

ISSN 2093-3754

YONSEI LAW JOURNAL

Vol. 5 No. 1, May 2014



INSTITUTE FOR LEGAL STUDIES
YONSEI UNIVERSITY

ISSN 2093-3754

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YONSEI LAW JOURNAL

VOL. 5 NO. 1, MAY 2014

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DID THE HAVES COME OUT AHEAD? CIVIL JUSTICE AND AGRARIAN RELATIONS IN KOREA UNDER JAPANESE RULE*

Chulwoo Lee**

ABSTRACT

This study offers an account of the operation of the judicial system under Japanese rule and the ways in which local Koreans made use of it with particular reference to the administration of civil justice by the Sunch'ŏn Branch of the Kwangju District Court. It demonstrates what types of civil disputes were brought to the court and analyzes the modes in which the court handled the disputes as well as the results of litigation. The study constitutes part of a broader research undertaking intended to uncover the nature of the power that permeated the legal order imposed by Japanese rule, to discern the ways in which local Koreans responded to the legal order, and to explain how the legal order was structured into the lives of the local people through their diverse and complex practices.

Following a brief description of the structure of the Sunch'ŏn court, the account presents information on the frequency of lawsuits and a typology of the disputes that the lawsuits represented. The study analyzes the Civil Case Registers of 1924-1928 and 1936-1938, and shows the total frequency of litigation and the frequency of each category of lawsuits. This is succeeded by an analysis of the modes of resolving the disputes and the final results of litigation, where the study attends to the types of lawsuits that involve major socioeconomic interests in this agrarian

* This is a revised and translated version of the article Lee Chulwoo, 1920 *nyŏndae Chŏllanamdo Sunch'ŏn chibang ūi sabŏp kigu wa punjaeng* [The Judicial Apparatus and Disputes in the Sunch'ŏn Region of South Chŏlla Province during the 1920s], 61 SAHOE WA YŎKSA [SOCIETY AND HISTORY] 101 (2002).

** Professor, Yonsei Law School, chulwoo.lee@yonsei.ac.kr.

society. Lastly, the research throws light on some of the substantive rules that must have shaped the motivations of disputants as to whether to go to court and the factors related to legal services that may have limited their access to court.

By focusing on civil justice, this study seeks to fill the vacuum erstwhile left by Korean sociolegal historiography with its concentration on criminal justice and, by looking into the details of the operation of justice in the Sunch'ŏn region, it helps to overcome the dominant research style characterized by a macro-scope observation that encompasses the whole of Korea and a text-centered understanding of the legal reality with little reference to law in practice.

I. INTRODUCTION

This study offers an account of the working of the judicial system in Korea under Japanese rule, with a focus on civil disputes handled by the Sunch'ŏn Branch of the Kwangju District Court in Southern Korea. By using some of the records of the local court as the main source of information, it shows how people approached the judicial system with their conflicting socioeconomic interests and how the judiciary functioned at its lowest local level in this period of Korean history. The account constitutes a part of a broader study intended to uncover the nature of the power that permeated the legal order imposed through Japanese rule, to discern the ways in which Koreans responded to the legal order, and to explain how the legal order was structured into the lives of the people through their diverse and complex practices.¹ It seeks to set the balance between differing aspects of law and society in Korea under Japanese rule, the historiography of which has been slanted toward certain features of criminal justice, and to overcome the dominant research style characterized by a macro-scope observation that encompasses the whole of Korea and a text-centered understanding of the legal reality with little reference to law in practice.² To be sure, detailed accounts of

¹ Lee Chulwoo, *Pōpsahoesa yōngu ūi han pangbōp: Ilcheha Sunch'ŏn jiyōk yōngu ūi kyōnghōm* [A Method of Studying the Social History of Law: The Experience of Studying the Sunch'ŏn Region under Japanese Rule], 17 PŌPSAHAK YŌNGU [KOREAN JOURNAL OF LEGAL HISTORY] 342 (1996).

² Moon Joon-young, *Kyōngsōng kongowon minsap'angyōl wonbonch'ōl ūl t'onghae bon hanmal ūi minsa punjaeng kwa chaep'an* [Civil Disputes and

local and regional realities are not rare in the field of social history, and Sunch'ŏn has not been neglected in social historiography.³ This study seeks to enrich the historical knowledge of the region by linking social and legal historiography.

The study begins with a brief description of the structure of the Sunch'ŏn court, and proceeds to show the frequency of lawsuits, followed by a typology of the disputes that those lawsuits represented. The information derives from the Civil Case Registers of 1924-1928 and 1936-1938. This is succeeded by an analysis of the final results of the legal proceedings, where the study pays attention to the types of lawsuits that involve major socioeconomic interests in this agrarian society. Lastly, the research throws light on some of the substantive rules that either motivated disputants to go to court or discouraged them from recourse to the court, as well as the availability of legal services, the prime procedural factor.

The Civil Case Register (*Minsasakŏnbu*), the most important source of information in this research, is the official roster of civil lawsuits. Each page is allocated to a single case, with the names and addresses of the parties, the type of claim, the amount in controversy, and the result of the proceedings. Records were compiled into annual volumes, with case numbers given according to the sequential order of filing each year. With only the type of the claim specified, one cannot understand even the basic facts

Litigation in the Gyŏngsŏng Court of Appeal in Modern Korea under the Japanese Protectorate, 22(1) PŎPHAK YŎNGU [CH'UNGNAM L. REV.] 9 (2011) is a rare attempt to analyze the working of a single court other than the highest court, but the geographic area under the jurisdiction of that appellate court was incomparably bigger than that of the Sunch'ŏn court – Kyŏnggi, Kangwon, Ch'ungch'ŏng and Hamgyŏng provinces.

³ Kanemori Ziosaku, *Chōsen nōmin kumiai undō shi* [A History of the Peasant Union Movement in Korea], 5/6 CHŌSEN SHISŌ [BULLETIN OF KOREAN HISTORY] 284 (1982); Ōwa Kazuaki, *1920 nendai zenhanki no Chōsen nōmin undo – Zenranandō Sunch'ŏngun jirei o chusin ni* [The Korean Peasant Movement in the Early 1920s: With Special Reference to the Case of Sunch'ŏn County in South Chōlla Province], 502 REKISHIGAKU KENKYŪ (REKISHIGAKU KENKYŪ) 18 (1982); Chi Sugōl, *Sunch'ŏn ūi sojak chaengūi* [Tenancy Disputes in Sunch'ŏn], in SUNCH'ŌN SISA [THE HISTORY OF SUNCH'ŌN CITY], Chŏngch'i-sahoe-p'yŏn [Volume on Politics and Society] 643 (Sunch'ŏn sisa p'yŏnch'an wiwonhoe ed., 1997); Lee Chulwoo, *Sunch'ŏn ūi nongmin undong* [The Peasant Movement in Sunch'ŏn], in SUNCH'ŌN SISA 671 (Sunch'ŏn sisa p'yŏnch'an wiwonhoe ed., 1997); Lee Chulwoo, *Sunch'ŏn nongmin undong ūi paegyŏng kwa chŏngae: Muŏsŭl ūtŏke yŏngu halkŏsinga* [The Background and Unfolding of the Peasant Movement in Sunch'ŏn: What and How to Study], 12 NAMDO MUNHWA YŎNGU [JOURNAL OF NAMDO CULTURAL STUDIES] 6 (2006); Han Kyumu, *Chiyŏkchŏk kwanchŏm esŏbon Sunch'ŏn nongmin undong* [The Sunch'ŏn Peasant Movement Seen from the Local Perspective], 12 NAMDO MUNHWA YŎNGU 41 (2006).

surrounding the dispute. Information of the content of a dispute can only be gleaned from the text of the court judgment stating the reason for the decision, the settlement decree, or the tenancy conciliation decree, depending on how the dispute was resolved. These records have been designated for permanent preservation, but many parts of them have been lost. As for civil judgments delivered by the Sunch'ŏn court, only those between 1924 and 1942 remain, with missing pages in some of the annual compilations. Given limited time and access, I had to restrict photocopying to the original copies (*wonbon*) of court judgments and tenancy conciliation decrees, and to regrettably forgo settlement decrees.⁴ This forced me to narrow the temporal scale of research from the whole of the Japanese occupation period to the 1920s and 1930s. Furthermore, for the present study, I selected sample years from that period, as limits in time and access disallowed a perusal or photocopying of the Civil Case Registers for the whole period. Hence, I focus on 1924-1928 and 1936-1938.

The five years I selected from the 1920s were significant in the modern history of the region. The relatively well-heralded peasant movement in Sunch'ŏn began in 1922, but it was in 1924 that the movement peaked. Since then the movement declined in scale until 1929, when it was transformed into a smaller but tighter organization of left-wing activists.⁵ This makes 1924-1928 an isolatable period for scrutiny. While the period of 1934-1938 would symmetrically correspond to the five years selected from the 1920s, I had to restrict my analysis to 1936-1938 because of technical reasons that disallowed me to do more than browse over the Civil Case Registers of 1934 and 1935. Nevertheless, data from 1936-1938 will show meaningful features that characterize the agrarian policy and concomitant changes to civil justice since the early 1930s under the Rural Revitalization Campaign, before the National General Mobilization Law of 1938 introduced another series of changes as part of enhanced corporatism across the empire.

⁴ The archival research was conducted in 1988 and 1989 at the Judicial Archives of the Kwangju High Court. Although the court administration kindly cooperated with my research, it had understandable reasons to restrict the time and manner in which I could get access to the unpublished court records. I was allowed to photocopy the materials within a limited time, which I spent according to an order of priority given to different sets of materials. I spent the largest amount of time on photocopying the original copies of civil judgments, the richest source of information.

⁵ See the articles cited *supra* note 3.

II. THE STRUCTURE OF THE SUNCH'ŎN BRANCH OF THE KWANGJU DISTRICT COURT

The origin of the current Sunch'ŏn Branch (*Sunch'ŏn chiwon*) of the Kwangju District Court (*Kwangju chibang pŏbwon*) can be traced back to 1907, when the Sunch'ŏn Ward Court (*Sunch'ŏn kujaep'anso*) was established. The Court Organization Law of 1895, a part of the Reform of 1894-1895 (*Kabo kyŏngjang*), sought to establish a judiciary which was functionally separate from the executive. However, no progress was achieved except the establishment of a supreme court, first named the High Court (*Kodŭng chaep'anso*) and then *P'yŏngniwon* since 1899, and two other courts – the Court of Seoul (*Hansŏng chaep'anso*) and the Court of Kyŏnggi (*Kyŏnggi chaep'anso*) – which enjoyed functional independence only until 1899. Even the High Court was under the direction of the justice minister, who sat on the bench as chief justice. The district courts (*chibang chaep'anso*) that the Court Organization Law had expected to become independent tribunals were no more than existing country magistrate offices with only the name of a court. This changed in 1907 when another Court Organization Law was issued.

In executing the provision in the Treaty of 1907 on the separation of judicial affairs from general administrative affairs, the law created a judiciary with a Supreme Court (*Taesimwon*) at the top and district and ward (*ku*) courts at the bottom.⁶ In South Chŏlla Province, a district court was established in Kwangju and ward courts opened in Mokp'o, Sunch'ŏn, Changhŭng and Cheju. The territorial jurisdiction of the Sunch'ŏn Ward Court encompassed five counties – Sunch'ŏn, Kwangyang, Yŏsu, Tolsan and Hŭngyang. The name of the court and its jurisdiction changed in 1912, when the judiciary was reshuffled into the High Court of Korea (in Japanese, *Chōsen kōdō hōin*), three Courts of Appeals (*hukushin hōin*), eight district courts (*chihō hōin*) and fifty-five district court branches (called *chichōng* and not *chiwon* as they are called now). The Sunch'ŏn Ward Court became the Sunch'ŏn Branch of the Kwangju District Court, with jurisdiction over five counties – Sunch'ŏn, Kurye, Kwangyang, Kohŭng and Yŏsu. The Kwangju District Court had nine branches in both South and North Chŏlla Provinces until 1922, when five of them in North

⁶ Chulwoo Lee, *Modernity, Legality and Power in Korea under Japanese Rule*, in COLONIAL MODERNITY IN KOREA 24 (Gi-wook Shin & Michael Robinson eds., 1999).

Chōlla Province came under the newly established Chōnju District Court.⁷

The five counties under the jurisdiction of the Sunch'ōn Ward Court had a total population of 260,000. While the Sunch'ōn Branch of the Kwangju District Court also had jurisdiction over five counties, their total population was larger. It was 420,000 in 1925 and over half a million in 1937.⁸ Of course, among those who appeared in the Sunch'ōn Court were people living outside of those five counties. People from adjacent localities such as Pōlgyo of Posōng County, then under the jurisdiction of the Changhūng Branch, often brought actions against Sunch'ōn residents or were brought to the Sunch'ōn court as defendants because of their connection with Sunch'ōn.

Two or three judges served in the Sunch'ōn court at any one time, but the court conducted only single-judge proceedings. No branch of the Kwangju District Court except Mokp'ō had a three-judge panel. The Sunch'ōn court and two other branch courts without a collegiate panel had jurisdiction over civil cases, where the amount in controversy did not exceed 1,000 yen and criminal cases involving crimes where the minimum sentence was less than one year in prison. Cases involving greater amounts than 1,000 yen had to be filed in a three-judge panel in Kwangju. All appeals from the Kwangju District Court and its branches went to the Taegu Court of Appeals.

III. THE FREQUENCY OF LITIGATION AND THE TYPOLOGY OF DISPUTES

It is often assumed that Koreans are averse to litigation. Are they? Were they during Japanese rule? A glimpse of the frequency of litigation in general will be followed by a breakdown of the data according to a typology of disputes.

⁷ KIM PYŒNGHWA, HANGUK SABŎPSA [THE HISTORY OF THE KOREAN JUDICIARY], KŪNSEP'YŒN [VOLUME ON MODERN PERIOD] 48-52 (1982).

⁸ CHŌSEN SŌTOKUFU [GOVERNMENT-GENERAL OF KOREA], CHŌSEN SŌTOKUFU TŌKEI NENPŌ [STATISTICAL YEARBOOK OF THE GOVERNMENT-GENERAL OF KOREA] 33-34 (1911), 29 (1925), 12 (1937) [hereinafter CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ].

A. The Frequency of Litigation

Lawsuits brought before the three-judge panel of the Kwangju District Court in the year 1928 totaled 218. These suits came from the territorial jurisdictions of all courts in the province except the Mokp'o branch. In the same year, over one thousand cases were brought to the single-judge tribunal of the Sunch'ŏn court.⁹ Since 1,000 yen was an amount of money roughly equivalent to 60-80 *sŏk* (*koku* in Japanese) of paddy, it is not strange that the three-judge panel did not face a large number of suits. Indeed, disputes involving amounts greater than 1,000 yen sometimes came to the Sunch'ŏn court, as plaintiffs divided their claims into smaller amounts in order to have their cases heard by a single judge sitting in the court of their region. On the whole, the Sunch'ŏn court dealt with minor disputes. The majority of lawsuits did not involve more than 100 yen. In 1928, for instance, 68 percent were of amounts in controversy that did not exceed 100 yen and only 6 percent were of amounts larger than 500 yen.¹⁰ In 1934, only 30 percent were of amounts exceeding 100 yen and, in only 4.5 percent, did the controversy involve more than 500 yen.

How many actions were brought before the Sunch'ŏn court each year? The following table shows the frequency of suits filed each year during the periods 1924-1928 and 1934-1938, and the frequency of disputes formally resolved and thus released from the court each year during the periods 1924-1928 and 1936-1938.

TABLE 1: Frequency of civil actions filed and cases resolved in the Sunch'ŏn Branch of the Kwangju District Court

Year	1924	1925	1926	1927	1928	1934	1935	1936	1937	1938
filed	992	1115	961	1294	1161	1000	1148	1141	1316	1267
resolved	901	1115	1099	1180	1207	--	--	1146	1280	1256

filed: number of complaints filed; resolved: number of disputes resolved

The figures show that an average of 1,150 complaints were filed each year from a population of 400,000-450,000 and that the frequency was fairly constant over those years. The number of

⁹ CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 426-27 (1928).

¹⁰ *Id.* at 436-37.

disputes resolved each year did not much differ from the number of suits filed. That number included cases carried over from previous years and resolved in the respective year, while as many cases were carried over into the following year.¹¹

The frequency of litigation in the Sunch'ŏn court jurisdiction did not deviate much from the national average. In 1928, there were 2.75 cases per one thousand people in Sunch'ŏn, whereas an average of 3.03 cases were filed from among 1,000 people nationally. In 1937, there were 2.63 cases in Sunch'ŏn and 2.34 nationally.¹² How do they compare with the litigation rates in the Republic of Korea? The highest annual litigation rate in the 1950s was 1.25 per one thousand recorded in 1959, a ratio spectacularly lower than those during Japanese rule. Lawsuits became more frequent with the passage of time, but the increase was gradual. In 1966, for example, the ratio was no higher than 1.95. It was only in the 1975, when there were 2.65 cases per one thousand, that the constantly rising curve reached a height comparable to those of the 1920s and the 1930s.¹³ This gives us a picture similar to that presented by John Haley, who pointed out that Japan had a lower litigation rate in much of the postwar period than in many of the prewar years.¹⁴ While it is debatable to what extent Haley's view and explication of the Japanese attitude to litigation can be applied

¹¹ It requires more scrutiny to find out the number of cases resolved each year than to determine the number of complaints filed, which is known directly from the case numbers. Because of technical difficulties, I failed to count the number of cases resolved in 1934 and 1935. THE STATISTICAL YEARBOOK OF THE GOVERNMENT-GENERAL OF KOREA (CHŌSEN SŌTOKUFU TŌKEI NENPŌ) provides statistical information of suits filed and cases resolved in the Sunch'ŏn court which differs from the above – for instance, 1,362 complaints filed and 1,211 cases resolved in 1925, and 1,566 complaints filed and 1,339 cases resolved in 1927. CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 434 (1925), 418 (1927). This discrepancy is puzzling because the number of complaints filed each year is demonstrated by the case numbers clearly displayed on the Civil Case Register.

¹² These numbers, including those for Sunch'ŏn, are based on the statistical information from CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 428 (1928), 320 (1937).

¹³ The litigation rate constantly increased to reach 7.25 in 1988, 13.88 in 1997, and 15.15 in 2000. See PŎBWON HAENGJŎNGCHŎ [MINISTRY OF JUDICIAL ADMINISTRATION], SABŎP YŎNGAM [STATISTICAL YEARBOOK ON THE JUDICIARY] (1960, 1976, 1989 and 2000). Litigation cases counted here are actions for judgment and do not include various kinds of applications such as those for payment order and for civil execution.

¹⁴ JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 83-119 (1991).

to the Korean experience, the Korean pattern, like that of Haley's Japan, cannot be explained in terms of a cultural lag.¹⁵

B. Typology of Disputes

What kinds of grievances were behind the civil actions brought before the Sunch'ŏn court? The description of a civil action on the Civil Case Register is very brief. It contains only a single word or two. The brevity is not the only reason why it is difficult to figure out what the suit was about. The crudeness of description adds to the difficulty. Recording on the Civil Case Register was the job of a clerk, whose statement was probably based on what the plaintiff had written in his complaint. Considering the lack of precision and inconsistency in the case descriptions, I reclassified the types of action, which were stated in diverse terms. I used loose and broad categories in order to minimize the discrepancy between the classification and the actual nature of the dispute, but some errors are inevitable.¹⁶

The frequency of disputes in each category is based on the number of cases resolved rather than cases filed, because information on this issue should be analyzed in conjunction with the frequencies of different resolution methods. Simultaneously, the total number of cases resolved each year introduced here does not coincide with that on Table 1, because a single action is counted as two if it combines two distinct claims. Although almost all cases have been counted in the statistics, some which do not fall into any of the reclassified categories have been excluded from analysis.

By putting cases into groups categorized on the basis of legal claims, we risk the elimination of socioeconomic implications of those cases. Yet it is difficult to determine the socioeconomic nature of a dispute from what is written in the Civil Case Register. Here, I introduce categories that combine legal and social criteria

¹⁵ Comparative studies of Korean and Japanese litigation patterns show that the litigation rate in today's Korea is remarkably higher than that of today's Japan, which led Kahei Rokumoto to conclude that "there is something fundamentally different in the litigation behavior patterns between the two nations." Kahei Rokumoto, *Some Comparative Observations*, in KOREA AND JAPAN: JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD 359 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

¹⁶ Moon Joon-young also categorized cases on the basis of his reinterpretation of the case descriptions on the records of the Kyŏngsŏng appellate court which he analyzed. See Moon, *supra* note 2, at 48-64.

as much as possible; disputes are divided into real-property-related disputes other than tenancy-related ones, tenancy disputes, disputes regarding crop and livestock, and disputes involving money, personal property or services.

1. Disputes Regarding Real Property Rights and Transactions

The following table shows the frequency of lawsuits relating to real property rights and transactions, excluding permanent tenancies and possession disputes arising from tenancies.

TABLE 2: Actions relating to real property rights and transactions

Type\Year	1924	1925	1926	1927	1928	1936	1937	1938
land/forest title	85 9.4 %	145 13 %	181 16.5 %	171 14.5 %	149 12.3 %	330 28.8 %	286 22.3 %	280 22.3 %
land price	7	7	15	12	10	6	13	6
mortgages	2	3	9	9	19	6	11	17
building title	19	13	8	12	12	5	1	3
bldg possession	40	29	28	28	18	33	40	41
building rent	13	13	20	16	16	24	27	25
forest trespass	2	5	3	5	2	0	1	0

The percentage shows the type’s proportion in all lawsuits.

Land- or forest-title disputes were frequent, second only to money-loan cases. This category includes actions for registration of title or rectification of registration, actions for declaratory judgment on ownership, and actions for declaratory judgment on the boundary of forestland. Although the Civil Case Register often distinguished arable land and forestland, it is difficult to tell whether a dispute recorded as a land dispute concerned a piece of arable land or a piece of forestland, because many pieces of forestland were recorded on land registers despite the existence of a separate forest registry. It is, however, probable that disputes concerning arable land outnumbered those concerning forestland.

Land- or forest-title disputes broke out in diverse contexts. A large number of actions were brought by purchasers of land demanding the registration of the land that they bought. Such an action was filed when the vendor or a third party refused to honor the vendee's title. The Civil Case Register sometimes mentions the purpose of a land-title suit — for example, to secure inheritance, to change the name of the registered owner after a trust was resolved, or to bring the title back to the debtor when the debtor

had deliberately conveyed the property to another in order to avoid civil execution. The nature of other cases can be discovered only by studying the reason given to the judgment or the settlement decree, depending on how the dispute was resolved.

Many title suits were related to security agreements. A lender offers a loan and obtains a security interest in the borrower's land in the form of a right to demand the transfer of the title when the borrower fails to repay. The lender brings an action for registration if the borrower refuses to transfer the title after default. Sometimes a loan is offered in exchange for the transfer of a land title, which the borrower has the right to redeem upon repayment. The borrower files an action for registration if the lender refuses to transfer the land back to him. A security arrangement of this kind was often cloaked in the form of a sale and purchase of land, which made the loan look like a purchase price. In this device, the creditor has the extra advantage of keeping the debtor from getting further loans. It is often difficult to tell a security arrangement of this kind from a real sale and purchase of land. Hence, I put all actions concerning title transfer in the same category, although it might be desirable to treat security-related ones in the same category as mortgage cases [mortgages in Table 2].

One group of actions which I classified as mortgage cases [mortgages] are actions for registration of mortgages or for cancellation of mortgage registration. Under the rules of mortgage (in German *Hypothek*) in the Japanese Civil Code, the title is transferred to another through a judicial sale after the debtor fails to repay the loan. While the law provided for judicial sale through auction, in most loan contracts the title to the collateral was transferred to the obligee. Agreements of this kind were often declared *contra bonos mores* depending on the degree of imbalance between the price of the land and the loan and on whether the mortgagor was educated and experienced enough to understand the true meaning of the agreement.¹⁷ Yet, as we shall see, the courts were fairly reluctant to invalidate such agreements. I put security devices of this kind in the category of land-title suits. Another group of cases which I include in the category of mortgage disputes are actions for cancellation of the provisional registration of a title transfer. Provisional registration was widely

¹⁷ *Civil judgment (summary), Dec. 14, 1925, High Court of Korea, in* CHŌSEN KŌTŌ HŌIN HANREI YŌSHI RUISHŪ [EDITED AND SUMMARIZED JUDGMENTS OF THE HIGH COURT OF KOREA] 125-26 (Shihō kiōkai ed., 1943) [hereinafter CHŌSEN KŌTŌ HŌIN HANREI YŌSHI RUISHŪ].

used as a security device. The creditor who enters a provisional registration obtains the full title to the land if the debtor fails to repay the loan, and the transfer of the title retrospectively takes effect from the time of the provisional registration.

Actions against trespass to forestland [forest trespass] were of two kinds. The first were actions to remove a grave built by someone who had no right to possess the site. Some people were so concerned to bury their relatives in *myōngdang* (propitious sites) that they built graves on the premises of another person. Their trespass not only affected the physical shape of the premises but also inflicted symbolic damage on the owner. Moreover, the occupation might someday turn into a legal right; the trespasser would acquire a superficies-like right to the gravesite by prescription if he enjoyed peaceable and notorious possession of the site for twenty years or more.¹⁸ Further, when there was a dispute over ownership of a piece of forestland, the disputant who had an ancestor buried there and had taken good care of the grave found himself in an advantageous position to claim ownership if no decisive evidence prevailed. The second were actions against trespassers who cut trees and picked plants without permission. Yet a tree already removed from the soil is an independent movable and an action to recover it differs from the action to oust the trespasser. I included actions to recover removed trees and plants in the category of suits relating to standing crops.

Most disputes regarding buildings [building title, bldg possession, and building rent in Table 2] were related to residential buildings. Yet they include a few disputes on watermills or other agricultural facilities. The housing shortage was a less serious problem than the land shortage. Most peasants had a house and a small vegetable garden around it even if they owned no arable land. But some percentage of agricultural tenants rented residential houses from their landlords.

2. Tenancy-related Disputes

I have identified six types of tenancy-related disputes.

¹⁸ Sunch'ŏn Branch of the Kwangju District Court [hereinafter SBKDC], Civil Case (hereinafter CC) CC 492 (1937), judgment on June 16, 1937; *Civil judgment (summary)*, Mar. 8, 1927, *High Court of Korea*, in CHŌSEN KŌTŌ HŌIN HANREI YŌSHI RUISHŪ at 61.

TABLE 3: Tenancy-related actions

Type\Year	1924	1925	1926	1927	1928	1936	1937	1938
delivery of land	24	18	6	2	1	5	5	3
possession	41 4.6%	92 8.3%	46 4.2%	30 2.5%	37 3.1%	3	4	1
declare/ register	2	9	7	7	4	4	0	6
waste removal	0	1	0	8	6	11	9	5
farming cost	4	10	1	1	0	0	1	0
rent	69 7.6%	70 6.3%	75 6.8%	80 6.8%	60 5%	54 4.7%	95 7.4%	79 6.3%

Some of the actions that I put in the category for delivery of possession of land [delivery of land] are described on the Civil Case Register as suits for the “return of land in tenancy,” but not every lawsuit in this category was tenancy-related. This category may include actions brought by purchasers of land demanding that the vendor deliver the possession of the land, as well as suits filed by owners of land against possessors whose occupation is not rightful. On the other hand, I placed actions for delivery of possession coupled with a title claim in the category of land-title suits [land/forest title]. Nevertheless, there is little possibility of the numbers of suits for delivery of possession of land on Table 3 seriously over-representing the true number of tenancy-related suits. My examination of twelve cases between 1924 and 1928, which ended in judgment and therefore left detailed information, shows that eleven out of those twelve cases were filed by landlords against tenants while only one case was between the vendor and purchaser of a land plot. Moreover, most of the non-tenancy-related actions for delivery of land were coupled with other claims, such as land-title claims and, for that reason, have been put into different categories.

I assume that a majority of the actions in this category were brought by landlords against holdover tenants. Of the rest, a few were instituted by tenants against landlords who refused to let the tenant occupy the land. Another group of suits were brought by possessors of land against trespassers. A possessor of land who has a property right over the land can oust a trespasser by virtue of either his property right or his possession. If the possessor has no property right, like a contractual tenant, he can only file a possessory action, since he cannot assert his right to possess against all the world. Normally, a suit by a tenant against a

trespasser was recorded in the Civil Case Register as a possessory action. Yet the terms employed in the Civil Case Register were so imprecise that a possessory action filed by a tenant was sometimes recorded as an action for delivery of land.¹⁹

A possessory action [possession] is strictly a possessory remedy available to a possessor seeking to retain his possession against, or to recover possession from, a trespasser. This form of action originated from the *interdictum possessionis* of Roman law.²⁰ A possessory action could be instituted by any possessor of land, but my study of judgment records suggests that most possessory actions were brought by a person asserting himself as the rightful tenant against another person claiming to be the rightful tenant. There were frequent possession disputes between evicted tenants and new tenants. Either of the two parties could file a possessory action unless he lost possession completely. The court judged the case in the light of who was in possession, regardless of whether the person had the right to possess the land.²¹ Therefore, contesting tenants had to fight hard to establish possession before a possessory action was instituted. The rules on possession of land were thus weapons for tenants in disputes over possession, and intensified possession disputes, which local people called *iangjŏn* (battles for transplantation).²²

Table 3 shows that possessory actions were far more frequent in the 1920s than in the mid- and late 1930s. The mid-1920s were a period of intense conflict between landlords and tenants. As the peasant movement withered away, possessory actions decreased in the mid- and late 1930s. Another decisive factor for the decrease was the implementation of the Korean Tenancy Conciliation Ordinance (*Chōsen kosaku chōtei rei*) and the Korean Farmland Ordinance (*Chōsen nōchi rei*). The Korean Farmland Ordinance reduced the chances of landlords to terminate tenancies and thus

¹⁹ An example, which is not included in the above statistical data, is SBKDC CC 588 (1935), July 4, 1935, Taegu Court of Appeals Civil Appeal 31 (1935), Sept. 20, 1935.

²⁰ W. W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* ch. 3 (1952).

²¹ Yet in some cases the court based its judgment on which party was the rightful tenant. SBKDC CC 397 (1924), Aug. 18, 1924; SBKDC CC 409 (1931), June 30, 1931.

²² This kind of dispute was frequent in the late Chosŏn period. See PARK MYOUNGKYU [PAK MYŎNGYU], *HANGUK KŬNDŬE KUKKA HYŎNGSŎNG KWA NONGMIN* [THE FORMING OF THE MODERN STATE IN KOREA AND PEASANTS] 111-15 (1997).

the causes of possession disputes.²³ The Tenancy Conciliation Ordinance opened new avenues for dispute resolution.

Seventeen percent of the actions which I classified as possessory actions are recorded on the Civil Case Registers as actions against "trespass to leased land," against "interference with tenancy," or against "interference with farm work." In theory no such action was available to an ordinary tenant whose tenancy was a mere contractual right and therefore bound only the landlord, while a permanent tenant could oust a trespasser by virtue of his real right. There are five cases recorded in the above terms whose details are available. All of them are possessory actions.²⁴ Assuming that the rest are of the same nature, I counted all of the actions recorded in those terms as possessory actions.

Tenants occasionally found it useful to secure declaratory judgments confirming their tenancies. A few tenants demanded that their landlords cooperate in registering their tenancies. I put the actions instituted for these purposes in a single category [declare/register]. This category also includes three cases in which the landowner sought a declaratory judgment ascertaining that no tenancy existed or a judgment to remove the registration of the tenancy in dispute.

Not all of what I categorized as actions demanding removal of waste [waste removal] relate to agricultural tenancies. A few were instituted by landowners demanding the removal of buildings constructed on their premises without permission. Among the rest are actions brought by landlords against agricultural tenants who installed agricultural facilities without permission or used the land in a way radically different from the agreement, thereby altering the nature of the land — for instance, transforming a rice paddy into a mulberry field.

Those which I have classified as actions to recover farming costs [farming cost] include, first, those brought by tenants against landlords who breached the tenancy contract by making another contract with a third party and gave him possession, and, second, actions filed between tenants contesting each other's claim to possession and trying to oust the other as a trespasser. The relatively high frequency of such suits in 1924 and 1925 can be

²³ Lee Chulwoo, *The Legal Topography of Agrarian Relations in Southern Korea under Japanese Rule: Law and Tenancy Practices in Suncheon County, South Jeolla Province, 1920-1934*, 12(2) REVIEW OF KOREAN STUDIES 139, 159-60 (2009).

²⁴ SBKDC CC 598 (1924); SBKDC CC 56 (1926); SBKDC CC 715-17 (1927).

attributed to the rising assertiveness of peasants during the heyday of the peasant movement.

The above data suggest that suits brought by landlords against tenants outnumbered suits by tenants against landlords or other tenants. A large percentage of tenancy-related suits in the 1920s and a great majority in the mid- and late 1930s were instituted by landlords to enforce rent payment [rent]. The frequency of rent claims remained constant after the reform of tenancy law, because no new rule was laid down on the issue of rent. When one claimed a rent in court, it was common to demand that the defendant pay either the agreed amount of crop or an equivalent amount of money.

3. Disputes Regarding Crops and Livestock

TABLE 4: Actions relating to crops and livestock

Type\Year	1924	1925	1926	1927	1928	1936	1937	1938
standing crop	5	15	4	3	0	2	0	1
crop loan	26	34	29	28	35	15	30	21
other crop	36	21	11	11	10	8	3	11
cattle delivery	3	0	4	0	1	1	0	1
breeding charge	0	2	2	1	0	0	1	0

What is meant by standing crop [standing crop] is the pre-harvest crop standing on the field. Some of the standing-crop disputes were connected with the sale and purchase of a paddy before harvest. Poor peasants, in desperate need of cash, often sold their paddy before harvest. When there was a large gap of time between the signing of the contract and the harvest, many events could occur and cause a dispute. Other standing-crop suits were brought by tillers against trespassers who had taken the former's standing crop or interfered with their possession of the crop.

In this category, I have also included suits concerning crops severed from the soil but not yet mixed up with other heaps of crops. A severed crop is a specific movable until it is mixed with a heap of the same kind of crop. Hence, what I grouped as standing-crop suits include all kinds of suits concerning crops as independent movables but not those claiming a certain amount of

grain as a rent or the repayment of a loan. Most of the standing-crop suits concerned paddy, while a few were about barley. I have put in the same category a few cases in which forest owners sought to recover trees or plants removed from their forestland.²⁵

A large percentage of crop-related suits were instituted by creditors against debtors for the repayment of crop loans [crop loan]. Some creditors claimed an equivalent amount of money in lieu of the crop. I included such claims in this category and distinguished them from actions to enforce the repayment of money loans.

The rest of the crop-related disputes [other crop] broke out in various contexts. Many of them were probably caused from the sale and purchase of paddy or barley. Paddy and rice were widely used as means of payment, and disputes occurred in connection with paddy or rice paid as contract deposits. Some of the crop suits were filed by guarantors against tenants to secure compensation for the rent obligations that they had discharged on behalf of the tenant.

Suits demanding delivery of cattle [cattle delivery] were of three kinds. The first involved a purchaser of an ox against the vendor who failed or refused to transfer the possession of the ox. The second involved a lender of an ox against a holdover borrower. The third was to recover possession of cattle held in bailment. People often delivered a calf to a breeder to be held in bailment until the calf became mature enough to work. Disputes occurred when the bailee refused to return the calf, now an ox, or the bailor refused to pay the bailee the cost of breeding as well as for the service [breed charge].

4. Disputes Regarding Money, Goods, Services and Others

TABLE 5: Actions for money, goods, services and others

Type\Year	1924	1925	1926	1927	1928	1936	1937	1938
loan repayment	367	390	425	447	535	303	358	374
	40.7	35	38.7	37.9	44.3	26.4	28	30
	%	%	%	%	%	%	%	%
assigned claim	0	0	0	0	4	42	37	30
assumed debt	3	10	15	8	5	8	3	1
loan guaranty	1	3	2	3	1	11	0	2
guaranty	7	12	6	5	15	12	4	12

²⁵ A tree is part of the soil unless it is declared to be independent realty by some form of notice to the public. Once it is severed, it becomes an independent movable.

indemnity								
goods delivery	3	1	7	6	0	6	7	4
goods payment	35	40	56	77	53	55	84	82
meal/ accommod	8	9	12	5	16	6	19	7
wage/service	6	13	18	11	12	21	17	22
negotiable inst	4	0	1	3	3	7	26	27
contract deposit	12	14	5	13	7	20	10	14
breach fee	3	5	2	3	5	4	7	5
money deposit	17	8	8	10	11	9	9	16
expense	6	8	12	7	11	8	31	31
restitution	8	14	9	13	16	8	14	1
damages	58	86	83	101	86	98	102	94
execution objection	21	33	45	69	66	36	55	50

Lawsuits demanding repayment of money loans [loan repayment] were unmatched by any other kind of suit in frequency, accounting for 35 percent of all suits during the sample years and reaching as high as 44 percent in 1928. To find out the true extent of loan-related suits, we must also take into account assigned money claims [assigned claim], the majority of which involved loan-related assignments; claims against those who assumed others' debts or other money-related obligations [assumed debt]; suits by creditors against guarantors for loan repayment [loan guaranty]; and suits by guarantors against principals for indemnities by reason of the discharge of obligations [guaranty indemnity], which include loan-related ones.

Actions regarding ownership or possession of movables other than crops [goods delivery] were not very frequent. The subjects of such actions were as diverse as a bicycle, a boat, a fishing net, a clock, a grain bucket, a rice-milling machine, a sewing machine, a motor, and even salt. On the other hand, quite a number of disputes were brought to court with regard to payment of goods prices [goods payment]. Those goods included grain, cattle, fish, wood, coal, oil, ginseng, a bicycle, a fishing net, farming instruments, and a copy of a genealogical record. A few disputes were brought to court each year regarding restaurant bills and inn charges [meal/accommod in Table 5].

In this region, where industry was minimal, a factory worker who earned monthly wages was not the standard shape of a wage laborer. The Civil Case Register often specifies the nature of the work for which wages were given — for instance, wages for the

repair of a sewing machine. It often refers to payments for the repair of a motor, for the repair of a house, for the repair of a damaged field and so forth, without using the term wages. In short, there was only a vague distinction between wages and payments for particular services. Indeed, the nature of the economy was such that wage labor was not fully differentiated from various kinds of artisan work, and the distinction was unclear between employment and contracts for work (in German *Werkvertrag*), which were two different forms of contract provided in the Civil Code. Contracts for work varied from those regarding humble daily jobs to very professional ones. Contracts for professional services were not distinct from mandate (in German *Auftrag*), another form of contract under the Civil Code, an example of which was the contract between a lawyer and his client. Thus, I have put all kinds of wages and payments for service together. Disputes in this category [wage/service] include those regarding payments for building construction, commercial service commissions, and medical and legal fees, as well as monthly wages and payments for artisan work.

Actions concerning negotiable instruments [negotiable inst in Table 5], namely promissory notes and bills of exchange, were not frequent, but gradually increased. Most of the disputes regarding negotiable instruments were between business figures — rice traders, farm managers and merchants — many of whom were Japanese.

Contract deposits [contract deposit] and fees based on liquidated damage clauses for breach of contract [breach fee] most often mattered in cases involving the sale of large goods and contracts for professional services. Most of the actions for the return of a deposit [money deposit] were instituted by individuals against other individuals. Although banking institutions were available, many people deposited money with people they knew, and members of a rotating credit association deposited money with the association and drew credit in return.

When the Civil Case Register refers to compensation for "expenses" [expense], it was about expenses incurred from the management of affairs for another person. It is difficult to establish what those expenses were. The few cases whose details I could study suggest that a large percentage of those actions were brought by parties seeking compensation for discharging money obligations of others without any prior agreement. It is difficult to enumerate the variety of contexts in which people sued over

restitution for unjust enrichment [restitution]. A number of them probably related to restitution following the rescission of a contract, but I do not have enough information to classify the types of legal relations from which those disputes arose.

Damage suits [damages] were relatively frequent. Again, the Civil Case Register provides no more than vague information, with which we cannot discern the exact causes of those actions. In some cases reference is made to whether the action involves a tort or a breach of contract. In some cases, it is also identifiable whether the damages were spiritual or monetary, or both.²⁶ Most spiritual damages were incurred from torts. The cases whose details I could analyze suggest that damage suits from torts were more frequent than those for breaches of contract. Assault, battery, reckless or negligent infliction of bodily injury, and infliction of damage to things were the major causes of such suits. Breaches of contract were more often dealt with by liquidated damages [breach fee].

Objections to compulsory execution [execution objection] were relatively frequent. This was due to the frequency of seizures and attachments, and to the manner in which they were carried out. There were two types of objections. The first type is objection to the legal claim on which the execution is undertaken — for instance, when the claim disappears after the judgment endorsing that claim because the obligor has repaid the debt. The second type is an objection to the object of execution — for instance, when the object seized does not belong to the debtor. The absolute majority of objections were of the latter kind. When seizing a standing crop, mistakes could occur in the course of the seizure, as it was often difficult to identify by a quick glance the true possessor of the field and the owner of the crop. One's crop was often seized in an execution against a relative, his landlord or against someone who farmed next to him. Many mistakes could also happen when household goods were seized.

C. Comparison with the Nationwide Trend

Let us compare the above features with those of lawsuits gleaned from the whole of Korea. The following table illustrates

²⁶ Spiritual damages are awarded in money on the basis of the amount of money needed to compensate for the distress.

the subject matters of the lawsuits brought before all district courts and their branches in Korea in 1928 and 1937.

TABLE 6: Subject matters of litigation in all district courts and district court branches²⁷

Subject Matter	family kinship	land	building	housing tenancy	agricultural tenancy	ship
1928	1,566	10,085	1,834	783	668	23
1937	1,575	13,167	1,697	468	872	6
Subject Matter	money	crop	goods	negotiable instrument	Others	total
1928	36,149	1,591	705	233	4,581	58,218
1937	29,527	1,559	522	229	2,624	52,246

Since the categories are rough and different from those employed in our Sunch'ŏn data, it is not easy to make a full comparison. We can, however, detect some common features: money disputes formed the largest percentage and land disputes were also frequent. We, on the other hand, discover that agricultural tenancy cases made up a considerably greater percentage in the Sunch'ŏn region than in the whole of Korea. In the Sunch'ŏn region, rent claims, possessory actions which were evidently tenancy-related, and actions for confirmation and/or registration of tenancy accounted for 5.9 percent in 1928 and 7.4 percent in 1937. If we add up all cases which I have loosely categorized as tenancy-related disputes, which certainly include some non-tenancy-related cases, the percentage becomes 9 percent in both 1928 and 1937. By contrast, lawsuits relating to agricultural tenancies accounted for 1.1 percent and 1.7 percent respectively in the whole of Korea. It is not clear whether the government statisticians took possessory actions into account. It is also possible that they classified rent claims as crop-related disputes and excluded them from tenancy-related cases. Even if we assume that all crop-related suits were rent-related, the percentage of tenancy-related cases was no larger than 4-5 percent. Allowing for all possibilities, we can still say that tenancy-related lawsuits were far more frequent in the Sunch'ŏn region than in the whole of Korea. This perhaps has much to do with the significance of arable farming and the remarkable extent of tenant farming in the Sunch'ŏn region.

²⁷ CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 428 (1928), 320 (1937).

IV. WEAPONS OF THE CLAIMANT

We have seen that loan-repayment claims accounted for the greatest percentage of lawsuits and that a large percentage of tenancy-related suits were rent claims. In short, moneylenders and landlords made the best use of the court. Lawsuits, however, formed only a small part of the picture. If the claim was about an amount of money or crop, one did not have to bring an action in the first place. The claimant could apply to court for a payment order. The court decided whether to issue a payment order after examining the application. It did not summon and examine the obligor. When the court issued a payment order, the obligor could make an objection to the order. If he did, the same procedure began as when a suit was filed. The application for payment order was then treated as a complaint, and the claimant appeared in court as plaintiff and the obligor as defendant. The lawsuits we have counted include payment-order applications that turned into proper actions in this way. Such cases made up 99 percent of all money- and crop-related suits.

The frequency of applications for payment orders was many times higher than the frequency of lawsuits. While the Sunch'ŏn court received 900-1,300 lawsuits each year including suits that had developed from payment-order applications, there were 5,091 applications for payment orders in 1928, 7,050 in 1931, 5,800 in 1932 and 4,210 in 1934.²⁸ We may attribute the high frequency of applications in 1931 to the impact of the depression. Let us look at the frequency of applications for payment orders in all district courts and their branches.

TABLE 7: Frequency of applications for payment orders in all district courts and district-court branches²⁹

Year	Frequency	Year	Frequency	Year	Frequency
1910	1,665	1920	89,332	1930	179,477
1911	2,262	1921	123,369	1931	204,357
1912	10,022	1922	100,099	1932	164,564
1913	29,181	1923	122,118	1933	131,523
1914	45,122	1924	121,671	1934	102,834

²⁸ CHŎSEN SŌTOKUFU, CHŎSEN SŌTOKUFU TŌKEI NENPŌ 444 (1928); TONG'A ILBO [DONGA DAILY] [hereinafter TI], Apr. 20, 1932, at 4; Feb. 16, 1933, at morning ed. 3. In 1931, the Sunch'ŏn court received the largest number of payment-order applications among all district courts and their branches. TI, Apr. 20, 1932, at 4.

²⁹ CHŎSEN SŌTOKUFU, CHŎSEN SŌTOKUFU TŌKEI NENPŌ 442-43 (1928), 324 (1937).

1915	62,101	1925	111,931	1935	96,311
1916	58,644	1926	127,051	1936	97,404
1917	56,921	1927	143,071	1937	127,131
1918	56,143	1928	130,874		
1919	52,867	1929	140,707		

We find that the number of applications remarkably soared in 1930-1932, the time when the tolls of the depression were the highest.

The courts rarely looked into the merits when they examined an application for a payment order. Examination was limited to whether there was any procedural flaw in the application. The courts could also dismiss the application if they found that the claim was obviously groundless. Dismissal on either account was extremely rare. The Sunch'ŏn court dismissed only four out of 5,091 applications which it decided in 1928.³⁰ The fact that only a portion, albeit a large part, of the 1,200 lawsuits brought that year had originated from payment-order applications means that a majority – far more than four-fifths – of payment orders were not objected to by the obligor. When a court issued a payment order and the obligor did not make any objection, the obligee could apply for an execution order. An execution order had the same effect as a default judgment accompanied by a decision of provisional execution. As many as 2,553 out of the 5,087 payment orders issued by the Sunch'ŏn court in 1928 were followed by an execution order.³¹ As with a default judgment, the obligor had another chance to apply for a trial. Cases reopened in this way are included in the above Sunch'ŏn data on lawsuits, but such cases were extremely rare and most execution orders took effect without developing into trial proceedings.

The claimant who secured an execution order following a payment order could apply for compulsory execution in the same way as when he secured a favorable judgment. In 1928, the Sunch'ŏn court received 309 applications for execution and issued 264 execution orders.³² The frequency of execution, of course, doubled in the depression years. During the first seven months of 1932 alone, three hundred applications were filed and 250

³⁰ CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 444 (1928).

³¹ *Id.* at 444.

³² *Id.* at 447.

executions were undertaken.³³ Another notable device was provisional attachment, which was designed to freeze the obligor's property against possible disposal or misuse before judgment or execution. In 1928, the Sunch'ŏn court approved 985 provisional attachments.³⁴ These figures do not sound striking, compared to the frequency of payment orders and to the size of the population under the Sunch'ŏn court's jurisdiction. This was because execution was no panacea. Fully successful executions were rather rare; less than half, and often as few as 35 percent, of executions each year satisfied more than half of the claim.³⁵ Claimants found it unwise to spend time and energy and, moreover, to risk irreparable damage to their reputation in return for such a meager result.

Anything could be an object of execution unless it was part of the food or firewood which remained in the hands of the judgment debtor and formed his or her livelihood for the final month. The 1935 amendment to the Code of Civil Procedure reduced the chances of execution by raising the requirement to three months. Yet the range of things subject to seizure was still very wide. Poor peasants had such essential household items as clocks, clothes and utensils seized. If the peasant had no land, his crop was the best thing to seize. Seizure of standing crops was a synonym for rural plight and was widely resented. There were 1,626 seizures of standing crops in the entire South Chŏlla Province in 1931, the year when the depression had the most far-reaching impact. There were fewer occasions of standing-crop seizures in other years.³⁶ The frequency may not be too striking, but the shock and discontent created by executions were enormous. Standing crops were seized amidst heightened tension between a small number of big claimants and a large number of small defaulters. A big claimant often stirred public outrage by undertaking multiple seizures at a single stroke. In the harvest season of 1932, the Sunch'ŏn and Sŭngju Financial Cooperatives seized the standing crops of one hundred debtors in Sunch'ŏn County alone. Although

³³ TI, Aug. 23, 1932, at 3. The frequency of auctions of land — either as part of execution or as a result of mortgage foreclosure — more than doubled. There were 255 cases of auction in 1928, which increased to 629 in 1932. CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 449 (1928); TI, Feb. 16, 1933, at morning ed. 3.

³⁴ CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 445 (1928).

³⁵ *Id.* at 448; CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 327 (1937).

³⁶ CHŌSEN SŌTOKUFU, CHŌSEN NŌCHI NENPŌ [ANNUAL REPORT ON FARMLAND IN KOREA] 96 (1940).

not a large number of people were directly affected, this sharp, sudden and ruthless strike by public bodies that purported to provide cheap credit for farmers was enough to produce a great deal of anger and fear across the locality.³⁷

Seizure of standing crops often drew the government into conflicts between landlords and tenants, and made the government the primary target of protest. Many violent protests that spread across the southwestern islands were precipitated by the government's heavy-handed measures for carrying out seizures of standing crops.³⁸ The behavior of the bailiffs and policemen who were in charge of the execution caused anger and triggered mass resistance.

A bailiff was a person performing various technical tasks in and around a court, including enforcing court orders through civil execution. In theory, he was not part of the state bureaucracy or judicial officialdom and worked on a commission basis rather than receiving a regular salary. However, since there were no professional bailiffs when the new judicial system was introduced, the Ordinance on Civil Affairs in Korea placed the responsibilities of bailiffs with local policemen and court clerks. Although there had emerged some professional bailiffs by the time of the above protests, much of the work of the bailiff was still being performed by policemen and court clerks. Neither was there a clear

³⁷ TI, Oct. 26, 1932, at 3.

³⁸ The TONG'A ILBO released the following report on one incident in Toch'odo, one of those islands in trouble:

Members of the Toch'o Tenant Association had already foiled the attempt by three bailiffs from the Mokp'o Branch of the Kwangju District Court and a number of policemen from the Mokp'o Police Office to undertake provisional attachments to enforce the payment of unpaid rents.... Inspector Nagano from the Mokp'o Police Office, three policemen and five bailiffs once again tried to undertake attachments based on 50 cases of rent default by tenants of four landlords [Nakajima et al.], on the basis of the landlords' rent demands which were at variance with last year's agreement of 40-percent rent for paddy fields and 30-percent for dry fields. A crowd of 1,000 assembled.... The bailiffs attempted to carry out the execution, but were soon driven back by the crowd.... The bailiffs returned without any result. TI, Oct. 11, 1925, at 2.

The Mokp'o Police Office, supported by the police of the surrounding areas, dispatched 120 armed policemen and arrested twenty cadres of the tenant association.... A heavy clash broke out as 1,000 residents vehemently resisted until they were suppressed. TI, Oct. 14, 1925, at 3.

The residents dispatched two representatives to the chief procurator of the Kwangju District Court and to the head of the South Ch'olla police. The representatives said that more than half of the islanders could not afford even barley porridge ... and the seizure of the crop would starve them to death. TI, Nov. 10, 1925, at 2.

distinction between bailiffs, policemen and lower governmental functionaries in jobs like civil execution, nor did people think that there was any distinction. Critical discourses abounded as to the inattentive, bureaucratic, corrupt and repressive manners in which bailiffs and bailiff-equivalents enforced court orders.³⁹

V. THE COURT AS A LOPSIDED BATTLEGROUND

What were the results of these legal actions, including the payment-order applications that had developed into actions? Examine the following table.

TABLE 8: Results of litigation in the Sunch'ŏn court

	1924	1925	1926	1927	1928	1936	1937	1938
P	81 9%	59 5.3%	118 10.7%	120 10.2%	120 9.9%	141 12.3%	101 7.9%	80 6.4%
PD	9 1%	15 1.3%	23 2.1%	23 1.9%	8 0.7%	23 2%	31 2.4%	15 1.2%
D	86 9.5%	90 8.1%	127 11.6%	164 13.9%	174 14.4%	78 6.8%	66 5.2%	56 4.5%
Pd	258 28.6%	217 19.5%	282 25.7%	274 23.2%	301 24.9%	338 29.5%	310 24.2%	362 28.8%

³⁹ Auctions of seized goods often involved collusion between bailiffs and merchants for manipulation of price. Chōsen nōkai [Korean Agricultural Association], *Shittatsuri no hasei o nozomu* [For Self-Reflection of the Bailiff], 21(3) CHŌSEN NŌKAIHŌ [KOREAN AGRICULTURAL ASSOCIATION REPORT] 49 (1926). What follows is a press report of an incident in Chido, one of the southwestern islands where the aforementioned mass protests took place:

The bailiffs carried out the attachment in unreasonable and malevolent ways. They seized A's goods when B was the debtor. When A complained, they told him to submit an objection to the court. TI, June 13, 1925, at 3.

Kim Chōnggi, a bailiff from the Mokp'o Branch of the Kwangju District Court, Chu Songyu, a steward serving the landlord Uchida, and two others seized 2 *turak* of Hwang Yonghyōn's barley field, while they should have seized Hong Sunyōng's property. Hwang, who had no contractual relationship with Uchida, was furious and asked Uchida to sort it out. Uchida admitted that there had been some mistake. When Hwang addressed this problem to the police patrol station, the policemen there slapped Hwang's face and kicked him, reproaching Hwang for insolently wearing straw shoes when visiting government officials.... When Hwang visited Kim Chōnggi and asked him to sort the problem out, Kim beat him with a wooden pillow, saying how unmannerly it was for an ordinary man to dare to complain to a government official.... After he had recovered from injury, Hwang went to a scrivener and asked him to draw a criminal complaint against Kim. The scrivener, however, refused and said that the relationship between a bailiff and a scrivener was similar to that between members of a family. TI, June 10, 1925, at 2.

Dd	40 4.4%	38 3.4%	35 3.2%	62 5.3%	55 4.6%	3 0.3%	2 0.2%	5 0.4%
Stm	84 9.3%	178 16%	137 12.5%	116 9.8%	83 6.9%	153 13.4%	244 19.1%	261 20.8%
W	342 38%	516 46.3%	367 33.4%	421 35.7%	462 38.3%	282 24.6%	344 26.9%	302 24%
Dism	1	2	8	0	1	96	173	161
Ak	0	0	2	0	0	17	7	2
P+Stm	0	0	0	0	1	0	0	0
P+W	0	0	0	0	0	1	0	0
P+Wv	0	0	0	0	1	0	0	0
Pd+Stm	0	0	0	0	1	0	0	0
Pd+W	0	0	0	0	0	2	1	0
Pd+Wv	0	0	0	0	0	1	0	0
Stm+W	0	0	0	0	0	0	1	0
Total	901	1,115	1,099	1,180	1,207	1,146	1,280	1,256

P: plaintiff wins; PD: claim satisfied in part; D: defendant wins; Pd: plaintiff wins on default judgment; Dd: defendant wins on default judgment; Stm: in-court settlement; W: withdrawal; Dism: dismissal; Wv: waiver (*Klageverzicht*)⁴⁰

As the table indicates, a large percentage of lawsuits were either withdrawn by the plaintiff before judgment or ended with an in-court settlement. Almost 40 percent of actions instituted during the period 1924-1928 were withdrawn. The percentage of withdrawals diminished during the period 1936-1938, yet one out of four suits were still withdrawn before judgment. The suits were withdrawn because the defendant discharged his obligation, the plaintiff chose to absolve the defendant of all or part of the obligation, or the parties reached an out-of-court settlement.

Approximately one-half of all suits in the five sample years of the 1920s, and a little more than 40 percent in the three sample years of the 1930s, ended up in judgment. That a dispute ended in judgment does not necessarily indicate that it was more intensely fought than a dispute resolved in some other way. In a great number of cases, the defendant did not appear at the proceedings and the plaintiff secured a default judgment, which honored the plaintiff's claim based on his allegations which the court regarded as admitted by the defendant. Default judgments accounted for 50-70 percent of all judgments rendered each year. The majority of those default judgments were entered against the defendant. When a default judgment was delivered, the defeated party could submit a motion for reopening the trial within fourteen days. By this

⁴⁰ Acceptance by the defendant of the plaintiff's legal claim rather than his/her allegation of fact.

procedure, he could return the proceedings to the point where he had failed to take the necessary steps and the default judgment could be overridden retrospectively. In Japan, this was criticized as too generous and causing unnecessary delays. Hence, the Code of Civil Procedure was amended in 1926 to remove the route for reopening the proceedings and encourage the courts to proceed on the basis of the complaint, answers and other pleadings. This came into force in 1929, but the change was not introduced in Korea.⁴¹ The only change was that the fourteen-day requirement for the motion to reopen the proceedings was reduced to seven days. On the other hand, in both Japan and Korea, the rules against plaintiffs in default changed. Before the legal change, the courts dismissed the lawsuit if the plaintiff was in default. Now, the court could look into the merits and render a judgment on the merits. This explains the drop in the number and percentage of “Dd” cases in 1936-1938.⁴²

Many defendants did not appear in court, because they thought it futile to contest the plaintiff's allegations which they regarded as unchallengeable. On the other hand, as Table 8 shows, a large percentage of cases in which both parties appeared were won by the defendant. This suggests that the defendant responded only when he was fairly sure of winning or, at least, when the case was so complex that it was worthwhile to fight. After all, it is clear that in the majority of cases the defendant had few grounds in fact and law to challenge the plaintiff. The obligor's tactic was more to delay the performance than to contest the claim. Indeed, it was not merely a tactic, but the only option.

Table 8 shows that in the 1930s a large percentage of suits were dismissed because of procedural flaws. This seems to have had some connection with the judicial policy since the 1926 amendment of the Code of Civil Procedure and the resulting practice toward discouraging abuse of suits and unnecessary delays.

That a majority of lawsuits were instituted by moneylenders and landlords, and that a large percentage of suits ended up in a default judgment against the defendant, combine to suggest that

⁴¹ SHINDŌ SHINJI, SHIN MINJISOSHŌHŌ [NEW CIVIL PROCEDURE LAW] 409-11 (2d ed. 2011).

⁴² In Table 8, judgments of dismissal by reason of the plaintiff's default are not included among the cases of dismissal [Dism], but are counted into a separate category [Dd], along with the 1936-1938 cases where the court rendered decisions on the merits in favor of the defendant because the plaintiff was in default.

the court was a vehicle of the rich to ascertain their claims and to pressure helpless peasants. We should not, however, explain away the function of the court by a crude instrumentalist presumption. We must find out to what extent the court catered to the rich and whether the court was of no help to the poor. We are less interested in whether the court was an instrument of the rich than to what degree it was so and how it operated in that way. With this in mind, let us examine the following table.

TABLE 9: Types, forms of dispute resolution, and results of tenancy-related disputes in the Sunch'ŏn court 1924-1928

Type/Result	P	Pd	PD	D	Dd	Stm	W	Others	Total
LAND-TEN	45	67	8	39	18	53	130	2	362
rent	44	65	8	38	18	51	127	2	353
cancel reg	0	1	0	0	0	0	0	0	1
expiry	0	0	0	0	0	0	1	0	1
delivery	0	1	0	0	0	2	2	0	5
rent+delivery	0	0	0	1	0	0	0	0	1
exp+delivery	1	0	0	0	0	0	0	0	1
LAND-TEN(p)	1	13	0	3	2	7	16	0	42
delivery	1	13	0	3	2	7	16	0	42
TEN-LAND	0	0	0	0	2	0	6	0	8
delivery	0	0	0	0	0	0	1	0	1
decl+delivery	0	0	0	0	1	0	1	0	2
deposit	0	0	0	0	0	0	2	0	2
registration	0	0	0	0	1	0	2	0	3
TEN-TEN	20	17	2	29	7	36	145	2	258
possession	20	15	1	22	6	35	135	2	236
declaration	0	1	0	0	1	1	5	0	8
decl+crop	0	0	0	2	0	0	1	0	3
decl+possess	0	1	0	5	0	0	4	0	10
perm price	0	0	1	0	0	0	0	0	1
TOTAL	66	99	9	65	29	96	297	4	670

P: plaintiff wins; Pd: plaintiff wins on default judgment; PD: claim satisfied in part; D: defendant wins; Dd: defendant wins on default judgment; Stm: in-court settlement; W: withdrawal; LAND-TEN: suit by landlord against tenant; LAND-TEN(p): presumably, suit by landlord against tenant; TEN-LAND: suit by tenant against landlord; TEN-TEN: presumably, suit by tenant against another tenant; cancel reg: cancellation of registration of tenancy; expiry (exp): suits seeking declaratory judgment confirming expiry of tenancy; delivery: delivery of possession of land; declaration (decl): suits seeking declaratory judgment confirming tenancy; deposit: tenancy-contract deposit; registration: registration of tenancy; possession (possess): possessory action; crop: delivery of unlawfully taken crop; perm price: price of permanent tenancy

The figures are about the cases which certainly or apparently related to agricultural tenancies and which ended in any kind of resolution in the Sunch'ŏn court during the period 1924-1928. I have excluded the 1930s because the frequency of tenancy-related cases, except rent claims, was negligible.⁴³ Again, what is written on the Civil Case Register is so crude that our information may not be accurate, and we must leave room for flexible interpretation.

To begin with, actions instituted by landlords against tenants [LAND-TEN] made up 54 percent of all tenancy-related suits. They do not include forty-two actions for delivery of land, most of which are presumed to have been eviction suits by landlords. If we include them [LAND-TEN(p)], the percentage reaches sixty-one. Approximately 36 percent of these suits were withdrawn, while 30 percent ended in judgments favoring the plaintiff.⁴⁴ Among those 30 percent, six out of ten were default judgments. The defendant achieved full victory in 15 percent of all cases in which landlords sued tenants. Consider eviction suits for a closer look. Of forty-nine suits by landlords demanding delivery of land, sixteen cases ended in landlord triumph, while the landlord suffered defeat in six. Eighteen were withdrawn and nine ended in settlement.⁴⁵ Compare this with what Richard Smethurst found from Kofu Basin in Japan. Smethurst concludes that the Japanese courts were protective of tenants, based on his finding that the tenant won in 2.5 times as many cases of eviction as the landlord did in Kofu Basin between 1925 and 1940.⁴⁶ It is impossible to draw the same conclusion from our data on Sunch'ŏn, although the court often played in favor of the tenant.

There were only eight actions instituted by tenants against landlords [TEN-LAND]. Tenant-tenant disputes [TEN-TEN] numbered 253, 40 percent of all tenancy-related suits. However, a possessory action instituted by a tenant against another tenant could be part of a landlord-tenant dispute, particularly when the plaintiff was an evicted or holdover tenant. It is difficult to tell

⁴³ The figures in this table may not exactly coincide with the figures in Table 20. In the latter, I counted each claim separately when a single suit contained multiple claims. Here, I excluded the categories of suits relating to waste and farming costs.

⁴⁴ This does not include the forty-two actions for delivery of land. Even if these were included, the percentage would remain rather constant.

⁴⁵ Withdrawal must not be treated as a failure for the landlord, for most of those who withdrew did so because the tenant had discharged his obligation or some compromise had been struck.

⁴⁶ RICHARD J. SMETHURST, *AGRICULTURAL DEVELOPMENT AND TENANCY DISPUTES IN JAPAN, 1870-1940* 408 (1986).

how many of the tenant-tenant suits were instituted by evicted or holdover tenants against new tenants. My study of judgment records suggests that as many possessory actions were brought by new tenants against evicted tenants as those instituted in the opposite direction. Although the possessory action was virtually the only weapon of an evicted or holdover tenant against the tenant whom the landlord favored, it was effective only under limited conditions. It was not honored if the trespasser had established his possession. On a paddy field, the question of who was the possessor was the same as who had transplanted seedlings onto the field. This work was done within days, and the disputant was unable to wait for a few weeks — normally two to five weeks — until the court examination ended, because his opponent might establish possession before then. Although one could apply for an interlocutory injunction against the trespasser before the court made a decision, the opponent could still more quickly secure his possession. This explains why such a large percentage of possessory actions were withdrawn.

VI. FREEDOM OF CONTRACT AND THE PROTECTION OF THE WEAK

The courts rarely declared a contract invalid because it was at variance with "public order and good morals." Article 90 of the Civil Code was often compared to Article 138 of the German Civil Code, which invalidated "profiteering transactions" (*wucherisches Geschäft*). According to the dominant interpretation, however, the range of counter-public-order and immoral practices under the Japanese Civil Code was narrower than that of "profiteering transactions" under the German Civil Code. What follows is a paragraph from an influential Japanese civil-law textbook:

The German Civil Code (Section 2, Article 138) invalidates profiteering transactions in which one's economic distress, indiscretion or inexperience is exploited. In other words, if there is the subjective condition that one of the parties has exploited the economic distress or indiscretion of the opposite party, in addition to an objective imbalance between performance and counter-performance, the law regards the legal transaction as a profiteering transaction that violates good morals. There is no room for such an interpretation in our civil code. That

there is an objective imbalance between performance and counter-performance is yet to be regarded as a deviation from the scope of freedom of contract, and a mere intention to exploit the opposite party's economic distress does not suffice to make the content of a legal transaction anti-social.⁴⁷

As I have stressed, tenancy agreements were rarely declared *contra bonos mores*. What about moneylending? The following case illustrates the position of the courts:

Ch'oe, a peasant and fisherman in Yösu County, borrowed 150 yen from Pak, a moneylender. He gave a mortgage in a piece of forestland to Pak as security and registered the mortgage. At the same time, the two parties made an agreement that the title to the forestland be transferred to Pak with the lapse of the period within which Ch'oe agreed to repay the loan. The agreement was drawn up by a scrivener. When Ch'oe offered a payment of 192.41 yen, which included an annual interest of 30 percent, Pak refused to receive it, saying that the period of repayment had lapsed. Pak told Ch'oe that he had conveyed the forestland to the Tolsan Financial Cooperative. Ch'oe brought an action against Pak, demanding that Pak cooperate in cancelling the mortgage registration. Ch'oe also sued the financial cooperative for cancelling the registration of conveyance. Ch'oe alleged that the scrivener had misunderstood the agreement and worded the agreement in a mistaken way, which he had been unable to notice because of illiteracy, and that he had believed that the title would remain with him until the land was auctioned. Even if he had agreed, he added, the agreement was null and void because of the enormous imbalance between the debt and the value of the forestland, which was 433 yen in market price. The Sunch'ön court ruled that the agreement was null and void because there was too large an imbalance and Ch'oe's indiscretion and inexperience had been exploited. The Taegu Court of Appeals reversed the decision, ruling that this degree of imbalance was not so extraordinary as to invalidate the agreement as immoral and that Ch'oe, who could write his name in Chinese characters, was not so indiscreet and ignorant when he signed the agreement.⁴⁸

⁴⁷ HATOYAMA HIDEO, NIHON MINPÖ SÖRON [GENERAL TREATISE ON JAPANESE CIVIL LAW] 330 (1930).

⁴⁸ SBKDC CC 553 (1940), July 8, 1941, Taegu Court of Appeals Civil Appeal 545 (1941), Dec. 26, 1941.

If there was one thing which the courts offered to debtors, it was the control of interest. The Ordinance on the Regulation of Interest placed ceilings on interest rates. The ceilings were 30 percent for loans smaller than 100 yen, 25 percent for loans of 100 yen or larger but smaller than 1,000 yen, and 20 percent for loans of 1,000 yen or larger. Although these may sound very high by today's standards, they were considerably lower than the market rates of the day. It was common that one had to get a loan at an interest rate of 10 percent for every market session, that is, every five days. But the ceilings mattered only when the loan was at issue in a lawsuit. When a creditor sued a debtor for repayment of the debt, the court examined the interest rate and endorsed the claim only up to the ceiling. If the transaction was not taken to court, there was no way to control the interest rate. Furthermore, the court applied the ceiling only when interest formed part of the claim. Hence, if a debtor had already paid the agreed interest and the lender sued the debtor for the principal, the court did not reduce the claim simply because the lender had received interest in excess of the rate permitted.

VII. THE SUPPLY OF LEGAL SERVICES

The deficiency of legal services compounded the insufficiency of substantive legal grounds for the poor in defending their interests by recourse to the law and judicial system. The greatest difficulty lay in the limited availability and affordability of legal counsel. The number of lawyers was limited and access to them was circumscribed by several factors. The following table shows to what extent disputants in court were represented by counsel.

TABLE 9: Representation by counsel in the Sunch'ŏn court

	P	D	$P \cap D$	$P \cup D$	Cases	Lawyers
1924-27	115	53	40 (3%)	208 (15%)	1,376	4
1927-30	134	52	68 (4%)	254 (16%)	1,573	5
1931-33	117	49	74 (5%)	240 (17%)	1,413	5
1934-36	167	103	112 (7%)	382 (23%)	1,692	5

1937-39	102	58	89 (6%)	249 (17%)	1,486	4
1939-42	100	43	119 (8%)	262 (18%)	1,445	5
TOTAL	735	358	502 (6%)	1,595 (18%)	8,985	9

P: number of cases in which only the plaintiff was represented by counsel; D: number of cases in which only the defendant was represented by counsel; $P \cap D$: number of cases in which both parties were represented by counsel (percentage of the total number of cases); PUD: number of cases in which at least one party was represented by counsel (percentage of the total number of cases); lawyers: number of lawyers practicing in Sunch'ŏn

I have analyzed only the cases which went all the way up to judgment, because the judgment record is the only material that shows whether a litigant was represented by counsel; the Civil Case Register does not contain this information. If we assume that recourse to counsel is proportionate to the complexity of the case, there is no reason to believe that recourse to counsel was less frequent in cases where the action was later withdrawn or which ended up in settlement than those which proceeded all the way up to a judgment, because withdrawn or settled cases were not necessarily less complicated than judgment cases. The danger of over-representing cases where counsel was present is not great even as we confine our analysis to judgment cases.

The table shows that both parties were represented by counsel in only 6 percent and no counsel was present in over 80 percent of all cases. Some hired counsel in disputes as small as involving 9 yen. In general, however, I deduce that litigants in large and complicated disputes, such as complex damage suits and land-title disputes, had a stronger tendency to hire counsel. This was largely because those who took such disputes to court were rather wealthy people.

Professional attorneys-at-law in Korea first appeared in 1905. There were eighty lawyers shortly after annexation and 330-380 during the 1930s.⁴⁹ Lawyers qualified to practice in Japan could practice in Korea, and those who passed the Korean bar examination, along with passers of the transition examination for clerks introduced in 1936, as well as ex-judges and ex-procurators, were licensed to practice. Most of the lawyers were based in Seoul or large towns. When starting a practice, the lawyer had to register his name with the district court having the jurisdiction over the place where he was to practice. Any lawyer practicing in Sunch'ŏn

⁴⁹ CHŌSEN SŌTOKUFU, CHŌSEN SŌTOKUFU TŌKEI NENPŌ 423 (1928), 319 (1937).

had to be registered at the Kwangju District Court. In the early 1920s, there were only two professional lawyers – No Chaesŭng and Yi Kyŏngsu – practicing within the jurisdiction of the Sunch'ŏn court. Both of them were Korean. Another Korean and a Japanese – Ōya Itoshi and An Ch'iyun – opened their offices in the mid-1920s, followed by Kio Yoshikiyo, Yŏ Ch'ŏlhyŏn, Nanjō Tamotsu, Kim Yongsik, and Kanemoto Kazuhisa. Hence, there were nine lawyers, five Korean and four Japanese, who at any one time practiced in the region between 1924 and 1942. At no time were there more than five lawyers practicing simultaneously. Though their clients were from all counties within the jurisdiction of the Sunch'ŏn court, all of them had their offices in Sunch'ŏn town. Lawyers practicing in other areas occasionally came to the Sunch'ŏn court to represent disputants from other areas whose cases were dealt with by the Sunch'ŏn court.

A lawyer's fee consisted of a deposit, mostly unreturnable and paid in cash before the service began, a main fee, expenses, and often a contingent fee on top of the main fee. Contingent fees were sometimes as huge as 40 percent of the amount in controversy. In the worst case, the total charge went up to 80 percent of the claim. The litigant's voluntary withdrawal or settlement entitled the lawyer to the same fee as when he won the case in full.⁵⁰ Except when the court ordered the litigant to hire counsel to conduct his litigation, which was exceptional, attorney fees were not regarded as part of the cost which the defeated party had to compensate.

An interesting court case shows some of the features of the legal fee at the time. The case began in 1936 by an action brought by the lawyer Nanjō Kazuhisa against his client Yi, whom he represented in a family and succession dispute. As a result of his service, according to Nanjō, the client recovered 3,500 yen. Nanjō then claimed a legal fee of 3,186 yen, which consisted of a starting fee of 280 yen, 400 yen as the main service fee, a contingent fee of 1,400 yen, based on an agreement that would give the lawyer a 40 percent share of the recovered inheritance, and various expenses. In order to have his case heard by the Sunch'ŏn court, Nanjō split his claim into four parts. He won a default judgment and brought an action for registration of land title transfer against a third person who had an obligation to transfer a piece of land to Yi. He

⁵⁰ SBKDC CC 407 (1936), May 27, 1936.

successfully grabbed the land by subrogation, which he said was to satisfy his claim of 2,400 yen.⁵¹

The lawyers of Sunch'ŏn were not natives of the region. A few had served as judges in the Sunch'ŏn court and another few had practiced as lawyers in other areas before moving to Sunch'ŏn. It is unknown how strongly they thought of Sunch'ŏn as their permanent residence. They were not enthusiastic about investing in land in Sunch'ŏn, although they assumed some business interests, and they left the area after Liberation. They socialized with members of the local elite and participated in local organizations, but they were not much bound by personal ties and duties, partly because they had no lineage links.⁵² They were interested in local affairs, but their roles and activities were not as far-reaching as those J. F. Campbell found among typical lawyers in rural Greece, who played the general role of "professional fixers," listening to humble people and sorting out their problems in exchange for political support in elections.⁵³

Sunch'ŏn's lawyers participated in local politics as district or provincial councilors, but it was not from the poor that they drew support, since ballots in local elections were given only to people who paid a certain amount of tax. The lawyers were public patrons, who accumulated symbolic capital more by contributing to education and mediating communication between the government and the local elite in regional development programs than by helping individuals to solve their personal difficulties. In comparison to their involvement in elite activities, these lawyers were indifferent to popular life and grievances, but one or two Korean lawyers paraded some sympathy for the hardships of peasants and supported the peasant movement by offering free services to some activists who stood trial.⁵⁴ No Chaesŭng, who lived in Sunch'ŏn longest among the lawyers, helped to organize a law study group for educating the public on legal issues.⁵⁵ No had settled in Sunch'ŏn after serving as a judge of the Sunch'ŏn Ward

⁵¹ SBCDC CC 444 & 445 (1936), June 2, 1936; CC 1067 & 1070 (1936), Dec. 16, 1936; CC 1086 (1936), Jan. 5, 1937.

⁵² No Chaesŭng, Ōya and Kio were included among notables of the province enumerated in the who's who section of Sunch'ŏn County in the book ZENRANANDŌ JIZIŌSHI [THE SITUATION OF SOUTH CHŌLLA PROVINCE]. See SOGAWA KAKUTARŌ, 2 ZENRANANDŌ JIZIŌSHI 599-604 (Zenranandō jiziōshi kankōkai ed., 1930) [hereinafter ZENRANANDŌ JIZIŌSHI].

⁵³ J. K. Campbell, Honour, Family, and Patronage: A Study of Institutions and Moral Values in a Greek Mountain Community 238-47 (1964).

⁵⁴ TI, Jan. 17, 1925, at 3; Jan. 21, 1925, at A1; Jan. 29, 1925, at 3.

⁵⁵ TI, Aug. 15, 1925, at 4.

Court. He was elected to a District Council and later the Provincial Council.⁵⁶

Only lawyers were allowed to represent disputants in court, except when the parent or guardian represented a minor or person with limited capacity, or when a lay person represented another person with the special permission of the court. Stewards often conducted court actions on behalf of their masters. Peasant-union activists occasionally represented fellow members of the union. Nonetheless, permission was strictly limited. In general, the government was intent on suppressing lay people's involvement in the disputes of others, particularly when those disputes had links with popular protest. When popular organizations in Sunch'ŏn opened a legal advice center, the authorities forced them to close it, fearing that it might inspire popular protest.⁵⁷ The Rules on the Punishment of Police Offences criminalized the act of abetting others to institute lawsuits.

Lower on the ladder of legal professions were judicial scriveners. In 1933 and 1940 respectively, there were fifteen and eighteen judicial scriveners registered in Sunch'ŏn.⁵⁸ Scriveners drew up judicial statements, such as civil and criminal complaints. In theory, one did not need to have a special qualification to become a judicial scrivener, but most judicial scriveners had some judicial experience, namely clerical careers in courts. They had to get approval from the court within whose jurisdiction they intended to practice. They were under the close supervision of the court and their script charges were determined by the head of the respective court. Besides, there were general scriveners who did similar work around county or district offices.⁵⁹ Script charges were not very high.⁶⁰ Yet people could not get much from the

⁵⁶ ZENRRANANDŌ JIZIŌSHI at 597-99; TI, Jan. 19, 1928, at 4; Mar. 1, 1928, at 4; Mar. 11, 1928, at 4. On one occasion in the late 1920s, when he was a member of the South Ch'ŏlla Provincial Council, he expressed rage against a Japanese member of the council who blamed rural poverty on investment in education for Koreans and resigned from the Council as a gesture of protest. The Japanese member apologized and he withdrew his resignation.

⁵⁷ TI, May 21, 1927, at 2.

⁵⁸ TAEHAN PŌMMUSA HYŎPHOE [KOREAN ASSOCIATION OF JUDICIAL SCRIVENERS], PŌMMUSA PÆKNYŌNSA [THE 100 YEAR HISTORY OF THE JUDICIAL SCRIVENER], charyop'yŏn [Volume on Materials] 540, 566-67 (1997).

⁵⁹ Until 1924, there was no distinction between general and judicial scriveners.

⁶⁰ In one case, 2.18 yen was charged for a criminal complaint alleging bodily injury, but the charge could increase to a few hundred yen, depending on the length and complexity of the statement. SBKDC CC 932 (1933), Jan. 1, 1934, Taegu Court of Appeals Civil Appeal 135, Apr. 18, 1934; SBKDC CC 514 (1941).

scriveners, as they were strictly banned from intervening in legal disputes.

The cost of engaging in court proceedings was high, whether or not counsel was hired. The litigant had to pay for the seals to be attached to the forms, the prices of which were determined by the amount in controversy. The plaintiff had to pay for the delivery of the complaint to the defendant. Since hearings were conducted in Japanese, parties who were not versed in Japanese had to pay for interpretation. One also had to pay the daily allowances and travel costs of lay and expert witnesses, the transport and accommodation expenses of the judge and clerks who made on-spot inspections, and for the bailiff service. The court could order a party to pay the cost of examining evidence which the court introduced in its own discretion. One who could not afford to pay these expenses was allowed to apply for legal aid. The legal aid did not, however, reduce or exempt a party's payment for all costs but only delayed the payment until he was able to pay.

Attending a court hearing or visiting a lawyer was quite a burden in those days, when one who lived in Kurye or Kohŭng had to walk two full days to get to Sunch'ŏn. It was a serious hassle for a disputant to appear at the Kwangju District Court. Big landlords' standard tenancy contracts contained a choice of forum, and it was normal for the landlord to choose the jurisdiction where he lived. A tenant of Tonggo Farm of Tongbok, for instance, had to travel all the way to Kwangju if the landlord sued him. It was even more demanding to attend an appellate hearing conducted in the Taegu Court of Appeals. Some lost their cases by failing to attend the appellate hearing after winning at the district court.⁶¹

VIII. CONCLUDING REMARKS

In a previous study, entitled *The Legal Topography of Agrarian Relations in Southern Korea under Japanese Rule* (2009), I professed to fill the gaps exposed by existing literature on Korean society under Japanese rule. One of the gaps comes from the lack of inquiry into the workings of law in shaping agrarian relations. The neglect of law has been coupled with the assumption that the law, particularly the system of regulations imposed by the Japanese rulers, was so remote from the actual

⁶¹ TI, Dec. 15, 1925, at 2.

socioeconomic life of the people that it was irrelevant or, conversely, so strictly binding and overpowering that people's behavior was governed as prescribed. In that study, I tried to show that the system of rules was not so coherent as one might imagine. There were many gaps in the rules and choices in invoking and applying legal rules. Yet the study also showed that the mobilization of rules as resources was bounded by the structure and character of the substantive law governing agrarian relations.⁶²

The present article combines with this previous study to form part of a project to reconstruct the picture of socio-legal life during Japanese rule with particular reference to the Sunch'ŏn region. The two studies form a pair, as they narrow their focus to a region and use historical data peculiar to the region, and because the present study brings to light the procedural side of the law that governed agrarian relations while the previous study inquired into the structure of substantive law. As the previous study sought a nuanced approach that distanced itself from the instrumentalist notion of law, this study shed light upon features of the strategic use of the court, instead of assuming away political and socioeconomic implications of the court as an apparatus of the elite. In the end, however, both essays underline the limitations of the law as a weapon for tenants against landlords or for other agrarian poor against the economic elite. As my 2009 study showed that the legal system under Japanese rule was never an open-ended space with ample availability of "weapons of the weak," the present article makes clear that the court was a lopsided battleground. Did the haves come out ahead? Yes, the haves came out ahead.

Lastly, I need to point out the common limitations of both studies. While both studies unveil the class character of the law, they do not discuss how the law was approached by the local people in the broader social context of domination and resistance. Historical studies of the agrarian economy and the peasant movement of the region should be combined with these two studies to produce a comprehensive historical ethnography of the region.⁶³ Another problem is that both studies do not address the situation of law in Korea under Japanese militarism during the late 1930s and the first half of the 1940s. My 2009 article deliberately limited its time frame to 1920-1934. The present article includes

⁶² Lee, *supra* note 23.

⁶³ See *supra* note 3.

an analysis of data from the mid- and late 1930s, and yet it does not look into the legal changes brought by the Bonarpartist reorganization of rural society under the policy and ideology of agrarianism in the mid-1930s and by the extreme controls introduced after the late 1930s. As mentioned, two pieces of law – the Korea Tenancy Conciliation Ordinance of 1932 and the Korean Farmland Ordinance of 1934 – combined to change the landscape of civil justice on both the substantive and procedural sides. Further, in the late 1930s, the whole economy was brought under a general mobilization system, decrees deriving from which, such as the Rent Control Ordinance of 1939, substantially affected the existing agrarian relations. It is ironical that the historiography of this period is not as rich as that of earlier periods of Japanese rule, despite the fact that the experiences of that late period shaped the memories of Koreans about their lives under Japanese rule.

Keywords

Tenancy, Landlordism, Dispute Resolution, Litigation, Court, Civil Law, Japanese Rule, Sunch'ŏn

Received: Apr. 15, 2014; review completed: May 8, 2014; accepted: May 20, 2014

CRIMINAL PUNISHMENT FOR INCHOATE AND THOUGHT CRIMES: A CRITICAL ANALYSIS OF SOUTH KOREAN CRIMINAL LAW*

Hoh Il Tae**

ABSTRACT

Conspiracy is an agreement between two or more persons to commit a crime. It is the stage of expressing and agreeing to commit a crime, without going further, and physically preparing to commit the crime. Of course, multiple persons' conspiracy to commit a crime may be more dangerous than one person's preparation for a crime in that the likelihood of the crime's execution may be greater. However, it does not reach the stage of physical preparation for commencing the commission of the crime. It is simply the state where two or more persons think about committing a crime. This is inconsistent with the recent global trend characterized by the principle that thinking about committing a crime cannot be punished and with the Roman legal maxim of two thousand years ago that "thought cannot be punished." All crimes should be regulated by a law based on culpable conduct and should comply with the principle of nullum crimen nulla poena sine lege. Given that the essential nature of punishment is physical and mental pain, there is a need to conclude that types of conduct subject to punishment should be limited to those which are not socially accepted, which infringe important legal rights or which risk infringement. Moreover, proof is required to punish conspiracy, but, if the criminal does not confess, this evidence is not easily available, and, if it is obtained through torture, it is against the principle of due process of law. In consideration of all these arguments, 'preparation and conspiracy' should be deleted from the Criminal Act with respect to any crime.

* This article was written with the support of the Dong-A University Research Fund.

** Professor, School of Law, Dong-A University.

I. POSING A QUESTION

The two thousand year old Roman legal maxim “Nobody should be punished for his thoughts” is still persuasive today. Thus, the French Criminal Code, as amended in 2008, does not punish the preparation or conspiracy to commit a crime,¹ as a general principle. However, the Korean Criminal Act (hereinafter Criminal Act), enacted in 1953, punishes both. The criminalization of preparation and conspiracy is found in twelve categories of crimes out of the total forty-two categories in the Specific Provisions of the Criminal Act,² and punishment occurs according to individual provisions of the Act.

Meanwhile, we all have freedoms of thought and expression guaranteed by the Constitution of the Republic of Korea, as well as the right to due process of law, all of which protects fundamental human rights. Since the freedoms of thought and expression are the foundation of a democratic state, everyone should enjoy them without exception and they should be faithfully guaranteed unless their exercise violates the rights of others. However, this does not mean that the freedom of any thought or expression is allowed under the constitution. Thoughts of conduct against humanity, or of violating the essence of human dignity, cannot be permitted under the constitution and are prohibited by the Criminal Act.³ Therefore, a criminalized thought should have the substance of criminal unlawfulness to the extent that it violates the rights of others protected under the law. It should also be clearly defined with concrete legal elements according to the principles of certainty and *nullum crimen sine lege*, under which the mere expression of criminal intent should not be the object of criminal punishment.⁴

¹ The CODE PÉNAL [C. PÉN.] art. 412-2 (Fr.) punished conspiracy only in the case of a crime for destruction of constitutional government. The CODE PÉNAL [C. PÉN.] art. 212-3 (Fr.) (current) essentially punishes conspiracy for the preparation of crimes against humanity by punishing an organization made for the purpose of anti-humanity crimes. However, the French Criminal Code does not punish either conspiracy or preparation for mere infringement of an individual legal interest or social legal interest.

² The Korean Criminal Act is divided into two parts; General Provisions and Specific Provisions.

³ See Constitutional Court [Const. Ct.], 89 Heon-Ga 22, Sept. 8, 1989, (1 KCCR 199) (S. Kor.) for more details on the limit and contents of the South Korean legislature's power.

⁴ See Constitutional Court, 93 Heon-Ba 98, Dec. 26, 1996, (8-2 KCCR 785) (S. Kor.).

From this perspective, conspiracy or preparation for a crime is an act at a stage which has not yet reached commencement of a crime itself. It is far from an act recognized as violating or endangering another person's interests protected by the law. It also so lacks clarity that to punish it might be against the principle of *nullum crimen sine lege*. It is difficult to find the essential difference between this behavior and daily routine behavior. Thus, consideration of whether to punish preparation or conspiracy of a crime is inevitable and reasonable. In addition, if any kind of physical force is used to get a confession from an accused, it may result in serious violations of the principles of due process and prohibition against torture. The Criminal Act has general provisions on preparation and conspiracy of a crime in Article 28 of the General Provisions of the Criminal Act, which provides that even conspiracy can be punished. However, Germany, Switzerland, Austria and Japan do not have such statements in the general provisions of their criminal codes. These countries have a general attitude against punishing conspiracy and criminalize it in extremely limited circumstances. The Korean Criminal Act differs by recognizing conspiracy as an externalized form of a crime, similar to preparation, and punishes it widely.

This Article will examine whether such an attitude in the Criminal Act is sound, and, if not, what we should do. Further, the courts deny the legal possibility of voluntary cessation of preparation or conspiracy, though voluntary cessation is recognized for an actual crime. The courts deny such possibility because of the lack of a substantive provision in the Criminal Act regarding the question.⁵ In this light, it is meaningful to explore methods for relieving the heavy legal consequences imposed on the actors. Whether this requires such devices as mandatory exemption or reduction of punishment through legislation will also be examined.

⁵ Supreme Court, 99 Do 424, Apr. 9, 1999 (S. Kor.). A 'retreating criminal' is one who commenced committing a crime but voluntarily stopped the acts. The concept of the retreating criminal is incompatible with the idea that the acts of preparation and conspiracy are punished before commencement. In addition, see Supreme Court [S. Ct.], 91 Do 436, June 25, 1991 (S. Kor.).

II. THE CONCEPTS OF PREPARATION AND CONSPIRACY AS CRIMES, AND GROUNDS FOR THEIR PUNISHMENT

A. *The Concepts of Preparation and Conspiracy*

According to the majority scholarly view, ‘conspiracy’ of a crime is a concept denoting an act before commencing the crime. From one point of view, it is the same as ‘preparation’ for a crime and does not differ much from any other ‘preparation’ in terms of the degree of danger caused by a crime. ‘Conspiracy’ is, thus, regarded as the mental or psychological preparation for a crime, while ‘preparation’ is the act of preparing the material aspects of a crime.⁶ According to this view, there is no difference between ‘conspiracy’ and ‘preparation’ in that both are pre-operational conduct.⁷

However, it is difficult to agree with this majority view. The common and dictionary definition of ‘conspiracy’ is “an evil, unlawful plan formulated in secret by two or more persons.”⁸ ‘Conspiracy’ in the Criminal Act is, of course, a legal term and cannot have the same meaning as is generally understood. Even if it is a legal term, however, it cannot differ too much from the normal meaning. The principle of *nullum crimen sine lege* may be severely damaged if the legal and common meanings totally differ from each other, making it difficult for citizens to understand the rules regarding sanctions for the act or sanctions for failure to act. Considering this, ‘conspiracy of a crime,’ under the Criminal Act, is a “secretive agreement by two or more persons to plot and

⁶ Kwon Mun-tek, *Yebijoe [Offense of Preparation]*, in 2 HYEONGSABEOP GANGJWA 548 (Hanguk Hyeongsabeop Hakhoe ed., 1984); KIM SEONG-DON, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 442-43 (2d ed. 2009); PARK SANG-KI, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 333 (8th ed. 2009); BAE JONG-DAE, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 551 (9th ed. 2008); Paek Hyung-koo, *Yebijoe [Offense of Preparation]*, in 170 GOSIYEONGU 76, 76-94 (May 1988); OH YOUNG-KEUN, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 491 (2d ed. 2002); LEE JAE-SANG, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 407-08 (6th ed. 2010); YIM WOONG, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 341 (2005); Jin Gye-ho, *Yebijoe [Offense of Preparation]*, in 146 GOSIYEONGU 57, 57-70 (May 1986).

⁷ The majority view clearly differentiates the two, if there is no actual difference between preparation and conspiracy in terms of preparation for a crime. See BAE, *supra* note 6, at 551.

⁸ KOREAN LANGUAGE ASSOCIATION, KOREAN LANGUAGE DICTIONARY 1815 (2005).

attempt to commit a crime.”⁹ It is a secret promise to commit a crime through the expression of an intention at the most elementary level of the preparation stage of the crime. However, there exists no typicality of acts, that is, an objective and external indication of the necessary acts (which is an aspect of a ‘criminal act’), and the conspiracy is not disclosed outside the agreed party. Compared to this, ‘preparation of a crime’ can be regarded as the set of preparatory actions for commencing a crime. The Criminal Act clearly distinguishes ‘preparation’ and ‘conspiracy,’ and courts strictly distinguish them. For example, the Stowaways Control Act¹⁰ punishes only the preparation for a crime and clearly states that an act cannot be punished if it fails to reach the preliminary stage of a crime, even if such an act reaches the level of conspiracy to commit the crime.¹¹

Given that the establishment of an attempted crime can be recognized as the time of commencing the crime, preparation for the crime is past the stage of conspiring or plotting the crime; it is an act or process of crime preparation at the stage before commencing the crime. In the meantime, a conspiracy to commit a crime is the stage when more than two persons, plotting and agreeing on illegal activities, are just at the point of expressing *mens rea* internally, and this is definitely distinguishable from ‘preparation of a crime’ which is the preparation stage for committing the crime.¹² Therefore, there is no choice but to follow the position of the majority view that ‘conspiracy’ is the mental preparation of a crime, while ‘preparation’ is the physical preparation for a crime. It should be noted, however, that there is

⁹ BAEK NAM-EOK, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 241 (1963); LEE HYUNG-KOOK, HYEONGBEOP CHONGNON YEONGU [A STUDY ON GENERAL THEORIES OF CRIMINAL LAW] 474-75 (1989); HWANG SAN-DEOK, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 197 (7th ed. 1984).

¹⁰ Milhang dansok beop [Stowaways Control Act], Act. No. 831, Dec. 13, 1961, art. 3 cl. 1, *amended by* Act. No. 2809, Dec. 31, 1975 (S. Kor.) states “those who stow away or leave ship will be sentenced to fewer than five years in prison.” Clause 2 states “those who have prepared with a view to commit a crime specified in Clause 1 will be sentenced to fewer than three years in prison.”

¹¹ Supreme Court, 86 Do 437, June 24, 1986 (S. Kor.) indicates that “if Party A promised to pay one million yen for a fee to Party B to smuggle Party A to Japan, but gave up stowing away, it will not be regarded as preparation for stowing away and just be regarded as conspiracy of stowing away.”

¹² Lee Deok-in, *Hyeongbeop gaejeong gwa yeobi eummojoe ui jaegeomto* [A Review of Offense of Preparation and Conspiracy in Revision of Criminal Act], in HYEONGBEOP GAEJEONGANGWA INGWON [REVISED DRAFT OF THE CRIMINAL ACT AND HUMAN RIGHTS] 77, 78-79 (2011).

no actual merit in such a distinction since ‘conspiracy’ and ‘preparation’ are not distinguished in imposing punishment under the Criminal Act.¹³

B. Theory and Caselaw on Grounds for Punishment

Regarding what the grounds are for punishment of ‘conspiracy,’ or ‘preparation,’ there is conflict in South Korea between the theory of an independent crime regarding preparation and conspiracy (TIC) and the theory of an expanded form of crime for the preparation and conspiracy (TEFC).

According to TIC, preparation or conspiracy is regarded as a type of crime independent from the underlying actual crime.¹⁴ The core basis for this theory is that the crimes of preparation and conspiracy are defined in such a way that “those who have prepared for, or conspired to commit, the offense of ... shall receive ... punishment.” Under such statutory definitions, acts of preparation or conspiracy can be recognized as an independent form of crime. For this reason, committing preparation or conspiracy for the purpose of committing the basic crime requires unique and independent *mens rea* and preparatory conduct. Therefore, the preparation/conspiracy crime has a substance of unlawfulness independent from the basic crime and is not merely a modified form of the basic crime.

TEFC, on the other hand, regards preparation and conspiracy as an expanded form of the underlying crime.¹⁵ Opinions supporting TEFC argue that ‘attempt’ is just a modified form of the underlying crime; that it is against logic to recognize preparation or conspiracy, a stage before the attempt, as an independent crime; and, that the statutory crime of preparation itself is just an expanded form of the underlying crime. Accordingly, preparation or conspiracy is not a type of independent crime but rather an expansion of the underlying crime

¹³ SHIN DONG-WOON, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 534 (4th ed. 2004).

¹⁴ KIM IL-SU & SUH BO-HACK, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 548 (11th ed. 2006); BAE JONG-DAE, *supra* note 6, at 552; CHO JUN-HYON, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 354 (3d ed. 2005).

¹⁵ CHO, *supra* note 14, at 444; KIM SEONG-CHEON & KIM HYUNG-JOON, HYEONGBEOP CHONGNON [GENERAL THEORIES OF CRIMINAL LAW] 530 (2005). See also PARK SANG-KI, *supra* note 6, at 334; OH YOUNG-KEUN, *supra* note 6, at 493.

to the stage before an attempt. The courts also adopt TEFC. Preparation is not part of the independent elements of a crime set forth in the Criminal Act; instead, the criminal should be punished for manifesting conduct. The ground for this theory is that Article 28 of the Criminal Act prohibits interpretation or inference of the elements of a crime in an inappropriately expansive way.¹⁶

However, in this author's view, the Criminal Act neither recognizes 'preparation or conspiracy of a crime' as an independent type of crime, totally separated from the underlying crime, nor fully accepts TEFC. Of course, since the statutory form of an attempted crime should be based on the commencement of the crime, an attempted crime is just the modified form of the consummated crime and punishment is based on the underlying crime. However, here is no clear logic to argue that a 'preparation crime and conspiracy crime,' in particular, a 'conspiracy crime,' are the modified forms of the underlying crime. The ground for an argument that a conspiracy is a modified form of the elements of an underlying crime is weak because, without intent to commit the crime, it cannot be generalized that conspiracy has the elements of the underlying crime.

'Intent to commit a crime' is the only modified element of an underlying crime that can be identified in conspiracy. Furthermore, a promise to commit a crime, which has not yet commenced, is not strong evidence to be treated as a modification of the elements of an underlying crime because objective elements of a crime cannot be fulfilled by such sign of action.

TIC also has a problem. The Criminal Act punishes 'preparation for a crime' as well as 'conspiracy of a crime.' If conspiracy is an independent crime in relation to the underlying crime, it should satisfy the requirement of concrete typicality of a crime which can cope with the principle of *nullum crimen sine lege*. Thus, the Crime of Organizing a Crime Group, Crime of Opium Possession and Crime of Obscene Material Possession are

¹⁶ Supreme Court, 75 Do 1549, May 25, 1976 (S. Kor.) states that "because execution of a preparation crime is an amorphous and undefined act in view of the criminal elements ..., Article 28 of the Criminal Act provides that, if preparation or conspiracy of a crime fails to reach commencement of the crime, it will not be punished unless otherwise specified in law." This prohibits application of a provision by way of analogy or expansive interpretation, so it will be proper, in view of the principle of *nullum crimen sine lege*, not to include the provisions punishing preparation, contained in the Specific Provisions of Korean Criminal Act, within the concept of independent elements of a crime.

just preparations of a crime in terms of its contents, but count as an independent crime. However, the Criminal Act does not accept an independent form of crime for conspiracy, the stage before preparation of these crimes, nor punish this. Where can we find the reason?

The reason is that typical acts for conspiracy cannot be described. For example, with regard to Preparation or Conspiracy of Counterfeiting Currency, Article 213 of the Criminal Act merely refers to “those who have prepared or conspired to commit crimes specified in Clause 1 (Counterfeit or Unauthorized alteration of Korean currency for ...) or Clause 3 (Counterfeit or Unauthorized alteration of Foreign Currency for ...) of Article 207.” Compare this to the type of preparatory conduct which is concretely specified in Japan under the title of Preparation of Currency Counterfeit, which describes preparing machines or materials for the purpose of counterfeiting or altering the currency or paper money.

The crime of preparation for currency counterfeiting can be established as an independent crime in Korea. However, the Criminal Act punishes preparation, as well as conspiracy, for currency counterfeiting, but it is impossible to describe an ‘external and objective typicality’ for conspiracy to counterfeit. That is why the Criminal Act, punishing conspiracy, cannot proscribe the preparation crime of currency counterfeiting like Japan because Japan specifies the elements of the preparation crime of currency counterfeiting in the form of completion of a crime. In addition, since there are no concrete standards for the typicality of acts if the conspiracy crime is recognized as an independent crime in the Criminal Act, there is a danger of differing punishments, depending on the discretion of judges.

However, there is an argument that clear limits on punishment can be set if such a preparation or conspiracy crime is identified from the position of TEFC,¹⁷ though it is difficult to regard such an argument as totally right. According to TEFC, preparation or conspiracy can be recognized as a modified element. Legislators may attempt to overcome being blind-sided regarding punishment of conspiracy or preparation with a theoretical approach rather than using an effective criminal policy which could expand the scope of criminal punishment for preparation or conspiracy. As a result, it is feared that this may expand legislated

¹⁷ OH YOUNG-KEUN, *supra* note 6, at 493.

punishment for preparation or conspiracy.

In addition, we cannot say that the position of courts which accept TEFC, based on Article 28 of the Criminal Act proscribing preparation or conspiracy, is logical. The reason is that an inability to allow application of a provision by way of analogy or expansive interpretation originates from the principle in interpreting the Criminal Act, not because application of a provision by way of analogy or expansive interpretation is impossible under Article 28 of the Criminal Act proscribing preparation or conspiracy as an independent crime. While Article 28 specifies the definition of a preparation crime or conspiracy crime, it is necessary to pay attention to the possibility that it can be used as a ground for punishment for preparation or conspiracy of any crime, if it is based on the code.

Regarding the ground for punishment of preparation or conspiracy, however, it is necessary to consider the circumstances when the Criminal Act was enacted. Due to the inherent nature of the Criminal Act, which was enacted during the national crisis of the Korean War, criminal punishment for instigation and propagation, including preparation for a crime and conspiracy of a crime, is attributable to the social confusion of the times and criminal policy to cope with that confusion. However, it is not wartime now, so it is necessary to closely examine whether preparation and conspiracy are the proper targets of punishment based on considerations of justice, the principle of *nullum crimen sine lege*, and criminal law theory.

C. Unlawfulness of Preparation and Conspiracy

1. The Essence of Unlawfulness of a Criminal Act

Unlawfulness of an act is not established merely by violation of duty to properly conduct oneself. If any act is to be regarded as unlawful to the extent that it should be subject to criminal punishment, there should be a violation of the obligation to properly conduct oneself and infringement or risk of infringement of protected legal interests. A criminal act consists of two factors, the level of violation of a duty to conduct oneself in a proper way and the level of infringement of the victim's legal interest or other damage to the victim. While acts of infringement of protected legal interests and violations of the duty to conduct oneself properly regard the same action, they differ in their nature and

viewpoints. The contents of the violation of the duty of conduct are the internal actions of the actor which form the unlawfulness of the conduct, and the contents of infringement of legal interest are the degree and level of damage which results from the unlawfulness. Thus, all illegal acts should be evaluated from the viewpoints of infringing legal interests and violating the duty of conduct. A conclusion can be made that the criminal act should have the nature of unlawfulness comprised of a violation of the duty of proper conduct and resulting infringement of a protected legal interest.

In this regard, an illegal act under the Criminal Act is an action that violates the duty to conduct oneself in a specific way and the action reaches a level which risks violation of protected legal interests. Unlawfulness of criminal acts is closely related to the unlawfulness of the conduct and the result of the unlawful conduct. Accordingly for conspiracy or preparation to be punished, it should include both unlawfulness of conduct and damages caused by that conduct.

2. Unlawfulness of Preparation and Conspiracy

It is common sense that crimes in the Criminal Act endanger or infringe a legal interest to an extent that they cannot be socially accepted and are established through violations of obligations to conduct oneself in a specific way. In addition, punishment is a criminal sanction imposed under state authority and its essence is a form of physical and mental pain. Accordingly, the state power of criminal punishment should be applied as the last resort and only in cases where socially important legal interests cannot be protected except through criminal punishment. The criminal code should not apply in principle to those who violate the rules but do not endanger or infringe a legal interest and, instead, are merely expressing a life attitude that cannot be clearly separated from daily life.

Since conspiracy under the Criminal Act remains at the stage where the accused simply agrees with the intention to commit a crime, and has not even started physical preparation to commence the crime, it lacks unlawfulness in conduct, a core element of a crime that is severe enough to call for criminal punishment. It is difficult to recognize this action as a crime that should be punished since it lacks an unlawfulness in result, such as infringement of legal interests, fails to involve the commencement of a crime, and

fails to fully actualize the unlawful conduct. In this context, Professor Shin Dong Wun's suggestion is useful: "Since criminal punishment for the simple expression of *mens rea*, which fails to reach the least stage of physical preparation, is highly likely to conflict with freedom of expression, we should give special caution in the use of this type of legislation."¹⁸

III. TARGETS OF PUNISHMENT AND FEATURES OF PREPARATION AND CONSPIRACY UNDER THE CRIMINAL ACT

A. Overview of Targets of Punishment

The Criminal Act indicates in its general provisions that "if preparation or conspiracy of a crime fails to reach commencement of a criminal offense, it should not be punished unless otherwise specified in law ... (Article 28)," and, in its specific provisions defining elements of each crime, states that "those who prepared or conspired with a view to committing the crime of ... will be punished with...." Accordingly, the preparation or conspiracy which can be punished reaches twelve out of forty-two types of crimes under the Criminal Act. Those crimes are Insurrection, Foreign Aggression, Use of Explosives, Escape and Harboring Criminals, Arson, Inundation and Water Utilization, Traffic Obstruction, Crimes Concerning Drinking Water, Counterfeiting Currency, Counterfeiting Valuable Securities, Murder, Kidnapping, and Robbery. Additionally, the Criminal Act punishes preparatory activities which may be merely the 'preparation to commit a crime' by making such activities crimes. These include Organization of a Criminal Group, Failure of Dispersion of Masses, Possession of Opium, and Possession of Obscene Materials. Furthermore, there are many provisions in special criminal laws that punish preparation of a crime or conspiracy. These include National Security Act,¹⁹ Military

¹⁸ SHIN DONG-WOON, SHIN PALYEBAEKSUN HYEONGBEOP CHONGNON [100 CASES ON GENERAL PRINCIPLES OF CRIMINAL LAW] (1st ed. 2009).

¹⁹ Gukgaboan beop [National Security Act], Act No. 10, Dec. 1, 1948, *amended by* Act No. 110423, Sept. 15, 2011 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2011). This act makes illegal preparation or conspiracy of any person who constitutes or joins an anti-government organization (art. 3, cl. 4, 5), preparation or conspiracy of a member of an anti-government organization or a person who has received his

Criminal Act,²⁰ Act on the Aggravated Punishment, etc. of Specific Crimes,²¹ Act on the Regulation and Punishment of Concealment of Gains from Crimes (Article 3), and Act on Prevention of Divulgence and Protection of Industrial Technology (Article 18 (3)).²² Types of crimes for which preparation or

order, committing any act to accomplish the purpose (art. 4, cl. 3, 4), preparation or conspiracy of any person who commits voluntarily the act prescribed in subparagraphs of Article 4 (1), with the intention of assisting an anti-government organization, a member of such organization, or from a person who has received an order from the organization (art. 5, cl. 4), preparation or conspiracy of any person who has infiltrated from, or escaped to an area under the control of an anti-government organization, with the knowledge of fact that it may endanger the existence and security of the State or democratic fundamental order (art. 6, cl. 5), preparation or conspiracy of Any person who has infiltrated from or escaped to receive an order from, or consult an accomplishment of purpose with, an anti-government organization or a member thereof (art. 6, cl. 6), preparation or conspiracy of any person who provides another person with any firearms, ammunition, gunpowder and other weapons, with the knowledge of the fact that he has committed or is to commit the crime as prescribed in Articles 3 through 8 of this Act (art. 9, cl. 4).

²⁰ Gunhyeongbeop [Military Criminal Act], Act No. 1003, Jan. 20, 1962, *amended by* Act No. 9820, Nov. 2, 2009 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2009). This act makes illegal preparation or conspiracy of persons who band together and rise in insurrection with weapons or persons who unlawfully take weapons, ammunition, or other goods contributing to military use (art. 8, cl. 1), preparation or conspiracy of certain crimes related to furnishing of military bases and military installations, destruction of military installations, etc., espionage or benefitting the enemy in general (art. 16, cl. 1), preparation or conspiracy of a commander who, without doing his/her utmost to fulfill his/her duty, surrenders him/herself to the enemy or abandons a military unit, a fortress, a military base, a naval ship, or an aircraft to the enemy or a commander who leads a military unit to escape together in the face of the enemy without doing his/her utmost to fulfill his/her duty (art. 26).

²¹ Teukjeongbeomjoe gajungcheobeol deung e gwanhan beomnyul [Act on the Aggravated Punishment, etc. of Specific Crimes], Act No. 1744, Feb. 23, 1966, art. 5-2, cl. 8, *amended by* Act No. 10210, Mar. 31, 2010 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2010) (preparation or conspiracy of any person who commits a crime as provided in Article 287 of the Criminal Act, the person who has committed a crime as prescribed in Article 287 of the Criminal Act and acquires or demands any goods or interest on property, taking advantage of the anxiety of the parents of the kidnapped or induced minor, or of other person who is anxious about the safety of the minor, the person who has committed a crime as prescribed in Article 287 of the Criminal Act and kills the kidnapped or induced minor, or Any person who commits a crime provided for in Article 288, 289 or 292 (1) of the Criminal Act).

²² Saneobgisul ui yuchulbangji mit boho e gwanhan beomnyul [Act on Prevention of Divulgence and Protection of Industrial Technology], Act No. 8062, Oct. 27, 2006, art. 37, *amended by* Act No. 9368, Jan 30, 2009 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2011). But see Gyeongbeomjoe cheobeol beop [Punishment of Minor Offenses Act], Act No. 3680, Dec. 30, 1983, art. 1, cl. 4, *amended by* Act No. 8435, May 17, 2007 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF

conspiracy are punished under the Criminal Act are mostly crimes involving infringing national or social legal interests. Types of crimes whose preparation or conspiracy are punished and which infringe personal legal interests include only murder, kidnapping, and robbery.²³ These crimes may cause severe social instability, as well as other negative social effects, if they are consummated crimes, and, thus, they should be prevented in advance. From this perspective, preparation for insurrection and foreign aggression (Article 90²⁴ and Article 101²⁵) are punished in most foreign countries as well. However, the Criminal Act punishes not only the preparation and conspiracy to commit such crimes but also the propagation and instigation thereof. In this regard, there is a big difference between the Criminal Act and other states' criminal laws in terms of the establishment of a crime based on national legal interests and the scope of punishment, which is much wider under the Criminal Act than that found in other countries' criminal laws. The Criminal Act punishes preparation for the following illegal actions as a form of a consummated crime: Insurrection (Article 87), Homicide for Purpose of Insurrection (Article 88), Inducement of Foreign Aggression (Article 92), Taking Side with an Enemy (Article 93), Benefiting an Enemy by Levying Soldiers (Article 94), Benefiting an Enemy by Providing Equipment (Article 95), Benefiting an Enemy by Destroying Equipment (Article 96), Benefiting an Enemy by Providing Goods (Article

KOREA (Korea Legislation Res. Inst. 2012) (preparation for crime), and Milhang dansok beop [Stowaways Control Act], Act No. 831, Dec. 13, 1961, art. 3, cl. 3, *amended by* Act No. 7427, Mar. 31, 2005 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2005) (preparation for stowaway and ship leaving) which punish preparation only.

²³ Gunhyeongbeop [Military Criminal Act], Act No. 1003, Jan. 20 1962, art. 69, *amended by* Act No. 9820, Nov. 2, 2009 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2009) punishes preparation or conspiracy for damaging military facilities in addition to murder and damaging vessels and aircraft.

²⁴ *Id.* at art. 90, cl. 1: "Those who have prepared or conspired with a view to commit a crime under Article 87 or Article 88 will be sentenced to a limited imprisonment or limited penal servitude for over three years." The articles provide, however, that such sentence will be reduced or exempted if the perpetrator surrenders before commencement. *Id.* at art. 90, cl. 2: "Those who instigated or propagandized the crime under Article 87 or Article 88 will be sentenced to the same punishment."

²⁵ *Id.* at art. 101, cl. 1: "Those who have prepared or conspired with a view to commit a crime under Article 92 or Article 99 will be sentenced to limited penal servitude for over two years. Provided, however, that such sentence will be reduced or exempted if the perpetrator surrenders before commencement." *Id.* at art. 101, cl. 2: "Those who instigated or propagandized the crime under Article 92 or 99 will be sentenced to the same punishment."

97), Spying (Article 98), Benefiting an Enemy by Other Methods (Article 99), and Offense of Organizing a Criminal Group (Article 14). Such types of crime are established merely by preparatory conducts.²⁶

The Criminal Act punishes preparation and conspiracy of the following crimes because of social and legal interests: Use of Explosives (Article 120),²⁷ Helping an Escape (Article 150),²⁸ Arson (Article 175),²⁹ Daily Installment Loan (Article 183),³⁰ Inundation (Article 191),³¹ Crimes with Drinking Water (Article 197),³² Counterfeiting Currency (Article 213),³³ and Counterfeiting Valuable Securities (Article 224).³⁴ In addition to the Criminal Act, there are special laws punishing preparation and conspiracy such as Act on Special Cases concerning the Prevention of Illegal Trafficking in Narcotics, Etc. (Article 7), Act on Protection and Inspection of Buried Cultural Heritage (Article 33), Cultural Heritage Protection Act (Article 97), and Radioactive

²⁶ Gukgaboan beop [National Security Act], Act No. 10, Dec. 1, 1948, *amended by* Act No. 110423, Sept. 15, 2011 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst.) punishes the preparation of crimes because of national legal interests. An example is Article 3, Section 1, of the same act which punishes the organization of anti-national groups. There, “organization of an anti-national group” is just the preparation of a crime in that the group is organized with a view to committing an anti-national crime.

²⁷ While the offense of using explosives (Hyeongbeop [Criminal Act], Act No. 293, Sept. 18, 1953, art. 119, *amended by* Act No. 10259, Apr. 15, 2010 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2013) is a crime that relates to social and legal interests, it was specified in Chapter 6, between the offense of Official’s Duty (Chapter 7) and the offense of harming the security (Chapter 5). Thus, it was included in the group of crimes proscribed with a view to protecting the national legal interests in the criminal law system.

²⁸ *Id.* art. 150: “Those who prepared or conspired with a view to committing a crime specified in Articles 147 and 148 will be sentenced to”

²⁹ *Id.* art. 175: “Those who have prepared or conspired to commit a crime, under Article 164 (1), Article 165, Article 166 (1), Article 172 (1), Article 171-2(1), Article 173 (1) and (2), will be sentenced to.... Provided, however, that such sentence will be reduced or exempted if the person surrenders before commencement.”

³⁰ *Id.* art. 183: “Those who have prepared or conspired a crime under Article 177 or 179 (1) will be sentenced to....”

³¹ *Id.* art. 191: “Those who have prepared or conspired to commit a crime under Article 186 or 187 will be sentenced to....”

³² *Id.* art. 197: “Those who have prepared or conspired to commit a crime, under Article 192 (2), Article 193 (2) or 195, will be sentenced to....”

³³ *Id.* art. 213: “Those who have prepared or conspired to commit a crime under Article 207 (1) or (3) will be sentenced to.... Provided, however, that such sentence will be reduced or exempted if the person surrenders before commencement.”

³⁴ *Id.* art. 224: “Those who have prepared or conspired to commit a crime, under Article 214, 215, and 218 (1), will be sentenced to....”

Waste Control Act (Article 39).

B. Review in Terms of Comparative Law

Most countries, for example Germany, Switzerland, France, Austria, and Japan, have no general provisions on the preparation or conspiracy of a crime in their criminal laws similar to the General Provisions Part of the Korean Criminal Act. Germany³⁵ and Switzerland³⁶ do not punish acts that remain at the level of conspiracy of a crime. These countries punish the actor only when he/she reaches the stage of preparation which is on the verge of commencement and beyond the stage of conspiracy. As a result, these countries do not punish any action of instigation or propagation under the purpose to commit a crime.

Japan also specifies no crime for preparation or conspiracy like in the General Provisions Part of the Korean Criminal Act. In addition, it differs from Korea in that conspiracy, by the person who infringed personal or social legal interests, is excluded from punishment for the preparation of a crime. For the crimes of murder and robbery, which are related to personal legal rights, there is no punishment for mere conspiracy, but punishment only when the actions reach the stage where external preparatory conduct for the crime can be visually recognized. Japan does punish preparation of the crimes of Insurrection and Foreign Aggression and Inducement of Private War, as well as conspiracy for these acts, and this is the same as in Korea. Despite this, Japan is much more limited than Korea in that it punishes conspiracy for Insurrection and Foreign Aggression, but excludes propaganda or instigation from punishment.³⁷

³⁵ SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] June 1, 2008 (Switz.), §80 (Preparation of a War of Aggression), §83 (Preparation of a High Treasonous Undertaking), §202c (Preparation of Data Espionage or Data Interception), §275 (Preparation for Counterfeiting of Official Identification Documents), §310 (Preparation of a Serious Criminal Offense Involving an Explosion or Radiation).

³⁶ SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] June 1, 2008 (Switz.), punishes preparation of a crime using radioactive matter at StGB CC art. 226ter, and the offense of preparation is restricted to eight violent crimes, such as murder, arson and robbery in StGB CC art. 260bis. In addition, it does not punish conspiracy, but only punishes acts of preparation.

³⁷ KEIHŌ [KEIHŌ] [PEN. C.] art. 78 (Japan) (Preparation and Conspiracy for Rebellion), art. 88 (Preparation and Conspiracy for Foreign Aggression), art. 93 (Prior Preparation and Conspiracy), art. 113 (Preparation and Conspiracy for Arson), art. 153 (Preparation for Counterfeit of Currency): “those who have prepared the machine or materials with a view to using the currency, paper

Austria punishes conspiracy of extremely critical crimes, but not preparation for a crime.³⁸ For punishment of conspiracy under the Austrian criminal code, first, the offender should promise to commit a specific grave crime together with others; and, second, an outline of the crime should be embodied based on this promise to commit the crime.³⁹ Due to this, the Austrian criminal code is much limited than the Criminal Act in that it specifies that more than two actors promise to commit a crime, and the promise can be punished only when it reaches the stage of preparatory activities by which a concrete outline of the crime can be recognized. The Criminal Act displays ‘preparation and conspiracy’ in parallel and adopts a system of punishing the actor if he commits one of the two.

The United Kingdom punishes conspiracy to commit a crime under Article 5 (1) of the Criminal Attempts Act, enacted in 1977 and amended in 1981. However, the crime of conspiracy has a special nature in the law of the United Kingdom.⁴⁰ The UK cases understand that ‘committing any crime’ means “committing a crime as the chief criminal” under the same article, and it needs factual impossibility which leads to the failed criminal attempt. It seems that the British law tries to punish an impossible defense or impossible attempt crime not a sole action of conspiracy.

China is the same as Korea in that the preparation of a crime is specified in the general provisions of the criminal code. It should be noted, however, that China greatly limits the constituting elements of such a crime in that China punishes only the preparation of crime and excludes conspiracy from

money or bank bill for the purpose of counterfeit or falsification ... will be sentenced to prison for over three years and fewer than five years,” art. 201 (Preparation for Murder), art. 228, cl. 3 (Preparation for Kidnapping), art. 237 (Preparation for Robbery).

³⁸ STRAFGESETZBUCH [StGB] [PENAL CODE] Jan. 1, 2010 (Austria) specifies deprivation of liberty for over six months and fewer than five years for those who have cooperated with others to murder (art. 75), kidnap by extortion (art. 102), transfer to foreign forces (art.103), sell slaves (art. 104), rob (art. 142), commit arson (art. 169), intentionally cause risks with nuclear energy (art. 171), intentionally cause risks with explosives (art. 173), intentionally generate public risks (art. 176), hijack (art. 185), intentionally cause risks in air traffic safety (art. 186), and conspire regarding prostitution in foreign countries (art. 217), as well as actions punished under the Drug Act, art. 28a or art. 31a.

³⁹ EGMONT FOREGGER & GERHARD KODEK, MANZSCHE KURZKOMMENTARE STRAFGESETZBUCH [StGB] (Manzsche Verlags- und Universitaetsbuch-handlung 1991) S. 604f/1991, S 604f/1991 §277 (Austria).

⁴⁰ BAEK WON-KI, MISURON YEONGU [A STUDY ON THE THEORY OF ATTEMPT] 308-09 (1995), Hollinshead [1985] AC 975; [1985] 1 All ER 850.

punishment.⁴¹

C. Features of the Crimes of Preparation and Conspiracy under the Criminal Act

1. Elements of the Preparation Crime and Conspiracy Crime and Principle of *Nullum Crimen Sine Lege*

Elements of preparation and conspiracy crimes under the Criminal Code are described as “preparing or conspiring with a view to committing the crime of” The elements are separated into ① ‘a view to committing the offense of ...’ and ② ‘preparing and conspiring.’ Here, ① merely refers to the purpose or desire of actors to commit a crime. Thus, ② should provide a specific and objective indication of conduct to supplement ① in order to satisfy the principle of certainty, consistent with *nullum crimen sine lege*. Despite this, ② merely describes such indication with only the repeated words ‘preparation or conspiracy.’ Since the description of elements in such a way is the same as describing the elements as ‘acts of preparation or conspiracy of a crime,’ almost all crimes of preparation or conspiracy will have the indication of elements that are merely repetition of the same words. Accordingly, since the crime of preparation and conspiracy in the Criminal Act can be regarded as having no objective and specific element indication, it lacks certainty, an important principle in *nullum crimen sine lege*.

2. Excessive Expansion of the Types of Crimes Regarding Preparation and Conspiracy

The Criminal Act punishes preparation and conspiracy as well as instigation and propaganda with respect to the crime of insurrection and foreign aggression. However, instigation and propaganda are merely the unilateral expression of the speaker’s idea. This type of behavior can be punished as the crime of infringing another’s personal dignity when it hurts the reputation of the victims or insults them. However, the state is not a personal individual or the target of defamation or insult. In addition,

⁴¹ Xingfa (刑法) [Criminal Code], art. 22 (1997) (China) defines the preparation of a crime as preparing tools and making conditions for a crime. The persons who prepared for an attempt are subject to mild punishment, exemption, or reduction of punishment compared to completion of the crime.

thinking that instigation or propaganda always infringes national legal interests is extremely senseless in that it is meaningful only when it is done by continuously targeting the public and is organized. Therefore, there exists no indication of the element of 'propaganda' or 'instigation,' as a constituent of a crime with the purpose of punishing the infringement of national or social legal interests, in advanced countries' criminal codes. Punishing instigation and propaganda for national legal interests under a criminal code shows the typical penalization of thoughts.

While 'conspiracy of a crime' focuses on internal conspiracy by more than two actors, 'preparation of a crime' focuses on external preparation activities for the commencement of a crime. Accordingly, the degree of culpability differs much between the two because the former is the stage of agreement that offenders express to commit a crime, but the latter is the stage immediately before the actual commencement or preparation for the commencement. The degree of danger can be also differentiated. Based on this analysis, it seems reasonable, and meets the criminal law principle of fault-based accountability, that preparation and conspiracy should be separately handled in terms of the degree and scope of punishment.

3. The Necessity of Mandatory Exemption or Reduction of Punishment for Preparation or Conspiracy

The crimes where the exemption or reduction of punishment apply, if the actor stopped due to a change of mind and surrendered to justice, even if such crime was prepared or conspired, are limited to insurrection, foreign aggression, use of explosives, arson and counterfeit of currency. However, preparation or conspiracy for such crimes as murder, arson, capture, enticement and robbery may not have the same exemption or reduction, even if the actor surrenders himself to justice. Such an attitude in the Criminal Act is difficult to accept for the following reasons.

First, preparation or conspiracy has much less unlawfulness or danger than the attempt of a crime, and, accordingly, the statutory degree of punishment is slighter than for attempt. While statutory punishment for abandonment of all attempts are mandatorily exempted or reduced, abandonment of preparation or conspiracy is given the same effect only with respect to several kinds of crimes. There is no effect on the preparation or

conspiracy of murder, arson, kidnapping, enticement and robbery, and this may be against the doctrines of equality or proportionality.

Second, an abandoned attempt is subject to mandatory exemption or reduction of punishment if the actor stops the crime voluntarily or prevents the occurrence of results due to the execution of the crime. The action of abandonment is not specified. On the contrary, preparation or conspiracy of a crime is subject to a reduction or exemption of punishment only when the actor voluntarily stops. That is, there is no effect if it has the form of surrender of the preparation or conspiracy of a crime. As a result, preparation or conspiracy cannot receive the benefit of a mandatory exemption or reduction of punishment if it takes the form of surrender. It is difficult to find a reasonable cause to give preference to the voluntary abandonment of the attempt of a crime when preparation or conspiracy of a crime has less culpability and unlawfulness than does attempt.

Third, from the viewpoint of comparative law, the attitude of the Criminal Act, which is related to punishment for conspiracy or preparation, is against the world trend. For example, different from Germany or Switzerland which provides a mandatory complete exemption or reduction of punishment, the Korean Criminal Act accepts a mandatory exemption or reduction only for some types of crimes, such as insurrection, foreign aggression, arson, and counterfeit of currency,⁴² and it requires a surrender.

4. The Target of Punishment for Preparation and Conspiracy, and the Unjustness of Legal Punishment

The Criminal Act provides sentences of fewer than seven years in prison for the crime of preparation or conspiracy of robbery. The act provides for fewer than two years in prison or a fine for the crime of violence or accidental homicide. This means that the conspiracy to commit robbery is punishable three times more severely than that for accidental homicide.⁴³ In addition, the

⁴² Provided, however, that such sentence will be reduced or exempted if the perpetrator surrenders before commencement, in cases of preparation, conspiracy, instigation or propaganda of the offense of insurrection or foreign aggression. (Hyeongbeop [Criminal Act], art. 90 and art. 101 (S. Kor.)).

⁴³ It is difficult to understand why conspiracy to commit a robbery becomes a cause for arrest without a warrant, while negligent homicide may not be the cause for arrest without warrant, since the crime that justifies arrest without warrant should be the one which requires imprisonment for over three years under the Hyeongsasongbeop [Criminal Procedure Act], Act No. 341, Sept.

Criminal Act punishes preparation or conspiracy for robbery, but does not punish preparation or conspiracy for rape. However, if A and B agree to steal a bag of a passerby, and get caught while looking for a victim, they are punished under the Criminal Act; but, if they conspire to rape a woman and get caught while looking for a victim, they are not the target of punishment. Is this fair?

When faced with a fire or robbery, citizens think it fortunate if there is no injury to their body and no loss of life, even if they lost their money. People put more emphasis on life, the body and personal dignity than on wealth. Despite this, the Criminal Act puts more emphasis on protecting property, rather than protecting the body or dignity. Nevertheless, in most cases preparation and conspiracy to commit a crime are not punished because it is not easy to identify a state of mind or distinguish the punishable act. For the above reasons, punishing conspiracy should be discouraged under the Criminal Act.

IV. THE HISTORY AND BACKGROUND OF THE ‘CRIMES OF PREPARATION AND CONSPIRACY’ UNDER THE CRIMINAL ACT

A. The Relevance of the National Security Law

Provisions on preparation and conspiracy in Article 28 of the Korean Criminal Code were enacted in 1953. Year 1953 was the final stage of the Korean War, which was started with an invasion by North Korea. In 1945, Korea was abruptly liberated from Japanese colonial rule and witnessed conflicts between the left and right wings. There was a strong campaign to remove the pro-Japanese faction, which benefited from the Japanese during the colonial period, and a campaign to suppress a communist faction, which was launched by the pro-Japanese faction. These campaigns caused a conflict between the two groups and drove the society into disorder. The Yeosun Insurrection Incident occurred in 1948 and fueled further social chaos. On December 1, 1948, when the Yeosun Insurrection Incident was almost over, the National Security Act was enacted to track down the communists and their

23, 1954, amended by Act No. 9765, June 9, 2009 (S. Kor.), translated in STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst. 2009).

adherents. This National Security Act⁴⁴ was based on the Maintenance of the Public Order Act, enacted in 1921⁴⁵ in Japan for the purpose of maintaining the imperial system. The core content of Japan's Maintenance of the Public Order Act indicates that the organization of a group for national uprisings, without a concrete crime, can be punished as a consummated offense even if it is just the 'preparation for a national uprising.'⁴⁶ The same act also severely punishes the organization of a secret group for national uprisings.⁴⁷ What was worse, consultation regarding the organization of a secret group for a national uprising was punishable by up to ten years in prison.⁴⁸ For this reason, the act was an undesirable law that even punished consultation for preparation to realize a preparatory act to commit a crime. Accordingly, this act was used by the Japanese governor-general to punish an organization of a secret group for the independence

⁴⁴ Gukgaboan beop [National Security Act], Act No. 10, Dec. 1, 1948, art. 1, *amended by* Act No. 110423, Sept. 15, 2011 (S. Kor.), *translated in* STATUTES OF THE REPUBLIC OF KOREA (Korea Legislation Res. Inst.): "Those who have formed a group or association with a view to cause an uprising against the state or to usurp the name of the government in violation of the constitution will be subject to the following punishments: 1. The head and executives are sentenced to a life sentence or imprisonment of over three years..."; art. 2: "Those who have organized the group or association, or the executive of such group, with a view to committing murder or arson are sentenced to imprisonment for fewer than ten years and those who joined the group will be sentenced to imprisonment for fewer than three years..."; art. 3: "Those who have instigated or propagandized the execution with a view as described in art. 2, above, and given an instruction to such group or association, will be subject to imprisonment."

⁴⁵ Chianyuji beop [Maintenance of the Public Order Act], Law No. 25, Apr. 21, 1925 (Joseon Chongdokbu) applied in Joseon from May 1925 to keep order in the Joseon colony. From the time when the Japanese ruling era started to 1925, control of thought was maintained with the Security Act and Matter of Political Crime Punishment (Regulation No. 7). Such acts were effective against mass demonstrations like the March First Independence Movement, but were not sufficient to control socialism. Due to this, it was inevitable to apply the Maintenance of Public Order Act in Joseon, and there were four arrests and punishments of Joseon communists. The independence movement, which used to be punished under Regulation No. 7 before this time, became punished under the Security Maintenance Act because it is equivalent to a revolution to change the national system.

⁴⁶ Chianyuji beop [Maintenance of the Public Order Act], Law No. 54, Mar. 8, 1941, art. 1 (Joseon chongdokbu): "Those who have organized the association with a view to changing the national system will be subject to the death penalty..."

⁴⁷ *Id.* art. 3: "Those who organized the association with a view to preparing the organization under Article 1 will be..."

⁴⁸ *Id.* art. 5: "Those who have consulted or inspired for the purpose of Article 1 or 3 will be sentenced to imprisonment for over one year and fewer than ten years."

movement, as well as consultation for a meeting to prepare a secret group for Korean independence movements. The Japanese governor-general tried to annihilate the existence of Korean independence movement groups using the Maintenance of the Public Order Act. Since the nature of the act was an unjust law against humanity, fundamentally suppressing the freedoms of assembly and association as well as of expression and thought, even Japan abolished this law in 1948.

However, the Maintenance of the Public Order Act of Japan was revived by Korea in 1948 and served as the prototype of the National Security Act. With such contents, the National Security Act's main legislative purpose is to annihilate communist forces and expand the scope of punishment to violent crimes such as murder or arson. The National Security Act could consequently punish an organization, or a discussion of an organization, to commit crimes such as arson or murder, as well as the offense of rebellion.⁴⁹ Accordingly, since it did not stop at punishing preparation for the offense of rebellion or murder, but further punished discussions with a view to organizing groups to commit such crimes, it punished even preparation for the crime. It deviates from the scope of action-based punishment under the theory of the Criminal Act and provides an extreme example of penalization of thought.

In 1953, the National Assembly, upon the enactment of the Criminal Code, decided to abolish all special laws which would be included in the new Criminal Act, including the National Security Act, and regulate crimes and punishments only in the Criminal Act. As a result, it was inevitable that the legislature would include the National Security Act in the Criminal Act and enact the Criminal Act that can thoroughly secure national security. In this regard, the Criminal Act regulated preparation for crimes related to national legal interests such as a crime that challenged the Constitution, as well as related conspiracy, instigation or propaganda. In addition, the Criminal Act borrowed the offense of organizing anti-national groups from the National Security Act and, in multiple regulations, established the offense of organizing a criminal group. This created the offense of preparation or conspiracy which allowed criminal punishment for the act before the concrete

⁴⁹ However, the National Security Act has been abused by suppressing anti-national parties or social groups rather than punishing a crime. See PARK WON-SOON, GUKGABOAN BEOP YEONGU [A STUDY ON THE NATIONAL SECURITY ACT] 95 (1989).

commencement of a criminal offense.⁵⁰

B. Influence of Japan's Draft Criminal Code on Korea's Criminal Code of 1953

Before the new South Korean Criminal Act was enforced, the Japanese Criminal Code was applied from 1912 through the Joseon Criminal Enforcement Act of 1907. The Japanese Criminal Code of 1907 established no regulation on the preparation or conspiracy of a crime, as is in the General Provisions of the Criminal Code. In addition, no regulation on the preparation and conspiracy of a crime was identified in the draft of the revised Japanese Criminal Code of 1941, considered the role model of Korea's Criminal Act, nor in Germany's Criminal Law of 1930 or the Republic of China's (Taiwan) Criminal Law.⁵¹ Among these laws, the offense of preparation or conspiracy, displayed in the Special Provisions of the revised Japanese Criminal Code of 1941, which had decisive effects on the enactment of the Criminal Act, is mostly identical with the South Korean Criminal Act. Preparation and conspiracy for insurrection and foreign aggression are punished, and even instigation is similarly punished.⁵² With regard to social and legal interests, punishable crimes are the Preparation or Conspiracy of Escape (Article 221), the Organization of a Criminal Group (Article 239), the Encouragement or Instigation of Crime (Article 241), the Preparation, Conspiracy or Instigation of the Use of Explosives (Article 251), Arson (Article 264), Crimes involving Drinks

⁵⁰ However, the majority of congressmen have accepted the necessity of the National Security Act and this act has remained, so far, the current National Security Act, establishing the offense of forming anti-national groups at Article 3 (1), and sentencing the head of such a group to death or life imprisonment, sentencing more than two years imprisonment for encouragement of such groups, and punishing the attempt, as indicated in Clause 1, and even punishing preparation or conspiracy (cl. 4 and 5 of the same article).

⁵¹ Japan had a provision punishing the act of preparation and conspiracy as an exception in Article 111 of Japan's old Criminal Act enforced in 1882. With regard to the reason for extremely restricting the punishment for conspiracy and preparation, Gustave Emile Boissonade, the founder of the old Japanese criminal act, explained, "It is actually difficult to differentiate the cause of no-punishment for preparation in principle from the ordinary act of human life, and there lies a consideration of human rights for avoiding a wrong decision from the arbitrary determination by the judge." The role model of the Japanese Criminal Code, which is the German Imperial Criminal Code of 1871, did not punish preparation and conspiracy in the General Part of the Criminal Code. See, LEE, *supra* note 12, at 81.

⁵² See KEIHO [KEIHŌ] [PEN. C.] 1941, arts. 162, 170, 181, and 182 (Japan).

(Article 287), the Counterfeiting of Currency (Article 298), Securities Violations (Article 305), Murder (Article 341), and the Preparation or Conspiracy of Robbery (Article 432). Accordingly, most regulations on the preparation or conspiracy of a crime, which are found in Special Provisions of the Criminal Code, seem to have been transferred to the Korean Criminal Act from the revised Japanese Criminal Code.

C. Preparation and Conspiracy, and Attempted Crime, in the Penal Code of 1905

The Penal Code of 1905, which is thought to have been influenced by the fourteenth-century Ming Code of China and the draft of the Criminal Code of 1897 created at the end of Joseon Dynasty, has the following regulation under the category of ‘attempt’ in Article 86 of the General Provisions: “An attempt crime is a crime committed by the person who conspired, prepared to commit a crime, or conducted other tasks, but failed to reach the stage of commencement due to an unexpected mistake or obstacle.” This provision suggests that the accused can be punished as an attempt only if he plots the crime before actual preparation of the criminal activity takes a place.

Due to this, there existed a deficiency in failing to clearly differentiate ‘attempt’ from ‘preparation’ or ‘conspiracy.’ Despite this, it is noticeable that the General Provisions of the Penal Code, which were established at the beginning of the twentieth century, broke from conventionalities and implied the contents of preparation and conspiracy crimes. In particular, while the current Criminal Act recognizes conspiracy and preparation crimes in the same category, and recognizes the crime as one of preparation or conspiracy if it belongs to either category, the Penal Code of 1905 accepted the exercise of state punishment only when the offender committed a conspiracy and preparation of a crime. This is how the Penal Code differed from the current Criminal Act. It partially developed the mental nature of a crime, unlike the current Criminal Act which simply punishes conspiracy.

D. Regulations in General Provisions of the Criminal Code of 1897 for the Offenses of Preparation and Conspiracy

Where does this approach in the Penal Code of 1905 on preparation and conspiracy come from? It seems to have been

affected by Article 10 of the draft Criminal Code⁵³ prepared in 1897. The draft Criminal Code of 1897 was enacted jointly by Korea and Japan eight years before the Penal Code was enacted. However, it was the draft of the first modern criminal law applied in Korea. This draft code regulates, in Article 10 of the General Provisions part, ‘preparation and conspiracy of a crime,’ as follows: “Those who conspired or prepared to commit a crime, but failed to commence a crime will not be punished if there is no regulation.” In addition, Nozawa Keiichi (野澤鷄一), one of the Japanese advisors to the Joseon Justice Ministry who prepared the draft, described Article 10 as follows:

This Article articulates that those who had the intention of a crime, but did not commit the crime, will not be punished. An attempted crime is a crime committed by a person who commenced the crime and accomplished only a part of the crime; persons guilty of preparation and conspiracy refer to those who have tried but failed to commence a crime. Conspiracy is more than secret thoughts. All forms of expressions should be clear enough to suggest determination to commit a crime.

Under the British Law, expressing one’s willingness to murder the king in written form is considered as conspiracy of high treason. However, since the severity of such act is low, conspiracy under this law is agreement between two or more persons to commit a crime (Article 82⁵⁴ and Article

⁵³ With regard to this, legislative reform was conducted forcefully by Japan in 1894 during the Gabo Reform of 1894. At the center, Japanese Ambassador to Korea, Inoue Kaoru (井上馨), requested enactment of civil and criminal laws when he had an audience with the Emperor Gojong, and obtained consent to dispatch a Japanese councilor to interfere in domestic affairs. In the meantime, the Korean Government proclaimed the Regulation on Basic Law Committee on June 15, 1895 and appointed seven committee members (committee chiefs: Lee Jae Jeong, Hyeon Young-yun). This committee was an organization set up to enact or revise the criminal, civil, commercial, penalty, and procedural laws, and it compiled Jeokdocheodanrye (No. 2, on Apr. 1, 1896) and Hyeongryeol Myeongeo (No. 5, Sept. 4, 1895). However, the draft of the criminal law was jointly drafted by the Japanese, Hosi Tōru (星亨) and Nozawa Keiichi, and translated by Hyeon Young-yun. See Jeong Geung-sik, *Hyeongbeop Chohan Haeseol [Explanation of Draft Criminal Act]*, 16 KOREAN JOURNAL OF LEGAL HISTORY, 181, 182-85 (1995).

⁵⁴ Those who prepared for the offenses specified in Article 2 will be sentenced to imprisonment (Article 80: “Those who harm the body or life of the emperor, empress, prince or princess will be sentenced to death, whether it is an attempted offense or completed offense.” Article 81: “Those who harm the body or life of other imperial family members will be sentenced to death; those who commit an attempted offense will be sentenced to life imprisonment.”). Those who conspire to commit a crime with two or more persons will be sentenced to life imprisonment or imprisonment for a limited term.

89⁵⁵).

This Act is not applicable to those who only conspire to commit a crime. It applies to offenders who considered commencing a conspired crime. The following examples are listed:

- (1) If A was so angry that he wrote his own poem to assassinate the King, he will not be subject to offense of conspiracy of high treason.
- (2) If A decided to kill the king in consultation with B, it will be the offense of conspiracy of high treason.
- (3) If A seeks the rifle or employs an assassin to snipe the king, it will be regarded as preparation.
- (4) If A fired the rifle at the king and failed to hit the mark, it will be an attempted offense.

Punishment of conspiracy under this law will be restricted to a political offense or a crime against the royal family, and the punishment for preparation remains with the offense of counterfeiting currency, and others will not be punished under this Act.

In terms of contents and explanation, the draft Criminal Code of 1897 seems to be the origin of the current Criminal Act in that preparation or conspiracy is specified in the General Provisions of the Criminal Code, and this type of a crime can be punished only when it is specified and regulated in a law. For these reasons, the origin of Article 28, as specified in the General Provisions of the Criminal Code, is the draft of the Criminal Code of 1897. However, it is difficult to remove suspicion that the purpose of legislating the draft Criminal Code prepared by the Japanese advisor was the legal and institutional domination of the Joseon Dynasty, in particular domination of a colony rather than compliance in a constitutional state. The reason is that there were no offenses of preparation/conspiracy in the General Provisions of the old Japanese Criminal Code, as well as in new Japanese Criminal Code revised ten years after the draft Criminal Code of 1897, and the scope of punishment for these crimes was extremely restricted.

⁵⁵ Those who prepared for the rebellion by inviting army members or preparing weapons, ammunition, ships or other war supplies will be demoted two ranks in accordance with Article 86 or 87. Those who just conspired will be demoted three ranks.

V. THE ESSENCE OF A CONSPIRACY CRIME AND THE LIMIT OF PUNISHMENT

A. *Punishment for Conspiracy and Freedom of Thought and Expression as Fundamental Human Rights*

Hatred and retaliatory emotion frequently occur due to conflict with others in social life. When such feeling is expressed in language, there can be some people who agree to it. Secretly harboring the thought of injuring others is morally reproachable and undesirable. However, imposing unconditional punishment for conspiracy can be against the fundamental principle of criminal punishment, if such conspiracy has constituted a crime merely because there was verbal consent or expressed intent to commit a crime in the course of devising the crime.

Humans have freedom of expression or thoughts. Unless the conspiracy reaches such an extent that it damages the order of liberal democracy, subjecting the exchange of malignant opinion to a criminal code and punishing it will amount to a fundamental violation of freedom of thought and expression. Punishment should be based on the actual commitment of crimes that may infringe important legal interests because punishment is the last socially-acceptable method to avoid crime. Therefore, it is unreasonable to exercise government's punishment power against the internal expression or agreement of opinion which is merely a secret conspiracy and agreement to commit a crime. For this reason, Ulpianus, a legal expert in the Roman Era during A.D. 98~117 when Trajan was emperor, argued that, "no matter how he plotted a crime and had an ulterior motive, he shall not be punished for the crime (*Cogitonis poenam nemo patitur*)."⁵⁶ Therefore, even in that era, when one had thoughts regarding whatever action infringed legal rights, he would not be punished simply for conspiracy, and the exercise of state punishment power was possible only when such conspiracy was realized externally. Thus, *Lex Cornelia*⁵⁷ of Rome, enacted in B.C. 67, did not punish anyone for conspiracy of a crime. Cornelia law recognized the "carrying of a weapon for the purpose of murdering others, staking out, or loitering" as the preparatory acts for murder which could

⁵⁶ This statement of Ulpian (Latin: Gnaeus Domitius Annianus Ulpianus, c. 170 ~ 223) is reported in Justinian's *Digest* 48, 19, §18.

⁵⁷ This law was enacted in B.C. 67 to give exceptional power to Pompey for suppression of pirates and Mithridates IV of Parthia.

be punished. Romans believed that the punishable essence of a crime was not the result of action but the objective expression of criminal intent. Roman law solved this issue by setting forth punishments in individual provisions based on the danger of a crime, objectively expressed through types of conduct. Accordingly, Rome did not punish mere conspiracy even though preparatory conduct for murder was punished.

B. Problems in Punishing Preparation and Conspiracy Viewed from the Basic Principle of the Criminal Act

1. Problems in Retaining Provisions for Punishing Preparation and Conspiracy in General Provisions of the Criminal Act

The General Provisions of the Criminal Act aim to clearly set forth the basic principles of the Criminal Act and common matters regarding individual crimes stated in the Specific Provisions of the Criminal Act. A special item in the Specific Provisions of the Criminal Act can be set forth in the General Provisions of the Criminal Act only when it would be inevitable. Therefore, it should be rare to put in the General Provisions a very exceptional matter set forth in the Specific Provisions, unless there is a reasonable ground for doing so.

It is a principle to punish consummated crime, and it should be exceptional to punish attempt. In the Criminal Act, interpretation of the exception should be strict, and exceptional punishment should be strictly limited. Accordingly, since attempt is an exception to a consummated crime, punishment for attempt is strictly limited. Of course, law is a social outcome, and the maintenance of peace is strongly required as a society gets more complex, necessitating punishment for attempt. Nevertheless, it becomes less necessary to punish attempt crimes which present no risk of infringement of legal interests, and the degree of punishment similarly should be lowered. For this reason, only 114 attempt crimes are proscribed while a total of 216 consummated crimes are covered in the Criminal Act, and the discretionary reduction of punishment is available for the statutory punishment of attempt crimes, in contrast to consummated crimes.⁵⁸ If this is the situation, punishment for preparation or conspiracy is more exceptional than for attempt with regard to consummated crimes.

⁵⁸ Hyeongbeop [Criminal Act] art. 2: "Punishment of attempt may be lighter compared to that of the completed offense."

Such punishment should be more strictly limited.

As stated earlier, Japan has no provision for punishing preparation in the general provisions of her criminal code and restricts punishment for preparation of crime to only eight types of crimes. Germany has no provision for punishing preparation of crimes in the general provisions of her criminal code and punishes preparation for only five crimes, such as Preparation of for an Invasion (Article 80). The Swiss have no provision for punishing preparation in the general provisions of their criminal code, and punish only nine preparation crimes in the specific provisions of the code. It should be noted that Germany and Switzerland decriminalized the simple act of conspiracy. There is almost no country except Korea and China, a communist country, which provides for punishing the preparation of a crime in the general provisions of a criminal code. In addition, China did not include the act of conspiracy in the category of preparation crimes. Punishing preparation or conspiracy as a crime is against the common nature of general provisions of criminal laws. There is almost no such precedent in foreign countries, and thus it is proper to delete such provisions from the Criminal Act.

2. Description of Preparation and Conspiracy as Crimes, and the Principle of *Nullum Crimen Sine Lege*

As a result of describing the elements of preparation and conspiracy as “with a view to committing a crime,” the Criminal Act did not describe the objective indication of the elements of a preparation or conspiracy crime. The principle of certainty, one of the principles of *nullum crimen sine lege*, is a common trait in all crimes, and it cannot be ignored even for minor crimes. The principle of *nullum crimen sine lege* requires stating what actions the law will punish, so that anyone can predict the punishment to be imposed, see clearly the elements, and determine one’s conduct accordingly. If the contents of laws and provisions of criminal law are vague or abstract so that people cannot clearly know which actions are prohibited, they cannot comply with the laws. Thus, the ideology of a constitutional guarantee of freedom, and the right of people expressed in the principle of *nullum crimen sine lege*, cannot be realized because whether the crime is established will be subject to arbitrary interpretation by the judges.⁵⁹ Accordingly, if

⁵⁹ Constitutional Court, 93 Heon-Ba 65, Dec. 26, 1996 (S. Kor.).

the application of the principle of *nullum crimen sine lege* should be excluded for preparation or conspiracy crimes, there must be a sufficient and necessary reason for that. It is appropriate to reconsider the legislation that ignored the principle of *nullum crimen sine lege* without proper ground. Provided, however, that, if there arises a situation where people may be exposed to a danger of infringement of legal interests, which is difficult to handle because of any specific preparation or conspiracy of a crime, those who prepared or conspired to commit the crime are subject to punishment due to the preparation or conspiracy itself.

Elements of preparation or conspiracy as a separate crime should be described so as not to go against the principle of *nullum crimen sine lege*, in particular the principle of certainty regarding each specific element of the crime. For this purpose, Clause 1 of Article 275 (Preparation of Counterfeit of Attested Document) of the German Criminal Code is relevant:⁶⁰

Those who have prepared for the counterfeiting of an attested document, by manufacturing, obtaining, selling, storing, transferring to others, or carrying in or carrying out the objects corresponding to each of the following subparagraphs, will be subject to monetary penalty or fewer than two years in prison:

1. printing plate, wooden printing block, typesetting for printing, electrotpe, concave printing plate, stereotype or other devices suitable for unlawful conduct,
2. papers which are the same or similar to the type of paper used to specially prevent counterfeiting and used for manufacturing attested documents, or
3. the format of an attested document.

As stated above, Germany did not punish conspiracy for counterfeiting attested documents and clearly described the elements of the crime with preparatory conducts. Japan takes the same stance as Germany with regard to counterfeiting currency by stating that “those who have prepared the machine or materials with a view to using the currency, paper money or bank bill for the purpose of counterfeit or falsification ... will be sentenced to imprisonment.” No such efforts can be identified in the Criminal Act to secure certainty of preparation as a crime in terms of

⁶⁰ KEIHŌ, May 23, 2007, art. 153 (Preparation of Counterfeit of Currency) (Japan): “Those who have prepared the machine or materials with a view to counterfeiting or falsifying the currency, paper money or bank bill will be sentenced to imprisonment for over three months and fewer than five years.”

elements. In addition, since a conspiracy crime is the stage where we have a secret internal exchange and agreement on the intention to commit a crime, it is not based on a unique type of external preparatory conduct for crime realization like preparation of a crime. Accordingly, it is almost impossible to typify the conspiracy as a part of concrete preparation conduct for a specific crime and, thus, even the principle of certainty found in *nullum crimen sine lege* cannot be expected. From this aspect, it seems clear that the Criminal Act, which provides for punishing conspiracy as a crime, is against the basic principle of *nullum crimen sine lege*, in particular, the principle of certainty.

C. Punishing Conspiracy, Related Conspiracy Theory and Joint Principal Theory

In terms of criminal law theory, the necessity of punishing conspiracy as a crime can be very great at the stage when perpetration and accomplice theory are not developed. For example, if a boss of gangsters plotted any crime and agreed to any conspiracy to realize the crime with his organization members, but did not directly participate in the realization process, it is difficult to punish him for attempt. To avoid this impunity, Germany in the common law era tried to treat the mastermind as 'the contributor to a crime' in terms of criminal policy and punished him. Feuerbach established the position that, if any crime is actually committed with the conspiracy, all conspirators who jointly conspired with the crime in advance will be treated as functional co-contributors to the crime, and such conspirers should be punished.⁶¹ As a result, according to scholars of the same era, if participants in a specific crime clearly expressed a law-breaking intention, and showed decisiveness with resolution or conspiracy to commit the same crime, the conspiracy was regarded as having remarkable danger, deserving punishment.⁶²

However, forming another's resolution for a crime is equivalent to instigation in the modern sense, and the concept of co-contributor has been gradually dissolved with the development of the joint perpetrator theory. In particular, Schütze already used

⁶¹ P.J.A. VON FEUERBACH & C.J.A. MITTERMAIER, TEXTBOOK OF COMMON PENAL LAW APPLICABLE IN GERMANY 80ff (1847).

⁶² SCHIRACH, DEVELOPMENT OF THE THEORY OF CONSPIRACY S. 521, NACr 1817; LUDEN, ABOUT THE 'TATBESTAND' 372; Hälschner, *The Prussian Criminal Law*, in Part 2, SYSTEM OF CRIMINAL LAW preußischen AT, 375, 384ff.

the concepts of co-contributor, joint principal and non-principal (that is, instigator and abettor), and he knew how to explain such concepts. He recognized conspiracy as advanced understanding by the joint co-contributors, and such recognition differs from today's joint principal because the main value of the joint principal of today is carrying out the *actus reus* by two or more persons, independently.

Despite this, Schütze did not recognize advance joint conspiracy as the basis of conduct subject to punishment, but he viewed it as meaningful only as a reason for aggravated punishment for joint culpability. As a result, simple conspiracy to commit a crime cannot be included in the concept of criminal acts subject to punishment under a criminal code, and the German Empire's Criminal Code of 1871 abandoned the term of conspiracy as a crime. After that, a crime of conspiracy under the German Criminal Code and a theoretical crime of conspiracy were thoroughly excluded from punishment.

VI. CONCLUSION

Since there was a strong necessity to punish those who jointly caused a crime when the theoretical separation of principal and co-contributor is not clear, it was common, in European countries during Medieval times, to punish those who simply participated in a conspiracy to commit a crime under the criminal codes. However, today's principal and co-contributor theory go beyond the theoretical stage of common law-era Germany. As the principal and the co-contributor became clearly differentiated, the differentiation between the simple co-contributor and joint principal, as well as between the instigator and indirect principal and between the abettor and joint principal, became much clearer. Today, since the principal offender is the person considered responsible for carrying out the *actus reus*, co-principal also means carrying out the *actus reus* by two or more persons. Both the principal offender and the joint principal offender should carry out the substantive offense or should promote commencing a crime.

However, conspiracy is just the stage when more than two persons conspire or agree to, and determine the intention to commit, any crime. It is the stage of expressing and agreeing to thoughts of bad behavior or bad intention, without going further to

physical preparation for commencing the crime. Of course, conspiracy to commit a crime may be more dangerous than preparation of a crime by one person in terms of realistic expectation and certainly in execution, in that more than two persons should participate in the conspiracy process. However, it does not reach the stage of physical preparatory activities for commencing a crime, and, in conspiracy, two persons simply think about committing a crime.

According to the recent global trend not to penalize thought, and the Roman legal maxim of two thousand years ago that ‘thought cannot be punished,’ France excluded preparation of any crime from punishment. All crimes should be regulated by such a law which is based on culpable conduct and should comply with the principle of certainty found in *nullum crimen sine lege*. Given the fact that the essence of punishment is physical and mental pain, the type of crime subject to punishment should be limited to those which cannot be socially accepted, infringe important legal rights, or risk of infringement. Moreover, proof is required to punish conspiracy, but, if the criminal does not confess, it is difficult to prove. If it is identified through torture, it is against the principle of due process of law. In consideration of all these situations, preparation and conspiracy punishable under the Criminal Act, in particular, conspiracy, should be deleted with respect to any crime.

Article 28 of the General Provisions of the Criminal Act, which is the general rule on a preparation or conspiracy crime, should be excluded as well. If the General Provisions of the Criminal Act are the place where the Criminal Act provides the common denominator regulating the Specific Provisions of the Criminal Act, it is not proper to provide in the General Provisions a general rule on preparation and conspiracy. This is just the exception to the exception in the Specific Provisions of the Criminal Act. Even the revised Japanese Criminal Code of 1941, which served as the womb of the current Criminal Act, did not proscribe a preparation crime or conspiracy crime in its general provisions. The general regulation of preparation and conspiracy crimes, in the General Provisions of the Criminal Act, should be deleted because such contents in the General Provisions present a great risk of serving as punishment for the preparation and conspiracy of all crimes. They can be used as grounds to expand punishment, rather than limit the scope of punishment for preparation and conspiracy.

Keywords

Preparation, Conspiracy, Criminal Act, the Principle of *Nullum Crimen Sine Lege*, Inchoate and Thought Crimes, Penalization of Thought

Received: Feb. 7, 2014; *review completed:* May 8, 2014; *accepted:* May 20, 2014

YONSEI LAW JOURNAL

VOL. 5 NO. 1, MAY 2014

STUDENT PAPER

A STUDY OF COPYRIGHT ISSUES SURROUNDING ONLINE GAMING

*Suk Jin Kim**

ABSTRACT

Based on the belief that gaming should be protected as are other copyrightable materials, this study analyzes two major concerns regarding gaming. First, the legal attributes in terms of gaming are analyzed. As briefly mentioned, gaming is a complex body of literature (plot of a game), picture (characters and background) and music. Through these three fundamental elements, gaming produces characters and the environmental background to embroider a unique world. Thus, we need to grasp 1) the concept of literary work, musical work and cinematographic work, 2) how these would be applied to a game, and 3) what could be the appropriate way to legally protect these features reflected in game. Second, this study discusses the inner-game copyright and the cash trade of game items. Inner-game copyrighting includes the protection of characters and items being used in the game. Whether to accept a game item as real property is becoming a huge issue in the game industry. The answer to this question could possibly open the gate to defining the legal attributes of game item transactions. Considering that one of the most effective ways to strengthen the IT industry of Korea is to foster international on-line gaming and to enact a law preserving the unique value of gaming as a complex work, it is time to stop regulating the gaming industry using the older generation's criteria. Thus, the ultimate goal of this study is to take a closer look at every legal factor forming a game to determine why it is so important to acknowledge gaming as a high-dimensional work and how gaming can be protected through the legal system.

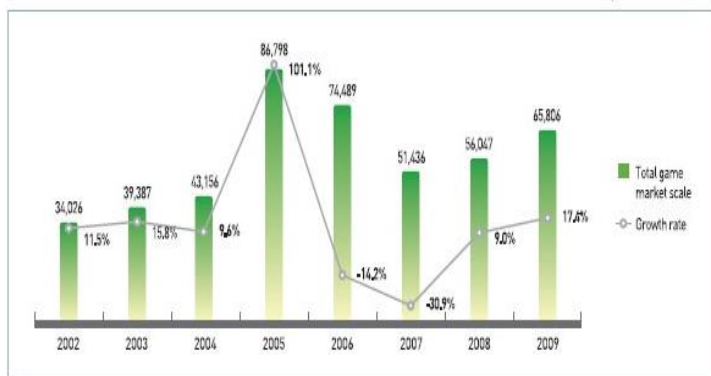
* J.D. Candidate, expected 2015. Yonsei Law School.

I. INTRODUCTION

Despite the presence of negative perceptions regarding computer games, the gaming market in Korea has grown rapidly since the late 1990s. With a 17.4 percent increase since 2008, the total value of the Korean gaming industry reached 6.58 trillion won in 2009.¹ This aggregate amounted to 7.43 trillion won in 2010, demonstrating the enormous potential for development. (Figure-1 shows the gradual growth pattern of Korean game market from 2007 to 2009.)²

<Figure-1> Total scale and growth rate trends of the Korean game market (2002-2009)

(unit: 100 million won)



Examining the various fields of the industry, the online gaming market has grown by 28 percent, to the total sum of 4.76 trillion won, from late 2000s. In fact, almost every game market, excluding the PC market, is expected to show some growth.³ Occupying 64.2 percent of the domestic market share, the online gaming industry is also expected to consistently expand its influence through the Internet. Considering all the factors examined, the domestic game market may register positive growth in 2013, up to the total sum of 11.46 trillion won, opening a new period in gaming history.⁴

Even though the rise of the Korean gaming industry is helping Korea join the ranks of culturally advanced nations, there

¹ HANGUK KONTENCHEU JINHEUNGWON [KOREA CREATIVE CONTENT AGENCY, hereinafter KOCCA], 2011 DAEHAN MINGUK GEIM BAEKSEO [2011 KOREAN GAME WHITE PAPER] 16 (2011).

² KOCCA, 2010 KOREAN GAME WHITE PAPER ABRIDGED VERSION IN ENGLISH 3 (2010).

³ *Id.* at 2.

⁴ *Id.* at 3.

are also many tasks that need to be accomplished in order to foster this.⁵ First, the lack of a general perception about the protection of the game producer's rights requires considerable comment. The necessity of legal protection for this emerging cultural content does exist, yet legal protection remains insufficient. The majority of the users who enjoy games still have no idea about the basic concepts of the copyright and how to preserve it. Such being the case, this absence of awareness will likely cause severe conflict between gamers and copyright holders in the near future. Though games today are basically based in computer programs, they require a certain type of story line, music and imagery. Games also need characters and an environment where they can reside, which requires art work. Computer games that we regard as a rather simple creation, in fact, consist of literature (plot of the game), pictures (characters and background) and soundtracks.⁶ Meanwhile, the development of the Internet swiftly expanded interaction by game users, and, with that particular characteristic, games can be regarded as a complex creation involving software and the participation of users.⁷ In this study, we will take notice of these original mechanisms, in order to grasp the factors constructing a game.

Second, the problem of cash trading of game items needs to be reviewed. Since the purpose of playing a game is to enjoy emotional pleasure, behaviors designed to gain unfair profit may cause social controversies.⁸ On the other hand, there exists a point of view which considers a game item as an asset that can be traded.⁹ Therefore, in this study, we will review the nature of game items to prevent the harmful consequences of cash transactions, and judge whether these items are legally protected. By considering all these points, the Korean gaming industry will

⁵ Kim Kyoo-young, *Onrain geim ui jeojakgwon e gwanhan yeongu* [A Study on the Copyrights of the On-line Games] (2008) (unpublished Master's thesis, Yonsei Judicial Affairs Graduate School) (on file with author) (S. Kor.).

⁶ 2 SON KYUNG-HAN, ENTEOTEINMEONTEU BEOP [ENTERTAINMENT LAW(ㄸ)] 118 (2008) (S. Kor.).

⁷ In Won-geun, *Dijiteol sidae ui saeroun munhwa hyeonsang: Keompyuteo geim, geu jeonmang gwa pyeongga* [A New Cultural Phenomenon in the Digital Age: Computer Game—Its Prospects and Evaluation] 45 MIHAK 119, 121 (2006) (S. Kor.).

⁸ KOCCA, THE STUDY OF THE SOCIAL/CULTURAL EFFECTS OF THE UTILIZATION OF GAME ITEMS 3-4 (2007).

⁹ LEE CHUN-SU, *GEIM AITEM UI SOYUGWON E DAEHAN BEOPJIEOK DAEUNG* [LEGAL APPROACHES TO PROPERTY RIGHTS CONCERNING GAME ITEMS] 7 (2006) (S. Kor.).

be able to advance the nation's cultural prosperity.

II. THE LAW AND GAME CONTENTS

A. *The Legal Approach to Gaming*

1. The Definition of a Game

Article 2 of Korea's Sound Records, Video Products, and Game Software Act defines a game as "Any sort of media or instrument, using data processing technology or a mechanical device such as a computer program, for amusement, to enjoy leisure or study, and to enhance the efficacy of a workout." The legal definition of a game may be the typical definition of an early form of gaming: it only mentions 'media or device' *qua* a game. Meanwhile, an online game is comprised of users who play the games in real time through a communications network.¹⁰ Hence, adding these unique attributes to the basic definition of game would give us the proper meaning of online gaming.

There are two methods for classifying online games. First, according to the Korea Customer Agency's comprehensive definition, a game falls into two classes. One class, including the *StarCraft* series, *Tekken* series and *League of Legends* series, is a game where one can engage in person-to-person combat, with or without teammates, and is called a 'fighting game series.' A second class, the 'growth-oriented game series,' includes the *Skyrim* series and the *World of Warcraft* (WOW). In these games, one can create his or her own cyber-space avatar and upgrade this virtual ego over a long period of time.¹¹ Apart from these definitions,¹² there is one more. The Korea Media Rating Board defines online game, under Article 20 of the Sound Records, Video Products, and Game Software Act, as "an entertainment which can be categorized beforehand, and sold and distributed for watching or playing, independent of distributing methods, the form of media, location

¹⁰ KIM HYUNG-RYULE & KIM YUN-MYUNG, ALGISWIUN ONRAIN GEIM KONTENCHEU WA DIJITEOL JEJAKGWON [ONLINE GAME CONTENTS AND DIGITAL COPYRIGHTS, MADE EASY] 29 (2003) (S. Kor.).

¹¹ The *World of Warcraft* is an online game made by Blizzard Entertainment.

¹² KOREA CONSUMER PROTECTION BOARD [hereinafter KCPB], THE ONLINE SERVICE AND THE ACTUAL CONDITION OF USE 1 (2000).

of server or the price.”¹³

2. The Necessity of Protecting Online Gaming

Since an online game is a certain kind within the broad meaning of game, reasons for protecting games, generally, can be applied. First, online gaming is a cultural content industry, growing at an exponential rate, as previously seen through the data compiled by the Korea Culture and Content Agency. Second, online gaming has multimedia properties.¹⁴ This attribute means that, a game is a creation consisting of literary works, cinematographic works, the protection of characters and items, and the real-time contribution of the users playing it.

B. Protection of Games

1. The Protection of Software

Software is a general term for computer programs as opposed to hardware.¹⁵ When this term is applied to the area of gaming, it embraces certain elements of game contents and compositions, excluding hardware constituents such as the game's CD. There are three ways of protecting software: copyright, patent, and the sui-generis approach.¹⁶ The means of copyright can be applied to various categories of creation (not only for gaming software) in order to help guard the rights of producers. By using this method, originators can protect their rights easily; yet, this does not protect the mere idea of the software itself. The copyright only prevents illegal duplication of a program. A patent requires particular, longer procedures, but it can provide protection for the composition of the software itself.

2. The Copyright Protection of the Game Program

A "computer program" is a creative production expressed as a series of statements or instructions, used directly or indirectly in a

¹³ KOREA MEDIA RATING BOARD, THE PUBLIC SERVICE GUIDE BOOK OF MEDIA 14 (2001).

¹⁴ SON, *supra* note 6, at 118.

¹⁵ This is the definition used by the Korea Foundation for the Advancement of Science and Creativity.

¹⁶ SON, *supra* note 6, at 120.

computer or other device (hereafter referred to as a "computer"), and which has an information processing ability in order to obtain a certain result.¹⁷ The question is whether a game can be protected as a computer program. Each element of the law's definition should be considered separately.

(A) "In Order to Obtain a Certain Result"

A game program has a vivid sense of purpose as a computer program. For instance, the aim of the 'fighting game series' is to beat one's opponents through continuous combat. Meanwhile, the aim of the 'growth-oriented game series' is to foster the user's own avatar to be a hero in his or her virtual world. From this point of view, it can be said that games are made to obtain certain outcomes.

(B) "A Series of Statements or Instructions Used Directly or Indirectly in a Computer or Other Device"

A game is developed through a large number of instruction systems during the programming process: the 'source code.' The source code is a delineated writing and constructed of computer programs, which people can read. It is made of one or more text files.¹⁸ The source code is an 'object coded'¹⁹ throughout some special internal operation systems, and it becomes a mechanism that users cannot directly identify. In other words, the game has a series of statements or instructions used directly or indirectly in a computer or other device.

(C) "Expression"

Expression is a certain action of the communication process. Therefore, ideas, feelings or thoughts, which fundamentally remain in the area of inward thinking, cannot be protected

¹⁷ Jeojakgwon beop [Copyright Act], Act. No. 8101, Dec. 28, 2006, art. 2 (S. Kor.).

¹⁸ SOURCE CODE, http://en.wikipedia.org/wiki/Source_code (last visited May 1, 2014).

¹⁹ An object code, or sometimes object module, is what a computer compiler produces. In a general sense, the object code is a sequence of statements or instructions in a computer language, usually a machine code language (i.e., 1's and 0's) or an intermediate language such as RTL (OBJECT CODE, http://en.wikipedia.org/wiki/Object_code (last visited May 1, 2014)).

legally.²⁰ In the case of a game, even if the elements, such as the 'object code,' are part of the inner operating system, a game can be produced and expressed externally by these factors. Thus, this requirement is also fulfilled.

(D) “Creative Production”

According to the first clause of Article 2 of the Copyright Act, 'works' means creative productions in which human ideas or emotions are expressed.²¹ Even this clause does not suggest the exact meaning of the word 'creation,' and defining it is not easy. This is the reason why the Supreme Court of Korea, the country's prime legal machinery, rather than the legislative organ, tried to explain the concept of creation. According to the court,

Creation does not necessarily require a whole new originality, but it asks only that there be no imitation of others' work and contain his or her own creativity. Thus, if we are able to find the psychological endeavor of a creator and to distinguish the production from other existing creations, it is an object of the Copyright Act.²²

Although online gaming can be classified into two kinds ('fighting game series' and 'growth-oriented game series'), each series is upgraded by the creator's original ideas and operation systems. Under this view, online gaming can also be viewed as a creative production. As introduced earlier, the *StarCraft* and *Tekken* series are members of the 'fighting game' group, yet they are protected as absolutely independent works, since each one has a completely different story line, background environment and set of characters.

With all the legal requirements satisfied, an online game is suitable for legal protection as a computer program. One thing that deserves some attention is that protected game software involves only certain computer-linguistic parts such as the 'source code' and the 'object code.' The legal value of literary and musical works of online games, characters or items, are factors which need to be assessed separately.²³

²⁰ Jeojakgwon beop, art. 2 (S. Kor.).

²¹ *Id.*

²² Supreme Court [S. Ct.], 94 Do 2238, Nov. 4, 1995 (S. Kor.).

²³ SON, *supra* note 6, at 121.

3. The Rights of a Game Producer

The process of obtaining legal rights by a game creator is the same as the normal process for other copyrighters. The main principle is that any copyright of a game belongs to the producer. However, a game created by employees of a game development company is a bit different, as all the rights belong to the firm.²⁴ A game producer exclusively enjoys his or her rights regarding the game created,²⁵ such as a right to reproduce, a right to translate, a right to publish, a right to transmit, a right to adapt and a right to distribute. The producer also has a right to proclamation, a right to indicate his or her real name and a right to maintain the identity of the content; these are called the author's 'moral rights.' The author's property right exists during the author's life, plus seventy years.²⁶

4. The Protection of Game Software by Patent Law

Even though a patent is one of the strongest rights, since mere ideas themselves can be preserved, the idea of protecting game software by patent law has been the subject of some controversy. In short, game software can be protected by patent law, when two requirements are fulfilled – originality (a new aspect of an invented work which distinguishes it from other works) and progressivity (technological advance).²⁷ Creativity,²⁸ on the other hand, does not require such a high level of novelty. According to the Copyright Act, the copyright of a game may be protected under the category of creative expression. Generally, it is therefore easier for game producers to receive protection for game software through copyright law, rather than patent law.

C. The Protection of Game Contents

As stated, online games necessarily have multimedia attributes. They include attributes of literary works such as the plot of a game, the attributes of musical works such as background

²⁴ Keompyuteo peurogeuraem boho beop [Computer Programs Protection Act], Act. No. 3920, Dec. 31, 1986, art. 5 (S. Kor.).

²⁵ Jeojakgwon beop, art. 10 (S. Kor.).

²⁶ *Id.* art. 39.

²⁷ SON, *supra* note 6, at 123.

²⁸ Jeojakgwon beop, art. 2 (S. Kor.).

music, images and animations, and the designing and depicting of characters. These various contents must be brought together to produce the game. It is essential to consider all these factors, since acknowledging the copyright of a game, while ignoring these individual and distinct characteristics, would plainly infringe on the rights of other original works.

1. The Protection of Cinematographic Work

'Cinematographic works' means the creative production in which a series of images (regardless of whether or not accompanied by sound) are collected, played by mechanical or electronic devices, and seen or both seen and heard.²⁹ Elements of game images are acknowledged as literary works since this is necessary to defend the rights of a producer and the game itself. Associated with this subject, there are three competing theories.

(A) The Affirmative View

The affirmative view maintains that, although images change through controlling a game, they are fundamentally the same game graphics, and the degree of change is pre-established by the game software. From this point of view, it is necessary to admit the game's original creativity and, thus, acknowledge the attribute of cinematographic work. The case of *Fortress 2 v. Gunbound* is a good example of a cinematographic work.³⁰ *Fortress 2* is a game with certain types of tanks; a player must choose a tank to combat against other players. *Gunbound* was accused of violating the copyright of *Fortress 2*. The attorney for *Fortress 2* insisted that the characters and play style were too similar. An injunction was issued, but this injunction was overruled. Nonetheless, the background logic of this verdict accepted the concept of the game's cinematographic work.

(B) The Negative View

Others argue that it is not possible to accept what the affirmative view insists, since the images of a game are not consistently settled; they differ according to each individual player.

²⁹ *Id.*

³⁰ Seoul District Court [Dist. Ct.], 2002 Ga-Hap 1989, Sept. 19, 2002 (S. Kor.); Son, *supra* note 6, at 127.

From their point of view, this means that a game is not a particular expression of cinematographic work.

(C) The Hybrid View

The rapid development of the game industry has enabled the classification of games into smaller categories. Certain advanced games definitely include attributes of multimedia, while other games, such as *Galaga*,³¹ are much simpler. A third view emphasizes this distinction: it applies the affirmative view to the former category, and the negative to the latter category.³²

Yet, the core of this discussion is whether a game has a series of fixed images or whether a series of floating images can also be recognized as a 'fixed graphic.' Thus, the hybrid view is using quite an improper yardstick for this conclusion.³³

(D) Assessment

As mentioned above, cinematographic works of a game can be protected by satisfying three requisites: a series of images, a playback function through mechanical or electronic devices, and creativity.³⁴ First, regarding a series of images, it is a natural consequence of a multimedia game to have diverse developments. A more important thing to remember is that those innumerable circumstances were predicted by the producer to be accomplished in some way. According to this opinion, any series of images could be a stream of the continuous process.

Second, a playback function through mechanical or electronic devices is needed even by extempore online gaming. However, this does not necessarily mean that the game functioning at this very moment is simultaneously played back. For illustration, *League of Legends*, one of the representative 'fighting game series,' can be enjoyed not only by direct playing, but also by watching the live broadcast of professional gamers; these matches are simultaneously recorded and consistently redistributed through the Internet and TV. This playback function contributed to the creation of various markets, such as gaming contests or

³¹ *Galaga* was a shooting game made by NAMCO in 1981; it allowed players to control their combat planes to shoot down enemies in space.

³² SON, *supra* note 6, at 125-27.

³³ SON, *supra* note 6, at 127.

³⁴ Jeojakgwon beop, art. 2 (S. Kor.).

broadcasting. Even general users save their matches in order to replay and watch them. Thus, it is necessary to recognize this playback function.

Third, the requirement of creativity is a basic element of newly produced games. A particular game without originality may not be acknowledged for the attribute of cinematographic work (for example, if it is a pirated edition or already a very popular item). If each picture comprising the game has constructive creativity, there is no problem with recognizing this requirement.³⁵

2. The Protection of Musical Works

In comparison with cinematographic work, the question of whether a game can have the attribute of a musical work is relatively easy to answer. Games always use background music and sound effects to form moods and play circumstances. It is the common view today to affirm the attribute of musical works.

With a legal point of view, the person who made or performed the music receives copyright protection as well as any “neighboring rights” under the Copyright Act.³⁶ Yet, it is hard to recognize every single right for a production made up of such various types of works. Consequently, there are exceptions. The right of a person who has agreed to cooperate in producing certain contents is presumed to have transferred rights to the game producer.³⁷ Of course, this presumption is reversed if the content pre-existed the production of the game.³⁸ Such exceptions are needed since, without them, the chance of being engaged in copyright disputes would dramatically increase.

3. The Protection of Literary Work

Earlier types of games, such as the brick breaking game from the 1970s, where the only player action was to control his or her own prop and bounce the ball to break bricks, had no story line at all. The idea of granting plot lines to a game was innovative during those days, but the present game market is quite different. Even video arcade games, like the *Tekken* or *Samurai Showdown*

³⁵ PAUL GOLDSTEIN, COPYRIGHT 139 (2d ed. 1996); SON, *supra* note 6, at 128.

³⁶ Jeojakgwon beop, art. 64 (S. Kor.).

³⁷ *Id.* arts. 100 and 101.

³⁸ *Id.* arts. 100 to 102.

series, have their own plotline.³⁹ An online game, more than others, must have story lines to attract a large number of players. It seems that no game producer would now produce a game without a detailed plot.

A scenario used for the creation of a game is protected as literary work.⁴⁰ A scenario is not necessarily required to be in writing; if it is possible to be recognized somehow as a plotline, the requirement is satisfied.⁴¹ Like musical works or cinematographic works, using a written plot, which was not developed for the game, would not support the game producer's rights. For example, plots like *Samgukji* would not be recognized for their creativity.⁴² According to caselaw, a game scenario is protected by the Copyright Act when it has originality which definitely differs from established online game sites or game scenarios.⁴³

4. The Protection of Characters

Characters are like people appearing in the plot with special personalities. Some attribute economic value to characters.⁴⁴ Almost every game, today, except for simple games such as *Mine Finding*, has characters, and their value is equivalent to the characters in novels. Examples of game characters would be the Monks of *World of Warcraft*, or the Witchdoctor of *Diablo 3*.⁴⁵

³⁹ *Tekken* is a tournament game made by NAMCO in 1994. Players can select their heroes to fight opponents' characters. *Samurai Showdown* is also one of the fighting game series from SNK; it is a combat game like the *Tekken* series.

⁴⁰ Jeojakgwon beop, art. 4-1 (S. Kor.).

⁴¹ The United States demands 'fixation' for legal protection. (QUIZ LAW, http://www.quizlaw.com/copyrights/what_is_fixation.php (last visited May 2, 2014)).

⁴² *Samgukji* is the famous game of KOEI. However, the plot was created by Na Gwan-jung, a famous writer from 600 years ago.

⁴³ Seoul District Court [Dist. Ct.], 2002 Na 40684, Nov. 16, 2004 (S. Kor.).

⁴⁴ SON, *supra* note 6, at 129.

⁴⁵ Monks are mystic duelists safeguarding their homeland, Pandaria. This character appears in *World of Warcraft* made by Blizzard Entertainment. Likewise, the Witchdoctor is one of the ancient mages of the *Diablo 3* series, which has been made by Blizzard Entertainment.

<Figure-2> Monk 'Touch of Karma' from World of Warcraft⁴⁶



The characters made by novelists are under legal protection, but the absence of the law regarding game characters has caused a theoretical conflict.⁴⁷

(A) *The Affirmative View*

The affirmative view insists that game characters need legal protection. For instance, illegally stealing a character or his identity is a direct violation of copyright law. The degree of protection increases if the character is depicted visually or has extraordinary caliber in comparison to other characters.⁴⁸

(B) *The Negative View*

The gist of the negative view is that any type of special protection for game characters is excessive. Since the attributes of cinematographic and art works are preserved by copyright law, there is no need for further protection of those figures. Because game characters are one part of game images in a macro view, this opinion is somewhat reasonable.

⁴⁶ Figure-2, the Monk called 'Touch of Karma,' is found at [HTTP://KR.BATTLE.NET/WOW/KO/CHARACTER/%EC%95%84%EC%A6%88%EC%83%A4%EB%9D%BC/%EC%97%85%EB%B3%B4%EC%9D%98%EC%86%90%EC%95%84%EA%B7%80/SIMPLE](http://kr.battle.net/wow/ko/character/%EC%95%84%EC%A6%88%EC%83%A4%EB%9D%BC/%EC%97%85%EB%B3%B4%EC%9D%98%EC%86%90%EC%95%84%EA%B7%80/SIMPLE) (last visited May 2, 2014).

⁴⁷ SON, *supra* note 6, at 129.

⁴⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); SON, *supra* note 6, at 130.

(C) Assessment

This author agrees with the negative view that characters are part of game images. Even so, it is not logical to deny the necessity of special protection.

<Figure-3> Harry Potter movie & animation



<Figure-4> Harry Potter Game screen



The *Harry Potter* series, for instance, not only needs to be preserved as literary works, but the figures, such as Harry Potter, Hermione, Ron, or Dumbledore, also need their identities protected.⁴⁹ The characters of this novel have gone beyond literature; they are also in the area of cinema, games and music.

⁴⁹ Figure-3, Harry Potter poster & animation version, found at FANPOP, <http://www.fanpop.com/clubs/harry-potter-vs-twilight/images/36194220/title/harry-potter-33333-> (last visited June 10, 2014). Figure-4, Harry Potter game, found at naver game café, <http://cafe.naver.com/fpsgame/1207515> (last visited June 10, 2014). The *Harry Potter* series is the world famous fantasy novel by J.K. Rowling.

(The figures above show that characters from Harry Potter can be converted to animation in order to be used as parody movie figures or game units.) From this point of view, protection provided by the basic copyright law, which is directed at protecting only the novel or movie, is not sufficient. The figures should be protected as separate creations. Likewise, the characters in other novels or games have latent possibilities of similar sprouting and need the same degree of protection.

(D) The Protection of Game Characters and Violations of the Copyright Act

As mentioned, if a game character is recognized as copyrighted, it is predictable that the right belongs to the game company. We have reviewed this kind of legal relationship, yet there is one remaining problem. Game characters have a very unique attribute, in comparison to the characters in novels: they grow stronger as users develop them with time and efforts. Even with extensive reading of the most beloved novel, the characters do not arise from the book or respond to readers' contributions. The characters in games grow by leveling up or acquiring items, and, in order to do this, player contribution is needed. This uniqueness raises a question: if a player exerts efforts to make his or her character unique, would this user have a copyright?

To recognize a copyright in that case, the player not only must improve the game character, but must originally design certain parts of 'a series of game images.' If not, merely upgrading the figures in a game does not merit the protection of copyright law, because this nurturing was predictable when the game was produced. Nevertheless, this does not mean that the user loses his or her particular ownership of the game characters in the game.⁵⁰

5. The Protection of Other Items

Game items are the objects which the characters possess so as to guard and improve themselves, such as spears, shields or swords.⁵¹ These are certain kinds of internal objects in a game.⁵²

⁵⁰ Kim Hye-kyeong, *Onrain geim aitem ui jaesanbeomjoe seongnip ganeungseong* [Online Game-Item and Crime Against Property], 14(2) BEOPHAK YEONGU [YONSEI LAW REVIEW] 215, 232 (2004) (S. Kor.); SON, *supra* note 6, at 131.

⁵¹ SON, *supra* note 6, at 122.

⁵² Chang Jae-Ok, *Onrain geim aitem hyeongeum georae ui beomnyul gwangye*

This kind of item is a prerequisite to progress in a game, and these items, like other game factors, should be given a strong degree of legal protection.

Though available only in cyberspace, items create money transactions since they are necessary requirements for playing a game.⁵³ Due to the rapid advancement of the game industry, not only the trading of items in a game have increased in number, but also trades with cash are prevalent.⁵⁴ If so, why is this type of money transaction rampant, and why is it bad to pay cash to obtain game items? Although virtual chattel, items still enjoy the attribute of existing objects in a game, a series of cash dealings give sellers chances to reduce their efforts in cyberspace, and buyers may obtain superb items without any time investment. This is the reason why the trades have gradually expanded. However, due to these dealings, various forms of violent crimes, including murder, are also occurring. Additionally, a fundamental question is whether game items enjoy the status of a real property right. This is not easy to determine, and it is aggravating cash trades. We, thus, have two core questions to answer about the legal attribute of a game and about public policy to prevent related violent incidents from happening.

(A) Legal Status of Game Items

Players trade game items and freely use them inside a game, so these items function perfectly as movables. There is a dispute as to whether to recognize these items as a real property right. The Civil Act of Korea defines 'things' as "corporeal things, electricity, and other natural forces which can be managed."⁵⁵ So defined, game items can be acknowledged as "things" when they meet these requirements. However, a game item has neither actual shape nor electrical features. Also, it is definitely not a type of

[*Legal Issue of Real-Money Trade in Online Game Items*], 9(2) CHUNGANG BEOPHAK [CHUNG-ANG LAW REVIEW] 394, 394-95 (2007) (S. Kor.); SON, *supra* note 6, at 122.

⁵³ Jung Hae-sang, *Inteonet geim aitem georae e gwanhan beomni* [*The Legal Theory of Transactions in Game-Item on Internet*], 5(3) CHUNGANG BEOPHAK [CHUNG-ANG LAW REVIEW] 261, 262 (2003) (S. Kor.); SON, *supra* note 6, at 122.

⁵⁴ Itemmania and ItemBay are the cash transaction sites of item (ITEMMANIA, <http://www.itemmaniakorea.net/>; ITEMBAY, <http://www.itembay.com/> (last visited June 11, 2014)).

⁵⁵ Minbeop [Civil Act], Act. No. 471, Feb. 22, 1958, art. 98 (S. Kor.).

natural force. Thus, according to the law, an item is not a chattel.

Can the phrase 'property of a criminal act' be applied to game items? If it is possible, an item owner will be legally protected from crimes of larceny and embezzlement. At least recognizing their value as property would enable protection from crimes of extortion, fraud and breach of trust.⁵⁶ If this phrase does not apply, virtually possessing game items would have no legal meaning.⁵⁷ Korean Supreme Court held that "the object of the crime of larceny is restricted to properties including natural forces which can be managed; ... data saved in a computer are neither corporeal things nor controllable powers; they can't be a property."⁵⁸ Thus, game items cannot be solidly guarded by the civil/criminal law. Nevertheless, the protection of cinematographic or art works is still available.

(B) Differing Views on the Legal Attribute of Game Items

There are three main theories regarding the legal attributes of game items.⁵⁹

(1) The 'Property' Theory

The theory of property endorses the protection of game items. On this view, although these items exist in cyberspace and it is hard to offer legal protection, the law should be reformed to endow them with attributes of property. First, game items, like other existing movables, can be occupied, possessed or traded. Second, the buying and selling process often relies on cash. Third, because of the rapid advancement of the game industry, legal conflicts over game items are increasing. Fourth, the players' time and exertion are needed to obtain items. Lastly, the current law was not able to foresee the development of game items, which is the obvious fault of the legislature and requires revision so that these items may receive legal protection. Criticism regarding this theory argues that the concept of these items is too ambiguous for lawmakers to have reasonably foreseen.

⁵⁶ KIM & KIM, *supra* note 10, at 49.

⁵⁷ Byun Jong-pil, *Inteonet geim aitem gwa jaesan beomjoe* [Internet Game Item & the Crime of the Property], 5 BEOPJO 26-47 (2001) (S. Kor.).

⁵⁸ Supreme Court [S. Ct.], 2002Do745, Dec. 7, 2002 (S. Kor.).

⁵⁹ SON, *supra* note 6, at 124-25.

(2) The 'Claims' Theory

The theory of claims pays attention to the relationship between game users and game system providers (GSP), in order to deduce the legal nature of game items. A user enters into a contract with GSP to play games, so it is natural to protect the right to utilize items in certain games. This view, however, claims that it would not be suitable to treat them as having the attributes of actual property.⁶⁰

(3) The 'Premium' Theory

The theory of premium takes notice of the analogous aspects between a lease and the user-GSP relationship. Since the game service contract is similar to a rental, a legal right that a lessee can assert against other tenants is asserted as the model for any right that may be claimed by game users.⁶¹ Rights regarding game items are subordinate to the main contract, so that a player can argue rights to use his or her own items against other users, but not a right to the item itself against the producer.

(4) Assessment

This author is of the view that game items need to be recognized as real properties. First, the game industry is advancing at an unprecedented speed, especially in Korea. Korean games are spreading around the world. This creates an economic necessity to legally protect games and items. Second, although lawmakers are not currently able to legally recognize the importance of game items, the law must be revised to reflect this social change, since the law must innovate to mirror the rational demands of society.

Nevertheless, it is also somewhat reasonable to deny rights to temporary items, which merely follow the birth-and-death cycle of game service contracts.⁶² Therefore, the conclusion reached by the theory of premium would be the most sensible one. Game items can only be utilized and traded inside a game and their legal

⁶⁰ Son, *supra* note 6, at 124.

⁶¹ YOON UNG-GI, MMORPG GEIM AITEM HYEONGEUM GEORAE E DAEHAN BEOP JEONGCHAEKJEOK GOCHAL [THE LEGAL & POLITICAL INQUIRY INTO THE IN-GAME ITEM EBAYING OF MMORPGs] 63-65 (2004) (S. Kor.); SON, *supra* note 6, at 125.

⁶² SON, *supra* note 6, at 124.

position is not the same as standard property rights.⁶³

However, the reasoning for the conclusion is questionable. The premium theory understands a game service contract as analogous to a lease agreement.⁶⁴ Yet, the Civil Act states that, “a lease becomes effective when one of the parties has agreed to allow the other party to use an object and take profits therefrom, and the latter has agreed to pay rent for it.”⁶⁵ In this circumstance, a ‘lessor’ means the person who lets his real estate or movables be used. A ‘lessee’ refers to the person who borrows these properties from the leaseholder. The object in the provision is legally termed ‘a hired article.’ In order to render this analogy valid, game items need characteristics similar to properties and the process of accessing a game website must share something in common with a lease. The reasoning does not seem persuasive.

Fundamentally, a lease contract and a game service contract share little in common, so that the claims theory has a better logical basis. The relationship between users and the GSP has the feature of a contract that generates credit. Nevertheless, the claims theory has its own defect, insisting that the proper owner of certain items cannot assert his rights of trade over other users.⁶⁶ The owner can enjoy only the right to utilize, and any other right arising from the ownership is denied. This conclusion ignores reality and excessively limits the rights of item owners.

The best solution would be a combination (a compromise) of the two theories. Because the contract generates a claim, it is necessary to acknowledge the exclusive rights of users regarding their items. Yet, this power can be applied only in relationship to other players. This right cannot be practiced as to the GSP, since game items are not real property according to Korea’s current civil law system.

6. The Cash Trade of Game Items

(A) The Current State of Affairs

The online trading websites, such as Itemmania or ItemBay, are frequently used by gamers. For example, the total amount traded through the ItemBay site in 2002 was valued at 198 billion

⁶³ *Id.* at 125.

⁶⁴ *See id.*

⁶⁵ Minbeop [Civil Act], Act. No. 471, Feb. 22, 1958, art. 618 (S. Kor.).

⁶⁶ SON, *supra* note 6, at 124.

won, 1,680 billion won in 2003, 2,452 billion won in 2004, and 2,845 billion won in 2005.⁶⁷ Regardless of precise legal status of game items, there is no doubt that the market is growing fast.

(B) The Provision and Prohibition Clause Regarding the Item Cash Trade

Under Korea's Game Industry Promotion Act, it is illegal to engage in the business of exchanging for money the results obtained from playing any game, such as the score or virtual currency used in the game. Facilitating the exchange of such results of repurchasing them is also prohibited.⁶⁸ According to the law, habitually purchasing game money or items for the purpose of gambling is forbidden. Thus, only trading through specialized sites, like ItemBay or Itemmania, is legally permitted.

A game service contract usually prohibits handing over the account of one player to another, or providing items at a cost.⁶⁹ There are court decisions regarding this prohibition and social problems arising from the buying and selling of game items.⁷⁰ Whether right or wrong, however, cash dealings involving game items do exist, and the subordinate profits taken by game companies are incalculable. Concerning all these circumstances, contracts limiting such actions seem fairly ineffective. The better solution would be to permit item trading with a series of stern sanctions when it exceeds certain boundaries.

(C) The Supreme Court Decision on the Cash Trade of Items

Against this background, a recent decision rendered by the Korean Supreme Court is worth noting. During the 2004 tax year, the plaintiff bought game money from users and sold it to other players through a game item trade site. When the government levied tax on such sales activities, the plaintiff sued to have the tax measure canceled.

The original court concluded that it is legally valid to tax the

⁶⁷ ITEM BAY, <http://www.itembay.com> (last visited Feb. 20, 2014).

⁶⁸ Geimsanup jinheung e gwanhan beomnyul [Game Industry Promotion Act], Act. No. 11785, May. 22, 2013, art. 32 (S. Kor.); SON, *supra* note 6, at 126.

⁶⁹ SON, *supra* note 6, at 126.

⁷⁰ Seoul District Court [Dist. Ct.], 2004 Ga-Hap 43867, Dec. 2, 2004 (S. Kor.); Seoul District Court [Dist. Ct.], 2004 Ga-Hap 56095, Dec. 2, 2004 (S. Kor.); Seoul District Court [Dist. Ct.], 2004 Ga-Hap 84721, Jan. 26, 2005 (S. Kor.); Seoul District Court [Dist. Ct.], 2004 Ga-Hap 56085, Jan. 26, 2006 (S. Kor.); SON, *supra* note 6, at 126.

plaintiff.⁷¹ First, it reasoned that according to the Value-Added Tax Act, game money is included within the meaning of ‘goods.’ Second, it was clear that the plaintiff had engaged in a form of business enterprise which is the subject of tax payments. Third, he continuously offered game money to users for the purpose of profit. Considering these factors, the plaintiff met the requirements of a ‘business operator’ under the VAT Act. The levy of tax was therefore lawful.

The plaintiff appealed to the Supreme Court to have the original decision overturned. The Supreme Court, however, affirmed the decision of the original court.⁷² In reaching its conclusion, the high court referred to Article 1 of the VAT Act which provides the legal definition “supplying of goods or services.” The law defined ‘goods’ as every kind of material and immaterial objects which has economic value. The plaintiff had traded a certain element of a game to earn profit. It was obvious that he had supplied a form of goods that had economic value. Therefore, the profit gained by buying and selling game money should be considered as the object of taxation.

This decision of the Supreme Court has an important message for the cash trade of game items. It appears to affirm that, as a basic principle, game items can be cash-traded. As a controlling system, specific regulations of this type of transaction are provided in each special law, such as the VAT Act and the Game Industry Promotion Act. Of course, the decision did not reach a conclusion on whether game items (including game money) can legally be considered the object of property rights. The Supreme Court merely held that it is legally valid to include game money in the concept of ‘goods’ for purposes of the VAT Act. The decision is nevertheless significant for thinking about future paths for better regulation of transactions involving game items.

III. CONCLUSION

The Korean online game industry has entered a period of glory days.⁷³ With its rapid growth, the debate over copyright has been energized. This paper has sought to examine the legal issues

⁷¹ Daegu High Court [Daegu High Ct.], 2011 Nu 1277, Oct. 14, 2011 (S. Kor.).

⁷² Supreme Court [S. Ct.], 2012 Du 30281, Apr. 13, 2012 (S. Kor.).

⁷³ KOCCA, WHITE PAPER OF KOREAN GAME MARKET 16 (2011).

surrounding the protection of online games, including the subjects of software protection, program copyrights, literary works, musical works and cinematographic works. The protection of game characters and items was also considered.

However, with all these various approaches to protecting online games, the legal system is far from perfected. Overcoming this incompleteness to strengthen the game industry will be the task of everyone involved in it. It will be crucial if Korea wishes to maintain and enhance its global competitiveness in the field.⁷⁴ On the other hand, game providers need to produce healthy cultural contents, not only to reject the games which stir up a speculative spirit, but to develop a wholesome trading culture for items.

The government has recently announced a so-called Gaming Addiction Law for the purpose of regulating the gaming industry and those who enjoy gaming. Some would agree that regulation of gaming is needed, since too much playing will cause people to waste their time. Government regulation, however, will be ineffective without proper understanding of gaming as a combination work. Unfortunately, many in our society seek to oppress games without valid reasoning, denouncing them as the primary cause of school violence or criminal action.⁷⁵ Yet, this is irrational witch-hunting, as violence-inciting factors can be found everywhere. Online games cannot be blamed. Nevertheless, improving the social perception of online games is one of the most critical tasks. To achieve this objective, cooperation between legislators, game producers and users is vital and necessary. Improvements in both law and the public perception will be crucial if the Korean game industry is to grow in size and diversity.

Keywords

Online Gaming, Cinematographic Work, Musical Work, Literary Work, Characters, Items

Received: Feb. 28, 2014; *review completed:* May 8, 2014; *accepted:* May 20, 2014

⁷⁴ The *1000 Years* and *Legend of Mir 2* from Actoz Soft Co., Ltd. maintained first ranking in the Chinese online game market for five years (2001~2005).

⁷⁵ The Shutdown Program made by the Ministry of Gender Equality & Family has encountered social criticism, due to this prejudice.

YONSEI LAW JOURNAL

Vol. 5 No. 1, May 2014

PUBLISHED BY

Institute for Legal Studies, Yonsei University

ADDRESS

**Institute for Legal Studies, Yonsei University
50 Yonsei-ro, Seodaemun-gu, Seoul, Korea 120-749**

TELEPHONE

+82-2-2123-6007

PRINTED BY

**Bup-Hyun Publications
Seoul, Korea**

DATE OF PUBLICATION

May 31, 2014

ISSN 2093-3754

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