http://dx.doi.org/10.5392/JKCA.2016.16.09.531

피해자충격진술의 내용 및 방법에 대한 비판적 검토
-심리학적 관점을 중심으로-

Reasonable Limits to Contents and Submission of Victim Impact Statement
-From Psychological Perspective-

이권철*, 이영림**
백석대학교 법행정경찰학부*, 단국대학교 심리학과**

Kwon Cheol Lee(kwoncheol.lee@gmail.com)*, Young Lim Lee(ppangi77@gmail.com)**

요약

피해자양형진술권은 2007년 형사소송법에 규정되어 시행되고 있다. 피해자의 재판과정 참여를 통해 피해자의 권리행사 확대 및 피해의 치유를 유도한다는 점에서 도입의 필요성이 인정된다. 그러나 피고인의 절차적 권리의 침해 가능성에 따른 피해진술의 합리적 제한방안에 대한 연구는 대부분 법학적 관점에서 도입에 대한 찬반론과 관련하여 진행되었을 뿐이고, 심리학적 측면에서 피해진술이 재판의 의사결정에 미치는 영향에 대한 논의는 부족하였다. 따라서 피해자가 받은 범죄피해가 법정에서 표현될 때 과연 정확히 측정되고 전달되어 법률적 판단의 합리성에 기여할 수 있는지에 대한 연구가 필요하다. 본 연구는 이와 같은 필요성에 기초하여 심리학적 측면에서 피해자양형진술을 통한 범죄피해 측정의 오류가능성 및 전달과정에서 발생하는 과대평가 등의 문제점과 피해자치유의 측면의 불완전성 등의 쟁점을 검토하였다. 이를 토대로 피해자양형진술의 실무에 있어 진술내용의 제한 및 필요절차 도입 등의 개선을 위한 대안을 제시하였다.

■ 중심어 : | 피해자권리 | 피해자양형진술 | 사법판단 | 법심리 |

Abstract

Victim Impact Statement, adopted as a crime victims' right, has been implemented in Korean criminal justice system since 2007, and known that the statement enlarges victims' right in courts and alleviates their suffering resulted from the crime. The statement, however, has raised concerns of infringing on a defendant's procedural rights. Scholars and practitioners had focused more on the legal issue, overlooking psychological effect of the statement to decision-makers in courts. This research reviews fallacy of impact assessment and therapeutic effect from psychological perspective, and also suggests alternatives to assuage the concerns by admission of the statement.

■ keyword : | Victims' Rights | Victim Impact Statement | Judicial Decision | Psychology of Law |

Ⅰ. Introduction

The Victim Impact Statement was considered as a major track to introduce the victim's participation into criminal procedures and, gradually, a number of countries have passed the law allowing the statement

접수일자 : 2016년 05월 11일
수정일자 : 2016년 06월 28일
심사완료일 : 2016년 06월 28일
교신저자 : 이권철, e-mail : kwoncheol.lee@gmail.com

since the 1980s. The main reason for this tide is anticipation that admission of the statement will have therapeutic effects on victims and/or survivors by giving them authority influencing the offenders' fate in trials. With this hope, jurisdictions had made efforts for providing legal rationale in order to enact adopting the statement. For example, the US Supreme Court proffered necessity of accepting the statement from legal aspect by supporting special harm theory, which overcomes the relevancy issue.

The situation surrounding the Victim Impact Statement(VIS, hereinafter) in Korea has little difference from other jurisdictions. The Korean National Assembly stipulated provisions into Criminal Procedure Act in 2007 which entitles victims and survivors(in case of homicide) to make statement on damages they suffer, opinion concerning punishment they think proper on defendant and other matters relating to the case. When the judiciary and academia considered about admission of the statement in court, there were controversies in the adoption only from legal aspects without empirical examination on the accuracy in assessing impact which victims (or survivors) have suffered from the crime committed on them or family members, and the presence or degree of satisfaction which victims will feel with offering the statement in courts. Merely they anticipated admission of the VIS would enhance victim's right at courts, satisfy their emotional needs, and thus overall improve trustworthiness of lay persons about criminal justice system.

Since Korean criminal justice system introduced the VIS approximately a decade passed. However, a question still remains since the rush on the part of victim's right advocates did not have chance to examine because there was no examination on the anticipation at the time of the adoption that the statement would work according to the expectation: was the admission of VIS promise which can satisfy the expectations? This question also asks the present criminal justice system for verifying that the promise has been fulfilled for now. On the other hand, there has been no chance to check whether the statement has decision-makers assess evidence inaccurate and thus make sentence flawy.

In response to these problematic aspects with adoption of VIS, fortunately, socio-legal researchers had performed empirical studies, focusing on whether the admission of the VIS affects on decision-makers in any undesirable manner. Especially researches from psychological perspective in decision-making process in U.S. courts have suggested meaningful insight on the practice.

The experimental research on effect of VIS, however, has not been performed with Korean criminal justice system. Researches on VIS in Korea were limited to legal analysis, which mainly deal with legality of adoption of VIS. This paper is given on the basis of existing legal issues with VIS. However, for enhancement of the system this research verifies from psychological perspective whether the current practice would raise issues with principle of fair trial, especially with defendant's procedural rights through examination of experimental researches performed in United States. Upon findings and implication from the researches, this paper would give alternatives which may redress the VIS system with suggesting them in two parts: contents and submission procedure. On this point, this research may give differentiation form existing researches on VIS in Korea.

II. Practice of VIS and Legal Issues

1. Overview of Current Practice

In this chapter the practice of VIS both in Korea

and the United States will be roughly reviewed. Examination of Korean practice aims at providing foundation for suggestions for VIS and exploring practice of the United States may give meaningful implications for improvement of VIS because experimental researches from psychological perspective on effect of VIS on trials are mostly performed in the U.S. since 1990s.

1.1 Contents of VIS

VIS has been regarded as a fundamental right under the Korean Constitution and The Korean Constitutional Court also ruled that the purpose of setting fort VIS in constitution is to guarantee basic rights of crime victim to request criminal courts to exercise just sentence to the offender in his case[1]. For the purpose Korean Criminal Procedure stipulates VIS clause and Rule of Criminal Procedure sets forth detail guidelines. According to Article 294-2, Section 1 of Criminal Procedure, if crime victim requests to have opportunity to make VIS, the court should interrogate him as a witness and should confer on him the chance. The article enumerates admissible contents of VIS as ①degree and result of damage, ② his/her opinion concerning punishment of the defendant, and ③other matters relating to the case.

Korean Criminal Procedure permits broader VIS in courts than United States. does. The types of VIS which U.S. courts has categorized and ruled as admissible are as follows: ①victim (or survivor if the case is homicide) impact evidence, ②victim (or Survivor) opinion evidence, ③victim character evidence. The victim impact evidence means deleterious effects on the victim and his relatives[2]. On the first type of VIS, Korean Statute expresses “degree and result of demage” Article 294-2, Section 2. The damage means deleterious effects on the victim and his relatives, including any negative impact or result of crime on victim like harm on body, finance and emotion of victim or survivor, as like as the victim impact evidence in U.S. criminal courts defines. Among the demage caused by a crime, subjective harm like emotional or psychological demage has been issued because of impossibility of precise assessment in both criminal justice system in Korea and the United States.

Second type of VIS, victims’ opinion on punishment, is subjective contents relating punishment including recommendations of sentence. Victims’ opinion is most controversial type of VIS. While it is admissible in Korean courts, some jurisdictions in United States like State of Texas, New Jersey and federal court prohibits such statement.

The last type of VIS in Korea is “other matters relating to the relevant case" as Article 294-2, Section 2 of Criminal Procedure stipulates, Upon on this clause, Korean prosecution service may present all kind of VIS with very long arms including victim character evidence, last category of VIS in United States. Victim character evidence signifies social value or characteristics of the victim, which has significance in the case of homicide. It could affect decision-makers on sentencing by consider victim's value in society.

To the matter of whether prosecution service may proffer this type of VIS in court under Korean Criminal Procedure, not the statue nor the rule does apparently dealt with. However, since the clause of Article 294-2, Section 2 could be interpreted as residual clause, there should be more possibility that in Korean criminal justice system VIS is admitted in unfettered manners than in United States.

1.2 Procedure of Submission of VIS

Korean Criminal Procedure Act permits victim, his legal representative, his/her spouse, lineal relative,

and sibling to make VIS in courts if they request. Upon receipt of the petition the court should admit such victim as witness for examination. Differently from the Act, Regulation of Criminal Procedure allow a court to exercise its authority to inquire VIS of victims without victim's petition. When victims request to make statement, according to Article 134-10 of the Regulation, they may produce VIS without formality and constraint, and this could be estimated as procedure which overcame the inefficiency of making VIS as a witness for examination from the clause in the Act[3].

Victims, however, could not proffer VIS in court under restrictions. According to Article 294-2 of Korean Criminal Procedure, the statement may be restricted ①Where it is recognized that the victim has already made sufficient statements relating to a case and therefore, there is no necessity of restatement, ② Where there is apprehension that the procedure of trial may be delayed on account of the statement. In addition, the Regulation adds three cases in the restriction. Courts may prohibit victims from making VIS when it judges that the statement is ③irrelevant to the case in issue, ④related to the fact of criminal conduct, and/or ⑤not appropriate for admission. The court also may set limits on the number of victims (including legal representatives, family members, sibling, relatives and so on) eligible for VIS[4].

The Practice of VIS in the United States varies according to jurisdictions since the U.S. Supreme Court ruled that VIS may be admitted with precaution of each jurisdiction from trilogy of cases in 1990s. The U.S. federal courts, which have survivor's opinion inadmissible, sets scope of eligible witness for VIS even to emergency personnel including police, co-worker of victims and representative of a community. Moreover, they does not limit on number of witness.

There are some procedural safeguards with notice and disclosure in some jurisdictions. State of Texas allows defendants to review VIS before trial and when prosecutors in federal courts do not include VIS in notice, he may not introduce the statement[5].

As we examined comparatively with U.S. system in previous, in Korean criminal courts victims may proffer VIS at large in terms of contents. The purpose to set limits on some procedure is also to proceed trials smoothly with presentation of VIS rather than to guarantee defendant's procedural rights. Therefore, problems or issues with VIS discussed in United States would be applicable in Korean criminal justice system and we may acquire some clues from existing legal issues and findings from experimental researches conducted in the jurisdiction.

2. Legal Issues with VIS

2.1 Relevancy of VIS to Culpability

The main argument for specific harm is that the harm caused by the offense is relevant to the defendant's blameworthiness and that criminal defendants with the same moral culpability may be punished differently according to the amount of harm caused. According to the proponent rationale, the difference in punishments to the defendant was related to the degree of harm they had caused, and the defendant may be sentenced to a harsher punishment because of the aggravated harm itself, even though the amount of blameworthiness is less than the harm caused by the crime[6].

There should be consideration of the fact, however, that generally the harm to a survivor was caused "after" the completion of the specific offense, and, thus, it was likely to be beyond a perpetrator's control. If a defendant chose a victim in order to result in following specific harm, before or during the commission of the crime, with the purpose or

knowledge, to harm the victim's family, it may be considered as a proper factor in determining blameworthiness. In addition, if survivors or state may present a survivor impact statement without providing evidence for a defendant's purpose or knowledge of the harm, there exists a considerable possibility of a defendant being sentenced severer than deserved under irrelevant considerations. This may undermine the principle of proportional retribution and punishment guaranteed[7].

With the specific harm, the most prominent reasoning against the admission of witnesses' opinions is the irrelevance argument: especially survivor opinions, descriptions of the defendant by the victim's family member and recommendations of appropriate sentences, are irrelevant to culpability or moral guilt, which decision-makers should focus on in sentencing. Thus, they cannot help jurors make a decision of proper sentence should be imposed. In the case of capital sentencing, death penalty can be sentenced and the opinions is not relevant to whether the defendant worths to live. Such opinions have nothing to do with the nature of the crime or the defendant, which are the most imperative criteria for a capital decision. The VIS proffered by the victims or their family members is merely opinions on the sentence advised by layperson who having a great personal interest in the outcome[8].

2.2 Inequity issue

Admission of victim's character, a type of VIS, at sentencing phase arises a concern that this application would turn on the perception that "defendant whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy," as Justice Powell argued in Booth case[9]. This perception gives rise to concern about equity issue: whether the difference of worthiness of victims (more valuable or less valuable) may justify disparity of punishments among the defendants with similar crime other than victim's character and, further, unequal treatment of general citizens[10].

2.3 Procedural Issues

As a main rationale for VIS, Payne Court emphasized the balance issue between mitigating evidence and the VIS. Some of the Justices maintained that since a defendant can present virtually unlimited mitigating evidence in a capital trial, a State should be allowed to present VIS. Some lower courts followed this rationale, expecting that VIS would redress the scales unfairly weighted by the admission of mitigating factors in a capital trial.

The concept of balance between a defendant and a state begins with the notion that a state has disproportionate power to a defendant. For the purpose of protecting defendants from overreaching by the state, any imbalance in favor of defendants is intentionally allowed by the U.S. Constitution by setting forth limitations on the state and entitling criminal defendants to certain rights[11]. In this sense, the mere fact that a defendant may introduce broad mitigating evidence is not a certain proof that there is an unacceptable imbalance between the parties. Thus, it is not clear whether the admission of VIS will redress such an imbalance, if there is any, or upset the pre-existing constitutional balance.

Granting that an unacceptable imbalance exists at the sentencing phase of a capital trial due to the broad admission of mitigating factors, it comes into question whether VIS are the proper cure for such an imbalance. The broad admission of mitigating evidence will affect the jury and, thus, some defendants who deserve death may have their lives spared. To the contrary, the broad admission of the

VIS will increase the possibility that an unjust capital sentence will be imposed on some defendants who don't deserve death. While both situations produce possible injustices in terms of the retribution theory that people should get what they deserve, no more and no less, the two retributive injustices are qualitatively different; life for a person deserving death and death for a person deserving life[12]. It is dubious that another factor, which may undermine high value of life in an arbitrary manner, should be admitted to redress the imbalance. Even if the broad admission of mitigating evidence may be regarded as wrong, the admission of victim impact evidence is not a wrong that provides check and balance against the other wrong. It is just another wrong.

Another procedural argument for VIS comes from the victims' viewpoint. The argument maintains that the criminal justice system treated victims and defendants differently not only by privileging defendants but also neglecting crime victims. Noting this, it goes on to say that victims should be granted the right to be heard at sentencing as a procedural due process protection, and that sentencing authorities at capital trials should take into consideration the victim's interest. According to this argument, the admission of the VIS does not violate the Eighth Amendment because the statements create a balance between defendants and victims by introducing the victim's interest. However, consideration of the victim's interest is not required in the evaluation of the admissibility of the VIS. The key issue in reviewing the admissibility of the VIS is whether the admission violates the defendant's constitutional right under the Eighth Amendment, not whether victims should receive help in overcoming the feeling of being ignored by the criminal justice system or help in alleviating their suffering from the offense.

III. New Challenges from Psychological Perspective

1. Inaccuracy Issue: Assessment of Victim's Subjective Emotional Harm

In addition to the legal problems that led further discussion for the admissibility of VIS, it is necessary to look at the reliability of the statement. The main focus may be laid on whether the admission of the statement about the harm, especially the emotional harm, to victims or survivors is "accurately" addressed by victims or survivors and assessed by judges and/or jurors. It comes from the procedural needs that the admission of the statement should provide appropriate information for decision-makers to assess the harm accurately since the specific harm helps the jury to find the defendant's culpability. Request for an accurate assessment of victims' or survivors' suffering in criminal courts should not be negligible since the statement may be added as an aggravating evidence, and thus contribute to decide degree of punishment or even life or death in capital cases.

The accuracy issue in emotional harm springs from its characteristic of subjectiveness. The emotional harm is different from physical and financial harm that can be measured relatively in objective manners. Admitted emotional harm in criminal courts is two-fold: ①the harm that victims currently suffer from the result of the crime and ②another harm that victims predict to undergo in future. As to the former we can evaluate that it raises a concern of inaccurate assessment as we examined previously in short. The later, moreover, is an anticipation of future harm which the victims neither experience nor may estimate the degree or length of the suffering. If the emotional harm would be admitted, it may doubly weigh the harm in present and future. This would

consummate an unreliable sentence and give unjust treatment to offenders. If a victim's family overestimated their current and anticipated emotional harm, a defendant who does not deserve death may still be sentenced to it. In contrast, if they underestimated the pain, the defendant may be given a lesser punishment although he/she deserves a severe sentence including capital punishment.

Empirical researches have demonstrated that people wrongly assessed future harm due to following two types of tendency in general: (1) the tendency of the harmed, victims and their families to overestimate the harm caused by the crime, and (2) the tendency of the unharmed person or public including sentencing authorities to predict sufferings of the harmed as being greater than these the harmed themselves estimated and actually experienced. Suh, Diener, and Fujita performed a two-year longitudinal study of 115 participants and they found that only recent events affect the degree of life satisfaction. They showed that people's feelings of well-being return to a normal state more quickly than they expected, even after they recently experienced emotional sufferings.

Suh et al. divided two years into several smaller intervals and compared the participants' responses of the questionnaire. They measured the correlation between a measure of subjective well-being and the period of some life events, including negative experiences such as divorce, abortion, being the victim of a violent crime, and the death of a close family member. It was found that the impact of most life events on the subjective sense of well-being, that is the individual's satisfaction with his life, lasted for only "three to six months" in general, although the duration may vary depending on the individual's characteristics and specific types of life events. In other words, the impact of a negative life event might not last for the period of time that people would normally expect. Thus, sufferings of the harmed, victims and their family may not last longer than we expect and thus, tendency to exaggerate sufferings of the harmed might be misused in court[13].

Brickman, Coates, and Janoff-Bulman also found that people tend to overestimate the effects of a life event. It particularly provided counterintuitive results on paraplegics' satisfaction with their lives. In general, people anticipate that paraplegics would feel more miserable and lottery winners happier than they actually felt. The result, interestingly, showed only a very small difference in life satisfaction between paraplegics and healthy people. Similarly, there was no difference between lottery winners and controls. The results suggested that the life satisfaction of people who experienced such extreme events would not be reduced or increased to the degree that other people generally expect[14].

Previous studies imply that it is not clear to measure how much sufferings would be resulted from an offense or how long it would last. Thus, it is possible that decision-makers rely on the unsure and even overestimated subjective statement and sentence to death a defendant who does not deserve it in the capital sentencing phase.

2. Compassion Issue: Inequity with Respectability of Victim

The U.S. Supreme Court proposed a role for victim character evidence in capital sentencing to help the jury assess the uniqueness of the victim as a human being. However, the Court, in Booth and Payne case, also expressed the concerns that the sentencing authority might be influenced by the evidence and assess the victim's value as compared to the defendant's or to that of any others in the community. A couple of empirical studies have investigated this issue and have shown that the Court's concern is

assured.

Greene, Koehring, and Quiat investigated whether the victim's respectability affects jurors' judgments of the victims. They hypothesized that a mock jury would be more likely to show compassion for survivors of highly respectable victims than for survivors of less respectable victims. Eighty jury-eligible participants performed one of two conditions with either high or low victim respectability. After being given the factual background of the case and the conviction of first-degree murder, participants watched a one hour video of a sentencing phase edited the transcript of the Booth case. One condition with high victim respectability included the victim impact statement that depicted the highly respectable victims. In this condition, the victims were elderly couple who had been married for 53 years. The husband served as a city councilman, spending a lot of his money and time for civic concerns. After retiring, the couple volunteered at a senior center and spent time with a large and loving family. In the other condition with low victim respectability, the victim impact statement that depicted the less respectable victims. The victims were elderly couple who had been married for 14 years and had a quiet life. Both were previously married and divorced. The husband worked as a clerk at the grocery shop but he had been laid off three years before retirement. The wife had also not worked in many years due to health problems. They hardly saw their children and stepchildren. After viewing the video, participants completed a questionnaire including various aspects of the trial and their beliefs about the evidence, such as "the defendant's likeableness, dangerousness, and chances for rehabilitation; the victims' likeableness, decency, and value to their community; the compassion they felt for survivors."[15] Participants in the high victim respectability condition reported that such victims were more likable, decent and valuable and felt more compassion for the victim's family compared to these in the low victim respectability condition. They also believed that the emotional impact of the murders on the survivors was greater and rated the crime as more serious. Thus, the results suggested that the participants dealing with highly respectable victims placed considerably less weight on the mitigating evidence than did the participants dealing with victims less respectable.

Greene investigated the effect of personal characteristics of victims on mock jurors in a capital case. performed one year later, supports the conclusion drawn from the In this study, half of participants read the murder case of a highly reputable victim and other half read one of a less reputable victim. The victim in the high reputability condition was described as a successful photographer who was a loyal friend, a devoted father providing support to a fatherless boy, and a member of the church choir. the other, In contrast, the victim in the low reputability condition was described as a felony convicted motorcycle biker who was a gang member and a father who did not live with his sons. After reading the case summary, participants completed the questionnaire consisted with three dimensions; sentiments about the victim (e.g., "how much compassion do you feel for the victim?"), thoughts about the victim's survivors (e.g., "how much compassion do you feel for surviving family members?"), and their opinions of the defendant (e.g., "how favorable is your impression of the defendant?")[16].

The results of this study were consistent with the previous results in which participants in the high reputability condition rated the victim more likable, respectable and valuable to family and friends, and

also felt more compassion for the victim. Although the researchers did not ask the participants to impose a sentence, the result suggested the possibility that the victim character evidence would cause a juror to compare and evaluate the victim's character beyond an assessment of him as a unique human being and thereby affect the juror's decision-making in sentencing.

According to the research studies explored above, In conclusion, previous researches have shown that victim character evidence permits the decision of capital sentencing authorities to turn on their perceptions of the victim's respectability. Further, the researches imply that the jurors would put a greater value on the lives of respectable victims and less on the lives of others. Consequently, they would make life-or-death decisions by focusing more on the victim's virtue that his character coincidentally extols than on the uniqueness of the decedent, or the victim, himself that was the primary rationale for the admission of such evidence. In other words, the evidence allows jurors to focus on the extralegal factor of victim respectability, distracting them from the essential factor that they should keep in mind throughout the sentencing calculus.

3. Satisfaction Issue: Therapeutic Effect on Victims

Since the VIS was developed from the concept of victims' rights, it would undermine one of the major justifications for using the statement in courts if the VIS gives little or no satisfaction to the person who gives the statement, or survivors and victims. From this viewpoint, socio-legal researchers have conducted a considerable number of studies on whether, and how, the VISs affect the victim's satisfaction with the outcome of the case or with the criminal justice system. The majority of studies argue that there is no meaningful effect of the VIS on a victim's satisfaction and that an opportunity to make the statement in the sentencing phases given to victim's family is an "unfulfilled promise" to give satisfaction to the victims.

Davis compared two courts to investigate the effect of VIS on victim's satisfaction in Brooklyn. In one court the VIS were taken and in the other they were not. The comparison of the outcomes of the victims' satisfaction with the statements did not show that the victims in the court where the statements were taken felt a greater satisfaction than those who were in the court without the statements[17]. In contrast, Erez and Tontodonato conducted a correlation study with approximately 500 felony cases, from which researchers argued for a positive effect of the VIS on satisfaction. The results showed that the victims who completed the VIS were more satisfied with the sentence and the criminal justice system than those who did not. However, the results did not show a sizeable effect on their satisfaction, but revealed that only two percent of the victims were satisfied with the sentencing decisions. Furthermore, this study had a serious methodological problem - an insufficient rate for appropriate representation. Only twenty five percent of the subjects, victims of felonies, completed and returned the survey. Therefore, the study found a negligible outcome (2% greater satisfaction) from a deficient number of the sample (25% of the total sample) and thus, it is hard to say that correlation between the statement and a victim's satisfaction is significant.[18] Erez, Roeger, and Morgan reaffirmed the possible faults of the previous study. The results showed that the mere bestowment of VIS did not produce an increment in satisfaction with the outcome of the sentencing phase, nor in satisfaction with justice in a more general sense[19].

Davis and Smith also showed the effect of the VIS

consistent with the results of previous researches. Participants were randomly assigned to one of following three conditions: ① victims were interviewed and a written VIS was made; ② victims were interviewed but no written statement was made; and ③ no interviews of victims. The results showed that the statements did not produce greater feelings of involvement, greater satisfaction with the justice process, or greater satisfaction with the sentence. In other words, no effect of the VIS was found on any of the measures of a victim's perception of their involvement in the statement and thus, the statements might hardly promote satisfaction of victims with the criminal justice system[20].

IV. Proposal for Reducing Concerns with VIS

As examined in previous chapters, VIS shows possibility to infringe defendant's procedural rights in spite of its advantages on the part of victim. The problematic aspects of VIS and necessity for enhancement can be summarized in two categories. First, even though the admissibility of VIS should and may be admitted, the harm of victims from crime result cannot be precisely measured. The harm may vary according to social value of victim himself and/or capacity of witness to articulate the harm. Thus, on the contents of VIS, requested some discussion on what harm may be admitted in court by which victims. Through this discussion alternatives to current practice of VIS may be devised with diminishing plausibility of infringement on defendant's rights.

Apart from the contents of VIS, the way to proffer the statement to decision-makers should be reviewed. In the case of reviewing VIS admitted at trial after determination of the contents, procedures should be set forth for reducing effect of VIS on emotion of decision makers, or conferring a defendant to rebut the statement against him at least. From these necessities, following alternatives may be proper devices to enhance VIS with decreasing its vulnerability at same.

1. Reasonable Restriction on Content of VIS

1.1 Reconsidering Victim's Opinion on Sentencing

Survivors' recommendation of sentences or descriptions of the offender and the crime is not relevant to sentencing and would produce inaccurate evaluation of sentencing factors. It would be most in case of death penalty. If such opinion is relevant and, thus, should be permissible, opinion in favor of the capital defendant should also be admissible. For example, if survivor's suggestion, which is usually consummated with a request of a death penalty, is a permissible, the court or jury should consider the survivor's request of life imprisonment rather than the death penalty, or the murder victim's opposition to capital punishment, expressed prior to the offense. Regardless of whether the survivor's opinion is against or in favor of the defendant, the opinion is merely a lay person's personal characterization of the defendant or recommendation of sentence, which reflect the individual's personal desire.

The admission of opinions raises another concern due to their intrinsic nature. The opinion is inevitably accompanied by their personal anger at the offender and desire for revenge. For example, victims' daughter and son stated before the jury that the defendant, who butchered their parents like animals, could never be rehabilitated and that the jury should forever protect another family from being put through such suffering by its decision. In cases like this, such highly subjective opinion is likely to increase the risk:

an unreasoned, capricious and arbitrary decision in a sentencing especially in capital sentencing. The admission of opinion, which is inflammatory in nature, will divert the decision-makers from a reasoned decision based on the constitutionally mandated consideration of aggravating and mitigating evidence.

2. Reasonable Restriction on Submission Procedure

2.1 Providing Fair Opportunity to Rebut VIS

Under ordinary criminal justice system, defendants in courts are provided with a right to confrontation through cross examination. The right to confrontation at trial has been extended to the defendant at sentencing and the U.S. Supreme Court has consistently held that it is a violation of the Due Process Clause if the defendant is not provided with the opportunity to rebut, deny, or explain the information introduced against him. Korean Criminal Act also proffers the right to defendants.

Despite these mandates, defendants are unable to truly exercise that right in VIS phase. First, it is difficult to accurately present the extent of the harm to survivors, and it is even harder for the defense counsel to verify its accuracy and rebut it. As the U.S. Supreme Court pointed out, the offender rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered. This difficulty applies as well as to evidence concerning the character of the deceased in capital sentencing phase.

Furthermore, even if the defense attorney desires to point out inaccuracies, he or she would encounter practical impediments both before and during the sentencing. Defense counsels have no chance to prepare a rebuttal of the VIS, since the statement is regarded as a non-aggravating circumstance which does not require pre-trial disclosure. Even in the jurisdictions where the VIS is an aggravating circumstance and the defense counsel may prepare due to pre-trial disclosure, it is virtually impossible for him or her to confront grieving survivors through cross-examination by telling their harm is not accurately evaluated and it would be less than that in the VIS. Examining the character of the deceased or questioning the genuineness and degree of survivors' grief will rarely be conducted without impressing upon the jurors just how much the confrontation hurts the bereaved. It is likely to increase both anger at the defendant and sympathy for the survivors[21]. In most cases, it will be a suicidal strategy placing the offender close to more severe sentence.

2.2 Inspecting Admissibility of VIS Before Admission

Upon these practical grounds, there is a need for a pre-sentencing hearing outside the jury for the admissibility of VIS, similar to motions in limine in the U.S. criminal justice system. During the in-camera hearing, the defense counsel would have opportunity to rebut potential VIS without the concerns about angering the decision-making authorities. In the hearing, the relevance and scope of VISs also should be examined for admissibility.

Not only might the prosecution feel a natural temptation to exceed the agreed scope of the VIS in his presentation, but survivors too might deviate due to emotional outburst or breakdown in VIS process. In this sense, the key factor for using the imperfect but helpful pre-sentencing hearing in an effective manner will be the willingness and ability of the court to adopt proper rules, such as restricting admissible VIS to those examined in the hearing, or choosing how to introduce the statements in a less inflammatory manner or deciding the number of the witnesses testifying impact of the crime[22].

V. Conclusion

Nobody may deny that a society has to try to fathom victims' pain impacted by crime and count victims in criminal justice system as a player, not a benchwarmer. Regardless of type of criminal justice system, jurisdictions has concentrated victim's role in the system, alleviated their pain which sidelined from their own case by devising various measures in a bid to heal the undue status. As many advocates' argument for the VIS, the statement has been regarded as one of the methods for improving victims' rights by increasing their participation in the criminal procedure.

It seems like that, however, the statement does not take firm stance for the advocates. As we examined above, rather, VIS dresses in layers of apprehension from psychological aspect, keeping concerns issued from the legal perspective. It does not give accurate assesment of impact of crime on the survivor or victims at the cost of putting defendants' procedural rights under risk, nor eliminate concerns relating to the statement's inherent nature to inflame compassion for victims to decision-makers. Moreover, it is not sure that it improves victims' satisfaction.

Admittedly, VIS is a meaningful equipment for the victim's participation in criminal justice system. Since 2007 Korean criminal justice system also adopted the VIS after debating on its constitutionality and effectiveness only from the aspect of legal theory. However, it did not have a chance to be examined with empirical researches. This research has a limitation on the same ground. The concerns and alternatives of VIS are based mainly on analysis of empirical researches performed in the United States. While previous chapters analyze practice of VIS in both jurisdictions and give rationale that the issues expected from psychological perspective would be brought with same or similar possibility in Korean VIS practice, it would be more valid, or plausible at least, if the issues were examined from research conducted with Korean criminal justice system.

Based on the limitation of this paper, recommendations for further research would be as follows. First, VIS effect on both decision-makers and victims who produced VIS in court should be examined in depth from experimental research designed as psychological aspect. Examination of effect on decision-makers may give to practitioners guideline of how to use uncountable harm of victims in sentencing phase. In addition, research on VIS effect on victims′ satisfaction should precede consideration of enhancing VIS in terms of procedure because VIS is regarded as a procedural right of victim and therefore victims′ contentment can be justification of adopting VIS in sentencing phase. Second, there should be researches conducted from experimental design on whether and how VIS affect defendant′s procedural rights, since the rights conferred to defendant has been accumulated for long time through struggling to guarantee to civil rights against totalitarian regimes.

Now is the time to examine the statement and agonize over remedies by reviewing the real world of VIS, rather than to merely expect unfulfilled promise that it may contribute to interest of crime victims without putting defendants' procedural right under peril.

참 고 문 헌

[1] Constitutional Court of Korea, 1989. 4. 17, 88 Heonma 3 Decision.

[2] J. Hoffmann, "Revenge or Mercy? Some Thought about Survivor Opinion Evidence in

Death Penalty Cases," Cornell Law Review, Vol.88, No.2, pp.530-542, 2003.

[3] J. Kim, *Research on System of Victim Opinion Statement,* Korean Institute of Criminology, 2008.

[4] K. Lee, *Reasonable Limits on Victim's Right to be Heard at Capital Sentencing,* Indiana University, 2008.

[5] W. Logan, "Victim Impact Evidence in Federal Capital Trials," Federal Sentencing Reporter, Vol.19, No.1, pp.5-12, Oct. 2006.

[6] Y. Min, "A Critical Examination on Victim Statement of Opinion," J. of the Justice, No.93, pp.164-179, 2006.

[7] J. Greenberg, "Is Payne Defensible?: the Constitutionality of Admitting Victim Impact Evidence at Capital Sentencing Hearing," Indiana Law Journal, Vol.75, No.4, pp.1349-1382, 2000.

[8] W. Logan, "Opining on Death: Witness Sentence Recommendations in Capital Trials," Boston College Law Review, Vol.41, No.3, pp.517-547, 2000.

[9] Booth v. Maryland, 482 U.S. 496, at 506. n.8, 1987.

[10] R. Mosteller, "The Effect of Victim-Impact Evidence on the Defense," J. of Criminal Justice, Vol.8, No.24, pp.27-28, 1993.

[11] S. Bandes, "Empathy, Narrative, and Victim Impact Statements," University of Chicago Law Review, Vol.63, No.2, pp.361-412, 1996.

[12] E. Mandery, "Notions of Symmetry and Self in Death Penalty Jurisprudence," Stanford Law & Policy Review, Vol.15, No.2, pp.471-518, 2004.

[13] E. Suh, E. Diener, and F. Fujita, "Events and Subjective Well-Being: Only Recent Events Matter," J. of Personality and Social Psychology, Vol.70, No.5, pp.1091-1102, 1996.

[14] P. Brickman, D. Coates, and R. Janoff-Bulman, "Lottery Winners and Accident Victims: Is Happiness Relative?," J. of Personality and Social Psychology, Vol.36, No.5, pp.917-927, 1978.

[15] E. Greene, H. Koehring and M. Quiat, "Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?," J. of Applied Social Psychology, Vol.28, No.2, pp.145-151, 1998.

[16] E, Greene, "The Many Guises of Victim Impact Evidence and Effects on Juror's Judgments," J. of Psychology, Crime and Law, Vol.5, No.4, pp.331-348, 1999.

[17] R. Davis, *First Year Evaluation of the Victim Impact Demonstration Project,* Victim Services Agency, City of New York, 1985.

[18] E. Ereza and P. Tontodonatoa, "Victim participation in sentencing and satisfaction with justice," Justice Quarterly, Vol.95, No.3, pp.393-417, 1992.

[19] E. Erez, L. Roeger, and F. Morgan, *Victim Impact Statements In South Australia: An Evaluation,* Australian Attorney-General's Department, 1994.

[20] R. Davis and B. Smith, "Victim Impact Statements and Victim Satisfaction: an Unfulfilled Promise?," J. of Criminal Justice, Vol.22, No.1, 1994.

[21] J. Anderson, "Will the Punishment Fit the Victims? The Case for Pre-trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing," Rutgers Law Journal, Vol.28, No.1, p.367, 1997.

[22] J. Donahoe, "The Changing Role of Victim Impact Evidence in Capital Cases," Western Criminology Review, Vol.2, No.1, 1999.

저 자 소 개

이 권 철(Kwon Cheol Lee) 정회원

- 2004년 5월 : State University of New York at Albany(형사사법 학석사)
- 2008년 12월 : Maurer School of Law, Indiana University(법학석사/박사)
- 2011년 3월 ~ 현재 : 백석대학교 법행정경찰학부 교수

<관심분야> : 형사법, 피해자, 형사정책, 회복적 사법

이 영 림(Young Lim Lee) 정회원

- 2000년 2월 : 성신여자대학교 영문학과(학사)
- 2003년 8월 : Western Kentucky University Experimental Psychology(석사)
- 2009년 9월 : Indiana University, Bloomington Psychological & Brain Sciences / Cognitive Sciences(박사)
- 2013년 3월 ~ 현재 : 단국대학교 심리학과 교수

<관심분야> : 3D 시각지각, 직접지각 접근법