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► **To cite this version:**

Mariko Nakamura. Examining the Possibility of Expanding the Use of Digital Images Recorded in the “Audio-Visual Recording of Custodial Interrogation” System. 14th IFIP International Conference on Human Choice and Computers (HCC), Sep 2020, Tokyo, Japan. pp.41-51, 10.1007/978-3-030-62803-1_4 . hal-03525264

HAL Id: hal-03525264

<https://inria.hal.science/hal-03525264v1>

Submitted on 13 Jan 2022

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Examining the Possibility of Expanding the Use of Digital Images Recorded in the “Audio-Visual Recording of Custodial Interrogation” System

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Abstract. Japan has recently introduced the “Audio-Visual Recording of Custodial Interrogation” system to verify the voluntariness of confessions or other disadvantageous statements of the accused that are contained in their depositions. Although digital images recorded in the new system are supposed to be used as supplementary evidence, it appears that they can be used to directly prove the truth of the matter asserted, which is the question to be left open. This article considers whether the digital images can be used to prove guilt or innocence, and if so, whether they need to meet more strict requirements than those for depositions. First, the article discusses the legal grounds pertaining to the application of a conventional hearsay exception to the digital images. Second, it explains how the use of the digital images, which could be concerning, can meet the legal demands of the adversary system underlying the Hearsay Rule. The article concludes that these recordings may be used to prove guilt or innocence if the accused or defense counsels have the meaningful opportunity for impeachment.

Keywords: Admissibility, Evidence, Digital Data, Interrogation, Hearsay.

1 Introduction

The Japanese criminal justice system made a significant shift in 2016 with “Act to Amend Parts of the Code of Criminal Procedure and Other Acts (Act No. 54 of 2016).” The core revision of this act was the introduction of the “Audio-Visual Recording of Custodial Interrogation” system, which was officially implemented in 2019. In a mail fraud case widely covered by the media as a false accusation, the Special Investigation Department of the Osaka District Public Prosecutors Office allegedly engaged in suggestive interrogations and evidence tampering, which substantially led to the amendment that aimed to reduce the excessive dependence on interrogations and depositions.

Digital images recorded in the system are supposed to be used as supplementary evidence to prove whether custodial suspects in certain cases have voluntarily made confessions or other disadvantageous statements included in depositions, upon objections from the accused or defense counsels when public prosecutors make requests for

examinations of the depositions. This is based on the premise that police officers or public prosecutors have recorded interrogations of custodial suspects and retained those images.

It can be expected that public prosecutors or the accused or defense counsels will eventually make requests for conducting examinations of the digital images themselves to directly prove whether the accused have committed the charged crimes. In this situation, whether such images are admissible under the same requirements as depositions of the accused may become an issue, which is left open. Because digital images constitute “electronic or magnetic records” under Article 7-2 of the Penal Code, they should be carefully authenticated to ensure that they have been recorded without falsification or other manipulations. Although the accused are presumed to be innocent during trials, it is possible that digital images of the accused being interrogated or confessing may give fact-finders, especially Saiban-in (lay judges), the impression that the accused are guilty before such guilt is established.

Part I of this article explains the “Audio-Visual Recording of Custodial Interrogation” system and the reasons for its introduction. Part II reviews certain courts’ reluctance to use digital images of custodial interrogations as evidence for the truth beyond the prescribed supplementary use. Part III considers whether digital images recorded in the new system can be used to prove guilt or innocence, and if so, whether they need to meet more strict requirements than those for depositions. The article concludes that the recordings may be used to prove guilt or innocence if the accused or defense counsels have the meaningful opportunity for impeachment.

2 Audio-Visual Recording of Custodial Interrogation

This section describes the types of cases for which the “Audio-Visual Recording of Custodial Interrogation” system is used and how it affects the notion of voluntariness. Article 301-2¹ was added to the Code of Criminal Procedure by Act No. 54 of 2016 as

¹ Article 301-2 provides as below (The author translated this new provision with reference to [1], which does not currently include the new provision. Translations of Japanese codes in this article also refer to [1].).

“(1) With regard to the cases prescribed in the following items, when a public prosecutor requests examination of a written statement made during an interrogation about the case pursuant to the provision of paragraph (1) of Article 198 (limited to the interrogation of an arrested or detained suspect; the same shall apply hereinafter in paragraph (3)) or an opportunity for explanation pursuant to the provision of paragraph (1) of Article 203, paragraph (1) of Article 204 or paragraph (1) of Article 205 (including cases to which these provisions apply *mutatis mutandis* pursuant to the provision of Article 211 and Article 216; the same shall apply hereinafter in paragraph (3)) that may be admissible pursuant to the provision of paragraph (1) of article 322 and contains an admission of a disadvantageous fact, and the accused or defense counsel raises an objection to the request of examination on the grounds that there is a doubt about the admission being voluntary, the public prosecutor shall request examination of the recording medium on which the statement of the accused and the circumstances during the interrogation or opportunity for explanation are recorded from beginning to end in accordance with the provision of paragraph (4) of this Article to prove that the ad-

mission has been made voluntarily; provided, however, that this shall not apply when there is no such recording medium because of the fact that the statements of the accused and the circumstances have not been recorded in accordance with the provision of paragraph (4) due to any of the items of the paragraph, or other unavoidable reasons.

- (i) cases involving offenses punishable by death penalty or life imprisonment with or without work;
 - (ii) cases involving offenses that are punishable by imprisonment with or without work for a minimum period not less than one year and that have caused a victim to die by intentional criminal acts; and
 - (iii) cases other than cases that a judicial police officer has sent to a public prosecutor (excluding those falling under the preceding two items)
- (2) When a public prosecutor does not request examination of the recording medium prescribed in the preceding paragraph in violation of the preceding paragraph, a court shall rule to dismiss the request of examination of the written statement prescribed in the preceding paragraph.
- (3) The preceding two paragraphs shall apply when, with regard to the cases prescribed in any of the items of the paragraph (1) of this Article, the accused or defense counsel raises an objection to the use of the statement made by a person other than the accused that may be admissible pursuant to the provision of paragraph (1) of Article 322 applied *mutatis mutandis* by the provision of paragraph (1) of Article 324 and that contains the statement of the accused (limited to the statement containing an admission of a disadvantageous fact) made during an interrogation about the case pursuant to the provision of paragraph (1) of Article 198 or an opportunity for explanation pursuant to the provision of paragraph (1) of Article 203, paragraph (1) of Article 204 or paragraph (1) of Article 205 on the grounds that there is doubt about the admission being voluntary.
- (4) When a public prosecutor or public prosecutor's assistant officer, with regard to cases prescribed in any of the items of the paragraph (1) of this Article (excluding those falling the item (iii) of the paragraph whose related cases have been sent to a public prosecutor and that are expected to be sent to a public prosecutor by a judicial police officer due to the fact that a judicial police officer is investigating the cases or other circumstances), interrogates an arrested or detained suspect pursuant to the provision of paragraph (1) of Article 198 or gives a suspect an opportunity for explanation pursuant to the provision of paragraph (1) of Article 204 or paragraph (1) of Article 205 (including cases to which these provisions apply *mutatis mutandis* pursuant to the provision of Article 211 and Article 216), the public prosecutor or public prosecutor's assistant officer shall, except when any of the following items applies, record the statement of the suspect and the circumstances on the recording medium by means of the audio-visual recording. The same shall apply when a judicial police official, with regard to cases prescribed in the item (i) or (ii) of the paragraph (1) of this Article, interrogates an arrested or detained suspect pursuant to the provision of paragraph (1) of Article 198 or gives a suspect an opportunity for explanation pursuant to the provision of paragraph (1) of Article 203 (including cases to which these provisions apply *mutatis mutandis* pursuant to the provision of Article 211 and Article 216).
- (i) when the malfunction of equipment necessary for recording or other unavoidable reasons prevent the recording;
 - (ii) when deeming that, judging from his/her refusal of the recording or other behaviors, the suspect will be unable to make enough statements if recorded;
 - (iii) when deeming that the case involves an offense that has been committed by a member of an organized crime group that has been designated by the Prefectural Public Safety Com-

a provision related to the examination of evidence. It requires (1) police officers or public prosecutors to perform the audio-visual recording of custodial interrogations and (2) public prosecutors to present the digital images to prove the voluntariness of confessions or other disadvantageous statements in depositions. Because suspects in custody practically assume that they have the legal obligation to undergo interrogations, the rate of objections from them against the voluntariness is much higher than from suspects not in custody.²

The following cases are subject to this system: (1) ones subject to the Saiban-in system, the Japanese version of the jury system, which is applicable for certain serious crimes such as Homicide, Robbery Causing Death or Injury, Arson of Inhabited Buildings, Kidnapping for Ransom and Dangerous Driving Causing Death; and (2) ones that public prosecutors exceptionally investigate independently of police officers such as corruption cases or corporate crimes, which require more sophisticated knowledge. Both types exhibit relatively higher rate of objections against the voluntariness; and the former is related to serious crimes as noted above and the latter lacks opportunities for separate scrutiny by two independent institutions, namely, the police and public prosecution.

Depositions of the accused are admissible as an exception to the Hearsay Rule³ when the accused have made confessions or other disadvantageous statements voluntarily, or other statements under special circumstances with credibility. In relation to the former statements, when the accused or defense counsels raise objections against the voluntariness, public prosecutors who have requested for the examination of depositions are required to also request for the examination of digital images of the given custodial interrogations in principle. If public prosecutors do not present those images without any reasonable ground, the courts shall dismiss the requests for examination of the depositions, which is premised on the fact that police officers or public prosecutors have the legal obligation to perform the audio-visual recording of custodial interrogations.

mission in accordance with the provision of Article 3 of the Act on Prevention of Unjust Acts by Organized Crime Groups; and

(iv) in addition to those provided in the preceding two items, when deeming that, judging from that there is a risk of physical or property harm, or threat or confusion of the suspect or his/her relatives through disclosing of his/her statements and the circumstances according to the nature of the crime, the behaviors of those concerned in the case, the character of a group to which the suspect belongs or other circumstances, the suspect will be unable to make enough statements if recorded.”

² When there is a doubt that given confessions or other disadvantageous statements have been made voluntarily, they may not be admitted into evidence.

³ No “document” nor “statement of another person made on a day other than the trial date” that is produced to prove the truth of the matter asserted may be admitted into evidence in principle primarily because an out-of-court statement contained in said document or statement cannot be subjected to a cross-examination.

3 Courts' Reluctance to Use Digital Images of Custodial Interrogations as Evidence for the Truth

Because police officers or public prosecutors have the legal obligation to perform the audio-visual recording of custodial interrogations in certain cases, it is natural for public prosecutors or the accused or defense counsels to want to use the digital images as evidence to prove guilt or innocence.

However, some courts have expressed concerns about using digital images recorded during custodial interrogations to prove the truth of the matter asserted, while others have admitted them into evidence. In 2016, the Tokyo High Court affirmed the court below to have dismissed a request by a public prosecutor to examine digital images for the truth that were recorded during the experimental period of the system, taking a cautious stance as follows.⁴

“If generally allowing the recording medium into evidence for the truth, beyond its use prescribed by the Act, because it makes it possible to judge the credibility of statements through the demeanor of a suspect as well as contents of the statements, aside from the difficulty or risk to judge the credibility through the demeanor during interrogations, there is not only a fear that, given the system or practice of interrogations in Japan, a trial would be a procedure to watch the recording medium of prolonged interrogations under the control of investigators and review the appropriateness, but also a doubt that such a procedure is found a proper trial, given that it significantly departs from the rule of fact-finding through evidences directly examined by courts and that it is not deemed to be independent of the investigation. Also, if a lot of time and energy is spent during a procedure for examining evidences to watch the recording medium to judge the credibility of statements through the demeanor of a suspect during interrogations, a trial might substantively and substantially lose balance compared to examinations for objective or otherwise critical evidences and would not meet the social requirement underlying the Act to break over-dependence on interrogations and written statements.

Therefore, the admissibility of the recording medium of interrogations for the truth, or if allowing it into evidence, its condition, etc. should be discussed carefully in view of a proper trial.”

Another judgment of the Tokyo High Court, whose chief justice was the same as the one who presided over the above-cited case, addressed a notorious murder case named “Imaichi-Jiken,”⁵ where the court below examined digital images of interrogations during the experimental period for about seven hours out of recorded 80 hours or so and was reversed because it illegally found that the accused was the perpetrator directly from his demeanor in the digital images that were allowed into evidence only to prove the voluntariness or credibility of his confessions (although the Tokyo High Court found the accused guilty considering other circumstantial evidences and ren-

⁴ Case cited in [2].

⁵ Case cited in [3].

dered the same punishment as the court below pronounced, now pending appeal). The relevant parts are quoted below.

“There is a fine line between whether the accused can be found a murderer and whether statements of the accused admitting that he/she is a murderer can be considered trustworthy.”

“Even if the recording medium of interrogations reveals the objective circumstances of the interrogations, there is a strong doubt about trying to judge the credibility of confessions of a suspect through his/her demeanor during the interrogations replayed by the recording medium, despite its inability to reflect his/her mind audio-visually.”

“Although our system and practice of interrogations may produce false confessions as past experiences show, there will still be a risk that confessions during investigations are evaluated to have higher probative value than in reality. Therefore, in judging the credibility of confessions, needless to say that the statements must not be coerced, it is deemed to be important to weigh the verifiable factors heavily, such as with or without the revelation of a secret, the consistency with objective facts or other evidences, etc.; and consider multi-directionally along with reasonableness or naturalness, etc. of the contents and calmly at a proper distance from the confessions. However, evaluating the credibility of statements by watching the recording medium of interrogations ... may result in intuitive judgments about confessions under the unique circumstances of custodial interrogations based on impressions influenced by subjective views of fact-finders in a way that is closely associated to the confessions in excess, such as whether the accused seems to tell the truth or not through watching his/her demeanor during the interrogations replayed audio-visually, and may have a negative impact by hindering the careful consideration explained above.”

Although the latter precedent was concerned about using the digital images as supplementary evidence for the credibility of statements by the accused, its mention may be the case with using them to prove guilt or innocence.

4 Discussions by Scholars

4.1 The Hearsay Exception of Article 322 (1)

Although the main focus of Article 301-2 of the Code of Criminal Procedure is depositions of the accused, it also applies to statements by people other than the accused that contain the accused’s out-of-court confessions or other disadvantageous statements. Some argue that digital images of custodial interrogations may not be used to prove guilt or innocence because the new provision assumes to use them only as supplementary evidence even for statements other than those by the accused, which appear to replay the accused’s interrogations less faithfully than digital images.⁶ However, most do not deny that they may be allowed into evidence as hearsay exceptions.

⁶ [4] pp.134-135.

The Hearsay Rule applies to “document[s]” or “statement[s] of [others] made on a day other than the trial date.” Article 322 (1), which is one of the exceptions to the Hearsay Rule, provides that “written statement[s] made by the accused” or “written statement[s] recording the statement[s] of the accused which ha[ve] the accused’s signature[s] or seal[s] affixed by [the accused]” are admissible when the accused have made confessions or other disadvantageous statements voluntarily, or other statements under special circumstances with credibility. Although some argue that digital images of custodial interrogations do not literally constitute “written statement[s],”⁷ equally electronically recorded audiotapes that include out-of-court statements have been conventionally addressed in analogy with “written statement[s]” on the premise that audiotapes constitute “hearsay” requiring scrutiny.

The remaining requirements for the hearsay exception are signatures or seals. Some argue that they are procedural guarantees for suspects to personally decide whether their own statements may be used as evidence in future trials, and digital images of custodial interrogations may not be used for the truth unless they have similar guarantees as alternatives to signatures or seals.⁸ However, with regard to documents with pictures in which the accused in a molestation case explained and demonstrated what he thought had happened before police officers, the Supreme Court took them to have been produced as “hearsay” to prove the truth of the matter asserted and demonstrated in the documents and their attached pictures.⁹ Although it required them to meet the same conditions as usual depositions accordingly, it exempted parts of the pictures from signatures or seals because the recording process such as shooting and developing is implemented mechanically. Signatures or seals are supposed to be placed on usual depositions to assure the accuracy of the recording process. If digital images of custodial interrogations may be addressed similarly, they are not required to have signatures or seals either.

4.2 The Rule of Fact-Finding Through Evidences Directly Examined by Courts

The most concerning factor indicated in the precedents above is clearly the rule of fact-finding through evidences directly examined by courts. Regarding this point, some scholars counter that because playing digital images is equivalent to reading out documents, it is not against the rule in the sense that courts may personally examine digital images similar to how they examine documents.¹⁰ Additionally, although the rule may be interpreted as requiring fact-finders to examine original evidences as well, digital images seem to be more original than depositions that are allowed into evidence as exceptions to the Hearsay Rule because they have mechanically recorded not only the contents of statements but also the circumstances before and during the

⁷ [5] p.167.

⁸ [6] p.16, [7] pp.73-74, [8] pp.154-156, [9] pp.84-85, [10] p.54, [11] pp.336-337, [12] p.165, [13] pp.31-32.

⁹ The case [14].

¹⁰ [15] p.17, [16] p.17.

statements and the demeanor of the speakers.¹¹ Even compared to statements in court, one argues that those in digital images are deemed to be original as well because both are instances of information produced by those who have personally experienced the facts.¹²

The rule of fact-finding through evidences directly examined by courts is typically explained in relation to the Hearsay Rule. However, the Hearsay Rule is originally based on the adversary system, which guarantees the opportunity to control fact-finders,¹³ and it also applies to out-of-court statements of the accused for both parties to have this opportunity. Although the accused are generally present in court during trials, their statements during the investigation stage are nevertheless necessary, particularly when they have changed their attitudes into silence or denial about the crimes, and depositions of their former statements may not be used as evidence because they have not given signatures or seals, or depositions have not been created for some reasons.¹⁴ When the accused (or at least their defense counsels) are in court, they can rebut the public prosecutors' cases using their statements during the investigation stage by personally explaining to fact-finders why they have made the statements in the past. This seems to be the case regardless of whether the statements are contained in depositions or digital images.

It is known that digital data generally have "black box dangers" in the sense that "a ... machine conveyance ... might be false or misleading because the machine is programmed to render false information ..., is inarticulate, or has engaged in analytical missteps."¹⁵ However, because digital images of custodial interrogations are deemed to be simply "conduits" for the assertions of people, the assertions themselves have only to be "subject to ... the usual safeguards that apply to human testimony[ies],"¹⁶ which include the Hearsay Rule.

Another noteworthy point about digital data is that they are "inherently mutable."¹⁷ Although digital data can be manipulated, "the admission of such evidence[s] may turn on authenticating whether ... human declarant[s] [have] actually made the statement[s]."¹⁸ With regard to digital images of custodial interrogations, verification is required about whether their edited versions wrongfully provide fact-finders too much disadvantageous impressions against the accused on the precondition that the digital images themselves have not been falsified.

Public prosecutors must promptly disclose evidences that they have requested to be examined, thus providing the accused or defense counsels the opportunity to inspect "documentary evidence or articles of evidence" (Article 316-14 (i)). Although digital images of custodial interrogations do not literally constitute given evidences, they are

¹¹ [17] pp.7-8.

¹² [16] p.18.

¹³ [18] p.426.

¹⁴ [19] p.15, [20] p.66, [21] pp.111-112.

¹⁵ [22] pp.1977, 1989-2000.

¹⁶ [22] pp.1977, 2002-2003.

¹⁷ [23] pp.214-215, 217.

¹⁸ [22] p.2002.

also deemed to be subject to the pretrial disclosure.¹⁹ Even when public prosecutors have not made requests for examinations of and disclose full versions, the accused or defense counsels may request the disclosure of “documents of recorded statements of the accused” (Article 316-15 (1) (vii)), which also include the “recording medium which is able to record images or sound and on which the [accused’s] statement[s] ha[ve] been recorded” (Article 316-14 (ii)).

The accused or defense counsels, on the other hand, must clearly indicate their opinions on whether they consent or have no objection relating to the public prosecutors’ requests of examination (Article 316-16 (1)). Additionally, they may request disclosure of evidences other than ones that public prosecutors have already disclosed in certain situations (Article 316-20 (1)). Thus, they have the opportunity before trials to watch digital images of custodial interrogations, and if necessary, to ask for making the given parts to be added to or deleted from the edited versions.

Although digital images might be affected by “lens, angle, speed, placement, cameraperson bias, or other variables,”²⁰ some of which are indicated as “Camera Perspective Bias,”²¹ the important aspect of fact-finding is deemed to involve considering not only the demeanor of the accused when making the given statements but also the whole circumstances of interrogations leading to the statements.²² Although digital images appear to be better evidences to watch the accused’s demeanor than depositions,²³ the accused or defense counsels may ask judges to instruct Saiban-in toward the appropriate manner of fact-finding or call expert witnesses of psychology in cases where Saiban-in, who are not supposed to be involved in the pretrial disclosure, might be at risk of being excessively reliant on the impressions from digital images.²⁴

When the accused or defense counsels eventually have the appropriate and sufficient opportunity to defend,²⁵ implying the meaningful opportunity for impeachment through a set of guarantees explained above, the demand of the adversary system underlying the Hearsay Rule will be met.

5 Conclusion

This article has discussed the use of digital images recorded during custodial interrogations. They may be used to prove guilt or innocence extending beyond supplementary evidence for the voluntariness or credibility of the accused’s statements if the accused or defense counsels have the meaningful opportunity for impeachment. When statements contained in digital images overlap with former statements of the accused made in response to questions in court, presiding judges shall deny public prosecu-

¹⁹ They are practically addressed in the same manner ([24] pp.28-29).

²⁰ [22] p.2038.

²¹ [25] pp.144-145.

²² [21] pp.110-111, [26] p.18, [27] p.47.

²³ [15] p.19, [28] p.188.

²⁴ Examples of studies that approach the “Audio-Visual Recording of Custodial Interrogation” system from a psychological perspective are [29], [30] and [31].

²⁵ [32] p.6.

tors' requests of examination for the digital images. Therefore, it must be carefully considered whether digital images themselves or the whole edited versions of which public prosecutors have made requests for examinations are substantially necessary to be examined,²⁶ i.e. whether they are deemed to be the best evidences.²⁷ Above all, we need to be aware that confessions themselves are supposed to be complementary evidences to avoid wrong judgments.²⁸

Acknowledgment

This article was supported by JSPS KAKENHI Grant Number JP18H05656 and JP19K20860.

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²⁶ [33] p.16, [34] p.57.

²⁷ [35] p.365.

²⁸ [36] pp.356-357.

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