

Publication state: Japan
ISSN: 2423-8767

Publisher: J-INSTITUTE
Website: <http://www.j-institute.jp>

Corresponding author
E-mail: pws7897@naver.com

Peer reviewer
E-mail: editor@j-institute.jp

<http://dx.doi.org/10.22471/law.2017.2.2.10>

© 2017 J-INSTITUTE

Some Problems about Victim's Consent under KOREA Criminal LAW

Park Woong-shin

SungKyunKwan University, Seoul, Republic of Korea

Abstract

The consent of the victim is that the subject of the legal interest allows the other person to infringe on his or her legal interest, and in some cases it is an effective system to engrave the illegality of the act by consent. In KOREA, as a legislative case, the consent of such victims is prescribed in the Article 24 of the Criminal Law, and it is a mainstream interpretation of our criminal law academics to view such acts as justification of illegal acts as self - defense, emergency evacuation. Of course, we also acknowledge that there is a possibility that the constitutional requirement may be denied by the consent of the victim even in this legitimate position. In other words, if the consent of the victim is accepted, the constitutional qualification of the act is denied, and the constitutional qualification is recognized but the illegality is sculptured.

The study initiates a discussion on what kinds of legal interests victims of a violation can accept. The consent of the victim is recognized only if the right of the disposition is greater than the social necessity of disposing of the disadvantage. However, there are cases where the willingness of the individual to be consent may be a problem if there are individuals who are also victims of the national and social. There is no doubt that the legal interests of a victim's consent is personal interests, but it will focus on the case of conflict between personal and legal interests. In this case, we will confirm that the consent of the person concerned does not affect the establishment of the crime if there is overlap between personal and legal interests and national and social interests.

Next, the dispossessed right will review whether any legal interest is disposable, unless there are special restrictions. This is to examine whether it is possible to limit the freedom of disposition by law. In this regard, we will consider that it is very difficult to uniformly define the limits for the restriction of consent, and that judging this by an uncertain phrase of social equity is not reasonable in terms of legal stability. It also examines how to see the effect of consent when the consent of the dispossessed person is made for illegal purposes. This is to examine whether it is possible to limit the freedom of disposition by law. In this regard, we will consider that it is very difficult to uniformly define the limits for the restriction of consent, and that judging this by an uncertain phrase of social equity is not reasonable in terms of legal stability. If the consent of the dispossessed person is made for illegal purposes, how to see the effect of the consent shall also be examined. It also examines how to see the effect of consent when the consent of the dispossessed person is made for illegal purposes.

[Keywords] *Consent of the Victim, Understanding, The Right of Self-Determination, The Effect of Consent, Legallinterests.*

1. Introduction

The consent of the victim's is that the subject of the legal interest allows another person to infringe on his legal interests. This has the effect of engraving the illegality of an act

by consent in certain cases. The consent of these victims comes from the Roman adjective Ulpianus, a jurist and politician of the Roman era, who said that it is not illegal to coincide with the will of the victim (Nulla injuria

est, quae in volentem fiat)[1]. Although Korea has stipulated the consent of victims(The Consent here is meant to encompass consent to carve a piece of constitutional requirement and consent to engage in illegality) in Article 24 of the Criminal Code, controversy over the consent of these victims is still ongoing. In this study, we examine the items that have recently become a problem for the victim's consent.

2. What Are the Legal Interests That a Victim Can Dispose of?

2.1. Theoretical argument

The consent of the victim is recognized only if the right of the disposition is greater than the social necessity of disposing of the disadvantage. However, there are cases where the willingness of the individual to be consent may be a problem if there are individuals who are also victims of the national and social. If there is an individual's consent in the performance of this constituent requirement, can the consent have the same effect as the consent to the personal interests? In this way, the victim's consent sculpts the constitutional requirements because it is only possible to satisfy the type of crime if both kinds of legal interests are violated on the effect of consent in the event of the infringement of personal legal interests and national / social is raised first[2]. In addition, it is argued that even if personal legal interests and national and social legal interests are overlapped, the personal's right to dispose of them can not be recognized[3], so the consent of the dispossessed person can not rule out illegal[4]. Furthermore, it is argued that the important illegal part of the crime should be considered individually whether it infringes on personal interests or infringes on national and social interests[1].

2.2. Supreme court's position in Korea

The Supreme Court concluded, "The Supreme Court concluded that" an indecent act is a criminal offense, or a fine of disciplinary power, which is the main protection interest of the state, but it is a criminal offense that protects the interests of the personal from

unfair punishment or discipline. Even if it had been, it did not affect the establishment of false charge[5]."

2.3. Review

Even if the personal legal interests and the national and social legal interests are overlapped, the subject of the personal legal interest may abandon his/her legal interest within the overlapping limits, but since there is no right to dispose of the national and social legal interests, is not valid. The point of judging which one is the center of the illegality of the infringement benefit is that the standard of judgment is unclear, and there is a possibility that the legal stability is deteriorated. In cases where the direct victim of the violation becomes a specific individual in the interest of protection of national and social interests, it may be a crime related to explosives under Article 119 and an offense under Article 164. However, in this case, the main protection law is the safety and tranquility of social and public security, which is the national and social protection legal benefit, and the body and the right of life of the individual protected by it are the secondary protection law benefits. Therefore, the right of disposition of subsidiary protection interests does not have the right to dispose of the main protection interests. In other words, if the personal interests and the national and social interests are overlapped, it is reasonable that the individual's consent does not affect the establishment of the crime.

3. Limitations by Social Norms

Article 20 of the Criminal Law provides the concept of social norms while defining party acts as a general illegal sculpture reason. In addition, Article 21 and below require "Reasonable" requirements while stating the grounds for individual illegality carvings, but the requirements of Article 24 of the victim are not required to reasonable. Furthermore, Article 24 stipulates that "any act that damages the legal interest by consent of the person who can be disposed of shall not be punished unless there is a special provision in the Act". If so, there is a question of whether any

discretion can be disposed of, unless there are special restrictions.

3.1. Bodily injury due to consent

3.1.1. Theoretical argument

The human body can not be replaced with life, it is the basis of existence of the subject of the legal interest, and if the person is entrusted with the possibility of disposing of the body to the person, the foundation of the social existence can be shaken. And if such a right exists, the extent to which it can be discussed. In other words, even though the dispossessed person approves of his/her injury to his/her body, the consent of the consent is effective because such consent violates social norms, and furthermore, Should be reviewed.

In this regard, it is stipulated that the act by consent of the person who can dispose of criminal law is not punishable unless there is special regulation in law. Therefore, It is a legal interest to be able to do it, and it has the position that it is possible only for the offense of injury[6].

On the other hand, in the premise that the grounds for justification for the fraudulent sculpture are based on the social profit appraisal in terms of monism, the consent of the victim is also the individual fraudulent sculpture recognized by our criminal law. Therefore, the general principle of justification, In addition, the consent of the victim is not limited to the "social norms" requirement such as self-defense, but because the criminal law is limited by social norms, it is necessary to examine the limitations of social crimes there is admission[1]. Furthermore, there is an eclectic position that, in view of the constitutional view of the inviolability of human dignity, in the case of a high level of personal benefit such as freedom of physical activity in addition to life and body, restrictions on acceptance are necessary[7].

3.1.2. Supreme court's position in Korea

The Supreme Court concluded that the consent of a victim whose fraud is carved in accordance with Article 24 of the Criminal Law is not only the consent of the person who can dispose of it in the case of damaging the

personal legal interest but also the consent of the victim is contrary to the social norm of ethical and moral I do not know. In other words, consent should not be contrary to social norms in order to engrave the illegality[8].

3.1.3. Review

The view that the only consent for criminal offenses should be restricted by social norms seems to have been influenced by German criminal law. Since the German Criminal Law provides that, in the interpretation of our criminal law[9], the victim's consent of the offense of crime is to engrave the illegality, it is interpreted as requiring a social justice in the interpretation of the criminal law, even if the criminal offense against the offense is against the good customs[10]. However, unlike Germany(and the Japanese Criminal Law), our criminal law has a single provision of consent of the victim. Despite the facts in this Act, it is hard to accept the fact that demanding judgments of fairness only for criminal offense without any explanation is reduced by "interpretation" of the fraudulent sculpture and means expansion of actual criminality.

If so, is it possible for an individual to be dispossessed for the benefit of the body? Although the body is the personal interest that an individual can dominate exclusively, there is a two-faceted aspect that is the foundation on which the individual can survive and is an essential component of the social community. Therefore, the possibility of individual disposition to the body is acknowledged in terms of recognizing the individual's right to self-determination, but the right to dispose of the body also has to be restricted in other respects(ie, as part of the formation of a social community).

Of course, even now, the limitation of social consciousness of victim consent is accepted by interpretation, but a legislative solution is also required. There are three possible solutions to this legislative solution. i) to Article 24 of the Criminal law, how to add "norms" requirements as for other reasons of misconduct; and ii) how to add a norms level of individual injury as in Germany; iii) A measure is taken to establish separate conditions for commission and acceptance of an

offence of manslaughter, similar to murder by proxy or consent.

First, it was tried to revise the past criminal law to establish a provision of Article 24. If this is followed, it is balanced in terms of the reasons for the other fraudulent sculpture and its substantiality, and it is advantageous that the legal relationship related to the consent can be handled simply by legally stating the reasons for the restriction. However, this position poses the problem that the ambiguity of the 'fairness' itself is ambiguous and the anti-ethics of the act which is not related to the legal interest in criminal law is subject to legal judgment. The same criticism will be used to add a considerable requirement to the offense. In other words, it is a problem due to inherent limitation of its ownness or social ethics.

So, how about creating a separate set of requirements? It is argued that it is necessary to refer to the provisions on murder and to establish a similar requirement on the offense of injuring the legitimacy of the body. However, this is not a valid solution because of the difference in the types of acts of murder and injury. In other words, conscientious objection is a matter of 'whether or not to commit murder' with consent. There is a problem that murder is a matter of killing or salvaging a person, but there is a problem that can not be uniformly judged by how harming a person by harming a person and damaging a physiological function. Therefore, it would be difficult to make a distinction between common offense and consent offense reasonably, which would inevitably be judged by social considerations, and furthermore, criterion of social equality is unclear and the same criterion applied in the third case will be. Therefore, the method of iii) is also a solution that can not overcome the intrinsic limit of significance.

In this sense, it is very difficult to define the limits for the restriction of consent uniformly, and judging this by a very ambiguous measure of social norms may undermine the legal stability. Although it is still reasonable to limit the theory and case law to the present, it is considered to be an unjustified legislation to try to solve the legal problem

based on the criteria that can not exceed the current theory and case law. The limitation is "social norms", but it is reasonable to impose restrictions by interpretation.

3.2. Effect of consent for illegal purposes

3.2.1. Theoretical argument

If the consent of the dispossessed person is made for an illegal purpose, how will the effect of the consent be seen? Regarding this, the majority of KOREA's theories say that an act that violates social norms[11], or the method of undermining legal interests in the act of consent does not have any effect[12]. First, it should be judged by the purpose prayed by the act, that the act itself is contrary to the social norms, and that it is not a problem that the acceptance is contrary to the social norms. There is a view to take out for the purpose of exclusion, injury for insurance fraud purpose[7]. On the other hand, it should be noted that the act of violating the social provisions does not constitute consent for itself or for the purposes of consent, but that the act of consent is not an offence and that it is not against the intent of the act to which it is subject, and that it is against which it is partially immoral. In addition, there is also a claim that if the consent of the dispossessed person does not require the consent of the motive(or purpose), the illegality of the infringement act is sculpted by the consent, which is different from the dominant view of the KOREA. This would be a stance on whether the dispossessed author should place the criterion of discretion in the motivation for acceptance or the act itself. The reason why this position does not take into consideration the motives of acceptance is presumably because it is not easy to judge whether or not it is against purpose or motivation against social norms. Because it is often the case that an illegal motive or purpose is against social norms in order to judge whether the object to which the restriction by consent of society is applied is the motive of acceptance or the act of infringement for legitimate interest due to acceptance, It is because the acceptance due to the purpose is also highly likely to be against social norms.

3.2.2. Review

It is not easy to distinguish the violation of social norms and the purpose of acceptance in violation of the social norms and the violation of legal interest for the time of acceptance. The act of infringement on legal affairs due to consent shall be based on the consent of the dispossessed person, and the relationship between the two is inseparable, so it can not be different. Therefore, I think that it is a reasonable interpretation to the social norm which is the guiding principle of the illegality sculpture reason that if the violation of the social norms is not able to engrave the illegality in any of the legal interests and motivations of consent.

4. Conclusion

The following discussion was considered based on the premise that the consent of the victim differs from the understanding that the composition requirement is relevant. In order to do this, the court first examined whether the legal interest to be granted in relation to the requirements for the establishment of consent of the victim is limited to pure personal interests. Furthermore, the victim's consent was declared by the legislature in a manner that did not, unlike the individual judges who consider the cases to remain under the statute of limitations as a result of the review of the reasons for the considerable limitations.

5. References

5.1. Journal articles

- [10] Lee HD. Allowed Range of Injury by Consent of Victim. *Comparative Criminal Justice Studies*, (1), 187-201(2002).

5.2. Thesis degree

- [4] Hwang TJ. Die Einwilligungim Strafrecht. Yonsei University, Doctoral Thesis (2006).

5.3. Books

- [1] Park KM. Victims Consent and Justification Principle. Issues of Complicity and Criminal Law. Commemorative Committee on the

Anniversary of JungSungGeuns 60th Birthday (1997).

- [2] Kim IS & Seo BH. Criminal Law. Pakyoungsa (2014).
 [3] Kim SD. Criminal Law. SKKU Press (2017).
 [6] Lee JS & Jang YM & Kang DB. Criminal Law. Pakyoungsa (2017).
 [7] Jun JY. A Collection of Studies in Celebration of Prof. Cha Yongsuk. Bobmunsa (1994).
 [11] Jung SK & Park GM. Criminal Law. SKKU Press (2016).
 [12] Yim W. Criminal Law. Bobmunsa (2017).

5.4. Additional references

- [5] Supreme Court Decision 2005do2712 Delivered on 30 September (2005).
 [8] Supreme Court Decision 2008do9606 Delivered on 11 December (2008).
 [9] Strafgesetzbuch § 228 Einwilligung Wer Eine Körperverletzung mit Einwilligung der Verletzten Person Vornimmt, Handelt Nurdann Rechtswidrig, Wenn die Tat Trotz der Einwilligung gegen die Guten Sitten Verstößt.

Author

Park Woong-shin / Sungkyunkwan University Post-Doc.
 B.A. Sungkyunkwan University
 M.A. Sungkyunkwan University
 Ph.D. Sungkyunkwan University

Research field

- A Critical Review on Intelligence Sharing System in Act on Anti-Terrorism, Prosecution Service, 12 (2017).
- A Study on the Problems and Improvement of the Investigation in the Act on Anti-Terrorism, Sungkyunkwan Law Review, 29(2) (2017).

Major career

- 2015~present. Gachon University, Lecturer.
- 2017~present. Sungkyunkwan University, Post-Doc