
***Nullum Crimen, Nulla Poena Sine Lege* in Korean Criminal Law**

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Abstract

The principle of nullum crimen, nulla poena sine lege is the most important principle of Korean criminal law. It is commonly understood as being composed of four sub-principles: lex certa, lex praevia, lex stricta and lex scripta. It was given lip service under the authoritarian regimes, but the military rulers never felt restricted by those in exercising the state power. After democratization, however, this principle has been actively pursued. Many legal scholars and civic organizations have argued that the task of criminal law is to protect citizens from the abuse of state authority as well as to fight against crimes. The legitimacy of a number of criminal law provisions in violation of this principle has been challenged in academic circles and in the courts. The principle of nullum crimen, nulla poena sine lege will play a crucial role in controlling and deterring the abuse of state authority in Korean society and freeing the criminal law from the legislation of moral norms.

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I. Introduction

The principle of *nullum crimen, nulla poena sine lege* (literally, without law, there is neither a crime nor a punishment) is the most important principle of Korean criminal law. It is to place state authority under the control of law and protect the citizens from the arbitrary exercise of penal power. This principle is commonly understood as being composed of four sub-principles: *lex certa*, *lex praevia*, *lex stricta* and *lex scripta*.

The principle has its own constitutional and legal grounds in the Constitution and the Penal Code. Article 12 (1) of the Constitution provides that no punishment or “protective security measure”¹⁾ shall be imposed without law,²⁾ and Article 13 (1) of the Constitution stipulates that “No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time the act was committed.” Article 1 (1) of the Penal Code³⁾ uses the same language found in Article 12 (1) of the Constitution.

Under the authoritarian military rule, the illegitimate regimes made use of criminal law to oppress dissidents and control the people. Thus, rather than being viewed as a shield to protect citizens from crime, criminal law was seen as no more than an instrument to maintain the regime. Since democratization, however, the question whether the provisions of criminal law are against *nullum crimen, nulla poena sine lege* has been considered very seriously. This Article is to briefly review the principle of *nullum crimen, nulla poena sine lege* in Korean criminal law.

1) In Korean criminal law, there are two types of criminal sanctions: punishment and “protective security measures” (*boancheobun* or *Maßnahmen* in German). The Korean Constitution provides legal basis for this distinction, saying that no punishment or protective security disposition shall be imposed without law [The Constitution, § 12 (1)]. These two sanctions are distinguished in theory in that the first is imposed on those with the capability to be responsible for their past criminal conduct, while the second is used to rehabilitate criminals and protect society from any future crimes that non-rehabilitated criminals may commit. The second is prescribed mainly in special criminal acts.

2) The Korean Constitution [*heonbeop*] (Law No. 1, July 17, 1948, last revised on October 29, 1987, as Law No. 10), arts. 10.

3) The Korean Penal Code [*hyeongbeop*] (Law No. 293, September 18, 1953, last revised on January 20, 2004, as Law No. 7077), art. 1(1)

II. Lex Certa

1. Vague for Vagueness

Lex certa means that the law should not be vague as to what kind of conduct is prohibited and what kinds of punishments shall be imposed. It is a Continental law version of the common law principle of “void for vagueness.”⁴⁾ Based on *lex certa*, constitutional review of vague languages in criminal law has been vigorously pursued.

For instance, Article 4 of the Family Ritual Standard Act⁵⁾ was held unconstitutional by the Constitutional Court.⁶⁾ The Act prohibited activities based on vanity in the family rituals, providing exculpatory condition that “the activities *within the reasonable scope of the true meaning* of the family rituals shall not be prohibited.”⁷⁾ The Court held the concepts of “reasonable scope” and “true meaning” are not easy for people to understand what they exactly mean and do not provide people with clear standard how to behavior, thus are likely to be abused by law enforcement authority.⁸⁾ Article 2-2 of the Protection of Minors Act unconstitutional for the language of “comics which are likely to foster obscenity or cruelty to minors or may cause urge of crime to minors” was held to be vague and consequently violate the principle of *lex certa*.⁹⁾ The Supreme Court also held the language of “good public morals” in the Rules of Foreign Exchange Control unconstitutional.¹⁰⁾

2. Prohibition of Indeterminate Sentence

Lex certa also requests that the kind and scope of criminal sanction be specifically provided and indeterminate sentence be prohibited. But indeterminate sentence may be allowed if maximum and minimum period of the sentence is determined (“relative

4) *Connally v. General Construction Company*, 269 U.S. 385 (1926).

5) Family Ritual Standard Act [*kajeong euirye e kwanhan peopryul*] (Law No. 4637, December 27, 1993).

6) Decision of October 15, 1998, Korean Constitutional Court, 98 HeonMa 168.

7) Family Ritual Standard Act, art. 4(Italics added)

8) Decision of October 15, 1998, Korean Constitutional Court, 98 HeonMa 168, at 3, Na.

9) Decision of February 28, 2002, Korean Constitutional Court, 99 HeonKa 8.

10) Decision of June 18, 1998, Korean Supreme Court, 97 Do 2231.

indeterminate sentence”). For instance, the Medical Treatment and Custody Act provides when “medical treatment and custody” is given for those who have committed any offense in the state of mental handicap or narcotic, alcohol or other drug addiction,¹¹⁾ commitment to a medical treatment and custody facility shall not exceed fifteen years.¹²⁾ The Juvenile Act provides in case where a juvenile commits a crime punishable by imprisonment of a limited term of two or more years, a sentence shall specify the maximum and minimum terms within the scope of such term of punishment; the maximum term shall not exceed ten years, and the minimum term shall not exceed five years.¹³⁾

III. Lex Praevia

1. Prohibition of Ex Post Facto Laws Unfavorable to the Defendant

Lex praevia is the principle that prohibits laws that are *ex post facto*, and is provided in Article 13(1) of the Constitution and Article 1(1) of the Penal Code. Article 1(1) provides: “The criminality and punishability of an act shall be determined by the law in effect at the time of the commission of that act.” Retroactive criminal laws destroy the trust of the people in existing laws.

A notorious case of punishment by *ex post facto* laws is the case of Mr. *Cho Yong-Soo*, who was the president of a progressive newspaper, *Minjok Ilbo*. He was accused of and executed for the violation of the Special Act for Punishment of Special Crimes after the May 16 coup of 1961. The Special Act was legislated in June 22, 1961, and its appendix stated the Act shall be retroactively applicable for three years and six months before promulgation.¹⁴⁾

Lex praevia is not applied when retroactive application of *ex post facto* law is *favorable* to the defendants. Article 1(2) provides: “When a law is changed after the

11) Medical Treatment and Custody Act [*chiryokamho beop*] (Law No. 7655, August 4, 2005), arts. 1, 2.

12) *Id.* art. 16(2).

13) Juvenile Act [*sonyon peop*] (Law No. 4929, July 24, 1958, last revised on January 15, 1995, as Law No. 4929), art. 60(1).

14) Special Act for Punishment of Special Crimes [*teuksubeomchoe cheobeol e kwanhan teukbyeolbeop*] (Law No. 633, June 22, 1961), appendix.

commission of a crime so that the act thereby no longer constitutes a crime under the new law, or the punishment therefore under the new law becomes less severe than under the previous law, the new law shall apply.”¹⁵⁾ Article 1(3) also provides: “When a law is changed after the sentence for a crime committed under the previous law has become final and such act thereby no longer constitutes a crime, the execution of the punishment shall be remitted.”¹⁶⁾

2. *The Scope of the Application of Lex Praevia*

1) Criminal Procedure

Lex praevia applies only to substantive criminal law, but not to rules regulating criminal procedures. In 1995, two retroactive laws were passed to overcome the statute of limitations which prevented the prosecution of former Presidents *Chun Doo Hwan* and *Roh Tae Woo* for leading a coup d’etat and killing many civilians in the Kwangju area in 1980. The first is the Act on the Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order.¹⁷⁾ It excludes the application of the statute of limitations to crimes of insurrection, rebellion, and benefiting the enemy. The second is Special Act on the May 18 Democratic Movement.¹⁸⁾ It allows prosecution of the leaders of the 1979 *coup d’etat* and the Kwangju massacre by the military junta in 1980. Although the constitutionality of these two Acts were challenged in the Korean Constitutional Court, the Court ruled that the laws were constitutional since *lex praevia* pertains to punishability, not prosecution.¹⁹⁾

Although two former presidents and other former military leaders were punished, there are still a number of governmental officials or agents who remain unpunished despite having tortured citizens, having distorted substantial facts to convict them, and even having killed them during interrogation. Although the Presidential Truth Commission on Suspicious Deaths, which was established in 2001,²⁰⁾ recognized

15) The Korean Penal Code, art. 1(2).

16) *Id.* 1(3).

17) Law No. 5028, December 21, 1995.

18) Law No. 5029, December 21, 1995.

19) Decision of February 16, 1996, Korean Constitutional Court, 86 Heon Ba 7 · 13.

their crimes, they are free from prosecution because a given period in the statute of limitations has expired. In the Criminal Procedure Code, the most serious crimes such as murder are subject to statutory limitations of only up to fifteen years.²¹⁾ This short period of statutory limitation is a major impediment to legal redress.

The public got very upset about this type of legal impossibility to punish the criminals, and civic organizations and human rights groups strongly argued for the establishment of a law to prosecute them. However, like American jurisprudence,²²⁾ the majority of Korean jurisprudence maintains that retrospective application of an amended limitation period to time-barred prosecution violates the Ex Post Facto principle because it may invoke arbitrary and oppressive exercise of state authority to punish, and may infringe upon the citizen's expectation of being free from punishment, while extending a limitation period before a given prosecution is barred does not violate this principle.

2) Judicial Interpretation

Lex praevia does not apply to case law made by courts. The issue here is whether or not new judicial interpretation that criminalizes the conduct of the defendant may be retroactively applicable even if the conduct was not punishable in accordance with existing judicial interpretation when he/she was prosecuted. The Supreme Court has held *lex praevia* has nothing to do with judicial interpretation for the term "law" in that Article 1(1) merely indicates legislations made by the National Assembly, and the change of judicial decision does not mean the change of the law itself, stating that "The ground for criminal sanction is not judicial decision but law, and the change of judicial decision regarding a criminal provision does not change the provision itself but confirm the contents of the provision."²³⁾

20) The Special Act for Truth-Finding of Suspicious Deaths [*euimunsa chinsang kyumyeong e kwanhan teukbyeolbeop*], Law No. 6170, January 15, 2001, last revised on December 5, 2002 as Law No. 6750.

21) The Korean Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, last revised Dec. 13, 1997 as Law No. 5454), art. 249.

22) *Commonwealth v. Guimento*, 491 A.2d 166 (Pa. Super. Ct. 1985); *People v. Shedd*, 702 P.2d 267 (Colo. 1985); *State v. Hodgson*, 740 P.2d 848 (Wash. 1987); *State v. Creekpau*, 753 P.2d 1139 (Alaska 1988); *State v. Nunn*, 768 P.2d 268 (Kan. 1989); *Commonwealth v. Barger*, 524 N.E.2d 829 (Mass. 1989); *Commonwealth v. Rocheleau*, 533 N.E.2d 1333 (Mass. 1989); *People v. Chesebro*, 463 N.W.2d 134 (Mich. Ct. App. 1990); *State v. Cookman*, 920 P.2d. 1086 (Or. 1996).

For instance, the Supreme Court retroactively renewed the interpretation of the concept “documents” in Article 231(1) of the Penal Code by including photocopied documents into the “documents,” and punished the defendant for the crime of uttering falsified private document.²⁴⁾ The Court also retroactively applies its new interpretation of “official document” covering driving license, and punished the defendant for the crime of unlawful uttering official document in Article 230 of the Penal Code.²⁵⁾

Although *lex praevia* does not apply to case law made by the courts, it is necessary to note that mistake of law may apply to the defendant. The defendants may be excused for committing a crime if they reasonably mistook the law. For instance, if they had reasonably believed their act does not constitute a crime according to the overruled previous case law, then they are not punished.²⁶⁾

3) “Protective Security Measure”

The Korean Supreme Court²⁷⁾ and the Korean Constitutional Court²⁸⁾ have held that *lex praevia* does not apply to retroactive imposition of “protective security measure” in principle because it -unlike punishments- exists to protect society from future danger from criminals.

Currently available “protective security measure” are as follow: “protective surveillance” for felonies who have probabilities of repeating crimes,²⁹⁾ “medical treatment and custody” for those who have committed any offense in the state of mental handicap or narcotic, alcohol or other drug addiction and who are considered to be a danger of recidivism and who need special treatments,³⁰⁾ “community service

23) Decision of September 17, 1999, Korean Supreme Court, 97 Do 3349.

24) Decision of September 12, 1989, Korean Supreme Court, 87 Do 506.

25) Decision of April 19, 2001, Korean Supreme Court, 2000 Do 1985.

26) The Korean Penal Code, art. 16.

27) Decision of February 9, 1982, Korean Supreme Court, 81 Do 2897; Decision of October 28, 1986, Korean Supreme Court, 86 Do 1626, 86 KamDo 195; Decision of February 24, 1987, Korean Supreme Court, 86 KamDo 286; Decision of December 8, 1995, Korean Supreme Court, 95 Do 2162, 95 KamDo 100.

28) Decision of April 1, 1992, Korean Constitutional Court, 89 HeonMa 17 · 85 · 100 · 109 · 125 · 167; Decision of November 28, 1996, Korean Constitutional Court, 95 HeonBa 20; Decision of November 27, 1997, Korean Constitutional Court, 92 HeonBa 28; Decision of March 21, 2001, Korean Constitutional Court, 99 HeonBa 7.

29) Protective Surveillance Act [*bhokwanchal deung e kwanhan beopryul*] (Law No. 4059, December 31, 1988, last revised on January 20, 2004, as Law No. 7078), arts. 1, 3.

order” and “order to take lecture” in the Penal Code³¹⁾ and the Juvenile Act³²⁾ are imposed in the event when the execution of sentence is stayed, and “security surveillance” for anti-state criminals including the convicts for the violation of the National Security Act.³³⁾

”Protective custody” (*bohokamho*) for violent felonies under the Society Protection Act³⁴⁾ was abolished in 1989. “Security custody”(boankamho) of leftist dissidents under the Social Security Act³⁵⁾ was also repealed in 1989. Both of “protective security measures” were criticized for they were *de facto* indeterminate imprisonments.

IV. Lex Stricta

Lex stricta prohibits the use of analogy to punish a conduct when there is no specific criminal provision to punish that conduct. The use of analogy beyond possible meaning of language of the legal provision is a creation of law by judges’ extension of the scope of punishability by interpretation, and thus violates the principle of division of powers.

For instance, the Supreme Court held it is against *lex stricta* to punish the defendant for slaughtering a black goat in unsanitary place by Article 2 of the Processing of Live Stock Act for the Article covered only “cattle, horses, sheep, pigs, chicken and ducks” at the time of the slaughter.³⁶⁾ It is held against *lex stricta* to interpret the language of “sale of medicines” in the Pharmacist Act including “export

30) Medical Treatment and Custody Act [*chiryokamho beop*] (Law No. 7655, August 4, 2005), arts. 1, 2.

31) The Korean Penal Code, art. 62-2.

32) Juvenile Act [*sonyon beop*] (Law No. 4929, July 24, 1958, last revised on January 15, 1995, as Law No. 4929), art. 32(2), 32(3).

33) Security Surveillance Act [*boankwanchal beop*] (Law No. 4132, June 16, 1989, last revised on October 16, 2004, as Law No. 7227), arts. 1, 3.

34) Society Protection Act [*sahoeboho beop*] (Law No. 3286, December 18, 1980, last revised on December 12, 1996 as Law No. 5179).

35) Society Security Act [*sahoeancheon beop*] (Law No. 2769, July 16, 1975, last revised on December 4, 1987, as Law No. 3993).

36) Decision of September 28, 1977, Korean Supreme Court, 77 Do 405. After this decision, “goat” was added in Article 2.

of medicines.”³⁷⁾ It was held to violate *lex stricta* to punish the defendant for downloading a computer file of a design drawing in his company’s computer by Article 329 of the Penal Code for the Article only punishes stealing of “tangible property”, but not information.³⁸⁾ The Court also held it is against *lex stricta* to interpret “self-surrender” as “self-surrender before the crime is disclosed” since such interpretation extends the scope of punishability beyond possible meaning of language of the legal provision.³⁹⁾

V. Lex Scripta

Lex scripta requests the judges to depend only upon written legislation made by the National Assembly to determine guilt and punishment. For instance, the Supreme Court held that an ordinance of a local autonomous entity is against *lex scripta*. In 1992, the provincial assembly of Kyoungbook Province made an ordinance to punish those who refuse to make an oath, give an expert opinion or testify by maximum of three year imprisonment or 100,000 Won fine, and punish those who provide false testimony or expert opinion after oath by maximum of three year imprisonment. There exists no legislation to delegate an authority to provide punishment to the local entity. The Court found this ordinance violates Article 12 (1) of the Constitution.⁴⁰⁾

Lex scripta prohibits the use of customary criminal law. This is different from the Civil Code, which provides: “If there is no provision in Acts applicable to certain civil affairs, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply.”⁴¹⁾ However, if customary law is favorable for the defendant, its use is not prohibited. Article 20 of the Penal Code provides “An act which is conducted in accordance with Acts and subordinate statutes, or in pursuance of accepted business practices, or other action which does not violate the *social norms* shall not be punishable,”⁴²⁾ and the “social norms” here covers customary law

37) Decision of March 28, 2003, Korean Supreme Court, 2001 Do 2479.

38) Decision of July 12, 2002, Korean Supreme Court, 2002 Do 745.

39) Decision of March 20, 1997, Korean Supreme Court, 96 Do 1167.

40) Decision of June 30, 1995, Korean Supreme Court, 93 Chu 83.

41) The Korean Civil Code [*minbeop*] (Law No. 471, February 22, 1958, last revised on March 31, 2005, as Law No. 7427), art. 1.

42) The Korean Penal Code, art. 20.

in a society.

Lex scripta also restricts the use of “blank criminal law,” which delegates the requirements of crime and punishment to inferior rules, administrative orders or local government’s ordinance. The Constitutional Court held “blank criminal law” is allowed only when such a delegation is inevitable for legislative technique or urgent for other reasons; “blank criminal law” itself could provide ordinary people with a general feature of what is punishable; and “blank criminal law” itself defines the kinds, maximum and scope of punishment.⁴³⁾

VI. Principle of Appropriateness

1. *New Sub-principle to Deter Over-criminalization and Over-penalization.*

Besides these traditional four sub-principles of *nullum crimen, nulla poena sine lege*, the principle of appropriateness is discussed as a new sub-principle to deter over-criminalization and over-penalization. This new sub-principle requires that criminal law be *prima ratio*, not *ultima ratio*, for social control; criminal law be demoralized from the standpoint of “harm principle”; excessive heavy punishment be prohibited, and proportionality be maintained between crime and punishment.

The constitutional grounds for this sub-principle are “human dignity and value” in Article 10 of the Constitution,⁴⁴⁾ which is the most fundamental right of people and the principle of “prohibition of excessive restriction” in Article 37(2) of the Constitution, providing even though restriction of the freedoms and rights of citizens is imposed when necessary for national security, the maintenance of law and order or for public welfare, no essential aspect of the freedom or right shall be violated.⁴⁵⁾

43) Decision of July 8, 1991, Korean Constitutional Court, 91 HeonKa 4; Decision of July 20, 2000, Korean Constitutional Court, 99 HeonKa 15; Decision of October 27, 2000, Korean Constitutional Court, 2000 Do 1007.

44) The Korean Constitution [*heon beop*] arts. 10.

45) *Id.*

2. Constitutional Review

1) Disproportionately Heavy Punishment

The Constitutional Court has rejected an argument that death penalty violates the principle of appropriateness.⁴⁶⁾ Although acknowledging death penalty as “an institutional killing by state under the name of law,”⁴⁷⁾ the majority opinion maintains that death penalty is “a punishment that has a public purpose to prevent crimes by deterring the general mass psychologically, to defend society by removing the sources of social evils permanently.”⁴⁸⁾ Also, the majority is of position that death penalty was chosen “a ‘necessary evil,’ and a corroboration of instinctive fear of death and the desire to retaliate against crimes.”⁴⁹⁾ They held:

The right of life is indeed legally reserved by Article 37(2) of the Constitution. Even so, due to the fact that restriction of the right results in a total deprivation of life, the death penalty does not violate the Constitution only when it is applied in the most exceptional cases where it is absolutely necessary for protecting other’s lives or public interests and it is within the extent of the principle of proportionality. ... The crime of murder, prescribed by Article 250(1) of the Criminal Law, stipulates the criminal act of negating human life, and among these there may be atrocious ones that can be categorized as inhumane from the type of method and graveness of the result. Thus if we are to deem the death penalty constitutional as a type of punishment then the reason for it is there is no choice but to negate a convict’s life who negates another person or persons’ life which is equally valuable. This does not violate the principle of proportionality and thus is constitutional.⁵⁰⁾

Based on the principle of appropriateness, however, the Constitutional Court invalidated some overly heavy penalty provisions in special criminal acts for they were disproportionate.

46) Decision of November 28, 1996, Korean Constitutional Court, 95 HeonBa 11.

47) *Id.* 3, Na, (5).

48) *Id.* 3, Na, (3), (Na).

49) *Id.* 3, Na, (4).

50) *Id.* 3, Na, (3), (Ka) & (4).

First, a few provisions of the Act for Heavier Punishment of Specific Crimes⁵¹⁾ were held unconstitutional. The Article 5-3(2) of the Act imposed death penalty, life imprisonment or minimum of ten year imprisonment to negligent drivers who ran away after they injured a victim to let the victim die. This punishment was heavier than the punishment of intentional homicide, which is death penalty, life imprisonment or minimum of five year imprisonment.⁵²⁾ The Constitutional Court held this provision is against the principle of “prohibition of excessive restriction” in Article 37(2) of the Constitution, and thus it is unconstitutional.⁵³⁾

The Article 11(1) of the Act was also held unconstitutional.⁵⁴⁾ The Article provided that convicts of purchase or possession of drugs with a purpose of selling might be sentenced to death, life imprisonment, or over 10 year imprisonment. The Court held this aggravated punishment is “an excessive abuse of state power to punish”⁵⁵⁾ and it “forbids the court from sentencing probation, and extremely narrows the judge’s choice of punishment and discretion.”⁵⁶⁾ Thus, the Court concluded that this punishment is unconstitutional.

Second, the Article 13 of the National Security Act was struck down in 1996. It stipulated that should a person, who has already been convicted for the violation of the Act, again violated the Act again, he/she may be sentenced up to death penalty. Should a person, who has committed an anti-state crime, repeatedly commit another anti-state crime, that person is to be blamed for this and the punishment should become heavier as a result.

In this case, Articles 7(1) and 7(5) were in issue. Under Article 7(1) of the Act, “praising, encouraging, or aligning with an anti-state organization or benefiting an anti-state organization in any other method” is punished by up to a maximum of seven years’ imprisonment.⁵⁷⁾ “Production, import, duplication, possession, transportation, circulation, sale or acquisition of materials, including documents and pictures” is also criminalized by Article 7(5).⁵⁸⁾ These two provisions were to control

51) The Act for Heavier Punishment of Specific Crimes [*Teukcheong peomchoe kachungcheopol e kwanhan beopryul*], Law No. 1744, February 23, 1966, last revised on October 16, 2004 as Law No. 7226.

52) The Korean Penal Code, art. 250(1).

53) Decision of April 28, 1992, Korean Constitutional Court, 90 HeonBa 24.

54) Decision of November 27, 2003, Korean Constitutional Court, 2002 HeonBa 24 .

55) *Id.* 4, Na, (3).

56) *Id.* 4, Na, (4).

57) National Security Act, art. 7(1).

the leftists or radical activities and have been frequently abused to infringe the freedom of expression. The Constitutional Court held the Article 13 is unconstitutional for it could make repeated violators of the Articles 7(1) and 7(5) face death penalty, stating:

Although it is basically within the discretion of the legislator to determine the kind and extent of a punishment, this legislative discretion cannot be infinite. When establishing the kind and extent of the punishment of a crime, the call for respect and protection of human dignity from punishment in Article 10 of the Constitution must be answered. Also ... the extent of punishment should be determined so that the principle of individualization of punishment could be applied. And finally the punishment should match the nature of a crime and responsibility, maintaining the adequate proportion. ... If the repeated anti-state crime was a relatively insignificant one such as Articles 7(5) and 7(1) of the National Security Act, to allow the sentencing up to death penalty just because it was a repeat of an antinational crime is a case of egregious disproportion of punishment in the whole system and cannot be justified. Even the call for protection of the state and people would not be able to overcome this disproportion.”⁵⁹⁾

In 2006, the Criminal Division of the Supreme Court requested the Constitutional Court to review the Article 53(1) of the Military Penal Code.⁶⁰⁾ The Article is to punish the murder of high-ranking officials, providing only death penalty as a punishment. In accordance with the rationale of the 2003 decision, the Article is expected to be held unconstitutional.

2) Moralism Legislation

On the other hand, the Constitutional Court has been reluctant to strike down criminal provisions which are moral in nature. For instance, in 1990 the Korean Constitutional Court rejected the argument that treating adultery as a crime is

58) *Id.* art. 7(5).

59) Decision of November 28, 2002, Korean Constitutional Court, 2002 HeonKa 5.

60) “It is Wrong to Punish Murder of a Higher Official Only by Death Penalty,” *Law Times* [*beopryul shinmun*] (September 30, 2006).

unconstitutional,⁶¹⁾ stating: “It is inevitable that adultery committed by married persons is punishable for the purpose of maintaining sound sexual morality and a system of monogamist marriage, for ensuring family life, for protecting the duty of sexual fidelity between spouses, and for preventing social ills caused by adultery.”⁶²⁾

Eleven years later, on October 25, 2001 the Constitutional Court reconfirmed its previous position, reiterating the main rationale behind its 1990 decision.⁶³⁾ However, the majority opinion rendered a new noteworthy statement. The eight-to-one majority opinion paid close attention to the following factors: (i) that the legal conscience of the public regarding sex had rapidly changed; (ii) the crime of adultery was sometimes abused as a means of obtaining consolation awards; and (iii) the 1990 revision of the Korean Civil Code recognized the wife’s right to share in the marital property after divorce, even if the property was registered under her husband’s name.⁶⁴⁾ The majority opinion then offered a suggestion to the legislature that it should survey the trends in the legal conscience of the public and that it should seriously consider the arguments in favor of abolishing the crime of adultery.⁶⁵⁾

With moralist approach to pornography, the Supreme Court has also upheld the crime of distribution or manufacture of obscene materials. It held the criminal sanction is to be taken if by the “generally accepted sound idea of society” a material as a whole is judged to appeal to the prurient interest, and contain detailed sexual depiction and description offending “normal sexual sense of shame” and infringing “good moral sense.”⁶⁶⁾ In this position, the value of freedom of expression is partially considered in the definition and accordingly a number of literature and artistic expressions have been punished as obscene materials. For instance, Alicia Steimberg’s novel, *Amatista*,⁶⁷⁾ and *Chang Chung-Il*’s novel, *Tell Me Lie*,⁶⁸⁾ were held

61) Decision of Sep. 10, 1990, Korean Constitutional Court, 89 HeonMa 82. Regarding the crime of adultery, see Kuk Cho, “The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women,” JOURNAL OF KOREAN LAW, Vol. 2, Issue 1(2002).

62) Decision of Sep. 10, 1990, Korean Constitutional Court, 89 HeonMa 82.

63) Decision of Oct. 25, 2001, the Korean Constitutional Court, 2000 HeonBa 60.

64) Korean Civil Code [*minbeop*], art. 839-2.

65) Decision of Oct. 25, 2001, the Korean Constitutional Court, 2000 HeonBa 60.

66) Decision of October 3, 1970, Korean Supreme Court, 70 Do 1879; Decision of December 9, 1975, Korean Supreme Court, 74 Do 976; Decision of February 10, 1995, Korean Supreme Court, 94 Do 2266; Decision of June 16, 1995, Korean Supreme Court, 94 Do 1758; Decision of August 22, 1997, Korean Supreme Court, 97 Do 937.

67) Decision of December 26, 1997, Korean Supreme Court, 97 Nu 111287.

to be “obscene material.”

Recently the Korean Constitutional Court applied a new “liberal” standard, limiting the scope of punishable obscenity to “the sexual expressions that destroy human dignity” such as “hard-core pornography,” and emphasized on the role of the “mechanism of ideas’ competition” before punishing obscene materials.⁶⁹⁾ However, this new standards has not been practically accepted by law enforcement authorities and lower courts.

VI. Conclusion

The principle of *nullum crimen, nulla poena sine lege* was given lip service under the authoritarian regimes, but the military rulers never felt restricted by those in exercising the state power. After democratization, however, this principle has been actively pursued. Many legal scholars and civic organizations have argued that the task of criminal law is to protect citizens from the abuse of state authority as well as to fight against crimes. The legitimacy of a number of criminal law provisions in violation of this principle has been challenged in academic circles and in the courts. The principle of *nullum crimen, nulla poena sine lege* will play a crucial role in controlling and deterring the abuse of state authority in Korean society and freeing the criminal law from the legislation of moral norms.

KEY WORDS: *nullum crimen, nulla poena sine lege*, *lex certa*, *lex praevia*, *lex stricta*, *lex scripta*, appropriateness, proportionality

68) Decision of October 27, 2000, Korean Supreme Court, 98 Do 679.

69) The Decision of April 30, 1998, Korean Constitutional Court, 95 HeonKa 16.