Abstract

Legal interests are the best value for maintaining a peaceful order in society. The legal interests of penal law is one of the most significant values among others protected by so many laws. The fundamental principle of criminal law is the benefits and protection of the law, which consists of national, social and individual legal interests. In particular, the national legal interests is related to the existence and security of the state, therefore it is a very important legal benefits. Thus, this study will try to formulate the concept of national secret in order to apply the criminal law accurately.

This research has been conducted to draw the concept of judging the national confidentiality based on the principle of legality (nulla poena sine lege). The Supreme Court precedents of the Republic of Korea state that the national confidentiality should not include facts, articles, or knowledge that are already widely known to the general public through proper procedures in Korea. National confidentiality should be kept as a secret for national interests. To be treated as national confidentiality, there must be a real threat to national security if it were publicly available. In general, there are three criteria for judging national security. First, a ‘theory of formally designated as secrets’ recognizes only the national secret as an explicit indication that the government organization prohibits the public from being known. Second, a ‘practical secret theory’ means regardless of a formal designation as a secret, if the contents of a document is critical to be preserved and it has a substantial value as a secret, which is recognized as confidentiality. Third, a ‘merge theory’ is a position that can become national secret if it has both formally designated and practically valuable as secret.

In conclusion, it is reasonable that ‘publicly known facts’ and ‘trivial things’ should be excluded in order to comply with the meaning of national secret. And conventional wisdom and current social atmosphere of Korea should be reflected during the process of classifying actual secrets. Furthermore, it needs to have an objective and concrete analysis on each field. Nevertheless, if the judgment on confidentiality is still ambiguous and unclear, then the principle of in dubio pro reo should be applied and favorable to the defendant.

Keywords: Criminal Law, National Legal Interests, National Secret, Principle of Legality, Military Secret

1. Introduction

The interests that is worth protected by laws is called 'Rechtsgut'. Legal interests are the best value for maintaining a peaceful order in society. The legal interests of criminal law is one of the most significant values among others protected by so many laws. The fundamental principle of criminal law is the benefits and protection of the law, which consists of national, social and individual legal interests [1]. In particular, the national legal interests is related to the existence and security of the state, therefore it is a very important legal benefits. There are many types of crimes threatening national security, and there is a great need to prevent information leakage related to national security. National security information is a part of national confidentiality, but
the act of detecting and collecting information to reveal the national confidentiality shall be punished as a spy pursuant to Article 98 of the Criminal Code. In addition, special laws stipulate leakage of national secret as a crime such as the Military Criminal Act, the National Security Act, and the Military Secret Protection Act, and many laws have specified the term "national confidentiality" in their contents. However, the concepts of national confidentiality used in the criminal law and other laws are not mutually unified. The criminal law is of the nature of last resort and should be carefully interpreted and applied, because it applies punishment as a retribution. Therefore, in order to exclude the judge's willingness and apply the law fairly, the principle of legality (nulla pona sine lege) should be used as a guiding principle and the correct concept should be used[2]. This is a common view of legal positivism. Thus, this study will try to formulate the concept of national secret in order to apply the criminal law accurately.

2. Concept of National Confidentiality

2.1. Comparison of national confidentiality and 'official secret'

The concept of national confidentiality has changed with ages and political systems. In addition, various factors of each country such as the governing system, social structure and nationality, which are requisites of judgement have influenced a premise of recognition of state confidentiality[3].

National confidentiality is generally defined as 'national defense or diplomatic information that should keep a secret from foreign countries for the sake of national security, and it can cause damage to national security if it is disclosed without authorization'. On the other hand, 'official secrets' means 'secrets' not only defined as secrets under the law, but also classified and specified as secrets or confidential matters according to political, military, diplomatic, economic and social needs, and recognized it is worthwhile to protect it as a secret, even if it involves considerable interests in something that is not generally known outside. For example, the important affairs related to urban planning are official secrets. If the government classifies the issues as confidential, they are protected as secrets based on security procedures and applications, and even if they are not, they are protected as official secrets when they have substantial value to be protected. Prosecutors and police investigations and investigation information are also official secrets stipulated as confidential in the statute. Therefore, the criminal law shall punish the person who leaked official secrets, if such secrets are disclosed.

2.2. Definition of Korean supreme court on national confidentiality

The Supreme Court of the Republic of Korea has broadly grasped the concept of state confidentiality, which is the object of espionage in the Criminal Act and espionage in the National Security Act. In other words, the Supreme Court has removed confidentiality from the known facts, reflecting the criticism that it had caused unreasonable criminal penalties by including publicized facts into national confidentiality. The Supreme Court said that national confidentiality "should not contain the facts, objects, or knowledge already known to the public through legitimate procedures in the country". And when it comes to making public, it is judged "there is no need for detection, collection, verification or confirmation by anti-government organizations or persons, considering the development of the mass media and communication means such as newspapers, broadcasting, the scope of the reader and the listener, the subject of the publication, etc."

The Supreme Court creates a following standard on judging whether there is a substantial value to be protected as confidential or not: it reflects conventional wisdom in the confrontation era with the anti-government organizations such
as North Korea at the time of collecting confidentiality, and even if the confidentiality is trivial, once it is classified as secret and it is clear that disclosure of confidentiality is beneficial to anti-state organizations and puts Republic of Korea in danger, then it should be confidentiality.

In addition, under the National Security Act, national confidentiality should be restrictively construed as a fact that this is not widely known to the general public, and the contents are important, so its disclosure may pose a risk to national security. In this light, it is fair to say that the Court precedents stick to a following principle: a Korean legal system has ruled “the fact of ‘disclosure’ is not confidential, when it defines penal regulations violating protection of secrets.” [4].

2.3. Stance of Korean constitutional court on national confidentiality

The Constitutional Court presents ① an unknown fact and ② a substantial secret as requirements of national confidentiality. The Constitutional Court stated, “an unknown fact means that it is not known to the general public, and the need for secrecy is recognized by necessity and significance to be concealed and protected as a secret, and the practical secret means that there is substantial value to be protected as a secrecy.” The Constitutional Court, in which such a judiciary is based, has argued that “national confidentiality is necessary to ensure that it is not known to the enemy or anti-state organization in order to prevent the occurrence of disadvantages to national security, and there must be substantial value to preserve the safety of the nation.”

The Constitutional Court has also ruled the meaning of an apparent threat to national security as “the degree where the effect on the national security is objectively ambiguous, trivial or not specific should be excluded in the case of any information leakage. And the judiciary must decide whether it is confidential or not, and the contents and the value of confidentiality must be determined by reasonably interpreting the functions of the national security in accordance with the criteria mentioned above.”

3. Requirement of National Confidentiality
3.1. Unknown facts

The Supreme Court precedents of the Republic of Korea state that the national confidentiality should not include facts, articles, or knowledge that are already widely known to the general public through proper procedures in Korea. In other words, the known fact is not confidential because it lost its value as a secret, which is neither profits nor value to the enemy or anti-government organization[5].

In view of the principle of legality, known facts should be beyond the scope of confidentiality in order to comply with the meaning of itself. The Constitutional Court also interprets secrets as “something that is not known to the general public. Likewise, a conventional wisdom excludes known facts from the boundary of national confidentiality[6].

3.2. Necessity

National confidentiality should be kept as a secret for national interests[7]. To be treated as national confidentiality, there must be a real threat to national security if it were publicly available. And if any information is leaked and the democratic and efficient operation of the state becomes impossible, then the information can be classified as a national confidentiality by recognizing the necessity of secrecy.

Necessity is the key criteria to consider when deciding whether it is national confidentiality or not. The concept of national secret is abstract and ambiguous, although the concepts are prescribed in the Secret Protection Act of each country. Therefore, it is difficult to judge whether a concrete case is relevant to national secret or not. In other words, there is a question
to judge which factors are applicable as confidential elements in detailed cases. To solve the problem, it is essential to set the criteria for judging confidentiality. In general, there are three criteria for judging national security.

First, a ‘theory of formally designated as secrets’ recognizes only the national secret as an explicit indication that the government organization prohibits the public from being known. That is, documents that are marked as a secret by government agencies are regarded as secrets, which are sometimes referred to as designated secrets. If an act of confidentiality designated by the state and a mark of a secret are contained in a document, it is equivalent to national confidentiality, even though the contents have no substantial values.

According to this theory, the range, kind, and degree of the confidential matters are formally specified, so there is an advantage that it is possible to know objectively what is confidential. However, from the side of addressing confidentiality issues, there is a possibility of not only procedural difficulties but also a loophole of confidentiality protection. For example, when crucial and urgent secret information has been obtained, if a person who assigns a secret mistakenly omits the secret designation, or if the secret is leaked before the designator specifies the secret, a person in charge of handling secrets can not be protected by a criminal law. There is also the problem that even the content that is not practically valuable is classified as national confidentiality by a willingness of person in charge of handling secrets, which infinitely broadens the scope of national confidentiality.

Second, a ‘practical secret theory’ means regardless of a formal designation as a secret, if the contents of a document is critical to be preserved and it has a substantial value as a secret, which is recognized as confidentiality. Although the theory is faithful, it is unclear whether the information is confidential at the stage of information leakage, and there is a problem that the leaker can not accurately understand he/she leaks the secret or not. There is also the problem on the criteria and methods where it is ambiguous to judge substantial values to be protected. However, the standards for judging the value of state confidentiality, called ‘substantiality’, are ‘a degree of danger’ and ‘unknown facts’. The problem is how to judge the degree of risk. The Korean Supreme Court and the Constitutional Court set the standard for the apparent danger to disadvantage to the Republic of Korea.

The Supreme Court, however, has clarified national confidentiality as follows: “Disclosure of secrets, even though it is trivial, will make a profit to anti-state groups, and if it is clear that it will endanger the safety of Korean society, which is categorized as national confidentiality,” but it makes the requirement of obvious threat meaningless by using a contradictory expression of “trivial” and “apparent danger.” On the contrary, the Constitutional Court has taken a different position by stating that “if the degree of secret leakage is objectively ambiguous, trivial, and not specified, it should be excluded from confidentiality of a possible threats to national security.”

Third, a ‘merge theory’ is a position that can become national secret if it has both formally designated and practically valuable as secret. These theories can be found in the Korea’s National Intelligence Service Act, the Military Secret Protection Act, and the Security Business Regulations. However, the theory of merge can not protect national secret that is not formally designated as a state secret but is practically worthy of protection, because only information that is recognized as a state secret by a person designating substantial value can be preserved as national confidentiality.

4. Conclusion

This research has been conducted to draw the concept of judging the national confidentiality based on the principle of legality(nulla poena sine lege).
The merge theory sets the scope of national secret as formally designated to be a national confidentiality, which can have a narrow meaning compared to a practical secret theory. Of course, despite a practical value of secrets, there can be a problem of protection gap caused by not being designated as national secret. However, the limitation can be addressed by not only formally designated as secrets in the National Intelligence Service Act, the Military Secret Protection Act, and the Security Business Regulations, but also the provisions of the National Security Act, the Criminal Act, and the Military Criminal Act.

And when judging whether it is national secret or not, the Supreme Court and the Constitutional Court, apart from the fact of “known facts”, present the requirement of ‘obvious danger’ to national security. The problem is the degree of risk. The Supreme Court shows that even if it is trivial, it sees it as a state secret if the risk of causing threats to the Republic of Korea is clear. But it is doubtful whether the ‘little things’ can bring disadvantages to the national security. Therefore, the Constitutional Court has corrected the contradictory expression of the Supreme Court, stating that “if a secret leaked is objectively ambiguous, trivial, and not specifically influenced on national security, it should be left out from confidentiality.

It is also not easy to judge whether a secret is actually dangerous. However, judicial precedents said, "in order to judge whether there is a substantial danger, it should be judged based on common sense and conventional wisdom, considering the situation of confrontation with anti-government organizations at the time of collecting the confidentiality." Although it is possible to say that the precedents have provided relatively specific criteria, but common sense and conventional wisdom are still ambiguous.

In conclusion, it is reasonable that ‘publicly known facts’ and ‘trivial things’ should be excluded in order to comply with the meaning of national secret. And conventional wisdom and current social atmosphere of Korea should be reflected during the process of classifying actual secrets. Furthermore, it needs to have an objective and concrete analysis on each field. Nevertheless, if the judgment on confidentiality is still ambiguous and unclear, then the principle of in dubio pro reo should be applied and favorable to the defendant.

The Constitutional Court has argued that the Supreme Court has to play a role as a main actor for making a final decision, saying “the Supreme Court should make a judgement on the actual and substantial values of secrets, which is undoubtedly fair and natural.”

Korea does not have a comprehensive legal system for the protection of national confidentiality, but it is meaningful to set the concept of state confidentiality precisely in a regard of excluding judge’s willingness at court by providing a unified interpretation.

5. References
5.1 Journal articles

5.2. Books


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