

## Observations on the South Korean Penal Code

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### Abstract

*This article presents an American legal perspective on the ROK Penal Code. The emphasis is on certain sections of the Code that differ dramatically from the mainstream of contemporary American criminal law including several provisions that should be revised in order to strengthen democracy and better protect human rights in South Korea. The article concludes by suggesting some modest changes to the Code in the name of law reform.*

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## I. Introduction

Relatively little has been written in English or, for that matter, in other Western languages<sup>1)</sup> on South Korean criminal law despite the importance of having a basic understanding of criminal law in order to appreciate any legal system or society as a whole.<sup>2)</sup> Here I hope to partly remedy this unfortunate situation. However, the purpose of this article is certainly modest. My intention is to provide the critical perspective of an American-trained lawyer on selected provisions of the *Hyeong-beop*<sup>3)</sup> or Penal Code<sup>4)</sup> of the Republic of Korea (“ROK” or “South Korea”)<sup>5)</sup> that differ significantly from American criminal law, and to suggest a few possible changes to the ROK Penal

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1) A rare book-length work available in a Western language in this field is a comparative study of South Korean and German criminal law written in German by a Korean legal scholar. Bo-Hack Suh, *Der Rechtsfolgenteil des neuen koreanischen StGB von 1995 im Vergleich zu den Regelungen im deutschen StGB: unter besonderer Beruecksichtigung der Regelungen des Entwurfes von 1992 in Korea* (Europaeische Hochschulschriften/European University Studies, Series 2, Volume 2029, 1996).

2) For a theoretical examination of the relationship between criminal law and culture, see Otfried Hoeffe, *Gibt es ein interkulturelles Strafrecht?: ein philosophischer Versuch* (1999).

3) In this article, the South Korean government’s new official transliteration system will be generally albeit not entirely followed. Although the system is not without its drawbacks, it does have the virtue of being “computer-friendly” due to the absence of any diacritical marks.

In this same overall spirit, German words and names will be spelt according the widespread convention of rendering umlauts with the letter “e” and another vowel letter. Meanwhile, French accent marks will simply be ignored.

Asian names will be generally written in style and spelling preferred by the individual or organization, if such is known by the author.

4) In the Korean language, the ROK Penal Code is called the *Hyeong-beop* (형법) (刑法). The Sino-Korean expression is based on two Chinese characters. The first character consists of six strokes while the second character consists of eight strokes. Literally, the term means “punishment law” or “criminal law.”

5) The original ROK Penal Code of 3 October 1953 was translated into English by Paul Ryu (Korean name: RYU Kichyun) as the second volume of the American Series of Foreign Penal Codes published by New York University. *The Korean Criminal Code* (Paul Ryu, trans. & Gerhard O.W. Mueller, ed., 1960) [hereinafter RYU]. This early translation also contains a very useful introduction by Ryu.

The somewhat awkwardly named Korea Legislation Research Institute (“KLRI”), in its series *Statutes of The Republic Of Korea*, has translated the contemporary ROK Penal Code into English as the “Criminal Act.” See 4 *Statutes Of The Republic Of Korea* (1997 & updates) [hereinafter ROK Stat.].

Yet, I maintain that “Penal Code” is a better rendition of the title even though, in this context, some Koreans appear to prefer somewhat rigidly the English word “code” only for the two character expression *beopjeon* (법전) (法典) and not for the single Chinese character-based word *beop*.

Code in the interests of law reform. Such modernizing reforms would benefit ROK citizens and foreign residents alike.

This article is not intended to be an exhaustive commentary on the Penal Code let alone on South Korean criminal law as a whole.<sup>6)</sup> Moreover, this article will not attempt to describe criminal procedure in any detail.<sup>7)</sup> Rather, this article points to certain features of the Penal Code that are significantly different from comparable criminal laws at the federal or state level in the United States (“US”).<sup>8)</sup> To varying degrees, some of my comments could be made by legal professionals from England and certain other common law jurisdictions with long traditions of parliamentary democracy.

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Likewise, in translating the Sino-Korean term *jo* (조) (條), which derives from a single eleven-stroke Chinese character, I feel that “section” is a better word than “article” for each of the major provisions in the code and other laws. So, for them I use either the word “section” or the standard symbol for section (§) that should be familiar to all American-trained lawyers. Nonetheless, for ROK constitutional provisions, I do retain the English word “article.”

In this connection, my overall approach to translating Korean legal terms into a form of English that sounds natural to lawyers who are native speakers of English has been generally inspired by the method used by J. Mark Ramseyer and Minoru Nakazato in rendering Japanese legal terms into English. J. Mark Ramseyer & Minoru Nakazato, *Japanese Law: An Economic Approach* xix (1999).

Here it should be pointed out that the English versions in the KLRI’s multi-volume series of loose-leaf binders are not official translations. Only the Korean text of any ROK law is legally binding. Nevertheless, because the series is published by the KLRI, which is an agency of the South Korean government, the English versions could be reasonably viewed as being semi-official in nature.

6) For a Korean perspective on some aspects of South Korean criminal law in English, see Kuk Cho, “Korean Criminal Law: Moralism Prima Ratio for Social Control” 1 *Journal of Korean Law* 77 (February 2001).

7) Nevertheless, one very dramatic difference in criminal procedure should be mentioned at least in passing. Unlike in the United States, South Korean prosecutors can appeal acquittals. ROK Code Of Criminal Procedure [*Hyeongsa Sosong-Beop*], § 338.

Although the sheer potential for appeals by prosecutors, regardless of the actual frequency of such appeals in practice, no doubt seems strange to many Americans, this is certainly not a situation unique to Korea. For instance, under German law, the public prosecutor can lodge an appeal according to provisions of the *Strafprozessordnung*. Anke Freckmann & Thomas Wegrich, *The German Legal System* 212 (1999). And, even in England, the birthplace of the common law, there is some limited room for appeals by the prosecution. Jacqueline Martin, *The English Legal System* 169-173 (3<sup>rd</sup> ed., 2002).

Furthermore, it should be kept in mind that an appeal in South Korea is really more like a retrial in the United States. For instance, witnesses can be called by a ROK high court whereas, by contrast, there are no witnesses in American appellate proceedings.

8) Contemporary penal codes in several US jurisdictions have been influenced by the Model Penal Code, which was prepared by the American Law Institute in 1962. Yet, the roots of American criminal law go back to English common law.

Nevertheless, a clearly American legal perspective is informative thanks to the relative strength of American constitutionalism and the important role of the American judiciary in safeguarding civil liberties.<sup>9)</sup>

Moreover, an American legal perspective on the Code is useful in light of the broad range of interactions between South Korea and the US including but certainly not limited to the security relationship centered on the role of the US military on the Korean Peninsula in the form of the United States Forces Korea (“USFK”).<sup>10)</sup> As an unpleasant yet inevitable consequence of such an extensive bilateral relationship, there are periodically criminal cases involving US citizens in South Korea as well as criminal cases involving ROK citizens in America. For criminal cases in South Korea involving members of USFK, the relevant Status of Forces Agreement (“SOFA”) must be considered.<sup>11)</sup>

Recently, the ROK-US SOFA has come under renewed criticism by many South

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9) In this connection, the practical effects of federalism should not be forgotten. In the US, there are state constitutions for each state as well as the national constitution. Both state and federal constitutions enshrine individual rights including those of criminal defendants and convicted criminals. State law can provide greater protection than what is covered by the federal constitution. *Mills v. Rogers*, 457 U.S. 291 (1982).

10) USFK operates military installations throughout South Korea. These are mostly used by either the US Army or the US Air Force. Currently, the US Navy and the Marines have only a very small presence in Korea. USFK, *U.S. Forces Korea Homepage* (last visited 19 July 2003) <http://www.korea.army.mil>.

11) The SOFA is a bilateral international agreement. The United States has entered into such agreements with a number of foreign states around the world where American forces are based. Each SOFA is somewhat different. *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960).

The text for the SOFA covering South Korea can be found at: USFK, *SOFA Documents* (last visited 19 July 2003), <http://www.korea.army.mil/sofa/docs.htm>

Under a SOFA agreement, certain criminal offenses are tried under American military law namely, the Uniform Code of Military Justice while all other offenses are handled by the courts of the host country. The most serious of the cases tried under American military law are handled by courts-martial. Civilian judicial review is handled by a special federal appellate court called the United States Court of Appeals for the Armed Forces. 10 U.S.C. §§ 801-946.

Here it should be noted that the SOFA certainly does not apply to all US citizens.

Many Americans in South Korea are thus subject to local criminal law like other foreigner residents and visitors. ROK Penal Code § 2.

Naturally, in the ROK, as is generally the case elsewhere, diplomatic agents enjoy immunity under the Vienna Convention on Diplomatic Relations, which came into force on 24 April 1964. South Korea signed the Convention on 28 March 1962 and then finally ratified it on 28 December 1970. Meanwhile, consular officers and consular employees are generally protected under the Vienna Convention on Consular Relations. That convention entered into force on 19 March 1967. The ROK acceded this Convention on 7 March 1977.

Korean citizens and NGOs in the aftermath of the June 13, 2002 traffic accident involving an American military vehicle that resulted in the tragic deaths of two young South Korean girls. Much of the criticism, however, has tended to be overly emotional and uninformed. Such criticism often ignores the reality that most offenses already come under the jurisdiction of Korean courts. Regardless of such criticism, at a very early stage USFK admitted to civil liability for the June 13, 2002 accident. Apologies were made by a number of different American military and civilian officials including eventually the US Ambassador and US President.<sup>12)</sup>

## II. Background

Although a measure of local autonomy exists in South Korea today, the ROK is essentially a unitary state rather than a federal republic.<sup>13)</sup> In other words, when it comes to formal governmental structure, the ROK is closer to the highly centralized, national system of France than it is to the federalism of, say, Germany or the US.<sup>14)</sup>

All courts in South Korea are run by the national government.<sup>15)</sup> Hence, the question of jurisdiction tends to be straightforward compared to what can be sometimes encountered in the United States. Moreover, most South Korean law, be it substantive or procedural, is national in scope. This is definitely true of criminal law.

In terms of comparative legal systems, the ROK is a civil law jurisdiction rather

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12) United States Embassy, Seoul, Republic of Korea, Press Releases: Statement by Thomas C. Hubbard, U.S. Ambassador to the Republic of Korea (statement dated 27 November 2002) <http://usembassy.state.gov/seoul/www4591.html>; Shin Yong-bae, "N.K. urged to drop nuke plan, Bush apologizes 'directly' for girls' deaths in phone talk with Kim", *The Korea Herald*, 14 December 2002, at 1, "USFK Public Affairs Office, Statement from USFK on courts-marital & U.S. military court-martial fact sheet", *The Morning Calm Weekly* (Seoul), 29 November 2002, at 13.

13) ROK Const [*Heon-Beop*] Arts. 117 & 118. Incidentally, the Korean names for the words Penal Code and Constitution sound somewhat similar at least to some non-native speakers of Korean. However, the Korean words do differ in terms of both pronunciation and spelling.

14) *See, e.g.*, B. de Gunten, A. Martin & M. Niogret, *Les Institutions de la France passim* (1999) [hereinafter DE GUNTEN]; Jean-Pierre Hue, *Introduction Elementaire au droit passim* (1997) [hereinafter HUE].

15) ROK CONST. Art. 101.

16) *See, e.g.*, Lee Sik Chai, *An Introduction to Korean Maritime Law* 7-8 (1999) [hereinafter CHAI]. *See also* Chong-Ko Choi, *Korean Law and World Law [Hangukbeop Gwa Segyebeop]* (1989) (In Korean).

than a common law jurisdiction.<sup>16)</sup> This helps to explain many things including certain aspects of the manner in which the judiciary and public prosecutors operate along with the nature of private criminal defense practice.<sup>17)</sup> More specifically, Japanese as well as German approaches to law have greatly influenced legislation, judicial decisions, and legal scholarship in South Korea.<sup>18)</sup> Originally, the German and other Western legal influences mostly came indirectly via modern Japanese law.<sup>19)</sup> In other words, Japan acted as something of an Asian filter for Western legal concepts. Now, however, there is considerable direct influence from the West including Germany.<sup>20)</sup>

Yet, of all the foreign influences on the law and legal system of South Korea, the Japanese remains perhaps the most profound. Japanese legal style can be especially felt when it comes to the education and training of South Korean lawyers with what remains an extremely competitive bar exam and a single government-run institute for the people who pass the bar exam.<sup>21)</sup> In particular, when it comes to the criminal justice system, Japanese influence can be seen in the behavior of many of the ROK public prosecutors as well as many members of the national police whereby confessions obtained from suspects are often vital for investigations and prosecution.<sup>22)</sup>

Modern Japanese law<sup>23)</sup> itself, which dates from the late 19<sup>th</sup> century, is ultimately based on Western legal concepts especially from German approaches although certain

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17) See generally John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2<sup>nd</sup> ed. 1985).

18) For example, law libraries at leading South Korea universities often have significant holdings in German and Japanese in addition to materials in Korean and English. By contrast, works in other major languages for legal scholarship like French are less common. Although there has been some French influence on both Japanese and Korean law, German influence is more pronounced. So, this helps to explain the emphasis on German materials.

19) A somewhat similar process occurred in Taiwan where Western law was transplanted by the Japanese authorities although unlike Korea, Taiwan did have some direct experience with European colonialism before Japan occupied the island. See generally "Tay-Sheng Wang Legal Reform in Taiwan Under Japanese Colonial Rule, 1895-1945: The Reception of Western Law" (*Asian Law Series*, School of Law, University of Washington, No. 15, 2000).

20) For instance, at any given time a number of Koreans are studying law at German universities. Some of these German-trained individuals eventually return to Korea to teach law. See, e.g., College of Law, Seoul National University, *Faculty Members* (last visited 19 July 2003) [http://law.snu.ac.kr/eng/index\\_eng.htm](http://law.snu.ac.kr/eng/index_eng.htm).

21) James M. West, "Education of the Legal Profession in Korea" passim (*International Legal Studies*, Korea University, No. 3, 1991); John Owen Haley, *The Spirit of Japanese Law* 40-69 (1998) [hereinafter HALEY].

22) See generally David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (2002).

23) By contrast, pre-modern law in both Japan and Korea was based largely on Ancient Chinese models. See, e.g., RYU, *supra* note 5, at 4; HALEY, *supra* note 21, at 3-4.

24) See generally Die Japanisierung des westlichen Rechts: japanisch-deutsches Symposium in Tuebingen vom 26.

significant modifications have been made in Japan.<sup>24)</sup> While the basic Japanese influence on Korean law is due to the legacy of the Japanese colonization of Korea, which endured for most of the first half of the 20<sup>th</sup> century, some of the Japanese influence is more recent and indeed on-going due to the close ties between South Korea and Japan in business and other fields.<sup>25)</sup>

However, it must be noted here that there has also been some influence on South Korean law from the common law world as represented by the Anglo-American legal tradition. Arguably, the overall Anglo-American influence on South Korean law is growing especially in the areas of corporate law, commercial law, and banking law.<sup>26)</sup>

### III. The ROK Penal Code

The ROK Penal Code is the main statute for South Korean criminal law. Many offenses that would be covered in the US by either state penal codes or Title 18 of the United States Code or even both are covered by the ROK Penal Code.<sup>27)</sup>

Nevertheless, not all types of criminal offenses are listed in the ROK Penal Code.

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bis 28. Juli 1988 (Helmut Coing et al, eds., 1990).

25) For instance, Japanese and South Korean bar associations sometimes hold joint events for attorneys from both nations. Likewise, there are periodic academic conferences involving law professors from Japan and South Korea.

Furthermore, even though English is the most widely studied foreign language in South Korea today, with the profound similarities between Korean and Japanese, many educated Koreans can read Japanese at least to some extent. This is especially true of Korean lawyers who must know a large number of Chinese characters, which happen to be common to both Korean and Japanese. Of course, much of Korean as well as Japanese legal vocabulary is based on Chinese terms.

26) One important source of this influence is the growing number of ROK citizens who have pursued law degrees in the United States. Some have then become members of American bars notably the New York state bar. In addition, an increasing number of Korean-Americans (US citizens of Korean ancestry) have become lawyers. Some of these Korean-American lawyers have even returned to their ancestral homeland to work as foreign legal consultants in Seoul law firms. Jae Won Kim, "Transnational Legal Practices", in *Recent Transformations in Korean Law and Society* 409-429 (Dae-Kyu Yoon ed., 2000).

Some ethnic Korean lawyers from various countries belong to an organization called the International Association of Korean Lawyers (IAKL). The author has attended a couple of recent IAKL conferences held in Seoul.

27) When looking at US criminal law, it should be kept in mind that there is a considerable amount of overlap between state and federal criminal laws in the US. This requires coordination on the part of the US district attorneys and local prosecutors. No such comparable situation exists in Korea.



Beside the Code, there are a number of other statutes and so-called “enforcement decrees”<sup>28)</sup> that deal with various aspects of criminal law.<sup>29)</sup> In other words, not everything can be found just in the Code. Accordingly, a comprehensive examination of Korean criminal law would have to extend beyond looking at the Code alone.

Perhaps the best known of these laws outside of the country is the controversial National Security Act.<sup>30)</sup> This statute has come under criticism from lawyers, scholars, and human rights groups both at home and abroad for its lingering authoritarian flavor that seems unsuitable in a democratic age.<sup>31)</sup> Indeed, some in the new government of Roh Moo-hyun, who was recently sworn in as President of the ROK, have expressed a desire to substantially revise or repeal the law.<sup>32)</sup>

Other criminal laws outside of the ROK Penal are more obscure. For instance, there is a separate South Korean criminal statute that covers stowaways along with seamen who jump ship.<sup>33)</sup> Presumably, such a law could have been incorporated into

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28) South Korean statutes are passed by the National Assembly. By contrast, enforcement decrees are presidential decrees. These are somewhat like the regulations issued by executive departments of the US federal government. Yet, enforcement decrees tend to be less detailed than federal regulations. For that matter, South Korean statutes tend to be shorter and sometimes vaguer than comparable federal statutes. In Korean, an enforcement decree is called a siheang-ryeong.

In examining ROK statutes, an American lawyer should keep in mind the nature of South Korea’s legislative structure. The ROK National Assembly is a purely unicameral body as opposed to, say, the French national legislature, which has served as something of a model for South Korea. France has two houses in the form of the French National Assembly and the French Senate. DE GUNTEN, *supra* note 14, at 42-49; HUE, *supra* note 14, at 225-256. In a similar vein, bicameralism is the norm for the US Congress and every state legislature except the Nebraska legislature. Jack Davies, *Legislative Law and Process* 22-23 (2<sup>nd</sup> ed. 1986). A bicameral institution clearly provides for additional oversight on legislative proposals with the existence of a second body. Hence, bicameralism possesses the theoretical potential to produce better legislation.

29) The KLRI’s English translations of these statutes and enforcement decrees can be found in 4 ROK Stat.

30) The Korean name for the National Security Act is the *Gukga Boan-beop*.

31) See, e.g., Amnesty International Publications, Amnesty International Report 2002 148-149 (2002).

32) Duk-Kun Byun, “Student Activists Still on the Run Despite Thawing S-N Relations”, [*sic*] *The Korea Times*, 31 March 2003, at 5; Yong-bae Shin, “Justice minister calls for replacement of security law”, *The Korea Herald*, 4 April 2003, at 3.

33) ROK Stoways Control Act [*Milhang Dansok-Beop*].

The law might have been designed partly to prevent South Koreans from leaving the country without official permission. After all, South Korea, like many Asian nations, maintains immigration controls for people departing as well as arriving whereas in some non-Asian nations passports are only examined upon entry. Reasons for such double controls in the ROK include stopping criminal suspects from fleeing, catching foreigners who have overstayed their visas, and potentially checking on young South Korean males who might not have performed the mandatory military

the Code itself.

The relatively high number of both statutes and enforcement decrees that deal with matters involving criminal law is potentially confusing to lawyers and law enforcement officials let alone average citizens and foreign residents. Consolidation of South Korean criminal laws into a single codification might help to make this important body of law more accessible to everyone concerned. In other words, it is easier to know the law if it is simply stated and well organized.<sup>34)</sup>

## IV. Observations

At the outset, it is worth examining the matter of the applicability of the ROK Penal Code as a whole. Then, I will look at some specific criminal offenses listed in the Code that are rather different from what is often found in American criminal laws.

### A. *Applicability*

As will be shown below, the drafters were ambitious in their desire to assert jurisdiction over a wide range of criminal offenses in Korea and beyond.

The Code covers all crimes committed within the territory of the Republic of Korea.<sup>35)</sup> That seems natural. However, in this context, one should consider that, in theory at least, the Code applies to all crimes committed in North Korea as well as South Korea because South Korea still maintains a constitutional claim on the entire Korean Peninsula and its adjacent islands.<sup>36)</sup> Furthermore, although both Koreas are now members of the United Nations (“UN”),<sup>37)</sup> at the time of writing, the two Korean

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service.

34) Such is the practical legal philosophy behind the famous French Civil Code or *Code Napoleon*. For a brief discussion of the history of that legislative landmark, see *Introduction: Un peu d'histoire*, Le Code Civil 7-10 (Jean Veil, ed., 1997).

Similarly, contemporary French criminal law has its roots in the Napoleonic penal code of 1810. Incidentally, French commercial law was *also* codified at that same time. HUE, *supra* note 14, at 222.

35) ROK Penal Code, § 2. Of course, this applies to crimes committed by Koreans as well as non-Koreans.

36) ROK Const. Art. 3.

37) Both Koreas have been members of the UN General Assembly since they jointly entered the organization on

states have not established diplomatic ties or even any form of quasi-diplomatic relations with one another.<sup>38)</sup> In this connection, it should be recalled that the Korean War merely ended in 1953 with an armistice agreement rather than a final peace treaty.<sup>39)</sup>

Be that as it may, the Penal Code has some interesting provisions that potentially extend far beyond the peninsula.<sup>40)</sup> For example, Section 3 declares that the Code applies to crimes committed by South Korean nationals outside of South Korean territory.<sup>41)</sup> This indicates that the ROK is using both the territorial and the nationality principles of jurisdiction under public international law.<sup>42)</sup> States typically employ one of these principles of international law when it comes to matters of jurisdiction in fields like international tax law although it should be noted here that the United States is unusual in that it taxes its citizens on their worldwide income.<sup>43)</sup>

However, Section 3 is a disturbing provision because an act or an omission that might be illegal in the ROK could be perfectly legal in another jurisdiction.<sup>44)</sup> Consider the following hypothetical situation. If a radical Korean student activist living in

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17 September 1991. The two former German states were similarly admitted to the UN together back in 1973. Eventually, East and West Germany united to form one sovereign nation in 1990. UN, *List of Member States* (last visited 19 July 2003), <http://www.un.org/Overview/unmember.html>.

38) In other words, Seoul and Pyongyang (a/k/a Pyonyang) have not recognized each other diplomatically. Likewise, there has not even been any sort of quasi-diplomatic recognition along the lines of what East Germany and West Germany had managed to achieve in the so-called Basic Treaty (“*Grundlagenvertrag*”) of 21 December 1972. The full German name of the agreement is: *Vertrag ueber die Grundlagen der Beziehungen zwischen der Deutschen Demokratischen Republik und der Bundesrepublik Deutschland*.

39) Robert D. Schulzinger, *U.S. Diplomacy Since 1900* 235-236 (4<sup>th</sup> ed. 1998).

40) ROK Penal Code, §§ 3-5. Incidentally, on the civil side, ROK courts appear to have broad powers to try civil cases with only slight contact with South Korea. CHAI, *supra* note 16, at 275.

41) ROK Penal Code, § 3.

42) For a concise discussion of criminal jurisdictional principles under public international law, see Rebecca M. Wallace, *International Law* 111-119 (3<sup>rd</sup> edition, 1997) [hereinafter WALLACE]. See also Ian Brownlie, *Principles of Public International Law* 303-309 (5<sup>th</sup> ed. 1998); Malcom N. Shaw, *International Law* 458-478 (4<sup>th</sup> ed. 1997).

43) Richard L. Doernberg, *International Taxation* 6-11, 19 (4<sup>th</sup> ed. 1999).

44) For instance, although abortion is widely tolerated in contemporary Korean society, abortion is still technically illegal in South Korea. ROK Penal Code, §§ 269 & 270. See also Dae-Kyu Yoon, “Abortion and Law in the Korean Cultural Context”, in *Recent Transformations in Korean Law and Society* 431-443 (Dae-Kyu Yoon ed., 2000). By contrast, however, despite being arguably more controversial in North American society, abortion is generally permitted in the United States. Indeed, in the United States, a woman has, under certain conditions, a constitutional right to obtain an abortion. *Roe v. Wade*, 410 U.S. 113 (1973).

Europe or North America were to burn the ROK flag in a protest anywhere in the world, then the student could eventually face a criminal trial in South Korea.<sup>45)</sup>

Aliens beyond ROK territory are also covered to some extent by the Code. Understandably, the Code covers crimes committed on South Korean vessels and aircraft operating overseas.<sup>46)</sup> But, this provision should be read together with Article 27 of the UN Convention on the Law of Sea that sets forth rules for criminal jurisdiction on board a foreign ship within the territorial sea of another state. Similarly, there is a series of relevant international agreements that relate to crimes committed onboard aircraft.<sup>47)</sup>

Beyond all this, the Code also applies to certain specific crimes committed anywhere in the world by aliens.<sup>48)</sup> Some of the offenses listed appear sensible enough like crimes relating to counterfeiting ROK currency overseas, but a few are dubious at best in that some of the listed offenses would likely have little, if any, real impact on South Korean social order if committed abroad.<sup>49)</sup> Be that as it may, such sweeping claims to jurisdiction could be interpreted as falling mostly under the protective/security principle. Yet, this particular basis for jurisdiction is not clearly defined under international law.<sup>50)</sup>

There is even a catchall provision for foreign crimes committed against the ROK or ROK nationals overseas.<sup>51)</sup> That could be classified under the passive personality principle. But, such principle has not been widely acknowledged as basis for jurisdiction.<sup>52)</sup>

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45) ROK Penal Code, §§ 3 & 105.

46) ROK Penal Code, § 4. *See also*, ROK Code of Criminal Procedure, § 4.

47) UN Convention on the Law of the Sea, Art. 27. The UN Law of the Sea finally came into force on 16 November 1994. However, South Korea only ratified the Convention on 29 January 1996. Meanwhile, the original treaty for criminal activity on aircraft is the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, which is also known as the Tokyo Convention. South Korea ratified the Tokyo Convention in 1971.

48) ROK Penal Code, § 5.

49) Section 5 of the ROK Penal Code contains a list of offenses including crimes related to the national flag. So, technically speaking, anyone anywhere in the world who, say, burns a South Korean flag is committing a crime under ROK law.

50) WALLACE, *supra* note 42, at 115.

51) ROK Penal Code, § 6. On a positive note, this provision could be potentially used to combat certain human rights abuses overseas.

52) WALLACE, *supra* note 42, at 118-119.

Of course, under international law, the ROK, like any state, is free to exercise jurisdiction to enforce its laws that punish universal crimes.<sup>53)</sup> An example of a widely recognized universal crime would be genocide.<sup>54)</sup>

Finally, for criminal defendants outside of South Korea that would be tried by ROK courts, one must naturally consider the matter of extradition, which involves the extradition law of the jurisdiction where the suspect is found and any relevant treaty.<sup>55)</sup> In this connection, the ROK has signed a series of extradition treaties with various nations including one with the United States.<sup>56)</sup> Furthermore, the ROK has its own extradition law for crimes allegedly committed overseas by Koreans, but that is not directly relevant to our purposes.<sup>57)</sup>

### *B. Crimes involving flags & symbols*

To Western observers, Koreans are often thought of as being rather nationalistic and even, at times, xenophobic.<sup>58)</sup> Regardless of the accuracy of such perceptions, the Penal Code has a nationalistic tone that is lacking in the criminal laws of a number of jurisdictions with long histories of parliamentary democracy. Specifically, the Code proclaims a particular brand of Korean patriotism. This codified nationalism suggests a certain insecurity and perhaps leftover militarism. It should be clear that such an approach is not suitable for a progressive society where free expression is valued. Moreover, if Koreans truly cherish their homeland, as I think many of them do, then they should not need an artificial, legislated patriotism. Genuine love of country flows from the heart and not from statutes.

Damaging, removing, or staining the ROK's national flag or national emblem constitutes a crime in South Korea with a maximum sentence of five years

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53) *See, e.g.*, Restatement (third) of the Foreign Relations Law of the United States § 423 (1986).

54) *See* William A. Schabas, *Geneocide in International Law* passim (2000).

55) Here it should be recalled that many nations have dual illegality and political offense exceptions in their extradition laws.

56) Extradition Treaty, June 9, 1998, US-ROK.

57) ROK Extradition Act [*Beomjwiindo-beop*].

58) For instance, Korean national pride, albeit generally harmless in its manifestation, was very much in evidence during the FIFA 2002 World Cup. That global soccer tournament was co-hosted by South Korea and Japan under the guidance of the *Federation Internationale de Football Association*.

imprisonment, suspension of qualifications for not more than ten years, or a fine of up to seven million won.<sup>59)</sup> Similarly, anyone who “defames”<sup>60)</sup> the national flag or emblem faces possible prosecution.<sup>61)</sup>

Whether it is a result of the relevant provisions of the code, a cultural trait, or a combination of both, the author is not aware of any cases of a South Korean burning the ROK flag.<sup>62)</sup> Indeed, the same could be generally said of non-Koreans. In other words despite my earlier hypothetical illustrations, there does not seem to be much actual interest in burning the ROK flag anywhere. By contrast, however, the burning of either the American or Israeli flag is a popular activity in many parts of the world.<sup>63)</sup>

Perhaps surprisingly, non-Korean flags are also protected under ROK law. Foreign flags and emblems are not to be damaged, etc. for the purpose of insulting a foreign country. However, the potential sanction is slightly less severe with imprisonment of not more than two years or a fine not exceeding three million won.<sup>64)</sup> Regardless of the degree of actual police enforcement, the provision does have a potentially chilling effect on the free expression of political views.

### *C. Crimes related to Seals*

Culturally specific features of Korean criminal law are not limited to the dubious provisions on flags and symbols. Rather, some features are well suited to the needs of contemporary Korean society. The sections relating to the criminal misuse of seals are

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59) ROK Penal Code, § 105.

60) The KLRI’s English version translates the Sino-Korean expression *bibang* (비방) (誹謗) as the English verb “defame.” Yet, in this particular context, a better translation would be “insult.”

61) ROK Penal Code, § 106.

62) In a recent right-wing political demonstration, however, some South Koreans burnt a North Korean flag in protest. The event took place in front of the Shilla Hotel in Seoul. The hotel was the venue for a round of inter-Korean talks. Photograph, *The Korea Times*, 14 August 2002, at 1. The author is not aware of any arrests having been made at that demonstration. Of course, as a practical matter, the North Korean flag might not be viewed by many members of the South Korean police as being the symbol of a legitimate state to begin with. After all, the ROK does not officially recognize the DPRK.

63) Incidentally, in the United States itself, burning the American flag has been recognized by the Supreme Court as a form of political expression to be protected under the freedom of speech provision of the First Amendment to the US Constitution. *Texas v. Johnson*, 491 U.S. 397 (1989).

64) ROK Penal Code, § 109.

valid responses to potential problems in much of East Asia that are somewhat different from what is typically encountered in the West.

Seals remain popular in South Korea today. In particular, seals, or really wooden stamps, with the name of an individual engraved on them i.e., chops, which are called *dojang* (도장) (圖章) in Korean, are widespread.<sup>65)</sup> Meanwhile, the impression made by a *dojang* is called an *ingam* (인감) (印鑑). Such impressions can be registered with the government.

South Koreans often employ *dojang* in situations where a signature would be used in the West. For example, South Korean attorneys routinely use chops instead of signatures on pleadings filed with ROK courts. Other legal documents such as leases and affidavits often involve chops. Likewise, retail bank customers in South Korea typically use chops instead of signatures on withdrawal slips. Special pads of red ink are provided by bank branches for this purpose. Indeed, trusted employees in many firms are allowed to borrow the boss's chop to transact company business.<sup>66)</sup>

Such chops are also used in certain other parts of East Asia. For example, the Japanese continue to use chops on a daily basis.<sup>67)</sup> Chops are a legacy of Ancient Chinese civilization. Nevertheless, Korean seals can be in either Chinese characters or the native Korean script viz., hangeul.<sup>68)</sup>

Because a person's chop traditionally functions much like a signature and because they are widely used even in this age of electronic commerce, counterfeiting a chop or

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That particular law might have been designed mostly with the America in mind.

65) The Sino-Korean term *dojang* is often translated as "seal." but the word "stamp" is arguably more descriptive because a *dojang* normally involves ink rather than the wax traditionally used in European seals. Of course, the word chop, which, in this particular sense, apparently derives from Hindi rather than Chinese, is the most exact equivalent in English for *dojang*.

66) Of course, automated teller machines can be used as a more modern alternative. And, Internet banking is also making inroads in much of Asia including South Korea.

Meanwhile, Westerners and certain other foreigners in the ROK are not legally required to use *dojang* although some expatriates do, in fact, own *dojang*. Instead, individuals from jurisdictions that do not have a chop system can just use signatures thanks to a short and little known law from 1958 called the Foreigners' Signature and Seal Act. Korean: *Weogukineui Seomyeong Nalin Aegwanhan Beopryul*. The KLRI's English version of the law can be found in 3 ROK Stat.

67) Mark Maginer & Makiko Inoue, "Japan's Stamp of Approval Still Thrives", *The Korea Times*, 17 November 2001, at 11. N.B. This article appeared in the World Report section, which was produced jointly with the Los Angeles Times.

68) Many small shops specialize in producing chops and the related business of selling cases or holders for chops.

misusing another person's chop is a matter of grave concern. Imprisonment for up to three years is possible.<sup>69)</sup> A related code provision exists for public seals with even greater sanctions.<sup>70)</sup>

Prohibiting the misuse of chops is not unique to South Korean criminal law. For example, Taiwanese criminal law has roughly comparable provisions relating to chops and forgeries.<sup>71)</sup>

#### *D. Sexual Offenses*

Like the criminal laws of many jurisdictions around the world, the ROK Penal Code attempts to regulate sexual activity by prohibiting certain forms of sexual behavior that are deemed to be socially unacceptable. Yet, here the Code differs significantly from the contemporary laws of many Western jurisdictions.

Perhaps the most disturbing Code provision on sexual offenses involves adultery.<sup>72)</sup> Adultery is a crime on the books in South Korea with adulterers facing sanction in the form of not a mere fine or even court-ordered counseling, but rather potential imprisonment of up to two years.<sup>73)</sup>

A constitutional challenge to the adultery provision a couple of years ago was unsuccessful when the Constitutional Court held that Section 241 of the ROK Penal Code did not violate the South Korean Constitution.<sup>74)</sup> The Court's decision astonished more than a few observers because adultery has been decriminalized in a number of foreign jurisdictions in recent decades.<sup>75)</sup> Moreover, during its relatively short history,

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69) ROK Penal Code, § 239. This provision also covers forgeries of Western-style signatures.

70) ROK Penal Code, § 238.

71) Taiwan Penal Code, §§ 210-220. My source here is: 1 *Major Laws of the Republic of China on Taiwan* 1089-1091 (James C. Liu, et al, eds., 1991) (In Chinese & English).

72) Kuk Cho, "The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women" 2 *Journal of Korean Law* 81 (February 2002).

73) ROK Penal Code, § 241. Here it should be noted that the crime of adultery can only be prosecuted when the "victimized spouse" brings a criminal complaint.

74) "Court Defends Prosecution of Adulterers But Invites Public Debate" *Yonhap News Agency*, (published 28 October 2000) <http://www.yonhapnews.co.kr/news/20011029/201001000020011029165907a.html>.

75) For instance, in many US states, adultery is no longer a crime. Similarly, fornication is typically not a crime in such states. The author's home jurisdiction of Hawaii is a good example of a fairly progressive jurisdiction by American standards. Neither adultery nor fornication is a crime in Hawaii.



the Court has been very active by striking down a fairly large number of other laws as being unconstitutional.<sup>76)</sup> Among some of the major laws that have been struck down by the ROK Constitutional Court have been a number of matters related to the freedom of expression such as certain provisions of the ROK Periodicals Statute and the ROK Motion Pictures Statute.<sup>77)</sup>

Other sexual offenses include matters related to obscenity<sup>78)</sup> and public indecency.<sup>79)</sup> The language employed in the relevant Code provisions is open to a considerable degree of interpretation. Here, as in certain other areas, the Code lacks precision. Whether by accident or by design, this frequent lack of precision in statutory drafting can facilitate politically motivated prosecutions.

In general, the Code appears to be promoting a relatively conservative ideal of sexuality. However, this ideal seems to be somewhat out of step with the views of many Koreans especially members of the younger generations. Compared to the not so distant past, South Korea is undergoing a sexual revolution.<sup>80)</sup> So, an overhaul of this part of the Code would be in order to better reflect evolving social norms.

### *E. Confucian Traits*

Some parts of the Penal Code have retained what can be best described as a latter-day Confucian tone. Indeed, Ryu in his introduction to his translation of the 1953 Code declares: “The Korean Code has incorporated the basic Confucian moral conception of filial duty.”<sup>81)</sup>

This Confucian-inspired approach might not be wholly unexpected given the profound role Confucianism has played in shaping Korean notions of ethics and proper

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76) [ROK] Korean Information Service, *Facts About Korea* 41-42 (rev. ed. 2001).

77) For a discussion of these and other seminal cases, see Kun Yang, “The Constitutional Court and Democratization”, *Recent Transformations in Korean Law and Society* 33-46 (Dae-Kyu Yoon ed., 2000) [hereinafter YANG].

78) ROK Penal Code, §§ 243 & 244. Obscenity itself is not defined in the Code. So, the precise border between simple pornography and obscenity is uncertain.

79) ROK Penal Code, § 245. The Code also does not define public indecency.

80) The evidence for this can be found in various many forms. However, the most visible example would be the fact that public displays of affection between young lovers have become more common whereas once even married couples tended to be rather modest outside of the home.

81) RYU, *supra* note 5, at 4.

behavior especially during the past several centuries.<sup>82)</sup> Indeed, in certain respects, despite rapid economic growth, modernization, and urbanization during recent decades, contemporary Korean society continues to be somewhat Confucian in nature although Confucianism is no longer the official state ideology per se.<sup>83)</sup> Be that as it may, most Koreans would not call themselves Confucians or Shamanists when asked to identify their religion, rather they would typically consider themselves to be either Buddhist (Mahayana Buddhist), Christian (mostly either Roman Catholic or Protestant), or simply not religious at all.<sup>84)</sup>

For a vivid example of the Confucian spirit in the Code one can turn to homicide. Among the various forms of homicide there is a special provision for killing one's lineal ascendant or the lineal ascendant of one's spouse.<sup>85)</sup> A somewhat similar provision can be found for battery.<sup>86)</sup> Likewise, abandonment of a lineal ascendant along with cruelty to or intimidation of a lineal ascendant are crimes.<sup>87)</sup> The prohibition of these various offenses has a Confucian flavor. Although US jurisdictions typically have criminal as well as civil laws dealing with various aspects of domestic violence, the ROK Criminal Code does seem to have been at least indirectly influenced by Confucian values in this important field.

However, the Confucian influence on contemporary South Korean law as a whole has not gone unchallenged. For instance, a provision in the ROK Civil Code that banned marriage between persons with the same surname of the same family origin i.e., people with the same so-called clan origin, which was based on a traditional Korean understanding of Confucian ethics, was struck down in 1997 by the ROK Constitutional Court as it infringed on the right to the pursuit of happiness. One of the

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82) Confucianism is a major part of Korea's cultural heritage. For a study of the impact of Confucian norms on Korea's pre-modern legal tradition, see William Shaw, *Legal Norms in a Confucian State* (Center for Korean Studies, University of California, Berkeley, *Korea Research Monograph*, No. 5, 1981).

83) Shamanism is also a part of Korea's religious heritage. See, e.g., David A. Mason, *Spirit of the Mountains: Korea's San-Shin and Traditions of Mountain Worship* (1999).

84) See, e.g., Jae-Ryong Shim, *Korean Buddhism: Tradition and Transformation* 257-270 (Korean Studies Series, No. 8, 1999).

85) ROK Penal Code, § 250 (2). See also Kuk Cho, "Aggravated Punishment on the Homicide of Lineal Ascendants in the Korean Penal Code: Maintain Filial Piety by Criminal Law?" 3 *Journal of Korean Law* 109 (April 2003).

86) ROK Penal Code, § 257 (2).

87) ROK Penal Code, §§ 271, 273 (2), & 283 (2)-(3).

clans allegedly had over two million members.<sup>88)</sup>

### *F. Criminal Sanctions for Defamation*

From an American legal perspective, an unusual feature of the ROK Penal Code is the existence of defamation (slander or libel) as a crime that can be punished by a fine or even imprisonment.

Defamation is normally only a civil wrong i.e., a tort in US jurisdictions.<sup>89)</sup> Being a tort, defamation is thus typically a matter for civil litigation rather than prosecution in US jurisdictions.<sup>90)</sup> But, in South Korea, defamation is actually both a crime and a tort.<sup>91)</sup> The Korean criminalization of defamation was originally inspired by Japanese law on this subject, which was, in turn, based on continental European legal concepts.<sup>92)</sup>

The existence of criminal sanctions for defamation might help to protect individual reputations, but it causes obvious tension with the notion of free speech. This is something that ROK courts have struggled with for decades.<sup>93)</sup>

Free speech is a vital element in any democratic society. Yet, criminalizing defamation represents a potentially dangerous restriction on free speech, which is even more serious than the potential for the abuse of tort law by government officials. Accordingly, defamation should be decriminalized.

Although suggesting that defamation be decriminalized might seem radical to some Korean readers, such change would simply endorse the current trend in South Korea towards seeking civil damages rather than criminal sanctions for defamation.<sup>94)</sup>

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88) YANG, *supra* note 77, at 40.

89) Restatement (second) of Torts, § 559.

90) Government officials can bring civil actions for defamation in the US. But, the free speech provisions of the federal constitution must be respected. *New York Times Co v. Sullivan*, 376 U.S. 254 (1964).

91) ROK Penal Code, §§ 307-312.

92) Hamid Mowlana & Chul-Soo Chin, "Libel Laws of Modern Japan and South Korea are Compared", 18 *Journalism Quarterly* 326 (1971).

93) Sun-Je Sung, "Law of Defamation in Korea", 30 *Korean Journal of International and Comparative Law* 1 (2002) [hereinafter SUNG].

94) SUNG, *supra* note 93, at 13-14.

## V. Conclusion : Law Reform Needed

When it comes to the ROK Penal Code, although some parts of the Code are well suited for local conditions, there is clearly much room for serious law reform in order to better protect human rights and to promote a truly free society. My point is certainly not that South Korea criminal law should be an exact copy of American criminal law, but rather that American criminal law does provide some models for possible changes that would ensure that the ROK Penal Code, which often continues to show disturbing signs of the nation's long authoritarian past, better serves the needs of South Korea's relatively young democracy.<sup>95)</sup>

In this connection, the Code criminalizes certain behavior that could be covered adequately by civil sanctions alone. For example, in the future, defamation could simply be a civil wrong instead of a crime.

In a similar vein, adultery should not be a crime. After all, we are now living in the 21st century. Arguably, adultery might still be relevant for purposes of family law namely, it could clearly serve as one of the possible grounds for divorce. Nevertheless, here it should be noted that many US jurisdictions have some form of no-fault divorce. Hence, a traditional i.e., fault-based ground like adultery need not be proven in those jurisdictions.

Some other forms of behavior that are proscribed under the Code should be not crimes because the Code contains many relics of the relatively closed society of the past. In particular, the sundry provisions on flags and emblems hinder free speech and thus none should be illegal.

Another problem is that the penalties proscribed in the Code often seem excessive. For example, distribution of obscene pictures is punishable by a sentence of up to one year in prison or a fine of up to five million won.<sup>96)</sup> Yet, as was noted earlier, the Code does not attempt the difficult task of defining obscenity.

Finally, all or at least most criminal offenses should be listed in the Code itself

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95) If another example of a potentially anti-democratic provision is still needed, then one should consider the Code's definition of an organized criminal group as including a group whose purpose is to reject compulsory military service. The possible sanction for organizing or even joining such group is imprisonment for up to ten years or a fine of up to fifteen million won. ROK Penal Code, § 114.

96) ROK Penal Code, § 243.

rather than scattered across various statutes and enforcement decrees. Listing all offenses systematically in just one place would, at the very least, make Korean criminal law more “user-friendly” for lawyers and non-lawyers alike.

