Confucian Influence on the Criminal Laws of Korea and Japan

Woo-Jung Jon, *University of Oxford*
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Abstract

In Korean Criminal Law there are thirteen provisions influenced by Confucian filial piety, imposing heavier punishment on crimes committed against lineal ascendants. The Japanese Criminal Law also had such provisions, but abolished them. This article examines the present and the past of the Confucian influence on the Criminal Laws of Korea and Japan. Chapter II investigates the historical background of the development of Confucianism in Korea and Japan, and the conflicts between traditional Confucianism and newly transplanted Western legal systems. Chapter III analyzes the provisions of the Criminal Laws of Japan and Korea related with aggravated punishment on the crime against lineal ascendants. Chapter IV examines the Courts’ decisions on the constitutionality of these provisions in Japan and Korea. Chapter V reviews scholars’ opinions about the aggravating provisions for crimes committed against lineal ascendants.

* Keywords: crime against a lineal descendent by a lineal ascendant, aggravated punishment, confucian Influence

I. Introduction

The legal history of Korean and Japan actually began with the reception of Chinese law. There is no doubt that the influence of Confucianism has been felt in Korea and in Japan.
In Korean Criminal Law, there are thirteen provisions influenced by Confucian filial piety, imposing heavier punishment on crimes committed against lineal ascendants. The Japanese Criminal Law also had such provisions, but they were abolished. This article examines the present and the past of the Confucian influence on the Criminal Laws of Korea and Japan. First of all, this article investigates the historical background of the development of Confucianism in Korea and Japan, and therefore the conflicts between traditional Confucianism and newly transplanted Western legal systems. Further, this article analyzes the provisions of the Criminal Laws of Japan and Korea related with aggravated punishment on the crime against lineal ascendants and the Courts’ decisions on the constitutionality of these provisions.

II. Historical Background

A. Confucianism

1. Development of Confucianism in Korea

As Christianity heavily affected Western civilization in the middle age, Confucianism similarly spiritually dominated East Asian civilizations. The influence of Confucianism has been felt in Korea from the beginning of the Korean history, and in Japan since the 7th century when Japan sent thousands of students to Tang Dynasty of China to be educated there in the ways of Confucius. Although many believe otherwise, the reception of European law in the 19th century was actually their second reception of foreign laws. Before the Europeans introduced their legal concepts to the east, the majority of laws were based on Chinese Confucian principles. For instance, the 71 Article Code of KoRyo (高麗) Dynasty was made referring to the Tang Code (唐律), and KyungGukDaeJeon (經國大典) of ChoSon (朝鮮) Dynasty was made based on the Great Ming Code (大明律) of China. The Yoro Code of Japan, which was promulgated in AD 702, was almost a direct copy of the Tang Code. ¹

Confucius (孔子) lived between 551 and 479 BC. For more than 2000 years since his time the teaching of Confucius has been a constant theme in China’s culture and politics. Confucianism philosophy was reborn by Zhu Xi (朱熹) in Song Dynasty (宋) of the 12th Century. Then, during the KoRyo Dynasty, this Chinese philosophy was introduced to Korea. During the following ChoSon Dynasty, Confucianism became the ruling state ideology for about 500 years from 1392 to 1910.


* LL.M. candidate, Peking University Law School. I would like to extend special thanks to Professor Wang Shizhou of Peking University Law School for his guidance and advice. I also thank my classmate, Laurel Su for the proofreading.
The crux of Confucianism is “Li” ("礼", rules of propriety or ceremony). As Li refers to a set of rules of behaviour varying in accordance with one’s status defined in the various forms of social relations, its function is to achieve differentiation. The Confucian philosophy is based on the belief that differences are in the very nature of things. The Confucian School believed that only through the harmonious operation of these natural differences could a fair social order be achieved. Obviously, the harmonious operation can only be achieved by practising Li, by treating people differently according to his or her status.

The Tang Code embodied Confucius’ idea of Li. Most of the Ten Abominations (十恶, ten categories of the most vicious crimes) were non-commutable capital offences provided in the Code. These were serious deviations from the norm of conduct prescribed by Li, for example, plotting rebellion, committing great irreverence (to one’s superiors) and lack of filial piety. These examples are against the virtue of Li. The reason for including the lack of filial piety in the Ten Abominations was that the keeping of a hierarchical order within the family was crucial to the preservation of feudal social order for behaviour resulting from the lack of hierarchical order in a family may be imitated outside the family and bring about great irreverence to one’s superior and eventually a rebellion.

The importance both the Confucian School and the Tang Code, adopted by Japan and Korea, attached to filial piety influenced the Korean and Japanese judiciary’s judgment on the value of filial piety and family order. For instance, The Korean Criminal Law imposes heavier punishment on the homicide of lineal ascendants by the lineal descendants, while it does not impose heavier punishment on the homicide of the lineal descendants by the lineal ascendants. This discrimination is advocated in the name of the Korean traditional culture, which emphasizes respect for the ancestor and filial piety for the lineal ascendants. The three principles and five morals (三綱五倫), the moral ideology of ChoSun Dynasty, emphasize the disciplinary relationship between parents and their children as well as the hierarchal order between elders and the youth. Not only did they outline these moral guidelines, the ChoSun Dynasty had also classified the crimes against lineal ascendants into the Ten Abominations (十惡). Up to now, the notion has been well kept intact that lineal descendants should treat their lineal ascendants with unconditional tolerance and respect. In spite of gradual

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awareness of the serious problems of child abuse, homicide of lineal ascendants provokes more intense outrage from the public, rendering the killers as a non-human defiling sacrosanct filial piety.

2. Confucianism Spread from Korea to Japan

Zhu Xi’s Confucianism was spread to Japan via Korea during the Japanese invasion of Korea in 1597 (壬辰倭乱) and then again in 1603 (丁酉再乱). In 1597, the official Justice of the Ministry Kang Hang (姜沆, 1567-1618) was kidnapped and taken to Japan. After experiencing many hardships, he became friendly with the Japanese scholar Fujiwara Seika (1561-1619) and introduced Confucianism to him.6 This event is explained as the beginning of Neo-Confucian studies in Japan.7 After four years, He returned to Korea and wrote his book, “On Japanese Things” (看羊錄),8 which was even translated into Japanese during his lifetime.

Another significant scholar in East Asian jurisprudence is Yi ChingYoung (李眞榮, 1571-1633).9 Born in YoungSan, KyongSang province in Korea in 1571, he was well-read in Confucian classics, and fought against the Japanese in the invasion of 1592. During this fight, he was kidnapped and taken to Osaka where he served as a monk at a Buddhist temple. After becoming recognized as an experienced scholar, he was summoned to tutor the daimyo Tokugawa Yoshimune in Wakayama. Later he played a leading role in the studies of Ming-Ching (明清) and in the formation of Japanese laws. When Japanese scholars could not understand the Chinese legal terms, they asked him for authoritative interpretations of the legal codes.10 Then, during the trades with Korea in 1626-1627, he worked in Tsushima Island. After his death in 1633, he was praised as the pioneer responsible for enlightening the Wakayama domain in the ways of Confucius.11

The influence of Confucianism was then furthered by several events. Later on his son, Yi MaeGye (李梅溪, 1617~1682) also became a renowned scholar and authored many books, including on titled Advice to Filial Piety (1660). Yi MaeGye appealed to the Shogun to proclaim the ethics of filial piety as the highest principle of ruling. Furthermore, the

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6 See Abe Yoshio (阿部吉雄), Nihon Chushigaku to Chosen (日本朱子学と朝鮮) (Univ. of Tokyo Press, 1965)
7 Chongko Choi, “Traditional Legal Thoughts in Korea” (English), Journal of Korean Law Vol.2, No.3, 2003, 100
8 See Ha Tai Kim, “Transmission of Neo-Confucianism to Japan by Kang Hang” in FS F. George L. Paik for his 60th Birthday (1955) fn 41
9 See Chongko Choi, Hanguk Popsasangsa (in Korean) (Seoul, 2001) 139-143
11 YI, Sanghee, Pashin Ui Nunmul (in Korean) (BumWo Sa, Seoul, 1997)
migration of several learned Ming loyalists to Japan after the final defeat of the Ming dynasty may account for the marked progress of Japanese scholars in Chinese law and language soon after 1700. Of these, the most important were the Zen priest Huang Po-Tsung, who taught Ogyu Sorai (1666-1728); Chu Shunshui (1600-1682), supported by Tokagawa Mitsukuni Shogun; and Wu Jen-Hsien, supported by the Nagoya domain. Furthermore, the thoughts of Yi ChinYoung, who provided guidelines for the politics of the Shogun Tokugawa, were strongly based on Confucian ethics. The guidelines were composed of principles referring to respect for the people, the rule of virtue, benevolence, harmony, and peace. Such Confucian values embodied in the legal codes written over several centuries, are now the foundation of East Asian Common Law (Jus Commune).

3. Confucianism since Tokugawa period in Japan

Japan adopted Confucianism after the Japanese invasion of Korea in 1597 and 1603 through the Confucian scholars who were kidnapped to Japan. Since then, the Tokugawa government fostered the notion of loyalty (忠) and filial piety (孝) as enlightenment policy in order to govern and control the warrior’s society (武家社会) with the background of the special family system up to the beginning of the Meiji (明治) period in 1866. Because of this mentality Judge Shimomura argued that filial piety is not an eternal or universal ethic, but an idea fostered in the wake of the special family system which existed during a certain period of history, and conversely, constituted the spiritual aspect of the judicial system. Because preservation of harmony under Confucianism is paramount, the rights of individuals are often down-played by the Japanese courts in their adjudication. This partly explains why the Japanese are extremely non-litigious and why Japanese courts have a tendency to preserve the status quo in their adjudication. The Supreme Court’s tendency to preserve the status quo, it is submitted, at least partly explains the reason for its inclination to reduce issues from a constitutional level to a technical level. This tendency is actually evidenced in the Aizawa case. The refusal of the majority judges in the Aizawa case to invalidate the impugned...
provision on the ground of differential treatment based on family status, and the dissenting opinion of Justice Takeso Shimoda, who was quite comfortable with the values of family system, indicates that the Japanese court still had reservation in accepting some fundamental western democratic values although the gap between the living norm and legal norm in Japan must have been considerably narrowed since the end of World War II, especially after the new Constitution was imposed on the Japanese by the Americans.¹⁷ By ruling that providing specifically for parricide is not an immediately unreasonable differential treatment on the ground of family status the majority aligned its position with that of the Diet, thus preserving the harmony between the Supreme Court and the Diet.¹⁸ By invalidating Article 200 of the Criminal Code on the ground of lack of proportionality, the Court managed to achieve what it wanted to do - to invalidate Article 200 on a more technical ground, which would help reduce the possible tension between the Court and the Diet caused by the outlawing of Article 200.¹⁹

The importance the Japanese attach to harmony under Confucianism was also witnessed during the last war. Before the war between America and Japan broke out the highest commanding officers of the Japanese Navy were strongly opposed to a war with the Americans. The Navy, however, finally approved the war. When asked why the Navy approved the war, Admiral Shimada Shigetaro, who was the then Navy Minister, replied that since the Army was strongly for the war, disapproval on the part of the Navy would destroy the harmony between the Army and the Navy. Admiral Shimada Shigetaro thought a destruction of the harmony between the Army and the Navy was the worst case - worse than hostility between Japan and the United States. He thought a compromise with the Army might win him some time during which he could take the Navy’s own step.²⁰ The result of the Japanese Navy’s effort to preserve harmony between the Navy and the Army was, ironically, the complete destruction of Japan’s armed forces.²¹

A further example of preserving harmony evidenced during the war occurred within the Navy. Vice-Admiral Nagumo was appointed as the Commander-in-Chief of the task force for Hawaii battle. This was a battle of aircrafts and aircraft carriers. Vice-Admiral Nagumo, though a torpedo expert, was an amateur when it came to aircrafts and aircraft carriers. Rear-Admiral Yamaguchi Tamon was regarded as the best candidate for the Commander-in-Chief of the Pearl Harbour operation since he had the right air-battle experience and expertise. But

¹⁷ Ibid [59]
¹⁹ Ibid
²⁰ Watanabe, S., The Peasant Soul of Japan (St Martin’s Press, NY, 1989) 42
he was not appointed. The only reason was Nagumo was a cadet of the class 36 of the Naval Academy and Yamaguchi belonged to class 40. If a less senior graduate was appointed to a position which is higher than that held by a more senior graduate of the Academy the harmony within the Navy would be destroyed. Again, the appointment has resulted in the loss of the battle, and eventually of the Navy itself. These examples show that the Japanese would try to preserve internal harmony at any cost, even at the risk of being destroyed by an external force.

It can be argued that Confucian influence is one of the reasons why the majority in the Aizawa case held that respect and gratitude towards ascendants are basic social morals and universal ethics deserving the sanction of criminal law.

B. Confusion of Confucianism and Western Laws in Modern Japan

1. Confucian glasses

It is fair to suggest that the Chinese jurisprudence and Chinese culture conditioned the soil in which European law was transplanted in Korea and Japan. That partly explains why the spirit of western law, such as the principle of equality, was not fully imported along with the adoption of the codes and legal science from France and Germany and the new Constitution from the United States of America.

Confucianism has directly influenced the Japanese jurists’ understanding of the western idea of natural law and the equality principle. When the western concept of natural law was introduced to the Japanese it was viewed through Confucian glasses.

For example, Tsuyoshi Mishma considered that all that was being taught by Biossonade was that “one should not conduct his life acting against reason” and “reason”

22 Watanabe, S., The Peasant Soul of Japan (St Martin’s Press, NY, 1989) 43-45
26 Frenchmen Gustave Boissonade and Georges Bousequet were invited by the Japanese government to teach French law in the newly founded Ministry of Justice Law School, which was led by the two men. Boissonade and Bousequet were also instrumental in the compilation of Japan’s first Civil Law, which was basically a copy the Code Napoleon: Mukai, K. & Toshitani, N., “The Progress and Problems of Compiling the Civil Code and the Early Meiji Era (Translated by Dan Fenno Henderson)”, 1 Law in Japan 25 (1967) 36, 39-40
was contained in “Li” taught by Confucius anyway.\textsuperscript{27} This understanding of natural law was of course very different from the then European jurists’ conception of natural law, which was perceived as the universal law that applies to everybody equally. If the observation of natural law means the practice of “Li”, then people should be treated differently according to his or her social status and any inequality is to be perpetuated.

This understanding of natural law is illustrated in a decision made by the Supreme Court of Japan in 1950 on the constitutionality of Article 205(2) of the Japanese Criminal Law.\textsuperscript{28} The impugned clause provides that persons who inflict bodily injury resulting in the death of their own or their spouse’s lineal ascendants shall be punished more severely than those who inflict similar bodily injury on non-ascendants. The Supreme Court of Japan upheld the constitutionality of the clause on the basis that the clause regarding lineal ascendants “reflected a moral postulate and that the morality ruling relationships among family members involves a fundamental truth of universal human morality, and thus is in the realm of natural law.”\textsuperscript{29} What can be gauged from this case is that according to the then Supreme Court of Japan, what natural law demanded was to treat people according to their status, not to treat them equally regardless of who they were. This precedent on the constitutionality of Article 205(2) of the Japanese Criminal Law might have some bearing on why the Court held that the provision for different treatment of parricide under Article 200 was not immediately unreasonable in the \textit{Aizawa} case.\textsuperscript{30}

\textbf{2. External Pressure}

Chinese culture and Chinese law were received without any external pressure. On the contrary, the reception of the western law in late 19th century was a result of external pressure.\textsuperscript{31} Commodore Perry’s landing in Japan in 1853 resulted in unequal treaties between Japan and America and some European countries.\textsuperscript{32} These treaties provided for extraterritoriality of foreign laws and deprived Japan of its customs autonomy.\textsuperscript{33} Obviously,
the only way to rectify the harm caused by extraterritoriality and the loss of customs autonomy was a revision of the treaties. The ability to revise the treaties hinged upon the power relationship between Japan and the western countries. To improve Japan’s position in the power relationship Japan needed to adopt the same type of political and economic system as that of the western countries. To achieve this purpose, it was imperative to adopt western laws since western political and economic systems are largely regulated by law. Also, the imperialistic powers would not have agreed to revise the unequal treaties if Japan had not adopted western laws to provide security for commercial transactions between Japan and western countries.

Hence Japan’s adoption of European laws in the 19th century was a choice made to avoid colonisation. The same would hold true regarding Japan’s reception of the new Constitution. The Japanese had to accept the new Constitution imposed by the Allied Occupying forces since the Occupation Forces were not to be withdrawn until the objectives under the Potsdam Declaration were achieved. The objectives of the Declaration included the assurance of “freedom of speech, of religion, and of thought, as well as respect for fundamental human rights” and the establishment of a responsible government. That is to say, the acceptance of the new constitutional arrangement was a pre-requisite for gaining back Japan’s sovereignty from the foreign occupying forces.

It will therefore be fair to say that Japan did not receive the western laws because the techniques and the spirit of the foreign laws held any appeal to them or western laws were perceived to be suitable for Japan’s living norm. On the contrary, the reception of the Western laws has created a wide gap between the living norm and legal norm in Japan. The reason for the reception of western laws explains why the Japanese did not effect a wholesale importation of the spirit of western laws when they copied western codes and legal science and adopted the new Constitution. The existence of the artificially created gap between the living norm and legal norm in Japan determined why the spirit of western law has not always been embraced by the Japanese judiciary.

34 Ibid 33
36 Ibid 47
38 Charles Qu, Parricide, “Equality and Proportionality: Japanese Courts’ Attitudes Towards the Equality Principle as Reflected in Aizawa v Japan”, Murdoch University Electronic Journal of Law, Volume 8, Number 2 (June 2001) [58]
39 Ishikawa, A., “Alternative Dispute Resolution (ADR) in Japan” 1 Yearbook Law & Legal Practice in East Asia 121 (1995) 129
40 Charles Qu, Parricide, “Equality and Proportionality: Japanese Courts’ Attitudes Towards the Equality Principle as Reflected in Aizawa v Japan”, Murdoch University Electronic Journal of Law, Volume 8, Number 2 (June 2001) [58]
Japan suffered more external pressure from America to adopt Western legal systems than Korea. On the other hand, Korea adopted those Western legal systems from Japan during the Japanese colonization period from 1909 to 1945. Therefore, it could be said that the Confucian influence is more preserved in Korea than in Japan.

III. Criminal Law Provisions

A. Japanese Criminal Law

Before 1995, in the Japanese Criminal Law, there were four provisions influenced by Confucian filial piety: Article 200 (parricide, 尊属殺人罪), Article 205(2) (injury causing death of a lineal ascendant, 尊属傷害致死罪), Article 218(2) (abandonment of a lineal ascendant, 尊属遺棄罪) and Article 220(2) (false arrest or imprisonment of a lineal ascendant, 尊属逮捕監禁罪). These provisions imposed aggravated punishment on the crime against lineal ascendants.

Among these lineal ascendant aggravation provisions, the Supreme Court of Japan confirmed that Article 205(2) (injury causing death of a lineal ascendant, 尊属傷害致死罪) was constitutional and valid in 1950.41 The Court decided this provision did not breach the principle of equality under Article 14 of the Japanese Constitution.

At that time, the penalties under Article 205(2) were considered to be life imprisonment with work (無期懲役) or imprisonment with work for a definite term of not less than 3 years, whereas the penalties for the crime against an ordinary person (普通傷害致死罪) under Article 205(1) were imprisonment with work for a definite term of not less than 2 years. The differences, however, between the penalties were not so significant.

However, in 1973, the Supreme Court of Japan declared Article 200 (parricide, 尊属殺人罪) as unconstitutional in the famous Aizawa case.42 At that time, Article 200 of the Japanese Criminal Law stipulated death penalty and life imprisonment with work for the penalties of parricide, whereas the penalties for ordinary homicide under Article 199 (普通殺人罪) were death penalty, life imprisonment with work or imprisonment with work for a definite term of not less than 3 years.

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41 Supreme Court of Japan Decision of April 4, 1950, SyouWa 25(a)292 (昭和 25(あ)292, 剛 た た 傷害致死, 昭和 25 年 10 月 11 日, 最高裁判所大法廷 判決破棄差し) 福岡高等裁判所

42 Supreme Court of Japan Decision of April 4, 1973, SyouWa 45(a)1310 (昭和 45(あ)1310, 剛 た た 殺人被告事件, 昭和 48 年 04 月 04 日, 最高裁判所大法廷 判決 (破棄自判) 第 27 剛 た た 265 頁)
Therefore, it was possible for an accused indicted under Article 199 to have the execution of the sentence suspended (Strafaussetzung zur Bewahrung, 執行猶予). However, an accused indicted under Article 200 could not have any opportunity to obtain suspension of execution of the sentence.

It is only when the sentence is for imprisonment for not more than 3 years that the court can suspend the execution of the sentence (執行猶予) for a period of not less than 1 year but not more than 5 years.\footnote{Article 25 of the Japanese Criminal Law}

The court is given the discretionary power to reduce the sentence in light of the extenuating circumstances of a crime (酌量減軽).\footnote{Article 66 of the Japanese Criminal Law} Reductions may be made twice at maximum. When imprisonment with or without work for life is to be reduced, it shall be reduced to imprisonment with or without work for a definite term of not less than 7 years.\footnote{Article 68(2) of the Japanese Criminal Law} Furthermore, when imprisonment with or without work for a definite term is to be reduced, its maximum and minimum term of punishment shall be reduced by one half.\footnote{Article 68(3) of the Japanese Criminal Law} As a result, the minimum punishment able to be imposed for parricide under Article 200 was imprisonment with work for 3 years and 6 months, which means that an application of Article 200 deprives the accused of the opportunity of obtaining a suspension of execution of the sentence (執行猶予).

With this regards, the Supreme Court of Japan declared that Article 200 of the Japanese Criminal Law had breached the principle of proportionality and was therefore unconstitutional in 1950. From 1950 to 1995 when the provision was actually abolished, Article 200 of the Japanese Criminal Law was a dead provision.

In 1995, in the revision of the Japanese Criminal Law, the Diet abolished all of the four provisions that imposed aggravated punishment on the crimes against lineal ascendants: Article 200 (尊属殺人罪), Article 205(2) (尊属傷害致死罪), Article 218(2) (尊属遺棄罪) and Article 220(2) (尊属逮捕監禁罪).

The Diet decided to abolish these provisions rather than lighten the gravity of the penalties.\footnote{In Korea, the National Assembly lightened the penalty of parricide in 1995 rather than get rid of the aggravation provision for parricide.} The Diet thought the descendants whom have committed crimes against their lineal ascendants can be punished more severely within the sentence scope of the existing provisions for the crime against ordinary persons: Article 199 (殺人罪), Article 205(1) (傷害致死罪), Article 218(1) (遺棄罪) and Article 220(1) (逮捕監禁罪). The Diet left the...
sentence decision to the discretion of the courts. Later, the gravity of some penalties was adjusted. Now, the penalties for homicide (殺人罪) under Article 199 of the Japanese Criminal Law are death penalty, life imprisonment with work or imprisonment with work for a definite term of not less than 5 years, which was 3 years under the old Article 199. The penalties for injury causing death (傷害致死罪) under Article 205 of the Japanese Criminal Law are imprisonment with work for a definite term of not less than 3 years, which was 2 years under the old Article 205(1).

As a result, there is not any provision emphasizing Confucian filial piety in the Japanese Criminal Law any more.

B. Korean Criminal Law

In the Korean Criminal Law, there are thirteen provisions influenced by Confucian filial piety and imposing heavier punishment on crimes committed against lineal ascendants: Article 250 (parricide, 尊屬殺害罪), Article 257(2) (injury of a lineal ascendant, 尊屬傷害罪), Article 258(2) (severe injury of a lineal ascendant, 尊屬重傷害罪), Article 259(2) (injury causing death of a lineal ascendant, 尊屬傷害致死罪), Article 260(2) (assault to a lineal ascendant, 尊屬暴行罪), Article 271(2) (abandonment of a lineal ascendant, 尊屬遺棄罪), Article 271(4) (abandonment of a lineal ascendant, 尊屬遺棄罪), Article 273(2) (cruelty to a lineal ascendant, 尊屬虐待罪), Article 275(2) (abandonment causing death or injury of a lineal ascendant, 尊屬遺棄致死傷罪), Article 276(2) (unlawful capture of a lineal ascendant, 尊屬逮捕罪, confinement of a lineal ascendant, 尊屬監禁罪), Article 277(2) (severe unlawful capture of a lineal ascendant, 尊屬重逮捕罪, severe confinement of a lineal ascendant, 尊屬重監禁罪), Article 281(2) (unlawful capture or confinement causing death or injury of a lineal ascendant, 尊屬逮捕·監禁致死傷罪) and Article 283(2) (intimidation of a lineal ascendant, 尊屬脅迫罪). All of these provisions impose more severe punishment on the crimes against lineal ascendants than the crimes against ordinary persons.

Above listed articles are comparatively very unique provisions among the Criminal Laws of other Far Eastern Asian countries that presently share Confucian tradition. For instance, none of the current Chinese, Japanese or North Korean Criminal Laws has such provisions at present.

According to the Korean family law, the term “lineal ascendant” includes all lineal ascendants of defendant and his/her spouse such as parents, parents-in-law, maternal/paternal grandparents, and maternal/paternal grandparents-in-law. The spouse in this crime is limited only to the legal spouse, so the lineal ascendants of de-facto spouse are not protected by Article 250(2). Most scholars agree that the lineal ascendants of deceased or former spouse are not protected as well. Adoptive parents become lineal ascendants when the legal
adopting process is completed. Adopted children are supposed to have two lineal ascendants, either biological or adoptive, because the adoption does not affect the previous family relationships. The biological mother automatically becomes a lineal ascendant of her extramarital child, while the biological father cannot automatically become a lineal ascendant without recognition of the child. In certain cases where the adopted children murder their adoptive or biological parents, or when extramarital children murder their biological mother; Article 250(2) shall prosecute them all. On the other hand, in cases when extramarital children murder their biological father before his recognition, Article 250(2) shall not prosecute them. In addition, according to the revision of the Korean Civil Law in 1990, the stepmother is not a lineal ascendant of her stepchildren, and the father’s legal wife is not considered as a lineal ascendant of the children born by the father’s concubines.

In 2002, there was a case regarding the constitutionality of Article 259(2) (尊屬傷害致死罪) of the Korean Criminal Law. However, the Constitutional Court of Korea confirmed that Article 259(2) does not breach the principle of equality under Article 11 of the Korean Constitution and therefore the provision is constitutional.

At that time, the penalties for the crime of injury causing death of a lineal ascendant (尊屬傷害致死罪) under Article 259(2) were life imprisonment with work or imprisonment with work for a definite term of not less than 5 years, whereas the penalties for the crime of injury causing death of an ordinary person (普通傷害致死罪) under Article 259(1) were imprisonment with work for a definite term of not less than 3 years. The differences between the penalties were not so significant.

Article 250(2) of the Korean Criminal Law prescribes parricide (尊屬殺害罪) in addition to the crime of the ordinary homicide (殺人罪) in Article 250(1). Those who kill their own or their spouse’s lineal ascendant shall all be punished by death penalty, life imprisonment with work or imprisonment with work for a definite term of not less than 7 years. Before the 1995 revision of the Korean Criminal Law, there were only death penalty and life imprisonment with work. Compared to the penalty of the ordinary homicide that includes death penalty, life imprisonment with work or imprisonment with work for a definite term of not less than 5 years, the penalty of homicide of lineal ascendants is still considered to be too heavy.

Even though the 2 year gap between the minimum penalties of Articles 250(1) and 250(2) might be considered insignificant, it can certainly act as a crucial obstacle in

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48 Supreme Court of Korea Decision of Jan. 31, 1967, 66Do1483
49 Supreme Court of Korea Decision of Nov. 11, 1986, 86Do1982
50 Supreme Court of Korea Decision of Sept. 9, 1980, 80Do1731
51 Constitutional Court of Korea Decision of Mar. 28, 2002, 2000Hun-Ba53
mitigating the penalty for the defendants who happened to murder their seriously abusive parents.\textsuperscript{52}

In particular, suspension of execution of the sentence (Strafaussetzung zur Bewahrung, 執行猶豫) is very hard to be given to the defendant because the minimum penalty of the crime in Article 250(2) is a 7 year imprisonment.

In Korea, likewise in Japan, suspension of execution of the sentence may be given to the defendants only when a maximum 3-year imprisonment is imposed on them.\textsuperscript{53}

In case of the homicide of a lineal ascendant, however, the minimum penalty shall be a 3 and half-year imprisonment even when the court mitigates the punishment,\textsuperscript{54} so that suspension of execution of the sentence is not available for the defendants.

In addition, different from the U.S. law, the Korean criminal law jurisprudence does not recognize the defense of “battered child syndrome,”\textsuperscript{55} which modifies the requirements of the traditional self-defense and paves the way to justify or to excuse the murders of abusive parents.\textsuperscript{56} As a result, parricides are supposed to receive heavy punishment.

Article 250(2) of the Korean Criminal Law is redundant since Article 250(1) of ordinary homicide fully protects the lives of the lineal ascendants.\textsuperscript{57} Without Article 250(2), Article 250(1) imposes severe punishment including death penalty and life imprisonment for those who are morally deprived and who murdered their lineal ascendants for sake of gain.

\textsuperscript{53} Article 62(1) of the Korean Criminal Law
\textsuperscript{54} Article 55 of the Korean Criminal Law
According to Article 51 of the Korean Criminal Law, the “relationship with the victim” should be considered in deciding the penalty for the offenders. Therefore, excluding Article 250(2) does not protect the lives of the lineal ascendants less under the Criminal Law.\(^{58}\) Without Article 250(2), the Korean criminal justice system has no problem in imposing harsh punishment to the depraved defendants whom have murdered their lineal ascendants for the sake of gain. However, with Article 250(2), the system cannot help punishing the defendants heavily whom have murdered their seriously abusive parents, which renders Article 250(2) to unreasonably discriminate the lineal descendants in the name of filial piety.\(^{59}\)

IV. Court Decisions

Let’s observe the reasons of the Japanese case which declared the aggravation provision for parricide (Article 200 of the old Japanese Criminal Law) as unconstitutional, and the Korean case which declared the aggravation provision for injury causing death of a lineal ascendant (Article 259(2) of the Korean Criminal Law) of as constitutional.

One of the important reasons that the Courts decided whether a provision breaches the principle of proportionality is whether it is possible for the accused to have suspension of execution of the sentence. Under Article 200 of the old Japanese Criminal Law, it was impossible, and the provision was declared as not proportional. On the other hand, under Article 259(2) of the Korean Criminal Law, it is possible, and the provision was decided as proportional.

It is noticeable that in Korea there was a judicial decision about only Article 259(2) (尊屬傷害致死罪), and there was not any judicial decision about Article 250 (尊屬殺害罪) under which suspension of execution of the sentence is impossible. It is not sure at present whether the Court will think Article 250 of the Korean Criminal Law is constitutional or not.

Moreover, even though the Supreme Court of Japan decided Article 200 of the old Japanese Criminal Law as unconstitutional, the Court admitted the difference between the crime against one’s lineal ascendant and the crime against an ordinary person. Furthermore, the Court also admitted that it does not breach the principle of equity to impose more severe punishment on the crimes against one’s lineal ascendants than the crimes against ordinary persons. The reason that Article 200 of the old Japanese Criminal Law was declared as unconstitutional was that the penalties were considered to be too heavy. The provision only stipulated death penalty and life sentence for parricide.

\(^{58}\) Ibid \(^{59}\) Ibid
A. *Aizawa* case in Japan

1. Facts

*Aizawa* case was a very extraordinary case. *Aizawa* was raped by her own father when she was only 14 years old. Thereafter her father forced her to keep a spousal relationship with him for 15 years. Out of this incestuous relationship, 5 children were born. *Aizawa* later fell in love with a male colleague and wished to marry him. Upon learning of this situation, *Aizawa*’s father falsely imprisoned and threatened her. In desperation, the *Aizawa* strangled her father to death when he was harassing her one night in October 1968.

2. Equality Issue

The issue facing the Supreme Court of Japan was whether Article 200 of the Japanese Criminal Law, which provided for a more severe penalty for the killing for one’s lineal ascendant than ordinary homicide under Article 199, contravened Article 14 of the Japanese Constitution. Article 14 of the Japanese Constitution stipulates, “All people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”

The first issue facing the court was whether family status, which is not expressly listed in the latter part of Article 14, was included as a prohibited basis for discrimination under Article 14 of the Constitution. If it did not, differential treatment on the ground of family status would not, prima facie, infringe the equality principle embodied in Article 14. On this issue, the Court reaffirmed the ruling of its en banc decision that the items listed in the latter part of the Article are explanatory, not restrictive. This meant that family status could be regarded as falling under Article 14. It followed that providing different treatments based on the accused person’s family status is prima facie discriminatory. The following issue facing the court, therefore, was whether there were reasonable grounds for the discriminatory treatment of parricide perpetrators under Article 200. The Court’s judgment on this issue was a two-step one. First, the court ruled that prima facie, Article 200’s purpose of penalising perpetrators of parricide more severely than ordinary murderers was not immediately unreasonable, and Article 200 did not infringe Article 14 of the Japanese Constitution. The majority reasoned that parricide was a more serious violation of social morality than ordinary murder and respect for ascendants was one of the most fundamental social mores which deserved the protection of criminal law.

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60 Supreme Court of Japan Decision of April 4, 1973, SyouWa 45(a)1310 (昭和 45(2)1310, 殺人被告事件, 昭和 48 年 04 月 04 日, 最高裁判所大法廷 判決 (破棄自判) 第 27 页 3 页 265 頁)

61 Supreme Court of Japan Decision of May 27, 1964, SyouWa 37(a)1472 (昭和 37(4)1472, 昭和 39 年 5 月 27 日, 最高裁判所大法廷 判決, 民集 18 页 4 页 676 頁)
3. Proportionality Issue

The court, however, declared Article 200 to be unconstitutional on the ground that the disproportional between the punishments prescribed under Article 200 and the achievement of the relevant legislative purpose rendered the discrimination unreasonable.

The test the majority applied in adjudicating on the constitutionality of Article 200 of the Japanese Criminal Law was to see whether the discrimination provided under Article 200 had reasonable grounds. The legal instrument the majority applied to invalidate the impugned provision, it is submitted, appears to be the principle of proportionality, although the word “proportionality” was not used by the court. The majority held, in effect, that the quantum of the penalty Article 200 provided was disproportionate to the achievement of the relevant legislative purpose, which was the maintenance of spontaneous affection of children towards their ascendants and the universal ethics and basic morals of respect and gratitude to ascendants.

The test the majority applied in the Aizawa case, it is submitted, was identical to the necessity test. The majority reasoned that in many parricide cases the perpetrators were only sentenced to three and a half years’ imprisonment at forced labour, the minimum sentence allowable for the crime. This fact, the majority argued, showed that the unethical nature of an offense in such cases was not always strong. This means that the heavy penalty provided under Article 200 is not necessary for most cases. Further, the majority held that it is not impossible to achieve the aim by applying the provision for an ordinary homicide. This means that less restrictive alternative mechanism is available for the attainment of the relevant legislative purpose. Therefore the aggravation of punishment provided for parricide under Article 200 is disproportionate to the achievement of the legislative purpose in view.

The basis on which the court exercised its power of judicial review in the Aizawa case thus seems to be the failure of Article 200 to meet the requirements under the principle of proportionality.

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63 Haley, J.O & Henderson, Dan. F., Law and the Legal Process in Japan Vol. 2, (University of Washington, Seattle, 1988) 81. This argument is reinforced by the statistics provided by Tanaka J., which showed that among a total of 621 parricide cases within 18 years from 1952 to 1969 in only five cases (0.18%) death penalty was imposed and in a majority of the cases, the perpetrators were only sentenced to less than five years’ imprisonment at forced labour: Ibid 90

The significance of the majority’s invocation of what is in substance the notion of proportionality is noticeable. First, the principle of proportionality served in this case as an ideal means for the Japanese judiciary to compromise between, on the one hand, the need not to affront traditional values of filial piety, and on the other, to uphold western values enshrined in its constitutional order constructed for them by the Americans.\(^65\) Invalidating Article 200 on the equality principle would have involved a blunt refutation of traditional values such as the notion of filial piety, which apparently was more difficult to do for the Japanese judiciary then achieving the same purpose by the application of the principle of proportionality. The proportionality principle, on the other hand, is more technical in nature in that the application of it is based on a measurement of two objectively certifiable reference points - the legislative purpose and the measure taken for the achievement of this purpose.\(^66\)

B. Korean Constitutional Court Decision\(^67\)

1. Facts

In this case, the Constitutional Court upheld the provision of the Korean Criminal Law (Article 259(2)) stipulating heavier sentence for crime causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury than that for crime causing death of other person resulting from bodily injury. Article 259(1) of the Korean Criminal Law provides that a person, who inflicts bodily injury upon another, thereby causing his death, should be punished by limited imprisonment for not less than 3 years. Article 259(2) stipulates that a person inflicting bodily injury upon a lineal ascendant of the offender or his spouse, thereby causing death, should be punished by imprisonment for life or not less than 5 years. The complainant charged with the crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury petitioned the Court to request the constitutional review of Article 259(2) of the Korean Criminal Law, but the Court did not grant the request. The complainant then filed the constitutional complaint to the Constitutional Court of Korea.

2. Equality Issue

The Constitutional Court of Korea stated that the differential treatment under Article 259(2) of the Korean Criminal Law has reasonable basis as follows. The principle of equality stipulated by Article 11(1) of the Korean Constitution does not imply imposition of absolute equality without any differential treatment. Rather, it stipulates a relative equality prohibiting

\(^{65}\) Ibid [25]
\(^{66}\) Ibid
\(^{67}\) Constitutional Court of Korea Decision of Mar. 28, 2002, 2000Hun-Ba53
differential treatment without reasonable basis in legislation and enforcement of the law. Therefore, differential treatment or inequality with reasonable basis does not violate the principle of equality.

Respect and love are the pillars of relationship between relatives formed by marriage or blood. A lineal ascendant rears his descendant to become a successful member of the society, and takes upon legal and moral responsibilities for the descendant’s action. A descendent, on the other hand, shares the responsibilities of the lineal ascendant as a family member, pays respect and strives to requite for the ascendant’s sacrifice. Such is the natural and overarching morality dominant in the historically and socially confirmed family relationships. Such morality should be protected by the Criminal Law because it forms a basic order that maintains and develops each family and the society. A crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury, then, is contrary to the universal social order, and morality, and there are ample reasons for more social censure of the immorality of this crime than that of a crime of injury causing death of an ordinary person.

3. Proportionality Issue

The Constitutional Court of Korea states that the aggravated punishment for the crime of injury causing death of a lineal ascendant is proper as follows. While a crime of injury causing death of an ordinary person is punishable by limited imprisonment for not less than 3 years, the crime of causing death of a lineal ascendant of the offender or his spouse resulting from bodily injury is punishable by imprisonment for life or not less than 5 years. Considering the original purpose, role, or function of punishment as well as the difference between injury causing death of a lineal ascendant and injury causing death of an ordinary person, it cannot be said that the sentence prescribed by the Korean Criminal Law for injury causing death of a lineal ascendant is too severe. Moreover, a single statutory mitigation or a discretionary mitigation under extenuating circumstance would enable the judge to suspend the sentence. In light of these facts, the heavy sentence for the instant crime prescribed by Article 259(2) of the Korean Criminal Law is not too severe as to destroy the balance of the entire scheme of criminal punishment system, and it does not deviate from the original purpose and function of the punishment.

Some argue that Article 259(2) of the Korean Criminal Law forces compliance with a moral principle by reflecting the principle in law. While the law and morality could be distinguished, moral components could not be overlooked altogether when making assessment for criminal liability. Article 259(2) does not force compliance with a moral principle. Punishment of injury causing death of a lineal ascendant is severe since the degree of criminal liability for the crime is greater because of its greater immoral nature. While the
law cannot force observation of morality, it cannot be denied that the Criminal Law does play some role in maintaining social morals and good customs. Since the fact that the victim is a lineal ascendant of the offender can be taken into consideration for specific sentencing procedures as one of the more important factors in the circumstance of the crime, incorporation of such consideration into the statutory provision, thereby making it a requirement to aggravate the sentence would not be forbidden, and it cannot be said that resulting differential treatment is without a reasonable basis.

4. Scope of Effectiveness

The Constitutional Court of Korea ruled that the criminal punishment provision stipulating aggravated sentence for a crime whose victim is a lineal ascendant of the offender is not unconstitutional. It might be a precedent when constitutionality of other statutory provision stipulating aggravated sentence for crimes against a lineal ascendant, such as parricide, is challenged.

The Constitutional Court of Korea, however, made it clear that the adjudication did not comprehensively recognize the constitutionality of all statutory provisions stipulating aggravated sentence for crimes against a lineal ascendant, and therefore, if this Court were to review the constitutionality of such provisions, the Court would need to make individual and detailed review of the legislative purpose, specific sentence prescribed by the provision, degree of illegality and blameworthiness.

V. Opinions of Contemporary Korean Scholars

A. Pro Aggravation Provisions

Former Prime Minister LEE, Soo-Sung stated his position as follows when he was a law professor:\textsuperscript{68}

Criminal law is a norm that is always limited by the reality and the tradition of a national state. A country’s Criminal Law is a part of their cultural and social consciousness of the nation. The cultural tradition of a nation is a womb that gives birth to the criminal law and it establishes the scope and the limit of the application of criminal law. ... Criminal law should not become no more than a “dead law” to establish the standard and the limit of criminal sanctions but should go further to be an “alive law” to enhance the valuable order and the moral standpoint of a community.

\textsuperscript{68} Soo-Sung Lee, “Cultural Tradition of Korea and Criminal Law” (in Korean), 	extit{Korean and Japanese Jurisprudence Study} 21 (1994) 38
He thinks the heavier punishment on the crimes against the lineal ascendants properly reflects the Korean tradition.

Professor *KIM, Il-Su* argues as follow:69

Viewed from our traditional culture and dominant legal consciousness, the aggravated punishment on the homicide of lineal ascendants has sufficient grounds in jurisprudence as well as in criminal policy. Children’s respect for their parents is an essential element of our social ethics and legal consciousness rather than remnant of the feudal family system. Asking to internalize the social and ethical value of parents respect from the standpoint of “active prevention” of crimes, the Article is not against the constitutional principle of equality before law.

He argues that parricide is of no excuse.

**B. Anti Aggravation Provisions**

Professor *LEE, Jung-Won* points out as follows:70

The illegality of “killing lives and destructing social order by immorality” cannot constitute essential difference (wesentliche Differenzierung) from “killing lives only”. If so, parricide discriminates arbitrarily the conducts which are essentially the same.

According to him, it is questionable if parricide includes extra substantial illegality apart from the illegality of ordinary homicide. He thinks the aggravation provisions for the crimes against lineal ascendants are not necessary.

Professor *CHO, Kuk* points out the motive and the background of parricide as follows:71

Children who kill their parents are likely to be misunderstood, despised, and stereotyped by the public. Instead of accurately pursuing for the motive and background of the killing, mass media tends to focus on the gory details of the killing of the parent. It is time for us to view the homicidal acts free from such moralistic and sensational measuring.

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There had been virtually no empirical research on the homicide of lineal ascendants in Korea before the excellent 1996 study by Dr. Choi In-Sub and Ms. Kim Ji-Sun. Based on official statistical data from 1986 to 1994, in which they made a number of significant findings, which are as follows.\(^{72}\)

First, according to the results, the average number of parricidal cases was 40 per year, which is lesser than the public’s assumption. The crime rate does not show any particular pattern since there are no conspicuous changes.\(^{73}\)

Second, 35.4% of the total murderers of lineal ascendants have had mental illness either in the past or at the time of the criminal act.\(^{20}\) 36.9% of the offenders committed the crime under the effect of hallucinations and bizarre disillusion.\(^{74}\) 65.4% of the offenders have no previous criminal records and only 1.3% of the offenders have the records of having committed a crime against their lineal ascendants.\(^{75}\)

Third, the victims, mainly the fathers, had habitually abused the offenders or/and their family members physically, emotionally, or sexually. 41.7% of the offenders or/and their family members had suffered from habitual abuse by the victims.\(^{76}\)

17.8% of the offenders committed the crime because of the victim’s abuse by other family members, particularly because of their mother. 8.4% of the offenders committed the crime because of the victim’s abuse of the offenders themselves.\(^{77}\) Only 7.1% of the offenders murdered their lineal ascendants for the sake of gain.\(^{78}\) 58.3% of the offenders’ family members express strong sympathy for the offenders because they believe that the victims themselves commit the crime.\(^{79}\)

The study shows that it is indispensable to consider the domestic violence in understanding parricide, and that the murderers of their lineal ascendants cannot just simply be accused for being sinister or depraved non-human beings. Substantially, most of the offenders have mental problems who need mental treatment rather than punishment. In many cases, offenders or/and their family members had been under the victim’s serious abuse, which has to be counted responsible for the offenders’ crime. To cite Mavis van Sambeek, “abused children who commit parricide are presented as criminals, yet surely they are victims

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\(^{72}\) Ibid 115-116
\(^{73}\) In-Sub Choi, Ji-Sun Kim, A Study on Crime Toward Lineal Ascendant (in Korean) (1996) 37-38
\(^{74}\) Ibid 62-63
\(^{75}\) Ibid 79-80
\(^{76}\) Ibid 64-65
\(^{77}\) Ibid 73-74
\(^{78}\) Ibid 79-80
\(^{79}\) Ibid 80
In this sense, Article 250 (2) is one-sided that presupposes only the immorality of lineal descendants/killers and excludes that of the lineal ascendants/victims.

VI. Concluding Remarks

Both Korea and Japan have been influenced by Chinese Confucian culture. However, those provisions which impose heavier punishment on the crimes committed against lineal ascendants nowadays exist only in Korea. What are the reasons? This article has explored to find the answers to this question. History said that Japan sent thousands of students to Tang Dynasty to be educated there in the 7th century. However, that was restrictive. Korea is connected with China through land road. Throughout the history, Chinese people came to Korea and Korean people came to China all the time. Thus, the influence of Chinese Confucianism to Korea was much more direct, and permeated every aspect of Korean culture. What’s more, the founding fathers of ChoSon Dynasty established the new government organization and administration of ChoSon according to the ideology of Confucianism. Since then, Confucianism became the ruling state ideology of ChoSon Dynasty for 500 years. In ChoSon Dynasty, those who were well versed in Confucianism philosophy could become high officers through the national examination system. On the other hand, in Japan, Confucianism philosophy developed after the Japanese invasion of Korea in 1597 and 1603 through the Korean Confucian scholars who the Japanese kidnapped to Japan. Since then, the Tokugawa government fostered the notion of loyalty (忠) and filial piety (孝) in order to govern the warrior’s society with the background of the special family system. On top of that, Japan suffered more external pressure from America to adopt Western legal systems than Korea did. Korea adopted those Western legal systems from Japan during the Japanese colonization period. As a result, the Confucian influence is more preserved in Korean people’s mind, and it results in the preservation of the aggravation provisions for the crime against lineal ascendants.

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80 Ibid 77-78