Abstract

**Purpose:** The Supreme Court changed its existing position on the provisions of the housing trespassing offense for 2021 and 2022 through a consensus decision. In 2021, if a part of the co-resident enters the co-living house according to the normal access method with the realistic consent of the current resident in the absence, the establishment of the crime of trespassing is denied even if it is against the presumed will of the other resident who is absent. In 2022, if you enter a restaurant where the public is freely allowed to enter without a restraint from the business owner, even if it seems that the business owner would not have consented to the entrance if he had known the actual purpose of entry, the purpose of this is not to constitute a crime of trespassing. According to the precedent, the legal benefit of protection for the crime of trespassing is ‘the de facto tranquility of the dwelling’. The purpose of this study is to examine the interpretation and judgment standards regarding the legal interests of protection against trespassing, and to consider trespassing, which is the act of trespassing.

**Method:** Article 16 of the Constitution of the Republic of Korea states, “All citizens shall not be infringed upon their freedom of residence. When a residence is seized or searched, a warrant issued by a judge at the request of the prosecutor must be presented.” The crime of trespassing is a component that guarantees the tranquility of an individual’s residence so that the freedom of residence stipulated by the Constitution is not violated. For this purpose, in order to form smooth relationships with various beings in society as a social being, human beings must be guaranteed that their private space is protected and that they can live peacefully without external intrusion. To this end, first, I would like to review the contents of the Supreme Court precedent on the crime of trespassing. Second, the current status of punishment for trespassing is reviewed through a comparative review of foreign laws on trespassing. Third, we examine the legal benefits of protection against trespassing. Fourth, the criteria for judging the crime of trespassing are reviewed. Lastly, based on the discussion so far, I would like to suggest the direction of the legislation on the punishment for trespassing.

**Results:** The starting point of the discussion of the crime of trespassing lies in the interpretation of the interests of protection. The representative theories are the claim of ‘housing rights’ and ‘the theory of de facto serenity’, but precedents adopt the doctrine of the theory of de facto serenity. As for the degree of protection for the crime of trespassing, the crime of danger and the crime of infringement are opposed to each other. The interpretation of these precedents shows a lot of changes in the protection and interest of the crime of trespassing, the meaning of the infringement, the timing of the commencement of execution, and the timing of implementation.

**Conclusion:** The reason for the existence of the crime of trespass is an indispensable prerequisite for the pursuit of happiness and the enjoyment of human dignity and value through the tranquility of private life. However, there are many cases where the crime of trespassing is applied and abused for other purposes rather than contributing to the protection of personal privacy, which is the original purpose, and a logical solution should be sought for its interpretation. Therefore, it is necessary to explore the legislative direction by analyzing the decision of the Supreme Court of the Supreme Court on the crime of trespassing.

**Keywords:** Residential Trespass, De Facto Serenity Theory, Right of Residence, Privacy Protection, Trespassing
1. Introduction

The Supreme Court has changed the interpretation of the precedents on residential trespassing in 2021 and 2022. The crime of trespassing is a component that guarantees the tranquility of an individual’s residence so that the freedom of residence stipulated in Article 16 of the Constitution is not violated. As a member of society, privacy protection is required in order to fully maintain dignity and values, develop personality freely, and pursue happiness. However, the Supreme Court had a conflicting issue with the doctrine regarding the interpretation of the crime of trespassing in protecting the tranquility of private life. In the past, there are parts that did not reflect the changes in the current socio-cultural phenomenon. In other words, in the present era, the form of housing such as apartments and multi-unit dwellings has changed, and it was pointed out that it is inappropriate to reflect the presumptive intentions of the co-residents in the case of co-living. Hereinafter, we will analyze and evaluate the Supreme Court precedents on the changed residential trespassing crime[1].

2. Supreme Court Precedent Analysis

On September 9, 2021, the Supreme Court said, “In the absence of the spouse, if the victim enters the residence according to the normal access method after obtaining realistic consent from the victim’s wife, even if it is presumed that the defendant’s access to the residence is against the will of the absent victim, the crime of trespassing is not. It does not work.” And on March 24, 2022, the Supreme Court ruled, “If you enter a restaurant to install hidden camera equipment to secretly record and record conversations taking place in a restaurant, it cannot be regarded as a crime of trespassing.” The previous position regarding the above two precedents and the changed precedents will be compared and analyzed to examine the future interpretation of the jurisprudence of the crime of trespassing[2][3][4].

2.1. Supreme court 2021. 9. 9. 2020 do 12630 en banc sentencing(married woman adultery case)

2.1.1. Facts and judgment

So called A entered the apartment where B and C lived together three times through the entrance opened by B for the purpose of having extramarital sex with C’s wife B during C’s absence. The Supreme Court overturned the guilty part of the original trial, which sentenced Mr. A, who had been charged with violating the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., to a fine of 5 million won. Aoso person A was charged with entering B’s house(house trespassing) for the purpose of having sex with B’s wife C, at 3 am in December 2018. A is also accused of repeatedly sending anxiety-provoking words and images 42 times in total, including sending a threatening message to C through KakaoTalk messenger(SNS) on his mobile phone when C found out about his affair with B in June 2019(information) violating the Network Act). The majority opinion is that ① the protection interests of the crime of trespassing are ‘de facto serenity’, ② ‘trespassing’ is ‘the act of harming the real peace’, and ③ co-residents accept that mutual legal interests are bound to be limited to a certain extent. However, if you enter according to the ‘normal way of entry’ with the consent of the co-resident, it cannot be regarded as breaking the de facto peace simply because it goes against the presumed will of the other residents, so that the crime of trespassing is not established.

As a separate(concurrence) opinion, it was considered that the protection law interests were regarded as the right to housing, and the invasion was regarded as entering against the will of the owner of the residence, but on the basis that the consent of one co-resident must be tolerated by the other co-resident, the crime of trespassing was not established. However, from the
standpoint that the previous Supreme Court precedent should be maintained, the dissenting opinion judged that even if one of the co-residents has consented, if it is clearly against the will of the other resident, it will result in the de facto harming the peace of the resident's residence, and it is determined that the crime of trespassing is established. In the end, the trespassing charge was acquitted. In the case of violation of the Information and Communications Network Act, the prosecution judged that the evidence submitted by the prosecutor was not sufficient to admit that the message was repeatedly sent to the victim to cause fear or anxiety, and was acquitted.

2.1.2. Judgment review

The entry of an outsider for the purpose of infidelity of one spouse is contrary to the express or implied intention of the other spouse, not the presumed intention of the other spouse. The majority opinion seems to mean that trespassing can be recognized only if it is against the express or implied will of the resident. It is construed to the effect that the intention of refusal must be explicitly expressed. In other words, the de facto serenity of the crime of trespassing is interpreted as meaning the actual de facto serenity. Part of the meaning of 'intrusion'. In other words, "Housing trespass crime is the protection of the peace of the dwelling in effect. Intrusion of dwelling trespass means 'entering the dwelling in an act that harms the state of de facto peace enjoyed by a resident in the dwelling', and whether it corresponds to trespassing or not. In principle, the judgment is made based on the behavioral patterns revealed objectively and outwardly at the time of entry. If entering the dwelling with an act that harms the actual peace, it would be against the will of the resident unless there are special circumstances, but simply entering the dwelling. The resident's subjective reason that it is against the will of the resident cannot be regarded as an intrusion." This is a modification of the conventional intentional intrusion theory('entering a residence against the will of a resident') with respect to the meaning of intrusion, and its scope is changed to the serenity intrusion theory('entering a dwelling with an act that harms the actual peace'). It means turning in the direction to reduce

If it goes against the will of the resident but enters peacefully, it will deny the establishment of a crime of trespassing. Therefore, as long as it is within the scope of social norms based on the rules of daily life experience of co-residents, even if it is against the will of other co-occupants, it is possible not to admit trespassing. For example, entering a house with the permission of the other party in a situation where one of the married couples invites a person they really dislike is difficult to see as breaking the de facto peace, so a crime of trespassing cannot be established. Even if the criminal purpose or case clearly contrary to the will of the resident is taken as the standard for intrusion, the burden of proof rests with the prosecutor, and it can be determined whether or not it has violated the peace in fact in terms of normative social norms.

However, according to the opposing(dissenting) opinion, it may be criticized that it is difficult to express or implicitly express an intention in preparation for the infidelity of one spouse in the reality that the crime of adultery has been abolished. In addition, the act of entering the residence for the purpose of adultery itself should be viewed as breaking the other spouse's 'actual serenity of residence'. Actual serenity should be viewed as including potential serenity as well as actual serenity. Only then can his tranquility be violated regardless of the presence of the resident, and therefore, entering an empty house 'peacefully' must also be acknowledged as trespassing. Also, according to the majority opinion, if the intended crime is not carried out at the time of intrusion for criminal purposes, it cannot be punished even by trespassing, resulting in a void in punishment. In addition, it is argued that the interpretation is contrary to social norms and the legal feelings of ordinary people with sound common sense.

2.1.3. Examine
The amended case law limits the scope of punishment by emphasizing real peace with respect to de facto serenity. There is a problem that makes it impossible to punish even punitive acts, such as adultery in a shared residence, but it seems to be resolved through civil litigation. The theory of intentional infringement, which focuses only on the intention of residents, is a fundamentally valid change in that whether or not a crime is established depends on the intention, which violates the principle of clarity and expands the scope of punishment excessively.

2.2. Supreme court 2021. 9. 9. 2020 do 6085 en banc sentencing(compulsory entry of co-residents)

2.2.1. Facts and judgment

Person A took some of his belongings from the apartment he was living in due to a quarrel with his wife B. After that, A went to the apartment with his parents C and D and asked to open the door, but B was out. When the chain-type latch on the door did not open, A and A’s brother E jointly broke the latch and broke into the apartment.

2.2.2. Judgment review

If one of the co-residents prohibits the other co-residents from entering the place of communal living without legal grounds or other justifiable reasons, the crime of trespassing is established even if the other co-resident (A) enters the place of communal living against this. I never do that. Even if the co-resident damages the de facto state of peace of the co-resident who is prohibited from entering by using some physical force, such as damaging the lock on the door, in order to enter, the crime of trespassing is not established. Acts of entry and use of outsiders(soldiers, soldiers) who have entered together with the consent of the co-resident (A) are part of and accompanying acts of entry and use of the common living place of the co-resident who has consented to his/her entry as a whole If it can be evaluated as a trespass, the crime of trespassing is not established against the outsider even though it has damaged the de facto peaceful state of the co-resident, who prohibits this.

2.2.3. Examine

In the case of co-living, the Supreme Court denied the establishment of the crime of trespassing in case of a peaceful entry with the consent of the current resident right, even if it is against the presumed intention of some of the co-residents. Changes in this interpretation are justified. Nevertheless, in order to regulate some acts, civil law methods such as increasing damages should be considered.

2.3. Supreme court 2022. 3.24. 2017 do 182372 en banc sentencing(cases of access to open places for criminal purposes)

The Supreme Court has ruled that a person entering a restaurant to install a wiretapping device cannot necessarily be regarded as a home invasion. It is the first change in 25 years of precedent in the so-called “grassland blowfish restaurant case,” in which the fact that government heads of government agencies tried to arouse local sentiment before the 1992 presidential election was revealed through wiretapping. In December 1992, at grassland blowfish restaurant case, Nam-gu, Busan, former Justice Minister Kim, as well as the mayor of Busan, the chief of the Busan District Prosecutors’ Office, the head of the Busan National Police Agency, and the head of the Busan branch of the National Safety Planning Department gathered together to incite local sentiment and unify the Democratic Party candidate Kim Dae-jung and Chung Ju-young. This is a case in which a conspiracy to disseminate content slandering opposition candidates was exposed through wiretapping by officials of the Unification Kookmin Party. It was judged that it was established, but the judgment was changed through this judgment.
2.3.1 Facts and judgment

A, the vice president of the transportation company, and B, the manager of the management team, were brought to trial on charges of installing and retrieving wiretapping equipment by entering a room prepared in a restaurant in 2015. It was to serve a meal to reporter C belonging to an internet media company who posted negative articles about the company and record his inappropriate request.

On the other hand, the 2nd trial judged not guilty, saying, "The defendants entered the restaurant with the permission of the restaurant manager in this case, and even if they recorded and recorded the conversation with C without the defendants' permission, it is difficult to see that entering the room is against the manager's will." did.

The all-inclusive body of the Supreme Court confirmed the lower court's verdict of acquittal by a majority opinion of 11 people in the appeals trial of Mr. A, who was charged with trespassing. The Supreme Court made the same decision as the lower court. The Supreme Court held that it should not be judged whether or not a resident would consent to simply knowing the actual purpose of entry into the case of a dwelling trespass. Instead, he said that the form, use, and nature of the dwelling should be comprehensively considered, including access and management methods and conditions for outsiders, and the background and method of access by actors. In particular, the Supreme Court held that the key to determining whether the 'state of peace', which is the protection legal interest of the crime of trespassing, was violated. Regardless of what the actual purpose of entry was, it is difficult to establish a crime of trespassing unless it is an act that infringes on the tranquility of the resident. The Supreme Court explained, "If the business owner had consented to enter a restaurant that allowed public access, even if it was recognized that the business owner would not have consented if he had known the actual purpose of the entry, it could be considered that the state of de facto tranquility was violated."

2.3.2 Judgment review

The meaning of the appearance that harms the state of de facto tranquility is abstract and unclear, and various interpretations are possible. In fact, even when trespassing is judged according to whether the state of peace is violated, whether or not a crime of trespassing is established must be determined by considering whether it is against the will of the resident as the most basic and important factor. As in the majority opinion, if you enter a public place for criminal purposes, it can be seen that the crime of trespassing cannot be established unless the manager's state of calm is violated.

2.3.3 Examine

It is significant in that it reaffirmed the principle by objectively reconfirming the meaning and judgment criteria of trespassing from the viewpoint of protection and interest in the crime of trespassing. In the case of entering a residence for criminal purposes in an open place where the public is allowed to enter, even if it is against the resident's presumed will, if it appears and objectively and actually enters peacefully, the establishment of the crime of trespassing is denied. The precedent took a clear position in the interpretation of the crime of trespassing through the above precedent.

2.4 Supreme court 2021.12.20. 2019 do 13818 en banc sentencing(homosexual purpose intrusion case)

2.4.1 Facts and judgment

Person A was charged with breaking into Mr. B's house in October 2018. Person A was accused of breaking into the house where Mr. B and Mr. C lived together for the purpose of having sex for homosexuality with Mr. B's son, whom he knew through SNS at the time. At the time, Mr. B was not at home, but the prosecution saw that Mr. A broke into the house against the will of Mr. B, a co-resident.
In the first (original) and second (appellate) trial, "Even if C, a minor, who is one of the people living in the joint, has consented to enter the residence, the victim's death is not allowed without the express or presumed consent of the other co-resident, C's father, B. If the result of entering the residence harms the freedom and tranquility of his residence, there is no hindrance to the establishment of the crime of trespassing." It was in accordance with the previous Supreme Court precedents (e.g., judgment 83 Do 695). However, the Supreme Court changed the existing precedent and upheld the acquittal in a case in which the issue of whether a house trespassing crime would be established if the husband entered the house of his wife for the purpose of having sex without the husband's knowledge through the decision of the all-in-one agreement in September, while the appeal hearing in this case was ongoing. Confirmed (2020 Do 12630).

2.4.2. Judgment review

In this case, the Supreme Court also reversed and remanded the case to the purport of not guilty, citing the principle of the all-colonial judgment as it is. The court said, "The crime of trespassing in the house is the protection of the peacefulness of the dwelling, and 'intrusion' means entering the dwelling with the act of harming the de facto state of peace that the resident enjoys in the dwelling." Entering the dwelling as a private residence would be against the will of the resident unless there are special circumstances, but simply the subjective circumstances of the resident that the act of simply entering the dwelling is against the will of the resident cannot be considered to be an intrusion." In particular, "If an outsider enters the common residence according to the usual method of entry with the realistic consent of the current resident in the absence of a part of the co-resident, a crime of trespassing is established even if it is against the presumed will of the other resident who is absent. I don't," he explained.

He added, "A person can admit that Mr. A entered Mr. B's residence according to the normal access method through the door during Mr. B's absence, and Mr. A entered Mr. B's residence with an act that harms Mr. B's de facto calm state. is not visible, so it should be considered that the crime of trespassing against Mr. A is not established."

2.4.3. Examine

The Supreme Court alleges that, when an outsider enters the common residence according to the normal access method with the realistic consent of the current resident in the absence of a part of the co-resident, the crime of trespassing does not occur even if it is against the presumed will of the other resident who is absent. The consensus decision was reaffirmed.

3. Legislative Direction on the Crime of Trespassing (‘The Theory of de Facto Serenity’ vs. ‘The Theory of Housing Rights’)

The point of punishment for theories and issues related to the crime of trespassing lies in the interests of protection. It depends on how you interpret the protection interests. Germany defines housing trespassing as a crime against public order, and views individual housing rights as protection interests. In Japan, the crime of trespassing is defined as a crime against social legal interests, but the theory of de facto serenity in individual housing is viewed as a protective legal interest. The revised Supreme Court precedent judges the protection legal interest in the crime of trespassing as the protection legal interest in de facto tranquility. However, it is also necessary to look at the position of understanding the housing right as a protection legal interest[5].

3.1. Protecting legal interests in residential trespassing

There has been a lot of discussion for a long time about the legal interests of housing trespassing. For example, the housing right theory and the de facto serenity theory are opposed. The housing claim is the oldest and most archetypal position in the crime of trespassing. The previous housing
rights theory interprets the right to a house as a protection against trespassing, and that only the head of the household or a person in the position of Australia has permission to enter or search the dwelling. Basically, it can be seen that it was developed as an expedient method to punish the currently abolished adultery as a crime of trespassing when it is difficult to punish it. The recent housing right emphasizes the aspect of protecting personal interests in housing trespassing. In other words, it means the right to dominate a certain space without any interference, the right to act freely within the space, and the freedom to decide whether to reside or not. Therefore, if it is judged that the right of residence of the right to live is infringed even if it is entered with the consent of the person who is actually guarding the residence, the crime of trespassing is established. On the other hand, in fact, the theory of serenity understands the protection legal interest of the crime of trespassing as the ‘right of residence’. In other words, the content of the right of residence is the de facto tranquility of all the residents of the community. Whether or not the tranquility of the dwelling is actually maintained is judged based on the will of the dweller, but if there is de facto control over the dwelling, it is protected even if there is no legitimate title. However, in the revised Supreme Court precedent, it is presumed that, while interpreting the doctrine of serenity as the protection and interest of the crime of trespassing, if one of the co-residents enters the house according to the normal access method with the realistic consent of the current resident, it is presumed to be against the will of the other resident who is not present. Even so, the position cannot be regarded as detrimental to the peace of residence, which is the protection legal interest of the crime of trespassing.

The Supreme Court's position can maintain legal stability in that it grasps the legal interests of protection against the crime of trespassing as a de facto theory of peace, and in the case of shared housing, it is based on the consent of the current resident.

3.2. Judgment of ‘trespassing’ in the crime of trespassing

This judgment, as the background of the ruling is related to misconduct, constitutes a legal battle over the ‘whether or not to intervene in the state’s penal rights to privacy’ and received a lot of attention from society. The judgment focused more on the ‘objective components’ of the ‘housing trespass crime’ and the ‘objective component’ of the ‘housing trespassing crime’ of the peace of In other words, trespassing means ‘entering a dwelling with an act that harms the de facto tranquility of the resident enjoys in the dwelling’, and whether or not a trespass is a trespass should be judged on the basis of the act of behavior revealed objectively and externally at the time of entry.

3.3. Object of trespassing

The object of the crime of trespassing is the residence of a person, a building managed, a ship, an aircraft, or an occupied room. The Supreme Court includes the common part of the apartment building as well as the main site of the building. Recent Supreme Court precedents deny the establishment of a crime of trespassing if the state of de facto tranquility is not violated when entering with the consent of the business owner even when unilaterally entering a public place for criminal purposes. In other words, if you enter a restaurant where the general public is allowed to enter through the normal method of entry with the consent of the business owner, even if it is recognized that the business owner would not have consented to the entry if he had known the actual purpose of entry, it could be said that the state of de facto tranquility was violated.

3.4. Period of trespassing

Residential trespassing is punishable by an attempted offense. The theory of the period when the offense of trespassing into a dwelling is in conflict with the theory of the body standard and the theory of actual serenity. The body criterion accepts a rider when the entire body is in.
the other hand, the theory of de facto serenity recognizes the rider even if only a part of the body has been entered, if it actually harms the serenity. The Supreme Court, taking the theory of de facto tranquility, judges the degree of protection as an infringer, and determines whether or not to stand based on the infringement of legal interests. In Germany, there is no punishment for attempted crimes, so judgments are made based on the body standard [19][20][21][22][23][24][25][26][27][28].

4. Conclusion

Due to the change in the Supreme Court's attitude on the crime of trespassing, the scope of punishment has been reduced. There are many criticisms of this as well. The theories on the crime of trespassing have their own logic, and it cannot be said that the attitude of the changed case law is always correct. However, as the scope of punishment for trespassing has been reduced, other laws must provide a space for punishment. In other words, it is necessary to increase the amount of compensation for illegal acts through civil methods. Our Supreme Court, which in fact adopts the theory of serenity as a protection law for the crime of trespassing, needs to develop a more logical interpretation. The intervention of the criminal law should not be too prepositional or postpositional[29][30].

5. References

5.1. Journal articles

6. Appendix

6.1. Authors contribution

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- Set of concepts ☑
- Design ☑
- Getting results ☑
- Analysis ☑
- Make a significant contribution to collection ☑
- Final approval of the paper ☑
- Corresponding ☑
- Play a decisive role in modification ☑
- Significant contributions to concepts, designs, practices, analysis and interpretation of data ☑
- Participants in Drafting and Revising Papers ☑
- Someone who can explain all aspects of the paper ☑

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