

Aggravated Punishment on the Homicide of Lineal Ascendants in the Korean Penal Code: Maintain Filial Piety by Criminal Law?

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Abstract

Article 250(2) of the Korean Penal Code prescribes the crime of homicide of “lineal ascendants” in addition to the crime of the “ordinary homicide” in Article 250(1). Not considering the motives and the backgrounds of the homicide of lineal ascendants such as family violence, Article 250(2) unjustly prescribes aggravated punishment on the crime in the name of enhancing filial piety by legal authority, and bothers the judiciary from mitigating the penalty for those who murdered their seriously abusive parents. Article 250(2) is a feudal-patriarchal legislation that is not enlightened on the idea of modern family. It is neither desirable nor effective to affect and to maintain social morals by the criminal law in a modern democratic society, and accordingly it should be abolished. Although tradition and culture definitely constitute the basis of criminal law, it is the criminal law that modifies and adjusts them, according to the constitutional principles and distinguishes its role for social control from morals. Without Article 250(2), the lives of lineal ascendants are completely protected by Article 250(1).

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I. Introduction

Article 250(2) of the Korean Penal Code¹⁾ prescribes the crime of homicide of “lineal ascendants”²⁾ in addition to the crime of the “ordinary homicide” in Article 250(1). Those who kill their own or their spouse’s lineal ascendants shall all be punished by the capital punishment, life imprisonment or minimum 7 year imprisonment. There were only capital punishment and life imprisonment prescribed before the 1995 revision of the Code. Compared to the penalty of the ordinary homicide that includes capital punishment, life imprisonment or minimum 5 year imprisonment, the penalty of homicide of lineal ascendants is still too heavy.

It is comparatively a unique provision among the Penal Codes of other Far Eastern Asian countries that share Confucian tradition. For instance, none of the current Chinese, Japanese or North Korean Penal Codes has such a provision. Article 250 (2)

1) The Korean Penal Code [hyeongpeop], (Law No. 293, September 18, 1953, was last revised on December 13, 1997 as Law No. 5454). For an introduction to understand the Code, see Kuk Cho, Korean Criminal Law: *Moralist Prima Ratio for Social Control*, JOURNAL OF KOREAN LAW, Vol. 1, 2001.

2) According to the Korean family law, the term ‘lineal ascendants’ includes all lineal ascendants of defendant and his/her spouse such as parents, parents-in-law, maternal/paternal grandparents, and maternal/paternal grandparents-in-law. The spouse in this crime is limited only to the legal spouse, so the lineal ascendants of de-facto spouse are not protected by Article 250(2). Most scholars agree that the lineal ascendants of deceased or former spouse are not protected as well [BAE JONG DAE, CRIMINAL LAW : SPECIFIC PART [hyeongpeop kakron] 76 (3rd ed., 1999); LEE JAE SANG, CRIMINAL LAW : SPECIFIC PART [hyeongpeop kakron] (4th ed.) 26 (2000); PARK SANG KI, CRIMINAL LAW : SPECIFIC PART [hyeongpeop kakron] 29 (1999); YIM WOONG CRIMINAL LAW: SPECIFIC PART [hyeongpeop kakron] 32 (2000)]. However, Professor Kim Il-Su argues that the lineal ascendants of the deceased spouse should be protected by Article 250(2) [KIM IL SU, CRIMINAL LAW : SPECIFIC PART [hyeongpeop kakron] (4th ed.) 28 (2001)]. Adoptive parents become lineal ascendants when the legal adopting process is completed. Adopted children are supposed to have two lineal ascendants, either natural or adoptive, because the adoption does not affect the previous family relationships (Decision of Jan. 31, 1967, the Korean Supreme Court 66Do1483). Natural mother automatically becomes a lineal ascendant of her extramarital child (Decision of Nov. 11, 1986, the Korean Supreme Court 86Do1982), while natural father cannot automatically become a lineal ascendant without a recognition of the child. In cases when adopted children murder their adoptive or natural parents, or when extramarital children murder their natural mother (Decision of Sept. 9, 1980, the Korean Supreme Court 80Do1731), they shall all be prosecuted by Article 250(2). On the other hand, in case when extramarital children murder their natural father before his recognition, they shall not be prosecuted by Article 250(2). According to the revision of the Korean Civil Code in 1990, stepmother is not a lineal ascendant of her stepchildren, and father’s legal wife is not a lineal ascendant of the children born by father’s concubines.

is a successor of the Article 200 of the Japanese Penal Code, which provided capital punishment or life imprisonment for those who commit homicide of their lineal ascendants, but was held unconstitutional by the Japanese Supreme Court in 1973,³⁾ and it was finally abolished in the Code of the 1995 revision.⁴⁾

Among the scholars of the Korean criminal law, there have been controversies over whether the maintenance of filial piety by executing the aggravated penalty is possible and desirable, and whether the heavier punishment unconstitutionally discriminates the lineal descendants. Article 11 (1) of the Korean Constitution prescribes the principle of equal protection, which prohibits such discrimination by “social status.” The Korean judiciary has not reviewed this issue yet.

This paper examines the features of the homicide of lineal ascendants that have been overshadowed by ethical accusation, and critically reviews the rationales of the Article 250(2) and argues for the abolishment. This work will proceed by checking the following questions; that if criminal law has to or needs to function in order to maintain and enhance filial piety; that what kind of penal disadvantaged are given to the lineal descendants/killers who have been the victims of their parents’ domestic abuse; and that if the lives of the lineal ascendants happen to be less protected under the current Penal Code without Article 250(2).

II. Rationales for the Aggravated Punishment

The Korean Penal Code imposes heavier punishment on a number of crimes if they are committed against lineal ascendants. They are homicide,⁵⁾ assault,⁶⁾ inflicting of bodily injury,⁷⁾ abandonment,⁸⁾ false arrest or imprisonment,⁹⁾ and intimidation.¹⁰⁾

3) Decision of April 4, 1973, the Japanese Supreme Court, 27-3. inflicting of bodily injury, abandonment, false arrest or imprisonment.

4) The 1995 revision also abolished several provisions that imposed aggravated punishment when the crimes of inflicting of bodily injury, abandonment, false arrest or imprisonment are committed against the lineal ascendants.

5) Korean Penal Code, Arts. 275(2).

6) *Id.* Arts. 260(2), 261.

7) *Id.* Arts. 257(2), 258(2), 259(2).

8) *Id.* Arts. 271(2), 271(4), 273(2), 275(1), 275(2).

9) *Id.* Arts. 276(2), 277(2), 278, 281(2).

10) *Id.* Arts. 283(2), 284.

Korean criminal law was given a role to enhance the filial piety of lineal descendants when it was legislated in 1953.

The Code does not impose heavier punishment on the homicide of the lineal descendants by the lineal ascendants, while it imposes heavier punishment on the homicide of lineal ascendants by the lineal descendants. This discrimination is advocated in the name of the Korean traditional culture, which emphasizes respect for the ancestor and filial piety for the lineal ascendants.

The “Samkang Oryun” (Three Principles and Five Morals), the moral ideology of the Chosun Dynasty (1392-1910), emphasizes the disciplinary relationship between the parents, and the children and the hierarchal order between the elders and the youth. The Dynasty had classified the crimes against lineal ascendants into the “Sib Ak”(ten categories of the most vicious crimes).¹¹⁾ Up to now, the notion has been well kept intact that lineal descendants should treat their lineal ascendants with unconditional tolerance and respect. In spite of gradual awareness of the serious problems of child abuse, homicide of lineal ascendants provokes intense anger of the public, rendering the killers as a non-human defiling sacrosanct filial piety.

Proponents for Article 250(2) stand on the idea that the criminal law should initiate its tasks by maintaining the social ethics. Although they accept that the basic role of law is different from the social morals, they argue that the roles of the two norms are overlapped to some extent, and accordingly the criminal law should consider the dominant moral value in a society and play a role to enhance it. In this sense, they may be said to be under the influence of Lord Partick Devlin.¹²⁾

Former Prime Minster Lee Soo Sung firmly stated his position when he was a law professor;

“Criminal law is a norm that is always limited by the reality and the tradition of a national state. A country’s Penal Code is a part of their cultural and social consciousness of the nation. The cultural tradition of a nation is a womb that gives birth to the criminal law and it establishes the scope and the limit of the application of criminal law. ... Criminal law

11) KIM KI CHOON, THE PENAL CODE OF THE CHOSUN ERA [*choseonsidae hyeongcheon*]168(1990).

12) See PATRICK DEVLIN, MORALS AND CRIMINAL LAW (1959); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965)

should not become no more than a “dead law” to establish the standard and the limit of criminal sanctions but should go further to be an “alive law” to enhance the valuable order and the moral standpoint of a community.”¹³⁾

Dr. Lee understands that different from the western countries, the heavier punishment on the crimes against the lineal ascendants properly reflects the Korean tradition. He continues; “In this case, the appropriateness of the tradition is beyond debate. Tradition is rather a conceptualized entity of a nation that materializes general morals. As a result, such a deviation from the tradition is not acceptable without any obvious or justifiable reasons.”¹⁴⁾

Professor Kim Il-Su is one of the strong proponents for Article 250 (2) who understands the filial piety to be “an important part of the social order, which is the core of the basic order that constitute family and society.”¹⁵⁾

“Viewed from our traditional culture and dominant legal consciousness, the aggravated punishment on the homicide of lineal ascendants has sufficient grounds in jurisprudence as well as in criminal policy. Children’ respect for their parents is an essential element of our social ethics and legal consciousness rather than remnant of the feudal family system. Asking to internalize the social and ethical value of parents-respect from the standpoint of ‘active prevention’ of crimes, the Article is not against the constitutional principle of equality before law.”¹⁶⁾

Therefore, proponents for Article 250(2) conclude that the heavier punishment has

13) LEE SOO SUNG, *Cultural Tradition of Korea and Criminal Law* [*hankuk eui munhwa cheontong kwa hyeongbeop*], KOREAN AND JAPANESE JURISPRUDENCE STUDY [*han il beophak yeonku*] 21, 38 (1994).

14) LEE SOO SUNG, *The Limits of Morality in Criminal Law* [*hyeongpeop cheol dodeokseong eui hanke e kwanhayeo*], 18 SEOUL NATIONAL UNIVERSITY JURISPRUDENCE 113 [*seouldae byeophak*] (June 1977).

15) KIM IL SU, KOREAN CRIMINAL LAW III [*hankuk hyeongpeop*] 66 (1997);

16) KIM IL SU, *supra* note 1, at 30. Different from other proponents for Article 250(2), Professor Kim argues that the immorality of the offender does not matter and that the fact, the lineal descendants killed their lineal ascendants is for no reason (Id.).

its own reasonable ground, namely, immoral character of the lineal descendant/offender, and finally insist that Article 250(2) does not unconstitutionally discriminate them.¹⁷⁾ Different from other proponents for Article 250(2), Professor Kim argues that immoral character or motive of the offender does not matter but the fact itself matters that lineal descendants commit homicide for their lineal ascendants for whatever motive and with whatever background.¹⁸⁾

Since the proponents advocated for the severe penalty before the revision of the Penal Code 1995, which were capital punishment and life imprisonment without 7 year imprisonment, it is not surprising that they are still the defenders of the current “lighter” penalty including 7 year imprisonment after the revision.

III. Criticism of the Rationales

A. *Biased Presumption of Immorality of Parents Killers*

At this point, it is necessary to check out the motive and the background of the homicide of lineal ascendants in Korea. Under the Confucian culture, those who commit homicide for their lineal ascendants are simply accused as depraved non-human beings, and they are all happened to deserve heavier punishment. Children who kill their parents are likely to be misunderstood, despised, and stereotyped by the public. Instead of accurately pursuing for the motive and background of the killing, mass media tends to focus on the gory details of the killing of the parent. It is time for us to view the homicidal acts free from such moralistic and sensational measuring.

There had been virtually no empirical research on the homicide of lineal ascendants in Korea before the excellent 1996 study by Dr. Choi In-Sub and Ms. Kim Ji-Sun. Based on official statistical data from 1986 to 1994, in which they made a number of significant findings, which are as follows.

First, according to the results, the average number of parricidal cases was 40 per year, which is lesser than the public’s assumption. The crime rate does not show any

17) BAEK HYONG KOO, CRIMINAL LAW : SPECIFIC PART [*hyeongpeop kakron*] 27 (1999); CHUNG SUNG KUN, CRIMINAL LAW : SPECIFIC PART [*hyeongpeop kakron*] 59-60 (1996); KIM IL SU, *supra* note 1, at 29-30; LEE JAE SANG, *supra* note 1, at 24-25; PARK SANG KI, *supra* note 1, at 28.

18) KIM IL SU, *supra* note 1, at 29-30.

particular pattern since there are no conspicuous changes.¹⁹⁾

Second, 35.4% of the total murderers of lineal ascendants have had mental illness either in the past or at the time of the criminal act.²⁰⁾ 36.9% of the offenders committed the crime under the effect of hallucinations and bizarre disillusion.²¹⁾ 65.4% of the offenders have no previous criminal records and only 1.3% of the offenders have the records of having committed a crime against their lineal ascendants.²²⁾

Third, the victims, mainly the fathers, had habitually abused the offenders or/and their family members physically, emotionally, or sexually. 41.7% of the offenders or/and their family members had suffered from habitual abuse by the victims.²³⁾ 17.8% of the offenders committed the crime because of the victim's abuse by other family members, particularly because of their mother. 8.4% of the offenders committed the crime because of the victim's abuse of the offenders themselves.²⁴⁾

Only 7.1% of the offenders murdered their lineal ascendants for the sake of gain.²⁵⁾ 58.3% of the offenders' family members express strong sympathy for the offenders because they believe that the victims themselves commit the crime.²⁶⁾

The study shows that it is indispensable to consider the domestic violence in understanding parricide, and that the murderers of their lineal ascendants cannot just simply be accused for being sinister or depraved non-human beings. Substantially, most of the offenders have mental problems who need mental treatment rather than punishment. In many cases, offenders or/and their family members had been under the victim's serious abuse, which has to be counted responsible for the offenders' crime. To cite Mavis van Sambeek, "abused children who commit parricide are presented as criminals, yet surely they are victims first."²⁷⁾ In this sense, Article 250 (2) is one-sided that presupposes only the immorality of lineal descendants/killers and excludes that of

19) CHOI IN-SUB & KIM JI-SUN, A STUDY ON CRIME TOWARD LINEAL ASCENDANT (CHONSOK PEOMJOE EUI SILTAE E KWANHAN YEONKU) 37-38 (1996).

20) *Id.* at 62-63.

21) *Id.* at 79-80.

22) *Id.* at 64-65.

23) *Id.* at 73-74.

24) *Id.* at 79-80.

25) *Id.* at 80.

26) *Id.* at 77-78.

27) Mavis J. Van Sambeek, *Parricide as Self-Defense*, 7 LAW & INEQ. J. 87, 91 (1988).

the lineal ascendants/victims.

B. Unreasonable Discrimination against the Lineal Descendants

Even though the 2 year gap between the minimum penalties of Articles 250(1) and 250(2) might be considered insignificant, it can certainly act as a crucial obstacle in mitigating the penalty for the defendants who happened to murder their seriously abusive parents. In particular, “stay of penalty enforcement”(Strafaussetzung zur Bewahrung) is very hard to be given to the defendant because the minimum penalty of the crime in Article 250(2) is 7 year imprisonment. “Stay of penalty enforcement” may be given to the defendants only when maximum 3 year imprisonment is imposed on them. In case of the homicide of lineal ascendants, however, minimum penalty shall be 3 and half year imprisonment even when the punishment is mitigated by the court,²⁸⁾ so that “stay of penalty enforcement” is not available for the defendants. In addition, different from the U.S. law, the Korean criminal law jurisprudence does not recognize the defense of “battered child syndrome,”²⁹⁾ which modifies the requirements of the traditional self-defense and paves the way to justify or to excuse the murders of abusive parents.³⁰⁾ As a result, most of the defendants who murdered their lineal ascendants are supposed to receive heavy punishment.

It is also questionable if the homicide of lineal ascendants includes extra substantial

28) Korean Penal Code, Arts. 55, 62(1).

29) In 1991, the Texas legislature became the first in the country to pass a gender-neutral statute allowing evidence of family violence to be admitted when a woman or a child kills [Tex. Penal Code Ann. 19.06 (West Supp. 1991)]. In 1993, the Supreme Court of Washington, in *State v. Janes* [850 P.2d 495 (Wash. 1993)], held that evidence of the battered child syndrome is admissible to prove self-defense. The “battered child syndrome” theory follows a track prepared by the “battered woman syndrome” theory. For the reference of the latter theory, see LENORE E. WALKER, *THE BATTERED WOMAN* (1979); *State v. Kelly*, 478 A.2d 364 (1984); *State v. Leidholm*, 334 N.W. 2d 811(N.D. 1983); *State v. Hundley*, 693 P.2d 475(Kan. 1985); *R. v. Lavallee*, [1990] 1 S.C.R. 852(Can.); *B. Ahluwalia*, [1992] 4 All.E.R. 889(Eng. C.A.).

30) See generally Beth Bjerregaard and Anita Neuberger Blowers, *Chartering a New Frontier for Self-defense Claims: The Applicability of the Battered Person Syndrome as a Defense for Parricide Offenders*, 33 U. OF LOUISVILLE J. OF FAM. L. 843 (1994); Joelle Anne Moreno, Comment: *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281(1989); Jamie Heather Sacks, Comment: *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill their Abusers*, 10 J. CONTEMP.H.L. & POL’Y 349 (1994)

illegality apart from the illegality of ordinary homicide. Professor Lee Jung-Won points out as follows;

“The illegality of ‘killing lives and destructing social order by immorality’ cannot constitute essential difference (wesentliche Differenzierung) from ‘killing lives.’ If so, the crime of homicide of lineal ascendants arbitrarily discriminates the conducts that are essentially the same.”³¹⁾

Article 250(2) is redundant since Article 250(1) of ordinary homicide fully protects the lives of the lineal ascendants. Without Article 250(2), Article 250(1) imposes severe punishment including capital punishment and life imprisonment for those who are morally depraved and who murdered their lineal ascendants for sake of gain. According to Article 51 of the Penal Code, the “relationship with the victim” should be considered in deciding the penalty for the offenders. Consequently, it can be realized that excluding Article 250(2), does not less protect the lives of the lineal ascendants under the Penal Code.

In conclusion, without Article 250(2), the Korean criminal justice system has no problem in imposing harsh punishment to the depraved defendants who murdered their lineal ascendants for the sake of gain. However, with the Article, the system cannot help punishing the defendants heavily who murdered their seriously abusive parents, which renders the Article to unreasonably discriminate the lineal descendants in the name of filial piety.

C. Moralism and Patriarchal Legislation

Finally, it is necessary to realize the function of criminal law in the modern society. The modern society assumes that criminal law is supposed to be segregated from morals. Moral values should be first protected by the moral norms, and the criminal law should play its role as *ultima ratio, not prima ratio*. Although criminal law and social morals certainly overlap each other in some aspects, the basic role of the

31) LEE JUNG WON, CRIMINAL LAW : SPECIFIC PART [*hyeongpeop kakron*] 51-52 (2nd, 2000).

criminal law is different from social morals. Other forms of social controls are available to enhance filial piety, such as morality, social convention and peer pressure. Once criminal law fancies itself as a protector of social morals, it tends to intervene and uniform the private lives of the individuals. Such an intervention is certainly undesirable in the modern society that claims ‘moral pluralism’ as one of its fundamental principles, which renders the criminal law to take the minimalist approach regarding moral issues. In this context, Professor Bae Jong-Dae firmly states that, “filial piety is not a legal interest that criminal law must protect.”³²⁾ As Justice Kim Yang-Kyoon stated in his dissenting opinion of the Adultery cases, “filial piety guaranteed by criminal punishment is not considered to be such fidelity in a genuine sense any more.”³³⁾

Our respect towards parents and elders needs to be cherished as one of the valuable traditional virtues inherited to the contemporary Korean society. However, this should not lead to the emphasis on the feudal-patriarchal idea of family. As the idea requests that lineal descendants unconditionally obey their lineal ascendants, it does not suppose the equal relationship among the family members. It often veils the fact that parents do not always fulfill their obligation to love and care for their children. To refer to Paul Mones, the idea is based on “an unspoken expectation that regardless of the depravity and violence visited upon a child, the child should treat his or her parents with unconditional tolerance, understanding, compassion, and love.”³⁴⁾

Modern democratic concept of family, which requests lineal descendants as well as lineal ascendants to be respected and cared, cannot stand on such idea. In contrast to Dr. Lee’s theory, the properness of the tradition in criminalization does matter and should be reviewed from the standpoint of contemporary democracy and the constitutional principles. In this light, I agree with Professor Yim Woong’s argument:

“We need to cast a critical glance on the inequality of the ‘morality’ that

32) BAE JONG DAE, *supra* note 1, at 74.

33) Decision of Sept. 10, 1990, the Korean Constitutional Court, 89 *Heon Ma* 81 (Justice Kim Yang-Kyoon, dissenting opinion). This decision was to held that the crime of adultery in Article 241 in the Penal Code was not unconstitutional.

34) Paul Mones, *Parricide: Opening a Window Through the Defense of Teens Who Kill*, 7 *STAN. L. & POL’Y REV.* 61, 64 (1995).

constitutes a basis of the law.”³⁵⁾

Although the popular morality of the public certainly plays a substantial role in constructing and applying the criminal law, the conception of morality that criminal law jurisprudence needs is called “critical morality,”³⁶⁾ which has to be rooted in a criteria constantly tested for its generality, consistency, and responsiveness to relevant social goals.

Finally, it is questionable that if Article 250(2) achieves its aimed purposes. It is not because of the Article that the lineal descendants fulfill their filial duty to their lineal parents. It is rather unrealistic to suppose that the Article makes the lineal descendants more cautious of their relationship with the lineal ascendants.

Therefore, I maintain that Article 250(2) is a legal moralist and patriarchal legislation, which is accordingly inconsistent with the basic principle of the contemporary constitutionalism.

IV. Conclusion

Public sentiment is still reluctant to give legal favor to those who murder their parents. However, criminal law should not be swayed by such sentiment. The crime is not committed in a vacuum. Not considering the motives and the backgrounds of the homicide of lineal ascendants such as family violence, Article 250(2) unjustly prescribes aggravated punishment on the crime in the name of enhancing filial piety by legal authority, and bothers the judiciary from mitigating the penalty for those who murdered their seriously abusive parents.

Article 250(2) is a feudal-patriarchal legislation that is not enlightened on the idea of modern family. It is neither desirable nor effective to affect and to maintain social morals by the criminal law in a modern democratic society, and accordingly it should be abolished.³⁷⁾ Although tradition and culture definitely constitute the basis of

35) YIM WOONG *supra* note 1, at 30.

36) See H.L.A. HART, *LAW LIBERTY, AND MORALITY* 19-20 (1963). See also the “discriminatory conception” of morality developed in Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in *MORALITY AND THE LAW* 55 (Richard Wasserstrom ed., 1971).

37) In this light, I agree with late Professor Yoo Ki Chun’s argument that other criminal law provisions imposing

criminal law, it is the criminal law that modifies and adjusts them, according to the constitutional principles and distinguishes its role for social control from morals. Without Article 250(2), the lives of lineal ascendants are completely protected by Article 250(1).

Abolishing the Article 250(2) is far from giving up our tradition or “westernizing” the Korean society. Rather, it is to keep the criminal law from excessively intervening into the privacy of the individuals in the name of enhancing morals, and also to remove the considerable hindrance in mitigating the penalty for the offenders who were the first victims of their parents’ grave abuse.

heavier punishment if the crimes are committed against lineal ascendants are unconstitutional [YOO KI CHUN, CRIMINAL LAW: SPECIFIC PART [*hyeongpeop kakron*] 35, n. 932 (2000)].