Korean Criminal Law under Controversy after Democratization

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This Article reviews what democratization has brought and what has remained intact in Korean criminal law, focusing on the change of three Korean criminal special acts under hot debate such as the National Security Act, the Security Surveillance Act, and the Social Protection Act after democratization. Then it examines the newly surfacing issues of Korean criminal law, focusing on the moralist and male-oriented biases.

Keywords: criminal law, National Security Act, Security Surveillance Act, Social Protection Act, adultery, rape, homicide of lineal ascendants

1. Introduction

The nationwide June Struggle of 1987 led to the collapse of Korea's authoritarian regime and opened a road toward democratization.[1] Under the authoritarian regime, the Constitution's Bill of Rights was merely nominal, and criminal law and procedure were no more than instruments for maintaining the regime and suppressing the dissidents. It was not a coincidence that the June Struggle was sparked by the death of a dissident student tortured during police interroga-

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1. For information regarding the June Struggle, see West, James M. & Edward J. Baker, 1991. "The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence", in *Human Rights in Korea: Historical and Policy Perspectives* (Harvard University Press, 1991): 221.

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tion.[2]

Democratization brought a significant change in the Korean criminal law and procedure.[3] Criminal law was a symbol of authoritarian rule in Korea. Successive authoritarian made a number of criminal special acts to oppress dissidents and control the people.[4] One of the major tasks the National Assembly had to take after democratization was to revise or repeal the acts. In 1988 the Committee for the Repeal or Revision of Acts to Advance Democracy was organized in the National Assembly to repeal or revise laws that infringed upon fundamental rights and contradicted the newly promulgated 1987 Constitution. As a result, some of the criminal special acts were revised or repealed.

This Article reviews what democratization has brought and what has remained intact in Korean criminal law,[5] focusing on the change of three Korean criminal special acts under hot debate such as the National Security Act, the Security Surveillance Act, and the Social Protection Act after democratization. Then it examines the newly surfacing issues of Korean criminal law, focusing on the moralist and male-oriented biases.

2. Partial Revision of the National Security Act—Imcomplete Freedom of Expression[6]

The repeal of the National Security Act (hereinafter NSA)[7] has been a major legal issue in Korea's democratization. Critics have argued that the NSA has functioned as a legal tool to maintain the authoritarian rule in South Korea for

2. See Eckert, Carter J. et al., 1990. *Korea Old and New: A History* (Harvard University Press, 1991): 381-82.
3. Regarding the change of criminal procedure after democratization, *see* Cho, Kuk 2002. "Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea", in *Denver Journal of International Law and Policy* Vol. 30, Issue 3.
4. Criminal acts other than the Penal Code (*hyeongbeop*, Law No. 293, September 18, 1953, last revised on December 13, 1997 as Law No. 5454), which is a 'general criminal act', are called 'special criminal acts' in Korea.
5. Regarding the general review of Korean criminal law, see Cho, Kuk 2001. "Korean Criminal Law: Moralist Prima Ratio for Social Control", in *Journal of Korean Law* Vol. 1, Issue 1.
6. For more discussion, see Cho, Kuk 1997. " Tension between the National Security Law and Constitutionalism in South Korea: Security for What?", in *Boston University International Law Journal* Vol. 15.
7. National Security Act (*gukgaboan beop*), Law No. 3318 (1980), lastly revised by Law. No. 4704 (1994).

half a century, rather than as a tool to protect South Korea's national security from the threat of North Korea.

Under the authoritarian regime, the ideas and activities that were critical of the anti-Communist and anti-North regime were labeled as pro-North and left-biased and strictly punished under the NSA. Home-grown dissidents, encompassing independent left-wing groups to liberal democrats, were a target of the NSA. Leftist, or radical, opposition organizations who promoted anti-capitalism, anti-Americanism, or pro-federation reunification were severely punished under the NSA. Human rights activists and the liberal opposition party were considered to be naïve sympathizers and often fell victim to the NSA. For instance, even former President Kim Dae-Jung was sentenced to death in a military court for violating the NSA and the Anti-Communist Act[8] in 1980.[9] The notorious *makgeolli* cases,[10] wherein citizens were prosecuted for trivial deviation from anti-Communist and anti-North Korea ideology, show the extremities to which the liberty trade-off was stretched under the military regime. In brief, the NSA has served as a *de facto* Constitution that totally overwhelmed democratic and constitutionalist principles.

The constitutionality of the NSA was first challenged in 1990 in the newly established Korean Constitutional Court.[11] The Court acknowledged the NSA's

8. Anti-Communist Act (*bangong beop*), Law No. 643 of July 3, 1961. The Anti-Communist Act was legislated separate from the NSA and emphasized "anti-communism" as the prime purpose of the regime, and to better suppress both the left and the reunification movements that resurrected after the April Revolution (because the NSA was amended moderately after the Revolution). The Act was integrated into the NSA in 1980.
9. *Ibid*. at 376. This is popularly known as the case of Kim Dae-Jung's conspiracy of rebellion.
10. See Park, Won-Soon 1992. *Kukgaboan boep yeongu (A Study of the National Security Act)* (Seoul: Yeoksabipyongsa) Vol. 2: 100-117. *Makgeolli* is a traditional Korean liquor made of raw rice. These cases were cynically called the *makgeolli* cases because ordinary citizens without any relation to anti-regime groups were severely punished for unintentional, half-conscious words expressed in *makgeolli* drinking bouts.
11. In Korean history there is a predecessor to the Korean Constitutional Court. It was established after the April Revolution of 1960, but never had a chance to function due to the military coup of 1961. Under the military-authoritarian regime, either the Korean Supreme Court (1962-72; 1980-87) or the Constitution Committee (1972-80) had the power to review the unconstitutionality of legislation. However, the courts were very passive and disfavored constitutional review. See generally Yoon, Dae-Kyu 1990. *Law and Political Authority in South Korea* (University of Washington Press, 1987): 150-170; Youm, Kyu Ho 1994. "Press Freedom and Judicial Review in South Korea", in *Stanford Journal of International Law* Vol. 30: 4-9; West, James M. & Dae-Kyu Yoon, 1992. "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?", *American Journal of Comparative Law* Vol. 40: 76-77.

unconstitutional elements, while the NSA itself was not held to be unconstitutional.[12] The Roh Tae-Woo government partly amended the NSA to a slightly moderate form in 1991 in order to appease the NSA's critics and to smooth over diplomatic relations with socialist countries.[13]

The 1991 revision of the NSA incorporated language, requiring that the offender has "knowledge that he might endanger the existence and security of the State or the basic order of free democracy" for a conviction for the crime of the "enemy-benefiting" activities or "praising, encouraging, or aligning with"[14] North Korea under Article 7(1) of the NSA. Since the revision *makgeolli* cases have not been observed any more.

However, the revision has not made a significant difference in guaranteeing freedom of expression. The vague prohibitions against "enemy-benefiting" activities in the NSA allow law enforcement authorities to interpret the meaning of the activities with wide discretion. Law authorities have continued to apply the NSA to anti-regime individuals even if they do not present a "clear and present danger"[15] to the system. The Korean judiciary also determines the danger of "enemy-benefiting" simply by "the proximity between conducts in Article 7(1) and its danger, particularly the gravity of the evil."[16] As a result, South Korean leftists and liberals are often punished, labeled as 'pro-North Korean radicals', and freedom of expression is still impaired.

The NSA shows that Korean democracy has a long way to go, and that Korean society is not still free from the vestiges of the "Cold War" and its attendant authoritarianism. It is high time for the Korean government and the National Assembly to listen to the deep concerns the UN Human Rights Committee expressed in 1994;

> "The Committee's main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications for public order in

12. Decision of Apr. 2, 1990, the Korean Constitutional Court, 89 HeonKa 113.
13. Communist parties in capitalist countries, as well as socialist states and their ruling parties, were excluded from the category of anti-state organizations in this amendment.
14. NSA, § 7.
15. Schenk v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919) (Justice Holmes' dissenting opinion); Gitlow v. New York, 268 U.S. 652 (1925) (Justice Holmes' dissenting opinion).
16. Decision of April. 2, 1990, Korean Supreme Court, 89 Heon Ka 113, 3-Ka .

> the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offenses against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not be truly dangerous for State security and responses to those acts unauthorized by the Covenant."[17]

3. From the Social Security Act to the Security Surveillance Act—Transformation of the Conversion System[18]

In 1988 the Social Security Act,[19] which kept leftist dissidents in prison even after they served their sentences under the name of 'security custody' (*boangamho*), was repealed, rather the Security Surveillance Act was legislated in 1989.

Since the Social Security Act was enacted under the Park Chung-Hee regime in 1975, it has imprisoned a number of non-converted leftists after they served their sentences on the grounds that there is the "danger of recommitting crimes."[20] "Security custody" was imposed by the Ministry of Justice,[21] not the judiciary, and might be repeatedly renewed until "anti-communism is established" in the leftists' minds.[22] Under this system, leftists who refuse to submit a 'conversion document' to the law authority faced the danger that they might not ever be released.

The case of Mr. Suh Joon-Sik, a leading human rights activist, is a well-known example that can show problems with the Act. He served seven years imprisonment in May 27, 1978 after he was arrested and found guilty as being a

17. *Report of the Human Rights Committee,* U.N. GAOR, 47th Session, Supplement No. 40, U.N. Doc. A/47/40 (1994), at 123).
18. For more discussion, *see* Cho, Kuk 2001. *Yangsim gwa sasang ui jayu reul wihayeo (For the Freedom of Conscience and Thought)* (Seoul: Chaeksesang, 2001), Chap. 1.
19. Social Security Act (*sahoeanjeon beop*), Law No. 2769, July 16, 1975, last revised on December 4, 1987 as Law No. 3993.
20. Ibid. § 6 (1).
21. Ibid. § 7 (4).
22. Ibid. § 7 (1).

'spy for the North' in 1971, having returned to South Korea after a visit to the North while a law student in Seoul National University. He was then put under 'security custody' until he was released in May 25, 1988. His voice criticizing the Social Security Act from prison caused the public to pay attention to the Act. He shouted in his letter from prison;

> "A dark 'Middle Age' persistently remains at the center of the state in the modern rule-of-law. The 'system of conversion' is no more than a 'test of tramping-on-the-Cross' to check religious conversion in the age of highways, judgment under the Social Security Act on those who are imprisoned for their thought is no more than 'witchcraft' in the age of skyscrapers."[23]

The Social Security Act accompanied with its 'conversion system' had been strongly criticized as it violated the freedom of conscience and the right to a trial by judge. With 'security custody,' it forced citizens to convert their creed and faith. Although 'security custody' was *de facto* punishment, it was free from judicial review because it was considered not to be a punishment in the legal sense.

However, the Korean judiciary has never doubted the unconstitutionality of the Act even after the Act was abolished. In its 1997 decision of a civil suit, the Korean Supreme Court stubbornly maintained that the Act was not unconstitutional.[24] The rationales are as follows: (1) 'security custody' is not a punishment but a 'protective disposition' (*boancheobun or Maßnahmen* in German), which may be imposed to rehabilitate criminals and protect society from any future crimes that non-rehabilitated criminals may commit;[25] (2) the conversion requirement for the exemption of 'security custody' is necessary to check the criminals' "danger of recommitting crimes."

23. Suh, Joon-Sik, 1987. "Anti-democratic 'Conversion System' Should Be Abolished", in *Mal* (May 1987): 20.
24. Decision of June 13, 1997, the Korean Supreme Court, 96 *Da* 56115.
25. In Korean criminal law, there are two types of criminal sanctions: punishment and protective dispositions. The Korean Constitution provides legal basis for this distinction, saying that no punishment or protective 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.

The Security Surveillance Act[26] is a replacement of the Social Security Act. Although 'security custody' is no longer available, violators of the NSA may be placed under 'security surveillance.'[27] The purpose of the Act is "to prevent the danger of their recommitting crimes and to promote their return to normal social life, and thereby to maintain national security and social peace."[28] 'Security surveillance' is imposed by an administrative authority. The period of a 'security surveillance' disposition is two years.[29] The Minister of Justice may, upon request by a public prosecutor, repeatedly renew the period through a resolution of the Security Surveillance Disposition Review Board.[30]

Those on whom 'security surveillance' is imposed must report to the police station in their residential area seven days after release, and reporting again when they change residence.[31] They must also report private information, including their name, date of birth, the names of family members and friends, their monthly salary, property, educational and profession background, religion, organization affiliations, and the location of their place of work. Every three months after the imposition of 'security surveillance', they must report on their primary activities, travel, and personal information on any other persons with whom they may have communication if they are also under 'security surveillance.'[32] The Korean judiciary has adhered to its position that 'security surveillance,' like 'security custody,' is a 'protective disposition' that is free from the requirement of imposing punishment.[33]

However, it is not easily justified to deprive citizens of their liberty by simply saying they are not given punishment but 'protective disposition.' Under the Social Security Act, leftists were imprisoned in secured facilities within prison, and they were not given a chance for parole unless they converted. 'Security

26. Security Surveillance Act (*boangwanchal beop*), Law No. 4132, June 16, 1989, last revised on November 22, 1991 as Law No. 4396.
27. In addition, Article 2 of the Security Surveillance Act provides that the protective disposition of "security surveillance" may be imposed on those who commit "crimes of insurrection" (Korean Penal Code, Art. 88~90) and "crimes of rebellion" (The Military Criminal Act (*gun hyeongbeop*, Law No. 3680, December 30, 1983, last revised on October 8, 1996 as Law No. 5153), §§ 5~8, 9(2), 11~16).
28. Security Surveillance Act, § 1.
29. Ibid. § 5(1).
30. Ibid. § 5(2).
31. Ibid. § 6.
32. Ibid. § 18.
33. Decision of November 27, 1997, the Korean Constitutional Court, 92 *Heon Ba* 28.

custody' was a punishment - even harsher - in every sense, and conversion was virtually compelled. Under the Security Surveillance Act, leftists are not imprisoned after they serve their sentences. However, they are "confined in the prison without bars,"[34] their liberties being substantially restricted. It is not a plausible argument to insist that constitutional requirements for punishment do not apply to 'protective dispositions' even when the dispositions are working as criminal sanctions.

In 1998 the notorious 'conversion system' was finally abolished by the Kim Dae-Jung government. Mr. Park Sang-Chun, then Minister of Justice, admitted the 'conversion system' violated the freedom of conscience and the right to silence, infringing the image of Korea as a human rights respecting country.[35] Instead of the 'conversion system,' however, the Kim Dae-Jung government introduced a new system of 'law-abiding oath,' which exempts 'security surveillance' or permits parole to NSA violators only when they submit a signed 'law-abiding oath' to the law authorities.

The new system seems to have no problem in that it does not force offenders to change their political credo, but asks them to abide the law in general. The majority opinion of the Constitutional Court maintained that the system is not unconstitutional for it simply demands a general obligation of abiding by the law, and does not infringe upon the freedom of conscience.[36]

However, most of the NSA violators strongly rejected taking the oath because the oath meant they had to promise to abide by the NSA, even though they believe the NSA is unconstitutional and seriously violates human rights. The minority opinion of the Constitutional Court pointed out that the 'law-abiding oath' system is a temporary expedient to maintain a low-key 'conversion system' to check the anti-social conscience of the offenders.[37] The UN Human Rights Committee urged the Korean government to abolish the new system.[38] Quite recently in 2003, the Ministry of Justice declared the 'law-abiding oath' system would be abolished in

34. Cha, Byong-Jik, 1998. "Another Disadvantageous Prison", in *Hankyoreh 21 (Weekly Hankyoreh 21)* No. 218.
35. Park, Sang-Chun, 1998. "Abolishing the Conversion System", *Dong-a ilbo (Dong-A Newspaper)* (July 30, 1998).
36. Decision of April 25, 2002, the Korean Constitutional Court, 98 *Heon Ma* 425, 99 *Heon Ma* 170 · 498.
37. Ibid. (dissenting opinion, Justices Kim Hyo-jong & Joo Sun-hoe).
38. Concluding Observations of the Human Rights Committee: Republic of Korea, 01/11/99, CCPR/C/79/Add.114.

August 2003.[39] It shows that the Roh Moo-Hyun government takes the freedom of conscience more seriously than preceding governments.

4. Partial Revision of the Social Protection Act—Double Jeopardy to Repeating Offenders

The Social Protection Act[40] was legislated by the military coup committee titled "Legislative Council for Protection of the State" in 1980. The Act was intended to give retroactively legal grounds for Martial Order No. 13, which put vagrants and repeated criminals into concentration camps under the name of "Purification of Society." In the camps even ordinary citizens who were neither vagrant nor criminal were incarcerated, and the inmates became extremely ill being treated under a harsh and oppressive program called "*Samcheong* Education." By the parliamentary inspection of the Ministry of Defense in 1988, it was revealed that 54 persons were killed during the "Education." The 2002 Presidential Truth Commission on Suspicious Deaths[41] also found that Mr. Jeon Jeong-Bae had been shot dead in the camp while protesting against such "Education."[42]

Although "*Samcheong* Education" is no more available, the Social Protection Act imposes 'protective custody' (*bohogamho*) on repeating felons when they are found to have "danger of recommitting crimes."[43] Like the 'secu-

39. *Hankyoreh shinmun (Hankyoerh Newspaper)* (July 8, 2003).
40. Social Protection Act (*sahoeboho beop*), Law No. 3286, December 18, 1980, last revised on December 12, 1996 as Law No. 5179.
41. The Commission was established to find the truth concerning suspicious deaths regarding the democratization movement by the Special Act for Truth-Finding of Suspicious Deaths, Law No. 6170, January 15, 2001, Last revised on December 5, 2002 as Law No. 6750.
42. *Yonhap News,* Sep. 16, 2001.
43. Social Protection Act, § 5. 'Protective custody' may be imposed; "(i) When a person who has been sentenced two or more times, for offences in the same or of a similar category to actual penalties of imprisonments without prison labor or heavier than the total period of which is three years or more, has again committed an offence in the same or of a similar category as shown in the attached Table, after having completed, in whole or in part, the last penalty, or having been exempted therefrom; (ii)When a person is deemed to be a habitual offender because of his multiple commission of offences shown in the attached Table; and (iii) When a person, who was sentenced to protective custody, has again committed an offence in the same or of a similar category shown in the attached Table, after having completed serving, in whole or in part, the custody, or having been exempted therefrom."

rity surveillance' referred to above, 'protective custody' is another form of 'protective disposition' distinct from punishment. Repeating criminals who are given 'protective custody' are incarcerated in strict confinement centers in the *Cheongsong* region. Commitment to a 'protective custody' facility must not exceed seven years.[44]

The ***mandatory*** disposition of 'protective custody' for repeating felons under the Act before the 1989 revision was strongly criticized and abolished in 1989. The unconstitutionality of mandatory imposition was confirmed in the 1989 decision of the Korean Constitutional Court.[45] However, the Court maintained that a 'protective custody' disposition itself was not unconstitutional, and that it did not violate the principle of double jeopardy. In another successive decision of 1996, the Court confirmed its position.[46]

Different from 'security surveillance', 'protective custody' is determined by a judge.[47] 'Protective custody' may be imposed on repeated criminals upon judicial discretion,[48] while matters concerning parole and cancellation thereof or exemption from execution of 'protective custody' are up to an administrative authority in the Ministry of Justice called the "Social Protection Committee."[49]

As the Constitutional Court maintains, in theory, 'protective custody' is not to punish offenders but to rehabilitate them and to protect society from them until they are rehabilitated. Despite this rhetoric, however, 'protective custody' may be simply a euphemism for double jeopardy.

The nature of 'protective custody' is certainly punitive. The Prison Act,[50] which is for those who are sentenced to punishment, applies to those who are placed in 'protective custody.' The current system of 'protective custody' totally lacks effective programs or facilities for "special training, rehabilitation, and treatment",[51] thus the purpose of the Act is simply incarcerating repeating

44. Ibid. § 7(3).
45. Decision of July 14, 1989, the Korean Constitutional Court, 89 *Heon Ka* 5, 8; 89 *Heon Ka* 44.
46. Decision of November 28, 1996, the Korean Constitutional Court, 93 *Heon Ba* 20.
47. Social Protection Act, § 20.
48. Ibid.
49. Ibid. § 32. The Committee is composed of: not more than seven persons who have qualifications as judges, prosecutors, or attorneys-at-law, and not more than two persons who have qualifications as medical doctors. The Vice Minister of Justice shall be the chairman of the Committee (Ibid. § 32 II).
50. Prison Act (*haengheong beop*) (Law No. 858, Dec. 23, 1961, last revised Dec. 28, 1999 as Law No. 6038.
51. Social Protection Act § 1.

offenders in remote confinement centers over a long period.

The anti-social character of inmates is exaggerated in that more than 70 % of the inmates are there for having committed repeating, non-violent thefts,[52] who are not dangerous enough to be the target of "selective incapacitation."[53] It is also too severe to impose 'protective custody' on repeating felons, considering the Penal Code and other special criminal acts already provide for heavier punishments against repeating felons[54] and habitual felons.[55]

Human rights violations in the *Cheongsong* center have often been reported as well. In 2002 the Presidential Truth Commission on Suspicious Deaths found that Mr. Park Young-Doo was cruelly treated by jailors and died after he demanded the abolition of 'protective custody' and jailors' violence against the inmates, and the improvement of treatment for the inmates.[56]

Quite recently, in 2003, several hundreds of the inmates of the *Cheongsong* center began to fast, demanding the abolishment of the 'protective custody' system. Inmates submitted a number of petitions to the National Human Rights Commission.[57] The Commission suggested to the newly established Roh Moo-Hyun government that the 'protective custody' system in ten major human rights areas be improved. Considering the Constitutional Court's consistent stance, it is not realistic to expect that the judiciary will admit the unconstitution-

52. *See Beomjoe baekseo (White Paper of Crimes)* (Seoul: 2002).
53. Regarding selective incapacitation, see Hanks, Donald 1991. *Selective Incapacitation Revisited* (New York: Vantage Press).
54. Article 35 of the Code provides; "Punishment for a repeated crime may be aggravated to twice the maximum term of that specified for such crime"(Penal Code, § 35). *See* also Article 3 of the Act for the Punishment of Specific Violence Crimes (*teukjeong gangryeok beomjeo eui cheobeol e gwanhan beopryul,* Law No. 4295, Dec. 31, 1990, last revised on Dec. 10, 1993 as Law No. 4590).
55. For instance, habitual larceny is punished by increasing by one half of the penalty specified in the relevant crime (Penal Code, § 332), and habitual robbery is punished by imprisonment for life or for not less than ten years (Penal Code, § 341). *See* also Article 2 of the Act for Punishment of Violent Conduct (*pokryeokhaengwi deung cheobeol e gwanhan beopryul,* Law No. 625, June 20, 1961, last revised on December 31, 1990 as Law No. 4294).
56. *Hankyoreh shinmun (Hankyoerh Newspaper)* (June 5, 2001) at 19.
57. The Commission was established in 2001 (National Human Rights Commission Act (*gukgaingweonwiwonhoe beop*), Law No. 6481, May 24, 2001). Its tasks are investigation and research with respect to statutes, legal systems, policies and practices related to human rights, developing recommendations for improvements or presentation of related opinions; investigation and remedy with respect to human rights violations and discriminatory acts; presentations and recommendations of guidelines for categories of human rights violations, standards for their identification and preventive measures, and so forth.

ality of 'protective custody' in the near future. However, the repeal of the Social Protection Act, or at least its substantial revision, will no doubt be one of the hottest issues in society.

5. Remaining Problems in Korean Criminal Law

The three criminal Acts discussed above have already attracted much attention from society because of their political implications. However, despite their importance, other problems in Korean criminal law have not been highlighted.

1) Moralist Bias

Korean criminal law is given the difficult task of encouraging social morality such as spousal fidelity and filial piety through the use of state authority. Adultery is punished as a crime and aggravated punishment is given to the homicide of 'lineal ascendants.'

Criminalization of Adultery[58]

Adultery is criminalized in Article 241 of the Penal Code, which provides for a maximum two-year prison sentence to the married persons as well as their partners if found to have committed adultery.[59] The crime of adultery is a good example of the manifestation of the moralist tradition in Korean criminal law. It aims to serve as a guardian for maintaining a certain ethos of socially acceptable behavior through the means of state authority and enforced sanctions. The Korean Constitutional Court has rejected the argument that treating adultery as a crime is unconstitutional.[60]

However, the decision to engage in sexual relations with loved ones is one of the most fundamental liberties of individuals. Although the exercise of sexual liberty may often result in adultery and certainly the consequential breaking of a spouse's heart, the use of criminal sanctions would be neither desirable nor effective in maintaining spousal fidelity. The issue of adultery should be dealt

58. For more discussion, see Cho, Kuk 2002. "The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women", in *Journal of Korean Law* Vol. 2, Issue 1.
59. Penal Code, § 241(1).
60. The Decision of Sep. 10, 1990, the Korean Constitutional Court, 89 *Heon Ma* 82.

with in a divorce court setting, not in criminal court, and adulterers should be handed civil sanctions and imputed moral blame, not imprisonment. The crime of adultery is no more than a "Scarlet Letter" that is an excessive infringement of the privacy of individuals' in the name of maintaining sexual morality, and fails to deter adultery.

Although some feminists propound that adultery should be criminalized in order to protect women's interests, the effect of criminalizing adultery may have the unintended consequence of acting as a fetter, and not as a shield for women rights, especially considering the rapid growth in Korean women's consciousness of their fundamental rights to privacy and freedom over sexual decisions.

Aggravated Punishment on the Homicide of Lineal Ascendants[61]

Under Article 250(2) of the Penal Code, those who kill their own or their spouse's 'lineal ascendants'[62] shall be punished by capital punishment, life imprisonment, or a minimum seven year imprisonment.[63] Compared to the penalty of 'ordinary homicide', which includes capital punishment, life imprisonment, or a minimum five year imprisonment, the penalty of homicide of lineal ascendants is heavier.

Among Korean criminal law scholars, there has been a controversy over whether the maintenance of filial piety through the aggravated penalty is possible or desirable, and whether the heavier punishment unconstitutionally discriminates lineal descendants. The Korean judiciary has not reviewed this issue yet.

Public sentiment is certainly reluctant to give legal favor to parent-killers. However, criminal law should not be swayed by such sentiment. Crime is not committed in a vacuum. The 1996 study by Choi In-Sub and Kim Ji-Sun[64]

61. For more discussion, see Cho, Kuk 2003. "Aggravated Punishment on the Homicide of Lineal Ascendants in the Korean Penal Code: Maintain Filial Piety by Criminal Law?", *Journal of Korean Law* Vol. 3, Issue 1.
62. According to Korean family law, lineal ascendants are to encompass all lineal ascendants of defendant and his/her spouse such as parents, parents-in-law, maternal/paternal grandparents, and maternal/paternal grandparents-in-law. Spouse in this crime is limited only to legal spouse, so lineal ascendants of de-facto spouse are not protected by Article 250(2). Adoptive parents become lineal ascendants when the legal adoption process is finished. Adopted children are supposed to have two lineal ascendants, natural and adoptive, because the adoption does not affect the previous natural family relationship (Decision of Jan. 31, 1967, the Korean Supreme Court 66 Do 1483).
63. There were only capital punishment and life imprisonment prescribed before the 1995 revision of the Code.

shows that it is indispensable to consider domestic violence in understanding parricide, and the killers of their lineal ascendants cannot simply be accused of being "sinister and depraved non-humans." A substantially high percentage of the offenders are mentally ill and in need of mental treatment, not punishment. In many cases, offenders or/and their family members had been under the victim's serious abuse, which has to be counted in evaluation to the extent of the offenders' crime. In this sense, Article 250(2) is one-sided, presupposing only the immorality of lineal descendants/killers, excluding that of lineal ascendants/victims.

Not considering the motives and the backgrounds of the homicide of lineal ascendants such as family violence, Article 250(2) prescribes unjustly aggravated punishment for the crime in the name of enhancing filial piety by legal authority, and keeps the judiciary from mitigating the penalty for those who killed their seriously abusive parents.

Article 250(2) is also redundant in that Article 250(1) concerning 'ordinary homicide' is enough to fully protect the lives of lineal ascendants. Without Article 250(2), Article 250(1) may impose severe punishment, including capital punishment and life imprisonment, for those who are morally depraved and kill their lineal ascendants for the sake of gain.[65] Consequently it can be safely said that without Article 250(2), the lives of lineal ascendants are not less protected under the Penal Code.

Our respect toward parents and elders needs to be cherished as one of the valuable traditional virtues handed down to contemporary Korean society. However, this should not lead to an emphasis on the feudal-patriarchal idea of family. Accordingly, Article 250(2) as legal moralist and patriarchal legislation is redundant and could be abolished.[66]

64. Choi, In-Sub & Kim, Ji-Sun 1996. *Jonsok beomjoe ui siltae e gwanhan yeonku (A Study on Crime Toward Lineal Ascendants)* (Seoul: Korean Institute of Criminology Press).
65. According to Article 51 of the Penal Code, the "relationship with the victim" should be considered in deciding penalties.
66. In this light, I agree with late Professor Yoo Ki-chun's argument that other criminal law provisions imposing heavier punishment if the crimes are committed against lineal ascendants are unconstitutional (Yoo Ki-chun, 2000. *Hyeongbeop gakron (Criminal Law: Specific Part)* (Seoul: Ilchogak): 35, n. 932).

2) Gender bias of Rape Law[67]

Sexual violence crimes are punished by the Penal Code and the Act for Punishment of Sexual Violence Crimes and Protection of Victims.[68] The most basic crime this Act targets is rape, which is defined and enforced in a male-biased way.

First, Korean jurisprudence has maintained a marital rape exemption even though the Penal Code itself does not provide for any basis for such exemption.[69] The abolition of this exemption in other countries has not been taken seriously.

Marriage must not be viewed as giving a husband the right to coerced intercourse on demand. A marriage license is not a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman. Just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy.[70] It is also necessary to note that in 1999, the Human Rights Committee expressed a concern that spousal rape is not a crime in Korea.[71]

Second, Korean jurisprudence has also adhered to the "utmost force" requirement for the crime of rape, which requires that the defendants use "utmost force" to suppress the victim's resistance. Here, the victim's resistance is considered as a vital element to decide whether the requirement is met. Thus, undisputed evidence that a woman said "no" to sexual advances is insufficient to establish rape. The victim may be sobbing, begging, or pleading with the assailant to stop, but the act of the perpetrator will often not be considered as rape unless the victim resisted to the utmost level. In this context, the victim's

67. For more discussion, *see* Cho, Kuk 2001. "Ane gangganjoe ui seongbu wa pokhaeng hyeopbak ui jeongdo e daehan jaekeomto" (Marital Rape and the Resistance Requirement of Rape), in *Hyeongsa jeongchak (Journal of Criminology),* Vol 13, Issue 2; Cho, Kuk 2003. *Hyeongsa beop ui seong pyeonhyang (Gender Bias of Criminal Law and Procedure)* (Seoul: Bakyoungsa), chap. 1.
68. Act for Punishment of Sexual Violence Crimes and Protection of Victims *(seongpokryeok beomjoe ui chebeol mit pihaeja boho deung e gwanhan beopryul),* Law No. 4702, January 5, 1994, last revised on January 29, 2001 as Law No. 6400.
69. *See* Bae, Jong-dae, 2001. *Hyeongbeop gakron(Criminal Law:Specific Part)* (Seoul: Hongmoonsa, 4rd ed.): 225; Kim, Il-su, 2001. *Hyeongbeop gakron(Criminal Law:Specific Part)* (Seoul: Bakyoungsa, 3th ed.): 141; Lee, Jae-sang, 2000. *Hyeongbeop gakron(Criminal Law:Specific Part)* (Seoul: Bakyoungsa, 4th ed.): 155.
70. People v. Liberta, 474 N.E. 2d 567, 573-574 (N.Y. 1984).
71. UN Human Rights Committee, Concluding observations of the Human Rights Committee: Republic of Korea. 01/11/99. CCPR/C/79/Add.114, § 11.

right to sexual autonomy cannot help being infringed. In 1999 the UN Human Rights Committee critically pointed out this resistance requirement.[72]

The current Korean rape law is male-biased, and needs to heed criticism from women. What matters in rape is not whether the victim was the defendant's legal spouse, nor whether the victim resisted, but whether the victim's right to sexual autonomy was violated.

6. Conclusion

Democratization has brought many changes in criminal law in Korea. In the process of this change has happened the dramatic incidences of the trials of two former Presidents, Chun Doo Hwan and Roh Tae Woo. In 1995, two retroactive acts were enacted to prosecute them for leading a *coup d'etat* and killing many civilians in Kwangju in 1980.[73] Despite the constitutional controversy regarding an extension of the period of the statute of limitations,[74] they were prosecuted and found guilty. This incident symbolized "the liquidation of the Past," evidence that Koreans would not tolerate authoritarian rule any longer. As democratization has gradually advanced, some criminal acts that were criticized as legal tools for authoritarian rule have been repealed, and some revised.

However, there still remain special criminal acts that violate the freedom of conscience and expression, and double jeopardy. Human rights groups and liberal scholars argue for repealing or substantially revising the acts, while the law enforcement authorities do not want more revision. The newly established Roh Moo-Hyun government is expected to approach this issue step by step. Although President Roh came to power with the support of liberals, he is now in a position to listen to voices of conservatives. Besides the special acts, the Penal Code's moralist and gender biases need to be seriously reconsidered. It will be

72. Ibid.
73. Act on the Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order *(Heunjeongjilseo pakoebeomjoe ui gongsosihyo e gwanhan teukrye beop)* Law No. 5028, December 21, 1995; Special Act on the May 18 Democratic Movement *(5.18 minjuhwa undong deung e gwanhan teukbyeol beop)* Law No. 5029, December 21, 1995.
74. The Constitutional Court ruled that the acts were constitutional since *lex praevia* pertains to punishability, not prosecution (Decision of February 16, 1996, the Korean Constitutional Court, 86 *Heon Ba* 713).

more difficult to remove bias than to revise the special criminal acts since such bias is deeply rooted in Korean culture.

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