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Judicial Nature and Achievements of Criminal Law and Procedure in Korea

SUMMARY: I. Introduction II.Transition of the Nature of Criminal Law over Time III. Initial Enactment of Criminal Law and Procedure: Strengthening the Protection of Human Rights IV.Modern Criminal Law: Recovery and Harmony V. Future Tasks of Korean Criminal Law and Procedure VI. Conclusion VII.References

I. INTRODUCTION

Conventional textbooks on criminal law illustrate the nature of the law from the normative perspectives. According to those books, criminal law serves as a behavioural norm that orders ordinary citizens to act or prohibits them from acting in certain ways. Meanwhile, criminal law, in its formality, imposes punishment for criminal acts, which sets itself apart from moral or religious norms that simply order or prohibit certain acts. Along with its nature as a norm to suggest behavioural standards to ordinary citizens, criminal law also regulates judicial activities of judges as standards of conducting trials. Lastly, criminal law provides an objective value evaluation of behaviour. It clearly describes what a crime is, thereby showing which behaviour is of no value.

However, the above-said nature is nothing more than just general characteristics of Korean criminal law and cannot be considered to be unique thereto. Law changes as times do. As it reflects the trends of the times, it will appear in different forms depending on such trends. Therefore, understanding the historical background and details of the enactment, revision, and repeal of criminal law is a prerequisite for the discussion of its nature and achievements.

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In this paper, the nature and achievements of Korean criminal law will be described in line with the change of times. Some systems of each period will also be introduced to help the readers have a better understanding. From the modern times when Korea was under Japan's colonial rule to the present, systems that were enacted or amended as the time required will also be discussed to better explain the nature and achievements of the current criminal law.

II. TRANSITION OF THE NATURE OF CRIMINAL LAW OVER TIME

THE PERIOD OF JAPAN'S COLONIAL RULE: USING LAWS FOR JAPANESE CONTROL OVER KOREAN SOCIETY

The Joseon Criminal Order was enacted in order to apply Japan's criminal law to Korea (Joseon), and served as a tool to facilitate Japan's rule over Korea by force. The Order promoted the effectiveness of colonial rule and the concept of judicial economy with the purpose of suppressing Korea's independence movement. Its special rules excluded provisions that safeguard human rights and pursued prompt legal procedures through suppression of individuals (Jung, 1998).

First, Japanese police had the discretion that Japanese judicial police officers was given the authority to announce sentences by summary decision. Despite the limitation that this was only allowed for relatively minor offenses, such an authority to announce sentences of up to three months in prison while excluding judgment by judges enabled those officers to exert suppressive and absolute control over Joseon people. The fact that judicial police officers were in charge of the entire legal procedures, *e.g.* police administration, prosecution, and trials, without other judicial personnel involved, can be interpreted as there was an intention of achieving the maximum control at the minimum cost (Shin, 1993).

The rule of warrant, a grand principle of criminal law, was excluded. The Joseon Criminal Order provided that investigative agencies may issue warrants. Not only prosecutors but also judicial police officers were allowed to carry out compulsory execution (*e.g.* seizure, search, and verification, etc.) during the course of investigation at their own discretion without determination of the court when "it is deemed that immediate disposition is required as a result of investigation," which was a very vague and general condition to be met. This was the reason why such an imperialistic and suppressive rule was possible.

> *[Joseon Criminal Order] Article 12. (1) A prosecutor may issue a warrant to order verification, search, seizure of articles, examination of the defendant or witness, or appraisal before filing a public prosecution when it is deemed that immediate disposition is required as a result of investigation even when it is not a*

> *case of a flagrant offender, provided that he/she may not announce, or have it declared, any penalty, minor fine or compensation of expenses. (2) Those duties that a prosecutor is allowed to perform by the preceding paragraph may also be conducted provisionally by a judicial police officer, provided that he/she may not issue a warrant of detention.*

The Joseon Criminal Order provides that a prosecutor and judicial police officer shall write a report related to evidence investigation. Therefore, an investigative agency, not a preliminary judge, could write a report of suspect examination, which enjoyed an absolute admissibility as "a document written in accordance with laws and regulations." The result of a trial was also nearly confirmed based on such report that was written during the course of investigation. This made investigative agencies be obsessed with the preparation of a report of suspect examination, and accordingly to torture to force a confession (Shin, 1986).

Based on these facts, the criminal law in this period can be characterised as follows (Han, 1998). First, the penal code was excessively powerful. The more serious a case was, the more general it was to apply special criminal law. There were many cases where special criminal law was enacted and applied so that heavy punishment could be imposed in order to maintain public order. Second, obvious violence was made into law for the purpose of supporting colonial rule. This can be attributed to the combination of fascist criminal jurisprudence and its actual application along with the growing fascism of the Japanese Empire. Third, criminal law was enforced in an arbitrary and discriminatory manner on grounds of the "unique characteristics of a colony." Torture and detention for a long period was frequently committed to fabricate crimes. The same laws and regulations were applied to colonists more harshly than in Japan to facilitate the rule.

MILITARY RULE OF THE U.S. AFTER INDEPENDENCE: START-UP TO PROTECT HUMAN RIGHTS

After liberation, Korea's criminal law broke from its nature of being used as a tool for Japan's rule of force through the infringement of human rights, and it gradually developed. During this time, a modern version of criminal law began to apply in the form of laws and regulations of the U.S. military rule. It went through Korean War and the following severe social turmoil but continued to develop through a series of revision. What was significant about such development was that guarantee of human rights, a fundamental principle of criminal procedure law, was established overcoming the disgrace of being a colonial type of criminal law that provided a reason for power abuse and violation of human rights by Japanese investigative agencies.

When the Japanese rule over Korea ended in 1945, the U.S. Army Military Government set its basic policy direction to maintain the colonial rule system of Japan. It decided to do so considering the need to fill administrative and legal gaps until the South Korean government fully resumed its functionality. Nevertheless, there were some significant changes to criminal law. First, the principle of "*nulla poena sine lege* (the principle of legality)" was declared, prohibiting any act from constituting a crime or being punishable unless it is clearly described as a crime in the applicable provision. It was also prohibited bringing a person into custody without positive evidence or imposing punishment without judgment. Second, No.11 of the Ordinance of the U.S. military government abolished the right of summary disposition of judicial police officers, which was pre-modern and colonial in its nature, preventing police officers from abusing judicial rights at their discretion. This brought to an end the criminal justice that was used to exert suppressive rule over Korea during the Japanese colonial era. Third, the court and prosecution was separated. With the enforcement of the Court Organisation Act and Presecutors' Office Act, the prosecutors' bureau was not any more under the court and became an independent organisation. And the court began to have jurisdiction and judicial administrative authority. *Hence*, separation of powers and independence of the judiciary.

The most salient change made to Korea's criminal law during this time around was the introduction of procedures to protect personal liberty. This measure was taken with the intent of criticising the criminal law during the colonial rule that rendered investigation agencies rights to take compulsory measures, such as detention, infringing upon human rights. In accordance with No. 176 of the Ordinance of the U.S. military government, the investigation agency was required to notify the suspect of the charges in detail and right to a counsel at the time of arrest, while the suspect had the right to request such notification and to submit evidence in favour of him/her. In case where the suspect was arrested, interviews and communication between the suspect and his/her counsel were allowed; a public defender could be appointed by the court; and the detention period was limited to ten days, provided that it could be extend once upon approval by the court.

Furthermore, the U.S. military government created an innovative tool to keep such detention in check – review of the legality of confinement. No. 17 of the same Ordinance provides that a person who is detained by the authorities or others, his/her counsel and a person who has the right to a counsel may apply for review of the legality of confinement to the competent court. No. 19 of the same Ordinance also provides that the court may allow bail of a person against whom an arrest warrant has been executed. For the purpose of addressing illegal detention, the U.S. military government entitled the

prosecution to investigate into any illegal detention at police stations, and improved the procedures to protect personal liberty by providing for compensation for victims of illegal detention and sanctions against the supervisors concerned as ex-post measures to tackle illegal detention.

The procedures to protect personal liberty under the U.S. military government went through minor modifications as times changed and still remain in many parts of the current constitutional law and criminal procedure law. Criminal law during this time did not completely abolish evil practices of the Japanese colonial era, but introduced basic principles and ideas of modern criminal law, thereby recovering functions of criminal law, such as the protection of personal liberty.

III. INITIAL ENACTMENT OF CRIMINAL LAW AND PROCEDURE: STRENGTHENING THE PROTECTION OF HUMAN RIGHTS

Legislation after liberation failed to completely break from the laws of Japan. The laws of the Republic of Korea were formalised, but they were still not cut off the Japanese ones in their nature. This was shown in the Addendum of the Constitution of 1948 that provides "the current laws and regulations are effective unless they are not in compliance with this Constitution." The same trend was also seen in criminal law that provided for multiple provisions for national and social defence emphasising national and social interest protected by law depending on political situations. Many of them were related to family affairs, *e.g.* aggravated punishment for crime against ascendants, lightened punishment for crime against descendants by ascendants, and adultery, etc. In many cases, traditional values, such as nationalism and patriarchy, were reflected, and social defence was placed above human rights (Han, 1998a). However, some improvement was, nevertheless, made to safeguard human rights. Modernisation of punishment was the basic policy direction of the Joseon Dynasty before Japanese colonial rule, and it continued to be maintained. The focus of punishment shifted from capital and corporal punishment towards imprisonment, and policies were also changed in a way to lessen punishment in accordance with principles rather than imposing extreme punishment.

Meanwhile, criminal procedure law of Korea was influenced by its U.S. counterpart, and it succeeded in breaking from Japanese criminal procedure law with more improvements compared to the case of criminal law. As discussed earlier, procedures to protect personal liberty were made into law. Other improvements include the introduction of the warrant system; enactment of those procedures to protect personal liberty, such as review of legality of confinement and bail; and guarantee of the defendant's rights, including right to a counsel and right to be interviewed. Strengthened protection of human rights and limitation on the authority of investigative agencies in

criminal procedures were institutionalised. Such legislation aimed at suppressing abuse of investigative rights during Japanese colonial rule. The same intention was also demonstrated as follows: the court was given superior authority in the process of issuing warrants; application for an adjudication regarding non-prosecution disposition was introduced to supplement the prosecutorial discretion; and the arrangement within the court reflected the superiority of the court.

IV. MODERN CRIMINAL LAW: RECOVERY AND HARMONY

REFLECTING THE VALUES AND ETHICAL BELIEFS OF THE TIME

Korean criminal law basically focused on protecting values of a family and community rather than those of individuals. However, such trend is now shifting towards protecting the integrity and values of individuals. Adultery and illegal abortion are the cases in point. The following is the provision on adultery under the Criminal Act of 1953:

> *Criminal Law Article 241 (Adultery) - abolished as of February 2015*
> *(1) A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant. (2) The crime in the preceding paragraph shall be prosecuted only upon the complaint of the victimized spouse. If the victimized spouse condones or pardons the adultery, complaint can no longer be made.*

The unconstitutionality of the above provision was brought to the Constitutional Court four times, *i.e.* in 1990, 1993, 2001, and 2008. As times went by, the court's decision continued to reflect changing social structures and public perceptions about marriage and gender, approaching to the determination of unconstitutionality. And, in 2015, the Constitutional Court finally decided that the provision was not in compliance with the spirit of the constitution. Focusing on social changes related to adultery, the court first explained that public perceptions regarding marriage and gender were changing and that individualism, which puts the right to sexual self-determination first, became prevalent. It also pointed out that the majority of the public did not consider it appropriate for the State to impose punishment for adultery. In addition, the court acknowledged that adultery, in its nature, is an unethical act, while, though, emphasising that it is within the realm of privacy and does not have any huge evil influence on the society, which ultimately renders unjust the involvement of the State. It has made it clear also that marriage and family, which is anticipated to be protected by punishing adultery, is something that can be maintained by individuals' free will and love, not heteronomously by virtue of punishment.

Negative aspects of punishing adultery have long been argued for. Meanwhile, even with the abolition of adultery, the effect that was expected to achieve by punishing adultery can still be gained through civil actions, *e.g.* claim for damages, etc. Adultery has been eliminated as an offense due to the changing perceptions of the public, who now believe that punishing it as a crime is in violation of the principle of prohibiting excessive restriction and that it infringes upon individuals' right to sexual self-determination as well as privacy and freedom.

Along with adultery, abortion has also been a source of social controversy as the perceptions of the general public thereon changed. Under the Korean legal system, abortion is governed by two Acts – one that prohibits abortion in principle, and the other that justifies it as an exception. The Criminal Act, in principle, criminalises, and provides for punishment for, both abortion by a woman herself and abortion by a doctor, etc. upon request, or with the consent, of a woman as follows.

Criminal Law Article 269 (Abortion)

(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

Criminal Law Article 270 (Abortion by Doctor, etc., Abortion without Consent)

(1) A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her consent, shall be punished by imprisonment for not more than two years.

The Mother and Child Health Act Article 14 enumerates reasons to allow exceptional abortion, *e.g.* any eugenic disability or disease, or contagious disease of the pregnant woman or her spouse, criminal reasons, such as impregnation by rape, etc., ethical reasons, such as pregnancy between relatives by blood, etc., and reasons related to the pregnant woman's health. For these reasons, it is justified to perform an induced abortion operation, which is not punishable. However, in reality, those provisions regarding abortion are not effective, and the Mother and Chile Health Act does not live up to its purpose. All cases of abortion that do not fall under any of the exceptions under the same Act are criminalised as a whole in violation of women's right to self-determination. It is not easy for minors or women in the low-income bracket to have an abortion operation in time for the following reasons: (1) couselling or education about abortion is not available in reality; (2) information on abortion is not sufficient; (3) it is difficult to rely on legal remedies even in the case of medical malpractice or aftereffects; and (4) they cannot afford the costs for such operation (Shin, 2019).

The Constitutional Court acknowledged in its decision in 2019 that the provision on abortion by a pregnant woman herself under the Mother and

Child Health Act actually forced such woman to maintain pregnancy and give birth without any exception even when she was agonising over abortion due to wide-ranging social and economic reasons during the period when it was possible to make decisions on abortion, unless the situation fell under any of the reasons specified in the same Act, and punished any violation thereof. Accordingly, the court decided that the aforementioned provision imposes restrictions on pregnant women's right to self-determination beyond the minimum level necessary to achieve the purpose of it, and the requirement of *de minimis* infringement was not satisfied. In addition, the court held that both the principle of balance of legal interest and the principle of prohibition of excessive restriction were violated as a unilateral and absolute superiority was given only to the public interest of protecting life of fetus over protecting rights of the pregnant woman, thereby infringing such woman's right to self-determination. It was also held by the same court that the provision prohibiting a doctor, etc. from procuring miscarriage of a woman upon her request or with her consent in order to achieve the same purpose as in the previous provision was unconstitutional. However, when abortion is, in principle, prohibited in those two provisions under the Criminal Act, while such prohibition of abortion is held unconstitutional, an intolerable legal hiatus may be created. To fill the gap, the Constitutional Court ordered lawmakers to revise the Act at issue by the end of 2020 when it declared those two provisions incompatible with the Constitution. Consequently, laws regarding pregnancy, labour, and termination of pregnancy are expected to be improved in 66 years since abortion was criminalised under the Criminal Act.

IMPROVING STATUS OF, AND STRENGTHENED PROTECTION FOR, VICTIMS OF CRIME

Under the Korean legal system, rights related to protecting victims of crime are guaranteed in the Constitution, and related Acts specifically provide for rights of such victims and obligations of the State. The Constitution mentions the right to pursue happiness that implies those rights of a victim of crime to be protected and supported, and provides for such victim's right to make statements during the proceedings of a trial (Article 27 paragraph 5) and his/her right to claim aid from the State along with the State's obligation to respond to such claim (Article 30).

Based on the Constitution, criminal justice organisations give more specific shape to the concept of protecting victims of crime stipulated in the Constitution by applying related laws, *e.g.* Criminal Procedure Act. They have measures in place to improve the status of such victims and protect them so that they are not sidelined any more during investigation and proceedings of a trial and can participate therein more actively. First, a victim of

crime is provided with information on the process of his/her case over the entire proceedings. In accordance with the Crime Victim Protection Act, a crime victim may, upon his/her request, be provided with information on the results of the investigation of the perpetrator(s), a date for trial, results thereof, and execution of a sentence and probation, etc. (Article 8), and, in the course of investigation and trial, information on his/her rights under criminal procedures, such as right to participate and make statements in a trial (Article 8-2). The Criminal Procedure Act also provides that a victim of a case pending before a court, and his/her legal representative, spouse, relative, and attorney may file an application to inspect or copy records of trial, and that the court may permit such inspection or copying when it deems appropriate (Criminal Procedure Act Article 294-4).

Second, there are systems in place to prevent a victim of crime from suffering unfair difficulties during investigation or trial. The State and local governments shall take measures necessary to protect honour and privacy of a victim of crime, and shall prepare appropriate measures where crime victims are in need of protection, *e.g.* when they are in danger of retaliatory violence due to their statements or testimonies made during criminal proceedings (Crime Victim Protection Act Article 9).

Third, measures are being enforced to protect a victim of crime when he/she participates in investigation or trial proceedings as a witness and to guarantee the effectiveness of his/her testimonies. When a victim of crime appears in court as a witness, the court may, if deemed that the victim is likely to feel severe uneasiness or tension in light of his/her age, physical or mental state, or any other circumstances, allow a person who is in a reliable relationship with the victim to sit in company with the victim, *ex officio* or upon a motion of the victim, his/her legal representative, or the prosecutor. Where the victim is less than 13 years of age, or incompetent to discern right from wrong or make a decision due to his/her physical or mental disability, a person who is in a reliable relation with the victim must sit in company with the victim (Criminal Procedure Act Article 163-2). Where the victim is a child or juvenile, or he/she is deemed likely to lose peace of mind substantially due to psychological burden when testifying in confrontation with the defendant, it may be considered to examine the person through a video or any other transmission system or to install a partitioning facility to place the person behind it for examination (Criminal Procedure Act Article 165-2). Furthermore, the right of a victim of crime to make statements is also guaranteed so that his/her opinions can be meaningfully reflected during the proceedings. A victim of crime or his/her legal representative (his/her spouse, lineal relatives or siblings in case of homicide) may file an application to be examined as a witness. With the permission of the court, the victim may make statements

regarding the degree and results of crime, his/her views on punishment for the defendant, and other views about the case (Criminal Procedure Act Article 294-2).

Lastly, individual systems to enable a victim of crime to actively participate in criminal proceedings have been made into law and being enforced. A case in point is a criminal conciliation system. It has put in place the concept of restorative justice, which has transformed the status of, and perception towards, victims. The criminal conciliation system, which is provided for in the Crime Victim Protection Act, aims at settling a criminal dispute between a suspect and a victim of crime in a fair and amicable manner to practically recover injury. Under the system, a case under investigation may be referred to the criminal conciliation committee by application of a party or by a prosecutor, *ex officio*. Cases that may be referred to criminal conciliation are fraud, embezzlement, and breach of trust attributable to money business between individuals; disputes between individuals, such as defamation, insult, infringement upon intellectual property rights, and delay in payment of wages; and other cases for which criminal conciliation is considered to be appropriate. Cases where a suspect is likely to flee, where the expiration of the statute of limitations is imminent, or where the case obviously constitutes grounds for non-prosecution disposition, cannot be referred to criminal conciliation. The procedures of criminal conciliation are initiated only with the consent of the parties. When criminal conciliation is achieved by the committee, a prosecutor may consider its results in investigation and in handling the case. Of course, the fact that such conciliation has not been achieved is not considered against the suspect.

These measures to enable victims to participate in criminal proceedings, and to protect and support them mostly rely on the application of a victim. When he/she is not aware of such measures, they cannot be enforced properly. This necessitates effective notice to the victim. The Crime Victim Protection Act provides that the following information shall be provided to the victim: information on the victim's rights under criminal procedures (right to participate in trial and make statements); information on support for the victim (payment of criminal injury relief, and the current status of protection for victims and organisations to support them); and information necessary to protect rights and promote welfare of the victim (Crime Victim Protection Act Article 8-2). For their practical invocation, the police and prosecution have embodied these provisions in more specific rules and guidelines to inform the victims. The investigative agencies have been active in notifying the victims of their rights considering such notification to be another version of the Miranda warning for victims, which is originally supposed to be spoken to suspects. As a result, the number of applications for information regarding

criminal procedures and that of applications for criminal injury relief saw a year-on-year increase of 40% and 15%, respectively (Chang, 2016).

While the status of victims of crime has been elevated through their participation in criminal proceedings, both response to sexual violence and protection of women has also been strengthened. General sexual offenses, such as rape and indecent act by force, are governed by basic provisions under the Criminal Act. However, special legislation regarding sexual offenses has gone through many changes. Provisions on sexual offenses except for those under the Criminal Act were promulgated and enforced under a special law regarding sexual crimes in the 1990s. The official name of the law was the Act on the Punishment, etc. of Sexual Crimes, and it provided for punishment for the perpetrators of sexual crimes as well as protection and support for the victims.

The act continued to be amended due to the huge impact sexual offenses have on the society and social changes, including the improved status of women. As a result, there are now two separate acts that govern sexual offenses and protection of victims, respectively, *i.e.* the Act on Special Cases concerning Sexual Crimes and the Sexual Violence Prevention and Victims Protection Act. The former has been amended quite frequently. The act provides for aggravated punishment for sexual offenses against people with disabilities or children. New offenses that have been added include intrusion upon publicly used places with intent to satisfy sexual urges, indecent acts in crowded public places, obscene acts by using means of communications, taking photographs by using cameras, and distribution of false images. The act has excluded the application of those provisions under the Criminal Act that reduce sentences for crimes committed in the state of mental disorder induced by drinking or use of medication. The date when the prescription of public prosecution against a sexual crime committed on a minor commences has been changed to when the minor reaches his/her majority. All these measures have been put in place in an effort to respond to sexual crimes more aggressively. Changes have been made not only to prevention of crime through punishment but also to preventive orders to reduce recidivism. For instance, such orders based on recidivism risk assessment, including disclosure of personal details of the offender, having the offender wear an electronic tracking device (*e.g.* an electronic anklet), and medication for sexual impulse, have been made into law. Furthermore, sentencing guidelines for sexual crimes are also being modified to consider those crimes to be very serious.

In the same vein as protecting female victims, responses to domestic violence have changed significantly. In the past, criminal law reflected traditional perceptions that the State's control over family through the application of criminal law had to be done in a passive manner since a household is

a unique space. However, as the society has developed, and the harmfulness of domestic violence has become a subject of public discussion, an increasing number of people began to believe that such violence is a serious crime, which has led to creating a social consensus that laws need to be made to prevent such crime. Consequently, laws to prevent domestic violence and to effectively punish it have been created. First, the Act on the Prevention of Domestic Violence and Protection, etc. of Victims aims at preventing domestic violence, and protecting and supporting victims thereof. The latter purposes have particularly been set in an effort to overcome the inadequacies of the past laws as they lacked practical support for the victims while only focusing on fostering, protecting, and maintaining families. To that end, relevant systems have been improved in order to provide prompt and appropriate protection and support for the victims so that they can avoid the risk of domestic violence. The obligation to protect other family members of the victims has been provided for as the State's fundamental responsibilities. To be more specific, those systems include investigation into actual situations of domestic violence, provision of education to prevent domestic violence, establishment and operation of emergency hotlines and counselling centres, operation of shelters, and protection through medical treatment.

Unlike in the case of sexual crimes, there exists no tendency to impose severe punishment for domestic violence, which seems to be attributable to a unique relationship between the perpetrators and victims. The Act on Special Cases concerning Sexual Crimes aims at helping restore the peace and stability of a family destroyed by domestic violence, maintain a healthy family environment, and protect the human rights of the victims and their family members, by issuing protective orders to change an environment for the persons who have committed domestic violence and to correct their personality and behaviours. In addition, although either criminal punishment or protective orders may be imposed upon such offenders in accordance with related laws, the latter seems to be strongly preferred. This Act is based on a fundamental premise that a person who has committed domestic violence can change by adjusting the environment and correcting his personality and behaviours. Therefore, the offenders of such crime are considered to be the ones who need protective orders, rather than harsh punishment, and treatment or correction for the sake of social welfare.

ADVANCING CRIMINAL LAW AND PROCEDURE BY ADOPTING FOREIGN LAWS

In modern days, many foreign legal systems began to be incorporated, *mutatis mutandis*, into Korean criminal law. Among them is the exclusionary rule that aims at preventing illegal acts by investigative agencies. Before this rule

was established, the court was, in principle, in favour of the admissibility of evidence illegally collected by an investigative agency. Under the authoritarian leadership in the past, investigative agencies were afforded much discretion regarding custody and evidence collection. Even when there was breach of procedures, the evidence was still used to prove the guilt of the accused when presented before the court unless it is proved to have been forged.

During this period, the admissibility of statement evidence, *e.g.* examination record of a suspect, was, however, strictly judged given its susceptibility to fabrication. In the following cases, any such record was considered as illegally collected evidence, *hence*, inadmissible: (1) when it was created while a suspect was in custody after being arrested illegally as the requirements of emergency arrest were not satisfied; (2) when the counsel's right to interview and communicate with the defendant was infringed upon; or (3) when the defendant's right to remain silent was not notified. On the contrary, other types of evidence - except for statement evidence - were allowed to be used in trials even when it was illegally collected on grounds that the nature or forms of the object itself was not affected. Consequently, such evidence was regarded as admissible and submitted during trials having a significant influence on the judges when they had strong suspicion regarding guilt or innocence.

However, with the emphasis on the due process principle, there was an increasing social demand for conducting fair trials and tackling illegal investigations. As a result, in 2007, a new provision was added to the Criminal Procedure Act, which provides "any evidence obtained in violation of the due process shall not be admissible," precluding the possibility of any illegally-collected evidence being used in trials. Therefore, the admissibility of tainted evidence was judged in a comprehensive manner taking into consideration all circumstances related to the violation of procedures during the course of collecting the evidence. Those circumstances to be considered include purposes of the provisions on the procedures, their violation, and the degree thereof; details of the violation and possibility of avoiding such violation; nature, and degree of infringement, of the rights or interest those provisions aim to protect, and their relation to the defendant; level of relevancy, *e.g.* causal link between the violation of the procedures and collection of evidence; and perception and intent of the investigative agency, etc.

While the exclusionary rule was introduced with the purpose of controlling abuse of investigative power by the investigative authorities, a jury trial system was introduced in order to enhance transparency and reliability of trials. Jury trials are a new type of trials that began to be conducted in 2018 by adapting the jury system under the common law to Korean criminal justice systems. In the past, judges were exclusively in charge of the trial proceedings and judgments. However, the jury trial system enabled ordinary

citizens to take part in criminal justice. It was introduced in an effort to improve the democratic legitimacy and reliability of criminal trials, and at the core of such system lies the jury, who present opinions about the guilt and innocence of the defendant as well as sentencing. The jury is selected randomly among people who are 20 years old or older. If anyone has reasons for disqualification or is engaged in certain professions, or is related to the case or in certain relationship with the parties to the case, he/she may not be a juror. Usually five to nine jurors are selected depending on the case, and there are prospective jurors to fill any vacancy.

All cases before the panel may be conducted in a jury trial format except for when the defendant does not want to stand such jury trial, or when the court considers it inappropriate and decides to exclude it. When a jury trial is initiated, jurors take an oath after the presiding judge announces the case and checks the attendance of the persons concerned. They then sit in the jury box to listen to the oral pleadings, *e.g.* statements and arguments of the prosecutor and defendant. When evidence examination is finished, they discuss the guilt or innocence of the defendant by unanimous consent or by majority. If they conclude the defendant is guilty, they then discuss sentences and deliver their final verdict and opinions on sentences to the presiding judge. This is all that they are supposed to do before the presiding judge announces the final ruling.

Unlike the jury system of the U.S., under which the judge should respect the verdict, the verdict on the guilt and innocence and sentencing opinions of the jurors under the Korean jury trial system only have "advisory effect" and are not legally binding. This means that the presiding judge may announce a ruling different from the jurors' verdict. Nevertheless, there are procedures that prevent the presiding judge from arbitrarily reject the opinions of the jurors. When judges make a decision different from the jurors' opinions, the verdict of the jury must be notified to the defendant, and the reasons for such discrepancy should be explained in writing in the ruling.

V. FUTURE TASKS OF KOREAN CRIMINAL LAW AND PROCEDURE

ENHANCED PROTECTION OF HUMAN RIGHTS: PRUDENT APPROACH TO THE SEVERE PUNISHMENT POLICY

As the society continues to assume more complexity accompanying a wide range of heinous crimes, there is a strong social demand for strict and harsh punishment for criminal offenders. As a result, the Criminal Act was revised in 2010 to raise the maximum limit of imprisonment from 15 to 30 years, the aggravation of sentences, from 25 to 50 years, and the requisite period to be served prior to a provisional release in the case of a life sentence, from

10 to 20 years. In addition, a provision on aggravation for repetitive sexual offenders was added. Reasons for these changes are as follows:

> *"The Criminal Act provides for an upper limit of the imprisonment of 15 years, which makes a huge gap in effect of criminal punishment between a life sentence and imprisonment for a limited period. Besides, it also puts limitation on imposing punishment for serious crimes. Therefore, the upper limit shall be raised to make it possible to announce sentences in a flexible manner depending on the responsibilities of the doer. As persons who are inclined to commit sexual offenses, such as rape, are very likely to repeat such offenses, recidivism of sexual crime shall be subject to aggravated punishment in order to crack down on such crime and protect potential victims."*[2]

However, the above revision is being criticised in terms of both its details and procedures. Some argue that it is utilising a severe punishment policy at a minimum cost in order to just showcase that the government is making effort to ease social anxiety caused by the surge in general crimes, including sexual offenses, and to tackle those crimes (Hah, 2011). In addition, such an upward adjustment excessively expands the judge's discretion, minimising people's predictability on punishment. It is also criticised that the upward change was made to the procedures only based on feeling out of political needs of lawmakers without prediction based on investigation or research, and it also lacked certain procedures, such as collecting opinions or holding public hearings.

IMPROVING THE CRIMINAL LAW SYSTEM: SECURING THE APPROPRIATENESS OF SPECIAL CRIMINAL LAWS

There exist numerous special criminal laws under the Korean criminal law.[3] This is due to historical backgrounds that the authoritarian regime under the Japanese colonial rule and junta made laws when necessary to justify such regime and suppress resistance, and these laws were made into new special criminal laws rather than being incorporated into the criminal law or revising the existing criminal law (Lee, 2014). Another reason is that, in modern times, the rapid social change is outpacing the criminal law in reflecting

2 Number of Bill of Korean National Assembly, 1902751 (2010)

3 Examples of special criminal laws include Road Traffic Act, Act on Special Cases Concerning the Settlement of Traffic Accidents, Act on the Aggravated Punishment, etc. of Specific Crimes, Punishment of Violence, etc. Act, Act on the Aggravated Punishment, etc. of Specific Economic Crimes, Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes, Act on the Protection of Children and Youth Against Sex Offenses, Illegal Check Control Act, Specialized Credit Finance Business Act, and Act on Promotion of Utilization of Information and Communications Network. Furthermore, general special laws, not special criminal laws, also have penal provisions, in accordance with which criminal punishment is imposed. For instance, Unfair Competition Prevention and Trade Secret Protection Act, Protection of Communications Secrets Act, and Electronic Financial Transactions Act.

such change through modification or revision (Park, 2012). On top of that, as legislation by the government is also recognised along with legislation by lawmakers, government agencies were eager to make laws to secure their own work scopes in competition with other agencies (Shin, 2005).

Special criminal laws are categorised into criminal law for public security, criminal law for politics, law on aggravated punishment for violence and recidivism, and special laws for economic, environmental, and health crimes. These special criminal laws are distinct in the following aspects. First, the enactment and revision was carried out in emergency by an emergency legislation organization, not in peacetime by the National Assembly. Second, the purpose of the enactment and revision was to expand the scope of recognising as crime and aggravate punishment, enhancing the severe punishment policy. Third, more protective orders were created. The military government has incorporated protective orders into laws to facilitate their imposition.

The modification of special criminal laws should begin by categorising their types by purpose of enactment. First, if a single law contains both criminal law provisions and criminal procedure law provisions, as well as administrative provisions for the enforcement thereof, which means that the purpose of making such laws was to respond to social change by relying on criminal law, it will be needed to take time to gradually incorporate them into the Criminal Act or abolish them when the purpose has been achieved. It should be considered to use sunset provisions to specify a time limit so that those provisions are automatically repealed when no special circumstance exists upon expiry of such time limit. If a special law was enacted with the purpose of aggravating punishment, it will be necessary to include such law in the Criminal Act as an independent crime subject to aggravated punishment (Lee, 2008).

STRENGTHENING RELIABILITY AND LEGITIMACY OF CRIMINAL LAW: STATE CRIMES AND COMPLETION OF TRANSITIONAL JUSTICE

It is required to realign responses to the severe infringement of human rights committed by the past authoritarian state, which constitutes State crimes. The organised and violent crimes committed during the Japanese colonial rule and junta need to be settled. During the past several decades, works were done in a specific and individual way before they began to be done in more comprehensive ways. For the former, individual laws were created when necessary to settle an individual issue, and an organisation was established to handle it. For example, the "Act on Compensation for People related to Gwangju Democratic Movement" was enacted in order to belatedly settle the State's illegal response towards the democratic uprising in 1980.

In accordance with the act, a committee was set up under the Prime Minister's Office to perform tasks, such as clarifying the truth, recovering honour, granting compensation, and imposing punishment, etc. Civil groups and the National Assembly played leading roles.

The focus of settlement was different depending on specific issues. For example, for military death under suspicious circumstances, the focus was on clarification of the truth, while, for the State's illegal acts during democratic movement, recovering honour and granting compensation was emphasised. The fact that social awareness was raised, consensus was generated, and activities were practically performed to settle issues of past history that used to remain unaddressed due to historical burden after liberation is indeed an undeniable achievement. However, structural reasons for the State's crimes or fundamental problems thereof were not clearly perceived; in some cases, the level of punishment for perpetrators and their apologies did not live up to the level of clarification of the truth and compensation; and an agency that is supposed to play a leading role did not participate in the settlement for illegal acts committed in the past, still leaving some regret. If a government organisation in the form of a public-private joint organisation participates in settling State crimes and past history, it will be meaningful in that the government itself engages in the settlement of its illegal acts in the past out of repentance. Furthermore, it will be an opportunity for the government to recover public confidence and the legitimacy of its power overcoming the responsibilities for committing illegal acts and concealing the truth in the past. In this regard, legal systems need to be modified so that agencies that have failed to set up their own organisations for settlement on grounds of legal stability can also be active in settling past affairs in the coming days (Kim, 2017).

In 2000s, the settlement of past history began to assume a comprehensive approach. This is a significant shift with the purpose of overcoming the limitations of the individual approach in terms of state policies, systems, practices, culture, and awareness, etc. In addition, such a comprehensive approach prevented any delay in providing remedies for individual cases, and did not confine the purposes of clarifying the truth only to punishing perpetrators, but also considered preventing recurrence by analysing the reasons and problems of the State's violence and victimisation. For example, the "Truth and Reconciliation Commission (TRC)" was established as an independent organisation and in charge of a wide range of tasks, such as comprehensive recovery of honour (deleting criminal and disciplinary records, and reinstatement, etc.), compensation, special pardon, research on past history, and reconciliation. Nevertheless, their achievements were not sufficient. Recommendations, including improving related legal systems, coming up with State mea-

sures for the recovery of honour and remedies, and minimising the restrictions on basic rights in case of emergency, still remain unsettled.

ROLES AS A MEANS FOR INTEGRATION: PREPARING FOR A UNITED KOREAN SOCIETY

Overcoming the national divide and proceeding with unification were principles that were also held up under the Criminal Act.[4] When the Criminal Act was enacted in the aftermath of the division of Korea, there was rather simple desire for unification, and naive legitimacy of preparing for unification in each social sector was emphasised. On the contrary, however, we are now at a phase where we need practical and realistic discussion while keeping a keen eye on the inter-Korean relationship and international situations. In Korea, there has long been discussion on criminal justice for a united Korea, which can be characterised in two aspects. First, it is needed to establish legal principles that reflect the situations on the Korea peninsula and take into consideration the changing phases of the time. To be more specific, the principle of *nulla poena sine lege* (the principle of legality) should be declared to guarantee a strengthened protection of basic rights of Korean nationals. In the past, criminal punishment and protective orders were imposed in different ways under different systems. Based on the principle of liability and proportionality, sentencing for such punishment and protective orders needs to be made reasonable. In addition, the necessity of crimes should be reviewed as they were provided for in order to protect the State's legal interest in the past era of confrontation. For example, a crime of non-performance of munition contract in wartime needs to be deleted, while new crimes need to be added to protect new legal interest of a united Korean society, such as environmental crimes. The criminal law that will govern such new integrated society should be an advanced version overcoming limitations of the existing law. For example, abolition of the death penalty, simplification of criminal punishment, introduction of a daily fines system, incorporation of special criminal laws into the Criminal Act of a united Korea, and further clarification of languages in criminal law provisions need to be considered (Park, 2017).

4 For other basic principles of the Criminal Act, see criminal legal systems of other countries, which include reflecting global trends, e.g. excluding elements of dictatorial politics, safeguarding people's basic rights, and realising freedom and peace; enhancing national customs as a new nation as well as people's creativity and progressive spirit; maintaining and improving public morals; and protecting the disadvantaged, etc.

VI. CONCLUSION

Korea experienced suppression under the Japanese colonial rule, joy of liberalism, and chaos of Korean War. During the period called the "Miracle of Han River" with industrialisation and economic boom, the industries and economy continued to grow, while social structures and perceptions were also transformed from being traditional and totalitarian to industrial-friendly and individualistic, respectively. The importance of education was emphasised, and its base was actually expanded. At the same time, awareness of human rights was also raised due to the brutality of the military regime. Afterwards, the Korean society has witnessed a high level of economic, political, and cultural development.

In compliance with such changes of times, criminal law continued to change and was revised to reflect the spirit and needs of the time. Recently, criminal law reform is gaining momentum thanks to a political consensus and people's awareness of its necessity, and is generating timely achievements by continuously revising the law. However, the society is still rapidly changing, and spirits that prevail during the time are also changing. Criminal law needs to sensitively respond to such change and produce substantial outcomes.

These reforms and achievements should be made through criminal policies based on scientific grounds and constitutional principles. In other words, criminal laws must be enacted based on reasonable grounds giving shape to constitutional principles, which are abstract valuation. The details of such enactment must be reviewed and verified. Enactment and revision must be done in harmony with the criminal law system as a whole and existing theories. Based on these basic directions, criminal law must be improved continuously. The recent effort to reform criminal law has generated remarkable achievements. Nevertheless, such effort should not stop as it is a challenge that the entire nation must continue to work on in the days to come.

VII. REFERENCES

Chang, H. J. (2016, March 14). Guaranteeing Rights of Crime Victims:
216 Soft-landing of Miranda Rule for Victims. Lawtimes.

Hah, T. H. (2011). The Task of Criminal Law and Criminal Procedural Law in Constitutional state. Korea Law Review, 62, 19–51.

Han, I. S. (1998a). Changes of Korean Criminal Law and Procedure. JOURNAL OF LEGISLATION RESEARCH, 34–58.

Han, I. S. (1998b). Korean Criminal Law and Procedure and Rule of Laws. Seoul, Republic of Korea: Hanwool.

Jung, G. S. (1998). Colonial Policy of Japanese Empire and Legal System of Cho Sun. JOURNAL OF LEGISLATION RESEARCH, 14(1), 56–78

Kim, H. K. (2017). State Crimes and Completing Transitional Justice in Korea - Proposals to amend the Act on Transnational Justice for the Truth and Reconciliation. Korean Criminological Review, 28(1), 171–203.

Lee, J. K. (2008). Issues and Perspectives in Criminal Law and Procedure. Journal of Legislation Research, 34(1), 85–110.

Lee, K. S. (2014). The Progression of Enactment and Revision of Korean Criminal Law and Development Challenges. Dankook Law Review, 38(3), 577–608. Retrieved from

Park, H. M. (Ed.). (2017). A Study on the Criminal Justice Policy and Integration for Korean Re-Unification (Ⅲ): Study on a Draft Unified Criminal Law. Seoul, Republic of Korea: Korean Institute of Criminology.

Park, K. W. (2012). Social Change and Requisites for Legitimation of Criminal Law. Journal of Criminal Law, 24(3), 3–33.

Shin, D. S. (1993). Effect of the U.S. Laws on Korean Criminal Law and Procedure. American Studies, 16(1), 31–49.

Shin, D. W. (1986). Preliminary Examination System of Japanese Empire. American Studies, 27(1), 149–165.

Shin, D. W. (2005). Prospects of Criminal Code Revision. Seoul National University Law Review, 46(1), 100–133.

Shin, O. J. (2019). Meaning of Constitutional Nonconformity Decision on Crime of Abortion and Direction of Constitutional Modification. Gender Review, 53(1), 26–41.