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Understanding Criminal Law in Korea*

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I. Introduction

Substantive criminal law is a complete set of legal norms that define criminal offenses and prescribe the categories and scope of criminal sanctions applicable to individual offenses. To put it concisely, criminal law deals with crime and punishment (and other criminal sanctions). A national regime of substantive criminal law performs two important functions. First, it protects the legal interests of citizens by deterring criminal behavior. Second, it should guarantee citizens freedom from undue government interference. The history of modern Korean criminal law can be summarized as the struggle to reconcile these two conflicting goals.

The main purpose of this article is to provide an overview of substantive criminal law in Korea.[1)] First, the sources of Korean criminal law are identified, accompanied by a discussion of issues around the principle of legality. Second, some of the basic concepts and principles set out in the Criminal Act of 1953 (CA), the most important source of Korean criminal law, are outlined. Third, new trends and transformative efforts to modernize the CA and other criminal statutory provisions are briefly discussed.

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1) In this chapter, Korea refers to the Republic of Korea (South Korea), unless otherwise specified.

II. The Sources of Korean Criminal Law

A. Statutory Provisions

1. The Principle of Legality

The sources of criminal law have to be understood in the context of the most fundamental principle of modern criminal law; that is, the principle of legality or *nullum crimen sine lege*, *nulla poena sine lege* (*nullum crimen sine lege* below), which means "no crime without law, no punishment without law."[2] The main purpose of this principle is to protect citizens from the arbitrary governmental exercise of penal power, and it is achieved by separating legislative from executive and judicial powers. The principle also aims to give citizens fair notice of what activities are prohibited and the consequences of committing a crime, thereby providing them with sufficient information on whether to proceed with a certain activity. Four subprinciples of the principle of legality have traditionally been identified: *lex certa* (the principle of certainty), *lex praevia* (the principle of non-retroactivity), *lex stricta* (the principle against analogy), and *lex scripta* (the principle against uncodified or unwritten criminal provisions).[3]

The principle of legality has its own constitutional grounds in the Korean Constitution. Article 12(1) provides that no person shall be punished, placed under measures of correction and prevention, or subject to involuntary labor except as provided by "act." In addition, Article 13(1) declares *lex praevia* by stipulating that no citizen shall be prosecuted for conduct that does not constitute a crime under an "act" in force at the time the conduct was committed.[4] In these clauses, "act" means a formal statute passed by the National Assembly, Korea's legislative authority. Therefore, in principle, the statutory provisions that define criminal offenses and prescribe criminal sanctions are the only source of criminal law.

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2) For an overview of this principle in Korean criminal law, see Kuk Cho, *Nullum Crimen, Nulla Poena Sine Lege in Korean Criminal Law*, 6(1) J. Korean L. 147 (2006).

3) Claus Kreß, Poena Nullum Crimen Sine Lege (2010); Kuk Cho, *supra* note 2, at 148.

4) Hyungbeob [Criminal Act] art. 1 para. 1 also asserts *lex praevia* by providing that "the criminality and punishability of an act shall be determined by the law in effect at the time of the commission of that act."

According to the Korean Constitutional Court, determining what conduct should be deemed criminal and how to punish such crimes is for the legislature to decide, with full consideration of the nation's history and culture, the times in which the legislation is drafted, the values or legal sentiments of the general public, criminal justice policies on preventing crimes, as well as the nature of the conduct and the protectable legal interests.[5] However, legislators' discretion is limited by the constitutional mandate of *nullum crimen sine lege* as well as the principles of criminal law as *ultima ratio* and the principle of proportionality. The criminal law as *ultima ratio* means that "the exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least."[6] Under the *ultima ratio* principle, legislators are to consider whether less restrictive alternatives than criminal sanctions exist. The principle of proportionality means that punishment is balanced with the gravity of the crime and the character of the criminal in question. These principles have a constitutional basis in Article 10 (the protection of human dignity and values) and Article 37(2) (the prohibition of excessive legislation) of the Korean Constitution.

2. The Criminal Act of 1953 (CA)

The CA of 1953 was proclaimed on September 18, 1953, and came into force on October 3, 1953, superseding the Japanese Criminal Code of 1908, which had been imposed upon the Korean people during the Japanese colonial period and had remained in effect after liberation. The CA was the first congressional act passed by the National Assembly after the establishment of the Korean government in 1948. Despite several amendments and repeals of provisions declared unconstitutional by the Constitutional Court, the basic structure and content of the CA have remained largely unchanged. To this day, it is still the most important source of criminal law in Korea.

3. Special Criminal Statutes

Although serving as the state's last resort to prevent undesirable behavior, criminal law is not impervious to changes in society—including

5) Hunbeobjaepanso [Const. Ct.], Mar. 25, 2010, 2008Hunba84 (S. Kor.).

6) Hunbeobjaepanso [Const. Ct.], Feb. 26, 2015, 2009Hunba17 (S. Kor.).

the emergence of new dangers created by technological developments or innovative types of commerce, evolving ideas about justice, and changes in social values and community standards as to what constitutes an intolerable moral wrong. Considering the "fair notice" function of criminal provisions (under the principle of legality), it is desirable that all types of crimes and their sanctions be collated in a single statute. However, the situation in Korea is opposite to this desirable statutory framework. Korean legislators prefer amending or creating special criminal statutes rather than amending the CA directly, because the former approach is convenient and speedy, whereas the latter calls for a prudent inquiry and careful deliberation.[7] It has also been said that legislating special criminal statutes can call the public's attention to the seriousness and urgency of preventing those newly introduced crimes. This kind of legislative motive, which is known as penal populism, is easily combined with people's sentiments against heinous crimes.

Consequently, there are numerous special statutes other than the CA that deal with various criminal offenses and criminal sanctions. These special statutes can be divided into three categories.

First, there are special statutes criminalizing various types of unlawful activities that are not specifically covered by the CA of 1953. For example, the National Security Act[8] criminalizes a range of dangerous activities undertaken by "anti-government organizations."[9] These types of statutes also provide specific procedures deemed to be adequate to try those special crimes. Article 19 of the National Security Act, for example, allows for longer detention periods for those suspected of breaching the act.

Second, there are special statutes that aim to stipulate aggravated punishments for specific crimes that are already included in the CA. For

7) However, there is also a criticism to this view, which notes that there is no procedural difference between introducing a special criminal statute and revising the CA.

8) On the controversy surrounding the National Security Act, see Kuk Cho, *Korean Criminal Law under Controversy after Democratization*, 6(2) Rev. Korean Stud., 49, 50-53 (2003).

9) According to Article 2 of the National Security Act, "anti-government organization" is defined as a domestic or foreign organization or group that fraudulently uses the title of the government or aims at a rebellion against the State and which is equipped with a command and leadership system. Practically speaking, it refers in most cases to the North Korean government.

example, the Punishment of Violence Act increases the punishments for crimes such as assault, injury, and intimidation when such an act meets certain additional requirements. According to Article 2(2) of the act, for instance, if two or more people jointly commit a crime listed in CA Articles 257(1) (inflicting bodily injury), 257(2) (inflicting bodily injury on lineal ascendant), 260(1) (assault), 260(2) (assault on the lineal ascendant), 276(1) (unlawful arrest), 276(2) (unlawful arrest on the lineal ascendant), 283(1) (intimidation), 283(2) (intimidation on the lineal ascendant), 319 (trespass), 324(1) (coercion), 350 (extortion), and 366 (destruction of property), the punishment can be increased by up to one half of the punishment prescribed in the relevant CA provision.

Third, there are statutes whose primary aim to implement public policies by administrative means but also criminalize some unlawful activities for which regulation by solely administrative means is deemed insufficient. For example, the purpose of the Road Traffic Act is to ensure the safe and smooth flow of traffic by preventing and removing all dangers and obstacles to traffic on roads. To fulfill this purpose, the Act imposes various duties on pedestrians and drivers to maintain a safe and smooth flow of traffic and regulates driver's licenses and traffic signs. Criminal sanctions are imposed only for breaches of the most important duties, for example, DUI (Driving Under the Influence), unlicensed driving, injury caused by dangerous driving, and so on. For other kinds of infractions, only administrative sanctions are imposed.

All told, Korea has more than 1,000 individual statutes that have at least one provision regarding criminal offenses. This situation is problematic from the perspective of the principle of legality. Because criminal provisions are not concentrated in one statute, it is not possible for ordinary people to find all the statutes that may apply to an activity they are considering. The criminal law is thus hindered from serving the purpose of general prevention because it cannot be the basis for decision making. It also endangers the principle of *ultima ratio*, because in reality not all its myriad criminal provisions are applied, which means that those statutes are rather symbolic. Therefore, it can be said that Korean criminal law suffers from the phenomenon of "over-criminalization."[10] While enacting symbolic

10) This situation is not unique to Korean criminal law; *see* Douglas Husak, *The Criminal*

criminal provisions may serve to temporarily direct people's attention to certain social problems, it may weaken the deterrence effect of the criminal statutory regime as a whole because over-criminalization is inevitably followed by underenforcement problems. In spheres of special statutes on aggravating crimes, the anti-proportionality problem is exposed, because those statutes tend to impose severe punishments to satisfy the demands of penal populism. Fundamental reform of Korea's criminal statutory regime is needed to overcome the domination of special statutes.

B. Administrative Rulemaking and Municipal Ordinances

The legislature is responsible for establishing policies across a wide range of areas but does not have the in-depth expertise to carry out those tasks in their entirety, so the executive branch must sometimes be granted rulemaking authority to implement statutory programs in detail. Therefore, Articles 75 and 95 of the Korean Constitution allow presidential decrees and ordinances of the prime minister and other ministers to regulate matters delegated to them by congressional acts. This delegation authority enables the National Assembly to focus on fundamental issues rather than debating every technical detail required to fully implement the complex public policies that are characteristic of the contemporary state. While the area of criminal law is no exception in this regard, delegation is less desirable in light of the principle of legality. Therefore, the legislature can delegate authority to the executive branch to supplement statutory criminal provisions in what is known as the parental statute by administrative rulemaking only when the following requirements are strictly met: (1) there must be an urgent necessity or an unavoidable circumstance that makes it unable to provide precise details in the parental statute; (2) the statutory description of the elements of crimes must be specific enough for ordinary people to infer the scope of the punished conduct; (3) the parental statute must clearly prescribe the type, maximum severity, and scope of the applicable penalties.[11] When the legislature's delegation is legitimate and valid, administrative rulemaking combined with the parental statute can be regarded as a valid

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Law as Last Resort, 24(2) Oxford J. Legal Stud., 207 (2004).

11) Heonbeobjaepanso [Const. Ct.], May 29, 1997, 94Hunba22 (S. Kor.).

source of criminal law.

According to Article 22 of the Local Autonomy Act, local governments may impose penalties if there is a delegation of authority by legislation. Therefore, municipal ordinances can be a source of criminal law if legislated under a legitimate and valid delegation. However, concrete examples of municipal ordinances with criminal penalties are rare.

C. Are Precedents Source of Law?

Precedents refer to Supreme Court judgments regarding the interpretation and application of legal norms. Many provisions in the CA and other criminal statutes need to be interpreted by the criminal courts in order to be applied to specific cases. Because the principle of legality prohibits judge-made criminal sanctions and unwritten customary criminal law, precedents *per se* cannot be the source of criminal law. Therefore, a new judicial interpretation that criminalizes a defendant's conduct may be retroactively applicable even if the conduct was not punishable according to the judicial interpretation prevailing when the act was committed. The Supreme Court has explained that "the change of judicial decision regarding a criminal provision does not change the provision itself but just confirm the contents of the provision."[12] There have been many instances in which the Supreme Court retroactively applied a new judicial interpretation to a criminal provision. For example, the Supreme Court retroactively modified the meaning of "document" in Article 231(1) (counterfeit or alteration of a private document) to include photocopied documents, on the grounds that photocopied documents are duplicated with complete accuracy and regularly function as substitutes for original documents in important matters.[13]

The principle of *lex certa* requires criminal statutes to prescribe the criminal offenses and their penalties clearly enough so that anyone can predict what kind of acts are punishable and how they are punished and act accordingly. Too much dependence on judicial interpretations may

12) Daebeobwon [S. Ct.], Sep. 17, 1999, 97Do3349 (S. Kor.).

13) Daebeobwon [S. Ct.], Sep. 12, 1989, 87Do506 (S. Kor.). In the amendment of the CA in 1995, Article 237(2) was introduced to codify the Court's interpretation into the CA itself.

erode this principle because it suggests that statutory provisions themselves do not adequately guide citizens in their actions. While the phenomenon of dependence on case law is hardly unique to Korean criminal law,[14] the CA's frequent use of ambiguous and abstract terms exacerbates the problem. When the legislators of the National Assembly were drafting the first statute of the newly independent nation during the Korean War (1950-1953), they did not have the time, expertise, and resources to prepare a finely articulated statute that would meet the demands of the principle of legality. Therefore, strictly applying the principle of *lex certa* would mean that many provisions in the CA would not clear the hurdle of constitutionality, because the CA makes it difficult to understand what activities are prohibited by its statutory provisions without referring to the case law of the Supreme Court.

However, the Constitutional Court does not tend to strictly apply the principle of *lex certa*. Rather, it adopts a compromised approach, arguing that "somewhat broad concepts requiring supplementary judicial interpretation are not necessarily against the rule of clarity insofar as any person equipped with sound common sense and conventional legal awareness may understand the concepts with general methods of interpretation."[15] The Court added the following:

> Whether a legal norm is clear or not is determined by whether it provides predictability through a fair notice of its definition and whether it prevents law enforcement from arbitrary interpretation or enforcement through sufficient clarification of its meaning in the norm itself. The implication of a legal norm takes concrete shape when its texts are interpreted with full consideration of their legislative purpose, history, systematic structure, etc. Thus, whether a norm is against the rule of clarity will depend on whether that interpretation method can provide for a reasonable interpretation of its meaning.[16]

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14) For similar situations in German criminal law, see Introduction to German Law (Joachim Zekoll and Gerhard Wagner eds.), Kluwer Law International (2018), 537.

15) Heonbeobjaepanso [Const. Ct.], May 28, 2009, 2006Hunba109 (S. Kor.).

16) Heonbeobjaepanso [Const. Ct.], Nov. 25, 2010, 2009Hunba27 (S. Kor.).

The Constitutional Court takes this approach for somehow understandable reasons, considering the serious effects of declaring the ambiguous provisions of the CA unconstitutional. According to Article 47(3) of the Constitutional Court Act, criminal statutory provision deemed unconstitutional lose their effect retroactively.[17] This means that all convictions obtained under an unconstitutional provision since 1953 (or the date of amendment, if any) could be vacated in the retrial procedures established in Article 47(4) of the Act, which is not desirable in terms of legal stability. However, the Constitutional Court cannot avoid criticism that its approach deviates from the core meaning of the *lex certa* principle.

One example of a provision that lacks clarity is Article 311 (insult), which punishes a person who publicly insults another by imprisonment for not more than one year or a fine not exceeding KRW 2 million. The Constitutional Court found this article constitutional.[18] According to the court, it does not appear to be significantly difficult for an ordinary citizen with common sense and a conventional legal mind to predict what kind of acts are banned. The court wrote that "the Supreme Court sets forth an objective standard for interpreting what insult means, which poses no concern for arbitrary interpretation by law enforcement agencies." However, it cannot be readily said that the Supreme Court provides a reliable standard for reasonable interpretation. The Supreme Court interprets "insult" as "the expression, without factual specification, of an abstract judgment or contemptuous sentiment deemed likely to undermine the victim's external reputation."[19] According to the court, "a pathetic and pitiful person"[20] and "a trashy journalist (*ki-re-gi*)"[21] do fit the concept of "insult," but it ultimately found the defendants in both cases not guilty because those expressions can be justified under Article 20 of the CA. It thus seems in practice that "sound common sense and conventional legal awareness" do not help predict what expressions are—or are not—insults.

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17) When there was a previous ruling that declared the contested provision constitutional, the scope of retroactivity is limited to the time period after the date on which the previous ruling was made, according to the proviso to Article 47(3).

18) Heonbeobjaepanso [Const. Ct.], June 27, 2013, 2012Hunba37 (S. Kor.).

19) Daebeobwon [S. Ct.], Nov. 28, 2003, 2003Do3972 (S. Kor.).

20) Daebeobwon [S. Ct.], Jul. 10, 2008, 2008Do1433 (S. Kor.).

21) Daebeobwon [S. Ct.], Mar. 25, 2021, 2017Do17643 (S. Kor.).

III. Basic Structure and Core Concepts of the CA

A. Basic Structure of the CA

The CA is divided into two parts. Part I (Articles 1 to 86) sets out general principles of criminal liability and punishment. The principles set out in Part I apply not only to the offenses described in the CA itself but also to offenses described in other special criminal statutes. Part II provides the elements of individual offenses and the scope of punishments for those offenses.

Part I of the CA consists of four chapters. Chapter I deals with the temporal and geographic applicability of Korean criminal statutes. Chapter II presents the general principles of criminal liability, while Chapter III prescribes the types of punishments, sentencing principles, and matters related to the enforcement of punishments. Chapter IV, which has the fewest provisions, deals with rules on calculating prison sentence terms.

Part II of the CA consists of 42 chapters, each of which contains offenses grouped by the common legal interest that they offend. Offenses are divided into three categories according to the nature of legal interest – crimes against the state (e.g., insurrection, aiding the enemy, spying, abandonment of duties by public officials, abuse of authority, unlawful arrest, bribery, assaulting or deceiving public officials, perjury, false accusation, escaping from lawful detention); crimes against society (e.g., arson, obstruction of traffic, counterfeiting of currency, securities, or documents, distribution of obscene materials, public indecency, gambling); and crimes against individuals (e.g., homicide, assault, abandonment, kidnapping, intimidation, rape, defamation, insult, trespass, larceny, robbery, fraud, embezzlement, extortion, destruction of property).

As it is impossible to cover all the CA's provisions in this brief introduction to Korean criminal law, only some of the core principles and concepts in Part I are discussed below.

B. The Geographic Applicability of Korean Criminal Statutes

As for the scope of the geographic application of Korean criminal

statutes, including the CA Act, CA adopts the territoriality principle (Article 2), the active nationality principle (Article 3), the flag state principle (Article 4), the passive nationality principle (Article 5), and the protective principle (Article 6). These principles are collectively referred to as principles of jurisdiction.

Article 2 stipulates that the CA is applicable to all offenses committed on Korean territory, which means that foreigners can be prosecuted in Korea, even if the activity in question is not a crime in their home country. An interesting relevant issue is the meaning of "Korean territory" in regard to North Korea. This issue arises because Article 3 of the Korean Constitution declares that the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands. In the past, the dominant view has held that South Korean criminal provisions applied to the North Korean area, even though the South Korean government was not able to enforce those statutes because the area was illegally occupied by the North Korean government, which is regarded as an anti-government by the South Korean government. However, the opposite view, which argues that Article 4 of the Korean Constitution on the state's duty to pursue peaceful unification[22] should be considered to interpret the term "Korean territory" in Article 3 appropriately, is gradually gaining support. Under the latter view, Korean criminal statutes do not apply to activities in the North Korean area, because it is considered analogous to any other area outside the territory of Korea.

Article 3 stipulates the Act is applicable to all Korean nationals who commit crimes outside the territory of Korea. Therefore, Korean nationals who commit activities prohibited under Korean criminal statutes can be prosecuted in Korea, even when an activity is not prohibited by the criminal statutes of the country in which the activity was committed. For example, if a Korean national smokes or even possesses marijuana for the purpose of smoking it in a country where the drug has been legalized, he or she can still be prosecuted for breaching Narcotics Control Act.

Articles 5 and 6 serve to protect Korean nationals and the state by making it possible to prosecute offenses against Korean nationals and the

22) Article 4 provides that the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the basic principles of a free and democratic order.

state. The offenses enumerated in Article 5, including crimes concerning insurrection and foreign aggression, are unconditionally punishable, whether they are committed inside or outside Korean territory and regardless of whether Korean nationals or foreigners (or both) are involved. The other offenses not enumerated in Article 5 are punishable on the condition that a given offense is also punishable by the criminal law of the country in which it is committed.

While the universality principle is not mentioned in Part I, there are several provisions that individually adopt this principle in the CA and other criminal statutes. Under the universality principle, an offender can be prosecuted in Korea even when there is no link between the offense and the state, unlike other principles of jurisdiction. The universality principle applies to offenses in which all states share a common interest in prosecuting the wrongdoer and offenses that harm humanity as a whole. Human trafficking offenses (Articles 287 to 292 of the CA), crimes of genocide, crimes against humanity, and war crimes (Articles 8 to 14 of the Act on Punishment of Crimes under the Jurisdiction of the International Criminal Court) are examples of offenses that fall under universal jurisdiction.

C. General Principles of Criminal Liability

1. Three-Step Test of Criminal Liability

a. Framework

To convict a person of a crime, the court has to complete a three-step test: (1) the elements of the crime, (2) its unlawfulness, and (3) the person's guilt. This test originated in German criminal law doctrine.

First, an offender has to fulfill all the objective elements of an offense as provided in the relevant provision in Part II of the CA or in other special criminal statutes as well as the relevant provisions in Part I of the CA, if applicable; this is known as the *actus reus*. Additionally, the requisite subjective elements, such as intent or negligence (*mens rea*), must be fulfilled.

Second, it must be confirmed that the offender acted unlawfully. An act that meets all the elements of *actus reus* and *mens rea* is presumed to be unlawful. However, an offender can be acquitted if there is a cause of justification such as self-defense or necessity.

Third, the offender must be held personally accountable for the act. Personal guilt can be rejected if there is an acceptable excuse such as insanity or duress.

As in German criminal law, questions of unlawfulness or justification and questions of guilt or excuse are strictly distinguished in Korean criminal law, an approach that stands in contrast to common law jurisdictions. When a person is excused due to a lack of guilt, the conduct is still deemed a legal wrong. The distinction between justification and excuse has both theoretical and practical importance. For example, self-defense is not allowed against an offender whose act is justified, but it is allowed against an offender whose act is not justified but is excused. Section 1, Chapter II of the CA provides principles related to the components of the three-step test.

b. Elements of Crime—*Actus Reus*

In Section 1 of Chapter II, there are three provisions on the general objective elements of crimes: Articles 17 (causation), 18 (crimes committed through omission), and 19 (concurrence of independent acts).

Many criminal offenses require the offender to bring about a specific unlawful result. Article 17 declares that causation is needed for these types of offenses. That is, it shall be confirmed that the result was caused by the offender's act in order to blame the offender for the unlawful result. Sometimes, however, it is not possible to identify which precise act among concurrent acts that are independent of each other actually caused the unlawful result. Article 19 provides that each offender shall be punished for an attempted crime in this situation. Article 263 establishes the only exception to the principle in Article 19 by providing that two persons using violence against a victim shall be deemed co-principals of the crime of injury if it is not possible to identify precisely who or which act caused the injury. Five of nine justices of the Korean Constitutional Court argued that Article 263 is unconstitutional because it unduly shifts the burden to prove causality from the prosecutor to the defendant.[23)]

Crimes are normally committed through actions, but they are at times

23) Hunbeobjaepanso [Const. Ct.], Mar. 29, 2018, 2017Hunka10 (S. Kor.). However, the provision is still valid because six votes are needed for unconstitutionality to be declared.

committed through omissions, and some criminal offenses can only be committed through omission. For example, Article 319(2) criminalizes the refusal to leave a certain place such as a private home in spite of a request to leave from the legitimate occupier. Beyond cases like that, Article 18 provides for general liability for omissions that cause harm; it stipulates that a person who—having a duty to prevent danger from arising from or having brought about jeopardy by his or her own act—does not prevent danger from arising shall be punished for the results of such danger. For instance, a person can be convicted of homicide by failing to prevent the death of a victim incapable of self-protection, despite the fact that he or she had a duty to do so and had enough control over the situation that caused danger to the victim's life that death could have been prevented. In this vein, the Supreme Court affirmed the homicide conviction of Jun-seok Lee, the captain of the ferry *Sewol* because he quickly abandoned the sinking ship without carrying out any rescue efforts for passengers who were waiting inside the ship, thereby causing the death of 152 victims who could not escape before the ferry sank into the sea.[24)]

c. Elements of Crime—*Mens Rea*

Mens rea is needed to constitute a crime because it is wrong for society to punish those who have innocently caused harm. Part I of the CA provides two categories of *mens rea*: intention and negligence; one or the other is necessary for a crime to have been committed.

Most of the offenses in the CA are crimes of intention, which is the default mode of *mens rea*. If there is no mention of *mens rea* in the description of a certain criminal offense, this implies that intention is required to constitute the crime. For example, intention is necessary to constitute the crime of intentional killing in Article 250[25)] because there is no specific mention of *mens rea* in that provision. Under Korean criminal law, intention does not necessarily mean purpose[26)] or desire to commit a crime. It suffices

24) Daebeobwon [S. Ct.], Nov. 12, 2015, 2015Do6809 (S. Kor.).

25) In Korea, there is no distinction between murder and manslaughter. Therefore, Article 250 encompasses both voluntary manslaughter and murder as defined in common law countries.

26) There are crimes that specifically require purpose in addition to intention as *mens rea*.

that the actor foresaw the possibility of fulfilling all the elements of *actus reus* and still acted in a way that led to the result that constitutes the offense.

In contrast to crimes with intention, the element of negligence is specifically mentioned in the description of crimes with negligence. For example, Article 267 (death by negligence) provides that a person who causes the death of another through negligence shall be punished by imprisonment for not more than two years or by a fine not exceeding KRW 7 million. In crimes with negligence, the actor must have disregarded a duty to foresee and prevent a harmful outcome. Although Article 14 of the CA only specifically mentions inadvertent negligence, the concept of negligence also encompasses advertent negligence, which means that an actor foresaw the possibility of a harmful outcome but honestly intended to cause no harm.

d. Justificatory Defenses

Justification means that an act is exceptionally lawful, even though it fulfills all the *actus reus* and *mens rea* elements of a specific criminal offense. There are five provisions on justification in the CA: Articles 20 (justifiable acts), 21 (self-defense), 22 (necessity), 23 (self-help), and 24 (consent of victim). Justifiable acts, self-defense, and necessity are discussed briefly below.

Article 20 provides a general provision of justification by stipulating that an act that is conducted in accordance with relevant statutes or in pursuance of accepted business practices or does not violate social norms shall not be punishable. This provision, especially the part regarding social norms, functions as an antidote to the absurd expansion of punishment that may follow from criminal statutes but does not accord with the common sense of ordinary people as to what is morally right and wrong.

Self-defense is justified when there are reasonable grounds for an act that is performed in order to prevent an impending and unjust infringement of one's own or another's legal interest (Article 21(1)), while necessity is justified when there are reasonable grounds for an act that is performed in order to avoid impending danger to one's own or other's legal interest.

For example, to constitute a crime of insurrection under Article 87, the purpose of usurping the national territory or subverting the Korean Constitution must be established.

Self-defense and necessity both deal with exigent circumstances in which it is imperative that actors protect their own legal interests or those of others. The main difference between self-defense and necessity is whether an attack against the act of the offender which is ultimately justified is unlawful or not. Self-defense is only allowed against unlawful attacks. Because this situation involves "right versus wrong," the protected interest of the defender need not outweigh the infringed interest of the attacker. In other words, strict proportionality is not necessary. However, there has been criticism in both academia and the wider society that Korean courts tend to require quite strict proportionality to recognize self-defense, which means that such claims are rarely accepted. By contrast, necessity is allowed against lawful attacks under the rationale that there is an obligation to show solidarity with fellow citizens. In this situation of "right versus wrong," strict proportionality is required because no one can be coerced to sacrifice his or her own interests to protect the less important interests of others.

e. Excusatory Defenses

An excusatory defense is allowed when the act is unlawful but the actor ultimately does not bear any criminal responsibility or bears only diminished criminal responsibility. Because of the free will of human beings, it is always presumed that a given offender could have acted in a different way than committing an unlawful activity. However, there are situations when it is not proper to blame an actor because that actor's ability to exercise free will is substantially diminished. There are five provisions for these excusable situations: Articles 9 (criminal minors), 10 (insanity), 11 (speech and hearing impairments), 12 (duress), and 16 (mistake of law). The degree of criminal responsibility of minors, those suffering from insanity, and speech and hearing impairments are discussed briefly below.

According to Article 9, children under the age of 14 cannot bear criminal responsibility. However, children aged at least 10 but under 14 years may be referred to juvenile proceedings for the purpose of rehabilitation and education. Juvenile proceedings are conducted by judges affiliated with the family courts. While juveniles aged at least 14 and under 19 can bear criminal responsibility, they also may be referred to juvenile proceedings,

depending on the nature of the crime, the character of the offender, and other relevant considerations. Even though these cases do go through criminal proceedings, special provisions stipulated in the Juvenile Act are applied to the conduct of such proceedings to account for the distinctive traits of juveniles who are not fully developed.

Article 10 deals with the legal effect of insanity. According to Article 10(1), the act of a person who, because of a pathological mental disorder, is unable to discern situations or exercise control one's will, shall not be punished. Instead, the individual may be subject to medical treatment and custody if there is an application from the prosecution for those measures, as provided in the Act on Medical Treatment and Custody. However, if the offender is not totally lacking but only deficient in the above abilities, punishment may be mitigated under Article 10(2). These articles do not apply to the act of a person who, in anticipation of the danger of a crime, has intentionally incurred the relevant mental disorder. Previously, Article 10(2) provided for mandatory mitigation of punishment. However, the courts came in for strong criticism that they were abusing this provision by treating intoxicated offenders leniently. Efforts to limit the scope of this provision emerged in the context of sex crimes against children, after Doo-soon Cho, who brutally raped an eight-year-old girl, was sentenced to 12 years of imprisonment with mandatory mitigation because he was drunk at the time.[27] After this episode intensified the controversy over undue leniency for drunken sex offenders, a newly introduced Article 19 of the Act on the Protection of Children and Youth Against Sex Offenders provided that Articles 10(1), 10(2), and 11 of the CA would not apply to sexual violence against a child who was committed in a state of physical or mental incapacity induced by alcohol or drugs. Ultimately, Article 10(2) was amended to provide for only discretionary mitigation of the punishment; that provision remains in force.

In addition, Article 11 provides that punishment should be mitigated for acts committed by those with hearing and speech impairments. However, this provision has been heavily criticized for its discriminatory stance toward people with disability, because it automatically deems a

27) Jon Herskovitz & Christine Kim, *South Korea seeks new laws after brutal rape of child*, Reuters (Nov. 9, 2009 6:05 PM), https://www.reuters.com/article/idUSSEO229240/.

physical handicap to be a psychological handicap that impairs one's ability to discern situations or to exercise control over self-will.[28)]

2. Inchoate Crimes

a. Attempt

Criminal attempts refer to a situation in which an offense, as prescribed in the relevant provision, was not completed. Not every attempted crime is punished; only those for which there are specific provisions that criminalize such attempts carry the risk of punishment.

Section 2, Chapter II, Part I of the CA outlines three types of attempts: attempted crime (Article 25), voluntarily ceased crime (Article 26), and impossible crime (Article 27). If an intended crime is not completed or the intended result does not occur due to an obstacle contrary to the offender's intention, the punishment for that attempted crime may be mitigated (Article 25). If a person voluntarily ceases the criminal act that he or she began or prevents the result that would arise from its fulfillment, punishment shall be mitigated or remitted (Article 26). If completing a crime is impossible because the means adopted for committing the crime are not suitable or there was mistake in objects, the punishment may be mitigated or remitted. (Article 27). If it is absolutely impossible to complete a crime and there is no possibility of danger, even Article 27 is not applied, and the offender is acquitted.

b. Crimes of Conspiracy and Preparation

According to Article 28, a conspiracy or preparation to commit a crime that has not reached the stage at which the crime has begun to be carried out is punished only when there is a specific statutory provision such as Article 255 (preparations or conspiracies for intentional killing). In the CA, 13 of 42 crime types criminalize conspiracy or preparation. Conspiracy means a secret agreement between two or more persons to attempt to commit a crime. Preparation is regarded as a set of actions undertaken before commencing a crime. While conspiracy focuses on internal plot by

28) Japan repealed a similar provision in 1995, in response to calls for equal treatment from people with disability; Koya Matsuo, *The Development of Criminal Law in Japan since 1961*, *in* Law in Japan: A Turning Point 312, 318 (Daniel H. Foote ed., 2007).

two or more actors, preparation focuses on concrete activities intended to enable a crime to be carried out.[29)]

D. Punishment

1. Types of Punishment

Influenced by German criminal law, Korean criminal law adopts a twin-track system of criminal sanctions,[30)] by distinguishing 'punishments' (*hyeongbeol*; German *Strafen*) and 'measures of correction and prevention' *(boan cheobun*; German *Maßregeln der Besserung und Sicherung*). Punishments include sanctions that deprive convicts of their legal rights for the compensation of guilt. Thus, punishments presuppose the offender's culpability, which means the capability to recognize the illegality of a deed and to act accordingly.[31)] By contrast, measures of correction and prevention are focused preventing recidivism and reoffending by reducing or eliminating the danger(s) posed by an offender. The culpability of an offender is not a prerequisite for such measures. While the CA defines every kind of punishment available to the state, the statutory grounds for various measures of correction and prevention are distributed throughout special criminal statutes[32)] and in the CA itself.[33)] Punishments and measures of correction and prevention are not mutually exclusive; rather, they are complementary in many circumstances. For example, a sex offender who victimized a

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29) For a critical view of the expansive use of conspiracy and preparation in the CA, see Il-Tae Hoh, *Criminal Punishment for Inchoate and Thought Crimes: A Critical Analysis of South Korean Criminal Law*, 5(1) Yonsei L. J. 41-74 (2014).

30) For a concise description of Germany's twin-track system, see Johannes Kaspar, *Preventive Detention in German Criminal Law*, 4(1) Peking U. L.J. 79, 80-83 (2016).

31) Johannes Kaspar, *supra* note 30, 82.

32) E.g., protective detention and other measures for juveniles under Article 32 of the Juvenile Act, medical treatment and custody under the Act on Medical Treatment and Custody, disclosure of personal information and restriction on employment under the Act on the Protection of Children and Youth Against Sex Offenses, pharmacologic treatment (frequently called 'chemical castration') under the Act on Pharmacologic Treatment of Sex Offenders' Sexual Impulses, and electronic monitoring orders under the Act on Probation and Electronic Monitoring, etc., of Specific Criminal Offenders.

33) E.g., probation orders (Article 59-2, 62-2, 73-2), social service orders (Article 62-2), and orders to attend lectures (Article 62-2).

minor or minors will be punished by imprisonment for a certain period of time and sanctioned with measures such as disclosure of personal information and restriction on certain kinds of employment.

Article 41 of the CA prescribes nine types of punishments: the death penalty, imprisonment with prison labor, imprisonment without prison labor, deprivation of qualifications, suspension of qualifications, fine, detention, minor fine, and confiscation. Among these, the death penalty, punishments restricting physical freedom, and monetary punishments are discussed below.

The death penalty is the greatest possible punishment and reserved for the gravest offenses, such as murder, murder after rape, murder after robbery, insurrection, inducement of foreign aggression, espionage, and acts benefiting the enemy. Since the establishment of its independent government, the Republic of Korea has executed 902 people, mostly by hanging.[34] The last execution took place on December 30, 1997,[35] when 23 death row inmates were executed at once on short notice. Since the late President Kim Dae-jung took office in February 1998, Korea has not carried out any executions and has been categorized as "abolitionist in practice"[36] by Amnesty International. Despite this *de facto* moratorium on carrying out the death penalty, courts have continued to impose the death penalty, although not frequently. The Supreme Court requires lower courts to sentence a person to death only when there are special circumstances in light of an offender's degree of criminal liability and the purpose of criminal punishment and after thoroughly examining the sentencing conditions under Article 51.[37] An analysis of cases in which the death penalty was

34) Sangmin Bae, *South Korea's De Facto Abolition of the Death Penalty*, 82(3) Pacific Affairs 407, 412 (2009). Hanging is the only form of execution permitted by Article 66 of the CA.

35) For the history of death penalty policy in Korea, see Byung-Sun Cho, *South Korea's Changing Capital Punishment Policy: The Road from De Facto to Formal Abolition*, 10(2) Punishment & Society 171-205 (2008).

36) "Countries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions" are abolitionist in practice. *Death Sentences and Executions,* Amnesty International Global Report, 58 (2020).

37) Daebeobwon [S. Ct.], Mar. 24, 2006, 2006Do354 (S. Kor.); Daebeobwon [S. Ct.], Jan. 24, 2013, 2012Do8980 (S. Kor.).

affirmed reveals that courts tend to impose the death penalty when (1) the crime was very dangerous because it was committed by at least two people, (2) there are no mitigating factors as to motive, (3) the crime was committed with premeditation, (4) the crime was committed in a cruel manner, resulting in serious harm, and (5) the defendant does not show any remorse during the trial.[38] The most recent death penalty affirmed by the Supreme Court was in 2016.[39] As of December 2023, it is believed that Korea has 59 prisoners on death row, all of whom had been convicted of murder or aggravated murder. The constitutionality of the provisions regarding the death penalty has been challenged three times. While the first two challenges were unsuccessful,[40] the last one is still pending in the Constitutional Court. The second ruling from the Constitutional Court observed that the decision of whether to maintain or abolish the death penalty is not a matter for judicial review but a matter of legislative policy. Further, it noted that the death penalty effectively serves several legitimate legislative purposes, including deterrence of crime, by posing a psychological threat to people, rendering justice through the fair punishment of criminals, and protecting society by permanently blocking the possibility of recidivism by certain criminals. The court concluded that it cannot be determined that there exists any other penalty with the same effect as capital punishment in accomplishing the legislative purpose of crime deterrence. However, it is notable that four of nine justices dissented from the ruling and wrote individual opinions to that effect. Former President Moon Jae-in administration's position on the death penalty was ambivalent. The government voted in favor of a moratorium on the use of the death penalty at the Third Committee of the 75th UN General Assembly held on November 17, 2020. This was the first time that a Korean government voted in favor of a death penalty moratorium in the international community. However, the Ministry

38) Kwoncheol Lee, *Criminal Law and Procedure*, Introduction to Korean Law 163 (Korean Legislation Research Institute ed., 2013).

39) Daebeobwon [S. Ct. Full Bench Decision], Feb. 19, 2016, 2015Do12980 (S. Kor.). The defendant was a sergeant surnamed Lim, who intentionally killed five soldiers and wounded seven others during a shooting rampage in a border unit of the Army's 22nd Division in Goseong, Gangwon Province, in 2014.

40) Heonbeobjaepanso [Const. Ct.], Nov. 28, 1996, 95Hunba1 (S. Kor.); Heonbeobjaepanso [Const. Ct.], Feb. 25, 2010, 2008Hunba23 (S. Kor.).

of Justice explained that "the vote does not mean the Korean government should abolish the death penalty or is liable to change its legal system."[41] Furthermore, the ministry filed a written opinion with the Constitutional Court, arguing that the death penalty is constitutional and should be retained "as a necessary evil".[42] In October 2021, lawmakers Sang-min Lee and others proposed a bill replacing the death penalty with imprisonment for life without parole. It remains to be seen whether the legislative branch will ultimately take the initiative of abolishing the death penalty or pass the issue to the Constitutional Court, taking into account public opinion, which is not favorable to the abolition movement.

There are three types of punishment that restrict physical freedom. The first is imprisonment with labor. The second is imprisonment without labor, which is regarded as less severe than imprisonment with labor. This is imposed upon convicts who are found to have committed political crimes or crimes involving negligence. In the case of these convicts, labor may be allocated on a voluntary basis. Imprisonment with or without labor may be imposed for life or for a fixed term, which ranges from one month to 30 years and can be increased to 50 years if the offender committed multiple offenses or meets the requirement of a repeat criminal under the CA (Articles 35 and 42). A serving prisoner who has demonstrated good behavior and shown sincere contrition may be provisionally released by the parole committee within the Ministry of Justice when 20 years of a life sentence or one third of a fixed term has been served (CA Article 72(1)). Therefore, life imprisonment without the possibility of parole, as sentenced by a court,[43] is only a recommendation rather than a binding order under current law. The last and least severe type of punishment restricting physical freedom is detention, which applies to offenders who have committed minor offenses; detention terms are limited to fewer than 30

41) Ministry of Justice, *Korean Government votes in favor of the resolution on a moratorium on the use of the death penalty at the 75th session of the UN General Assembly*, 34 Recent Trends of Law & Regulation in Korea, 25 (2020).

42) Seung-woo Kang, *Horrific crimes reignited debate over death penalty*, The Korea Times, (Sep. 1 2021, 16:05), https://www.koreatimes.co.kr/www/nation/2022/03/251_314858.html.

43) In March 2021, an appellate panel of the Seoul High Court insisted that a murderer who killed three women in the same family should be sentenced to life imprisonment without the opportunity of parole, although it recognized that the sentence was not binding.

days (CA Article 46).

There are three types of punishment that deprive the offender of property. Most typical are fines. These begin at a minimum of KRW 50,000 (CA Article 45) and must be paid within 30 days from the date when a judgment becomes final (CA Article 69(1)). A person who fails to pay a fine in full by the deadline is to be detained in prison and compelled to work for a term of not less than one day and no more than three years as a substitute for payment (CA Article 69(2)). When levying a fine, the court shall simultaneously determine and decree a substitute term of prison labor (CA Article 70(1)). While one day of prison labor is normally calculated at KRW 100,000 (approximately US$80), there are cases where one day's labor is valued at significantly more than that, due to the three-year cap established in Article 69(2). However, if the ratio between offenders serving time because of high fines and normal offenders becomes unreasonably high, it can arouse suspicion of unfairness and erode public confidence in the criminal justice system. After the notorious "emperor's labor" case[44] drew that kind of criticism, the National Assembly introduced Article 70(2) to the CA, which provides a lower limit for the substitute term when the courts assess a fine of not less than KRW 100 million. Minor fines, which are imposed for lesser crimes, range from KRW 20,000 to KRW 50,000 (Article 47). In addition to other punishments, confiscation is imposed to deprive the offender of property such as (1) goods used or sought to be used in the commission of a crime, (2) goods produced by or acquired by means of criminal conduct, (3) and goods received in exchange for the above items (Article 48). It is not mandatory for the court to order confiscation, except when a specific provision orders it, as is the case with Article 134.[45]

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44) Gee-hyun Suk, *Judge resigns over 'emperor's labor'*, The Korean Herald (Mar. 30, 2014, 21:15) http://www.koreaherald.com/view.php?ud=20140330000377#.

45) Hyeongbeob [Criminal Act] art. 134 (Confiscation and Subsequent Collection) (S. Kor.) ("A bribe received or money or goods to be received as a bribe by an offender or by a third party having knowledge of its nature shall be confiscated, or, if confiscation is impossible, the value thereof shall be collected.").

2. Sentencing[46)]

The different types of punishment and their ranges are stipulated in specific provisions on individual offenses in Part II of the CA. Within the range of prescribed punishments, judges enjoy broad discretion in sentencing because Article 51 requires judges to consider several factors: (1) the age, character and conduct, intelligence, and environment of the offender; (2) the offender's relation to the victim; (3) the crime's motive, means, and results; (4) and the circumstances following the commission of the crime. However, the CA does not offer more specific guidelines on how to interpret and apply these considerations in individual cases. While it is legitimate to give judges discretion to enable decisions that are appropriate for individual cases, discretionary sentencing has drawn criticism because of the variation in sentences for similar crimes. That is, leeway in sentencing aroused the suspicion of corruption (*Jeon-kwan-ye-woo*, which suggests that judges gave lenient sentences to defendants represented by counsel who were former judges) has contributed to the public distrust of the judiciary. Alleged leniency toward white-collar crime offenders in particular has been heavily criticized.

In 2006, the National Assembly revised the Court Organization Act (COA) to establish the Sentencing Commission of Korea, which bears responsibility for setting and revising sentencing guidelines. It was established to ensure fair and objective sentencing and restore public confidence in the judiciary (COA Article 81-2). Although the commission was established as a court-affiliated institution (COA Article 81-2(1)), it carries out its duties independently (COA Article 81-2(2)). It consists of 13 commissioners appointed by the Chief Justice, including one chairperson and one standing commissioner; they serve two-year terms and are subject to unlimited reappointment (COA Article 81-3(1), (4)). The Commission is to include four judges, two prosecutors recommended by the Minister of

46) For a useful explanation of the process of establishing the Sentencing Commission of Korea and its historical background, see Hyungkwan Park, *The Basic Features of the First Korean Sentencing Guidelines*, 22 Fed. Sent'g Rep. 263 (2010). For the basic concepts and principles of sentencing guidelines, see Sentencing Commission of Korea, *Sent'g Comm'n of Kor.*, Sentencing Guidelines Manual Commentary, https://sc.scourt.go.kr/sc/engsc/guideline/manual/introduction/introduction_01.jsp (last visited Feb. 11, 2024).

Justice, two defense attorneys recommended by the president of the Korean Bar Association, two law professors, and two non-lawyers with relevant expertise and experience (COA Article 81-3(3)).[47] Although sentencing guidelines are not mandatory, judges are presumed to respect guidelines when selecting punishments and determining specific terms or amounts (COA Article 81-7 (1)). A judge who wishes to deviate from the sentencing guidelines must justify that decision in writing (COA Article 81-7 (2)). There was a lively debate on which approach should be adopted: the one used by the UK Sentencing Council or the US Federal Sentencing Commission's approach. The Sentencing Commission of Korea chose the former by crafting separate sentencing guidelines for each offense, starting with the most frequently occurring and socially important offenses.[48] The first sentencing guideline, encompassing eight categories of crime (homicide, bribery, sex crimes, perjury, false accusation, embezzlement, misappropriation, and robbery), took effect on July 1, 2009. As of 2020, the commission had established sentencing guidelines for 41 types of offenses.[49]

IV. Transformations and New Trends in Korean Criminal Law

A. Overview

While the legislators who crafted the CA were aiming to modernize Korean criminal law in accordance with western democratic countries, the CA also incorporated some basic Confucian moral concepts.[50] As Korea has

47) This structure of the commission allows for a significant influence of the judiciary, despite its independent status, a point that has been a criticism of the commission; *see* Daniel Fiedler, *Sentencing Guidelines in South Korea: Lessons from the American Experience*, 10 J. Korean L. 133 (2010); Hyungkwan Park, *supra* note 46, at 269.

48) Sent'g Comm'n of Kor., Sentencing Guidelines: Introduction, https://sc.scourt.go.kr/sc/engsc/guideline/intro/introduce.jsp

49) Sent'g Comm'n of Kor, 2021 Sentencing Guidelines, https://sc.scourt.go.kr/sc/engsc/guideline/down/down.jsp

50) Paul Kichyun Ryu, *The New Korean Criminal Code of October 3, 1953 – An Analysis of Ideologies Embedded in it*, 48 J. Crim. L. & Criminology, 275 (1957). The most vivid example of provisions reflecting Confucian moralism is Article 250(2), which aggravates the penalty of

gradually become a more liberal society, provisions founded on the moralism of the old era became increasingly out of touch with the views of people living in the 21st century. In addition, ambiguous and abstract terms used to describe specific criminal offenses opened the way for the courts to overly restrict people's individual rights. To cope with these problems, the Constitutional Court has actively reviewed the constitutionality of criminal provisions, leading to a considerable number of rulings declaring unconstitutionality. The Supreme Court also exerted some effort to apply provisions with broad legal terms in a way that respects diverse modes of living and doing business while not deviating exceedingly from the common sense of the people. Some of the transformations and new trends led by Korea's Constitutional Court and the Supreme Court are briefly discussed below.

B. Transformations Led by the Constitutional Court

1. Repealing Outmoded Provisions Restricting Individual Liberty Protected by the Constitution

a. Adultery

According to the repealed Article 241 of the CA, a married person who committed adultery could be punished by imprisonment for not more than two years. The same applied to a person who had sex with that married person. That is, a case of criminal adultery could be established if only one married person were involved. Since 1953, almost 100,000 people have been convicted of adultery, of whom more than 30,000 people were detained awaiting trial. Four constitutional challenges to Article 241 proved unsuccessful, with the Constitutional Court determining that the provision was constitutional in 1990, 1993, 2001, and 2008. However, people's attitudes toward adultery had evolved to a great degree. This change was

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intentional killing when a person kills his own or his legal spouse's lineal ascendant. However, the Constitutional Court declared this article to be constitutional. According to the Court, "descendants' respect and love for ascendants are core values constituting essential elements of our social morals, rather than a cultural heritage of the feudal family system. It is especially emphasized in our nation that has succeeded and developed traditional cultures based on Confucian ideas." Hunbeobjaepanso [Const. Ct.], July 25, 2013, 2011Hunba267 (HUNJIP 25-2, 82) (S. Kor.).

reflected in the sentencing practices of trial courts, which began suspending terms of imprisonment[51] rather than having them enforced immediately. The Constitutional Court ultimately overruled its own precedent and declared the adultery provision unconstitutional in 2015, finding that it is an excessive restriction on people's rights to sexual self-determination, protected by the Korean Constitution Article 10, and the right to privacy protected by Article 17.[52] The reasoning of the majority opinion of five Justices is as follows:

> There is no longer any public consensus regarding the criminalization of adultery, along with the change in public perception of social structure, marriage, and sex and the spread of the idea of valuing sexual self-determination. In addition, the tendency of modern criminal law directs that the state should not exercise its authority in the event that an act, in essence, belongs to the sphere of personal privacy and is not socially harmful or in evident violation of legal interests, despite the act being in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes. It should be left to the free will and love of people to decide whether to maintain a marriage, and the matter should not be externally forced through criminal punishment.

It should be noted that adultery remains a breach of marital duty that establishes a cause for divorce and non-pecuniary damages. The Court's ruling clarified that any criminal sanction must remain a last resort, only being invoked when other means are insufficient.

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51) Article 62 of Hyungbeob [Criminal Act] enables suspending a sentence of imprisonment up to three years when extenuating circumstances exist, for a period of at least one year up to five years, except when the crime was committed during a period of three years after a final judgment sentencing imprisonment was completely executed or discharged.

52) Hunbeobjaepanso [Const. Ct.], Feb. 26, 2015, 2009Hunba17 & 205, 2010Hunba194, 2011Hunba4, 2012Hunba57 & 255 & 411, 2013Hunba139 & 161 & 267 & 276 & 342 & 365, 2014Hunba53 & 464, 2011Hunga31, 2014Hunga4 (consol.)(Hunjip 27-1, 20) (S. Kor.). For an in-depth analysis of the reasoning and legal consequences of this ruling, see Seokmin Lee, *Adultery and the Constitution: A Review on the Recent Decision on 'Criminal Adultery'*, 15 J. Korean L. 325 (2016).

b. Abortion

The CA prohibited abortion without exception and regardless of timing, punishing both women who terminated their pregnancies and doctors or others who performed abortions with or without consent of the pregnant women. This strict and general ban on abortion had been somewhat eased by Article 14 (limited permission for abortion operations) of the Mother and Child Health Act, which allowed abortion when (a) the woman or her spouse suffers from a eugenic, genetic, or mental handicap or physical disease; (b) the woman or her spouse suffers from an infectious disease; (c) the woman is impregnated by rape; (d) the woman and her spouse are relatives who are unable to marry legally; or (e) the maintenance of the pregnancy injures or might injure the health of the mother's body. The law prohibiting abortion was enforced arbitrarily, based on the contemporary social atmosphere. The state did not strictly enforce the abortion law, especially when abortion contributed to implementing its birth control policy during the baby boom era. The underenforcement of the abortion law was also due to the dominant patriarchic culture preferring a son to a daughter, which was less of a concern to the state. However, as religious groups' pressure against abortion became stronger, more and more doctors were indicted for performing illegal abortions. As for women, many protested that that access to safe and affordable abortion in the formal health system was not possible; as a result, women's health and right to self-determination were under-protected. In consequence, the constitutionality of the abortion law faced challenges from both doctors and women.[53)]

The first challenge was not successful. In 2012, the Constitutional Court denied the petition of a midwife who challenged the constitutionality of the relevant law.[54)] Emphasizing that the right to life is the most fundamental right of human rights, the court recognized the fetus's right to life as a fundamental right protected by the Korean Constitution. After balancing

53) For a more detailed explanation on the abortion law before the Constitutional Court's ruling in 2020, see Hyosin Kim & Hyun-A Bae, *A critical assessment of abortion law and its implementation in South Korea*, 24 Asian J. of Women's Studies 71 (2018).

54) Hunbeobjaepanso [Const. Ct.], Aug. 23, 2012, 2010Hunba402 (Hunjip 24-2, 471) (S. Kor.).

the right to life of the fetus and the right to self-determination of a pregnant woman under the proportionality analysis, the court concluded that it was not an excessive restriction on the latter that the relevant provision did not permit abortion based on social or economic grounds and that the provision therefore did not violate the constitution.

However, the court overruled its previous decision in 2019, declaring those provisions unconstitutional on the ground that a complete and uniform ban on all abortions throughout pregnancy, regardless of the developmental stage or viability of the fetus, excessively restricts a pregnant woman's right to self-determination.[55] Further, the court pointed out that the exceptions provided by Article 14 of the Mother and Child Health Act are extremely limited and therefore unable to encompass the myriad social and economic reasons for seeking an abortion. However, rather than simply striking down the abortion law, the court rendered a decision of nonconformity to the constitution, ordering that the relevant provisions continued to be applied until the legislature amended them by December 31, 2020. Because no legislation was passed by the deadline set by the court, there is currently no criminal sanction attached to abortion, regardless of the timing of termination or the circumstance leading to abortion.

c. Sexual Intercourse Under the False Promise of Marriage

Article 304 provided that a person who induces "a woman free from habitual debauchery" into sexual intercourse through the false promises of marriage or other fraudulent means shall be punished by imprisonment for not more than two years or by a fine not exceeding KRW 5 million. The "false promises of marriage" part of this provision was declared unconstitutional in 2009.[56] The Constitutional Court reasoned that the legislative purpose of that provision could not be regarded as legitimate for the following reasons.

First, it is totally within the realm of privacy for a man to have a sexual relationship with a female partner, against which the state's interference

55) Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hunba127 (S. Kor.). For an overview of this case, see Sang-Hyeon Jeon, *Notable Cases on Constitutional Law*, 19(1) J. KOREAN L. 63, (2020).

56) Hunbeobjaepanso [Const. Ct.], Nov. 26, 2009, 2008Hunba58 (S. Kor.).

should be as minimal as possible if no coercion or violence is involved.

Second, if a woman, after voluntarily deciding to have a pre-marital sexual relationship with a man who requests it, later asks the court to punish him by arguing that her decision was made by mistake, that is an act of denying her own right to sexual self-determination.

Third, under the provision, the subjects of protection were limited to women free from habitual debauchery, while all other women who had sexual relationships with multiple partners were stigmatized as sexually promiscuous and excluded from protection, which forces a sexual ideology based on patriarchy and moralism on women. In this regard, the provision not only ran afoul of the state's constitutional duty to create and maintain a gender-equal society (Constitution Article 36, Section 1) but also denied women's right to self-determination regarding sexual activity under the guise of protecting them by treating them as not mature enough to have the capacity to voluntarily make such a decision.

Although the court did not declare the "other fraudulent means" provision of Article 304 unconstitutional, the National Assembly deleted Article 304 in its entirety after the court's ruling. As a consequence, there remains no provision criminalizing rape by deception committed against adults without any mental incapacity.

2. *Efforts to Fulfill the Principle of Proportionality in Punishment*

The principles of proportionality and criminal law as the last resort require legislators to act so that the criminal law shall not intervene if there are other adequate means for deterring specific activities. Even when the criminal law does intervene, proportionality between responsibility and punishment shall be maintained. This is needed because punishment is a stigma; that is, a marked condemnation that is publicly communicated. The entire criminal justice system involves severe infringements of personal autonomy by means of arrest, search, seizure, detention, interrogation, public court hearings, conviction, and punishment. Therefore, even when an accused person is ultimately acquitted, being subject to a criminal trial itself can cause tremendous suffering.

However, the reality of legislation in the criminal law area ran counter to these principles. Legislators' eagerness to gain public support often produced new criminal provisions with harsh punishments in order to

respond to public anxiety about crimes, without meticulously examining the effectiveness and long-term practicality of the punishment. What made matters worse was that legislators simply added new provisions with harsher punishments to special criminal statutes, leaving the provisions punishing the same crimes in the CA as they were. As a result, the unity and coherence of the criminal statutory regime have been seriously impaired.

The Constitutional Court put a brake on this legislative practice by declaring unconstitutional a large number of special criminal statutes that aggravated the punishment of certain crimes already covered in the CA. The reasoning behind those rulings was twofold. First, those aggravated punishments were so severe that the proportionality between criminal responsibility and punishment was not maintained. Second, the overlap of those provisions with existing provisions in the CA could lead to arbitrary justice because it was entirely within a prosecutor's discretion to choose which one to apply. One example is the so-called "Jean Valjean" law, Article 5-4(1) of the Act on the Aggravated Punishment of Specific Crimes. The article provided that any person who habitually commits larceny shall be punished by life imprisonment or imprisonment not less than three years. It meant that even if a person with previous convictions of larceny stole a piece of bread only because of hunger, a prison term of at least 18 months could result automatically. In comparison, Article 332 of the CA punishes the same offense by imprisonment of not more than nine years or a fine not exceeding KRW 15 million. The court declared the Jean Valjean article to be unconstitutional.[57]

C. Transformations Led by the Supreme Court Reflecting Social Changes in the Interpretation of Specific Provisions

1. Narrowing the Scope of Defamation in Favor of Protecting the Right to Expression

The CA criminalizes defamation, regardless of whether the alleged facts are true or false. Article 307(1) punishes a person who defames another by publicly alleging facts with imprisonment or imprisonment without prison

57) Hunbeobjaepanso [Const. Ct.], Feb. 26, 2015, 2014Hunga16 (S. Kor.).

labor for not more than two years or a fine not exceeding KRW 5 million. Article 307(2) aggravates this punishment when the alleged facts are false, punishing by imprisonment for not more than five years, suspension of qualifications for not more than ten years, or a fine not exceeding KRW 10 million. According to Article 310, defamation can be justified when the facts are true and solely in the public interest. Therefore, if a person says something true about another person and it harms another person's reputation without a purpose related to the public interest, the first person can be convicted even though the reputation is a "false reputation." This framework designed by the CA was heavily criticized by scholars and activists as excessively infringing the right to expression protected by Article 21 of the Constitution. However, the Constitutional Court determined such framework constitutional in 2021.[58)]

The Supreme Court has developed several jurisprudential techniques for the purpose of narrowing the scope of defamation that would adopt a more balanced approach between protection of reputation and protection of the right to expression, especially regarding defamation of public officials. Because such officials have the right to enjoy human dignity, they can be victims of defamation, whereas the state itself cannot be a victim. However, if public officials actively accuse citizens or even simply turn a blind eye to an investigation triggered by a third party's complaint,[59)] defamation charges can be used for the purpose of stifling criticism of the government. To cope with this problem, two approaches were taken by the Supreme Court.

First, the court tried to narrow the scope of "alleging facts" to ensure that freedom of expression regarding public figures or public matters could be protected as broadly as possible. Recently, the court ruled that publicly saying "presidential candidate Moon Jae-In is a communist" is not defamation because it is simply an opinion about a candidate's political

58) Hunbeobjaepanso [Const. Ct.], Feb. 25, 2021, 2017Hunma1113 & 2018Hunba330 (consol.) (S. Kor.).

59) According to Hyungbeob [Criminal Act] art. 312, para. 2 (S. Kor.), defamation shall not be prosecuted over the express objection of the victim; that is, if the victim does not clearly state a positive objection to the investigation and prosecution of defamation, those processes are allowed.

views.[60] Another recent case dealt with a critical comment about an incumbent president. According to the court, raising the suspicion that President Park Geun-Hye was taking drugs when she did not appear for seven hours after the *Sewol* ferry accident was reported to the President's Office did not defame her because it was an opinion that emphasized the need for transparent disclosure of the president's activities at the moment when hundreds of people were about to drown due to the failure of the maritime police to rescue them.[61]

Second, the Supreme Court declared that defamation against a public official is only punishable when that statement is made with "actual malice," even if it is false.[62] This jurisprudence appears to have been influenced by *New York Times Co. v. Sullivan* (1964), a landmark US Supreme Court decision ruling that the freedom of speech protections in the First Amendment to the US Constitution restrict the ability of American public officials to sue for defamation.

On the other hand, the Supreme Court has maintained a broad interpretation of the term "publicly" by adopting the "theory of propagation possibility." According to this theory, even when a defamatory remark about a person was made to only one other person, it can meet the requirement of "publicly" if there is a sufficient possibility that the other person will relay the defamatory remark to other people. The recent full bench decision of the Supreme Court in 2020 reaffirmed this theory as firmly grounded precedent.[63] However, three justices who joined a dissenting opinion criticized this theory on the ground that it relies on an analogical interpretation that is prohibited under the principle of legality.

2. *Expanding the Scope of Rape by Recognizing Marital Rape as Punishable Under Article 297 of the CA*

At times, the Supreme Court has expanded the applicable scope of specific criminal offenses to protect the legal interest of citizens more thoroughly. One example is the case of marital rape. In the past, Article 297

60) Daebeobwon [S. Ct.], Sept. 16, 2021, 2020Do12861 (S. Kor.).

61) Daebeobwon [S. Ct.], Mar. 25, 2021, 2016Do14995 (S. Kor.).

62) Daebeobwon [S. Ct.], Sept. 2, 2011, 2010Do17237 (S. Kor.).

63) Daebeobwon [S. Ct. Full Bench Decision], Nov. 19, 2020, 2020Do5813 (S. Kor.).

was interpreted as not including marital rape, because 'female' as a victim of rape only meant women other than the offender's legally married wife in the traditional view of a majority of scholars. The Supreme Court also followed this traditional position. In 2013, however, the court overruled precedent and declared that the legal spouse of an offender can also be protected as a victim of rape under Article 297, because 'female' in that provision refers simply to a 'woman', whether adult or minor, married or single.[64] Furthermore, this provision does not expressively exclude a legal spouse from the scope of being a victim. The court therefore concluded that there are no restrictions to interpreting an offender's legally married wife as included withing the possible range of rape victims. The court wrote as follows:

> Even when we recognize a married couple's duty to cohabit under the Civil Act, it can hardly be deemed to include the duty to endure sexual intercourse coerced by violence or intimidation. This is because a marriage can hardly mean the abandonment of an individual's sexual autonomy, nor can it be a process of enduring a sexually repressed life.

At the same time, the court emphasized the necessity of strictly interpreting the concept of 'force or intimidation' in marital rape cases, in full view of all relevant circumstances, including whether the content and degree of violence or intimidation have reached such a point as to essentially infringe upon the wife's sexual autonomy, the circumstances leading up to the husband's use of tangible force, the patterns of the couple's married and sexual lives, and the situation during and after the sexual intercourse at issue.

V. Conclusion

As we have seen above, the CA had inherent limitations in strictly pursuing the principle of legality. In addition, for the past several decades,

64) Daebeobwon [S. Ct. Full Bench Decision], May 16, 2013, 2012Do14788 (S. Kor.).

public sentiment demanding harsh punishment of criminal offenders produced a substantial number of special criminal statutes that called for severe punishments. As a consequence, the Constitutional Court and the Supreme Court have taken up the task of making Korean criminal law more understandable and proportionate. Beyond these efforts from the judicial authorities, however, fundamental reform is needed to make Korean criminal law more coherent and reasonable.

First, the heavy dependence on special criminal statutes must be overcome. The CA has to regain its status as the basic criminal statute of Korea by providing a complete set of punishable crimes and thus adequately fulfilling the function of fair notice.

Second, the excessive reliance on judicial interpretations of statutory provisions needs to be addressed. Of course, supplementary interpretations by courts are not completely avoidable because of the intrinsic ambiguity of language. However, the pervasiveness of judge-made law in the criminal law area has become incompatible with the principle of legality.

Third, legislators should conduct an in-depth constitutional analysis before submitting any bill with criminal provisions for consideration. An *ex post facto* ruling of unconstitutionality from the Constitutional Court is sometimes too late to prevent the infringement of individual liberty and the social costs that arise from implementing hastily introduced criminal provisions.