current lawsuit structure that is focused on the adversary system, the weapon equality principle, which forces the parties participating in a lawsuit to be on even ground, is a basic principle of criminal procedure.

Originally, in the Anglo-American Law, the weapon equality principle was interpreted as a formal equality between a prosecutor and suspect or defendant. And the main contents of the principle were focused on reinforcement of autonomous defense activity of a suspect or defendant and expansion of the scope of respect of human rights.<sup>10)</sup> But henceforward, the contents has changed, focusing on making a suspect or defendant and prosecutor substantially be on an equal footing in a trial on the premise that a suspect or defendant has a lower defense capability in comparison with a prosecutor's ability.

Even though a formal equality is acknowledged in a criminal procedure, it may be said that the substantial capability of suspect is considerably vulnerable in comparison with a prosecutor. While a prosecutor is a legal expert, who deals with a defendant on the basis of the authority as a governmental institution and powerful organization, most suspects are agnostic about laws. And there is a limit to their abilities when collecting, submitting and evaluating favorable evidence for themselves. In addition, it is common that they have difficulty in normal self-defense as they are in psychological instability.

Accordingly, in order to realize the substantial weapon equality principle for a suspect, it is essential that an attorney can assert the rights of suspect or defendant on an equal footing with the prosecutor by using the right to counsel, along with the right to refuse to make statements.

## 3) *Human rights guarantee*

The reason why the Constitution specifies that a criminal defendant under detention has the right to counsel is in association with the relationship between the detention based on the government power and the due process of law, however, it seems that the law also considers the possibility of human rights violation and illegal actions by investigation

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10) Mi-suk Park, *Guarantee of Rights of Counsel for Suspects* (1985) (Ph.D. dissertation, Kyunghee University), 2.

institutions during the detention. In reality, the modern history of Korea shows that illegal detentions were carried out by investigation institutions, and the suspects were tortured or assaulted for confessions under illegal detention by such institutions, and such cases have been found out in relatively recent years.<sup>11)</sup>

Accordingly, in the case of a detained suspect, the immediate exercise of the right to counsel may function as a means of effective protection of the human rights of suspect from a possible illegal action of investigation institutions. As explained in the next chapter, the recent revision of Criminal Procedure Code has made a progress in reality as the provisions in the code make it possible for an attorney to directly participate in a questioning of suspect, which is a part of the right to counsel. This system is expected to directly deter such illegal actions that may be conducted by prosecutors or other investigation institutions during the interrogation.

#### **IV. Systematic realization of the right to counsel**

In this chapter, various systems that may concretely realize the right to counsel as the right of suspect and defendant will be examined, according to the regulations specified in the Constitution and Criminal Procedure Code. There have been discussions in the various aspects regarding the specific activities and rights of attorneys. But in this paper, the right to interview and exchange information will be examined, which are the core contents of the right to counsel, including the right to inspection and copy of documents kept by a prosecutor, and the right to participate in interrogation of suspect, and the explanation is focused on the historical backgrounds, present time situation, and the improvement points in Korea.

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11) For instance, a case in which a suspect of a murder case was killed by detectives during an investigation at the Prosecutor's Office due to harsh interrogation methods (see KOREA TIMES, Oct. 27, 2002), a case in which police officers were arrested and indicted due to torturing a suspect (see THE HANKYOREH, Dec. 30, 2010).

## 1. Attorney's right to interview and exchange information

### 1) Significance and history

#### (1) Significance and function of the right to interview and exchange information

When the right to counsel is granted to a detained suspect or defendant, the basic contents and starting point of the right is to allow them to meet and consult an attorney to discuss about proper defense plan. In this respect, it may be said that the most basic contents of the right to counsel is to ensure the right to interview and exchange information, which is regarded as the most important right among the natural rights of an attorney.<sup>12)</sup> The Constitutional Court has confirmed this by stating that "the detained suspect or defendant's right to interview an attorney and exchange information is a basic right guaranteed by the Constitution (Clause 4 article 12), so that a free interview and exchange of information with an attorney is the most important part in the right to counsel, which is given to a detainee, and the right cannot be restricted by any cause such as national security, maintenance of order, or public welfare."

On the other hand, as for the subject of right to interview and exchange information, it is said that suspects or defendants shall be given the complete right to interview and exchange information as a right to counsel, however, in general it is argued that the right belongs to both suspects or defendants and attorneys because an attorney or a person who is supposed to be appointed as a defense attorney needs to meet a suspect or defendant freely to exchange opinions and counsel for a effective legal defense activities.<sup>13)</sup>

#### (2) History

As the original Constitution acknowledged the detained suspect or defendant's immediate right to counsel, Article 34 of the original Criminal Procedure Code stipulated that "an attorney or a person to become a

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12) DONG-WOON SHIN, SHINHYEONGSASOSONGBEOP [New Lectures on Criminal Procedures], 90 (2009).

13) *Id.*, at 90.

defense lawyer shall be able to meet a detained suspect or defendant and receive documents and articles, and make the suspect or defendant be receive a medical treatment”, so that the attorney’s right to interview and exchange information could be acknowledged in principle. However, the attorney’s right to interview and exchange information was not ensured freely and completely until 1990s, despite the regulations prescribed in the Constitution and Criminal Procedure Code, as interviews were restricted by the criminal administration codes such as participation of prison officer and censorship according to Article 18 and 62 (treatment-related regulations for convicted were applied to the unconvicted prisoners) of the former Criminal Administration Code (regulations before the revision in 1995, which were enacted in 1950), including Article 54 and 72 of the same Code.

In the mean time, the Constitutional Court prohibited such actions violating the right to interview and exchange information, such as participation of prison officer in an interview with attorney and inspection of correspondence, by deciding that “allowing prison officers to participate in an interview between an unconvicted prisoner and attorney according to Clause 3, Article 18 of the Criminal Administration Code<sup>14)</sup> is unconstitutional because it violates the right to counsel, which is given to detained unconvicted prisoners.”<sup>15)</sup> This statement was reflected in the revision of the Criminal Administration Act in 1995, and as the overall reorganization of the act into ‘Execution of Sentence and Prisoner Treatment Act’ has been carried out, the contents ensuring the free interview has been specified and maintained so far.

## 2) *Details of current right to interview and exchange information*

### (1) Ensuring free interview

The current Criminal Procedure Code maintains the regulations regarding the attorney’s right to interview and exchange information, which was regulated at the first enactment. In respect of this issue, in order

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14) Gu Haenghyeongbeop[Former Criminal Administration Code] art. 18: A prison officer shall participate in an interview with a prisoner and incoming and outgoing letters shall be censored.

15) Constitutional Court, 91Hun-ma111, Jan. 28, 1992.



to ensure a substantially free interview, Clause 1, Article 84 of the 'Execution of Sentence and Prisoner Treatment Act' stipulates that prison officers cannot participate in an interview between an unconvicted prisoner and attorney (including a person to become a counsel), and the contents of interview cannot be heard or recorded. But only an observation from a distance is allowed. And also, as for the time and frequency of interviews, which was not regulated in the past, Clause 2 of the same article ensures interviews without time and frequency limits in principle by stipulating that 'time and frequency of interviews between an unconvicted prisoner and attorney is not limited'.<sup>16)</sup>

However, the legal assurance does not mean that it is possible to have limitless interviews with an attorney.<sup>17)</sup> In general, it is interpreted as an inevitable restriction of time that interviews on Sundays and at a time after daily work are prohibited, of which the regulation is put in a minimum range and in order to keep the order in a detention place for unconvicted prisoners.<sup>18)</sup> Admitting the fact that an interview between an unconvicted prisoner and attorney must not be restricted means that an unreasonable influence or interference shall be excluded during an actual interview, the Constitutional Court also stated that "it is natural that the attorney's right to interview an unconvicted prisoner may be restricted by the law when it is required for national security, maintenance of order or public welfare."

And also, the Constitutional Court judged that restriction on interviews according to the work hours of correctional institutions does not violate attorney's right to interview and exchange information guaranteed by the Constitution, stating that "even though an interview between an unconvicted prisoner and attorney could not be carried out at a certain time, it cannot be concluded immediately that the right to counsel has been violated. And when it is acknowledged that the right to counsel for self-defense of an unconvicted prisoner has been ensured enough, it may not be

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16) See Dong-Wook Kang, *Decisions of the Constitutional Court and the Right to Assistance of Counsel in the Criminal Procedure*, 9-1 BEOPGWAJUNGCHAERYEONGU [RESEARCH OF LAW AND POLICY] 363-364 (2009) (in Korean).

17) So to speak, it may be a case in which an attorney and suspect stay in a meeting room for a couple days.

18) Shin, *supra* note 12, at 94.

concluded that the right to counsel has been violated, even though the interview between the unconvicted prisoner and an attorney could not be carried out at a certain time they wanted<sup>19)</sup>.

(2) Receiving documents or articles

In order to ensure an effective defense for a detainee, Article 34 of Criminal Procedure Code stipulates that a detainee may receive case-related documents or articles, as well as have an interview with attorney. In principle, the provisions in the 'Execution of Sentence and Prisoner Treatment Act' allow attorneys and unconvicted prisoners to take documents or articles from each other, by stipulating that censorship or inspection can be allowed only when the other party has not been identified as an attorney, and it is suspected that the article or a letter may do harm to the security or maintenance of order in the detention center.<sup>20)</sup>

However, when there is a suspicion that prohibited items are accepted, a prison officer or chief of correctional institution may bend the rules according to their own judgment, which may result in substantial violation of the right to interview and exchange information. So, we need to consider the purpose of the decision of Constitutional Court<sup>21)</sup>, which stipulates that

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19) Constitutional Court, 2009Hun-ma341, May 26, 2011 On the other hand, in this decision, the supplementary opinion of three judges suggest that the current practice of correctional facilities, which does not allow interview with an attorney on Saturdays and national holidays, shall be corrected.

20) Hyeongui jibhaeng mit suyongzai cheowoee kwanhan beopryul [Administration and Treatment of Correctional Institution Inmates Act]

Article 92 (Prohibited Goods)

No prisoner shall possess any goods falling under any of the following subparagraphs:

1. Narcotics, firearms, swords, explosives, lethal weapons, toxic chemicals, and other goods which are likely to be used as criminal tools;
2. Liquor, tobacco, firearms, cash, check and other goods which are likely to damage security or order of the institution;
3. Pornographic materials,, goods used for speculation and other goods which are likely to damage convicted prisoners' edification or sound rehabilitation into society.

Article 93 (Medical Examination, etc.)

- (1) Any correctional officer may inspect bodies clothes, personal effects, wards, places of work, etc. where it is deemed necessary for the maintenance of security and order of a correctional institution

21) Constitutional Court, 92Hun-ma144, Jul. 21, 1995

“the suspicion must not depend on arbitrary decision of the correctional institution, but it must be based on a reasonable standard, and the standards of judgment shall include the contents of criminal charge, social position, life history outside the detention center and living attitude in the detention facility.”<sup>22)</sup>

### (3) Medical treatment from doctor

A counsel or a person who is suppose to become an attorney is able to ask a doctor to give medical treatment to a detained suspect or defendant (Article 34 of Criminal Procedure Code). Though a medical treatment is not a direct method to realize the defense right, it is a call for humanitarian consideration. But it has a secondary meaning that human right violation can be identified and prevented by investigating the state of suspect or defendant in advance. Such medical treatment from a doctor must not be restricted by any reason because we need to approach it from a humanitarian point of view.

In this respect, Article 106 of the ‘Enforcement Ordinance of Execution of Sentence and Prisoner Treatment Act’ stipulates that “if an unconvicted prisoner is receiving a medical treatment, a prison officer shall observe the process and describe record the progress in a detention record.” The doctrine of judicial precedent<sup>23)</sup> is expressed in the regulation which says that “such measures are aimed at preventing or coping with an unexpected situation or emergency situation that may break out during the treatment, so that it has rationality and may not be regarded as an illegal disposition violating the right to medical treatment”.

### 3) *Discussion on improvement of the right to interview and exchange of information*

#### (1) Concerning the substantial assurance of the right to interview and exchange information

The current regulations concerning the right to interview an attorney and exchange information may be regarded as a regulation that ensures free interviews by and large, however, it is thought that some parts shall be

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22) See Kang, *supra* note 16, at 366-367.

23) Supreme Court, 2000Mo112, May 6, 2002

supplemented. Above all, as pointed out above, though the law allows prison officers to investigate the stuff received by a prisoner, in case the stuff is suspected to be a forbidden item, we need to prevent prison officers from abusing their power by making them suggest an objective reason for suspicion and carry out investigation on a clear legal basis.

And as suggested by the Constitutional Court its supplementary opinion, the practice of correctional facilities, in which interviews with attorneys are disapproved on Saturdays and other holidays, shall be improved, allowing them to have interviews on those days. In respect that weekends and holidays are not reflected in elapse of detention and investigation period, prohibition of interviews on weekends may act as relatively an unreasonable restriction on attorney's activity. In addition, as for the interview method, it is required to consider an introduction of remote interview methods by using the technical means such as a video telephone. This method will contribute to realization of more effective and positive counseling activities by saving time and costs that are spent when attorneys visit a correctional facilities located far away. And it may be reviewed as an alternative to the interviews on weekends prohibited as mentioned above.

Many academic theories and judicial precedents<sup>24)</sup> are focused on the standpoint that attorney's right to interview and exchange information shall be given to suspects taken to an investigation institution in the form voluntary traveling, as well as a suspect under arrest according to the law. It is required to reflect this idea in the legislation in order to ensure human rights in a clear manner.

## (2) Remedy for violation of the right to interview and exchange information

When the right to interview an attorney and exchange of information has been violated, the person concerned may claim for cancellation or change of the relevant disposition through an appeal (Article 402 and 403 of the Criminal Procedure Code) or a quasi-appeal (Article 417 of the same code). As it is a violation of constitutional right, it may become an object of constitutional complaint, and if the violation of the right to interview has

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24) Supreme Court, 96Mo18, Jun. 3, 1996.

been recognized as an illegal act, the person concerned may demand compensation for the case.

However, it is difficult to expect an effect of direct remedy for damage caused by the relevant act, even though the claim for compensation or constitutional appeal may prevent the repetition of such actions. And in the case where the restriction on the right to interview is caused by a passive attitude, not an active disposition imposed by an investigation institution, or the right to interview is restricted by another disposition, it is debatable whether the disposition can be an object of quasi-appeal or not. Even though a remedy procedure is carried out as the case has become an object of quasi-appeal, it cannot be a sufficient and proper means of remedy. That is because there are many cases in which the remedy may not be effective due to occurrence of irrevocable damage caused by the violation of the right to interview and exchange information, so that the substantial effect may be secured when the right is ensured at the right time.

Accordingly, in terms of procedure, it may be logical to introduce a system in which the procedure of suspect interrogation in investigation institutions is suspended when a quasi-appeal has been filed on the basis of violation of attorney's right to interview. And in terms of the evidence rule, the admissibility of evidence obtained from confession shall be compulsorily excluded when it has been revealed that the right to interview with an attorney and exchange information was violated and the confession was made under such circumstances.<sup>25)</sup>

## *2. Right to inspection and duplication of documents kept by prosecutor*

### *1) Significance and history*

In order to ensure defendant's right to counsel, the attorney shall know the crime contents of the defendant and the important issue accurately. And such information can be collected through recognition of the contents of suspect interrogation carried out by an investigation institution, contents of testifier's statement, and other evidences collected by the investigation institution. Accordingly, it is required to ensure the defendant and

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25) Kuk Cho, *Review on Attorney's Right to Participation in Suspect Interrogation*, 7 JURIST 49-50 (2004) (in Korean)

attorney's right to have access to and know the contents of various records in order to guarantee the defendant's right to counsel and secure a fair trial.

The right may be called the 'Right to Inspection and Duplication of Documents'. In short, the attorney's right to inspection and duplication of documents collected by a governmental institution is the primary means to defend the suspect or defendant because suspects, defendants or attorneys cannot collect evidence by using legal forces.<sup>26)</sup>

Besides, in the current criminal trials, it is acknowledged that the evidence of various documents prepared by investigation institutions and courts has broad admissibility in an attempt to make rapid progress in trials and carry out economical trials.<sup>27)</sup> So, in the case where an attorney has failed to recognize the existence of lawsuit documents, or understand the contents fully, the attorney may not defend in a proper manner when the prosecutor comes up with an unexpected evidence. Accordingly, ensuring attorney's right to inspection and duplication in advance is important in terms of the weapon equality and fair trial, so that we may say that the right is an imperative premise for an attorney preparing for a legal defense.<sup>28)</sup>

Though it was limited to a certain range, Clause 1, Article 35 of the original Criminal Procedure Code prepared the legal basis that enabled attorneys to inspect or copy the records and evidences by stipulating that "an attorney may inspect or copy the lawsuit documents and evidences". And the range was stipulated comprehensively as 'documents and evidences related to lawsuit', so that all the investigation records and evidences sent to the court after prosecution could be inspected or copied.

In the mean time, the Criminal Procedure Code was revised in 1961, in which the provision was changed into "an attorney may inspect or copy the documents and evidences related to on-going criminal suit", so that a new interpretational issue has occurred regarding the range of 'the documents and evidences related to on-going criminal suit'. Especially, in 1983, the newly enacted Rules on Criminal Procedure included the 'Principle of Only

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26) Shin, *supra* note 12, at 98.

27) Hyeongsasosongbeop[Criminal Procedure Code] art. 311.

28) Lee, *supra* note 8, at 146; Kyong-Hwan Hwang, *The Legal Review of Criminal Discovery*, 20-1 HANYANGBEOPHAK [HAN YANG LAW REVIEW] 172-173 (2009) (in Korean)

One Written Prosecution<sup>29)</sup>, in which attachment of documents that could enable the court to predict about the written prosecution was prohibited when prosecuting. So, the issue as to whether the records that have been kept by prosecutors and not submitted to the court after prosecuting shall be regarded as the 'documents related to on-going criminal suit' has come to the fore. Whether to admit that the documents are related to the criminal suit or not is a matter that may cause a difference in the quantity and quality of information, which can be acquired by an attorney before a trial, because the issue is directly connected to whether the right to counsel can be ensured or not.

In respect of this issue, the negative theory<sup>30)</sup> argues that the attorney's right to inspection and duplication of the records kept by a prosecutor, which have not been not submitted yet, cannot be acknowledged, according to the litigation structure focused on trial-centered litigation and adversary system. But the affirmative theory<sup>31)</sup> argues that the attorney have to be able to inspect and copy the records of case which have been prosecuted, regardless whether they are kept by a prosecutor or not, because the relevant provision does not restrict the place where the documents are stored and the criminal suit continues due to the filing of the suit.

However, in the revision of the Criminal Procedure Code in 2007, this issue resulted in the reflection of the affirmative theory in legislation, when the regulation regarding the inspection and duplication of documents kept by a prosecutor after prosecution (Section 3 of Article 266) was newly established. As a result, the 'Evidence Discovery System' has been stipulated, so that an attorney can ask a prosecutor for permission to inspect, copy or apply for issuance of documents or list of items related to the prosecution case, including the documents that may affect the acceptance of criminal charge and assessment of the case. And Article 35, which is the general

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29) Hyeongsasosonggyuchik[Rules on Criminal Procedure] art. 118.

30) Il-kyo Seo, *Hyeongsasosongbeop*[Criminal Procedure Code], 95 (1973) (in Korean).

31) Hyeong-gu Baek, *Hyeongsasosongbeopgangui*[Lecture on Criminal Procedure Code], 105-106 (2001), (in Korean); Jae-sang Lee, *Hyeongsasosongbeop*[Criminal Procedure Code], 150 (1994) (in Korean); Dong-woon Shin, *Hyeongsasosongbeop*[Criminal Procedure Code], 382 (1993) (in Korean).

provision about the right to inspection and duplication of documents, has been revised, so that a 'defendant' can become a subject of right to inspection and duplication in comparison with the past when only a counsel was specified as the person who had such rights.

## 2) *Specific details*

### (1) Documents and others kept by court

Because a defendant and attorney have the right to inspection and duplication of the documents and evidences related to on-going criminal suit, they can inspect and copy the various documents and evidences, including the written prosecution submitted to the court. The subjects of right to inspection and duplication include the legal representative, special agent, court-appointed assistant, or spouse, lineal relatives, and siblings of the defendant, and a person who has submitted a power of attorney and other documents that prove the relationship with the defendant may have the same right (Clause 2, Article 35 of the Criminal Procedure Code). Besides, a defendant may apply for the permission to inspect and copy the report of trial (Clause 1, Article 55 of the Criminal Procedure Code), and if the defendant cannot read, he/she may ask a court staff to recite the report of trial (Clause 2 of the Same article).

### (2) Documents and others kept by prosecutor after prosecution - Evidence discovery system

A defendant or attorney may ask a prosecutor for permission to inspect, copy or apply for issuance of documents and the list of items that are related to the prosecution case, including the following documents that may affect the acceptance of criminal charge and assessment of the case. The documents include ① documents and others that will be claimed for evidences by a prosecutor, ② documents and others including the name of a person who will be summoned as a witness by the prosecutor, preparatory documents in which the relationship between the case and witness is described, or the written statement made by the witness before the date of trial, ③ documents related to certification of the writings or documents mentioned in Item ① or ②, and ④ documents regarding the legal and actual assertion of the defendant or attorney (including the confirmed records and non-prosecution disposition records of the relevant



criminal trial) (Item 1 or 4, Clause 1, Section 3, Article 266 of the Criminal Procedure Code).

In response to the request of a defendant or attorney, a prosecutor may refuse or restrict the scope of request if the prosecutor has fairly good grounds to refuse attorney's request for permission to inspect and copy, or issue certificates due to reasons such as the national security, necessity of witness protection, anxiety about destruction of evidence, and other circumstance that is expected to cause a disorder in investigations (Clause 2, Section 3, Article 266 of the Criminal Procedure Code). However, in an attempt to secure the effectiveness of the Evidence Discovery System, it is stipulated that a prosecutor cannot refuse attorney's inspection and duplication of the list of documents (Clause 5 of the same code).

When a prosecutor refuses attorney's inspection and duplication of documents, or restricts the range, the prosecutor shall notify the applicant of the reason in written form (Clause 3 of the same code), and if such a notification has not been carried out, the applicant may apply for the permission to inspect and copy the documents (Clause 4 of the same code).

When an applicant applies for inspection and duplication at a court because the prosecutor refuses to notify or does not notify within the period, the court may order the prosecutor to allow the inspection, duplication or issuance of certificates, or reject the application in consideration of the harmful effect of permission or the importance of such documents.<sup>32)</sup> In addition, if the prosecutor does not respond to the decision to the decision of court, the attorney cannot apply for the evidence regarding the relevant witness and documents (Clause 5, Section 4, Article 266 of the Criminal Procedure Code). However, the prosecutor's refusal is regarded as an "infringement of defendant's right to counsel as well as the right to swift and fair trial".<sup>33)</sup>

### *3) Improvement points – Groping for attorney's inspection and duplication at investigation stage*

In the current laws, the Evidence Discovery System is made use of only

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32) See Seung-Ryun Lee, *Discovery in Korean Criminal Procedure*, 57-2 Beopjo (Lawyers Association journal) 231-239 (2008) (in Korean)

33) Constitutional Court, 2009Hun-ma257, Jun. 24, 2010

after prosecution, so that an attorney may not request a permission to inspect and copy the investigation records in progress at the investigation institution.<sup>34)</sup> However, firstly, if a suspect fails to defend him/herself in terms of the suspicion at the initial state, the suspect will have a bigger difficulty in the trial procedure, so that the attorney needs to grasp the contents of investigation records in progress through inspecting and duplicating such investigation documents in order to facilitate the defense activity of suspect effectively at the investigation stage.<sup>35)</sup> Secondly, in order to hold fast to the weapon equality principle, it is required to make the activities of investigation institution and the level of attorney's activity be equal to each other. For this reason, the attorney's right to inspection and duplication is essential for sharing of information and equality of opportunity. Besides, in respect that attorney's right to inspection and duplication of documents may protect innocent suspects effectively and raise the confidence in investigation procedure, it seems that institutional supplementation is required, in which attorney's right to inspection and duplication is acknowledged.<sup>36)</sup>

In 2003, the Constitutional Court made a decision<sup>37)</sup> on the acceptance of attorney's right to inspection and duplication regarding the legality of an arrest or detention. Reflecting this point in the law, the Rules on Criminal Procedure revised in 2006 stipulated that "an attorney who is supposed to participate in a suspect interrogation may read the application form of arrest warrant application submitted to a district judge, the complaint and indictment attached to the arrest warrant application, and the documents containing defendant's statement" (Clause 1, Section 21, Article 96 of the Rules on Criminal Procedure).

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34) See Yang-Kyun Shin, *Susajeolchaeseo Bynhoinui Girokyeolamdeungsakwon* [Discovery at the process of investigation], 53-7 BEOPJO[LAWYERS ASSOCIATION JOURNAL] 176 (2004) (in Korean).

35) Gi-yeong Jo, *Piuijaiui Yeolamdeungsakwon* [Defendant's Right to inspection and Duplication], 20-3 HYEONGSABEOPYEONGU[JOURNAL OF CRIMINAL LAW] 155 (2008) (in Korean).

36) Shin, *supra* note 34, at 178; Lee, *supra* note 32, at 251; Young-Bub Kwon, *Gongsojegi-jeon Susaseoryuui Yeolamdeungsakwon* [Reading/Printing Rights of Investigation Documents Prior to Prosecution], 60-8 BEOPJO[LAWYERS ASSOCIATION JOURNAL] 272 (2011) (in Korean).

37) Constitutional Court, 2000Hun-ma474, Mar. 27, 2003.

### 3. *Right to participation in suspect interrogation*

#### 1) *Significance and history*

##### (1) Significance of the right to participation in suspect interrogation

The suspect interrogation is a kind of free investigations, in which an investigation institution summons a suspect to its office and interrogates and listens to the suspect's statement. In this procedure, the suspect who is accused of crime is interrogated to identify the criminal fact, and the detective extract a confession or collects evidences. Even though a suspect interrogation is a kind of free investigation, the fact that the interrogation is aimed at extracting suspect's confession and collecting evidences, which will be used as important evidences in a trial procedure, implies that the suspect interrogation is very important both to the party planning to prosecute the case after collection of evidence and the other party defending him/herself regarding the criminal suspicion.

From the viewpoint of investigation institutions, a suspect interrogation is a good opportunity to get a confession from the suspect, so that the temptation to use illegal means may be relatively bigger, which is directly connected to a human rights violation against the suspect. And from the viewpoint of attorney defending a suspect, it may provide an opportunity to prevent an unreasonable prosecution in certain circumstances, if the attorney succeeds in defense at the suspect interrogation stage. Otherwise, the attorney can reduce the criminal suspicion that may be put into the protocol for suspect examination, of which the admissibility of evidence is admitted in a public trial court. Accordingly, participation in a suspect interrogation with regard to ensuring the right to counsel has a significance in the aspect of preparation of active and effective defense plan and human rights guarantee.<sup>38)</sup>

For this reason, the current Criminal Procedure Code allows an attorney to participate in a suspect interrogation when requested by a suspect or attorney by stipulating that "a prosecutor or judicial police officer shall

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38) Young-Cheol Yoon, Piujasinmune Daehan Byunhoinui Chamyekwone Daehan Sogo [*The Legal Review of the Right for the Counsel to Participate in Suspect Interrogation*, 16-1 HYEONGSAJEONGCHAEKYEONGU[KOREAN CRIMINOLOGICAL REVIEW] 70-71 (2005) (in Korean).

allow an attorney to have an interview with suspect according to the request from the relevant attorney, legal representative, spouse, lineal relatives or siblings, and the attorney may participate in the interrogation unless there is no due cause". (Clause 1, Section 2, Article 243 of the Criminal Procedure Code)

## (2) Introduction of historical background

Before the revision of Criminal Procedure Code in 2007, there was a provision which stipulated that only a third party such as detective or clerk from the prosecutor's office should participate in a suspect interrogation (Article 243 of the Criminal Procedure Code), but there was no applicable provision about participation of an attorney.

In that circumstance, the traditional academic theories were divided into positive and negative opinion. In the case of positive opinion, it was argued that the constitutional right to participation in a suspect interrogation should be admitted because the right to participation in a suspect interrogation was inherent in the right to interview and exchange information.<sup>39)</sup> And also, the positive opinion was based on Article 48 of the Criminal Procedure Code, which stipulated the right to raise objection regarding the accuracy of writings in the protocol for suspect examination, so that the attorney's right to participation could be admitted indirectly. But the negative opinion was based on the fact that there was no substantive enactment admitting attorney's participation in suspect interrogation, and Article 243 of the act restricted the participants, and the confidentiality of investigation and proper progress of suspect interrogation might be interfered if the attorney's participation was admitted.

On the other hand, in legal practices, each judicial agency created and operated internal guidelines regarding the participation in suspect interrogation. The police set up the 'Guidelines for Attorney's Participation in Suspect Interrogation' in 1999, so that it could be confirmed whether an

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39) Jin-Yeon Chung, Hunbeopsang Byunhoinui Joryukeul Badeul Kwonliui Naeyonggua Hankye -Piuijasinmungua Byunhoinui Chamyeokwoneul Jungsimeuro - [*Constitutional Contents and Limits to the Right of Counsel - With Special Reference to Interrogation of Suspect and Presence of Counsel -*], 18-3 SUNGKYUNKWANBOPHAK[SUNGKYUNKWAN LAW REVIEW] 642 (2006) (in Korean).

attorney would participate in the interrogation, and the attorney participating in the interrogation could help the suspect and read the protocol of suspect examination. However, the internal guidelines allowed the police to restrict participation of attorney in the special cases, such as public safety-related crime, criminal organization, and drug-related crimes, or when the participation of attorney may facilitate destruction of evidence or escape of accomplice or have a great impact on the investigation or trial of the relevant case.

In 2002, the prosecution authority prepared the 'Operational Guidelines for Participation of Attorney in Suspect Interrogation' as a part of "Measures Against Recurrence of Investigation Torture." According to the guidelines, a prosecutor could allow an attorney to participate in an interrogation by preparing a seat for the attorney in the proper position behind the suspect. However, if it was judged that the attorney's participation might cause a considerable disturbance to the interrogation, the prosecutor could ask the attorney to leave. Such guidelines set up by investigation institutions was evaluated as ineffective in reality because the guidelines admitted the participation of attorney as a mere formality, stipulating the reasons why the attorney should leave on the basis of broad and arbitrary decision.<sup>40)</sup>

In such circumstances, the Supreme Court admitted attorney's right to participation in suspect interrogations through inference-based application of the constitutional right to counsel, including Article 209 and 89 of the Criminal Procedure Code, when the court was stipulating that "though the Criminal Procedure Code has no provision regarding attorney's participation in an interrogation of detained suspect, the suspect under detention may request attorney's participation by inferring and applying the regulations in the Criminal Procedure Code, which is in accordance with the constitutional regulations stipulating that the Constitution ensures detainee's right to interview with an attorney and anyone who is under arrest or detention has the right to counsel", which was announced at the time of 'Professor Song Du Yul's case'<sup>41)</sup> in 2003. Nevertheless, the Supreme Court confirmed that

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40) Ho-chang Song, *Piujasinmun Gwajeongeseo Byunhoin Chamyekwon [Attorney's right to participation in the process of suspect interrogation]*, 7 JURIST 45-46 (2004) (in Korean).

41) Supreme Court, 2003Mo402, Nov. 11, 2003.

attorney's participation might be restricted in case of an objective and definite reason to worry about a 'disturbance of interrogation', and possibility of 'divulgence of a investigation secret'.<sup>42)</sup>

And in the next year, 2004, the Constitutional Court decided that an attorney should be allowed to participate in a suspect interrogation for an undetained suspect from the viewpoint that the attorney's right to participation should be regarded as a part of the right to interview and exchange information, stipulating that "regardless whether to arrest a suspect or defendant or not, the role of an attorney as a counselor, which is carried out through giving advice and counseling, shall be regarded as the most essential part of the right to counsel just like the right to appoint an attorney, and the right to consult an attorney and get an advice is what is derived from the right to counsel, which is the compulsory premise of other procedural right among the contents of right to counsel, and the specific legislation is required for the right. In the case of undetained suspect or defendant, it is possible to make an attorney sit next to the suspect to consult and get an advice even though there is no special provision in the Criminal Procedure Code, which is available at all times during the period from the beginning of investigation procedure to the end of trial procedure".<sup>43)</sup>

Making such a decision, in a similar view of the Supreme Court, the Constitutional Court stipulated that the defendant's right to consult an attorney and get an advice had reasons of inherent restrictions, such as disturbance of suspect interrogation, divulgence of a investigation secret, and illegal assistance. Through these processes, the Congress reached the agreement on legislations of attorney's right to participation, and at last Section 2 of Article 243 was newly established in the revision of the Criminal Procedure Code in 2007.<sup>44)</sup>

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42) Jin-Ho Cheon, *Gaejeong Hyungsasosongbeopsang Hyungsapiuija Pigoinui Bangeokwon Bojang* [Guarantee of suspect's and defendant's right to defense in new criminal procedure code], 103 JUSTICE 116 (2008) (in Korean).

43) Constitutional Court, 2000Hun-ma138, Sep. 23, 2004. See Kang, *supra* note 16, at 360-362.

44) See Cheon, *supra* note 42, at 117.

## 2) *Specific details and legal characteristics*

### (1) Contents of Section 2, Article 243 of the Criminal Procedure Code

Above all, Clause 1 has prepared the basis regulation that confirms attorney's right to participation in suspect interrogations and the right to interview and exchange information in principle by stipulating "prosecutors and judicial police officers shall allow an attorney to interview a suspect according to the request from the suspect or the attorney, legal representative, spouse, lineal relatives, or siblings, or make an attorney participate in the suspect interrogation unless there is no reason to prohibit. And Clause 2 stipulates that the number of participants shall be one, who is designated by the suspect or a detective, if there are multiple attorneys, by stipulating that "when there are more than two attorneys, one of them shall be designated to participate in the suspect interrogation. If the defendant fails to designate, the prosecutor or a judicial police officer can do it." In Clause 3, the specific rights that can be exercised by an attorney during the interrogation are described by saying that "the attorney participating in a suspect interrogation can state his/her view after completion of the interrogation. However, the attorney may raise an objection regarding the unreasonable method of interrogation during the interrogation by obtaining an approval of the prosecutor or judicial police officer." Clause 4 and 5 stipulate that "when an attorney states his/her own views, the contents shall be put into the protocol of suspect examination, and the attorney shall confirm the contents. And the facts related to the participation and restrictive disposition in the process of interrogation shall be put into the protocol of suspect examination as well."

### (2) Legal characteristics of attorney's right to participation

As for the legal characteristics of attorney's right to participation in suspect interrogations, the points of view are in confrontation with each other. In the first point of view, ① the participation is understood as an institutional strategy that is used to secure the legitimacy and voluntariness from the viewpoint of procedural legitimacy,<sup>45)</sup> and in the other point of

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45) It is said that the Korean Ministry of Justice takes a position in this way. See Wan-gyu Lee, *Byunhoinui Piuijasinmun Chamyekwonui Beopjeok Seongjil* [Legal characteristics of attorney's participation in suspect interrogation], 5 HYEONGSABEOPUI SHINDONGHYANG [NEW TENDENCY OF CRIMINAL LAW] 36 (2006) (in Korean).

view, ② the participation is understood as a part of the right to interview and exchange information from the viewpoint that it helps ensure suspect's right to counsel.<sup>46)</sup> According to the point of view in Item ①, the participation of attorney is focused merely on monitoring, so it is nothing more than just stay in the place with the suspect. On the contrary, according to the point of view in Item ②, the participation of attorney means helping the suspect directly in the process of interrogation, so that the attorney's participation may be regarded as the right to consult the suspect and give advice to the suspect, and request the right to state his/her views. Even though the participation is understood from the point of view in Item ②, it does not mean that attorney's right to participation guarantees 'illegal assistances'.

As the Constitutional Court judges that "though the right to consult an attorney and receive legal advice during the suspect interrogation is the core contents of the right to counsel and such a right is directly applied to the criminal procedure, the permissible range does not include the cases in which an advice or counseling process interferes the suspect interrogation or reveals the investigation secret. That is because the right to counsel through advices and counseling refers to the 'legal assistance' from an attorney, but it does not mean that the right to receive an illegal assistance is ensured",<sup>47)</sup> a definitely illegal assistance cannot be an object to protect.

As mentioned above, it may be said that the specific details of the right to counsel in an investigation process are centered on establishment of proper defensive measures, so that we need to understand the concept of attorney's participation in suspect interrogation in line with the right to interview and exchange information, which enables the suspect to consult an attorney and get advice during the interrogation process.

### (3) Interpretation of 'due reason' restricting attorney's right to participation

Regarding the attorney's right to participation in suspect interrogation, Clause 1, Section 2, Article 243 of the Criminal Procedure Code stipulate

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46) See Chung, *supra* note 39, at 643; Yoon, *supra* note 38, at 74. Also standpoint of the Supreme Court and Constitutional Court. See Supreme Court, 2003Mo402, Nov. 11, 2003; Constitutional Court, 2000Hun-ma138, Sep. 23, 2004.

47) Constitutional Court, 2000Hun-ma138, Sep. 23, 2004.



that attorney's right to participation may be restricted if there is a due reason by prescribing that "as long as there is no due reason, the prosecutor or judicial police officer shall allow the attorney to participate". By the way, the expression, 'Due Reason' may be regarded as excessively abstract when it is used as a standard to restrict a certain constitutional right. It may be said that the current provision of law is based on the regulation method of which the directional nature can not be identified only by literary interpretation, in comparison with the guidelines of investigation institutions where the attorney's right to participation was considered to have a certain level of directional nature and purpose, though the investigation institutions could make abstract and arbitrary judgment due to the provisions such as "when the investigation or trial may be greatly affected by attorney's participation "(guidelines of the police), and "when attorney's participation may cause an enormous trouble to the investigation." (guidelines of the prosecution)

Nevertheless, when integrating the guidelines of investigation institutions and the purpose of judgment of the Supreme Court and Constitutional Court, the 'Due Reason' in this regulation can be specified as the 'case in which the purpose of investigation is substantially jeopardized'. In the same manner, in which the Constitutional Court has mentioned specifically about the cases in the judgment, the 'Due Reason' may be interpreted as 'disturbance of interrogation', 'divulgence of a investigation secret', and 'illegal assistance'. According to the interpretation, we may give some example of the cases, where there is a due reason to exclude attorney's participation, as follows.

① a case where an attorney excessively intervenes in interrogation in order to hinder the investigation, ② a case where an attorney answers the question on behalf of the suspect, induce the change in suspect's statement, or request the suspect to exercise the right to refuse to make statements against the suspect's will, and ③ a case where an attorney takes down every word or records all the conversation in interrogation and makes contact with a person outside the room, doing other things more than just taking a memos of the outline of interrogation.<sup>48)</sup>

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48) See Chung, *supra* 39, at 647-648; Pil-Gun Byun, *Byunhoinui Piuijasinmun Chamyeokwonui Jehane Daehan Bikyobeopjeok Gochal [A Comparative Study about the Right to*

3) *Improvement direction regarding the system of attorney's participation in suspect interrogation*

(1) Actualization of reasons of restriction on participation

As mentioned above, the current regulations on reasons related to restrictions on attorney's participation are excessively abstract. Accordingly, we need to concretize the regulations by defining the cases such as 'the case in which an investigation is hindered considerably', or 'the case in which the purpose of investigation is jeopardized substantially'. It is because there is a big possibility of conflict under the current regulations, due to differences of opinion between investigation institutions and attorneys over the acknowledgement of the 'Due Reason'.<sup>49)</sup>

(2) Preparation of supplementary device to ensure the effectiveness of attorney's right to participation

The current regulation has not included the contents regarding whether a suspect interrogation shall be suspended until an attorney participates in the interrogation after the suspect requested participation of an attorney during the interrogation as the suspect decided that he/she needed an attorney's aid. And also, it is not clear whether the investigation institution may continue the interrogation regardless of attorney's participation in the suspect interrogation. On the premise that the purpose of attorney's participation is to ensure the substantial aid for the suspects through an immediate advice and counseling, it is desirable to suspend the interrogation when the suspect claims participation of an attorney during the interrogation, and resume the interrogation after the attorney arrives.

Accordingly, when a suspect interrogation begins without an attorney, in principle, the investigation institution shall inform the suspect that he/she may claim participation of an attorney at any time. And if the suspect

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*Counsel During Interrogation and It's Limitation*], 58-2 BEOPJO[LAWYERS ASSOCIATION JOURNAL] 235-243 (2009) (in Korean).

49) Gang-Ho Song, *Piuijasinmuni Byunhoin Chamyeojedoui Hwalseonghwa Bangan* [A Study for the system of attorney participation in the process of interrogation], 20 HALLIMBEOPHAK FORUM[THE JOURNAL OF HALLYM LAW FORUM] 58 (2009) (in Korean); Suk-Yoon Choi, *Byunhoinui Piuijasinmunchamyeokwoone Daehan Bikyobeopjeok Yeonku* [A Comparative Study on the Right for the Counsel to Participate in Suspect Interrogation], 23-4 HYEONGSAJEONGCHAECHEONGU [KOREAN CRIMINOLOGICAL REVIEW] 79 (2012) (in Korean).

claims participation of an attorney during the interrogation, the interrogation shall be suspended in principle until an attorney arrives at the place. However, if the attorney does not come in time without a good cause, and in an urgent situation like an emergency arrest, exception may be granted.

(3) Expansion of state-appointed attorney's right to participation

In the current system, the state-appointed attorney system is not applied to suspects, except for the cases where the review of legality for confinement (Clause 10, Section 2, Article 201 of the Criminal Procedure Code) is applied, or a suspect is interrogated when applying for an arrest warrant application (Clause 8, Section 2, Article 201 of the same code). However, the necessity of attorney's participation in an investigation procedure, especially in a suspect interrogation procedure, is emphasized not because of the poverty of a suspect, which prevents the suspect from hiring an attorney, but because of the passive response to the investigation process as the vulnerable members of society are intimidated. Accordingly, it is required to set up an institutional scheme, which may facilitate selection and participation of a state-appointed attorney, on a request from a suspect or attorney in suspect interrogations for the suspects, who shall be provided with a state-appointed attorney (Item 1~6, Clause 1, Article 33 of Criminal Procedure Code).<sup>50)</sup>

(4) Fact of attorney's participation and admissibility of evidence

In order to increase attorney's participation in suspect interrogations and expand permission from investigation institutions, it may be considered to differentiate the admissibility of evidence between the case in which an attorney has participated and other case where an attorney has not participated. In short, setting up a special regulation, in which a protocol of examination of a suspect prepared in the presence of an attorney is recognized as an evidence, including relaxing the requirements for approval, despite the exceptional rules of the current Criminal Procedure Code, may be evaluated as a desirable policy in accordance with the equilibrium principle as ensuring attorney's right to participation is

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50) Song, *supra* note 49, at 55; Choi, *supra* note 49, at 80-82.

equivalent to compensating the investigation institution for the contribution to the system<sup>51)</sup>. It is worth reviewing the system in the aspect of economical litigation as the participation of attorney reduces human right violation and ensures the objectivity of investigation process.

## V. Conclusion

Summarizing the future supplement points and improvement direction may replace the conclusion of this article, in which the constitutional guarantee focused on ensuring the right to counsel has been discussed.

According to attorney's right to interview and exchange information, censoring the documents and other stuff received by a suspect during an interview with an attorney is prohibited in principle. However, in order to ensure the security and maintenance of order in a correctional facility, prison officers may inspect such stuff on the basis of discretionary power, so that it is required to stipulate rational reasons for doubt in order not to infringe suspect's right to interview with attorney and exchange information. And also, the current practice of correctional facilities, in which interviews with attorney is prohibited on Saturdays and holidays shall be improved to allow the interviews. Regarding this issue, it is required to review a remote interview by using technical means such as a video telephone.

On the other hand, the interpretation, in which the right to interview and exchange information shall be given to a suspect taken to an investigation institution in the form of voluntary traveling, as well as a detainee, is regarded as reasonable, so the legislative improvement shall be considered in the future. As for the means of relief for the violation of the right to interview, we may consider suspending the suspect interrogation in procedural aspect when a quasi-appeal has been filed. And in the aspect of Evidence, it is required to make exclusion of evidence compulsory when the right to interview has been violated.

As for the right to inspection and duplication of documents, the current

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51) Do-hyeon Cho, *Susajeolchasang Byunhoin Chamyoe Kwanhan Yeonku* [A Study on Attorney's participation in Investigation Procedure], 16-2 JOSEON UNIV. BEOPHAKNONCHONG [COLLECTION OF LAW TREATISES] 23 (2009) (in Korean).

system allows the exercise of right only after a case has been prosecuted, so that there has been a discussion in which the expansion of the right to the investigation stage in order to protect suspects and raise the trust in investigation procedure.

As for attorney's right to participation in suspect interrogations, it is required to carry out institutional improvement in which the restrictions on participation that have been stipulated in a excessively abstract manner is concretized according to the purpose, a suspect interrogation, which has begun without an attorney, is suspended when the suspect wants an attorney and begins when an attorney arrives at the place, and selection and participation of a state-appointed attorney is carried out on the request of suspect who is supposed to hire a state-appointed attorney. Finally, in order to raise the participation rate on the spot, setting up a special regulation, in which a protocol of examination of a suspect prepared in the presence of an attorney is recognized as an evidence, including relaxing the requirements for approval, despite the exceptional rules of the current Criminal Procedure Code, may be considered.

