

Chairman (with authority to represent the company) and SKC's Head of the Office of Coordination and Management Planning; Jin-Mo Choi, Managing Director in Charge of Finance; In-Pyo Lee, Inside Auditor; and, Hae-Yong Choi, Outside Auditor.

2. Taehan Telecom should be merged with SKT but Taehan Telecom's stock price should be valued at 400 won per share so that Tae-Won Choi and Joon-Il Kim do not profit from the transaction.

3. SKT must end its terminal supply contract with SK Distribution, and management must provide a specific plan to redeem the 5.7 billion won (\$ 3.5 million) that was transferred to SK Distribution.

4. SKT's unilateral contracts with SK Engineering and Construction ("SKEC") must be terminated and management must provide a specific plan to redeem the excessive profit transferred to SKEC. The excessive profits of approximately 7.5 billion won (\$ 4.7 million) that SKEC received is based on that amount over 11.5% which is the average profit margin based on the construction industry's sales.

5. To comply with the various new February 6, 1998 regulations, SKT must amend its articles of incorporation and appoint outside directors and auditors. Among the outside directors and auditors appointed, a certain portion must represent the interests of minority shareholders. In addition, to improve the corporate governance of SKT, the attached amendments to the articles of incorporation as proposed by PSPD should be adopted to the fullest extent.

6. SKT should implement a stock split to facilitate investment by minority shareholders and to increase liquidity,

7. SKT's accountants Ahngun Accounting must be terminated for their failure to prevent the improper dealing practices and their poor accounting and auditing.

8. SKT must not participate in its sister company SK Securities' planned private stock issuance if SK Securities' financial status is questionable.

## **Korean Criminal Law: Moralist *Prima Ratio* for Social Control**

*Kuk Cho\**

### **Abstract**

*The fundamental framework of the Korean Penal Code has remained unchanged for half a century. However, a large number of special criminal acts armed with heavier punishments have been legislated. Since democratization, the question of whether the provisions of Korean criminal law are against "nullum crimen, nulla poena sine lege" has been taken more seriously. Arguments for the liberalization or "de-criminalization" of Korean criminal law have proliferated. However, there is still a trend toward "over-criminalization", and heavier punishment is still preferred for social control. Without serious debate over the legitimacy of subjecting citizens to double jeopardy, "protective security measures" are imposed upon citizens who have already served their sentences. Criminal law is "prima ratio," not "ultima ratio," for social control in Korean society. Korean criminal law reform must attempt to perform two seemingly contradicting tasks: it must not only de-criminalize the over-criminalized criminal law, it must also provide a blueprint for solving the worsening crime problem in modern Korean society.*

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## I. Introduction

The fundamental framework of the Korean Penal Code has remained intact for half a century. Even after the collapse of the authoritarian military regime in 1987 and the subsequent democratic reforms, the basic structure of the Penal Code<sup>1)</sup> has remained as it was in 1953, although the Korean Criminal Procedure Code<sup>2)</sup> has been substantially revised in order to meet constitutional standards. The recent 1995 revision of the Penal Code simply added a small number of new crimes and adjusted several penalties in the Code.

Considering the many social changes caused by political turbulence and economic development that Korea has experienced, the relative stability of the Penal Code seems quite unusual. However, this stability is deceiving when once considers the huge number of special criminal acts which have been legislated. In order to have a correct understanding of Korean criminal law, therefore, it is necessary to take a close look at these special laws. Special criminal acts include heavier punishments, and are preferentially applied when conduct violates both the Penal Code and a special criminal act.

There have been very few articles written in English regarding Korean criminal law. This article is an introduction to the basic principle, system and problems of Korean criminal law. It starts with a brief review of the history of Korean criminal law. It then discusses the main principle of Korean criminal law: *nullum crimen, nulla poena sine lege*. Finally, examining the basic framework of the criminal legal system, it explores the characteristics of Korean criminal law and the changes brought about by democratization.

## II. A Brief History of Korean Criminal Law

The Korean Penal Code was enacted in 1953. Although the legislation took place

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1) The Korean Penal Code [*Hyeongpeop*], (Law No. 293, September 18, 1953, last revised on December 13, 1997 as Law No. 5454).

2) The Korean Criminal Procedure Code [*Hyeongsa sosongpeop*], (Law No. 341, September 23, 1954, last revised on December 13, 1997 as Law No. 5454). For a basic introduction to Korean criminal procedure, see Kuk Cho, *The Reform of Korean Criminal Procedure after Democratization*, in *Recent Transformations in Korean Law and Society* 135~49 (Seoul National University, 2000).

after liberation from the Japanese colonial rule, the Japanese Penal Code of 1907 and the 1941 draft of Japanese Penal Code had a strong influence on the new Korean laws. Legislators lacked adequate time to undertake extensive research, for they had to draft a new Code quickly in the turbulent social aftermath of the Korean War. Other than the 1988 abolition of the crime of “blasphemy against the state,”<sup>3)</sup> which had been added in 1975 under the *Yushin* regime, the Code was not seriously debated or criticized until the mid-1980s.

### The Legislation and Partial Revision of Special Criminal Acts

However, there are more than 180 special criminal acts. Many of these special acts were legislated by the emergency legislative councils<sup>4)</sup> established after the *coup d'états* in May 1961 and May 1980, or by the “emergency cabinet council” established after the declaration of the *Yushin* regime in 1972, rather than by the National Assembly. Some of them were passed by the National Assembly during the so-called “War against Crimes” in 1990. A flood of special criminal acts has also taken place more recently. Criminal law has been preferred as *prima ratio* for social control. The special criminal acts are political tools which serve mainly to demonstrate the resolve of the regime to fight crime.

Some of the special criminal acts have been revised after democratization. The Committee for the Repeal or Revision of Acts to Advance Democracy in the National Assembly led the revision efforts. The Committee was organized in 1988 to repeal or revise laws that infringed upon fundamental rights and contradicted the newly promulgated 1987 Constitution.

For instance, the system of “protective security measures” (*boancheobun* or *Ma nahmen* in German)<sup>5)</sup> was revised. In 1989, “Security custody” (*boankamho*) of leftist dissidents under the Social Security Act was repealed, although “security

3) Law No. 4040, December 31, 1988.

4) The “Supreme Council for Reconstruction of State” (*kukgachaekeon choegohoeui*: 05/19/1961-12/17/1963) was established after the May 16, 1961 coup and the “Legislative Council for Protection of State” (*kukgabowi impeophoeui*: 10/28/1980-04/10/1981) was made after the May 17, 1980 coup.

5) In Korean criminal law, there are two types of criminal sanctions: punishment and protective security measures. They 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.

surveillance” (*boankwanchal*) may be still imposed on them under the Security Surveillance Act.<sup>6)</sup> Mandatory use of “protective custody” (*bohokamho*) for violent felonies under the Society Protection Act<sup>7)</sup> was also abolished in 1989. Protective custody is still available at the discretion of the court, however.

Some crimes in the Misdemeanor Act<sup>8)</sup> were removed in 1988, such as vagrancy, fabrication or spreading of groundless rumors, having excessively long hair and wearing indecent clothing. The National Security Act,<sup>9)</sup> which has been strongly criticized for infringing upon civil and political rights in order to maintain the authoritarian regime, was partly revised to restrict the abuse of the Act in 1991. Although these revisions were not a full-scale sweeping away of the special criminal acts, they were certainly an important step in the process of reforming Korean criminal law to make it more consistent with modern notions of human rights and democracy in a changing Korean society.

### The Special Committee for the Revision of the Criminal Law: A Dormant Vision for Reform

In 1985, the Special Committee for the Revision of the Criminal Law was established as a special governmental committee.<sup>10)</sup> The Committee drew up guidelines to revise the whole system of Korean criminal law as follows:<sup>11)</sup>

- (1) The basic spirit of the Constitution should be reflected in the criminal law acts. State authoritarianism should be eliminated and the principle of *nullum crimen, nulla poena sine lege*<sup>12)</sup> should be made more explicit.
- (2) The scope and definition of crimes in the Penal Code should be reexamined in light of modern theories of criminal law.
- (3) Some conduct should be de-criminalized in accordance with changing social

6) *Boankwanchal peop*, Law No. 4132, June 16, 1989, last revised on November 22, 1991 as Law No. 4396.

7) *Sahoeboho peop*, Law No. 3286, December 18, 1980, last revised on December 12, 1996 as Law No. 5179.

8) *Kyeongpeomchoe cheobeol peop*, Law No. 3680, December 30, 1983, last revised on August 8, 1996, as Law No. 5153.

9) *Kukgaboan peop*, Law No. 3318, Dec. 31, 1980, last revised on December 13, 1997 as Law No. 5454.

10) Presidential Order, No. 11601.

11) Il-Su Kim, *Criminal Law (Specific Part) [hyeongpeop kakron]* 98-99 (3rd ed., 1999).

12) Literally “without law, there is neither crime nor penalty”. For more detailed discussion about this principle, see *infra* Ch. III.

values and ethics, such as sexual intercourse under pretence of marriage, adultery and gambling.

(4) Some conduct should be criminalized to reflect new social and economic circumstances, such as computer and environmental crimes.

(5) The system of punishments should be reformed. Protective security measures in special criminal acts should be defined in the Penal Code, and the system to delay the execution of penalties should be reformed.

(6) The relationship between the Penal Code and special criminal acts should be coherently organized. Some crimes under the special criminal acts should be repealed, and others should be incorporated into the Penal Code.

(7) The structure and language of the Penal Code should be changed to reflect these reforms.

This guideline was epoch-making in the history of Korean criminal law. The guiding principles of the proposals were consistency with the constitution, liberalization, and de-criminalization.

The Special Committee submitted the first draft of the Penal Code in November 1991 and the final draft in May 1992. These drafts were intended to substantially revise the entire Penal Code.

#### Minimal Revision of 1995

However, the National Assembly decided to delay passage of the draft, for many contentious issues remained. The National Assembly passed an alternative draft in 1995, which provided for new crimes such as computer-related crimes, changed the scope and kinds of penalties for some crimes, and introduced the protective security measure of probation for adults who receive suspended sentences. However, these revisions were minimal, and the vision of the Special Committee has yet to be realized.

### III. The Fundamental Principle of Korean Criminal Law: *nullum crimen, nulla poena sine lege*

First, let us briefly review the main principles of Korean criminal law. Article 1 (1) of the Penal Code stipulates that “the criminality and punishability of an act shall be determined by the law prevailing at the time of the commission of the act.” Article 1(2)

prohibits *ex post facto* laws. These provisions are based on principles articulated in the Korean Constitution. Article 12 (1) of the Constitution provides that no punishment or protective security measure shall be imposed without law, and Article 13 (1) of the Constitution uses the same language found in Article 1 (1) of the Penal Code. This principle of *nullum crimen, nulla poena sine lege* is the most important principle of Korean criminal law. It places state authority under the control of law and protects citizens from the discretionary exercise of penal power. This principle is commonly understood as being composed of four sub-principles: *lex certa*, *lex praevia*, *lex stricta* and *lex scripta*.

#### *lex certa*

*Lex certa* means that the law should not be vague as to what kinds of conduct is prohibited and what kinds of punishment shall be imposed. It is a Continental law version of the common law principle of “void for vagueness.”<sup>13)</sup>As will be discussed below,<sup>14)</sup> the National Security Act has been criticized because a number of its provisions violate the principle of *lex certa*.

#### *lex praevia*

*Lex praevia* is the principle of prohibition of *ex post facto* laws. Retroactive criminal laws destroy the trust of the people in existing laws. The Korean Supreme Court has held that retroactive imposition of “protective surveillance” is not against this principle, because protective security measures, unlike punishments, exist to protect society from future danger from criminals.<sup>15)</sup> However, since both punishments and protective security measures are viewed as criminal sanctions by the people, this conclusion is dubious at best.

In 1995, two retroactive laws were passed to overcome the statute of limitations which prevented the prosecution of former Presidents Chun Doo-Hwan and Roh Tae-Woo for leading a *coup d'etat* and killing many civilians in Kwangju in 1980. The first is the Act on the Non-Applicability of Statutes of Limitations to Crimes Destructive of

13) Connally v. General construction Company, 269 U.S. 385 (1926).

14) See *infra* Ch. V. 2.

15) Decision of June 13, 1997, the Korean Supreme Court, 97 do 703.

the Constitutional Order.<sup>16)</sup> It excludes the application of the statute of limitations to crimes of insurrection, rebellion, and benefiting the enemy. The second is the Special Act on the May 18 Democratic Movement.<sup>17)</sup> It allows prosecution of the leaders of the 1979 *coup d'état* and the Kwangju massacre by the military junta in 1980. Although the constitutionality of these two Acts were challenged in the Korean Constitutional Court, the Court ruled that the laws were constitutional since *lex praevia* pertains to punishability, not prosecution. In addition, these laws were held to be in the public interest since they punish anti-democratic criminal behavior and restore justice.<sup>18)</sup>

#### *lex stricta*

*Lex stricta* is the prohibition of the use of analogy to punish conduct when there is no specific criminal provision to punish the conduct. Analogy *in malam partem* is prohibited.

#### *lex scripta*

*Lex scripta* prohibits the use of customary criminal law. Judges should depend only upon written law to determine guilt and punishment.

The principle of *nullum crimen, nulla poena sine lege* was given lip service under the authoritarian regimes, but the military rulers never felt restricted by it in the exercise of state power. After democratization, however, this principle has been actively pursued. Many legal scholars and civic organizations have argued that the task of modern criminal law is to protect citizens from state authority. The legitimacy of a number of criminal law provisions in violation of this principle has been challenged in academic circles and in the courts.

### IV. The Basic Structure and Problems of the Korean Penal Code

The Korean Penal Code consists of 372 articles, including 4 Chapters of General

16) *Heoncheongchilseo pakoepeomchoe eui kongsosihyo e kwanhan teukrye peop*, Law No. 5028, December 21, 1995.

17) *5.18 minchuhwa wundong deung e kwanhan teukboel peop*, Law No. 5029, December 21, 1995.

18) Decision of February 16, 1996, the Korean Constitutional Court, 86 *Heon ba* 7 13.

Provisions and 42 Chapters of Specific Provisions.

#### 1. General Provisions

The general theory of crime and punishment in the General Provisions is strongly influenced by Continental criminal law theory. The General Provisions do not go beyond a brief sketching of the theory.

#### Crime

Chapter 2 of the Code begins with defining and grading criminal conduct. The parameters of *mens rea*, such as criminal intent, negligence, mistake of fact and mistake of law, are defined in Section 1 of Chapter 2.<sup>19)</sup> Crimes by negligence are punishable only when prescribed by law.<sup>20)</sup> Mitigation of sentence is allowed in case of mistake of fact and mistake of law. In case of mistake of law, the person shall not be punishable only when the misunderstanding is based on reasonable grounds.<sup>21)</sup> Article 17 provides for accountability for the results of conduct (“causation”). Article 18 punishes one who has a duty to prevent the occurrence of danger or has caused the occurrence of danger through act or omission.

Section 1 of Chapter 2 also specifies “justifications” which remove the illegality of certain acts, such as self-defense, necessity, self-help, consent of victim, and other socially justifiable conduct,<sup>22)</sup> and “excuses” which make acts unpunishable or mitigate punishment, including juvenile status, mental disorder, deafness and muteness, duress and coercion.<sup>23)</sup>

Section 2 of Chapter 2 defines criminal attempts. A person who begins a crime but does not complete it, or the necessary result does not occur, may be punished for an attempted crime, and the punishment may be reduced to less than that for the consummated crime. “Voluntarily renunciation” results in a mitigated punishment. Even where the occurrence of a crime is impossible because of the means adopted for

19) Korean Penal Code, Art. 13, 14.

20) *Id.* Art. 14.

21) *Id.* Art. 15~16.

22) *Id.* Art. 21~24.

23) *Id.* Art. 9~12.

the commission of the crime or because of mistake, punishment shall be imposed if there has been a resulting danger (“impossibility”). However, the punishment may be reduced or remitted. On the other hand, preparation or conspiracy which has not reached commencement of commission of crime is not punishable except as otherwise provided by law.<sup>24)</sup>

Section 3 defines the scope of complicity, including co-principals, instigators, and accessories. Instigators of a given crime receive the same punishment as a person who actually commits the crime. When the person encouraged to commit a crime does not actually commit the crime (“ineffective instigation”), the punishment for preparation or conspiracy applies *mutatis mutandis* to the instigator and the person who was to commit the crime. Even where a person does not agree to commit a crime (“failed instigation”), the instigator shall be punished.<sup>25)</sup> Section 4 provides the definition of and sentencing guidelines for recidivism.<sup>26)</sup>

#### Punishment

Chapter 3 addresses the topic of punishment. Section 1 of Chapter 3 prescribes the eight kinds of punishment: capital punishment, imprisonment with labor, imprisonment without labor (*custodia honesta* or *Einschliessung* in German), deprivation of qualifications, suspension of qualifications, fine, detention, minor fine, and confiscation.<sup>27)</sup> “Imprisonment” and “detention” (*kuryu*) are distinguished in that the period of former is one month or more, while that of the latter is from one day to thirty days.<sup>28)</sup> The amount of a “fine” (*peolkeum*) is 500 Won or more, while that of a “minor fine” (*kwaryo*) is from 50 Won to 500 Won.<sup>29)</sup> Other Sections of Chapter 3 provide guidelines for the determination of punishment, the suspension of sentences, and parole.<sup>30)</sup>

The 1995 revision extended the application of several protective security measures originally applicable only to juveniles to adults. For instance, probation,

24) See *Id.* Art. 25-28.

25) See *Id.* Art. 30-32.

26) *Id.* Art. 35-36.

27) *Id.* Art. 41.

28) *Id.* Art. 42, 46.

29) *Id.* Art. 45, 47.

30) *Id.* Art. 51-82.

community service, and mandatory class attendance orders are now available for adult criminals now.<sup>31)</sup>

## 2. Specific Provisions with Strong Moralism Features

The crimes prescribed in the Specific Provisions may be classified into three categories: crimes against the state, crimes against society and crimes against individuals. The classification order of the Code shows that the interests of the state and society are emphasized over individual interests. Let us briefly review the provisions, focusing on characteristic crimes.

### Crimes Against the State

Crimes against the interests of the state include insurrection, aiding the enemy, and spying. Desecration of the Korean national flag or emblem is prohibited, and Korea extends this protection to foreign sovereign states as well: assaults against a foreign envoy or desecration of a foreign national flag or emblem are punishable under Korean criminal law. Other crimes against the state include the organization of criminal groups, participation in riots and failure to disperse, illegal use of explosives, and other conducts which threaten social order and security. Public officials may not abandon their official duties, abuse their authority, make unlawful arrests, divulge official secrets, or accept bribes. Citizens likewise may not impersonate public officials, obstruct them in the performance of their official duties, escape from lawful arrest or custody, harbor criminals, or engage in perjury, suppression of evidence or false accusation.<sup>32)</sup>

These crimes are not unique to Korean law. However, the prohibition against the desecration of the Korean or foreign flags may violate the freedom of expression.<sup>33)</sup>

### Crimes Against Society

Crimes against the interests of society include defiling corpses and excavation of

31) *Id.* Art. 59-2, 61-2, 62-2, 64-2, 73-2, 75, 76.

32) See *Id.* Art. 87-157.

33) See *e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (flag burning as a means of expression is fully

graves; arson and negligent setting of fires; obstruction of flood control measures; obstruction of traffic; interference with the drinking water supply system; manufacturing of opium; counterfeiting of currency; counterfeiting of securities or postage stamps; counterfeiting of official or private documents; counterfeiting of seals; adultery, distribution or manufacture of obscene materials, and public indecency; illegal gambling and lotteries.<sup>34)</sup>

Among the above crimes, the criminalization of adultery is perhaps unique. Korean criminal law is given the task of maintaining sexual morality through the authority of the state. Most legal scholars argue for the decriminalization of adultery, arguing that adultery is a matter for divorce court, not for criminal law.<sup>35)</sup> However, the Korean Constitutional Court rejected the argument that treating adultery as a crime is unconstitutional.<sup>36)</sup>

#### Crimes Against Individuals

Crimes against the interests of individuals include homicide, homicide of lineal ascendants, and infanticide; assault, inflicting of bodily injury; negligent homicide and negligent inflicting of bodily injury; abortion; abandonment; false arrest or imprisonment; intimidation; kidnapping; rape, sexually indecent act by compulsion, “quasi-rape” or “quasi-sexually indecent conduct” by taking advantage of other’s unconsciousness or inability to resist, and sexual intercourse under pretence of marriage; defamation and insult; injuring of credit, interfering of auction or bidding; invasion of privacy; intrusion upon habitation; obstructing the exercise of another’s rights; larceny, robbery, and special larceny or robbery<sup>37)</sup> bodily injury resulting from robbery, robbery and homicide or death resulting from robbery, robbery and rape; fraud, extortion; embezzlement; acquiring of stolen property; destruction of property,

protected by the First Amendment); *Texas v. Johnson*, 491 U.S. 397(1989) (state’s interest in preventing breaches of peace did not justify defendant’s conviction for flag burning).

34) See Korean Penal Code, Art. 158~249.

35) Jong-Dae Bae, *Criminal Law (Specific Part) [hyeongpeop kakron]* 670~72 (3rd ed., 1999); Jae-Sang Lee, *Criminal Law (Specific Part) [hyeongpeop kakron]* 595~96 (4th ed., 2000); Sang-Ki Park, *Criminal Law (Specific Part) [hyeongpeop kakron]* 527~28 (1999).

36) Decision of Sep. 10, 1990, the Korean Constitutional Court, 89 *Heonma* 82.

37) Larceny or robbery becomes “special” when it is committed when it is committed by trespassing upon habitation at night.

trespassing.<sup>38)</sup>

The heavier punishment for the murder of lineal ascendants demonstrates that Korean criminal law is intended to maintain social morality through legal authority. There is some controversy over whether these heavier punishments violate the principle of equal protection guaranteed in Article 11 (1) of the Constitution.<sup>39)</sup> The Korean judiciary has not reviewed this issue. The criminalization of sexual intercourse under the pretence of marriage has also been criticized as excessive interference in the private sphere by the state.<sup>40)</sup> Like the crime of adultery, these provisions also show how the Code serves as a guardian to maintain social morality through state authority and heavy penalties.

## V. Special Criminal Acts and Their Problems

As stated in the Introduction, a number of special criminal acts have been legislated, even though the Penal Code itself has not been substantially revised. Much attention should be paid to special criminal acts, because they are applied preferentially when conduct violates both a special criminal act and the Penal Code. As a result, in some areas, the Penal Code is often eviscerated by the special criminal acts.

### 1. Characteristics—Highly Aggravated Sanctions

The characteristics of the special criminal acts may be summarized as follows:<sup>41)</sup>

First, the majority of the acts simply increase the punishment for conduct already prescribed by the Penal Code. They are intended to make the criminal law “stronger”

38) See Korean Penal Code, Art. 250~372.

39) Proponents for the heavier punishment are Il-Su Kim, *supra* note 11, at 31; Lee Jae Sang, *supra* note 35, at 25; Park Sang Ki, *supra* note 35, at 28. Antagonists are Jong-Dae Bae, *supra* note 35, at 75; Woong Yim, *Criminal Law (Specific Part) [hyeongpeop kakron]* 30~31 (2000).

40) Jong-Dae Bae, *supra* note 35, at 241; Lee Jae Sang, *supra* note 35, at 173; Sang-Ki Park, *supra* note 35, at 165; Woong Yim, *supra* note 39, at 176. However, Professor Il-Su Kim supports this provision (See Kim Il Su, *supra* note 11, 160~61).

41) See *Hankuk hyeongsacheongchaek yonkuwon* [Korea Institute of Criminology], *Hyeongsateukpeolpeop eui checheong siltae wa kaeseon pangan* [Current Status and Reform of Special Criminal Acts] 13-16, 57~63 (1996); In-Sup Han *Kwonwichooeui hyeongsapeop ul numeoseo* [Beyond the Authoritarian Criminal Law] 308~09 (2000).

The upper limit of punishment in the acts is much higher than that for similar criminal conduct in the Penal Code. As a result, “penalty inflation” has been observed in criminal law system.

Second, a number of the acts include several “protective security measures” as criminal sanctions in addition to the actual punishment. Protective security measures are often free of judicial control or under nominal control. A citizen’s liberty may be infringed upon by a protective security measure even after he or she has completed the sentence imposed by the court. For instance, until recently leftist dissidents were not released from prison for decades even after they serve their sentences. Vagrants and violent criminals were often sent to concentration camps under the authoritarian regime.

## 2. Main Acts and Their Problems—Panacea for Social control?

### Political Criminal—Acts Infringement of the Freedom of Conscience and Expression

In Korea, there are several political criminal acts. Among them, the National Security Act is criticized most fiercely, despite its partial revision in 1991.<sup>42)</sup> In particular, its vague prohibitions against “praising,” “encouraging,” or “aligning with” North Korea are in violation of the principle of *lex certa*.<sup>43)</sup> This law allows law enforcement authorities to exercise great discretion in their reaction to any anti-government conduct, even without “clear and present danger.”<sup>44)</sup> South Korean leftists and liberals are often punished, labeled as violent pro-North Korean radicals, and freedom of expression is significantly impaired.

The UN Human Rights Committee has expressed deep concern about the National Security Act.<sup>45)</sup> Amnesty International has also urged South Korea to amend this law, saying that “the provisions of the National Security Law ... are used to imprison people

42) For a more detailed discussion for the National Security Act, see Kuk Cho, “Tension between the National Security Law and Constitutionalism in South Korea: Security for What?,” 15 *Boston U. Int’l L. J.* 125 (1997).

43) National Security Act, Art. 7.

44) *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).

45) “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 the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable

for the non-violent exercise of their right to freedom of expression.”<sup>46)</sup> Although the Korean Constitutional Court acknowledged in 1990 that Articles 7 and 19 of the Act have partly unconstitutional elements, the Court did not accept the argument that the law itself was unconstitutional.<sup>47)</sup>

Violators of the National Security Act may be placed under “security surveillance” under the Security Surveillance Act.<sup>48)</sup> Such persons must report to the police station in their residence 7 days after release, and report again when they change residence.<sup>49)</sup> 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.”<sup>50)</sup>

Unlike other protective security measures, “security surveillance” may be imposed by an administrative authority. This violates the “right to trial” under the Constitution.<sup>51)</sup> It also infringes upon the constitutional “right of conscience”<sup>52)</sup> for the purpose of the surveillance is to keep an eye on the citizen’s thought.

These political criminal acts show that Korean democracy still has a long way to

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” [*Report of the Human Rights Committee*, U.N. GAOR, 47th Session, Supplement No. 40, U.N. Doc. A/47/40 (1994), at 123].

46) Amnesty International, *Republic of Korea (South Korea): Concerns Relating to Freedom of Expression and Opinion* (AI Index: ASA 25/12/95), June 1995, at 1.

47) Decision of April 2, 1990, the Korean Constitutional Court, 89 *Heon Ka* 113; Decision of June 25, 1995, the Korean Constitutional Court, 90 *Heon Ka* 11; Decision of April 14, 1992, the Korean Constitutional Court, 90 *heonma* 82.

48) In addition, Article 2 of the Security Surveillance Act provides that “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 (*kun hyeongpeop*, Law No. 3680, December 30, 1983, last revised on October 8, 1996 as Law No. 5153), Art. 5~8, 9(2), 11~16].

49) Security Surveillance Act, Art. 6.

50) *Id.* Art. 18.

51) The Korean Constitution, Art. 27 (1)~(3).

52) *Id.* Art. 19.

go, and that Korean society is not still free from the vestiges of the “Cold War” and its attendant authoritarianism.

#### Aggravated Punishment for Violent Felonies

There are a number of special criminal acts that serve to aggravate the punishment for violent felonies. First, the Act for Punishment of Violent Conduct<sup>53)</sup> was legislated by the military junta in 1961. It increases the penalties for collective or habitual violent crimes, and violent crimes during the night. Those who collectively or habitually commit Penal Code crimes or commit the crimes at night shall receive much heavier punishment.<sup>54)</sup> In 1989, the Korean Constitutional Court held this law constitutional, even though the Court admitted that it was “not desirable” legislation.<sup>55)</sup>

Second, the Act for Heavier Punishment of Specific Crimes<sup>56)</sup> was passed during the Park Chung-Hee government in 1966. It provides for heavier punishment for specific crimes in the Penal Code, the Customs Act, the Tax Crime Act, the Forestry Act, and the Narcotics Act. Bribery, unlawful arrest and unlawful confinement by public officials, disclosure of state secrets acquired in the Information Committee in the National Assembly, loss of national treasury, kidnapping, flight from the scene of a traffic accident, habitual robbery and larceny, rape by robber, organizing criminal group for larceny, and retaliation crimes were all given more severe punishment under this Act.<sup>57)</sup> However, the aggravated penalty for bribery and “runaway drivers” was held to be unconstitutionally excessive by the Korean Constitutional Court.<sup>58)</sup>

Third, the Act for Punishment of Specific Violent Crimes<sup>59)</sup> was legislated under the Roh Tae-Woo government in 1990. In October of 1990, the government proclaimed a “War against Crimes” and legislated the Act as a legal tool for this campaign. Many

53) *Pokryeokhaengwi deung cheopeol e kwanhan peopryul*, Law No. 625, June 20, 1961, last revised on December 31, 1990 as Law No. 4294.

54) *Id.* Art. 2~6.

55) Decision of Sep. 29, 1989, the Korean Constitutional Court, 89 *heonma* 53.

56) *Teukcheong peomchoe kachungcheopol e kwanhan peopryul*, Law No. 1744, February 23, 1966, last revised on December 28, 1999 as Law No. 6040.

57) *Id.* Art. 2~5-9.

58) Decision of Sep. 28, 1995, the Korean Constitutional Court, 93 *heonba* 50; Decision of Jul. 16, 1997, the Korean Constitutional Court, 95 *heonba* 2.

59) *Teulcheong kangryeok peomchoe eui cheopeol e kwanhan peopryul*, Law No. 4295, December 31, 1990, last revised on December 10, 1993 as Law No. 4590.

crimes such as murder, rape and robbery were given more severe penalties under this Act. The punishment for organizing a criminal group for larceny, already increased by the Act for Heavier Punishment of Specific Crimes, was again increased by this Act.<sup>60)</sup>

Fourth, the Act for Punishment of Sexually Violent Crimes and for the Protection of Victims<sup>61)</sup> was legislated under the Kim Young-Sam government in 1994. The Korean women’s movement urged the government to pass a new law to combat the increase in sexual crimes in 1991, and competing political parties promised to do so during the presidential race in 1992. After the new civilian government came to power, the law was duly passed.

One special feature of the Act is that, unlike rape in the Penal Code,<sup>62)</sup> rape or sexually indecent conduct by relatives is prosecuted even without complaints under this Act.<sup>63)</sup> The provision of the Korean Criminal Procedure Code<sup>64)</sup> that prohibits complaints against lineal ascendants is not applicable to crimes in the Act.<sup>65)</sup> New crimes are also prescribed, such as rape or sexually indecent conduct against the disabled, indecent conduct via communication methods, and secret video or photographic recording of another persons’ body.<sup>66)</sup>

The above special acts show that Korean society has considered heavier punishment as a panacea for fighting crimes. However, the prospect is not rosy at this time. Despite a number of strengthened criminal laws, crime has been rapidly increasing. It is necessary to explore the roots of crime and emphasize crime prevention.

#### “Protective Custody” as Double Jeopardy

The Society Protection Act was legislated by the military junta in 1980. It was intended to give legal grounds for Martial Order No. 13, which put vagrants and

60) *Id.* Art. 2 (v).

61) *Seongpokryeok peomchoe eui cheopeol mit pihachea boho deung e kwanhan peopryul*, Law No. 4702, January 5, 1994, last revised on December 28, 1998 as Law No. 5593.

62) The Korean Penal Code, Art. 306.

63) Act for Punishment of Sexually Violent Crimes and Protection of Victims, Art. 7.

64) The Korean Criminal Procedure Code Art.224.

65) Act for Punishment of Sexually Violent Crimes and Protection of Victims, Art. 18.

66) *Id.* Art. 8, 14, 14-2.

habitual criminals into concentration camps. The extremely oppressive program in the camp was called “*Samcheong* Education”.

The mandatory imposition of “protective custody” for chronic felonies under the Society Protection Act was held unconstitutional by the Korean Constitutional Court in 1989.<sup>67)</sup> In 1993, however, the Court held that the protective custody itself was not unconstitutional, and that it did not violate the principle of double jeopardy.<sup>68)</sup> Currently, protective custody may be imposed on habitual criminals upon judicial discretion.<sup>69)</sup> The period of protective custody may be extended by administrative authority.

The imposition of protective custody after the prison sentence has been served cannot be justified. It has the same effect as imprisonment, but it is not punishment in theory because it is allegedly intended to educate criminals and to protect society from future crimes. Despite this rhetoric, however, “protective custody” is simply an euphemism for double jeopardy.

#### Special Acts for Health-related Crimes, Economic and Environmental Crimes

There are also special criminal acts for health-related crimes, economic crimes, and environmental crimes.

The Special Act for the Regulation of Crimes Against Health<sup>70)</sup> is meant to punish the manufacture of noxious foods, additives, medications and cosmetics, and the administration of unlicensed medical treatment. Those who cause death or injury through the commission of the above acts shall be punished by death, imprisonment for life, or imprisonment for not less than five years.<sup>71)</sup>

The Act for Aggravated Punishment for Specific Economic Crimes<sup>72)</sup> provides increased punishment for fraud, extortion, and embezzlement when the amount of

67) Decision of July 14, 1989, the Korean Constitutional Court, 89 *heonka* 5, 8; 89 *heonka* 44.

68) Decision of September 14, 1993, the Korean Constitutional Court, 93 *kamdo* 67.

69) Society Protection Act, Art. 20.

70) *Bokeon beomchoe dansok e kwanha teukbeol chochi peop*, Law No. 2137, August 4, 1969, last revised on February 28, 1998 as Law No. 5229.

71) *Id.* Art. 2 (1) (iii), 3 (1) (iii).

72) *Teukcheong kyeongche kachung cheopeol deung e kwanhan poepryul*, Law No. 3693, December 31, 1983, last revised on January 13, 1998 as Law No. 5505.

money acquired by the crime is five hundred million Won or more.<sup>73)</sup> It punishes flight abroad of property and unlawful conduct regarding financial activities, including bribery of or by employees of financial institutions.<sup>74)</sup>

The Special Act for Regulation of Environmental Crimes<sup>75)</sup> is designed to heavily punish conduct that harms the environment. Crimes of both intent and negligence are punished.

These acts are all legal responses to the rapid industrialization and commercialization of Korean society. This process has produced several new kinds of non-traditional crimes. Special acts had to be legislated to address these crimes, for the Penal Code does not cover them and it is not easy to revise the Code.

## VI. Conclusion

Criminal law was a symbol of authoritarian military rule in Korea. Successive illegitimate regimes made use of criminal law to oppress dissidents and control the people. Thus, rather than being viewed as a shield to protect citizens from crime, criminal law was seen as no more than an instrument to maintain the regime. Since democratization, the question of whether the provisions of criminal law are against *nullum crimen, nulla poena sine lege* has been taken more seriously. Arguments for the “liberalization” or “de-criminalization” of Korean criminal law have proliferated. However, there is still a trend toward “over-criminalization,” and heavier punishment is still preferred for social control. Without serious debate over the legitimacy of subjecting citizens to double jeopardy, “protective security measures” are imposed upon citizens who have already served their sentences. Criminal law is *prima ratio*, not *ultima ratio*, for social control in Korean society.

Korean criminal law reform must attempt to achieve two seemingly contradicting tasks: it must not only decriminalize the overly criminalized criminal law, it must also provide a blueprint for solving the worsening crime problem in modern Korean

73) *Id.* Art. 3.

74) *Id.* Art. 4~9.

75) *Hwankeong peomchoe eui tansok e kwanhan teukbeol chochipeop*, Law No.6094, December 31, 1999. The former title of the Act was Act for Punishment of Environmental Crimes (*Hwankeong peomchoe eui cheobeol e kwanhan teukbeol chochipeop* Law No. 4390, May 31, 1991)

society. Korean criminal law must respond to two apparently divergent needs. On the one hand, it must provide a “modern” criminal legal framework that protects citizens from state authority and frees criminal law from the legislation of moral norms. Yet at the same time, it must be a “post-modern” system that is able to swiftly respond to new kinds of social harms and protect citizens from such harms before they occur.

## **Comparative Analysis of Laws on Information and Tangibles in the U.S. and Korea from the Perspective of Transaction Cost Economics**

*Junu Park\**

### **Abstract**

*For decades, legal scholars have debated whether and how much legal protection should be conferred on commercially valuable information. As a result, various ad hoc legislative solutions for information have been proposed, some of which have been adopted by most countries. Though necessary to promote the development of information technologies, legislation and its enforcement are social tools that take costs. Thus, it is also necessary to avoid devising and maintaining redundant and inconsistent laws. Transaction cost economics has been shedding light on providing bases for economizing legal tools. Based on the concept of the transaction cost, this Article purports to provide a theoretical ground for minimal and consistent laws on information: consistent not only among different laws on information, but also between laws on information and tangibles. Lawmakers should understand that the fundamental difference between laws on information and tangibles arises from the difference in transaction costs of internalizing externalities.*

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