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A Study on the Problems and Improvement of Investigation in the Act on Anti-TERRORISM for the Protection of Citizens and Public Security

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Abstract

The provisions of the "Act On Anti-Terrorism For The Protection Of Citizens And Public Security(Act on Anti-Terrorism)" of 2016, which are concerned with the limitation of the human rights, have been continuously discussed since the 18th National Assembly, and the provisions of the current law have balanced at least the security rights of the people and the fundamental rights of the human rights. However, there is a system deviating from the center of the controversy even though there is a possibility of infringing on the fundamental rights of the people. It is the right of investigation by the staff of National Intelligence Service prescribed in Articles 2 and 9 of the Act on Anti-Terrorism.

The investigation of the "Act on Anti-Terrorism" is similar to the preliminary domain investigation in Germany, but it is futuristic in that it aims to prevent crime, but at the same time, And the process of searching for relevant information in a situation where the existence of the allegation is uncertain. The problem is, in principle, that there is no provision on the subject, scope and limitations of the right to investigate, even though the exercise of the investigation, which has a precautionary nature, may infringe the fundamental rights of the people as described above. First, this study explores the legal nature of the right to investigate "Act on Anti-Terrorism" and opens up the possibility of applying the due process principles.

Next, I pointed out the problems of criminal law in the field investigation and submission order system, which is the concrete type of investigation, and suggested ways to improve them. In other words, the specific type of investigation is substantially similar to the compulsory disposition, and the lawful procedure such as the constitutional warrant is stifled as the cause of the investigation. In this study, we explored problems and remedies for field investigation and submission order, which are highly similar to those of forced disposal.

[Keywords] ***Terror, Investigation, On-Site Investigation, Requirement of Submission, Due Process***

1. Introduction

Since the September 11, 2001 terror attacks, many countries have taken various institutional measures to protect the safety of the nation from terrorism and to protect the lives and property of the people. However, despite the necessity of such an institutional apparatus, it is true that there is a considerable controversy to the present in that it paradoxically violates human rights of the people and restricts fundamental rights[1].

"Act on Anti-Terrorism" was not free from such controversy, but it was argued that the legislation was essential for the national security and national security from the time of the legislation[2], and that the possibility of human rights abuses and the abuse of authority of national intelligence agencies(such as National Intelligence Service, NIS), But the result was that the necessity was asserted.

In the reality that the problem of the "Act on Anti-Terrorism" is still being discussed, this study examines the right of counterterrorism investigation which has not received

much attention from the "Act on Anti-Terrorism". The investigation is formally an administrative investigation, but it is necessary to review it because it has substantial substance of investigation.

2. The Concept and Necessity of Investigation in "Act on Anti-Terrorism"

2.1. The concept of investigation in "act on anti-terrorism"

The Article 2 of the "Act on Anti-Terrorism" stipulates that activities that require site investigation, document reading, sampling and to collect information or data necessary for counter-terrorism activities, or requests data to be submitted and statements are subject to counter-terrorism investigation to director of NIS.

2.2. Necessity of investigation for the counter-terrorism

The most important asset for identifying terror crimes as well as the substantive truths of criminal offenses is "Intelligence[3]". In order to prevent the Terror crime in advance, we have learned from the experience of foreign countries that it is important to get the "Intelligence" in advance and analyze it. However, considering the possibility of infringement of the fundamental rights of the people because of the threat of terrorism[4] and "the chilling effect doctrine", it is necessary to conduct an internal investigation before transferring the criminal procedure. In addition, there are a variety of legislative forms (such as "Financial Investment Services and Capital Markets Act" and "Monopoly Regulation and Fair Trade Act") that provide forcible investigation to relevant agencies(such as "Financial Services Commission", "Fair Trade Commission") in order to prevent crime proactively and to decide whether to incorporate it into future criminal procedure.

The problem is that although the investigation is not a form of criminal procedure but a kind of administrative investigation, it has a form of actual criminal procedure, which is a possibility of infringing the fundamental rights of the people, It is abstractly defined.

3. Review of the Nature of Investigation in the "Act on Anti-Terrorism"

In this way, regardless of the formal aspect, the right to investigate can infringe fundamental rights regardless of whether or not the subject is actually perceived. It is necessary to identify the nature of the investigation and seek legislative supplementary measures because it can infringe on the fundamental rights of the people without the rule of law.

3.1. Investigation from the perspective of administrative law

In general, an administrative investigation means any administrative action in which an administrative agency decides a policy or conducts site investigation or document reading to gather data or information necessary for administration, or makes a request for data submission and a statement of attendance to the person to be investigated[5]. These administrative investigations are understood not as realizing the specific results required by the administration but as an auxiliary means for the collection of the data necessary for a specific administrative purpose.

3.2. Investigation from the perspective of criminal law

Considering the concerns of the infringement of the fundamental rights of the people, investigation should be differentiated from the investigation that has the relation of general investigation and criminal sanctions[6]. The investigation can be regarded as confirmation of the fact before the allegation of the crime, and it is the procedure of judging whether the allegation of the crime is judged in the criminal procedure[7]. The problem is that it is not possible to clearly distinguish the facts before the charge and judge the existence of the charge.

For this purpose, if the investigation is conducted with the aim of collecting basic data for pure administrative purposes, it is a pure administrative investigation, but if the investigation is carried out by an investigation agency(such as, NIS, The National Police Agency etc) and the basic data acquired here can be grounds for future criminal sanctions,

And it can be placed as a clue to criminal investigation proceedings.

4. Problems and Improvement of Investigation on "Act on Anti-Terrorism" from the Perspective Criminal Law

4.1. The nature of the on-site investigation and the due process principles

4.1.1. Introduction

In order to collect information and materials necessary for counter-terrorism activities, a civil servant belonging to the NIS agecies enters the office or workplace suspected of being related to a terrorist crime, and reports the status of work, books, documents, It is similar to a search for a material forcible disposition with the authority to investigate materials or objects. However, even though i) it is not subject to warrants, ii) it is an investigation whose purpose is similar to the search which is the premise to investigate specific data or specific persons, and iii) The fact that there is no detailed provision in the case that it is a possibility means that the field investigation of the "Act on anti-terrorism" is suspected that it violates the Due Process.

4.1.2. Limitations of the on-site investigation

Since the on-site investigation has the nature of arbitrary survey, but there are no specific regulations and procedures for site investigation, it is necessary to know the limits of the on-site investigation, the effect of the investigation deviating from the limitation and how to evaluate the evidence evidenced in the investigation procedure do.

Since the on-site investigation has a predisposing nature of other investigative rights, it is necessary to establish a prestigious rule for the point of time at which the site investigation begins. Although it is not possible to uniformly define the scope of data or information necessary for the suppression of terror crime, even if the criminal procedure does not lead to the initiation of investigation or the issuance of a warrant, the minimum threshold for the exercise of the authority of the NIS. It may be considered that the on-site investigation can be initiated if the "NIS can refer to"[8] it as "objective evidence" that there is "minimal relevance" or "minimum violation of the law". And the organization conducting this verification process should be performed by an independent body, such as a The Court or Intelligence Committee of The National Assembly.

4.1.3. Improvement of the on-site investigation

The field investigation system in the "Act on Anti-Terrorism" is a system for preventing terror crime through the smooth collection of information related to terrorism. However, since the field survey system has an atypical nature, it is necessary to take measures to prevent it from expanding unlimitedly. First of all, it is specific to the field survey. Anti-terror investigation is not a procedure after the alleged terror crime is confirmed, but it is the stage of conducting basic investigation about the relation with terrorism, so it can not demand the level such as seizure and search. Since the field survey has a logical inevitable relation with the concept of place, it is necessary to judge the scope of the field survey as a matter of question, and it is judged that it is not a forced disposition.

Considering the prevention and suppression of terror crime, it can be divided into proactive control and post - as a lexical control system, it is possible to consider the participation guarantee system in the field survey and the notification system of the survey result. The participation guarantee system in the field investigation is in line with the guarantee of the participation rights of the parties etc. in the seizure of the criminal procedure law[9]. Participation rights guarantee system is aimed at securing the procedural fairness of seizure search and protecting the interests of those who are executed, and it is a system for reasonably restricting the seizure scope by excluding the confiscation of evidence irrelevant to the allegations. The on-site investigation in the "Act on Anti-Terrorism" will be able to check the unlimited expansion of the field investigation in the first place, if the opportunity to participate is provided to the

subject in accordance with the guarantee of the right to participate in the penal law.

In addition, it may consider the purpose of the investigation after the completion of the fieldwork, the period and place of the investigation, the name and position of the investigator, and the procedure of notifying the investigator of the scope and contents of the investigation. This is because it not only guarantees the right of information to be controlled by the respondent but also serves as a basis for the investigator to contest the legality of the investigation.

4.2. The legal nature and problems of the requirement of submission

4.2.1. Introduction

NIS staff can not only view documents to collect information or data necessary for counter-terrorism activities. That is, the right to request arbitrary submission to the respondent to collect necessary information or data. Because there is “consent” of the other party, it can be regarded as stipulating the seizure system not based on the warrant stipulated in Article 218 of the Criminal Procedure Act. The Criminal Procedure Act also allows for the search without warrants in certain cases, which allows for six specific types of cases, each with its own legal basis[10]. In the case of terror crimes, there is a necessity in view of the urgency. However, in the reality that the data submission request is practically meaningless, the legislative attitude, such as the existing law, which grants the right to submit data and statements to the NIS without special permission, should be improved.

4.2.2. Improvement of the requirement of submission

In order to collect information or data necessary for counter-terrorism activities to suppress terror crimes, it is necessary to obtain specific information or data from the intelligence agencies inevitably[11]. However, the current law does not specify the detailed object and procedure of the data submission request by the intelligence agency, so it is necessary to specify detailed procedures. First of all, it is possible to consider introducing provisions such as the seizure procedure prescribed in Article 427 of the “Financial Investment Services and Capital Markets Act” and Article 8 of the “Tax Code Punishment Procedure Act” to the “Act on Anti-Terrorism”. However, there is a great difference between these laws and the legislative purpose of the “Act on Anti-Terrorism” and the “Financial Investment Services and Capital Markets Act”, and when considering the characteristics of terror crimes, it is necessary to acknowledge the data obtained by respecting the judgment in the field. In other words, considering the fact that 1)it is a preventive struggle of terror crimes, the application of collective warrants in the investigation stage of intelligence agencies is not valid, 2)but from the viewpoint of the respondent it is clear that it has a meaning similar to a warrantless seizure, and 3)because the current law is silent on the requirements, limitations and control measures of the request for data, It is necessary to make systematic supplementary measures to create new control measures.

Of course, the current “Act on Anti-Terrorism” also requires the “National Counterterrorism Commission”, which is chaired by the prime minister, to report beforehand or afterwards as counter-measures to counter-terrorism investigation and tracking rights. However, in order to deal with counter-terrorism, it is necessary to report to the “National Counterterrorism Commission”, which deliberates and resolves the important issues of counter-terrorism activities, and the basic purpose of this regulation is to guarantee the basic rights. Therefore, the counter-terrorism controlmeasure can take into consideration the obligation to “an Ex Post Facto Warrant system”, the court's examination thereof, and the notification system to the parties, in that the request for submission of data has a meaning similar to that of a material forced disposition.

An Ex Post Facto Warrant system should be recognized firstly(necessity and urgency), because it is the information and data necessary for counter-terrorism activities because of the relevance to the terror crime when the NIS officer reasonably judges it, The criticism

that the right to investigate infringes on warrants system is infringed by the fact that the legality of the request for submission is not only an internal judgment(ie, an internal review of the intelligence agency after receipt), but also allows for an independent judgment by an independent court It will be able to dispel.

In addition, if the submitted data proves to be irrelevant to a terror crime, it must be returned to the holder or other holder. However, there is no explicit article about "Right to Request the Return of Seized Articles[12]". Furthermore, even if there are arbitrary submissions of the subject under the request for submission of data, it is possible to consider the introduction of the duty to prepare and distribute the seizure list in accordance with Articles 129 and 219 of the Criminal Procedure Act, since it is practically confiscated.

5. Outro

It is natural that the most effective way to struggle with terror crime is to effectively suppress terrorist crimes before they occur[13]. However, in order to prevent all crimes including terror, necessary and appropriate intelligence is needed, and intelligence and investigation agencies should make efforts to collect this information. To this end, our "Act on Anti-Terrorism" has been granted the right to investigate by the NIS. However, since these necessities and legitimacy are separate, we have confirmed that the right to investigate the "Act on Anti-Terrorism" has room for improvement in terms of legality. In particular, it can be seen that the concrete type of the investigation is substantially similar to the forced disposition, and that the lawful procedure such as the warrant in the Constitution Law is inadequate.

In this study, although the nature of the anti-terrorism investigation started from the investigation in the administrative law, it can be seen in the same way as the investigation. Although the right to investigate of "Act on anti-terrorism" can be viewed as a compulsory disposition, it should be applied to warrants. However, due to the nature of terrorist crimes, it is not possible to carry out warrants at the same level as ordinary criminal proceedings.

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LEGAL Proposal for Digital Evidence Seizure and Admissibility in KOREA

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Abstract

Today, the digital revolution has completely changed all areas of society, and the evidence of crime has also become digitalized. Therefore, it is no exaggeration to say that the success or failure of investigation to reveal the truth depends on how digital evidence is secured and recognized. In this way, our society is rapidly changing into a digital society, but the law has not been completely restored, and it maintains the analog legal system of the past. In other words, the provision related to digital evidence is only Article 106(3), (4) and (313) of the Criminal Procedure Act. However, these few words alone cannot solve all the problems related to digital evidence. This study is based on the evaluation of the problems of Article 106(3) and (4) of the Criminal Procedure Act and recently revised Articles 313 and 314 of the Criminal Procedure Act, the purpose is to present a new legislative alternative.

Current deficiencies in the acceptability of digital evidence should be addressed through amendments to the law. First of all, the digital evidence corresponding to the specialization is subject to the existing special law, so there are certain limitations on the ability of evidence. However, there are exceptions to the special law, I believe that it is reasonable to allow valuable evidence that is essential to substantiate the fact.

And any digital evidence that does not contain a statement should be able to acknowledge evidence capability only if it is proven authentic to establish the truth and credibility of the data. That is, errors in systems and software, and authenticity requirements to ensure the reliability of digital evidence exposed to the risk of unauthorized access, has proven that there has been no such error or danger. The accuracy and reliability of the system and the procedures are mainly presented as such authenticity verification methods. However, more specific requirements for the authenticity of digital evidence should be laid out in a manner that is based on technical standards established by experts, but can be easily applied to legal judgments

[Keywords] ***Digital Evidence, Search and Seizure, Participation Rights, Cooperation Duty, Password Submission Order System***

1. Introduction

Today, the digital revolution has completely changed all areas of society, and the evidence of crime has also become digitalized. Therefore, it is no exaggeration to say that the success or failure of investigation to reveal the truth depends on how digital evidence is secured and recognized. In this way, our society is rapidly changing into a digital society, but the law has not been completely restored, and it maintains the analog legal system of the past. In other words, the provision related to digital evidence is only Article 106(3), (4) and (313) of the Criminal Procedure Act. However, these few words alone can not solve all the problems related to digital evidence.

Already in many advanced countries, severallegislative measures are being taken to secure digital evidence in response to these

digital changes. In other words, in view of the characteristics of digital evidence, in order to establish the seizure and search rule for digital evidence itself and to be able to recognize evidence of digital evidence, objective evidence to admit that the testimony or the author of a forensic investigator, (Ie log records, comparisons with other electronic information, details that only the author can know, or that the author has used only). This study is based on the evaluation of the problems of Article 106(3) and (4) of the Criminal Procedure Act and recently revised Articles 313 and 314 of the Criminal Procedure Act, The purpose is to present a new legislative alternative.

2. Legal Regulations and Assessments on the Seizure and Evidence of Digital Evidence

2.1. Regulation and evaluation of seizure search of digital evidence

In order to respond to the changing digital environment, the Korean legislator newly established Article 106(3) and (4) of the Criminal Procedure Act for the seizure and search of digital evidence through amendment of the Criminal Procedure Act(Law No. 10864) on July 18.

Article 106 (Seizure) (3) Where the object to be seized is a computer disc or other data storage medium similar thereto(hereafter referred to as "data storage medium or such" in this paragraph), the court shall require it should be submitted after the data therein are printed out or it is copied within the specified scope of the data stored: Provided, That the data storage medium or such may be seized, when it is deemed substantially impossible to print out or copy the specified scope of the data or deemed substantially impracticable to accomplish the purpose of seizure.

(4) Where the court receives the data pursuant to paragraph (3), it shall inform, without delay, the subject of information defined in subparagraph 3 of Article 2 of the Personal Information Protection Act, of the relevant fact.

In other words, Article 106(3) and (4) of the Criminal Procedure Act can output and confiscate digital evidence stored in an information storage medium such as a computer and confiscate an information storage medium such as a computer in an exceptional case. However, Article 106(1) of the current Criminal Procedure Act restricts confiscation to "evidence or confiscated articles". In addition, Article 106(3) does not “confiscate information stored in information storage medium such as computer disk” but “confiscated object is computer disk or other similar information storage medium”, The object of seizure is still centered on “fluid as information storage medium". In conclusion, Article 106 (3) of the Criminal Procedure Act is merely a "confiscation method" for information storage media, and the subject of confiscation is still "digital information itself" The question of whether digital evidence can be seen as an object of seizure[1].

In this regard, in practice, a seizure and search warrant for digital evidence is issued based on Article 106 (3)[2][3]. However, on the other hand, digital evidence has different characteristics from that of liquid evidence, so it is argued that separate procedures for the seizure and search of digital evidence should be established[4].

2.2. Provision and evaluation of evidence capability of digital evidence

On May 29, 2016, Korea`s legislator amended the Code of Criminal Procedure Act(Law No. 14179) on the ability of evidence of digital evidence.

Article 313 (Statement, etc.) (1) Except as provided in the preceding two Articles, a written statement prepared by a criminal defendant or any other person, or a document containing the statement, if there being the handwriting, or the signature or seal of a person who prepared such statement or document or a stater, shall be admissible as evidence, if the authenticity of its formation is proved by a statement made by the person who prepared such statement or document or the stater at a preparatory hearing or

during a trial: Provided, That the document containing the statement of the criminal defendant shall be admissible as evidence regardless of the statement made by the criminal defendant at a preparatory hearing or during trial, only when the authenticity of its formation is proved by a statement made by the person who prepared the document at a preparatory hearing or during trial and the statement entered in the document was made in a particularly reliable state.

(2) If, despite the text of paragraph 1, the author of the affirmation denies the petition of the Constitution on the date of the trial or the date of the trial, it shall be evidence when the authenticity of the constitution is proved by objective methods such as digital forensic materials, Can be. However, a statement made by a non-accused person shall require that the defendant or his or her lawyer be able to report the writer on the written matter at the hearing or trial date.

(3) The documents describing the progress of the emotions and the results are also the same as in paragraphs 1 and 2.

In other words, through amendment of Article 313 of the Criminal Procedure Act, despite the text of Article 313(1), a statement(a computer disk for information such as texts, photographs, and images including statements made or written by a defendant or a defendant, Or similar information stored on storage media) denies the allegation of its establishment on the date of the trial or the hearing, evidence should be provided in the event that the authenticity of the establishment is proved by objective methods such as digital forensic materials, But the defendant's written statement required the defendant or counsel to be able to report the writer on the date of the trial or trial[5].

Yet another problem arises from the fact that these legislations do not solve all the problems to acknowledge the evidence of digital evidence[6]. In other words, any of the techniques of digital forensics and the question of which of the forensic investigators will be accepted remains a matter of interpretation[7].

3. Legislative Proposal for Digital Evidence Seizure and Evidence Capability

Digital evidence cannot be solved by the existing seizure and search system due to physical evidence and other special characteristics. Accordingly, the Criminal Procedure Act of Korea established the Article 106(3) and (4) and tried to deal with it through the amendment of Article 313.

Despite these legislative responses, however, there are many problems that arise in the ability to seize, search, and test evidence of digital evidence. In other words, there is a problem of the possibility of confiscation of all digital information when it is impossible to confiscate and confiscate digital evidence, the problem of confiscation and search ability of digital evidence, the problem of confiscation and search of remote servers, ‘Problem of search’, ‘participation in participation’, ‘problem of application of special rule of digital evidence’. These problems can be said to be inadequate to solve the problems arising from confiscation and search of digital evidence by the provisions of Articles 106 and 313 of the current Criminal Procedure Act.

The most fundamental way to solve this problem is to solve the problem through solving through the seizure and search of digital evidence rather than solving the problem through interpretation. In order to do this, I think it is appropriate to establish the regulations for the seizure and search of the digital evidence itself in Article 106 of the Criminal Procedure Act and to establish various regulations that can solve the problems arising from seizure and search of digital evidence. Therefore, the amendment to the current Criminal Procedure Act or the practical solution will be presented below.

3.1. Establishment of seizure and search regulations for digital evidence itself

As we have seen in the Problems of Article 106(3) of the current Criminal Procedure Act, it is necessary to first legislate(Article 106(3))

which seeks digital seizure itself as confiscation and search[8].

In this regard, the United States has a stipulation for this. In other words, for digital evidence stored in information storage media, US federal criminal lawsuits are limited to tangible objects in the properties subject to confiscation and search in section 41 (a) (2) (A) And it is legally resolved that digital information is subject to confiscation and search by including information itself. However, even before reflecting information as an object of confiscation in the rules, the US courts had recognized the possibility of confiscation of the information, saying that the rules of federal criminal lawsuits on the subject of confiscation were exemplary through interpretation[9].

In addition, the US Federal Criminal Procedure Rules states that Article 41 (e) (2) (B) provides for a Warrant Seeking Electronically Stored Information, It is possible to seize the electronic storage medium itself or to confiscate or duplicate electronic information only in parallel, so that the subject of confiscation can be selected according to the specific situation. Unless otherwise specified, it permits unlimited later review of the storage media or information on the warrant.

It is proposed to revise Article 106(3) and (4) of the Criminal Procedure Law of the Republic of Korea as follows by referring to the US legislation.

Article 106 (Seizure) (3) The evidence or article under Paragraph (1) includes information stored in a computer disk or other similar information storage medium (hereinafter referred to as "information storage medium").

(4) If the information is provided pursuant to Article 115 (2), the court shall notify the information subject to Article 2 (3) of the 「Personal Information Protection Act」 without delay. Provided, however, that this shall not apply when there is a fear of disturbing the trial in progress.

3.2. Establishment of digital evidence confiscation, search method and participation rights, establishment of confiscation and search ground rules for remote servers

The Criminal Procedure Act of Korea defines the methods of seizure and search as 'principle and exception'. However, with regard to the search for digital evidence, it will be necessary to enact legislation (Article 115, Paragraph 2, Paragraph 1 of Article 115), which provides only a method of seizure search without priority[6].

In order to guarantee the fundamental rights of the person to be imprisoned, Regarding the method of seizure and search of digital evidence[10], it will be necessary to legislate the basis of seizure and search for remote servers which are not stipulated in our law (Article 115-2, Paragraph 3). To this end, it proposes to establish Article 115 (2) as follows.

Article 115-2(Execution of confiscation of information) (1) Confiscation of information may be done by any of the following methods. In cases 2 and 3, only information that is deemed relevant to the case may be confiscated.

1. How to set up a range of information that is memorized and output or duplicate it

2. A method of seizing an information storage medium in which electronic information is stored

3. How to transfer and confiscate electronic information only.

(2) A suspect, an attorney, or a person provided for in Article 129 may participate in the categorization of information related to an incident during the course of paragraph (1).

(3) If there is a reasonable reason to believe that the information to be enforced is stored in the information processing device such as the confiscated or searched computer and the information storage medium connected to the information communication network, the information may be transferred to the information

processing device or other storage medium You can confiscate or search by cloning or printing. In this case, it can not be executed beyond the authority of the information processing apparatus administrator concerned.

3.3. Other rules of procedure

In the case of confiscation and search for digital evidence, it will be necessary to prescribe in law the contents used in the practice of issuing warrants. To this end, it proposes to establish Article 115(3) as follows.

Article 115-3 (Confiscation of information Special conditions after execution) (1) When the information is confiscated pursuant to Article 115-2 (1), it may be reproduced or viewed on another storage medium, in whole or in part, to determine the relevance of the information to the incident. In this case, information copied to other storage media that is deemed irrelevant to the incident should be returned to the owner, holder or custodian of the information or discarded.

(2) In the case of Paragraph 1, when copying all the information stored in the information storage medium or the like to another storage medium, the relevant information storage medium, etc. shall be returned to the owner, etc. in accordance with Article 133 or Article 134 without delay.

(3) In the case of paragraph 1, a list of confiscated information shall be issued to the person prescribed in Article 129.

(4) The court shall notify the accused, the lawyer, or the person prescribed in Article 129 of the date and time in advance in order to carry out the procedure of paragraph 1. Provided, however, that this shall not apply to cases where the person who will be notified stipulates not to participate, when notice is impossible or difficult, or when there is a fear of disturbing the trial in progress.

3.4. Establishment of cooperation duty and password submission order system

If digital evidence is cryptographic, there is a need to create new rules that force it. In the case of the United Kingdom with such provisions, Part Ⅲ of RIPA(Regulation of Investigatory Powers Act 2000) and the "Investigation of Protected Electronic Information Code of Practice" apply to encrypted information(para. 37). RIPA requires certain law enforcement agencies to order individuals or companies to provide a password or cryptographic key to read encrypted information or files. If anyone do not comply with this, criminal punishment can be made(para. 38). It is proposed that, with reference to the British legislation, Article 120-2 shall be newly established as follows.

Article 120-2 (cooperation duty and password submission order system) (1) A person who executes a confiscation / search warrant for information may request cooperation such as the operation of an information storage medium or the like to an owner, holder or manager of an information or information storage medium, or access to other information storage media connected to the information communication network , Those who are requested to cooperate should cooperate unless there is unavoidable reason.

(2) Confiscation of information The person who executes the search warrant may order the owner, holder, or manager of the information or information storage medium to specify the scope of information stored, output, duplicate or submit.

(3) The court may impose a fine of up to KRW 100 million or a compulsory transitional compulsory deposit of up to KRW 10 million per day if the recipient of the request under paragraph 1 fails to do so without justifiable reasons. Provided, however, that the owner, holder or manager of information or information storage media shall be the defendant.

4. Outro – Suggestions for Evidence of Digital Evidence

Current deficiencies in the acceptability of digital evidence should be addressed through amendments to the law. First of all, the digital evidence corresponding to the specialization is subject to the existing special law, so there are certain limitations on the ability of evidence. However, there are exceptions to the special law, I believe that it is reasonable to allow valuable evidence that is essential to substantiate the fact[11]. In this respect, the amendment of Article 313 of the Criminal Procedure Act is considered to be valid. However, it seems that the issue of how our courts take their operations is a matter of concern. And any digital evidence that does not contain a statement should be able to acknowledge evidence capability only if it is proven authentic to establish the truth and credibility of the data. That is, errors in systems and software, and authenticity requirements to ensure the reliability of digital evidence exposed to the risk of unauthorized access, has proven that there has been no such error or danger. The accuracy and reliability of the system and the procedures are mainly presented as such authenticity verification methods. However, more specific requirements for the authenticity of digital evidence should be laid out in a manner that is based on technical standards established by experts, but can be easily applied to legal judgments.

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Restorative JUSTICE and Community Sentence

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Abstract

In recent, restorative justice has become a new paradigm for criminal justice in response to crime. In the existing criminal justice system, punishment is a legal consequence of crime, which has the nature to impose harm on the crime committed by the actor. On the other hand, restorative justice focuses on conflict parties to resolve conflicts. In this view of the world, the problem of crime is the wound of the community and the damage of the network. More fundamentally, this view of illicit behavior implies an interest in the healing of the affected parties, including the perpetrator and the community, as well as the victim. So the parties(the perpetrators, the victims, the community members, etc., in relation to the recovery) participate in the process of resolving conflicts and set and pursue the goal of restoring and reintegrating conflicts. The recovery of the perpetrator is also as important as the recovery of the victim, and it is necessary to accept the perpetrator as a member of the community again

Therefore restorative justice emphasizes active support and involvement of the community in the process of recovery. From this point of view, we consider that social treatment is appropriate for the realization of ideology of restorative justice rather than treatment in facility at the correction stage, and we seek to utilize social treatment as restorative sanction by practice program of restorative justice.

In this respect, the process of acknowledging responsibility for their actions and trying to heal the damage they have with them will lead to regret and responsibility for the past. In addition, you can expect the preventive effect, which is the purpose of punishment. On the other hand, "restorative justice differs from the existing criminal justice in that it pursues its goals and means, so many theorists of restorative justice have found that the restorative programs they want to practice are uncritically absorbed into the existing criminal justice system, the problem is that it is simply a solution to the problem-solving type of the problem by restoring the victim's damage to the victim.

Therefore, in the aspect of recovery of the main keyword which is the center of restorative justice, the criminal apologizes for himself and takes a restorative duty, so that the result of his / I must start with. It should not be forgotten that in this process, the promise of restoration of the damage between the parties is the starting point for restoring the relationship, not the purpose of distressing the sufferer.

[Keywords] ***Restorative Justice, Restorative Sanction, Community Sanction, Criminal Sanctions, Restoration***

1. Introduction

In recent, restorative justice has become a new paradigm for criminal justice in response to crime. In the existing criminal justice system, punishment is a legal consequence of crime, which has the nature to impose harm on the crime committed by the actor. On the other hand, restorative justice focuses on conflict parties to resolve conflicts. In this view of the world, the problem of crime is the wound of the community and the damage of the network. More fundamentally, this view of illicit behavior implies an interest in the

healing of the affected parties, including the perpetrator and the community, as well as the victim[1]. So the parties(the perpetrators, the victims, the community members, etc., in relation to the recovery) participate in the process of resolving conflicts and set and pursue the goal of restoring and reintegrating conflicts. The recovery of the perpetrator is also as important as the recovery of the victim, and it is necessary to accept the perpetrator as a member of the community again.

Because of the nature of restorative justice, the term restorative sanction may sound like a contradiction. However, the term restorative sentencing is used in the sense that it is a countermeasure against crime and a concept corresponding to criminal sanctions. In this paper, therefore, we start from the point of view of responsibility in restorative justice and the necessity of alternative to punishment and detention. We will identify the meaning of the restorative sanctions and discuss the possibility of applying them to these sanctions.

2. Restorative Sentence

2.1. Criminology implications of sanctions in society

Community Sentence is used as a concept against the sanctions in the facility. It was presented as an Sanction without liberty[2] to the problem of overcrowding of the treatment of existing facilities, problems of economics, and efficiency of short term imprisonment. On behalf of the existing freeforms deprived of freedom and punishment in the facility, the guards are guided and guided by the guards in the society, and continue to live their lives and receive criminal sanctions. However, 'sanctions in society' is used as a concept similar to 'treatment in society', but the concepts of both are not the same[3]. The treatment of social treatment is used to refer to specific programs for the improvement[4], rehabilitation, and rehabilitation of offenders in the community rather than in prisons, so social treatment understands the program of sanctions in society.

In Korea, the treatment of social workers is guilty, while the various postponement(probation and postponement) of deferring execution and sentencing of punishment(detention and fines) Social service, enrollment orders, and probation. In addition to these treatment programs, discussions on the necessity of development of various social treatment programs based on advantages of social sanctions are being steadily raised.

2.2. Definition of restorative sanctions

Restorative justice, in which the parties participate in problem solving, provides an alternative framework for thinking about how to deal with illegal acts[5]. The concept of restorative sanctions is also being tried variously, but according to Professor Tony Marshall, “the process by which interested parties in a particular crime are gathered together to deal with the consequences of crime and how it will deal with its meaning in the future[6].” Professor Howard, who has done a lot of research in defining the concept of restorative justice, says restorative justice is "a way to correct and correct the mistakes as much as possible, And the process of identifying and dealing with obligations”.

On the other hand, the attempt to incorporate the restorative restoration system into criminal sanctions and influence the judgment of sentencing is likely to result in resurrection and reorganization of private revenge[7], and the restriction of tangible and intangible, There is also a negative view that there is a great likelihood of bringing about such a situation[8].

Professor Kim Sung Don said, “These concerns exist in the form of fines. Instead, the fines are attributed to the national treasury and are not attributed to victims, so they are carried out irrespective of the victim. The negative view is that the system for the protection of damages between the parties is civil damages "It is argued that the criminal act is based on a fixed consciousness that it is solved by a system of national criminal sanctions inherent in criminal law[9].”

Therefore, for restorative sanctions, first of all, it is necessary to understand the exist-

ing definition of criminal justice and new definition according to the restoration perspective. Based on this understanding, and for more effective sanctions, Professor Lode Walgrave explains that restorative justice is "a regime that requires voluntary participation to restore justice by realizing the damage caused by a crime Instead, restitutional sanctions such as a restoration order or a civil service order imposed by the court are also incorporated into the restorative justice framework[10].

2.3. Restorative responsibility

Responsibility used in restorative justice does not coincide with the concept of accountability. When the restorative justice takes accountability requirements as the premise of recovery, the responsibility used in restorative justice is broader in that it covers moral responsibility. As O'Malley points out, "The responsibility for crime or the prevention of crime is not the domain of political rights, nor does it just mean a punitive response to the perpetrator[11]." In the end, responsibility is a fundamental and debateable issue in all judicial systems, including restorative justice. " Emphasize that restorative justice has its roots in the current criminal justice paradigm and its first starting point in fulfilling that role is the meaning and role of responsibility in restorative justice. Likewise, the view of responsibility in relation to the restoration of contexts, such as the claim that restorative justice is not entirely new, and that it did not originate in any particular area, is often visible in our judgment.

Judges in many criminal trials(almost all), as the judges say, because of the weight of sentencing, “... Without trying to forgive the victim or recover the damage(compensation for the loss), there is no repentance...", we would like to start from the premise that restorative justice is not entirely new. Our society as well is an insult to the fact that it is an important factor in problem solving, in that it tries to recover from the victim's relationship with his or her abusive behavior.

Of course, in such premises, it is difficult to expect everyone to acknowledge and act on our behalf as we anticipate, and in such cases, to add or to impose penalties (especially imprisonment), which is a supplement to the criminal law. It is desirable to give the parties an opportunity to recover positively before leaving the judge for the victim's recovery to the discretionary judgment of the judge solely. It will be a more accurate and reasonable sentence to judge the elements of sentencing in light of the will and efforts of the parties to recovery in these procedures. Also, even if a party does not have access to such a procedure prior to his sentence, the judge will be able to fulfill the purpose of punishment in the original sense by providing a place for the recovery of the party's injury rather than imprisonment.

3. Encounter with Restorative Sanctions and Social Treatment

3.1. Possibility of combining with restorative sanctions and social treatment

The core principle of restorative justice can be called 'recovery process' and 'effort process' for recovery(conflict resolution) between the parties. This viewpoint is worthy of the process of dialogue and recovery between the parties even though there is no result of resolution between the parties. In order to be able to combine both the restorative justice and the retaliatory justice without being alternatives, it requires the process of resolution between the parties and the society members and the expectation effect of the process as a post-treatment of the criminal act do. In addition, Professor Choi Seok-yoon argues that it is better to refrain from applying penalties such as freestyle if the treatment of society is sufficient by the last means of punishment and the flexibility of punishment by turning minor offenders who do not have the risk of recidivism into social treatment, they also have a criminal policy function that can reduce the overcrowding phenomenon of the hanging facilities and improve the correction effect by focusing the criminal ability on the criminal offenders. I would like to see the necessity of improving treatment in society[7].

On the other hand, Professor Kim Yong - seh warned against the adverse effects of selective or preferential application of restorative justice, especially in the issue of criminalization or the introduction of recovery into the criminal procedure. Damage restoration and criminal reconciliation are legitimate in themselves because it is desirable to end the dispute by self-talk and damages, but it is dangerous to over-emphasize the victim's interests in this process. In this case, the victim has the entire right to decide the conflict resolution between the parties, and the problem of genetic innocence(advantageous to the defendant capable of compensation) remains. If the victim needs to recover enough damage, the victim's excessive demands will make it difficult to reach an agreement, and the perpetrator who wants to treat the lighter brother especially in society should endeavor to listen to the victim's demands while enduring the unfairness something to do. It is argued that this should be complemented as a supplementary procedure to improve the efficiency of traditional criminal justice system, pointing out that it is an indirect coercion, a pressure, and a means to compel civil compensation. If the enlargement of the social treatment by using alternative sanctions as a means of criminal reconciliation and restoration of the damage is expected to solve some of the side effects and problems of the traditional punishment enforcement[12].

3.2. Encounter with current social treatment

Restorative justice theorists argue for "priority work" of the restorative justice mechanism, but in reality, the restorative justice program is largely dependent on decisions (sentence of probation or probation) It is also uncertain that the Criminal Justice agencies of the United States are willing to cooperate favorably with the restorative procedural programs coming into their territory[13]. Therefore, in order to construct social treatment as a recovery sanction, first of all, it is necessary to review the economics of the efficiency and effectiveness of the restorative sanctions.

If we look at social treatment systems individually, probation, postponement of sentence, and fines are the means of treatment in the society in accordance with the current criminal law, and social service and lecture orders are relatively recently introduced sanctions measures in society[14].

A Community Service Order means a person who commits a convicted offender or a juvenile offender to engage in public activities(labor) within a certain period of time[14]. The Attendance center order started by ordering a certain lecture or education to correct or improve the offender or the juvenile delinquent.

The purpose is to develop mentalities for minor offenders, to instill proper values, and to promote the normal return to society by correcting sexual activity[15]. It is a compulsory disposition for criminals whose punishment and treatment must be accompanied by a high degree of fear that they will repeat crimes without being aware of their crime tendency[16].

The probation system promotes the well-being of individuals and the public by promoting healthy social rehabilitation by guiding and supervising probation officers for a certain period of time in a society, not a specific facility, but by promoting effective crime prevention activities and to protect society(Act On Probation). It is also important to improve and educate the criminals, but the probation system focuses on finding out the resources needed in society and utilizing, managing and evaluating them[17].

4. Outro

The expectation that the regret of past acts and the suffering of punishment will prevent future crime has been largely met. On the other hand, anger and resentment of what they have lost may happen rather than counting how their opponents are hurt and hurt by their actions. In fact, these are also the visible aspects of the criminal justice system in which I work. These reactions are reactions to the progress of the formula coming from the

equilibrium of the crime = punishment of suffering that it hurts itself as much as the wound of the opponent by paying the pain of harming his actions. In the course of these procedures, the legal consequences of crime, the accusation and the focus on suffering, have already focused on the pain and suffering that will be witnessed as soon as they enter the criminal justice process (Considering and consideration of the victim), the recovery and care of the victim will be excluded.

Perhaps this paradigm and process are making it harder to nurture a process that focuses on self-centered pain alone? In this respect, the process of acknowledging responsibility for their actions and trying to heal the damage they have with them will lead to regret and responsibility for the past. In addition, you can expect the preventive effect of second conviction, which is the purpose of punishment.

On the other hand, Professor Lee Ho-Jung's "Restorative Justice, because its goals and means are different from existing criminal justice, many theoreticians of restorative justice have unanimously absorbed the restorative programs they are trying to practice into the existing criminal justice system. "I do not want to fall to the level of a diversion program that is paralyzed by the criminal justice system." As pointed out in the article, it should be remembered that the solution to crime is merely converted to a problem-solving program by simply restoring the victim's damage[13].

Therefore, in the aspect of recovery of the main keyword which is the center of restorative justice, the criminal apologizes for himself and takes a restorative duty, so that the result of this start with. It should not be forgotten that the promise of restoration of the damage between the parties is a starting point for restoring the relationship, not for the purpose of harassing the perpetrator, nor for imposing pain.

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