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THE NEW KOREAN CRIMINAL CODE OF OCTOBER 3, 1953.  
AN ANALYSIS OF IDEOLOGIES EMBEDDED IN IT

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EDITOR.

I. A. BRIEF HISTORICAL SURVEY AND MAIN FEATURES OF THE CODE

Throughout her long history, dating back to the time of her mythical foundation in 2333 B.C., until 1905, Korea had no criminal code in a modern sense. Although the Hyung-Pub-Tai-Chun of 1905 was enacted with a view to a modernization of criminal law, this code, initiated by the Japanese, in fact combined two patterns: the older traditional laws based upon the Chinese Code and the "old Japanese Criminal Code of 1882,"<sup>1</sup> the latter being the work of Boissonade, a distinguished French jurist employed by the Japanese Government.<sup>2</sup> In 1913, three years after Korea's annexation by Japan, the Japanese Governor-General imposed upon the Korean people the Japanese Criminal Code of 1908. That code was patterned after the German Code of 1871. After their liberation from Japanese oppression, the Korean people, striving for spiritual as well as political independence, have strongly opposed the continued use of the Japanese code. The present code was thus improvised to meet the popular demand for repeal of Japanese legislation, notwithstanding warnings from academic circles against premature legislation. The new code—the first autonomous modern Korean Criminal Code—came into force on October 3, 1953, superseding the code imposed by Japan which had been in force in Korea for 40 years.

The present article purports to present the leading ideas of the new code of 1953, as they emerged under the impact of the several competing tendencies of the Chinese classical idea, of Anglo-American and of German criminal law.

The code consists of two parts. Part I contains the general provisions, Part II the specific provisions. The former deals with the general principles to be applied to the latter, and comprises four chapters. Chapter 1, discussing the scope of the application

<sup>1</sup> The so-called "old Japanese Code", patterned after the Code Napoleon of 1811, became effective on January 1, 1882. It was later superseded by the Code of 1908 which is now in force.

<sup>2</sup> It was Korea's tragedy that political factionalism and corruption during the latter part of the Lee Dynasty made it impossible to carry out a law reform in accordance with the patterns of Western civilization from within. The modernization of Korean law was initiated by Japan. In accordance with suggestions of Japanese advisers, the Korean Government abolished the feudal principle of joint responsibility in 1894 and enacted a new code, the so-called Hyun-Pub-Tai-Chun in 1905. Cf. McCUNE, *KOREA TODAY* (1950) 14-16. Also HULBERT, *PASSING OF KOREA* (1906) 367-368.

of the criminal code, extends the territorial principle of criminal jurisdiction to offenses against Korea's interests committed by aliens outside of her territory,<sup>3</sup> and thus raises problems belonging to the area of international criminal law.<sup>4</sup> Chapter 2, on Crimes, deals with general principles concerning elements of crime.<sup>5</sup> Chapter 3, regarding Punishment, is divided into several topics: (1) Death penalty; (2) Penal servitude; (3) Imprisonment; (4) Deprivation of qualifications; (5) Suspension of qualifications; (6) Fine; (7) Detention; (8) Minor fine; (9) Confiscation. Among these, deprivation and suspension of qualifications are newly created types of punishment. Another innovation has been the code's introduction of provisions concerning the extinction of punishment.<sup>6</sup> Finally, under Anglo-American influence, the code has received provisions for the suspension of a sentence.<sup>7</sup> Chapter 4 deals with the computation of terms of imprisonment and related matters.

Part II consists of 42 chapters and 286 articles. It divides the interests protected against the criminal into three kinds. The first among these are State interests (Chapters 1-11). Significantly, the code lists under this heading the crime of false accusation, conventionally deemed a crime against the person.<sup>8</sup> This classification implies that consent of the victim is not regarded as a defense against the charge of that crime.<sup>9</sup> New provisions listed under this heading concern crimes against the national flag (Chapter 3),<sup>10</sup> non-performance of a munitions contract in war-time (Article 103), non-fulfilment in war-time of a contract with the government for the supply of necessities of life (Article 117), organization of criminal groups (Article 114), impersonation of a public official (Article 118), abandonment of official duties (Article 122), premature publication by an official in charge of an investigation of facts of suspected crime (Article 126), obstruction of suffrage by a public official

<sup>3</sup> Art. 5 of the Korean Code provides:

This Code shall apply to aliens who commit, outside the territory of the Republic of Korea, any of the following crimes: 1. Crimes of Insurrection; 2. Crimes of Foreign Aggression; 3. Crimes concerning the National Flag; 4. Crimes concerning Currency; 4. Crimes concerning Valuable Securities, Postage and Revenue Stamps; 6. Crimes, specified in Articles 225 to 230 inclusive, concerning Documents; 7. Crimes, specified in Article 238, concerning Seals.

Art. 6 of the Korean Code provides:

This code shall apply to aliens who commit, outside the territory of the Republic of Korea, against the Republic of Korea or her nationals, crimes other than those specified in the preceding Article, except where they do not constitute crimes at the place of commission or where their prosecution or execution of the punishment imposed has been there remitted.

<sup>4</sup> See W. BERGE, *CRIMINAL JURISDICTION AND THE TERRITORIAL PRINCIPLE*. 30 MICH. L. REV. 238 (1932).

<sup>5</sup> See *infra*, Section 11.

<sup>6</sup> Article 81, 82, Korean Code.

<sup>7</sup> Article 59 to 61, Korean Code.

<sup>8</sup> The French Penal Code deals with the crime of false accusation (Art. 373) within the framework of Title II, Major and Minor Crimes against Individuals, Chapter I, Major and Minor Crimes against Persons, §2 of Section VII, under the heading, "*Calomnies, injures, révélation de secrets.*" But the Korean Code followed the German classification of that crime. See Section 164, German Penal Code.

<sup>9</sup> See Japanese Supreme Court Law Reports, decision of December 20, 1911, 18 Kei-Ji-Han-Ketsu-Shu 1566. Japanese decisions are regarded in Korea not as binding but as persuasive authority.

<sup>10</sup> Articles 105, 106, Korean Code.

(Article 128), obstruction by a police officer of the public prosecutor's function of protecting human rights (Article 139),<sup>11</sup> and the crime of contempt of court, received from the Anglo-American law.<sup>12</sup> The second kind of protected interests are social interests (Chapters 12-23). In the group of crimes falling under this heading there are no innovations, except amendment of the rule on adultery and minor changes in punishment.<sup>13</sup> The third kind of interests protected by the criminal code are interests of individuals; they are dealt with in provisions on crimes against persons (Chapters 24-42). In this group the following new provisions are worth noting: on pandering (Art. 242); infanticide (Art. 251); abandoning a baby (Art. 272); cruelty to a person who is under the accused's supervision and to lineal ascendants (Art. 273); delivery of a child under the accused's supervision for employment at hard labor (Art. 274); sexual intercourse under pretense of marriage (Art. 304); unjustifiable acquisition of profit by taking advantage of another person's state of necessity (Art. 349); receiving stolen property by gross negligence or negligence in the conduct of a trade (Art. 364); trespass upon a boundary (Art. 370).

While the Korean Code has been influenced mainly by American and German legal ideas, certain notions of that code are traceable to Chinese cultural patterns, which were introduced into Korea particularly during the Lee Dynasty (1392 A.D.-1910 A.D.). Before discussing the American and German roots of Korean law, it is necessary to note briefly its Chinese elements. Chinese classical ideas, expressed in the teachings of Confucius and Mencius, may be summarized in two propositions. The first is that human beings are born good, so that an ideal society is one governed by an irreducible minimum of legal provisions.<sup>14</sup> The second is recognition of a division of society into the common man and the noble man, leading to the rule of the former by the latter, and the consequent view that ordinary people "may be made to follow a path of action, but . . . may not be made to understand it."<sup>15</sup> These two elements resulted in a separation of the people from the law and establishment of a hierarchy of the people in accordance with their relative importance. It is these elements which explain the failure in Korea of the institution of trial by jury, introduced by Japanese law, the fact that the function of law as a means of social control has been more limited in Korea than in the Western countries,<sup>16</sup> and the special status accorded in the Korean Code to government officials and to public property.<sup>17</sup> Thus, where a government official commits a crime, his punishment is more severe than that imposed

<sup>11</sup> Articles 103, 114, 117, 118, 122, 126, 128, 138, 139, Korean Code.

<sup>12</sup> The provisions concerning that crime bear all the marks of their Anglo-American origin.

<sup>13</sup> Under the old Code, adultery was a crime only against the husband. The present Code (Art. 241) speaks of "a married person who commits adultery" instead of "a married woman who commits adultery" (former Code, Art. 183).

<sup>14</sup> The Book of the (former) Han (Dynasty), the Annals of (the Emperor) Kao-(Tsu), Ballmore. Waverly Press (1938), states at 58:

I am merely going to agree with you, Fathers and Elders, upon laws in three articles, he who kills anyone will be put to death; he who wounds anyone or robs will be punished according to his offence.

<sup>15</sup> Confucian Analects Book VIII, Chapter 9 (Chinese Classics I, at 211).

<sup>16</sup> This is the reason for the small number of lawyers in relation to the total population in Korea (about 600 lawyers in a population of 23,000,000).

<sup>17</sup> See Articles 136 and 165, Korean Code.

upon ordinary men.<sup>18</sup> The Korean Code has incorporated the basic Confucian moral conception of filial duty. Where a man kills, injures or harms his or his spouse's lineal ascendant, the punishment is aggravated.<sup>19</sup> An individual may not lodge a complaint against his or his spouse's lineal ascendant.<sup>20</sup>

In addition, there may be found in the new code certain specifically Korean moral notions. Thus, the element of evil "motive" renders an offense an aggravated crime. Punishment for simple perjury is penal servitude for not more than five years, whereas that for malicious perjury (for the purpose of causing injury to a person accused of crime) is aggravated up to ten years (Art. 152). A similar gradation of punishment applies to the crimes of suppression of evidence and of harboring (Art. 155).<sup>21</sup> Moral censure of falsehood is expressed in the differential treatment of defamation depending on whether it does or does not accord with truth. Subject to certain exceptions, a public allegation of defamatory—even though true—facts is punishable by penal servitude or imprisonment for not more than two years or fine not exceeding fifteen hundred Hwan; in contrast, a mere public allegation of false facts is punished by penal servitude or imprisonment for not more than five years or suspension of qualifications for not more than ten years (Articles 307, 310).<sup>22</sup>

## II. THE ANGLO-AMERICAN AND THE GERMAN POINTS OF VIEW

Since the principal rules of the Korean Code are derived partly from American and partly from German legal ideas, their exposition requires a preliminary presentation and critical comparison of the principles underlying the two systems, which differ in philosophical outlook and political ideology.<sup>23</sup>

<sup>18</sup> See Art. 135, Korean Code, which reads thus:

A public official who, taking advantage of his official authority, commits a crime other than those described in this Chapter, shall be punished by increasing by one half the penalty specified for the crime committed, except in those cases where the punishment was specially prescribed in view of (the offender's) status as a public official.

It should be noted that abuse of authority is punishable separately (art. 123).

<sup>19</sup> Where a man kills, injures, injures causing the death of, uses violence against, cruelly treats, makes a false arrest of, makes a false arrest causing the death of, or intimidates, his or his spouse's lineal ascendant, the punishment is aggravated. See Articles 250 II, 257 II, 258 III, 259 II, 260 II, 273 II, 276 II, 277 II, 283 II, Korean Code.

<sup>20</sup> Art. 224, Code of Criminal Procedure. The special provision of the German Code for parricide has been repealed in 1941 (Sect. 215).

<sup>21</sup> Compare Sections 257, 258, German Penal Code.

<sup>22</sup> It should be noted that certain provisions of Korean law are due to the uncritical continuation of policies introduced into Korea by the Japanese. Chapter 33 of the Korean Code on Crimes against Reputation (Articles 307 to 312) belongs to this category. The defense of truth to a charge of defamation (Art. 310) is not available where the defamation has been committed in print or by radio (Art. 309). This defense is essential to a "free man living in a free society" (LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM, 1950, at 49), lest the country become a "garrison-police state."

<sup>23</sup> Judging in terms of historical development, one might say that the approach of the Anglo-American law is realistic or inductive whereas that of the German law is idealistic or deductive. See ROSCOE POUND, SPIRIT OF THE COMMON LAW (1921), 3, 156, 166 *et seq.*; THE FUTURE OF AMERICAN LAW, published by the School of Canon Law, the Catholic University of America (1946) at 15.

## 1. MENS REA

Both the Anglo-American and the German law have accepted the Roman law maxim, *Actus non facit reum nisi mens sit rea*. However, the principle expressed in this maxim developed differently in the two systems. The German law draws a sharp distinction between *Vorsatz* (*dolus*, intent) and *Fahrlässigkeit* (*culpa*, negligence). This distinction leaves no room for the intermediate concept of "recklessness" as conceived by the Anglo-American law. The difference in approach may be best illustrated by comparing two hypothetical situations viewed in the light of the two systems. Under German law, a farmer who, in a state of high emotional tension, after a quarrel with his wife, smokes in his barn filled with hay, thereby causing the burning of the barn, will not be guilty of the crime of arson, if, although aware of the danger, he hopes that the fire will not occur. By contrast, a servant who, in a similar emotional state, after a quarrel with his master, causes the burning of the latter's house by smoking, will be adjudged guilty of arson, if, while not desiring the destruction of the house, accepts it in case it should occur. The theory underlying the distinctive treatment of the two situations under German law is that there is a difference in principle and not merely in degree between the state of mind of the farmer and that of the servant in the described cases.<sup>24</sup> The former is merely guilty of advertent negligence (*bewusste Fahrlässigkeit*), whereas the latter is guilty of *dolus eventualis*, which is an instance of intent.<sup>25</sup> Under Anglo-American law both situations would fall within the category of "recklessness."<sup>26, 27</sup> Similarly, homicide under German law is sharply divided into two categories: intentional killing (comprising *Mord*<sup>28</sup> and *Totschlag*, Sections 211 and 212 of the Penal Code) and negligent

<sup>24</sup> The stated hypothetical cases are used as examples in MAX ERNST MAYER, *DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS* (Sec. ed. 1923) at 264.

<sup>25</sup> *Dolus eventualis* in German law is an instance of intent that may be present in any type of intentional crime. In the cited example, however, there is in German law an additional element which is absent in the common law concept; in the latter, a man cannot commit arson by burning his own property (except in cases of burning for the purpose of collecting insurance, made criminal by special statutes e.g., Mass. Gen. Laws, Chapt. 266, Sect. 10), whereas in the former arson can be committed in this manner; for the purpose of punishing arson in German law is not protection of "the habitation of individuals" but protection against public danger. And compare *infra*, note 26.

<sup>26</sup> The German Criminal Code distinguishes between aggravated arson (Sect. 306, *schwere Brandstiftung*) and simple arson (Sect. 308, *einfache Brandstiftung*). The former applies where the object consists of a building or other structure which is used as human habitation, whereas the latter applies where the object consists of a building or thing which is not used as human habitation. In the latter case (Sect. 308), the object is usually not the property of the accused. Setting fire to one's own property is arson only where the fire is likely to spread to one of the premises enumerated in Section 306, subsections 1 and 3, or one of the things above mentioned which belong to another person. The case in the text falls within the latter part of Section 308.

<sup>27</sup> G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* (1953) at 49. See also J. HALL, *General Principles of Criminal Law* (1947) at 217. According to common law principles, arson cannot be committed by mere recklessness. *Rex v. Faulkner* [1876] 11 Ir. C. L. 8, 13 Cox 550. But see Model Penal Code, Tentative Draft No. 4, Sect. 2.02 (3), pp. 14, 127, 128.

<sup>28</sup> Philologically, the German word "*Mord*" is derived from "*Mortil*" (Latin *murdrum*, French *murdre*) which meant secret homicide. See Pollock & Maitland, *History of English Law*, vol. II, at 484. However, the Anglo-American conception of manslaughter does not fall within the category of either the German *Totschlag* (Sect. 212), which linguistically corresponds to "manslaughter," or to the German *fahrlässig Tötung* (Sect. 222), meaning "negligent homicide."

killing (*fahrlässige Tötung*, Section 222, *id.*). There is no concept corresponding squarely to the general notion of manslaughter, as conceived by the Anglo-American law.

As between these divergent points of view, the Korean legislator chose to follow the German pattern (Arts. 13, 14, 250, 267, Korean Code).

#### a) CRIME OF NEGLIGENCE

In German law the principle prevails that where a statute declares conduct criminal without specifying the required state of mind, it is assumed that intent is necessary, whereas negligent conduct will constitute a crime only in those cases in which the statute specifically proscribes negligence.<sup>28a</sup> Article 14 of the Korean Code, which basically adopted the German principle, provides that "Conduct in ignorance, due to neglect of normal attention, of facts which are constitutive elements of a crime shall be punishable only where prescribed by law." The code introduces five crimes of negligence: 1. Setting fire by negligence (Arts. 170, 171); 2. inundation by negligence (Art. 181); 3. obstruction of traffic by negligence (Art. 189); 4. bodily injury and homicide by negligence (Arts. 266, 267, 268); 5. crimes concerning stolen property committed by negligence (Art. 364). As may be seen, the crimes of negligence in Korea are less numerous than in Germany,<sup>29</sup> but more numerous than in Anglo-American law, in which the crime of negligence is a very exceptional phenomenon.<sup>30</sup> The Korean Code rather resembles the Anglo-American pattern in accepting certain acts as criminal only if committed by gross negligence, in contrast to simple negligence. Thus, the crimes of receiving stolen property are punishable only when committed by gross negligence (or negligence in the conduct of a trade) (Art. 364).<sup>31</sup> In cases of setting fire, obstructing traffic, bodily injury and homicide, due to gross negligence, the punishment is aggravated.

#### b) MISTAKE OF FACT AND MISTAKE OF LAW

The traditional position, prevailing both in the Anglo-American legal system and in the German law, as interpreted by the Reichsgericht, may be best expressed in terms of the Latin maxim, *Ignorantia facti excusat, ignorantia legis nominem excusat*.<sup>32</sup> The rule that it is no defense to a criminal charge that the accused did not know the law which he has violated, has been variously justified. Justice Holmes advanced as its basis the policy "to make men know and obey the law."<sup>33</sup> Austin pointed to the practical difficulty of proving ignorance of law.<sup>34</sup> Judicially, it has been said in support of

<sup>28a</sup> But see Model Penal Code, Tentative Draft No. 4, Sect. 2.02, pp. 12 *seq.*; 123 *seq.*

<sup>29</sup> The German Code punishes negligence in supervising a minor (Sect. 139b), negligent perjury (Sect. 163), committing an offense while drunk (Sect. 330a). The Korean Code contains no such provisions.

<sup>30</sup> See J. HALL, *op. cit.*, at 233. Professor Hall insists that mere negligence should not be punishable.

<sup>31</sup> Articles 364, 362, Korean Code.

<sup>32</sup> The Anglo-American law still adheres to this position. See Kenny, *Outline of the Criminal Law*, 16th ed., Sect. 39 (1952). See also Model Penal Code, Section 2.04 and Section 205.1, Tentative Draft No. 4, at 17, and Tentative Draft No. 1, at 51 *et seq.*

<sup>33</sup> HOLMES, *COMMON LAW* (1881) at 48, 49, 125.

<sup>34</sup> AUSTIN, *LECTURES ON JURISPRUDENCE* (1911), vol. I, 481 *et seq.*

the doctrine that the law should be paramount and that its paramount validity requires independence of subjective belief in its existence.<sup>35</sup>

While the German Penal Code deals only with mistake of fact (Sect. 59) and does not mention mistake of law, legal scholars have for many years advocated adoption of mistake of law as a defense. Eventually, without a formal amendment of the code, the defense was introduced into the law by way of judicial interpretation. The *Bundesgerichtshof*, in a historical decision rendered on March 18, 1952,<sup>36</sup> held that knowledge of the wrongfulness of the act is part of criminal "guilt," so that where, without fault on his part, the accused did not know the law which he violated, he is fully excused, whereas in case his mistake was based on fault, the court may in its discretion reduce the penalty. The rule that mistake of law constitutes a defense has since become a settled principle of German law, and the controversy now centers solely upon the question whether the theory of "guilt" accepted by the *Bundesgerichtshof* should be replaced by the theory of "intent," according to which mistake of law is assimilated to mistake of fact.<sup>37</sup> In the latter view, advanced by *Mezger*,<sup>38</sup> unawareness that the act is wrongful eliminates intent, whereas a negligent mistake of law renders the actor punishable for crime by negligence if negligent commission constitutes a crime.

Under the Japanese occupation, the traditional view that a mistake of law is not a defense was applied strictly. Even advice of counsel that the act was lawful afforded no basis for an excuse.<sup>39</sup> The new Korean Code adopted the excuse of mistake of law, however, not as at present formulated in German law, but rather as suggested by M. E. Mayer.<sup>40</sup> His view was that the possibility of knowledge of legal duty is a constituent element of *mens rea*. In addition, the Korean Code formulated the test of the excuse of error of law in objective terms. Article 16 of the Korean Code provides:

Where a person commits a crime in the belief that his conduct does not constitute a crime under existing law, he shall not be punishable provided that his mistake is based on reasonable grounds (adequate cause).

Under this provision, an unreasonable mistake of law affords no excuse whatever, except in case of extenuating circumstances (Art. 53).

<sup>35</sup> *People v. McCalla*, 63 Cal. App. 783, 220 P. 436 (1923).

<sup>36</sup> Decision of the Great Senate for Criminal Matters of March 18, 1952 (2 B.G.H. St. 194). The decision is hailed as one of the great events of legal history.

<sup>37</sup> See *Probleme der Strafrechtsreform*, Deliberations of the Gross Strafrechtskommission, 4th sessions, Febr. 1-4, 1955, Annex No. 76 to the *Bundesanzeiger* of April 21, 1955.

<sup>38</sup> MEZGER, *Wandlungen der strafrechtlichen Tatbestandslehre*, NEUE JURISTISCHE WOCHENSCHRIFT 1953, 2.

<sup>39</sup> Decision of the Japanese Supreme Court of Sept. 28, 1934, 13 Han-Rei-Shu 1230.

<sup>40</sup> M. E. MAYER, *op. cit.*, at 322. The view of Mayer that punishment is predicated upon possibility rather than upon actuality of knowing the legal duty (*Möglichkeit der Pflichterkenntnis*) is again gaining ground in Germany. WELZEL, *DAS DEUTSCHE STRAFRECHT* (4th ed., 1954, 121 *et seq.*) and MAURACH, *DEUTSCHES STRAFRECHT* (4th ed., 1954, at 410) have recently abandoned their previous view that guilt requires an actual consciousness of illegality and adopted the position that a "possibility of knowledge" that an act is wrongful should be sufficient.



C) FELONY-MURDER, MISDEMEANOR-MANSLAUGHTER DOCTRINE—VERSARI IN RE ILLICITA

The felony-murder and misdemeanor-manslaughter doctrine of the Anglo-American law and the corresponding doctrine of *versari in re illicita* of the continental European law constitute the main exception to the requirement of *mens rea*. Their rationale in a modern legal system being rather dubious, it may be instructive to speculate on their historical origin and justification.

The Biblical theory of criminal responsibility proceeds from the idea of guilt (*mens rea*).<sup>41</sup> However, popular belief in the Middle Ages held the very appearance of guilt as incompatible with performance of Church functions.<sup>42</sup> Under its influence, there developed the notion of *irregularitas ex defectu famae* or disqualification due to the publicity (or the scandal) produced by the apparent commission of crime even though none had been in fact committed.<sup>43</sup> This notion, in turn, affected the medieval thinking on criminal responsibility. Eventually, a compromise was reached in the canonical doctrine of criminal law between this notion and the common tenet of Christian morality and of Roman law that the exclusive determinant of guilt is the mental attitude of the actor. This compromise was thus formulated by an eminent scholar:<sup>44</sup>

Irregularity attaches to every *guilty* homicide. However, guilt consists not only in *dolus* or *culpa* of the Roman law; rather, a homicide is also deemed to be due to guilt where the actor, about to perform an illegal act, accidentally kills another. *Versanti in re illicita (operam danti rei illicitae) imputantur omnia quae sequuntur ex delicto.*

According to Loeffler, this doctrine was first formulated by Bernardus Papiensis between 1191 and 1198.<sup>45</sup> It is highly probable that Bracton was acquainted with this canonical view,<sup>46</sup> and that his famous distinction between acts of killing depending on "whether a person is employed upon a lawful or unlawful work"<sup>47</sup> is traceable to its influence.<sup>48</sup> It is hardly accidental that the principle of *versari in re illicita* is in both the Canon and the Anglo-American law limited to the law of homicide.<sup>49</sup>

<sup>41</sup> An exemption is granted to the person who commits an *actus reus* without intent. Deuter. 19, 2-5. The Anglo-Saxon law used the device of royal pardon to adjust the principle of absolute responsibility to the requirement of moral guilt. Sayre, *Mens Rea*, 45 HARV. L. REV. 980 (1932).

<sup>42</sup> LOEFFLER, *DIE SCHULDFORMEN DES STRAFRECHTS* (1895) 138, 139. The following historical account is based upon this study.

<sup>43</sup> This explains the great significance attributed to "notoriety" of crime in the canon law. LOEFFLER, *op. cit.*, note 9, at 139.

<sup>44</sup> LOEFFLER, *op. cit.*, 139.

<sup>45</sup> LOEFFLER, *op. cit.*, 139, 140.

<sup>46</sup> On the influence of Roman and canonical doctrine on Bracton see POLLOCK and MAITLAND, *op. cit.*, 475, 476; also STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, vol. III (1882) 32 *et seq.*

<sup>47</sup> BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE*, Twiss ed., vol. II (1879) 277.

<sup>48</sup> Of course, it has been argued that the felony-murder doctrine had its inception when all felonies were punished capitally, so that it was a matter of indifference to an offender as to which he was convicted of committing. See WHARTON, *THE LAW OF HOMICIDE*, 3rd ed. (1907) 114, 147.

<sup>49</sup> As to the Canon law see LOEFFLER, *op. cit.*, 142. The scope of the doctrine has been restricted in course of time. Originally it was understood that "if A meaning to steal a deer in the park of B, shooteth at the deer and by the glance of the arrow killed a boy that is hidden in a bush, this is

It is generally accepted in continental European legal theory that the "crimes determined by result" (*Erfolgsdelikte*) and the "crimes aggravated by the result" (*erfolgsqualifizierte Delikte*) originated in the Canon law doctrine of *versari in re illicita*. Since in modern law all crimes are determined by some result, there is no reason to dwell upon the former concept of crime.<sup>50</sup> Only the latter concept presents a serious issue. In German law, in contrast to the Canon law and the Anglo-American law, the notion of crime aggravated by a result whose gravity is not traceable to the guilt of the actor was extended to offenses other than homicide; namely, cases involving bodily injury. However, vigorous criticism by German commentators of the idea underlying all crimes of *versari in re illicita* led to a significant amendment (August 25, 1953) of the German Penal Code which reads thus:

Where the law attaches a higher penalty to a special consequence of the act, such higher penalty shall not be imposed upon the actor unless he caused the consequence at least negligently.<sup>51</sup>

Under the old Korean law—the Japanese law—the idea of "crimes aggravated by the result" extended beyond its scope within the framework of the former German law. It comprised not only cases involving bodily injury, but also cases of unlawful conduct resulting in the spreading of fire to structures.<sup>52</sup> Furthermore, the courts held that where A instigates B to inflict a bodily injury upon C and that injury accidentally results in C's death, A is guilty of instigating the crime of aggravated bodily injury.<sup>53</sup> The rationale of these holdings was that the idea of crime aggravated by the result applies to the instigator as well as to the principal actor, so long as there is approximate causal relationship between the latter's conduct and the aggravated result. Actually, these rules constituted an exception from the principle of *mens rea*.

The new Korean Code preserved the broad view of crime aggravated by the result in its Japanese version. At the same time, however, it adopted the idea of the German amendment of August 25, 1953. Article 15 II of the Korean Code reads as follows:

murder, for the act was unlawful, although A had no intent to hurt the boy and know not of him." Coke, 3rd Institute, at 56. Later, the "unlawful act" required as a basis of felony-murder was only a felony. On the other hand, the same doctrine was applied to the area of misdemeanor with a fatal result, and thus the misdemeanor-manslaughter doctrine came into being. Where a man slapped the face of another who turned out to be a hemophiliac and who died in consequence of the assault he was held guilty of manslaughter, although he did not know that the deceased was a hemophiliac. *State v. Frazier*, 339 Mo. 966, 98 S.W. 2d 707 (1936).

<sup>50</sup> The Nazis tried, but failed, to substitute for the "crimes determined by result" "crimes based upon intent." (On this see *infra*, Section II, 2, b).

<sup>51</sup> This amendment added Section 56 of the Penal Code (text of September 1, 1953, B.G.Bl. pt. I, at 1083).

<sup>52</sup> Section 111 of the Japanese Code, which reads as follows:

When, as a result of the commission of the crime described in paragraph 1 of Article 109 (setting fire to structures other than dwellings owned by the offender) or paragraph 2 of the preceding Article (setting fire to object other than structures owned by the offender), a fire spreads to and burns any of the objects mentioned in Article 108 (setting fire to dwellings) or paragraph 1 of Article 109 (setting fire to structures other than dwellings), imprisonment at forced labor for not more than three years shall be imposed.

<sup>53</sup> See decision of the Japanese Supreme Court of October 22, 1931, 470 Kei-Ji-Han-Rei-Shu 10.

Where a more severe punishment is imposed upon a crime because of certain results, such higher punishment shall not be applied if these results were not foreseeable.

It follows that in the above described case, A would now be responsible for instigating an aggravated bodily injury only if, at the time when he instigated B to inflict a bodily injury upon C, the latter's death was foreseeable.

## 2. ACTUS REUS

### a) ACTUS REUS BY OMISSION

Criminal conduct normally consists of a positive act. Occasionally, however, it consists of an omission, that is, of a failure to act where there is a legal duty to do so. The extent to which positive duties to act should be imposed by law is the subject of vigorous ideological controversy. The political philosophy of "laissez-faire" which generally advocates a minimum of restraint of an individual's freedom of action places an increased emphasis upon his freedom not to act if he so chooses. A socially oriented political philosophy, on the other hand, tends to impose upon the individual a maximum of social responsibility for the welfare of others: this implies broad duties of positive action.<sup>54</sup> The varieties of views lying between the one and the other extreme are exemplified by the manner in which the moral idea of the "Good Samaritan" is reflected in the Anglo-American, the French and the German law. In the United States, the duty to assist another is primarily conceived as a civil law concept.<sup>55</sup> Nor does failure to assist necessarily constitute a tort.<sup>56</sup> However, assistance in certain cases has been considered conduct which may properly be expected and, therefore, will not be deemed an unnecessary assumption of risk which would afford a defense to a tort action.<sup>57</sup> Certainly, violation of the moral duty of brotherly assistance does not carry a criminal sanction.<sup>58</sup> The French Penal Code (Art. 63 (2)) imposes a punishment of three months to five years and a fine of 24,000 to 1,000,000 francs (or either punishment) upon a person who "voluntarily abstains from rendering assistance to a person in peril, if he could render it, either by personal action or by summoning help, without risk to himself or others."<sup>59</sup> In Germany, the Nazis introduced a broad duty of assistance in accordance with their idea of the total social integration of the individual. Failure of an individual to assist "in case of an accident or common danger or emergency, although, according to the people's sound sentiment,

<sup>54</sup> An ideal "Free Society" should be neither purely individualistic nor exclusively socially oriented. Discussion of the features characterizing such society exceeds the scope of the present paper.

<sup>55</sup> HOLMES, *op. cit.*, at 278.

<sup>56</sup> E. CAHN, *THE MORAL DECISION* (1955) 190, 191.

<sup>57</sup> CAHN, *op. cit.*, 183-184.

<sup>58</sup> See "*The Failure to rescue; A comparative study*," Note, 52 COL. L. REV. 631 (1952).

<sup>59</sup> Art. 63(2), enacted by Ordinance No. 45-1391 of June 25, 1945, concerning the citizens' assistance in the administration of justice and in public security (JOURNAL OFFICIEL, June 26, 1945, p. 3862), as amended by Law No. 54-411 of April 13, 1954, regarding the punishment of felonies and misdemeanors committed against children (JOURNAL OFFICIEL, April 14, 1954, p. 3580).

The new Yugoslav Penal Code of 1951 (Art. 147) imposes imprisonment for not more than one year upon anyone who "fails to offer help to a person exposed to immediate danger of life, although he was able to do so without any danger to himself or any other person." See DONNELLY, *The New Yugoslav Criminal Code*, 61 YALE L. J. 510 (1952).

he has a duty to render assistance," was rendered punishable by imprisonment up to two years or by a fine.<sup>60</sup> After World War II, this rule (Sect. 330c) was alleged to have been invalidated by the provisions of the Control Council Proclamation No. 3, abolishing legislation which reflected specific Nazi ideologies. The broadness of the concept of "sound popular sentiment" used as a standard of duty, lending itself to arbitrary use of discretion, was, of course, a typical Nazi feature. An amendment of the provision finally did away with its objectionable parts, at the same time preserving the basic idea of duty to render assistance sanctioned by criminal law. The pertinent section now reads:<sup>61</sup>

Whoever fails to render assistance in case of accidents or common danger or emergency, even though such assistance was required and he could be expected to render it under the circumstances, particularly without considerable danger to himself and without violating other important duties, shall be punished by imprisonment up to one year or by fine.

The courts have since interpreted the section broadly by extending the term "accident" to events not clearly within its linguistic scope.<sup>62</sup>

The Korean Code introduced a number of positive duties of action: nonperformance of a munition contract in war-time, of a contract with the government for the supply of necessities of life, refusal to leave another's habitation,<sup>63</sup> etc., were placed under criminal sanction. However, the Code did not adopt a "Good Samaritan law". Nor does it punish, except to a very limited extent, failure to assist the police, disobedience to lawful orders, or misprision.<sup>64</sup>

The above described instances of crime by omission consisted in failure to act in violation of a specific statutory duty. Such omissions are referred to in German doctrine as "crimes by genuine omission" (*echtes Unterlassungsdelikt*).<sup>65</sup> They correspond in Anglo-American law to the category of crime by "non-feasance".<sup>66</sup> With these may be contrasted the so-called "crimes by pseudo-omission" (*unechtes Unterlassungsdelikt*), or "omission in the narrower sense" within the meaning of Anglo-American law. The latter consist in failing to avert a result, where such failure is deemed equivalent to bringing about such result. Duty to act in these cases is not specifically placed under criminal sanction. But most crimes which are normally com-

<sup>60</sup> Section 9 of Law of June 28, 1935 (R.G.Bl. pt. I at 833).

<sup>61</sup> Amendment of August 3, 1953 (B.G.Bl. pt. I at 735).

<sup>62</sup> On this see H. SILVING, *Euthanasia; A Study in Comparative Criminal Law*, 103 U. OF PA. L. REV. 350, note 94 at 373 (1954). Also compare with regard to Art. 63 of the French Penal Code the interesting decision of the Cour de Cassation (Ch. crim.) of June 23, 1955, reported in *Recueils Dalloz et Sirey*, 1955, Jurisprudence 575.

<sup>63</sup> Articles 103, 117, 319 II, Korean Code.

<sup>64</sup> The Korean Code punishes some instance of non-feasance as mere violations. See A.L.I. Model Penal Code, Sect. 1.04 (5) for definition of the term "violation."

<sup>65</sup> Anglo-American scholars do not distinguish omission from non-feasance. See J. HALL, *op. cit.*, at 250; compare G. WILLIAMS, *op. cit.*, at 4, stating: "The legal duty to act . . . must be positively laid down by the law."

<sup>66</sup> Kirchheimer's distinction of "direct omissions" and "indirect omissions" (see *Criminal Omissions*, 55 HARV. L. REV. 615, 1942) is rather vague. The distinction suggested by German scholars of "genuine omission" and "pseudo-omission" is commendable. "Pseudo-omission" is conceived as a positive act, although, in fact, it consists in non-action. The distinction might be best expressed in English by use of the term "omission," as contrasted with "non-feasance."

mitted by a positive act can be also committed by failure to act. For example, a mother can murder her infant child by failing to rescue it when it is about to drown, as well as by a positive act of drowning it.<sup>67</sup> In instances of this nature, however, there must be present, in addition to the mere fact that the proscribed result would not have occurred but for the failure to act (causation), a duty to act. Here, in contrast to cases of crimes by genuine omission, the scope of duty whose violation may render a defendant responsible for a criminal result is not circumscribed by criminal law. It may accordingly vary in different legal systems and at different times. There is a general tendency toward increase of the range of such positive duties. Thus, in the early German law the crime of pseudo-omission was held to lie only where a duty to act was imposed by statute, customary law or contract, or where the defendant had himself created certain factual circumstances which called for further action. It was held not to lie where the duty was based merely upon principles of good faith (*gute Sitten*). On February 13, 1936, however, the Reichsgericht<sup>68</sup> overruled these holdings and decided that where defendants had passed bills of exchange without disclosing the fact, known to them, that the transactions underlying the drawing of these bills were sham and that the acceptors were insolvent, they were guilty of criminal fraud in failing to observe the principles of good faith and fair dealings between contracting parties.<sup>69</sup> In a similar situation in English law, failure to disclose pertinent fact was held not to constitute a crime,<sup>70</sup> "because it is only an inconvenience and injury to a private person." In a Massachusetts case,<sup>71</sup> however, the court upheld a direction to the jury that if a fire had accidentally started on the defendant's premises and he intentionally refrained from extinguishing it in order that the premises might be destroyed and that he might recover the insurance, he was guilty of arson,<sup>72</sup> just as much as if he had started the fire.

The Korean law, under the Japanese occupation, developed in a similar direction. Where defendant sold his property without disclosing the fact that it was mortgaged and took the full price from the purchaser, the Supreme Court of Japan held his silence to constitute criminal fraud.<sup>73</sup> Finally, the new Korean Code introduced an express provision dealing with crime by pseudo-omission:

A person who, having a duty to prevent danger from arising or, having brought about jeopardy by his own act, does not prevent danger from arising shall be punished for the results of such danger. (Art. 18)

This provision consists of two parts. The first merely states in general terms that a person violating his duty to prevent danger is responsible for its results. It does not state upon what conditions the duty to prevent danger depends. This is left to judicial

<sup>67</sup> MAURACH, *DEUTSCHES STRAFRECHT (Allgemeiner Teil)* (1954) 231-247.

<sup>68</sup> Decision of Febr. 13, 1936, R.G.St. 70, 151 (II Strafsenat. Urt. v. 13 Febr. 1936, g. v. W. u. a.).

<sup>69</sup> Sect. 263, German Civil Code.

<sup>70</sup> Court of King's Bench (1761) 2 Burr. 1125, 97 Engl. Rep. 746.

<sup>71</sup> *Commonwealth v. Cali*, 247 Mass. 20, 141 N.E. 510 (1923).

<sup>72</sup> Burning one's own house for the purpose of collecting insurance, not a crime at Common Law, has been made a crime by special statute in Massachusetts. MASS. GEN. LAWS, Chap. 266, Sect. 10.

<sup>73</sup> 8 Han-Rei-Shu 107, March 7, 1929.

interpretation. The courts have formulated three grounds upon which the duty to prevent danger is based: statute or customary law, contract, and principles of good faith and public policy. It is believed that the third mentioned source should be invoked only in extreme cases, such as the Massachusetts case, in which the defendant's omission can be interpreted as *actus reus*, but not in other cases such as the Japanese case, which reflects a rather far-reaching socially oriented view of criminal responsibility.<sup>74</sup> The policy of the second part of the provision is very dubious. That part suggests that the mere creation of jeopardy renders a defendant who fails to prevent its results as responsible as if he had brought them about. Thus, in a case similar to that of *People v. Goodman*,<sup>75</sup> where defendant, having occasioned the victim's jumping from his running car, failed to stop and rescue her, as a consequence of which she died, he would be guilty of murder by omission rather than of manslaughter. By way of general criticism of the entire provision, it may be added that the distinction it assumes between a "positive" and a "negative" act is not satisfactory. The difference between such acts is actually a relative one. Every *actus reus* can be committed by an omission as well as by an act. It is only that proof of intent may be easier to adduce from an act than an omission.

#### b) COMPLICITY

The German concept of "parties to a crime" differs widely from the corresponding Anglo-American concept. Parties are classified into three categories: co-principals, instigators and aiders, the latter two being also treated as a comprehensive group and contrasted with co-principals. Only those whose activities are antecedent to or coincide with the commission of the crimes are regarded as "parties", whereas the activities of these who, in Anglo-American law, would qualify as "accessories after the fact" constitute an independent crime ("Harboring a criminal," Sect. 257 of German Penal Code). Where two or more persons agree to commit a crime, they may be co-principals (Sect. 47) or aiders (Sect. 49) depending on the degree of their participation in the crime. Participation in the *actus reus* qualifies as co-principal, whereas mere assistance characterizes the aider. The latter is punishable in accordance with the standard applicable to the principal, but his punishment may be reduced in the Judge's discretion (Sect. 44). Instigation consists in inciting another to commit a crime. It is distinguishable from "spiritual aiding" (*intellektuelle Beihilfe*).<sup>76</sup> Instigation, by its very nature, precedes the commission of the crime, and thus cannot be said to constitute a part of the *actus reus*.<sup>77</sup> But it is deemed so dangerous as to justify punishment "in accordance with the law applicable to the act which (the defendant) has knowingly instigated." (Sect. 49 (2)).

The crime of "solicitation", which is an extension of the idea of instigation, plays

<sup>74</sup> It is highly dubious that the Model Code's recommendation that certain types of omission be made crimes accords with the traditional Anglo-American concept of criminal law. See Model Code Tentative Draft No. 2, 65 *et seq.*

<sup>75</sup> 182 Misc. 585, 44 N. Y. S. 2d 715 (Supr. Court, Spec. Term, Sullivan County, 1943).

<sup>76</sup> M. E. MAYER, *op. cit.*, 397.

<sup>77</sup> In this sense, instigation is sharply distinguishable from the Anglo-American notion of "accessory before the fact."

an important role in German penal law.<sup>78</sup> Its historical development is worth restating, for it reflects an ideological evolution pervading the entire theory of criminal law.<sup>79</sup> At the time of the enactment of the German Penal Code, the prevailing theory was the objective view of the *actus reus*. Where instigation was unsuccessful, that is, in the case of a mere solicitation, no punishment would lie, for no crime was objectively present, to which the act of solicitation could be attached. Gradually, this theory yielded ground to the so-called subjective theory of the *actus reus*. This theory, in substance, corresponds to the "positivist" or socially-oriented view. In its light, the *actus reus* is no more than a symptom of the dangerous, anti-social personality of the actor. Where stress is laid on the personality of the actor rather than on the objective aspect of criminal conduct, instigation, reflecting reprehensible character traits, is itself, in a sense, an *actus reus*. Hence, solicitation which, in effect, constitutes an attempted instigation is deemed a crime. The crime of solicitation was first introduced into the German law in 1876 by insertion in the Penal Code of Section 49a.<sup>80</sup> This original version of Section 49a largely resembles the rule on solicitation as known in the Anglo-American law. In the Nazi-inspired German legislation the crime of solicitation acquired unprecedented dimensions. The aim of the National Socialists, expressed in the National Socialist Memorandum on Criminal Law of the Prussian Ministry of Justice, was to substitute for the traditional concept of "criminal law based on the injury done" (*Verletzungsstrafrecht*) the concept of "criminal law based on danger" to the blood community of the German People (*Gefährdungsstrafrecht*). They believed that danger lies in the criminal intent, and they accordingly proceeded from the theory of "crime based on intent" (*Willensstrafrecht*).<sup>81</sup> The object of criminal law, in their view, was to punish that dangerous intent. Thus, under the Nazi regime Section 49a was reformulated as follows:<sup>82</sup>

Whoever solicits another to commit a felony or to participate in a felony shall be punished as an instigator even if the crime was not carried out or was carried out independently of the solicitation. The punishment may be reduced. . .

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<sup>78</sup> Theoretically, mere "solicitation" cannot constitute an *actus reus*, for the latter, under the legality principle, usually consists in express action rather than in a mere expression of thought. For this reason, "solicitation" may be understood only in terms of an extended criminality of instigation.

<sup>79</sup> MAURACH, *op. cit.* (1954) 562.

<sup>80</sup> Sect. 49a reads thus:

Whoever solicits another to commit a felony or to participate in a felony and whoever accepts such solicitation shall be, unless the law provides for another penalty, punished by imprisonment for not less than three months if the solicited felony is punishable by death or confinement for life in a penitentiary; but if the solicited felony is punishable by a lighter punishment, he shall be punished in a fortress for the same period.

<sup>81</sup> *Nationalsozialistisches Strafrecht, Denkschrift des Preussischen Jurizministers* (1933) 112. The "danger-principle" (*Gefährdungsprinzip*) means that a dangerous act should be punishable even if it does not result in any actual harm. The traditional view of criminal law predicates punishment upon the occurrence of a harmful result. In adopting the theory of danger, the Nazis took an extreme subjective view of the criminal act.

<sup>82</sup> As amended May 29, 1943, (R. G. Bl. Pt. 1 at 339).

This Section, reflecting an extreme subjectivist position, was severely criticized after the collapse of the Nazi regime as violating the democratic idea of the rule of law.<sup>83</sup> In 1953, Section 49a was accordingly amended to read as follows:<sup>84</sup>

(1) Whoever attempts to induce another to commit an act which the law punishes as a felony shall be punished in accordance with the provisions applicable to the attempt of such felony.

Other change introduced into the law of complicity in crime under the Nazi regime but not connected with ideological considerations were retained after its collapse. They are adoption of the Anglo-American conception of conspiracy and repudiation of the ancillary nature of complicity. The first mentioned change consisted in the insertion in the Criminal Code of Section 49a(2):<sup>85</sup>

The same punishment shall be applied to the person who enters into an agreement to commit an act which the law punishes as a felony, or accepts the offer of another to commit such act or declares readiness to commit a felony.

The second change consisted in rendering punishment of the accomplice independent of whether or not the principal is punishable (Sect. 48).

The New Korean Code adopted largely—though by no means fully—the ideas of the German Code of the pre-Nazi era.<sup>86</sup> The Korean provision, while deviating from its German pattern, conforms to it in an important respect: both impose a lighter punishment upon solicitation than upon attempt.

With regard to aiders, the Code provides (Art. 32(2)):

The punishment of aiders shall be less severe than that imposed upon principals.

It should be noted that the concept of “accessory” in Korean law is wider than the corresponding Anglo-American concept. It includes a person who, under American law, would qualify as principal in the second degree.

Significantly, in contrast to other codes, the Korean Code contains an express provision dealing with crime committed by an “innocent agent.” It is further interesting to note the nature of this provision. The punishment for such crime is the same as that imposed upon instigating and aiding. Article 34(1) provides:

<sup>83</sup> The punishment which the judge was authorized to mete out was clearly excessive; mere solicitation of murder could be punished as severely as the completed crime. The discretion granted to the judge was extremely wide; it ranged from punishment for murder to complete remission of punishment.

<sup>84</sup> Text of Sect. 1, 1953 (B. G. Bl. pt. 1 et 1083).

<sup>85</sup> See *supra*, note 78.

<sup>86</sup> Article 31 reads as follows:

(1) Whoever instigates another to commit a crime is subject to the same punishment as is applicable to the person who actually commits the crime.

(2) Where a person instigates another to commit a crime and the latter consents thereto but does not reach the commencement stage of its commission, the instigator and the person who has been instigated shall be subject to punishment as applicable to conspiracies and preparations.

(3) The preceding section shall apply to the instigator even though the person whom he instigated does not consent to the commission of a crime.



A person who commits a crime by instigating or aiding another who is not punishable for such conduct or who is punishable as a negligent offender shall be punished in accordance with the provision for an instigator or an aider.

In most laws, in cases of crime by an innocent agent the instigator is punished as a principal. The Korean view is thus rather restrictive. By contrast, an outright socially oriented view is adopted in Article 34(2) which provides:

A person who causes the results described in the preceding section by instigating or aiding another person who is under his control and supervision shall be punished by increasing by one half the maximum term or maximum amount of penalty provided for the principal in the case of instigation, and by the full penalty provided for the principal in the case of aiding.

With group offenses the Code deals expressly, in providing specifically for the severe punishment of ring leaders in cases of insurrection (Art. 87), and in creating a new crime of "organization of a criminal group" (Art. 114). However, these offenses do not properly fall within the framework of the general part of the Code regarding complicity. They are crimes in which participation of several people is an essential part of the *actus reus*, as defined by statute, and thus constitute instances of so-called "necessary complicity" (*notwendige Teilnahme*).<sup>87</sup>

### 3. POLICY CONSIDERATIONS IN THE CRIMINAL LAW

Many, though by no means all, provisions of the criminal law reflect the political ideology of the nation within which they developed, and it is indeed desirable that the entire body of such law be based on a sound and consistent political philosophy. To crystallize a philosophy that could serve as a basis for the future reform of Korean law, it may be useful to compare the Anglo-American traditional philosophy with the German, as they appear in particular provisions. For the Korean legislation was not the result of considered autonomous planning, but a compilation of divergent views, among which the German views predominated. A future reform will have to make an intelligent choice of a point of view rather than of specific solutions. Roughly, the Anglo-American traditional idea may be said to give effect to a maximum of individual freedom as against the State, whereas the German idea has been rather oriented to protection of State interests.

#### a) FORMAL CRIMES AND MATERIAL CRIMES

In Germany crimes have been classified into formal crimes (*Formaldelikte*) and material crimes (*Materialdelikte*). In formal crimes the *actus reus* does not include any element of injury, whereas in material crimes some injury to an interest protected by law is an essential part of the crime. An instance of the former category may be the German crime of perjury, which is punishable regardless of whether or not the false testimony is material. An example of the latter is murder, in which the death of a person is an essential part of the definition. The very fact that the described distinction developed in German law expresses recognition of the existence of crime without injury to anyone. M. E. Mayer criticized this distinction by pointing out that it is a fallacy to believe that a formal crime has no result whereas a material

<sup>87</sup> M. E. MAYER, *op. cit.*, 85 *et seq.*

crime has a result. This idea results from confusion of chronological with logical coincidence.<sup>88</sup> M. E. Mayer's criticism, while logically correct, confuses the legal with the sociological definition of crime. The fact is that the distinction is a valid one but that it is not inherent in the nature of a particular crime to be a crime in form only or a crime of substance. Rather, the question whether a crime should be formulated as the one or as the other depends upon policy considerations.<sup>89</sup> These considerations should also prevail with regard to the Anglo-American concept of perjury, which has been criticized by Stephen for taking materiality into account.<sup>90, 91</sup>

#### b) ENTRAPMENT

Where a crime is committed or attempted at the instigation or with the cooperation of government agents, the liberal position is that the accused can set up the defense of "entrapment" against the criminal charge. The Anglo-American law which assumes this position, indeed, goes one step further in affording the accused, in addition, also the defense of consent by the injured party wherever such consent would normally constitute an excuse. The defense of entrapment is available only where the accused did not intend to commit the crime except by virtue of government inducement,<sup>92</sup> the theory being that—as a requirement of "the highest public policy"—the government is estopped from prosecuting where it had itself induced the commission of the crime. "Public policy" here means "a body of principles within the common law" representing the ethos of the community.<sup>93</sup>

In contrast, in countries of continental Europe the defense of entrapment is unknown. Indeed, the principal concern of these countries in dealing with the problem of the "*agent provocateur*" or "*Lockspitzel*" has been not the defense of the entrapped person but the punishment of the entrapper. The French position particularly is that the latter commits a technical crime of instigation and is not punished only for want of prosecution. In Germany, the prevailing view is rather that the government agent

<sup>88</sup> According to MAYER, *op. cit.*, at 119, it is fallacious to say that perjury, for example, has no results.

<sup>89</sup> The practical importance of the distinction lies solely in the area of causation.

<sup>90</sup> STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND, vol. III (1882) 240-250.

It may be necessary to give a wide interpretation to the word "material," but whether materiality is to be entirely eliminated as a constituent element of perjury in the Anglo-American law is to be determined in terms of policy. Although the purpose of punishing perjury is protection of the judicial function, it is to be considered whether it would serve the criminal function of guaranteeing individual freedom to punish a person even where there is no possibility of infringement upon the judicial function at all. In addition, the Anglo-American law does not recognize the crime of negligent perjury, as known to the German law.

<sup>91</sup> Another classification, namely, that into crimes of risk (*Gefährungsdelikte*) and crimes of injury (*Verletzungsdelikte*) may also be shown to be ultimately based on policy considerations. It is interesting to note that there was a tendency, during the Japanese occupation in Korea, to interpret provisions as crimes of risk rather than as crimes of injury. For example, the crime of obstruction of business has been interpreted as crime of risk, requiring no infliction of real harm. See 19 Kei-Ji-Han-Rei-Shu 85.

<sup>92</sup> *Sorrells v. United States*, 287 U.S. 435 (1932). Compare CLARK and MARSHALL, LAW OF CRIMES (1952) 215 *et seq.*

<sup>93</sup> DENNIS LLOYD, *Law and Public Policy*, 8 Current Legal Problems 42 (1955).

does not actually "intend" the crime to be committed.<sup>94</sup> As to the victim of the entrapment, French courts occasionally hold him to be excused on the theory that he acted under an irresistible compulsion exercised by the government agent (French Penal Code, Art. 64).<sup>95</sup> In Germany, the Bundesgerichtshof<sup>96</sup> recently held that where a police woman placed her purse upon her shopping bag in a department store in order to entrap the accused and the latter took the purse, she was guilty of attempted larceny rather than of the completed crime, since she never acquired full control over the purse, the police being at all times capable of withdrawing it from her.<sup>97</sup> The court rejected the accused's argument that the police woman had "consented" to the taking, on the ground that the accused was not aware of such consent.<sup>98</sup>

After World War II, the Anglo-American theory of entrapment had promptly been adopted by the Japanese lower courts.<sup>99</sup> The accused sold opium to a police officer upon the latter's instigation and in ignorance of his status. The court acquitted the accused on the ground that he had been entrapped. Later, however, the Japanese Supreme Court<sup>100</sup> overruled this theory which had often been followed by the lower courts.

The Korean Code contains no provision dealing with entrapment. Nor has the problem arisen before courts. There are two possibilities under Korean law of recognizing the significance of entrapment. Article 20 of the Criminal Code condemning acts which are *contra bonos mores* may be used as a basis for setting up the defense of entrapment, or the defense may be based on purely procedural grounds.<sup>101</sup>

#### C) WITHDRAWAL FROM CRIME AND SELF-DENUNCIATION; CRIME UPON COMPLAINT

While generally tending to applying criminal sanctions sparingly, so as to safeguard a maximum of individual freedom, the Anglo-American law in some instances admits punishment where the continental European law grants immunity or a reduction of penalty. Such extensive application of criminal sanctions in this country is the result of the jurisprudential view that criminal law has an objective quality or, as is sometimes said, that the law is paramount.

The objective view of criminal law is expressed in the non-recognition of with-

<sup>94</sup> MAURACH, *op. cit.*, at 551.

<sup>95</sup> This assumes that the agent does more than is comprised in mere complicity, within the meaning of Art. 60, Penal Code. Art. 64 assumes that the action of the accused is no longer "free." Donnedieu de Vabres, *Traité de droit criminel et de législation pénale comparée* (1947), 75, 76, 216.

<sup>96</sup> Decision of April 30, 1953, 4 B.G.H.St. 199.

<sup>97</sup> In contrast to the Anglo-American law, in which a slight movement of the object is sufficient to constitute an asportation (see English case of *Regina v. Simpson*, 1854, 1 Dears 421), the German law requires for the consummation of larceny of complete establishment of control over the property.

<sup>98</sup> Compare with this case *Jarrott v. State*, 108 Tex. Cr. App. 427, 1 S.W. 2 619 (1927), rehear. den. (1928).

<sup>99</sup> Yokohama District Court decision of June 19, 1951.

<sup>100</sup> 7 Sai-ko-Sai-ban-Sho-Han-Rei-Shu 482 (1953).

<sup>101</sup> As suggested by Justice Roberts in the *Sorrrells* case (*supra*), it would be wiser simply to quash the indictment in such a case. In any event, the defense of entrapment should be purely personal to the person who has been entrapped. It should not be available to an accessory who has not been entrapped by the Government agent.

drawal from crime and self-denunciation as a mitigating factor, on the one hand, and of crime upon complaint, on the other.

Voluntary desistance from crime is not a ground for mitigating punishment in the Anglo-American law<sup>101a</sup>. Thus, "if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose."<sup>102</sup> Of course, a more liberal tendency may be reflected in sentencing policies. By contrast, the German law foregoes punishment of attempt entirely in cases of abandonment of a criminal intention and prevention of the injurious result (Sect. 46 of German Penal Code).

The Korean Code adopts an intermediary solution in providing for mitigation or remission of punishment in cases of desistance from a criminal conduct or of prevention of its completion (Art. 26). With regard to self-denunciation, the Code adopts an extremely flexible attitude. It provides in Article 52:

(1) When self-denunciation is made to competent authorities which have the responsibility to investigate the commission of crime, the punishment may be mitigated or remitted.

(2) The preceding section shall apply when voluntary confession is made to the injured party in cases of crimes which cannot be prosecuted over the objection of the victim.

In addition, with regard to certain specific crimes, the Code provides for mandatory mitigation or remission of punishment in cases of self-denunciation or voluntary confession.<sup>103</sup>

In contrast to the American law, both the German and the French laws recognize initiation of criminal proceedings by parties injured by the commission of a crime.<sup>104</sup> The reasons for admitting the principle of private complaint are protection of the victim's interest and in case of minor offenses the consideration that prosecution may not be desirable except where the victim demands it.

The Korean Code recognizes numerous instances of crime upon complaint: crimes concerning foreign relations (Art. 110); crimes of violence (Art. 260 111); bodily injury through negligence (Art. 266 11); crimes of intimidation (Art. 283 111); kidnapping (Art. 296); rape (Art. 306); defamation (Art. 312); violation of secrecy (Art. 318); property crimes between relatives (Arts. 328II; 334; 354; 361; 365). In addition, the Code introduced the idea of crime which "cannot be prosecuted over the express objection" of the victim (Arts. 110; 260III; 266II; 283III; 312).<sup>105</sup>

#### 4. PSYCHIATRY AND CRIMINAL LAW

The basic distinction between the traditional Anglo-American test of insanity and the German test, as prevailing since 1933,<sup>106</sup> lies in the fact that the former defines

<sup>101a</sup> But see the recent case, *people v. Hacht*, 283 p 2nd. 764 (1955).

<sup>102</sup> *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889), at 386.

<sup>103</sup> This applies to cases of insurrection (Art. 90(1)), treason (Art. 101), crimes concerning foreign relations (Art. 111 III), crimes concerning explosives (Art. 120(1)), perjury (Art. 153), false accusation (Art. 157), arson (Art. 175), crimes concerning currency (Art. 213).

<sup>104</sup> In practice, the same result may be reached in the Anglo-American law. Note the rare instances of indictment of adultery in New York State.

<sup>105</sup> Art. 110; consent of victim in crimes concerning foreign relations; Art. 260 111: consent of victim in the crime of violence; Art. 283 111: consent of victim in the crime of intimidation; Art. 312: consent of victim in the crime of defamation.

<sup>106</sup> Sect. 51, Penal Code, as amended Nov. 24, 1933 (R. G. Bl. pt. 1 at 995).

insanity in purely cognitive terms, whereas the latter also introduces volitional elements into its definition.

The McNaghten rules define insanity as "a defect of reason from disease of the mind," resulting in the accused's not knowing the nature or quality of the act or its wrongfulness. A further possibility of defense is afforded by the "partial delusion" rule, which is but a special instance of the rule concerning mistake of fact. In some states of the United States, the volitional aspect of insanity has been given some effect in the "irresistible impulse" test.

In Germany, the source of irresponsibility is formulated broadly: it may be an "impairment of consciousness," a "pathological mental derangement" or a "mental infirmity". The incapacity resulting from any of these sources may be the actor's cognitive inability to realize the wrongfulness of his conduct or his volitional inability to act in accordance with such realization (Sect. 51).

In the United States, the Durham case<sup>107</sup> has recently introduced a revolutionary change. This case describes the source of incapacity as "mental disease or mental defect" and the inability itself, excluding responsibility, as simply "the product of mental disease or mental defect."<sup>108</sup>

The Korean Code does not strictly follow any of the stated patterns. It provides in Article 10(1) as follows:

(1) A person is not punishable if, because of mental disorder, he is unable to pass rational judgments or to control his will.

As may be seen, incapacity, excluding penalty, is, as in the German law, either cognitive or volitional. However, the cognitive incapacity is described broadly. It consists not merely in the incapacity to distinguish right from wrong, but generally in the incapacity to pass rational judgments. Nor is the inability directed to the particular act in issue; it is rather an inability to evaluate generally. While there is no objection to assuming a broad concept of cognitive incapacity, the same cannot be said of the breadth of scope of volitional incapacity; for inability "to control one's will", in contrast to the inability to evaluate, is a matter which cannot be determined without psychiatric knowledge and a clear understanding of the meaning of punishment. Here, it is important that the lawyer receive a proper psychiatric guidance, based on sound psychiatric principles, as well as a legislative guidance based on a proper philosophy of punishment. It is also imaginable that a man may possess no volitional capacity with regard to one crime but possess such capacity with regard to the crime of which he stands indicted.<sup>109</sup>

Regarding "partial responsibility" as a basis for a reduction of punishment, the German law recognizes diminished responsibility in cases where the cognitive or volitional capacity of the actor is diminished due to the enumerated causes (Sect. 51(2)). The punishment in such cases may be reduced, in the judge's discretion, in accordance with the provisions on attempted crime. Persons who have committed a

<sup>107</sup> *Durham v. United States*, 214 F 2d 962 (App. D. C., 1954).

<sup>108</sup> See *Insanity and the Criminal Law, A critique of Durham v. United States*, Symposium, 22 U. of CHICAGO L. REV. 317 (1955).

<sup>109</sup> The Model Code rejects the "product test" adopted in *Durham v. United States* and, in addition, in Paragraph (2) of Section 4.01, excludes from the concept of "mental disease or defect" the case of the so-called "psychopathic personality". See Tentative Draft No. 4, at 156-160.

crime in a state of diminished responsibility are, if public safety requires, committed by the court to an institution for cure and treatment and such commitment is ordered in addition to the punishment (Section 42b). This German solution is the result of a practical compromise between two opposing historical penal philosophies, the classic retributory theory of punishment and the positivistic reformatory theory. The former requires that in the case of a person whose cognitive or volitional capacity is diminished the punishment should be reduced, whereas the latter insists that such a person is more dangerous to society than a normal person and that consequently his punishment should be increased.<sup>110</sup>

By contrast, the conception of partial responsibility has been rejected both in the British Commonwealth<sup>111</sup> and in most American jurisdictions.<sup>112</sup> This writer believes that the Anglo-American careful approach to this problem is commendable. The scope of punishment must be judged comprehensively on the basis of a sound theory applicable to the entire field of criminal law rather than resolved in a piecemeal manner. A simple provision for reduction of penalty in cases of diminished responsibility tends to oversimplify this important basic issue of criminal legislation.

The uncritical reception by the Korean Code of the continental European concept of diminished responsibility is regrettable. The Code provides (Art. 10(2)):

Where, due to mental disorder, a person is deficient in the powers mentioned in the preceding section, the punishment shall be mitigated.

It is hoped that a future revision of the Code will reexamine this provision and consider the question of diminished responsibility in contact with the fundamental problem of responsibility in general.

#### CONCLUSION

In the present paper an attempt has been made to present certain fundamental rules of the New Korean Code, as they emerge from conflicting ideologies, without seeking to fully answer each problem. Although the discussion has been necessarily cursory, it is hoped that it has succeeded in conveying to the reader a basic belief of the writer; namely, that not only criminal legislation but also interpretation of criminal law must develop from a clear understanding of two basic elements of criminal law, crime and punishment, which is to be derived from a sound democratic philosophy. This is an age when scientific (and ethical) knowledge should be applied to the construction of legal machinery for the realization of the higher value of human dignity, which is a basic requirement of "free society." The criminal law must be not a conglomeration of unrelated rules but a product of a considerable "World-view",<sup>113</sup> integrating science and ethics.<sup>114</sup>

<sup>110</sup> SALEILLES, INDIVIDUALIZATION OF PUNISHMENT (Jastrow transl., 1911) 56 *et seq.*

<sup>111</sup> Except murder case in Scotland. Royal Commission on Capital Punishment (1949-1953) Report, Cmd. 8932 (1953) at 131, 413.

<sup>112</sup> *Fisher v. United States*, 80 App. D. C. 96, 149 F 2d 28 (1945), *affd.*, 328 U. S. 463 (1946). For comment see KEEDY, *A problem of First Degree Murder: Fisher v. U. S.*, 99 U. OF PENNA L. REV. 267 (1950).

<sup>113</sup> I use the term "world view" to translate the term *Weltanschauung*. See A. SCHWEIZER, THE PHILOSOPHY OF CIVILIZATION XVII (translator's note) (1953).

<sup>114</sup> If we negate the ethical experience, "there is no possibility of holding our world back from the ruin and disintegration toward which it is being hastened." SCHWEIZER, *op. cit.*, at XV.