

**A socio-legal analysis of the development and use of  
compulsory pharmacological treatment of sex  
offenders in South Korea**

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### **Abstract**

The compulsory pharmacotherapy of sex offenders in Korea was initiated by the Pharmacological Treatment of Sex Offenders Act 2010. This Act's legal defects are frequently discussed, but most recent studies do little to explain why such flaws are created. This thesis aims to provide a socio-legal analysis of the introduction and development of the pharmacotherapy of sex offenders in Korea, focusing on the reason for and background to the introduction of compulsory pharmacotherapy, which have hardly been discussed. This study will explore why such legal defects have occurred and how these flaws can be improved by looking into the social context in which this Act was introduced. To do this, the study has employed literature review, documentary analysis and doctrinal research, and has examined media reporting, parliamentary records, government reports and academic papers.

This thesis analyses the historical, legal and cultural context that has influenced the perceptions of sexual violence in Korea. The lower social status of women and the historically low awareness about sexual offending have been influenced by Confucian patriarchal thought. This study has explored the background of the initial legislative changes towards sexual violence that resulted in the enactment of the Punishment for Sex Offenders and Protection of Victims Act 1994. This act came about because of the work of feminist activists in Korea, and the role of these groups is explored pushing the government to develop policies for the protection of victims, rather than harsher punishment such as pharmacotherapy, but their voices were ignored during the deliberation of the series of legal revisions, and instead there have been increasingly harsh punishments for sex offenders since 2006.

This thesis finds that this emphasis on punishment was caused by the combination of a series of serious sexual offences and the ensuing moral panic in the media. This study examines what happened in parliamentary debates on pharmacotherapy and compares the 2010 Act with the international comparators. The examination found that the deliberations were insufficient; that some states' law in the U.S. were ignored, and that less-punitive types of legislation in European countries were unknown. This thesis determines that the 2010 Act should be repealed because its legal defects are too significant to amend, such as compulsory pharmacotherapy without the consent of the offender, and imprisonment for refusal of treatment. Based on arguments that are rarely discussed in Korea, this thesis suggests that pharmacotherapy should be provided with the freely-given consent of an offender; correctional and probation officers should be educated for the enhancement of attitudes towards sexual violence to achieve the goal of the treatment, and the reintegrative policies for sex offenders should be provided.

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## List of Abbreviations

<b>AMA</b>	American Medical Association
<b>ATSA</b>	Association for the Treatment of Sexual Abusers
<b>BRC</b>	Better Regulation System
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CAT Committee</b>	U.N. Committee against Torture
<b>Circles</b>	Circles of Support and Accountability
<b>CPA</b>	Cyproterone Acetate
<b>DYC</b>	Democratic Youth Coalition
<b>ECHR</b>	European Convention on Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court on Human Rights
<b>EM</b>	Electronic Monitoring
<b>FDA</b>	Federal Drug Association
<b>GnRH</b>	Gonadotropin-Releasing Hormone
<b>GPS</b>	Global Positioning System
<b>HRC</b>	U.N. Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICD-10</b>	International Statistical Classification of Diseases and Related Health Problem
<b>KBS</b>	Korea Broadcasting System
<b>KNCW</b>	Korean National Council of Women
<b>KWAU</b>	Korea Women's Association United
<b>Lanzarote Convention</b>	Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
<b>LHRH</b>	Luteinising Hormone-Releasing Hormone
<b>MPA</b>	Medroxyprogesterone Acetate

<b>NHS</b>	National Health Service
<b>PMTCO</b>	Preventive Medical Treatment and Custody Orders
<b>SSRIs</b>	Selective Serotonin Reuptake Inhibitors
<b>UK</b>	United Kingdom
<b>US</b>	United States of America
<b>WHO</b>	World Health Organisation
<b>WFSBP</b>	World Federation of Societies of Biological Psychiatry

## **Chapter 1: Introduction**

### **1.1. Introduction**

Sexual violence involves serious harm to victims, most often women and girls, at all times and places. According to Krug and others, ‘nearly one in four women may experience sexual violence by an intimate partner’ and ‘up to one-third of adolescent girls report their first sexual experience as being forced’.<sup>1</sup> However, how to deal with sex offenders has varied depending on time and place. Although a number of issues around dealing with sex offenders are contentious, including their punishment, treatment and rehabilitation and the prevention of their reoffending, the pharmacological treatment of sex offenders is especially controversial, which is quite a new sanction being imposed by the Pharmacological Treatment of Sex Offenders Act 2010 (hereafter ‘the 2010 Act’) in South Korea. This thesis will explore how sexual violence has been dealt with in Korean history, why and how the 2010 Act was introduced and developed in Korea, compared with the legal examples in other jurisdictions, and what human rights problems exist in the 2010 Act and how to reform the Act.

In the 2010 Act the target of pharmacotherapy is a sex offender whose victim is under the age of sixteen. However, in this thesis the definition of sexual offences includes sexual offending against women as well as children. This research will explore how Korean legislation and criminal justice relevant to sexual violence have evolved up to the 2010 Act. These changes have been led by feminist activists who have recognised that sexual violence can occur as a result of patriarchal social orders that suppress women and have fought to change this. These feminist activists have perceived sexual violence against children as part of the oppression of women, and have not distinguished between sexual offending against children and sexual offending against women. The revision of the law to protect vulnerable persons from sexual violence has usually taken into account the protection of women and children simultaneously in Korea. In this sense this thesis will use the term ‘sexual offences’ to describe sexual violence against both women and children. Even though feminist

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<sup>1</sup> Etienne G Krug and others, *World Report on Violence and Health* (World Health Organization 2002) 149.

activists have striven not only against sexual violence but also against domestic violence such as wife battering, in this thesis sexual offences will not include domestic violence because the focus is on the issues relevant to sexual violence.

The first part of this chapter will address the background of this thesis, including a brief history of the legislation of the 2010 Act and the social contexts of its enactment, and will be followed by a discussion of the science of pharmacological treatment, exploring the drugs used for the treatment, the efficacies and side effects, and appropriate targets of the treatment. In the subsequent sections, research objectives, research questions, methodology and the limits of this thesis will be addressed. This thesis consists of nine chapters. The outline of the chapters will be described in the final section.

## **1.2. Background**

The 2010 Act was passed on 29 June 2010 in Korea. The bill was presented to the Korean Parliament in September 2008 but the Legislative and Judiciary Committee of the Korean Parliament held off deliberations on the Bill on the grounds that existing research into the pharmacological treatment of sex offenders was insufficient.<sup>2</sup> As a number of sexual assault cases, including five high-profile sexual offences against children, were reported between February 2006 and February 2010, a number of Bills were considered and then passed by 31 March 2010. This included an extension of post-release electronic monitoring time limit and preventive medical treatment and custody orders of sex offenders, an expansion of the definition of sexual offences, an extension of the maximum term of imprisonment, and measures to strengthen the registration, disclosure and notification of sex offenders.<sup>3</sup> During this period of deliberation, the bill relevant to the pharmacological treatment of sex offenders was not significantly discussed. However, another serious sex crime against children, committed on 7 June 2010, garnered much public attention and the bill was discussed in the Legislative and Judiciary Committee very briefly, on 28 and

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<sup>2</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* (22 March 2010) 49–50.

<sup>3</sup> Tae Myeong Kim, 'Realities of Sexual Violence and Its Countermeasures' (2011) 22(3) *Korean Criminological Review* 5, 23–30.

29 June 2010.<sup>4</sup> The Whole House Committee passed the 2010 Act on 29 June 2010,<sup>5</sup> which was the revised version of the Prevention and Treatment of Persistent Child Sex Offenders Bill (hereafter ‘original Bill’) that was introduced to Parliament on 8 September 2008. According to the 2010 Act, if a sex offender is paraphilic or incapable of controlling his behaviour due to sexual abnormalities, judged to be at high risk of reoffending and the victim was under the age of 16, the offender can be sentenced to pharmacological treatment for up to 15 years after his release from prison or preventive medical treatment and custodial facility (referred to hereafter as ‘the National Forensic Hospital’ because all sex offenders who have been sentenced to preventive medical treatment and custody orders are incarcerated in this hospital).<sup>6</sup> The consent of the offender is not required.<sup>7</sup>

In general terms, there are two types of legislation regulating the pharmacological treatment of sex offenders. One is more punitive, forcing the treatment regardless of an offender’s opinion, and the other is less punitive, requiring a sex offender’s consent for the treatment. The 2010 Act is the more punitive type of legislation. This thesis begins by considering why this approach was taken. The original Bill, introduced by MP Min-Sik Park, required the consent of an offender, but the consent requirement was removed in the deliberation in the Legislative and Judiciary Committee. This Act is modelled on the laws in some U.S. States and legal examples from other jurisdictions were not thoroughly explored in the course of deliberation. Although only a small number of states in the U.S. permit the compulsory chemical castration of sex offenders, and such provisions are not always actively enforced in such states,<sup>8</sup> this fact was seldom considered in Korea. Less punitive types of pharmacological treatment in European countries is also little known in Korea. Therefore, this Act was enacted based on insufficient information.

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<sup>4</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* (28 June 2010) 1–22; National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* (29 June 2010) 1–30; National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* (29 June 2010) 4–9.

<sup>5</sup> National Assembly, *Whole House Committee Assembly Records* (29 June 2010) 35–61.

<sup>6</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 1, 4.

<sup>7</sup> *Ibid* s 4.

<sup>8</sup> William Green, ‘Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues’ (1986) 12(1) *University of Dayton Law Review* 1, 14.



In this sense, it is imperative to scrutinise legislative examples of the pharmacological treatment of sex offenders in other jurisdictions.

As mentioned above, MP Min-Sik Park introduced the Bill in 2008. The Bill, however, had not drawn attention in Parliament until a severe child sexual offence was committed on 7 June 2010 because the pharmacotherapy of sex offenders was unfamiliar and unknown to scholars, policy makers and the public. MP Park, an ex-prosecutor, had been interested in legislating sex offender treatment programme since he worked as a prosecutor.<sup>9</sup> As his career experience influenced the presentation of the Bill resulting in the 2010 Act, the concept of ‘hidden law-making’, argued by Montgomery, Jones and Biggs, may help to examine the background of the legislation: they state that a judge’s personal experience of participating in a judicial process before appointment needs to be considered for a comprehensive description of ‘how the law is being made’.<sup>10</sup> Their arguments how an MP’s special experience affected the pharmacotherapy of sex offenders in Korea will be explored.

In addition, employing a policy transfer analysis, this research will explore the reason why the Korean Parliament decided to introduce a more-punitive type of compulsory pharmacological treatment without sufficient discussion. According to Dolowitz, policy transfer means the policy introduction and development in one nation which is based on the policy originated from other nations.<sup>11</sup> He explains that if a nation hastily tries to resolve a pressing problem, policy transfer tends to occur more often, but it may be more likely to be unsuccessful because of limited time resulting in insufficient exploration of models or unsuitable modifications.<sup>12</sup> As the 2010 Act is modelled on some States’ statutes of the U.S., under pressure of the media and public, policy transfer analysis will be useful to illuminate the defects of the legislative process of the 2010 Act.

This Act is in line with a series of laws to strengthen punishment for sex offenders enacted between 2006 and 2010. Although tougher sanctions for sexual

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<sup>9</sup> Sung-Gi Hwang, Jung Hoon Lee and Seung-Hee Hong, *A Legislative Scheme of Prevention and Treatment of Persistent Child Sex Offenders* (The Office of MP Min-Sik Park 2008) Preface

<sup>10</sup> Jonathan Montgomery, Caroline Jones and Hazel Biggs, ‘Hidden Law-Making in the Province of Medical Jurisprudence’ (2014) 77(3) *Modern Law Review* 343, 369

<sup>11</sup> David P Dolowitz, ‘Introduction: A New Face to British Public Policy’ in David P. Dolowitz and others (eds), *Policy Transfer and British Social Policy* (Open University Press 2000) 3.

<sup>12</sup> *Ibid* 11.

offending have been a trend in recent years, traditionally, violent crimes towards women have not received great attention in Korea. In order to understand how and why the social awareness of sexual victimisation has changed, the following need to be addressed: the traditional status of women, characteristics of the Korean traditional law and the effect of cultural mores on modern Korean law and the law enforcement agencies dealing with sexual violence. Women's status has been lower than men's for a long time and sexual violence has long been considered as a crime against chastity. Because women have been required to keep their chastity, they have been reluctant to report sexual violence for fear that they would be blamed for failing to do so. As a result, reporting rates for sexual offences and social awareness of sexual victimisation had not improved until feminist groups raised the social awareness of women's issue and campaigned to revise the laws regulating sexual and domestic violence after the late 1980s. In 1991 and 1992, two significant murders were committed by women who had been sexually abused from childhood. The murdered men were sex offenders and were killed by their victims. In the wake of these incidents, feminist activists fought to draw public attention on sexual victimisation and to enact the law regulating sexual violence and victim protection. Their effort resulted in the enactment of the Punishment for Sex Offenders and Protection of Victims Act 1994. Since the legislation of this 1994 Act, social awareness of sexual violence has improved and the number of reported sex crimes has increased significantly. The reasons for this statistical change need to be considered.

Until the early 2000s legislative modifications towards sexual offending had focused on the protection of women rather than strengthening the punishment of sex offenders, which was led by feminist activists, including revisions to strengthen victims' rights in a criminal justice process, and to change 'Crimes relating to Chastity' in the Criminal Act' into 'Crimes relating to Rape and Indecent Assault'. However, since the middle of 2000s, the media reporting of sexual offences has drawn public attention and provoked public outrage, which put pressure on government and politicians to publish harsher legal responses. Between 2006 and 2010, six high-profile sexual offences against children were committed. In this period, the media and government responses argued for tougher punishment for sex offenders, even though feminist activists claimed that heavier penalties would have

little effect on women's protection. Post-release EM was introduced and the limit was extended from five years to ten years, and finally extended to thirty years. The limit of a definite imprisonment was also extended from fifteen years to thirty years. Almost all of the Bills were passed without careful consideration. It is important to examine the tone in which the media reported the incidents because it has influenced public opinion and government responses. The concept of 'moral panic' may help analyse the media reporting on those sexual offences against children and subsequent punitive legislative responses to sexual offending. Greer explains moral panic as follows:

The term 'moral panic' refers to the disproportionate and hostile social reaction to a group or condition perceived as a threat to social value. It involves sensational and stereotypical media coverage, public outcry and demands for tougher controls.<sup>13</sup>

With the concept of moral panic, this research will analyse the influence of sensational and provocative media reports on following punitive and disproportionate legislative reactions to sexual offending.

How the Bills relating to sexual offences were deliberated in Parliament should be scrutinised. Among all the laws passed, the 2010 Act raises many human rights issues, because pharmacological treatment is quite new and little research had been done before the deliberation. Therefore, human rights analysis of the 2010 Act and how to reform the Act would be significant issues. This research will explore the human rights problems of the 2010 Act and scrutinise how to revise the Act to reduce such problems.

### **1.3. What is the pharmacological treatment of sex offenders?**

Pharmacological treatment is the use of drugs which leads to the elimination or decrease of sexual drive and a change in sexual behaviour.<sup>14</sup> The media often calls it 'chemical castration', but this is an incorrect description because the treatment is not

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<sup>13</sup> Chris Greer, 'Crime and Media: Understanding the Connections' in Chris Hale and others (eds), *Criminology* (3rd edn, Oxford University Press 2013), 156.

<sup>14</sup> Karen Harrison, 'Legal and Ethical Issues When Antiandrogenic Pharmacotherapy with Sex Offenders' (2008) 3 *Sex offender Treatment* 1. <[www.sexual-offender-treatment.org/2-2008\\_01.html](http://www.sexual-offender-treatment.org/2-2008_01.html)> accessed 15 June 2014; John Q. La Fond, *Preventing Sexual Violence* (American Psychological Association 2005) 167.

surgical and its effects are reversible, whilst ‘castration’, originating from the Latin, means permanent cut.<sup>15</sup> In this thesis, ‘pharmacological treatment’, or ‘pharmacotherapy’, rather than chemical castration will be used in principle. Chemical castration will be used only in the parts to cite media reporting or academic literature, or to describe legal examples in other jurisdictions, which use chemical castration instead of pharmacological treatment.

La Fond states that, with regards to the purpose of the pharmacological treatment of sex offenders, ‘the logic was simple: A sex offender who does not have a sex drive will not commit more sex crimes’.<sup>16</sup> Neurotransmitters and sex hormones, such as serotonin, dopamine and testosterone, interrelate in a complicated manner in the body, and these control and influence sexual drive and behaviour.<sup>17</sup> Serotonin is involved in mood, cognition, appetite and sleep<sup>18</sup> as well as being associated with regulating sexual behaviour.<sup>19</sup> Selective serotonin reuptake inhibitors (SSRIs), which are usually used as an antidepressant medication, make serotonin increase and they are involved in the decrease of sexual drive.<sup>20</sup> In contrast, dopamine agonists have been known to increase sexual drive.<sup>21</sup> Testosterone is so vital for sexual drive and impulsive erection that it has been a targeted hormone used to change sexual behaviour.<sup>22</sup> Pharmacological treatment aims to control sexual drive and behaviour by using drugs that affect specific neurotransmitters or sex hormones. Two types of drugs are generally used in pharmacological treatment: one is the medications which lower testosterone and the other is the serotonergic agents which control the serotonin levels of the body.<sup>23</sup> The three medications most commonly used for lowering testosterone are: Medroxyprogesterone acetate (MPA), Cyproterone acetate (CPA) and Gonadotropin-releasing hormone (GnRH) agonist.<sup>24</sup>

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<sup>15</sup> Harrison, *ibid.*

<sup>16</sup> Fond (n 13) 167.

<sup>17</sup> Charles Scott and Elena del Busto, ‘Chemical and Surgical Castration’ in Richard G. Wright (ed), *Sex Offender Laws* (2nd edn, Springer 2015) 194; Fabian M. Saleh and Fred S. Berlin, ‘Sex Hormones, Neurotransmitters, and Psychopharmacological Treatments in Men with Paraphilic Disorders’ (2003) 12(3/4) *Journal of Child Sexual Abuse* 233, 235–38.

<sup>18</sup> Saleh and Berlin, *ibid* 236.

<sup>19</sup> Michael C. Seto, *Pedophilia and Sexual Offending Against Children* (American Psychological Association 2008) 179.

<sup>20</sup> Cindy M. Meston and Penny F. Frohlich, ‘The Neurobiology of Sexual Function’ (2000) 57 *Archives of General Psychiatry* 1012, 1017.

<sup>21</sup> *Ibid* 1019.

<sup>22</sup> Scott and Busto (n 16) 194.

<sup>23</sup> Saleh and Berlin (n 16) 240.

<sup>24</sup> Scott and Busto (n 16) 195.

In the U.S., the first pharmacotherapy of sex offenders using MPA was at the Biosexual Psychological Clinic of Johns Hopkins Hospital by Dr John Money in 1966.<sup>25</sup> He claimed that it reduced sexual drive considerably.<sup>26</sup> Since Money's report, a number of experiment results regarding MPA treatment have been published and among them, eleven studies show a recidivism rate ranging from 3% to 83% during the treatment, with an average of 27%.<sup>27</sup> MPA is a synthetic progesterone agent mainly used in the U.S., which reduces testosterone in the body.<sup>28</sup> According to the previous research, MPA reduces testosterone levels through the mechanisms as follows:<sup>29</sup> It stimulates testosterone-A-reductase in the liver which disassembles testosterone. Testosterone circulates in human plasma by binding to globulin.<sup>30</sup> But MPA is attached to plasma globulin, so testosterone is hindered by MPA and disappears from the body more rapidly. It also interferes with the emission of hormones, which stimulate the testes to make testosterone, from the pituitary gland. MPA is administered by oral medication, branded as Provera, at a dose of 50 to 300 mg a day or intramuscular injection, known as Depo-Provera, in doses of 300 mg a week.<sup>31</sup>

Since Heller and others reported that MPA decreased the male sexual drive in 1958, many studies have demonstrated the effect of MPA in controlling sexual behaviour and recidivism of sex offenders including paraphiliacs.<sup>32</sup> According to the *Diagnostic and Statistical Manual of Mental Disorders*, fifth edition (DSM-5), a paraphilia means 'any intense and persistent sexual interest other than sexual interest

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<sup>25</sup> Green (n 8) 5.

<sup>26</sup> Ibid, 6.

<sup>27</sup> Ariel Rösler and Eliezel Witztum, 'Pharmacotherapy of Paraphilias in the Next Millenium' (2000) 18 Behavioral Sciences and the Law 43, 47.

<sup>28</sup> Scott and Busto (n 16) 194.

<sup>29</sup> Ibid, citing Joan Albin and others, 'On the Mechanism of the Antiandrogen Effect of Medroxyprogesterone Acetate' (1973) 93(2) Endocrinology 417; Fred S. Berlin and Frederick W. Schaerf, 'Laboratory assessment of the paraphilias and their treatment with antiandrogenic medication' in Richard C.W. Hall and Thomas P. Beresford (eds), *Handbook of Psychiatric Diagnostic Procedures* (Spectrum Publications 1985); Saleh and Berlin (n 16).  
<sup>30</sup> Michel M. Pugeat, James F. Dunn and Bruce C. Nisula, 'Transport of Steroid Hormones: Interaction of 70 Drugs with Testosterone-Binding Globulin and Corticosteroid-Binding Globulin in Human Plasma' (1981) 53(1) Journal of Clinical Endocrinology and Metabolism 69, 69.

<sup>31</sup> Scott and Busto (n 16) 195.

<sup>32</sup> Ibid, citing Carl G. Heller and others, 'Effects of Progestational Compounds on the Reproductive Processes of the Human Male' (1958) 71(5) Annals of the New York Academy of Sciences 649, 663–64.

in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners'.<sup>33</sup> Meyer, Cole and Emory show, in the follow-up study with a duration from six months to 12 years, that the recidivism rate of the target group, which consisted of 23 paedophiles, seven rapists and 10 exhibitionists undertaking MPA treatment with psychotherapy was 18%, which was far lower than 58%, the recidivism rate of the control group including 14 paedophiles, six exhibitionists and one voyeur, participating in psychotherapy alone.<sup>34</sup> Even though MPA is known as an effective drug for decreasing abnormal sexual behaviour, it has also been reported that MPA has numerous adverse effects including breast tenderness, galactorrhoea, weight gain, nausea, diabetes mellitus, gallstones, hypogonadism, hypo-spermatogenesis, hypertension, and bone loss.<sup>35</sup>

CPA has been primarily used for pharmacological treatment in Europe and Canada since the 1970s but it is unlikely to be used in the U.S. because the Federal Drug Administration (FDA) does not approve its use.<sup>36</sup> Testosterone needs to bind to the receptor to stimulate target organs, but it can be blocked by competitive and non-competitive inhibitors.<sup>37</sup> Competitive inhibitors interfere with testosterone by binding to the receptor and non-competitive inhibitors reduce the number of receptor sites.<sup>38</sup> CPA binds to androgen receptors as a competitive inhibitor so that it blocks testosterone uptake and its androgenic intracellular influence.<sup>39</sup> It also prevents the pituitary gland from releasing luteinising hormone, which leads to a decrease of the testosterone level in blood.<sup>40</sup>

CPA is prescribed for the treatment of paraphilia in an oral form at a dose of 100 to 600 mg a day or in an intramuscular injection form at a dose of 400 to 700 mg

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<sup>33</sup> American Psychiatry Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatry Association 2013) 685.

<sup>34</sup> Scott and Busto (n 16) 195, citing Walter J. Meyer, Collier Cole and Evangeline Emery, 'Depo-Provera Treatment for Sex-Offending Behavior: An Evaluation of Outcome' (1992) 20(3) *The Bulletin of American Academy of Psychiatry and the Law* 249, 249.

<sup>35</sup> Scott and Busto (n 16) 196; Saleh and Berlin (n 16) 241.

<sup>36</sup> Scott and Busto (n 16) 196; Seto (n 18) 177.

<sup>37</sup> J.M.W. Bradford, 'The Antiandrogen and Hormonal Treatment of Sex Offenders' in W.L. Marshall, D.R. Laws and H.E. Barbaree (eds), *Handbook of Sexual Assault* (Plenum Press 1990) 297.

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid* 304.

<sup>40</sup> Saleh and Berlin (n 16) 243.

a week.<sup>41</sup> Studies have reported reduction of sexual urges, sexual fantasies, masturbation frequency and decrease of the sexual recidivism rate of the offenders taking CPA treatment.<sup>42</sup> Zonana and others claim that ‘it is clear that CPA can play an important role in the treatment of sex offenders’ and ‘it can substantially reduce recidivism rates and that these beneficial effects continue even when treatment is terminated’.<sup>43</sup> According to Scott and Busto, reported side effects of CPA include ‘depression, weight gain, nausea, vomiting, weakness, thromboembolism, gynecomastia, irreversible liver damage, and decrease in mineral bone density’.<sup>44</sup> Because the inhibitive effect of secretion or activity of testosterone of MPA and CPA is incomplete, GnRH agonists have been used for pharmacological treatment of paraphilias since the middle of the 1980s.<sup>45</sup> GnRH agonists, which are also called luteinising hormone-releasing hormone (LHRH) agonists, have drawn attention due to their potent effect of decreasing testosterone in the body.<sup>46</sup> GnRH agonists have been developed and used for the treatment of prostate cancer since the 1970s, and this medication experience has influenced their use in the treatment of sex offenders.<sup>47</sup>

The gonadotropins, including luteinising hormone and follicle-stimulating hormone, are secreted in the anterior pituitary gland by the stimulation of LHRH which is produced from the hypothalamus.<sup>48</sup> Luteinising hormone stimulates the testes to release testosterone.<sup>49</sup> When the GnRH agonists stimulate the gonadotropic cells, new gonadotropins are released at first, but, as the sensitiveness of the gonadotropic cells decrease through the constant administration of the GnRH agonists, the production of gonadotropins is reduced, and, finally, testosterone levels

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<sup>41</sup> Dan R. Reilly, Nicholas J. Delva and Robert W. Hudson, ‘Protocols for the Use of Cyproterone, Medroxyprogesterone, and Leuprolide in the Treatment of Paraphilia’ (2000) 45(6) *Canadian Journal of Psychiatry* 559, 559.

<sup>42</sup> Howard Zonana and others, *Dangerous Sex Offenders* (American Psychiatric Association 1999) 109.

<sup>43</sup> *Ibid*

<sup>44</sup> Scott and Busto (n 16) 197.

<sup>45</sup> Ariel Rösler and Eliezel Witztum, ‘Treatment of Men with Paraphilia with a Long-Acting Analogue of Gonadotropin-Releasing Hormone’ (1998) 338(7) *The New England Journal of Medicine* 416, 416; Peer Briken, Evangelia Nika and Wolfgang Berner, ‘Treatment of Paraphilia with Luteinizing Hormone-Releasing Hormone Agonists’ (2001) 27 *Journal of Sex & Marital Therapy* 45, 47–48

<sup>46</sup> Scott and Busto (n 16) 197.

<sup>47</sup> Briken, Nika and Berner (n 44) 46–47.

<sup>48</sup> *Ibid*.

<sup>49</sup> Scott and Busto (n 16) 195.

drop to almost zero.<sup>50</sup> GnRH agonists are administered by injection every three months.<sup>51</sup> Many studies have demonstrated that GnRH agonists are effective for paraphilias, decreasing testosterone levels, sexual urges, masturbation frequency and recidivism rate.<sup>52</sup> Reported possible side effects of GnRH agonists are osteoporosis, bone pain, hypogonadism, weight gain, hot flushes, depression, sleep disturbance and hair loss.<sup>53</sup> GnRH agonists are accepted as useful alternatives for paraphiliacs who are not responsive to MPA and/or CPA.<sup>54</sup> Thibaut and colleagues state that GnRH agonists are more efficacious and cause fewer side effects than MPA and CPA, and they claim that ‘GnRH analogue treatment probably constitute the most promising treatment for sex offenders at high risk of sexual violence’.<sup>55</sup>

Pharmacological treatment is not applied to every sex offender, but only those with paraphilic disorders. Paraphilic disorders are known as one of the main causes of sexual violence, and it is claimed that ‘at least one paraphilic disorder is found in around 50% of sex offender samples’.<sup>56</sup> Some state that pharmacotherapy is only useful for ‘preferential paedophiles’ who feel sexually aroused by children not by adults and who are ‘addicted’ to children.<sup>57</sup> It is claimed that pharmacotherapy is not effective for offenders who rape adults, because their sexual offences are not caused by the inability to control sexual desires, but by the urge to sexually control victims.<sup>58</sup> According to the 2010 Act, the treatment can be imposed on a sex offender

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<sup>50</sup> Briken, Nika and Berner (n 44) 47–48.

<sup>51</sup> Ibid 53.

<sup>52</sup> Peer Briken, Andreas Hill and Wolfgang Berner, ‘Pharmacotherapy of Paraphilias With Long-Acting Agonists of Luteinizing Hormone–Releasing Hormone: A Systematic Review’ (2003) 64(8) *Journal of Clinical Psychiatry* 890, 892.

<sup>53</sup> Rösler and Witztum (n 44) 416; Briken, Nika and Berner (n 44) 52.

<sup>54</sup> Rösler and Witztum *ibid* 420–21; Briken, Hill and Berner (n 51) 894.

<sup>55</sup> Florence Thibaut and others, ‘The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias’ (2010) 11 *The World Journal of Biological Psychiatry* 604, 647.

<sup>56</sup> Daniel Turner and others, ‘Pharmacological treatment of patients with paraphilic disorders and risk of sexual offending: An international perspective’ (2017) *The World Journal of Biological Psychiatry*, DOI: 10.1080/15622975.2017.1395069, 1, citing Karl R. Hanson and Kelly Morton-Bourgon, ‘The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies’ (2005) 73 *Journal of Consulting and Clinical Psychology* 1154–1163; Reinhard Eher, Martin Rettenberger and Frank Schilling, ‘Psychiatrische Diagnosen von Sexualstraftätern: Eine empirische Untersuchung von 807 inhaftierten Kindesmissbrauchstätern und Vergewaltigern [Psychiatric diagnoses of sexual offenders: An empirical study of 807 incarcerated child sexual abusers and rapists]’ (2010) 23 *Zeitschrift für Sexualforschung* 23–35.

<sup>57</sup> Aisha K. Gill and Karen Harrison, ‘Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches’ (2013) 8(2) *International Journal of Criminal Justice Sciences* 166, 171.

<sup>58</sup> *Ibid*



with a paraphilic disorder or who is determined to be incapable of controlling his sexual behaviour due to sexual abnormalities.<sup>59</sup> Briken and Kafka argue that drugs used for pharmacological treatment have such acute adverse effects that the treatment should be applied for only ‘the most aggressive, recidivistic and paraphilic offenders’.<sup>60</sup> Most of the U.S. statutes regulating pharmacological treatment require that a victim is a child or an adolescent in order to make the sex offender undertake the treatment, even though the treatment is not applied only for paraphiliacs.<sup>61</sup>

DSM-5 distinguishes a paraphilic disorder from paraphilia, and explains that ‘a paraphilic disorder is a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm to others’.<sup>62</sup> There are eight paraphilic disorders specified in the DSM-5, including voyeuristic disorder, exhibitionistic disorder, frotteuristic disorder, sexual masochism disorder, sexual sadism disorder, paedophilic disorder, fetishistic disorder and transvestic disorder.<sup>63</sup> Zonana and others recommend that pharmacological treatment should be applied if a sex offender is diagnosed with hypersexuality,<sup>64</sup> but hypersexuality is not specified as a paraphilic disorder in DSM-5.

#### **1.4. Research aims and objectives**

The legal defects of the 2010 Act has frequently been argued since its enactment in Korea but it is hard to find the study relevant to the reasons and the backgrounds of the introduction of compulsory pharmacotherapy. This thesis will provide a socio-legal analysis of the introduction and development of the pharmacological treatment of sex offenders in Korea. In order to understand what happened around the introduction of pharmacotherapy, primary documents, such as media reporting, parliamentary records and government reports, will be reviewed, combined with looking at social science, legal and historical literature on sexual violence, feminist movements and human rights. In order to achieve these aims five research objects are formulated:

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<sup>59</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 2.

<sup>60</sup> Peer Briken and Martin P. Kafka, ‘Pharmacological Treatments for Paraphilic Patients and Sex Offenders’ (2007) 20 *Current Opinion in Psychiatry* 609, 609.

<sup>61</sup> Scott and Busto (n 16) 201.

<sup>62</sup> *Ibid* 685–86.

<sup>63</sup> *Ibid* 685.

<sup>64</sup> Zonana and others (n 41) 119.

1. Analyse the context that has influenced the perceptions of sexual violence in Korea.
2. Explore the backgrounds of the initial legislative changes in regulating sexual violence.
3. Scrutinise the reason of harsher punishment and criminal justice agencies' unchanging perceptions around sexual violence deviated from the demand of feminist activists.
4. Examine the legislation of pharmacotherapy with the reference to the laws in different countries and international human rights norms.
5. Propose how to reform the 2010 Act and to regulate voluntary pharmacotherapy

### **1.5. Research questions**

To attain these research objectives, eight primary research questions are derived as follows. This thesis explores how to answer these questions:

1. To what extent has the historical, political, legal and cultural context shaped perceptions and responses to sex crimes in South Korea?
2. How was the legislative changes on sexual violence triggered and how did it proceed?
3. How have recent high-profile cases shaped public, including media, responses and affected legal change?
4. What was the reason of the legislation and criminal justice practice regarding sexual violence deviated from the demand of feminist activists?
5. What happened in the Korean parliamentary debates after those cases and what was the impact of the public and media responses on these debates?
6. To what extent may the experience of other jurisdictions inform analysis of the Korean legislation and reform proposals?
7. What are the implications of pharmacological treatment orders in regard to human rights and constitutional perspectives?
8. What sort of reforms could be suggested?

## **1.6. Methodology**

This thesis is comprised of a literature review, documentary analysis and doctrinal research. The 2010 Act was enacted under the influence of legal examples in other jurisdictions, but those were not sufficiently deliberated. Therefore, the legislation and government documents that relate to the pharmacological treatment of sex offenders of different countries, including England and Wales, Germany, Sweden, Denmark and the U.S., will be examined. Despite the fact that, traditionally, violent crimes against women have not been significantly dealt with in Korea, since the 1990s public outrage towards sexual offences has resulted in a number of legislative responses. This means that there have been huge changes in social awareness, which needs to be addressed. In order to identify the traditional thinking regarding women and sex crimes, historical analysis will be done, focusing on historical and political literature, including the Annals of the Chosun Dynasty. Changing perspectives on female sexual victimisation will be explored by looking at the sociological literature and also media reporting of this phenomenon. The parliamentary official records, the legislation relating to sex offences, official statistics, governmental decrees, newspapers and jurisprudence literature will be reviewed in order to scrutinise the social and legal responses to high-profile sexual offences in South Korea. The doctrinal research will be applied for the interpretation of the Constitution, the Criminal Act, the 2010 Act and other relevant laws. Also, interdisciplinary academic literatures related to socio-legal analysis, criminal justice theory and human rights views on sex crimes will be explored.

## **1.7. Limits of the research**

This research focuses on how to analyse the background of the introduction of the Pharmacological Treatment of Sex Offenders Act 2010, how to find the flaws of the 2010 Act and how to revise it to reduce its potential for the violation of offenders' human rights. Accordingly, this study does not include empirical questions such as whether the treatment would be actually effective, how treated offenders and their family feel about the treatment or what the thoughts of doctors and probation officers are.

## **1.8. Outline of the chapters**

This thesis consists of nine chapters, including introductory and concluding chapters. Chapter 2 will address the international context of the legislation of pharmacotherapy. Since the 2010 Act was modelled on the laws of some American states and the international legislative comparators will be used in the subsequent chapters, dealing with this issue in the beginning stage will be important in the future development of this thesis. Two types of legislation of pharmacotherapy, more-punitive and less-punitive, will be contrasted.

Chapter 3 will discuss the influence of Confucianism on the status of women; the nature of traditional and modern Korean law; the characteristics of traditional Korean criminal justice processes, and the attitude of historical and temporary criminal justice agencies in dealing with violent crimes against women.

Chapter 4 will explore how Korean feminist activism has developed, why feminist activists have paid attention to sexual violence, how they have influenced the social awareness of and responses to sexual violence, and the main points discussed during the deliberation of the bills from the early 1990s to the middle of the 2000s.

Chapter 5 will scrutinise why the number of reported sex crimes has increased since the mid-1990s. Media reporting, public outcry and harsher punishment against sex offenders will also be analysed, using the concepts of ‘news values’, ‘signal crimes’ and ‘moral panic’.

Chapter 6 will discuss the key points of the original bill on pharmacotherapy and the debates during the deliberation. The intention of the original bill, a removal of the main themes of the bill and the punitive characteristics of the 2010 Act will be addressed with the ‘policy transfer’ analysis.

Chapter 7 will analyse the human rights problems of the 2010 Act in light of the Korean Constitution and international norms. The adjudication of the Korean Constitutional Court, the European Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights will be addressed. The problematic overlap of preventive measures will also be discussed.

Chapter 8 will address how to reform the 2010 Act and how to provide voluntary pharmacotherapy of sex offenders in the National Forensic Hospital. The ways to administer the pharmacotherapy of prisoners and probationers will also be explored.

How to enhance the rehabilitation of sex offenders will be discussed, including the improvement of psychological treatment and the introduction of the Circles of Support and Responsibility and the 'Stop it Now!' programme based on reintegrative shaming theory. How to better organise preventive measures will also be addressed.

## Chapter 2: The International Context of Legislation of Pharmacological Treatment

### 2.1. Introduction

Globally castration has been used for centuries for various purposes, including as a punishment for sex offenders.<sup>1</sup> Surgical castration has decreased since the end of the Second World War.<sup>2</sup> Although surgical castration for convicted sex offenders is still legal in many European countries, it has been used extremely rarely in recent decades.<sup>3</sup>

In contrast to surgical castration, pharmacotherapy is still used for sex offenders, and there are two types of contrasting legislation. As noted in Chapter 1, one is more-punitive and the other is less-punitive. Most European countries have adopted less-punitive pharmacotherapy, which requires an offender's informed consent and an appropriate medical diagnosis procedure. In the United States, some states in the U.S. have adopted a more-punitive approach which does not require the consent of an offender and does not have to adhere to standard adequate medical processes. It is noticeable that, in the early 2000s, some European countries, including Poland, Moldova and Turkey, adopted more-punitive types of pharmacotherapy rather than other European countries' less-punitive types of legislation.

Besides informed consent, there are various characteristics in terms of the requirements and procedures for pharmacotherapy between these two types of legislation. The main characteristics of the two types of legislation will be contrasted in the first section of this chapter, followed by a detailed analysis of the U.S. state legislation, including a brief history of the introduction and development of the laws, the primary characteristics of the laws, the debates around constitutional problems, and the current situation of the laws including the repeal in Georgia and Oregon. Compulsory pharmacotherapy outside the U.S. will be addressed in the subsequent

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<sup>1</sup> Scott and Busto (Ch.1, n 16) 191.

<sup>2</sup> Ibid, 192.

<sup>3</sup> Shoba Sreenivasan and Linda E. Weinberger, 'Surgical Castration and Sexual Recidivism Risk' in Amy Phenix and Harry M. Hoberman (eds), *Sexual Offending: Predisposing Antecedents, Assessments and Management* (Springer 2016) 769; Liliame Maury Pasquier, *Putting an End to Coerced Sterillisations and Castrations* (2013) 10; Karen Harrison, 'Legal Aspects of Surgical Castration' (2010) 5(2) Sex Offender Treatment 1, 1.

section. The less-punitive type of legislation in some European countries and Texas in the U.S. will be scrutinised in the final section.

As discussed in Chapter 1, despite the fact that the 2010 Act was modelled after the laws in some U.S. laws, details of the U.S. legislation were not deliberated on in the legislative process. Additionally, less-punitive types of legislation in European countries were ignored. Discussions about the international context of pharmacotherapy legislation will be helpful in exploring whether or not the 2010 Act represents successful policy transfer, which will be addressed in Chapter 6; to illuminate the human rights problems of the Act in Chapter 7; and to justify the reform proposal in Chapter 8.

## **2.2. The spectrum of the use of the pharmacotherapy of sex offenders**

Since the mid-1960s, pharmacotherapy has been used as a medical treatment for suppressing the deviant sexual fantasies, urges and behaviours of paraphilic disordered persons. However, the pharmacotherapy of sex offenders may be justified on various grounds. It can be justified as a treatment or, as a punishment, but, in most jurisdictions, both elements are present. This will be addressed in detail in this chapter.

In order to ensure that the pharmacotherapy of an offender is considered as a *pure* treatment, the offender should be dealt with as a patient, therefore patients' rights should be guaranteed. The World Health Organization (WHO) declares that patients have the right to be 'fully informed about the medical procedure with its potential risks and benefits, alternatives to the proposed procedures, the effects of non-treatment, and about the diagnosis, prognosis and progress of treatment'.<sup>4</sup> They also have the right 'to refuse or to halt a medical intervention', and a patient's informed consent is a requirement for any medical treatment.<sup>5</sup> The National Health Service (NHS) also publishes similar principles in the NHS constitution.<sup>6</sup> The American Medical Association (AMA) declares that physicians who deliver a court-ordered treatment should participate only if the mandated procedure is

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<sup>4</sup> World Health Organization, *A Declaration on the Promotion of Patients' Rights in Europe* (1994) 10–11.

<sup>5</sup> *Ibid.*

<sup>6</sup> NHS, *The NHS Constitution* (2015) 8.

unquestionably not a form of punishment, and should confirm that the patient has given voluntary consent.<sup>7</sup> The Framework of the Health and Medical Service Act 2013 states that ‘all nationals shall have the right to receive full explanations from health and medical services personnel on methods for treating their diseases and to decide whether to agree with the aforementioned’.<sup>8</sup> If these prerequisites are fully guaranteed in medical processes separate from a criminal justice procedure and no disadvantages are imposed for refusal to undergo pharmacotherapy, it could be characterised as a *pure* treatment rather than a punishment.

In a criminal justice setting however, the pharmacotherapy of sex offenders typically has more punitive characteristics. When some or all of the following components are incorporated into treatment, it can be considered more punitive:<sup>9</sup> pharmacotherapy is imposed in a criminal justice setting rather than a therapeutic procedure; it is imposed as an additional punishment or a condition of probation or parole; the area of discretion of decision-making agencies is narrowed; the category of target offenders is wider; duration of pharmacotherapy is longer; the procedure for informed consent is ignored; mental health professionals are less involved in the decision-making processes, and greater disadvantage is given to an offender who refuses to undertake it. Some states’ laws in the U.S. include these kinds of provisions. The 2010 Act has almost all of these elements, as follows: pharmacotherapy can be imposed for up to 15 years as an additional punishment, combined with imprisonment or preventive medical treatment and custody orders by a criminal court, and targets sex offenders who are aged 19 or over with paraphilic disorders whose victim is a person under the age of 16, informed consent is not required and a refusal to accept the treatment is punished by imprisonment for not more than three years or by a fine not exceeding 10 million Korean won (referred to herein as ‘won’).<sup>10</sup>

In contrast to the above, when some or all of the following components are incorporated into treatment, it can be considered less punitive and more

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<sup>7</sup> American Medical Association, ‘Court-Initiated Medical Treatment in Criminal Cases’ in *AMA Code of Medical Ethics* (2016) 122–23.

<sup>8</sup> Framework of the Health and Medical Service Act 2013 (ROK) s 12.

<sup>9</sup> Karen Harrison and Bernadette Rainey, ‘Human Rights and Human Wrongs: A Rights-Based Approach to the Punishment and Treatment of Sex Offenders’ (2014) 13(3) *Contemporary Issues in Law* 229, 236–39.

<sup>10</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 4, 8, 14(3), 35(2).



therapeutic:<sup>11</sup> the use of pharmacotherapy is decided in a purely medical process that is separate from a criminal procedure and managed by physicians; it is determined based on an offender's informed consent, and no disbenefit is given to the offender who refuses to undergo it or wishes to discontinue it. Some European countries, such as Germany, Denmark, France and Norway, have introduced laws that incorporate these elements.<sup>12</sup> Although Texas in the U.S. provides surgical castration to sex offenders, its legislation seems to have some less-punitive characteristics.<sup>13</sup> The original bill on pharmacological treatment orders included both provisions which were more-punitive and less-punitive. The less-punitive elements included the requirement for informed consent, shorter treatment periods of up to six months, and a narrower focus, targeting persistent sex offenders of the aged 25 or over with a victim under the age of 13.<sup>14</sup> However, all of these were subsequently removed in deliberation, so only the more-punitive characteristics remain in the 2010 Act.

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<sup>11</sup> Harrison and Rainey (n 9). 236–39.


<sup>12</sup> Anne-Marie McAlinden, *The Shaming of Sexual Offenders* (Hart Publishing 2007) 146–47; Anne-Marie McAlinden, 'The Governance of Sexual Offending across Europe: Penal Policies, Political Economies and the Institutionalization of Risk' (2012) 14(2) *Punishment and Society* 166, 175; Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46(1) *The Howard Journal* 16, 23.

<sup>13</sup> *Ibid*, Harrison, 23.

<sup>14</sup> Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 (ROK) s 2, 3, 9, 10.

Table 2-1 below shows the criteria of the nature of pharmacotherapy that is punitive or therapeutic, and summarises the discussion examined above.

Table 2-1: Criteria of the nature of pharmacotherapy

<b>&lt; Factors &gt;</b>			
Procedure of decision	Sentencing	Release from prison	Medical assessment
Informed consent or request of offenders	Not required	Conditional consent	Required
Forms	Additional punishment	Condition of parole or probation	Irrelevant to penalty
Discretion of decision-making agencies	No discretion	Less discretion	Much discretion
Targets	Wider		Narrower
Duration	Life	Longer	Shorter
Involvement of medical professionals	No involvement	Less involvement	Much involvement
Disadvantage for refusal	Heavier	Lighter	No disadvantage
			
	<b>Punitive</b>		<b>Therapeutic</b>

The effectiveness, ethics and practicality of a coercive treatment in a criminal justice setting have been much discussed.<sup>15</sup> Some have opposed coercive treatment on the grounds that it violates offenders' self-determination and autonomy,<sup>16</sup> and it cannot be effective for those who have little motivation.<sup>17</sup> By contrast, some have supported it in that 'coerced treatment is no less effective than treatment on a voluntary basis'<sup>18</sup> or where legal compulsion is justified as external motivation for offenders who rarely wish to participate in the treatment programme.<sup>19</sup> Mair and

<sup>15</sup> Tim McSweeney, Paul J. Turnbull and Mike Hough, *The treatment and supervision of drug-dependant offenders* (UK Drug Policy Commission 2008) 22; David Farabee, Michael Prendergast and M. Douglas Anglin, 'The Effectiveness of Coerced Treatment for Drug-Abusing Offenders' (1998) 62(1) *Federal Probation* 3, 3.

<sup>16</sup> McSweeney, Turnbull and Hough (n 15) 22.

<sup>17</sup> Farabee, Prendergast and Anglin (n 15) 3.

<sup>18</sup> Mike Hough and Darian Mitchell, 'Drug-Dependent Offenders and Justice for All' in Michael Tonry (ed), *Confronting Crime: Crime Control Policy under New Labour* (Willan 2003) 42;

<sup>19</sup> Farabee, Prendergast and Anglin (n 15) 3.

Canton argue that, even though an offender attends a treatment programme mandatorily, the person can be motivated with recognition of the worth of the programme.<sup>20</sup> ‘Motivation to change’ is the key element in the psychological treatment of sex offenders,<sup>21</sup> and there has been significant research demonstrating the effectiveness of psychological intervention of offenders.<sup>22</sup> Furthermore, even though an offender attends the programme involuntarily, the person who decides to apply the knowledge and skills, learned in the programme, to his life to change his behaviours is the offender himself.<sup>23</sup> Therefore, contrary to what has been previously recognised, a coercive psychological intervention of sex offenders cannot be evaluated as merely negative because of its coerciveness. This is significantly different from compulsory pharmacotherapy, which impacts on the offender neurochemically and deprives him of the room for voluntary choice of law-abiding behaviour. Unlike a coercive psychological treatment, the nature of compulsory pharmacotherapy seems problematic in terms of therapeutic effectiveness, ethics and practicality. This characteristic of pharmacotherapy will be discussed in detail in Chapter 7.

### 2.3. More-punitive type of legislation

Some U.S. states provide examples of legislation of a more-punitive type of pharmacotherapy. Although the U.S. and European countries have a similar history of sterilisation in the first half of the twentieth century, surgical and chemical castration has progressed differently on these two continents.

Surgical and chemical castration has been legalised and practised as a punishment or means of eugenics in some states in the U.S.<sup>24</sup> In European countries forced surgical castration was used for similar purposes to the U.S. until the end of

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<sup>20</sup> George Mair and Rob Canton, ‘Sentencing, Community Penalties and the Role of the Probation Service’ in Loraine Gelsthorpe and Rod Morgan (eds), *Handbook of Probation* (Willan 2007) 280–81.

<sup>21</sup> Anthony R Beech and Dawn D Fisher, ‘Treatment of Sex Offenders in the UK in Prison and Probation Settings’ in Hazel Kemshall and Gill McIvor (eds), *Managing Sex Offender Risk* (Jessica Kingsley 2004) 154.

<sup>22</sup> WL Marshall and others, *Treating Sex offenders: An Integrated Approach* (Psychology Press 2006) 91–95.

<sup>23</sup> Beech and Fisher (n 21) 154.

<sup>24</sup> Robert D. Miller, ‘Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?’ (1998) 4(1/2) *Psychology, Public Policy, and Law* 175, 178–80.

the Second World War. Since then, the laws regulating castration have been amended to ensure that they are based on patients' informed consent, and a more therapeutic context has evolved.<sup>25</sup>

Of nine U.S. states that legislated for castration in the 1990s, Georgia and Oregon subsequently repealed their legislation in the 2000s, each for different reasons as described below. Texas is the only state that introduced surgical castration, in 1997, but Stinneford argues that Texas law is not classified as a punishment because of the less-punitive characteristics incorporated into it.<sup>26</sup>

### **2.3.1. A brief history of castration in the U.S.**

In the U.S. surgical castration was consistently practiced as a punishment for sex offenders in the early 1800s, in particular for slaves who were accused of having sexual relations with white females.<sup>27</sup> Under the influence of the eugenics movement, in 1907, Indiana legalised the forced sterilisation of mentally disabled people for the first time in the U.S.<sup>28</sup> It was triggered by Dr Sharp who, since 1899, had castrated 176 inmates committing sexual offences to reduce their sexual urges, and recognised the eugenic impact of his works.<sup>29</sup> This Indiana law influenced other states' legislation and in 1927 the U.S. Supreme Court upheld the Virginia law sterilising mentally disabled people in *Buck v. Bell*.<sup>30</sup>

In this case, the Supreme Court affirmed the state's authority to sterilise Carrie Buck, the plaintiff, with reference to the expert statement of Dr Laughlin, an American eugenicist who had drafted the compulsory sterilisation law of Virginia.<sup>31</sup> In the written judgement, Carrie Buck was described as an eighteen year-old woman who was 'the daughter of a feeble-minded mother, and the mother of an illegitimate

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<sup>25</sup> Stacy Russell, 'Castration of Repeat Sex offenders: An International Comparative Analysis' (1997) 19 *Houston Journal of International Law* 425, 442–47.

<sup>26</sup> John F. Stinneford, 'Incapacitation through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity' (2006) 3(3) *University of St Thomas Law Journal* 559, 599.

<sup>27</sup> Kris W. Druhm, 'A Welcome Return to Draconia: California Penal Law § 645, the Castration of Sex Offenders and the Constitution' (1997) 61 *Albany Law Review* 285, 286.

<sup>28</sup> Miller (n 24), 178.

<sup>29</sup> *Ibid*; Druhm (n 27) 286.

<sup>30</sup> Miller (n 24) 178.

<sup>31</sup> Peter Quinn, 'Race Cleansing in America' (2003) 54(1) *American Heritage* 35, 35.

feeble-minded child'.<sup>32</sup> Laughlin had not met Carrie Buck, but, relying on the report of the Eugenics Record Office stating that she had a nine-year-old girl's level of intelligence, he concluded that she was 'shiftless, ignorant and worthless', and that her pregnancy was the result of promiscuity.<sup>33</sup> Laughlin expected that the Supreme Court's upholding of the Virginia law would cause expansion of compulsory sterilisation legislation nationwide.<sup>34</sup> As he had anticipated, 28 states had enacted the compulsory sterilisation laws by 1932, and more than 60,000 persons were sterilised in the U.S.<sup>35</sup> Most of them were poor and people regarded as inferior, such as 'epileptics, manic-depressives, alcoholics, prostitutes, the homeless and criminals'.<sup>36</sup> This American legislation influenced Adolf Hitler's concept of the 'Master Race' and a castration campaign in Germany.<sup>37</sup>

In addition to the serious human rights violations of forced sterilisation, Buck's case shows important procedural problems of compulsory treatment imposed by a judge in a trial procedure. Even though a medical expert's opinion in the trial was crucial in determining whether to impose a compulsory sterilisation, Buck was not given any procedural rights to engage in medical diagnosis. Similar procedural problems exist in some states' legislation regulating the pharmacotherapy of sex offenders in the U.S., and such defects are inherited in the 2010 Act. It should be important, then, to make reasonable processes of decision, including adequate medical assessment and the guarantee of offenders' procedural rights to debate. This issue will be addressed in subsequent sections relevant to the content of legislation.

Forced sterilisation was used as an additional punishment for sex offenders or habitual criminals by a number of states, but, before long, those were nullified by the U.S. Supreme Court and federal district courts. The Supreme Court recognised castration as an example of cruel and unusual punishment, which was prohibited by the constitution in 1910,<sup>38</sup> even though this was not a case dealing with castration. In 1914, the U.S. District Court Southern District of Iowa ruled that the Iowa statute enforcing vasectomy for an offender convicted of two felonies violated the

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<sup>32</sup> *Buck v Bell*, 274 U.S. 200 [1927], 205.

<sup>33</sup> Quinn (n 31) 35.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Christa Piotrowski, 'Dark Chapter of American History: U.S. Court Battle Over Forced Sterilization' *Neue Züricher Zeitung* (21 July 2000).

<sup>37</sup> Druhm (n 27) 288.

<sup>38</sup> *Weems v United States*, 217 U.S. 349 [1910], 404.

constitutional principle of cruel and unusual punishment.<sup>39</sup> This Iowa Act was repealed in 1915.<sup>40</sup> Along the same lines, in 1918, the U.S. District Court of Nevada struck down the Nevada statute compelling vasectomy for convicted sex offenders.<sup>41</sup> In 1941, the U.S. Supreme Court declared that the Habitual Criminal Sterilization Act 1935 of Oklahoma, which required sexual sterility by vasectomy for third time offenders whose crimes ‘amounted to felonies involving moral turpitude’, violated the right to marriage and to procreate, which are fundamental rights of an individual.<sup>42</sup> In 1985, the South Carolina Supreme Court ruled that surgical castration as a condition of probation was invalid, in that it was a cruel and unusual punishment prohibited by the constitution.<sup>43</sup>

Apart from surgical castration or sterilisation, pharmacotherapy using Medroxyprogesterone acetate (MPA), the first drug for the pharmacotherapy of sex offenders in the U.S, was first reported by Dr John Money in 1966.<sup>44</sup> John Money and Fred Berlin had administered pharmacotherapy with Depo-Provera at the Johns Hopkins Hospital, but it did not draw national attention until the Washington Post reported it in 1983.<sup>45</sup> Engel reported that 150 sex offenders had been treated with the drug and that there were ninety more patients, including seventy offenders, under court order to receive it.<sup>46</sup> At that time, although there had been debates as to whether the informed consent of convicted offenders was truly given,<sup>47</sup> the legality of pharmacotherapy as a condition of probation was not disputed in any court until the case of Roger Gauntlett. Gauntlett was an heir of the Upjohn Company, which produced Depo-Provera, and had abused his stepdaughter and stepson. He filed an appeal against a castration sentence to Michigan’s appeal court in 1984.<sup>48</sup> In the Kalamazoo Circuit Court, he was sentenced to five years of probation with one-year

<sup>39</sup> *Davis v Berry*, 216 F. 413 (S.D. Iowa) [1914], 417.

<sup>40</sup> *Berry v Davis* 242 U.S. 468 [1917], 469.

<sup>41</sup> *Mickle v Henrichs*, 262 F. 687 (D. Nevada) [1918], 690–691.

<sup>42</sup> *Skinner v Oklahoma* 316 U.S. 535 [1942], 541.

<sup>43</sup> *State v Brown* 326 S.E.2d 410 (S.C.) [1985], 410.

<sup>44</sup> Florence Thibaut and others, ‘The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias’ (2010) 11 *The World Journal of Biological Psychiatry* 604, 621; Green (Ch.1, n 24) 5.

<sup>45</sup> William Green, ‘The Food and Drug Administration and the Limits of Contraceptive Drug Risk: The Experimental and Criminal Justice Use of Depo-Provera’ (Annual Meeting of the American Political Science Association 2014), 3.

<sup>46</sup> Margaret Engel, ‘Giving sex Offenders Drug Spurs Concerns’ *Washington Post* (Baltimore, 18 July 1983) A1

<sup>47</sup> Green (Ch.1, n 24) 6–7.

<sup>48</sup> *Ibid*, 9.

jail detention and pharmacotherapy at the Johns Hopkins Hospital as a probation condition, even though he did not give informed consent to pharmacotherapy.<sup>49</sup> Michigan's appeal court ruled that it violated the Michigan probation law because imposing treatment with an experimental drug was an invalid probation condition and this probation sentence was 'significantly disproportionate to harsher sentences generally imposed upon similarly situated defendants and was thus an abuse of discretion'.<sup>50</sup>

As child sexual abuse drew public attention, the number of convicted and imprisoned sex offenders increased significantly during the 1980s.<sup>51</sup> In Washington State, there were two high-profile sexual offences committed by convicted rapists Gene Kane and Gary Minnix, in September and December 1988, respectively.<sup>52</sup> In May of 1989, Earl Shriener raped a seven-year-old boy, injuring his genitals and leaving him for dead. Shriener's case attracted significant attention because he had been convicted for molestation three times and he was known for conspiring in child abduction, torture and murder in prison.<sup>53</sup> There was a public uproar against the government to demand a reaction to repeated sexual offences. USA Today reported that:

His story shocked the nation and sent the Legislature scrambling for tougher sex-offender laws. The case is responsible for unusually quick legislation. Last week, by a 48-0 vote, the State Senate passed laws lengthening sentences for sex offenders; the House is expected to pass it this week.<sup>54</sup>

Under public pressure, the lawmakers of Washington State enacted a 'sexual predator law', named the Community Protection Act, in 1990, which included sex offender notification to the community and civil commitment, which means the indeterminate incarceration of sex offenders in a high-security commitment facility

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<sup>49</sup> Ibid, 9–10.

<sup>50</sup> *People v Gauntlett* 352 N.W.2d [1984], 310.

<sup>51</sup> Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (Yale University Press 1998), 190.

<sup>52</sup> Andrew J. Harris, 'The Civil Commitment of Sexual Predators: A Policy Review' in Richard G. Wright (ed), *Sex Offender Laws* (Springer 2015) 222.

<sup>53</sup> Jenkins (n 51) 191.

<sup>54</sup> Ibid footnote 3, 283, citing Deeann Glamser, 'Rape victim, 8, to face accused' *USA Today* (30 January 1990) 3A

after release from prison.<sup>55</sup> The New York Times criticised this aspect of the Act, in that civil commitment should only mean life-confinement of sex offenders, because ‘mental abnormality or personality disorder’ affecting the sexual offences, a requirement for civil commitment, is ambiguous.<sup>56</sup> These kinds of legislative responses to sex offenders, however, were adopted in other states and by the U.S. Congress in the 1990s, including sex offender registration and public notification, residency restrictions, harsher punishment and civil commitment.<sup>57</sup> The process and contents of the American legislation seem to be similar to the legislation regulating sex offenders that was adopted in Korea in the 2000s, in which high-profile sexual offences against children incurred legislation targeting sex offenders, including the introduction of post-release electronic monitoring (EM), tougher punishment, registration, public disclosure and notification, and pharmacotherapy, which will be addressed in Chapter 5.

Under the circumstances described above, in 1996, California became the first state to introduce compulsory MPA treatment of sex offenders in the Penal Code.<sup>58</sup> Surgical castration was replaced by MPA treatment by this revision.<sup>59</sup> Before this modification, a court could order the surgical castration of a sex offender who had committed a sexual offence against children under the age of 10.<sup>60</sup> During deliberation in the California Assembly Committee, it was discussed whether or not compulsory MPA treatment would be a ‘cruel and unusual punishment’ violating the Eighth Amendment of the U.S. constitution. The Committee concluded that ‘it is the domain of the Legislature to craft laws that punish criminal behaviour’.<sup>61</sup> California politicians seemed to be self-confident with this legislation. Bill Hoge, a member of the assembly, said that ‘we can do this all over the country. This is going to have the

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<sup>55</sup> Jenkins (n 51) 191; Karen J Terry and Alissa R Ackerman, ‘A Brief History of Major Sex Offender Laws’ in Richard G Wright (ed), *Sex Offender Laws* (Springer 2015) 55–57.

<sup>56</sup> Jenkins (n 51) 192 footnote 4, 283, citing Robb London, ‘Strategy on Sex Crimes Is Prison, Then Prison’ *New York Times* (8 February 1991) B16

<sup>57</sup> Terry and Ackerman (n 55) 55–57.

<sup>58</sup> Avital Stadler, ‘California Injects New Life into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution’ (1997) 46 *Emory Law Journal* 1285, 1294.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> California Assembly Committee on Public Safety, *Analysis of Public Safety Bill No. AB 3339 (Apr. 23, 1996)* (1996) 6.



biggest impact on this horrible, horrible crime of any legislation ever seen'.<sup>62</sup> Governor Pete Wilson said that 'as long as it protects one girl or one boy, then keeping it on the books is worth enduring all of the criticism the opponents can muster'.<sup>63</sup>

Following this Californian legislation, 27 states subsequently considered legislating for pharmacotherapy. Only seven – Florida, Iowa, Louisiana, Montana, Wisconsin, Georgia and Oregon – have enacted statutes regulating the pharmacotherapy of sex offenders as an additional punishment or condition of parole or probation.<sup>64</sup> Among these seven states, Georgia repealed the law in 2006 and Oregon did so in 2011;<sup>65</sup> thus, pharmacotherapy legislation remains in six states in the U.S. at present. There has been no more legislation of pharmacotherapy since 1999, except for Louisiana, which revised the law to expand the use of pharmacotherapy from a condition of probation, parole or suspension of sentence, to additional punishment added to incarceration in 2008.<sup>66</sup> Louisiana's amendment was a political reaction to the U.S. Supreme Court's judgement in *Kennedy v Louisiana*,<sup>67</sup> which struck down capital punishment for sex offenders.<sup>68</sup> Louisiana Governor, Bobby Jindal, said 'I am especially glad to sign (SB144) into Louisiana law ... on the same day the Supreme Court has made an atrocious ruling against our state's ability to sentence those who sexually assault our children to the fullest extent'.<sup>69</sup>

### 2.3.2. Main characteristics of pharmacotherapy statutes in the U.S.

Considering the criteria of more-punitive pharmacotherapy suggested in Section 2.2, most states legislation seems more of a punishment than a treatment. None of the

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<sup>62</sup> Raymond A Lombardo, 'California's Unconstitutional Punishment for Heinous Crime: Chemical Castration of Sex offenders' (1997) 65 *Fordham Law Review* 2611, citing Dave Leshner, 'Molester Castration Measure Signed' *Los Angeles Times* (18 September 1996) A3.

<sup>63</sup> *Ibid*, Leshner A3.

<sup>64</sup> Scott and Busto (Ch.1, n 16) 191; Miller (n 24) 188.

<sup>65</sup> 2006 Georgia Laws Act 571; 2011 Oregon Laws Chapter 419.

<sup>66</sup> Louisiana Revised Statutes s 14:43.6, 15:538.

<sup>67</sup> *Kennedy v Louisiana* 554 *U.S.* 407 [2008].

<sup>68</sup> Green (Ch.1, n 24) 14.

<sup>69</sup> Haley A Smith, 'Common Enemy and Political Opportunity Leave Archaically Modern Sentencing Unchecked: The Unconstitutionality of Louisiana's Chemical Castration Statute' (2013) 59 *Loyola Law Review* 211, 247, citing Huffington Post, 'Louisiana Gov. Jindal Authorizes Chemical Castration Of Sex Offenders' (4 July 2008).

<[http://www.huffingtonpost.com/2008/06/26/louisiana-gov-jindal-auth\\_n\\_109342.html](http://www.huffingtonpost.com/2008/06/26/louisiana-gov-jindal-auth_n_109342.html)> accessed. 'SB 144' was the number of the Bill on Castration of Sex Offenders in the Louisiana Assembly.

states use pharmacotherapy outside of a criminal justice setting. Nor do they require the informed consent of an offender, or give the offender the right to refuse it without any disadvantage.

Some states' courts and the federal court have explicitly ruled that pharmacotherapy is a punishment. The Louisiana Supreme Court held in *Nicholson v State of Louisiana* that the pharmacotherapy requirement is 'expressly part of the punishment',<sup>70</sup> and in *Tran v State of Florida* the Fourth District Court of Appeal of Florida stated that pharmacotherapy is not a remedial treatment but a punishment 'imposed as a part of a criminal sentence'.<sup>71</sup> When the Ninth Circuit U.S. Court of Appeal held the *U.S. v Cope*, it found that requiring the offender to take all prescribed drugs as a condition of lifetime supervised release was too broad, in that pharmacotherapy would be included in this condition, which 'may be found at the extreme end of the spectrum of intrusive medications and procedures'.<sup>72</sup>

Although the California Penal Code has been a model of other states' statutes of pharmacotherapy,<sup>73</sup> there are a number of differences between the laws, so its punitiveness can be evaluated differently. Table 2-2 shows the more-punitive factors discussed in Section 2.2 between six states' legislation, which will be discussed below.

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<sup>70</sup> *Nicholson v State of Louisiana* 169 So.3d 344 (Louisiana) [2015], 347.

<sup>71</sup> *Tran v State of Florida* 965 So.2d 226 (Fla.App. 4 Dist.) [2007], 227.

<sup>72</sup> *United States v Cope* 527 F.3d 944 (9th Cir.) [2008], 944, 955.

<sup>73</sup> Stinneford (n 26) 578.

Table 2-2: More-punitive factors between six states' legislation

Factors	California	Florida	Louisiana	Iowa	Montana	Wisconsin
Imposition as part of a criminal sentence		√	√			
Widest targets				√		
Additional punishment		√	√	√	√	
Statutory condition of parole or probation			√	√	√	√
No discretion of agencies	√	√	√	√		
Inadequate involvement of medical professionals	√	√	√	√	√	√
Do not require informed consent	√	√	√	√	√	√
Treatment for life	√	√	√	√		√
Greatest disadvantage for refusal					√	
Voluntary surgical castration as an alternative	√	√	√	√		
Offenders have to pay the cost			√	√		

Of the six states, Iowa has the broadest range of target offences, from sexual abuse causing bodily injury to indecent contact and lascivious conduct. In contrast, Florida limits pharmacotherapy to those convicted of sexual battery, which means oral, anal, or vaginal penetration.<sup>74</sup> California, Louisiana, Montana and Wisconsin have similar target offences.<sup>75</sup> Regarding a victim's age, there are no restrictions in Florida and Louisiana, while it is under 16 for first-time offenders and no age limit for second-time offenders in Montana, and it is under 13 in California, Iowa and Wisconsin.<sup>76</sup> California, Florida, Iowa and Louisiana introduced mandatory pharmacotherapy for a second-time sex offence and a discretionary one for a first-time sex offence,

<sup>74</sup> Iowa Code s 903B.10 3; Florida Statutes s 794.0235(1)(a)(b).

<sup>75</sup> California Penal Code s 645(a), (b); Louisiana Revised Statutes s 14:43.6 A, B(1); Montana Code Annotated s 45-5-512 (1), (2); Wisconsin Statutes s 304.06(1q)(a).

<sup>76</sup> California Penal Code s 645(a), (b); Florida Statutes s 794.0235(1)(a)(b); Iowa Code s 903B.10 3; Louisiana Revised Statutes s 14:43.6 A, B(1); Montana Code Annotated s 45-5-512 (1), (2); Wisconsin Statutes s 304.06(1q)(a).

whereas Montana and Wisconsin allow only discretionary imposition regardless of the number of convictions.<sup>77</sup>

Florida, Louisiana and Montana impose pharmacotherapy as an additional punishment, to be enforced when the offender is released on parole or on the expiration of the term of imprisonment.<sup>78</sup> Iowa uses pharmacotherapy as a condition of release, but, as the target sex offenders for pharmacotherapy shall be under mandatory lifetime supervision after release, it is similar to additional punishment.<sup>79</sup> California and Wisconsin introduced pharmacotherapy as a condition of parole.<sup>80</sup> Since parole is not mandatory, but discretionary, in California and Wisconsin, the offender who is not granted parole does not need to undertake pharmacotherapy. Therefore, in California, even though pharmacotherapy is imposed for first-time sex offenders by the court and for second-time sex offenders by law, it cannot be enforced unless parole is allowed to the offender by the Board of Parole Hearing.<sup>81</sup> Regarding pharmacotherapy as a condition of probation, Iowa, Louisiana, Montana and Wisconsin introduce it as a statutory condition of probation.<sup>82</sup> Even though the imposition of pharmacotherapy as a condition of probation is not prohibited by law in California or Florida, its legality has been debatable, as noted above in the discussion of *People v Gauntlett*. Thus, the imposition of pharmacotherapy as a condition of probation would be easier in the former four states than in the latter two states.

Medical assessment of an offender is essential to make pharmacotherapy less-punitive and closer to pure treatment in that it would include the identification of whether an offender needs pharmacological intervention, whether it would be effective for the offender and how severe the expected side effects would be. Furthermore, since this process is inevitably connected with the provision of information to the offender about the effects, side effects and alternatives to pharmacotherapy, and predictable results of the absence of this intervention, it would

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<sup>77</sup> California Penal Code s 645(a), (b); Florida Statutes s 794.0235(1)(a)(b); Iowa Code s 903B.10 1; Louisiana Revised Statutes s 14:43.6 A, B(1), 15:538 C(1)(b); Montana Code Annotated s 45-5-512(1), (2); Wisconsin Statutes s 304.06(1q)(b).

<sup>78</sup> Florida Statutes s 794.0325(1)(a), (b); Louisiana Revised Statutes s 14:43.6 A, B(1), (2); Montana Code Annotated s 45-5-512(1), (2).

<sup>79</sup> Iowa Code s 903B.1, 903B.10 1.

<sup>80</sup> California Penal Code s 645(a), (b); Wisconsin Statutes s304.06(1q) (a), (b).

<sup>81</sup> California Penal Code s 5075.1.

<sup>82</sup> Iowa Code s 903B.10 1–2; Louisiana Revised Statutes s 15:538 C; Montana Code Annotated s 45-5-512(1), (2); Wisconsin Statutes s 304.06(1q)(b).

be important to define in detail who manages it, what should be done and how to make an objective and fair decision. However, these points are not sufficiently reflected in the states' legislation.

California law has no provisions for a medical diagnosis. Fred S. Berlin argues that the California statute is problematic in that it ignores individual assessment, which is essential to identify if a person is appropriate for the treatment, because pharmacological treatment may be useful only for offenders driven by abnormal sexual urges.<sup>83</sup> Florida requires a court to appoint a medical expert to determine the offender's appropriateness for treatment within 60 days of sentencing, and the court's order shall be contingent on the determination of the offender's appropriateness by the medical expert, but what qualification a 'medical expert' should have and what 'appropriateness' means are not provided in the laws.<sup>84</sup> In addition, the effectiveness of this provision seems to be questionable in that there is a time difference between the medical expert's assessment and commencement of the treatment, because the treatment should be provided shortly before the offender's release from prison.<sup>85</sup> Furthermore, none of the states, except Wisconsin, requires that the offender should be assessed as a paraphilic disordered person. As a number of scholars have stated that pharmacotherapy is not effective for all sex offenders, but is effective mainly for those with paraphilic disorders,<sup>86</sup> it seems problematic that the states impose compulsory pharmacotherapy on sex offenders regardless of their characteristics.

Similarly, in Iowa, although pharmacotherapy cannot be imposed, when a court or parole board determines that 'it would not be effective after an appropriate assessment', there is no provision of the assessment process.<sup>87</sup> Florida and Louisiana require that the MPA treatment be discontinued when it is not 'medically appropriate', but it does not seem to be effective in that there is no provision regulating how to evaluate the medical appropriateness of the treatment.<sup>88</sup> Louisiana

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<sup>83</sup> Fred S Berlin, "'Chemical Castration' for Sex Offenders' (1997) 336(14) *The New England Journal of Medicine* 1030.

<sup>84</sup> Florida Statutes s 794.0235(2)(a); Green (Ch.1, n 24) 13.

<sup>85</sup> *Ibid.*

<sup>86</sup> Berlin (n 83) 1030; Philip J Henderson, 'Section 645 of the California Penal Code: California's "Chemical Castration" Law - A Panacea or Cruel and Unusual Punishment?' (1998) 32 *University of San Francisco Law Review* 653, 668; Thibaut and others (n 44) 645.

<sup>87</sup> Iowa Code s 903B.10 1.

<sup>88</sup> Florida Statutes s 794.0235(3); Louisiana Revised Statutes s 14:43:6 C(3).

law defines the meaning of ‘mental health evaluation’ and qualification of a mental health professional, and requires a licensed medical practitioner to conduct the treatment,<sup>89</sup> but there are no provisions relevant to the criteria of ‘appropriateness for treatment’ and the deliberating process. The lack of an adequate medical diagnosis procedure is a significant flaw in this legislation. William Green argues that, in the course of legislation, the management of MPA’s risks were neglected, that there was no consultation with medical experts’ testimony, and that these statutes allow ‘uncontrolled scientific experiments’.<sup>90</sup>

In contrast to other states, Wisconsin has the most detailed description of the appropriate medical processes in the administrative code: a licensed physician should conduct clinical and medical evaluations to determine whether the offender is a paedophile and whether the diagnosis is appropriate for pharmacological treatment; the offender should be provided with sufficient information about the risks and benefits of the treatment; the results of medical evaluation should be deliberated in a hearing with the attendance of the offender; the rights to present evidence and relevant witnesses, and to cross-examine department witnesses in hearings are allowed to the offender; whether to permit the treatment should be decided by a hearing examiner; the offender has the right to appeal a decision to the division administrator and the treatment should be reviewed every 24 months.<sup>91</sup>

The procedure for giving information about pharmacotherapy to an offender is inadequate in the states, except Wisconsin. Even though California requires informing the offenders of the effects and side effects of the treatment, and Montana requires informing the offenders of the effects, they are not informed of the results without the treatment or the alternatives.<sup>92</sup> Furthermore, the offender has no right to refuse or give consent to the treatment in any state. Berlin argues that the administration of pharmacotherapy without informed consent is problematic, in that evidence shows that this treatment is helpful only for voluntary participants.<sup>93</sup>

None of the statutes require psychological treatment to be provided alongside with pharmacotherapy, and, except Louisiana and Wisconsin, there are no provision

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<sup>89</sup> Louisiana Revised Statutes s 15:538 C(2)(a), 6(a).

<sup>90</sup> Green (Ch.1, n 24) 12–13.

<sup>91</sup> Wisconsin Administrative Code DOC 330.05–330.14.

<sup>92</sup> California Penal Code s 645(f); Montana Code Annotated s 45-5-512(5).

<sup>93</sup> Berlin (n 83) 1030.

relevant to who should be a clinician for the treatment or how to deal with side effects of the treatment. Berlin and the Association for the Treatment of Sexual Abusers (ATSA) have also suggested that psychological treatment be combined with pharmacological treatment.<sup>94</sup>

Concerning the duration of pharmacotherapy, it shall be continued until the government determines that it is no longer necessary in California, Iowa, Montana and Wisconsin, whereas the court shall specify the duration, either of a specific term of years or for life, in Florida and Louisiana.<sup>95</sup> As discussed in Chapter 1, the effects of pharmacological treatment are reversible when the treatment ceases,<sup>96</sup> so it is hardly expected that the states would determine that the treatment is no longer necessary.<sup>97</sup> In addition, the target offenders of pharmacotherapy shall be released on parole for life in Iowa, for 10 years or life in California and may be sentenced to lifetime supervision after release in Wisconsin.<sup>98</sup> Therefore, once pharmacotherapy is imposed in any of these six states, normally, it would be enforced for life in practice.<sup>99</sup>

Regarding of what happens when an offender does not comply with the treatment order, the responses vary considerably. In Florida, the offender should be punished for second degree felony, by a fine not to exceed 10,000 dollars or a term of imprisonment for not more than fifteen years, or both; in Louisiana, it is punished by imprisonment between three and five years without benefit of probation, parole or suspension of sentence; in Montana, by imprisonment between ten and one hundred years without parole; in Iowa, by imprisonment of not more than two years for first revocation and not more than five years for second; in California, by imprisonment for one year in principle; and, in Wisconsin, punished for Class A misdemeanour, by a fine not to exceed 10,000 dollars or a term of imprisonment for not more than nine months, or both.<sup>100</sup>

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<sup>94</sup> Ibid; ATSA, *Pharmacological Interventions with Adult Male Sex offenders*, (ATSA 2012), 4.

<sup>95</sup> California Penal Code s 645(d); Florida Statues s 794.0235(2)(a); Iowa Code s 903B.10 4; Louisiana Revised Statutes s 14:43:6 C(1); Montana Code Annotated s 45-5-512(4); Wisconsin Administrative Code DOC 330.16(3).

<sup>96</sup> Briken and Kafka (Ch.1, n 59) 610.

<sup>97</sup> Stinneford (n 26) 580.

<sup>98</sup> Iowa Code s 903B.1; California Penal Code s 3000(b)(2)(B), 3000.1.(a)(2); Wisconsin Statutes s 939.615(2)(a).

<sup>99</sup> Stinneford (n 26) 580.

<sup>100</sup> Florida Statues s 794.0235 (5)(b), 775.082(3)(d), 775.083(1)(b); Louisiana Revised Statutes s 14:43:6 C(4)(5), 13:4611(1)(b); Montana Code Annotated s 45-5-512(4);

Although the voluntary nature of an offender's choice in a criminal justice setting is debatable, voluntary surgical castration is legalised as an alternative in California, Florida, Iowa and Louisiana.<sup>101</sup> Because his alternative choice of surgical castration cannot be regarded as truly voluntary however,<sup>102</sup> it is deemed as a more-punitive element. This option may push the offender to irreversibly exchange bodily integrity for exemption from long-term pharmacotherapy.

While other states do not ask an offender to pay the costs of treatment, Louisiana requires probationers and parolees to pay the costs, and Iowa does so to all types of target sex offenders.<sup>103</sup> Smith claims that this payment condition seems to be unfair 'because the structure of the statute only encourages rehabilitation to those who can afford it and punishes those who cannot', and 'the indigent offender is more likely to violate the statute and return to prison, not because he committed a sexual offense, but because he could not procedurally comply with the statute'.<sup>104</sup>

Overall, taking into consideration the factors illustrated in Table 2-1 above, Iowa and Louisiana have nine factors equally, but Iowa's legislation seems the most punitive because of its widest range of target offenders. Wisconsin is the least punitive.

### **2.3.3. Constitutional problems of pharmacotherapy statutes**

Stinneford states that, when the California Penal Code regulating pharmacotherapy was legislated, it was expected to be quickly nullified because it would be viewed as a cruel and unusual punishment.<sup>105</sup> However, it has not been tackled by the U.S. Supreme Court.<sup>106</sup> Regarding the reason for this unexpected situation, Green and Stinneford explain that most sex offenders have pleaded guilty and, in the plea agreement, they abandoned the right to appeal, so few cases of pharmacotherapy

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California Penal Code s 3000.1.(a)(2), 3057(a); Iowa Code s 903B.1; Wisconsin Statutes s 939.51(3)(a).

<sup>101</sup> California Penal Code s 645(e); Florida Statutes s 794.0235 (1)(b); Iowa Code s 903B.10 1; Louisiana Revised Statutes s 14:43:6 B(2).

<sup>102</sup> Tanya Simpson, 'If Your Hand Causes You to Sin...': Florida's Chemical Castration Statute Misses the Mark' (2007) 34 Florida State University Law Review 1221, 1239.

<sup>103</sup> Louisiana Revised Statutes s 15:538 D(5); Iowa Code s 903B.10 5.

<sup>104</sup> Smith (n 69), 237.

<sup>105</sup> Stinneford (n 26) 561.

<sup>106</sup> Naomi M Weinstein, 'The Legal Aspects of Conditional Release in the Criminal and Civil Court System' (2014) 32 Behavioral Sciences and the Law 666, 674.



have been addressed in a higher court.<sup>107</sup> In *People v Foster*, the California 4<sup>th</sup> District Court of Appeal affirmed the trial court's sentence of imprisonment for 30 years with the MPA treatment, on the grounds that the defendant could not argue the constitutionality of the trial court's sentence in the Court of Appeal, because he agreed to waive his right to appeal in the plea agreement.<sup>108</sup> Regarding the waiver of the right to appeal of a defendant, the Criminal Resource Manual published by the U.S. Department of Justice reads that 'a plea bargain is a contract between the prosecutor and the defendant, so the scope of the sentencing appeal waiver in a plea bargain will depend upon the precise language used in the sentencing appeal waiver provision', and 'a broad sentencing appeal waiver requires the defendant to waive any and all sentencing issues on appeal and through collateral attack'.<sup>109</sup> However, a defendant's claim based on some constitutional and statutory rights, such as being denied the proper legal assistance, being sentenced on the grounds of race, or the sentence exceeding the statutory limit, will be considered 'on the merits by a court of appeal' despite the waiver of sentencing appeal in a plea bargain.<sup>110</sup>

Another reason is that the courts tend to deal with this as a statutory issue rather than a constitutional issue.<sup>111</sup> In *People v Steele*, the defendant contended the unconstitutionality of pharmacotherapy under the California Penal Code Section 645 in that it would 'deprive him of liberty, privacy, bodily integrity and procreation and due process of law'.<sup>112</sup> The California 3<sup>rd</sup> District Court of Appeal, however, did not address the constitutional issue, stating that: 'By not challenging the constitutionality of the order in the trial court, the defendant has failed to preserve the issue for review'.<sup>113</sup>

Even though pharmacotherapy statutes have rarely been addressed in courts, some constitutional problems have been discussed. The essential issue is whether the state's enforcement of pharmacotherapy is constitutional in the light of the First, Eighth and Fourteenth Amendments of the U.S. constitution (hereafter 'First',

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<sup>107</sup> Stinneford (n 26) 563; Green (Ch.1, n 24) 14.

<sup>108</sup> *People v Foster* 101 Cal. App.4th 247 [2002], 247.

<sup>109</sup> 'Criminal Resource Manual 626. Plea Agreements and Sentencing Appeal Waivers-Discussion of the Law' (*United States Department of Justice / Office of the United States Attorneys*) <<https://www.justice.gov/usam/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law>> accessed 3 November 2016.

<sup>110</sup> *Ibid.*

<sup>111</sup> Stinneford (n 26) 563.

<sup>112</sup> *People v Steele* 2004 WL 2897955 (Cal. App. 3d Dist.) [2004], 2.

<sup>113</sup> *Ibid.*

‘Eighth’ and ‘Fourteenth’ Amendments). The Eighth Amendment prohibits the government from imposing a ‘cruel and unusual punishment’ that violates human dignity and is inflicted on an offender’s mental and bodily integrity.<sup>114</sup> The Supreme Court has ruled that a punishment must accord with ‘the dignity of man, which is the basic concept underlying the Eighth Amendment’, and a punishment violates human dignity, if it involves ‘the unnecessary and wanton infliction of pain’ or it is “grossly out of proportion to the severity of the crime’.<sup>115</sup>

As discussed in Chapter 1, pharmacotherapy is deemed to be helpful only for sex offenders with paraphilic disorders who desire to undergo the treatment voluntarily.<sup>116</sup> Only Wisconsin, however, requires the target sex offenders to have a sexual disorder, and none of the states requires the informed consent of the offenders. Surgical castration has been ruled as a cruel punishment by courts,<sup>117</sup> and pharmacotherapy causes harm that is close to that of surgical castration for as long as it continues.<sup>118</sup> As noted above, once pharmacotherapy is enforced, it is more likely to last for life. Therefore, pharmacotherapy in states’ legislation is a cruel punishment that involves ‘the unnecessary and wanton infliction of pain’ on the offender rather than offering a medical benefit.<sup>119</sup>

In addition, Stinneford argues that ‘cruel’ means ‘indifference to or pleasure in another’s suffering’, so the punishment is cruel if the punisher does not treat the offender as a human being, but as an animal or thing regardless of his or her human dignity, and has an attitude of ignoring or enjoying the offender’s suffering.<sup>120</sup> If the punishment intends to manipulate or invalidate an offender’s internal capabilities, which are regarded as most important to human dignity, such as reason and self-determination, the offender is not being treated as a human being, but as an animal or thing.<sup>121</sup> Since pharmacotherapy influences the mechanisms of the human brain directly, which deprives the offender of the capacity to choose to obey the law, it is

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<sup>114</sup> Stinneford (n 26) 565–566. The Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

<sup>115</sup> *Gregg v Georgia*, 428 U.S. 153 [1976], 173.

<sup>116</sup> Stinneford (n 26) 567; Berlin (n 83) 1030.

<sup>117</sup> *Weems v United States*, 217 U.S. 349 [1910], 404; *State v. Brown* 326 S.E.2d 410 (S.C.) [1985], 411.

<sup>118</sup> Stinneford (n 26) 596.

<sup>119</sup> *Ibid.*, 567, 579.

<sup>120</sup> *Ibid.*, 566, citing *Oxford English Dictionary* (Oxford University Press 1989)

<sup>121</sup> *Ibid.*

harsher than the strictest incarceration, which still gives an offender the chance to make his or her own choice. Thus, it is a cruel punishment.<sup>122</sup>

Another aspect of pharmacotherapy is that it may be disproportionate to the crime, which may also make it a cruel and unusual punishment. As discussed in Chapter 1, the offender may suffer from a number of side effects of the pharmacotherapy. For MPA, the loss of bone density is particularly severe, so Pfizer, the manufacturer of MPA, has cautioned that females should not use it for more than two years.<sup>123</sup> Most target sex offenders are given a prescription to take a dose of MPA 8 to 43 times larger than the dosage for females for more than two years.<sup>124</sup> Pharmacotherapy is imposed as an additional punishment in addition to imprisonment, or a condition of life-long parole or post-release supervision in the states' legislation, and it seems to be hard to avoid severe side effects, so pharmacotherapy is disproportionate to the crime.<sup>125</sup> Stinneford argues that pharmacotherapy is introduced to 'shackle the mind and cripple the body of sex offenders, which is doubly cruel'.<sup>126</sup>

Moreover, lower federal courts have ruled that the forced use of drugs against prisoners is a cruel punishment.<sup>127</sup> The U.S. District Court for the Eastern District of California held that the use of a 'fright drug' without a prisoner's consent, which made him 'suffer nightmares in which he relives the frightening experience and awakens unable to breathe, raises serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes'.<sup>128</sup> In regard to this case, pharmacotherapy seems to have similar constitutional problems associated with it.

It has been discussed whether pharmacotherapy violates the First Amendment, which declares freedom of speech, including two elements: the right to create a thought and the right to share the thought.<sup>129</sup> The ideas of freedom of

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid, 597–598.

<sup>124</sup> Ibid, 598.

<sup>125</sup> Green (Ch.1, n 24) 22.

<sup>126</sup> Stinneford (n 26) 568.

<sup>127</sup> Ibid, 591.

<sup>128</sup> *Mackey v Proconier*, 477 F.2d 877 [1973], 878.

<sup>129</sup> Scott and Busto (Ch.1 n 16) 203. The First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

thought and the right to be free from state thought control, which involves mental autonomy and integrity, are originated in this.<sup>130</sup> The Supreme Court stated, in *Stanley v Georgia*, which involved the defendant's possession of pornography, that, constitutionally, the government is not given the authority to control one's mind.<sup>131</sup> In *Kaimowitz v Department of Mental Health*, the Michigan Circuit Court ruled involuntary experimental psychosurgery for a confined sexual psychopath is impermissible because it violates the First Amendment, 'which protects the generation of free flow of ideas from unwarranted interference with one's mental process'.<sup>132</sup> Since pharmacotherapy deprives the offender's body of testosterone, which reduces or removes the capacity to think about sex and to participate in sexual activity,<sup>133</sup> it is a kind of forced mind control,<sup>134</sup> and, therefore, it violates the First Amendment.

According to the Fourteenth Amendment, no state shall deprive any person of liberty without due process of law,<sup>135</sup> which guarantees the 'procedural due process and substantive limits' on the government's intrusion on bodily integrity.<sup>136</sup> The U.S. District Court of New Jersey held, in *Rennie v Klein*, that a 'due process hearing is required prior to forced administration of drugs' in order to protect against the violation of constitutional rights of an involuntary mental patient who refuses medication in the absence of an urgent situation.<sup>137</sup> Another reason for a due process hearing was the 'great risk of hospital error', such as inadequate interpretation of hospital records, the omission of documents or unclear whole-drug history.<sup>138</sup> The court required four points for a due process hearing in this case: 'patients must be informed of and participate in' the decision-making process of the treatment;

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<sup>130</sup> Green (Ch.1, n 24) 17.

<sup>131</sup> *Stanley v Georgia* 394 U.S. 557 [1969], 1248.

<sup>132</sup> 'Kaimowitz v. Department of Mental Health for the State of Michigan No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973)' (1976) 9-10 Mental Disability Law Reporter 147, 152.

<sup>133</sup> Stinneford (n 26) 596.

<sup>134</sup> GL Stelzer, 'Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?' (1997) 81 Minnesota Law Review 1675.

<sup>135</sup> The Fourteenth Amendment: 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>136</sup> Green (Ch.1, n 24) 17, 20.

<sup>137</sup> *Rennie v Klein* 462 F.Supp. 1131 (D.N.J.) [1978], 1147.

<sup>138</sup> *Ibid.*

assistance by a lawyer must be allowed for patients; independent psychiatrists outside of the hospital in which patients stay must participate in the hearing, and the access to the hospital records of patients must be allowed for their lawyer and psychiatrist.<sup>139</sup> Except for Wisconsin, five states' legislation has no provisions dealing with due process hearing, so it seems to violate the principle of due process of law.

The Supreme Court has acknowledged that every individual has the right to privacy and to make a personal choice about marriage and procreation.<sup>140</sup> According to the Fourteenth Amendment, the government can restrict personal rights with the due process of law.<sup>141</sup> The state government, however, must show that the restriction is 'necessary to the accomplishment of a permissible state policy', and reasonable regulations are required, which do not significantly interfere with decisions about principal rights, if the government deprives an individual of fundamental rights such as their right to marry or procreate.<sup>142</sup> Green argues that it would be difficult for the government to demonstrate that pharmacotherapy is necessary to achieve state policy to protect the community from child sexual abuse, because there are less harsh means, such as psychotherapy and incarceration.<sup>143</sup> Along the same lines, the Ninth Circuit U.S. Court of Appeal held that, instead of pharmacotherapy, 'we do not doubt that there will be other types of medication or procedures designed to rehabilitate or deter, which would implicate particularly significant liberty interests'.<sup>144</sup> Furthermore, it is more dubious whether compulsory pharmacotherapy is a 'permissible state policy' because medication would be effective for sex offenders who are paraphilic and wish to undertake it voluntarily.<sup>145</sup> Thus, six states' legislation on pharmacotherapy does not seem to comply with due process of law.

In summary, it appears to be arguable that pharmacotherapy in six states' statutes is unconstitutional because it violates the First, Eighth and Fourteenth Amendments.

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<sup>139</sup> *Ibid*, 1147–1148.

<sup>140</sup> Green (Ch.1, n 24) 20; *Griswold v Connecticut*, 381 U.S. 479 [1965], 488; *Zablocki v Redhail*, 434 U.S. 374 [1978], 374.

<sup>141</sup> Green (Ch.1, n 24) 21.

<sup>142</sup> *Ibid*; *Griswold v Connecticut*, 381 U.S. 479 [1965], 497–98; *Zablocki v Redhail*, 434 U.S. 374 [1978], 396.

<sup>143</sup> Green (Ch.1, n 24) 21.

<sup>144</sup> *United States v Cope* 527 F.3d 944 (9th Cir.) [2008], 955.

<sup>145</sup> Berlin (n 83) 1030.

### 2.3.4. Current situation of enforcing pharmacotherapy statutes in the U.S.

Even though nearly twenty years have passed since six states made the legislation, it is still hard to find literature relevant to compulsory pharmacological treatment cases. D’Orazio and others state that, as of 2009, the California chemical castration statute is not being enforced.<sup>146</sup> However, this does not seem to mean that no offender has been sentenced to pharmacotherapy. Rather, the treatment appears have not been enforced until 2009, even though offenders have been sentenced to pharmacotherapy. Some cases can be found on the Westlaw website with the terms ‘castration’, ‘hormone’ or sections of the states’ statutes relevant to pharmacotherapy.

Although the cases of the first trial courts are not included on the Westlaw website, three cases of the California Court of Appeal can be found there. In these cases, all defendants were sentenced to extremely long terms of imprisonment. Steven Foster was sentenced to 30 years, and 15 years to life in 2002.<sup>147</sup> Rudolph Christopher Steele was sentenced to the longest term for sodomy against a five-year-old victim and consecutive terms for the other specific sexual offences in 2004.<sup>148</sup> Anthony Brian Foster was sentenced to 27 years and 8 months to life in 2012.<sup>149</sup> All these cases were affirmed by the Court of Appeal. As the prison terms are long and pharmacological treatment should begin one week before the offenders’ release,<sup>150</sup> it has not been possible to enforce the treatment in California. It seems to be a similar case in Florida and Louisiana.

Among six cases in Florida, four were reversed by the Florida Court of Appeal because of failure to comply with the statutory requirement of a medical expert’s determination and specification of the duration of treatment,<sup>151</sup> or for

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<sup>146</sup> Deirdre M D’Orazio and others, *The California Sexually Violent Predator Statute: History, Description and Areas for Improvement* (The California Coalition on Sexual Offending 2009), 38.

<sup>147</sup> *People v Foster* 101 Cal. App.4th 247 [2002], 247.

<sup>148</sup> *People v Steele* 2004 WL 2897955 (Cal. App. 3d Dist.) [2004], 1. His sodomy offence shall be punished by imprisonment for the term of 25 years to life. (California Penal Code s 288.7(a)).

<sup>149</sup> *People v Foster* 2012 WL 688247 (Cal. App. 5th Dist.) [2012], 1.

<sup>150</sup> California Penal Code s 645(d).

<sup>151</sup> *Houston v State* 852 So.2d 425 (Fla.App. 5 Dist.) [2003], 426; *Jackson v. State* 907 So.2d 696 (Fla.App. 4 Dist.) [2005], 696; *Boone v. State* 933 So.2d 1252 (Fla.App. 1 Dist.) [2006], 1253.

violation of the double jeopardy rule.<sup>152</sup> Three defendants were sentenced to imprisonment for life. Another was sentenced to consecutive prison terms of eight years and twelve years by the trial courts. The treatments were scheduled to begin no later than one week before the offender's release.<sup>153</sup> In the other two cases, pharmacological treatment was a condition of probation, but the imposition of the treatment was not an issue.<sup>154</sup>

In Louisiana, two cases were found on Westlaw. Regarding the sentence of pharmacotherapy, on the grounds of violation of the *ex post facto* clause, in one case, it was vacated by the Supreme Court of Louisiana.<sup>155</sup> In the other case it was deleted by the Court of Appeal,<sup>156</sup> and the defendant was sentenced to imprisonment for life.

One other reason why compulsory pharmacotherapy has been rarely enforced is trial court judges' lack of awareness of statutes and hesitation to impose mandatory pharmacological treatment, combined with the states' difficult situation regarding the implementation of imperfect statutes.<sup>157</sup> In Florida, judges had sentenced pharmacological treatment for only three out of 107 sex offenders eligible for mandatory treatment by the statute from the day of legislation in 1997 to April 2005.<sup>158</sup> Lee Garringer, a Florida State Court Office administrator, reports that prosecutors and judges were so unaware of the statute or the offender's qualification that judges had not given any mandatory sentence for pharmacological treatment for eligible sex offenders.<sup>159</sup>

The Florida District Court of Appeal was so uncertain as to the effectiveness of the assessment process because of the time difference, as noted above, that the Court indicated in *Jackson v State of Florida*, that medical determination would be more appropriate closer to the time of the release date and that this determination of the appropriateness of an offender could be subject to change during the period of

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<sup>152</sup> *Tran v State* 965 So.2d 226 (Fla.App. 4 Dist.) [2007], 226.

<sup>153</sup> Florida Statutes s 794.0235(2)(b).

<sup>154</sup> *Marcano v State* 814 So.2d 1174 (Fla.App. 4 Dist.) [2002]; *State v Coleman* 44 So.3d 1198 (Fla.App. 4 Dist.) [2010].

<sup>155</sup> *Nicholson v State of Louisiana* 169 So.3d 344 (Louisiana) [2015], 345.

<sup>156</sup> *State v Gordon* 146 So.3d 758 (La.App. 4 Cir.) [2014], 777.

<sup>157</sup> Green (Ch.1, n 24) 14; Simpson (n 102) 1239–1242.

<sup>158</sup> Simpson, *ibid*, 1222–1223, citing Memorandum from Les Garringer, Office of the State Courts Administrator, Florida, to Lisa Goodner, State Courts Administrator, Florida, 1 (May 27, 2005) (hereafter Garringer Memo).

<sup>159</sup> *Ibid*, 1239, citing Garringer Memo 6–7.

imprisonment.<sup>160</sup> The lack of a standard of appropriateness is another issue. In *Jackson*, the Florida Department of Corrections sent the medical review to the court stating that the defendant ‘had no symptoms or problems’ relevant to pharmacological treatment.<sup>161</sup> Stinneford argues that this medical review was merely relative to the determination of the defendant’s physical tolerance of the treatment and disregarded more essential aspects, such as whether he was paraphilic or the treatment would be effective for him.<sup>162</sup> He adds that the Florida statute ignores medical reassessment at the commencement of the treatment and continuing clinical evaluation of the treatment.<sup>163</sup> The Senate of Florida also raised concerns about the administration of the treatment, saying that ‘neither community correctional centres nor probation and parole offices possess the infrastructure necessary to administer treatment’.<sup>164</sup> This comment became a reality in *Marcano v State* in which the treatment was not provided for the offender during the probation period.<sup>165</sup>

California and Montana prohibit compelling a physician hired by state government to participate in the treatment against his or her will.<sup>166</sup> Iowa exempts a person who administers pharmaceutical agents from civil liability for the treatment.<sup>167</sup>

### 2.3.5. Repeal of pharmacotherapy in Georgia and Oregon

Georgia and Oregon introduced pharmacotherapy in 1997 and 1999 respectively.<sup>168</sup> Georgia repealed it in 2006, and Oregon did so in 2011,<sup>169</sup> for different reasons.

In Georgia, by the State Code 1997, a court may require, as a condition of probation, a defendant ‘who has been convicted for a first time offence of aggravated

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<sup>160</sup> *Jackson v State* 907 So.2d 696 (Fla.App. 4 Dist.) [2005], 698.

<sup>161</sup> *Ibid*, 697.

<sup>162</sup> Stinneford (n 26) 583.

<sup>163</sup> *Ibid*.

<sup>164</sup> Simpson (n 98) 1242, citing Florida Senate Criminal Justice Committee, *Senate Staff Analysis and Economic Impact* (1997) 4–5.

<sup>165</sup> *Marcano v State* 814 So.2d 1174 (Fla.App. 4 Dist.) [2002]

<sup>166</sup> California Penal Code s 645(f); Montana Code Annotated s 45-5-512(6).

<sup>167</sup> Iowa Code s 903B.10 5.

<sup>168</sup> Jennifer M Bund, ‘Did You Say Chemical Castration?’ (1997) 59 *University of Pittsburgh Law Review* 157, 170; Barry M Maletzky, Arthur Tolan and Bentson McFarland, ‘The Oregon depo-Provera Program: A Five-Year Follow-Up’ (2006) 18 *Sex Abuse* 303.

<sup>169</sup> Green (Ch.1, n 24) 14.



child molestation' to undergo pharmacotherapy.<sup>170</sup> However, by the revision in 2006, an aggravated child molester shall be punished by imprisonment for life or by a split sentence, that is a term of imprisonment for not less than 25 years, and probation shall be prohibited during the mandatory minimum incarceration period.<sup>171</sup> Accordingly, the provisions relevant to pharmacotherapy as a condition of probation were deleted.<sup>172</sup> Therefore, the repeal of the Georgia legislation was caused by the revision to toughen the punishment for sex offenders.

Oregon introduced pharmacotherapy as a pilot treatment programme to determine its effectiveness in preventing reoffending by sex offenders.<sup>173</sup> The Department of Correction selected convicted sex offenders who were deemed suitable for pharmacotherapy, after medical evaluation by a physician, and required them to undergo pharmacotherapy as a condition of parole or post-prison supervision.<sup>174</sup> If an offender fails to participate in the treatment or takes any countervailing drugs, the offender violates a condition of parole or post-prison supervision.<sup>175</sup> Maletzky, Tolan and McFarland, who evaluated this pilot programme in which 275 sex offenders participated from 2000 to 2004, state that the recidivism rate of the participants undertaking MPA was 5.1%.<sup>176</sup> It was significantly lower than that of the offenders refusing to receive MPA, at 30.9%.<sup>177</sup> The offenders undergoing MPA were less likely to have violated their conditions (13.9% vs. 34.5%) or to have returned to prison (0% vs. 20.0%).<sup>178</sup> Their violations were also less likely to have been sexual in nature (1.3% vs. 12.0%).<sup>179</sup>

Even though this programme had methodological problems, such as whether the pre-treatment reoffending risk was equivalent between different groups,<sup>180</sup> Maletzky, Tolan and McFarland recommend that the use of medication to diminish sexual urges can be another option for selected sex offenders.<sup>181</sup> They found that

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<sup>170</sup> Georgia State Code 1997 s 16-6-4(d)(2).

<sup>171</sup> Georgia State Code 2006 s 16-6-4(d)(1), 17-10-6.2(b).

<sup>172</sup> *Ibid*, s 16-6-4(d)(2).

<sup>173</sup> Stinneford (n 26) 580; Oregon Revised Statute 1999 s 144.625.

<sup>174</sup> Oregon Revised Statute 1999 s 144.625(2), (3).

<sup>175</sup> *Ibid*, s 144.625(4).

<sup>176</sup> Maletzky, Tolan and McFarland (n 168) 309, 311.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid*.

<sup>179</sup> *Ibid*.

<sup>180</sup> Marnie E Rice and Grant T Harris, 'Is Androgen Deprivation Therapy Effective in the Treatment of Sex Offenders?' (2011) 17 *Psychology, Public Policy, and Law* 315, 324.

<sup>181</sup> Maletzky, Tolan and McFarland (n 168) 312.

disruption to an offender's completion of the treatment was caused by two issues – first, it was difficult to find physicians capable of prescribing or injecting medication continuously, and second, the offender could not always afford to pay the costs.<sup>182</sup> Oregon statute requires an offender to pay all costs of the treatment.<sup>183</sup> They recommend that, in order to make more offenders undergo the treatment, prison officers should investigate the possibility of providing medication in the local area before an offender's release, and supervising officers should manage the offender's treatment to the end.<sup>184</sup> They also state that medical professionals should assist local physicians to provide pharmacotherapy through training and follow-up supervision, and non-medical treatment professionals should recognise a local pharmacotherapy programme and advise supervising officers if an offender appears to need pharmacotherapy.<sup>185</sup>

However, the problems noted above had not improved. The Oregon State government failed to find physicians who would support the pharmacotherapy programme.<sup>186</sup> As a result, on 17 June, 2011, the provisions relevant to the Oregon pilot treatment programme were repealed,<sup>187</sup> and the programme was abolished.

The experience of the Oregon pilot treatment programme should have been discussed in the course of deliberation of the 2010 Act. The Oregon case has some points of reference to South Korea in managing pharmacological treatment systems. The Oregon government seems to have failed to persuade medical professionals to participate in the pharmacotherapy of sex offenders. As noted above, AMA states that the voluntary consent of a patient is required for physicians' participation in a court-ordered treatment. This could be one of the reasons for the failure. Because Korean pharmacotherapy in the 2010 Act is compulsory and a refusal of an offender is punished as a new offence, Korean physicians might be unwilling to participate in the treatment. Even a court might be reluctant to impose pharmacotherapy on sex offenders. The answer to the policy failure of Oregon was the repeal of the law. There is a need to consider revising the 2010 Act in reference to the Oregon case.

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<sup>182</sup> Ibid.

<sup>183</sup> Oregon Revised Statute 1999 s 144, 629.

<sup>184</sup> Maletzky, Tolan and McFarland (n 168) 312.

<sup>185</sup> Ibid, 313.

<sup>186</sup> Robert Watters, 'A Shot in Arm: Can chemical castration statutes cure sex offenders legally and ethically?' (2012) Not previously published, 27.

<sup>187</sup> Oregon Laws 2011 Chapter 419, Section 2.

When California first introduced pharmacotherapy, there was optimism about its development and expansion. Druhm stated that the absence of a medical screening procedure and psychological intervention would be problematic in the Californian legislation, but, if this problem were solved, it could be ‘capable of sustaining a constitutional challenge’, and ‘not long before other states adopt similar policies’ if California demonstrates the ‘effectiveness and legality’ of pharmacotherapy.<sup>188</sup> This prediction, however, has turned out to be incorrect. Nearly twenty years have passed since the California legislation, but only five states have enacted pharmacotherapy laws. Even though the bills relevant to pharmacotherapy have been deliberated in more than twenty states, none of the states, except Louisiana, passed the bill in the 2000s. Rather, as discussed above, pharmacotherapy has not been widely used in existing states because of a number of problems associated with its implementation, and the number of states with pharmacotherapy laws has decreased. Ironically, the American examples have spread to different countries without any light being shed on the real facts, or any engagement with subsequent problems, debates or developments.

### **2.3.6. Recent legislation of compulsory pharmacotherapy outside the U.S.**

Since 2000, whilst compulsory pharmacotherapy of sex offenders has not been newly adopted by any state in the U.S., it has spread to countries outside the U.S. South Korea introduced it in 2008, Poland in 2009, Moldova in 2012 and Turkey and Indonesia in 2016.<sup>189</sup> It is notable that the Constitutional Court of Moldova declared

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<sup>188</sup> Druhm (n 27) 343.

<sup>189</sup> ‘Poland Approves Forcible Castration for Paedophiles’ (*The Telegraph*, 25 September 2009) <<http://www.telegraph.co.uk/news/worldnews/europe/poland/6232530/Poland-approves-forcible-castration-for-paedophiles.html>>; ‘Moldova Introduces Chemical Castration for Paedophiles’ (*BBC*, 6 March 2012) <<http://www.bbc.co.uk/news/world-europe-17278225>>; Samuel Osbourne, ‘Turkey Introduces Chemical Castration for Sex Offenders’ (*The Independent*, 27 July 2016) <<http://www.independent.co.uk/news/world/europe/turkey-chemical-castration-introduced-sex-offenders-laws-a7158486.html>>; ‘Indonesia Passes Chemical Castration Law for Paedophiles’ (*BBC*, 12 October 2016) <<http://www.bbc.co.uk/news/world-asia-37629558>>; ‘Indonesia Approves Chemical Castration, Capital Punishment for Pedophiles’ (*RT*, 13 October 2016) <<https://www.rt.com/news/362581-indonesia-pedophiles-chemical-castration/>> all accessed 19 November 2016.

that the pharmacotherapy law was not constitutional just one year after its enforcement, so it was repealed in 2013.<sup>190</sup>

Poland became the first EU country to introduce compulsory pharmacotherapy<sup>191</sup> following the Krzysztof B. case in early September 2008, in which the defendant had confined and raped his daughter for six years and made her pregnant with two children.<sup>192</sup> This case incurred public outrage and he was named the ‘Polish Fritzl’ by the media after the Austrian sex offender arrested in April 2008, who had imprisoned and raped his daughter for 24 years and made her bear seven children.<sup>193</sup> Donald Tusk, the Prime Minister of Poland, had pushed the introduction of compulsory pharmacotherapy as a response to this case, saying, ‘I want to introduce in Poland the most rigorous law possible regarding criminals who rape children’.<sup>194</sup>

A court shall impose pharmacotherapy as an additional punishment to an offender who rapes a child under the age of 15, or his descendant, adoptee, adoptive parent, brother or sister.<sup>195</sup> Other kinds of sex offenders may be sentenced to pharmacotherapy.<sup>196</sup> A diagnosis of ‘disorder of sexual preference’ (from F.65 of the International Statistical Classification of Diseases and Related Health Problem (hereafter ‘ICD-10’) published by the WHO),<sup>197</sup> is required, and the court should hear from a sexologist doctor,<sup>198</sup> but the informed consent of the offender is not required.<sup>199</sup> Six months before the release of an offender, the court shall determine whether the treatment is still needed for the offender and the manner of the treatment, be it inpatient or outpatient.<sup>200</sup> If the court determines inpatient treatment, the

<sup>190</sup> ‘Moldova Bans Chemical Castration Sentence for Paedophiles’ (*Reuters*, 5 July 2013) <<http://uk.reuters.com/article/uk-moldova-castration-idUKBRE96405Y20130705>> accessed 9 November 2016.

<sup>191</sup> Min Kyoung Han, ‘A Study on Pharmacological Treatment of Sex Offenders in the EU Countries’ Ministry of Government Legislation (ed), *World Law Research Paper 2013* (Ministry of Government Legislation of South Korea 2013) 32.

<sup>192</sup> ‘Chemical Castration – Humane or Insane?’ (*Krakow Post*, 3 October 2008) <<http://www.krakowpost.com/1169/2008/10>> accessed 9 November 2016.

<sup>193</sup> *Ibid*; Han (n 191) 33.

<sup>194</sup> *The Telegraph* (n 189).

<sup>195</sup> Han, *ibid*, 34; Criminal Act 2009 (POLAND) s 95a §1a, 197 §3 2), 3).

<sup>196</sup> Criminal Act 2009 (POLAND) s 95a §1.

<sup>197</sup> WHO, ‘International Statistical Classification of Diseases and Related Health Problem (ICD 10)’ (*WHO*, 2010) <<http://apps.who.int/classifications/icd10/browse/2010/en#/F60-F69>> accessed 9 November 2016. F.65 of the ICD-10 includes paraphilias.

<sup>198</sup> Criminal Act 2009 (POLAND) s 93, 95a §1.

<sup>199</sup> Han (n 191) 38; Mental Health Act 1994 (POLAND) s 3 6)b).

<sup>200</sup> Criminal Act 2009 (POLAND) s 95a §2.

offender shall be remanded in a hospital until the court decides the treatment is no longer necessary.<sup>201</sup>

Moldova introduced pharmacotherapy as an additional punishment on 6 March, 2012, which came into force on 1 July, 2012.<sup>202</sup> This legislation came about by public outrage over foreigners' sex tourism involving children and repeated child sexual offences by the same offenders.<sup>203</sup> Five foreigners had been convicted for child sex offences in Moldova between 2012 and 2014.<sup>204</sup> By the new law, a court shall impose pharmacotherapy on offenders who rape a child under the age of 15 and may do so for the offender against a victim aged over 15.<sup>205</sup> The Constitutional Court of Moldova, however, judged that the provisions relevant to pharmacotherapy are unconstitutional in that compulsory pharmacotherapy violates 'the fundamental right to physical and psychological integrity of the person', and that this right is 'granted by Article 24 of the constitution and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms'.<sup>206</sup> Article 24 of the constitution declares that 'the State guarantees every individual the right to life and physical and mental integrity' and 'no one may be subjected to torture or to any cruel, inhuman or degrading punishment or treatment'.<sup>207</sup> It is notable that the court stated that pharmacotherapy against a person's will without preliminary medical assessment and follow-up clinical observation 'represents in itself an inhuman treatment'.<sup>208</sup>

Turkey adopted pharmacotherapy by the Regulation on Treatment and other Liabilities against Sexual Offences, which was passed on 26 July, 2016. This legislation was encouraged by public outrage over the attempted rape and murder of

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<sup>201</sup> Ibid, s 94 §2, 95a §3.

<sup>202</sup> Criminal Act 2012 (MOLDOVA) s 104<sup>1</sup>(2).

<sup>203</sup> 'Moldova Legalizes Chemical Castration For Convicted Pedophiles' (*Radio Free Europe / Radio Liberty*, 6 March 2012) <[http://www.rferl.org/a/moldova\\_legalizes\\_chemical\\_castration/24507056.html](http://www.rferl.org/a/moldova_legalizes_chemical_castration/24507056.html)> accessed 20 November 2016.

<sup>204</sup> BBC 2012 (n 189).

<sup>205</sup> Criminal Act 2012 (MOLDOVA) s 104<sup>1</sup>(2), (3).

<sup>206</sup> 'Finding of Unconstitutionality on the Safety Measure of "Chemical Castration" (Complaint No. 11a/2013)' (*The Constitutional Court of Moldova*, 4 July 2013) <<http://constcourt.md/libview.php?l=en&idc=7&id=471&t=/Media/News/Finding-of-unconstitutionality-on-the-safetymeasure-of-Chemical-castration-Complaint-No-11a2013>> accessed 29 August 2016.

<sup>207</sup> Constitution of Moldova art. 24(1), (2). Article 24(2) of the Constitution of Moldova is exactly the same as Article of 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>208</sup> The Constitutional Court of Moldova (n 206).

a 20-year-old woman that occurred in February 2015.<sup>209</sup> This regulation includes the obligations of sex offenders, such as undertaking pharmacological treatment, participation in an intervention programme, being banned from living in the area where the victim resides or works, being prohibited from approaching the victim and being barred from working in an environment that includes children, during the term of imprisonment or post-release supervision.<sup>210</sup> A prosecutor decides whether an offender should take pharmacological treatment with reference to a medical board report written by physicians, and the informed consent of the offender is not required.<sup>211</sup>

Most recently, on 12 October, 2016, Indonesia passed laws regulating sex offences against children, which include pharmacotherapy, a ten-year minimum imprisonment, embedding a microchip for EM and capital punishment.<sup>212</sup> Joko Widodo, the President of Indonesia, proposed these amendments as a response to the case of the gang rape and murder of a 14-year-old girl that occurred in April 2016.<sup>213</sup> He said, ‘chemical castration, if we enforce it consistently, will reduce sex crimes and wipe them out over time’.<sup>214</sup> However, Prijo Sidipratomo, the chair of the medical ethics committee of the Indonesian Doctors Association, objected to this because of its violation of professional ethics and said that the members of the association should not take part.<sup>215</sup>

#### **2.4. Less-punitive types of legislation**

The pharmacotherapy laws in some European countries and Texas in the U.S. are less-punitive than those of six states in the U.S. As noted above, the American eugenic sterilisation laws influenced similar legislation in European countries in the

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<sup>209</sup> ‘Turkey Split as ‘Chemical Castration’ is Introduced for Rapists’ (*Asharq Al-Awsat*, 1 August 2016) <<http://english.aawsat.com/2016/08/article55355497/turkey-splits-chemical-castration-introduced-rapists>> accessed 20 November 2016.

<sup>210</sup> Regulation on Treatment and other Liabilities against Sexual Offences 2016 (TURKEY) s 6(2).

<sup>211</sup> *Ibid.*, s 6(1), 7(2).

<sup>212</sup> BBC 2016 (n 189); RT (n 189).

<sup>213</sup> *Ibid.*, RT (n 189).

<sup>214</sup> BBC 2016 (n 189); ‘Indonesia Castration Law ‘will Wipe Out Paedophilia’ (*BBC*, 19 October 2016) <<http://www.bbc.co.uk/news/world-asia-37694475>> accessed 20 November 2016.

<sup>215</sup> *Ibid.*

early 1900s.<sup>216</sup> Voluntary sterilisation and castration were legislated by Vaud Canton of Switzerland in 1928 and in Denmark in 1929, and involuntary sterilisation and castration were adopted by Germany in 1933.<sup>217</sup> Similar laws were enacted in Norway in 1934, Finland in 1935, Iceland and Latvia in 1938 and Sweden in 1944.<sup>218</sup>

Surgical castration was widely used for the treatment of sex offenders under this legislation until the 1970s. In Germany, no fewer than 2,800 sex offenders were mandatorily castrated between 1934 and 1944, and 800 sex offenders were castrated between 1955 and 1977 in West Germany.<sup>219</sup> In Denmark, 285 sex offenders were castrated between 1935 and 1970, and nearly 1,100 persons were sterilised between 1929 and 1973.<sup>220</sup> Forcible castration of very serious sex offenders was included in Danish law before its amendment in 1967, although Stürup, who managed surgical castration in Herstedvester Prison in Denmark, argues that forced castration was not carried out in Denmark.<sup>221</sup>

The primary characteristics of European countries' castration laws at present include: a wider range of targeted individuals for the treatment, including non-offenders; the voluntary nature of the process; decision-making in public health administrative procedures being separated from a criminal justice process, and the application of the same law to sex offenders and non-offenders, are primary characteristics of European countries' castration laws at present.

In Denmark, the Castration Act was abolished in 2007 and the related provisions were moved into the Health Act 2005. A person over eighteen years who has been diagnosed with transsexualism or whose sex drive means that they pose a danger in terms of committing crimes may request castration to the National Board of Health.<sup>222</sup> An applicant must be informed of the procedure, and the consequences and risks of the treatment by a physician before submitting the application form with

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<sup>216</sup> Deborah Barrett and Charles Kurzman, 'Globalizing Social Movement Theory: The Case of Eugenics' (2004) 33(5) *Theory and Society* 487, 509.

<sup>217</sup> *Ibid.*

<sup>218</sup> Sreenivasan and Weinberger (n 3) 770.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> George K Stürup, 'Treatment of sex offenders in Herstedvester Denmark' (1968) 43 *S204 Acta Psychiatrica Scandinavica* 5, 13.

<sup>222</sup> Health Act 2005 (DENMARK) s 115–117.

his signature.<sup>223</sup> Prior to the treatment, the local council must offer the applicant at least two or more conversations with a sex counsellor or social worker who has special knowledge of the treatment.<sup>224</sup>

For incarcerated sex offenders, the same procedure of application and permission is applied. However, a psychiatrist in the Herstedvester Institution, the only prison in Denmark that implements the pharmacotherapy of sex offenders, should recommend the offender applies to take the treatment if the following prerequisites are satisfied: an offender has committed sexual offences repeatedly or significantly heinous sexual crimes; the offender seems to be at risk of reoffending; the offender seems to be a person for whom psychological treatment will not be effective in reducing the risk of reoffending; all other options for the offender have been applied or seem to be insufficient; a psychopathological examination must be done for several years, and, a reasonable start date for the treatment must be discussed at the clinical meeting between psychiatrists, nurses, psychologists, welfare officers, jurists and unit officers.<sup>225</sup> Even though the offender applies to the National Health Board upon the recommendation and obtains permission from the Board, he must have an interview with an external consultant and be informed of the effects and adverse effects of the medication. After receiving this information, the offender can still refuse to consent to undertake the treatment.<sup>226</sup> However, if the offender does not wish to undergo the treatment, he may be denied parole on the grounds that his risk of reoffending without the treatment is considered too high to be released early.<sup>227</sup>

In Germany, a person suffering from serious disease or mental disorder on the grounds of abnormal sexual impulse, or a person who suffers from abnormal sexual impulses and commits sexual offences against individuals under fourteen years of age, murder, manslaughter, infliction of bodily injury, aggravated bodily injury or death resulting from bodily injury, is allowed to undergo castration based on the patient's consent.<sup>228</sup> The minimum age for surgical castration is twenty-five,

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<sup>223</sup> Ibid, s 113; Order on Sterilization and Castration 2014 (DENMARK) s 5.

<sup>224</sup> Order on Sterilization and Castration 2014 (DENMARK) s 2.

<sup>225</sup> Ministry of Justice Protective Legislation Division, *Report on Pharmacological Treatment in Denmark and Germany* (2010) 2–5.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Voluntary Castration and Other Treatment Methods Act 1969 (GERMANY) s 2(1), (2).



but there is no age limit for pharmacotherapy.<sup>229</sup> The reason for this difference seems to be that the effect of surgical castration is permanent, whereas that of pharmacotherapy is reversible.

Whilst the application of a patient is required in Denmark, consent is necessary in Germany. The patient's consent is invalid if, before consent is given, a patient is not informed of the reason, significance, effects, side effects, considerable alternatives and any other significant circumstances.<sup>230</sup> Even though the patient gives their consent to castration, it must not be implemented until the Expert Witness Office approves the patient's castration.<sup>231</sup> A physician who is a member of the Expert Witness Office must diagnose the patient and explain the procedure, effects, side effects and alternatives to the patient and related persons.<sup>232</sup>

In Germany, castration has not been implemented for sex offenders detained in prison, only for those confined in a preventative psychiatric hospital, based on the patient's consent and the approval of the Expert Witness Office.<sup>233</sup> For sex offenders in this hospital, a psychiatrist should observe the consequences of psychopathological and psychological treatment towards the patient and recommend pharmacotherapy if the psychiatrist decides that it is necessary.<sup>234</sup> If the patient does not consent to it, pharmacotherapy cannot be realised, but it may prevent the patient from being released from the hospital. Since the preventative psychiatric hospital order is indeterminate and the patient cannot be released until a court decides that he is not at risk of further reoffending because of his mental disorder,<sup>235</sup> the patient who refuses to undergo pharmacotherapy may be confined in the hospital for life because he may be judged to be still a high-risk offender.

As discussed above, the pharmacotherapy legislation in Denmark and Germany seems to be closer to pure treatment in that its decision is based entirely on medical assessment and the purpose of the treatment. However, since a patient's refusal of a physician's recommendation to undertake the treatment may incur serious harm, disqualification of parole or lifelong confinement, to the patient, this

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<sup>229</sup> Ibid, s 4(1).

<sup>230</sup> Ibid, s 3(1).

<sup>231</sup> Ibid, s 5(1).

<sup>232</sup> Ibid.

<sup>233</sup> Ministry of Justice Protective Legislation Division (n 225) 6; Voluntary Castration and Other Treatment Methods Act 1969 (GERMANY) s 63.

<sup>234</sup> Ministry of Justice Protective Legislation Division (n 225) 7.

<sup>235</sup> Criminal Act 2013 (GERMANY) s 67d(6).

aspect is deemed punitive. In this regard, Texas-type legislation seems to be less-punitive than Danish and Germany legislation, which will be addressed below.

Texas provides surgical castration rather than pharmacotherapy for an inmate who wishes to undertake it. No benefit is given for castration and no disadvantage is imposed for the inmate who does not request it.<sup>236</sup> The imposition of surgical castration as a condition of parole or mandatory post-release supervision by the parole panel, and that of community supervision by judges, is prohibited by law.<sup>237</sup> The Texas Government Code Section 501.061 under Chapter 501 titled 'inmate welfare' requires the following procedure for surgical castration:<sup>238</sup> the inmate at the age of 21 or older should request it in writing; a psychiatrist and a psychologist, who are experienced in the sex offender treatment and appointed by the government, should assess him, determine whether he is suitable for the treatment and counsel him before the treatment; the physician should obtain informed, written consent to the treatment of the inmate; the inmate can withdraw his request at any time before the treatment and he is then ineligible for the treatment in the future; a monitor should be appointed by the government in order to assist and consult with the inmate to ensure sufficient information on the treatment is offered to him by medical professionals to him, to determine whether the inmate decides to take the treatment freely, and to advise the inmate to withdraw his request if the monitor believes that he is being forced to undergo the treatment, and, the inmate's name must be kept confidential and the government can use it only for notifying his spouse if he is married. Stinneford states that, unlike the states that impose compulsory pharmacotherapy, Texas legislation is not considered to violate the Eighth Amendment.<sup>239</sup> According to the criteria noted in Section 2.2, the type of castration used in Texas may be regarded as purely therapeutic. It would be better, however, if pharmacotherapy were provided as an option, because, unlike surgical castration, it is reversible, and an experimental treatment would be possible, which can allow an offender to experience the effect of the treatment before determination.

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<sup>236</sup> Stinneford (n 26) 582.

<sup>237</sup> Texas Government Code s 508.226; Texas Code of Criminal Procedure art. 2.12 s 11(f).

<sup>238</sup> Texas Government Code Chapter 501 s 501.061.

<sup>239</sup> Stinneford (n 26) 599.

Sweden repealed the 1944 Castration Act in 2013.<sup>240</sup> Repeal of the Act had been discussed in Parliament since 1989 and a two-year investigation into the laws regulating sterilisation and castration was commissioned by the Swedish government in 1997.<sup>241</sup> The report published in 1999 stated that the 1944 Castration Act should be repealed because this act had only been applied to the individuals who wished to change sex rather than sex offenders, since 1975, and it was out-of-date.<sup>242</sup> More than ten years after this report, the Swedish government published another report in 2007.<sup>243</sup> This again suggested the repeal of the 1944 Act. Castration had been implemented on the grounds of mental illness, gender modification, sexual crimes driven by sexual abnormality or mental disorder, and serious problems caused by deviant sexual orientation or impulse.<sup>244</sup> Abelson stated that the first two causes had not been regulated by the Castration Act, but by the Health Care Act and the Gender Act, and castration based on the last two causes had not been used for decades, so the Castration Act seemed unnecessary.<sup>245</sup> He added that anyone who needed to be castrated because of the last two causes could be supported by the Health Care Act, even if the Castration Act were to be repealed.<sup>246</sup> With reference to this report, the Swedish government presented the Bill on the repeal of the 1944 Castration Act to Parliament on 12 April, 2012, which was passed on 18 April, 2012 and came into force on 1 January, 2013.<sup>247</sup>

## 2.5. Conclusion

In this chapter, the more-punitive type of legislation occurring in some states in the U.S., which became a model for the Korean 2010 Act, and the less-punitive type of legislation occurring in some European countries and Texas, are explored. California was the first state to legalise compulsory pharmacotherapy in 1996, which has influenced similar legislation in other states. Since then, American legislation has

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<sup>240</sup> <[https://www.riksdagen.se/sv/dokument-lagar/svenskforfattningssamling/sfs\\_s](https://www.riksdagen.se/sv/dokument-lagar/svenskforfattningssamling/sfs_s)> accessed 26 November 2015.

<sup>241</sup> Han (n 191) 24.

<sup>242</sup> Carl-Gustaf Andrén, *Steriliseringsfrågor i Sverige 1935-1975, Ekonomisk Ersättning* (Statens Offentliga Utredningar 1999) 72–73.

<sup>243</sup> Lars Göran Abelson, *Ändrad Könstillhörighet – Förslag Till Ny Lag: Betänkande av Könstillhörighetsutredningen* (Statens Offentliga Utredningar 2007).

<sup>244</sup> *Ibid*, 239.

<sup>245</sup> *Ibid*, 241.

<sup>246</sup> *Ibid*.

<sup>247</sup> Göran Hägglund, *Regeringens Proposition 2011/12:142 Ändrad Könstillhörighet* (2012)

become an example of the more-punitive type of pharmacotherapy worldwide. This was influenced in part by circumstances in the 1980s when sexual offenders and especially those offending targeting children, held the public attention. In response to public outcry, new legislation to control sex offenders was introduced, such as registration and public notification, residency restrictions, harsher punishment, civil commitment and pharmacotherapy. Although many states contemplated enacting compulsory pharmacotherapy following the California legislation, only seven States introduced it; and, two of these, Georgia and Oregon, repealed it in 2006 and 2011, respectively. No state has newly legalised compulsory pharmacotherapy since the 2000s, so only six states maintain the relevant law at present. In light of the criteria of punitiveness of pharmacotherapy discussed in Section 2.2, states' statutes in this regard seem oriented towards punishment rather than treatment. No state that provides pharmacotherapy requires an offender's informed consent for the treatment. The right to refuse the treatment is not allowed in any state, and no state decides pharmacotherapy outside a criminal justice procedure.

Some academics have considered these six states' statutes as unconstitutional, because compulsory pharmacotherapy is a cruel and unusual punishment violating human dignity and an offender's mental and bodily integrity. It also violates freedom of thought and deprives an offender of liberty without due process of law. Moreover, there have been difficulties of implementation in the states, such as a lack of awareness of the laws by prosecutors and judges, and inadequate infrastructure to provide the treatment. Due to the problem of not being able to find physicians to prescribe or inject medication, for instance, Oregon repealed the law in 2011, twelve years after the legislation was enacted. These constitutional and administrative problems have resulted in the unpopularity of compulsory pharmacotherapy in the U.S.

Unlike the American type of legislation, less-punitive types of pharmacotherapy have long been used in European countries such as Denmark, Germany and Sweden. In these countries it is viewed as a therapeutic procedure, separate from the criminal justice process, and is administered with the informed consent of, or at the request of, the recipient. In this legislation, the same processes are applied to permit the treatment between offenders and non-offenders. Texas

manages a therapeutic model of surgical castration only for incarcerated sex offenders.

The Korean government tried to quickly seek a solution to the urgent sexual offence problem due to public pressure and moral panic, so its legislation was done swiftly. However, this resulted in insufficient deliberation of the models, and inadequate modifications being made to them. The problems and realities of the U.S. states' legislation were not even considered, and less-punitive types of legislation were ignored, which seems to make the 2010 Act an example of a failed policy transfer. It is remarkable that there were similar circumstances in countries such as Poland, Moldova, Turkey and Indonesia that introduced compulsory pharmacotherapy laws in the early 2000s. This issue will be addressed by the concepts of moral panic in Chapter 5 and policy transfer in Chapter 6.

Discussions about human rights problems in the U.S. states' laws will be helpful to explore the legal defects of the 2010 Act, which will be addressed in Chapter 7. In addition, with reference to the therapeutic legislative examples of European countries and Texas, how to reform the 2010 Act and current treatment systems will be explored in Chapter 8.

As mentioned in Chapter 1, traditionally, violence against women has not been considered in Korea. However, social awareness of sexual victimisation has significantly changed in recent decades, which has resulted in important modifications in legal and criminal justice systems regulating sexual offending. In order to understand how this change occurred in Korea, traditional thought around status order, the characteristics of the Korean traditional law, and the effect of traditional thought on modern laws in Korea and on the government agencies dealing with sexual violence need to be addressed. These issues will be explored in the next chapter.

## Chapter 3: The Social, Political and Legal Character of South Korea

### 3.1. Introduction

Social awareness of and attitudes towards violent crimes against women have changed in recent decades in South Korea. Feminist activists have contributed to this change since the late 1980s, which led to the increase in the reporting of sex crimes and the revision of the laws regulating sexual violence, which are addressed in later chapters. To understand why this change is remarkable, it is appropriate to scrutinise the social, political and legal landscape in South Korea.<sup>1</sup>

A brief snapshot of contemporary Korea will be followed by an exploration of the influence of Confucianism on Korean society. Confucianism has influenced Korean history, culture, law and social order for more than two thousand years, so almost all aspects of Korean life are intimately entwined with Confucianism. In particular, Confucianism was a state religion and the primary philosophy regulating morals, ethics, laws and social orders during the Chosun dynasty, which lasted for over five hundred years, from the late 1300s to the early 1900s. A brief overview of Confucianism will be given, and its influence on the roles and status of women, will be described in the first section below. The aspects of Korean traditional law that focused on criminal justice and how to deal with sexual violence in the Chosun dynasty will be explored in the second section. Because the Confucian hierarchical order has influenced the Korean modern law, there has been conflict between Confucian aspects of the law and the constitution, which will be discussed in the third section. Feminist activists have tried to erase the influence of Confucian patriarchy from Korean statutes, particularly from the laws regulating violence against women. Their efforts resulted in the enactment of the Punishment for Sex Offences and Protection of Victims Act 1994 and Punishment for Domestic Violence Act 1997. However, feminist groups' arguments on how to regulate violence against women have not been fully reflected in either legislation or the practice of criminal justice. This is partly because the influence of Confucian patriarchal thought extends to criminal justice agencies' perceptions of and responses to violence against women. This issue as it is relevant to the Punishment for Domestic Violence Act 1997 will be

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<sup>1</sup> Kyoung Ja Min, 'History of the Women's Movement Against Sexual Violence' in Korea Women's Hotline (ed), *History of the Korean Women's Rights Movement* (Hanul Academy 1999) 18.

addressed in the fourth section below. Because of the persistence of such attitudes in criminal justice agencies, many rape victims in Korea have experienced secondary victimisation, which will be addressed in the final part of this chapter.

Although feminist groups have greatly influenced the legislation on sexual offending, their arguments on how to regulate sex offenders have not been entirely accepted, which will be explored in Chapter 6. They rejected compulsory pharmacotherapy as an effective way to prevent sexual violence on the grounds that sexual offences are not just caused by sexual desire. They continued to ask the government to understand how important it was to accurately analyse the reality and causes of sexual violence, and to change criminal justice agencies' perception towards violence against women. This claim was ignored in the deliberation process, however, by the members of Parliament and public officials who did not recognise how significant the arguments of feminist activists were. This shows how hard it is to change criminal agencies' perception of and attitudes towards sexual violence that often lag behind changes to public perceptions. The discussions in this chapter, linked to the analysis of moral panic in Chapter 5 and policy transfer in Chapter 6, will explain why the pharmacological treatment of sex offenders was legislated despite of the opposition of feminist activists.

### **3.2. Contemporary Korea**

The official English name of South Korea is the Republic of Korea, which is located in the southern part of the Korean peninsula, at the centre of Northeast Asia. It is bordered in the land by North Korea to the north, officially the Democratic People's Republic of Korea, and bordered in the sea by China in the west, and by Japan in the east. The population of South Korea is just over fifty million, spreading out over 100,148km<sup>2</sup>. Seoul is the capital and largest city with a population of nearly ten million.

The politics of South Korea takes the form of a presidential democratic system. The president is elected for a single five-year term by direct vote. The Korean Parliament is a unicameral legislature of 300 members, elected for a four-year term. South Korea is a multi-party democracy and four parties have had seats in the Parliament since the 2020 election. The Democratic Party, one of two main parties positioned centre to centre-left, took 176 seats and the People Power Party, one of two parties positioned to the right, took 103 seats. The Justice Party, on the

left, took six seats. The People's Party, on the centre to centre-left, took three seats. Non-partisans took seven seats. Among the 300 seats of the Parliament, 253 seats are elected by the single-member constituency election in which the electorate selects only one lawmaker in a designated small constituency, and 47 seats are distributed by the result of the proportional representative election in which the electorate selects only one party among the parties published in the ballot sheet.<sup>2</sup>

### **3.3. A brief history of Korea and the effect of Confucianism on the status of women**

#### **3.3.1. The influence of Confucianism**

Human beings have lived in Manchuria and the Korean peninsula since the Palaeolithic Age. People from the north of China moved into Manchuria and the Korean peninsula around 2000 BC. As an advanced Neolithic civilisation they settled large parts of the land, conquering, absorbing or displacing the aboriginal people who were there already.<sup>3</sup> According to Kim, these peoples are recognised as the ancestors of Koreans by most modern historians and 'they who emerged in this new culture are separately identified in old Chinese historiographies as the Han, Ye, or Maek tribes'.<sup>4</sup> They built ancient kingdoms in Manchuria and the Korean peninsula from around 1000 BC. In 668 AD., the first unified dynasty, the Great Silla, was established and occupied the Korean peninsula and the Han-Ye-Maek people have had a national identity since Great Silla's unification.<sup>5</sup> These ancient Korean kingdoms received Buddhism as a socially integrative religion and Confucianism as a political ideology since the fourth century.<sup>6</sup> These two factors have affected Korean culture and politics for many centuries. In particular, the influence of Confucianism has been dominant. Berthrong and Berthrong note that:

Confucianism, at various times and places, was a primordial religious sensibility and praxis; a philosophic exploration of the cosmos; an ethical system; an educational program; a complex of family and community rituals; dedication to government service; aesthetic

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<sup>2</sup> An electorate is given two ballot sheets: one is for the constituency election and the other is for the proportional representative election.

<sup>3</sup> Djun Kil Kim, *The History of Korea* (Greenwood Press 2005) 13.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, 41.

<sup>6</sup> Ibid, 24-25.



criticism; a philosophy of history; the debates of economic reformers; the intellectual background for poets and painters; and much more... In short, Confucians were profoundly concerned with all aspects of human life.<sup>7</sup>

Humanity is at the core of Confucian thought. Confucius explained the definition of humanity as: ‘in daily life, to be courteous; in doing works, to be reverently attentive; in human relations, to be strictly sincere’.<sup>8</sup> He believed that the recovery of virtue between all kinds of human relations was of paramount importance and could be achieved.<sup>9</sup> Confucius thought that everyone was capable of becoming a man of virtue, so even ‘lower’ status people would be on the same terms with ‘higher’ status people by their virtuous conducts.<sup>10</sup> Confucius accepted the traditional Chinese hierarchies based on social status and gender and believed that harmony in human society could be achieved if all the people acted in accordance with their social status.<sup>11</sup> This thought appears in the Confucian Analects, a book edited by his disciples, as follows:

The duke Ching of Chi asked Confucius about government. Confucius replied, there is government, when the king is king, and the minister is minister; when the father is father and the son is son. 'Good!' said the duke; if, indeed; the king be not king, the minister not minister, the father not father, and the son not son, although I have my revenue, can I enjoy it?<sup>12</sup>

Even though Confucius recognised traditional hierarchy, he focused on the performance of hierarchical duty. There is no definition of right in Confucian thought; there is only the definition of duty.<sup>13</sup> Cho describes this thought as that: ‘A king must do his duty for subjects and people; a subject must do his duty for a king;

<sup>7</sup> John H Berthrong and Evelyn Nagai Berthrong, *Confucianism: A Short Introduction* (Oneworld Publications 2000) 1.

<sup>8</sup> Confucius, *Analects* Book 13 Chapter 19.

<sup>9</sup> Se Young Jeon, ‘Modern Adaptability of Confucian Traditional Ethics’ (2000) 10(1) 21th Century Political Science Review 47, 50.

<sup>10</sup> Cho-yun Hsü, ‘The Unfolding of Early Confucianism: The Evolution from Confucius to Hsün-tzu’ in Irene Eber (ed), *Confucianism, The dynamics of tradition* (Macmillan Publishing Company 1986) 25.

<sup>11</sup> Kong Beom Lee and others (eds), *Overview of Oriental History* (Jisik-Sanup Publishing 1983) 38.

<sup>12</sup> Confucius and James Legge, *Confucian Analects, The great Learning, and The Doctrine of the Mean/ translated, with Critical and Exegetical Notes, Prolegomena, Copious Indexes* (Lun yü, Ta hsüeh and Chung Yung trs, Dover Publications 1971) 256.

<sup>13</sup> Kwang Su Cho, ‘Power Theory in Confucianism’ (2001) 11(1) 21th Century Political Science Review 1, 2.

a father must do his duty for a son; a son must do his duty for a father'.<sup>14</sup> Confucians believed that the abuse of power could be prevented by moral cultivation in order to do the duty.<sup>15</sup> Social hierarchy was not so strict in the early era of Confucianism. Mencius (371-289 BC), even insisted that a subject could change the king if the king does the wrong thing repeatedly and does not listen to the remonstrance of a subject.<sup>16</sup>

Confucianism emphasises treating people with humanity, making for a harmonious society, and believes that sound government is possible within a social hierarchy if all people do their duties through individual moral cultivation of the mind. Oldstone-Moore explains this thought as follows:

Confucianism demands that all people be treated with humanity, but within a well-articulated hierarchy. Filial piety is a central Confucian virtue, as is behaving according to one's rank. The most important relationships are those between parent and child, husband and wife, elder brother and younger brother, friend and friend, ruler and subject. An ordered, harmonious society is dependent on self-education and on each person playing his or her part appropriately and with good intent.<sup>17</sup>

Confucianism became the national religion during the reign of King Wudi (140-87 BC) of the Han dynasty (202 BC-220 AD) in China. King Wudi required all of his subjects to study Confucianism and put it into practice in their daily life. They should justify the political power of a king and it became their duty.<sup>18</sup> In this era, Confucian officials established the principle of three primary relations: king and subject; father and son; husband and wife.

A notable official of King Wudi, Tung Chung-shu (179-104 BC), described the principle of the three primary relations as follows: 'A king receives an order from heaven; a lord from a king; a son from a father; a wife from a husband'.<sup>19</sup> While the respect and duty of the lower classes towards the upper classes were emphasised, the

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 3.

<sup>16</sup> Mencius, *Mencius Volume Two* (DC Lau tr, 2 edn, The Chinese University Press 1984) 219.

<sup>17</sup> Jennifer Oldstone-Moore, *Understanding Confucianism* (Duncan Baird Publishers 2003) 53.

<sup>18</sup> Lee and others (eds) (n 11) 64.

<sup>19</sup> Jeon (n 9) 52.

upper classes had no moral responsibility to the lower classes.<sup>20</sup> This principle of three primary relations leads to absolute monarchy and patriarchal order.<sup>21</sup> These kinds of Confucian thought and social order have been strengthened and systemised in subsequent dynasties of China and Korea.

In Korea, after the fall of the Great Silla in 936, the Koryo dynasty lasted until the Chosun dynasty was established in 1392. During the Koryo dynasty, the Confucian classics were taught nationally and Neo-Confucianism was introduced in the late thirteenth century.<sup>22</sup> Neo-Confucianism was different from traditional Confucianism, which stressed textual interpretation.<sup>23</sup> Neo-Confucianism was created by Zhu Xi, a Chinese scholar, in the late twelfth century,<sup>24</sup> and was a ruling ideology in the Chosun dynasty from the fourteenth century. It can be understood as a metaphysical and philosophical study of the fundamental principles of human beings and the universe.<sup>25</sup> Berthrong and Berthrong described it as follows:

As the Korean state emerged, Confucianism became more and more important in Korean culture. By the end of the fourteenth century, the long-lived Chosun dynasty (1392-1910) declared Confucianism to be the orthodox philosophy (and religion) of Korea. In the centuries that followed, Korean scholars appropriated and refined the Neo-Confucian tradition. It is not an exaggeration to say that the best philosophic work of the sixteenth century in East Asia was done in Korea. No one advanced the specifics of Zhu Xi's synthesis more than the Koreans. Moreover, the Koreans even drastically transformed their family structure, including marriage ritual, to conform to orthodox Confucian models.<sup>26</sup>

Since Confucianism, which had been modified by political power for more than a thousand years, ruled all kinds of human relations in the Chosun dynasty, the principle of the three primary relations noted above was strictly adopted. Thus, a subject must obey a king; a son must obey a father; a wife must obey a husband; and

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Chong Ko Choi, 'Confucianism and Law in Korea' (1996) 37(2) Seoul Law Journal 115, 116.

<sup>23</sup> Andrew C Nahm, *A Panorama of 5000 Years: Korean History* (2nd edn, Hollym 1989) 44.

<sup>24</sup> Kim (n 3) 68.

<sup>25</sup> Choi (n 22) 115.

<sup>26</sup> Berthrong and Berthrong (n 7) 5.

criticism was not permitted.<sup>27</sup> This perspective has long shaped perceptions of women in general and responses to the female victims of male violence in particular.

### 3.3.2 The effect of Confucianism on the status of women

The status of women is lower than men in Confucianism. Women should follow men for life in the Confucian social order. The status of women was summarised as follows in the Book of Rites, the representative Confucian book edited in the first century BC, which set out among other things the overall social norms, family ritual, administration and ceremonial rites transmitted since the Zhou dynasty:<sup>28</sup>

Women are the people who follow. When they are young, they follow their father; when they get married, they follow their husbands; when their husbands die, they follow their son.<sup>29</sup>

According to Confucianism, women were allowed to do business only inside a house. For instance, women's duty is classified in 'Elementary Learning', a representative Neo-Confucian book for children's moral education, as follows:

Women are in charge of only making food, liquor and clothes in accordance to rites. Women should not participate in administration of a government and manage an important thing in family. Even if a woman is very clever and intelligent, she must just assist her husband and give him an advice. If women exceed their duty such as hen's crying in the early morning, it should incur a disaster.<sup>30</sup>

Confucian patriarchal order and the lower status of women had been strengthened through this kind of education in the Chosun dynasty.

In addition, Confucian patriarchal order and the lower social status of women have relevance to violent crime against women. There is an old saying in Korea: 'Beating women and dried pollack makes them tastier'.<sup>31</sup> It means that a husband should treat his wife with violence to make her obey him. While a husband's

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<sup>27</sup> Jeon (n 9) 53.

<sup>28</sup> Deuk Su Kim, 'Confucius's View on Women' (2013) 12 *Women's Research* 59, 62-63.

<sup>29</sup> Mengou Wang, *A current Commentary of Book of Rites vol. 1* (Tianjin Old Book Press 1987) 349.

<sup>30</sup> Heung Seok Nam, 'On the Concept of Womankind of Confucian Ideas and Femininity Leadership in the Present Age' (2008) 14 *Eastern studies* 275, 280, citing *Elementary Learning*.

<sup>31</sup> Since dried pollack is very solid, it needs to be beaten with a club for cooking. If it is beaten more, it becomes softer and tastier.

violence against a wife was not punished, or was punished lightly, a wife's violence against a husband was punished heavily by the law in the Chosun dynasty.<sup>32</sup> It is one example of legitimised Confucian patriarchal order and the lower status of women. When a husband beat a wife, it was not a crime unless the beating incurred injury. Even if a wife was injured, a husband was not punished if a wife did not make a complaint to the official. A husband who injured a wife was punished with two degrees lower than a normal injury case.<sup>33</sup> The punishment was not less than twenty cudgels and not more than two years forced labour with eighty cudgels.<sup>34</sup>

When a wife beat a husband, however, she should receive eighty cudgels as a punishment, even though the beating did not incur injury. A wife who inflicted injury upon her husband was punished with three degrees higher than a normal injury case.<sup>35</sup> The punishment was not less than eighty cudgels and not more than exile with one hundred cudgels.<sup>36</sup>

These historical examples demonstrate that the belief that a wife must obey a husband was realised violently in the Chosun dynasty. Since the Chosun dynasty lasted more than five hundred years, until the early twentieth century, it is difficult to deny that this thought is deeply embedded in Korean culture.

Violence against women that resulted from their lower status has been common in East Asian countries. In 1996, representatives of the East Asia Women's Forum from South Korea, China, Japan and Taiwan insisted that: 'Violence against women is especially severe in East Asian countries. Confucian patriarchy is the reason for domestic violence and sexual crimes'.<sup>37</sup> Chang, a Korean scholar, in her empirical study investigating 217 wife batterers,<sup>38</sup> shows that men who practise high

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<sup>32</sup> Kyoung Park, 'The Government's Family Policy, Reflected in Penal Administration during the Early Half Period of the Joseon Dynasty - Examination of How Spousal Abuse were Punished' (2008) 90 *Journal of Historical Studies* 67, 73.

<sup>33</sup> *Ibid.*, 73-74. Punishment for assault was classified into eight degrees related to the level of injuries suffered by a victim, whether a weapon was used and what kind of a weapon was used in the crime, in the criminal law of the Chosun dynasty. Thus, 'two degrees lighter than a normal injury case' means to mitigate two degrees from the punishment which is appropriate to the assault committed by the offender.

<sup>34</sup> Jung Hoon Lee, 'The Purpose of Criminal Punishment in the Chosun Dynasty' (2010) 13(1) *Journal of Philosophy of Law* 227, 239-40.

<sup>35</sup> Park (n 32) 74.

<sup>36</sup> *Ibid.*

<sup>37</sup> Hyun Sook Park, 'Patriarchal Order Incurs Sexual Offence and Domestic Violence' *Segye Ilbo* (Seoul, 28 August 1996) 23.

<sup>38</sup> Hee-Suk Chang, 'A Typology of Maritally Violent Men: Testing the Three Batterer Subtypes Derived from Theory' (2004) 56 *Korean Journal of Social Welfare* 303, 322.

levels of violence towards their wives have patriarchal perceptions of women's roles, and attitudes supportive of violence.

A number of western feminist researchers support the theory that patriarchy influences domestic violence and sexual offences. Smith states that: 'patriarchy has two basic components: A structure, in which men have more power and privilege than women, and an ideology that legitimizes this arrangement'.<sup>39</sup> Confucian patriarchy has these two elements exactly in the Chosun dynasty. Smith demonstrates that husbands who agree with patriarchal ideology tend to beat their wives more than husbands who do not agree with such beliefs.<sup>40</sup> Patriarchy focuses on sustaining male supremacy and female inferiority, which is the reason and aim of sexual violence.<sup>41</sup>

As described in this section, it is evident that the status of women has been lower in Confucian patriarchal order and it has been legitimised for a long time in Korean history, which has influenced sexual violence against women. It is noticeable that theoretical and empirical research from both eastern and western countries shows similar results regarding violence against women.<sup>42</sup>

### **3.4. Characteristics of the Korean traditional law**

#### **3.4.1. Characteristics of Confucian criminal justice in the Chosun dynasty**

Confucius thought that politics should be governed not by judgement but by virtue.<sup>43</sup> His thought appears in the Confucian Analects as follows:

The Master said, if the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid punishment, but have no sense of shame. If they be led by virtue, and uniformity sought

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<sup>39</sup> Michael D Smith, 'Patriarchal Ideology and Wife Beating: A Test of a Feminist Hypothesis' (1990) 5(4) *Violence and Victims* 257.

<sup>40</sup> *Ibid*, 268.

<sup>41</sup> Susan Brownmiller, *Against Our will: Men, Women and Rape* (Ballantine Books 1975) 17-8; Susan B Sorenson and Jacquelyn W White, 'Adult Sexual Assault: Overview of Research' (1992) 48(1) *Journal of Social Issues* 1, 3-4; Jill Radford and Elizabeth A Stanko, 'Violence Against Women and Children: the Contradiction of Crime Control Under Patriarchy' in Marianne Hester, Liz Kelly and Jill Radford (eds), *Women, Violence and Male Power* (Open University Press 1996) 65.

<sup>42</sup> Park (n 37) 23; Chang (n 38) 322; Smith (n 39) 257; Brownmiller (n 41) 17-8.

<sup>43</sup> Chong Ko Choi, 'Ancient Foundation of East Asian Jurisprudence' (2002) 43(3) *Seoul Law Journal* 141, 153.

to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.<sup>44</sup>

Confucius contrasts government by virtue with government by punishment, and claims that the former should make the people do the right thing.<sup>45</sup> Even though punishment would be inflicted upon the offenders, the purpose of punishment is not only for retribution, but also for edification.<sup>46</sup> Confucianism focuses on human morality and education, which makes people practise the virtues. Thus, the subjective aspect of a crime is thought to be more important than the objective aspect in Confucian criminal justice. When an offence was not regarded as a revelation of an offender's personal malignity, the offender might be punished leniently in the Chosun dynasty. However, if an offender committed a crime repeatedly, the offender should be punished harshly, since the crime was regarded as a disclosure of the offender's inner evil and it would be difficult to expect the offender to be edified.<sup>47</sup>

In addition, there was one more exception to be punished heavily in any circumstance. This was a crime violating the principles of the three primary relations - a king and a subject; a father and a son; a husband and a wife – since it was related to Confucian fundamental social order. The most severe offences were called 'the Ten Cardinal Evils, of which disloyalty and lack of filial piety were the most important'.<sup>48</sup> To place or attempt to place the dynasty in peril, or to destroy or attempt to destroy palaces or kings' graves were actions against the king and subject relation. To kill or not to support grandparents, parents, a husband's grandparents or parents were actions against the father and son relation. To kill a husband, to hide a husband's death and not to wear mourning garments during the period of mourning for a husband, were actions against the husband and wife relation.<sup>49</sup>

Reductions in sentence, substitution fines and pardons were not allowed for the Ten Cardinal Evils.<sup>50</sup> While it was a common rule to execute a death penalty only between the autumnal equinox and the spring equinox, this rule was not applied in

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<sup>44</sup> Confucius and James Legge (n 12) 146.

<sup>45</sup> Young Chan Lee, 'The Social Institution of Confucianism: Centring on the Institutions of Family, Nation and Estate' (2007) 34 *Keimyung Korean Studies Journal* 271, 290.

<sup>46</sup> Hui Gi Sim, 'Reformation of Criminal Justice in the Eighteenth Century' (1997) 20 *Journal of Korean Culture* 199, 215.

<sup>47</sup> *Ibid*, 216.

<sup>48</sup> Choi (n 22) 119.

<sup>49</sup> Jae Su Yoon, 'The Ten Cardinal Evils' (1981) 6 *Legal History Studies Journal* 285, 288-303.

<sup>50</sup> *Ibid*, 287.

respect of the Ten Cardinal Evils: those found guilty were executed promptly.<sup>51</sup> Further, certain aspects of the Ten Cardinal Evils only applied to women. For instance, a wife would be punished for a Cardinal Evil if she killed her husband, while a husband's murder of his wife would be dealt with as a normal crime. This kind of discrimination is rooted in Confucian patriarchal order.<sup>52</sup>

### 3.4.2. Dealing with sex crimes in the Chosun dynasty and beyond

Patriarchy was a core value in Confucian family order, which is connected with a political order, and functions as an institution to solidify a Confucian nation and to achieve a Confucian political purpose.<sup>53</sup> In the early stages of the Chosun dynasty (1392-1598), rape was regarded as a significant crime that violated Confucian patriarchal order and was punished by hanging regardless of the offender's class, whilst attempted rape was punished by exile with corporal punishment by the law.<sup>54</sup> From the late 16<sup>th</sup> century, when a victim was a member of the ruling class, the offender was punished by decapitation.<sup>55</sup>

There are official chronicles of the Chosun dynasty written by the public historiographer which span over five hundred years and which document a huge number of criminal cases and provide detailed information as to how sex crimes were dealt with. Most recorded sex crimes were committed by members of the ruling class and most victims were women of the lower class.<sup>56</sup> Hundreds of rape cases committed by the ruling class are recorded in the chronicles.<sup>57</sup> For instance, Doohyoung Nam, a local governor, raped a wife of his subordinate and a wife of a commoner in December 1627<sup>58</sup>, while Sukgu Lee, a chief police officer, raped a married woman living in his district in September 1818.<sup>59</sup>

Until the sixteenth century, when a ruling class man raped a lower class woman, the offender was usually charged with attempted rape and punished by exile

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid, 299, 301.

<sup>53</sup> Heon-Gyu Lim, 'Confucian's Universal Familism: Critics and Prospect' (2012) 23 *The Journal of Korean Studies* 289, 301.

<sup>54</sup> Byoung In Chang, 'Changes of A State Regulation Towards Sex Crimes in the Chosun Dynasty' (2001) 56 *Journal of Criticism on History* 228, 231.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, 236.

<sup>57</sup> National Institute of Korean History, *The Annals of the Joseon Dynasty*, <<http://sillok.history.go.kr/main/main.jsp>> accessed 28 August 2014.

<sup>58</sup> Chang (n 54) 249, citing *Chronicle of King Incho vol. 17*.

<sup>59</sup> Ibid, citing *Chronicle of King Sooncho vol. 21*.



along with the offender's whole family. The punishment for sex crimes by men from the ruling class was heavier than for other crimes by them, because a higher level of sexual morality was required of the ruling class in the early stages of the Chosun dynasty.<sup>60</sup> In addition, the levels of violence accompanying rape, the resistance of a victim, sexual history or conduct of a victim were not regarded as important in sexual offence trials in the early stages of the Chosun dynasty.<sup>61</sup> It was the same in the case in which a victim was a prostitute. It is difficult to find a rape case in which a victim's complaint was rejected or a more lenient sentence was passed because the victim was a prostitute.<sup>62</sup> This means that the definition of rape was not narrow and the offenders were punished properly in the early stages of the Chosun dynasty.

From the late sixteenth century, however, whilst the recorded number of sex crimes by members of the ruling class increased, punishments became lighter.<sup>63</sup> In many cases, ruling class sex offenders were not punished at all, depending upon their political power, or they were merely fired from their official positions without any punishment.<sup>64</sup> The sexual history and conduct of a victim were regarded as important in sexual offence trials.<sup>65</sup>

Furthermore, resistance by the victim became increasingly important in sexual offence cases. If a victim was killed while resisting rape or subsequently committed suicide, the offender would be punished strictly, even if it were a ruling class man who raped a lower class woman.<sup>66</sup> However, if a victim did not resist strongly or commit suicide, she could be punished as follows: a married woman abducted and raped was ordered to be a slave in 1682;<sup>67</sup> the fact of pregnancy by a rape was revealed seven years after rape so that a raped woman was sentenced to exile with the child in 1766.<sup>68</sup> Thus, it can be seen in some incidences that victims became culpable for being raped, on the grounds that the rape would have been impossible if the victim had resisted intensely.<sup>69</sup>

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid, 241.

<sup>62</sup> Ibid, 242.

<sup>63</sup> Ibid, 237.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid, 243.

<sup>66</sup> Ibid, 238.

<sup>67</sup> Ibid, 250, citing *Chronicle of King Sookjong vol. 9*.

<sup>68</sup> Ibid, citing *Chronicle of King Youngjo vol. 109*.

<sup>69</sup> Ibid, 238

Whilst a victim's suicide is seen in the chronicle very rarely in the early stages, many suicide cases after rape appear in the chronicle of the late stages of the Chosun dynasty.<sup>70</sup> The frequency of official posthumous commendations for victims who died while resisting rape or who committed suicide afterwards increased from the seventeenth century. Arguably, the Chosun dynasty tacitly encouraged a rape victim's death.<sup>71</sup>

This phenomenon was caused by the Chosun dynasty's diminishing control and authority over sexual offences committed by members of the ruling class. Even though the Chosun dynasty strengthened the law relating to sex crimes, it did not impose appropriate punishments upon perpetrators from the higher social strata. Due to the weakening of control and authority, the Chosun dynasty could only punish ruling class sex offenders when a victim resisted so intensely that she died or committed suicide.<sup>72</sup>

The problems of dealing with sexual offences in the late Chosun dynasty still cast a shadow over Korean criminal justice. Levels of resistance, sexual history and the conduct of a victim are still considered important factors by the current Korean criminal court. These issues will be explored later in this chapter.

### **3.5. The effect of Confucianism on modern Korean law**

#### **3.5.1. Introduction**

Even though Confucianism has greatly affected the evolution of Korean modern law, which was first enacted between 1948 and 1953 after the Japanese colonial era (1910-1945), its influence has gradually reduced gradually in recent years. Since constitutional law embraces the principle of equality, discrimination based on Confucian hierarchical order is prohibited. Confucian thoughts and culture, however, have such a long history and are so deep-rooted that they still influence the perceptions and behaviours of people, including law enforcement officers. This section focuses on how Confucian thought has affected responses to violence against women in the contemporary Korean justice system.

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

### 3.5.2. The Constitution and Confucian hierarchical order

Confucianism is premised on the different status and social roles of people on the basis of a claimed natural hierarchy. The Korean constitution, however, proclaims that all citizens are equal and any discrimination based on status shall not be recognised. The preamble of the Korean constitution declares that:

We, the people of Korea do hereby amend the constitution ... To destroy all social vices and injustice, and to afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony.

In addition, there is the rule of equality in Section 11(1) cited above and the duty of the state to protect women, which is affirmed in Section 34(3), and states that: ‘The State shall endeavour to promote the welfare and rights of women’. Section 36(1) states that: ‘Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal’.

Therefore, Confucian social order based on a hierarchical social status is difficult to harmonise with the constitution. The supreme authority of the constitution has been actualised through the constitutional adjudication system introduced in 1988. Any person whose fundamental rights guaranteed by the constitution are infringed due to the exercise or non-exercise of the public power, excluding judgment of the court, may request that the Constitutional Court adjudicates on a constitutional complaint.<sup>73</sup>

The family head system, a Confucian institution, requiring only a male to be the legal head of the family, was repealed after the decision of the Constitutional Court in 2005 on the grounds of its conflict with the constitution. The Constitutional Court ruled that:

The family head system is a discrimination based on stereotypes concerning sexual roles. This system, without justifiable grounds, discriminates men and women in determining the succession order to house head, forming marital relations, and forming relations with children... It does not respect individuals inside a family as individuals

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<sup>73</sup> Constitutional Court Act 1988 (ROK) s 68(1).

with dignity but rather treats them as a means to succeeding a family. Such attitude does not comply with Article 36(1) of the constitution that demands respect for the right of autonomous decisions of individuals and families in deciding how to manage marriage and family life...<sup>74</sup>

On this decision, almost all the Confucian differential provisions were repealed in the Korean family laws. Since the actual supreme authority of the constitution is so great, it is very important to scrutinise the provisions, administrations and behaviours of public officials, in particular, relating to criminal justice or the protection of a victims, from a constitutional viewpoint. It would be helpful to analyse the problems constitutionally and to find a way to revise the law or to solve the institutional problems concerning violence against women in reality.

### **3.5.3. Confucian influence on criminal law relating to violence against women**

Confucian patriarchy has influenced Korean criminal law and criminal justice relating to violence against women. Rape had not been dealt with as a crime regarding the right to sexual self-determination, but as a crime concerning chastity, so that rape belonged to ‘Chapter 32: Crimes relating to chastity’ in the Criminal Act<sup>75</sup> until its revision in 1995. Chastity in this respect means the social requirement placed on women to maintain their ‘purity’ and to abstain from sexual relations prior to and outside of the marriage.<sup>76</sup> Thus, this chapter name means that a rapist is punished, not for violating the right of a victim’s sexual self-determination, but by violating social order, which requires women to keep their chastity.<sup>77</sup> It was connected to the idea that Confucian patriarchal order should be kept by the law.

Along the same lines, a complaint by a victim had been required for prosecution of rape by criminal law until it was repealed in 2012. Even if a victim or third party reported a rape to the police, the victim was asked to express her intention to make a complaint separately. The reason for this requirement was to protect the honour of the victim through preventing disclosure of sex offences during the criminal justice process.<sup>78</sup>

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<sup>74</sup> CCC 2001 Hun-Ga 9, 10, 11, 12, 13, 14, 15 and CCC 2004 Hun-Ga 5 (consolidated), 3 February 2005 [2005]3 February 2005, 2.

<sup>75</sup> Criminal Act 1958 (ROK).

<sup>76</sup> Young Keun Oh, *Criminal Law II* (Pakyoungsa 2005) 165.

<sup>77</sup> *Ibid.*

<sup>78</sup> Il Su Kim, *Korean Criminal Law*, vol 3 (Pakyoungsa 1994) 379.

Victims suffered however, and offenders benefited from this rule in many cases. It was common that an offender suggested giving reparations and asked or intimidated a victim into withdrawing a complaint.<sup>79</sup> If a victim argued against an offender for a favourable agreement, she could be criticised for benefiting by means of her being a victim, which would be a stigma to her; therefore, this rule did not protect a victim's honour, rather, it would harm her honour.<sup>80</sup>

Meanwhile, if a victim came to an agreement with an offender and withdrew a complaint, the investigation, prosecution or trial was concluded and the offender was not punished. It invalidated the blame of the offender and weakened the perception of the seriousness of the sexual offence. Furthermore, this rule obscured the criminal justice system's active and proper responses to sex crimes.<sup>81</sup>

This requirement placed the responsibility on the victim for whether the state should exercise its authority to punish an offender.<sup>82</sup> It was a burdensome task, which caused victims to hesitate over the punishment for perpetrators. The premise of this rule, that disclosure of sex crimes would harm a victim's honour, is not reasonable and is again rooted in patriarchal thought, since victimisation should have no bearing on the honour of the victim and the blameworthy person is not the victim, but the offender.

The Confucian patriarchal effect also appears in the way domestic violence is dealt with. Although there have been no legal restrictions on the punishment of domestic violence in Korean modern criminal law, domestic violence cases have not been treated properly in the criminal justice system on the grounds of this common thinking: if a man beats his wife or child, no one may interfere with it.<sup>83</sup> This is further evidence of Confucian patriarchal expression. Even if a victim of domestic violence reports it to the police, the police attitude is usually passive. Thus, there has been a convention of non-intervention towards domestic violence in criminal justice agencies.<sup>84</sup>

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<sup>79</sup> In Sup Han, 'Victim Protection and the Punishment for Sex Offences and Protection of Victims Act' (1994) 3 *Victimology* 33, 38.

<sup>80</sup> Hye Jin Park, 'A Critical Study on "Offenses Subject to Complaint" in Sexual Violence Crimes' (2013) 40 *Anam Law Journal* 417, 434.

<sup>81</sup> *Ibid.*, 437.

<sup>82</sup> *Ibid.*, 433.

<sup>83</sup> In Sup Han, 'Legal Policy Analysis on the Punishment for Domestic Violence Act' (1999) 7 *Journal of Victimology* 111, 116.

<sup>84</sup> *Ibid.*

Feminist activists had vehemently criticised this attitude of government agencies from the early 1990s and tried to change the law relating to domestic violence. Their efforts were supported by politicians, resulting in the passing of the Punishment for Domestic Violence Act 1997 and the Protection of a Victim of Domestic Violence Act 1997.

The main features and problems of the Punishment for Domestic Violence Act 1997 are as follows: Firstly, the purpose of this act is ‘to restore the peace and stability of a family destroyed due to crimes of domestic violence, maintain a healthy family environment and protect the human rights of victims and their family members’.<sup>85</sup> Even though this act is enacted based on the reflection that the state’s passive intervention in domestic violence for the sake of family peace has failed to protect victims’ human rights, it seems contradictory for the Act to aim equally at protecting victims’ rights and maintaining family peace. It should have clearly stated that the protection of victims is the purpose of the Act. Eun Kyung Kim also argues that the main purpose of this act is not clear.<sup>86</sup>

Secondly, the disposition order for a domestic violence offender was introduced as a new kind of lighter penalty in comparison to other punishments. If a domestic violence offence is deemed unsuitable for punishment because of its trivial nature, or the victim does not want the offender to be punished, a prosecutor has discretion over whether to send the case to the family court or suspend prosecution on condition of the offender taking counselling with an expert. A judge of the family court may impose a disposition order, which may include restrictions on the offender's access to victims, unpaid work, supervision order, medical treatment or counselling order, on the offender.<sup>87</sup> A judge has the authority to decline to impose any disposition order, called a non-order, when the judge deems the offender unable to comply with such an order or considers it unnecessary.<sup>88</sup> The rate of non-orders as measured by the number of non-orders as a percentage of whole sentences for domestic violence in family court was 43.3% in 2015 and 44.9% in 2016.<sup>89</sup> There

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<sup>85</sup> Punishment for Domestic Violence Act 2012 (ROK) s 1.

<sup>86</sup> Eun Kyung Kim, ‘Responding to Domestic Violence in the Criminal Justice System’ (2003) 65 *Women’s Studies Forum* 57-58.

<sup>87</sup> Punishment for Domestic Violence Act 2012 (ROK) s 40 (1).

<sup>88</sup> *Ibid*, s 37 (1).

<sup>89</sup> The Office of Court Administration, *Yearbook of Justice* (2015, 2016) 1006, 1042.

has been criticism that such a high percentage of non-orders is caused by the attitudes of judges.<sup>90</sup>

Thirdly, a prosecutor should respect the victim's intention when dealing with domestic violence cases.<sup>91</sup> This rule imposes a burden on the victim to decide whether or not to prosecute the offender. In practice, even if the offender has committed severe violence repeatedly, a prosecutor usually sends the case to the family court or suspends prosecution on condition of counselling without deliberation, rather than prosecuting the offender, if the victim does not want to punish the offender.<sup>92</sup> In this sense, the intention of the victim has been overemphasised and there is no provision regarding systems capable of helping the victim to make an appropriate decision in this act.<sup>93</sup>

Fourthly, in this act the authority and responsibilities of police significantly increased in dealing with domestic violence cases. When police receive a report of ongoing domestic violence, they must: arrive at the scene of the crime, without delay, and stop the violence, isolate offenders from victims, and conduct an investigation of the crimes; refer victims to domestic violence counselling centres or protection facilities; and refer victims requiring emergency treatment to medical institutions.<sup>94</sup>

Even though the police are given the duty and authority to intervene in domestic violence cases, it has been indicated that the perceptions and attitudes of the police have still not changed enough. Kim, Choi and Nam, in their empirical study investigating the behaviour of 178 police officers in domestic violence cases, found that 14 officers did not know their duty or authority and 69 officers had no experience to enforce their authority.<sup>95</sup> A further 51 officers did not know the contact number of regional counselling centres or protection facilities.<sup>96</sup> In addition, many of the officers viewed intervention in domestic violence negatively, as follows: 113 officers claimed that domestic violence cases were burdensome; 79 responded that police intervention was not inevitable in domestic violence cases; 126 answered that resolution within the family was preferable; and 101 answered that there was little

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<sup>90</sup> Ho-Joong Lee, 'Critical Analysis on the Indictment Suspension with Consultation in Domestic Violence Cases' (2005) 16(2) Korean Criminological Review 171, 185.

<sup>91</sup> Punishment for Domestic Violence Act 2012 (ROK) s 9 (1)

<sup>92</sup> Kim (n 86) 71.

<sup>93</sup> Lee (n 90) 205.

<sup>94</sup> Punishment for Domestic Violence Act 2012 (ROK) s 5.

<sup>95</sup> Jae Yop Kim, Ji Hyeon Choi and Bo Young Nam, 'South Korean Police Recognition of Domestic Violence' (2011) 23 Journal of Correction Welfare 1, 13.

<sup>96</sup> Ibid.

for police to do in domestic violence cases.<sup>97</sup> Confucian notions which suggest that a patriarch is responsible for governing the family may well be responsible, in part at least, for the negative perceptions of police officers.

Table 3-1: Decisions of prosecutors regarding domestic violence cases<sup>98</sup>

Year	Total	Sending to Family Court	Prosecution	Suspending or Non-Prosecution	Other
1999	9,210 (100%)	3,384 (36.7%)	2,037 (22.1%)	3,620 (39.3%)	169 (1.9%)
2002	15,347 (100%)	4,998 (32.6%)	2,682 (17.5%)	7,468 (48.7%)	199 (1.2%)
2005	15,498 (100%)	4,475 (28.9%)	2,161 (14.0%)	8,663 (55.9%)	199 (1.2%)
2008	19,249 (100%)	3,100 (16.1%)	2,885 (15.0%)	13,047 (67.8%)	217 (1.1%)
2011	6,227 (100%)	1,100 (17.7%)	1,103 (17.7%)	3,993 (64.1%)	31 (0.5%)

Such provisions in the Act and the attitudes of criminal justice workers towards domestic violence become obstacles to a positive outcome for victims. Their negative effects are shown in the statistics for the domestic violence. Table 3-1 shows the decisions of prosecutors regarding domestic violence cases from 1999 to 2011. Prosecutors have tended not to prosecute offenders or send them to family court in domestic violence cases, opting instead for suspending prosecution or non-prosecution. The use of suspension of prosecution on condition of counselling, introduced in 2004, is indicated as a reason for this statistical change.<sup>99</sup> As noted above, this practice has been criticised: even repeat offenders or offenders using weapons tend to be given a suspension of prosecution because victims do not want to punish them.<sup>100</sup>

Table 3-2 shows the result of family court decisions in domestic violence cases from 1999 to 2011. The proportion of non-disposition has declined since 2002,

<sup>97</sup> Ibid, 14.

<sup>98</sup> Ibid; Supreme Prosecution Office, *Crime Analysis* (Supreme Prosecution Office 2008, 2011) 630, 688.

<sup>99</sup> Lee (n 90) 187.

<sup>100</sup> Ibid.



but is still over 30%. This is influenced by the attitudes of judges. Kim argues that: ‘judges believe that non-disposition – closing the case without any action – is better than a disposition order to promote the possibility of reconciliation between a victim and an offender in order to achieve the purpose of the Act, to maintain a healthy family environment, if a victim does not want to divorce’.<sup>101</sup> Along the same lines as the prosecutor’s decision making process, a victim’s intention is regarded as the most important factor to decide the order in the family court, even though it could lead to a victim remaining at risk of domestic violence.<sup>102</sup>

Table 3-2: Family court decisions in domestic violence cases

Year	Total	Disposition Order	Non- Disposition	Other
1999	2,552 (100%)	1,448 (56.7%)	1,071 (42.0%)	33 (1.3%)
2002	6,203 (100%)	2,647 (42.7%)	3,257 (52.5%)	299 (4.8%)
2005	4,405 (100%)	2,577 (58.5%)	1,332 (30.2%)	496 (11.3%)
2008	5,132 (100%)	3,132 (61.0%)	1,758 (34.3%)	242 (4.7%)
2011	2,971 (100%)	1,855 (62.4%)	974 (32.8%)	142 (4.8%)

In conclusion, the claims of feminist groups were not properly reflected in the legislative process, even though the enactment of the Punishment for Domestic Violence Act 1997 is a considerable achievement by virtue of the efforts of feminist activists’ effort in Korea, where Confucian thoughts remains in many ways dominant. The perceptions and attitudes of criminal justice agencies towards violence against women have not improved significantly, even after the Act was passed. The failure to address feminist concerns has influenced a secondary victimisation of rape victims in the criminal process as will be discussed in the subsequent section. Feminist activists have consistently argued that it is important to accurately analyse the causes and nature of violence against women. Only in this way can policies be made that effectively reduce the damage of victims. However, these voices have not been fully

<sup>101</sup> Eun Kyung Kim, *Responding Domestic Violence in Criminal Justice Process* (Korean Institute of Criminology 2001) 212.

<sup>102</sup> Lee (n 90) 185, 204.

considered in the legislative process or criminal justice practices. The same problems occurred in the process of introducing the pharmacotherapy of sex offenders, which will be explored in Chapter 6.

### **3.6. The effect of traditional attitudes on the criminal justice agencies towards sexual offence cases**

#### **3.6.1. Interpretation of the definition of rape**

As described above in Section 3.4.2., the consideration of the resistance offered by victims became more important in sexual offence cases during the later stages of the Chosun dynasty. It was at this time that the responsibility for being raped shifted more towards the victim. It was a distorted attitude in comparison with the early stages of the Chosun dynasty, and was precipitated by growing evidence of sexual offences committed by members of the ruling class.

Such an attitude, however, still appears in the sentences of sex offence cases in contemporary Korea. Section 297(2) of the Criminal Act, the provision of rape, states that: ‘A person who, by means of force or threat, has sexual intercourse with another against the person’s will shall be punished by imprisonment for a fixed term of not less than three years’.<sup>103</sup> Even though there is no rule about the definition of the level of force or threat in this provision, the Korean Supreme Court has maintained the view that ‘an offender must use force or threat for rape which is sufficient to make a victim not resist or have difficulty in offering significant resistance’, in many precedent cases.<sup>104</sup> This interpretation has narrowed the scope of rape cases and has resulted in many sex offenders not being punished. If a man has non-consensual sex using force or threat not being sufficient to be recognised as a rape, he would not be punished for the use of force or for threat.<sup>105</sup>

In most rape cases, then, the Korean Supreme Court has decided that offenders do not deserve to be sentenced for rape if the victim did not resist the offender

<sup>103</sup> Criminal Act 2012 (ROK) s 297.

<sup>104</sup> SCC 85Do 1537, 8 October 1985 [1985], 2; SCC 90Do 1562, 28 September 1990 [1990], 2; SCC 90Do 2224, 11 December 1990 [1990], 2; SCC 91Do 546, 28 May 1991 [1991], 1; SCC 99Do 2608, 21 September 1999 [1999], 2; SCC 2005 Do 3071, 28 July 2005 [2005], 2; SCC 2012Do 4031, 12 July 2012 [2012], 2.

<sup>105</sup> In Sup Han, ‘Different View Towards the Definition of Violence in Criminal Law’ (1997) 10 Journal of Criminal Law 113, 126; Yoon Jin Shin, ‘Criticism of the Interpretation of the Definition of Violence in the Provision of Rape’ (2006) 1 Trying to change the Supreme Court Case promoting rape 21, 29.

strongly,<sup>106</sup> or did not ask for help, even if the victim could have done so.<sup>107</sup> This view of the Korean Supreme Court has been criticised:

If an offender uses force or threat which is not sufficient to make a victim not resist or have difficulty in offering significant resistance, the offender shall not be punished as a rapist... The view which is connecting the use of force or threat in rape with strong resistance of a victim reflects the rape myths that rape is impossible if a victim resists heartily. It also reflects the thought that if a victim does not resist an offender greatly, it is equivalent to consenting sexual intercourse with an offender.<sup>108</sup>

In the most recent cases, the Korean Supreme Court seems to have changed the standard relevant to force or threat in rape. It stated that:

Regarding force or threat of an offender, it shall not be concluded carelessly that it was not sufficient to make a victim not resist or make it difficult for her to offer significant resistance even if a victim did not resist an offender desperately or was able to escape the scene of an offence before sexual intercourse.<sup>109</sup>

This view implies that a victim may not resist an offender for fear that this might incur the use of greater force by the offender.<sup>110</sup> Nonetheless, the possibility of a poor outcome for the victim still exists as far as the severity of force or threat is required for rape.<sup>111</sup>

The definition of rape employed by the Korean Supreme Court requires immediate amendment. Section 260(1) of the Criminal Act states: ‘A person who uses force against another person’s body shall be punished by imprisonment for a fixed term of not more than two years, a fine not exceeding five million won, detention, or a minor fine’. And, the definition of threat is explained as ‘the activities making another person feel fear through a notification of harm’.<sup>112</sup>

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<sup>106</sup> SCC 85Do 1537, 8 October 1985 [1985], 2; SCC 90Do 2224, 11 December 1990 [1990], 2.

<sup>107</sup> SCC 90Do 1562, 28 September 1990 [1990], 2; SCC 91Do 546, 28 May 1991 [1991], 1; SCC 99Do 2608, 21 September 1999 [1999], 2.

<sup>108</sup> Ho-Joong Lee, ‘Significance and Implication of SCC 2005Do 3071 28 July 2005’ (2006) 5 *Trying to change the Supreme Court Case promoting rape* 3, 5-7.

<sup>109</sup> SCC 2005 Do 3071, 28 July 2005 [2005], 2; SCC 2012Do 4031, 12 July 2012 [2012], 2.

<sup>110</sup> Lee (n 108) 12.

<sup>111</sup> In Sup Han, ‘Supreme Court Cases Promoting Rape’ (2006) 2 *Trying to change the Supreme Court Case promoting rape* 3, 12.

<sup>112</sup> Oh (n 76) 133.

However, an offender should be punished for rape if the offender has sexual intercourse against a victim's will, *regardless* of whether force or threat are employed. At the present time, this is not the case.

### 3.6.2. Secondary victimisation of rape victims in the criminal justice process

In the popular imagination, sexual assault is perceived as being committed by a stranger on a credible victim, using violence against the intense resistance of the victim; this is known as the 'real rape' stereotype.<sup>113</sup> It has been demonstrated, in a number of empirical studies in different countries, that criminal justice agencies' perceptions of and attitudes towards rape victims have been influenced by this stereotypical view, and that this results in *secondary victimisation*. Secondary victimisation refers to the additional suffering of a victim caused by their treatment at the hands of criminal justice agencies.<sup>114</sup> Lee argues that secondary victimisation is caused by Korean criminal justice agencies' lack of awareness and expertise in sexual violence.<sup>115</sup> She criticises that fact that whilst the rights of a victim are legislated in the laws, such as right to participate in the criminal justice process or the right to information, these are usually ignored by criminal justice agencies.<sup>116</sup> It is noticeable that criminal justice agencies' perceptions of sexual violence are considered as the cause of secondary victimisation both in the U.K. and Korea. This section scrutinises this issue using the data and literature on secondary victimisation in the U.K. and Korea.

According to Smith's study conducted in two London boroughs, stereotypical rape is more likely to be recorded as a crime amongst reported rapes.<sup>117</sup> Kelly, Lovett and Regan reveal in their study of sexual assault cases in the U.K. that: 22% of 2,244 reported cases were 'no crime'; 33% were undetected; 30% had been detected, but in 12% of cases no proceedings were brought.<sup>118</sup> This study indicates that the 'no crime' category is classified so carelessly that 'it still functions as something of a

<sup>113</sup> Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 31.

<sup>114</sup> Lorraine Wolhuter, Neil Olley and David Denham, *Victimology: Victimisation and Victim's Rights* (Routledge-Cavendish 2008) 47.

<sup>115</sup> Mi-Kyoung Lee, 'The Structure of Secondary Victimisation on Sexual Violence' (2013) 23(2) *The Journal of Women's Studies* 43, 68.

<sup>116</sup> *Ibid.*

<sup>117</sup> Temkin and Krahe (n 113) 17., citing Lorna JF Smith, *Concerns About Rape* (Home Office 1989) 26.

<sup>118</sup> Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home office 2005) 36.

dustbin’; and that some cases are labelled ‘false allegation’ where the victim has used alcohol or drugs, had mental health problems or made previous allegations.<sup>119</sup> Brown, Hamilton and O’Neill argue that ‘the locations of initial contact between the victim and offender and the rape incident are also important in determining whether a case is likely to be no-crimed’.<sup>120</sup>

The stereotypical view of real rape has also influenced prosecution. In 2003/2004, whilst 2,433 rapists were sent for trial from the magistrates’ court to the Crown court, merely 1,675 offenders were tried for rape in England and Wales.<sup>121</sup> Brown, Hamilton and O’Neill explain that stereotypical rape cases are more likely to lead to prosecution.<sup>122</sup> It was found that, in rape cases, prosecutors are inclined to focus on what a victim said to the defendant and whether a victim consented, and to consider weaknesses rather than taking the initiative in seeking more facts in order to develop or build a case.<sup>123</sup>

Along the same lines, the conviction rate for rape has decreased in England and Wales since 1979. The official statistics of England and Wales quoted by Temkin and Krahé show that whilst 32% of reported rape cases resulted in conviction in 1979, merely 5.3% resulted in conviction in 2004/2005.<sup>124</sup> This rate increased to 7.2% in 2011/2012.<sup>125</sup> Meanwhile, the acquittal rate has increased in the Crown Court during the same period. Whilst 24% of defendants tried for rape were acquitted in 1979, 57% of defendants were acquitted in 2005.<sup>126</sup> This rate decreased to 46.6% in 2011/2012.<sup>127</sup>

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<sup>119</sup> Ibid, 38, 49.

<sup>120</sup> Jennifer M Brown, Carysand Hamilton and Darragh O’Neill, ‘Characteristics of Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors’ (2007) 13 *Psychology, Crime and Law* 355, 359.

<sup>121</sup> Temkin and Krahé (n 113) 18-19., citing Home Office, *Criminal Statistics, England and Wales 2004*, Home Office Statistical Bulletin (2005) 19 May 2005, Supplementary Tables, vol. 1, Table S1.1 (A) ‘Defendants Proceed Against at Magistrates’ Courts by Offense, Sex and Result; vol. 2. Table S2.1A ‘Defendant Tried and/or Sentenced at the Crown Court by Offense, Sex and Result’ <<http://www.homeoffice.gov.uk/rds/crimstats04.html>> accessed 4 October 2006.

<sup>122</sup> Brown, Hamilton and O’Neill (n 118) 359.

<sup>123</sup> Her Majesty’s Crown Prosecution Inspectorate, *A Report on the Joint Inspection Into the Investigation and Prosecution of Case Involving Allegations of Rape* (2002) 9.

<sup>124</sup> Temkin and Krahé (n 113) 20., citing Home Office, *Annual Tables of Recorded Offences: Criminal Statistics, England and Wales* (1979-2005) Table 2.1, 1979-2004 and Supplementary Tables, vol. 2 Table S2.1 (A); Home Office 1980-2000; 2005a.

<sup>125</sup> Home Office and Ministry of Justice, *Sexual Offending Overview Tables 2011/2012* (2013)

<sup>126</sup> Temkin and Krahé (n 113) 22, citing Home Office, *Criminal Statistics, England and Wales Supplementary Tables*, 1980-2000; 2005a; 2006f, vol. 2, Table S2.1 (A).

<sup>127</sup> Home Office and Ministry of Justice, *Sexual Offending Overview Tables 2011/2012* (n 123)

Martin and Powell explored how legal officials, such as police, prosecutors and judges, treat victims unsympathetically in the U.S., as follows: police officers tend to consider victims merely as witnesses and evidence during the criminal justice process rather than as victims of rape to be supported and believed; prosecutors are apt to ‘refuse to file charges on cases where the victim or case is ‘messy’ to avoid dropping the case and losing their reputation; judges are inclined to ‘protect the rights of the alleged rapist more than the rights of the rape victim’.<sup>128</sup>

Ellison and Munro, however, indicate that over-reliance on a stereotypical views of real rape could veil the complexities of jury deliberations, since there are factors, such as ‘the behavioural or emotional reaction of victims’, that influence the responses of jurors in rape cases.<sup>129</sup> They argue that jurors do not reject acquaintance rape or fail to view it seriously, but often have difficulty in convicting the perpetrator in acquaintance rape cases on the grounds that these cases are deemed ‘less clear-cut’.<sup>130</sup> They suggest that actions to change the beliefs of jurors that aggressive resistance is the ‘normal’ response of a victim is required, alongside an exhaustive exploration of dominant thoughts towards ‘socio-(hetero) sexual behaviour and communication’.<sup>131</sup>

The secondary victimisation of rape victims has been a significant issue in South Korea. Chang demonstrates the prevalence of secondary victimisation in her research, which interviewed female victims of rape. Of 782 women who took part in the study, 482, 63.7%, said they had experienced secondary victimisation during the criminal justice process.<sup>132</sup> Chang suggests that rape myths, which are defined as ‘descriptive or prescriptive beliefs about sexual aggression (i.e., about its scope, causes, context, and consequences) that serve to deny, downplay, or justify sexually

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<sup>128</sup> Patricia Yancey Martin and R. Marlene Powell, ‘Accounting for the “Second Assault”: Legal Organisations’ Framing of Rape Victims’ (1994) 19 *Law and Social Inquiry* 853, 874-76.

<sup>129</sup> Louise Ellison and Vanessa E Munro, ‘A Stranger in the Bushes, or An Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13 *New Criminal Law Review* 781, 799-800.

<sup>130</sup> Louise Ellison and Vanessa E Munro, ‘“Real rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Jury Deliberations’ (2013) *Economic and Social Research Council Briefing Report* 1.

<sup>131</sup> *Ibid*, 5.

<sup>132</sup> Pii Wha Chang, *Study on the Protection of Rape Victim in Criminal Justice Process* (Korea Sexual Violence Relief Centre 2003) 27.

aggressive behaviour that men commit against women',<sup>133</sup> amongst the police, prosecutors and judges influence the secondary victimisation of rape victims. According to Chang, these attitudes reflect wider patriarchal thoughts and attitudes towards rape among the general public, which can be classified into four types: In the first type, rape is regarded 'as not a crime but a personal matter', which may cause the police not to record the complaint of a rape victim or to discontinue the investigation.<sup>134</sup> The second type is 'attribution of responsibility to the victim', such as when a victim is deemed responsible for her victimisation on account of being drunk when she was raped.<sup>135</sup> The third type is 'unfair investigation in favour of the offender': Chang notes a case where the police officer discontinued the investigation after talking with the offender's father, a city council member.<sup>136</sup> The last type is 'interpreting rape as consensual sexual intercourse', as illustrated by the case where a prosecutor told a victim that the Act looked like fornication, not rape.<sup>137</sup> Chang's analysis can be linked to the traditional criminal justice agencies' attitudes towards sexual violence. As discussed above, traditionally, rape was regarded as a crime against chastity, so a victim should resist to the death in order to keep her chastity. If a victim does not resist enough, she would be blameworthy. In the same sense, the sexual history or conduct of a victim was regarded as important, because the victim might be judged as a person who did not keep her chastity through her past behaviour. Accordingly, criminal justice agencies dealing with sexual violence cases focused on how vehemently a victim resisted an offender and what the sexual history or conduct of a victim was. In this regard, the traditional Confucian patriarchal order has still influenced the criminal agencies' attitudes towards sexual violence, which has led to or helped proliferate the real rape myth and secondary victimisation.

In addition to investigative agencies, the Korean courts have precipitated secondary victimisation by taking into account facts which are not related to the offence, such as the victim's conduct, profession or sexual history, when deciding whether the offender is guilty. Again, this reflects traditional attitudes towards the

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<sup>133</sup> Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 *Aggressive Behavior* 422, 425.

<sup>134</sup> Chang (n 132) 103–04.

<sup>135</sup> *Ibid*, 110.

<sup>136</sup> *Ibid*, 116.

<sup>137</sup> *Ibid*, 121.

victims of sexual offences in the late stages of the Chosun dynasty. The following quotations provide examples of judicial attitudes:

Case 1: The victim stated to police, prosecutor and judges that she lost her virginity by reason of this rape. However, the victim had been punished for prostitution at the age of 16 and she changed this statement after the fact was revealed. Therefore, it is difficult to believe the victim's statement that she was raped by the defendant is true.<sup>138</sup>

Case 2: On the day before this rape was committed, the victim did not return home and stayed out overnight with her colleagues including the defendant in the dormitory of her workplace. The victim did not return home for three days from the next day after this rape was committed. Therefore, it was difficult for the court to accept the victim's statement that she was raped rather than having had consensual sex is true.<sup>139</sup>

Case 3: The defendant raped the victim in the video room at 03:00 18 January 2004 and raped the victim again in the resting room of his office at 13:00 18 January 2004...The defendant seems to have had intercourse with the victim against the victim's will with violence. However, the evidence that the defendant used sufficient violence to make the victim not resist or have difficulty in offering significant resistance is not enough to bring a guilty verdict as being beyond reasonable doubt.<sup>140</sup>

As already noted, using violence or intimidation, and having sexual intercourse against a victim's will are central to the conception of rape in the Korean Criminal Act. In the first and second cases above, the statements of the victims that sexual intercourse was against their will are not accepted by the judges on the basis of the victim's ex-profession, criminal record or conduct. In the third case, there is no direct expression for the judges' decision based on the victim's reasons. However, researchers have been critical of this sentence on the grounds that the judges seem to have been prejudiced against the victim, who was constructed as blameworthy, having stayed with the defendant in the video room until 3 o'clock and then gone to the defendant's office after the first rape; therefore, they did not pass a guilty

<sup>138</sup> *Daejeon District Court 92 Go-Hap 625, 4 June 1993* [1993], 3.

<sup>139</sup> *Seoul High Court Case 81No 1370, 18 September 1981* [1981], 3.

<sup>140</sup> *SCC 2004Do 2611, 25 June 2004* [2004], 4-5.



judgment even though they admit the defendant had intercourse with the victim against her will with violence.<sup>141</sup>

This attitude of the Korean courts has been criticised, because a distinction is made between victims worth protecting who keep their chastity and those not worth protecting. This is based on a patriarchal ideology.<sup>142</sup> It is essential that the Korean Supreme Court change its attitudes considering the sexual history or conduct of a victim. This would remove the inappropriate shift of responsibility for rape to the victim and prevent the secondary victimisation that occurs when victims are asked about their sexual history or conduct during criminal justice procedures.

The secondary victimisation of rape victims during the criminal justice process has been noted in different countries. This shows how patriarchal thought and rape myths are deeply and widely rooted. The criminal justice process for rape cases has been reformed recently in order to attempt to prevent secondary victimisation in South Korea, as follows: Firstly, prosecutors and police officers to be in exclusive charge of sexual crimes shall be designated by the superintendent public prosecutor of each district public prosecutor's office and the chief of each police station.<sup>143</sup> Secondly, designated prosecutors and police officers shall be educated in professional knowledge for investigating sexual crimes and investigative methods for the protection of victims.<sup>144</sup> Thirdly, a victim of a sexual crime may appoint a public attorney in order to protect the victim from damage and to take legal aid and the appointed public attorney may attend the investigation process with the victim.<sup>145</sup> Fourth, the presence of a person of reliable relations with the victim may be allowed where prosecutors or police officers investigate the victim, or the court interrogates the victim as a witness.<sup>146</sup>

This reform is a positive step and such improvements need to be continued in order to overcome the influence of Confucian patriarchal thought on criminal justice processes relating to sexual crimes. However, as Lee argues, this revision of the law has had little effect in reducing secondary victimisation in criminal justice practice

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<sup>141</sup> Yong Chul Park, 'Commentary on SCC 2004Do 2611' (2006) 4 Trying to change the Supreme Court Case promoting rape 3, 12; Kyoung Hwan Lee, 'Critique on Two Psychological Facts Make the Courts Keep the Narrowest Theory' (2006) 7 Trying to change the Supreme Court Case promoting rape 3, 8.

<sup>142</sup> Lee (n 115), 53.

<sup>143</sup> Punishment for Sexual Crimes Act 2013 (ROK) s. 26(1), (2).

<sup>144</sup> *Ibid.*, s. 26(3)

<sup>145</sup> *Ibid.*, s. 27.

<sup>146</sup> *Ibid.*, s. 34.

because there has been little change in criminal justice agencies' perceptions and attitudes of violence towards women. This shows that no matter how much the content of victim protection is included, legislation alone would not be effective to solve the problem of violence against women. If so, it is natural that legislation without an understanding of the cause of sexual violence would not be an appropriate response to sexual offending.

Korean feminist activists continues to oppose compulsory pharmacotherapy legislation in that it cannot be an effective way to prevent sexual offences because sexual violence is not just caused by sexual desire.<sup>147</sup> Yoon-Sang Lee, the Chief of the Korean Sexual Violence Relief Centre, argues that since sexual violence, particularly against children, is mostly committed by acquaintances, neither electronic monitoring nor compulsory pharmacotherapy would be effective in preventing sex crimes by such offenders.<sup>148</sup> She states that sexual violence policies should focus on strengthening a system that enables victims to be helped easily and quickly, and receive practical protection in criminal justice procedure, rather than harsher punishment.<sup>149</sup> She adds that it is concerned that a large amount of money would be spent on compulsory pharmacotherapy or electronic monitoring, which would lead to a shortage of budget in the policies for victim protection.<sup>150</sup> If the voice of feminist group were fully reflected during the deliberation process of the 2010 Act, the content of the 2010 Act would be changed in many ways. The cause of this insufficient reflection of feminist activists towards the 2010 Act will be explored in Chapter 6.

### 3.7. Conclusion

How traditional Confucian thought and patriarchal order have legitimised and influenced the perceptions of and attitudes towards violence against women has been explored in this chapter. Confucianism, which had been modified by political power, governed all kinds of human relations strictly for more than 500 years. The status of women is lower than men in Confucian social order. Confucian patriarchal order and

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<sup>147</sup> Mi-Kyoung Lee, 'Hold Offenders Fully Accountable, Protect Victims Thoroughly', *Hankyoreh Shinmun* (Seoul, 15 March 2006) 27.

<sup>148</sup> Yoon-Sang Lee, 'Will Chemical Castration and Electronic Monitoring Make Sexual Violence Disappear?' (*The Korean Sexual Violence Relief Centre*, 1 August 2011), <<https://stoprape.or.kr/274>> assessed 15 September 2020

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

the lower status of women are relevant to violent crimes against women. This is demonstrated by the studies of eastern and western countries.

As the control and authority of the government over the punishment of sexual offences committed by the ruling class became evident in the late stages of the Chosun dynasty, the level of resistance, sexual history and conduct of a victim began to be regarded as more important, and to receive more scrutiny, in sexual offence trials. This shift in responsibility towards the victim rests on the view that rape would be impossible if the victim resisted harshly. This thinking still influences the current Korean criminal justice process for sexual offences, and criminal justice agencies' perception of and attitudes towards sexual violence, which are resulting in secondary victimisation.

Confucian hierarchical order does not conform to the constitution, which prohibits inequality and discrimination based on status. Even though a number of provisions, which are not harmonised with the constitution, have been repealed or revised, Confucian patriarchal thought still remains in the criminal law relating to violence against women and in the perceptions and attitudes of criminal justice agencies. The Korean Supreme Court regards force or threat as a prerequisite for rape, which reflects rape myths rather than the complex reality of rape. As feminist activists have tried to solve the legislative deficiencies regarding violence against women, various legislation has been achieved since 1990s. The legislative purpose has not been sufficiently realised in the criminal justice practice because of criminal justice agencies' perceptions of violence towards women. Regarding domestic violence, police do not exactly know their duties in dealing with domestic violence cases. Prosecutors tend not to prosecute wife batterers and judges used to close the case without taking any action in about a third of such cases. Concerning sexual violence, victims' rights legalised in the laws are often ignored by criminal justice agencies, resulting in secondary victimisation. However, the enactment of the Punishment for Sex Offences and Protection of Victims Act 1994 by virtue of feminist groups' effort is significant because it is a signpost that suggests the direction in which the policies relevant to violence against women focusing on the protection of victims should go in Korea, which will be discussed in the next chapter. How Korean feminist movements have developed and how the 1994 Act was legislated will also be explored. As discussed above, feminist activists have focused on protecting and helping victims instead of strengthening punishment for sexual

offenders. However, since the legislation of the 1994 Act, contrary to their intentions, several laws to impose harsher punishment on sexual offenders have been made, including electronic monitoring and compulsory pharmacotherapy. This has been prompted, in part, by an apparent rise in the number of sexual offences committed in recent decades. Also significant has been the public, media and government reaction to a series of high-profile crimes which generated much discussion and debate. This issue will be scrutinised in the next three chapters.

## **Chapter 4: Changing Perspectives on Female Victimization with a Particular Focus on Violence and Sexual Offences**

### **4.1. Introduction**

As noted in Chapter 3, Confucian patriarchal order has made it hard to challenge old attitudes regarding violence against women in Korea. Feminist activists have endeavoured to draw attention to the issue of sexual violence since the late 1980s when people were unaware of the problems of sexual offending under the influence of patriarchal culture. Indeed, these activists have achieved remarkable changes in terms of the social and legal responses to sexual violence. Korean feminist movements have played a crucial role in addressing the problems of each generation of women in modern history, which has been developed in a different political and social context in comparison to the West. The first part of this chapter will explore how feminist activism has developed in Korea, why feminist activists have paid attention to sexual violence, and how they have influenced the social recognition of and responses to sexual violence.

The early 1990s saw victims of child sexual abuse involved as perpetrators in several high-profile murder cases that drew public attention. Because of this, feminist activists have led social and legal responses to sexual violence against children as well as against adult females. Child sexual abuse has been addressed not as a child protection issue but as a gender issue by feminist campaigners. As a result, the provisions regulating child sexual abuse and sexual violence against females have been legislated in the same act. The context of this point will also be addressed in the present chapter.

Over the last two decades, feminist movements have influenced many legislative changes regulating sexual violence. In the first half of this period, from 1991 to 2003, the Punishment for Sex Offences and Protection of Victims Act 1994 was passed in 1994 and was revised twice in 1997 and 2003. These were significant turning points in regulating sexual offences. During the deliberation process of this legislation, feminist groups emphasised the necessity of securing victims' rights during the criminal justice process and of toughening sentences for sexual offences. This move had significant meaning, because strengthening victims' rights and giving

heavier punishment have become trends in the legislation relevant to sexual violence ever since. The main points discussed in the course of legislation from 1994 to 2003 will be described and analysed in the final part of this chapter. Since 2006, the second half of the period, punishment for sexual violence has tended to be further toughened, including the use of Electronic Monitoring (EM) and pharmacological treatment, with a series of high-profile sexual offences occurring between 2006 and 2010, as will be discussed in the next chapter. As such, current legislative trends in sex offender management will be explored through these two chapters.

## **4.2. The development of feminist perspectives towards sexual violence**

### **4.2.1. Development of feminist movements in South Korea**

Feminist researchers have argued that Korean feminist movements should be explored in the context of historical developments, such as the Japanese colonial experience; the Korean War resulting in the division of Korea; the subsequent dictatorship and the democratisation movement, and finally, Korea's rapid economic growth.<sup>1</sup> Korean feminist movements have been shaped by each of these periods, as shown in Table 4-1 below.<sup>2</sup>

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<sup>1</sup> Seong-Young Sohn, 'Transition of Korean Women's Movement and Its Particularity' (1998) 3 *Dongduk Women's Study* 191, 202; Song-Woo Hur, 'Mapping South Korean Women's Movements During and After Democratization: Shifting Identities' in Jeffrey Broadbent and Vicky Brockman (eds), *East Asian social movements power, protest, and change in a dynamic region* (Springer 2011) <<http://dx.doi.org/10.1007/978-0-387-09626-1>> 181; E-Hwa Yoon, 'A Study on Influential Factors of Strategic Changes in the Korean Women's Movement' (DPhil, Kyungpook National University 2010) 51.

<sup>2</sup> Sohn (n 1) 193; Yoon (n 1) 51.

Table 4-1: Features of Korean feminist movements by period

Stage	Time period	Features
1	Late 1800s–1945	Initial period; Nationalist enlightenment movements; Women's movement as part of national liberation movements
2	1945–1970s	Developmental period; Legalisation of women's rights; Women's movement being permissible only for pro-government groups; Rise of female labour movements
3	1980s	A period of democratisation; Strengthening of feminist organisations; The raising of the problem of violence against women
4	1990s	A period of political diversification in daily life; Pursuing legislation relevant to violence against women; Expression of diversity

Korean feminist movements first emerged in the late nineteenth-century<sup>3</sup> when the Chosun dynasty faced a significant national crisis caused by the Japanese invasion. As enlightenment thinking was introduced by pioneering intellectuals and foreign Protestant missionaries before Japanese occupation, many social movements emerged to restore national strength based on these thoughts. Progressive male scholars insisted upon respect for women's individuality, called for the prohibition of wife abuse, and petitioned the King for educational equality for women, and tried to propagate these thoughts by newspaper reports during the 1880s and 1890s.<sup>4</sup> Even though they regarded female liberation not as an ultimate objective, but as a way to save the nation, they recognised that women's education and liberty would be indispensable in order to enlighten the public and expand human resources.<sup>5</sup> Protestant Christianity began to spread throughout the country in the 1880s, which influenced the life and thoughts of women significantly through churches, schools and hospitals.<sup>6</sup> It provided great opportunities to participate in social activities for women who had not previously been allowed to engage in activities outside of the

<sup>3</sup> Hur (n 1) 183.

<sup>4</sup> Hyung Sik Shin and Bae Yong Lee, *New Understanding of the History of Korea* (Ewha Womans University Press 1997) 305.

<sup>5</sup> Yung-Chung Kim (ed) *Women of Korea* (Yung-Chung Kim tr, Ewha Womans University Press 1982) 214.

<sup>6</sup> Shin and Lee (n 4) 305.

home.<sup>7</sup> The first modern school for women, Ewha Haktang,<sup>8</sup> built by Mary Fitch Scranton, an American Methodist missionary, was opened in 1886 and several girls' schools were launched by foreign missionaries.<sup>9</sup>

Under these circumstances, around 300 women from the elite classes published the first women's rights declaration in 1898, as follows: Women should discard old customs and follow new civilisation; women have the same rights as men; and girls' schools should be founded for women's education.<sup>10</sup> As many women participated in this movement, the first Korean women's organisation was formed in 1898 and the first private girls' school was opened in 1899.<sup>11</sup> These women campaigners had been active in enlightening women in all parts of the country.<sup>12</sup> Many women's organisations were involved in women's education and agitating for change across the country up to the 1920s.<sup>13</sup> Whilst nationalists had led these movements, socialism had also been introduced as a way to overcome Japanese colonialism and the conflict between capitalists and workers in the 1920s.<sup>14</sup> Under this influence, the first socialist women's organisation was founded in 1924, and as female workers increased, the first female labour union was established in 1923, and female labour movements were active in the 1920s.<sup>15</sup> In 1927, as nationalists and socialists combined to strengthen the anti-Japanese movements, women's organisations based on different ideologies were united.<sup>16</sup> This led to the formation of the 'Keunwoo-hoe', which means 'Korean Association', the largest women's organisation during the Japanese colonial era, which launched 70 branches throughout the country.<sup>17</sup> However, the association was disassembled in 1933 due to the custody of the leaders by the Japanese police as well as internal ideological conflicts.<sup>18</sup> As the Japanese Government General forced the dismissal of all kinds of social organisations that defied Japanese colonial policies after the Second Sino-

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<sup>7</sup> Ibid.

<sup>8</sup> 'Ewha' means pear blossom and 'haktang' means a hall for learning.

<sup>9</sup> Shin and Lee (n 4) 305.

<sup>10</sup> Yong Ok Park, 'The Context and Historical Characteristics of the Korean New Women's Movement' (2000) 1 Women's Research 1, 3–4.

<sup>11</sup> Ibid, 5.

<sup>12</sup> Shin and Lee (n 4) 305.

<sup>13</sup> Sohn (n 1) 194.

<sup>14</sup> Park (n 10) 12.

<sup>15</sup> Sohn (n 1) 195.

<sup>16</sup> Park (n 10) 15.

<sup>17</sup> Ibid, 17.

<sup>18</sup> Hur (n 1) 183.



Japanese war broke out in 1937, women's movements were weakened until liberation in 1945.<sup>19</sup>

After liberation from Japanese colonial rule in 1945, feminist organisations demanded democratic legislation relevant to women's status, marriage and family, and many of those demands were successful.<sup>20</sup> The first constitution of Korea, promulgated on the 17 of July 1948, included formal equality between the sexes, women's suffrage and the introduction of mandatory primary education without discrimination between girls and boys. As a matter of fact, equality between the sexes and women's suffrage were already declared in the Korean Provisional Charter of the constitution and the Korean Provisional Constitution, proclaimed by the Korean Provisional Government in Shanghai, China, in 1919, which greatly influenced the first constitution.<sup>21</sup> This Charter also included the abolition of the death penalty, corporal punishment and licensed-prostitution.<sup>22</sup> Women's suffrage and education had been significant issues of first-wave feminism in Western countries.<sup>23</sup> In contrast to the Western countries achieving these through over one hundred years of intense struggle, the liberation from the Japanese colonialism and the establishment of the Korean government meant women's suffrage and education could be institutionalised relatively easily in Korea.<sup>24</sup> After the Korean War, the political circumstances were unstable due to the emergence of the military government, which gained power through a coup d'état in 1961. This meant that the reconstruction of the state had been the most significant national agenda in the 1950s and 1960s, so the government did not permit any social organisations to oppose government policy. As a result, most feminist organisations at the time were pro-government.<sup>25</sup> The Korean National Council of Women (KNCW), a coalition of feminist organisations founded in 1959, had been at the centre of pro-government feminist activities.<sup>26</sup> Since it was hard for them to deal with the problems of

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<sup>19</sup> Park (n 10) 18.

<sup>20</sup> Sohn (n 1) 196.

<sup>21</sup> In Sup Han, 'The Korean Provisional Charter of the Constitution in 1919' (2009) 50(3) Seoul Law Journal 167-168.

<sup>22</sup> Ibid.

<sup>23</sup> Marlene LeGates, *In their time: a history of feminism in Western society* (Routledge 2001) 202-05, 237-239.

<sup>24</sup> Hee-Kang Kim, 'Trends and Issues in Western Feminist Theory and Their Implications to Korean Feminist Scholarship in the Global Context' (2006) 16(2) 21st Century Political Science Review 27, 39.

<sup>25</sup> Sohn (n 1) 196.

<sup>26</sup> Yoon (n 1) 47.

discrimination or women's social status, until the 1970s they focused on supporting government policies by making speeches on national security to strengthen anti-communism activities, give assistance to low-income families, family planning and revisions of family law.<sup>27</sup>

As the government had pushed export-centred industrialisation since the middle of the 1960s, the percentage of female workers in the manufacturing industry reached 77.2% in 1971, because companies tended to depend upon female workers' cheaper labour.<sup>28</sup> As the working conditions of female workers were often very challenging, their demonstrations had been frequent and female labour movements had developed since the 1970s.<sup>29</sup> Formation of an extensive female working class and the growth of social awareness of female workers through female labour movements became the basis for progressive feminist movements which would combine social reform with female liberation.<sup>30</sup> As the dictatorship extended over a long period, student movement groups which were opposed to authoritarian government expanded, and many student campaigners had joined labour movements and anti-dictatorship movements since the 1970s.<sup>31</sup> Student activists believed that the working class should become a subject of social revolution in order to overthrow authoritarian government; as such, they worked as factory workers and tried to organise trade unions struggling with inequality and government oppression.<sup>32</sup> Amongst them, many female student groups identified themselves with female workers and they played important roles in feminist movements.<sup>33</sup> However, Hur has suggested that 'the identity politics based on women as women workers and poor women also contributed to silence many other women's identities and needs'.<sup>34</sup>

Meanwhile, Western feminist theory and movements became influential in the late 1970s and the first women's studies course was launched at Ewha Womans

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<sup>27</sup> Myung-Sun Suh, 'The State and Women's Organisations during Yu-Shin Period' (1989) 6 *Women's Studies Review* 79, 82–92; Young-Sun Kim, 'Internationalization of Women's Movement and Korean National Council of Women(KNCW) in the 1960s and 1970s' (2012) 36(4) *Phenomenon and Perception* 171, 182.

<sup>28</sup> Chong Ku Lee (ed) *A Study on the History of the Korean Labour in the Early Industrialisation Era in the 1970s* (Department of Labour 2002) 20.

<sup>29</sup> Sohn (n 1) 197.

<sup>30</sup> Yoon (n 1) 48.

<sup>31</sup> Hur (n 1) 186.

<sup>32</sup> Kyeong Soon Yoo, 'Labour Participation Patterns and Influence of the Student Activists-Focused on the 1970s' (2013) 29 *Memory and Future Vision* 52, 75–83.

<sup>33</sup> Hur (n 1) 186–187.

<sup>34</sup> *Ibid*, 187.

University in 1977.<sup>35</sup> Liberal feminism and radical feminism were first introduced at the same time in universities.<sup>36</sup> In 1976, *Sexual Politics*, one of the key texts of radical feminism written by Kate Millet, was translated into Korean<sup>37</sup> followed by *The Feminine Mystique*, one of the foundational texts of liberal feminism written by Betty Friedan, translated in 1978.<sup>38</sup> However, most of the feminist researchers and activists had an unyielding belief that Marxist or socialist feminism should be the most appropriate theory to analyse Korean women's problems in the 1980s.<sup>39</sup> Feminist activists argued that feminist movements should proceed in the context of democratisation movements and the division of South and North Korea from the late 1970s.<sup>40</sup> This thought became stronger in the 1980s so that the main stream of feminist movements advanced as part of social revolutionary movements for political democratisation and overcoming the contradiction of national division.<sup>41</sup> The major feminist groups, such as the Women's Division of Democratic Youth Coalition (DYC), founded in 1984, and the Korean Women's Association United (KWAU), the largest feminist organisation, founded in 1987 through the merging of different feminist groups, thought that patriarchy derived from the class conflicts of capitalism; therefore, female oppression could be resolved through class struggle in solidarity with other progressive movements and so feminist movements must be amalgamated into national and democratisation movements.<sup>42</sup> These groups thought that female workers should lead feminist movements.<sup>43</sup> This was the formal viewpoint of the KWAU.<sup>44</sup> In contrast, smaller feminist groups, such as Alternative Culture, founded in 1984, believed that patriarchy had its own structure, thus, they claimed to focus on the problems that stemmed from the patriarchal structure

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<sup>35</sup> Yoon (n 1), 48.

<sup>36</sup> Soon-Kyoung Cho, 'Social Formation of the Knowledge of the Korean Feminism' (2000)

45 *Economy and Society* 172, 178.

<sup>37</sup> *Ibid.*

<sup>38</sup> This fact is found at [www.riss.kr](http://www.riss.kr), the web page of RISS (Research Information Sharing Service). (accessed 24 June 2015)

<sup>39</sup> Cho (n 36) 179.

<sup>40</sup> Yoon (n 1) 48.

<sup>41</sup> *Ibid.*, 49.

<sup>42</sup> Joo-Hyun Cho, 'Gender Identity Politics: The case of Women's Liberation Movement in Korea in 80s and 90s' (1996) 12(1) *Korean Women's Studies* 138–145.

<sup>43</sup> *Ibid.*, 146.

<sup>44</sup> Kyoung Ja Min, 'History of the Women's Movement Against Sexual Violence' in Korea Women's Hotline (ed), *History of the Korean Women's Rights Movement* (Hanul Academy 1999) 31.

independently and believed feminist movements should be guided by women as a whole.<sup>45</sup>

Even though a number of female workers or women campaigners had been sexually assaulted by the police in the 1980s, the major feminist groups did not regard this as patriarchal oppression, but as governmental authority's labour repression or violation of human rights stemming from the class conflicts of capitalism.<sup>46</sup> Min argues that 'these feminist groups used the definition of human rights without consideration of women's own interest and demand. It was based on gender blindness'.<sup>47</sup> However, this interpretation of the definition of human rights can be understood based on the gender perspective of the working class under the influence of Marxist feminism rather than based on gender blindness. Tong explains that Marxist feminists 'tend to identify classism rather than sexism as the ultimate cause of women's oppression'.<sup>48</sup> Thinking around how to recognise sexual violence was not agreed even in the same feminist organisation. For instance, there were different thoughts amongst the members of the Women's Hotline; the first feminist organisation, which was founded in 1983, had paid attention to and struggled against violence against women. The Women's Hotline's formal perspective on violence against women was the same as the major feminist groups, which was the opinion of the leaders and staff of this organisation. However, counsellors who faced victims directly in the Women's Hotline consented to the belief that sexual violence should be regarded as patriarchal oppression.<sup>49</sup> Min argues the perspectives of the major feminist groups in the 1980s as follows:

They did not criticise patriarchal sexual conflict which was the background of the government authority's use of sexual violence as a way of repression. There was no viewpoint of gender politics that regards inequality between female and male as an institutionalised social contradiction. It would be one of the causes of this problem that there was no organisation doing research in feminist theory systematically amongst feminist groups in the 1980s.<sup>50</sup>

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<sup>45</sup> Cho (n 42) 139–140.

<sup>46</sup> Min (n 44) 27–28.

<sup>47</sup> *Ibid*, 27.

<sup>48</sup> Rosemarie Putnam Tong, *Feminist Thought* (2nd edn, Westview Press 1998) 94.

<sup>49</sup> Min (n 44) 32.

<sup>50</sup> *Ibid*, 36–37.

Feminist activists and organisations became more competent and advocated for women's interests through their organisational power in the 1980s.<sup>51</sup> As the communism of Eastern Europe collapsed in the late 1980s, progressive movements weakened and, therefore, solidarity between feminist movements and progressive movements loosened. In the 1990s, feminist groups were unwilling to regard women's issues as a part of class or national contradiction, so that they generally formed their own organisations dealing with women's issues exclusively.<sup>52</sup>

Violence against women had been an important issue for feminist movements in the 1990s.<sup>53</sup> The Korean Sexual Violence Relief Centre, which specialised in sexual violence issues, was founded by the professors of Women's Studies and feminist activists studying Women's Studies in 1991 and opened the first 24-hour emergency call centre for victims in 1993.<sup>54</sup> This centre has put feminist theory into practice in responding to sexual violence and has been regarded as a paragon of the cooperation between women's studies and feminist activists.<sup>55</sup> Feminist movements trying to enact the laws regulating violence against women resulted in legislation around sexual violence in 1994 and legislation towards domestic violence in 1997. Many feminist organisations based on different political stances combined to deal with violence against women.<sup>56</sup> In addition, as two presidents who had participated in the democratisation movements since the 1970s won the election in 1992 and 1997, feminist organisations increased, and political spaces in Parliament, political parties, public institutions and local government were provided to members of feminist organisations in the 1990s and 2000s.<sup>57</sup> These changes propelled the legislative reforms towards women's issues, including the Assistance of Women Forced into Sexual Slavery by the Japanese Military Act 1993;<sup>58</sup> the Punishment for

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<sup>51</sup> Sohn (n 1) 199.

<sup>52</sup> Cho (n 42) 140.

<sup>53</sup> Ibid, 153.

<sup>54</sup> Min (n 44) 45–46.

<sup>55</sup> Ibid, 45.

<sup>56</sup> Cho (n 42) 154.

<sup>57</sup> Hur (n 1) 188–89.

<sup>58</sup> The term 'sexual slavery' was first used in the 'Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime' of the UN Commission on Human Rights, published on 4 January 1996. 'Sexual slavery' is defined as 'the case of women forced to render sexual services in wartime by and/or for the use of armed forces a practice of military sexual slavery.' <http://www1.umn.edu/humanrts/commission/country/52/53-add1.htm> [accessed 24 June 2015]. The number of Korean sexual slavery has been estimated at 170,000-200,000. Jeong Ok

Sex Offences and Protection of Victims Act 1994; the Framework of Women's Development Act 1995; and the Prevention of Domestic Violence Act 1997.<sup>59</sup> Feminist groups expanded their focus to broader issues around violence against women, education, environment, harmony and cooperation between South Korea and North Korea, and sexual slavery by the Japanese army during the colonial era.<sup>60</sup>

New feminist groups emerging in the 2000s criticised KWAU, which had relied on government financial support, on the grounds that KWAU had lost its independence and become conservative in maintaining its influence over women's policies through the connection with the government.<sup>61</sup> Hur argues that new feminist groups focused on 'how to include the politics of the personal within feminist politics; how to consider differences between women; and how to create coalitions among women with different backgrounds'.<sup>62</sup> They believed that the first concern should be how to politicise the personal daily life and women's bodies, because patriarchal power is engraved in them.<sup>63</sup> They criticised the main feminist groups for excluding the rights and needs of irregular female workers, disabled women and lesbians because they perceived women as a homogeneous category.<sup>64</sup> They also emphasised that feminist groups should admit their differences and try to communicate and interconnect for coalition.<sup>65</sup> The differences between women were first discussed by third-wave feminism activists in the Western countries in the late 1970s, with a focus on differences between women owing to class, race and culture.<sup>66</sup> New Korean feminist groups have been in line with third-wave feminism, so they have also paid attention to diversity and differences between women.<sup>67</sup>

In summary, the Korean feminist movement had developed as a part of the national independence movements during the Japanese colonial era and as a part of democratisation movements in the 1980s. After democratisation was achieved, the number of feminist groups increased and feminist political spaces expanded, so that

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Yoon, 'Sexual Slavery of the Japanese Army' (1997) 23-24 *Bulletin of the Ewha Institute of History* 172, 179.

<sup>59</sup> Hur (n 1) 189.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 192.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, 193.

<sup>64</sup> *Ibid.*, 193.

<sup>65</sup> *Ibid.*, 194.

<sup>66</sup> Sook-I OhKim, 'Women's Movements and Differences in South Korean - Exploring Newly Emergent Feminist Movements since 2000s' (2010) 22 *Journal of Women's Theory* 106-107.

<sup>67</sup> *Ibid.*, 117.

legislative reforms around women's issues, such as violence against women, began to be realised in the 1990s. As various women's issues emerged, feminist groups have diversified and feminist perspectives have expanded since the 2000s. The effects of this on response to sexual violence are discussed in the next section.

#### **4.2.2. Effects of the feminist movements on responses to sexual violence, including child sexual abuse**

As women's movements had begun to change, from being a part of the democratisation movements to becoming an independent feminist movements from the late 1980s, feminist groups had paid attention to sexual violence not related to democratisation or labour movements and anti-sexual violence movements had developed in the 1990s.<sup>68</sup> Amongst feminist groups, Women's Hotline was the first to raise public awareness of violence against women, and has tackled this since 1983. This group defined sexual violence as all kinds of violent expressions of discrimination against women, including violent sexual relationships, wife battering and sexual harassment.<sup>69</sup> Women's Hotline provided counselling and shelter services as well as medical and legal support for battered women and victims of sexual violence in an attempt to draw public attention to sexual violence through seminars, surveys and demonstrations. In addition to this, the organisation has requested the punishment of offenders and the protection of victims' human rights in specific cases.<sup>70</sup> As noted in Chapter 3, sex offences were not considered such a critical issue at the time and there was a social atmosphere in which blame was apportioned to rape victims until the early 1990s.<sup>71</sup> Although feminist groups were trying to draw public attention to the seriousness of sexual offences, they were not successful. However, two murders committed in 1991 and 1992, by adults who had been sexually abused as children, became turning points to make people pay attention to the efforts of feminist movements to improve social and legal responses to sexual violence.

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<sup>68</sup> Min (n 44) 38.

<sup>69</sup> *Ibid*, 23.

<sup>70</sup> *Ibid*, 24–25; Hyun Sook Lee and Chun Sook Jeong, 'History of the Women's Movement Against Wife Battering' in Korea Women's Hotline (ed), *History of the Korean Women's Rights Movement* (Hanul Academy 1999) 112–34.

<sup>71</sup> Kim (Ch.1 n 3) 22.

The first case was an incident in which a 29-year-old female killed a 54-year-old male at his home on 30 January 1991.<sup>72</sup> When the woman was nine years old, she was raped by the man who lived in her neighbourhood. She did not tell anyone, including her parents, because he had threatened to kill her, her parents and brothers if she did not remain silent about his offence. She subsequently suffered from schizophrenia and could not have sex with her husbands (she married twice.), and had divorced from her former husband. She tried to file a complaint to punish the offender once she became an adult, but she could not do it because the statute of limitations and time limits on making a complaint had expired. At that time, by the Criminal Act 1953, all kinds of sexual offences, except causing the injury or death of a victim, could not be prosecuted without the complaint of a victim<sup>73</sup> within six months of the date on which the identity of the offender became known.<sup>74</sup> Unable to find a way to officially punish the offender, she killed him.<sup>75</sup> She was sentenced to three years' suspension of execution of sentence and preventive medical treatment and custody orders in the Criminal Court, and this was affirmed by the Supreme Court.<sup>76</sup> Her counsel advocated that she should be acquitted of murder on the grounds that she was incapable of distinguishing right from wrong, or of controlling herself because of a mental disorder: post-traumatic stress disorder and schizophrenia, caused by her child rape trauma. The High Court ruled that, even though the court admitted she had a mental disorder, she was not unable but deficient in the abilities to control her will, and she was at risk of reoffending. As such, three years' suspension of execution of imprisonment was deemed reasonable as a mitigated punishment for murder while preventive medical treatment and custody orders were also given to prevent her reoffending.<sup>77</sup> Gender issues were not discussed in the sentencing statements and the court examined this case from a purely legal perspective, focusing on whether her mental disorder had taken away her abilities to determine her action and control her will. However, since it was the

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<sup>72</sup> *Gwangju High Court 91 No 899, 20 December 1991* [1991], 2–4.

<sup>73</sup> Criminal Act 1953 (ROK) s 306.

<sup>74</sup> Criminal Procedure Act 1954 (ROK) s 230(1).

<sup>75</sup> Chang Won Pyo, 'I Killed a Beast, not a Human' (14 November 2012) <<http://www.sisapress.com/news/articleView.html?idxno=59233>> accessed.

<sup>76</sup> *SCC 92Gamdo 10, 14 April 1992* [1992].

<sup>77</sup> *Gwangju High Court 91 No 899, 20 December 1991* [1991]



lightest punishment that could be given for murder, the judgment was deemed as lenient by the media.<sup>78</sup>

This case did not initially draw attention when it was reported in the media. However, as local feminist groups became aware of this case, eleven feminist organisations combined to form a committee to support her on 10 April, 1991 and demanded a fact-finding inspection of her rape case and the legislation regulating sexual violence.<sup>79</sup> They tried to attract the attention of the public, with these attempts yielding wide reporting of the case and their activities in different countries including Japan, the U.S. and Germany.<sup>80</sup> Almost all of the media reported the proceedings of the trial in detail. Amongst them, however, few media focused on exploring the causes of sexual offending, or appropriate social and governmental responses to sexual violence. Most of the media seemed to be unfamiliar with the notion of linking sexual violence to patriarchy. Seven major Korean newspapers published their opinions about this case through editorials. Some newspapers viewed the severity of sexual violence from the ideology of virginity. *Donga Ilbo*,<sup>81</sup> a conservative broadsheet,<sup>82</sup> stated that ‘female virginity is as valuable as life in all ages. This case has evidently revealed how a victim is devastated by sexual violence’<sup>83</sup> *Kookmin Ilbo*,<sup>84</sup> another conservative broadsheet newspaper, claimed that ‘since virginity is seriously considered in this country, sexual violence hinders a victim from getting married. The most important thing is the social endeavour to protect female virginity’.<sup>85</sup> Some newspapers focused on the retaliation of the victim. *Hankook Ilbo*,<sup>86</sup> a conservative broadsheet, maintained that ‘this retaliatory murder should be regarded as the result of 21 years’ tragic psychological conflict of the

<sup>78</sup> Editorial, ‘Rape is Equal to Murder’. *Hankyoreh Shinmun* (Seoul, 12 September 1991) 2.

<sup>79</sup> Min (n 44) 47–48.

<sup>80</sup> Ibid, 48.

<sup>81</sup> KABC (Korean Audit Bureau of Circulations), ‘2012 Korean Daily Newspapers Quantity’ <[www.kabc.or.kr/about/notices/100000001120](http://www.kabc.or.kr/about/notices/100000001120)> accessed. It was ranked third in quantity with a circulation of 1,060,760.

<sup>82</sup> Most of the major daily newspapers are classified as conservative except *Hangkyoreh Shinmun*. *Chosun Ilbo* and *Seoul Shinmun* represent ‘the far right-wing readership’ and *Donga Ilbo*, *Joongang Ilbo* and *Hankook Ilbo* ‘aim to reach the conservative elite’. *Hankyoreh Shinmun* ‘targets progressive intellectual and working-class readers’. Chul Heo, Ki-Yul Uhm and Jeong-Heon Chan, ‘South Korea’ in Shelton A Gunaratne (ed), *Handbook of the media in Asia* (Sage Publications 2000) 618-619

<sup>83</sup> Editorial, ‘A Life of a Woman’. *Donga Ilbo* (Seoul, 31 August 1991) 2.

<sup>84</sup> KABC (n 81) 1. It was ranked seventh with a circulation of 206,035.

<sup>85</sup> Editorial, ‘Eradicate Sexual Violence As Hard As Possible’. *Kookmin Ilbo* (Seoul, 25 November 1991) 2.

<sup>86</sup> KABC (n 81) 1. It was ranked fifth with a circulation of 263,718,

victim. The mental condition of the defendant should be considered in the trial'.<sup>87</sup> *Kyounghyang Shinmun*,<sup>88</sup> a progressive broadsheet, argued that 'there have been many victims of child sexual abuse, so this retaliatory murder and the trial draw public attention. This trial should consider the anguish of victims of child sexual abuse living in this generation'.<sup>89</sup> Only one newspaper analysed this case from a feminist perspective and demanded governmental policies for victims. *Hankyoreh Shinmun*,<sup>90</sup> a progressive broadsheet, claimed that:

This case has obviously disclosed how sexual assault and virginity ideology, caused by patriarchal atmosphere, have devastated a victim. She has suffered from our patriarchal sexual ethics for life. Government should found institutions which would support sexually victimised children and females as well as toughening punishment for sexual violence.<sup>91</sup>

This incident drew keen attention from the public and positively influenced feminist activists' efforts to enact legislation regulating sexual violence. Immediately following the sentence of this case in the High Court on 20 December, 1991, another murder by a different victim of child sexual abuse was committed early in January 1992.

The second murder involved a 20-year-old male named Kim, who killed his girlfriend's stepfather in conspiracy with her on 17 January, 1992.<sup>92</sup> When the girlfriend was six years old, her mother had married the murdered man. He first raped her when she was eight years old and had then raped her continuously over the following twelve years until he was killed. Sometimes, he raped his wife and stepdaughter at the same time. Even though he abused them violently for a long time, they could not resist or escape from him because he threatened that he would kill both of them if they told anyone about his sexual offences and that he would be able to find them if they left him. As he was a detective in a district public prosecutor's office, they could not expect the police or a prosecutor to help them. After his

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<sup>87</sup> Editorial, 'Trial of Retaliatory Murder of a Victim of Sexual Violence'. *Hankook Ilbo* (Seoul, 18 August 1991) 2.

<sup>88</sup> KABC (n 81) 1. It was ranked sixth with a circulation of 232,660.

<sup>89</sup> Editorial, 'This is Not 'Retaliation''. *Kyounghyang Shinmun* (Seoul, 18 August 1991) 3.

<sup>90</sup> KABC (n 81) It was ranked fourth in quantity with a circulation of 269,174.

<sup>91</sup> Editorial, 'Government Should Push the National Policies for Child Sexual Abuse'.

*Hankyoreh Shinmun* (Seoul, 13 August 1991) 2.

<sup>92</sup> SCC 92Do 2540, 22 December 1992 [1992], 2-4.

stepdaughter entered university, she met Kim and confided in him about her victimisation. Both of them came to her stepfather and asked him not to abuse her anymore, but her stepfather threatened them that he would kill or arrest both of them. Then they conspired together to kill him.<sup>93</sup>

This was the first case that disclosed the problem of sexual violence by relatives and became an important turning point of legislation regulating sexual violence and enhancing social awareness of sexual violence.<sup>94</sup> In 1991 and 1992, the number of the Korea Sexual Violent Relief Centre's counselling cases involving child sexual abuse by relatives stood at 210 amongst a total of 1,260 counselling cases of sexual violence. This equates to a percentage of 16.7%.<sup>95</sup> According to a survey of 1,205 Korean physicians in 1998, 157 physicians reported that they had experienced treating 315 sexually abused children under the age of 15.<sup>96</sup> Nevertheless, why had sexual violence by relatives been hidden until this case was reported? Donalek argues that 'secret is intrinsic to incest' with the victims normally remaining silent because of abusers' violence, intimidation, regularising abuse or compensation in order to control the victims.<sup>97</sup> Since children are afraid to disclose their abuse, it is normally revealed by mothers.<sup>98</sup> However, in many cases, there is an absence of mothers who care for the victims because of divorce, death or disappearance. Kang's research shows that, among 46 cases of father/daughter rape-incest, a mother was absent in 13 cases.<sup>99</sup> Furthermore, even though mothers who are living with children become aware of abuse, many of them have difficulties disclosing it. Lustig and others explain that, from the structural family therapy perspective, incestuous sexual abuse occurs to avoid family dissolution in a dysfunctional family when the sexual relationship between a father and a mother has

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<sup>93</sup> Chang Won Pyo, 'A Woman of Misfortune Killed a "Beast" Step-Father' (*Sisa Journal*, 21st November 2012) <<http://www.sisapress.com/news/articleView.html?idxno=59279>> accessed.

<sup>94</sup> Min (n 44) 51.

<sup>95</sup> Korea Sexual Violence Relief Centre, 'Case Analysis of Child Sexual Abuse by Relatives' in *Korea Sexual Violence Relief Centre Second Anniversary Report* (1993) 54.

<sup>96</sup> Kang-E Hong, Byung-Goo Kang and Young-Sook Kwak, 'A Survey of Intrafamilial Child Sexual Abuse by Physician's Reports' (1998) 9 *Korean Journal of Child & Adolescent Psychiatry* 138, 138.

<sup>97</sup> Julie G Donalek, 'First Incest Disclosure' (2001) *Issues in Mental Health Nursing* 573, 573-574.

<sup>98</sup> Kyoung Hee Kim, 'A Study on Mother's Experience in Disclosure of Incestuous Sexual Abuse' (2009) 61(3) *Korean Journal of Social Welfare* 205, 207.

<sup>99</sup> Eun-Young Kang, *A Study on Child Sexual Abuse* (Korean Institute of Criminology 2000) 113.

broken down, and the mother contributes by keeping the abuse secret, consciously or unconsciously.<sup>100</sup> On the contrary, from the feminist perspective, Finkelhor argues that the claim that a mother disregards the abuse to preserve the family is exaggerated, and maintains that her lack of social and financial means to protect herself and her daughter combined with the father's oppressive personality could explain the inactiveness of the mother.<sup>101</sup> Following interviews with mothers of interfamilial abused children, Kim maintains that mothers are anxious about whether they should disclose the abuse because of worry related to the foreseeable conflicts inside and outside the family.<sup>102</sup> Their disclosure is influenced by the level of their awareness of incestuous sexual abuse, their relationship with the husband, fear of being blamed, and whether or not they have emotional support systems.<sup>103</sup> Specifically, if the woman is a battered wife, as a beating is more serious, she tends to be more hesitant to disclose her husband's sexual abuse against a daughter.<sup>104</sup> In the second murder case, the mother of the abused girl, who had long been battered by the murdered man, did not dare to disclose the abuse, even though the daughter asked her to divorce or escape from him several times.<sup>105</sup> Instead, and in order to persuade her daughter, she told her that he would stop when she grew up, when she went to university, and when she got married.<sup>106</sup> Conclusively, the disclosure of incest would be increased by improving social awareness of interfamilial child sexual abuse and enhancing social structures which support the victims or the mothers.

In the second murder case, Kim's father asked the Korea Sexual Violence Relief Centre to help them, and this organisation became central in bringing together feminist groups to support the defendants of this case.<sup>107</sup> Many lawyers and university student organisations also joined feminist groups to give legal assistance and urge the court to make the right decision against them.<sup>108</sup> By virtue of these

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<sup>100</sup> Noel Lustig and others, 'Incest-A Family Group Survival Pattern' (1966) 14 *Archives of General Psychiatry* 31, 39.

<sup>101</sup> David Finkelhor, 'Psychological, Cultural and Family Factors in Incest and Family Sexual Abuse' (1978) 4 *Journal of Marriage and Family Counselling* 41, 45.

<sup>102</sup> Kim (n 98) 210.

<sup>103</sup> *Ibid.*, 223.

<sup>104</sup> *Ibid.*

<sup>105</sup> Joo-Hyun Cho, 'Father Rape As the Locus of Power and Sexuality' (1993) 9 *Korean Women's Studies* 90, 128.

<sup>106</sup> *Ibid.*

<sup>107</sup> Min (n 44) 52.

<sup>108</sup> *Ibid.*, 51, 55.

efforts, the female defendant was sentenced to five years' suspension of execution of imprisonment, which was the first suspension of execution of sentence in a murder case in the High Court in South Korea.<sup>109</sup> The male defendant was sentenced to five years' imprisonment.<sup>110</sup> Even though the court did not agree with the defendants' statements, which claimed that their conduct was justifiable self-defence, the media regarded the judgment, which considered the defendants' circumstances, as lenient. Many felt that the punishment for the female defendant was almost the lightest punishment that could have been given for the murder of a lineal ascendant.<sup>111</sup> As President Kim Young Sam pardoned both of them on 6 March, 1993, the female's civil rights were restored and the residual term of imprisonment of the male was reduced by half.<sup>112</sup>

These two incidents, and the efforts of feminist groups, significantly influenced social awareness of and the legal response to sexual violence and child sexual abuse. Min explains that, since these cases were relevant to child sexual abuse, there were no debates surrounding the social prejudice which blames victims of sexual violence. Indeed, feminist campaigns around these incidents were widely supported by the people through the arousal of their maternal and paternal instincts.<sup>113</sup> Feminist activists attempted to continue changing patriarchal society through making law which regulated sexual violence and child sexual abuse. In light of this, they used methods to both criticise the traditional social structure and to utilise the existing social order and people's emotions.<sup>114</sup>

Under these circumstances, sexual violence and child sexual abuse have been dealt with simultaneously as a gender issue. Until the Punishment for Sex Offences and Protection of Victims Act 1994 was passed, child sexual violence against children was punished in the same way as sexual violence against adult females and there had been only two exceptions amongst eight kinds of sexually violent crimes. 'Sexual intercourse with a child, between the age of 13 and 18, through fraudulent

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<sup>109</sup> Ibid, 51.

<sup>110</sup> SCC 92Do 2540, 22 December 1992 [1992] 2.

<sup>111</sup> Editorial, 'Judging a Suspension of Execution of Sentence for Kim Bo Eun' *Kookmin Ilbo* (Seoul, 15 September 1992) 3.

<sup>112</sup> Editorial Board, 'Government Pardons More Than 40,000 People' *Hankyoreh Shinmun* (Seoul, 7 March 1993) 1.

<sup>113</sup> Min (n 44) 49.

<sup>114</sup> Mi-Kyoung Lee, 'Achievement and Task of the Movements for Anti Sexual Violence Legislation' in Korea Sexual Violence Relief Centre (ed), *Sexual Violence on Trial* (Korea Sexual Violence Relief Centre 2007) 12.

means or by the force' is one of the two exceptions only applied to the offenders who commit the crimes against a child.<sup>115</sup> The other is 'sex with or committing an indecent act on a child under the age of 13'.<sup>116</sup> These mean that the age of consent for sex has been thirteen since 1953 in South Korea. This is relatively low in comparison with other countries. Graupner's study shows that 54 jurisdictions amongst 60 European jurisdictions and 62 jurisdictions amongst 79 non-European jurisdictions set a minimum consent age at 14, 15 and 16.<sup>117</sup> Only six jurisdictions set a minimum consent age at 12, as follows: Malta, Spain, the Vatican, Philippines and the U.S. States of Alabama and Louisiana.<sup>118</sup> Two Bills on the Criminal Act focusing on changing the minimum consent age from 14 to 16 to strengthen the protection of children were introduced to the Korean Parliament in 2012. However, they were not passed in the Legislative and Judiciary Committee Sub-Committee because MPs and the Secretary of the Ministry of Justice objected to the bills on the grounds that they needed more research into whether this change would widen the extent of punishment and whether sexual relations with peers would be punishable.<sup>119</sup> Since the first Criminal Act 1953 was passed, there had not been any amendment or new legislation towards sexual violence against children until the Punishment for Sex Offences and Protection of Victims Act 1994 was passed. The contents of this act will be discussed later in this chapter.

In summary, since sexual violence against females and child sexual abuse have been dealt with simultaneously and from the same perspectives, the provisions relevant to protecting children, strengthening the procedural rights of a victim during the criminal justice process, and toughening the punishment for sex offences, have been included in the same act.

#### **4.2.3. Development process of the first legislation towards sexual violence in 1994**

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<sup>115</sup> Criminal Act 1953 (ROK) s 302.

<sup>116</sup> Ibid, s 305.

<sup>117</sup> Helmut Graupner, 'Sexual Consent: The Criminal Law in Europe and Outside of Europe' (2005) 16(2),(3) *Journal of Psychology & Human Sexuality* 111, 117–118, 145–146.

<sup>118</sup> Ibid.

<sup>119</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* (22 November 2012), 4–5.

As the first incidence noted above drew public attention in April 1991, feminist groups trying to change the law held a public hearing on the legislation of sexual violence on 18 April, 1991.<sup>120</sup> At this hearing, the problems of the then-existing laws regulating sexual violence were described as follows:<sup>121</sup> First, the provisions regulating sexual violence are dispersed to different laws, so that they are not systematic and effective. Second, in criminal law, sexual offences belong to ‘Crimes relating to Chastity’, so that the characteristics of victims, such as sexual history, have influenced the criminal justice process. Third, categories of sexual offences are too narrow to sufficiently protect victims. Fourth, victims’ complaints are required for the prosecution of sexual offences. Fifth, there are no provisions to support and protect victims.

There were two different opinions around the definition of sexual violence and the scope of the act between feminist groups. Women’s Hotline, which had long experience of responding to the problems of wife battering, argued that the definition of sexual violence in the Act should mean gender violence, so as to include wife battering and sexual harassment in addition to rape and indecent assault.<sup>122</sup> They believed that beating women and rape were within the continuum of violence, and they regarded sexual violence to be the same as violence against women.<sup>123</sup> They urged that the use of this definition of gender violence could include various sexual oppressions against women.<sup>124</sup> On the contrary, the Korea Sexual Violence Relief Centre claimed that it would be difficult to legislate if they used a wider definition of sexual violence, because the term and definition of sexual violence would be unclear.<sup>125</sup> After long debate, in February 1992, feminist groups reached agreement that they would use the term sexual violence centred on rape and indecent assault, and they would try to legislate to prevent wife battering separately.<sup>126</sup> By virtue of feminist groups’ consistent effort, the Punishment for Domestic Violence Act 1997 and the Prevention of Domestic Violence and Protection of Victims Act 1997 were legislated three years after the legislation of the Punishment for Sex Offences and

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<sup>120</sup> Min (n 44) 56; Lee (n 114) 13.

<sup>121</sup> Min (n 44) 56; Yoon Ok Shin, ‘What do we do in the Committee for Legislation of Sexual Violence’ (1992) 62 *Bettle* 6–7.

<sup>122</sup> Lee and Jeong (n 70) 144–45.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 146.

<sup>126</sup> *Ibid.*

Protection of Victims 1994. Prohibition of sexual harassment in the workplace was included in the Prohibition and Remedy against Discrimination between Men and Women Act 1999 and the Sexual Equality Employment Act 1999.<sup>127</sup>

As the second incidence noted above attracted intense public attention, feminist groups drafted the bill on sexual violence and put pressure on politicians to introduce it. Since a presidential election was scheduled in December 1992, lawmakers of different parties agreed to the necessity of legislation to attract women's votes, resulting in three bills on sexual violence being introduced in Parliament between 13 July 1992 and 31 October 1992.<sup>128</sup> Feminist groups founded the 'Committee for Legislation of Sexual Violence' in order to proceed the legislation movement more strongly on 19 March, 1992 and introduced their own bill in Parliament by the petition in August 1992.<sup>129</sup> The public hearing for discussing these bills was held on 11 May, 1993. The Bills were integrated in the deliberation process of the Legislative and Judiciary Committee and the integrated bill was passed in the Whole House Committee on 17 December, 1993, as the Punishment for Sex Offences and Protection of Victims Act 1994.

These rapid changes in legal responses to sexual violence have been influenced by globalisation alongside the domestic struggle of feminist groups. The expansion of global discourses relating to women's rights has affected the Korean government's policy changes surrounding women's issues.<sup>130</sup> The Korean government ratified the Convention on the Elimination of All Forms of Discrimination against Women on 27 December, 1984.<sup>131</sup> This has influenced the Korean policy and helped feminist groups to implement legislation.<sup>132</sup> This Convention was adopted and ratified by the U.N. General Assembly on 18 December, 1979 and entered into force on 3 September, 1981. The Convention declares that States Parties should undertake 'to adopt appropriate legislative and other measures,

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<sup>127</sup> Ibid, 147.

<sup>128</sup> Lee (n 114) 14.

<sup>129</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Legislation Regulating Sexual Offences* (11 May 1993) 2.

<sup>130</sup> Kyoung Hee Kim, 'Globalisation and the Korean Women's Policy Changes' (2005) 16 *Women and Society* 137, 153.

<sup>131</sup> Seon Wook Kim, 'UN Convention on the Elimination of All Forms of Discrimination against Women and the Korean Legislation Policy towards Women' (2000) 4(4) *Ewha Law Journal* 139.

<sup>132</sup> Young-Hee Shim, 'Sexuality Policy in Korea in the 1990s: Policy Changes and Factors' (2002) 1 *Gender and Society* 69, 79.



including sanctions where appropriate, prohibiting all discrimination against women’,<sup>133</sup> ‘to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’,<sup>134</sup> and ‘to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect within one year after the entry into force for the State concerned; thereafter at least every four years and further whenever the Committee so requests’.<sup>135</sup> The Committee on the Elimination of Discrimination against Women, established by the convention to consider the progress made in the implementation of the convention,<sup>136</sup> has made general recommendations based on the reports of the States Parties.<sup>137</sup> In 1989, the Committee recommended to the States Parties to ‘include in their periodic reports to the Committee information about the legislation in force to protect women against the incidence of all kinds of violence in everyday life (including sexual violence, abuses in the family, sexual harassment at the work place etc.)’.<sup>138</sup> This convention has imposed the duty of legislative response to women’s issues on the Korean government and has made the Korean feminist groups more influential to women’s policies.<sup>139</sup> The Punishment for Sex Offences and Protection of Victims Act 1994, the Punishment for Domestic Violence Act 1997 and the Prevention of Domestic Violence and Protection of Victims Act 1997 were influenced by the convention.<sup>140</sup>

### **4. 3. Debates around the Punishment for Sex Offences and Protection of Victims Act 1994**

#### **4.3.1. Enactment of the 1994 Act**

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<sup>133</sup> Convention on the Elimination of All Forms of Discrimination against Women Article 2(b).

<sup>134</sup> Ibid, Article 2(f).

<sup>135</sup> Ibid, Article 18 1.

<sup>136</sup> Ibid, Article 17 1.

<sup>137</sup> Ibid, Article 21 1.

<sup>138</sup> United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 12* (1989).

<sup>139</sup> Kim (n 131) 147.

<sup>140</sup> Ibid.

Feminist groups analysed the direction of the legislation towards sexual violence in detail.<sup>141</sup> Almost all of their requests have been codified in the last 20 years, so that the debates surrounding this legislation have significant meaning and continue to influence the laws regulating sexual violence. Feminists' arguments can be arranged into three categories: strengthening victims' rights, expanding the possibilities of punishment for sex offenders, and toughening sentences for sexual offences. This section will explore which kinds of issues were discussed and realised in each category during the enactment process.

### **A. Strengthening victims' rights**

Feminist activists believed that, in order to eradicate sexual violence, comprehensive policies, including in the public and private sector, should be implemented, as sexual violence is a complex and structural problem connected to economic, political and cultural structures.<sup>142</sup> They also thought that establishing a social welfare service network aimed at supporting victims and treating offenders might be the most important thing in terms of preventing sexual offences and changing social awareness, the social atmosphere and the culture surrounding sexual violence. This would, in turn, influence the social structure significantly.<sup>143</sup> Since the provisions regulating sexual violence were scattered across different laws prior to 1994, it was hard to apply special procedural rules for protecting victims during the criminal justice process. According to feminist arguments, in the 1994 Act, all kinds of sexual offences dealt with across different laws were defined as 'violent sexual offences'. In light of this, special procedural rules for protecting victims were introduced. A complaint against lineal ascendants of a victim or a victim's spouse has been prohibited by the section 224 in the Criminal Procedure Act 1954. However, with the enactment of the 1994 Act, this rule is no longer applied to all kinds of sexual offence cases. In addition, a number of other provisions were realised in order to support victims and prevent sex crimes. These included the establishment of organisations for victim assistance and declaring the government's duty and financial support towards the prevention of sexual offences. Further acts have increased the

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<sup>141</sup> Kyoung Ja Lee, *A Study on the Countermeasures on Sexual Violence* (Korean Women's Development Institute 1993) 121–28.

<sup>142</sup> *Ibid*, 12.

<sup>143</sup> *Ibid*, 122, 149, 178, 183.

number of provisions aimed at securing victims' rights. Indeed, the Prevention of Sexual Violence and Protection of Victims Act 2010 was passed to enhance the prevention of sexual offences and to protect victims.

Feminist groups argued that the complaint system of sex crimes must be abolished, because it does not protect a victim. Instead, it encourages the concealment of sexual offences or makes it hard to punish the offenders.<sup>144</sup> During the deliberation of the bill in Parliament, this issue was rigorously discussed in the public hearing held on 11 May, 1993. Young-Ho Moon, a prosecutor, claimed that the complaint system should be maintained to protect a victim's honour, and that increases of victims' human rights awareness would lead to a rise in the number of complaints filed by victims.<sup>145</sup> Hyun-Joo Shin, a lawyer, and Hee-Tae Park, an MP, both supported this opinion.<sup>146</sup> On the contrary, Young-Ae Choi, head of the Korea Sexual Violence Relief Centre, insisted that the complaint system reflected the social perception whereby a victim is criticised rather than a sex offender, and it was the primary reason for the concealment of sexual offences.<sup>147</sup> Young-Ran Kim, a judge, agreeing with her, added that abolition of the complaint system would increase reporting of sex crimes and change social attitudes towards a victim of sexual offences.<sup>148</sup> Eventually, the complaint system was not abolished entirely, but revised significantly in the 1994 Act. As a result of this legislation, the space to prosecute sex crimes without a victim's complaint was expanded. The reason why the law requires most sex offences to contain a complaint from the victim for prosecution is supposedly to protect the honour of a victim through preventing disclosure of sex offences in a criminal justice process.<sup>149</sup> However, in many cases, offenders benefited from this rule, while victims suffered. It became commonplace for an offender to suggest giving reparations and asking or intimidating a victim to withdraw a complaint.<sup>150</sup> If the victim withdrew the complaint, the offender ended up escaping punishment. Therefore, this revision of the complaint system had a significant impact on the protection of a victim. For instance, if a victim of robbery

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<sup>144</sup> Ibid, 127.

<sup>145</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Legislation Regulating Sexual Offences* 28.

<sup>146</sup> Ibid, 37, 45.

<sup>147</sup> Ibid, 6, 49.

<sup>148</sup> Ibid, 22.

<sup>149</sup> Kim (Ch.3 n 78) 379.

<sup>150</sup> Han (Ch.3 n 79) 38.

and rape at the same time by the same offender did not make a complaint of rape or withdrew the complaint afterwards, according to this legislation, the offender could not be punished for rape, but only for robbery. In addition, the time limit for a complaint on sex offences, still requiring a victim's complaint for prosecution, was extended from six months to a year from the date on which the identity of the offender had become known.<sup>151</sup> Finally, the complaint conditions for the prosecution of sex offences were repealed in 2012.<sup>152</sup>

Feminists also maintained that the chapter title of the Criminal Act, 'Crimes relating to Chastity', to which sex crimes belong, should be changed. Indeed, they felt that this title is based on the notion that sex crimes do not violate the right of a victim's sexual self-determination, but violate the social order that women should keep their chastity, which reflects a male-centred belief towards sexual violence and female sexuality.<sup>153</sup> Young-Keun Oh agrees with their argument and claims that this thinking makes it difficult to punish a husband who rapes his wife as a rapist, because he does not violate the chastity of the victim.<sup>154</sup> This chapter title did not change in the 1994 Act, but was finally changed in 1995 following an amendment of the Criminal Act.

The necessity of special procedures for victims during the criminal justice process was discussed. Feminist groups claimed that, since most of the professionals in the processes are male and their attitudes are male-centred, many victims have, thus, suffered from secondary victimisation. Responding to this, two provisions relating to procedural protection for victims in the criminal process were introduced. One stipulates that government officials who participate in an investigation or trial process must not disclose the personal information of a victim;<sup>155</sup> the other holds that a judge may decide not to open a trial or an examination of a witness to the public in order to protect the privacy of the victim.<sup>156</sup> Even though these were inadequate to protect a victim, various procedural protection methods have been added, step by step up, until 2012.

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<sup>151</sup> Punishment for Sex Offences and Protection of Victims Act 1994 (ROK) s 19.

<sup>152</sup> Criminal Act 2012 (ROK) s 306.

<sup>153</sup> Lee (n 141) 123.

<sup>154</sup> Oh (Ch.3 n 76) 169.

<sup>155</sup> Punishment for Sex Offences and Protection of Victims Act 1994 (ROK) s 21.

<sup>156</sup> *Ibid*, s. 22.

## **B. Expanding the possibility of punishment for sex offenders**

Feminist groups argued that existing laws were insufficient to regulate sexual violence properly, and so the scope of the Act should be expanded. They claimed that sexual violence against children by relatives should be inserted as an independent crime and that the complaint system should be changed in order to punish the offenders. It was difficult to punish the offender who raped descendants because, while the complaint of a victim was required for prosecution, a complaint against lineal ascendants was prohibited by the Criminal Procedure Act 1954.<sup>157</sup> This rule is based on Confucian patriarchal thought.<sup>158</sup> Since this was relevant to the second murder case noted in Section 3.2.2., the provisions for sexual violence against children by relatives were introduced.<sup>159</sup> The term ‘relatives’ denotes elder ascendants by blood within four degrees<sup>160</sup> of a victim.<sup>161</sup> As the prosecution of rape or indecent assault by a victim’s relative does not require the victim’s complaint by this act,<sup>162</sup> the possibility of prosecution would increase, because the offender could be prosecuted without the complaint of a victim if third parties, such as teachers, doctors or social workers, became aware of the victimisation and report it to the police. Furthermore, the exception of prohibition on filing a complaint against complainants or their spouse’s lineal ascendants was inserted in this law.<sup>163</sup> This was the first exception to the complaint prohibition rule against lineal ascendants since the Criminal Procedure Act was enacted in 1954.<sup>164</sup> Therefore, if a sex offender is a victim’s or her husband’s lineal ascendant, the victim is able to file a complaint against the offender.

They also stated that new kinds of sexual offences, such as sexual molestation in a crowded place or lewd conduct using telecommunications, should be added, as many women suffered from these types of conduct.<sup>165</sup> In the 1994 Act,

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<sup>157</sup> Criminal Procedure Act 1954 (ROK) s 224.

<sup>158</sup> Han, (Ch.3 n 79) 35.

<sup>159</sup> Punishment for Sex Offences and Protection of Victims Act 1994 (ROK) s 7.

<sup>160</sup> ‘Degree’ is a typical concept in Korean family law. The relationship between parents and offspring is one degree. Degrees between relatives by blood should be calculated by adding the number of generations reaching their common ancestor. For instance, the relationship between cousins is four degrees, since the number of generations reaching to their grandparents, the common ancestors of cousins, is two for each cousin.

<sup>161</sup> Punishment for Sex Offences and Protection of Victims Act 1994 (ROK) s 7(3).

<sup>162</sup> *Ibid*, s 15.

<sup>163</sup> *Ibid*, s 18.

<sup>164</sup> Criminal Procedure Act 1954 (ROK) s 224.

<sup>165</sup> Lee (n 141) 122.

new kinds of sex offences were created in order to address a legal gap. These new offences included sexual intercourse or indecent acts against females with physical disability;<sup>166</sup> indecent acts through abuse of occupational authority;<sup>167</sup> indecent conduct without violence or a threat in a crowded place, such as a transportation vehicle,<sup>168</sup> and lewd conduct to transmit a voice, a sound, a word, a picture, a video clip or things which may bring sexual shame to a person using communication measures such as a telephone, post or via a computer.<sup>169</sup> With this legislation, the space to punish sexual intercourse or an indecent act without violence or intimidation was extended.

Discussion now focused on how the laws regulating specific forms of sexual violence with separate, penis-centred and dichotomous approaches resulted in inappropriate legal responses to sexual violence.<sup>170</sup> In light of this, forced sexual intercourse, not by means of explicit violence or intimidation, but without the consent of a victim, was not punished at all; indeed, even the most severe indecent assault would not be punished as heavily as rape if an offender did not have intercourse with the victim. Furthermore, the criminal act of inserting an offender's sexual organ into a victim's bodily part other than a genital organ was not punished as rape, but merely as indecent assault regardless of the extent of damage to the victim.<sup>171</sup> Debates also focused on the fact that being a victim of the crime of rape, sexual intercourse by abuse of occupational authority, or sexual intercourse with children under the age of 13 is limited to females in the Criminal Act. Feminists argued that this reflects the dual ethics in sexuality, that sexual violence harms only women because men do not lose anything if they lose their chastity. In order to protect male children then, the term 'a person' instead of a 'woman' should be used to describe the potential victim of these crimes. These arguments were not realised in the 1994 Act but were legislated in 2012.

### **C. Toughening the sentences for sexual offences**

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<sup>166</sup> Punishment for Sex Offences and Protection of Victims Act 1994 (ROK) s 8.

<sup>167</sup> *Ibid*, s 11.

<sup>168</sup> *Ibid*, s 13.

<sup>169</sup> *Ibid*, s 14.

<sup>170</sup> Lee (n 141) 125–26.

<sup>171</sup> *Ibid*.

Feminists maintained that sentencing for sexual offences had been too lenient and they preferred to toughen the sentences within the court's sentencing discretion rather than reinforce maximum punishment of the law.<sup>172</sup> However, all of the bills included the provisions to toughen punishment, and, thus, in the public hearing, Young-Hwan Kim, a professor of the School of Law at Hanyang University, criticised the trend of heavier punishment on the grounds that the deterrent effect of punishment would not be influenced by the severity of the penalty, but by the certainty of prosecution.<sup>173</sup> However, this argument was not discussed in detail.

This was not in line with the argument of feminist groups and the content discussed in the public hearing. Lee criticises the trend of heavier punishment for sexual violence as follows:

Feminist groups are anxious about the trend toward heavier punishment for sexual offences including EM and pharmacological treatment because it covers the problems of investigation and trial process, and they are assumed to be a solution that will prevent sexual violence even though they can be applied to merely a small number of offenders. As many sexual offences are committed in the house or workplace of the offender, it is questioned whether EM would be effective to prevent reoffending. Also, since a sexual offence may not be primarily the result of sexual drive, the argument for drug injection seems to be built upon insufficient understanding of sexual violence.<sup>174</sup>

Despite this criticism, the trend towards heavier punishment for high-profile sexual offences has been intensified since the Act was passed. The media dealt with sexual violence merely within the criminal justice system and focused on tougher punishment and unnecessarily detailed descriptions of sexual violence, but the fundamental resolution of sexual violence, such as how to improve sex education in society, was ignored.<sup>175</sup> The introduction of pharmacological treatment was also influenced by this trend, and it will be addressed in detail in the subsequent chapters.

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<sup>172</sup> Ibid, 126-127.

<sup>173</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Legislation Regulating Sexual Offences* 11.

<sup>174</sup> Lee (n 114) 20–21.

<sup>175</sup> Jung-Hye Yang, 'News Representation of Crime: the Case of Sexual Violence against Children' (2010) 10(2) *Journal of Communication Science* 343, 360–61

### 4.3.2. Debates about the Amendments to the 1994 Act

Feminist groups consistently asked for revision of the Punishment for Sex Offences and Protection of Victims Act 1994 in order to address the defects already discussed.<sup>176</sup> There were two important amendments to the Act in 1997 and 2003.

#### 4.3.2.1. Amendment to the Punishment for Sex Offences and Protection of Victims Act 1997

Two sexual offence cases against children reported by the media in July 1996 accelerated the revision of the Act. The first case was an incident involving a 15-year-old girl, who gave birth to a baby on 27 June, 1996. She was raped by a stranger in October 1995 and she could not talk about it to anyone for fear of leaving school and of causing anxiety to her parents. Her parents usually worked together until late at night, so it was hard for them to talk with their daughter face-to-face. This case was made known to the public by the media on 6 July, 1996.<sup>177</sup> Shortly after it was reported, on 7 and 8 July, newspapers ran headlines about the persistent and long-lasting sexual assault against an 11-year-old girl by her neighbours.<sup>178</sup> As the victim's mother had left home when she was 11 months old and her father had died when she was three years old, she was living with her 75-year-old grandmother in the countryside, around 70 miles away from Seoul. The offenders raped her 23 times from mid-April to early July 1996 after making her drunk. Even though the sexual assault against her was made known to other neighbours directly after the crime, no neighbours paid any attention to her. The victim wrote the offences and the names of the offenders in her diary, and handed it to her aunt on 1 July, 1996. She attempted suicide by taking poison on 2 July, 1996. Her aunt reported the assault to the police using the diary, and the offences were revealed.

As the victims of the above two incidents were students and their parents or carers' abilities to take care of them were limited, feminist activists demanded the government 'employ sex assault counsellors and provide sexual offence prevention

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<sup>176</sup> Min (n 44) 62.

<sup>177</sup> Ho-Gap Lee, 'A Middle School Girl's Delivery' *Donga Ilbo* (Seoul, 6 July 1996) 39.

<sup>178</sup> Cheon-Ryol Lee, 'Suicide Attempt of 11-Year-Old Girl' *Seoul Shinmun* (Seoul, 7 July 1996) 19; Gang-Jun Kim, 'Beastlike Sexual Assault by 14 Neighbours' *Kookmin Ilbo* (Seoul, 8 July 1996) 3; Editorial, 'Cruel Indifference Attitude' *Hankook Ilbo* (Seoul, 8 July 1996) 3; Editorial, 'Most Vicious Sexual Offences' *Segye Ilbo* (Seoul, 8 July 1996) 3.



programmes in every kindergarten and school in order to change the distorted attitude of students towards sexual assault'<sup>179</sup> and 'to strengthen child welfare delivery practice and introduce a foster care system in order to provide special services of social workers to the children in need',<sup>180</sup> in addition to a harsher punishments for sex offenders. Politicians tried to respond to the concern swiftly, so three bills to revise the Punishment for Sex Offences and Protection of Victims Act 1994 were introduced in Parliament between 30 October, 1996 and 13 November, 1996 and the Bill integrated in the deliberation process of the Legislative and Judiciary Committee was passed in the Whole House Committee on 30 July, 1997. This was the Punishment for Sex Offences and Protection of Victims Act 1997.

In this legislation, the provisions relating to the protection of children were strengthened. The definition of a relative of the victim is extended from 'an elder ascendant relative by blood within four degrees of the victim' to 'a relative by blood within four degrees and a relative by marriage within two degrees'.<sup>181</sup> By this amendment, the definition of a relative has included a stepfather, younger brother or cousin of the victim.

In addition, the procedural protection of a victim was improved. The presence of a person having trustworthy relations with the victim might be allowed when a court interrogates the victim as a witness or an investigative agency investigates the victim.<sup>182</sup> This had been discussed as a form of psychological and emotional support for victims during the criminal justice process.<sup>183</sup> The head or employee of a facility which serves to protect, educate or treat minors under the age of 18 shall report to an investigation agency immediately when he/she discovers that the minor under his/her protection and support is a victim of sex offences.<sup>184</sup> Where any circumstances exist that make it significantly difficult for a victim to appear and

<sup>179</sup> Young-Ae Choi, 'Hidden Offenders in Sexual Assault' *Donga Ilbo* (Seoul, 11 July 1996) 5.

<sup>180</sup> Jeong-Suk Kwon, 'Provide Substantial Support to Children in Need' *Hankyoreh Shinmun* (Seoul, 28 July 1996) 11.

<sup>181</sup> Punishment for Sex Offences and Protection of Victims Act 1997 (ROK) s 7(4). A relative by marriage is composed of 'a spouse of a blood relative', 'a blood relative of a spouse' and 'a spouse of a spouse's blood relative'. A degree between the victim and 'a spouse of blood relative' is the same as degrees between the victim and the blood relative, and a degree between the victim and 'a blood relative of a spouse' or 'a spouse of a spouse's blood relative' is the same as a degree between the spouse and the spouse's blood relative. For the definition of degree, see (n 160).

<sup>182</sup> *Ibid*, s 22-2.

<sup>183</sup> Jae Sang Lee and Ho-Joong Lee, *Victim Protection Programmes in Criminal Procedure* (Korean Institute of Criminology 1993) 98.

<sup>184</sup> Punishment for Sex Offences and Protection of Victims Act 1997 (ROK) s 22-23.

give testimony on a trial date, the victim may ask the public prosecutor to make a request for the preservation of evidence and the public prosecutor may request the judge to permit the preservation of evidence.<sup>185</sup> When the judge admits the request, the victim is allowed to state as a witness in the preservation of evidence process;<sup>186</sup> and the protocol prepared in this process shall be regarded as absolute admissible evidence.<sup>187</sup> Before this legislation, these had been argued as ways of preventing a victim from answering the same questions repeatedly.<sup>188</sup> But it is not easy for a victim to get permission, because this procedure was originally introduced for a suspect or a defendant to preserve favourable evidence. The concept of significant difficulty relates to circumstances such as where the victim is seriously ill or is living abroad.<sup>189</sup> Besides, it is hard to expect a victim to use this procedure in the investigation phase of the police or prosecution, because a prosecutor might rarely permit a victim to use it before the end of the investigation. Furthermore, the most appropriate ways to prevent a victim from being confronted by an offender in a courtroom were discussed.<sup>190</sup> For instance, a victim might be examined as a witness by means of video recorder whilst staying in a separate room outside of the courtroom.<sup>191</sup> This method was merely discussed and not realised in this legislation, but was introduced in 2003.

#### **4.3.2.2. Amendment to the Punishment for Sex Offences and Protection of Victims Act 2003**

The amendment to the 1997 Act was initiated by the feminist groups, which filed a petition to notify the government of the violation of the victim's rights during the criminal justice process. Women's Hotline hosted the 'seminar on protecting the human rights of a victim of sexual offences in the investigation process by the public prosecutor' on 27 November, 2001. The analysis of the results of 150 counselling cases of sexual offences showed the realities of human rights violations of the victims as follows:

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<sup>185</sup> Ibid, s 22-4.

<sup>186</sup> Criminal Procedure Act 1954 (ROK) s 184.

<sup>187</sup> Criminal Procedure Act 1973 (ROK) s 311.

<sup>188</sup> Han (Ch.3 n 79) 43.

<sup>189</sup> Dong Woon Shin, *Criminal Procedure Law* (Pakyounsa 2008) 318–320.

<sup>190</sup> Lee and Lee (n 183) 104.

<sup>191</sup> Ibid.

A victim of sexual offences was asked to make an agreement with the offender and to withdraw the complaint by an investigator in the prosecutor's office. Another victim was embarrassed to hear the prosecutor's statements that 'it seems not to be a rape because you're not a virgin'. Among 150 counselling cases of sexual offences carried out by Women's Hotline, between 1999 and June 2001, human rights violations of the victims in the investigation process by the public prosecutor are found in 76 cases. The most frequent type of violation is criticising a victim, which is found in 44 cases, such as 'why didn't you report it right after the offence?' or 'do you make a complaint against the offender for money?'.<sup>192</sup>

Shim, a presenter of this seminar, insisted that the 'male-centred thoughts of an investigator and the investigation practice without consideration of the victims, are one of the factors of human rights violations'.<sup>193</sup>

In addition, an indecent assault case against a four-year-old girl attracted public attention on the grounds that she was asked to answer the same questions repeatedly in the investigation by the police and a prosecutor.<sup>194</sup> Requests for repeated statements and an investigation practice in which there is little consideration for the needs of child victims had been indicated as a form of secondary victimisation of child victims in the criminal justice process.<sup>195</sup> Using this case as momentum, organisations for women's rights and the prevention of child abuse asked for the Act to be modified and this was reported in detail by the media. *Seoul Shinmun*,<sup>196</sup> a conservative broadsheet, reported that:

Self-help groups of child rape victims' families and women's rights movement organisations ask the government to revise the Act relevant to sexual offences. They insist that a video tape of a child victim's statement should be regarded as admissible evidence with only one statement during the criminal justice process and the statement process should be improved with consideration of the features of a child. Shin Eui Jin, a child psychiatrist, said that 'A child tends not to tell the truth to a person they do not know and trust, so

<sup>192</sup> Young Su Kang, 'There is No Human Rights in the Investigation of Sexual Offence Victimisation'. *Kookmin Ilbo* (Seoul, 27 November 2001) 30.

<sup>193</sup> Dong Yong Min, 'Sexual Insult on Female Victims of Sexual Offences in Investigation by Public Prosecutor' *Donga Ilbo* (Seoul, 28 November 2001) 30.

<sup>194</sup> Nam Ju Heo, 'Blind Spot on Human Rights' in Investigation of Sex Crime' *Seoul Shinmun* (Seoul, 11 December 2001) 6.

<sup>195</sup> Hyun Mi Jeong, 'Secondary Victimisation in Criminal Justice Process of Sexual Offences' (2000) 8 *Victimology* 162, 175, 185–186.

<sup>196</sup> KABC (n 81) 1. It ranked ninth with a circulation of 163,713.

that the statement of a child victim is likely to be unreliable if given to an investigator who is a stranger to them'.<sup>197</sup>

Immediately following this report, on 11 December, 2001, the Secretary of the Ministry of Gender Equality announced that they would push to introduce the mandatory presence of a person having reliable relations with a child victim in principle when an investigative agency investigates the victim.<sup>198</sup> The bill to revise the 1997 Act, focused on protection of a victim's human rights, was introduced in Parliament on 3 May, 2002 and was passed in the Whole House Committee on 21 November, 2003. This was the Punishment for Sex Offences and Protection of Victims Act 2003.

As noted above, the 1997 legislation was inadequate to protect a victim from not being asked to answer the same questions repeatedly; therefore, additional ways of protecting a victim were introduced. A video recording system of a victim's statement and investigation process in the investigative agency was introduced in order to prevent the child victim from stating the same facts repeatedly in the investigation process. A prosecutor or police officer is required to record the statement and the whole investigation process by means of a video recorder or other recording device if a victim of a sexual offence is under the age of 13 or disabled.<sup>199</sup> The statement recorded by the investigative agency shall be regarded as admissible evidence if a person having reliable relations with the victim who was present in the investigation process testifies that the statement of the victim is true before the judge at the trial.<sup>200</sup> In this case, a defendant is not allowed to cross-examine the victim, but can cross-examine a person having reliable relations with the victim who was present in the investigation process; however, this is criticised on the grounds that it violates the defendant's right of cross-examination.<sup>201</sup> Kwon claims that the necessity of protecting a child victim from meeting an offender in the examination process is

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<sup>197</sup> Heo (n 198)

<sup>198</sup> Eun Kyoung Yang, 'Push to Introduce Mandatory Presence of Family When Investigating a Child Rape Victim' *Hankook Ilbo* (Seoul, 12 December 2001) 29; Nam Ju Heo, 'Mandatory Presence of Family of a Victim in Sex Crime Investigation and Trial' *Seoul Shinmun* (Seoul, 12 December 2001) 14.

<sup>199</sup> Punishment for Sex Offences and Protection of Victims Act 2003 (ROK) s 21-2(2).

<sup>200</sup> *Ibid*, s 21-22(3).

<sup>201</sup> Soon-Min Kwon, 'The Study on Unconstitutionality of Videotaped Testimony in the Protection of Children and Juveniles from Sexual Abuse Act and the Special Cases Concerning the Punishment, ETC. of Sexual Crimes Act and Reasonable Operational Proposal about this System' (2014) 21(3) *Chosun Law Journal* 737, 759.

recognised, but this is an excessive restriction of a defendant's right because there are other ways, such as a cross-examination by means of video camera, to balance the rights of both parties.<sup>202</sup> As the right of cross-examination is crucial for a defendant, this debate needs to be reflected in legislation.

In addition, the provisions to consider the characteristics of victims and to protect their rights are inserted. Any court may seek opinions from any psychiatrist, psychologist, social welfare scholar or other related professionals about the mental and psychological state of any offender or any victim, the outcome of their diagnosis and the details of a statement made by the victim, and any court shall, in investigating and trying any sexual crime case, take into account these professional opinions.<sup>203</sup> The presence of a person having reliable relations with the victim shall be allowed in principle when a court interrogates the victim as a witness or an investigative agency investigates the victim if they are a child or disabled.<sup>204</sup> Where a court interrogates, as a witness, a victim of sexual offences, it may do so by means of video or other relay devices.<sup>205</sup>

In summary, the Punishment for Sex Offences and Protection of Victims Act has been gradually revised. The trend to strengthen the procedural rights of a victim has been apparent. As a defendant's right of cross-examination has been restricted, it becomes important to consider how to balance the rights of a defendant and a victim during the criminal justice process.

#### **4.4. Conclusion**

The extent to which Korean feminists have impacted on the development of social awareness and legal responses to sexual violence has been scrutinised in this chapter. Since the late nineteenth-century, feminist groups have taken an active role in the struggle for national liberation or democratisation in the context of Japanese colonialism and military dictatorship. Since the late 1980s, feminist groups have played a prominent role in opposing the social oppression of women generally and sexual violence specifically.

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<sup>202</sup> Ibid, 760.

<sup>203</sup> Punishment for Sex Offences and Protection of Victims Act 2003 (ROK) s 22

<sup>204</sup> Ibid, s 22-23(3).

<sup>205</sup> Ibid, s 22-24.

It is notable that feminist groups have tackled not only sexual violence against adult females, but also against children. Following two murders committed in 1991 and 1992, respectively, by victims who had been raped since childhood, feminist activists continuously tried to legislate to regulate sexual violence against women and children. Their struggles were reported by the media and these had drawn the attention of the public and politicians. They influenced the changes in the social recognition of sexual violence which had been influenced by the Confucian social order for a long time. As a result, the Punishment for Sex Offences and Protection of Victims Act 1994 was enacted.

Even though feminist groups were not satisfied with this Act, the 1994 legislation could be regarded as a new milestone of regulating sexual violence, because the discussions in the course of debates for legislation offered a direction as to where the laws relevant to sexual violence would go. Following the 1994 legislation, in two amendments in 1997 and 2003, most of the contents of this Act were strengthened in the same direction. The definition of sexual violence was extended because of the addition of new kinds of sex offences. Punishments for specific sexual offences became tougher in spite of the critical argument against it. The possibility for prosecution without the complaint of a victim improved as the scope of the complaint system diminished and the time limit for a complaint was extended. Procedural protection of a victim was reinforced as many ways to secure a victim's rights were introduced. Contrariwise, the discussion as to how to maintain a balance of the rights of a victim and a defendant arose, as the rights of a defendant were decreased.

As noted above, there have been significant developments in social and legal responses to sexual violence in Korea since the late 1980s. This has influenced the changes in the statistics of sexual offences; therefore, this thesis will explore how the statistics have changed and what this change might mean. Also, there were noteworthy legislative changes responding to a series of high-profile crimes between 2006 and 2012. Pharmacological treatment is one of the legal responses to emerge as a result of these crimes in the context provided in this chapter. The trend towards heavier punishment has intensified since 2006. In the following chapters, this thesis will scrutinise the media, public and government response to the crimes, and how those responses affect the legislation regulating sexual violence.

## **Chapter 5: Social and Legal Responses to Serious Sexual Offences**

### **5.1. Introduction**

Under the influence of traditional Confucian thought and patriarchal order, the responsibility of sexual crimes had focused on the victim rather than the offender in Korea. As discussed in Chapter 3, rape myths and secondary victimisation are common in Korea and other jurisdictions. In particular, criminal justice agencies dealing with sexual violence have tended to regard rape as a personal matter rather than a crime, to attribute responsibility to a victim, to investigate in favour of an offender or interpret rape as consensual sexual intercourse. As a result, victims of sexual crimes have been reluctant to report the crime. As discussed in Chapter 4, since the late 1980s, social awareness of sexual violence has risen as the result of media reporting and legislative responses to sexual offending, which has been prompted by Korean feminist activists and organisations. In this period, the number of reported sexual offences increased significantly. There are a number of possible reasons for this increase. More sex crimes may be committed by more offenders, or there may be little change in the number of committed sex crimes, but the reporting may have increased. Legislation adding new types of offences into the list of sex crimes may be the other reason. This issue will be discussed in the first part of this chapter through a review of the literature relevant to crime data.

Alongside a sharp increase in recorded sex crimes in the 2000s, six high-profile cases of sexual offences against children occurred between 2006 and 2010, which caused significant changes in the responses to sexual violence in the late 2000s. The media reported those crimes in graphic detail, which roused public opinion and put politicians and government officials under pressure to reform the law on sexual offences. Following widespread media reporting, the Korean Parliament passed various bills to strengthen punishment for sex crimes, including the Special Cases Concerning the Punishment for Sexual Crimes Act 2010, the Electronic Monitoring Act 2007, the Medical Treatment and Custody Act 2008, the Use and Protection of DNA Identification Information Act 2010, the Criminal Act 2010 and the Pharmacological Treatment of Sex Offenders Act 2010. In the second part of this chapter, a brief overview of the six high-profile cases committed between

2006 and 2010, a description of the media responses to the cases, and the accompanying debates in Parliament and the government will be addressed. Why the media paid much attention to these sexual offences and how those offences were illustrated by the media will also be analysed, using the concepts of ‘ideal victim’, ‘news values’ and ‘signal crimes’. In the subsequent section, an analysis and critique of the media reaction and resulting legislation will be discussed. The concept of a ‘moral panic’ will be applied to address a series of social reactions to sex offenders in this period. The idea of a ‘moral panic’ refers to the excessive and harsh social responses to a group considered as a social threat,<sup>1</sup> and, as such, it is suitable for an analysis of public outrage, inflated by media reporting, resulting in tougher legislation against sex offenders.

The discussion in this chapter will show how Korean legislation regulating sexual offending became more punitive, which will be linked to the debates on the pharmacological treatment bill that will be addressed in the next chapter

## 5.2. Changes in the statistics of sexual offences in Korea

### 5.2.1. Statistics of sex crimes in recent decades

The numbers of reported sex crimes and changes over time are shown in Table 5-1. There were few changes between 1985 and 1992, but the number of sex crimes has increased since 1993. In 2008, 15,094 sex offences were reported, which was an approximately a three-fold increase compared to 1990, when 5,519 sex offences were reported.

Table 5-1: Sex crimes between 1985 and 2008<sup>2</sup>

1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
5,453	5,002	5,034	4,658	5,102	5,519	5,175	5,447	7,051	7,415	6,174	7,158
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
7,120	7,886	8,830	10,189	10,446	9,435	10,365	11,105	11,757	13,573	13,634	15,094

<sup>1</sup> Chris Greer, ‘Crime and Media: Understanding the Connections’ in Chris Hale and others (eds), *Criminology* (3rd edn, Oxford University Press 2013), 156.

<sup>2</sup> Institute of Justice, *White Paper on Crime* (1990-2008).

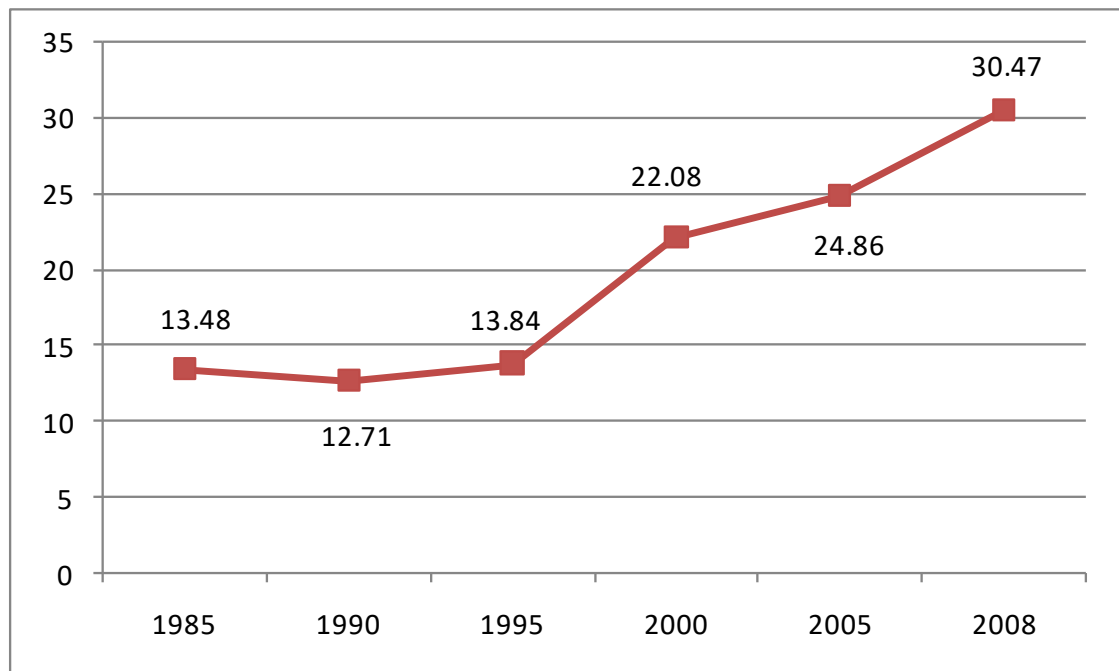


The statistical changes in the number of sex crimes are shown more clearly if the sex crimes rate per 100,000 populations is used. Table 5-2 shows the changes of the number of Korean populations between 1985 and 2008, and the sex crimes rate per 100,000 populations in the same period are shown in Figure 5-1. The sex crimes rate changed little between 1985 and 1995, but it increased gradually from 13.84 to 30.47 per 100,000 populations between 1995 and 2008.

Table 5-2: Populations between 1985 and 2008<sup>3</sup>

1985	1990	1995	2000	2005	2008
40,448,486	43,410,899	44,608,726	46,136,101	47,278,951	49,540,367

Figure 5-1: Sex crimes rate per 100,000 populations between 1985 and 2008



Additionally, the number of reported sex offences against children has kept increasing, also shown in Table 5-3. It nearly quadrupled between 1999 and 2008. Parents or guardians' recognition of sex offences may influence the reporting rate of child sexual offences, since it is difficult for children to report their victimisation by

<sup>3</sup> <<http://www.mois.go.kr/frt/sub/a05/totStat/screen.do>>  
<[http://kosis.kr/statisticsList/statisticsListIndex.do?menuId=M\\_01\\_01&vwcd=MT\\_ZTITLE&par mTabId=M\\_01\\_01#SelectStatsBoxDiv](http://kosis.kr/statisticsList/statisticsListIndex.do?menuId=M_01_01&vwcd=MT_ZTITLE&par mTabId=M_01_01#SelectStatsBoxDiv)> accessed 20 November 2017.

themselves. The social and legal climate changes, as will be discussed later, may be the reason for the increase.

Table 5-3: Sex offence cases against victims under 15-years of age between 1999 and 2008<sup>4</sup>

Sex of victims	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Male	38	26	17	45	41	29	58	87	113	93	547
Female	482	427	311	808	883	1,051	1,224	1,578	1,619	1,865	10,248
Total	520	453	328	853	924	1,080	1,282	1,655	1,732	1,958	10,795

### 5.2.2. Possible reasons for the increase in the statistics of sex crimes in Korea

Tables 5-1 and Table 5-3 show an increasing trend in reporting sex offences in Korea. The reason for this trend can be explained from different perspectives. More offenders may commit more sex offences, or, alternatively, there may be an increase in reporting to the police. As Croall indicates, events can be labelled as crimes through a series of processes requiring the actions of people concerned, such as victims, citizens, police or other law enforcement agents.<sup>5</sup> Reporting by victims or members of the public and recording by the police are needed for incidents to be classified as official crimes. It is difficult for the police to know what crimes are committed if victims or witnesses do not report them.<sup>6</sup>

If victims' attitudes or the social climate changes, it can influence official crime data. In particular, the number of recorded sex offences is largely influenced by victims' awareness and attitudes. Croall states that victims of sex offences may hesitate to report it because of confusion, and an anxiety about attendance at court.<sup>7</sup> Maguire explains that in the 1980s, a growth in the inclination of victims to report rape led to a sharp increase in recorded offences.<sup>8</sup> Newburn indicates the importance of the

<sup>4</sup> Institute of Justice, *White Paper on Crime* 65-66.

<sup>5</sup> Hazel Croall, *Crime and Society in Britain* (2 edn, Pearson 2011) 17.

<sup>6</sup> Tim Hope, 'What Do Crime Statistics Tell Us?' in Chris Hale and others (eds), *Criminology* (2 edn, Oxford University Press 2009) 42.

<sup>7</sup> Croall (n 5) 18.

<sup>8</sup> Mike Maguire, 'Criminal Statistics and the Construction of Crime' in Mike McGuire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012), 216.

change in social attitudes towards sexual offences in official crime statistics as follows:

The most obvious example here concerns rape, sexual assault and other domestic violence against women. As a result of much campaigning work over many years, attitudes toward violence against women have changed somewhat. One consequence has been significant increases in both reporting (and recording) rates and, therefore, within official statistics, the impression that such offences have been rapidly increasing. In reality, there is little evidence of an increase in such offences.<sup>9</sup>

He adds that new legislation can be another reason for official crime statistics.<sup>10</sup> Such views can be applied to explain why sex offences have been increasing in official crime data in Korea.

It is possible to explain the increase in reported sex crimes with the facts described above. Revision of the complaints system and a broadening of the definitions of sex offences, including sexual intercourse against female with mental disability,<sup>11</sup> and taking photographs or videos of another person's body causing any sexual stimulus or shame against the will of the person who was shot, by using a camera or other devices,<sup>12</sup> may be the reasons for the increasing trend in sex offences shown in Tables 5-1 and 5-3. In addition, increased awareness of sexual offending resulting from the activities of victims' movements and legislation may affect reporting rates in Korea. Counselling centres for victims founded by the Punishment for Sex Offences and Protection of Victims Act 1994 have provided the services to respond to a victim's report, to advise a victim, to provide legal aid and to promote better prevention of sex offences. On the basis of changes of this kind of victim-centred view of sex offences, the title of the chapter in the Criminal Act addressing sex offences was revised in 1995.<sup>13</sup> Sex offences had previously come under 'Chapter 32. Crimes relating to chastity', but the title of this chapter was changed to 'crimes relating to rape and indecent assault'. Therefore, a rise in social awareness towards sexual offences and new legislation rather than an increase in committed sex crimes may be the reasons for the upsurge in official statistics of sex crimes since 1993. In

<sup>9</sup> Tim Newburn, *Criminology* (Willan 2007) 58.

<sup>10</sup> *Ibid* 55.

<sup>11</sup> Punishment for Sex Offences and Protection of Victims Act 1998 (ROK) s 8.

<sup>12</sup> *Ibid*, s 14-2.

<sup>13</sup> Kim (Ch.1, n 3) 8.

addition, media reporting and the social responses towards six high profile sex offences in the late 2000s may be another reason for this statistical change, which will be addressed in the next section.

### **5.3. Responses of the media and legislative changes on serious sexual offences between 2006 and 2010**

There were six prominent cases of sexual offences against children reported between 2006 and 2010 that received notable media and public attention. The trend of amendments to the laws relevant to sexual offences changed remarkably as a response to the reporting of these offences. Whenever serious sex crimes against children have been reported, the punishment for sex offenders has become heavier and new kinds of criminal sanctions, such as Electronic Monitoring (EM) or pharmacological treatment orders, have been introduced. Repeatedly, bills to toughen the punishment for sex offenders, which were not considered important by the media at the time they were presented, suddenly caught the public attention after heinous sexual crimes had been reported. Parliament passed the bills without much deliberation under pressure from the press. In this section, these offences will be described in detail and the subsequent responses of the media and legislative changes in relation to each crime will be explored chronologically.

#### **5.3.1. The responses to Case 1 reported in February 2006**

A 53-year-old male shoe-store owner kidnapped an 11-year-old girl in his shop in Seoul on 17 February 2006. The offender attempted to rape her in his shop, but the victim resisted and the offender strangled her to death. He burned her body and abandoned her remains, aided by his 26-year-old son, in a mountain nearly fifty kilometres from his shop. He had earlier committed child molestation against a 4-year-old girl in 2005 and had been sentenced to a two-year suspended sentence without supervision.<sup>14</sup>

##### **5.3.1.1. Media responses to Case 1**

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<sup>14</sup> Jang Hee Han, 'Father and Son, Neighbours of the Victim, Were Arrested on Suspicion of a Child Murder' *Kookmin Ilbo* (Seoul, 20 February 2006) 8

After case 1 was reported on 17 February 2006, the media criticised the delay in deliberations regarding the bills relevant to strengthening the punishment for sex offenders that were pending in Parliament. *Chosun Ilbo*, a conservative broadsheet newspaper,<sup>15</sup> demanded prompt legislation under the headline ‘members of the Parliament were sleeping when the children were assaulted’:

Belatedly, lawmakers are pushing after a primary school girl was raped and killed by the repeat sex offender. At present, ten bills relevant to sex crimes including the bill on EM are pending in the Legislative and Judiciary Committee and most of them were introduced more than seven months ago. If the Parliament would have passed the Bills without delay, this crime might be prevented.<sup>16</sup>

Furthermore, *Kookmin Ilbo* reported that: ‘professionals insist that EM using satellite tracking devices needs to be introduced to the sex offenders against children. In addition, public opinion supports the disclosure of the offenders’ personal information’.<sup>17</sup> *Seoul Shinmun* maintained that:

The Bill on EM on sex offenders is still pending in the Parliament because of the objection of human rights movement organisations. Human rights of sex offenders committing a heinous crime at high risk of reoffending are more important than the right for protecting children from their attacks?<sup>18</sup>

Human rights organisations objected to the bill on the grounds that EM of the prisoner after release on the expiration of the imprisonment period might violate their right to personal liberty, the rule of double punishment and the principle of banning excessive enforcement.<sup>19</sup>

This strong media reporting, however, represented a fairly sudden attitude change as the media had not paid attention to the introduction of the bill before case 1 was reported. The actual introduction of the bill was reported by only two

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<sup>15</sup> KABC (Ch.4, n 81) 1. It was ranked first with a circulation of 1,769,310 per annum.

<sup>16</sup> Bong Ki Kim and Joon Ho Ahn, ‘Members of the Parliament were Sleeping When the Children were Assaulted’ *Chosun Ilbo* (Seoul, 22 February 2006) A1

<sup>17</sup> Jang Hee Han and Ming Young Cho, ‘Sex Crimes Become Harsher and Harsher. What Does the Government Do?’ *Kookmin Ilbo* (Seoul, 21 February 2006) 1

<sup>18</sup> Editorial, ‘Such a Sex offender Against Children Is in the Neighbourhood’ *Seoul Shinmun* (Seoul, 21 February 2006) 31

<sup>19</sup> Yong Taek Noh, ‘Electronic Monitoring and Chemical Castration: Human rights Movement Organisations Say that They Are Harsh Punishment’ *Kookmin Ilbo* (Seoul, 22 February 2006) 3

newspapers, *Hankyoreh Shinmun*<sup>20</sup> and *Hankook Ilbo*.<sup>21</sup> Only two newspapers, *Seoul Shinmun*<sup>22</sup> and *Donga Ilbo*<sup>23</sup> reported EM supportively just once from 13 July 2005, the day the bill was introduced, to 16 February 2006, one day before case 1 occurred.

### 5.3.1.2. Legislative responses to Case 1

The bill on EM began to be discussed from March 2006 and was passed in the Parliament on 2 April 2007. In addition, other bills relevant to strengthening the punishment for sex offenders were passed at this time.

#### A. Enactment of the Electronic Monitoring Act 2007

The bill on EM was introduced on 14 July 2005. An EM system had been discussed as a means of lessening punishment, such as a substitution for short-term imprisonment or a condition of bail, parole or intensive probation, before this bill was introduced in Korea.<sup>24</sup> However, EM in this bill was designed as an extended surveillance measure to protect a community from sex offenders reoffending after their release from prison. The co-sponsors of this bill explained the reasons for its introduction:

The probability of sex offenders' reoffending is high. Making sex offenders sentenced to imprisonment whose risk of re-offence is objectively very high wear the location tracking type of EM devices after release may keep their tracks and prevent them from reoffending.<sup>25</sup>

After Case 1 was reported, the Legislative and Judiciary Committee of Parliament hurriedly tried to discuss the bill and subsequently held the public

<sup>20</sup> Ik Lim Choi, 'The Electronic Monitoring Against Specific Sex Offenders Bill was Introduced' *Hankyoreh Shinmun* (Seoul, 14 July 2005) 6.

<sup>21</sup> 'The bill on the Electronic Monitoring was Introduced' *Hankook Ilbo* (Seoul, 14 July 2005) 6.

<sup>22</sup> Kyun Mi Kim, 'Strengthening Punishment for Sex offenders in the U.S.' *Seoul Shinmun* (Seoul, 24 August 2005) 30.

<sup>23</sup> Hee Kyun Kim, 'Must refer to the Foreign Legislation to Prevent Sex Crimes Against Children' *Donga Ilbo* (Seoul, 8 October 2005) 29.

<sup>24</sup> Gap Sup Jeong, 'Electronic Monitoring System in the United States of America' (1993) 3 *Correction Journal* 85, 111-12.; Hye-Jeong Kim, *Preliminary Study on the Introduction of Electronic Monitoring System* (Korean Institute of Criminology 2000) 137-50.

<sup>25</sup> Bill on the Electronic Monitoring 2005 (ROK), 2.

hearing for the bill on 16 March 2006. In this public hearing, all of the presenters consented to the introduction of EM as a measure of lessening punishment, but half of them objected to using it as a strengthened surveillance measure after release from prison.<sup>26</sup> The bill was discussed six times in the Legislative and Judiciary Committee and passed in the Whole House Committee on 2 April 2007.

The main points of the Electronic Monitoring Act 2007 are as follows: firstly, only location tracking type devices which can trace the offender's movement are permitted for EM.<sup>27</sup> The reason for this clause is supposedly based on the thinking that providing an EM system makes 24-hour monitoring possible as a strengthened sanction against sex offenders. Secondly, a judge may sentence an EM order for a sex offender whose risk of reoffending is high within a five-year period if the offender will be punished by imprisonment.<sup>28</sup> Thirdly, offenders subject to EM must not take off or damage the bracelet to jam radio waves, or harm the utility of EM devices.<sup>29</sup> If they violate this condition, they shall be punished by imprisonment for not more than seven years or by a fine not exceeding twenty million won.<sup>30</sup> They also have to notify their probation officer of any changes in their residence or visits abroad.<sup>31</sup> There is, however, no penalty if an offender violates this condition. Fourthly, there is no clause relating to discretion for a judge to impose special conditions taking into consideration an offender's characteristics. Furthermore, while the probation officer has the duty to provide guidance and support to the offender, it is not an obligation of the offender to follow the instructions of the probation officer. This means that the officer has no choice but to leave the offender without any further action, such as giving a warning, reporting to a court and requesting a change of a condition or a punishment for the offender. It is a very different point in comparison to normal probation.

## **B. Strengthening punishment and expanding the extent of registration and access for sex offenders against children**

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<sup>26</sup> National Assembly Legislative and Judiciary Committee, *Record of the Public Hearing on How to Respond to Sexual Offences* (16 March 2006) 1-17.

<sup>27</sup> Electronic Monitoring Act 2007 (ROK) s 2.2.

<sup>28</sup> *Ibid* s 9(1).

<sup>29</sup> *Ibid* s 14(1).

<sup>30</sup> *Ibid* s 38.

<sup>31</sup> *Ibid* s 14(2).

According to the Punishment for Sex Offences and Protection of Victims Act 2006, the following acts against another person under the age of 13 may be punished by imprisonment for not less than three years: inserting the genitals into the inner part of the other person's body (excluding genitals), such as the mouth or anus; inserting a part of the body (excluding genitals), such as fingers or implements into the other person's genitals or anus.<sup>32</sup> These acts were punished as indecent assaults by imprisonment for a fixed term of not less than one year, or by a fine not less than five but not more than 30 million won, before this law was amended on 27 October 2006.

The extent of registration for sex offenders against children and access to their information was expanded by the amendment of the Protection of Juveniles from Sexual Abuse Act on 3 August 2007. All kinds of sex offenders against children, including offenders punished for purchasing sex with juveniles more than once or for purchasing sex with juveniles under the age of 13, should have their personal information registered by the law.<sup>33</sup>

### **5.3.2. Responses to Case 2 reported in December 2007 and Case 3 in March 2008**

Case 2 involved a 39-year-old male who kidnapped two girls aged 10-years and eight years and held them in his house in Anyang, a satellite city of Seoul, on 25 December 2007.<sup>34</sup> The man was drunk and intoxicated with substances when he abducted the victims. He choked them, holding their mouths and noses after molestation. He cut up the dead bodies with a saw in a bathroom of his house. He abandoned the remains of the victims in a mountain and a river. Other unsolved crimes committed by him were revealed during the investigation. He had murdered a woman and abandoned her after cut up and hid her body in 2004.<sup>35</sup>

A 41-year-old male attempted to rape a 10-year-old girl in an apartment lift in Koyang, another satellite city of Seoul, on 26 March 2008. He had previously been

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<sup>32</sup> Punishment for Sex Offences and Protection of Victims Act 2006 (ROK) s 8-2(2)(ii).

<sup>33</sup> Protection of Juveniles from Sexual Abuse Act 2007 (ROK) s 32(1).

<sup>34</sup> Byoung Cheol Kim, 'Police Arrested the Suspect'. *Seoul Shinmun* (Seoul, 20 March 2008)

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<sup>35</sup> Kyoung Hyun Nam, 'The Suspect Also Killed Another Adult Female'. *Donga Ilbo* (Seoul, 24 March 2008) 16



sentenced to a ten-year period of imprisonment for five sex offences against children and was released from prison two years before this crime. Those five sex offences were committed consecutively between December 1995 and April 1996. He lived without any restriction or treatment after release from the prison, since there was no provision for the supervision of offenders who served out a full-term sentence.<sup>36</sup> This was Case 3.

### 5.3.2.1. Media responses to Case 2 and 3

In Case 2, the victims' remains were not found until more than 70 days after their disappearance on 25 December 2007. The dead body of a 10-year-old girl was found on 11 March 2008 and the suspect was arrested on 16 March 2008. Another victim's remains were found on 18 March 2008. As the police opened a criminal investigation on the 31 December 2007, this case became the focus of public attention and the investigation was reported constantly by the media with the faint hope of the victims returning alive. When the victims were found dead and the suspect was captured, it greatly shocked the public.<sup>37</sup> The press criticised the inefficiency of the government and demanded that they establish policies to prevent sexual offences against children. *Seoul Shinmun* argued that the capability of the police to investigate sex crimes against children should be reinforced and more punitive sentencing for sex offenders should be enacted:

We need to improve the social systems to protect children from sexual offences. Investigation in child rape cases has made poor progress even if sexual offences against children have been committed frequently, since our society still does not understand the special characteristics of this kind of crime. Sex crimes against children are committed by paedophiles so that their reoffending rate is far higher than that of normal rapist. Therefore, the number of trained professional investigators should be increased imminently. In addition, sentencing for child rapists should be harsher and post release supervision for sex offenders needs to be strengthened.<sup>38</sup>

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<sup>36</sup> In Jin Choi, 'The Suspect Is a Persistent Child Rapist'. *Kyounghyang Shinmun* (Seoul, 1 April 2008) 14

<sup>37</sup> Tae Young Kyoung, 'Wish You were Alive. 10-Year-Old Missed Girl's Dead Body was Found in a Mountain'. *Kyounghyang Shinmun* (Seoul, 14 March 2008) 8

<sup>38</sup> Editorial, 'Tragedy of Hyejin and Yesl Must Not to Be Repeated'. *Seoul Shinmun* (Seoul, 20 March 2008) 31

In this situation, on 26 March 2008, the National Police Chief announced that the police would focus on preventing crimes against children,<sup>39</sup> and stated that the police would try to establish teams which would address the missing cases exclusively in every police office; to introduce a mandatory installation of Global Positioning System (GPS) in all kinds of mobile phones in order to find a missing person promptly, and to increase the installation of CCTV in playgrounds and parks.<sup>40</sup> On 26 March 2008, the Secretary of the Ministry of Justice ordered prosecutors to ask for the maximum punishment allowable by the law for child abduction, rape or murder and announced that he would push for a sex offender DNA database system to use for an investigation and a trials.<sup>41</sup>

Even though the media demanded responses from government, newspapers were not very supportive of this announcement. *Hankook Ilbo* criticised the government's statement:

The strategies of the Ministry of Justice and Police to push for a sex offenders' DNA database system, mandatory installation of GPS in all kinds of mobile phones and increasing CCTV seem to incur debates. Anxiety about unjust surveillance by governmental authorities and violation of human rights would be bigger than positive functions such as the early arrest of suspects or crime prevention; therefore extreme disputes are likely to be inevitable. A participant from a civic organisation expressed an objection to these policies on the grounds that apparently the Ministry of Justice and Police are using the recent unsafe security situation as a way of achieving their long-term coveted projects.<sup>42</sup>

Case 3 was committed on the very day the Secretary of the Ministry of Justice and the National Police Chief presented new policies regarding sex crimes against children. In spite of the National Police Chief's announcement, the response of the police officers who received the report of the victim's parents was lukewarm: they dealt with this case as simple violence and did not even check CCTV at the scene of the offence, even though the offender carried a weapon and the victim was

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<sup>39</sup> Jae Hoon Lee, 'National Police Chief said, 'Stamp Out the Crimes Against Children'' *Seoul Shinmun* (Seoul, 25 March 2008) 9

<sup>40</sup> Seong Kyu Hong and Jae Hoon Lee, 'Dreaming Big Brother?' *Seoul Shinmun* (Seoul, 27 March 2008) 12

<sup>41</sup> *Ibid*

<sup>42</sup> Jin Seok Park and Sang Jun Park, 'GPS in All Kinds of Mobile Phones In Order To Prevent Missing?' *Hankook Ilbo* (Seoul, 27 March 2008) 2

so injured that she was sent to hospital.<sup>43</sup> This was reported by the media, resulting in a vehement outpouring of public anger. Almost immediately, the President of Korea visited the police officer in charge of this case on 31 March 2008 and reproached the police. A thousand police officers were deployed and the suspect was arrested six hours after the president left.<sup>44</sup> The media criticised the government response severely. *Seoul Shinmun* accused the police with the headline, ‘ultimately lazy and untrustworthy police’,<sup>45</sup> while *Donga Ilbo* denounced the lazy attitude of the government in an editorial:

To protect people’s life and property is a basic responsibility of public officials. They should fulfil their duties with dedicated attitude. Police did not investigate the attempted rape against a primary school girl with any enthusiasm until the President visited the field office and rebuked them. It is not desirable that the President even takes part in the lowest level of the government, and public officials must act before presidential orders. Their attitudes need to be changed.<sup>46</sup>

As soon as the suspect was arrested, on 1 April 2008, the government announced new legal measures involving sexual crimes against children as follows: firstly, punishment for sex offences against children under the age of 13 would be strengthened and early release for offenders would be prohibited in principle. Secondly, an exclusive team for sexual offences against children would be in charge of the investigation from the first moment a crime was reported. Thirdly, sex offenders with psychosexual disorders including paedophiles would be treated in preventive detention hospitals.<sup>47</sup>

The responses of the media towards this announcement were divided. *Segye Ilbo*, a conservative broadsheet newspaper,<sup>48</sup> also reported positively on this development:

The main points of the responses of the government can be summarised as intense punishment for, segregation and supervision of

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<sup>43</sup> Sang Jun Han, ‘Police Neglect the Report of a Citizen, But Arrest the Suspect Six Hours After the President Reproaches’ *Donga Ilbo* (Seoul, 1 April 2008) 16

<sup>44</sup> Ibid

<sup>45</sup> Seol Young Yoon, ‘Ultimately Lazy and Untrustworthy Police’. *Seoul Shinmun* (Seoul, 1 April 2008) 9

<sup>46</sup> Editorial, ‘Officials Do Not Act Until the President Orders’. *Donga Ilbo* (Seoul, 2 April 2008)

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<sup>47</sup> Se Dong Kim, ‘All of the Rape-Murder of an under the Age of 13 Will Be Punished by Death or Imprisonment for Life’. *Munhwa Ilbo* (Seoul, 1 April 2008) 8

<sup>48</sup> KABC (Ch.4, n 81 ) 1. It was ranked tenth in quantity with a circulation of 85,865.

sex offenders. It seems that the government, having been torn between human rights and punishment, has turned towards punishment rather than human rights, for sexual offences at least.<sup>49</sup>

On the other hand, *Hankyoreh Shinmun* opposed the government's statement:

A lot of policies relevant to sexual offences have been pouring out from the government since the current heinous sex crimes against children. However, being produced hastily, most of them are nothing but strengthening punishment, an easier option. Experts have pointed out that focussing on severe punishment is not very useful in preventing crimes. Human rights organisations wonder whether the government is driving to execute-capital punishment using public anger.<sup>50</sup>

On 3 April 2008, Seol Min Su, a judge in Seoul High Court, expressed a negative opinion towards the government's reactions on the court intranet, which was noted by the press. He argued that:

Sexual offences are similar to other social problems which are not able to be solved in one go. By the current criminal law, capital punishment can be the punishment for rape and murder and life sentence also can be applied to sexual offences against children already. Therefore, strengthening punishment for sex crimes by amendment would not be a practical method, but provides something to do. The thought, trying to deter a crime by harsher punishment, is based on the belief that offenders are reasonable, but most sex offences are far from reasonable consideration. The most immediate thing is to increase the personnel and budget relevant to sexual offences. Post release supervision of the offenders and a victims-aid policy are critical projects as well.<sup>51</sup>

This insistence was reported by many newspapers, even those broadsheets with a positive stance on the government's responses.<sup>52</sup> At the time, this attitude seemed to

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<sup>49</sup> Jae Young Jeong, 'Swiss, Mandatory Life Sentence for Sex offenders Against Children'. *Segye Ilbo* (Seoul, 2 April 2008) 3

<sup>50</sup> Jin Hwan Seok, 'Worrying About the Side-Effect of the Policies of Sexual Offences Against Children Produced Hastily'. *Hankyoreh Shinmun* (Seoul, 4 April 2008) 10

<sup>51</sup> Jae Young Jeong, 'A Judge in Seoul High Court, 'Amendment of the Law is Just a Show''. *Segye Ilbo* (Seoul, 4 April 2008) 8

<sup>52</sup> Ibid; Jong Sik Lee, 'A Judge Criticised, 'Amendment of the Law is a Show''. *Donga Ilbo* (Seoul, 4 April 2008) 18; Eun Ju Jeong, 'A Judge Insisted that 'Legislative Change is a Show''. *Seoul Shinmun* (Seoul, 4 April 2008) 11; Seong Cheol Jeon, 'A Judge, Seol Min Su, Said that 'Amendment of the Law is Not the Correct Answer''. *Hankook Ilbo* (Seoul, 4 April 2008) 10

be a balanced viewpoint between punitive and non-punitive measures towards sexual offences against children. However, as more sex crimes against children were reported not long after Case 3, more support was given to punitive measures by the media.

### **5.3.2.2. Legislative responses to cases 2 and 3**

The bills relevant to regulating sex offenders as responses to cases 2 and 3 were passed on 22 May 2008. Firstly, punishment for sexual offences against children under the age of 13 was strengthened by the Punishment for Sex Offences and Protection of Victims Act 2008. Secondly, the date of coming into force of the Electronic Monitoring Act 2008 was advanced and the limit of the EM term was extended.

#### **A. Strengthening punishment for sex offences against children**

The bill of the Punishment for Sex Offences and Protection of Victims Act 2008 was introduced to Parliament by the government on 8 May 2008. It was discussed three times in the Legislative and Judiciary Committee and passed in the Whole House Committee with an approval rate of 100 %<sup>53</sup> on 22 May 2008.

The main points of the amendment are as follows: first, punishment for rape against females under the age of 13 was intensified from imprisonment for not less than five years to not less than seven years.<sup>54</sup> A suspension of execution sentence to a rapist against a girl below the age of 13 could not be imposed by a court in principle. Second, a sex offender who also injures or causes injury to another person under the age of 13 should be punished by imprisonment for life or not less than seven years.<sup>55</sup> Third, a sex offender who murders a person under the age of 13 should be punished by death or imprisonment for life; a sex offender who also causes the death of a person under the age of 13 should be punished by death or imprisonment for life or not less than ten years.<sup>56</sup>

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<sup>53</sup> National Assembly, *Whole House Committee Assembly Records* (22 May 2008) 4.

<sup>54</sup> Punishment for Sex Offences and Protection of Victims Act 2008 (ROK) s 8-2(1).

<sup>55</sup> *Ibid* s 9(1).

<sup>56</sup> *Ibid* s 10.

Regarding the third point, the Legislative and Judiciary Committee professional support team suggested that capital punishment for a sex offender who unintentionally causes the death of a victim needed to be discussed.<sup>57</sup> It was deliberated on in the Legislative and Judiciary Committee Sub-Committee on 20 May 2008. Dongmin Cha, the Chief of the Bureau of Prosecution in the Ministry of Justice, provided the following outcome:

Punishment for an abductor who also uses violence and causes death under the age of 19 is death or imprisonment for life or not less than seven years. As the actions of a sex offender who also causes death of another person under the age of 13 seem to be heavier than this kind of an abductor in the nature of crime, we add the death penalty in this crime.<sup>58</sup>

Jooyoung Lee, an MP, reacted by saying: ‘then, leave it as it is. The legal emotions of the people are likely to put the death penalty here’. Byoungryeol Sun, another MP, added, ‘even though I support the abolition of capital punishment, leave it at the moment. Let’s discuss death penalty abolition later’.<sup>59</sup> This record shows how politicians were under pressure to provide responses acceptable to the public mood.

## **B. Amendment of the law on EM**

The bill on the amendment to the Electronic Monitoring Act 2007 was introduced to parliament by 11 MPs on 24 April 2008. It was discussed three times in the Legislative and Judiciary Committee and passed in the Whole House Committee with an approval rate of 96.7% on 22 May 2008.<sup>60</sup>

The main points of the amendment are as follows: firstly, the date of coming into force of the Act was advanced.<sup>61</sup> Even though the Act had been determined to come into force on 28 October 2008 to allow the government to prepare EM systems, when the first bill was passed in the Whole House Committee on 2 April 2007, it

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<sup>57</sup> National Assembly Legislative and Judiciary Committee, *Report on the Bill on the Amendment of the Punishment for Sex Offences and Protection of Victims Act 2006* (May 2008) 10.

<sup>58</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Assembly records* (20 May 2008) 21.

<sup>59</sup> *Ibid*

<sup>60</sup> National Assembly, *Whole House Committee Assembly Records* 3.

<sup>61</sup> Electronic Monitoring Act 2008 (ROK) additional rules s 1.

was altered to become effective on 1 September 2008. The purpose of this was to calm public uproar through the earlier implementation of EM. Secondly, the EM term limit was extended from five years to ten years.<sup>62</sup> The Legislative and Judiciary Committee professional support team suggested considerate discussion, citing research conducted in other countries, on the grounds that more than six months of EM would be unreasonable because it restricted not only bodily liberty but also mental and psychological liberty. There was also insufficient research about the side effects of long-term EM because it had only a short global history.<sup>63</sup> The Ministry of Justice stated that ten years would be better to mitigate the reoffending risk of a monitored offender and provide protection for victims, taking into consideration the high risk of the offender and the harmful effects of sex crimes.<sup>64</sup> It was a significant point, but MPs did not discuss this point at all.

### **5.3.3. The responses to Case 4 reported in December 2008**

A 56-year-old male kidnapped an 8-year-old girl on the way to school in Ansan, a city located near Seoul on 11<sup>th</sup> December 2008. He beat and raped her cruelly in a lavatory of the building close to the victim's school, to the extent that she had severe injuries to her internal organs, anus and genitals. He was sentenced to imprisonment for twelve years and post-release EM for seven years by a district court on 27 March 2009.<sup>65</sup> The prosecutor asked the judge to sentence him to imprisonment for life, but the judge of the court of the first instance applied the provision of mitigation with the reason being his drunkenness at the time he committed the crime.<sup>66</sup> The prosecutor did not appeal and only the defendant appealed the sentence. The prosecutor's office explained that the reason why the prosecutor did not appeal the sentence was that imprisonment for twelve years was close to fifteen years, the maximum of fixed term imprisonment allowed by the law, and an increase of the original judgment was hardly expected in the Court of Appeal.<sup>67</sup> The appeal and final appeal of the

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<sup>62</sup> *Ibid* s 9(1)

<sup>63</sup> National Assembly Legislative and Judiciary Committee, *Report on the Bill on the Amendment of the Electronic Monitoring Act 2007* (May 2008) 4.

<sup>64</sup> *Ibid* 3.

<sup>65</sup> *Ansan Regional Court Case 2009 Go-Hap 6, 27 March 2009* [2009]

<sup>66</sup> *Ibid* 3.

<sup>67</sup> Young Chang Lee, 'We Can Not Understand the Prosecutor's Relinquishment of Appeal and the Judge's Mitigation'. *Hankook Ilbo* (Seoul, 2 October 2009) 6.

defendant were rejected by the Court of Appeal on 24 July 2009,<sup>68</sup> and by the Supreme Court on 24 September 2009,<sup>69</sup> respectively. As a more severe penalty than that imposed by the original judgment is prohibited if an appeal has been lodged by the defendant in the Criminal Procedure Act 1973,<sup>70</sup> the Court of Appeal and the Supreme Court had no way to increase the original sentence. This is Case 4.

### 5.3.3.1. Media responses to Case 4

This offence received limited attention when it was committed. However, a current-affairs programme on KBS (Korea Broadcasting System) ran an in-depth report on this crime on 22 September 2009. After that, public opinion was vehemently critical of the government and the Parliament. *Chosun Ilbo* reported that:

The crime that a fifty-six-year-old male raped an eight-year-old girl cruelly and caused the victim a permanent handicap has been a very hot issue on the internet. Nayoung, the fictitious name of the victim, has become the most searched keyword on internet portal sites and thousands of comments asking for heavier punishment on the offender have been loaded on every portal post. Even President Lee said that 'I feel acute distress at this horrible crime' and added that 'It would seem that those kinds of offenders should be excluded from the community for life'.<sup>71</sup>

The prosecution and judgement of this case were severely criticised by the media. *Hankook Ilbo* claimed that:

It is unacceptable that the prosecutor did not appeal the sentence less than the maximum punishment allowed by the law in such a severe case, despite the government's repeated announcement of an intense punishment for sex crimes against children. Mitigation of the judge in consideration of the defendant's drunkenness is also undesirable because he tried to destroy the evidence right after the offence, so it is questionable that the judge regarded him as being deficient in ability. The opinions as follows are worth paying attention: to increase the maximum punishment by the amendment of the law; not to apply or apply the rule of deficient in ability due to drunkenness very strictly,

<sup>68</sup> *Seoul High Court Case 2009 No 794, 24 July 2009* [2009].

<sup>69</sup> *SCC 2009 Do 7948, 24 September 2009* [2009].

<sup>70</sup> Criminal Procedure Act 1973 (ROK) s 368, 369(2).

<sup>71</sup> Dae Jin Hwang, 'We Are Sorry. What Did Adults Do When This Child Cried?' *Chosun Ilbo* (Seoul, 1 October 2009) <[http://srchdb1.chosun.com/pdf/i\\_service/pdf\\_ReadBody.jsp?Y=2009&M=10&D=01&ID=2009100100176](http://srchdb1.chosun.com/pdf/i_service/pdf_ReadBody.jsp?Y=2009&M=10&D=01&ID=2009100100176)> accessed 15 November 2013



and to abolish the statute of limitations for sex offences against children or to suspend the statute of limitation until a victim becomes an adult.<sup>72</sup>

*Donga Ilbo* argued in its editorial that:

In the U.S., the government notify residents in a particular locality of offenders who commit sex offences against children who live in the area. They do this by using the internet, by putting up signboards in front of their houses. They also order them not to live close to public places such as schools, churches and parks since their recidivism rate is high. The government should consider using similar measures to control and supervise sex offenders strictly. More offenders need to be supervised by EM.<sup>73</sup>

Unlike most of the media reporting, *Hankyoreh Shinmun* indicated the problems of harsh punishment-oriented discussion as follows:

Politicians who are susceptible in public opinion seem to direct their steps to strengthen the punishment but there are warning voices against the argument on the grounds that strict punishment is already possible with the current provisions; and equality in punishment among different crimes needs to be considered. In addition, it would be desirable to discuss how to make a comprehensive policy to prevent sex crimes.<sup>74</sup>

The government and the ruling party announced a succession of measures responding strongly to sex crimes on the back of public opinion between 6 October 2009 and 22 December 2009 as follows: the collection, use, and protection of DNA identification information of the offender committing heinous crimes, such as sexual offences, arson and homicide; extension of the limit of EM; extension of the statute of limitations of sexual offences against children; expansion of information disclosure of sex offenders; extension of the limit of a fixed term of imprisonment, and the introduction of the pharmacotherapy of sex offenders.<sup>75</sup> However, most of

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<sup>72</sup> Lee (n 65) 6.

<sup>73</sup> Editorial, 'If Sex Offenders are Loosely Controlled, Another Nayoung Would Be Attacked' *Donga Ilbo* (Seoul, 2 October 2009)

<sup>74</sup> Hyun Woong Noh, 'Sex Crimes Against Children, "Harsher Punishment" vs "Equality in Punishment"' *Hankyoreh Shinmun* (Seoul, 5 October 2009) 5.

<sup>75</sup> Je Hoon Lee, 'Push the Use of DNA of a Vicious Criminal/Extension of Electronic Monitoring' *Kookmin Ilbo* (Seoul, 7 October 2009) 9; Byoung Han Kang, 'Chemical Castration Will Be Introduced'. *Kyounghyang Shinmun* (Seoul, 10 October 2009) 2.

these measures were not really new. The bill on DNA collection was abrogated in the last Parliament and five bills, relevant to the announced policies, had been already presented to Parliament,<sup>76</sup> before the statement. The Parliament and government had been in a position to discuss these bills and to respond with new policies before the media paid attention to Case 4, but they didn't. Also, the media did not indicate the delay of deliberation of the bills even after the reporting of Case 4.

Some of the media supported the announced policies, whilst others were concerned about the risks of hasty deliberation. *Donga Ilbo* reported that 'new policies that extend the limit of the fixed term of imprisonment to 30 years and do not allow sexual offenders to use involuntary intoxication defence are in the right direction'.<sup>77</sup> *Kookmin Ilbo* stated that 'the extension of the limit of EM from ten years to thirty years is reasonable. Who does not support strengthening punishment for heinous crimes?'<sup>78</sup> On the other hand, *Hankyoreh Shinmun* criticised the policies as follows:

Even though the government pushes the policies aiming at eradication of sex crimes against children, the side effects such as human rights violations and over-expansion of the government's authority to punish would be expected. The bill on 'the use and protection of DNA identification information' is almost the same as the bill which was abrogated in Parliament in 2008. The Ministry of Justice is trying to extend the EM to the offenders committing homicide, arson and robbery. Therefore, the government seems likely to realise the long-cherished projects by taking advantage of the severe punishment atmosphere against heinous crimes.

### 5.3.3.2. Legislative responses to Case 4

As noted above, five bills on the amendment of the Punishment for Sex Offences and Protection of Victims Act had been pending in the Legislative and Judiciary Committee before the media reporting of Case 4. In addition, several bills relevant to sexual offences were presented to Parliament between 1 October 2009 and 18

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<sup>76</sup> Bill on the amendment of the 'Act on the punishment for sex offences and protection of victims' No 1800206, No 1800731, No 1804035, No 1804492, No 1805371.

<sup>77</sup> Editorial, 'Sexual Offences Against Children Must Be Eradicated'. *Donga Ilbo* (Seoul, 3 December 2009) 39.

<sup>78</sup> Editorial, 'Prevent Heinous Crimes Even By Means of Electronic Monitoring'. *Kookmin Ilbo* (Seoul, 23 December 2009) 27.

February 2010 aiming at: an extension of the statute of limitations of sexual offences against children; an exclusion of sexual offenders from the use of involuntary intoxication defence, an expansion of information disclosure of sex offenders; introduction of notification of a sex offender's information to the neighbours; an extension of the limit of EM; an expansion of the target crimes of EM; an extension of the limit of fixed term of imprisonment, and the use and protection of DNA identification information. Since there were a number of bills to discuss in the Legislative and Judiciary Committee, the deliberation process progressed slowly and only one bill, the bill on 'the use and protection of DNA identification information', was passed in the Whole House Committee with an approval rate of 62.6% on 29 December 2009<sup>79</sup> before Case 5 was reported on 24 February 2010.

#### **5.3.4. The responses to Case 5 reported in February 2010**

A 34-year-old male kidnapped a 13-year-old girl, detaining her in his home in Busan, the second biggest city in Korea, on 24 February 2010. He raped and strangled her to death. He was a wanted criminal for a rape and false imprisonment committed only one month before this crime. Police failed to arrest him immediately after they found the victim's dead body, so the president asked the police to apprehend the offender with all possible speed.<sup>80</sup> He was arrested on 10 March 2010. He had formerly been sentenced to eight-year imprisonment for attempted rape and a rape after detainment. He reoffended seven months after release from prison. This is Case 5.

##### **5.3.4.1. Media responses to Case 5**

This offence was reported as public opinion had become increasingly agitated as a result of Case 4. *Chosun Ilbo* reprimanded the politicians in the report with the accusation, 'politicians are the accomplices'.<sup>81</sup> During this period, most of the media

<sup>79</sup> National Assembly, *Whole House Committee Assembly Records* (29 December 2009) 12.

<sup>80</sup> Dae Jin Hwang, 'President Lee Said: Arrest the Offender With All Speed' *Chosun Ilbo* (Seoul, 9 March 2010) <[http://srchdb1.chosun.com/pdf/i\\_service/pdf\\_ReadBody.jsp?Y=2010&M=03&D=09&ID=201003090019](http://srchdb1.chosun.com/pdf/i_service/pdf_ReadBody.jsp?Y=2010&M=03&D=09&ID=201003090019)> accessed 15 November 2013

<sup>81</sup> Eun Jin Shin, 'Politicians are Accomplices. They Do not Fix a Barn Even Though They Have Lost a Cow' *Chosun Ilbo* (10 March 2010) <[http://srchdb1.chosun.com/pdf/i\\_service/pdf\\_ReadBody.jsp?Y=2010&M=03&D=10&ID=2010031000175](http://srchdb1.chosun.com/pdf/i_service/pdf_ReadBody.jsp?Y=2010&M=03&D=10&ID=2010031000175)> accessed 15 November 2013

began to focus on more strict punishment and surveillance on sex offenders. *Donga Ilbo* criticised the Parliament and claimed that:

Korean people are angered by the politicians' late deliberation on the bills related to regulate sex offences. A number of bills to cope with sex offences were introduced since last September, but the Legislative and Judiciary Committee did not deliberate the bills, even though there are no ideological arguments on them.

*Chosun Ilbo* argued for EM of sex offenders to be applied retrospectively. On 6 March 2010, police found the murdered body of the victim of the fifth crime mentioned above. The suspect was a previously convicted sex offender released from prison seven months before this offence. *Chosun Ilbo* reported it on the front page with this headline, 'If he was on electronic monitoring, the victim would be a junior-high school student at this moment'.<sup>82</sup> Because of the *ex post facto* law, EM could not be sentenced to an offender whose trial process was already completed when the Electronic Monitoring Act 2008 came into force. There was no measure to sentence the suspect to EM when he was released from prison. *Chosun Ilbo* argued for retrospective application of EM in its editorial titled 'We should not let beasts do children harm anymore':

Kiltae Kim, the suspect in the rape and murder of a 13-year old girl, was incarcerated for eleven years because of two sex offences. However, he was not on EM because EM could only be sentenced on offenders prosecuted on or after 1 September 2008, when the Electronic Monitoring Act 2008 came into effect. The ruling party and government determined that they will try to amend the law in order that EM may be applied retroactively to sex offenders. If it can avoid the constitutional debates, it should be done.<sup>83</sup>

*Seoul Shinmun* reported about the retrospective application of EM supporting the call made by *Chosun Ilbo*:

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<sup>82</sup> Kyung Hun Kwon, 'If He was on Electronic Monitoring, the Victim Would Be a Junior-High School Student Now' *Chosun Ilbo* (Seoul, 8 March 2010)  
<[http://srchdb1.chosun.com/pdf/i\\_service/pdf\\_ReadBody.jsp?Y=2010&M=03&D=08&ID=2010030800181](http://srchdb1.chosun.com/pdf/i_service/pdf_ReadBody.jsp?Y=2010&M=03&D=08&ID=2010030800181)> accessed 15 November 2013

<sup>83</sup> Editorial, 'We Should Not Leave Beasts Do Children Harm Anymore' *Chosun Ilbo* (Seoul, 10 March 2010)  
<[http://srchdb1.chosun.com/pdf/i\\_service/pdf\\_ReadBody.jsp?Y=2010&M=03&D=10&ID=2010031000058](http://srchdb1.chosun.com/pdf/i_service/pdf_ReadBody.jsp?Y=2010&M=03&D=10&ID=2010031000058)> accessed 15 November 2013

Among many problems to control sex offenders, the most serious one is that there is no appropriate measure to supervise the offenders who committed sex offences before 2008, when EM began to be enforced to sex offenders. Unconstitutionality can be avoided if the offenders' risk of reoffending is assessed scientifically and EM orders would be sentenced to a limited number of offenders.<sup>84</sup>

Few media reports expressed different views. *Hankook Ilbo* argued in its editorial that:

Korean people are furious about consecutive heinous crimes. The politicians have contended to make more effective law to prevent crimes and more than forty bills to regulate sex offences have been introduced in the Parliament. However, the politicians become indifferent to deliberate the bills again when public opinion calms down. Hasty legislation in order to avoid criticism on late deliberation is just as problematic as delaying discussion due to political disputes. We are worried that retroaction of EM might stir up the controversy on EM more largely.<sup>85</sup>

As in the past, most of media reporting inclined towards harsher sanctions for sex offenders including the retrospective application of EM, which led to legislation to strengthen punishment.

So far, the media responses to high profile sex offences have been addressed in detail. The media reporting has played an important role in changing social awareness of and government responses to sexual offending. Why did the media pay significant attention to these offences? How can it be analysed? The concepts of 'ideal victim', 'news values' and 'signal crimes' may be used to understand why the media paid great attention to these offences and how the media reporting has influenced social and government responses.

Greer states that the media focus excessively on violent and sexual offences, but that some kinds of crimes, including white-collar or lower-level property crimes, rarely get media attention.<sup>86</sup> In the same sense, the media tend to concentrate on the 'ideal victim', which means 'a person or category of individuals who are given the

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<sup>84</sup> Editorial, 'There is No Problem in Retroaction of Electronic Monitoring If Unconstitutionality Would Be Reduced' *Seoul Shinmun* (Seoul, 11 March 2010) 31

<sup>85</sup> Editorial, 'Be Careful of Hasty Legislation Related to Prevent Sex Offences Against Children' *Hankook Ilbo* (Seoul, 11 March 2010) 39

<sup>86</sup> Chris Greer, 'News Media, Victims and Crime' in Pamela Davies, Peter Francis and Chris Greer (eds), *Victims, Crime and Society: An Introduction* (2 edn, SAGE 2017) 21.

complete and legitimate status of being a victim'.<sup>87</sup> Greer claims that 'young children are typical ideal victims' who draw much media attention and propel remarkable change to 'social and criminal justice policy and practice'.<sup>88</sup> He adds that ideal victims, such as child murder victims, are at the top of the 'hierarchy of victimisation'. All of the victims in the six cases in this chapter were girls under the age of 14. Of four cases, discussed in Chapter 4, two women involved in murder were sexually abused in childhood, one girl was 15 and the other girl was 11 years old. According to the concept of 'ideal victim', all of them fit the description.

Why the media pay significant attention to 'ideal victims' is that their victimisation is 'newsworthy'. 'Newsworthiness' is created by 'news values', which affect the choice and production of incidents as news.<sup>89</sup> 'Violence, sexual connotations, children and individual casualty' are commonly regarded as accounts of 'news values'.<sup>90</sup> Because all the cases discussed above had these factors, the media apparently considered those offences newsworthy. The concept of 'signal crimes' may also be useful to understand public and government responses to those offences. Greer states that 'signal crimes' are 'particularly serious or high profile crimes, which impact not only on the immediate participants (victims, offenders, witnesses), but also on wider society, resulting in some reconfiguration of behaviours or beliefs'.<sup>91</sup> Because the media revisit, reactivate and recreate the signal crimes, as long as such crimes maintain primary news values, their newsworthiness would be reinforced.<sup>92</sup> In the UK, after Sarah Payne, an 8-year-old girl, was abducted and killed by a paedophile, predatory child sexual violence became more newsworthy.<sup>93</sup>

In addition, the media tend to misrepresent child sexual victims. Concerning child sexual abuse, the media are inclined to focus on a child abused by a stranger despite the fact that children are more likely to be abused at home or by an

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<sup>87</sup> Ibid, 22, citing Nils Christie, 'The ideal victim' in Ezzat A. Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan 1986).

<sup>88</sup> Ibid, 22.

<sup>89</sup> Ibid, 26.

<sup>90</sup> Ibid, 27.

<sup>91</sup> Ibid, 28, citing Martin Innes, 'Signal Crimes: detective work, mass media and constructing collective memory' in Paul Mason (ed), *Criminal Visions: Representations of Crime and Justice* (Willan 2003).

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

acquaintance.<sup>94</sup> The media reporting of signal crimes has also influenced ‘wider issues and debates on public safety, social and criminal justice, or the nature of society itself’.<sup>95</sup> The media debates on legislative changes to sexual violence, triggered by Sarah Payne’s victimisation, led to the enactment of the Sex Offenders Act 2003,<sup>96</sup> including an expansion of the definition of sex crimes, strengthening sex offender registration and the introduction of the sexual offences prevention orders and the risk of sexual harm orders.<sup>97</sup>

Similarly, child sexual abuse has become a signal crime in Korea. The media have selected and published high profile child sexual offences sensationally and repeatedly because of their news values. Such media reporting has put significant pressure on Parliament and government, leading to a number of legislative responses centred on tougher punishment. Korean media may also influence the public to reconstruct and reinforce the belief that child abuse is normally committed by a stranger or that tougher punishment is effective for the prevention of sexual offending. If this belief grows stronger, the media may be more likely to consider the news value of sexual violence higher, which causes more punitive legislation. Jung-Hye Yang compares and analyses the frame types of the reports of cases 4 and 5 in two representative conservative and progressive newspapers, Chosun Ilbo and Hankyoreh Shinmun, as shown in Table 5-4.<sup>98</sup> She states that the news frames used to construct the meaning of the cases are similar in these two newspapers.<sup>99</sup>

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<sup>94</sup> *Ibid*, 41.

<sup>95</sup> *Ibid*, 32.

<sup>96</sup> *Ibid*, 33.

<sup>97</sup> McAlinden 2007 (Ch.2 n 12) 10, 102, 131.

<sup>98</sup> Yang (Ch.4 n 175) 360–61.

<sup>99</sup> *Ibid*, 358.

Table 5-4: Frame types of reports between *Chosun Ilbo* and *Hankyoreh Shinmun*

Frame types	Chosun Ilbo	Hankyoreh Shinmun
Strengthening punishment and surveillance	44 (30.3%)	27 (26.7%)
Description of a crime, investigation and trial	22 (15.2%)	15 (14.9%)
Poor investigation of police and prosecutors	21 (14.5%)	15 (14.9%)
Abnormality of suspects	19 (13.1%)	9 (8.9%)
Victim support	15 (10.3%)	7 (6.9%)
Lack of social policies	10 (6.9%)	9 (8.9%)
Violation of human rights	6 (4.1%)	11 (10.9%)
Public uproar	6 (4.1%)	2 (2.0%)
Appropriateness of present laws	2 (1.4%)	5 (5.0%)
Basic causes of sex crimes	0 (0.0%)	1 (1.0%)
Total	145	101

She maintains that the dominant frames focus on tougher punishment, detailed description of a crime and progress of an investigation, and a criticism of poor government policies.<sup>100</sup> She notes that these frames form the logic that strong law enforcement power would be the most effective way to prevent and root out sexual offences, leading to marginalising an understanding of the basic causes of sexual offences.<sup>101</sup> She adds that the juxtaposition of the frames of tougher punishment and the violation of human rights would limit the scope of debate of the problems of sex crimes to the inside of the criminal justice system, and from this point of view, long-term and invisible solutions, such as an improvement of lenient sexual culture towards male sexual behaviour or an enhancement of sex education, would be excluded from public debate.<sup>102</sup> She also argues that the mental abnormalities of offenders were overemphasised without enough evidence whilst basic concerns were ignored such as how to address mental problems, or the social, familial and psychological causes of psychopathic tendencies.<sup>103</sup> This frame

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<sup>100</sup> Ibid, 358–59.

<sup>101</sup> Ibid, 363.

<sup>102</sup> Ibid, 363–64.

<sup>103</sup> Ibid, 367–68.



promotes the idea that sexual offences against children are normally committed by a small number of pathological offenders rather than ordinary people.<sup>104</sup>

It is noticeable that feminist activists have cautioned that responses biased towards tougher punishment are not in the right direction. As noted in Chapter 4, Mi-Kyoung Lee, the chief of the Korea Sexual Violence Relief Centre, states that ‘feminist groups are anxious about the trend toward heavier punishment for sexual offences’ because it ignores the fact that many sex crimes are committed at home or workplaces, and that sexual violence is not essentially caused by sexual urge, and it covers the problems of criminal justice agencies.<sup>105</sup> While feminist activists have played an important role in the changes in responses to sexual violence, this caution has not been reflected by the media because it does not seem newsworthy.

#### 5.3.4.2. Legislative responses to Case 5

After the fifth sex offence was reported, almost all of the pending bills relating to regulate sex offences were passed on 31 March 2010. Most of the revised clauses aimed at aggravating punishment or sanction against a sex offender. Firstly, the limit of EM was extended from ten years to thirty years.<sup>106</sup> In addition, retrospective application of EM was allowed for sex offenders who had already been sentenced to imprisonment by a request of a prosecutor and a decision of a court.<sup>107</sup> Secondly, the provisions relating to the term of imprisonment were amended in the Criminal Act. The limit of imprisonment was extended from fifteen years to thirty years.<sup>108</sup> The limit was extended from twenty-five years to fifty years for aggravated offences.<sup>109</sup> The time when parole can be permitted was changed from ten years to twenty years being served in cases of indefinite imprisonment.<sup>110</sup> Additionally, the following provisions were amended: the statute of limitation of child sexual abuse should not apply until a child victim becomes an adult.<sup>111</sup> The intoxication defence is not

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<sup>104</sup> Ibid, 368.

<sup>105</sup> Lee (Ch. 4 n 114) 20–21.

<sup>106</sup> Electronic Monitoring Act 2010 (ROK) s 9(1).

<sup>107</sup> Electronic Monitoring Act 2008 (ROK), Additional rules s 2.

<sup>108</sup> Criminal Act 2010 (ROK) s 42.

<sup>109</sup> Ibid

<sup>110</sup> Ibid s 72 (1)

<sup>111</sup> Punishment for Sex Offences Act 2010 (ROK) s 20.

allowed for sexual offenders.<sup>112</sup> Registration and disclosure of sex offenders were strengthened, and a notification system was introduced. All kinds of sex offenders being convicted should be registered mandatorily.<sup>113</sup> Furthermore, their personal information should be disclosed via the internet and should be notified to the neighbours in principle by a decision of a court.<sup>114</sup>

Some MPs objected to these amendments in the Whole House Committee. Jeong-Hee Lee said that ‘strengthening punishment cannot be an alternative to the prevention of reoffending and it cannot be a fulfilment of a duty of a state to rehabilitate offenders’ and that ‘these bills taking advantage of public uproar against child sexual abuse cannot be the right criminological policy’.<sup>115</sup> Jeong-Sook Kwak argued that ‘EM cannot be applied retrospectively because it violates the non-retroactivity rule of law and the strengthening of punishment, surveillance and control cannot eradicate sex crimes’ and ‘instead, to raise a reporting rate and to improve a protection system of sexual victims would be the most effective responses to sexual offences’.<sup>116</sup> However, the bill on the retrospective application and extension of the limit of EM was passed with an approval rate of 81%, as was the bill on the extension of the limit of fixed term of imprisonment with 70.4% agreement in the Whole House Committee, on 31 March, 2010,<sup>117</sup> only 21 days after the arrest of the suspect in Case 5.

### **5.3.5. The responses to Case 6 reported in June 2010**

A 45-year-old male kidnapped an 8-year-old girl in the playground of her primary school on 7 June 2010. He brought the victim, whom he threatened with a knife, into his house and raped her. He had previously been sentenced to a fifteen-year imprisonment for a rape and robbery in 1987. In that case, he had raped the victim in front of her husband. He had also molested a 15-year-old boy in 2005. However, he was not prosecuted, since his victim withdrew his complaint based on an agreement with the offender. This is Case 6.

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<sup>112</sup> Ibid s 19.

<sup>113</sup> Ibid s 32.

<sup>114</sup> Ibid s 37, 41.

<sup>115</sup> National Assembly, *Whole House Committee Assembly Records* (31 March 2010) 11.

<sup>116</sup> Ibid, 6.

<sup>117</sup> Ibid, 7, 13.

Even though many measures for sex offences were discussed before and after the bill on pharmacological treatment was introduced to the Parliament, this issue was not so much discussed as an important sex offender management policy. Table 5-5 shows how frequently the terms related to sex offences against children were reported in the Korean online media.

Table 5-5: Frequency of online news report between terms related to sex offences against children<sup>118</sup>

period	frequency			
	Sex offences against children	Chemical castration	Electronic monitoring	Sex offender registration and notification
17 February 2006 – 7 September 2008	3,530	116	525	617
8 September 2008 – 23 February 2010	4,470	268	1,880	504
24 February 2010 – 6 June 2010	1,790	149	1,140	338
7 June 2010 – 30 June 2010	781	363	226	127
1 July 2010 – 31 December 2010	3,560	236	1,430	375

‘Sex offences against children’ were reported 3,530 times from 17 February 2006, which was the day after Case 1 was committed, to 7 September 2008, which was the day before the bill was introduced to the Parliament. In this period, three severe sex offences against children were committed and the Electronic Monitoring Act 2007 was passed on 27 April 2007. In the same period, ‘chemical castration’ was reported only 116 times, whilst ‘electronic monitoring’ and ‘sex offender registration and disclosure’ were reported 525 times and 617 times, respectively. The media did not pay much attention to chemical castration, even after the bill was introduced to the Parliament. It was only reported 268 times from 8 September 2008, the day the bill was introduced, to 23 February 2010, the day before Case 5 was committed.

<sup>118</sup> This is a result of news search in the portal site titled ‘daum’, which is one of the biggest portal sites in South Korea. <<http://search.daum.net/>> accessed 24 October 2013

‘Electronic monitoring’ was reported 1,880 times and ‘sex offender registration and disclosure’, 504 times, during the same period.

It was a controversial issue as to whether this new treatment would be executed or not. Most of the media took a stance that it should be deliberated carefully. *Hankook Ilbo* reported that:

Chemical castration is extended slowly in the U.S., while electronic monitoring spreads rapidly. This phenomenon is caused by the problems of chemical castration such as the danger of violating human rights, anxiety over side effects and there being little proof of its effectiveness to prevent reoffending. It is desirable to scrutinise the side effects and crime control effects elaborately before chemical castration is executed.<sup>119</sup>

This view of the media was almost the same until more than a year had passed after the introduction of the bill. *Chosun Ilbo* presented the arguments against pharmacological treatment and concluded that: ‘A psychiatrist and professor, Shin Euijin, adds that it should not be enforced impatiently without adequate administrative preparation’.<sup>120</sup> However, the tone of the press towards chemical castration became different after 7 June 2010, the day Case 6 was reported. *Segye Ilbo* reported that ‘it is not the time to consider the human rights of sex offenders and side effects of chemical castration. Child sexual abusers should be castrated chemically’ and ‘if it is not enough, surgical castration needs to be done’.<sup>121</sup> *Munhwa Ilbo*, a conservative broadsheet,<sup>122</sup> also demanded prompt legislation of chemical castration in its editorial, saying that ‘Parliament should not delay passing the bill on chemical castration’.<sup>123</sup> In contrast, *Hankyoreh Shinmun* stated in its editorial that:

Many policies are discussed to punish sex offenders against children more strictly. Heavier sentencing and even chemical castration are considered. However, all of the experts on sexual violence agree that it is difficult to root out sex offenders only through punishment measures. The effect of chemical castration has not been proved yet

<sup>119</sup> Sang Jin Hwang, ‘Chemical Castration’ *Hankook Ilbo* (Seoul, 17 January 2009) 30

<sup>120</sup> Hyung Won Kim, ‘Can Chemical Castration Prevent the Second Nayoung Case?’ *Chosun Ilbo* (Seoul, 17 December 2009) <[http://news.chosun.com/site/data/html\\_dir/2009/12/17/2009121700317.html](http://news.chosun.com/site/data/html_dir/2009/12/17/2009121700317.html)> accessed 26 October 2013

<sup>121</sup> Kook-Hyun Lim, ‘Chemical Castration’ *Segye Ilbo* (Seoul, 11 June 2010) 23

<sup>122</sup> KABC (Ch. 4, n 81) 1. It was ranked eighth in quantity with a circulation of 174,525

<sup>123</sup> Editorial, ‘Chemical Castration of Child Sex offenders Should Be Considered Positively’ *Munhwa Ilbo* (Seoul, 10 June 2010) 31.

and it might violate human rights significantly. Even if it takes a long time, government should concentrate on prevention policies. The most urgent issue is to provide social systems to protect children who are left without parents' care.<sup>124</sup>

Because almost all of the bills relating to sexual offences pending in Parliament had been passed on 31 March 2010 as mentioned above, MPs felt public pressure to pass the bill on pharmacotherapy as a legal response to Case 6. Only 22 days after Case 6, the bill was passed in the Whole House Committee on 29 June 2010. This was the Pharmacological Treatment of Sex Offenders Act 2010, which will be discussed in detail in the next chapter.

#### **5.4. Analysis of the media reporting and government responses to sex crimes**

As discussed above, the media has reported, in an often sensational manner, on a series of significant sexual offences against children. The media has emphasised harsher punishments for sex offenders rather than prevention or balanced and comprehensive policies. Although the media reporting has been based on public outcry, it has also generated and escalated public outrage, which puts pressure on the government and politicians to hastily strengthen the legislation around sexual offending. It seems that sexual offences threaten the safety of people, and there is a lack of government policies dealing with sex crimes. However, this issue could have been handled more carefully and in different ways instead of taking a hard line stance. The concept of 'moral panic' provides an insight into these more punitive responses to sex offenders.

Thompson describes five elements of a moral panic, citing Stanley Cohen's definition as follows:<sup>125</sup>

1. Something or someone is defined as a threat to values or interests.
2. This threat is depicted in an easily recognisable form by the media.
3. There is a rapid build-up of public concern.
4. There is a response from authorities or opinion-makers.

<sup>124</sup> Editorial, 'Prevention Should Be the Main Point of Measures for Sex Offence Against Children' *Hankyoreh Shinmun* (Seoul, 29 June 2010) 31.

<sup>125</sup> Kenneth Thompson, *Moral Panics* (Routledge 1998) 8; Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (MacGibbon and Kee 1972) 9.

5. The panic recedes or results in social changes.

Critcher defines moral panics as ‘disproportionate reactions to perceived threats’.<sup>126</sup> He states that there will be ‘signs of disproportionality, exaggeration and distortion of the actual incidence of the problem’ if a certain thing is considered to be a moral panic.<sup>127</sup>

According to these statements, the media and legal responses to high-profile sexual offences as discussed above fits definition of the moral panic. When a heinous sex crime was committed, almost all of the media reporting focused on public outrage and tougher punishment, whilst the government published stronger action plans and Parliament passed the bills, including harsher sanctions, without careful deliberation. Even though it is a fact that sex crimes threaten people’s safety, the following significant issues have been little dealt with by the media and government: whether a present criminal sanction is sufficient to regulate sex crimes; whether strengthened punishment would be effective for the prevention of sexual offences; what the basic causes of sex crimes are, and what the appropriate ways to reduce the amount of sexual offending would be. In this respect, the media reporting, government policies and legislation towards sexual offences seem disproportionate reactions.

Similar to the attitude of the media reporting and indeed influenced by it, legal responses were heavily weighted to harsher punishment and alternative policies regulating sex crimes were either poorly considered or ignored. How to deal with the predicted side effects of extremely long-term post-release EM reaching thirty years should have been scrutinised. A national victimisation survey could have been introduced in order to find the facts about sexual violence. Research could also have been mandated to explore and try to understand the basic causes of sexual offences and the characteristics of sex offenders. How to raise the reporting rate of child sexual abuse and how to expand the education to prevent sexual violence in society should also have been considered. In these respects, legal responses to high-profile sex crimes discussed in this chapter can be considered to be the consequences of moral panic.

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<sup>126</sup> Chas Critcher, ‘Introduction: More Questions than Answers’ in Chas Critcher (ed), *Critical Readings: Moral Panics and the Media* (Open University Press 2006) 6.

<sup>127</sup> *Ibid.*

## 5.5. Conclusion

The reason why reported sex crimes have increased since the middle of the 1990s has been scrutinised in the first part of this chapter. While the number of reported sex crimes changed little between 1985 and 1995, it increased significantly between 1995 and 2008, as shown in Figure 5-1. It would be reasonable to believe that this change was caused not by actual increases in sexual offences, but by revision of the complaint system, widening of the scope of sexual offences and raised social awareness about sexual victimisation. These all affected reporting rates and resulted in large parts from feminist activism and efforts to provide advice and legal aid to victims.

Between 2006 and 2010, six high-profile sexual offences against children were reported on in a sensational manner by the media, which drew public attention and put pressure on the government and politicians to make appropriate responses. The attitude of the media has been framed above by the concepts of ‘news values’ and ‘signal crimes’. The media selected these high-profile sexual offences and created them as news because of their news values. As the media revisited and recreated these offences, the public paid more attention to the news, so that child sexual abuse became a signal crime and its news value became more intensified.

Because the media reporting and legal reactions had been too much inclined to tougher punishment, whenever a new sex crime attracted media attention, the laws regulating sexual violence became strengthened. In this period, bills relevant to sex crimes were passed seven times. Each time, new types of sanctions, including EM, the gathering of DNA information, the sex offender registration, disclosure and notification, and pharmacological treatment orders, were introduced, and punishment for sex crimes was tightened. Post-release EM of sex offenders was legalised on 2 April 2007. The date of enforcement of electronic tagging was advanced and the limit was extended from five years to ten years on 22 May 2008. A revision was passed to apply EM retrospectively to convicted sex offenders and to extend the limit of tagging from ten years to thirty years on 31 March 2010. The limit of imprisonment was extended from fifteen years to thirty years on the same date.

Such media and government responses overemphasising harsher punishment can be analysed through the concept of moral panic, which has five characteristics as listed by Thompson and discussed above. Discussions and legislation towards sex crimes lost the balance between criminal sanctions and other possible policies. The increase in high-profile sex offences could have been a good opportunity to consider the ways to deal with sex crimes other than punishment, such as studying the characteristics or recidivism rate of sexual offenders, understanding the effectiveness of psychological treatment, and treating offenders with mental illness. Unfortunately such an approach was ignored.

Even though almost all of the pending bills around sex offenders were passed on 31 March 2010, as legal responses to Case 5, the bill on the pharmacological treatment of sex offenders was not, because the Legislative and Judiciary Committee agreed that more discussion on this issue was needed. However, after Case 6 occurred on 7 June 2010, the bill was promptly passed on 29 June 2010. The debates on the bill will be addressed in the next chapter.



## Chapter 6: Debates on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008

### 6. 1. Introduction

The Prevention and Treatment of Persistent Child Sex Offenders Bill was introduced to the Korean Parliament by thirty-one MPs on 8 September 2008. As noted in the preceding chapter, it was one of the legal responses to a series of high-profile child sexual offences committed between February 2006 and March 2008. On account of public pressure incurred by the child rape and murder case that occurred on 24 February 2010, a number of bills relevant to sexual offences pending in the Legislative and Judiciary Committee were passed after rapid deliberation in Parliament on 31 March 2010. This bill, however, was not passed until 22 months after its introduction because it proved contentious and it was difficult for the Legislative and Judiciary Committee Sub-Committee to reach agreement. It would have expired if it had not been for the child sexual offence that occurred on 7 June 2010, which provided fresh impetus and eventually led to the bill being passed by the Whole House Committee on 29 June 2010.<sup>1</sup>

This bill was introduced by the MP Min-Sik Park, an ex-prosecutor and the representative of the MPs proposing the bill,<sup>2</sup> who had an interest in the pharmacological treatment of sex offenders. He introduced the bill and, at the same time, published *A Legislative Scheme of Prevention and Treatment of Persistent Child Sex Offenders*,<sup>3</sup> a research paper regarding the pharmacotherapy of sex offenders that he had commissioned. In the first part of this chapter, the influence of his personal experience as a prosecutor on this legislation will be addressed through the concept of hidden law-making.

The authors of this research paper tried to devise pharmacotherapy not as a punishment but as a preventive measure, and so they insisted that the consent of an

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<sup>1</sup> According to Section 51 of the Constitution, Bills shall be repealed when the term of MPs has expired.

<sup>2</sup> According to Section 79(3) of the National Assembly Act 2008, when a MP proposes a Bill, the name of the proposing MP shall be entered to the title of the Bill, and if there are two or more proposing MPs, one representative proposing MP shall be clearly described.

<sup>3</sup> Sung-Gi Hwang, Jung Hoon Lee and Seung-Hee Hong, *A Legislative Scheme of Prevention and Treatment of Persistent Child Sex Offenders* (The Office of MP Min-Sik Park 2008)

offender must be required for sentencing to pharmacotherapy. The key themes of the research document and how those arguments were put into the bill will be dealt with in the next part. Whether the consent of an offender might be regarded as freely given and whether pharmacotherapy is a preventive measure or a punishment will be explored here. The procedures for carrying out pharmacotherapy that were included in the initial proposal will also be discussed. There was much discussion about whether to adopt pharmacotherapy and how to carry it out. The debates and changes from the initial bill in Parliament will be addressed in the third part of this chapter, and will be followed by a detailed analysis of the main structure of the final Act and a conclusion.

Before the research document commissioned by Park was published, there was little literature on this subject in South Korea apart from two articles briefly describing the pharmacotherapy laws in the U.S.,<sup>4</sup> and one article that briefly examined surgical and chemical castration as one of the therapeutic measures for sex offenders.<sup>5</sup> This research document is significant because it was the first serious research paper on the pharmacotherapy of sex offenders in South Korea and it was influential on the main structure of the bill.

The bill presented and advanced pharmacotherapy as a preventive measure aimed at treatment rather than a punishment, and, as such, many provisions were devised for realising this purpose, such as narrowing down the target offenders of the treatment, requiring informed consent from the offender and pre-release treatment in the National Forensic Hospital rather than in prison. During the debates of the bill in Parliament, however, crucial parts of it were significantly revised despite dissenting and cautious opinions, so the final version of the bill was substantially different from the original one.

Arguably, deeper and wider deliberation was needed but the bill was inadequately discussed and was passed hastily due to pressure from the public to react to the high-profile sex offences. As a result, it will be argued that there are a

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<sup>4</sup> Kang (Ch.4 n 98) 204–06; Young-Sil Jeon and others, *Types of Sexual Assault and Measures against Recidivism* (Korean Institute of Criminology 2007) 575–84.

<sup>5</sup> Soo-Jung Lee and Kyong-Ok Kim, 'Correct Understanding on Recidivism Rate of Sex Offences and Searching for the Preventive Strategies of Recidivism' (2005) 19(3) *Korean Journal of Social and Personality Psychology* 83, 97.

number of human rights problems and defects in the Act. These will be considered in the next chapter.

## **6.2. The background role of Min-Sik Park MP**

Park was first elected as an MP on 9 April 2008. He had worked as a prosecutor for thirteen years from 1993 to 2006 before he became an MP and his career experiences influenced his interest in the therapeutic management of sex offenders. He stated ‘there is a personal story behind this research paper that I felt regretful in dealing with victims of child sexual offences when I worked as a prosecutor, so I have been keen to develop a policy to root sexual offences out, and I have been absorbed in studying how to make the Bill relevant to the treatment of sex offenders with many lawyers and researchers since three months before the start of the new Parliament 2008’.<sup>6</sup>

In terms of how the law is being formed, how MP Park’s former prosecutor experience influenced the introduction of the bill would be apparent if the concept of ‘hidden law-making’, discussed by Montgomery, Jones and Biggs, is applied. They argue that various types of law-making actions are hidden, which have influenced parliamentary authority of legislation and judicial law-making through litigation.<sup>7</sup> According to their arguments, parliamentary legislative power is dispersed by ‘intermediate law-makers’, such as the Human Fertilisation and Embryology Authority, which has published guidance on practice and ethics for staff of the National Health Service and licensed clinics, and has made a regulatory decision that may impact on parliamentary legislative amendments.<sup>8</sup> Citing Ronald Dworkin, they also pay attention to the adjudication of judges who decided the best resolution in ‘hard cases’, and the intervention of the individuals behind the judicial law-making process.<sup>9</sup> They claim that it can be seen ‘as a form of law-making in the shadow of the court process’, whereby particular professional solicitors and barristers, holding a specific view on certain issues, have a significant impact on the judicial law-making procedure regarding those issues through the frequent appointment of test cases

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<sup>6</sup> Hwang, Lee and Hong (n 3), Preface

<sup>7</sup> Jonathan Montgomery, Caroline Jones and Hazel Biggs, ‘Hidden Law-Making in the Province of Medical Jurisprudence’ (2014) 77(3) *Modern Law Review* 343, 343.

<sup>8</sup> *Ibid*, 343, 348–350.

<sup>9</sup> *Ibid*, 344, 360.

enabling them to advise and argue consistently.<sup>10</sup> Furthermore, they illustrate the case with an example in which a judge presented his own interpretation of a particular issue in the ruling based on his long experience as counsel.<sup>11</sup> They suggest that a thorough explanation of ‘how the law is being made’ needs to consider the personal involvement of a judge before making an appointment.<sup>12</sup>

Although Montgomery, Jones and Biggs discuss the influence of particular personalities on judicial law-making, their arguments and ideas may be used in examining how a specific individual affected the introduction of this bill in that MP Park seems to have considered his own views regarding how to deal with sex offenders through his experiences as a former prosecutor, which became the basis of the bill and of the discussion in Parliament. In the legislative process, MPs’ personal experiences relevant to government policies are said to be an influential factor for legislation in that government officials can develop professional expertise in their fields.<sup>13</sup> Yoo and Lee explored the correlation between MPs’ ex-government official experiences and the passing rate of bills presented from 2008 to 2012 in the Korean Parliament. Their research shows that the passing rate of bills introduced by MPs with ex-government official experiences was 1.17 times higher than that of bills proposed by MPs without such experience.<sup>14</sup> In addition to MP Park’s personal experiences, some other aspects, such as the occurrence of significant sexual offences, moral panic in the media, a punitive turn and the statistical rise of sex crimes, are crucial in terms of how this law was created.

When MP Park prepared to introduce this bill in the first half of 2008, coincidentally, Hwang, a professor teaching Constitutional Law and Media Law at the Law School of Hanyang University in Korea, was writing a paper regarding pharmacotherapy, separately from MP Park.<sup>15</sup> Hwang had an interest in the issues around child sexual abuse and perceived pharmacotherapy being reported in the media as a possible response to sexual offences. As mentioned in Table 5-5 of

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<sup>10</sup> *Ibid*, 366–367.

<sup>11</sup> *Ibid*, 368–369.

<sup>12</sup> *Ibid*, 369.

<sup>13</sup> Eun-Ji Yoo and Jeong-Wook Lee, ‘A Study on the Factors Influencing the Passage of the Bills Introduced by MPs’ (2015) 25(2) *Journal of Modern Society and Administration* 385, 393.

<sup>14</sup> *Ibid*, 400.

<sup>15</sup> I communicated with Sung-Gi Hwang via email. (17 May 2016). Hwang answered my question about the background of this research.

Chapter 5, the term ‘chemical castration’ was found 116 times in online news between 17 February, 2006 and 7 September, 2008. However, there was little preceding research about this subject, so he started to write an article concerning chemical castration. This paper includes types of castration, legislative examples of pharmacotherapy from other jurisdictions, constitutional problems, human rights issues and the legislative scheme of pharmacotherapy. Shortly before Hwang published this article, MP Park heard about the paper and contacted him to commission more detailed research regarding the pharmacotherapy of sex offenders in order to prepare the bill. Hwang asked two professors studying criminal law in Korea, with whom he had been acquainted, to participate in this research. One was Hong, a professor at the Law School of Wonkwang University, and the other was Lee, a professor at the Law School of Chung Ang University. In addition to the parts written by Hwang noted above,<sup>16</sup> Hong wrote the parts relevant to German legislation with regards to pharmacotherapy because she had received her doctorate in Law from the Konstanz University in Germany, and Lee participated in making a draft of the bill and an explanation of each provision in it. The result of their cooperative work is the research monograph, *A Legislative Scheme of Prevention and Treatment of Persistent Child Sex Offenders*, published by MP Park, which was the basis for the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008.

It is not unusual for MPs to publish research papers for legislation. According to the Allowances for the Members of Parliament Act 2010, money to cover expenses incurred in the legislation and development of policies may be paid to MPs within budgetary limits.<sup>17</sup> More than three million pounds were paid to them as a result of their work on this Act in 2014.<sup>18</sup>

### **6.3. Main arguments of the research document and essential points of the Bill**

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<sup>16</sup> It was published by Hwang in August 2010 before this commissioned research paper was issued. Sung-Gi Hwang, ‘A Constitutional Study on the Castration Laws as Protection against Habitual Sex Offenders’ (2008) 9(3) Public Law Journal 121.

<sup>17</sup> Allowances for the Members of Parliament Act 2010 (ROK) s 7-2.

<sup>18</sup> Green Party Korea, *Budget for supporting legislation and development of policies is wasted* (4 April 2016).

The most important point that the authors of the research paper made was to argue that pharmacotherapy was not equivalent to punishment, so it did not violate the human rights of an offender. Hwang, Lee and Hong stated that the paper aimed at finding a way of maintaining a balance between child protection and offenders' human rights.<sup>19</sup> Since a state policy for strengthening child protection would create a restriction on the human rights of offenders, they were attentive to justifying pharmacotherapy.<sup>20</sup> They believed that pharmacotherapy, being applied to a limited category of sex offenders and based on the informed consent of an offender, would be a constitutional preventive measure rather than a punishment.<sup>21</sup> They suggested that pharmacotherapy should be introduced as a supplementary measure to punishment-oriented legislation and rehabilitation programmes for sex offenders.<sup>22</sup> In order to promote the legislative schemes of pharmacotherapy, Hwang, Lee and Hong referred to the Voluntary Castration and Other Treatment Methods Act in German law and the California Penal Code.<sup>23</sup> The former provides a typical example of the legislation of voluntary pharmacotherapy and the latter of a compulsory one, which were discussed as international legislative comparators in Chapter 2.

Table 6-1 shows the main structures of pharmacotherapy in the research paper and the bill which will be addressed here.

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<sup>19</sup> Hwang, Lee and Hong (n 3) 2–3.

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid* 24–25, 36–37.

<sup>22</sup> *Ibid* 24.

<sup>23</sup> *Ibid* 4–16.

Table 6-1: Main points of pharmacotherapy in the bill

Main points	Pre-release	Post-release
Target <sup>24</sup>	Paraphilic disordered or persistent sex offenders against children under the age of 13	
Requirements <sup>25</sup>	- A prosecutor's request - A court's sentence - An offender's informed consent	- Completion of pre-release treatment - Decision of parole - An offender's informed consent
Term <sup>26</sup>	Up to six months within the term of imprisonment or preventive medical treatment and custody orders	Within a parole period
Effect of breach of treatment <sup>27</sup>	No disadvantage for refusal of treatment	Imprisonment for not more than seven years or a fine not exceeding 20 million won as well as parole revocation
Withdrawal of consent	Not permitted	

### 6.3.1. Narrowing down the target offenders

In the California Penal Code, a judge shall impose mandatory pharmacotherapy on sex offenders convicted for the second time for offences against children under the age of 13 as a parole condition.<sup>28</sup> Rebish argues that the reason why the California Penal Code focuses on sex offenders whose victims are under the age of 13 is to respond to the problem of paedophilia.<sup>29</sup> The California Penal Code affected the target offenders of Hwang, Lee and Hong's legislative scheme of pharmacotherapy. In the debate over whether pharmacotherapy, in the California Penal Code, is a punishment or a treatment, Henderson considers it a punishment rather than a treatment because it has proved to be effective to control sexual arousal only for paraphilic-disordered sex offenders; therefore, it would be a punishment rather than a treatment if it were applied to non-paraphilic disordered sex offenders who would not be expected to experience the desired effect of the treatment.<sup>30</sup> Hwang, Lee and Hong also argued that the target should be limited to paraphilic-disordered sex offenders convicted for the second time for offences against children

<sup>24</sup> The Prevention and Treatment of Persistent Child Sex Offenders Bill 2008, s.2(2)

<sup>25</sup> *Ibid*, s.3(1),(3), 6(1), 9, 15(1),(2).

<sup>26</sup> *Ibid*, s.10(2), 16(3)

<sup>27</sup> *Ibid*, s.18.

<sup>28</sup> California Penal Code, s 645 (a), (b).

<sup>29</sup> Karen J. Rebish, 'Nipping the Problem in the Bud: The Constitutionality of California's Castration Law' (1998) 14 New York Law School Journal of Human Rights 507, 531.

<sup>30</sup> Hwang, Lee and Hong 9, citing Henderson, 668.

under the age of 13 and considered as ‘persistent’ sex offenders, because the use of pharmacotherapy should be minimised as far as possible, taking into consideration the principle of proportionality.<sup>31</sup>

In the bill, pharmacotherapy is not applied to all kinds of sex offenders, only to paraphilic-disordered or persistent sex offenders aged 25 or over, whose victims were under the age of 13, and who are judged to be at risk of reoffending.<sup>32</sup> A prosecutor shall request a court to order pharmacotherapy to a sex offender based on the decision of the necessity of the treatment after the offender is diagnosed by a psychiatrist.<sup>33</sup> A paraphilic-disordered patient means a person who falls under Section 2(1) of the Preventive Medical Treatment and Custody Act 2008, a sex offender who has a psychosexual disorder showing a propensity for sexual activity, such as paedophilia and sexual sadism, or a person who is determined as incapable of controlling his behaviour due to sexual abnormalities according to a psychiatric assessment by a mental health physician.<sup>34</sup>

The provision of this bill in which pharmacotherapy is applied to a persistent sex offender who is not paraphilic is not consistent with the argument of Hwang, Lee and Hong because the treatment of a sex offender who is persistent but non-paraphilic might be inconsistent with the principle of proportionality. If they intend to narrow down the treatment targets, in accordance with their argument, the treatment should be applied to paraphilic-disordered and persistent sex offenders whose victims were under the age of 13.

### **6.3.2. Pre-release and post-release pharmacotherapy**

Hwang, Lee and Hong believe that pharmacotherapy would not replace imprisonment, because it would not be a punishment responding to the culpability of

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<sup>31</sup> Hwang, Lee and Hong (n 573) 25, 35–37. ‘Persistent’ is a legal term used in the Korean Criminal Act but its definition is not legislated in the Act. According to the Supreme Court, persistence means a tendency to commit a same offence repeatedly, and it may be decided in consideration of the offender’s criminal records, the number of committing crimes, means, ways and motives of crimes. *SCC 2009Do 980, 24 November 2011* [2011]

<sup>32</sup> Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 (ROK) s 2.

<sup>33</sup> *Ibid* s 3(1), (2).

<sup>34</sup> *Ibid* s 2.



an offender, but be a preventive measure aiming at treatment.<sup>35</sup> They have therefore suggested that it should be applied in connection with parole or post-release treatment after completion of a term of imprisonment.<sup>36</sup> If pharmacotherapy were used as an additional punishment to imprisonment, it would violate the rule of double punishment.<sup>37</sup> In this context, they believe that it would not be a punishment, but a preventive measure, if it were based on the consent of an offender;<sup>38</sup> thus, the issue of the consent of an offender is a crucial point in the research and the bill. This will be explored in the next section.

Hwang, Lee and Hong, further suggest that pharmacotherapy should consist of a pre-release course of treatment during the term of imprisonment and post-release during parole.<sup>39</sup> They maintain that pre-release pharmacotherapy should be provided in the National Forensic Hospital, rather than in a prison, up to six months before release, because both the pharmacotherapy and the medical treatment and custody orders are preventive measures rather than a punishment.<sup>40</sup> They explain that the reason for the restriction of the duration to six months was to avoid harmful effects caused by long-term detention in the facility.<sup>41</sup> This account, however, is difficult to understand because an offender being sentenced to pharmacotherapy would normally be imprisoned for far longer than six months. Moreover, an offender being sentenced to pharmacotherapy and a preventive medical treatment and custody orders, who shall not be punished or shall be punished to a mitigated degree, because of a mental disorder, shall be confined in the National Forensic Hospital, instead of a prison, for up to fifteen years.<sup>42</sup> It seems to be better for the term of the pharmacotherapy to be decided by a physician following the result of the treatment and the offender's view within the term of imprisonment or preventive medical treatment and custody orders rather than it being imposed for up to six months in all cases. Meanwhile, they state that pharmacotherapy should not be provided alone but applied together with an ongoing rehabilitation programme that includes psychological treatment.<sup>43</sup>

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<sup>35</sup> Hwang, Lee and Hong (n 3) 20–21.

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid* 21.

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid* 45–48.

<sup>40</sup> *Ibid* 44.

<sup>41</sup> *Ibid*

<sup>42</sup> Preventive Medical Treatment and Custody Act 2005 (ROK) s 2(1), 16(2).

<sup>43</sup> Hwang, Lee and Hong (n 3) 44–45.

Offenders who undertake pre-release pharmacotherapy might be paroled earlier than they would otherwise be, only when they consent to post-release castration during the parole period as set out in the bill. They may be released early through a parole board decision five years after sentencing if they are sentenced to imprisonment for life, or when a fifth of the period has passed if they are sentenced to imprisonment for a definite term.<sup>44</sup> It is a mitigated requirement in comparison to normal parole, which requires the elapse of ten years for life imprisonment or a third of the period for a definite term of imprisonment.<sup>45</sup> At that time, EM was an additional post-release sanction and its duration was a maximum ten years.<sup>46</sup> By contrast, the bill introduced pharmacotherapy as merely a condition of parole within the term of imprisonment. This seems to have been due to the authors' intention to minimise the punitive character of pharmacotherapy.

The bill declares that 'chemical castration means a treatment to suppress abnormal sexual arousal of paraphilic disordered or persistent sex offenders, which is conducted by administering medication and psychological therapy for incapacitating sexual function', and it gives the rules of the treatment as follows: it must prevent, cure or relieve serious disease, mental disorder or pain, relevant to an offender's abnormal sexual arousal, which is medically well-known; it must not cause excessive physical side effects, and it must be performed according to well-known medical procedures.<sup>47</sup> Pharmacotherapy shall be provided in the National Forensic Hospital, before enforcing the imprisonment sentence, for not more than six months with concurrent mandatory psychological therapy.<sup>48</sup>

The provisions relevant to the execution of the treatment are not sophisticated. Only the rules of the treatment are listed in this bill and detailed points relevant to how to manage the treatment are entrusted to a presidential decree. Even though the side effects of the treatment are generally considered significant, there are no provisions relevant to regular health checks of the offender, including diagnosis and treatment of any side effects. When an offender is released early, he should undergo the treatment during the parole period, which is managed by a probation officer.<sup>49</sup>

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<sup>44</sup> Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 (ROK) s 15 (1).

<sup>45</sup> Criminal Act 1953 (ROK) s 72.

<sup>46</sup> Electronic Monitoring Act 2008 (ROK) s 9(1).

<sup>47</sup> Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 (ROK) s 2.

<sup>48</sup> *Ibid* s 10, 11. 13.

<sup>49</sup> *Ibid* s 16 (1)–(3).

The procedures relevant to the management of the treatment in the community are assigned to a presidential decree.<sup>50</sup>

### 6.3.3. The informed consent of an offender

The Voluntary Castration and Other Treatment Methods Act in German law requires the informed consent of an offender for castration, the assessment of a physician and the permission of the expert office.<sup>51</sup> Prosecution and sentencing are not required. Surgical castration is allowed only for an offender aged over 25, but pharmacotherapy is permitted for an offender under the age of 25.<sup>52</sup> The consent of a legal representative of an offender is required, if the offender is a minor,<sup>53</sup> who is under the age of 18.<sup>54</sup> Age difference between surgical castration and pharmacotherapy seems to imply that surgical castration needs more careful consideration as to whether to give an offender's consent, because it would incur permanent incapacitation.

Hwang, Lee and Hong, in their legislative scheme, followed the example of this German law, in that they suggested that the target offenders should be 25 years of age or over and their informed consent should be required.<sup>55</sup> They regarded the informed consent of an offender as an essential requirement for pharmacotherapy in order to avoid violating the human rights of the offender, such as the right to self-determination and the right not to suffer physical injury.<sup>56</sup> Harrison argues that offenders should be informed of all the side effects in order that the consent is valid.<sup>57</sup> Hwang, Lee and Hong also stated that the offender should be informed of the necessity, procedure, effects and side effects of pharmacotherapy.<sup>58</sup>

In the bill, the informed consent of a sex offender is required when a prosecutor requests a court order.<sup>59</sup> A court should be certain of a defendant's

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<sup>50</sup> Ibid s 16(4).

<sup>51</sup> Voluntary Castration and Other Treatment Methods Act 1969 (GERMANY) s 3, 5.

<sup>52</sup> Ibid s 2(1)3, 4(1).

<sup>53</sup> Ibid 4(3).

<sup>54</sup> Civil Act 2002 (GERMANY) s 2.

<sup>55</sup> Hwang, Lee and Hong (n 3) 27, 37.

<sup>56</sup> Ibid 19–20.

<sup>57</sup> Harrison (Ch.1 n 8) 3.

<sup>58</sup> Hwang, Lee and Hong (n 3) 27.

<sup>59</sup> Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 (ROK) s 3(3), 9.

consent in the trial.<sup>60</sup> A sex offender must be informed about the reason, significance and side effects of pharmacotherapy before the offender consents to have the treatment.<sup>61</sup> A prosecutor shall not request a court order, if the offender is not able to understand the reason for, and significance and side effects of the treatment, and make an informed decision about it.<sup>62</sup> However, it is unclear who informs offenders of the required points in the bill.<sup>63</sup> If offenders are informed by non-professionals rather than experienced physicians, this would not be considered ‘informed consent’, in that it would be difficult for offenders to get sufficient information from non-professionals.

Whether the consent of an offender in the bill would be evaluated as a freely given one is a significant issue in that it was regarded as the most important point for making pharmacotherapy a preventive measure rather than a punishment. Hwang, Lee and Hong emphasised avoiding coercing offenders and maintaining the therapeutic characteristic of pharmacotherapy throughout the whole process.<sup>64</sup> Eyal states that ‘coercion’, ‘undue inducement’ and ‘no-choice situations’ are possible obstacles to voluntary consent.<sup>65</sup> His statements seem to be helpful to evaluate the voluntariness in the bill.

For pre-release pharmacotherapy, it would be arguable whether an offender always understands what consent means and what side effects are possible.<sup>66</sup> Harrison argues that the consent of an offender should be certified by a neutral third party concerning whether it is given freely and therefore valid.<sup>67</sup> In the bill, the consent of an offender for pre-release treatment was certified merely by a prosecutor and a court, but this seems to be insufficient to determine whether the consent is voluntary. However, it would be debatable whether mitigation of parole conditions for an offender undertaking pharmacotherapy continues undue inducement. Eyal argues that undue inducement makes it impossible to analyse the offer properly.<sup>68</sup>

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<sup>60</sup> Ibid s 6(1).

<sup>61</sup> Ibid s 9(1).

<sup>62</sup> Ibid s 9(2).

<sup>63</sup> Ibid s 9(1).

<sup>64</sup> Hwang, Lee and Hong (n 3) 24–28.

<sup>65</sup> Nir Eyal, ‘Informed Consent’ in Edward N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University 2011) <<http://plato.stanford.edu/entries/informed-consent/>> accessed 7 July 2016

<sup>66</sup> Harrison (Ch.1 n 8) 3.

<sup>67</sup> Ibid

<sup>68</sup> Eyal (n 61).

Taking into consideration the insecure state of an offender facing trial, mitigation of parole conditions might interrupt an offender's assessment of whether or not to consent. Thus, it can be regarded as undue inducement. If mitigation of parole conditions had been allowed for an offender who discontinued pre-release pharmacotherapy in the middle of treatment, it would not have been regarded as undue inducement. However, even though there was no penalty for refusal of pre-release pharmacotherapy, it would be difficult for the offender to cease the treatment, regardless of losing the incentive of mitigating parole conditions. Therefore, the consent of an offender for pre-release pharmacotherapy does not seem to be fully voluntary.

In regards to post-release pharmacotherapy, Hwang, Lee and Hong argued that this might amount to coerced consent, if early release were completely prohibited for offenders refusing the treatment but it might not be coercion if the requirement for parole was merely mitigated.<sup>69</sup> At the time when an offender chooses whether or not to consent to post-release pharmacotherapy, he does not seem to be coerced, but induced. With the same logic as mentioned above, an offender might consent to post-release treatment in order not to lose the incentive of mitigating parole conditions. In that case, the consent would not be regarded as fully voluntary. Moreover, Hwang, Lee and Hong did not discuss the withdrawal of the offender's consent during parole, so it would be constitute coerced treatment if the offender does not want to undertake it before the end of his parole period. Furthermore, in the draft of the bill, they introduced a punishment for offenders violating the obligation relevant to pharmacotherapy or psychological treatment, which is imprisonment for not more than seven years or a fine not exceeding 20 million won, as well as parole revocation.<sup>70</sup> Violation includes refusing to undergo castration or psychological treatment, taking countervailing medications or fleeing to avoid castration.<sup>71</sup> This provision makes it difficult to regard post-release pharmacotherapy as a treatment. The purpose of this penalty was explained as being to ensure that the offender undergoes the treatment.<sup>72</sup> However, this seems to be inconsistent with the argument that pharmacotherapy should be devised not as punishment, but as treatment,

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<sup>69</sup> Hwang, Lee and Hong (n 3) 26, 47.

<sup>70</sup> *Ibid*, 49.

<sup>71</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 35.

<sup>72</sup> Hwang, Lee and Hong (n 3) 49.

because revocation of parole alone would be enough to realise that purpose. Moreover, it places the offender who consents to post-release treatment in a far worse position than the offender who does not consent to it, because the former is at risk of being imprisoned for up to seven years for refusing to undertake the treatment, while the latter is not at risk of this, but merely risks revocation of parole no matter how seriously he violates his parole conditions. In this respect, the consent to post-release pharmacotherapy seems to be a coerced one rather than a freely given one.

Hwang, Lee and Hong also discussed the participation of an offender's spouse in the process, on the grounds of securing the human rights of the spouse whose rights to have a sexual relationship or to procreate would be violated by the pharmacotherapy of the offender.<sup>73</sup> They stated that, at the least, an opportunity to present an opinion in the criminal procedure should be given to an offender's spouse, even though it would be difficult to require the consent of the spouse.<sup>74</sup> However, this was not included in the draft of the bill. Discontinuation or suspension of the treatment based on side effects was also ignored. Although it was beneficial for the offender to introduce mandatory concurrent psychological treatment, which has been commonly recommended for pharmacological treatment by medical professionals,<sup>75</sup> detailed points were also assigned to a presidential decree.

In summary, the original purpose of the legislation was to introduce pharmacotherapy as a preventive measure rather than a punishment. In order to achieve this, the elements to be considered punitive should not have been in the bill. However, the case for pharmacotherapy in the bill included a number of flawed points, which are neither necessary nor appropriate for the realisation of the authors' and the proposing MPs' intentions. In consideration of these points, whether pharmacotherapy in the bill is a preventive measure or a punishment will be explored in the next section.

#### **6.4. Whether pharmacotherapy in the bill is a preventive measure or a punishment**

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<sup>73</sup> *Ibid.*, 28.

<sup>74</sup> *Ibid.*

<sup>75</sup> Thibaut and others (Ch.1 n 49), 613; Briken and Kafka (Ch.1, n 54) 612.

#### 6.4.1. Distinction between a preventive measure and a punishment

Korean criminal sanctions consist of punishments and preventive measures. The Korean constitution declares that ‘no person shall be punished, placed under preventive restrictions or subject to involuntary labour except as provided by Act and through lawful procedures’.<sup>76</sup> Whilst a punishment is imposed for the culpability of offenders based on their past criminal behaviour and restricted by the principle of culpability, which means that the punishment must be proportionate to the significance of the past crime, a preventive measure is imposed based on the risk of the offender reoffending in the future and controlled by the principle of proportionality, which means that preventive measures must be proportionate to the risk of reoffending.<sup>77</sup> The Constitutional Court has adhered to the views as follows:

For certain offenders, a mere punishment might not be enough for elimination of the risk of reoffending because the punishment shall be restricted by the offenders’ culpability relating to their past crime. Since a preventive measure, aiming at social protection and rehabilitation of those kinds of offenders, which was created in the European countries in the early twentieth century, has been introduced in the Constitution 1972, Parliament has legislative authority to enact any type of preventive measure which does not violate the constitutional rules. Accordingly, preventive detention in the Social Protection Act 1989, a kind of a preventive measure based on the constitution, is a separate criminal sanction having a different nature, purpose and function from those of a punishment. Therefore, the provisions, which allow a court to sentence preventive detention and punishment concurrently for the same crime, do not violate the rule of double punishment.<sup>78</sup>

Regarding the rule of double punishment prohibited by Article 13(1) of the constitution, the Constitutional Court has repeatedly declared that ‘this rule does not prohibit imposition of any and all sanctions or disadvantageous measures in addition to criminal punishment, but prohibits a state sanction equivalent to the exercise of authority to criminal punishment’.<sup>79</sup> Hwang, Lee and Hong thus thought that, in order to avoid violating the rule of double punishment, the most significant thing

<sup>76</sup> Constitution of the Republic of Korea 1987 (ROK) Art 10(1).

<sup>77</sup> Young Keun Oh, *Criminal Law I* (Pakyoungsa 2002) 905.

<sup>78</sup> CCC 88 Hun-Ga 5, 8 and CCC 89 Hun-Ga 44 (consolidated), 14 July 1989 [1989]

<sup>79</sup> CCC 92 Hun-Ba 38, 30 June 1994 [1994]; CCC 99 Hun-Ga 18, 31 May 2001 [2001]; CCC 2001 Hun-Ga 25, 24 July 2003 [2003]

would be not to make pharmacotherapy equivalent to punishment.<sup>80</sup> They believed that pharmacotherapy based on the consent of an offender, aiming at treatment and the prevention of reoffending, would be a preventive measure, which would not be equivalent to the exercise of authority as in criminal punishment.

A strict distinction between a punishment and a preventive measure has a long history in Korean criminal law. Under the Korean Criminal Act, since its first legislation in 1953, punishment has been crime-centred and tightly restricted by the principle of culpability, so that punishment is not based on a consideration of the risk of an offender reoffending.<sup>81</sup> It is based on what has been called ‘Classicism’,<sup>82</sup> having emerged as a reaction to a cruel, unpredictable and irrational criminal justice system in Europe in the eighteenth century, which insisted that punishments must be suitable for the characteristics of a crime rather than the criminal.<sup>83</sup> Modern criminal law was introduced to Korea for the first time in 1911 by the application of the Japanese Criminal Act 1907, which was influenced by the German Criminal Act 1871, which in turn was legislated under the influence of Classicism.<sup>84</sup> The Korean Criminal Act 1953 was legislated with reference to the Draft Bill of the Japanese Criminal Act 1940, which was influenced by the German Criminal Acts 1933 and 1935.<sup>85</sup>

With regards to how to deal with the past crime and the future risk of reoffending in the criminal sanction system, there have been two different ways.<sup>86</sup> One is the sole system of a criminal sanction regulating the past crime and the future risk with only a punishment.<sup>87</sup> The other is a dual system of criminal sanctions consisting of punishments that regulate the past crime, and preventive measures that regulate the future risk of reoffending. The latter has been adopted by most European countries.<sup>88</sup> The Korean Criminal Act has adopted the dual criminal sanction system. Preventive measures, other than punishments, were added as a target of the principle of legality in the section 10(1) in the Constitution 1972.

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<sup>80</sup> Hwang, Lee and Hong (n 3) 21.

<sup>81</sup> Wu Ye Kang and Hark-Mo Park, *Study on the System of Security-Measure* (Korean Institute of Criminology 2009) 21.

<sup>82</sup> Oh (n 73) 24–28.

<sup>83</sup> Newburn (Ch.5 n 9) 114–18.

<sup>84</sup> Oh (n 73) 28, 36.

<sup>85</sup> *Ibid* 37.

<sup>86</sup> Kang and Park (n 77) 22.

<sup>87</sup> *Ibid*

<sup>88</sup> *Ibid* 19–20



The dual system has been supported in that it can avoid imposing disproportionate punishments through the strict application of the principle of culpability, and preventive measures can be applied to high-risk or non-culpable offenders for security, rehabilitation or treatment.<sup>89</sup> Preventive measures in practice, however, have sometimes been criticised on account of their potential for abuse in the name of crime prevention and social protection. As punishments and preventive measures might be respectively deployed for the same offence in the dual system, it is likely that a harsher sanction will be imposed in dual system than in a single system. In order to avoid such a result, many scholars have maintained the following: that preventive measures should be executed earlier than imprisonment; that the executed term of preventive measures should be deducted from the term of imprisonment, and that the decision to suspend the execution of imprisonment after completion of the preventive measure should be deliberated on by a court.<sup>90</sup> These arguments, however, have rarely been reflected in the Korean acts, so all kinds of preventive detentions, except preventive medical treatment and custody orders, have been used as an additional sanctions to imprisonment, and in many cases offenders have been detained after completion of the term of imprisonment.

The first Korean preventive measure was introduced in the Social Safety Act 1975 and included indeterminate preventive detention, not for violent offences but for anti-state crimes such as insurrection, benefiting the enemy or joining an anti-government organisation.<sup>91</sup> The second one was legislated in the Social Protection Act 1980 and included a maximum of ten years of preventive detention for persistent offenders with a high-risk of reoffending and an indeterminate preventive medical treatment and custody orders for non-culpable or partly-culpable offenders based on a mental disorder or for offenders with a narcotic or alcohol addiction.<sup>92</sup> More than 80% of inmates detained in preventive detention facilities by the Social Protection Act 1980 between 1987 and 2003 were not violent offenders but larcenists, so Kang and Park claim that preventive detention had not been mainly used for dangerous offenders, but, rather for troublesome offenders in order to isolate them from

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<sup>89</sup> Ibid 21–22.

<sup>90</sup> Oh (n 73) 909.

<sup>91</sup> Social Safety Act 1975 (ROK) s 2, 17(1).

<sup>92</sup> Social Protection Act 1980 (ROK) s 5, 8.

society.<sup>93</sup> Such a distorted practice of preventive measures has been criticised in that it was inconsistent with the ideals of a dual criminal sanction system.<sup>94</sup> Finally, indeterminate preventive detention under the Social Safety Act was abolished in 1989, and the Social Protection Act 1980 was repealed in 2005. The term for preventive medical treatments and custody orders was limited to fifteen years by the Preventive Medical Treatment and Custody Act 2005.

Even though custodial preventive measures were removed, other than the preventive medical treatment and custody orders, non-custodial ones, such as EM, pharmacotherapy, and sex offender registration, disclosure and notification, have been expanded since the middle of the 2000s, due to the occurrence of high-profile sexual offences, moral panic in the media and the punitive turn of legal responses, as noted above. As a reaction to this trend of overusing non-custodial preventive measures, Lee argues that the concept of preventive measure implies a risk of expanding criminal sanctions and that a single system can regulate not only past crimes but also the future risk of reoffending under the premise that the extent of dangerousness must be assessed within the range of culpability because offenders' dangerousness cannot be evaluated separately from their offence.<sup>95</sup>

The current trend of increasing preventive measures in the Korean criminal justice system seems to be along the same lines as an 'emerging pre-crime society'<sup>96</sup> in Western countries. Zedner claims that growing pressure on governments regarding the pro-active response to risk has been significant due to continuing disasters since the September 11 attacks, thus, pre-crime interruption has been deemed crucial for reducing criminal opportunity, and, in this circumstance, prison becomes merely a facility for detaining high-risk offenders rather than a vehicle of punishment.<sup>97</sup> McAlinden states that, under the influence of the intensified punitive legislation in America, the UK has enacted the laws to manage dangerous offenders, in particular

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<sup>93</sup> Kang and Park (n 77) 27–28.

<sup>94</sup> Seung-Ho Lee, 'A Study on the Relation between the Diversification of Criminal Sanctions and the Function of Criminal Law' (2012) 24(3) *Journal of Korean Criminal Law* 63, 66.

<sup>95</sup> *Ibid* 84–85.

<sup>96</sup> Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11(2) *Theoretical Criminology* 261, 261.

<sup>97</sup> *Ibid* 624–25, citing R. Clarke, 'Situational Crime Prevention' in N. Morris (ed), *Crime and Justice: An Annual Review of Research vol 19* (1995); A. Von Hirsch, D. Garland and A. Wakefield, *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing 2000); J. Simon, 'The "Society of Captives" in the Era of Hyper-Incarceration' (2000) 4(3) *Theoretical Criminology* 285.

sex offenders, within ‘an overall retributive regulatory framework’,<sup>98</sup> which includes a ‘mandatory life sentence’,<sup>99</sup> the ‘extended sentence’ consisting of ‘the appropriate custodial term’ and ‘extension period’ of post-release supervision of up to eight years,<sup>100</sup> and the indeterminate detainment of offenders with dangerous severe personality disorder under the Mental Health Act 1983 and 2007.<sup>101</sup> Crawford addresses the British expansion of new forms of regulation to avoid the traditional crucial principles, such as proportionality and due process.<sup>102</sup> He argues that, in the name of a ‘response to perceived risk’, a continuing ‘regulatory spiral’ has become more dangerous in British policy.<sup>103</sup> He cites the 2006 report of the Better Regulation Commission (BRC), which claimed that ‘the role of the Government as risk manager is reinforced’ as a result of the public demand that something should be done, ‘which is amplified by the media’.<sup>104</sup> These arguments seem to be appropriate to explain the debates of the bill in the Korean Parliament, which will be addressed in the next section.

#### **6.4.2. Nature of pharmacotherapy in the Bill 2008**

Regarding whether pharmacotherapy as introduced by the bill was a punishment or a treatment, it would be helpful to look at the discussion about the definition and justification of punishment. H.L.A. Hart describes five requirements of punishment as follows: punishment ‘must involve pain or other consequences normally considered unpleasant’ and ‘must be for an offence against legal rules; of an actual or supposed offender for his offence; intentionally administered by human beings other than the offender; imposed and administered by an authority constituted by a legal system against which the offence is committed’.<sup>105</sup> According to this definition of punishment, pharmacotherapy seems to amount to punishment in that it creates suffering and a distasteful result, and it is used in response to an offender’s sexual

<sup>98</sup> McAlinden 2007 (Ch.2 n 12) 25–29.

<sup>99</sup> Criminal Justice Act 2003 s 225, 226(2).

<sup>100</sup> *Ibid* s 226A.

<sup>101</sup> Mental Health Act 1983 Part II Compulsory Admission to Hospital and Guardianship, Mental Health Act 2007 Chapter 1 Changes to key provisions

<sup>102</sup> A. Crawford, ‘Governing through Anti-Social Behaviour’ (2009) 49 *British Journal of Criminology* 810, 811.

<sup>103</sup> *Ibid*

<sup>104</sup> *Ibid*, citing Better Regulation Commission (BRC), *Risk, Responsibility and Regulation: Whose Risk is it Anyway?* (Better Regulation Commission 2006)

<sup>105</sup> HLA. Hart, *Punishment and Responsibility* (Oxford University Press 1968) 4–5.

crime. It might be argued that pharmacotherapy is not a punishment in that it is not a response to an offender's offence, but to reduce his risk of reoffending. As the risk of reoffending, however, cannot be separated from, and should be evaluated within the range of, an offender's offence,<sup>106</sup> it cannot be denied that pharmacotherapy is a response to a sexual offence. As noted above, even though the consent of an offender was required for imposing pharmacotherapy in the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008, the specific of the consent mean that it is insufficient to be regarded as a fully voluntary, and, once it starts, it would be enforced regardless of the offender's view about continuing treatment. Furthermore, the refusal of post-release pharmacotherapy would be punished. Harrison also argues that pharmacological treatment with voluntary participation may be considered as treatment, unless participation is compulsory, in which case it may be considered as punishment.<sup>107</sup> In this regard, pharmacotherapy in the bill comes close to punishment rather than a preventive measure aiming at treatment.

Pharmacotherapy in the bill would not be evaluated negatively simply because it amounts to punishment. Whether it would be justified is another issue. Punishment needs to be justified because it addresses a moral problem in that it causes harm to persons intentionally.<sup>108</sup> Concerning the justification of punishment, two major theories, consequentialism and non-consequentialism, have been discussed.<sup>109</sup> Whilst consequentialists claim that punishment is justified when it produces consequential benefit in the future, non-consequentialists, normally known as 'retributivists', insist that punishment is justified when it makes proportionate and appropriate response to crime.<sup>110</sup>

Non-consequentialism is a backwards-looking theory focusing on past crimes.<sup>111</sup> Non-consequentialists claim that offenders deserve to be punished and punishment is justified if it is an 'appropriate response to crime', which might called 'just desert'.<sup>112</sup> In the bill, pre-release pharmacotherapy is imposed during the term

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<sup>106</sup> Lee (n 90) 85.

<sup>107</sup> Harrison (Ch.1 n 8) 4.

<sup>108</sup> Wesley Cragg, 'Punishment' in C.B. Gray (ed), *The Philosophy of Law: An Encyclopedia* (Garland 1999) 707.

<sup>109</sup> R.A. Duff and D. Garland, 'Introduction: Thinking about Punishment' in R.A. Duff and D. Garland (eds), *A Reader on Punishment* (Oxford University Press 1994) 2–8.

<sup>110</sup> *Ibid* 4–8.

<sup>111</sup> *Ibid* 8.

<sup>112</sup> *Ibid* 7.

of imprisonment based on the consent of an offender and post-release pharmacotherapy is not an additional sanction to imprisonment, but merely a condition of parole. In this regard, it seems to be justified. From the non-consequentialists' viewpoint, however, pharmacotherapy in the bill cannot be justified in that this does not focus on an offender's past crimes, but on their future risk of reoffending, treatment and rehabilitation. In this context, pharmacotherapy seems to be disproportionate to an offender's crimes, taking into consideration its potential to violate human dignity, and the problems of disapproval of withdrawal of consent and of punishing refusal of post-release pharmacotherapy, which make it coercive rather than voluntary.

In contrast, consequentialism is a forward-looking theory focusing on the future effects of punishment.<sup>113</sup> Amongst consequentialists, utilitarians argue that punishment is justified if it produces more happiness than the pain incurred by it, and other consequentialists claim that punishment is justified if it achieves 'general deterrence, individual deterrence, rehabilitation and incapacitation'.<sup>114</sup> It is crucial to empirically prove the efficiency of a punishment in consequentialism.<sup>115</sup> From the consequentialist perspective, in order to decide whether pharmacotherapy is justifiable, the following issues need to be considered: whether it produces beneficial effects that are greater than the harmful results caused by it; whether there are no available alternatives to promote valuable results, at least the same as the results of coerced pharmacotherapy, and whether there are not less harmful alternatives.<sup>116</sup>

Harms incurred by pharmacotherapy might include the restriction of an offender's right to self-determination and their right not to suffer physical injury; the restriction of an offender and his spouse's rights to have sexual relations and to reproduction; the side effects of the treatment; the risk of treatment failure; the risk of being punished for refusal; the stigmatisation of an offender and the financial expenses of trial and treatment. In contrast, the advantages resulting from pharmacotherapy might include mitigating the excessive sexual drive or fantasies of an offender; helping him use self-control for appropriate sexual behaviour; rehabilitating the offender, and improving the safety of society through reducing the

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<sup>113</sup> Ibid 4, 8.

<sup>114</sup> Lucia Zedner, *Criminal Justice* (Oxford University Press 2004) 90–101.

<sup>115</sup> Duff and Garland (n 105) 7.

<sup>116</sup> Ibid 4, 6.

risk of sexual crime. If its advantages are not greater than its harm or the same benefits are achieved by a less harmful measure, pharmacotherapy would not be justified. Whilst harm caused by pharmacotherapy seems to be predicted intuitively, its advantages seem unpredictable unless they are proved by empirical research, so it cannot be said that its advantages are greater than its harms. The targets of pharmacotherapy were narrowed down in the bill in order to minimise its punitive characteristics but the treatment would be provided to a wider category of offenders without any expenses of a trial, if it were devised as pure treatment separately from criminal procedure. It would be an available alternative to coerced pharmacotherapy in the bill. If the withdrawal of consent to post-release pharmacotherapy were allowed, harmful results caused by the treatment would be reduced. It would be a less harmful alternative. In this respect, pharmacotherapy in the bill does not seem to be justified from the consequentialists' perspective.

In conclusion, even though there were many provisions relevant to curtailing the punitive characteristics of pharmacotherapy in the bill, it seems to be a punishment rather than a preventive measure and cannot be justified from either the consequentialist or non-consequentialist perspectives. This chapter now moves on to consider the debates on the bill in the Parliament.

## **6.5. Debates in the Parliament**

### **6.5.1. Debates before the public hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008**

This bill was introduced on 8 September 2008 and was first discussed in the Legislative and Judiciary Committee Sub-Committee on 21 November 2008. At the beginning of the sub-committee discussion, the chief expert advisor of the committee<sup>117</sup> reported that pharmacotherapy based on an offender's informed consent and targeted at high-profile child sex offenders would be constitutional, but that adequate social consensus was needed to enforce the treatment because it might

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<sup>117</sup> Each standing committee has its own expert advisory team. This team consists of a chief expert advisor, expert advisors and public officials who review the Bills. National Assembly Secretariat Act 2007 (ROK) s 8.

be controversial in view of human rights or effectiveness.<sup>118</sup> He also indicated that the term ‘castration’ might make people feel ashamed or embarrassed.<sup>119</sup>

Most of the members of the Legislative and Judiciary Committee were not convinced that pharmacotherapy should be legislated. In particular, they believed that there was a lack of social consensus on the treatment. Chun-Seok Lee stated that ‘even though the treatment is based on the offender’s consent, it is doubtful whether it would be purely voluntary. It would be better to deliberate this bill after confirming a national consensus through a public hearing’.<sup>120</sup> Il-Pyo Hong argued that ‘it is too cruel. I am not sure it coincides with the national legal sentiment’.<sup>121</sup> Sung-Woo Moon, the Vice-Minister of the Ministry of Justice, claimed that the Ministry of Justice did not have any empirical information about the effectiveness of pharmacotherapy.<sup>122</sup> Yun-Seok Jang, the chairman of the Sub-Committee, concluded that:

This Sub-Committee needs more process to ascertain the social consensus and more information about the effectiveness in different countries already running this treatment. This bill should be deliberated continuously through this process.<sup>123</sup>

### **6.5.2. Debates in the public hearing**

After this first discussion, this bill was not deliberated for nearly a year. However, as mentioned above, the Parliament faced huge criticism from the public after the Korea Broadcasting System (KBS) reported the fourth sex offence on 22 October 2009, therefore, the Parliament had no choice but to deliberate the bills regulating sex offenders. A public hearing of the bill was held by the Legislative and Judiciary Committee on 19 November 2009. Four panels, consisting of two criminal law professors, a psychiatrist and a forensic psychology professor, argued about the important points of the bill and answered questions from MPs. These are described in sub-sections A to D below.

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<sup>118</sup> National Assembly Legislative and Judiciary Committee, *Report on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008* (20 November 2008) 10.

<sup>119</sup> *Ibid* 11.

<sup>120</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* (21 November 2008) 7.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* 6-7.

### A. The effectiveness, assessment and side effects of pharmacotherapy

Whether pharmacotherapy would be effective was the topic of most concern. Eui-Jin Shin, a psychiatrist, argued that well-devised pharmacological treatment would be effective for specific kinds of sex offenders, but sufficient clinical study on the drugs used for the treatment should be done before execution.<sup>124</sup> She added that a lot of information and data pooling about the effectiveness of the treatment of different types of sex offenders and the side effects of the treatment was also required, and that a training programme for psychiatrists should be prepared because they need to participate in the trial and treatment procedure.<sup>125</sup> Eun-Kyoung Cho, a forensic psychology professor, who opposed the bill, stated that:

There is no study of the classification system of the psychological character of child sex offenders in Korea. Paedophile sex offenders can be categorised quite differently and their offences would be various. Therefore, it is difficult to judge whether the offender is a paedophile or if he is appropriate for the treatment based on only the exposed criminal activity. Who would be responsible for the treatment executed to improper persons by false positive errors in the assessment? The pharmacological treatment's effect does not persist if the treatment is discontinued, so I doubt whether it can treat the sexual activity based on the distorted sexual attitude of sex offenders who commit offences against children. We need more studies.<sup>126</sup>

Sang-Hun Han, a criminal law professor, claimed that, even though he agreed with the introduction of new kind of therapeutic measure for sex offenders, it should be deliberated cautiously because there has been little research relevant to the effectiveness and side effects of the treatment, the causes of sexual offences and the reoffending of sex offenders.<sup>127</sup> He added that provisions relevant to physicians' monitoring of side effects during the treatment should be inserted.<sup>128</sup> Hee-Kyun Kim,

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<sup>124</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008* (19 November 2009) 5–6.

<sup>125</sup> *Ibid* 6–7.

<sup>126</sup> *Ibid* 8–10; National Assembly Legislative and Judiciary Committee, *Sourcebook of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008* (19 November 2009) 28.

<sup>127</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 11.

<sup>128</sup> National Assembly Legislative and Judiciary Committee, *Sourcebook of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 51.



a criminal law professor, argued in favour of the bill and stated that side effects cannot be an obstacle, because these would be reduced if the government monitored it thoroughly, and those sex offenders deemed suitable for the treatment, who were suffering mentally and physically from excessive sexual energy, could be classified using a current psychiatric assessment model.<sup>129</sup>

### **B. Informed consent of an offender and whether pharmacotherapy is a punishment**

There were no objections to the requirement for an offender's consent to the treatment, but some supplementary points were indicated. Hee-Kyun Kim argued that the offender should be informed of the risks and anticipated benefits of the treatment, the consequences of not having the treatment, and alternatives to the treatment before giving their consent.<sup>130</sup> He added that post-release pharmacotherapy would be a double punishment if it were executed without an offender's consent.<sup>131</sup> Eun-Kyoung Cho indicated the problem of the consent to pre-release pharmacotherapy. She claimed that it would be difficult to expect an offender, who faces a choice regarding minimising his custodial sentence, to fully understand the effects and side effects of the treatment.<sup>132</sup>

Regarding the legal nature of the treatment, Sang-Hun Han argued that the punishment should be imposed based on past offences and that the preventive measures should be based on the risk of reoffending in the future, so pharmacotherapy in this bill should be considered as a preventive measure rather than a punishment, because the treatment aimed at the prevention of reoffending.<sup>133</sup> He added that the effectiveness and non-severity of the side effects of the treatment and the consent of the offender are required in order that the treatment could be regarded as a preventive measure.<sup>134</sup> He also maintained that the provisions relevant

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<sup>129</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 2.

<sup>130</sup> National Assembly Legislative and Judiciary Committee, *Sourcebook of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 9.

<sup>131</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 31.

<sup>132</sup> National Assembly Legislative and Judiciary Committee, *Sourcebook of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 28.

<sup>133</sup> *Ibid* 42–43.

<sup>134</sup> *Ibid* 43, 47.

to the withdrawal of consent afterwards should be added, to secure the human rights of an offender.<sup>135</sup>

### **C. Early release, when to execute pharmacotherapy and the use of the term ‘chemical castration’**

Concerning early release based on undergoing the treatment and the other points, Hee-Kyun Kim criticised early release on the grounds that pharmacotherapy should be an additional disposition to the punishment to prevent high-risk offenders from reoffending.<sup>136</sup> Furthermore, he argued that the treatment should not be executed at the beginning of imprisonment but at the end of imprisonment at a time when the offender returns to the community, because its purpose is to protect the community.<sup>137</sup> He also claimed that the term ‘castration’ should be used in order that the treatment has a deterrent effect on sex offenders.

Sang-Hun Han argued that it is not effective to provide the treatment at the beginning of imprisonment because the effects of pharmacotherapy were reversible and that normal imprisonment terms for sex offenders are far longer than six months, so that proper intervention after the treatment would be neglected.<sup>138</sup> He also claimed that a treatment period of longer than six months could be considered if there were few side effects and the treatment was effective.<sup>139</sup> Contrary to Kim, he opposed the use of the term ‘castration’ and ‘incapacitating’ because the effect of the treatment was not incapacitating but a temporary weakening of sexual function.<sup>140</sup> He suggested that pharmacotherapy should be legislated in the Preventive Medical Treatment and Custody Act rather than in a separate law because the target patients of both mostly overlap.<sup>141</sup>

### **D. MPs’ Discussions**

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<sup>135</sup> Ibid 50.

<sup>136</sup> Ibid 11.

<sup>137</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 4.

<sup>138</sup> National Assembly Legislative and Judiciary Committee, *Sourcebook of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 50.

<sup>139</sup> Ibid

<sup>140</sup> Ibid 48–49.

<sup>141</sup> Ibid 51.

Among eleven MPs participating in this public hearing, five commented that more research would be required before the legislation of pharmacotherapy. Byoung-Kook Choi argued that current laws relevant to sexual offences seemed to be enough to regulate sexual offences, even if pharmacotherapy was not introduced, because the real concern was weak sentencing for sexual offences.<sup>142</sup> Il-Pyo Hong claimed that it was premature to legislate because, according to the panel's discussion, assessment to decide on appropriate sex offenders for treatment was not that simple and the effectiveness of the treatment needed to be investigated more.<sup>143</sup> Kwang-Duk Joo expressed his concern about the treatment's risk of violating an offender's human rights in relation to marriage and reproduction.<sup>144</sup>

In contrast, two MPs supported the bill. Min-Sik Park maintained that various legislative measures to respond to sex offenders were presently required because of the high number of victims and the suffering caused to them.<sup>145</sup> He added that its current implementation in different countries was the proof of the effectiveness of the treatment, and the term 'castration' might have a deterrent effect.<sup>146</sup> Bum-Kyu Sohn argued that pharmacotherapy using safe drugs would not be a double punishment, even if it were executed without an offender's consent after release from prison, separately from the punishment, because it produced only temporary cessation of sexual function and therefore should be regarded as treatment rather than a punishment.<sup>147</sup> He was the only participant who denied the necessity of the requirement for an offender's consent.

In summary, most of the participants in the hearing agreed that there was not enough information about pharmacotherapy and more research was required. The requirement for an offender's consent was also accepted as a necessary factor to keep pharmacotherapy's therapeutic nature in this bill.

### 6.5.3. Debates after the public hearing

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<sup>142</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008*, 15–16.

<sup>143</sup> *Ibid* 17–19.

<sup>144</sup> *Ibid* 28–29.

<sup>145</sup> *Ibid* 14.

<sup>146</sup> *Ibid*

<sup>147</sup> *Ibid* 32.

Three months after the public hearing, the fifth sex offence discussed in Chapter 4 was committed on 24 February 2010. At that time, public opinion had become more heated as a consequence of the KBS report on the fourth crime mentioned above, so criticism of the government and Parliament grew daily. After the fifth offence, the bills related to sex offences pending on the Legislative and Judiciary Committee were hurriedly discussed and most of them were passed in the Whole House Committee on 31 March 2010. The Legislative and Judiciary Committee Sub-Committee was held four times from 24 February 2010 to 31 March 2010, but this bill was deliberated on only once, on 22 March 2010.

Supportive opinions on the use of pharmacological treatment increased slightly among MPs and Gwee-Nam Lee, the Secretary of the Ministry of Justice, supported the introduction of the pharmacological treatment of sex offenders in the Legislative and Judiciary Committee on 18 March, 2010.<sup>148</sup> Nonetheless, some Committee members were still not convinced about the bill. In the Legislative and Judiciary Committee Sub-Committee on 22 March, 2010, Il-Pyo Hong commented, with reference to public opinion, that ‘it looked like we were in trouble when we held the public hearing, but very recent public opinion has asked us to deliberate pharmacological treatment. We need more time to discuss’.<sup>149</sup> Young-Seon Park added that ‘the treatment does not make sex offenders sterilised and the effect is reversible, so we don’t need to view it too seriously’.<sup>150</sup> Hee-Chol Hwang, the Vice-Minister of the Ministry of Justice, maintained that ‘we are told that the side effects of the drugs are becoming reduced and the effectiveness of the treatment has been improved, so it seems to be discussed positively’.<sup>151</sup> In contrast, Si-Kyu Lim, a judge in the Supreme Court, stated that ‘the method of execution and effectiveness of the treatment do not seem to have been proved yet’.<sup>152</sup> Soon-Hyoung Cho stated strongly that the bill should be discussed more carefully, saying:

The effectiveness or practicality of the treatment has not been proved yet, and there are very many other policies against sex offences that we have to deliberate apart from this bill. Even though it is executed

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<sup>148</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* (18 March 2010) 12.

<sup>149</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 49–50.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

based on the offender's consent, it cannot help but cause physical harm to them.<sup>153</sup>

Yun-Seok Jang, the chairman of the Sub-Committee, concluded that 'there are some positive opinions in this committee, but it would be better to discuss the bill more seriously'.<sup>154</sup>

When the sixth offence was committed on 7 June 2010, a number of bills regulating sexual offences apart from this bill had already been passed in Parliament on 31 March 2010, so MPs felt pressured to deliberate this bill to relieve the public uproar. In this context, the Legislative and Judiciary Committee deliberated this bill again three times between 28 and 29 June 2010, and the Whole House Committee passed it on 29 June 2010. The main points of the bill were changed dramatically through this short deliberation, which are outlined in sub-sections A to I below. Whilst consideration of therapeutic factors decreased, punitive points increased during this discussion. As ten members of the Legislative and Judiciary Committee out of the sixteen were replaced on 8 June 2010 due to a procedural requirement of the National Assembly Act 1994,<sup>155</sup> only three members who had participated in the public hearing remained.

#### **A. Change of the term 'chemical castration' to 'pharmacological treatment'**

During the deliberation, it was agreed without any objection to change the term 'chemical castration' to 'pharmacological treatment' because the effects of the treatment are reversible and it is not used as a means of sterilising but of treating an offender.<sup>156</sup>

#### **B. Elimination of the requirement of informed consent of an offender**

As informed consent was a crucial point in introducing pharmacotherapy as a treatment, whether or not the requirement for the offender's consent was needed was

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<sup>153</sup> Ibid, 49–50.

<sup>154</sup> Ibid, 50.

<sup>155</sup> The term of the Standing Committee members shall be two years so that many MPs change their Standing Committee after the term. National Assembly Act 1994 (ROK) s. 40.

<sup>156</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 4–5, 21.

discussed seriously. Jun-Seon Park argued that ‘the legal nature of this treatment is a preventive measure and there is no preventive measure that requires an offender’s consent for prosecution or sentence in current criminal procedure, so the requirement for an offender’s consent does not seem to correspond to the principle of criminal procedure’.<sup>157</sup> Hee-Chol Hwang, the Vice-Minister of the Ministry of Justice, added that ‘it would be of no use if the preventive measure required an offender’s consent’.<sup>158</sup> This implied that no offender would agree to take the pharmacological treatment, which would result in a policy with little practical application. Eun-Su Park disputed these opinions strongly, as follows:

Even though the legal nature of the pharmacological treatment orders is regarded as a preventive measure, it can violate human rights more than a punishment. There is no legislation for pharmacological treatment without the offender’s consent in other countries except only a few states of the U.S. It can even violate the human rights of the offenders’ spouses. Therefore, we need to deliberate the legislation of the countries that do not introduce pharmacological treatment. European countries’ legislation requires offender’s consent. We need to scrutinise foreign countries’ legislation in more detail.<sup>159</sup>

Young-Seon Park added that ‘it would be better to keep the condition of the offender’s consent, which is a very important point’.<sup>160</sup> Jun-Seon Park argued that ‘it is unacceptable if the national legal system might be controlled by the consent of the parties concerned like a business deal’, and ‘if an offender’s consent were required, prosecution and sentence procedure would be unnecessary’.<sup>161</sup> Even though Eun-Su Park stressed the problems associated with removing the requirement for consent, it was finally decided to remove it.

### **C. Removal of pre-release treatment and survival of post-release treatment**

When to execute the treatment was the other issue that was discussed intensely. While in the bill it was stated that the treatment should be executed at the beginning of imprisonment or preventive medical treatment and custody orders, the Ministry of

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<sup>157</sup> Ibid 5.

<sup>158</sup> Ibid

<sup>159</sup> Ibid 6, 10.

<sup>160</sup> Ibid, 7, 12.

<sup>161</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 9–10.

Justice claimed that it should be a post-release treatment as a preventive measure separated from the punishment, on the grounds that it is unnecessary in custody where the risk of reoffending is low, but it is necessary in the community where the risk is high.<sup>162</sup> Its procedural structure is similar to post-release EM, which is imposed by prosecution and sentence, and enforced when an offender is released from prison or the National Forensic Hospital. Eun-Su Park criticised post-release treatment sharply as follows:

I am worrying that this Sub-Committee is in a hurry. We need to discuss this more deliberately because the Ministry of Justice seems not to be prepared enough to do this treatment. Post-release treatment seems very irrational. A court normally sentences child sex offenders to imprisonment for more than ten years in the present. This means giving the Ministry of Justice the opportunity to rehabilitate an offender for more than ten years so that pharmacological or psychological treatment should be executed for these ten years aiming at an offender's rehabilitation. We need to discuss what the government should do in this period.<sup>163</sup>

Seong-Young Joo argued that the 'psychological treatment of sex offenders is already executed during imprisonment and the immediate problem is how to respond to the reoffending of sex offenders in the community after their release from prison'.<sup>164</sup> Jun-Seon Park maintained that it would be better if an offender's sexual deviance could be cured or ceased for a long time after release through treatment during the imprisonment term, but, if it was not, a preventive measure was needed to protect society.<sup>165</sup> He added that 'it would be imposed by sentence in consideration of a mandatory physician's assessment and executed by medical professionals, so the factors violating human rights would be minimised'.<sup>166</sup> Finally, post-release treatment was adopted and whilst pre-release treatment was not.

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<sup>162</sup> Ministry of Justice, *Opinions About the Prevention and Treatment of Persistent Sex offenders Bill* (25 June 2010) 3.

<sup>163</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 16; National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 3–4.

<sup>164</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 4.

<sup>165</sup> *Ibid.*, 5.

<sup>166</sup> *Ibid.*

#### **D. Retroactive application of pharmacotherapy on existing inmates**

Existing inmates were excluded from the pharmacological treatment in the original bill. The Ministry of Justice, however, suggested inserting the procedure to enable existing inmates to take the treatment.<sup>167</sup> Seong-Young Joo argued that ‘it would violate the *ex post facto* principle so that, in that case, it requires an inmate’s consent’.<sup>168</sup> Consequently, among inmates detained in custody for whom imprisonment or preventive medical treatment and custody orders have been given but pharmacological treatment orders have not been declared, paraphilic-disordered sex offenders who agree to take pharmacological treatment become a target of the treatment.

#### **E. When to sentence to pharmacotherapy**

When to sentence the offender to the treatment and the procedures to reassess the necessity of the treatment were also discussed. According to the original bill, a court shall decide whether to impose pharmacological treatment at the same time as the court sentence is given to an offender, and there is no way to reassess the necessity of the treatment afterwards. Eun-Su Park argued that ‘it would be better to order the treatment only for inmates whose risk of reoffending is still high right before they are released’<sup>169</sup> and that ‘it might be possible to assess an offender in the present, but how can a court judge the necessity of the treatment of an offender in the future after the term of imprisonment?’<sup>170</sup> Il-Hwan Park, a judge of the Supreme Court, answered that ‘it seems to be difficult to decide whether the treatment would be required for an offender, for instance, after 5, 10 or 15 years of imprisonment’.<sup>171</sup> Young-Seon Park suggested that it would be reasonable for a court to judge the previous sentence again six months or a year before an offender was released.<sup>172</sup> Jun-

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<sup>167</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 7.

<sup>168</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 6–7.

<sup>169</sup> *Ibid*, 15.

<sup>170</sup> *Ibid*, 4; National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* 6.

<sup>171</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* 6.

<sup>172</sup> *Ibid*, 7.



Seon Park claimed that a court might reject the request for treatment if it were difficult to decide.<sup>173</sup>

The procedures to reassess the necessity of pharmacotherapy afterwards should have been reflected in the Act in that no one objected to this intensely and it was significant for a court to decide appropriately, but there was too little time for the Legislative and Judiciary Committee to do that. Eventually, on 23 December 2015, the Constitutional Court ruled that the provision relevant to the sentencing procedure for the treatment was not coincident with the constitution on the grounds of this matter. This case will be scrutinised in detail in the next chapter.

#### **F. Duration of pharmacotherapy**

In the original bill, the duration of treatment was not more than six months, but this was soon extended significantly to a term of not more than fifteen years. This was decided with reference to the duration of preventive medical treatment and custody orders, which are not more than fifteen years. It was provided that a court shall give a sentence for the treatment with a determined period and the Preventive Medical Treatment and Custody Committee would examine the necessity of continuous treatment every six months.

#### **G. Extension of victims' age**

Whether to change the limitation on victims' ages was debated. The expert advisory team,<sup>174</sup> reported that, among the U.S. states' statutes for pharmacological treatment, there was no limitation on a victim's age in Florida; it was under the age of 13 in California and Iowa; under the age of 16 in Montana, and under the age of 17 in Texas.<sup>175</sup> The team also suggested that under the age of 16 would be appropriate on the grounds that the EM Act 2007 applied to cases involving victims under the age of 16.<sup>176</sup> Eun-Su Park argued that, from a human rights point of view:

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<sup>173</sup> Ibid.

<sup>174</sup> Each standing committee has its own professional support team.

<sup>175</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 14.

<sup>176</sup> Ibid

We must be very careful when we introduce the system restricting human rights. I think EM is very different from pharmacological treatment, so it is not reasonable to apply the same criterion as EM.<sup>177</sup>

Some preferred to delete the requirement of the victims' age altogether. Seong-Young Joo asked 'why do we restrict victims' age? I don't think there is any reason to limit victims' age'.<sup>178</sup> Young-Seon Park debated that the original bill targeted sex offenders who offended against children, so the limitation on the age of victims was necessary and argued that targeting offenders whose victims were under the age of 16 would be reasonable.<sup>179</sup> Finally, under the age of 16 was selected as a compromised proposal in the revised bill.

#### **H. Differentiated punishment following the level of violation**

Punishment for violation of obligatory treatment was discussed. Hwang, the Vice-Minister of the Ministry of Justice, stated that punishment for violation would be the only way to force the offender to take the treatment, because forcible treatment against the offender's body was not allowed.<sup>180</sup> Eun-Su Park stated that there might be no legislative example in the world of punishing an offender on account of their refusing to take treatment.<sup>181</sup> Hwang again argued that punishing an offender should be inevitable if the person escaped or took drugs that have the opposite effect, and that it was impossible to inject drugs into the offender by force.<sup>182</sup> Jun-Seon Park claimed that this policy might be meaningless unless measures to compel an offender to take the treatment were arranged. Finally, in the revised bill, differentiated punishment following the level of violation was introduced.

#### **I. Elimination of the requirement of persistent offenders**

The requirement of 'persistent offenders' was eliminated. Actually, this modification was based on a misunderstanding of the Sub-Committee Members. The target

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<sup>177</sup> Ibid

<sup>178</sup> Ibid 15.

<sup>179</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 29–30.

<sup>180</sup> Ibid 14.

<sup>181</sup> Ibid 16.

<sup>182</sup> Ibid 16–17.

offenders of the bill were paraphilic disordered *or* persistent sex offenders, who had committed offences against children under the age of 13. However, the Sub-Committee Members thought that the target offenders were paraphilic disordered *and* persistent sex offenders, who had committed offences against children under the age of 13, so they deleted the ‘persistent’ condition in order to expand the application of the treatment. Doo-A Lee asked, ‘will a risk of re-offence be the only requirement if we delete ‘persistent’?’ and stated that it may widen the application of the order.<sup>183</sup> Han-Kyu Lee, the chief expert advisor of the Legislation and Judiciary Committee said ‘yes, it does’.<sup>184</sup> In conclusion, a persistent but non-paraphilic disordered sex offender was excluded from the target group of the treatment orders.

Even though more deliberation was required, the Legislative and Judiciary Committee was pressured to pass the bill. At the last Sub-Committee on 29 June, 2010, Eun-Su Park claimed that, ‘frankly speaking, the deterrent effect seems to be the most significant intention of the treatment. If so, rather, why don’t you introduce flogging?’<sup>185</sup> He also raised important questions, such as whether to allow a prosecutor to request a court to sentence the same sex offender to imprisonment, preventive medical treatment and custody orders and pharmacological treatment orders concurrently.<sup>186</sup> However, time was again too short to deliberate. Chun-Seok Lee stated that, ‘I might agree with the statements of MP Eun-Su Park who insists on careful deliberation. However, since the situation has been very bad, we need to show our endeavour and this bill can sound an alarm in the society’.<sup>187</sup> The Legislative and Judiciary Committee Sub-Committee revised the bill and sent it to the Legislative and Judiciary Committee on the afternoon of the 29 June, 2010. Yun-Keun Woo, the chairman of the Legislative and Judiciary Committee, stated that ‘since both parties made a mutual agreement to pass this bill in the Whole House Committee today, we need to decide the bill right now. We will be able to introduce an amendment bill for unsatisfactory parts in the future’.<sup>188</sup> The bill was sent to the Whole House

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<sup>183</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 7.

<sup>184</sup> *Ibid*

<sup>185</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Sub-Committee Records* 11.

<sup>186</sup> *Ibid*, 27.

<sup>187</sup> *Ibid*, 7.

<sup>188</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* 9.

Committee and was passed with a 76.1% agreement rate on 29 June, 2010. It became the Pharmacological Treatment of Sex Offenders Act 2010.

#### **6.5.4. Policy transfer analysis of the debates**

As discussed in Chapter 2, compulsory pharmacotherapy has been enacted in a similar context in the both some U.S. States' and Korea. Despite the fact that there are various ways to use medication for sex offenders, the reason why more-punitive types of compulsory pharmacotherapy have been introduced in different countries since the early 2000s can be analysed through a policy transfer analysis. Dolowitz explains that policy transfer means 'the occurrence and processes of the development of programmes, policies and institutions in one political system which are based upon the ideas, institutions, programmes and policies emanating from other political systems'.<sup>189</sup> Under the influence of globalisation, in order to revise their own political or social structures, policy-makers tend to consider more the expertise and ideas of foreign systems.<sup>190</sup>

According to Dolowitz's policy transfer framework, policy transfer occurs at some point on a continuum between purely voluntary and coercive transfer.<sup>191</sup> If actors adopt policy transfer enthusiastically in order to solve a 'perceived problem', it is purely a voluntary policy transfer.<sup>192</sup> Most policy transfer, however, occurs at a point closer to the middle of the continuum, because whether and how to engage in policy transfer may be based on a biased or incorrect evaluation of the 'real' situation on the grounds of the policy actors' perceptions influenced by a particular situation, specific ideals, and other influences at any given time.<sup>193</sup> Regarding the recent legislation on compulsory pharmacotherapy discussed at length above, it seems evident that public outrage pushed politicians and government officials to respond to child sexual offences, and, under these circumstances, they seem to have hastily sought a solution to this issue which was more acceptable to the public, with a lack of consideration of other ways to introduce medication for sex offenders. This

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<sup>189</sup> David P Dolowitz, 'Introduction: A New Face to British Public Policy' in David P. Dolowitz and others (eds), *Policy Transfer and British Social Policy* (Open University Press 2000) 3.

<sup>190</sup> *Ibid*, 4.

<sup>191</sup> *Ibid*, 12.

<sup>192</sup> *Ibid*, 13.

<sup>193</sup> *Ibid*, 14.

seems the reason, combined with the moral panic examined in Chapter 5, why more-punitive types of compulsory pharmacotherapy have been chosen rather than purely therapeutic pharmacotherapy. Dolowitz states that policy transfer is more likely to occur, if a state hurriedly seeks a solution to an ‘urgent problem’, but it may be less likely to be successful, because the restricted time will inevitably result in an inadequate examination of models, inappropriate changes, or even no modifications.<sup>194</sup>

He adds that policy-makers often drive policy transfer “with little understanding of how it works in the originating system or how it will work in its new setting’.<sup>195</sup> This argument can be applied literally to the legislation of the 2010 Act in Korea in that the constitutional problems and problematic situation of implementation in the U.S. states discussed above were ignored during the deliberation in Parliament, despite the fact that the research document commissioned by Park included related discussions and that there was a large amount of literature on these issues written in English that could be easily found. As discussed in Chapter 2, only six states of the U.S. have adopted mandatory pharmacotherapy, and few of those have been managed well. These issues have rarely been known in Parliament and the government. Accordingly, the enactment of the 2010 Act can be regarded as a case of unsuccessful policy transfer.

As addressed in 6.2., a personal experience of a law maker needs to be considered important in order to explain how the law is created. MP Park played a great role in the enactment of the 2010 Act under the influence of his experience of a prosecutor, but he seems to have little information about how the U.S. pharmacotherapy of sex offender works. Had he properly understood the reality of the U.S. examples and purely therapeutic types of medication in European countries, the 2010 Act might have been a successful policy transfer.

#### **6.5.5. The ignorance of the arguments of feminist activists**

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<sup>194</sup> Ibid, 11.

<sup>195</sup> Ibid, 14.

As discussed in 3.6.2., feminist activists continued to oppose the compulsory pharmacotherapy of sexual offenders.<sup>196</sup> They claimed that compulsory pharmacotherapy would not be effective for the prevention of sexual offenders from reoffending because most of them are acquaintances of a victim,<sup>197</sup> and sexual offences are not just caused by sexual desire.<sup>198</sup> In addition, they were worried that the budget for the protection of victims would be reduced because of spending too much money on electronic monitoring or compulsory pharmacotherapy.<sup>199</sup> Their arguments were important but ignored during the deliberation process of the 2010 Act. As explored in this chapter, it was because the members of Parliament had not enough time to deliberate the 2008 Bill carefully under the pressure of the public requiring legal responses to case 6 noted in Chapter 5. In addition to this, however, the analysis of sex difference on male and female members of Parliament would be reasonable to explain why feminist activists' arguments were ignored.

Choi, Kim and Yoon analyse the activities of MPs on women-related bills to find sex difference between male and female MPs from 30 May 2004 to 30 June 2006.<sup>200</sup> They argue that female members tended to be far more active on women-related bills than male members.<sup>201</sup> The average number of women-related bills introduced by a female member was 2.23, whilst that by a male member was 0.3.<sup>202</sup> More women-related bills were introduced in the standing committee where females have more seats than males.<sup>203</sup> They conclude that as the number of female members increases, there are more opportunities for women-related issues to be legislated.<sup>204</sup> Interesting result emerged from the examination of the composition of the Legislative and Judiciary Committee at the time the 2010 Act was enacted. Of 14 members of the committee, eleven members were male and three members were female.<sup>205</sup> In addition to the small number of female members, it is hard to find committee members who

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<sup>196</sup> Lee (Ch 3., n 148).

<sup>197</sup> Ibid.

<sup>198</sup> Lee (Ch 3., n 147).

<sup>199</sup> Lee (Ch 3., n 148).

<sup>200</sup> Jeong-Won Choi, Wonhong Kim and Deuk-Kyung Yoon, 'Analysis of Sex Difference on Men and Women Members of the 17th National Assembly: Focused on the Legislation Process on Women's Issues' (2008) 14(1) Korean Journal of Legislative Studies 83, 83.

<sup>201</sup> Ibid, 96.

<sup>202</sup> Ibid. 96.

<sup>203</sup> Ibid. 97.

<sup>204</sup> Ibid, 104.

<sup>205</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* (29 June 2010) 30.

were closely related to feminist groups whether they were male or female.<sup>206</sup> There was little discussion on behalf of feminist activists during the deliberation of the 2010 Act in the records of the Legislative and Judiciary Committee.<sup>207</sup> In this regard, it seems that feminist activists' thoughts about compulsory pharmacotherapy were unknown to MPs. If there were any MPs who understood the statement of feminist groups about compulsory pharmacotherapy, the deliberation would have proceeded in different ways.

### 6.6. Main points of the 2010 Act

The Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 attempted to introduce pharmacotherapy as a treatment but it was finalised as a punishment in the 2010 Act. Ironically, even though the term 'chemical castration' in the bill was replaced by 'pharmacological treatment' in the Act, the therapeutic colours became lighter and the punitive colours became deeper. Table 6-2 shows how the punitive factors of the 2010 Act have been strengthened in contrast to the bill.

Table 6-2: Contrast between the Bill and the Act

Main Points	The Bill	The Act
An offender's consent	Requiring an offender's consent for a prosecutor's request and a court's sentencing	Not required
Expansion of targets	Sex offenders aged 25 or over who have committed a sexual crime against children under the age of 13	Sex offenders aged 19 or over who have committed a sexual crime against children under the age of 16
Treatment duration	Up to six-months for pre-release treatment During the term of parole for post-release treatment	Elimination of pre-release treatment Up to fifteen years for post-release treatment
Retroactive application of the order	None	Pharmacological treatment orders may be sentenced retroactively to the convicted paraphilic disordered sex offenders who consent to take the treatment after release.

<sup>206</sup> National Assembly, *18th National Assembly Guidebook* (2008)

<sup>207</sup> National Assembly Legislative and Judiciary Committee, *Legislative and Judiciary Committee Records* (1 June–30 June 2010)

Punishment for violation	Imprisonment for not more than seven years or a fine not exceeding 20 million won	Differential punishment shall be imposed following a violating activity.
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In order to revise the essential parts of the bill in the short deliberation time, the existing provisions for preventive measures for sex offenders, such as the EM order and preventive medical treatment and custody orders, were adopted. An offender's consent is not required for either. The age limit of the offender and victims, retroactive application to inmates and punishment for violation in the Act were modelled on the Electronic Monitoring Act 2010.<sup>208</sup> The duration of the treatment, up to fifteen years, is the same as for preventive medical treatment and custody orders.<sup>209</sup> The main points of the Act will be addressed here.

#### **6.6.1. Elimination of the consent requirement and pre-release pharmacotherapy**

As noted above, the consent of an offender was the most important point in the bill in order to make pharmacotherapy a preventive measure aimed at treatment rather than punishment. However, during the deliberation in Parliament, this requirement was eliminated, so that the consent of an offender was not required for a prosecutor's request or a court's sentencing in the Act.<sup>210</sup> There is no process to enquire into an offender's will during a trial. This cannot affect the criminal procedure at all, even if an offender expresses his opposition to the treatment. This modification has been criticised as a crucial cause of the fact that the Act is punishment-oriented.<sup>211</sup> Pre-release pharmacotherapy has been removed. As MP Eun-Su Park indicated in the deliberation, long-term imprisonment for sex offenders would be an opportunity for the government to provide treatment but this idea was ignored by the 2010 Act.

#### **6.6.2. Expansion of targets**

According to the intention of the authors of the research paper described above and the proposing MPs, which was to minimise the targets of pharmacotherapy, the

<sup>208</sup> Electronic Monitoring Act 2010 (ROK) s 4, 5(1), 38–39, Addenda s 2.

<sup>209</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 16.

<sup>210</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 4, 8.

<sup>211</sup> Sam-Kwang Oh, 'A Study on the Scheme for Development of the Drug Treatment System for Sex Drive' (2012) 21 *Ilkam Law Review* 519, 527.



target offenders' age limit was 25 or over in the bill and the victims' age was to be under 13. The victims' age limit was connected with the definition of paedophilia, which is defined as a 'sexual preference for prepubescent children', and girls' puberty normally occurs 'by the ages of twelve or thirteen'.<sup>212</sup> In the Act however, the victims' age as related to the legal response was extended to under 16.<sup>213</sup> In addition, the age limit of an offender was lowered to 19 or over in the Act.

This revision has also been criticised in that it reinforces a punitive characteristic of the Act,<sup>214</sup> and raises a problem regarding whether offenders who commit sexual offences against children over the age of 13 are paraphilic because being a 'paraphilic-disordered sex offender' is another requirement for the treatment.

### **6.6.3. Post-release treatment up to fifteen years**

The duration of the treatment in the Act has been lengthened extraordinarily in comparison to that of the bill. Post-release treatment may be imposed by a court for up to fifteen years in the Act.<sup>215</sup> When sentencing to the treatment, a court shall decide on a specific period for the treatment within fifteen years.<sup>216</sup> An offender must be diagnosed by a mental health professional before a prosecutor can request a treatment order in a court, and a court may order another mental health professional to diagnose the offender in trial.<sup>217</sup> A court may extend the treatment period within fifteen years of the total period including the previous one, if there are sufficient grounds to continue the treatment for an offender in view of the treatment progress, or there are violations of an offender's obligation.<sup>218</sup> The Probation Examination Committee may decide on the temporary rescission of the treatment order by the application by the chief probation officer, or an offender, as well as his legal representative.<sup>219</sup>

As the provisions relevant to the mitigation of parole conditions in the bill were eliminated, post-release treatment is separated from parole in the Act. In the

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<sup>212</sup> Seto (Ch.1 n 13) 3–5.

<sup>213</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 1, 4.

<sup>214</sup> Oh, (n 196) 527.

<sup>215</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 5(1).

<sup>216</sup> Ibid

<sup>217</sup> Ibid s 4, 9.

<sup>218</sup> Ibid s 16.

<sup>219</sup> Ibid s 17, 18.

real-world of early release, there is little possibility of parole for child sex offenders under the trend of punitive turn policies. The Secretary of the Ministry of Justice stated in the State Council, on 1 April 2008, that the Ministry of Justice would significantly limit the opportunity for early release of sex offenders who offended victims under the age of 13.<sup>220</sup> This was one of the government's responses to the second sexual offence noted in Chapter 5. According to this policy, the Manual of Early Release was revised on 19 December 2008 so that only first level well-behaved sex offenders whose victims were under the age of 13 would be able to be on the list for parole examination by the discretionary request of a warden when more than 90% of their prison term had passed.<sup>221</sup> The prison term requirement increased to more than 95% on 14 June 2010.<sup>222</sup>

#### **6.6.4. Retroactive application of the treatment to existing prisoners**

As noted above, retroactive application of the treatment to inmates convicted of sexual offences was discussed during the deliberation. As a result, among inmates who are paraphilic-disordered sex offenders committing offences against children under the age of 16, for whom a custodial sentence has been imposed but a pharmacological treatment order has not been declared, a court may order pharmacotherapy of an inmate for up to fifteen years by a prosecutor's request and with the consent of the offender.<sup>223</sup> In this case, according to the indication of MP Seong-Young Joo, the consent of an inmate is required in order to avoid violating the *ex post facto* law. A warden of the prison and a prosecutor should inform an inmate of the details, methods, processes, efficacy, side effects, and assumption of costs of the treatment.<sup>224</sup> If a court orders the pharmacotherapy of an inmate, the warden of a prison shall apply for an evaluation of the qualifications for parole of the inmate to the Parole Board and the Parole Board shall take into consideration the fact that the treatment has been decided upon.<sup>225</sup> In this case, an inmate has to pay for the costs of the treatment in principle on the grounds that he chooses the treatment voluntarily.

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<sup>220</sup> Hyun-Soo Kim, 'Death Penalty or Imprisonment for Life for Child Sexual Abuse and Murder' *Donga Ilbo* (Seoul, 2 April 2008) 14

<sup>221</sup> Manual of Early Release 2008 (ROK) s 13.

<sup>222</sup> Manual of Early Release 2010 (ROK) s 13.

<sup>223</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 22(1), (2), (3).

<sup>224</sup> *Ibid* s 22(2).

<sup>225</sup> *Ibid* s 23.

Withdrawal of consent is not allowed and the provisions relevant to punishment for violation are applied to the inmate in the same way as those applied to non-retroactive cases.<sup>226</sup>

The logic of this makes it seem that it is not a punishment, if a court's decision is based on the consent of the offender. However, as explored above with regards to the informed consent in the bill, this consent of an inmate is difficult to regard as fully voluntary,<sup>227</sup> and it could be classed as coerced treatment in that the inmate cannot withdraw his consent and he has no choice but to undertake the treatment in order to avoid a punishment for refusal. Seol criticises the fact that it would not be valid consent if the inmate were informed not by a medical professional, but by a warden or a prosecutor.<sup>228</sup> In this regard, this treatment order for inmates seems to be punishment rather than voluntary treatment.

#### **6.6.5. Punishment for violation**

In the bill, all kinds of violations relevant to pharmacotherapy or a psychological treatment programme are to be punished with the same punishment, which is imprisonment for not more than seven years or a fine not exceeding 20 million won. However, in the Act, a differentiated punishment shall be imposed according to the level of violation.<sup>229</sup> An offender who escapes the treatment or takes countervailing medications shall be punished by imprisonment for not more than seven years or by a fine not exceeding 20 million won. An offender who refuses to take pharmacological or psychological treatment, or a hormone level assessment, shall be punished by imprisonment for not more than three years or by a fine not exceeding 10 million won.<sup>230</sup> If an offender violates another obligation ordered by a court, he may be punished by a fine not exceeding 10 million won.<sup>231</sup>

#### **6.7. Conclusion**

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<sup>226</sup> Ibid s 35.

<sup>227</sup> Min-Soo Seol, 'The Effectiveness, Constituionality and Limitation of Pharmacological Treatment of Child Sex offenders' (2010) 649 Korean Lawyers Association Journal 5, 64–65.

<sup>228</sup> Ibid

<sup>229</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 35.

<sup>230</sup> Ibid s 35(1), (2).

<sup>231</sup> Ibid s 35(3).

The original bill aimed to introduce pharmacotherapy as a treatment-oriented preventive measure rather than as a punishment. But this purpose was not achieved because of some flawed points. In the context of the punitive turn on sex offenders, the intention of the proposers of the bill and the authors of the research paper must not be underestimated because they first attempted to introduce the consent of an offender in criminal procedure in Korea. As discussed in 6.2., MP Park's former prosecutor experience influenced the proposal of the original bill. Without his experience, pharmacotherapy would have not been legislated. Although he had an experience in dealing with sexual offending, he seemed to have little understanding regarding the reality of pharmacotherapy in the U.S. states, which would make this treatment policy unsuccessful.

As noted above, even though the consent of an offender was required for pharmacotherapy in the bill, it cannot be evaluated as purely voluntary, in that mitigation of parole conditions would be regarded as undue inducement; withdrawal of consent was not allowed, and refusal of the treatment should be punished. In this regard, pharmacotherapy in the bill seems to be a punishment rather than a preventive measure. Regarding whether pharmacotherapy might be a justified punishment, it cannot be justified from either the non-consequentialists' view, in that it is too strict to be an appropriate response to crime, or the consequentialists' view, in that it cannot produce benefits greater than the harm it causes and, there is a less harmful alternative to it.

Furthermore, during the deliberation of the bill, most of the therapeutic points were eliminated or replaced by punishment-oriented content, so the punitive characteristics have been strengthened and many human rights and constitutional issues exist in the 2010 Act. As discussed in 6.5.4., policy transfer theory can be applied to this Act. It seems evident that the members of Parliament sought a solution to new sexual offending urgently under the public outrage, which caused pharmacotherapy to be an unsuccessful policy transfer. As discussed in 6.5.2., if feminist activists' argument that the policies for victim protection should be prioritised over the harsh punishment for offenders were reflected in the deliberation, the bill would have changed. However, their voice was ignored.

Despite many of the constitutional problems, the Constitutional Court ruled on 23 December 2015 that pharmacological treatment in the 2010 Act was not

unconstitutional because the Constitutional Court and the Supreme Court in South Korea have permitted preventive measures very widely. This will be analysed in the next chapter. These human rights and constitutional issues will be explored with reference to the international comparators.

It is regrettable that the authors of the research paper and MP Min-Sik Park did not introduce the treatment as a purely therapeutic institution separate from the criminal procedure, following the example of most European countries. It would be more treatment-oriented and appropriate to realise the initial purpose if this treatment were provided, not by a prosecutor's request and a court's sentencing in a criminal procedure, but by a physician's assessment and recommendation, and an offender's consent. If the bill were devised in this way, the debates in Parliament might have progressed differently. Another regrettable thing is the fact that the arguments of feminist activists were ignored during the deliberation. They argued consistently that compulsory pharmacotherapy would not be useful to prevent sexual reoffending because most victims are raped by acquaintances and sexual drive is not only cause of sexual offences. They asked government to spend more money for the protection of victims than the punishment for offenders. However, their voices were not reflected in the 2010 Act.

How to reform the 2010 Act and the treatment system will be tackled in Chapter 8.

## Chapter 7: Human Rights Analysis of Compulsory Pharmacotherapy in Korea

### 7.1. Introduction

Since the 2010 Act was passed on 29 June 2008, the constitutional and human rights problems of the Act have been continuously debated. As discussed in Chapters 2 and 6, this Act was modelled upon American legislation that has a number of constitutional flaws. These flaws did not receive sufficient deliberation during the enactment procedure. As a result, similar constitutional defects remain in the Korean legislation. A number of researchers have argued that compulsory pharmacotherapy violates human rights which are secured by the constitution, such as the rights to bodily integrity, self-determination and privacy. Besides the constitution, the United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter ‘CAT’)<sup>1</sup> and the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’)<sup>2</sup>, to which South Korea is a state party, asks the state parties to respect freedom and human rights specified in these international norms, such as rights to be free from cruel, inhuman or degrading treatment or punishment, and rights to privacy, family and marriage. Therefore, it had been expected that these constitutional faults would be corrected by the Constitutional Court, but this has not been the case.

The Daejeon District Court requested a judgment regarding the constitutionality of the 2010 Act from the Constitutional Court on 8 February 2013. The Constitutional Court ruled on 23 December 2015 that the pharmacological treatment of sex offenders in the 2010 Act is, in itself, not unconstitutional. A number of human rights and constitutional issues were addressed in the trial, but there are still some questions that have not been discussed sufficiently. The following issues will be addressed in this chapter: human rights relevant to pharmacotherapy which are secured by the constitution and international norms; whether compulsory pharmacotherapy restricts these human rights; whether this restriction is justifiable; and how to deal with any problems of proportionality of the preventive measures. The proportionality of preventive measures is another

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<sup>1</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 December 1984, *entered into force* 26 June 1986.

<sup>2</sup> International Covenant on Civil and Political Rights, *adopted* 16 December 1966, *entered into force* 23 March 1976.

significant issue. As noted in chapter 5 and 6, post-release preventive measures introduced since the 2000s, as additional criminal sanctions to imprisonment, including EM, compulsory pharmacotherapy and public disclosure and notification, have been considerably overlapped relating to the same offence.

In the first section, the structure of human rights concerning pharmacotherapy in the Korean constitution, the CAT and the ICCPR will be addressed, followed by a detailed examination of specific human rights issues in subsequent sections, including a critical analysis of the adjudication of the Constitutional Court. As discussed in Chapter 2, similar human rights issues concerning pharmacotherapy have been debated in different jurisdictions. In order to shed light on the human rights debates of the 2010 Act, discussions in the European Convention on Human Rights and Fundamental Freedoms (hereafter 'ECHR'), the European Court of Human Rights (hereafter 'ECtHR'), and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter 'the Lanzarote Convention') as well as the arguments in the U.S. States' legislation which was noted in Chapter 2, will be referred to. In the last section, taking the proportionality of preventive measures into consideration, whether it is proportionate to an offender's risk of reoffending will be addressed.

The discussion in this chapter will be a stepping stone to the following chapter, which will address how to reform the 2010 Act and treatment systems.

## **7.2. Human rights in the Korean Constitution and international norms**

### **7.2.1. Human rights and their limits regarding pharmacotherapy in the Korean Constitution**

The Korean constitution provides for a number of specific human rights, and the constitutional principles from Articles 10 to 36, including rights to bodily integrity, self-determination and privacy, as well as the idea of human dignity and the principle of due process of law, relevant to pharmacotherapy. Whether any human rights are restricted by pharmacotherapy can be clarified by an examination of these related provisions.

Article 10 declares that ‘all citizens shall be assured of human dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals’. The rights to bodily integrity and self-determination originate from this provision.<sup>3</sup> The Constitutional Court ruled that ‘the rights to bodily integrity include the freedom not to suffer from physical force or psychological threat and the freedom to act freely and autonomously’.<sup>4</sup> Because pharmacotherapy lowers the physical ability to engage in sexual relationships and reproduce, and deprives an offender of sexual urges whilst incurring significant side effects, it violates the right to bodily integrity.<sup>5</sup> In this sense, the right to self-determination concerning significant aspects of the offender’s own life, such as whether to undertake a treatment causing sexual dysfunction, engage in sexual relationships, marry or procreate, is also restricted by pharmacotherapy.<sup>6</sup>

Article 12(1) provides the principle of due process of law, stating that ‘no person shall be punished, placed under preventive measure or subject to involuntary labour except as provided by law and through due process of law’. Since pharmacotherapy has been considered as a preventive measure, it should be imposed through due process of law.<sup>7</sup> Article 17 states that ‘the privacy of the citizen shall not be infringed’. This provision guarantees individuals the right to create their own life freely and, as such, the rights to engage in sexual relationships, marry and procreate are secured by this article as well as by Article 10.

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<sup>3</sup> Jong-Sup Chong, *Constitutional Law* (8th edn, Pakyoungsa 2013) 416, 493.

<sup>4</sup> *CCC 92 Hun-Ga 8, 24 December 1992* [1992] 873.

<sup>5</sup> Sang Kyung Lee, ‘A Constitutional Revisit on Sexual Compulsivity Chemical Treatment for Sex Offenders’ (2010) 11 *Studies on Constitutional Cases* 93, 115; Bong-Jin Park, ‘Constitutionality and Criminal Policy Review of the Pharmacological Treatment of Sex Offenders Act 2010’ (2012) 47 *Korean Law Review* 171, 181; Han Ki Jeong, ‘The Constitutional Research on Drug Treatment for Sexual Impulse’ (2012) 5(3) *Gachon Law Review* 31, 44.

<sup>6</sup> Lee, *ibid*, 113–14; Jeong, *ibid*, 43; Chan-Keol Park and Ju-Young Song, ‘The Problems and Reformation on the ‘Chemical Castration for Sex Offender Law’’ (2011) 23(1) *Korean Journal of Criminology* 227, 237; Ho-Joong Lee, ‘Issues on the Human Rights and the Prevention Policies for Child Sexual Offences’ (Conference for Human Rights and the Prevention Policies for Child Sexual Offences Year), 67; Joong-Tak Sung, ‘A Study on the unconstitutionality of chemical castration for sex offenders’ (2016) 459 *Journal of Human Rights and Justice* 73, 88.

<sup>7</sup> Ji-Hoon Jeong, ‘Unconstitutional Drug Treatment of Sex Offenders’ (2016) 27(1) *Korean Criminological Review* 133, 149.



There has been no objection to the statement that compulsory pharmacotherapy in the 2010 Act restricts the rights to bodily integrity, self-determination and privacy of an offender, but there have been significant debates as to whether the restriction is constitutional. Even though pharmacotherapy restricts the human rights of an offender, this does not immediately mean that the treatment is unconstitutional because the Korean constitution introduces a general provision about the restriction of human rights in Article 37(2), which states that: ‘any freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated’.<sup>8</sup>

Since any freedoms and rights might be restricted by law, how to prevent the law from excessively restricting human rights is significant. It is generally agreed that the first paragraph of Article 37(2) means a statement of the principle of proportionality, which means that state power must be exercised within the necessary area to achieve a legitimate purpose, because the limits of freedoms and rights of citizens are not allowed at any time, ‘but only when necessary for national security, the maintenance of law and order, or for public welfare’.<sup>9</sup> Jeong Yeop Seong states that the principle of proportionality is introduced as a standard for judging the justification of an exercise of state power to restrict human rights based on the following line of thought: human beings have unlimited freedom in principle and human rights have been considered a device to protect the freedom of human beings from state power, so State power to restrict human rights would be justifiable only when it complies with the principle of proportionality.<sup>10</sup> This principle consists of four rules: legitimacy of the legislative purpose; appropriateness of the means adopted; the least restrictiveness; and a balance of the legal interests concerned.<sup>11</sup> The Constitutional Court has required that the provisions restricting the human rights of the individual must comply with these four rules in order to be constitutional.<sup>12</sup>

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<sup>8</sup> Constitutional Court Act 1988 (ROK) Art. 37(2).

<sup>9</sup> Chong (n 3) 377–78; Jeong Yeop Seong, ‘The Principle of Proportionality and Basic Rights’ (2013) 136 *Justice* 5–6.

<sup>10</sup> Seong, *ibid*, 10.

<sup>11</sup> Chong (n 3) 378–83; *CCC 2008 Hun-Ga 23, 25 February 2010* [2010] 53–56.

<sup>12</sup> *CCC 89 Hun-Ga 95, 3 September 1990* [1990] 259.

Concerning ‘the essential aspect of freedom or right’ in the second paragraph of Article 37(2), the Constitutional Court ruled that it means a substantial or fundamental factor of freedom or right, and it would be a violation of this essential aspect if a certain restriction makes the freedom or right nominal or empty, so that the ultimate purpose of constitutional security of the freedom or right cannot be realised.<sup>13</sup> Accordingly, in the proceedings of adjudication on constitutionality, it is significant to consider whether a certain restriction of human rights complies with the principle of proportionality and whether it violates an essential aspect of human rights.

Some argue that whether to violate an essential aspect of human rights does not need to be examined separately because whether to violate the principle of proportionality is normally examined precedently, and a certain restriction satisfying the principle of proportionality might be regarded as not to violate an essential aspect of human rights.<sup>14</sup> Dai-Whan Kim, however, criticises this statement in that the principle of prohibition of violating an essential aspect of human rights is a separate constitutional standard, so that even the restriction complying with the principle of proportionality might violate an essential part of human rights and, in this case, the restriction cannot be justifiable.<sup>15</sup> He states that the second paragraph of Article 37(2) requires that the state should prove that its exercise of the authority does not violate an essential aspect of human rights, as well as the principle of proportionality, and, by this provision, the human rights of citizens can be more strongly secured.<sup>16</sup> In addition, whether an essential part of specific human rights is violated might be fully scrutinised by this examination, which may limit an excessive exercise of a state’s authority on the grounds of national security, the maintenance of law and order, or public welfare.<sup>17</sup>

The Constitutional Court has been inconsistent in applying both provisions of Article 37(2). In some cases, the court has examined them both separately.<sup>18</sup> In

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<sup>13</sup> Ibid, 255.

<sup>14</sup> Chong (n 3) 388; Soo Woong Han, *Constitutional Law* (1st edn, Bobmunsa 2011) 485.

<sup>15</sup> Dai-Whan Kim, ‘The Principle of Proportionality in the Korean Constitution’ (2005) 6(3) *Journal of Public Law* 191, 216.

<sup>16</sup> Dai-Whan Kim, ‘The Theory and the Praxis of the Principle of Basic Rights’ *Essence Guaranty* (2013) 34 *Journal of Constitutional Law* 197, 200.

<sup>17</sup> Young Shin Oh, ‘A Study on Standards of Constitutional Review for Criminal Statutes’ (DPhil, Sungkyunkwan University 2016) 294.

<sup>18</sup> Kim (n 15) 210–13.

general, however, the court has not addressed the principle of prohibition of violating an essential aspect of human rights separately, but replaced it by the principle of proportionality,<sup>19</sup> which was the same in the adjudication of constitutionality of the 2010 Act. Dai-Whan Kim states that because the principle of proportionality involves a risk that any kinds of restriction might be justifiable as long as the restriction is proportionate, the examples of a violation of an essential aspect of human rights should be more actively scrutinised in order to secure human rights, even though it is not easy to find such things because of the vague meaning of ‘essential’.<sup>20</sup>

As noted above, it was not addressed in the Constitutional Court as to whether compulsory pharmacotherapy violates the essential aspect of rights to bodily integrity, self-determination and privacy, which will be addressed in subsequent sections, and there is little literature arguing this issue. The practice of the court may be one reason for this, but the neglect of international norms concerning pharmacotherapy is apparently another reason. Because the CAT and the ICCPR both state that the right not to be subjected to torture, or cruel, inhuman or degrading punishment is non-derogable,<sup>21</sup> it should have been addressed whether compulsory pharmacotherapy is torture, or cruel, inhuman or degrading punishment, if the CAT and the ICCPR have been considered relevant international laws. This issue will be addressed in the next section.

### **7.2.2. Human rights and their limits regarding pharmacotherapy in international norms**

The CAT and the ICCPR are the representative international human rights documents relevant to pharmacotherapy. Article 6(1) of the Korean constitution states that: ‘treaties duly concluded and promulgated under the constitution and the generally recognised rules of international law shall have the same effect as the domestic laws of the Republic of Korea’.<sup>22</sup> Because South Korea ratified the CAT and the ICCPR, both have the same

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<sup>19</sup> Ibid 220–33.

<sup>20</sup> Ibid 199, 233–34.

<sup>21</sup> CPA Art. 2(2),(3); ICCPR Art. 4(2).

<sup>22</sup> Constitution of the Republic of Korea 1987 (ROK) Art. 6(1).

effects as Korean domestic laws without any special legislative procedure.<sup>23</sup> If there is a contradiction between domestic laws and international laws, the doctrines of *lex posterior*, which means that the *most new* law prevails, and *lex specialis*, which means that special laws have priority over general laws, would be applied.<sup>24</sup>

The CAT, of which South Korea became a state party in 1995, requires the states parties to take governmental action to prevent acts of torture. In this convention, ‘torture’ includes any intentional act causing physical or mental severe pain or suffering for the purpose of punishing an offender, but pain or suffering which is inherent in or incidental to lawful sanctions is excluded.<sup>25</sup> No exceptional circumstances, such as war or public emergency, and no order from a superior officer or a public authority may justify torture.<sup>26</sup> Each state party is required to prevent ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1’.<sup>27</sup>

The ICCPR includes the fundamental human rights relating to life, liberty and equality.<sup>28</sup> South Korea became a state party of the ICCPR in 1990, and as of 2016, 168 countries have ratified the covenant.<sup>29</sup> This covenant has some provisions relevant to the analysis of pharmacotherapy. Article 7 states that: ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’.<sup>30</sup> This article, which is aimed at protecting both ‘the dignity and the physical and mental integrity of the individual’,<sup>31</sup> is considered the statement relevant to the rights to bodily integrity of the Korean constitution, which is originated from the guarantee of human dignity.<sup>32</sup> Articles 17(1) and 23(2) of the ICCPR state that: ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence’ and ‘the right of men and women of marriageable age to marry and to have a family shall be recognised’,

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<sup>23</sup> Ki-Taek Woo, ‘The Problems for Domestic Implementation of International Human Rights Law’ (2016) 51(2) *Kyounghee Law Review* 237, 247, 263.

<sup>24</sup> *Ibid.*, 247–48, 263.

<sup>25</sup> CAT Art. 1.

<sup>26</sup> *Ibid.*, Art. 2(2), (3).

<sup>27</sup> *Ibid.*, Art. 16(1).

<sup>28</sup> Jin-A Park, ‘50 Years of International Covenant on Civil and Political Rights—the Development and Implementation of the Covenant’ (2016) 17(4) *Hoingik Law Review* 211, 213.

<sup>29</sup> *Ibid.*

<sup>30</sup> ICCPR Art. 7.

<sup>31</sup> United Nation Office of the High Commissioner for Human Rights, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Ohter Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) para. 2.

<sup>32</sup> Chong (n 3) 492.

respectively.<sup>33</sup> The states parties may derogate from their obligation when an officially proclaimed public emergency threatening the life of the nation exists,<sup>34</sup> but, even in such situations, no derogation from Article 7 is allowed.<sup>35</sup> Regarding Article 7, the United Nations stated that this is aimed at protecting ‘both the dignity and the physical and mental integrity of the individual’,<sup>36</sup> and no limitation is permitted and a violation for any reasons cannot be justified.<sup>37</sup>

In order to urge the states parties to implement the obligations, both laws require them to submit reports on the measures adopted for the protection of the rights and the progress in promoting the rights.<sup>38</sup> After studying these reports, the U.N. Committee against Torture (hereafter ‘CAT Committee’) and the U.N. Human Rights Committee (hereafter ‘HRC’) transmitted the General Comment to the states parties.<sup>39</sup> The General Comment explains the details secured by the relevant rights and how to implement the obligations, and present ways to resolve the problems, or the alternatives.<sup>40</sup> In addition, individuals whose rights enumerated in these laws have been violated by a State Party may submit a written communication to the CAT Committee or the HRC, if they have exhausted all available domestic remedies.<sup>41</sup> The committees shall examine the communication and forward their views to the state party concerned and to the individual.<sup>42</sup> Even though the committees’ views are not legally binding upon state parties, these would be effective way to make the state party to stop the violation of rights and to enhance a protection, because the committees’ declaration of a state party’s violation is considered authoritative.<sup>43</sup>

As noted above, the CAT and the ICCPR have the same effect as Korean domestic laws. Whether the 2010 Act is compatible with these international laws should have been addressed by Korean courts, but this has not been the case. This issue can be examined by the CAT Committee or the HRC, based on the individual communication of an offender.

<sup>33</sup> ICCPR Art. 17(1), 23(2).

<sup>34</sup> *Ibid.*, Art 4(1).

<sup>35</sup> *Ibid.*, Art 4(2).

<sup>36</sup> United Nations Office of the High Commissioner for Human Rights, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) para. 2.

<sup>37</sup> *Ibid.*, para. 3.

<sup>38</sup> CAT Art. 19(1); ICCPR Art. 40(1).

<sup>39</sup> CAT Art. 19(3); ICCPR Art. 40(4).

<sup>40</sup> Park (n 28) 227–228.

<sup>41</sup> CAT Art. 22(1),(5)(b); Optional Protocol to the ICCPR (*adopted* 16 December 1966, *entered into force* 23 March 1976) Art. 2.

<sup>42</sup> CAT Art. 22(6),(7); Optional Protocol to the ICCPR Art. 5(3),(4).

<sup>43</sup> Park (n 28) 226.

Although no offender has submitted a complaint yet, it would influence Korean domestic laws were this issue to be addressed by the committees. As an illustrative example, in some Korean individual communication cases of the right to conscientious objection to military service, the HRC has declared that punishment for a conscientious objection to military service violates the rights to freedom of thought, conscience and religion, which are secured by Article 18 of the ICCPR.<sup>44</sup> The Korean government has been recommended to allow the right to conscientious objection to military service by the U.N. Human Rights Council.<sup>45</sup>

Even though Korean courts have not applied international laws widely in trial, in the case of the right to conscientious objection to military service, the Korean Constitutional Court stated that: ‘if the ratified treaties or the generally recognised rules of international law grant the right to conscientious objection to military service, it would be legally binding’.<sup>46</sup> In this case, the court ruled that the right to conscientious objection to military service is not granted by Article 18 of the ICCPR, because the right is not clearly stated in Article 18 and the interpretation of the ICCPR has not a binding effect, but, rather, an advisory effect, on a State Party.<sup>47</sup> According to the attitude of the court in this case, relevant provisions of the CAT and the ICCPR should have apparently been addressed in the judgment of constitutionality of compulsory pharmacotherapy by the court, but it was ignored. This issue will be addressed further below.

### **7.2.3. Judgment of the Constitutional Court concerning the constitutionality of pharmacotherapy**

According to the Constitutional Court Act 1988, if the constitutionality of a law is a precondition of the adjudication of a court case, the court hearing the case shall request adjudication on the constitutionality of the law to the Constitutional Court and proceedings shall be suspended until that court makes a decision.<sup>48</sup> By this provision, the Daejeon District Court requested an adjudication to the Constitutional

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<sup>44</sup> Chan-Un Park, ‘Conscientious Objection to Military Service: Its International Situation and Choice of Korea’ (2014) 141 Justice 5, 11 citing Communication No. 1786/2008, U.N. Doc. CCPR/C/106/D/1786/2008, para. 7.4.

<sup>45</sup> *Ibid.*

<sup>46</sup> Woo, 264–265; CCC 2008 Hun-Ga 22, 2009 Hun-Ga 7-24, 2010 Hun-Ga 16-37, 2008 Hun-Ba 103, 2009 Hun-Ba 3, 2011 Hun-Ba 16 (Consolidated), 30 August 2011 [2011], 195.

<sup>47</sup> CCC 2008 Hun-Ga 22, 2009 Hun-Ga 7-24, 2010 Hun-Ga 16-37, 2008 Hun-Ba 103, 2009 Hun-Ba 3, 2011 Hun-Ba 16 (Consolidated), 30 August 2011 [2011] 196.

<sup>48</sup> Constitutional Court Act 1988 (ROK) s 41(1), 42(1).

Court during the trial against a defendant named Lim, a 34-year-old who had molested a five-year-old girl on 7 June, 2009 and a six-year-old girl on 1 July, 2009. Before this prosecution, Lim had committed similar sexual offences against children, resulting in him receiving a juvenile disposition when he was a teenager, sentenced to a two-year suspended sentence on 22 April, 2000, imprisonment for one and half years on 9 February, 2001, and imprisonment for six years on 14 September, 2012.<sup>49</sup> Lim was prosecuted for the two counts of child molestation noted above on 18 September, 2012, and he was assessed by a psychiatrist, who stated as follows: ‘the defendant is diagnosed with paedophilia because of his uncontrolled sexual urges towards children and continuous deviant sexual fantasies, which seem to influence repeated sexual offences against children’.<sup>50</sup> The proceedings of this case ceased until the judgment of the Constitutional Court.

The Daejeon District Court stated that the 2010 Act is unconstitutional because it violates the right to bodily integrity, self-determination and the human dignity of an offender,<sup>51</sup> which are secured by Articles 10 and 12(1) of the constitution. This court did not distinguish the principle of prohibition of violating an essential aspect of human rights from the principle of proportionality. The court claimed that the pharmacotherapy in the 2010 Act violates the essential aspect of human rights because it does not abide by the principle of proportionality and, therefore, it is unconstitutional.<sup>52</sup> This statement apparently followed the general stance of the Constitutional Court, as noted above, which has regarded a violation of the principle of proportionality as a violation of an essential aspect of human rights, without separate examination.

The Constitutional Court ruled on 23 December, 2015, that compulsory pharmacotherapy of sex offenders in the 2010 Act is, in itself, not unconstitutional, but the fact that there is no way to re-examine an original sentence for which pharmacological treatment orders have been given is inconsistent with the constitution, because there are considerable time differences between the time of the sentence and the enforcement of the treatment. The court has strictly distinguished

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<sup>49</sup> *Daejeon District Court 2012 Go-Hap 512, 2012 Gam-Go 17, 2012 Chi-Go 1, 5 February 2016* [2016] 2–4.

<sup>50</sup> *Ibid*, 4.

<sup>51</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality, 8 February 2013* [2013] 6–7.

<sup>52</sup> *Ibid*, 10.

‘unconstitutional’ from ‘inconsistent’ within the constitution, which will be explained in the relevant section of this chapter. In the resumed trial in the Daejeon District Court after the judgment of the Constitutional Court, on 5 February, 2016, Lim was sentenced to imprisonment for five years, 80 hours in a sex offender treatment programme, preventive medical treatment and custody orders, pharmacotherapy for five years, and public disclosure and notification for seven years.<sup>53</sup>

As noted above, the Court should have discussed whether compulsory pharmacotherapy violates an essential aspect of human rights, because it is another independent constitutional standard to secure human rights, as well as its compatibility with the CAT and the ICCPR.

### **7.3. Human rights analysis of the 2010 Act**

#### **7.3.1. Rights to bodily integrity, self-determination and privacy**

As noted in Chapter 1, pharmacotherapy lowers testosterone levels in the body of an offender, the same as for surgical castration, resulting in a decrease of ‘deviant and non-deviant’ sexual urges and fantasies,<sup>54</sup> so the offender loses the ability to think about sex, to perform sexual activity and to reproduce.<sup>55</sup> Moreover, pharmacotherapy may cause significant side effects such as osteoporosis, bone pain, hypogonadism, weight gain, hot flushes and depression.<sup>56</sup> In this respect, it seems apparent that pharmacotherapy restricts the rights to the bodily integrity, self-determination and privacy of an offender, but, as discussed above, in order to decide whether this restriction is justifiable, it needs to pass the examination of the principle of prohibition of violating an essential aspect of human rights and the principle of proportionality. In addition, whether the 2010 Act is compatible with the CAT and the ICCPR should be examined. Because a proportionality test is related to the decision of whether compulsory pharmacotherapy is cruel, inhuman or degrading

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<sup>53</sup> *Daejeon District Court 2012 Go-Hap 512, 2012 Gam-Go 17, 2012 Chi-Go 1, 5 February 2016* [2016] 1.

<sup>54</sup> Fond (Ch.1, n 8) 170.

<sup>55</sup> Stinneford (Ch.2, n 26) 596.

<sup>56</sup> Rösler and Witztum (Ch.1, n 39) 420–21; Briken, Hill and Berner (Ch.1, n 44) 894.



punishment violating these international laws, this issue will be addressed in conjunction with the discussion about the principle of proportionality.

### **7.3.1.1. Compatibility with the CAT and the ICCPR**

As noted above, the right to not be subjected to torture, or cruel, inhuman or degrading punishment in Article 1 and 16(1) of the CAT and Article 7 of the ICCPR is non-derogable. The HRC states that: ‘cruel or inhuman treatment or punishment refers to acts (primarily in detention) which must attain a minimum level of severity, but which do not constitute torture’ such as ‘direct assault on persons, imposition of extended solitary confinement and inadequate medical and psychiatric treatment for detainees, with severe corporal punishments (amputation, castration, sterilisation and so forth)’. ‘Degrading treatment or punishment is the ‘weakest’ level of violation of Article 7, in which the severity of suffering is less important than the level of humiliation or debasement to the victim’, such as ‘arbitrary detention practices aimed at humiliating prisoners and making them feel insecure (for instance, repeated solitary confinement, submission to cold and persistent relocation to a new cell)’.<sup>57</sup>

It is not easy to decide, with this interpretation, whether compulsory pharmacotherapy in the 2010 Act constitutes cruel, inhuman or degrading punishment. The HRC has not differentiated torture and cruel, inhuman or degrading treatment/punishment, saying that ‘the Covenant does not contain any definition of the concepts covered by Article 7’ and ‘the distinctions depend on the nature, purpose and severity of the treatment applies’.<sup>58</sup> Nowak (a UN Special Rapporteur on Torture), McArthur and Buchinger state that ‘the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim’ rather than the severity of pain or suffering are the key criteria for the distinction between torture and cruel and inhuman treatment.<sup>59</sup> They explain that ‘it is torture if any act intentionally inflicts severe pain or suffering for a specific purpose, such as obtaining a confession or infliction of punishment, against a vulnerable victim in a situation of

<sup>57</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee A/58/40 (Vol. II)* (2003) 194, 209–210.

<sup>58</sup> United Nations Office of the High Commissioner for Human Rights, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, para. 4.

<sup>59</sup> Manfred Nowak, Elizabeth McArthur and Kerstin Buchinger, *United Nations Convention Against Torture: a Commentary* (Oxford University Press 2008) 558.

detention or similar direct control’, and ‘whereas torture might be considered as absolutely prohibited, cruel, inhuman or degrading treatment by definition is a relative concept’, so the principle of proportionality is applied to decide whether a certain use of force is cruel, inhuman or degrading treatment ‘outside a situation of detention and similar direct control’.<sup>60</sup> By the examination of proportionality, while disproportionate use of force causing ‘severe pain or suffering’ would be cruel or inhuman treatment/punishment, such a force resulting in ‘less severe pain or suffering’ in a ‘humiliating manner’ would be degrading treatment/punishment.<sup>61</sup>

Along the same lines, Joseph and Castan state that ‘proportionality does play a role in the determination of violations of Article 7’ and that ‘proportionality is relevant when considering the appropriate *classification* of the Act as Article 7 treatment, rather than in considering any alleged *justification* for engaging in Article 7 treatment’.<sup>62</sup> The principle of proportionality means that the use of force should have the following elements: ‘legality, a lawful purpose and not being excessive but necessary for achieving the purpose’, in order to be considered proportionate.<sup>63</sup> A proportionate measure then would not be classified as cruel, inhuman or degrading treatment, even if it definitely violated the right to bodily integrity.<sup>64</sup>

The HRC has used the proportionality test in a number of cases relating to Article 7. In *Benitez v Paraguay*, the applicant was arrested during a demonstration, beaten with batons and kicked while he was handcuffed in a police station. The HRC stated that such a use of force by the police was ‘disproportionate’ and violated Article 7 of ICCPR.<sup>65</sup>

Besides Article 7, the proportionality test is applied to rights to privacy and to have a family in Article 17(1) and 23(2). Joseph and Castan state that ‘despite the differently worded permissible limitations, most ICCPR rights may be limited by proportionate laws designed to protect a countervailing community benefit, such as

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<sup>60</sup> Manfred Nowak and Elizabeth McArthur, ‘The Distinction between Torture and Cruel, Inhuman or Degrading Treatment’ (2006) 16(3) *Journal of Rehabilitation of Torture Victims and Prevention of Torture* 147 147, 149, 151.

<sup>61</sup> *Ibid*, 150.

<sup>62</sup> Sarah Joseph and Mellissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 238.

<sup>63</sup> Nowak and McArthur (n 60) 149.

<sup>64</sup> *Ibid*, 149.

<sup>65</sup> UN Human Rights Committee, *Communication No. 1829/2008* (2012), para. 7.4.

public order, or to protect the conflicting right of another person'.<sup>66</sup> In *Toonen v Australia*, in which the author challenged two provisions of the Tasmanian Criminal Code criminalising all forms of sexual contact between consenting adult homosexual men in private, the HRC stated that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.<sup>67</sup> In this case, the HRC accepted a violation of the author's rights under Article 17, stating that 'the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV'.<sup>68</sup>

Accordingly, whether compulsory pharmacotherapy in the 2010 Act does amount to cruel, inhuman or degrading punishment, and violates the rights to privacy and to have a family under the CAT and the ICCPR depends on the examination of the principle of proportionality on which Korean literature and the Constitutional Court have focused, which will be addressed in a subsequent section below.

Unlike the HRC, the European Court of Human Rights (hereafter 'ECtHR') and the European Commission of Human Rights have specified the types of the treatment/punishment which it has raised in its interpretation of Article 3 of the ECHR, which is equivalent to Article 1 of the CAT and Article 7 of the ICCPR.<sup>69</sup> Although the ECHR has no binding effect to South Korea, the interpretation of the European Commission of Human Rights and the ECtHR may be a good reference to the discussion of whether compulsory pharmacotherapy in the 2010 Act is compatible with the CAT and the ICCPR.

Article 3 of the ECHR states that: 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.<sup>70</sup> In the *Greek Case*,<sup>71</sup> the European Commission of Human Rights stated that the treatment or punishment is inhuman if it 'deliberately causes severe suffering, mental or physical, which, in the

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<sup>66</sup> Joseph and Castan (n 62) 31.

<sup>67</sup> UN Human Rights Committee, *Communication No. 488/1992* (1994), para. 8.3.

<sup>68</sup> *Ibid*, para. 8.5.

<sup>69</sup> Joseph and Castan (n 62) 229.

<sup>70</sup> ECHR Art. 3.

<sup>71</sup> In this case, Denmark, Norway, Sweden and the Netherlands contended the Greek government's violations of the ECHR, including Article 3, because a revolutionary military government of Greece notified the Council of Europe on 3 May, 1967 that the application of certain rights of the Greek Constitution had been suspended. European Commission of Human Rights, *The Greek Case: Report of the Sub-Commission Vol. 1* (1969) 1; European Court of Human Rights, *Factsheet – Derogation in Time of Emergency* (2017) 3.

particular situation, is unjustifiable’, whereas it is degrading ‘if it grossly humiliates him before others or drives him to act against his will or conscience’.<sup>72</sup> In *Jalloh v Germany*, the ECtHR reaffirmed that inhuman treatment is intentional and causes ‘actual bodily injury or intense physical and mental suffering’, and degrading treatment makes victims feel ‘fear, anguish and inferiority capable of humiliating and debasing them’.<sup>73</sup>

In contrast to the HRC, the ECtHR has not applied a proportionality test to decide whether a certain treatment is inhuman or degrading.<sup>74</sup> Instead, different criteria have been required: one is the ‘minimum level of severity’, the other is ‘medical necessity’. In regards to the minimum level of severity of a certain treatment, the ECtHR stated that it is assessed by ‘the nature and the duration of the treatment; its physical or mental effects; and the sex, age, and state of health of the victim’.<sup>75</sup> Although the judgement of minimum level of severity is relative,<sup>76</sup> Palmer emphasises that the relativity requirement must not be confused with the proportionality test, stating that ‘by focusing on the individual case and the victim in question it is engaging in an exercise of relativity’.<sup>77</sup> For instance, concerning the detention in context, the ECtHR will examine ‘whether the conditions are compatible with respect for human dignity and whether the individual has been subjected to greater levels of distress or hardship than is required by the detention’.<sup>78</sup> Rainey also states that ‘once an interference of the right has been found, the state cannot justify interference by reference to a legitimate aim’ and that ‘ill-treatment deals directly with the idea of an attack on the human dignity’.<sup>79</sup> She adds that ‘how dangerous the person may be is irrelevant to the protection afforded by the Article’, citing a

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<sup>72</sup> European Commission of Human Rights, *Yearbook of the European Convention on Human Rights: The Greek Case, 1969* (1969), 186.

<sup>73</sup> *Jalloh v Germany*, App No. 54810/00 (ECtHR, 11 July 2006) [2006], para. 68. In this case, the victim was arrested under suspicion of dealing drugs, swallowing a small plastic bag containing cocaine and refused to take medication causing vomiting; so, in order to obtain evidence of his crime, four police officers held him to let a doctor forcibly administer to him medication through his nose into stomach using a tube, which caused the victim’s suffering from oesophageal pain. *Jalloh v Germany*, para. 13–17.

<sup>74</sup> Stephanie Palmer, ‘A Wrong Turning: Article 3 ECHR and Proportionality’ (2006) 65(2) Cambridge Law Journal 438, 439.

<sup>75</sup> *Ireland v United Kingdom (1978) 2 EHRR 25* (ECtHR, 18 January 1978) [1978], para. 162.

<sup>76</sup> *Jalloh v Germany*, App No. 54810/00 (ECtHR, 11 July 2006) [2006], para. 67.

<sup>77</sup> Palmer (n 74) 439.

<sup>78</sup> *Ibid.*

<sup>79</sup> Bernadette Rainey, ‘Dignity and Dangerousness: Sex Offenders and the Community - Human Rights in the Balance?’ in Karen Harrison (ed), *Managing High-Risk Sex Offenders in the Community* (Willan 2010), 272.

judgment of the ECtHR in *Chahal v UK*, stating that ‘the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct’.<sup>80</sup>

Regarding ‘medical necessity’, the ECtHR ruled in *Herczegfalvy v Austria* that ‘as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading’.<sup>81</sup> In this case, the applicant, being detained in prison and psychiatric hospital because of assaults and his mental illness, was subjected to treatment, including force-feeding, being handcuffed and shackled to a security bed and coerced sedation injection because of his refusal of feeding and medical treatment, the deterioration in his physical and mental health, and the risk of violence he posed and the death threats he made.<sup>82</sup> Although the European Commission on Human Rights considered the treatment inhuman and degrading,<sup>83</sup> the ECtHR stated that there was no violation of Article 3 in that the evidence was insufficient to reject the arguments of the Austrian government that the treatment was justified by medical necessity.<sup>84</sup>

Harrison and Rainey state, citing this case, that ‘if the use of drug therapy is primarily to offer public protection, the ECtHR may find it is not medically necessary’.<sup>85</sup> They add that it would violate Article 3 if side effects were severe and long-lasting, and pharmacotherapy was explicitly beyond a therapeutic necessity, which makes it closer to a punishment.<sup>86</sup> Baker argues that, if castration of an offender inhibits not only sexual offending, but also all kinds of sexual behaviour, it seems that ‘the treatment exceeds the cure’.<sup>87</sup> The ECtHR reaffirmed in *Jalloh v Germany* that ‘the Court must satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision exist and are complied with’.<sup>88</sup>

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<sup>80</sup> *Ibid*, citing *Chahal v UK* 23 E.H.R.R. 413 (15 November 1996) [1996], para. 80.

<sup>81</sup> *Herczegfalvy v Austria* (1992) 15 EHRR 437 (ECtHR, 24 September 1992) [1992], para. 82.

<sup>82</sup> *Ibid*, para. 24–28.

<sup>83</sup> *Ibid*, para. 80.

<sup>84</sup> *Ibid*, para. 83–84.

<sup>85</sup> Harrison and Rainey (Ch.2 n 9), 238.

<sup>86</sup> *Ibid*.

<sup>87</sup> William L Baker, ‘Castration of the Male Sex Offender: A Legally Impermissible Alternative’ (1984) 30 Loyola Law Review 377, 389.

<sup>88</sup> *Jalloh v Germany*, App No. 54810/00 (ECtHR, 11 July 2006) [2006], para. 69.

Concerning the pharmacotherapy of sex offenders, in *Dvořáček v Czech Republic*, the ECtHR reaffirmed that minimum level of severity and lack of medical necessity were required in order for a certain treatment to fall within the scope of Article 3.<sup>89</sup> In this case, the ECtHR stated that pharmacotherapy without an offender's free and informed consent would reach the minimum level of severity, thereby violating Article 3.<sup>90</sup> The Lanzarote Convention also requires entirely the free and informed consent of an offender for pharmacotherapy.<sup>91</sup> On 30 August 2007, the Olomouc district court in the Czech Republic, in dealing with a repeated child sex offender suffering from hebephiliac disorder and Wilson's disease, ordered a sentence of suspended imprisonment and a preventive treatment in psychiatric hospital, with references to psychiatrists' assessment, stating that 'the offender could be dangerous if he is released and lives free without pharmacotherapy'.<sup>92</sup> Pharmacotherapy had been administered, based on his verbal consent, from 3 December 2007, but it was discontinued after the last injection on 28 July 2008 because of his dissatisfaction of with the treatment.<sup>93</sup> The Olomouc district court changed his confinement to outpatient treatment on 16 May 2008, in spite of the appeal of a prosecutor, on the basis of the recommendation of his psychiatrist, and, as such, he was discharged on 4 September 2008.<sup>94</sup> During his staying in the community, in October 2009, a psychiatrist reported that the offender needed psychotherapy as well as pharmacotherapy, or even surgical castration, in the event of failure of psychotherapy, in order to maintain public safety and allow him to live in the community; on 23 April 2010 another psychiatrist stated that the outpatient treatment was not effective, because he refused to undertake pharmacotherapy and lacked self-scrutiny of his offence in spite of psychotherapy.<sup>95</sup> Following a court decision, he was detained in a psychiatric hospital on 10 January 2011, and the detention was extended for two years by the request of the hospital on 29 November

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<sup>89</sup> *Dvořáček v Czech Republic*, App No. 12927/13 (6 November 2014) [2014], para. 90.

<sup>90</sup> *Ibid.*

<sup>91</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Art. 17; Council of Europe, *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (25 October 2007), para 104, 110, 111.

<sup>92</sup> *Dvořáček v Czech Republic*, App No. 12927/13 (6 November 2014) [2014], para. 7–8.

<sup>93</sup> *Ibid.*, para. 14, 97.

<sup>94</sup> *Ibid.*, para. 15–17.

<sup>95</sup> *Ibid.*, para. 19–20.

2012.<sup>96</sup> On 15 October 2013, the Brno Municipal Court changed his detention to outpatient treatment based on the offender's request.<sup>97</sup> The offender applied to the ECtHR on 12 February 2013, with the following reasons: he had consented to pharmacotherapy only for fear of surgical castration and not being able to be released from the hospital; no free and informed consent was available in the situation, whereby he could make a choice only between pharmacotherapy and unlimited confinement.<sup>98</sup>

Even though the ECtHR accepted that 'the offender was in a difficult situation between undertaking pharmacotherapy and further confinement, which may constitute a form of pressure', the court stated that "the treatment was justified because it responded to the medical necessity of the offender on the basis of the psychiatrists' assessment and recommendation".<sup>99</sup> Regarding the matter of free and informed consent, the ECtHR stated that 'if the offender's consent had been recorded in written form including the benefits and side-effects of pharmacotherapy, and his right to withdraw his original consent at any time, it would have been clearer', but 'there was no sufficient evidence beyond a reasonable doubt that the offender had been subjected to compulsory pharmacotherapy without free and informed consent'.<sup>100</sup> The court did not accept the statement that the offender was under pressure to undertake surgical castration because of the strict regulation of surgical castration requiring free and informed consent.<sup>101</sup> Finally, the court concluded that the pharmacotherapy of the offender did not violate Article 3 in this case.<sup>102</sup>

In *Dvořáček v Czech Republic*, the offender was not punished for his refusal of the treatment and the court changed his confinement to an outpatient programme upon his request, despite the provisions enabling a court to repeatedly prolong his preventive treatment in a hospital,<sup>103</sup> even though the offender underwent pharmacotherapy for nearly 3.5 years in a psychiatric hospital. The Czech Republic government does not seem to compel pharmacotherapy regardless of an offender's objection. This seems remarkable. In England, the Divisional Court ruled in *Janiga v*

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<sup>96</sup> *Ibid*, para. 21.

<sup>97</sup> *Ibid*, para. 25.

<sup>98</sup> *Ibid*, para. 99.

<sup>99</sup> *Ibid*, para. 102, 104.

<sup>100</sup> *Ibid*, para. 104–105.

<sup>101</sup> *Ibid*, para. 100.

<sup>102</sup> *Ibid*, para. 106–107.

<sup>103</sup> Criminal Act 2011 (Czech Republic) s 99.

*Czech Republic*, an extradition case of a sex offender against children from the UK to the Czech Republic who had been sentenced to imprisonment and preventive treatment, that ‘if what is known as pharmacotherapy were to be applied without the patient's consent that could amount to a breach of Article 3’.<sup>104</sup> Accordingly, Korean pharmacotherapy in the 2010 Act is apparently far more severe than that of the Czech Republic, because the consent of an offender is not required for the treatment and the offender’s refusal might be punished harshly and repeatedly.

As discussed in Section 2.2.3, the U.S. Supreme Court ruled that if a punishment involves ‘the unnecessary and wanton infliction of pain’ or it is ‘grossly out of proportion to the severity of the crime’, it is cruel and unusual punishment that violates human dignity, which is an essential idea of the Eighth Amendment.<sup>105</sup> In the U.S., pharmacotherapy has been considered a cruel and unusual punishment, violating human dignity because none of the states’ legislation requires the informed consent of an offender, which invalidates an offender’s internal capabilities, such as reason and self-determination, which are regarded as most important to human dignity, and, furthermore, the treatment is more likely to last for life.<sup>106</sup>

Taking into consideration the discussions in the ECtHR and the U.S., the absence of free and informed consent in the 2010 Act seems a fatal defect, and, thus, compulsory pharmacotherapy in this Act apparently falls into the notion of punishment which is cruel, inhuman or degrading in Article 7 of the ICCPR.

Side effects are another problem of pharmacotherapy. As discussed in Chapter 1 and Chapter 6, compulsory pharmacotherapy in the 2010 Act is closer to punishment than a treatment, and its significant side effects have been debated since the bill of pharmacotherapy was introduced in Parliament in 2008. The Ministry of Justice notified that MPA, Leuprolide Acetate, Goserelin Acetate, Triptorelin Acetate and CPA are the official drugs for pharmacotherapy,<sup>107</sup> with reference to the commissioned research document.<sup>108</sup> According to this document, among the official drugs, Leuprolide, Goserelin and Triptorelin may, although rarely, cause a pituitary

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<sup>104</sup> *Janiga v Czech Republic*, [2011] EWHC 553 (Admin) (22 February 2011) [2011], para. 21(1).

<sup>105</sup> *Gregg v Georgia*, 428 U.S. 153 [1976], 173.

<sup>106</sup> Stinneford (Ch.2, n 26) 566, 596.

<sup>107</sup> Drugs for Pharmacological Treatment (Ministry of Justice Notification 2014-393).

<sup>108</sup> Young-Deuk Choi, *A Study on the Standardisation of Drug Selection and Administration, and Screening Procedures for Pharmacological Treatment* (Ministry of Justice 2011).



apoplexy that can cause an unrecoverable bodily injury.<sup>109</sup> The Daejeon District Court posed a question about the side effects of the drugs, stating that ‘all of the side effects of the official drugs reviewed by the research are based on clinical trials in foreign countries, so what kinds of side effects that could affect Koreans after pharmacotherapy for a long period of up to 15 years have not been clarified’.<sup>110</sup> Regarding the effects and side effects of pharmacotherapy, as noted in Section 6.5, even though Shin, a psychiatrist, claimed that sufficient clinical tests must be done before the enforcement of the treatment, in the public hearing of the bill on 19 November 2009,<sup>111</sup> it was ignored by Parliament and the government.

Research on the side effects of pharmacotherapy on Korean patients was published in 2013. After the 2010 Act was passed by Parliament on 29 June, 2010, and before it went into effect on 24 July, 2011, the National Forensic Hospital, the main facility for preventive medical treatment and custody orders in Korea, implemented short-term pharmacotherapy for three months on confined sex offenders who wished to undertake the treatment with informed consent.<sup>112</sup> Early release was not connected with participation in the treatment.<sup>113</sup> Of 121 patients, 61 volunteered after a comprehensive explanation of the treatment by physicians, and 38 received the treatment for three months.<sup>114</sup> During three months of treatment and 9.3 months later, 26 out of 38 patients had suffered from side effects such as ‘hot flushes, weight gain, testis size reduction, depressed mood, and a reduction of bone mineral density’.<sup>115</sup>

Taking into consideration the maximum term of 15 years, significant adverse effects of pharmacotherapy may be anticipated in this report. Harrison and Rainey argue that compulsory pharmacotherapy may be degrading treatment violating Article 3 of the ECHR because ‘the side effects of the drugs may grossly humiliate an offender’.<sup>116</sup> In addition, in the U.S., as noted in Chapter 2, a number of side

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<sup>109</sup> Ibid, 15–17.

<sup>110</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 8–9.

<sup>111</sup> National Assembly Legislative and Judiciary Committee, *Record of Public Hearing on the Prevention and Treatment of Persistent Child Sex Offenders Bill 20085–6*.

<sup>112</sup> Jae Woo Lee and others, ‘Treatment outcomes of chemical castration on Korean sex offenders’ (2013) 20 *Journal of Forensic and Legal Medicine* 563.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid, 563–64.

<sup>115</sup> Ibid, 565.

<sup>116</sup> Harrison and Rainey (Ch.2 n 9) 237.

effects of MPA have caused some to deem pharmacotherapy disproportionate to the crime, making it a cruel and unusual punishment. Therefore, taking into account the imposition of pharmacotherapy without any given consent, expected severe but unintentional side effects and a long-term treatment period, compulsory pharmacotherapy in the 2010 Act appears to be cruel, inhuman or degrading punishment, so that it violates Article 7 of the ICCPR.

Furthermore, the rights to self-determination, privacy and family of an offender are significantly restricted by compulsory pharmacotherapy. The offender stands to lose some important things during pharmacotherapy, such as the ability to decide whether to undertake a treatment, potential sexual relationships and even marriage and the ability to procreate. If temporary suspension of pharmacotherapy is allowed for an offender to have a sexual relationship with a partner or to reproduce, a degree of restriction may be mitigated, but there is no room to consider such a thing in the Act. Furthermore, harsh punishment shall be imposed for an offender who violates the conditions during the period of pharmacotherapy. As noted in Section 6.6.5, an offender escaping the treatment or taking countervailing medications shall be punished by imprisonment for not more than seven years or by a fine not exceeding 20 million won, and an offender refusing to take pharmacological or psychological treatment, or a hormone level assessment, shall be punished by imprisonment for not more than three years or by a fine not exceeding 10 million won.<sup>117</sup>

Additionally, if an offender is incarcerated because of his violation of the conditions or a new offence, during the period of confinement the term of pharmacotherapy should be suspended and resumed after the offender's release.<sup>118</sup> Because there is no limit to the number of punishments for violations of the conditions, the offender can be punished over and over and the term of pharmacotherapy may be prolonged indefinitely in practice if an offender refuses to undergo the treatment continuously. Moreover, the duration of pharmacotherapy may be extended if reasonable grounds to continue pharmacotherapy exist, in view

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<sup>117</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 35(1),(2).

<sup>118</sup> *Ibid*, s 14(4),(5).

of the treatment progress, or if an offender violates the conditions, provided that the total period, including the previous term, shall not exceed 15 years.<sup>119</sup>

Overall, compulsory pharmacotherapy in the Act seems to violate the ICCPR. It would be revealed more explicitly by a proportionality test, which will be addressed in the next section.

### **7.3.1.2. Compatibility with the principle of proportionality**

As noted in Section 7.2.1, there are four rules in the principle of proportionality. Of the four rules, it has been generally agreed that pharmacotherapy in the Act complies with the rule of legitimacy of the legislative purpose.<sup>120</sup> Section 1 of the Act declares that ‘the purpose of this Act is to prevent the recidivism of sexual offences by performing pharmacological treatment on patients with paraphilic disorder who have committed sexual crimes with a risk of reoffending, thereby promoting their rehabilitation’.<sup>121</sup> The Daejeon District Court stated that the purpose of pharmacotherapy is legitimate in that the mere toughening up of the punishment would not be an effective response to sexual offences, because therapeutic approaches, taking into consideration the characteristics of sex offenders, are needed, and pharmacotherapy would help some sex offenders who have deviant sexual urges and behaviours to avoid reoffending.<sup>122</sup> All the justices of the Constitutional Court affirmed this opinion.<sup>123</sup> Of the nine justices of the Constitutional Court, six affirmed that the pharmacotherapy in the 2010 Act is constitutional because of its compliance with the four rules, except the provision requiring a court to order pharmacotherapy at the same time as the conviction of an offender, while three justices dissented from the majority opinion, saying that the pharmacotherapy in the Act is itself unconstitutional on the grounds of its dissatisfaction with the three rules.

However, as discussed above, compulsory pharmacotherapy in the Act seems to contravene Article 7 of the ICCPR. Although the wording of the provision about

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<sup>119</sup> *Ibid*, s 16(1).

<sup>120</sup> Jeong (n 5) 47; Soon-Chul Huh, ‘The Constitutional Debates of the Treatment with Medication for Sexual Drive (Chemical Castration)’ (2012) 57 *Public Land Law Review* 403, 420.

<sup>121</sup> *Pharmacological Treatment of Sex offenders Act 2010 (ROK)* s 1.

<sup>122</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 6–7.

<sup>123</sup> *CCC 2013 Hun-Ga 9*, 23 December 2015 [2013] 3, 12–13, 24–25.

the purpose of the Act seems to aim at the treatment and rehabilitation of an offender, the purpose apparently cannot be realised by compulsory pharmacotherapy, which is closer to punishment. Harrison and Rainey state that ‘the use of pharmacotherapy as punishment is unlikely to be accepted as a legitimate aim’.<sup>124</sup> In this sense, the Act does not seem to satisfy the rule of legitimacy of the legislative purpose. Whether the Act complies with the other three rules of the principle of proportionality will be addressed below.

#### **A. The rule of the appropriateness of the means adopted**

This rule requires a law restricting human rights to be an appropriate way to achieve the purpose of the restriction, so the law would be unconstitutional if the means of restricting human rights are not fit for the purpose.<sup>125</sup> Therefore, whether compulsory pharmacotherapy is an effective way to prevent sex offenders from reoffending and promote their rehabilitation is significant.

It is hard to find any literature stating that compulsory pharmacotherapy has the same effect as voluntary pharmacotherapy. Even though the Ministry of Justice in Korea has maintained the effectiveness of pharmacotherapy in the deliberation of the Act in Parliament and the trial of the Constitutional Court, citing the results of the Oregon pilot pharmacotherapy programme, which significantly lowered the recidivism rates of attendees, it does not seem to be proper evidence for the Act because the Ministry of Justice ignored attendees’ high refusal rates on the Oregon programme, which reached 41%.<sup>126</sup> The Daejeon District Court stated that there is no scientific evidence for the effectiveness of pharmacotherapy in Korea, and therefore it violates the rule of the appropriateness of the means adopted.<sup>127</sup> The court did not recognise the statement of the Ministry of Justice, saying that ‘the target of the Oregon programme was the offenders who wished to attend the programme voluntarily, so this research cannot be a suitable basis for the effectiveness of compulsory pharmacotherapy’; rather, ‘the offenders undertaking compulsory

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<sup>124</sup> Harrison and Rainey (Ch.2 n 9) 238.

<sup>125</sup> Chong (n 3) 379.

<sup>126</sup> Maletzky, Tolan and McFarland (Ch.2 n.168) 309.

<sup>127</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 7.

pharmacotherapy might tend to express aggression more severely because of resistance and anger'.<sup>128</sup>

In contrast to the view of the Daejeon District Court, the majority of the justices of the Constitutional Court stated that pharmacotherapy is an appropriate means of achieving the legislative purpose of the Act, because pharmacotherapy has been known for its effectiveness, regardless of an offender's informed consent, in reducing the sexual fantasies and urges of paraphilic-disordered sex offenders, which play a significant role in their sexual behaviour, and its efficacy in reducing the recidivism rates of sex offenders.<sup>129</sup> However, the minority did not agree with the statement of the majority because of the inefficacy of pharmacotherapy, based on the following reasons: a) even though pharmacotherapy decreases sexual fantasies and urges, it cannot guarantee the absolute prevention of an offender's reoffending because, in addition to sexual fantasies and urges, other elements including anger, a sense of inferiority or isolation, male-centred violent sexual recognition, and a lack of empathy could cause sexual offences;<sup>130</sup> b) there has been little trustworthy research on the effectiveness of compulsory pharmacotherapy because most studies have been conducted using the freely given consent of offenders and have methodological problems, such as small sample sizes or being non-double-blind control studies;<sup>131</sup> c) in addition, since pharmacotherapy does not cure paraphilic sexual interest, it does not seem to be an appropriate means of accomplishing the legislative purpose of the 2010 Act.<sup>132</sup>

A primary issue is whether compulsory pharmacotherapy is as effective as voluntary pharmacotherapy, which may help determine whether pharmacotherapy in the Act is an appropriate means of achieving its legitimate purpose. While the literature exploring the effectiveness of compulsory pharmacotherapy is scarce, a number of researchers agree on the effectiveness of voluntary pharmacotherapy and maintain that the informed consent of an offender is one of the most significant elements for ethical and effective treatment.<sup>133</sup> The Lanzarote Convention also

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<sup>128</sup> Ibid 7.

<sup>129</sup> *CCC 2013 Hun-Ga 9, 23 December 2015* [2013] 14.

<sup>130</sup> Ibid 26.

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Berlin (Ch.2, n 83) 1030; Thibaut and others (Ch.1 n 49) 606, 622, 633, 643, 647; IATSO, *Standards of Care for the Treatment of Adult Sex Offenders of the International Association*

requires entirely the free and informed consent of an offender in order to undertake pharmacotherapy.<sup>134</sup>

As discussed in Chapter 1, the effectiveness of mandatory psychological intervention in a criminal justice setting has been supported by a number of academics, since even involuntary attendees tend to be motivated to change in the course of participating in the programme and start applying recognised knowledge and social skills to their life. The opposite seems to be the case for compulsory pharmacotherapy. The reason seems to be that the effectiveness of compulsory pharmacotherapy has scarcely been explored, and it is hard for an offender to experience playing an important role in changing his behaviour autonomously because his behavioural change is not caused by his own choice, but as a direct effect of the drugs. Even though the offender can choose whether he goes to hospital to have an injection, he does not apparently feel like he is making his own choice to change his deviant sexual behaviour because he would be imprisoned for not more than three years or receive a fine not exceeding ten million won,<sup>135</sup> if he refused to undertake pharmacotherapy. Berlin states that an offender whose deviant sexual urges have been reduced by pharmacotherapy may focus on a psychological treatment programme and be motivated to change,<sup>136</sup> but it does not seem to be demonstrated yet whether compulsory pharmacotherapy would have the same effect.

Therefore, the majority opinion of the Constitutional Court seems anything but convincing, and it clearly needs more developed research in order to state that compulsory pharmacotherapy is an appropriate means of achieving its legitimate purpose.

As to whether pharmacotherapy based on the informed consent of an offender is constitutional, this is generally agreed in the literature.<sup>137</sup> Of the three justices standing on the minority side in the Constitutional Court, two did not

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*for the Treatment of Sex offenders (IATSO)*, (IATSO 2013) Principle 2; Briken and Kafka (Ch.1, n 54) 3.

<sup>134</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Art. 17; Council of Europe, *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para 104, 110, 111.

<sup>135</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 35(2).

<sup>136</sup> Fred S. Berlin, 'Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment' in Joanne Greer and Irving R. Stuart (eds), *The Sexual Aggressor* (Van Nostrand Reinhold Company 1983) 110.

<sup>137</sup> Lee (n 5) 113–15; Park (n 5) 180–81; Jeong (n 5) 43–44; Sung (n 6) 87; Park and Song (n 6) 237; Huh (n 120) 420.

explicitly comment on this issue, but one, Jin-Seong Lee, stated that pharmacotherapy would not violate the rights to bodily integrity, self-determination or the privacy of an offender if it were based on the freely given informed consent of the offender as whether or not to undergo the treatment would be decided by himself.<sup>138</sup> As discussed above, the effectiveness of voluntary pharmacotherapy has been widely accepted, so it would be an appropriate means of achieving the legitimate purpose if an offender participates in the treatment based on informed consent.

It seems worthwhile to examine the other basis for the minority argument in the Constitutional Court, indicating the inefficacy of pharmacotherapy because of insufficiently dealing with other causes of sexual crimes, such as anger, and the non-curable nature of an offender's paraphilic sexual interests. Psychotherapy, necessarily combined with pharmacotherapy, is recommended for comprehensive treatment to deal with the causes of sexual offending, such as anger, a sense of inferiority, male-centred violent sexual recognition, and a lack of empathy.<sup>139</sup> In the Act, psychotherapy must be provided in conjunction with pharmacological treatment during the term of the treatment,<sup>140</sup> which should include the following: a change of distorted sexual recognition; a reconsideration of deviant sexual orientation; an enhancement of motivation for treatment; victim empathy and social adaptability; and the prevention of relapse of the deviant sexual behaviour.<sup>141</sup> Concerning how to deal with sexual interest, Thibaut and colleagues state that, even though pharmacotherapy does not change the paraphilic sexual orientation of an offender, according to many research reviews and meta-analyses, the combination of pharmacotherapy and behavioural or psychological treatment has been useful in decreasing the risk of recidivism.<sup>142</sup>

In this respect, the minority statement does not seem acceptable, and the minority should have argued that psychological treatment would not be effective in dealing with other causes of sexual offending aside from deviant sexual fantasies and urges, and any treatment would be of no use should an offender's sexual orientation

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<sup>138</sup> *CCC 2013 Hun-Ga 9, 23 December 2015* [2013] 32.

<sup>139</sup> Thibaut and others (Ch.1, n 49) 645.

<sup>140</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 10(1).

<sup>141</sup> Presidential Order of the Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 5(1).

<sup>142</sup> Thibaut and others (Ch.1, n 49) 644, 647.

not be changed. Therefore, despite the arguments of the minority of the Constitutional Court, voluntary pharmacotherapy combined with psychological treatment seems an appropriate way to accomplish the legitimate purpose.

Whether an offender can be treated by pharmacotherapy before release from a confinement facility is another issue. In order for pharmacotherapy to become an appropriate means for the treatment of paraphilic-disordered sex offenders, it should be provided during the term of imprisonment, because offenders still suffer from paraphilic disorders in prison and, in the therapeutic view, there is no reason to delay the treatment until release. This issue was ignored in the Constitutional Court and has hardly been addressed in the literature. Pharmacotherapy reduces deviant sexual fantasies and urges and helps offenders enter a normal life and psychological treatment willingly;<sup>143</sup> therefore, it would be a good way to motivate inmates to participate in psychotherapy. If inmates positively experience the effect of the treatment in prison, they might undertake post-release treatment voluntarily or with less resistance. However, in the Act, pharmacotherapy begins two months before the offender's release from the confinement facility and continues for up to 15 years.<sup>144</sup> This seems to mean that the Act introduces pharmacotherapy from the perspective of social protection rather than the treatment and rehabilitation of an offender. In other words, the following thinking lies in the background of the Act: during the term of incarceration, the offender cannot commit sexual offences, so pharmacotherapy does not need to be provided until his return to the community, even if he needs the treatment in prison. In this context, both the treatment and rehabilitation of the offender are ignored whilst pharmacotherapy is considered merely as a means of social protection, thus violating the human dignity which is assured by Article 10 of the constitution. Ho-Joong Lee states that pharmacotherapy based on informed consent should be provided as part of a comprehensive treatment programme in prison or in the National Forensic Hospital.<sup>145</sup>

As discussed in Chapter 2, this seems similar to legislative examples in different countries. In jurisdictions that have treatment-oriented legislation, such as Denmark and Germany, pharmacotherapy is provided to offenders during the term of

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<sup>143</sup> Berlin (n 136) 110; Edward A. Fitzgerald, 'Chemical Castration: MPA Treatment of the Sex offender' (1990) 18 *American Journal of Criminal Law* 1 33.

<sup>144</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 14(3).

<sup>145</sup> Lee (n 6) 68.



incarceration, whilst in the jurisdictions that have punishment-oriented legislation, such as in some states in the U.S., it is provided only after release from prison. This point is another reason why the pharmacotherapy of the Act does not comply with the rule of the appropriateness of the means adopted.

### **B. The rule of least restrictiveness**

This rule means that a law restricting human rights should adopt the least restrictive means among the ways capable of achieving the same purpose.<sup>146</sup> It has been a dominant statement in the literature that pharmacotherapy without informed consent does not comply with this rule because of its severe effects of eliminating sexual urges and capacities, as well as its side effects which can cause long-term physical defects,<sup>147</sup> implying that it would be less restrictive if an offender is allowed to choose or refuse the treatment voluntarily. The Constitutional Court, however, ruled with a contrary opinion to the literature.

The majority of the Constitutional Court stated that the pharmacotherapy in the 2010 Act satisfied the rule of least restrictiveness because of the following reasons: the objects of the treatment are restricted to paraphilic disordered sex offenders who commit grave sexual crimes with a risk of reoffending, so a court shall reject the prosecution of pharmacotherapy when the court acquits the offender, suspends the sentence of the accused, or sentences him to a fine or suspension of execution of imprisonment; and pharmacotherapy is provided on the basis of the medical necessity of the treatment and is therapeutic in nature, the term of pharmacotherapy is limited, and the effect is reversible.<sup>148</sup> In order to emphasise that the pharmacotherapy in the Act is a treatment, the majority also claimed that, with reference to the guideline of the World Federation of Societies of Biological Psychiatry (WFSBP), ‘it is not medically unusual to use pharmacotherapy for serious paraphilic patients’.<sup>149</sup>

However, if the Act adopted voluntary pharmacotherapy, it would be a less restrictive alternative. Regarding the freely-given informed consent of an offender,

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<sup>146</sup> Chong (n 3) 380.

<sup>147</sup> Lee (n 5) 115; Park (n 5) 181; Jeong (n 5) 48; Huh (n 120) 421.

<sup>148</sup> CCC 2013 Hun-Ga 9, 23 December 2015 [2013] 15–19.

<sup>149</sup> Ibid 16.

the majority claimed that the pharmacotherapy in the Act aims at social protection as well as the rehabilitation of the offender through the treatment, but ‘it is easily predicted that the offenders who need pharmacotherapy tend to refuse to undertake it, so through voluntary pharmacotherapy only it would be difficult to achieve the legislative purpose of the 2010 Act’.<sup>150</sup> This seems like speculation, however, because no evidence to prove this prediction was discussed in the case. The number of sex offenders who would choose to accept the treatment could be easily estimated if the government conducted a pilot programme in a prison or the National Forensic Hospital, following the suggestions of the experts in the public hearing in Parliament as noted above. There was a preliminary treatment programme at the National Forensic Hospital, as noted above. In this programme, among 121 patients, 61 volunteered and 38 received the treatment for three months.<sup>151</sup> From this result, contrary to the statement of the majority, it is assumed that more sex offenders than expected would volunteer to undertake pharmacotherapy.

This preliminary pharmacotherapy was not commented on in the adjudication of this case, but it seems to have a significant implication. The act narrows the targets of pharmacotherapy in order to satisfy the rule of least restrictiveness, but this attempt makes pharmacotherapy far from the appropriate means of achieving the legislative purpose of the Act, because the less the treatment is applied, the more sex offenders who need the treatment might be excluded. This is caused by the fact that, instead of being voluntary, the Act introduces compulsory pharmacotherapy. In addition, as concerns the informed consent of an offender, the majority ignored the guidelines of the WFSBP, while Thibaut and colleagues – the authors of this document – emphasised the guidelines in repeatedly saying that ‘informed consent must be obtained’.<sup>152</sup> In this respect, the majority does not seem convincing, and compulsory pharmacotherapy in the Act does not seem to satisfy the rule of least restrictiveness.

According to Section 8(1) in the Act, pharmacotherapy can be ordered for up to 15 years at the time of a defendant’s conviction,<sup>153</sup> but the treatment should begin

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<sup>150</sup> Ibid 17.

<sup>151</sup> Lee and others (n 112) 563.

<sup>152</sup> Thibaut and others (Ch.1, n 49) 622, 633, 643, 647.

<sup>153</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 8(1).

two months before his release from prison or the National Forensic Hospital.<sup>154</sup> This provision has been considered a violation of the rule of both least restrictiveness and the due process of law, because no procedure exists in the Act to reconsider conceivable changes of a risk of reoffending and therapeutic necessity after execution of long-term imprisonment or preventive medical treatment and custody orders.<sup>155</sup> It was one of the reasons why the Daejeon District Court requested adjudication.<sup>156</sup> All the justices of the Constitutional Court held that it is ‘inconsistent with’ the rule of least restrictiveness unless the procedure for re-examination of original sentencing is legislated at the time of the offender’s release.<sup>157</sup> There is a difference between the concepts of ‘unconstitutional’ and ‘inconsistent’ as they guide decisions within the constitution. When the Constitutional Court decides that a certain law or provision is unconstitutional, it shall lose effect from the date on which the decision is made and any law or provision regarding criminal punishment shall lose effect retrospectively.<sup>158</sup> Conversely, when any law or provision is decided as being inconsistent with the constitution, its effect lasts until the time decided by the Constitutional Court.<sup>159</sup> This is used to avoid a potential legal vacuum created by the decision of unconstitutionality, and the Constitutional Court generally decides in the ruling the deadline when a relevant law or provision should be amended following the intent of the court.<sup>160</sup> In this case, the Constitutional Court ruled that Section 8(1) in the Act should be amended by 31 December 2017.<sup>161</sup>

The minority stated that pharmacotherapy is not necessary to achieve the legislative purpose of the 2010 Act, the prevention of sexual offenders from reoffending, because the purpose can be realised by policies already introduced, such as preventive medical treatment and custody orders, post-release supervision, EM, and public notification.<sup>162</sup> Pharmacotherapy cannot be provided by post-release supervision, EM, and public notification, so, in this respect, the minority’s opinion

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<sup>154</sup> *Ibid* s 14(3).

<sup>155</sup> Park and Song (n 6) 239; Jeong (n 7) 149.

<sup>156</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 8.

<sup>157</sup> *CCC 2013 Hun-Ga 9*, 23 December 2015 [2013] 20–21, 29.

<sup>158</sup> Constitutional Court Act 2014 (ROK) s 47(2), (3).

<sup>159</sup> Chong (n 3) 1516.

<sup>160</sup> *Ibid* 1517.

<sup>161</sup> *CCC 2013 Hun-Ga 9*, 23 December 2015 [2013] 1.

<sup>162</sup> *Ibid* 28–29.

does not seem acceptable. However, their statements about preventive medical treatment and custody orders are worth reviewing because the orders might be an alternative to the pharmacotherapy detailed in the Act.

Preventive medical treatment and custody orders target offenders with mental illnesses or substance abuse problems as well as sex offenders with psychosexual disorders,<sup>163</sup> whilst pharmacotherapy is applied to paraphilic-disordered sexual offenders ‘who are determined to be incapable of controlling their behaviours due to sexual deviation according to an assessment by a psychiatrist’.<sup>164</sup> The definition of ‘psychosexual disorder’ in the Preventive Medical Treatment and Custody Act 2008 comes from the ICD-10,<sup>165</sup> which describes paraphilia and psychosexual disorders as ‘approximate synonyms’,<sup>166</sup> and, therefore, it can be interpreted that ‘sex offenders with psychosexual disorders’ has the same meaning as ‘paraphilic-disordered sex offenders’. In this regard, paraphilic-disordered sexual offenders could be a target of pharmacological treatment orders and preventive medical treatment and custody orders at the same time. When an offender is sentenced to imprisonment and preventive medical treatment and custody orders concurrently, the offender is incarcerated in the National Forensic Hospital instead of prison for up to 15 years.<sup>167</sup> The period for the execution of preventive medical treatment and custody orders shall be included in the period of imprisonment, and if the order terminates before the term of imprisonment ends, the offender is transferred to prison.<sup>168</sup> In the National Forensic Hospital, an offender takes prescription drugs and medical treatment as well as participating in psychotherapy, learning social skills and vocational training programmes under the care of psychiatrists, physicians and other professionals.<sup>169</sup>

According to the Framework of the Health and Medical Service Act 2013, all patients have the right to receive appropriate medical services to protect and improve

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<sup>163</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 2(1).

<sup>164</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 2

<sup>165</sup> National Assembly Legislative and Judiciary Committee, *Report on the Bill on the Amendment of the Preventive Medical Treatment and Custody Act 2008* (February 2008) 10.

<sup>166</sup> 2017 ICD-10-CM Diagnosis Code F65.9 paraphilia, unspecified, <http://www.icd10data.com/ICD10CM/Codes/F01-F99/F60-F69/F65-/F65.9> accessed 16 January 2017.

<sup>167</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 16(2), 18.

<sup>168</sup> *Ibid* s 18.

<sup>169</sup> Sung Hoon An, *Study on Improvement of Forensic Psychiatry* (Korean Institute of Criminology 2011) 48–49.

their health and each medical services personnel member has the right to choose the appropriate medical treatment measures to protect the health of patients.<sup>170</sup> The Medical Service Act 2016 states that each physician should issue a prescription to administer the necessary medicine for a patient.<sup>171</sup> According to these provisions, a psychiatrist in the National Forensic Hospital can administer anti-androgen drugs for paraphilic-disordered sex offenders who have not been given pharmacological treatment orders, but rather preventive medical treatment and custody orders, based on their written informed consent.<sup>172</sup> Ji-Hoon Jeong states that pharmacotherapy and preventive medical treatment and custody orders need not be managed separately,<sup>173</sup> and Ho-Joong Lee argues for the necessity of providing wide-ranging treatment of sex offenders, including pharmacotherapy, in the National Forensic Hospital.<sup>174</sup> The Lanzarote Convention requires the party to ensure sex offenders against children access intervention programmes, including medical castration.<sup>175</sup> In this respect, preventive medical treatment and custody orders would be an alternative to compulsory pharmacotherapy in the Act. This issue will be addressed in detail in the next chapter.

### **C. The rule of the balance of legal interests concerned**

This rule means that the benefits caused by the restriction of human rights should be greater than or the same as the inhibited legal interests of the party whose human rights are restricted.<sup>176</sup> Some argue that an offender's restricted human rights are of a much more severe nature than the public benefits gained by the restriction, so pharmacotherapy does not comply with the rule of the balance of legal interests concerned.<sup>177</sup> The Daejeon District Court admitted that the public interest in pharmacotherapy, which may protect the community from sexual reoffending, is

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<sup>170</sup> Framework of the Health and Medical Service Act 2013 (ROK) s 6(1), (2).

<sup>171</sup> Medical Service Act 2016 (ROK) s 18(1).

<sup>172</sup> Ministry of Justice Regulation on the Classification and Treatment of Patients in the National Forensic Hospital 2015 s 20(4), (7).

<sup>173</sup> Jeong (n 7) 145–46;

<sup>174</sup> Lee (n 6) 68.

<sup>175</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Art. 7, 15(1); Council of Europe, *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* 16.

<sup>176</sup> Chong (n 3) 381.

<sup>177</sup> Jeong (n 5) 48; Huh (n 120) 421.

great.<sup>178</sup> However, taking into consideration its violation of human dignity and restriction of the rights to bodily integrity, self-determination, family life and privacy of the offender, in addition to reasonable questions about the effectiveness of compulsory pharmacotherapy, the time difference between the sentencing and treatment, and the necessary response to the side effects of the drugs, the court stated that ‘it is difficult to say that the balance is kept between the protected interest of the public and the restricted interest of an offender as related to pharmacotherapy’.<sup>179</sup> In addition, the court stated that, while the Prevention and Treatment of Persistent Child Sex Offenders Bill 2008 maintained the balance between social protection and the rights of an offender through a requirement for the consent of an offender, the Act, which removed the consent requirement, focuses on social protection rather than the human rights of an offender.<sup>180</sup> Moreover, since the research document commissioned by the Ministry of Justice asserts that pharmacotherapy should not be provided for the patients who do not wish to undertake the treatment,<sup>181</sup> by citing this document, the court ruled that compulsory pharmacological treatment does not comply with the rule of the balance of legal interests concerned.<sup>182</sup>

Concerning this issue, the majority of the Constitutional Court stated that pharmacotherapy in the Act maintains the balance between public benefits caused by the treatment and the restricted legal interests of an offender, as follows: it is obvious that the offender’s inhibited human rights are significant, but this treatment is not only for other persons or society, but also for the offender himself; its effects are reversible and the procedures to deal with side effects are well-prepared in the Act, including the diagnosis and cure of side effects as well as temporal cessation of the treatment.<sup>183</sup> On the contrary, the minority claimed that the public benefits gained by the treatment are not considerable, but the restricted human rights of an offender are significant, so pharmacotherapy in the Act seriously loses the balance.<sup>184</sup> While the effectiveness of pharmacotherapy to prevent reoffending and to protect society is temporary or obscure, because the main effect is reversible and the effectiveness of

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<sup>178</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 9.

<sup>179</sup> *Ibid* 10.

<sup>180</sup> *Ibid*

<sup>181</sup> Choi (n 108) 9, 12, 15.

<sup>182</sup> *Daejeon District Court Request of an Adjudication of Unconstitutionality*, 8 February 2013 [2013] 10.

<sup>183</sup> *CCC 2013 Hun-Ga 9*, 23 December 2015 [2013] 21.

<sup>184</sup> *Ibid* 29–31.

compulsory pharmacotherapy is ambiguous, the offender's rights to bodily integrity, self-determination and privacy are significantly restricted and the reported side effects are harsh.<sup>185</sup> In this sense, the minority posed the fundamental question of whether pharmacotherapy is aimed at the modification of a human by controlling bodily function, which would endanger identification as a human being.<sup>186</sup>

As discussed in previous sections, there is as yet little evidence for the effectiveness of compulsory pharmacotherapy and, paradoxically, the coercive nature of this treatment seems to have made it difficult to be used widely. Since the Act came into effect on 24 July 2011, courts had sentenced only 21 sex offenders to pharmacotherapy by 30 July 2016.<sup>187</sup> Thus, it is unclear how significant the public benefits of the treatment would be. By contrast, it is well-known and clear that pharmacotherapy significantly restricts human rights, its side effects are harsh and an offender who refuses treatment can be severely punished. Furthermore, it may have helped sex offenders much more if it had been introduced as voluntary, but, at present, there is no way to find out how many offenders volunteer to undergo the treatment and what their responses to it are. Therefore, the 2010 Act does not seem to comply with the rule of the balance of legal interests.

As discussed above, compulsory pharmacotherapy in the 2010 Act clearly does not pass the proportionality test because of the absence of free and informed consent, the neglect of medical necessity of an offender before release, the significant side effects and the imbalance between the restricted rights of an offender and public interests. If a long-term treatment causes irreversible damage, such as permanent impotence, to an offender's body, it would be a cruel or inhumane punishment, and even if such harm is temporary and reversible, it would be a degrading punishment causing an offender to be humiliated. Thus, compulsory pharmacotherapy in the Act seems to violate the ICCPR. Because the doctrines of *lex posterior* and *lex specialis* are applied to a contradiction between domestic laws and international laws,<sup>188</sup> the prohibition of cruel, inhumane or degrading punishment/treatment in Article 7 of the ICCPR, which is a special provision relating to punishment/treatment, clearly prevails over the Act. It was ignored, however, in

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<sup>185</sup> Ibid

<sup>186</sup> Ibid 31.

<sup>187</sup> Ministry of Justice Protective Legislation Division, *Monthly Report on Pharmacological Treatment Orders* (2016) Unpublished.

<sup>188</sup> Woo (n 23) 247–48, 263.

the adjudication of the Constitutional Court, and has been rarely discussed in relevant literature.

### **7.3.1.3. Compatibility with the principle of prohibition of violating an essential aspect of rights**

As noted above, if a certain restriction makes relevant rights empty or nominal, it violates an essential aspect of the rights and the restriction would not be compatible with the second paragraph of Article 37(2) of the constitution, so that it cannot be justifiable. The Constitutional Court did not address whether compulsory pharmacotherapy of the Act violates this principle.

If a restriction caused by pharmacotherapy is short-term and reversible, it is hard to state that such a restriction makes relevant rights empty or nominal, or *vice versa*,<sup>189</sup> so that whether the restriction is permanent and irreversible needs to be addressed. It is generally agreed that the effect of pharmacotherapy is temporary and reversible contrary to that of surgical castration.<sup>190</sup> However, as noted above and in Chapter 1 and 6, what kinds of side effects would occur and how severe these would be after long-term treatment have not been studied sufficiently with Korean clinical cases, so it seems difficult to declare that the effect of pharmacotherapy is reversible. Forced pharmacotherapy, regardless of uncertainty, might cause unknown irreversible damage to an offender, which violates an essential aspect of the rights to bodily integrity, self-determination and privacy. It evidently would disregard the human dignity of an offender to place him in such an uncertain and unstable status for a long time by putting him under the threat of severe punishment for refusal of the treatment.

As noted above, the temporary suspension of pharmacotherapy for a sexual relationship or procreation is not allowed and undertaking countervailing medication is punished, which makes pharmacotherapy ‘a treatment exceeding cure’, inhibiting not only sexual offending, but also all kinds of sexual behaviour, which is what Baker has stated.<sup>191</sup> Harrison states that, if an offender undertaking pharmacotherapy is able to engage in sexual activity, it can be a treatment option, and if he is not, it

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<sup>189</sup> Kim (n 15) 226–33.

<sup>190</sup> Fond (Ch.1, n 8) 167.

<sup>191</sup> Baker (n 87) 389.



can only be a punishment.<sup>192</sup> Along the same lines as Baker and Harrison, if the prohibition of temporary suspension and undertaking countervailing medication might cause an offender to fail to satisfy the desire of himself or a partner to marry, reproduce or have a sexual relationship, it would be a violation of an essential aspect of the rights to marriage, reproduction and to have a family of an offender.

Overall, the uncertainty of side effects and the absolute prohibition of the suspension of pharmacotherapy or the taking of countervailing medication violate an essential aspect of the rights to bodily integrity, self-determination and privacy.

#### **7.4. Due process of law**

Article 12(1) of the constitution declares the principle of due process of law, which requires granting an opportunity for individuals to present their opinions or relevant materials in the process of the exercise of state power.<sup>193</sup> As discussed in Chapter 2, a well-established medical assessment and management process is essential when making pharmacotherapy an appropriate means of achieving the legislative purpose of the Act. In this sense, the U.S. District Court of New Jersey required a due process hearing for the forced administration of drugs for an involuntary mental patient in *Rennie v. Klein*.<sup>194</sup> Wisconsin enacted this procedure for sex offenders.<sup>195</sup> Because few similar cases relevant to this principle in the Constitutional Court have been found in Korea, these examples of U.S. case law and legislation would be a reference for the interpretation of the provision of the 2010 Act.

According to the 2010 Act, a prosecutor should request a medical diagnosis or an evaluation of an offender by a psychiatrist, and if it is not sufficient, a court may request a new diagnosis or evaluation by another psychiatrist.<sup>196</sup> However, neither the requisite qualifications and experience of psychiatrists, nor the nature of the assessment, are specified in the 2010 Act. Other important matters are also neglected, such as whether the result of diagnosis should be explained or disclosed to an offender, or how to assist an offender who wishes to contest the result. Because

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<sup>192</sup> Harrison (Ch.1, n 8) 4.

<sup>193</sup> Chong (n 3) 502.

<sup>194</sup> *Rennie v. Klein* 462 F.Supp. 1131 (D.N.J.) [1978], 1147. See p.27 in Ch. 2.

<sup>195</sup> Wisconsin Administrative Code DOC 330.05–330.14. See p.21 in Ch. 2.

<sup>196</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 4(2), 9.

the offender cannot choose to undertake the treatment voluntarily, it would be more important to secure his procedural rights to challenge an assessment deciding the necessity of pharmacotherapy, but this is not guaranteed by the 2010 Act.

Before prosecution and sentencing, the offender is not provided with knowledge of the necessity, risks or benefits of pharmacotherapy until a probation officer explains its effects, side effects, means, duration and procedure in the enforcement phase.<sup>197</sup> This does not seem acceptable, because a probation officer is not a professional in medical aspects of pharmacotherapy, and since offenders' opinions are excluded in the trial procedure, the possibility of giving them information is also ignored. During the period of pharmacotherapy, a probation officer should request a physician to diagnose and cure any side effects experienced by an offender, and the probation officer may cease pharmacotherapy temporarily and report it to the probation committee if a physician believes further treatment would cause irreversible bodily harm to the offender or the side effects would be significant.<sup>198</sup> However, since the probation committee, in charge of making a decision regarding cessation or resumption of treatment, generally consists of probation officers, prosecutors, judges, attorneys and professors, but no physician or psychiatrist. This can lead to erroneous decisions concerning the pause or continuation of pharmacotherapy.<sup>199</sup> Overall, the medical assessment and management process does not seem sufficient, thus violating the principle of the due process of law, and this is another reason why the pharmacotherapy in the Act does not satisfy the rule of least restrictiveness.

### **7. 5. Proportionality of preventive measures**

As noted in chapter 5 and 6, compulsory pharmacotherapy of the Act is one of the legal responses to high-profile sexual offences committed in the 2000s, focusing on strengthening punishment and post-release control rather than the treatment or rehabilitation of an offender. In dealing with the human rights issues posed by pharmacotherapy in the 2010 Act, it needs to be considered that it is a purely additional criminal sanction rather than a condition of early release or substitution

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<sup>197</sup> *Ibid*, s 14(2).

<sup>198</sup> Presidential Order of the Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 11(1)–(3).

<sup>199</sup> *CCC 2013 Hun-Ga 9, 23 December 2015* [2013] 31.

for imprisonment. By law, a sentence of pharmacotherapy or EM shall not favourably affect the sentencing of the same offence of the offender.<sup>200</sup> This means that a court should consider an offender's culpability and the risk of reoffending separately, therefore, even if the offender is sentenced to the death penalty or imprisonment for life, pharmacotherapy or EM might be imposed in preparation for the offender's release because of a commutation of the death penalty or life imprisonment. Since the principle of proportionality is applied to preventive measures as well as punishment, the imposition of preventive measures should be proportionate to an offender's risk of reoffending because preventive measures relate to the risk of recidivism. It is noticeable that three different post-release preventive measures might overlap to target sex offenders at the same time, including compulsory pharmacotherapy for up to 15 years, EM for up to 30 years,<sup>201</sup> and public disclosure and notification for up to 10 years.<sup>202</sup> As different types of preventive measures have increased and toughened in the 2000s and 2010s, preventive measures have overlapped considerably.

As noted in the introductory section, three different post-release preventive measures, including compulsory pharmacotherapy, EM and public disclosure and notification, might be imposed on sex offenders in addition to imprisonment and preventive medical treatment and custody orders. Korean criminal law, as discussed in Section 6.4, distinguishes punishment and preventive measures strictly, so the former relates to past crime and the latter relates to future risk of reoffending. The Constitutional Court has maintained the view that if punishment and preventive measures are sentenced for the same offence concurrently, it does not violate the rule of double punishment because each relates to an entirely different aspect respectively.<sup>203</sup> Since punishment and preventive measures have a different purpose and function, even though both are imposed for the same crime, it does not constitute double punishment if both are sentenced at the same time. However, whether it is proportionate to an offender's risk of reoffending is another issue.

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<sup>200</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 8(6); Electronic Monitoring Act 2010 (ROK) s 9(7).

<sup>201</sup> Electronic Monitoring Act 2010 (ROK) s 9(1); Punishment for Sexual Crimes Act 2013 (ROK) s 470.

<sup>202</sup> Protection of Juveniles from Sexual Abuse Act 2012 (ROK) s 49, 50.

<sup>203</sup> CCC 88 Hun-Ga 5, 8 and CCC 89 Hun-Ga 44 (consolidated), 14 July 1989 [1989]; CCC 92 Hun-Ba 28, 27 November 1997 [1997].

How to evaluate the future risk of reoffending is significant for the imposition of preventive measures. However, although the assessment of an offender's future risk of reoffending is required by laws, by simply stating that '[a person who] is likely to recommit crime',<sup>204</sup> there are no provisions regulating how to evaluate the risk of reoffending and no legal limitations or standards to control an overlap of preventive measures. Public disclosure and notification, which are mandatorily given to all convicted sex offenders by law, do not require an assessment of the future risk of reoffending, so a court has discretion only for the decision of the term.<sup>205</sup> Consequently, as Table 7-1 shows, several different post-release preventive measures have been imposed simultaneously, which comes from the analysis of judgment documents of 17 of the 21 offenders who have been sentenced to pharmacotherapy from 2010 to 2016 in Korea.

Table 7-1: Sentencing for whom pharmacotherapy has been given<sup>206</sup>

Offender	Term of Imprisonment	Term of Pharmacotherapy	PMTCO*	Term of Electronic Monitoring	Public Disclosure and Notification
O1	12yrs	3yrs	N	N	10yrs
O2	2.5yrs, 10m	1yr	Y	6yrs	5yrs
O3	10yrs	2yrs	N	20yrs	10yrs
O4	life	5yrs	N	30yrs	10yrs
O5	12yrs	2yrs	N	20yrs	10yrs
O6	17yrs	7yrs	Y	N	10yrs
O7	5yrs	2yrs	N	20yrs	10yrs
O8	12yrs	2yrs	N	20yrs	10yrs
O9	2yrs	3yrs	N	5yrs	5yrs
O10	5yrs	1yr	N	7yrs	7yrs
O11	8yrs	2yrs	N	10yrs	10yrs
O12	9yrs	7yrs	N	15yrs	10yrs
O13	12yrs	3yrs	Y	20yrs	10yrs
O14	25yrs	5yrs	N	20yrs	10yrs
O15	6yrs, 6yrs	2yrs	N	20yrs	10yrs

<sup>204</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 4(1); Electronic Monitoring Act 2010 (ROK) s 5(1); Preventive Medical Treatment and Custody Act 2008 (ROK) s 2(1).

<sup>205</sup> Protection of Juveniles from Sexual Abuse Act 2012 (ROK) s 49(1), 50(1).

<sup>206</sup> This table is based on the analysis of the judgement documents of each case.

O16	15yrs	3yrs	N	20yrs	10yrs
O17	5yrs	5yrs	Y	N	7yrs

\* Preventive medical treatment and custody orders (PMTCO)

Of 17 offenders, nine are imprisoned for more than ten years and should undergo pharmacotherapy for at least a further two years. Four offenders are confined in the National Forensic Hospital for up to 15 years. The personal information on all offenders in Table 7-1 should be disclosed on the internet and notified to neighbours. 14 offenders are subject to Electronic Monitoring (EM), which tracks them 24 hours a day via GPS, and of these, ten will be monitored for more than ten years. As noted in Chapter 5, the EM Act 2010, amended on 31 March 2010, enacted the minimum and maximum term depending on the statutory punishment of committed crimes, which is shown in Table 7-2.<sup>207</sup>

Table 7-2: Term of EM

Statutory Punishment of Committed Crimes	Term of EM
Maximum is death penalty or imprisonment for life	10 to 30yrs
Minimum term of imprisonment is three years or more	3 to 20yrs
Minimum term of imprisonment is less than three years	1 to 10yrs

Whether such an overlap of preventive measures is proportionate to the risk of reoffending is questionable. For instance, O3 in Table 7-1 should undertake pharmacotherapy for two years and be tracked by GPS for 20 years alongside public disclosure and notification for 10 years following his release from prison. The durations of both pharmacotherapy and EM are not fixed, but extendable. If reasonable grounds to continue pharmacotherapy exist in view of the treatment progress, or if an offender violates the conditions, the original term can be extended by the decision of a judge based on the request of a prosecutor, which is on the basis of a probation officer's application, provided that the total period, including the

<sup>207</sup> Electronic Monitoring Act 2010 (ROK) s 9(1).

previous term, shall not exceed 15 years.<sup>208</sup> If an offender violates the conditions, the term of EM can be extended within one year an unlimited number of times using the same procedures as pharmacotherapy.<sup>209</sup>

Such an overlap of preventive measures has been criticised as disproportionate to the crime and an offender's risk of reoffending is evaluated two or three times, even though the purposes of all preventive measures are similar, such as the prevention of recidivism, protection of society and rehabilitation of an offender.<sup>210</sup> Hye-Jeong Kim states that risk of reoffending should be evaluated appropriately considering the characteristics of an offender and the imposition of preventive measure should focus on the rehabilitation of an offender.<sup>211</sup> This statement seems reasonable because excessive preventive measures might make it harder for an offender to rehabilitate into the community.

Myoung-Su Ko argues that Section 71(1) of the German Criminal Act could be an example to the Korean legislation of preventive measures. It states, 'if the requirements for several preventive measures are met, but the desired purpose is to be achieved by one of them, the identical one preventive measure shall be imposed. In that case, among several appropriate preventive measures, the measure laying the least burden on an offender takes priority'.<sup>212</sup> This means that if the prerequisite of pharmacotherapy and EM are met, and the prevention of recidivism and rehabilitation of an offender can be achieved by pharmacotherapy, a court shall impose pharmacotherapy aside from EM. It could be considered as one of the ways to solve the problem of proportionality, but it does not seem easy to decide whether the purpose can be exclusively achieved by one measure, because each has its own end. It seems easier way to substitute compulsory with voluntary pharmacotherapy. This issue will be addressed in detail in the next chapter.

Along the same lines as the ruling of the Constitutional Court noted above, for an offender who has been sentenced to EM, it would be worth considering a re-examination of the risk of reoffending, and to judge the necessity of execution or a

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<sup>208</sup> Pharmacological Treatment of Sex Offenders Act 2010 (ROK) s 16(1).

<sup>209</sup> Electronic Monitoring Act 2010 (ROK) s 14(1).

<sup>210</sup> Hye-Jeong Kim, 'Problems of Legislative Control against Sex offenders' (2010) 10(2) Korean Probation and Parole 7, 33; Myoung-Su Ko, 'A study on the overlapped imposition of security-measures' (2013) 21(2) Seoul Law Review 39, 48, 51.

<sup>211</sup> Kim, *ibid*, 34.

<sup>212</sup> Ko (n 210) 51.

reduction of the term just before the offender's release. In addition, since preventive measures are aimed at decreasing the risk of reoffending, it should be modified in accordance with the changes in an offender's social, psychological, financial and personal status.<sup>213</sup> Therefore, it would be conceivable to narrow the range of the term of EM or public disclosure and notification that can be imposed at the beginning stage and to extend the term during the execution of these orders depending on an offender's violation of the conditions.

## **7. 6. Conclusion**

It is generally accepted that pharmacotherapy restricts the rights to bodily integrity, self-determination, privacy, and engaging in sexual relationships, marriage and procreation, as well as the principle of due process of law, which are secured by Articles 10, 12(1), and 17 of the Korean constitution. In order to ensure that this restriction is justifiable, it should not violate the ICCPR, and it should comply with the principle of proportionality and the principle of prohibition of violating an essential aspect of rights, which is legislated in Article 37(2) of the Korean constitution.

Article 7 of the ICCPR forbids a state party from introducing cruel, inhumane or degrading punishment. The imposition of pharmacotherapy without any given consent makes it closer to punishment rather than treatment. Severe side effects, a long-term period of execution and harsh punishment for a violation of conditions during the treatment, clearly make compulsory pharmacotherapy as it stands at present in the 2010 Act a cruel, inhumane or degrading punishment violating Article 7 of the ICCPR. Along the same lines, forced pharmacotherapy might violate an essential aspect of the rights to bodily integrity, self-determination and privacy, regardless of the lack of studies and uncertainty of irreversible and severe side effects, as well as absolute prohibition of the suspension of pharmacotherapy and taking countervailing drugs.

Of the four rules constituting the principle of proportionality described in 7.2.1., the compatibility of the Act with the rule of legitimacy of the legislative purpose is generally agreed, but the purpose of the Act obviously cannot be realised

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<sup>213</sup> Ibid 53.

by compulsory pharmacotherapy, which is a degrading punishment and violates an essential aspect of the rights of the offender. The other three rules also do not seem to be satisfied. Compulsory pharmacotherapy needs to be as effective as voluntary pharmacotherapy in order to be an appropriate means of lowering the recidivism rates of sexual offenders, but the literature relevant to this issue is scarce. Whether compulsory pharmacotherapy encourages an offender to be motivated to change is also questionable, because the direct effect of drugs and the fear of punishment rather than his autonomous choice would be the decisive factors behind his behavioural change. Although offenders who have been subject to pharmacotherapy still suffer from paraphilic disorders during the term of imprisonment, their needs are ignored until release. In light of the results of the preliminary voluntary pharmacotherapy in the National Forensic Hospital, more sex offenders than expected apparently would volunteer to undergo the treatment. In this respect, voluntary pharmacotherapy rather than compulsory pharmacotherapy would be an appropriate means and less restrictive way of achieving the legislative purpose. Whilst the severity of the restricted interests of an offender is clear because it is generally agreed that compulsory pharmacotherapy obviously restricts human rights and its side effects are severe, the benefit to the public interest is unclear because its effectiveness has not been firmly established and it has not been widely used. Therefore, compulsory pharmacotherapy does not seem to maintain the balance of legal interests concerned, and pharmacotherapy in the Act seems to violate the principle of proportionality.

Concerning the principle of due process, it seems to be violated by the Act. The Act ignores the procedural rights of an offender, which would be important in challenging an assessment for instance. It means though that an offender cannot receive any information about the result of diagnosis, necessity, risk and benefits of the treatment before sentencing. As a result, offenders are not informed of the effects, side effects, means and procedure of pharmacotherapy from medical professionals, but by a probation officer.

In addition to the human rights problems discussed above, as different types of preventive measures have increased since the 2000s, an overlap of these measures has been problematic, which does not seem proportionate to the risk of reoffending of an offender. Since a reduction in the number of preventive measures would help



to resolve this problem, serious consideration should be given to substituting voluntary pharmacotherapy for the current compulsory sentence.

Even though the Constitutional Court ruled that pharmacotherapy is constitutional, as discussed above, the defects of the 2010 Act seem to be too significant to maintain the Act without modification. Besides the legal flaws and human rights problems, it has been narrowly utilised in practice. When the 2010 Act was enacted, MPs and government officials modified voluntary pharmacotherapy in the bill into compulsory pharmacotherapy because they were anxious that offenders would not choose to undergo the treatment voluntarily, but this modification seems to make it less likely to be used, as shown in the statistics. More problematically, the 2010 Act seems to be an obstacle to applying pharmacotherapy to more sex offenders suffering from a paraphilic disorder. If an offender is diagnosed with a paraphilic disorder, the offender may be prosecuted for conviction and compulsory pharmacotherapy at the same time, so offenders who wish to volunteer for the treatment accept the risk of being prosecuted or sentenced. In order to resolve these human rights and practical problems, the 2010 Act needs to be reformed. Since the legal requirements of pharmacotherapy and preventive medical treatment and custody orders are overlapped, the latter might substitute for the former. The National Forensic Hospital has already provided pharmacotherapy and is able to offer comprehensive treatment and psychosocial programmes to offenders. How to reform the 2010 Act and treatment systems will be addressed in the next chapter.

## **Chapter 8: Reform of the Pharmacological Treatment of Sex Offenders Act 2010 and Treatment System**

### **8.1. Introduction**

As already detailed, compulsory pharmacotherapy in the 2010 Act includes the following problems: the absence of free and informed consent of an offender; ignorance of the importance of the medical treatment of offenders during their incarceration; allowing an offender to remain uncertain about unpredictable side effects caused by long-lasting treatment; the absolute prohibition of the temporary suspension of treatment or the use of countervailing drugs as well as an imbalance between the restricted rights of an offender and the public benefits of treatment. As a result, the 2010 Act violates human rights secured by the ICCPR, including rights to bodily integrity, self-determination, privacy and to have a family. Even though the Constitutional Court ordered Parliament to amend the 2010 Act in a way that would appropriately regulate the significant time differences between the time of the sentence and the enforcement of the treatment, this is only a minor element of the significant flaws in the 2010 Act, and; thus, this Act should be revised completely.

In the first section, such reform of the 2010 Act will be addressed, which would reduce the problems noted above. In order to secure the human rights of an offender, whether the offender is sexually deviant and whether they require medical treatment should be carefully assessed, and the result of assessment should be disclosed to the offender. The offender should be informed of the effects and side effects of pharmacotherapy, and the treatment must be provided based on the freely given consent of the offender. It seems evident that the human rights of an offender cannot be secured as long as pharmacotherapy is non-consensual, so it would be essential to replace compulsory pharmacotherapy with voluntary treatment. To achieve this purpose, the abolition of the 2010 Act is unavoidable. Because almost all processes of this Act are intentionally devised to introduce pharmacotherapy as a punishment rather than treatment, it seems very hard to accomplish therapeutic goals simply by the revision of this Act. Two ways can be considered to apply voluntary pharmacotherapy to sex offenders after the 2010 Act is repealed. One is to provide sex offenders with pharmacotherapy by the Preventive Medical Treatment and Custody Act 2008. As noted in Chapter 7, the Preventive Medical Treatment and

Custody Act 2008 and the 2010 Act are overlapped in treating paraphilic-disordered sex offenders, and the former can replace the latter. Because preventive medical treatment and custodial orders (hereafter 'PMTCO') have been implemented in the National Forensic Hospital, normal medical laws have already been applied. Even if pharmacotherapy is implemented with informed consent of an offender in the National Forensic Hospital under medical laws, it is still not clear if the consent can be automatically considered as 'truly voluntary'. As discussed in Chapter 2, if the consent of an offender is not freely given, pharmacotherapy would still be punitive rather than therapeutic. How to offer the treatment to an offender without any threat or pressure will be addressed in the first section below. The arguments about offenders' consent to treatment under the Mental Health Act 1983 in the U.K., as well as the legislation in Texas discussed in Chapter 2, will be explored here. How to revise the Preventive Medical Treatment and Custody Act 2008 will also be discussed. Any offenders who are sentenced to the PMTCO have to be supervised by probation officers for three years after release from incarceration.<sup>1</sup> If the offenders taking pharmacotherapy voluntarily in the National Forensic Hospital recognise its effectiveness, they may choose to continue the treatment during and after supervision.

Another way to apply voluntary pharmacotherapy to sex offenders is provide imprisoned or released sex offenders who are not given PMTCO, and persons who suffer from sexual deviancy but who do not engage in sexual offences, with pharmacotherapy. Without a legal basis, it seems difficult to do so. Accordingly, new legislation for voluntary pharmacotherapy can be the other option. This issue will be discussed in the second section. In order to make pharmacotherapy successful, non-medical officers in the National Forensic Hospital and prisons should understand psychological treatment programmes for sex offenders as well as pharmacotherapy. Because they spend a lot of time with offenders, they can play a vital role in identifying changes in offenders' perceptions of sexual violence or motivating offenders to participate in psychological treatment programmes, and vice versa. However if the attitudes of these staff are influenced by deep-rooted Confucian patriarchal thought, like those of personnel in other criminal agencies as noted in Chapter 3, this would be an obstacle to achieving the goal of pharmacotherapy. Feminist activists are concerned about this issue and demand a government response.

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<sup>1</sup> Preventive Medical Treatment and Custody Act 2008(ROK) s.13.

This issue will be addressed in the third section. Regarding the treatment of imprisoned and released sex offenders, the examples of England and Wales is also discussed, which provides offenders with voluntary pharmacotherapy by referral of the prison and probation services.

Concerning the treatment of sexually deviant persons so as to prevent them engaging in sexual offences, a preventive intervention outside of the criminal justice setting is also important, this will be scrutinised. Pharmacotherapy is one of the ways to rehabilitate sex offenders. How to reintegrate sex offenders more effectively needs to be addressed. As discussed in the previous chapters, Korean legislation and policies regarding sexual offending have focused on heavier punishment, stronger surveillance and public protection, rather than the rehabilitation or reintegration of the offenders. It is hard to find any Korean organisations that consist of trained volunteers to support sex offenders in the community, such as Circles of Support and Accountability (hereafter ‘Circles’), which has helped sex offenders for more than 20 years, which originated in Canada and was transferred to the UK and other European countries.<sup>2</sup> These issues will be dealt with in the fourth section, followed by a discussion of how to help the persons who suffer from deviant sexual thoughts, desires or behaviour *before* they engage in sexual offences. This will include a discussion of how to raise social awareness about child sexual abuse, which will refer to the ‘Stop it Now!’ programme developed in the U.S. and the UK.

The problems of disproportionate preventive measures were discussed in Chapter 7. How to better organise preventive measures is also significant because preventive measures of sex offenders at the present overlap to a significant degree. This issue will also be discussed.

Discussions in Chapter 8 will reflect all of the arguments made in the previous chapters, aiming at enhancing the legislation and policies relevant to the security of human rights and the treatment of sex offenders as well as public protection.

## **8.2. Reform of the 2010 Act**

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<sup>2</sup> Mechtild Höing, Laurie Hare Duke and Birgit Völlm, *COSA, European Handbook* (Circles4EU 2015) 37.

### 8.2.1. Abolition of the 2010 Act and substituting the PMTCO for compulsory pharmacotherapy

As discussed in Chapter 7, paraphilic-disordered sex offenders could be sentenced to pharmacological treatment orders and the PMTCO at the same time because the requirement of both orders regarding sexual deviancy is almost the same. As shown in Table 7-1, four offenders have already been sentenced to both orders concomitantly. Both orders are a preventive measure, being imposed based on the future risk of reoffending of an offender rather than the significance of the past crime, which aims at the same purpose, the treatment of an offender.<sup>3</sup> Therefore, even if the 2010 Act is repealed, pharmacotherapy can be implemented voluntarily for paraphilic disordered sex offenders under the Preventive Medical Treatment and Custody Act 2008. This legislative reform would cause the following positive results. First of all, pharmacotherapy may be provided to the offenders who suffer from sexual deviancy in the National Forensic Hospital during incarceration. As discussed in Chapter 7, physicians in the hospital can carry out pharmacotherapy on paraphilic-disordered sex offenders who have been given the PMTCO if they consent to the treatment in writing. The PMTCO is implemented ahead of imprisonment,<sup>4</sup> and the implemented term of the orders should be deducted from the term of imprisonment.<sup>5</sup> Accordingly, the offenders' medical requirement for pharmacotherapy during confinement would not be ignored by this replacement. However, it is problematic that offenders might be detained at the National Forensic Hospital for up to 15 years, even after completion of the term of imprisonment.<sup>6</sup> This is an excessive human rights limitation against offenders.<sup>7</sup> Mandatory inpatient treatment of the offenders who are sentenced to the PMTCO after the expiration of imprisonment term should be revised to voluntary outpatient treatment after release under probation supervision.<sup>8</sup> On the other hand, the offender should be transferred to a prison if the term of imprisonment remains after 15 years of confinement in the hospital.<sup>9</sup> The

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<sup>3</sup> Pharmacological Treatment of Sex offenders Act 2010 (ROK) s 1; Preventive Medical Treatment and Custody Act 2008 (ROK) s 1.

<sup>4</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 18.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid, s 16(2)1.

<sup>7</sup> Do-Hee Kim, 'Legal Issues Relevant to the Crimes Caused by Mental Disorders', in Korean Bar Association (eds), *Human Rights Report 2019* (Korean Bar Association 2020), 218.

<sup>8</sup> Ibid.

<sup>9</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 18

maximum term of 15 years, however, needs to be extended to the same period as imprisonment, if the term of the prison sentence is longer than 15 years, in order to provide an offender with sufficient treatment. For instance, under the current law, for a sex offender who is sentenced to imprisonment for life and the PMTCO should be transferred to prison when 15 years has passed in the hospital, even if the offender still requires medical treatment. Because this is apparently unreasonable, an exceptional extension of the maximum period needs to be considered. In summary, the term of the PMTCO should be limited up to the term of imprisonment. Comparing this amendment with the current regulations, offenders who are sentenced to imprisonment for not more than 15 years will stay in the National Forensic Hospital up to the term of imprisonment, and those sentenced to imprisonment for more than 15 years will continue to stay in the hospital without going to prison after the expiration of the term of the PMTCO up to the term of imprisonment.

Secondly, compulsory pharmacotherapy has to be substituted by voluntary treatment if provided as one of the various required medical treatments for an offender being sentenced to the PMTCO, because medical laws should be applied. The Framework of the Health and Medical Service Act 2013 declares that ‘all nationals shall have the right to receive full explanations from health and medical services personnel on methods for treating their diseases, whether they are subject to medical research, whether they require organ transplants, etc. and then to decide whether to agree with the aforementioned’.<sup>10</sup> This right to self-determination of a patient cannot be restricted if pharmacotherapy is executed to an offender in the National Forensic Hospital, as there is no provision to force any treatment of an offender in the Preventive Medical Treatment and Custody Act 2008, with it merely stating that ‘medical treatment of persons under the PMTCO shall be provided equivalent to the treatment in a psychiatric hospital and subject to the prescription of a doctor’.<sup>11</sup> Even if pharmacotherapy is based on the informed consent of an offender, whether the consent can be considered as ‘freely given’ is still a controversial issue because the decision may be due to psychological threat or pressure. Fennell suggests that although the consent to treatments, including surgical or chemical castration, and psychological intervention, may be seen as being made to avoid

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<sup>10</sup> Framework of the Health and Medical Service Act 2013 (ROK) s 12.

<sup>11</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 25(2).

indefinite detention, consent plays an important role in legalising these problematic interventions.<sup>12</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment prohibits the treatment for a detained person without his/her ‘free and informed’ consent.<sup>13</sup> Exceptions to this principle are permitted only for extraordinary circumstances on the legal basis, but exceptions are recognised in many cases in the U.K where ‘the existence of consent is determined by the doctor or the court, taking into account all the circumstances’.<sup>14</sup> The claims of offenders that their consents to treatments, such as anti-psychotic drugs injection or administration of libidinal suppressants, were not valid have not been accepted by some courts in the U.K.<sup>15</sup> Fennell is concerned that ‘both law and psychiatric ethics accept such circumscribed consent as valid, even when given in the knowledge that the likely consequences of refusal is indeterminate detention’.<sup>16</sup> Fennell’s arguments are worth listening to in order to revise the procedure for offenders’ consent to treatment. Texas legislation regulating the surgical castration of inmates, explored in Chapter 2, contains the provisions that guarantee the freely-given consent of offenders, such as no benefit for choosing castration; no disadvantage for refusal, and prohibition of reporting the castrated person’s name to the parole board or the use of castration as a condition of early release. This would be a good example for the revision of the Preventive Medical Treatment and Custody Act 2008. In order to secure freely-given informed consent of an offender, the following needs to be inserted into the Preventive Medical Treatment and Custody Act 2008: a doctor shall give an offender sufficient information about the necessity, effects, side effects, methods and process of pharmacotherapy; no benefit is given for the treatment; disadvantage should be prohibited for a refusal of treatment; an offender should consent to the treatment freely in writing; he can withdraw the original consent at any time in the course of pharmacotherapy; a doctor shall not give an offender any pressure to undertake pharmacotherapy; third party should identify whether an offender’s consent is freely-given or the treatment is appropriate for him; the name of the offender who consents

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<sup>12</sup> Phil Fennell, ‘Sex Offenders, Consent to Treatment and the Politics of Risk’, in Karen Harrison and Bernadette Rainey (eds), *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management*, (John Wiley & Sons 2013) 38.

<sup>13</sup> *Ibid*, 47.

<sup>14</sup> *Ibid*, 48, citing *Freeman v. Home Office (No. 2) [1984] QB 524 (CA)*

<sup>15</sup> *Ibid*, 48-49, citing *R v. Mental Health Act Commission ex parte W 1988*

<sup>16</sup> *Ibid*, 59.

or refuses to undergo pharmacotherapy must be kept confidential in the early release review process.

Thirdly, comprehensive treatment as well as pharmacotherapy of an offender would be available because the PMTCO is executed in the National Forensic Hospital. Since some paraphilic-disordered sex offenders have comorbidity with different mental illness, including ‘substance abuse, depression, anxiety, bipolar disorder, autistic spectrum disorders, attention deficit and hyperactivity disorder, and personality vulnerabilities’, which may make an offender more likely to commit sexual offences, these mental disorders need to be diagnosed and treated to reduce the future risk of reoffending in the offender.<sup>17</sup> Thibaut and colleagues acknowledge that ‘treatment of comorbidities is necessary’.<sup>18</sup> In addition, close observation of the effects and side effects by physicians in the hospital may help an offender with immediate and appropriate medical services. With the information that will be gathered in the course of pharmacotherapy, the following needs to be studied, which was discussed in the deliberation of the 2008 Bill: the effects and side effects of the treatment, and the differences of attitude in psychotherapy and recidivism rate, after release between treated offenders and non-treated.

Fourthly, temporary termination of the orders and post-release supervision are available through the Preventive Medical Treatment and Custody Act 2008. Whether the orders need to be continued should be assessed by the Preventive Medical Treatment and Custody Committee every six months during the term of the orders.<sup>19</sup> If the committee decides upon temporary termination of the orders, the offender would be released under three-year probation supervision.<sup>20</sup> During the term of supervision, pharmacotherapy may be provided based on freely-given informed consent of an offender.

Although such positive results would be expected by the legislative reform discussed above, the discussion about the use of paraphilia diagnosis in a criminal trial needs to be considered carefully. First and Halon contend that ‘profound and avoidable errors are made by some mental health professionals who invalidly diagnose paraphilia’ during the process of sexually violent predator (SVP)

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<sup>17</sup> Mohan Nair, ‘Pharmacotherapy for Sex Offenders’ in Amy Phenix and Harry M Hoberman (eds), *Sexual Offending: Predisposing Antecedents, Assessments and Management* (Springer 2016) 755–56.

<sup>18</sup> Thibaut and others (Ch.1, n 49) 645.

<sup>19</sup> Preventive Medical Treatment and Custody Act 2008 (ROK) s 22.

<sup>20</sup> *Ibid*, s 22, 32.



commitment trials.<sup>21</sup> They argue that in some cases ‘mental health experts have made a DSM-IV-TR diagnosis of paraphilia without providing valid evidence to justify the diagnosis.’<sup>22</sup> In order to provide a precise diagnosis in criminal trials they suggest ‘three-step process’ as follows:<sup>23</sup>

First, establish whether a paraphilia is present; provide reasonable evidence of the existence in the offender of the recurrent, intense, sexually arousing fantasies and urges. Second, if a paraphilia is present, establish whether the offender’s sexually violent crimes occurred as direct consequences of that paraphilia. Third, present positive evidence suggesting whether the offender is volitionally impaired with regard to committing sex crimes.

Even though voluntary pharmacotherapy would be implemented under the PMTCO, it would not be human rights-friendly if the process of paraphilia diagnosis is not reasonable. In this regard, the argument of First and Halon needs to be considered carefully to decide whether to impose the PMTCO to a sex offender.

### **8.2.2. New legislation for the pharmacotherapy of sex offenders not being given the PMTCO**

Even though compulsory pharmacotherapy is replaced by the alternative PMTCO, dealing with a medical necessity of imprisoned and released sex offenders who are not given the PMTCO should be considered. In 2014, while the number of sex offenders detained in the National Forensic Hospital was 92,<sup>24</sup> 2,796 sex offenders were imprisoned and 3,528 were on probation.<sup>25</sup> Because most sex offenders are in prison or under probation, it seems important to provide them with pharmacotherapy when they require and/or desire to undergo the treatment. New legislation is required for prisoners and probationers in order for stable management of pharmacotherapy. As discussed in Chapter 2, the legal examples of Germany, Denmark and Texas are good references.

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<sup>21</sup> Michael B. First and Robert L. Halon, ‘Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases’ (2008) 36 *Journal of American Academy of Psychiatry and Law* 444.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* 445.

<sup>24</sup> Soo-Jin Kwon and Kwon-Chul Shin, *A Study on the Mental Health Court and the Forensic Psychiatric Ward* (Korean Institute of Criminology 2016) 58.

<sup>25</sup> Institute of Justice, *White Paper on Crime* (2015) 327, 338, 419.

New legislation should include the following: in prison, whether an inmate is paraphilic and needs pharmacotherapy should be observed and assessed by medical professionals. This process should be explained to the offender prior to treatment. If physicians believe that pharmacotherapy of the offender is helpful, they should give him information, including an assessment of the medical necessity, effects and side effects of medication, and the methods and process of administration. The offender should give consent to pharmacotherapy freely in writing. A government agency should appoint a counsellor to ensure whether the consent is freely-given based on sufficient information. The offender should be allowed to withdraw the consent at any time during the treatment without any disbenefit. Pharmacotherapy should be implemented by medical professionals with a well-proven method and medication. Psychological treatment should be combined. Whether side effects occur in the course of pharmacotherapy should be carefully checked by physicians. Undertaking or refusal of pharmacotherapy should not affect the offender's qualification for early release.

If the offender undergoing pharmacotherapy is under post-release supervision, a probation officer should ensure whether the offender wishes to continue the treatment in the community and guide him to a local medical professional. If an offender is a probationer or a parolee who does not undertake pharmacotherapy in prison, a probation officer should introduce appropriate local physicians to him. The provisions relevant to the implementation of pharmacotherapy being applied to inmates should be employed for probationers or parolees. The series of legal revisions discussed above should be carefully conducted after sufficient examination of therapeutic or less-punitive types of legislative examples for pharmacotherapy in different countries and literature review, in order to make it a successful policy transfer.

An imprisoned paraphilic sex offender's experience of the effect of pharmacotherapy is significant because, if he evaluates it positively, he may continue the treatment after release in the community. The enactment for pharmacotherapy of prisoners and probationers does not ensure that the treatment works. It is imperative for correctional and probation officers to raise awareness of the therapeutic aspects of the treatment as well as to change perceptions of and attitudes against sexual violence, because they have to play an important role in the pharmacological and psychological treatment process. As discussed in Chapter 3, criminal justice agencies

have been influenced by Confucian patriarchal thought. In order for the pharmacotherapy to be successful, it is significant to change offenders' misconceptions, such as justifying male domination over female, viewing rape as consensual sex, or passing the responsibility of sexual violence to the victim, by the combined psychological intervention.<sup>26</sup> It is essential to educate correctional and probation officers to recognise how important this change is because they have to motivate offenders to participate in the psychological treatment and to identify their responses to the treatment. If the officers' attitudes against sexual violence are still influenced by Confucianism, it would be difficult to make the treatment successful. Accordingly, the education programme for the enhancement of correctional and probation officers' perceptions of sexual offending should be well-managed, which has consistently been demanded by feminist groups. The involvement with sex offenders of correctional officers in England and Wales is a good example for this and will be addressed below.

#### **8.2.2.1. Referral to pharmacotherapy for imprisoned and released sex offenders in England and Wales**

In England and Wales, voluntary pharmacotherapy of sex offenders in prison and probation services has been implemented since 1 December, 2007.<sup>27</sup> Following careful screening of an offender, referral would be considered if he seems to suffer from 'mental illness, causing the risk of reoffending or preventing him from attending a treatment programme, hyperarousal, intrusive sexual fantasies or urges, experiencing urges that are hard to control, sexual sadism, other dangerous paraphilias, or highly repetitive paraphilic offending'.<sup>28</sup> If the referral is considered appropriate, the offender would be referred to a local psychiatrist or a prison doctor and undertake pharmacotherapy based on his informed consent.<sup>29</sup>

This referral policy in England and Wales would be a good example to the Korean government to expand medical treatment of sex offenders in the criminal justice system. In order to implement a referral policy successfully, two things seem imperative. One is to strengthen the recognition of correctional and probation

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<sup>26</sup> Hye-Soon Hyun, *Manual of Psychological Treatment Programme for Sex Offenders* (Ministry of Gender Equality and Family 2010) 19-23.

<sup>27</sup> NOMS, *Probation Circular PC35/2007: Medical Treatment for Sex Offenders* (2007) 1.

<sup>28</sup> *Ibid*, 3-4.

<sup>29</sup> *Ibid*, 4-5.

officers towards the medical treatment of sex offenders, and the other is to found a system which encourages medical professionals to get involved in the treatment. HM Prison Whatton in Nottinghamshire has educated all staff in order to ensure ‘everyone has the understanding and confidence to make a referral where appropriate’, by which the need for pharmacotherapy would be identified and addressed at earlier stages.<sup>30</sup> Lievesley and others highlight staff education and understanding, stating ‘behaviours associated with sexual preoccupation or hypersexuality are more likely to be picked up by those in frequent contact with offenders, such as wing staff’.<sup>31</sup> Because the aim of referral cannot be achieved if correctional or probation officers lack awareness of pharmacotherapy, sufficient education and training of the officials seems crucial. Increasing awareness of the officials would have a positive influence on the collaboration of all professionals engaging in the intervention of an offender, which is necessary to help released offenders whose motivation for pharmacotherapy is reducing the treatment after release.<sup>32</sup>

Regarding the latter point, even though the Ministry of Justice in Korea made agreements with ten leading hospitals nationwide for pharmacotherapy in 2011, only the National Forensic Hospital has implemented the treatment exclusively at present because other hospitals are reluctant to do compulsory pharmacotherapy. Accordingly, regardless of the location of probation offices, all probation officers in Korea who supervise an offender being sentenced to pharmacotherapy have to bring the offender to the National Forensic Hospital once every three months because that is the length of time the GnRH agonists used by the Hospital last. The attitude of the local hospitals might be changed if pharmacotherapy is given voluntarily, but the necessity of a budget and medical facility for referral would still be imperative. Furthermore, the lack of physicians in prison has worsened. As of October 2016, while the required number of physicians by the legislative criteria is 264, only 82 are working in prison, so one prison doctor has to treat 216 inmates a day on average.<sup>33</sup> Accordingly, how to resolve these problems needs to be deliberated alongside how to introduce a pilot referral programme in prison and probation offices.

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<sup>30</sup> Rebecca Lievesley and others, ‘The Use of Medication to Treat Sexual Preoccupation and Hypersexuality in Sex offenders’ (2013) 208 *Prison Service Journal* 17 - 18.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 24.

<sup>33</sup> Sin-Jeong Ko, ‘A physician in prison has to treat 216 inmates a day’ *Medical Observer*, <http://www.monews.co.kr/news/articleView.html?idxno=94122> accessed 1 May 2017.

### 8.2.2.2. Improvement of treatment systems in the National Forensic Hospital

Thibaut and colleagues state that ‘pharmacological interventions should be part of a more comprehensive treatment plan, including psychotherapy and, in most cases, behaviour therapy’.<sup>34</sup> In order to implement a comprehensive treatment plan for sex offenders, sufficient treatment systems are required. In particular, the enhancement of the treatment systems in the National Forensic Hospital is significant because this is the only medical facility providing the pharmacotherapy of sex offenders at present in Korea. Furthermore, the mentally ill inmates in prison may be transferred to this hospital by the decision of a warden and the permit of the Secretary of the Ministry of Justice,<sup>35</sup> therefore, prisoners may undertake pharmacotherapy in this hospital. However, the current state of the resources and budget of the National Forensic Hospital is far too inadequate to implement a comprehensive treatment, even though it is slightly better than that in prison, as noted above. Table 8-1 shows the resources and budget of the hospital.

Table 8-1: Resources and budget of the National Forensic Hospital<sup>36</sup>

Doctors	Other Professionals (Psychologists, social workers, therapists, occupational trainers)	Nurses	Assistant Nurses
22 Psychiatrists 16 Physicians 6	14	89	128
Patients	Budget (£)	Units	Beds
1,149	16,061,486	20 Mental Disorder 14 Substance Abuse 2 Sexual Deviancy 2 Not Used 2	1,200

As shown above, the number of medical professionals per patient is 0.22, and the amount of money per patient is £16,871. This hospital is mainly a forensic psychiatric facility holding almost all offenders who have been given the PMTCO.

<sup>34</sup> Thibaut and others (Ch.1, n 49) 645.

<sup>35</sup> Administration and Treatment of Correctional Institution Inmates Act 2008 s 37(2).

<sup>36</sup> Ministry of Justice, *Report on the Rampton High Security Hospital in the UK* (2011) 43; Kwon and Shin (n 21) 56, 58.

Although five national psychiatric hospitals have been legally designated as a facility for the PMTCO since 2015, as of August 2015 only 41 offenders are detained in one hospital, among which there are no sex offenders.<sup>37</sup> The National Forensic Hospital provides paraphilic-disordered sex offenders with various treatment services, including voluntary pharmacotherapy, administration of psychiatric medication, behavioural treatment programme, cognitive behavioural treatment programme focusing on cognitive restructuring, victim awareness and empathy training as well as a substance abuse treatment programme.<sup>38</sup> Kwon and Shin state that the hospital uses better medication than general psychiatric hospitals, but that non-medication treatment programmes have been overwhelmed by group work rather than personalised plans considering individual characteristics of an offender because of lack of therapeutic professionals.<sup>39</sup> For instance, because there are only five social workers in the hospital, one social worker has to support nearly 230 patients. Psychiatrists in the hospital have to diagnose the offenders commissioned by a court or a prosecutor and submit forensic assessment reports for a trial or a prosecution in addition to treating patients. As of 2013, the number of assessment reports was 722,<sup>40</sup> so one psychiatrist was in charge of nearly 45 forensic assessment cases on average. Such hard work caused by a lack of doctors would lower the quality of treatment in the hospital.<sup>41</sup>

In contrast, England has employed a far larger budget and resources for medical treatment of mentally disordered offenders. High security psychiatric services are provided for offenders who ‘are liable to be detained under the Mental Health Act 1983 and require treatment under conditions of high security on account of their dangerous, violent or criminal propensities’.<sup>42</sup> A court may order an offender who suffers from a mental disorder to be detained in a hospital instead of prison.<sup>43</sup> Taking into account ‘the nature of the offence and future risk of reoffending if set at large’, a court may impose a restriction order to an offender when it believes that it is necessary for public protection from serious harm.<sup>44</sup> Without the consent of the

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<sup>37</sup> Kwon and Shin, *ibid*, 70.

<sup>38</sup> *Ibid*, 74–75.

<sup>39</sup> *Ibid*, 191.

<sup>40</sup> *Ibid*, 51.

<sup>41</sup> *Ibid*, 188.

<sup>42</sup> National Health Service Act 2006 (England and Wales) s 4(1).

<sup>43</sup> Mental Health Act 1983 (England and Wales) s 37(2).

<sup>44</sup> *Ibid*, s 41(1).

Secretary of State, the offenders being sentenced to a restriction order cannot have leave of absence, be transferred to another hospital or be discharged,<sup>45</sup> and they should be detained in a high security hospital.<sup>46</sup>

As of 2014, there are three high-security hospitals in England with 795 beds, there are also medium-security hospitals with 3,192 beds and low-security hospitals with 3,732 beds.<sup>47</sup> Table 8-2 shows the budget and resources of the Rampton Hospital, one of three high security facilities in England.

Table 8-2: Resources and budget of the Rampton Hospital (2011)<sup>48</sup>

Doctors	Other Professionals (Psychologists, social workers, therapists, occupational trainers)	Nurses	
		Assistant Nurses	
50	110	1,000	
Patients	Budget (£)	Units	Beds
324	84,000,000	27	359

As shown above, the number of medical professionals per patient is 3.58, and the amount of money per patient is £259,259, which are 16 times and 15 times more than those of the Korean National Forensic Hospital, respectively.

Rampton Hospital consists of five different centres: the Mental Health Services Centre, the National Learning Disabilities Centre, the National Women's Centre, the Personality Disorder Centre and the Dangerous and Severe Personality Disorder Centre.<sup>49</sup> On average, each unit has 15 patients and 33 medical professionals, so one psychiatrist is in charge of 15 patients.<sup>50</sup> Qualified and experienced staff in high security hospitals provides patients with 'assessment, treatment and management of mental disorders and risk of harm to others including medication, pharmacotherapy, psychological treatment and social intervention'.<sup>51</sup> Interventions dealing with risk and offending behaviour should include 'sex offender

<sup>45</sup> *Ibid*, s 41(3)(c).

<sup>46</sup> NHS, 2014/15 NHS Standard Contract for High Secure Mental Health Services (Adults) (2014) 1–2.

<sup>47</sup> *Ibid* 2.

<sup>48</sup> Ministry of Justice, *Report on the Rampton High Security Hospital in the UK*, 15.

<sup>49</sup> *Ibid*, 4–7.

<sup>50</sup> *Ibid*

<sup>51</sup> NHS, 2014/15 NHS Standard Contract for High Secure Mental Health Services (Adults) (n 38) 15.

treatment, fire setting interventions, substance misuse programmes, thinking skills and problem solving, anger management, violent offender management programmes'.<sup>52</sup>

As discussed above, lack of resources and budget has become an obstacle for improving the treatment systems of mentally ill sex offenders in Korea. It is the same problem in both prison and the National Forensic Hospital. Without drastic investment, it seems hard to achieve the purpose of preventive intervention: the rehabilitation of the offenders and public protection.

### **8.3. Enhancing the rehabilitation of sex offenders**

Psychological treatment programmes have long been used for sex offenders in the West since the 1960s.<sup>53</sup> Because some sex offenders do not react to psychologists individually, small-group treatment is deemed the most effective.<sup>54</sup> In group therapy, the offenders who are unresponsive and deny their responsibility may change their attitudes by the influence of peers' participation in the programme and acceptance of their misconduct, which mitigates social alienation and may help psychologists to find the causes of the offenders' behaviour more easily.<sup>55</sup> In this respect, psychological treatment is helpful for the rehabilitation of sex offenders.

However, the psychotherapy of sex offenders had not been much used in Korea until the Punishment for Sex Offences Act 2012 was revised. By this Act, a court must impose a psychological treatment order with respect to sex offenders whose sentences are a fine or heavier;<sup>56</sup> therefore, at present, all imprisoned sex offenders should participate in a psychological treatment programme. Five psychological treatment centres in prisons provide offenders with a 300-hour long sex offender treatment programme for six months.<sup>57</sup> All sex offenders on probation also should participate in psychological treatment programmes.<sup>58</sup> The number of sex offenders who participate in psychotherapy has increased in recent years. It was 969 in 2013, 2,322 in 2014 and 3,799 in 2015.<sup>59</sup> Almost all programmes comprise 40 to

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<sup>52</sup> Ibid

<sup>53</sup> Marshall and others (Ch.2 n 22) 21.

<sup>54</sup> McAlinden 2007 (Ch.2 n 12) 63.

<sup>55</sup> Ibid

<sup>56</sup> Punishment for Sex Offences Act 2012 (ROK) s 16(2).

<sup>57</sup> Institute of Justice, *White Paper on Crime* (2016) 366.

<sup>58</sup> Punishment for Sex Offences Act 2012 (ROK) s 16(2).

<sup>59</sup> Hyoung-Sup Lee and others, *Probation and Parole* (Pakyungsa 2016) 376.



80-hour cognitive-behavioural group therapy consisting of eight-hours a day for one or two weeks, or four to six hours a week for six to thirteen weeks.<sup>60</sup> The follow-up study focusing on the recidivism rate of participants is rare. In 2017, Seoul Probation and Parole Office investigated the recidivism rate of 298 offenders who participated in psychotherapy programme in 2015. Of 298 participants, 23 offenders committed new sexual offences, so the recidivism rate was 7.7%.<sup>61</sup> In order to identify the effect of psychotherapy, reoffending of the participants should be investigated regularly.

Kang and Lee recommend that the following points should be improved: firstly, the qualification of therapists is not standardised. Secondly, the lack of trained specialists of psychotherapy is problematic. Thirdly, small groups consisting of not more than 12 members and meeting for four to six hours a week for more than two months are ideal, which are not fulfilled due to the lack of resources.<sup>62</sup> No matter how effective, psychotherapy alone seems insufficient to help the offenders live without reoffending; therefore, continuing interventions are needed for the prevention of repeated crime.<sup>63</sup> In particular, imprisoned sex offenders have difficulties in applying what they have learned in psychotherapy in real life,<sup>64</sup> so they need more careful interventions in the community.

When they return to the community, they have to face a number of problems, including where to live, what to work and whom to mingle with.<sup>65</sup> If the offenders are released without any intervention, it would be hard for them to reintegrate to the community and to keep themselves from causing harm to others. Because their personal information is notified to the neighbours and disclosed via the Internet, readaptation into society would be more difficult for them. Accordingly, trained volunteers and professionals are required to help the rehabilitation of sex offenders as well as to enhance public protection, which is why Circles was established in Canada in the 1990s. Helping sex offenders is an alien idea in Korea, so relevant experiences in different countries would be invaluable to introduce and develop such a movement.

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<sup>60</sup> Ho-Sung Kang, Hye-Hwa Lee, 'A Study on the Model of Program Order Enforcement Center for Effective Enforcement of Program Order' (2017) 17(1) Probation Studies 153, 161.

<sup>61</sup> *The Minutes between Seoul Central Court and Seoul Probation and Parole Office* (unpublished 2017) 9.

<sup>62</sup> Kang and Lee (n 57) 183–93.

<sup>63</sup> McAlinden 2007 (Ch.2 n 12) 70.

<sup>64</sup> *Ibid*, 66.

<sup>65</sup> Marshall, Laws and Barbree (Ch.1 n 31) 153.

In Circles, trained volunteers meet a high risk sex offender, called a ‘core member’, regularly in the community to make the offender accountable for past sexual offences through a careful and supportive relationship as well as to help him/her to prepare individual goals enabling an enjoyable and fulfilling life.<sup>66</sup> In 1994, Circles was developed by the Mennonite faith community in Canada in order to respond to public fear over a high risk sex offender released from prison without any legal intervention, because this kind of offender had to serve the whole sentence and to be excluded from parole.<sup>67</sup> For this reason, the Canadian Circles spontaneously developed outside of the community.<sup>68</sup> In contrast, England and Wales have a long history of legislation regulating the effective management of sex offenders and public protection in the community, so relevant activities, including Circles, have been organised and financially supported by the government.<sup>69</sup> Three pilot projects of Circles in different regions were introduced in 2002, based on an individual relationship in which the offender plays an important role.<sup>70</sup>

McAlinden states that Circles are fit for reintegrative shaming theory.<sup>71</sup> According to Braithwaite, shaming is defined as ‘all social processes of expressing disapproval which have the intention on effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming’.<sup>72</sup> The key point of this theory is that how ‘society, the community and the family’, as well as the State, sanction deviant behaviour influences the degree to which their members are involved in vicious crimes.<sup>73</sup> Two types of shaming are contrasted by Braithwaite. One makes an offender become stigmatised by tough formal punishment, the other helps an offender become reintegrated by informal sanction of deviant behaviour.<sup>74</sup> The latter is ‘reintegrative shaming’ consisting of two aspects: (1) the explicit condemnation of the deviant behaviour (shaming) by socially influential members; and (2) continuing inclusion of the criminal within ‘an

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<sup>66</sup> Chris Wilson, Andrew Bates and Birgit Völlm, ‘Circles of Support and Accountability: An Innovative Approach to Manage High-Risk Sex Offenders in the Community’ (2010) 3 *The Open Criminology Journal* 48.

<sup>67</sup> *Ibid.*, 48–49.

<sup>68</sup> *Ibid.*, 49.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> McAlinden 2007 (Ch.2 n 12) 171.

<sup>72</sup> *Ibid.*, 43, citing John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 100.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, citing John Braithwaite, (n 72) 84–85.

interdependent relationship (reintegration)'.<sup>75</sup> McAlinden states that 'shaming is reintegrative when it reinforces an offender's membership in civil society'.<sup>76</sup> She also claims that 'Circles are tailored to the central facets of reintegrative shaming theory'.<sup>77</sup> Firstly, Circles develop a strong connection of support and treatment between the lawbreaker and the community in cooperation with government and voluntary organisations.<sup>78</sup> Secondly, Circles satisfy two aspects of reintegrative shaming, mentioned above. Regarding the first element, Circles normally consist of between six and eight members, including church members, police officers, social workers and influential other members, such as friends and family.<sup>79</sup> Concerning the second element, the core member has a daily meeting with a member of Circles in the beginning stage, and, in a weekly meeting of all members, they deal with any issues. Circles usually last at least one year but continue 'as long as the risk to the community and the offender are above average'.<sup>80</sup> Thirdly, four conditions should be satisfied in order that Circles achieve their reintegrative purpose:<sup>81</sup> (1) 'the shaming maintains bonds of love or respect between the person being shamed and the person doing the shaming'; (2) shaming 'is directed at the evil of the Act rather than to evil of the person'; (3) shaming 'is delivered in a context of general social approval'; (4) shaming 'is terminated with gestures or ceremonies of acceptance and forgiveness'.

Between 2015 and 2016, 137 Circles conducted 16 projects with nearly 1,024 volunteers across the UK, and, out of 137 core members, four were recalled to prison, three were charged and five were convicted.<sup>82</sup> Circles have been introduced in different European countries, including the Netherlands, Belgium, Catalonia, Latvia, Bulgaria, France, Ireland and Hungary.<sup>83</sup> In Korea, Circles will be helpful for sex offenders under post-release EM and supervision as well as offenders undertaking pharmacotherapy or psychotherapy.

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<sup>75</sup> Ibid, 44.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid, 171.

<sup>78</sup> Ibid, 172.

<sup>79</sup> Ibid, 172–73.

<sup>80</sup> Ibid, 173.

<sup>81</sup> Ibid, 173, citing Braithwaite (n 72) 100–101.

<sup>82</sup> Circles UK, *Annual Review 2015-2016* (Circles UK 2016) 5–6.

<sup>83</sup> Mechtild Höing, Laurie Hare Duke and Birgit Völlm, *European Handbook: COSA, Circles of Support and Accountability* (Circles4EU 2015) 59.

#### 8.4. Supporting paraphilic disordered persons and raising social awareness

How to help the persons who suffer from deviant sexual thoughts, desire or behaviour before they get involved in sexual offences is also important for their welfare as well as public protection. The public fears and hates child sex offenders, but has little information about them. If sufficient information is provided, it would help to raise social awareness about child sexual abuse. ‘Stop it Now!’ is the best known and most developed programme, playing an important role in this respect. It was first organised in Vermont and subsequently spread to other states in the U.S.<sup>84</sup>

In the UK, the ‘Stop it Now!’ helpline services began in 2002, led by the Lucy Faithfull Foundation,<sup>85</sup> which has been financially supported by the UK government since 2007 as a part of the ‘Review of the Protection of Children from Sex Offenders’, a comprehensive scheme for the prevention of child sex offences.<sup>86</sup> The ‘Stop it Now!’ programme consists of a helpline service and a campaign. The helpline encourages ‘adult abusers and those at risk of abusing to recognise their behaviour as abusive or potentially abusive and to seek help to change’, and family and friends of such an adult ‘to recognise the signs of abusive behaviour in those close to them and to seek advice about what action to take’.<sup>87</sup> Moreover, ‘parents and carers concerned about a child or young person with worrying sexual behaviour can be encouraged to recognise the signs being abused and to seek advice about what positive action they can take’.<sup>88</sup> Between June 2002 and December 2012, 14,524 persons called 31,314 times to the helpline and 38% of callers were troubled by their own sexual behaviours, and calls notably increase right after a high-profile child sex crime.<sup>89</sup> During the same period, the helpline helped 1,918 professionals who wanted to talk with experienced operators dealing with child sexual abuse, such as child services officials, health services workers, police, solicitors and probation officers.<sup>90</sup> The Lucy Faithfull Foundation also has provided a call back service, face-to-face clinical work and the following intervention programmes: Inform, which is for family members and parents of offenders arrested for accessing child pornography;

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<sup>84</sup> McAlinden (Ch.2 n 12) 165–66.

<sup>85</sup> Deborah Denis and Hannah Whitehead, *Stop it Now! UK & Ireland: Helpline and Campaign Report 2002-2012* (Lucy Faithfull Foundation 2013) 8.

<sup>86</sup> Home Office, *Review of the Protection of Children from Sex Offenders* (2007) 13.

<sup>87</sup> Denis and Whitehead (n 85) 9.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, 10.

<sup>90</sup> *Ibid.*, 26.

Inform Plus, which is for offenders who are arrested, cautioned or convicted for accessing child pornography; and Inform Young People for young people aged between 16 and 25 who engage in inappropriate use of the internet, such as ‘sexting, possession or distribution of child pornography, or problematic use of adult pornography’.<sup>91</sup>

The ‘Stop it Now!’ campaign has been implemented to raise awareness about child sexual abuse, as well as general awareness of the following: ‘parents, carers and other protective adults’; ‘people working with children and families in a professional or voluntary capacity’; ‘politicians and key decision makers’, and ‘agencies working to protect children or working with children, including Police, Probation, Children’s Services, Health and Housing’.<sup>92</sup> During the 12 months between April 2012 and March 2013, in the UK, tens of thousands of posters and pamphlets were distributed, and 65,389 people visited the ‘Stop it Now!’ website.<sup>93</sup> In England, more than 4,500 parents and carers attended a prevention programme, Parents Protect! and 4,428 professionals were educated on prevention measures that they can utilise in daily work.<sup>94</sup>

Table 8-3 illustrates how the prevention strategy of child sexual abuse should be constituted.

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<sup>91</sup> Ibid, 31–32.

<sup>92</sup> Ibid, 39.

<sup>93</sup> Ibid, 38.

<sup>94</sup> Ibid.

Table 8-3: 12 points of focus for preventing child sexual abuse<sup>95</sup>

<b>Targets</b>	<b>Primary prevention (before abuse)</b>	<b>Secondary prevention (before abuse at-risk groups)</b>	<b>Tertiary prevention (after abuse)</b>
<b>Offenders</b>	<ul style="list-style-type: none"> <li>• General deterrence</li> <li>• Developmental prevention</li> </ul>	<ul style="list-style-type: none"> <li>• Interventions with at-risk adolescent and adult males</li> </ul>	<ul style="list-style-type: none"> <li>• Early detection</li> <li>• Specific deterrence</li> <li>• Offender treatment and risk management</li> </ul>
<b>Victims</b>	<ul style="list-style-type: none"> <li>• ‘Resistance’ training</li> <li>• Resilience building</li> </ul>	<ul style="list-style-type: none"> <li>• Resilience building and other interventions with at-risk children</li> </ul>	<ul style="list-style-type: none"> <li>• Ameliorating harm</li> <li>• Preventing repeat victimisation</li> </ul>
<b>Situations</b>	<ul style="list-style-type: none"> <li>• Opportunity reduction</li> <li>• Controlling precipitators</li> <li>• Extended guardianship</li> </ul>	<ul style="list-style-type: none"> <li>• Situational prevention in at-risk places</li> </ul>	<ul style="list-style-type: none"> <li>• Safety plans</li> <li>• Organisational interventions</li> </ul>
<b>Ecological systems</b>	<ul style="list-style-type: none"> <li>• Parenting education</li> <li>• Community capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• Responsible bystander training</li> <li>• Enabling guardians</li> <li>• Interventions with at-risk communities</li> </ul>	<ul style="list-style-type: none"> <li>• Interventions with ‘problem’ families, peers, schools, service agencies and communities</li> </ul>

In Korea, as discussed in previous chapters, most sexual offending policies and legislation have focused on tougher punishment and surveillance rather than treatment and rehabilitation. As a result, while tertiary prevention of child sexual abuse has been partly implemented, little has been known about how primary and secondary prevention should be managed. It has been reported that the ‘Stop it Now!’ helpline service has achieved successful interventions in a number of cases.<sup>96</sup> Early treatment seems imperative to prevent potential sex offenders from offending, which requires trained professionals and volunteers as well as financial support. The campaign is also clearly significant in order to raise the awareness of parents, carers and professionals dealing with children about sexual deviancy, as well as that of sexually deviant persons and ordinary people. However, such a campaign cannot be useful unless the treatment and counselling systems for sexually deviant people or the persons who are concerned about them are well-organised and ready to go when needed. Therefore, it should be the Korean government’s priority to constitute treatment and counselling structures dealing with sexually deviant behaviour outside of the criminal justice system.

<sup>95</sup> Ibid 58.

<sup>96</sup> Ibid, 13–15.

### 8.5. How to better organise preventive measures

As noted in Chapter 7, a sex offender might be sentenced to post-release EM for up to 30 years, compulsory post-release pharmacotherapy for up to 15 years, public disclosure and notification for up to 10 years and the PMTCO, for the same offence, besides imprisonment for up to life. The term of the PMTCO replaces that of imprisonment, but the other preventive measures are purely additional criminal sanctions, which cause a problem of disproportionality; therefore, how to better organise preventive measures needs to be addressed.

The abolition of post-release compulsory pharmacotherapy would be one way to reduce the disproportionality of preventive measures. With this modification, paraphilic-disordered sex offenders do not need to undertake unwanted pharmacotherapy under the pressure of punishment. Public protection can be secured by post-release EM and supervision, even if compulsory pharmacotherapy is repealed. As shown in Table 7-2, the term of post-release EM is for up to 30 years and monitored offenders are under the supervision of a probation officer.

Among current preventive measures, EM is the most widely-used method; therefore, restructuring post-release EM is imperative to better organise preventive measures. Of 17 offenders given pharmacotherapy, as shown in Table 7-1, 14 are given post-release EM concurrently. Table 8-4 shows the statistics of the use, duration and temporary cessation of post-release EM.

Table 8-4: Statistics of post-release EM (as of April 2015)<sup>97</sup>

Crime	Total	Sexual Offences	Murder	Robbery	Child Abduction
Running total	4,623	2,868 (62.0%)	1,548 (33.5%)	201 (4.3%)	6 (0.2%)
At present	2,167	1,853 (85.5%)	233 (10.8%)	78 (3.6%)	3 (0.1%)
<b>Ordered Duration (At present)</b>					
Under 1 yr.	154	2 (0.1%)	83 (35.6%)	69 (88.5%)	0
1-5 yrs.	1,290	1,140 (61.5%)	140 (60.1%)	9 (11.5%)	1
5-10 yrs.	686	676 (36.5%)	10 (4.3%)	0	0
10-15 yrs.	24	24 (1.3%)	0	0	0
15-20 yrs.	12	10	0	0	2
20-30 yrs.	1	1	0	0	0
<b>Temporary Cessation (Accumulated)</b>					
Application		120/2,868 (4.1%)	745/1,548 (48%)		
Permission		9/120 (7.5%)	538/745 (72.2%)		
Temporary cessation rate		9/2,868 (0.31%)	538/1,548 (34%)		

<sup>97</sup> Seong-Su Park, 'Problems of Long-Term GPS Electronic Monitoring and How to Improve' (2016) 13(1) Journal of Korean Public Police and Security Studies 73, 75–76, 84.

Of four target crimes of post-release EM, as shown in Table 8-3, the percentage of sexual offences has increased. The duration of monitoring of sex offenders is far longer than that of other crimes. While the rates of murderers monitored for less than one year is 35.6%, it is a mere 0.1% for sex offenders. In contrast, the rates of sex offenders being monitored for more than five years is 37.8%, while 4.3% for murderers.

Temporary cessation of EM is rarely permitted for sex offenders. According to the law, a chief probation officer or an offender can make an application for temporary cessation of EM to the Probation Committee after three months have passed from the start.<sup>98</sup> Even though there are no legal differences for temporary cessation of EM between the types of offences, the rate of application, permission and temporary suspension for monitored murderers is far higher than that for sex offenders. It is apparent that monitored sex offenders are principally excluded from temporary cessation. Hye-Jeong Kim argues that, in some areas, the committee tends to apply too strict criteria for sex offenders for fear of being criticised publicly if an offender re-offended.<sup>99</sup> This exclusion, combined with long-term monitoring of sex offenders, has been criticised in that it causes the following significant problems: the increase of offenders' stress, suicide and recidivism rates, and hindrance to rehabilitation.

Sung-Chil Lee and Choong-Sub Kim, in an empirical study investigating 109 monitored offenders and 102 normal probationers focusing on their stress level, argue that the percentage of extraordinarily high stress levels for monitored offenders is 61%, while 19% for normal probationers<sup>100</sup>, whereas it is 16.1% for sex offenders under normal probation.<sup>101</sup> The suicide rate of monitored offenders also has drawn public attention. As of April 2015, of a running total of 4,623 monitored offenders, 25 offenders had committed suicide, so the rate of suicide of monitored offenders reaches 0.54%, which is 20 times more than that of the whole nation,

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<sup>98</sup> Supervision and Electronic Monitoring against Specific Criminals Act 2012 (ROK) s 17.

<sup>99</sup> Hye-Jeong Kim, *A Study on the Appropriateness of the Target Offences and Duration of Electronic Monitoring for the Long-Term Development Strategy* (Ministry of Justice 2015) 109.

<sup>100</sup> Sung-Chil Lee and Choong-Sub Kim, 'A Study on The Stress and Suicide of Offenders Who Have Placed on GPS Electronic Monitoring' (2013) 13(1) *Korean Journal of Probation* 227, 257.

<sup>101</sup> *Ibid*, 258.



reaching 0.029%.<sup>102</sup> Sung-Su Park argues that these high rates of extreme stress levels and suicide of monitored offenders apparently results from long-term monitoring and the extraordinarily low permission of temporary cessation of monitoring, which inhibits the rehabilitation of offenders.<sup>103</sup>

Hye-Jeong Kim states that the extremely low possibility of temporary cessation combined with extraordinary long-term GPS tracking makes monitored sex offenders lose motivation for abiding by the conditions of supervision, and might be a cause of reoffending.<sup>104</sup> Youn-Oh Cho, in her empirical study interviewing 63 monitored sex offenders, argues that GPS tracking has a strong deterrent effect,<sup>105</sup> citing the following interview results: 52 offenders answer that they have tried to avoid engaging in illegal activities during the term of GPS tracking and 35 say that EM apparently has a positive influence on the prevention of reoffending.<sup>106</sup> According to a study by Ji-Seon Kim and others, 273 out of 406 monitored offenders answered that GPS tracking strengthens the possibility of arrest if they re-offend.<sup>107</sup>

Table 8-5 shows the difference in recidivism rates between monitored sex offenders and the non-monitored.

Table 8-5: Recidivism rates of monitored and non-monitored sex offenders<sup>108</sup>

Non-monitored sex offenders	Monitored sex offenders						
	2008	2009	2010	2011	2012	2013	2014
2004-2008	0.49%	0.0%	0.65%	2.19%	2.40%	1.72%	2.03%
14.1%							

As shown in Table 8-4, the recidivism rates of monitored sex offenders are far lower than that of the non-monitored. These statistics seem to correspond with the statements of Youn-Oh Cho and Ji-Seon Kim and others, as noted above. However, another statistic illustrates the fact that the recidivism rates of monitored sex offenders have increased as the duration of GPS tracking has increased. Table 8-6

<sup>102</sup> Seong-Bae Kim, 'Suicide Rate of Electronic Monitored Offenders Is 20 Times More Than That of a Whole Nation' *Naeil Shinmun* (Seoul, 9 November 2015).

<sup>103</sup> Park (n 97) 81–82.

<sup>104</sup> Kim (n 99) 119.

<sup>105</sup> Youn-Oh Cho, 'The Factors of GPS Electronic Monitoring on Crime Deterrence' (2009) 9(2) *Korean Journal of Probation* 153, 178.

<sup>106</sup> *Ibid*, 171.

<sup>107</sup> Ji-Sun Kim and others, *Community-based Management of Sex Offenders in Korea(II): An Evaluation Study on the Electronic Monitoring* (Korean Institute of Criminology 2013) 533.

<sup>108</sup> Kim (n 99) 44–45.

shows the increase of the average ordered duration of EM and the changes in recidivism rates according to the length of monitoring.

Table 8-6: Average ordered duration of EM and changes in recidivism rates<sup>109</sup>

<b>Increase of average ordered duration of EM for sex offenders (yrs.)</b>						
2008	2009	2010	2011	2012	2013	2014
1.0	1.8	3.7	5.1	6.3	6.6	7.0
<b>Changes in recidivism rates by duration of EM for sex offenders (2008-2014)</b>						
Executed Duration	Under 1 yr.	Over 1 yr. - Under 3 yr.	Over 3 yr. - Under 6 yr.	Over 6 yr.	Total	
Total	503	643	916	621	2,683	
Reoffenders	1 (0.2%)	18 (2.8%)	50 (5.5%)	46 (7.4%)	115 (4.3%)	

As shown in Table 8-4, the average ordered duration of EM for sex offenders has increased, because courts have imposed EM on sex offenders more heavily, year by year, during this period. The longer the offenders are tracked by GPS satellite, the more the offenders tend to engage in reoffending. These statistics clearly correspond with the statement of Hye-Jeong Kim, as noted above, that rare permission of temporary cessation combined with far too long a term of EM might cause offenders to reoffend.

Because the initial imposition of an extraordinarily long term of EM may discourage an offender from trying to reintegrate into the community, it would be reasonable to reduce the maximum term of the original EM and extend the duration afterwards based on the chances of the risk of reoffending.<sup>110</sup> In addition, 30 years as the current upper limit of EM, seems far too long, so it needs to be reduced to ten years, which was the maximum in the original act.<sup>111</sup> As noted in Chapter 5, this extension was one of the legal responses to high profile sexual offences, and was insufficiently deliberated. Furthermore, in order to increase the use of the temporary cessation of EM, automatic schemes might be considered. For instance, if a specific condition is achieved, such as the passing of half of the ordered duration or a certain

<sup>109</sup> Ibid, 106–107.

<sup>110</sup> Ibid, 108.

<sup>111</sup> Ibid.

period without any violation of conditions, EM would cease automatically by law.<sup>112</sup> This might motivate offenders to abide by the conditions and obey the law.<sup>113</sup>

## 8.6. Conclusion

How best to deal with the flaws of compulsory pharmacotherapy in the 2010 Act was addressed in this chapter. Because its defects are significant, there seems no other way but to repeal the Act. After the repeal of the 2010 Act, the provisions regulating voluntary pharmacotherapy of paraphilic sex offenders should be inserted into the Preventive Medical Treatment and Custody Act 2008. With reference to the arguments of Fennell and Texas legislation regulating surgical castration discussed above, the following should be included: giving an offender sufficient information about the necessity, effects, side effects, methods and process of pharmacotherapy by a doctor; no benefit for choosing the treatment; no disadvantage for a refusal; an offender's freely-given consent in writing; allowing free withdrawal of the original consent during the treatment; prohibition of any pressure to undertake pharmacotherapy from staff on an offender; identifying whether the consent is freely-given or the treatment is appropriate for an offender; keeping the name of the offender who consents or refuses to undergo the treatment confidential in the early release review process, and prohibition of imposing pharmacotherapy as a condition of early release. These provisions should apply to the offender during post-release supervision. In addition, the term of the PMTCO should be limited up to the term of imprisonment. If an offender experiences the effectiveness of the treatment based on freely-given consent, he may continue to undergo the treatment during post-release supervision and even after the termination of the supervision. This revision will reduce the risk of voluntary pharmacotherapy violating the offenders' rights to bodily integrity, self-determination and privacy, which are secured by the Constitution and the ICCPR.

Dealing with the medical requirement of sex offenders who are not given the PMTCO needs to be considered, because most sex offenders are sentenced to imprisonment or probation. New legislation for prisoners and probationers is required in order to provide them with stable pharmacotherapy. New legislation should include the provisions regarding observation and assessment processes of

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<sup>112</sup> Ibid, 109.

<sup>113</sup> Ibid.

inmates; giving them sufficient information about the treatment; the freely-given consent of offenders; a third party's involvement in the process; the free withdrawal of the consent; the careful implementation of the treatment; attendance to the requirement of combined psychological treatment; advice on how to deal with side effects, and the qualification for parole being separated from whether to undergo or refuse pharmacotherapy. These amendments need careful deliberation of therapeutic or less-punitive types of legislative examples for pharmacotherapy in different countries and literature review, which is crucial to ensure that voluntary pharmacotherapy becomes a successful policy transfer. It is also important how to raise the therapeutic awareness as well as the perceptions of and attitudes against sexual violence of correctional and probation officers, because their roles are imperative in the treatment process. If their attitudes against sexual offending are still influenced by Confucian patriarchal thought, as noted in Chapter 3, it is hard to expect that the pharmacotherapy will be successful. Accordingly, government should provide correctional and probation officers with well-designed education programme to improve their perceptions of sexual offending. The referral policy and correctional officers' involvement with sex offenders in England and Wales would be a good example to expand voluntary pharmacotherapy in the criminal justice setting. In order to provide more sex offenders with voluntary pharmacotherapy, the problems of lack of resources and budget for medical facilities, including in prisons and the National Forensic Hospital, need to be tackled immediately.

While a number of policies and legislation focusing on tougher punishment and surveillance for sex offenders have been introduced recently, it has been scarcely discussed how to encourage them to reintegrate into the community and how to implement early intervention for them before they engage in sexual reoffending. The British experience relevant to the Circles and 'Stop it Now!' projects, based on reintegrative shaming theory, would be invaluable to constitute the support and treatment systems in Korea. In the Circles, with supportive relationships between volunteers and core members, sex offenders might be accountable for past offences and maintain a balanced and autonomous lifestyle. Early intervention with sexually deviant people would be imperative to prevent them from becoming an offender. This requires continuing financial and political support to educate volunteers and professionals sufficiently, and to establish treatment and counselling systems outside

of the criminal justice setting, which will help the Korean government to maintain a harmonious intervention structure for sexual offending.

The proportionality of preventive measures is another issue in the post-release control of sex offenders. Even though the abolition of compulsory pharmacotherapy would reduce this disproportionality, the problems of post-release EM for sex offenders are still significant. The limit of duration of EM is too long, extending to 30 years, and the ordered duration for sex offences is significantly longer than that of other crimes. In addition, the temporary cessation of EM is rare, which might cause offenders to reoffend. Accordingly, a reduction in the upper limit and automatic temporary termination of EM should be considered in order to motivate sex offenders to abide by the law.

**Chapter 9: Conclusion**

This thesis has explored several issues relevant to the pharmacotherapy of sex offenders. These issues have rarely been addressed in Korea. Regarding the examples of pharmacotherapy in other jurisdictions, the provisions of the laws have been introduced, but how they work has little been examined. This thesis has found that pharmacotherapy has not been well implemented in the U.S. which provided a major source of inspiration for the Korean system. In other countries, such as Germany, Denmark and Sweden, the treatment is provided to sex offenders and non-offenders by the same process outside of the criminal justice setting. I have discussed how traditional Korean thinking has influenced the perception and attitudes of criminal justice agencies dealing with violent crimes against women. I have also considered the influence of feminist activists, especially on the increase in social awareness of sexual violence, and on the enactment and revision of the Punishment for Sex Offences and Protection of Victims Act 1994. Until now, neither the reasons for the statistical increase of reported sex crimes nor the debates in Parliament have received much discussion. Likewise, feminist activists' anxieties about government responses weighted towards tougher punishment have hardly been considered. These issues have been addressed in this thesis. Several studies have explored how the laws became more punitive in the course of responding to a series of high-profile sexual offences committed between 2006 and 2010. However, news reporting on these offences and Parliament's records on the bills have rarely been utilised in analysis of the situation. This thesis has clearly shown how the legislative responses to sex offenders became punitive with the use of this primary literature. I also addressed how the original bill on pharmacotherapy had been made more punitive during the deliberation process through the use of the minutes in Parliament.

Regarding the human rights problems of pharmacotherapy, few studies have looked at the existing international norms, including the CAT and ICCPR, or the ECHR and the ECtHR, which were all reviewed in this thesis. A number of studies have dealt with the problems of the 2010 Act, but the repeal of the Act and new legislation on voluntary pharmacotherapy for prisoners and probationers have rarely been discussed. Reintegrative shaming theory, the Circles of Support and Responsibility and 'Stop it now!' programme have also received little if no attention in Korea. All these issues were addressed in this thesis.

Through my completed research, this thesis can provide answers to the research questions. Firstly, Confucian patriarchal order and the consequent low status of women had become established as a social system for more than five hundred years in the Chosun dynasty, which has influenced social awareness towards sexual violence, and the perceptions and attitudes of criminal justice agencies dealing with violent crimes against women. Until the sixteenth century, the scope of rape was broad and sex offenders were punished properly. When a ruling class man raped a lower-class woman, the offender was usually charged with attempted rape and punished by exile along with the offender's whole family. The levels of violence accompanying rape, the resistance of a victim, the sexual history or conduct of a victim were not regarded as important in sexual offence trials. From the late sixteenth century, as the Confucian hierarchical order had been strengthened and state control and authority had become weakened, punishment for sex crimes by members of the ruling class became lighter. Resistance by the victim became increasingly important in sexual offence cases. Victims became culpable for being raped, on the grounds that the rape would have been impossible if the victim had resisted intensely. Ruling class sex offenders could be punished only when a victim resisted so harshly that she died or committed suicide. Under this influence, levels of resistance, sexual history and the conduct of a victim are still considered significant factors by the current criminal justice agencies. Force or threat is regarded as a prerequisite for rape by criminal justice agencies, which reflects rape myths rather than the complex reality of rape. These perceptions and attitudes have caused secondary victimisation.

Feminist activists have done much to raise levels of social awareness about violent crimes against women. Since the late 1980s, feminist groups have played a prominent role in opposing sexual violence and the social oppression of women. Following two murders committed in 1991 and 1992, by victims who were raped from childhood, feminist activists continuously tried to legislate to regulate sexual violence, which led to a series of legislation relevant to the expansion of the scope of sex crimes, the abolition of mandatory complaint for the prosecution of sexual offences and the reinforcement of protection for victims, including the enactment of the Punishment for Sex Offences and Protection of Victims Act 1994. These campaigns have drawn public attention and have influenced significant changes in the social recognition of sexual violence.

Secondly, the rise of social awareness towards sexual victimisation, combined with the provision of advice and legal aid to victims, the revision of the complaint system and widening of the scope of sexual crimes, can give an answer to why the number of reported sex crimes has increased sharply since the middle of the 1990s. While the sex crimes rate was little changed between 1985 and 1995, it increased gradually from 13.84 to 30.47 per 100,000 populations between 1995 and 2008. As social awareness of and social anger towards sex crimes have increased so have various changes been made in the criminal justice system relevant to sexual violence. At the same time, counselling centres have offered various services for victims since 1994. The number of reported sexual offences has also increased. Therefore, it would be reasonable to believe that the rise in sex crimes was caused not by actual increase in sexual offences, but by such legislative and social environmental changes.

Thirdly, whenever a high-profile sex offence has been reported, it has drawn public attention and has caused legislative responses which have inclined towards harsher punishment. Why the media reporting tend to focus on sex crimes can be addressed by the concepts of 'news values', 'ideal victim' and 'signal crimes'. Not every crime but only what the media select becomes news. It is generally agreed that the media determine whether to report a criminal event based on its newsworthiness. Violence, sexual connotations, children and personal causes are commonly considered as accounts of 'news values', which creates newsworthiness. In particular, if a crime is committed against an 'ideal victim', who is regarded to have a complete and lawful status as a victim, such as a young child, its newsworthiness becomes stronger. Child sexual abuse is regarded one of the 'signal crimes', extremely serious or high-profile crimes, which are often reactivated by the media, resulting in the reinforcement of their newsworthiness and a reconstruction of social attitudes or perceptions. In addition, child sexual abuse tends to be misrepresented by the media. Despite the fact that more child sexual offences are committed at home or by an acquaintance, the media tend to focus on children abused by a stranger. As the media recreate signal crimes, this belief is reinforced.

Korean media have selected and reported high profile child sexual abuses repeatedly because of their newsworthiness, which has created pressure on Parliament to make the laws punitive, including the extension of the maximum term of imprisonment and EM, the retroactive application of EM, strengthening of sex offender registration, notification and disclosure, and pharmacotherapy. Under the



influence of the media, the belief that toughened punishment is effective to prevent sex offenders from reoffending or whether children are normally abused at home or by stranger may be reinforced. If this belief becomes stronger, the news value of child sexual abuse may be considered more significantly by the media, leading to more punitive legislation.

The 'moral panic' concept is useful to analyse the media and government attitudes inclined to toughened punishment. According to Critcher, a moral panic is characterised by 'disproportionality, exaggeration and distortion of the actual problem'.<sup>1</sup> Whenever serious sex crimes are committed, the media reporting and government responses centre on public outcry and harsher punishment. Despite the fact that sexual offences harm others, it is not understandable that the media, Parliament and government ignored the following significant issues: whether existing punishment was effective to prevent sexual offences; whether tougher punishment would be productive to regulate sex crimes; why some offenders repeat sexual offences, and what the root causes of sex crimes are. In this sense, the media reporting, Parliament and government responses to sex crimes are disproportionate, which can be regarded as the result of a moral panic.

Fourthly, as the original bill on pharmacotherapy was intended for a treatment-oriented preventive measure rather than a punishment, the informed consent of an offender was required. Consent should be regarded as freely given in order for pharmacotherapy to be a treatment. However, because pre-release pharmacotherapy was a mitigated requirement for parole, which may interfere in an offender's decision of whether to consent, it can be considered as undue inducement, taking into account the offender's status facing trial. Therefore, pharmacotherapy in the original Bill cannot be regarded as a treatment in that the consent is not freely given. Whether pharmacotherapy in the original Bill was a preventive measure or a punishment is also debatable. In a dual system, punishment regulates the past crime and a preventive measure regulates the future risk of reoffending. While a punishment should be proportionate to an offender's culpability, a preventive measure should be proportionate to the risk of reoffending. If a preventive measure exceeds or is inappropriate for the risk of reoffending, it cannot be justified and can be regarded as a double punishment. The pharmacotherapy in the bill was not an

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<sup>1</sup> Critcher (Ch.5 n 124) 6.

additional sanction but a parole condition, but the offender, who refuses to continue the treatment, would be punished by imprisonment for not more than seven years or by a fine not exceeding 20 million won combined with parole revocation. In this sense, pharmacotherapy in the bill cannot be justified as a preventive measure because it is disproportionate to the risk of reoffending, and, thus, it is regarded as a punishment.

Whether pharmacotherapy in the bill is justified as a punishment is another issue. From the non-consequentialists' viewpoint, punishment is justified if it is an appropriate response to a crime, but pharmacotherapy in the Bill cannot be justified because it is disproportionate to an offender's 'deserts' in that it is coercive; withdrawal of consent is not permissible, and a refusal to continue pharmacotherapy is punished. From the consequentialists' perspective however, pharmacotherapy cannot be justified. The harms caused by pharmacotherapy are clear, such as its violation of an offender's right to bodily integrity and self-determination, or the potential side effects of the treatment. Its advantages are much less clear however and have yet to be proven empirically. Therefore, it is difficult to say that its advantages are greater than its harm. Pharmacotherapy can be introduced as less-punitive if it is based on freely given consent and separated from criminal procedure. It would be an available alternative in this context. If withdrawal of consent were allowed, the harmful results created by pharmacotherapy would be reduced, which would make it a less harmful alternative. In this sense, pharmacotherapy in the Bill is a punishment rather than a preventive measure, and it cannot be justified.

During the deliberation of the bill, most of the therapeutic elements were removed. Accordingly, in the 2010 Act, the punitive characteristics became stronger so obviously it became a punishment. The main points of the 2010 Act are as follows: the consent of an offender is not required; the duration of pharmacotherapy is extended up to 15 years for post-release treatment; and the refusal to undertake pharmacotherapy is punished by imprisonment for not more than three years or by a fine not exceeding 10 million won.

Fifthly, the 2010 Act is modelled on some state laws in the U.S., but existing human rights problems in these laws and the difficulties in implementation were comprehensively ignored. Since California first introduced compulsory pharmacotherapy in 1996, American legislation has become a model of the more-punitive type of pharmacotherapy worldwide. Although a number of states

considered enacting compulsory pharmacotherapy following the California legislation, only seven states did so; however, two of them, Georgia and Oregon, repealed it in 2006 and 2011 respectively. No state has newly enacted compulsory pharmacotherapy since the 2000s, so merely six states maintain the relevant law at present. No States require an offender's informed consent for the treatment. The right to refuse the treatment is not allowed in any state. No state decides pharmacotherapy outside of a criminal justice procedure. These six states' statutes are deemed unconstitutional by a number of academics because compulsory pharmacotherapy is a cruel and unusual punishment violating human dignity and the mental and bodily integrity of an offender. It also violates freedom of thought and deprives an offender of liberty without due process of law. Moreover, it has not been well managed in the states because of a lack of awareness of the laws by prosecutors and judges, and insufficient infrastructure to provide the treatment. Due to the difficulty to find physicians to prescribe or inject medication, Oregon repealed the law in 2011. These constitutional and administrative problems have caused the unpopularity of compulsory pharmacotherapy in the U.S., but these issues were ignored in the deliberation in the Korean Parliament.

Unlike the U.S., European countries such as Denmark, Germany and Sweden have used less-punitive types of pharmacotherapy, which is seen as a therapeutic procedure separate from the criminal justice process and based on the informed consent or the request of the offender. In this legislation, the same processes are applied to permit the treatment whether for offenders or non-offenders. Texas manages a therapeutic model of surgical castration only for incarcerated sex offenders, but it is considered a treatment rather than a punishment. The administration of these examples of less-punitive types of pharmacotherapy needs to be scrutinised in detail in order to reform the 2010 Act.

Sixthly, the numerous human rights problems of the 2010 Act have been illustrated. Pharmacotherapy restricts the rights to bodily integrity, self-determination, privacy, and engaging in sexual relationships and marriage, as well as the principle of due process of law. In order to ensure that this restriction is justifiable, it should not violate the CAT, ICCPR or the Korean Constitution. As Korea is a state party to the CAT and ICCPR, any restriction of human rights should not violate these international norms. Article 7 of the ICCPR prohibits introducing cruel, inhuman or degrading punishment. Obviously, compulsory pharmacotherapy

in the 2010 Act is a cruel, inhuman or degrading punishment, which violates Article 7 of the ICCPR because of its imposition without any given consent, severe side effects, a long-term period of execution and harsh punishment for a violation during the treatment. Along the same lines, forced pharmacotherapy regardless of lack of studies and uncertainty of its irreversible severe side effects, as well as the absolute prohibition of the suspension of pharmacotherapy and taking countervailing drugs, might violate an essential aspect of the rights to bodily integrity, self-determination and privacy.

Concerning the compatibility with the principle of proportionality, any restriction of human rights should satisfy four rules of the principle. Of the four rules, it is generally agreed that the 2010 Act is compatible with the rule of legitimacy of the legislative purpose, but the purpose of the Act obviously cannot be realised by compulsory pharmacotherapy, because it is a degrading punishment. The other three rules also do not seem to be satisfied. Compulsory pharmacotherapy needs to be as effective as voluntary pharmacotherapy in order to be an appropriate means, but this has not been convincingly proven. Because the direct effect of drugs and the fear of punishment would be decisive for behavioural change, whether compulsory pharmacotherapy encourages an offender to be motivated to change is also questionable. Although offenders who have been given pharmacotherapy still suffer from paraphilic disorders during the term of imprisonment, their needs are ignored until release. In this regard, voluntary pharmacotherapy rather than compulsory pharmacotherapy would be an appropriate means and a less restrictive way of achieving the legislative purpose. While the severity of the restricted interest of an offender is clear because it is generally agreed that compulsory pharmacotherapy obviously restricts human rights and its side effects are severe, the benefit to the public interest is unclear because its effectiveness has not been firmly established and it has not been widely used. In this respect, compulsory pharmacotherapy does not seem to maintain the balance of legal interests of all parties concerned. Therefore, pharmacotherapy in the 2010 Act violates the principle of proportionality.

Concerning the principle of due process, it seems to be violated by the Act. The Act ignores the procedural rights of an offender which would be important to challenge an assessment, so that an offender cannot receive any information about the result of diagnosis, necessity, risk or benefits of the treatment before sentencing.

The offenders are not informed of the effects, side effects, means and procedure of pharmacotherapy from medical professionals but by a probation officer.

Seventhly, there is no other way but to repeal the Act because its flaws are extremely significant. Voluntary treatment can reduce the problems of compulsory pharmacotherapy. This treatment can be provided to paraphilic-disordered sex offenders voluntarily at the National Forensic Hospital by the Preventive Medical Treatment and Custody Act 2008. In order to secure the freely-given informed consent of an offender, the following needs to be added to the Act: providing an offender with sufficient information including the necessity, effects, side effects, methods and process of pharmacotherapy; a withdrawal of original consent at any time in the course of pharmacotherapy without any disbenefit; prohibition of giving an offender any pressure to undertake pharmacotherapy, and the separation of the offender's consent or refusal to pharmacotherapy from the qualification for early release.

New legislation for prisoners and probationers is required in order for the stable administration of pharmacotherapy. New legislation should include the following: in prison, the observation and assessment process by a doctor as to whether an inmate is paraphilic or requires pharmacotherapy; the explanation process for the offender prior to the treatment; providing an offender with information, including an assessment of the medical necessity, effects and side effects of medication, and the methods and process of administration; an offender's freely-given consent to pharmacotherapy in writing; the appointment of a counsellor to ensure whether the consent is freely-given based on sufficient information; allowing to withdraw the consent at any time during the treatment without any disadvantage; pharmacotherapy conducted by medical professionals with a well-proven method and medication; combined psychological treatment; careful assessment as to whether side effects occur, and preventing an offender's undertaking or refusal of pharmacotherapy from affecting the decision of early release.

How to help sex offenders to reintegrate in the community is another significant issue. In order to constitute the support and treatment systems in Korea, British experience relevant to the Circles and 'Stop it Now!' projects, based on reintegrative shaming theory, would be invaluable. Early intervention of sexually deviant people would also be imperative for the prevention of sex crimes. Financial

and political support to educate volunteers and professionals, and the establishment of treatment and counselling systems outside the criminal justice setting, will help the Korean government to maintain a harmonious intervention structure for sexual offending.

There are some limitations of this research. Empirical questions are not included such as the effectiveness of compulsory pharmacotherapy, the thinking and feeling of treated offenders and their families, the thoughts of physicians and probation officers who are involved in the treatment or the number of sexual offenders who wish to undertake the treatment voluntarily in prison.

In the future, a number of arguments may be developed based on the discussions conducted in this thesis. To repeal the 2010 Act, its unconstitutionality should be argued for in the light of the international norms. How voluntary pharmacotherapy should be enacted for prisoners and probationers needs to be discussed in detail with reference to the comprehensive study of implementation examples in other jurisdictions. To find the correct ways to enhance the rehabilitation of sex offenders, the management of initiatives like the Circles and the 'Stop it Now!' programmes in other jurisdictions should be scrutinised. A careful approach is required because a policy transfer failing to achieve sufficient understanding of the different social, political, historical and cultural context in other jurisdictions may cause an unsuccessful policy transfer. This thesis also may have broader implication for the discussion about how to justify the therapeutic intervention programmes for offenders in Korea. The result of this research may guide for what factors should be included in determining which treatment is justified in the criminal justice process.

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