THE UNDER-PROTECTION OF WOMEN UNDER KOREAN CRIMINAL LAW

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I. INTRODUCTION

Since the Republic of Korea ("Korea") democratized in the late 1980s, efforts have been made to achieve comparable democratization in the social and cultural spheres. Many other concerns which had previously been overshadowed by the goal of achieving political freedom from authoritarian military rule, such as women's human rights in the criminal justice system, have since received increased attention. Korean women's groups, such as the Korean Women's Association United, have persistently demanded that victims of sexual violence be well cared for and protected.[1] In 1992, a girl killed her stepfather, who had repeatedly raped and abused her since she was twelve years old.[2] This case drew attention to domestic violence and the killing of male abusers by battered women. Although two special Acts to punish sexual and domestic violence were passed in response to the activism of the women's movement in the 1990s,[3] Korean criminal law and jurisprudence still do not fully address the issues surrounding women's human rights in criminal justice.

This article critically reviews Korean criminal law and procedure as they pertain to women. First, it explores the male-centered definition of rape in Korean criminal law, which recognizes a marital exemption and continues to require the use of "utmost force/threat" and the victim to complain. Second, it examines the experience of rape victims in the Korean criminal process and then briefly proposes and evaluates modifications for a new system of protection. Third, it analyzes the reluctance of Korean jurisprudence to justify or excuse a battered woman's killing of her abusive husband or partner in both confrontational and non-confrontational situations.

II. MALE-CENTERED DEFINITION OF RAPE

In Korea, crimes of sexual violence are punished under the Penal Code and the Act for the Punishment of Sexual Violence Crimes and

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[1] *See* http://www.women21.or.kr/. (Last visited February 19, 2009).

[2] Decision of December 22, 1992 (92Do2540) (Korean Supreme Court). *See infra* text accompanying note 108.

[3] SEONGPOKRYOK BEOMJOE EUI CHEOBEOL MIT PIHAEJA BOHO EEUNG E KWANHAN BEOPRYUL [THE ACT FOR THE PUNISHMENT OF SEXUAL VIOLENCE CRIMES AND PROTECTION OF VICTIMS], Law No. 8059 of 2006, Law revised on October 27th, 2006, as Law No.8059; KAJEONG POKRYEOK BEOMJOE EUI CHEOBEOL DEUNG E KWANHAN TEUKRYEBEOP [THE SPECIAL ACT FOR THE PUNISHMENT OF DOMESTIC VIOLENCE], Law No. 8580 of 2007, art. 2(3), Law revised on August 3, 2007 as Law No.8580.

Protection of Victims. The former statute covers several sex crimes.[4] The latter applies if the sex crimes referenced in the Penal Code are committed by relatives,[5] in an aggravated manner (such as in the course of burglary or robbery)[6] by groups of more than two people, or in conjunction with the use of weapons.[7]

Among the crimes delineated by these two acts, the most basic is rape which is punishable by imprisonment for more than three years.[8] As discussed below,[9] the majority view in Korean jurisprudence defines rape as non-consensual sexual intercourse with a woman (other than the offender's wife) with the use of utmost force/threat. It is first necessary to examine critically this definition of rape.

A. Denial of Marital Rape: Marriage License as License to Rape?

Until recently, marital rape attracted little attention from academics, lawyers, or the public in Korea. Marital rape, it seemed, did not exist. However, research reports published recently by the Korean Institute of Criminology show that about 20-30% of battered wives have been subjected to coercive sexual intercourse after being battered by their husbands.[10]

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[4] For instance, it covers rape (HYEONGBEOP [THE KOREAN PENAL CODE], Law No. 7623 of 2004, last revised on July, 29th, 2005, as Law No.7623, art. 297), sexually indecent acts by compulsion (*Id.* art. 298.), "quasi-rape" or "quasi-sexually indecent conduct" in which the perpetrator takes advantage of another's unconsciousness or inability to resist (*Id.* art. 299), the above three crimes with intention to kill or injure, the above three crimes resulting in death or injury (*Id.* art. 301-301(2)), sexual intercourse with a minor or a mentally or physically handicapped person by use of fraud, threat or force (*Id.* art. 302) sexual intercourse with a woman who is under the offender's protection or supervision in business or employment by use of fraud, threat or force (*Id.* art. 303(1)), and sexual intercourse with a minor under the age of thirteen (*Id.* art. 305).

[5] SEONGPOKRYOK BEOMJOE EUI CHEOBEOL MIT PIHAEJA BOHO DEUNG E KWANHAN BEOPRYUL [The Act for Punishment of Sexual Violence Crimes and Protection of Victims], Law No. 8059 of 2006, art. 7.

[6] *Id.* art. 5.

[7] *Id.* art. 6.

[8] The Korean Penal Code, art. 297.

[9] *See infra* text accompanying notes 13-19, 40-43.

[10] *See* YOUNG-HEE SHIM ET AL., KOREAN INST. OF CRIMINOLOGY, SEONGPOKRYEOK EUI SILTAE WA DAECHAEK E KWANHAN YEONKU [A STUDY OF SEXUAL VIOLENCE AND CRIMINAL POLICY] 88 (1990); IK-KI KIM ET AL., KOREAN INST. OF CRIMINOLOGY, KAJEONGPOKRYEOK EUI SILTAE WA DAECHAEK E KWANHAN YEONKU [A STUDY OF DOMESTIC VIOLENCE AND CRIMINAL POLICY] 108-9 (1992); SUNG-EON KIM, KOREAN INST. OF CRIMINOLOGY, SEONGPOKRYEOK EUI SILTAE WA WEONIN E KWANHAN YEONKU [A STUDY OF THE CURRENT SITUATION OF SEXUAL VIOLENCE AND ITS REASONS] 22 (1998).

The Penal Code refers to a rape victim simply as a "woman" [*boonyuh*].[11] It does not require that she be unmarried.[12] However, the majority view of Korean jurisprudence has firmly denied the existence of marital rape and maintained that a husband who commits rape can be punished only for battery or threat.[13] For instance, Professor Yim Woong has noted that, "A married couple has a duty of co-habitation in the Civil Code, which includes a duty of sexual intercourse, and the trouble of sexual life [sic] can be a reason for divorces. Thus, a rape against one's wife cannot be punished."[14] Korean jurisprudence, on the whole, seems to accept the old English theory that the marital contract includes the "irrevocable and implied consent" of a wife to sexual intercourse with her husband at his demand.[15]

In 1970, the Korean Supreme Court reversed the trial court's conviction of a man who had raped his wife.[16] The defendant forced his wife to have intercourse with him after she had filed for divorce and asked the authorities to punish him for adultery.[17] The Supreme Court reasoned that, because the wife had withdrawn her adultery accusation, the two had reconciled, and so a "substantial relationship as a couple" existed between the two; by this logic, the defendant had a right to have sexual intercourse with his wife.[18] Although this case did not explicitly assert that marital rape itself is not punishable, it has often been cited as a

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[11] As a result, forcible sexual intercourse against males is punished as a sexually indecent act by compulsion in Korea. The Korean Penal Code art. 297. Although in 2008 a bill was submitted in the National Assembly to include males in the category of rape victim (The Bill to Revise the Penal Code(submitted in August 26, 2008, Bill No. 738), arts. 297, 305, 339, 340(3)), it was not passed.

[12] The Korean Penal Code, art. 297.

[13] *See* JONG-DAE BAE, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 241 (6th ed. 2006); SUNG-KEUN CHUNG & KWANG-MIN PARK, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 159 (2002); IL-SU KIM & BO-HACK SUH, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 158 (6th ed. 2004); JAE-SANG LEE, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 158 (5th ed. 2004); JUNG-WON LEE, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 197 (revised ed. 2000); DONG-KWON SOHN, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 128-129 (2004); WOONG YIM, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 162 (revised ed. 2003).

[14] YIM, *supra* note 13, at 154.

[15] MATTEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN, Vol. 1 629 (Sollom Emlyn ed., 1778), recited in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESS 366 (7th ed. 2001).

[16] Decision of March 10, 1970 (70Do29) (Korean Supreme Court).

[17] Adultery is criminalized in Korea. *See* Kuk Cho, *The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, JOURNAL OF KOREAN LAW, VOL. 2, NO. 1, 81 (2002).

[18] Decision of March 10, 1970 (70Do29) (Korean Supreme Court).

precedent denying marital rape.[19] Korean law enforcement authorities have been reluctant to pursue perpetrators of marital rape and the Supreme Court has not readdressed the issue.

The efforts of the Korean women's movement to fight sexual and domestic violence have led to the two special Acts referred to above. Neither of the Acts, however, criminalizes marital rape. The Act for the Punishment of Sexual Violence of 1994 punishes rape by a relative, but its definition of "relative" excludes one's spouse.[20] The Special Act for the Punishment of Domestic Violence Crimes of 1997 does not include rape in the category of domestic violence crimes.[21]

Denying the criminality of marital rape is tantamount to giving a husband the unconditional right to control his wife's bodily integrity during the marriage.[22] A marriage license should not be a "license to rape,"[23] and the house of a married couple is not an extraterritoriality lying beyond the jurisdiction of criminal law. It is irrational and absurd to assume that a wife consents to humiliating and violent rape by her husband. It is also a cruel paradox that a husband who commits simple assault and battery is punishable by the Penal Code or the Special Act for Punishment of Domestic Violence Crimes of 1997,[24] but if he goes further and commits the more serious crime of rape, he is immune from prosecution.[25] A married woman should have the same right to control her own body as an unmarried woman. Even if a husband feels aggrieved by his wife's refusal to engage in sexual intercourse, he should seek relief in divorce courts rather than turning to rape.

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[19] *See* Bae, *supra* note 13, at 241; Chung & Park, *supra* note 13, at 159; Kim, *supra* note 13, at 158; Lee Jae-sang, *supra* note 13, at 158; Lee Jung-won, *supra* note 13, at 197; Sohn, *supra* note 13, at 129; Yim, *supra* note 13, at 162.

[20] The Act for the Punishment of Sexual Violence Crimes and Protection of Victims, art. 7.

[21] The Special Act for the Punishment of Domestic Violence, art. 2(3). In 1996, the UN Commission on Human Rights made "A Framework for Model Legislation on Domestic Violence" [(E/CN.4/1996/53/Add.2) (2 Feb. 1996), art. 11], explicitly including marital rape in the scope of domestic violence.

[22] State v. Smith, 426 A.2d 38, 44-45 (N.J. 1981); Weishaupt v. Commonwealth, 315 S.E.2d 847, 854 (Va. 1984).

[23] DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985).

[24] The Korean Penal Code, arts. 260, 283; The Special Act for the Punishment of Domestic Violence Crimes, art. 40.

[25] The Supreme Court has maintained that the defendant cannot be prosecuted for the crime of a simple assault and battery if the victim does not file a complaint. The reasoning is that the crime of rape includes the crime of a simple assault and battery, so if a victim does not file a complaint for rape, then she forfeits the right to file a complaint for the crime of a simple assault and battery. *See* Decision of May 16, 2002 (2002Do51) (Korean Supreme Court).

A minority position holds marital rape punishable if a couple is living apart, is legally separated, or has filed for divorce.[26] This also fails to protect a wife's right to bodily integrity, if, for example a woman is raped while living with her husband and has not filed for divorce.

Just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, regardless of whether they are separated or a divorce suit has been filed, he should not be able to invoke marital privacy to justify the rape his wife. The heinousness of rape demands that criminal law override marital privacy even before separation or the filing of a divorce suit. A wife who has expressed her wish to separate from her husband or to file a divorce suit against her husband because of marital rape is relatively active in asserting and maintaining her rights to bodily integrity. However, a wife who has failed to separate or to file a suit, despite marital rape, is likely to be in a more passive condition, and therefore in greater need of protection under the criminal law.

Another problematic minority argument is that non-habitual marital rape and marital rape that does not involve the use of weapons should not be punishable.[27] Here, a married woman's bodily integrity is not protected in cases where her husband is neither a habitual rapist nor uses weapons in committing the act. At most, I believe perpetrators of these kinds of marital rape should be sentenced more leniently than habitual marital rapists and marital rapists who use weapons.

Marital rape has been acknowledged throughout the world as a crime. For instance, the United States partially abolished the marital exemption in the late 1970s.[28] In the United Kingdom, the House of Lords abolished the exemption;[29] the term "unlawful" was removed from the definition of rape, which was "unlawful sexual intercourse."[30] Germany also criminalized marital rape in 1997 as part of the 33rd revision of the Penal Code.[31] The Declaration on the Elimination of Violence against Women, adopted by the U.N. General Assembly in 1993, explicitly states that marital rape is an example of violence against

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[26] SANG-KI PARK, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 149 (7th ed. 2008); JOON-HYUN CHO, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 128 (2002).

[27] Sang-don Lee, *Bubu Kangjechuhaeng Kwa Beop Jeongchaek [Sexually Indecent Act by Compulsion between Married Couple]*, CITIZENS AND LAWYERS, Oct. 2004, at 27.

[28] *See* Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 364-369 (1995); WAYNE R. LAFAVE, CRIMINAL LAW 780 (3rd ed. 2000).

[29] R. v. R., 3 W.L.R. (H.L. 1991).

[30] Criminal Justice and Public Order Act 1994, §142.

[31] The German Penal Code, art. 177.

women.[32] In 1999, the United Nations Human Rights Committee expressed concern that "marriage to the victims of rape provides a defense to the accused in Korea."[33]

In light of these considerations, I have argued that the marital exemption should be abolished to give every woman, married or unmarried, the freedom to control her own body.[34] This argument has attracted great attention from the Korean women's movement and Korean lawyers who support gender equality. Indeed, in 2004, the Seoul Central District Court found guilty a defendant, who, when his wife requested divorce, forcibly subjected her to a sexually indecent act, resulting in bodily injury.[35] Although this was not a rape case, the Court provided a significant rationale to deny the marital exemption:

> Married couples have a duty of sexual intercourse, but [spouses] have not waived their right to sexual autonomy. The right to sexual autonomy should be protected in a married relationship. Therefore, if one spouse commits sexual violence by forcibly violating the other's right to sexual autonomy, the violator should be criminally punished. In particular, the relationship between a married couple is difficult for others to intervene in, so such a crime may be repeated, requiring strict punishment.[36]

In 2005, two bills criminalizing marital rape were submitted in the National Assembly.[37] In 2009, the Pusan District Court reviewed a marital rape case where a Korean husband had forced sexual intercourse on his foreign wife by using a gas gun and knife, leading to the first judgment explicitly criminalizing marital rape.[38] The Court provided that

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[32] Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. No. 49 at 217, U.N. Doc. A/48/49 (1993).

[33] UN Human Rights Committee, Concluding observations of the Human Rights Committee: Republic of Korea. 01/11/99. CCPR/C/79/Add.114,§11.

[34] Kuk Cho, *Anae Anggan Eui Seongbu Wa Angganjwe Eui Pokhaeng Hyeopbak Eui Jeongd E Daehan Jaekeomto* [*Rethinking Marital Rape and the Resistance Requirement of Rape*], 2 HYEONGSA JEONGCAHEK [JOURNAL OF CRIMINOLOGY], 13 (2001); Kuk Cho, *Anae Kanggan Bulinjeong Eun Namseoun Nyeonhyang Eui Kwaso Beomjwehwa* [*Denial of Marital Rape is Male-centered Under-criminalization*], CITIZENS AND LAWYERS, Oct. 2004, at 27.

[35] Decision of August 20, 2004 (2003KoHap1178) (The Seoul Central District Court).

[36] *Id.*

[37] The Bill to Revise the Special Act for Punishment of Domestic Violence Crimes (submitted in June 13, 2005, Bill No. 2028), art. 2 (iii); The Bill to Revise the Act for Punishment of Sexual Violence (submitted on June 22, 2005, Bill No. 2091), art. 9-2.

[38] Decision of January 16, 2009 (2008KoHap808) (The Pusan District Court).

marital rape makes a spouse no more than "an object of inappropriate desire" and that sexual intercourse between spouses represents a "curse," rather than a "blessing," finding the marital exemption to be an "intolerable historical remnant in this civilized age."[39]

The two District Court decisions are no longer reviewable by the Supreme Court because the defendant in the Seoul Central District Court's case did not appeal the guilty judgment and the defendant in the Pusan District Court' case committed suicide after the guilty judgment. The two bills failed to pass in the National Assembly. These developments show, however, that Korean society has begun to take a woman's right to sexual autonomy more seriously.

B. Requirement of "Utmost Force/Threat": Rendering a Broad Range of Non-consensual Sex Unpunishable

The crime of rape requires "utmost force/threat" in Korea. This means that the force or threat of force in the crime of rape should be more severe than that required in the crime of battery or intimidation; the defendant must use "utmost force/threat" to "make the victim's resistance completely impossible or extraordinarily difficult."[40]

This interpretation is based on the variation in the severity of the penalties for the crimes of rape, battery, and intimidation. The penalty for rape is a minimum of three years' imprisonment, but the penalties for the crimes of battery and intimidation are a maximum of two years' imprisonment and a maximum of three years' imprisonment, respectively.[41] Therefore, it is alleged that this disparity in punishments reflects the view in Korean jurisprudence that the force/threat involved in rape is more severe and therefore more punishable than the other two crimes. The following statement has been reiterated in a number of Supreme Court decisions: "The defendant tried to have sexual intercourse with the victim simply by using physical force against her will. However, the force was not enough to make the victim's resistance completely impossible or extraordinarily difficult [t]herefore, the defendant's conduct

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[39] *Id.*

[40] *See* Bae, *supra* note 13, at 244; Chung & Park, *supra* note 13, at 160; Kim, *supra* note 13, at 159; Lee Jae-sang, *supra* note 13, at 159; Lee Jung-won, *supra* note 13, at 199; YOUNG-KEUN OH, HYEONGBEOP KAKRON [CRIMINAL LAW: SPECIFIC PART] 169 (2005); Yim, *supra* note 13, at 163. Also, *see* Decision of February 13, 1979 (78Do1792); Decision of November 8, 1998 (88Do1628); Decision of May 28, 1991 (91Do546); Decision of September 21, 1999 (99Do2608).

[41] The Korean Penal Code, arts. 260(1), 283(1), 297.

does not constitute rape."[42]

In 1993, the Supreme Court reversed a guilty verdict of rape resulting in injury. In this case, the defendant brought the victim into a hotel room after drinking and dancing together. He then locked the door, threatened her by saying he was from the Military Academy, and would kill her if she left, and, against her will, tried to have sex with her. When he went to the bathroom, she jumped from the window and was seriously injured. The Supreme Court held that the force the defendant used was "relatively minor as means to rape," so he was found not guilty.[43]

This requirement conceptually limits the scope of the definition of rape, leaving perpetrators of a broad range of non-consensual sex acts immune to prosecution. Under current jurisprudence, undisputed evidence that a woman said "no" to sexual advances is insufficient to establish that a rape has occurred, because if the defendant used force/threat of a degree that did not reach that of "utmost force/threat," he cannot be found guilty. Yet, maintaining that forcible sex without the victim's consent does not constitute rape denies a woman's right to sexual autonomy. For these reasons, the minority opinion in Korean jurisprudence has argued that rape should be punishable if the defendant has used the same level of force/threat that would be punishable in the crimes of battery or intimidation.[44]

The difference in severity of the penalties for rape, battery, and intimidation does not justify heightening the degree of the force/threat that is necessary to establish the crime of rape. Rape is punished more harshly than battery or intimidation because it violates a person's right to sexual autonomy, not because it can be done only by "utmost force/threat."

The definition of the requirement of "utmost force/threat" does not address whether the victim's resistance is typically required to constitute rape. By definition, it assumes that the victim may not even be able to resist due to the offender's force/threat. However, the victim's

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[42] *See* Decision of November 8, 1988 (88Do1628) (Korean Supreme Court); Decision of December 11, 1990 (90Do2224) (Korean Supreme Court); Decision of May 28, 1991 (91Do546) (Korean Supreme Court); Decision of April 14, 1999 (92Do259) (Korean Supreme Court); Decision of September 21, 1999 (99Do2608) (Korean Supreme Court); Decision of April 27, 2001 (2001Do230) (Korean Supreme Court); Decision of October 30, 2001 (2001Do4462) (Korean Supreme Court); Decision of June 25, 2004 (2004Do2611) (Korean Supreme Court).

[43] Decision of April 27, 1993 (92Do3229) (Korean Supreme Court). The Court also held that the defendant was not responsible for the victim's injury for he could not have anticipated that she would jump from the window to escape the room.

[44] Park, *supra* note 26, at 151.

resistance is often considered a crucial criterion when the courts review whether the requirement is met.

When delivering a "not-guilty" judgment, the Korean Supreme Court has often noted that the victim did not actively resist, yell for help, or attempt to escape.[45] When determining whether the victim consented to sexual activity, the Court often scrutinizes what the victim did to exhibit resistance. In a 1999 case, for instance, the defendant was drinking with a female friend, after which they went to a hotel room to rest. After shaking her, which inhibited her ability to explicitly reject his advances, the defendant had forced sexual intercourse with her. The Court focused on the fact that the victim did not attempt to escape from the room or shout for help and found the defendant not guilty.[46] The Supreme Court's stance seems to underestimate the fear and dread that a victim experiences when facing a rapist. These decisions are likely to place an undue burden on the victim to prove the strength of her resistance,[47] requiring that all women react to rape in a uniform and stereotypical manner, and to cast doubt on victims who do not resist.

The Korean legislature and judiciary should refer to the following provisions of the Rules of Procedure and Evidence of the newly established International Criminal Court:

> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.[48]

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[45] *See* Decision of September 21, 1999 (99Do2608) (Korean Supreme Court); Decision of December 11, 1990 (90Do2224) (Korean Supreme Court).

[46] Decision of September 21, 1999 (99Do2608) (Korean Supreme Court).

[47] In the United States, the "utmost resistance requirement" has been abolished in states due to the "Rape Reform Movement" since the mid 1970s. A majority of states abolished the "resistance requirement" itself. The remaining states loosened it, requiring "earnest resistance" or "reasonable resistance" is necessary to constitute rape. *See* Kathleen F. Cairney, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291, 297-99 (1995).

[48] The Rules of Procedure and Evidence of the International Criminal Court, Rule 70-71.

Also crucial is the UN Human Rights Committee's criticism in 1999 of the manner in which many judicial systems handle rape, noting that it is wrong to insist that "the offense of rape requires evidence of resistance by the woman."[49] Although in 2008 a bill was submitted in the National Assembly to criminalize non-consensual sexual intercourse obtained by using less than "utmost force/threat," it did not pass.[50]

However, it is noteworthy that in a few recent rape cases the Supreme Court has interpreted the "utmost force/threat" requirement less strictly although it has maintained the requirement itself. In a 2007 case, the defendant forced sexual intercourse upon a married woman several times by threatening to send photographs of their affair to her husband and family.[51] The Supreme Court quashed the lower court's not guilty judgment, interpreting the defendant's threat as meeting the "utmost force/threat" requirement.[52] In a 2008 case, the defendant, a powerfully built 27-year-old male, had sexual intercourse with a much smaller 15-year-old girl, despite her explicit refusal, in a motel room after a night of group drinking.[53] The Supreme Court quashed the lower court's non-guilty judgment, providing that even though the defendant did not use extra force for sexual intercourse with the victim, other than lying on her, she was scared and overwhelmed by him and that he violated her free will, thus constituting rape.[54]

C. *Requirement of Victim's Complaint: Procedural Barrier Acts to Shield Rapists*

The crimes of rape, "sexually indecent act[s] by compulsion," "quasi-rape," or "quasi-sexually indecent conduct" by taking advantage of another's unconsciousness or inability to resist, sexual intercourse with a minor or a mentally or physically handicapped person by using fraud, threat or force, and sexual intercourse with a minor under thirteen years old in the Penal Code can be punished only when a victim files a complaint.[55] This means that a perpetrator of sexual violence cannot be prosecuted without a complaint by the victim. Therefore, although the

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[49] UN Human Rights Committee, art. 11.

[50] The Bill to Revise the Penal Code (submitted in August 26, 2008, Bill No. 738), art. 297(1)(2).

[51] Decision of January 25, 2007 (2006Do5979).

[52] *Id.*

[53] Decision of July 24, 2008 (2008Do4069) (Korean Supreme Court).

[54] *Id.*

[55] The Korean Penal Code, art. 306. The more serious sex crimes in the Act for Punishment of Sexual Violence Crimes and Protection of Victims can be punished without such a complaint. *See* The Act for Punishment of Sexual Violence Crimes and Protection of Victims, art. 15.

abuser may be under investigation, there is no prosecution if the victim does not file a complaint.

The rationale for the complaint requirement is to protect the victim's privacy and honor.[56] However, this requirement has been criticized for having the negative practical effect of concealing and encouraging sexual violence.[57] Male-centered sexual norms persist in Korean society: a female victim of a sex crime is blamed, and it is not easy for a woman to fight against a male offender in a criminal proceeding.[58] In the majority of sexual violence crimes, the victim never files a complaint.[59]

The complaint requirement often makes investigators hesitant to pursue an investigation and leaves the victim vulnerable to contact and coercion by the perpetrator, his family members, or his attorney, all of whom may insist that the victim reconcile with the perpetrator instead of filing a complaint. After committing a sex crime, a perpetrator will often taunt the victim by pointing out that filing a complaint would amount to a public announcement that she had been raped.

Although it is true that the victims of sex crimes often do not want to make their cases public, it is a dereliction of duty for a State and its Justice system not to punish those who have committed a serious crime. The complaint requirement may be implicitly interpreted as a legal message that the State and its Judiciary are not eager to punish sexual violence and would prefer private reconciliation. The victim's privacy should certainly be protected, though not by blocking investigation and prosecution, as the complaint requirement does, but by providing a system to prevent re-victimization during the investigation and trial.[60] Although a bill was submitted in the National Assembly in 2008 to abolish the complaint requirement, it did not pass.[61]

D. Conclusion

Current Korean rape law is biased in favor of males, and greatly in need of reform. Neither the Legislature nor the Judiciary has taken any

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[56] *See* Bae, *supra* note 13, at 247; Chung & Park, *supra* note 13, at 162; Kim, *supra* note 13, at 162; Lee Jae-sang, *supra* note 13, at 161; Oh, *supra* note 40, at 174; Sohn, *supra* note 13, at 132; Yim, *supra* note 13, at 166.

[57] Park, *supra* note 26, at 157; SHIM ET AL., *supra* note 10, at 206; CHOI IN-SUP, KANGKANBEOM EUI SILTAE E KWANHAN YEONKU [A STUDY OF THE CURRENT SITUATION OF THE CRIME OF RAPE] 191 (1992).

[58] SHIM ET AL., *supra* note 10, at 90.

[59] *Id.* at 90.

[60] *See infra* text accompanying notes 70-86.

[61] The Bill to Revise the Penal Code (submitted in August 26, 2008, Bill No. 738), art. 306.

significant steps to revise the law and, as a result, women are second-class citizens who are not fully protected under the criminal law.

However, the Korean women's movement has energetically tried to reform current rape law to eliminate inequities. Recent court decisions give some indication that judicial opinion is becoming more favorable to women's rights. As a result, awareness seems to be developing in Korean society that what matters in the prosecution of rape is not whether the victim was the defendant's legal spouse, or whether the victim resisted, but whether the victim's right to sexual autonomy was violated. In this sense, rape law in Korea is making progress towards a more gender-neutral and equitable form.

III. RAPE VICTIMS ARE NOT FULLY PROTECTED BY THE CRIMINAL PROCESS

A. Rape Victims as Suspected "Flower Snakes"

When a rape victim files a complaint to punish the offender, she normally expects that the criminal justice system will take care of her. However, the reality is that another ordeal—the investigation and trial—is waiting for her. Through the criminal justice process she often encounters distrust and suffers further trauma. A casual survey of case law suggests that in most instances where a victim has been badly injured or raped by a group of offenders, or in which others have witnessed the rape, there is little difficulty convicting the defendant. However, in many cases where a victim was lightly injured, was raped by an acquaintance, or has no witnesses, the victim and the offender present contradictory arguments during the investigation and trial. The victim's difficulties are further exacerbated by the fact that women who suffer from "rape trauma syndrome"[62] tend to make inconsistent statements and present confusing positions, while offenders strongly and consistently argue their innocence. This can call the victim's account of the incident into doubt and lead people to label the victim a "flower snake" [*kkotbaem*]–a woman making a false extortionary claim.

The investigation and trial tend to further degrade and traumatize the victim. First, investigators ask a rape victim a number of unnecessary questions in a manner that tends to worsen her trauma and cast doubt on her trustworthiness. For instance, a rape victim is often asked if she has ever had previous sexual experiences, how she felt when being raped, and

[62] Ann W. Burgess & Lynda L. Holmstrom, *Rape Trauma Syndrome,* 131 AM. J. PSYCHIATRY 981 (1974).

if she fully resisted.[63] Second, in a trial, the victim often has to face and confront her assailant(s). The defense attorneys attack her credibility and integrity by putting on display her dress, occupation, sexual history, and sexual preferences.[64] Many victims find the trial almost as degrading as the rape itself, about which Morrison Torrey has remarked that "in many rape prosecutions the victim, for all practical purposes, becomes a pseudo-defendant." [65] It is thus not surprising that rape is an underreported crime.[66]

An analysis of the Korean socio-cultural environment demonstrates that placing a rape victim on trial along with the defendant can be traced to existing male-centered rape myths in Korean society. For instance, it is a popular belief that when a woman says "no," she often really means "yes;" that women fantasize about rape; that decent women do not get raped; that if a woman really wants to prevent a rape, she can; that women who have "bad character" or many sexual experiences deserve to be raped or have seduced men to rape them; that women frequently fabricate charges of rape to exact revenge against men or because women fear blame by parents, husbands, or lovers, and so forth.[67] This attitude also features in sayings common among men, such as, "a moving needle cannot be penetrated by a thread." In this context, Aviva Orenstein's observations about women who come forward also characterize the Korean justice system: "Women who 'cry rape' are not believed. Even women who eschew the cry and calmly report sexual violence are not believed (because they don't behave like real victims). Women are disbelieved because they delay reporting rape. Those who report promptly are suspected of malice or delusion."[68]

Such rape myths call into question and degrade a woman's integrity and justify the violation of a woman's right to sexual autonomy.

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[63] CHUNG HYUN-MEE, SEONGPOKRYEOK HYEONGSAJEOLCHA SANG PIHAEJA BOHO [A STUDY OF THE PROTECTION OF SEXUAL VIOLENCE VICTIMS IN CRIMINAL PROCESS], 96-118(1999).

[64] Park Sun-mee, *Yeoseonghak Jecok Kwanjeom Eseo Bon Kanggan Beomchwe Eui Chaepan Kwajeong [The Trial Process of Rape from Standpoint of Women's Studies]*, 14 HYEONGSA JEONGCAHEK [JOURNAL OF CRIMINOLOGY], 300-308, 310-312 (1989).

[65] Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1059 (1991).

[66] *See* SHIM ET AL., *supra* note 10, at 90.

[67] American society seems to have similar myths. For instance, the Model Penal Code states: "Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say 'no'." [Model Penal Code, sec. 213.1 Comment. 4 (1980)]. *See, also* Torrey, *supra* note 57 at 1015; Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 808-810 (1996).

[68] Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trial*, 49 HASTINGS L.J. 663, 664 (1998).

Yet these myths are refuted by available data. Very few rape cases result from provocation by a woman; rather, most rapes are intentionally committed by offenders.[69] Rape is not only committed against "indecent" women; rather, it is indiscriminately committed against all classes, groups, and ages of women.[70]

Those who imply that women are prone to making false accusations of rape fail to explain why this point is not supported by statistics. The reality is that rape is greatly underreported due to the victim's fear of retaliation or public exposure, and concern about suffering during the criminal process,[71] even if a small number of false accusations may be leveled by "flower snakes." Moreover, skeptics have not demonstrated why women would be more prone to fabricate charges of rape than men are to falsely accuse people of other crimes.

B. The 1993 Special Act to Provide Mental and Psychological Stability for the Victims in Criminal Process

The Korean women's movement has actively criticized these problems. In 1998, the Korean Women's Association United released "The Charter for the Rights of Sexual Violence Victims," requesting that the following nine rights be guaranteed to rape victims: (i) the right to be recognized and treated as a victim irrespective of occupation, age, sexual history and relationship with the offender; (ii) the right to be questioned only about the case; (iii) the right not to be questioned about sexual history; (iv) the right to have her identity concealed when filing a complaint; (v) the right to request her security; (vi) the right to have her family, attorney, or counselor sit with her in the process of investigation and trial; (vii) the right to request a closed trial to protect her privacy and psychological stability; (viii) the right to request the offender not be present in court if so doing will alleviate her mental suffering in giving testimony; and (ix) the right to seek compensation for psychological, bodily and economic damage.[72]

Due to strong lobbying by the Korean women's movement, the Act for the Punishment of Sexual Assault Crimes and Protection Victims

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[69] Chung Kyung-ja, *Seongpokryeok Pihae Hyeonhwang Kwa Keu Daechaek* [*The Current Situation of Damages from Sexual Violence and Policy to Solve Them*], 2 PIHAEJAHAK YEONKU [JOURNAL OF VICTIMOLOGY], 77 (1993).

[70] SHIM ET AL., *supra* note 10, at 115-118; Chung Hyun-mee, *supra* note 61, at 27-28.

[71] SHIM ET AL., *supra* note 10, at 90.

[72] *See* http://www.women21.or.kr/. (Last visited February 19, 2009).

(hereinafter "the Act") was passed in 1993.[73] Subsequent revisions of the Act have heightened the penalty for crimes of sexual violence and given rise to a number of new systems to protect victims of sexual violence. Let us review the newly established protection system for the victims.

First, prosecutors and police officers have a duty to avoid infringing on the privacy of victims and to minimize the number of unnecessary investigations.[74] In cases where the victim is under the age of sixteen or lacks mental capacity, prosecutors and police officers videotape the victim's statement and the investigation process.[75] In cases where the crime is an aggravated one, such as rape committed in the course of burglary or robbery, or rape committed by a group of more than two persons or with weapons, prosecutors and police officers may allow "a person who has a reliable relationship with the victim" to sit with the victim during the investigation.[76] A "person who has a reliable relationship with the victim" is interpreted to include the victim's family members, friends, and practicing counselors.

Second, the court may decide on its own, or at the request of the victim, to conduct a closed trial.[77] In the above aggravated sexual violence crimes,[78] the court allows "a person who has a reliable relationship with the victim" to sit with the victim during the trial.[79] Furthermore, when examining the victim about the basic sexual violence crimes in the Penal Code[80] and the aggravated sexual violence crimes,[81] the court may use video or closed-circuit television facilities to ensure that the victim does not face her offender during the examination.[82]

C. *What More Needs to Be Done?—The Introduction of a "Rape Shield" Law*

Despite all of the benefits of the new legislation, the Act does not include provisions prohibiting irrelevant and repetitive questioning of victims or restricting the admission of evidence concerning the victim's prior sexual conduct and predisposition during a trial. Although the Rules

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[73] *See supra* note 3.
[74] The Act for Punishment of Sexual Violence Crimes and Protection of Victims, art. 21(1)-(3).
[75] *Id.* at. 21-3(3).
[76] *Id.* at 22-3(2).
[77] *Id.* at 22(1)-(2).
[78] *See supra* text accompanying note 74.
[79] The Act for Punishment of Sexual Violence Crimes and Protection of Victims, at 22-3(1).
[80] The Korean Penal Code, arts. 297-303, 305.
[81] *See supra* text accompanying note 74.
[82] The Act for Punishment of Sexual Violence Crimes and Protection of Victims, at 22-4(1).

of Criminal Procedure generally prohibit "threatening or insulting examination" and "defaming examination,"[83] these provisions have not been applied to prevent defense attorneys from launching hostile attacks against the victims of crimes of sexual violence. Hence, additional and more specific legislation is necessary to ensure that rape trials focus on the defendants' violation of the victims' right to sexual autonomy, rather than becoming inquisitions into the victims' sexual behavior.

The "rape shield" laws in many common law jurisdictions can act as an appropriate reference point. Since the first "rape shield" statute was passed in Michigan in 1974, the majority of American states have enacted some form of a rape shield statute.[84] These laws limit the admissibility of evidence in the form of opinion, reputation, and specific instances relating to the victim's sexual conduct.[85] England, Canada, and Australia have followed the U.S. in this regard.[86] The Rules of Procedure and Evidence of the newly established International Criminal Court also provide similar provisions, noting that: "Credibility, character, or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness."[87] It is necessary for the Korean legislature or judiciary to take this legal trend very seriously.[88]

IV. NON-ALLOWANCE OF JUSTIFICATION OR EXCUSE OF BATTERED WOMEN'S KILLING OF ABUSIVE MEN

Domestic violence committed by a husband or male partner has long been a hidden crime because of a male-centered, patriarchal bias within Korean culture, an attitude evident in dated and vulgar aphorisms sometimes circulated among males, such as, "Wives and dried cods should be beaten every day to make them soft."

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[83] The Rules of Criminal Procedure [*hyeongsa sosong kyuchik*], Law No. 828, December 31, 1982, last revised on August 20, 2004, as Law No. 1901, arts. 74(2)(i), 77.

[84] *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1985-1986); Andrew Z. Soshnick, *Comment, The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. CRIM. L. & CRIMINOLOGY 644 (1987-1988).

[85] *See* Mich. Comp. Laws Ann. Art. 750.520j(1)(a) & (1)(b) (West 1991); N.J. Stat. Ann. Art. 2C:14-7(West 1994); Cal. Evid. Code Art. 782, 1103(c) (West 1995).

[86] Youth Justice and Criminal Evidence Act 1999, §41 (Eng.); Criminal Code §§276-277, R.S.C. 1985, ch. C-46 (Can.); Crimes Act, 1990, §409 (Austl. N.S.W.).

[87] The Rules of Procedure and Evidence of the International Criminal Court, Rule 70-71.

[88] In Korea, it is expected that introduction of a "rape shield" law would face criticism on the grounds that it may violate the defendant's right to full cross-examination. It would also be constitutionally controversial to strip courts of their discretion to determine the relevancy of sexual conduct evidence on a case-by-case basis.

It was not until the late 1980s, after Korea became a democracy, that domestic violence came to be viewed as a serious human rights issue. Although the Special Act for the Punishment of Domestic Violence Crimes, passed in 1997,[89] requires law enforcement authorities to intervene more actively in domestic violence and to establish a variety of sanctions to deter the offenders, domestic violence in Korea persists.[90] Due to a lack of societal protection and support for women, there have been a number of cases where a battered woman has killed her husband or partner.[91] As of July 2005, 53% of women serving life sentences were convicted for killing their spouses.[92] Korean jurisprudence has been very reluctant to recognize the defense of battery as justification or excuse for such killings.

A. Limitation of Self-defense in Confrontational Situations: Theory of "Socio-ethical Limitation of Self-defense"

Article 21(1) of the Korean Penal Code stipulates: "Not punishable is the self-defense that is appropriate to ward off a present, wrongful attack from oneself or another."[93] Besides Article 21(1), which justifies self-defense, the Penal Code also provides two Articles to excuse "excessive self-defense" when the actor exceeds the limits of defensive action, "in a state of fear, fright, stimulation or confusion in the night or under [an] unstable situation."[94] Korean criminal jurisprudence strictly distinguishes "justification" from "excuse." "Justification" removes the illegality of certain acts, while "excuse" does not, but instead makes acts unpunishable or mitigates punishment.[95]

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[89] The Special Act for the Punishment of Domestic Violence, art. 2(3).

[90] According to the research by Korea Institute for Health and Social Affairs in 1998, domestic violence committed by a husband upon his wife occurred in 5.6% of households annually. *See* KIM SEUNG-KWON & CHO AE-JEO, HANKUK KAJEONG POKRYEOK EUI KAENYEOM CHEONGRIB KWA SILTAE E KWANHAN YEONKU [A STUDY OF THE ESTABLISHMENT OF CONCEPT OF DOMESTIC VIOLENCE AND THE CURRENT SITUATION OF DOMESTIC VIOLENCE] 12 (1998).

[91] *See* Han In-sup, *Kajeong Pokryeok Pihaeja Eui Kahaeja Salhae* [*Domestic Violence Victims' Killing of Domestic Violence Offenders*], 37 SEOUL DAEHAKKYO BEOPHAK [SEOUL LAW REVIEW], No. 2 (1996).

[92] Han In-sup, *Yeoseong Muki Suhyeongja e Daehan Hyeongsa Jeclcha Mit Siseol Nae Cheowu* [*Criminal Process and Prison Treatment regarding Female Lifetimers*], 16 HYEONGSA JECONGCHAEK YEON KU [KOREAN CRIMINOLOGICAL REVIEW] 205 (2005).

[93] The Korean Penal Code, art. 21(1).

[94] *Id.* art. 21(2)(3).

[95] *See* BAE JONG-DAE, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 146 (8th ed., 2005); CHUNG SUNG-KEUN & PARK KWANG-MIN, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 82-83 (2001); KIM IL-SU & SUH BO-HAK, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 100 (11th ed., 2006); LEE JAE-SANG, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 69-70 (5th ed., 2003); LEE JUNG-WON, HYEONGBEOP

The requirement of "appropriateness" is a vital consideration in cases where a battered woman kills her husband or partner in a confrontational situation. The Korean Supreme Court has decided that the "appropriateness" test should include consideration of the background, purpose, means, and intention of the defensive act.[96] At the same time, Korean jurisprudence dictates that self-defense requires neither retreat before defending oneself against the attacker nor deep consideration of the proportionality of the defense.[97] In 1989, the Supreme Court affirmed the legality of self-defense taken by a woman who bit her male attacker's tongue hard enough to cut it when he and his accomplice attacker grabbed and forcefully kissed her.[98]

However, this defense has not been applied to the scenario in which a battered woman kills her husband or partner in a confrontational situation. In a 1994 case, the Supreme Court upheld a guilty judgment against a female defendant who killed her abusive husband.[99] On the day of the killing, the defendant's husband, who had frequently beaten her, stripped her clothes off and bit her severely, then repeatedly pointed a knife at her neck, threatening to kill her and then himself. Struggling to grab his hands, she stabbed him in the neck with the knife. After he pulled the knife out and dropped it, he came towards her. She then picked up the knife and killed him. The Court held that the killing was "difficult to be considered as self-defense even if she thought there was a possibility that he may [have] attack[ed] her again."[100]

In a 2001 case, the Supreme Court upheld the guilty verdict of another female defendant who killed her violent husband.[101] The defendant had separated from her husband and filed a divorce suit against him on the grounds that he had beaten her and forced her to have perverted sex with him. On the day of the killing, the defendant's husband visited her and asked her to drop the suit. When she refused, he

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CHONGRON [CRIMINAL LAW: GENERAL PART] 68-69 (revised ed., 1999); OH YOUNG-KEUN, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 95-96 (2005); PARK SANG-KI, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 73-74 (7th ed, 2007); SHIN DONG-WOON, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 78 (3rd ed. 2008); SOHN DONG-KWON, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 64 (2004); YIM WOONG, HYEONGBEOP CHONGRON [CRIMINAL LAW: GENERAL PART] 68 (revised ed. 2002).

[96] Decision of June 24, 1984, 84Do242 (Korean Supreme Court).

[97] *See* Bae, *supra* note 93, at 348-352; Chung & Park, *supra* note 93, at 231; Kim & Suh, *supra* note 93, at 297-298; Lee Jae-sang, *supra* note 93, at 226-227; Lee Jung-won, *supra* note 93, at 176; Oh, *supra* note 93, at 329-331; Park, *supra* note 93, at 175-176; Sohn, *supra* note 93, 156-157; Yim, *supra* note 93, at 217-220.

[98] Decision of August 8, 1989 (89Do358) (Korean Supreme Court).

[99] Decision of March 22, 1994 (93Do3336) (Korean Supreme Court).

[100] *Id.*

[101] Decision of May 15, 2001 (2001Do1089) (Korean Supreme Court).

pointed scissors at her neck and forced her to perform oral sex, saying, he would kill her if she divorced him. When she refused his request for vaginal sex, he beat her, shouting that he would kill her if she did not listen to him. The defendant then killed him with a knife hidden under her bed. The Court held that the defendant's act was, "beyond the extent of a defensive act, and so as a general rule goes against society."[102]

In these cases, the Supreme Court did not provide detailed explanations for why the defendants' actions were not appropriate or justifiable from the standpoint of "generally accepted social concept[s];" it also did not show why the defendants' acts did not constitute "excessive self-defense" even if they were not "appropriate."[103] Without considering whether she might be excused, the Court jumped to the conclusion that the defendant's killing was not defensive, and held that it was not justifiable.

Legal scholars offer a theoretical explanation for these decisions based on a "socio-ethical limitation of self-defense," which reasons that in extraordinary self-defense situations, one must retreat before exercising self-defense, that when exercising self-defense one needs to do so in a manner proportionate to the threat, and that the court needs to deter the abuse or excessive use of self-defense against infants, mentally handicapped persons, and one's spouse or family members.[104] However, if this theory is applied to the case of a woman killing an abusive male in a confrontational situation, it can create serious problems.[105] The limitation of self-defense between married or cohabitant couples will yield the bizarre result of benefiting the aggressor. A male who has repeatedly abused his wife or partner does not deserve the protection afforded by this theory, and a battered woman should be entitled to exercise her full right of self-defense against an abusive male. In this sense, it is unfair and gender-biased to request that a battered woman refrain from exercising her right to self-defense because the attacker is her husband or partner.

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[102] *Id.*

[103] The Korean Penal Code, art. 21(1)-(3).

[104] *See* Bae, *supra* note 93, at 352-354; Chung & Park, *supra* note 93, at 232; Kim & Suh, *supra* note 93, at 298-303; Lee Jae-sang, *supra* note 93, at 228-233; Lee Jung-won, *supra* note 93, at 176-177; Sohn, *supra* note 93, at 159-163; Yim, *supra* note 93, at 220-227.

[105] Kim & Suh, *supra* note 93, at 302; Park, *supra* note 93, at 183; Sohn, *supra* note 93, at 162.

B. *Denial of Self-defense and Necessity Defense in Non-confrontational Situations*

Battered women do not always kill abusive husbands in the context of a confrontational situation. Such a killing can also happen in a non-confrontational situation, for instance, while the attacker is sleeping after beating the victim. This is because a victim of spousal abuse is often physically weaker than the abuser and would be subject to severe violence if her self-defense occurred in a confrontational context.

The Korean Supreme Court has rejected a self-defense argument made by a female defendant with respect to a non-confrontational context. The Korean Penal Code provides the "present attack" requirement for self-defense, ensuring that self-defense claims will be allowed only when serious harm is imminent.[106] In other words, preemptive self-defense is not allowed. The requirement prevents the claim of self-defense from being applied to a non-confrontational situation because the batterer was not attacking his victim at the precise moment she killed him. Moreover, a killing done by a woman in a non-confrontational situation does not fulfill the "appropriateness" requirement because, it is argued, she could have run away from her abuser or reported the situation to law enforcement agents instead of killing the abuser. For instance, in a notorious 1992 case where a girl killed her sleeping stepfather who had repeatedly raped and abused her since the age of twelve, the Supreme Court rejected the girl's self-defense argument, finding that the killing was not appropriate, and upheld a guilty verdict.[107]

The Supreme Court and the majority of Korean criminal law scholars have never acknowledged the "battered woman syndrome," a theory supporting the reasonableness of the battered woman's belief that she was in imminent danger of death or serious bodily injury.[108] A few Korean scholars have argued against the majority that the "present attack" requirement for self-defense can be met in a non-confrontational situation

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[106] The Korean Penal Code, art. 21(1).

[107] Decision of December 22, 1992 (92Do2540) (Korean Supreme Court).

[108] This theory was first established in Lenore E. Walker, THE BATTERED WOMAN (1979). The "battered woman syndrome" has been acknowledged in the court since the decision of State v. Kelly in 1984[478 A.2d 364 (N.J. 1984)]. Other common law jurisdictions also accepted it. *See* Alexander L. Wannop, *Survey: Battered Woman Syndrome and the Defense of Battered Women in Canada and England*, 15 SUFFOLK TRANSNAT'L L. REV. 251 (1995); Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R. v. Lavallee*, 47 U. TORONTO L.J. 1 (1997); Julie Stubbs & Julia Tolmie, *Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome*, 23 MELBOURNE U.L. REV. 709 (1999).

by accepting the implications of "battered woman syndrome" and extending the scope of a "present attack."[109]

On the other hand, the Korean Supreme Court and the majority of Korean criminal law scholars have not even tried to apply the "necessity defense" in Article 22(1) of the Korean Penal Code to a killing by a battered spouse in a non-confrontational situation. The "necessity defense," derived from German criminal law is another justification, or excuse, defense.[110] It provides: "Not punishable is the act that is appropriate to escape oneself or another from a present danger."[111] The concept of "present danger" in a necessity defense is broader than that of "present attack" in self-defense, so it does not require the defendant to be under present attack.[112]

In short, neither the Korean Supreme Court nor Korean criminal law jurisprudence have seriously considered the trauma that a battered woman suffers and how it affects the reasonableness of her belief that she is in present danger of attack. It must be recognized that repeated and long-standing domestic violence is a "slow homicidal process,"[113] and the courts must revise their traditional definition of self-defense in cases where a woman kills to escape from what one scholar has called the "regimes of private tyranny."[114]

V. CONCLUSION

Since Korea became a political democracy, the Korean criminal justice system has successfully achieved a "criminal procedure revolution,"[115] adopting the principles behind *Miranda v. Arizona,*[116] *Massiah v. U.S.*,[117]

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[109] Han In-sup, *supra* note 89, at 279-285; Park, *supra* note 93, at 171.

[110] The German Penal Code, art. 54.

[111] The Korean Penal Code, art. 22(1).

[112] *See* Bae, *supra* note 93, at 285; Chung & Park, *supra* note 93, at 231; Kim & Suh, *supra* note 93, at 325-326; Lee Jae-sang, *supra* note 93, at 221; Lee Jung-won, *supra* note 93, at 176; Oh, *supra* note 93, at 368; Yim, *supra* note 93, at 218.

[113] ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 77 (2002).

[114] Jane Maslow Cohen, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?* 57 U. PITT. L. REV. 757 (1995-1996).

[115] *See* Kuk Cho, *The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L L. & POL'Y 377 (2002); Kuk Cho, *The Ongoing Reconstruction of Korean Criminal Justice System*, 5 SANTA CLARA J. INT'L L. 1 (2006).

[116] Miranda v. Arizona, 384 U. S. 436 (1966). *See* Decision of June 26, 1992 (92Do682) (Korean Supreme Court). This case is popularly called the "20th Century Faction Case" because the defendant was a leader of a criminal organization called "20th Century Faction" (*Yisip Seki Pa*).

and *Mapp v. Ohio*[118] to strengthen the procedural rights of defendants. The rights of criminal suspects and defendants are currently taken seriously in Korea, and legislative and judicial endeavors to control the investigative authorities' overriding power are evident.

However, the voices and perspectives of women are noticeably absent from this "revolution." In rape law, the right to sexual autonomy is not taken seriously. The marital exemption completely ignores a married woman's right to sexual autonomy; the requirement of "utmost force/threat" means that, to be believed, all women must react to rape in a uniform and stereotypical manner; the credibility of victims who do not appropriately resist their attackers is undermined. In reality, the requirement that a victim must file a complaint in order for a rapist to be prosecuted conceals and encourages sexual violence. In the criminal justice process, rape victims are often doubted and considered as "flower snakes" making false claims, and are often traumatized by questions and examinations that attack their credibility and integrity. Finally, the killing of an abusive and battering male by his female victim is deemed unjustifiable under all but the most stringent circumstances.

Although Korea, as a member of the Organization for Economic Cooperation and Development, enjoys the status of being among the world's fifteen largest economies in terms of domestic product and is a political democracy, women's human rights are not seriously protected by its criminal justice system. Strenuous domestic efforts and international attention are needed to improve this situation. The Korean criminal justice system thus needs another kind of "revolution"–one which would allow it to fully address and embrace the impassioned pleas of women.

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[117] Massiah v. U.S., 377 U.S. 377 U.S. 201 (1964). *See* Decision of Aug. 24, 1990 (90*Do*1285). This case is popularly called the "Legislator Seo Kyeong-Weon Case"; Decision of Sept. 25, 1990 (90Do1586) (Korean Supreme Court). This case is popularly called the "Artist Hong Seong-Dam Case."

[118] Mapp v. Ohio, 367 U.S. 643 (1961). *See* Decision of Nov. 15, 2007 (2007Do3061) (Korean Supreme Court). This case is popularly called the "Governor Kim Tae-Hwan Case."