Abstract

Purpose: In recent years, the number of infanticide cases has been steady at around 30 per year and the number of toddler murders at around 10 per year, which are generally punishable as ordinary murder. Also, Crimes against immediate family members are subject to aggravated penalties. A person (descendant) who kills a member of his or her own or his or her spouse’s immediate family is guilty of subsistence murder, which is punishable by death, life imprisonment, or imprisonment for seven years or more. This is a more severe offense than ordinary murder, which is punishable by death, life imprisonment, or imprisonment for five years or more. Most survival-related violent crimes, such as injury, assault, abandonment, abuse, arrest, confinement, and intimidation, have aggravated penalties. However, under the current law, there is no provision for aggravated punishment for violent crimes against direct survivors. There is an aggravated punishment for the murder of a direct survivor by a direct descendant, but there is no aggravated punishment for the murder of a direct descendant. The Korean Constitution stipulates that “no one shall be discriminated against on the basis of social status,” which may violate the Equal Rights Clause of Article 11 of the Constitution. In other words, it is unconstitutional because it may constitute “discrimination based on birth”. Therefore, we would like to critically examine whether the Korean criminal law should continue to provide for the offense of feticide.

Method: The aggravated punishment of capital murder is one of the most controversial issues in society. In this critical review of the aggravated murder penalty, we will first look at the Constitutional Court’s decision on the aggravated murder penalty. Second, we will look at the arguments in favor of and against the aggravated penalty of capital murder. Third, we will examine the current state of affairs through a comparative legal review of foreign jurisprudence on the aggravated punishment of capital murder. Fourth, the legal, moral, and religious perspectives on the aggravated punishment of capital murder will be discussed. Fifth, based on the above discussion, we will provide a direction on whether to abolish the aggravated penalty of capital murder.

Results: It is recommended that the aggravated punishment for survival murder be abolished as it violates the right to equality under the Korean Constitution. Even if it is abolished, the purpose of the punishment can still be realized through judicial modification.

Conclusion: In light of the meaning and legislative purpose of the provision that aggravates the crime of intentional homicide, it cannot be said that the legislative act of selecting a comparative standard, i.e., that intentional homicide is more severely punished than ordinary homicide in the Korean Penal Code, is unconstitutional. However, while the criminal laws have the same criminal offense of killing a person, there is a difference in the presence or absence of paternity. The abolition of capital murder is consistent with the principle of proportionality. It would be contrary to the principle of proportionality to impose severe restrictions based on prosecutorial convenience. For these reasons, it would be a violation of the constitutional principle of equality, and even if it is not unconstitutional, it is difficult to see that it reflects constitutional values such as the principle of equality.

Keywords: Parricide, Infanticide, Aggravated Punishment, Principle of Proportionality, Principle of Equality
1. Introduction

In the U.S., Parricide accounts for 2% of all homicides, in the U.K. 1%, and in France 2.8%, and in Korea it is higher at about 4%, with about 30 cases a year. The Constitutional Court has made the following rulings regarding survival-related crimes. First, respect and love for the immediate survivors of the family is not a legacy of the feudal family system, but a value order that constitutes an essential part of our social ethics, especially in the case of Korea, which has inherited and developed a traditional culture based on Confucian ideas; therefore, there is a rational basis for the discriminatory treatment in light of the reason for the aggravated punishment based on the status of ‘descent’ and the validity of the degree, and the statutory provisions in this case cannot be said to violate the principle of equality in Article 11(1) of the Constitution. Secondly, since a criminal offense such as manslaughter with injury to existence cannot be considered to fall within the realm of constitutionally protected private life, and since the legislative purpose of the statutory provisions in this case is justified and there are reasonable reasons for the aggravation of the sentence, and since it cannot be said that the aggravated punishment distorts the private life of the family, or that there is unreasonable interference from outside, such as the imposition of filial piety or intervention in personal ethical matters, the statutory provisions in this case do not violate the right to freedom of private life under Article 17 of the Constitution. Third, there is no indication that the dignity and gender equality of each member of the family will be undermined by the aggravated punishment or that a humanized life will not be guaranteed, but rather that the aggravated punishment of patrimonial and anti-moral acts will further guarantee the dignity and value of individuals by protecting the natural and universal ethics of kinship and family in criminal law, and that a proper social order will be formed through this. The provisions of the law in this case do not violate Article 36(1) of the Constitution on the marriage and family system, nor do they infringe on the dignity and worth of the human person or the right to the pursuit of happiness. However, as the times have changed, the reasons for the crime of feticide have also changed. Therefore, a multifaceted review of the abolition of feticide is necessary. With the abolition of the infanticide provision, which reduces the sentence in certain cases when an immediate relative kills a non-relative, there is a public consensus on the abolition of infanticide based on the principle of equality[1].

2. Arguments in Favor of Enhanced Penalties for Parricide

Parricide is the crime of killing a member of one’s own or one’s spouse’s immediate family (Article 250, paragraph 2 of the Penal Code). Immediate relatives are legal relatives, such as adoptive parents. However, unrecognized de facto wealth is not survivorship. Spouse means only a legal spouse, not a de facto spouse. Since it is required that there was an immediate relationship at the time of the murder, if an adopted child kills his or her adoptive parents after adoption, he or she is guilty of ordinary murder. On July 17, 2023, the National Assembly passed the abolition of the infanticide statute regarding the non-existence of immediate relatives[2][3]. The reason for the abolition of infanticide was due to a recent survey of infants born in medical institutions but whose birth registration was missing, which confirmed a number of cases of infanticide, and the critical public opinion on whether the punishment for murdering infants should be reduced because they are infants. As a result, the abolition of the aggravated punishment of the crime of murder for the survival of an immediate relative has been raised as a social topic. Therefore, it is necessary to look at the arguments in favor of the aggravated punishment of murder.

2.1. The traditional “filial duty” mentality

Korea has continued to impose aggravated penalties for the crime of infanticide from the past to the present, and the background of this legislation is Confucianism and traditional ideas that emphasize the “filial duty” of our society. Therefore, the aggravated punishment for intrafamilial
crimes rather than general murder is justified and does not violate the principle of proportionality[4][5].

Today, the vast majority of foreign countries have either eliminated or abolished aggravated penalties for survivor crimes, including survivor murder. If we look at comparative law, the Anglo-American legal system, which is centered on the Common Law, has never imposed aggravated penalties for crimes against humanity, such as murder and manslaughter, and the same is true for most countries, including China. However, when it comes to the crime of murder for survival, which is a representative provision of crimes for survival, some countries still have such provisions, and some countries even have aggravated penalties for the murder of not only survival but also non-siblings or spouses. There are also countries that have deleted their existing regulations on subsistence killing, which is just a difference in legislation based on the historical background and socio-cultural differences of each country. Here are some examples of foreign legislation on assisted suicide First, France still has an aggravated penalty for murder. In this case, the object of the offense is the legal or de facto lineal descendant or adoptive father or mother. Unlike ours, the French Penal Code(Article 221-4) also punishes the murder of a minor by an immediate relative and even provides for aggravated penalties for spousal homicide by a de jure or de facto spouse. This is because it recognizes spousal homicide as a more serious offense than ordinary murder. Second, Taiwan has enacted an aggravated penalty provision for sustained murder(Article 272 of the Penal Code) since the enactment of the Penal Code in 1935, i.e., the statutory penalty for sustained murder is death or life imprisonment, whereas the statutory penalty for ordinary murder is death, life imprisonment, or imprisonment for more than 10 years. Third, Germany abolished the law of murder with intent to kill(Article 217 of the Penal Code) in 1941[6][7].

2.2. High social condemnation consensus

There is good reason to believe that infanticide should be highly socially condemned compared to ordinary murder in light of its heinous nature. Parents and children are in a position of guarantor to help and protect each other, and the killing of a parent by a child is a travesty and an ethical and moral responsibility that should be highly condemned.

When a child is born, the first environment he or she encounters is the family, and parents are the first people he or she experiences. In the relationship with parents, to which we automatically belong, children learn to adapt to the environment, recognize their roles centered on their relationship with parents, and grow as members of society. In other words, the form, process, and content of the parent-child relationship extends to social relationships and becomes an important factor that directly affects the child’s personality formation and emotional development. Parent-child relationships vary depending on the society and culture to which they belong. In particular, Korea is a country with a strong Confucian tradition among East Asian Chinese character cultures and a particularly strong blood consciousness. In addition to this, the relationship between parents and children in Korea is characterized by the fact that they perceive each other as one, and they see themselves as part of a whole called "family" and see their children as an extension of themselves[8][9].

2.3. Appropriate statutory penalties for parricide

However, the Korean Penal Code has been amended to provide for the death penalty, life imprisonment, or imprisonment for a term of not less than seven years, resolving the issue of specific disparity in sentencing[10][11].

2.4. Aligning with the equality principle

The survival killing provision of the Korean Penal Code cannot be said to violate the principle of equality because it is an arbitrary legislation that is out of balance in the penalty system. The killing of a parent by a child is highly reprehensible regardless of whether the child is from the East
or the West, and the statutory punishment is not so severe as to violate the right to equality as
the statutory punishment is abandonment.

2.5. Reviews

The argument in favor of aggravated murder in Korean criminal law is problematic because it
emphasizes the traditional Korean idea of filial duty and does not take into account the motives
for murder, which are: first, murder due to insanity, second, murder due to child abuse, and third,
murder due to profit in the form of a family feud. Here, the argument in favor of an aggravated
punishment for sustained murder is weak, as sustained murder by insanity and parental child
abuse account for 70% of the cases.

Table 1. Number of occurrences of parricide.

<table>
<thead>
<tr>
<th>Years</th>
<th>Number of occurrences</th>
<th>Arrested</th>
<th>Remand opinions/decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Prosecution/</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>arraignment</td>
</tr>
<tr>
<td>2017</td>
<td>24</td>
<td>25</td>
<td>22</td>
</tr>
<tr>
<td>2018</td>
<td>42</td>
<td>44</td>
<td>38</td>
</tr>
<tr>
<td>2019</td>
<td>35</td>
<td>45</td>
<td>22</td>
</tr>
<tr>
<td>2020</td>
<td>28</td>
<td>35</td>
<td>24</td>
</tr>
<tr>
<td>2021</td>
<td>25</td>
<td>25</td>
<td>22</td>
</tr>
<tr>
<td>Total</td>
<td>154</td>
<td>174</td>
<td>128</td>
</tr>
</tbody>
</table>

Note: Includes murder, attempted murder, aiding and abetting, and premeditation and conspiracy.

3. Arguments Against Enhanced Penalties for Parricide

In terms of the types of crimes, sustained murder can be categorized as "paternal," "maternal," or "foster," depending on the target. It can also be categorized as juvenile sustained homicide or adult sustained homicide, depending on the age of the offender. Juvenile sustained homicide can be further divided into (1)sustained homicide due to childhood abuse, (2)sustained homicide due to serious mental illness, and (3)sustained homicide due to antisocial behavior. Adult homicides can be categorized into (1)homicides due to paranoia and psychosis, (2)homicides due to altruism, and (3)other types of homicides such as selfishness, jealousy, impulsivity, and personality disorders. The victim's injuries are usually concentrated around the head, face, and neck because the perpetrator is extremely excited or angry at the time of the murder. The main injuries were to the head and neck, and in cases of assault deaths, the victim was assaulted on the face, especially the eyes. The most common weapon used was a knife, such as a kitchen knife, followed by indiscriminate assaults and blunt objects such as baseball bats and hammers. Murders with knives often involved indiscriminate stabings to the head, face, or neck, and sometimes involved the dismemberment of a parent's body or near dismemberment of a limb. In particular, survival homicides associated with schizophrenia were brutalized by the use of knives and a high number of confessions, but few survival homicides were planned, concealed, or disguised. On the other hand, murder for money was often premeditated, and in the case of accidental killing by violence or verbal abuse as well as premeditated crimes, the case was often concealed by methods such as arson or
dark burial, and sometimes disguised as accidental death. The majority of homicides were committed in isolation, and factors that increased the likelihood of homicide included excessive alcohol consumption during the commission of the crime and a history of violence, such as repeatedly assaulting parents[12][13][14][15].

Table 2. Whether each country has an aggravated penalty for parricide.

<table>
<thead>
<tr>
<th>No aggravated murder penalties</th>
<th>Anglo-American countries such as the United Kingdom and United States, Switzerland, Denmark, Norway, Russia, China, etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repeal of the aggravated murder rule</td>
<td>Germany(1941), Austria(1974), Japan(1973)</td>
</tr>
<tr>
<td>Aggravated penalties for capital murder, non-capital murder, and spousal homicide</td>
<td>France, Italy, Argentina, Taiwan, etc.</td>
</tr>
</tbody>
</table>

3.1. Violating personal dignity

Article 36(1) of the Korean Constitution states that "Marriage and family life shall be established and maintained on the basis of individual dignity and equality of the sexes, and the state shall guarantee them." In addition, human dignity and free expression of personality are the core values of the Constitution, and the democratic basic order forms the basis of the constitutional order. Not only does this naturally affect family life, but family life is a component and foundation of social life and national life, which cannot be properly realized unless these constitutional values and order are upheld in family life. In other words, the aggravated punishment of subsistence killing should be abolished as it harms the equality of family life and the dignity of individuals. The family system guaranteed by the Constitution is based on democratic family relationships in which all family members are respected equally as individuals with human dignity. Consequently, such discriminatory treatment cannot be reconciled with the democratic family relationship or family system guaranteed by the Constitution. The Korean Criminal Code's subsistence killing penalty discriminates against those who kill their immediate family members, thus hindering society's basic morals for maintaining free and peaceful community life. The aggravated punishment of subsistence killing is not necessary to protect through the strongest and final means of punishment[16][17][18].

3.2. Based on an authoritarian, patriarchal family

Parents and children are obligated to support and cooperate with each other. Recently, the rule that reduced the punishment for the murder of a non-sibling by an immediate family member was abolished. In other words, infanticide was punished with a reduced penalty if the immediate family member had special extenuating circumstances such as concealment of the crime, anticipation of the inability to raise the child, or other extenuating motives, but this rule has been abolished. However, it is still an aggravated offense if an immediate non-family member kills an immediate family member. In the case of killing an immediate relative, it is unjustifiable to aggravate the punishment based solely on the formal status of the relationship, without asking about other circumstances, such as parenting, protection, or the formation of an attachment relationship. This is still based on feudal ethics, and the purpose of the discrimination is to maintain an authoritarian and patriarchal family order based on the dominance-submission relationship between parents and children, which is not justified[19][20].
3.3. Equal rights violations

It is not reasonable discrimination to punish a person who kills another person, or a person who has no legal relationship with the perpetrator but has a special relationship with the perpetrator, with a general murder offense and an aggravated punishment for the killing of an immediate relative. The law was enacted in light of Confucian ethics from ancient times before the separation of morality and law. It is important to keep in mind that the law is based on morality and that the rules of law should be the "minimum necessary". The main difference between law and morality is enforceability. Laws can be enforced by organized state power, but morals are not, and their implementation is left to the conscience. The goal of law is justice, and the goal of morality is good. It is undesirable for the law to get involved in moral matters[21][22].

Despite the fact that the Constitutional Court has consistently held that legislators are granted freedom of formation as long as it does not violate the principles of accountability or proportionality, it is not systematically or logically valid to justify the criminalization of subsistence killing by invoking the legislator's freedom of formation. Rather, there is nothing particularly problematic, legally or emotionally, in applying the current statutory punishment for survivor's murder, which is essentially the same as survivor's murder. However, it can be said that the crime of survival murder, which is not based on the ruin of the family, such as the abuse of the surviving spouse or the surviving child, or the mental abnormality of the surviving child, violates the principle of responsibility and proportionality in that it is punished more severely than ordinary murder, even though it is less responsible or illegal than ordinary murder due to its structure. In this respect, when dealing with the constitutionality of capital punishment in the future, it seems that it would be more effective to apply the principle of proportionality rather than the principle of abstract equality to derive the constitutionality of capital punishment. Moreover, even if the law of subsistence killing is abolished, the responsibility and illegality of subsistence killing can be sufficiently reflected through sentencing in the process of applying the law of ordinary murder[23][24].

3.4. Increase in parents abusing children

Parental abuse of children has been on the rise in recent years. We should consider the reality that the number of cases of domestic violence on the part of parents is increasing. The previous section on survival killings shows that mental illness and parental abuse play a large role. It would be unrealistic to impose aggravated penalties without considering these circumstances in a case where self-defense is inevitable. In the case of capital murder, it is sufficient to impose a severe sentence based on the culpability at trial[25][26].

4. Legislative Direction on Aggravated Petticide

4.1. Social status

There is no disagreement that the equality clause of the Constitution applies regardless of how the relationship between descent and non-descent is identified, as long as the prohibited grounds for discrimination in Article 11(1) of the Constitution are viewed as exemplary. The crime of descent murder stipulates that the 'direct descent of the person or spouse' is a constitutive element of the crime. These are all social statuses that are prohibited grounds for discrimination under Article 11(1) of the Constitution. Social status refers to a person’s long-term, not temporary, position in society.

The rationale for the aggravated punishment of intentional homicide is not the aggravated liability for non-persons, but the objective fact of killing one’s own or one's spouse’s direct lineal descendants, which is identified as an illegal aggravation to protect social and ethical behavioral values. The argument for the abolition of the old offense of subsistence murder was also raised in
the 1992 Proposed Criminal Code Amendment Bill. However, on the grounds that it would be contradictory in the criminal law system to abolish the relevant provisions on the grounds that the statutory punishment for subsistence murder is severe while maintaining the aggravated punishment provisions for other subsistence crimes, an amendment was proposed to slightly reduce the statutory punishment by adding seven years of imprisonment to the provisions of subsistence murder, which was reflected in the Third Amendment to the Criminal Code in December 1995.

The sentencing guidelines for murder with intent to kill include special and general aggravating factors. In light of this, the current sentencing guidelines have a special aggravating factor of "surviving victim," which facilitates aggravated punishment for surviving murder, but there is no special aggravating factor (behavioral factor) for "non-victim," so it is quite difficult to elicit aggravated punishment for non-surviving murder under the current sentencing guidelines. Therefore, if sentencing factors are accepted together as aggravating factors without discrimination, each of these statuses can be balanced in importance, and one methodology is to abolish liability punishment for ordinary murder if it is possible[27][28].

4.2. Considering abolition of capital punishment

The position in favor of aggravated punishment for murder of a living being is that respect and love for living beings means the ethics of human security and the basic ethics of social life, so even if the crime of murder of a living being has its origins in the feudal patriarchal system in history, even from today's perspective, it can only be considered that the blameworthiness, which is the essence of criminal responsibility, is greater than that of simple murder. The lower limit of the statutory penalty is only two years compared to simple murder (five years), so it cannot be considered unduly discriminatory. ③ If there is a legal reason for a reduction in the penalty, such as voluntary surrender, a sentence of probation can be imposed with two reductions, including a reduction in the penalty. ④ The legislative intent of the aggravated punishment provision for surviving murder is not to provide special protection for surviving relatives, but to specifically condemn the cruelty of non-siblings, and the special protection for surviving relatives is only a reflexive benefit of this. The problem with the constitutional theory is that enforcing moral principles by reflecting them in the law, even if law and morality are distinguished, cannot completely eliminate the ethical element in determining liability. In addition, the law does not impose morality, but merely increases the sentence based on the aggravation of the responsibility due to the familial relationship. It is a discriminatory result that surviving victims are more protected than ordinary victims. The intent of the law is to protect surviving victims, and even if surviving victims receive greater protection as a result, it is only a reflexive benefit.

The view that argues for its abolition is that the aggravated punishment for infanticide is a remnant of feudal and anti-human patriarchy and is unreasonable discrimination against human dignity. The ethic of non-killing is a voluntary ethic and cannot be enforced by law. Since there are many cases where the reprehensibility of the murder is not great, it is sufficient to punish the murder by the statutory penalty of ordinary murder. ④ It is argued that the lower limit of the statutory penalty for murder is seven years, which severely limits the sentencing discretion of judges so that probation cannot be imposed even in cases of mitigation[29][30].

Upon review, the abolition of capital murder is more reasonable and justified.

5. Conclusion

Just as the question of law and morality is the unresolved Cape Horn of legal philosophy, the question of the aggravated punishment of capital murder may be the eternal problem of legal philosophy that our society needs to solve. However, criminal law should be applied as a last resort.
There is no problem in determining the sentence even if the penalty is abolished, and the motivation for murder is often mental illness and parental abuse, so the penalty should be abolished. All citizens are equal before the law according to the developmental stage of human life by limiting the range and time that can be allowed for abortion[31].

Despite the fact that the presence or absence of 'patrimony' plays an important role in the existing murder of survivors, the actual review of 'patrimony' is difficult to list specifically due to the unclarity of the concept. Therefore, rather than placing an ambiguous concept as a new mitigating factor, we believe that placing the preceding patrimonial act of survivorship, i.e., 'provocation of the victim', as an aggravating factor will prevent it from being applied unfavorably to the perpetrator who lacks patrimony and implement a reasonable sentence without the need to establish a new patrimony factor. Furthermore, it would be necessary to include "victim being a spouse" as an aggravating factor in the sentencing guidelines. Spousal homicide is a crime that harms the constitutionally protected family as well as the specificity of the relationship and the trust based on it, and it should be punished as aggravated as surviving or non-surviving homicide, and when surviving, non-surviving, and spousal factors are included as aggravating factors, each of them will be balanced in importance.

6. References

6.1. Journal articles


6.2. Books


7. Appendix

7.1. Authors contribution

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<thead>
<tr>
<th>Initial name</th>
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</tr>
<tr>
<td></td>
<td>-Design ✔</td>
</tr>
<tr>
<td></td>
<td>-Getting results ✔</td>
</tr>
<tr>
<td></td>
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</tr>
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<td>-Make a significant contribution to collection ✔</td>
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<td>-Corresponding ✔</td>
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<td>-Play a decisive role in modification ✔</td>
</tr>
<tr>
<td></td>
<td>-Significant contributions to concepts, designs, practices, analysis and interpretation of data ✔</td>
</tr>
<tr>
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</tr>
<tr>
<td></td>
<td>-Someone who can explain all aspects of the paper ✔</td>
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7.2. Funding agency

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