

Trends & Policies in Criminal Justice

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A Study on the Improvement of the Arrest Restraint System under the Criminal Procedure Act for the Protection of Human Rights of the People

Necessity and Purpose

- All people are endowed with certain fundamental rights, including property rights, portrait rights, freedom of movement and residence, personal liberty, the right to informational self-determination, which can be violated at any point in the investigation stage by various investigative agencies. Among these rights, the right to personal liberty is the most central in importance.
- According to the United Nations Human Rights Committee's 2006 Evaluation Report, investigative agencies in the Republic of Korea (hereafter referred to as Korea) regularly abuse emergency arrest power, and the Criminal Procedure Act permits an excessively long pre-trial detention period.
- This aforementioned arrest and detention system in Korea has been the subject of contentious debate in light of Article 9 Paragraph 3 of the International Covenant on Civil and Political Rights (Covenant B), which was enforced on March 23, 1973, and came into effect for Korea on July 10, 1990.
- The long dispute over the so-called "Adjustment in the Investigation Power between the Prosecutors and the Police" came to conclusion with the passage of relevant legislation in 2020, and said legislation has been enforced since 2021. Considering that this adjustment will undoubtedly bring about major changes in investigative practice looking forward, the researchers aim to identify the effects and impact these changes will have on the current arrest and detention system.

Keywords

※ Arrest; detention; principle of
warrant; judicial control;
democratic control; adjustment
of investigative power

Research Methods

Research Methods

- This research is mainly based on the research method of literature review. The study first reviews the current state of the arrest and detention systems in various countries and then briefly examines the history of the Criminal Procedure Act related to these systems. The study also reviews the current dualized arrest and detention system.
- The detention systems in Japan, Germany, and the United Kingdom were examined through comparative legal research. Considering that criminal procedures and systems regarding arrest and detention in Japan bear the highest degree of similarity with those currently administered in Korea, it is essential to research Japanese laws with the aim of identifying possible avenues of improvement in the Korean system. The criminal procedures of Germany and the United Kingdom concerning arrest and detention show considerable differences from those of Korea, but are nonetheless expected to be of research value in suggesting direct and/or indirect implications for system development as they represent the continental legal system and Anglo-American legal system respectively.
- This study discusses problems that have already been raised in academic circles and among practitioners regarding arrest and detention in the current investigation procedure, and then goes on to propose improvements for such problems. In particular, the study provides a critical review of the principle of summary arrest in the current emergency arrest procedure, as well as the process involving arrests in *flagrante delicto*. In addition, the study further examines the duration of the period of detention at the investigation stage in the detention procedure. Furthermore, the study also examines the democratic procedure for controlling investigating agencies.

Highlights of the Study

Characteristics of the Development of the Arrest and Detention System in the Republic of Korea

- Although the principle of the prearrest hearing has not been adopted in Korea, Korea's systems of arrest and detention are strictly dualized. This dualized system goes against the global trend of adopting a unified system, and is also often characterized as complex, eccentric, and lacking systematic coherence.

- The misuse of the detention system for stalling the investigative process has been mainly sustained by investigative agencies. As a result, the detention system has been abused for the sole purpose of its convenience in extending investigations.
- The implementation of the faulty practice of starting hasty investigations immediately after arrest has been observed.

Implications of Research on Foreign Laws

- The principle of *habeas corpus* has been reinforced through the implementation of a system that prioritizes transferring custody to the judicial level (in the United Kingdom and Germany), and actively refraining from utilizing the faulty detention system that only serves to convenience investigations. This is based on the notion that detaining authority should be held primarily by the court, rather than investigative agencies.
- United Kingdom: Granting individuals the option of making use of the bail system in the early stage of investigation guarantees citizens' personal liberty and right to defend themselves.
- Japan: Judicial control has been strengthened by enforcing the principle of the pre-arrest hearing and the principle of the post-arrest warrant. Additionally, Japan has implemented an integrative system of detainment which does not segregate based on detaining authority.
- Germany: The implementation of a flexible detention system which considers the severity and complexity of crimes on a case-by-case basis when assigning detention periods.

Research on the Improvement of the Arrest System at the Investigation Stage

- Research on the Development of a System to Unify Arrest and Detention
 - An arrest is merely a preliminary activity prior to detention, and therefore the arrest should not have any independent meaning in itself.
 - Therefore, the current system of arrest with a warrant should be abolished and system of arrest should only be executed in cases of emergency arrests and arrests of offenders in *flagrante delicto*.
 - In principle, the requirements and procedures for conducting emergency arrests are strict. However, in practice, these emergency arrests often take place without fully satisfying the requirements and procedures.

- Research on a Specific Measure to Remove the Unconstitutionality of Emergency Arrest
 - The argument that a remand hearing should be conducted even in the case of emergency arrests lacks validity because such a proceeding would result in a duplication of processes.
 - While the precondition that the bail system for suspects should be reinforced to the same level that is enforced in the bail system for defendants is upheld, the bail system for suspects can also be applied to cases of emergency arrests.
 - Upon receiving a request to issue a detention warrant after an emergency arrest, the legality of the emergency arrest should be examined. In these cases, the process of requesting a post-emergency arrest warrant is not necessary.
 - It is imperative that a post-emergency arrest system in which no detention warrant is requested after an emergency arrest is implemented.
- It is unnecessary to implement a post-arrest warrant system in cases of arrests of offenders in *flagrante delicto*.

Research on the Improvement of the Detention System at the Investigation Stage

- Changing the detaining authority at the investigation stage from investigative agencies to the court and introducing the system of transferring custody to a judge
- Reinforcing the bail system at the investigation stage: Currently, the bail system for suspects and the bail system for defendants exhibit differences in several aspects, and thus, efforts should be made to remove such differences and establish a unified bail system throughout the criminal procedure.
 - Introducing a rightful, mandatory bail system that is isolated and reviewed separately from the review of legality of arrest and detention
 - Providing arrested suspects with access to the bail system
 - Recognizing the right to request bail at the stage of a the detention warrant hearing

- Ultimately, it is necessary to establish a unified bail system throughout the criminal procedure.

Research on the Period and Location of Detention at the Investigation Stage

- Under the current system of detention which schematizes and enforces detention periods in phases at the discretion of each respective investigative authority, the proposed solution of reducing the detention period is insufficient. Such a schematized and phased detention period system is not consistent with the currently adjusted system of investigative power of the prosecution and the police.
- Rather, it is suitable to abolish such a system that formularizes and phases the detention period and enforces a separate detention period at the discretion of each investigative agency, in favor of an integrated detention period system which applies across all investigative agencies.
- The period for the warrant hearing and the review of the legality of arrest are not recognized as counting towards the total detention period, and so, it is necessary to improve the system and introduce regulations to include these periods in the detention period.
- Such an integrated model also requires a change in the location of detention. At present, suspects are detained in the jail of a police station, but improvements should be made to detain them in correctional facilities or other, more appropriate facilities under the jurisdiction of a court.

Strengthening Democratic Control Over Arrest and Detention

- Preparing measures to empower national and local police committees that have since exhibited limited and minimal functionality.
- Strengthening the operative function of the current National Human Rights Commission and Anti-Corruption and Civil Rights Commission
- Mid-evaluations of the current expanded warrant examination system of the police
- Have discussions about the possibility of establishing citizen-led external oversight organization in the future

Policy Proposals

- The criminal procedure should advance toward the direction of unification and integration by integrating arrest and detention into one system with consistent principles throughout the criminal procedure.
 - This system would prioritize the unification of the processes of arrest and detention, as well as integration of methods and proceedings of the detention system by law enforcement and the prosecution throughout the criminal procedure.
 - Furthermore, the possibility of integrating systems of detention prior to and post prosecution is a subject worthy of future discussion
 - In regards to the issue of emergency arrests, improvements to the system are proposed as follows:
 - The current system which requires the request of a review of the legality of an arrest in addition to a request for a detention warrant for the purpose of examining the legality of an emergency arrest is practically ineffective.
 - A new bail system should be introduced for arrested suspects, assuming that preparing the bail for a suspect of emergency arrest is reasonably possible in alignment with the monistic perspective of arrest and detention. The introduction of this system should be accompanied by the improvement of the currently inadequate system for the bail of suspects so that it is held to the same standard as the bail system for defendants.
 - If a request for a detention warrant is made after an emergency arrest, the court involved in the investigation should not only conduct a review of the validity of the issuance of the detention warrant, but also a review on the legality and reasonableness of the emergency arrest at the time of arrest. The court should dismiss the request for issuing a detention warrant if the conditions of issuing the detention warrant are met but the arrest is unlawful and unfair.
 - A post-arrest warrant system should also be introduced for emergency arrests. In the cases of emergency arrests, it is only advisable to issue an arrest warrant in cases where an investigative agency does not request a post-detention warrant and releases the suspect to avoid the duplication of processes.
- The following improvements are proposed in relation with the issue of detention during an investigation.
 - The court should be the detaining authority even before prosecution. In order to implement this improvement, a system of custody transfer to the judge must be introduced and enacted.
 - In the future, the bail system for suspects prior to prosecution should be changed to the rightful, mandatory bail system that is consistent the bail system for defendants.
 - The renovated bail system for suspects should extend to the cases of arrested suspects.
 - Ultimately, the period of requesting bail in the reinforced bail system for suspects should be extended to the suspect's hearing stage prior to detention.
- The following improvements are proposed in relation to the detention period at the investigation stage.
 - From the perspectives of international and comparative law, the detention period is excessively long. However, the proposed solutions of merely reducing the detention period while retaining its formulaicity and uniformity without making necessary adjustments to the entirety of the system that correspond to the reality of investigations are insufficient. Simply reducing the detention period by the police or the prosecution is a shortsighted and inadequate solution.
 - The current provisions concerning the formulaic, uniform and phased detention period should be repealed, and the detention period should be made more flexible with a maximum period of 20 days.
 - Under the renewed detention period system, the statutes that currently do not recognize the hearing stage prior to detention in the total detention period should be revised to include this stage.
 - The location of detention at the investigation stage which has since been relegated to the jail of the police station should be changed to detention facilities operated by the Judiciary.

Expected Effects of Policies

- Strengthening judicial and democratic control over the processes of arrest and detention by national investigative agencies at the investigation stage is expected to guarantee a higher degree of personal liberty for suspects.
 - The actualization of the suggested policies will achieve the principle of investigation without detention, the principle of presumption of innocence, and the principle of a warrant recognized under the criminal procedure.
- Strengthening judicial and democratic control over personal detention will grant investigative agencies opportunities to break free from conventional investigative practices that are highly dependent on suspects.
 - The proposed policies will reduce the evidential value of a suspect's verbal evidence and increase the evidential value of physical evidence acquired through scientific investigation.
- The proposed policies are expected to raise the public's confidence in the investigative agencies' activities related to arrest and detention by strengthening judicial and democratic control.
 - These effects will also speed up investigations and make them more efficient in the future.