

# Statutory Rape in Korea: Do Teens have the Legal Capacity to give Consent to Sex?\*

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## Abstract

*Protection and regulation of youth sex is a sensitive and complex issue in Korea. The Korean Penal Code criminalizes any person who, with no force or threat, obtained consensual intercourse with a minor under thirteen years old. Consensual intercourse with a juvenile aged thirteen or older is not an offense unless consent was acquired through fraudulent means or by means of force. Therefore, a perpetrator, who obtained intercourse without fraud or exercise of power with a minor aged thirteen or older, is not being punished. A multitude of cases has embarrassed Korean society and has fueled debate over the age of consent.*

*This article discusses the age of consent under the Korean statutory rape law. After giving an overview in Part I of this paper, Part II is providing a primer of statutory rape under Korean Criminal Law articulating legislative intent, related principles, and the critiques of the statutory rape law. Part III discusses the issue of juveniles' capacity to consent to sexual intercourse focusing on whether they should be recognized as legally capable of making decisions based on sexual autonomy. Part III contends that the age of consent must be raised to protect juveniles from sexual abuse. Part IV proposes possible solutions for a balance between juveniles' sexual autonomy and the government's protection.*

KEY WORDS: Korean Penal Code, statutory rape law, juveniles, juveniles' consent, youth sex

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## I. Introduction

In recent years, the law of sexual violence in Korea has undergone dramatic changes: 1. not only a female but also a male can be victimized under gender-neutral provision;<sup>1)</sup> 2. perpetrators are subjected to prosecution regardless of a victim's complaint under the Korean Criminal Act [hereinafter "KCA"];<sup>2)</sup> and 3. marital rape is punishable under the Supreme Court's current rulings.<sup>3)</sup> Although Korean society and jurisprudence are generally recognized to have assumed a tougher stance against sexual violence,<sup>4)</sup> the statutory rape law is currently hotly debated, which targets only consensual intercourse with children aged 13 years and younger, rendering consensual sex with a juvenile aged 13 and less than 19 years as not punishable.<sup>5)</sup>

Notably, the adjudication by the Supreme Court in November 2014 triggered the debate. The defendant, in his forties, engaged in several instances of consensual intercourse with a girl then aged 15 years old, seduced her into moving into his house after she became pregnant, and maintained the sexual relationship while videotaping oral sex scenes on

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1) See Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art. 297 amended by Act No. 11574, Dec. 18, 2012 (S. Kor), available at [http://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=38891&lang=ENG](http://elaw.klri.re.kr/kor_service/lawView.do?hseq=38891&lang=ENG) (last visited Apr. 17, 2017) (Prior to the revision of Article 297 of KCA, rape was defined as sexual intercourse with a female with the use of irresistible force or threat. See, e.g., Kuk Cho, *The Under-Protection of Women under Korean Criminal Law*, 22 COLUM. J. ASIAN L. 119, 121 (2008).

2) See, e.g., [Editorial] *Getting tough on sex crimes*, THE KOREA HERALD, June 19, 2013, [http://khnews.kheraldm.com/view.php?ud=20130619000429&md=20130622004309\\_BL](http://khnews.kheraldm.com/view.php?ud=20130619000429&md=20130622004309_BL) (last visited Apr. 18, 2017).

3) Supreme Court, 2012Do14788, May 16, 2013 (S. Kor) (ruling that "In sum, the definition of "female" as a victim of rape as provided by Article 297 the Criminal Act includes an offender's legally married wife... even when the marriage is substantively maintained as well as when it is broken down...") available at [http://library.scourt.go.kr/base/eng/SCD/eng\\_judg\\_view.jsp](http://library.scourt.go.kr/base/eng/SCD/eng_judg_view.jsp) (last visited Apr. 18, 2017).

4) See, e.g., Han-Kyun Kim, *The System is tough on Sex Crimes*, THE KOREA HERALD, Dec. 19, 2011, [HTTP://KHNEWS.KHERALDM.COM/VIEW.PHP?UD=20111219001050&MD=20120317051248\\_BL](http://KHNEWS.KHERALDM.COM/VIEW.PHP?UD=20111219001050&MD=20120317051248_BL) (last visited Apr. 18, 2017).

5) See, e.g., Lee Han-Soo, *Lawmaker pushes for statutory rape age increase*, THE KOREA TIMES, July 17, 2016, [http://www.koreatimes.co.kr/www/news/nation/2016/07/116\\_209581.html](http://www.koreatimes.co.kr/www/news/nation/2016/07/116_209581.html) (last visited Apr. 18, 2017).

several occasions.<sup>6)</sup> In the ruling, the Court found that the victim loved the defendant and had sexual intercourse by her own volition, judging from the text messages she sent to the defendant.<sup>7)</sup> The Supreme Court concluded that by these facts the defendant is not guilty.<sup>8)</sup> More shocking was the 2016 case when two school police officers in charge of protecting and supervising school violence victims had consensual intercourse with the high school students. The officers resigned before the probe began.<sup>9)</sup> One of the two officers was charged with rape whereas the other was not prosecuted since the prosecutor could not prove that the suspect wielded his power to obtain intercourse.<sup>10)</sup> Under Article 302 of the Korean Criminal Act, 'exercise of power' is the element that constitutes 'sexual intercourse with a minor through power of force', thus statutory rape cannot be applied. Following widespread criticism, a few lawmakers submitted revision bills to the 20<sup>th</sup> National Assembly (May 30, 2016–May 29, 2020) to raise the age of consent to sixteen years. The bills are currently pending examination. Before the proposed bills were submitted, efforts were made to raise the age of consent during the session of the 19<sup>th</sup> National Assembly (May 30, 2012–May 29, 2016). However, these efforts were unsuccessful, as the proposed bills failed to get approval from the Legislation and Judiciary Committee, who has jurisdiction over the bills.

This article critically reviews the pros and cons of the arguments over the current Korean statutory rape law and proposes possible solutions. Part II explores the overview of elements of statutory rape and its related principles under KCA. Part III analyzes the legislative history of statutory rape in Korea and discusses the legal capacity of adolescents to give

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6) See Kim Yon-se, *Man Cleared of assault charge on 15-year-old girl*, THE KOREA HERALD, Nov. 14, 2014, [http://khnews.kheraldm.com/view.php?ud=20141124001134&md=20141125003142\\_BL](http://khnews.kheraldm.com/view.php?ud=20141124001134&md=20141125003142_BL) (last visited Apr. 10, 2017).

7) Supreme Court, 2014Do9288, Nov. 13, 2014 (S. Kor).

8) *Id.*

9) See Lim Jeong-yeo, *Policemen get away after having sex with teenagers*, THE KOREA HERALD, June 27, 2016, [HTTP://KHNEWS.KHERALDM.COM/VIEW.PHP?UD=20160627001033&MD=20160630003920\\_BL](http://khnews.kheraldm.com/view.php?ud=20160627001033&md=20160630003920_BL) (last visited Apr. 10, 2017).

10) See No Jun-cheol, *Of the two school police officers who had sexual intercourse was one prosecuted without detention and the other not charged*, KBS NEWS, Oct. 13, 2016, <http://news.kbs.co.kr/news/view.do?ncd=3360976&ref=A> (last visited Apr. 10, 2017).

consent to sexual intercourse. Part IV proposes possible reform measures to protect juveniles from wrongful sex and at the same time to guarantee their rights to privacy.

## II. Statutory rape and its related principles in Korea

Sketching an overview of the statutory rape law, this part discusses elements of the offense and presents legal issues on other related rape laws. It demonstrates that the current age of consent is too low to protect juveniles from being sexually exploited by adults and argues that the Supreme Court interprets the element of 'fraud' and 'power of force' too narrowly and arbitrarily.

### 1. Overview

A person aged 14 or over who had consensual sex with a minor under 13 years shall be punished by imprisonment for a limited term of at least three years,<sup>11)</sup> while a person aged 13 and younger, a criminal minor, is exempted from criminal liability.<sup>12)</sup> However, a perpetrator who had sexual intercourse in an aggravated manner, such as by force or threat, is punished under the Act on Special Cases Concerning the Punishment, and the like, of Sexual Crimes<sup>13)</sup> [hereinafter Special Act]. On the other hand, a person over 13 years will not be punished if he or she has consensual intercourse with a juvenile aged from 13 to 18 years old unless the consent was obtained through fraudulent means or by power of force. If fraudulent means or power of force were used, then the perpetrator is to be punished by imprisonment not more than five years under Article 302 of KCA.<sup>14)</sup> In this

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11) See Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art. 297 Amended by Act No. 11574, Dec. 18, 2012 (S. Kor).

12) Hyeongbeob [Criminal Act] *Id.*, art. 9 (S. Kor).

13) See Seongpokryeok beomjoeoeu cheobeol deungeo gwanhan beobryul [Act on Special Cases Concerning the Punishment, Etc. of Sexual Crimes] Act No. 10258, Apr. 15, 2010, art. 7, Amended by Act No. 12889, Dec. 30, 2014 (S. Kor.), available at [http://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=33346&lang=ENG](http://elaw.klri.re.kr/kor_service/lawView.do?hseq=33346&lang=ENG)(last visited Apr. 17, 2017).

14) Hyeongbeob [Criminal Act] *Id.*, art. 302 (S. Kor).

case, however, the perpetrator will be punished under the Act on the Protection of Children and Juveniles against Sexual Abuse<sup>15)</sup> [hereinafter Protection Act]. Besides rape, any person who purchases sex from a child under 13 years, or from a juvenile aged 13 and less than 19 years, will be punished under the Protection Act.<sup>16)</sup> Rape against an adult who is 19 years and older occurs in the following instances: 1. when sexual intercourse is non-consensual and is obtained with irresistible force or threat;<sup>17)</sup> 2. when consent is obtained through fraudulent means or power of force by a person who, in the course of his or her business, employment, or other relationship, has the duty to protect or supervise the victim;<sup>18)</sup> or 3. when the sexual act occurs between a guardian and a person who is in his or her custody.<sup>19)</sup>

## 2. Principles of Statutory Rape in Korea

### 1) Legislative Intent

The statutory rape law protects minors from any harm until they reach sexual maturity and ensures children's healthy sexual development. According to the rulings by the Supreme Court, the statutory law specifically ensures a child's right to be protected in his or her sexual identity and values against any physical or psychological disturbances resulting from any type of improper sexual stimulus or intrusion.<sup>20)</sup> This means that a child's privacy rights to sexual autonomy, which guarantees a person's free formation and development in his or her own sex, is outside the realm of the statutory rape law with a child's consent being no defense.

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15) Adong cheongsoneon seong bohooe gwanhan beoblyul [Act on the Protection of Children and Juveniles against Sexual Abuse] Act No. 9765, July 9, 2009, art. 7, Amended by Act No. 12361, Jan. 28, 2014 (S. Kor), available at [http://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=33019&lang=ENG](http://elaw.klri.re.kr/kor_service/lawView.do?hseq=33019&lang=ENG) (last visited Apr. 17, 2017).

16) *Id.*

17) Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art. 297, Amended by Act No. 11574, Dec. 18, 2012 (S. Kor).

18) Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art 303(1), Amended by Act No. 11574, Dec. 18, 2012 (S. Kor).

19) *Id.*

20) Supreme Court, 2005Do6791, Jan. 13, 2006 (S. Kor).

Therefore, a general precept of statutory rape law in Korea is that children below thirteen are deemed as being legally incapable of consenting to any sexual activity.

From the perspective of legislative history, at the time when KCA was enacted in 1953, the initial title of Chapter 32 that included Article 305 of the statutory rape law was 'Crime against Chastity.' This means that the statutory rape law was enacted to protect the chastity of women for marriage. However, the title changed into 'Rape and Indecent Act' in 1995.<sup>21)</sup> In fact, the Korean statutory rape law was modeled after the Japanese statutory rape law, which prescribes that a man who has consensual intercourse with a female aged 13 years or younger shall be punished by imprisonment for a limited term of at least three years.<sup>22)</sup> However, the current Korean statutory rape law protects not chastity but sexual rights. It protects not just a female child but all children regardless of gender. Does this change provide any meaningful argument over the age of consent? While the proper age of consent from the perspective of chastity must be decided based on the socially acceptable age for marriage, the age of consent, from the viewpoint of the protection of children's sexual rights, must be considered not only from the biological, social, and cultural perspectives, but also from the psychological and criminological points of view.

## 2) *Mistake of Age as a Defense to Statutory Rape*

Article 13 of KCA prescribes that "an act performed through ignorance of the facts that comprise the constituent elements of a crime shall not be punishable, except as otherwise provided by the Act,"<sup>23)</sup> and Article 14 of KCA prescribes that "an act performed through ignorance of the facts that comprise the constituent of a crime by neglect of normal attention, shall be punishable only when prescribed so by Act."<sup>24)</sup> Under these principles,

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21) See Kim, Han-Kyun, *Statutory Rape Law & Minors' Capacity to Consent: A proposal of reform*, 25 JOURNAL OF CRIMINAL LAW no. 1, 105, 115 (2013).

22) *Id.*

23) Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art. 12, *Amended by* Act No. 11574, Dec. 18, 2012 (S. Kor).

24) Hyeongbeob [Criminal Act] Act No. 293, Sep. 18, 1953, art. 13, *Amended by* Act No. 11574, Dec. 18, 2012 (S. Kor).

*mens rea* is required in any type of offenses in Korea, while strict liability is not recognized. As the statutory rape law requires a defendant's criminal intent, a perpetrator's knowledge of the victim's age is an essential element of the offense. Thus, a perpetrator who was ignorant of the victim's age may seek to raise the defense of mistake of age, which, if proven, will result in the perpetrator's acquittal.

Highly controversial is the issue of who takes the burden of producing the evidence. The general principle is that a prosecutor has the burden of proof on the elements of the offense charged.<sup>25)</sup> Following this principle, the Supreme Court has ruled that the prosecutor must provide the evidence and persuade the factfinder beyond a reasonable doubt that the defendant was aware of the victim's age at the time of the offense.<sup>26)</sup> But how to count a person's age is problematic. Consider this case: The girl, a first-year middle school student, was turning thirteen on her next birthday still six months away. But she was considered fourteen-years-old in Korean age at the time of offense. Moreover, she looked mature enough to be fully seen as a fourteen year-old.<sup>27)</sup> The Supreme Court denied the defendant's *mens rea* by indicating that such subjective elements must be determined only by factual and rational analysis.<sup>28)</sup> The Court concluded:

“The burden of proof regarding the facts that organize an indicted crime in a criminal trial lies in the prosecutor, whether the factual elements are objective or subjective. Thus, the legal principle that willful negligence concerning the crime of the provision of this case may be acknowledged “as long as the victim is under 13, unless there are rational grounds to acknowledge that the defendant would not have proceeded to rape the victim if he was aware - based on the objective circumstances at the time - that she was under 13 years of age.” This is unacceptable, as it extensively damages an important principle of the Criminal Procedure Act - the prosecutor must prove the subjective and objective factual elements of a crime - without any

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25) Supreme Court, 2010Do14487, Apr. 28, 2011 (S. Kor).

26) Supreme Court, 2012Do7377, Aug. 20, 2012 (S. Kor).

27) *Id.*

28) *Id.*

justifiable reason.”

The Supreme Court’s ruling seems to be based on rational grounds under the current legal principle. Given the relatively low age of consent, however, doubts exist on whether the statutory rape law of Korea functions well in attaining its legislative goal.

### 3) *Consensual Sex through Fraud and Power of force*

#### **a. Fraud**

Sexual intercourse with the consent of a minor aged under 13 years is an aggravated sexual crime if the consent was obtained by fraudulent means or through the power of force under Article 7(5) of the Special Act, and under Article 7(5) of the Protection Act when the victim is aged between 13 to 18 years. Thus, original statutory rape under Article 305 of the KCA applies only when the victim knowingly, intelligently, and voluntarily consented to the sexual act. However, the definition of ‘fraud’ and ‘power of force’ is so malleable and arbitrary when applied to real cases that it is difficult to determine whether the victim was defrauded or threatened by force in a manner as to negate the consent. Indeed, the Court has ruled that a victim must be defrauded to the sexual intercourse itself and not to any other collateral matter, such as the motivation to have sex.<sup>29)</sup> Accordingly, when a perpetrator deceived a victim into having intercourse by promising to pay for the sex, the consent is not deemed to be obtained by fraud.<sup>30)</sup> In the same vein, if a victim, who was deceived by a defendant promising to introduce a new boyfriend, followed the defendant into a hotel room, and had sexual intercourse with the defendant, the Court ruled that the victim was not defrauded.<sup>31)</sup> The Court draws a line between ‘fraud of intercourse’ and ‘fraud of inducement’: the former is a direct deception on sexual intercourse while the latter is any type of artifice, trick, or inducement collateral to intercourse; the former negates a victim’s consent and the latter does not.

The Court’s rulings are problematic. First, with this extremely narrow

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29) *See, e.g.*, Supreme Court, 2001Do5074, Dec. 24, 2001 (S. Kor).

30) *Id.*

31) *See, e.g.*, Supreme Court, 2002Do2029, July 24, 2002 (S. Kor).

definition of fraud,<sup>32)</sup> fraud would be acknowledged only in a few cases. For instance, let us suppose that a doctor obtained intercourse with a child's consent by deceiving the child that the penetration is a medical treatment. The victim was aware of the intercourse but gave the consent not for any sexual motive but for the medical purpose, which is fraud on a material fact of sexual intercourse. But then, the consent to sexual intercourse that a juvenile gave to a perpetrator who is impersonating the victim's lover may also fall under this category. However, fraud in the above two cases amounts to be an irresistible force or threat as to constitute forcible rape. Thus, Korean legal commentators argued that 'fraud' should be considered as any type of a perpetrator's deception on juveniles in order to obtain consent to sexual intercourse.<sup>33)</sup>

Second, the Court's ruling does not fully protect the juvenile's privacy rights of sexual autonomy, thereby exposing juveniles to sexual abuses or exploitation by adults. As the Court puts it,<sup>34)</sup> the legislative intent of Article 302 of the KCA is to protect juveniles from unhealthy, improper, and wrongful sex as they are deemed to be deficient in the ability to understand and take responsibility for their sex. However, the Court's rulings fall short in the protection of the targeted class—juveniles aged between 13 to 18 years. The Court, with no reasonable grounds, applies the narrowest definition of fraud.

### **b. Power of force**

The Supreme Court has ruled that 'power of force' is any type of tangible or intangible force, exercised to suppress a victim's free will, and that the power can be generated not only by assault or threat but also from any type of social, economic, and political status or authority.<sup>35)</sup> A 'power of force' is to show a perpetrator's power or influence, it does not necessarily

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32) See, e.g., Cho, Kuk, *Rethinking the Crime of Rape: Change of Judicial Decisions and its Limit*, JOURNAL OF CRIMINAL LAW VOL. 28 No. 4, 91, 113 (2016); Choi, Eun-Ha, *Study on Sexual Intercourse with Minor, etc. through Fraudulent Means or by the Threat (Article 302 of Criminal Code)*, JOURNAL OF COMPARATIVE CRIMINAL LAW VOL. 17 No.3, 177 (2015).

33) Cho, *id.* See also, Lee, Deok-In, *Meaning of 'Deceptive Scheme' in the Child and Juvenile Adultery by Deceptive Scheme*, JOURNAL OF CRIMINAL LAW VOL. 28 No. 4, 255 (2016).

34) KIM, SEONG-DON, CRIMINAL LAW, 192 (3d ed. 2013).

35) See Supreme Court, 2004Do5868, July 29, 2005 (S. Kor).

require physical force or threat. In this sense, 'power of force' is different from the elements of rape, such as irresistible 'force' or 'threat.'<sup>36)</sup> Moreover, it does not entail any abuse of power, psychological oppression, or coercion that causes fear. The Constitutional Court of Korea concluded:<sup>37)</sup>

"In general, 'force' is construed as 'any kind of power or influence that can be used to subdue and/or confuse the free will of another person'. The Supreme Court also construed the meaning of force in the Instant Provision as 'any kind of physical or intangible influence that can be used to suppress and/or confuse the free will of a person'. 'Force' includes not only physical violence or intimidation but also any kind of pressure exerted from one's social, economic or political authority and status."

The Supreme Court made a broad definition of 'power of force' since 2005.<sup>38)</sup> In one case, the perpetrator, knowing that his son parted with the girl who was then seventeen years old, met the victim, drank, and took her into a hotel room.<sup>39)</sup> He kissed her and took her tightly by the wrist while she was saying, "Don't do this!"<sup>40)</sup> He continued to take off her jeans, ignored her cry, and had intercourse with her.<sup>41)</sup> The lower court ruled that it was hard to believe the credibility of the victim's testimony, as to that the defendant psychologically compelled her since the victim did not try to escape the motel room while the defendant was taking a shower. Further, the court judged that when she threw herself into the defendant's arms there was no force or threat from the defendant. Also, the victim had sexual intercourse with the defendant's son the day after the incident.<sup>42)</sup> However, the Court, in overruling the lower court's decision, acknowledged that the intercourse was obtained by the defendant's power of force. It was difficult

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36) Ryu, Bu-Gon, *Meaning of 'the Power of Force' for the Crime Sexual Intercourse against Minor, etc.*, JOURNAL OF CRIMINAL LAW VOL. 28 No. 1, 133, 147 (2013).

37) Constitutional Court, 2013Hun-Ba107, Feb. 26, 2015.

38) 2004Do5868, *supra* note 35.

39) *Id.*

40) *Id.*

41) *Id.*

42) *Id.*

for the victim, who was psychologically intimidated and embarrassed by the breakup with the defendant's son, to resist the intercourse while in desperate need of the defendant's help. The Court continued this position in another case: a large, twenty-five-year-old man mounted a small, fifteen-year-old girl despite the victim's verbal refusal, and the defendant had intercourse with no force or threat.<sup>43)</sup> In this case, the Court found the defendant guilty of obtaining sexual intercourse by 'power of force.'<sup>44)</sup>

This line of rulings on the definition of 'power of force' broadened the scope of sexual violence against juveniles. At least one commentator argued that the Court is on the way to a de-facto acknowledgement of no-consent rape in Korea.<sup>45)</sup> In one sense, legal commentators who have long criticized physical force and threat-based rape in Korea have welcomed these rulings.<sup>46)</sup> Indeed, the irresistible force or threat approach, as legal professionals criticized, has geared courts into examining sexual violence by too much focusing on a perpetrator's point of view and not from the viewpoint of the victim's privacy rights. In this vein, the broad meaning of 'power of force' may contribute to the protection of juveniles from sexual assault not amounting to forcible rape.

The broad definition, however, may not be enough in complicated cases. Consider the following situation:<sup>47)</sup> a perpetrator, aged thirty-six years engages in an on-line chat via a smartphone application with a girl aged fourteen years. He lies to the girl that he is a high school student, and both agree to internet dating. The defendant requests the victim to send him her nude photos by e-mail and the victim complies. To have sexual intercourse, the perpetrator lies to the victim that he is being stalked by a woman and that he must send a video of sexual intercourse between his friend and her. With her continuous refusal, the defendant demands break-up, expressing his utmost distress. The victim then complies with the demand on the condition that she meets the defendant who is

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43) Supreme Court, 2008Do4069, July 24, 2008 (S. Kor).

44) Id.

45) See Lee, Su-jin, *Die sexuelle Selbstbestimmung der Minderjährigen über Dreizehn Jahren*, JOURNAL OF COMPARATIVE CRIMINAL LAW, VOL. 17 No. 3, 117, 136 (2015).

46) See, e.g., Cho, *supra* note 32, at 113.

47) Lee, Deok-in, *supra* note 33, at 257 (citing Judgment of June. 11, 2015 No145 (Gwang-ju High Court))

impersonating as his friend. During the first sexual encounter, the victim complains about pain and requests the defendant to stop, but the defendant continues and demands two more instances of sex. The victim submits to these demands. In this case, the prosecutor charged the defendant with rape by power of force under Article 302 of KCA. The court of the first instance, however, ruled that the prosecutor did not prove that the defendant had sexual intercourse through power of force in a manner as to suppress the victim's free will. The prosecutor appealed.<sup>48)</sup> The prosecutor in the appellate court amended the bill of indictment by changing 'rape by power of force' to 'rape by fraudulent means.'<sup>49)</sup> However, the appellate court found the defendant not guilty based on the Supreme Court rulings.<sup>50)</sup> The lower court seemed to have focused only on the fact that the victim gave the consent under no force, threat, or coercion at the exact time of sexual intercourse, despite the psychological suppression of the victim's will. The court, however, should have considered that the juvenile, defrauded and daunted by the worry of the break-up, was not capable of actively refusing the intercourse.

On the other hand, a critical view states that the broad definition by the Court made 'power of force' much murkier, placing it into the gray zone together with 'irresistible force,' 'threat-based rape,' and 'non-consent rape.'<sup>51)</sup> As sexual intercourse with a minor itself can be interpreted as 'power of force' under the current rulings, trial courts may decide based not on facts but on a generalized categorical situation.<sup>52)</sup> If the punitive target of the offense is the person who infringes on the juvenile's sexual autonomy, then the Court must acknowledge the 'power of force' only when the force is specifically and causally related to the infringement of the victim's privacy rights.<sup>53)</sup> The Court's definition, therefore, is too abstract and ambiguous for a defendant to anticipate whether his or her behavior is

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48) *Id* (citing Judgment of Feb. 5, 2014 Go-Hab278 (Suncheon Local Court of Gwang-ju District Court)).

49) 2015 No145, *supra* note 47.

50) *Id*.

51) Ryu, *supra* note 36, at 148.

52) *Id*.

53) *Id*.

punishable, which results in the court's arbitrary decision-making.

#### 4) *Critique of Statutory Rape in Korea*

Regarding the statutory rape law, two questions arise. Is the age of consent proper enough to meet the legislative intent? Moreover, is the definition of fraud and power of force applied adequately and practically in real cases? The cases mentioned before raise doubts on the matter of clear line-drawing between the two different protected classes. As there is no biological, sociological, and cultural evidence that children under thirteen years lack the capacity to consent while juveniles do, there are no legitimate grounds to guarantee absolute protection for children but limited protection for juveniles. Korean teenagers seem to be more sexually active and Korean culture needs to adapt to juveniles' increased sexual activity. Therefore, our society seem to need to respect teenagers' privacy rights. But the Korean society does require more protection of adolescents to guarantee that they develop their own sexual identity and values without being abused and exploited.

Thus, expansion of adolescents' privacy rights is dependent on whether they are adequately protected from a legal and criminological perspective. As aforementioned, statutory rape law in Korea lies in a gray area. Juveniles thirteen or over are legally capable of giving consent to sexual intercourse unless they are defrauded or threatened by the power of a perpetrator. But fraud is not adequately well defined as to protect juveniles so that they give consent knowingly, intelligently, and voluntarily in a well-informed situation. Therefore, the definition of fraud under the current rulings fails to punish adults who manipulate juveniles into giving indiscreet and careless consent to sexual activity. Power of force also does not function in nuanced cases when a victim's free will is substantially affected by, for example, the guise of love affairs or by intimidation of a break-up.

### III. Juveniles' Legal Capacity to Consent

As the legislative intent behind Korean statutory rape law is that children below thirteen are not legally capable of consenting to sexual

intercourse, so juveniles aged thirteen or older are reasonably deemed to have legal capacity. Are Korean juveniles legally mature? This part discusses the issue on whether juveniles aged thirteen or older are legally capable of consent to sexual intercourse.

### *1. Right to Sexual Autonomy*

The Constitutional Court of Korea has defined sexual autonomy as the right to determine one's own sex under one's own responsibility,<sup>54)</sup> generated from the rights of self-determination, based on the right to human worth and dignity, and the right to pursue happiness.<sup>55)</sup> Then, sexual autonomy is based on the premise that a person has the capacity for sexual decision-making by taking full responsibility for a decision. In this sense, the Constitutional Court decided that the repealed Penal Code, Article 304 of KCA, which penalized a man who obtained consent from an adult female through fraudulent means, is unconstitutional because the victim's filing of a complaint that she gave the consent by mistake is contradictory to her sexual autonomy.<sup>56)</sup> Therefore, in order for juveniles to fully enjoy the same rights to sexual autonomy as adults, they must be able to take their own responsibility for the decision they made not only from a personal but also from a social perspective.

### *2. Is Juvenile's Consent a Justified Conduct?*

Except for the age of consent under Article 305 of the KCA, there is no general provision that sets an age of legal consent under the Penal Code. In the Korean criminal jurisdiction, juveniles are thus also legally capable of giving consent. Article 24 of the KCA under the title of 'Consent of Victim' prescribes that "an act which infringes a legal interest with the consent of

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54) Constitutional Court, 2008Hun-Ba58, Nov. 26, 2009. For the information of the Constitutional Court of Korea, see Kuk Cho, *The Exclusion of Illegally Obtained Confessions, Electronic Communications and Physical Evidences in Korea*, JOURNAL OF KOREAN LAW, VOL. 13, 175, 176 (2014).

55) *Id.*

56) 2008Hun-Ba58, *supra* note 54.

one who is authorized to dispose of such interest shall not be punishable except as otherwise provided by Acts.” Under this provision, therefore, an adult who obtained a juvenile’s consent and had intercourse with such juvenile will not be punished unless the consent was given by fraudulent means or power of force. Thus, it is the generally accepted principle that the Article 24 is a justification defense.

However, a victim’s consent may negate the elements of an offense under certain circumstances. For example, to take a bag with the owner’s consent does not constitute larceny. Likewise, sexual intercourse between two persons who freely consent to participate in the intercourse does not constitute rape. In this case, the victim’s consent is called ‘yang-hae’. In contrast, medical treatment by a doctor is different. Some legal scholars argue that medical treatment, such as surgery by a doctor, is also ‘yang-hae’ since its purpose is not to harm but to ultimately recover a patient’s physiological function. Others argue that a surgery does not negate a defendant’s mens rea since the surgery doctor has an instant intent to injure by cutting a patient’s body. Thus, his act constitutes an injury but is justified only under the patient’s flawless consent, which is called ‘seung-nak.’ Therefore, effective seung-nak is obtained knowingly and intelligently, which requires that a surgery doctor provides a patient with full information on the nature and possible aftereffects of the surgery.<sup>57)</sup>

Despite the high controversy between the difference of yang-hae and seung-nak, it can be accepted that yang-hae is acknowledged when its legal benefits are only related with personally disposable rights, such as battery, rape, trespass, and larceny. Seung-nak, on the other hand, is acknowledged when the legislative intent behind the statute is to protect not only individual rights but also other social values, such as bodily injury and defamation.<sup>58)</sup> Consent to sexual intercourse among adults, therefore, is yang-hae as long as it is obtained voluntarily, knowingly, and intelligently. However, juveniles’ consent is different. As juveniles are incompetent in making decisions with full responsibility, social norms are such that

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57) See, e.g., Supreme Court, 92Do2345, July 27, 1993 (S. Kor.) (Ruling that the patient’s consent obtained through insufficient explanation of operation is not effective and does not justify the crime of professional negligence resulting in injury).

58) SEONG-DON KIM, CRIMINAL LAW 325 (4th ed. 2015) (in Korean).

juveniles should be protected from any harm to their psychological, physical, and health condition.<sup>59)</sup> It is especially recognized that sexual experience during the adolescent period significantly affects juveniles' physical and psychological development.<sup>60)</sup> That being said, juveniles' consent to sexual intercourse must be carefully treated in terms of seung-nak rather than yang-hae.

Seung-nak in general is the capacity to make a decision.<sup>61)</sup> Today, the general acceptance is that capacity in criminal law is an ability to make a factual decision, which is not equal to legal capacity that is required to do a legal act such as those under civil law.<sup>62)</sup> Under this principle, the capacity of seung-nak is dependent on the giver's age, intellectual capacity, nature and purpose of the conduct, and other related circumstances, which varies according to the specific cases.<sup>63)</sup> Seung-nak also should not be against socially accepted ethics and norms.<sup>64)</sup> Therefore, the issue of the seung-nak capacity of juveniles narrows down to the question whether juveniles are capable of making a decision while also understanding the meanings and results of the decision and taking full responsibility for the decisions made. Likewise, juvenile's seung-nak to sexual intercourse must be acknowledged when they are deemed to understand the entire circumstances and the full meaning of having sex and are able to take full responsibility in a socially accepted manner. In this sense, the current Korean statutory rape law fails to meet this standard as the current Penal Code acknowledges juveniles' seung-nak capacity when there is no fraud or power of force. Then, we need to devise a proper measurement, on one hand, to protect juveniles and, on the other hand, to guarantee the privacy of their rights.

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59) See, e.g., Cheongsongyeon-Gibon-Beop [Framework Act on Juveniles], Act No. 4477, Dec. 31, 1991, amended by Act No. 13180, Feb 3, 2015, art. 7 (S. Kor.).

60) See *infra* note 90 & 91.

61) Lee, *supra* note 45, at 132.

62) Kim, *supra* note 58, at 331.

63) *Id.* See also, Lee, *supra* note 45, at 128.

64) Kim, *supra* note 58.

### 3. A Matter of Line Drawing to raise Age of Consent

As noted before, a multitude of legal professionals pointed out that the current statutory rape law is not enough to protect juveniles from wrongful sex.<sup>65)</sup> Line drawing is not an easy task, however. As the age of consent in Korea has long been set at under thirteen, there must be a justifiable standard or reason to reset it. Legal professionals are divided on this issue. Proponents' arguments can be summarized into four: the lack of parental supervision and the increasing harmful social environment to juveniles, the comparatively high global age of consent, legal inconsistency in defining the age of consent under Korean statutes, and an empirical evidence on the need to raise the age of consent.

First, it is known that the Korean society has been rapidly and dramatically industrialized and that at the same time the extended family system collapsed.<sup>66)</sup> Parents in the increased nuclear and double-income family lost their supervision on their children, rendering juveniles increasingly exposed to a harmful environment with the rapidly growing use of smartphone and internet.<sup>67)</sup> Under these circumstances, juveniles are more likely to be tempted to gain economic benefits by participating in sexual acts and to submit to an adult's request due to the unfair and unequal mental, social, and economic power and status. Thus, proponents argue that it is urgently needed for the government to devise measures ensuring that juveniles' sexual autonomy rights are not exploited.<sup>68)</sup>

Second, most of the proponents argue that the age of consent must be

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65) See *supra* Part II.2.C.

66) See, e.g., Da-sol Kim, *Changing Definition of Korean Family*, THE KOREA HERALD, Mar. 29, 2016, [http://khnews.kheraldm.com/view.php?ud=20160329000677&md=20160401004640\\_BL](http://khnews.kheraldm.com/view.php?ud=20160329000677&md=20160401004640_BL) (last visited in Apr. 18, 2017).

67) See, e.g., Ji-seung Kim, *Children from Poor Families More Likely to Be Targets of Sexual Crimes*, THE HANKYOREH, Jul. 25, 2012, [http://www.hani.co.kr/arti/english\\_edition/e\\_national/544154.html](http://www.hani.co.kr/arti/english_edition/e_national/544154.html) (last visited in Apr. 18, 2017).

68) See, e.g., Jeong-A Chun, *The Raise of Age of Consent in Statutory Rape for the Protection of Juveniles' Sexuality*, proceedings of seminar held by Korean Women Lawyers Association on Dec. 3, 2015, available at [http://www.kwla.or.kr/board/free/read.html?no=231&board\\_no=7#none](http://www.kwla.or.kr/board/free/read.html?no=231&board_no=7#none) (last visited in Apr. 18, 2017) (in Korean).

raised to a level comparable to the global age of consent.<sup>69)</sup> A multitude of countries set the age of consent at sixteen or older.<sup>70)</sup> For example, the age of consent in the United States ranges from sixteen to even eighteen across the states.<sup>71)</sup> Although the age of consent ranges between eleven and twenty-one across the world, only a few countries set the age at thirteen.<sup>72)</sup> In some countries, the Penal Code directly prescribes that a person under a certain age is not legally capable of consent. For example, the New York Penal Code regulates that a person under seventeen is not capable of consent.<sup>73)</sup>

Third, a few legal professionals point out that the age of consent needs to be consistent with other Korean statutes.<sup>74)</sup> For example, the Korean Criminal Procedure Act<sup>75)</sup> and the Korean Civil Procedure Act<sup>76)</sup> prescribe that any person under sixteen years old is not capable of taking an oath. Under the Civil Act, juveniles are legally permitted to marry with their parents' consents when they reach eighteen years.<sup>77)</sup> A minor under fifteen and a juvenile under eighteen years attending a middle school may not be employed unless they are issued an employment certificate from the Minister of Employment and Labor.<sup>78)</sup> Internet game providers must obtain consent from "the person with parental authority over the juvenile when the users are under sixteen years old."<sup>79)</sup> Although juveniles' legal capacity

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69) See generally, Eun-kyeong Jeong, *A Study on the Validity of the Age Raise in Statutory Rape*, KOREAN 29 CRIMINOLOGICAL REVIEW, VOL. 27 No. 2, 5, 15 (2016).

70) See AgeOfConsent home page available at <https://www.ageofconsent.net/> (last visited in Apr. 18, 2017).

71) *Id.*

72) *Id.*

73) See N.Y. Penal Law §130.05(3)(a) (McKinney 2004); see also Cal. Penal Code §261.5 (prescribing that a person under eighteen years of age is incapable of legal consent).

74) See Kim, *supra* note 21, at 115.

75) Hyeogsa sosong beop [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, amended by Ac. No. 13454, Jul. 31, 2015, art. 159 (S. Kor.).

76) Minsa sosong beop [Civil Procedure Act], Act No. 547, Apr. 4, 1960, amended by Act No. 12882, Dec. 30, 2014, art. 322 (S. Kor.).

77) Minbeop [Civil Act], Act No. 471, Feb. 22, 1958, amended by Act No. 13125, Feb. 3, 2015, art. 322 (S. Kor.).

78) Geunro gijun beop [Labor Standard Act], Act No. 5309, Mar. 13, 1997, amended by Act No. 12527, Mar. 24, 2014, art. 64 (S. Kor.).

79) Cheongsongyeon boho beop [Juvenile Protection Act], Act No. 5297, Mar. 7, 1997, amended by Act No. 14967, Mar. 3, 2016, art. 24 (S. Kor.).

varies among statutes, it is fair enough to say that the age of consent under the Penal Code is extremely low.

Fourth, a few legal scholars and criminologists argue that juveniles became more sexually active and that they are increasingly targeted with sexual violence. They also argue that the most vulnerable class of juveniles aged between thirteen to sixteen shows the fastest growing victim rate.<sup>80)</sup> For example, according to the analysis of data from the Supreme Prosecutor's Office, the class of juveniles aged between 13 to 16 years has shown the rapidest increase in victim rate since 2001 with juveniles aged between 16 to 20 years showing the highest victim rate in the same period.<sup>81)</sup>

By contrast, opponents argue three main reasons: the need to respect teenagers' right to sexual autonomy, the problem of penalizing teenagers' sex activities, and the need for more fundamental measures to enhance the welfare of juveniles. First, some argue that as Korean juveniles become more open to sex and actively participate in sexual relationships, society must respect their rights and should not intervene in their privacy with criminal sanction.<sup>82)</sup> It is also argued that, as some juveniles aged fourteen or fifteen are high school students, sexually precocious juveniles look like adults in their appearance. Thus, adults can be easily deceived making the statutory rape law's strict application difficult.<sup>83)</sup> In addition, some argue that with no biological and psychological basis, a standard to set a certain age of consent may be arbitrary.<sup>84)</sup>

Second, it is also disputed that teenagers are more likely to be punished if the statutory rape law applies to all the juveniles over thirteen years old. For example, the former vice-minister on behalf of the Ministry of Justice, in

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80) See Eun-kyeong Jeong, *supra* note 69, at 10 (2016).

81) *Id.*

82) See Jong-Heu Hong, *Review on the Raise of Age of Consent in Statutory Rape*, proceedings, *supra* note 68, at 21.

83) See Jin-Tae Kim, a law-maker, statement in the minutes of hearing, *Amendment Bill of Criminal Act: Hearing on Bill Number 1901590 and 1901742 Before the Legislature and Judiciary Committee, 19<sup>th</sup> National Assembly, 311<sup>th</sup> second hearing held on Nov. 22, 2012, available at <http://likms.assembly.go.kr/record/mhs-10-030.do?ConferNum=042236> (last visited Apr. 18, 2017) (in Korean).*

84) *Id.*

examining the amendment bill to revise Article of 305 of KCA that two lawmakers submitted to Legislation and Judiciary Committee, advised against the bill by expressing concern about criminalizing teenagers' sexual activities.<sup>85)</sup>

Third, some argue that raising the age of consent is not an ultimate solution to the prevention or reduction of sexual violence targeting juveniles, as adults who obtained a juvenile's consent may raise the defense of mistake of age.<sup>86)</sup> It is also discussed that, as juveniles have the mental capacity to understand the meaning of sex and choose their sex partners on their own responsibility, the duty of Korean society is not to prohibit them from having sex but to educate juveniles on how to exercise their sexual rights in a desirable manner.<sup>87)</sup> Furthermore, to protect juveniles from being sexually exploited and to enhance their welfare, it is argued that Korean society needs to guarantee juveniles' social and political rights to participate in social matters so that they grow in their own sense of responsibility to protect themselves.<sup>88)</sup>

Undoubtedly, for drawing a line between a juvenile who has no legal capacity to consent to sexual intercourse and one who has, there is no public acknowledgement in that the former does not have their own sexual autonomy and the latter does. It must be noted that age of consent does not negate a juvenile's sexual rights. The legal point is whether juveniles older than twelve need to be more protected by the Korean society. In this regard, I argue that the age of consent must be considered from three perspectives. First, does the current Penal Code fully guarantee the juvenile's sexual rights enough to fulfill the legislative intent behind the statutory rape law? Second, is the age of consent consistent with other relevant statutes that provide the legal capacity to consent? Third, is there an adequate possible solution to balance the protection of juveniles and the guarantee of juveniles' sexual rights?

First, rape by fraud or power of force fails to protect juveniles aged

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85) See *Tae-Gi Gil*, statement in the minutes of hearing, *supra* note 83, at 5.

86) Mi-Gyeong Lee, *Review on the Standard of Sexual Violence Beyond Age*, proceedings, *supra* note 68, at 25.

87) *Id.*

88) *Id.*

thirteen years or older. As mentioned before, fraud under Article 302 is so narrowly defined that most of the juveniles are outside the protection. Moreover, power of force, despite the Court's broad definition, does not provide an answer in certain complicated cases when a perpetrator orchestrated sexual instances artfully appealing to a victim's emotion. The Court has ruled that a victim's sexual rights were violated not by examining whether the consent was obtained by fraud or power of force but by scrutinizing whether sexual intercourse itself occurred by fraud or power of force. Therefore, under the Court's current ruling, the crime of Article 302 became a barrier for the protection of juveniles' sexual rights by straddling in a gray area between the statutory rape and forcible rape.

Second, the current age of consent is not consistent with other relevant statutes. As already explained, juveniles younger than sixteen are not legally capable of taking an oath or being users of internet games without the parents' consent. Moreover, any harmful "article," "media product," and "business establishment" may not be distributed to juveniles under Article 2 & 7 of the Juvenile Protection Act.<sup>89)</sup> Although it may be disputed whether sexual experience during the adolescent period is as harmful as watching a rated-R movie or drinking alcohol, it is inarguable that the sexual experience of juveniles has a long lasting physical and psychological effect. Indeed, it is reported that juveniles under fifteen years are passive and lack the mental capacity to consent<sup>90)</sup> and that they are not adequately educated on the results of sexual intercourse, such as pregnancy.<sup>91)</sup>

Third, to balance the sexual rights and the protection of juveniles, sex between juveniles aged thirteen and younger than nineteen years old is not punishable, as they both lack the capacity to consent. Sex between teenagers, therefore, can be only criminalized when there is clear indication that one party's sexual autonomy was substantively infringed upon, such as by fraud or power of force.

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89) See *supra* note 79.

90) See, e.g., Sook-Hyung Song et. al., *A Study of Sexual Assaults on Children and Adolescents: Based on Data from a One-Stop Service Center*, KOREAN JOURNAL OF CHILD & ADOLESCENT PSYCHIATRY vol. 19, no. 3, 2008 at 162-167 (in Korean).

91) Kyung-Soon Jeong, *Pregnancy and Childbirth Experience of Unmarried Teenage Mothers*, CHILD HEALTH NURSING RESEARCH, vol. 14, no. 2, 2009, 186-194 (in Korean).

## IV. Possible Solution

### 1. *Lawmakers' Efforts to Revise Statutory Rape Law*

There have been several attempts to amend the current statutory rape law. The amendment bill that lawmaker Joo Kwang-deok submitted to the 18<sup>th</sup> National Assembly (May 30, 2008–May 29, 2012)<sup>92)</sup> provided that a person shall be punished if the person had consensual intercourse with a minor younger than thirteen, or if the person had consensual intercourse with a minor aged thirteen and less than sixteen years old who is in a reliable relationship with the perpetrator as a guardian or teacher. This bill was automatically discarded when the 18<sup>th</sup> National Assembly closed. Thereafter, two amendment bills were submitted to the 19<sup>th</sup> National Assembly (May 30, 2012–May 29, 2016). One, submitted by lawmaker Cho Kyung-Tae, proposed to raise the age of consent to younger than sixteen and punish the person who has consensual sex with a minor aged sixteen and less than nineteen when the victim and the perpetrator are in a reliable relationship.<sup>93)</sup> The other bill, submitted by lawmaker Kweon Seong-Dong, proposed to raise the age of consent to younger than sixteen.<sup>94)</sup> Of the two bills, the former did not pass the Committee encountering opposition that the meaning of ‘reliable of relationship’ is not clear, and the latter for possible infringement of juveniles’ sexual autonomy.<sup>95)</sup>

After the controversial rulings by the Supreme Court in 2014, however, the debate over the age of consent reignited. For example, the Korean Women Lawyers Association held a seminar and discussed the issue.<sup>96)</sup> In this seminar, a presenter proposed to set the age of consent at under-sixteen years arguing that as Koreans normally adopt their Korean age, it is difficult for the prosecutor to prove that a perpetrator knew the victim’s age

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92) It was submitted on Dec. 23, 2010 (bill number:10378).

93) It was submitted on Sep. 5, 2012 (bill number:1901590).

94) It was submitted on Sep. 12, 2012 (bill number:1901742).

95) See the minutes of the Legislation and Judiciary Committee of the 19<sup>th</sup> National Assembly, *supra* note 83, at 5 (statement of Kweon Soon-Il, Vice Minister of the National Court Administration).

96) See *supra* note 68.

against the perpetrator's defense of mistake of age.<sup>97)</sup> Two members of the 20<sup>th</sup> National Assembly (May 30, 2016–May 29, 2020) proposed revision bills which are still pending to be examined. Of the two bills, the one proposed by lawmaker Kim Seung-Hee sets the age of consent at under sixteen with the penal code being applied only to adults.<sup>98)</sup> This bill tries to settle the problem of criminalizing teenagers' sex. The other bill submitted by lawmaker Jin Sun-Mee aims not to raise the age of consent but to punish public officials, caring for or supervising juveniles, or persons, managing juvenile institutional care, who obtain sexual consent without fraud or power of force.<sup>99)</sup> The latter bill, pointing out the problem of the Court's narrow rulings on the definition of fraud and power of force, aims to punish persons like those school police officers who had consensual intercourse with high school students whom they supervised.

## 2. Age of Consent Based on a Class Type

The protection of juvenile needs to be discussed based on the class: class I (under thirteen years old), class II (from thirteen to fifteen years old), and class III (from sixteen to eighteen years old). Among the classes, I argue that the age of consent needs to cover the class I & II.

First, as mentioned elsewhere in part III,<sup>100)</sup> the inconsistency of the Korean statutes regarding juveniles' capacity to consent makes people insensitive to norm observance. A line needs to be drawn between fifteen and sixteen years, for the reasons that the global age of consent is sixteen, that other related Korean statutes set the age of consent at sixteen years in similar circumstances, and that juveniles aged sixteen years and older, normally high school students, are deemed to have relatively adequate mental capacity to understand and decide on their sex. Second, there is a compelling interest for the government to protect juveniles under sixteen years old. Notably, those juveniles are much more likely to be targeted by sexual violence. As was indicated in Part III, this class has shown the fastest

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97) Chun, *supra* note 68.

98) It was submitted on Jul. 11, 2016 (bill number:2000788).

99) It was submitted on Aug. 9, 2016 (bill number:2001487).

100) See *supra* Part III.C.

increase in victim rate since 2001.<sup>101)</sup> If the government has more compelling interest to protect those juveniles, the class has a fundamental right to be protected even from themselves.<sup>102)</sup>

### 3. *Defense of Mistake of Age*

As noted earlier, as a perpetrator's knowledge of victim's age is fundamental to constitute statutory rape under the Penal Code, the perpetrator's defense will be successful.<sup>103)</sup> However, for the juveniles aged twelve years or younger, the law needs rethinking. A juvenile aged twelve is normally a sixth grader in an elementary school or a first grader in a middle school. As to the class I, therefore, a perpetrator's defense of mistake of age is quite unreasonable, and it is highly improbable that the perpetrator does not know the victim's age. Here arises the issue on whether the burden of proof needs to be shifted to a defendant. I argue for this. It is legally justifiable to say that any person has the duty to check a sex party's real age before he or she obtains intercourse with a teenager. However, the degree of duty of care may vary depending on the type of the protected class. A person who obtains intercourse from a minor of class I is willfully negligent due to the required high degree of duty of care, when the perpetrator fails to check the victim's real age or haphazardly believes in the victim's remarks. Thus, the defendant must bear the burden of proof in this case. A person having intercourse with a minor of class II, however, is not as willfully negligent as the former perpetrator. For these reasons, Article 305 of KCA needs revision.

### 4. *Protection of Class III*

As aforementioned, fraud and power of force under the current law is not sufficient to guarantee full sexual autonomy for juveniles of the class III.<sup>104)</sup> I argue that the proper standard must be 'the existence of a

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101) Jeong, *supra* note 80.

102) Kim, *supra* note 21, at 110.

103) *See supra* Part II.2.B.

104) *See supra* Part II.2.D.

meaningful consent' from the juveniles' point of view. For consent to be meaningful, it must be delivered explicitly to the other party. In other words, consent must be explicitly expressed. Otherwise, any other type of acquiescence does not meet the standard. However, a clearly given consent is not always meaningful when it was obtained by deceptive scheme or implicit compulsion through any type of power of force. Here, fraud must be interpreted as any type of deception that played a significant role in obtaining the consent, which requires a change in the Court's current rulings.

### *5. The Matter of Criminalizing Sex between Teenagers*

The Legislative and Judiciary Committee did not pass the two amendment bills due to the concern that the expanded age of consent might excessively criminalize sex between teenagers. The expansion is to protect juveniles from being sexually exploited by adults who take advantage of their social, economic, and another intangible status. For this reason, a minor's consent given to adults must be deemed as being unfairly obtained. In contrast, sexual activity between teenagers is not in itself problematic. Only when there is an indication that a minor's will was infringed upon will the penal regulations have a valid ground to interfere. For this reason, the statutory rape should not apply to minors. However, juveniles are subjected to punishment when they acquired consent by fraud or power of force.

## **V. Conclusion**

Today, Korean adolescents seem to participate more actively in sexual activity. As adolescents' sex is a natural aspect of transition into being an adult, Korean society needs to harmonize juveniles' sexual autonomy and the government's duty to provide them with a secure and healthy environment to develop their own sexual identity. However, an inevitable tension arises between recognizance of their sexual rights and the protection of their inchoate capacity. Age of consent is in the middle of this tension.

Age of consent under the Korean Penal Code was set at thirteen years since its enactment in 1953. Korean juveniles, however, have become main targets of sexual violence due to their increased participation in sexual activity. As the juveniles aged from thirteen to sixteen years show the rapidest increasing victim rate since 2001, Korean society is urgently required to cope with this social malaise. However, the current statutory rape law does not function well to protect this class. Fraud under the current principle is so narrowly interpreted that it is practically inapplicable unless the sexual intercourse was obtained by fraud. Power of force, despite its relatively broad definition, is also inapplicable in special cases, such as instances where a perpetrator entreats a minor and appeals to the victim's emotion. To ensure that statutory rape law adequately protects juveniles thirteen years or older, the age of consent needs to be raised to sixteen years. With regard to a perpetrator's defense of mistake of age, the burden of proof needs to be shifted when the victim is under thirteen years old. Furthermore, sex between teenagers should not be criminalized, as the legislative intent of the statutory rape law is to protect the targeted juveniles from being abused by adults with superior social and economic power. Sexual intercourse between juveniles, therefore, needs to be criminalized only when the consent was obtained through fraud or by power of force.