Volume 7 Issue 1 June 2025

International Journal of Criminal Justice

KICJ Korean Institute of Criminology and Justice

International Journal of Criminal Justice

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International Journal of Criminal Justice

A Criminal Law Approach to Digital Platform Crimes*

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Abstract

The advancement of digital platforms has brought social and economic benefits while it has caused new types of crimes. Crimes such as online fraud, deepfake sex crimes, and cyberbullying contain the characteristics of 'connection' and 'interaction' on digital platforms. Currently, online transaction fraud is punished just by the general provision of the Criminal Code. Whereas the current law and victim protection measures have been established for deepfake sex crimes, investigative techniques and victim support systems need to be further enhanced. Despite serious violations of human rights, current law lacks adequate provisions for repeated and persistent actions on digital platforms. This highlights the necessity for enacting a particular law, establishing measures to prevent secondary victimization, and reinforcing the responsibility of telecommunication service providers. Therefore, in order to effectively respond to digital platform crimes, it is essential to develop appropriate legal frameworks that reflect the characteristics of each crime, to strengthen institutional systems for victim protection, and to reinforce the responsibility of telecommunication service providers. Furthermore, efforts to establish international cooperation from this perspective must also be pursued.

Keywords: online platform, digital platform crimes, online transaction fraud, deepfake sex crimes, cyberbullying

* This article is a revised version of part of the research report titled 'Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)', published on 31 December 2024.
http://dx.doi.org/10.36889/IJCJ.2025.001
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Received 31 December 2024; Revised 18 June 2025; Accepted 30 June 2025
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 7 Issue 1, June 2025, 004-010

I . Introduction

The rapid development of science and technology has accelerated digitalization across all sectors of society. It has been further intensified by the COVID-19 pandemic. Today, people engage in economic and social activities through the global network known as the internet, primarily within digital spaces referred to as 'Platforms'. The widespread use of platforms allows users to accelerate the efficiency within a short period, providing convenience for society.

However, digitalization brings about some downsides. Ddigital platform crimes are distinct from traditional crimes, manifesting in new forms due to the anonymity and non-face-to-face nature. This shift has made crimes easier to commit, and the harm inflicted has grown increasingly widespread. In particular, the exposure of adolescents to these crimes causes serious emotional harm and calls for an urgent social response. Recently, as digital platform-based crimes have become increasingly sophisticated, various forms of new threats have continued to emerge.

Cyberbullying is are a presentative example, causing severe suffering and long-term harm to victims. Furthermore, the advancement of deepfake technology has led to the production and distribution of fabricated sexual images and videos, seriously infringing on individual privacy and human rights. Other crimes such as online fraud, illegal gambling, and trafficking in prohibited goods also occur via digital platforms. Online financial crimes, including phishing, are continuously evolving in line with technological progress. These crimes undermine the security of platforms and result in economic losses to victims.

Many governments have established legal and policy measures to regulate crimes on digital platforms. However, empirical analysis on these crimes remains insufficient. Therefore, this paper aims to examine the conceptual definition and types of digital platform crimes. Furthermore, by analyzing the application of relevant legal frameworks, by focusing on online transaction fraud, deepfake sexual crimes, and cyberbullying, this paper will examine the limitations of current systems and confirm implications.

1. Definition and Types of Digital Platform Crimes

1) Concept of Digital Platform Crimes

Digital platforms are characterized by "connection" and "interaction."[1] Definitions may vary depending on the subject and method involved. Currently, there is no single, unified legal concept of digital platforms. Each country offers a different definition in accordance with legislative objectives and policy needs. Nevertheless, the concept of a digital platform can be specified based on the above mentioned features.

For instance, Article 3 of the Digital Services Act, adopted by the European Commission in 2022, defines a digital platform as an intermediary that stores and disseminates received information to the public.[2] Systems that do not have these features and cannot operate independently, are excluded from this definition of the digital platform. Based on this concept, digital platform crimes can be understood as any illegal or unlawful actions that occur through platforms using cyberspace. In other words, digital platform crimes refer to cybercrimes that occur on platforms embodying the characteristics of 'connection' and 'interaction'.

Digital platforms can broadly be categorized into two functional types: intermediary platforms

1 Ahn, S. H., Sim, S. B., Ryu, B. G., & Shin, H. J. (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*. (Research report) Korean Institute of Criminology and Justice. (p.40).

2 European Union. (2022). *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)*.

that facilitate transactions and social networking platforms.[3] The former includes applications like Googleplay, e-commerce platforms such as Coupang and Naver Shopping, and second-hand trading platforms like Danggeun Market and Jooggonara. The latter includes platforms such as Kakaotalk, Instagram, and Facebook, which provide services for information exchange and network formation between users. Accordingly, cybercrimes that arise from the transaction-intermediary platforms or social networking platforms are the most representative type of digital platform crimes.

2) Types of Digital Platform Crimes

As mentioned above, digital platforms can generally be classified into two categories based on their characteristics. The first is transaction intermediary platforms that mediate the exchange of goods and services between users. The second refers to social networking platforms that can exchange and share information based on multidirectional interaction. The types of crimes that occur on these two platforms closely resemble common forms of cybercrime. Digital platform crimes can be confirmed based on the characteristics of 'connection' and 'interaction'.

Currently, the 'Electronic Cybercrime Report & Management System' operated by the Korean National Police Agency classifies cybercrime into three broad categories: ① 'Information and Communication Network Infringement Crimes', ② 'Information and Communication Network Utilization Crimes' and ③ 'Illegal content crimes'.[4]

The first type, intrusive actions on information and communication networks, refers to technical attacks targeting the network infrastructure itself, such as hacking and DDoS attacks.[5] This type is distinct from digital platform crimes that are premised on user-to-user interaction, as it involves unilateral hacking into the system. In contrast, the second type that utilizes the information and communications network is directly related to digital platforms. This category includes online fraud and online financial crimes, which frequently occur on second-hand trading platforms and e-commerce platforms.[6] Subtypes of such crimes include phishing, pharming, and body-cam phishing, known as 'Momcam phishing'. These crimes contain the characteristics of digital platform crimes, given that they occur in user-to-user transactions or interactions.

The third type involving illegal content, covers the distribution of unlawful information on digital platforms, typically including offences such as cyber sexual violence, defamation, and insults. Information such as images, videos, and text shared on social networking platforms falls under this classification.[7] A current analysis of digital platform crimes in South Korea shows that both the number of reported cases and arrests have steadily increased since 2014. This trend is driven by increasing the diversification of criminal methods along with technological advancement.[8] A previous researches confirm that various forms of digital platform-based crimes, such as the distribution of deepfake videos, second-hand trading fraud, and bodycam

3 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Concerning specific classifications', (Research report) Korean Institute of Criminology and Justice. (pp.1-38).

4 Korean National Police Agency. *Cyber Crime Reporting System (ECRM)*. Retrieved May 5, 2025, from https://ecrm.police.go.kr/minwon/crs/quick/cyber1

5 Korean National Police Agency. *Cyber Crime Reporting System (ECRM)*. Retrieved May 5, 2025, from https://ecrm.police.go.kr/minwon/crs/quick/cyber1

6 Korean National Police Agency. *Cyber Crime Reporting System (ECRM)*. Retrieved May 5, 2025, from https://ecrm.police.go.kr/minwon/crs/quick/cyber1

7 Korean National Police Agency. *Cyber Crime Reporting System (ECRM)*. Retrieved May 5, 2025, from https://ecrm.police.go.kr/minwon/crs/quick/cyber1

8 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Concerning specific patterns and trends in digital platform criminal activities, (Research report) Korean Institute of Criminology and Justice. (pp.1-50).

phishing, are indeed occurring. This suggests that such crimes are no longer merely theoretical concepts but have emerged as significant social issues.

2. Countermeasures to Major Digital Platform Crimes

1) Online Transaction Fraud

Online transaction fraud is one of the most common types of digital platform crimes, involving fraudulent actions related to the trading of goods and to services via online platforms. This type of fraud is characterized by its entirely non-face-to-face process, where the perpetrator deceives the victim and unilaterally either receives payment without delivering the goods or obtains the goods without making payment.[9] Such crimes frequently occur on open markets and second-hand trading websites, where perpetrators falsely present themselves as buyers or sellers in order to fraudulently obtain pecuniary earnings from victims.

For these fraudulent actions committed on online transaction platforms, the fraud, as stipulated in Article 347 of the Criminal Code, can be applied. In particular, if a perpetrator posts information on a trading website without any intent to provide the goods and defrauds a buyer by falsely presenting the legitimate transaction in order to obtain a pecuniary advantage, this may constitute fraud. In these cases, all the necessary elements provided in the Criminal Code must be obviously established. However, aside from the provision of the Criminal Code, there are no specific provisions for protecting victims and for responding to fraud in online second-hand transactions.[10]

Thus, the following institutional improvements are required.[11] First, legislative revisions are demanded to classify online transaction fraud as a form of telecommunications based financial fraud. Second, in cases where online transaction fraud is linked to particular crimes such as messenger phishing, legal frameworks should be established to enhance victim protection and to improve the efficiency of investigations. Third, the adoption of provisions for aggravated punishment in several cases should be considered. Such a comprehensive approach could serve as an institutional safeguard against digital platform crimes and would substantially contribute to both victim protection and crime prevention.

2) Deepfake Sex Crimes

With the seriousness of deepfake-related sexual offences, the current legal framework has responded in a timely and proactive manner.[12] In particular, strict provisions have been applied to all process involving deepfake videos, from production and distribution to possession.[13] There are the provisions for aggravated punishment. Additionally, policies for victim protection have been implemented telecommunications companies have the obligations to take action, and the current law allows local governments to support the removal of deepfake videos.[14]

Representative laws relative deepfake sex crimes include the Act on Special Cases Concerning the Punishment of Sexual Crimes,

9 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Concerning specific patterns and trends in digital platform criminal activities', (Research report) Korean Institute of Criminology and Justice. (pp.1-239).

10 Hyun et al. (2021). A proposal on necessity of preventing fraud damage in C2C used trading markets: Focusing on fraud red flags. *The Journal of Police Science, 21*(1). (p.254).

11 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Concerning the detailed analysis of the subsequent policy improvements', (Research report) Korean Institute of Criminology and Justice. (pp.241-242).

12 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'With respect to this assessment', (Research report) Korean Institute of Criminology and Justice. (p.294).

13 Act on Special Cases Concerning the Punishment of Sexual Crimes, Article 14-2, etc.

14 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I),* section 'With respect to this assessment', (Research report) Korean Institute of Criminology and Justice. (p.1-307).

which contains provisions on the distribution of false video, and the Act on the Protection of Children and Youth against Sex Offenses, which defines the production and distribution of child or youth sexual exploitation materials and special cases concerning the investigation of digital sex offenses against children or youth. Matters about victim protection and recovery support are further stipulated in the Sexual Violence Prevention and Victims Protection Act and the Act on Promotion of Information and Communications Network Utilization and Information Protection. However, deepfake sex crimes covertly take place on digital platforms. Given this characteristic, special procedures for investigations must be established.

For example, when a victim becomes aware that a deepfake video has been distributed, a systematic procedure for providing information has to be ensured. To this end, it is necessary to actively consider imposing a duty of cooperation on telecommunication service providers and platform operators, obligating them to promptly provide relevant information.[15] Such institutional mechanisms would go beyond merely aiding in the recovery of victims and would also serve as a fundamental countermeasure to prevent deepfake sexual offences, to protect victims' right to self-determination digital platforms.

3) Cyberbullying

Cyberbullying is a type of cyber violence that perpetrators collectively harass a specific target. The current legal framework does not provide separate provisions for punishing cyberbullying. However, individual acts that may constitute cyberbullying such as insult, dissemination, and actions that cause fear or anxiety can be punished under the Act on Promotion of Information and Communications Network Utilization and Information Protection. In cases of repeated and sustained online insults, Article 311 of the Criminal Code can be applied, given that the Act on Promotion of Information and Communications Network Utilization and Information Protection does not contain explicit provisions relative to the insult.[16]

Meanwhile, the Act on Punishment of Crime of Stalking can be applied to cyberstalking that causes fear or anxiety to another person. Nevertheless, cyberbullying that excludes or isolates victims from their social networks remains insufficient under the current law framework.[17] As demonstrated by many cases of school violence and group bullying, cyberbullying occurs frequently and results in serious violations of human rights. Despite this, legal responses remain inadequate. Because new forms of violence, including cyberbullying, emerge as serious problems, some countries are actively establishing new regulations to penalize specific cyberbullying actions.

Therefore, it would be more appropriate to penalize specific actions according to their severity, with reference to legislative examples in other countries. In particular, repeated posting of threats, abusive language, or obscene content should be clearly subject to criminal punishment. It is also desirable to precisely define the scope of application by taking into account personal circumstances such as the victim's age and characteristics.[18]

In addition, in order to prevent cyberbullying and facilitate recovery, telecommunications service providers should be obligated to take

15 Shin, H. J. (2024). Cyber violence status and measures to strengthen victim protection - Focusing on cyber bullying -. *Korean Journal of Victimology*, *32*(2). (p.402).

16 Lee, K. H. (2014). Criminal Measures against Cyberbullying. *Law Review (korlaw)*, 56.(p.279).

17 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Regarding the following specific problems and limitations', (Research report) Korean Institute of Criminology and Justice. (pp.324-326).

18 Lee, J. G. (2015). The Prevention of Cyberbullying and the Freedom of Student Speech: Focusing on the discussion in the United States. *European Constitutional Law Studies*, 17.

prompt action, such as the removal or blocking of relevant content.[19] Furthermore, as an institutional safeguard to prevent secondary victimization, new policy measures such as restrictions on communication devices should also be introduced. Procedural improvements should also strengthen the processes of search and seizure for digital devices, such as mobile phones used in the commission of the offence, thereby enhancing the efficiency of evidence collection.

Ⅱ. Conclusion

Digital platforms offer efficiency and convenience across all sectors of society. Nevertheless, they are not solely advantageous, as they have also led to the emergence of a new form of crimes. In particular, digital platform crimes stem from the features of platforms, namely 'connection' and 'interaction'. These crimes are related to online transaction fraud, deepfake sex crimes, and cyberbullying. Digital platform crimes have been rapidly increasing due to the anonymity , and this trend is expected to persist over the long term.

In recent years, online transactions have become active on digital platforms. This has led to a surge in online transaction fraud. Nevertheless, under the current legal system, online transaction fraud remains inadequate beyond the general fraud provisions of the Criminal Code. For this reason, legislative amendments are required to explicitly categorize illegal actions within the classification of telecommunications based financial fraud.

In the case of deepfake sex crimes, although a legal framework is well established, further improvements are required in investigative techniques and methods for victim protection. Cyberbullying causes serious psychological harm to victims. To respond effectively, it is necessary to establish criminal provisions targeting each action of cyberbullying and to impose an obligation on telecommunication providers to take prompt action.

To prevent digital platform crimes, an integrated and systematic legal framework must reflect the characteristics of platforms. Particularly, online transaction fraud, deepfake sex crimes and cyberbullying should be analyzed in detail. It is crucial to strengthen victims' relief and trust. The responsibilities and obligations of platform and telecommunication service providers must also be clearly defined. In addition, legal and institutional systems should be continuously improved to keep pace with a rapidly changing era and an international cooperation. This multi-dimensional approach will ensure the safety and protection of citizens from digital platform crimes.

19 Ahn et al., (2024). *Criminal Policy Research on Combating Digital Platform Crimes and Preventing Victimization (I)*, section 'Regarding the following specific countermeasures for improvement', (Research report) Korean Institute of Criminology and Justice. (pp.1-337).

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International Journal of Criminal Justice

A Study on the Reform of the Commercial Act in Conformity with Global Standards – Focusing on Corporate Law-*

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Abstract

This study presents legislative reform proposals for the Korean Commercial Act (Corporate Chapter), based on criticisms that it does not conform to global standards, with a focus on protecting minority shareholders and restoring trust in the capital markets. First, in terms of corporate governance, the study proposes: easing restrictions on voting rights of interested parties; codifying the obligation to establish internal control systems within the board of directors; harmonizing the approval requirements for directors' non-competition and self-dealing; and clarifying the rules on provision of benefits during general meetings of shareholders. In the area of finance and accounting, the proposals include permitting the issuance of redeemable convertible preferred shares (RCPS); restructuring the system for treasury stocks; protecting minority shareholders in reverse stock splits; and clarifying accounting standards for interim dividends. Furthermore, with regard to corporate restructuring, the study emphasizes the need to grant appraisal rights to dissenting shareholders in physical (vertical) spin-offs, to prevent abuse of exceptional procedures, and to codify related legal processes. Lastly, the study examines the legislative need to expand the scope of directors' fiduciary duties from the perspective of shareholder protection, based on both domestic and international discussions and legislative precedents.

Keywords: Corporate Law, Minority Shareholder Protection, Corporate Governance, Financial Accounting, Corporate Restructuring

* This article is a condensed version of the 2024 research report by the Korean Institute of Criminology and Justice, titled "A Study on the Reform of the Commercial Act in Conformity with Global Standards: Focusing on Corporate Law"

http://dx.doi.org/10.36889/IJCJ.2025.002

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Received 31 December 2024; Revised 18 June 2025; Accepted 30 June 2025
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 7 Issue 1, June 2025, 012-021

Ⅰ. Introduction

Despite multiple amendments to the Korean Commercial Act in response to changes in the economic environment, it continues to face criticism for failing to establish a legal framework that meets global standards. This legislative deficiency has been cited as one of the factors leading foreign investors to undervalue the Korean capital market, serving as a structural cause of the so-called "Korea Discount" phenomenon.

In particular, the weakness of corporate governance and the insufficiency of minority shareholder protection systems serve as major factors undermining investor confidence, while diminishing the predictability and transparency of the capital market. Minority shareholders have limited ability to exert meaningful influence over corporate management and decision-making processes, and are often excluded within structures dominated by controlling shareholders and executive management. Therefore, institutional mechanisms to safeguard their rights and interests constitute a critical policy task directly linked to restoring trust in the capital market.

Accordingly, this study focuses on the Company Chapter of the Korean Commercial Act and aims to identify provisions that require urgent institutional reform from the perspective of minority shareholder protection and corporate value enhancement. Specifically, the study examines key issues in the areas of corporate governance, financial accounting, and corporate restructuring—issues that have long been discussed but have yet to be realized through legislative amendments. Priority is given to areas where a certain degree of consensus among shareholders has already been established regarding the need for reform. In addition, the study briefly explores the legislative background and key legal issues surrounding the recent expansion of directors' fiduciary duties under the Commercial Act, which has garnered growing public attention.

Ⅱ. Corporate Governance

1. Overview

This section identifies key institutional provisions requiring amendment within the realm of corporate governance, with a particular focus on enhancing the substantive protection of minority shareholder rights. Drawing on an analysis of relevant Supreme Court precedents, the study concentrates on four core areas: (1) restrictions on voting rights of interested parties, (2) regulations concerning the authority and internal control responsibilities of the board of directors, (3) the non-competition obligations of directors, and (4) prohibitions on the provision of improper benefits.

2. Issues and Reform Measures

1) Reform of the Voting Rights Restriction for Interested Shareholders

The current Commercial Act prohibits directors who are shareholders from exercising voting rights at shareholder meetings concerning directors' remuneration, treating them as special interested parties. However, such a blanket restriction may unduly limit shareholders' rights. It would be more appropriate to exclude the voting rights of the relevant director only at the board level—when determining the remuneration of individual directors—as a member of the institution.[1] To address this concern, this study proposes revising Article 388 of the Commercial Act to explicitly exclude the application of Article 368(3) in such cases. This amendment would provide legal clarity by allowing directors to exercise their voting rights as shareholders in resolutions regarding directors' remuneration at general meetings.

1 Kim, Ji-Pyoung, *The Legal and Practical Issues on the Remuneration for Directors and Statutory Auditors of the Corporation*, JURIS, vol. 1, no. 57, Judicial Development Foundation, 2021, p. 17.

2) Reform of the Board's Authority and Internal Control Obligations

The Korean Supreme Court's ruling in the Daewoo accounting fraud case (Supreme Court Decision 2006Da68636, rendered on September 11, 2008) is known to have been influenced by the 1996 Caremark decision of the Delaware Court of Chancery[2], which was the first U.S. ruling to impose a duty of oversight on corporate directors through internal control systems. Since then, the Korean Supreme Court has consistently held that directors have a duty to establish and properly operate internal control systems.[3] Given that such obligations have been established through judicial precedent, it is necessary to codify the directors' duty to establish internal control systems in the Commercial Act, which serves as the general law governing corporate legal relations. Accordingly, this study proposes an amendment to Article 393(1) of the Commercial Act to explicitly include the establishment of internal control systems as a matter subject to board resolution.

3) Reform of the Directors' Duty of Non-Competition

Article 397 of the Korean Commercial Act prohibits directors from engaging in business that competes with the company. This regulation shares the same underlying purpose as the rules on self-dealing namely, the prevention of conflicts of interest. Given that both provisions aim to prohibit directors from prioritizing personal interests over those of the company, there is no compelling reason to impose different procedural requirements. According to the prevailing academic view, directors must disclose material facts and obtain prior approval from the board of directors before engaging in competitive business activities, just as they are required to do in self-dealing transactions.[4] Therefore, this study proposes amending Article 397(1) to harmonize the approval procedures for competitive conduct with those applicable to self-dealing, including requiring the approval of outside directors. This reform would strengthen conflict-of-interest controls and enhance shareholder trust.

4) Reform of the Prohibition on Providing Benefits to Shareholders

Under the current Commercial Act, there is no explicit provision regarding the offering of monetary or material incentives by listed companies to encourage shareholder attendance at general meetings. This legislative gap creates legal uncertainty and raises the possibility that resolutions adopted at such meetings may be later annulled or invalidated. To address this concern, this study proposes adding a new Paragraph 4 to Article 467-2 of the Commercial Act, stipulating that, within the limits prescribed by Presidential Decree, the provision of such incentives by listed companies shall not constitute grounds for the annulment or cancellation of shareholder resolutions.

3. Conclusion

In summary, this study proposes a series of legislative amendments: refining the rules to exclude the voting rights of interested directors at the stage where individual remuneration amounts are determined in shareholder meetings; imposing a statutory obligation on the board of directors to establish internal control systems; aligning the board approval requirements for directors' non-competition and self-dealing; and

2 Ryu, Jimin, *Mission Critical in the Caremark Claims – Scope and Limits of Corporate Directors' Oversight Duties*, Korean Commercial Law Review (KCLA), vol. 41, no. 4, Korean Commercial Law Association, 2023, p. 398.

3 Kim, KonSik, Rho, Hyeokjoon, and Chun, Kyung-Hoon, *Corporate Law*, 8th ed., Pakyoungsa, 2024, pp. 441–442.

4 For scholarly views requiring disclosure of material facts and prior approval, see Song, Ok-Rial, *Lecture on Corporate Law*, 14th ed., Hongmunsa, 2024, pp. 1065–1066; Hong, Bok Ki and Park, Seihwa, *Corporate Law Lecture*, 7th ed., Beommunsa, 2019, p. 493. Other scholars explicitly requiring prior approval include Kim, Hongki, *Lecture on Commercial Law*, 7th ed., Parkyoungsa, 2022, p. 612; Lee, Chul-Song, *Corporate Law Lecture*, Parkyoungsa, 2023, p. 791; Chung, Joon Woo, *Corporate Law of Stock Companies*, Jeongdok, 2024, p. 455. By contrast, Kim, KonSik, Rho, Hyeokjoon, and Chun, Kyung-Hoon, *Corporate Law*, 8th ed., Pakyoungsa, 2024, p. 470, take the position that ex post ratification may be permitted.

institutionalizing the prohibition on the provision of improper benefits to shareholders. Through these reforms aimed at rationalizing corporate governance, the substantive rights and interests of minority shareholders can be better protected, and the global coherence of the Korean Commercial Act can be enhanced.

Ⅲ. Finance and Accounting

1. Overview

The provisions on finance and accounting in the Korean Commercial Act play a critical role in ensuring corporate financial soundness, protecting shareholder rights, and securing trust in the capital markets. The major revision to the Company Chapter of the Act in 2011 coincided with the adoption of the International Financial Reporting Standards (IFRS) and introduced institutional reforms aligned with global accounting practices. However, over the past decade, shifts in the corporate environment and capital market structures have exposed various legislative limitations. This section examines four key areas that have repeatedly raised practical concerns: the system of classes of shares, treasury stock regulations, reverse stock splits, and interim dividends. Through this analysis, the study identifies problems in the current legal framework and proposes directions for legislative reform.

2. Issues and Reform Measures

1) Reform of the Legal Framework for Classes of Shares

While the Korean Commercial Act permits the issuance of redeemable shares and convertible shares, it does not provide a clear interpretation regarding the permissibility of issuing redeemable convertible preferred shares (RCPS), which combine both features. Under the current Article 345(3) and (5), the Act prohibits the inclusion of "matters relating to conversion" in the articles of incorporation for redeemable shares. This creates legal ambiguity as to whether conversion terms may be stipulated at the time of issuing redeemable shares.

Such uncertainty poses significant challenges in practice, particularly for startups and venture companies seeking capital investment, and undermines the legal stability of RCPS, a commonly used instrument in venture capital transactions. In response, this study proposes amending Article 345 of the Commercial Act by deleting the phrase “matters relating to conversion,” thereby explicitly allowing the issuance of preferred shares that combine both redeemable and convertible features.

In addition, Article 346(1) of the Commercial Act has been interpreted by some as limiting the target of conversion for convertible shares to “other classes of shares” only.[5] This ambiguity can be addressed by revising the provision to explicitly state that convertible shares may be converted into “common shares or other classes of shares.” Such an amendment would institutionally ensure flexible financing mechanisms that meet the demands of the capital market and contribute to aligning Korea’s corporate legal framework with global standards.

2) Reform of the Treasury Stock System

Treasury stock may serve as a strategic instrument for various corporate purposes, including price stabilization, defense of management control, and employee incentives. However, under the current Commercial Act, there is no legal obligation for a company to dispose of treasury shares remaining after achieving a specific acquisition purpose. In practice, this has raised concerns that boards of

5 See Kwon, Kiboum, *Modern Corporate Law Theory*, Samyoungsa, 2020, p. 525; Kim, KonSik et al., *Corporate Law Lecture*, Parkyoungsa, 2024, p. 154; Lee, Chul-Song, *Corporate Law Lecture*, Parkyoungsa, 2023, p. 288; Chung, Chan Hyung, *Corporate Law Lecture*, Parkyoungsa, 2022, p. 402; Hong, Bok Ki and Park, Seihwa, *supra*, p. 208.For opposing views that consider common shares to fall within the scope of classes of shares, see Kim, Jeong-Ho, *Corporate Law*, Beommunsa, 2020, p. 153; Lim, Jae-Yeon, *Corporate Law (I)*, Parkyoungsa, 2022, p. 391; Jang, Deok-Jo, *Corporate Law*, Beommunsa, 2023, p. 122.

directors may dispose of treasury shares under favorable terms to particular parties, especially in the context of defending control by transferring such shares to individuals aligned with controlling shareholders.

First, Article 341 of the Commercial Act limits the purposes for which treasury shares may be acquired, making it difficult for companies to respond flexibly to market conditions for purposes such as corporate value enhancement or control defense. This study proposes relaxing these purpose-based restrictions while simultaneously strengthening disclosure and board resolution requirements to mitigate the risk of abuse.

Second, while the current law requires that treasury shares be disposed of at no less than their fair value, it lacks clear provisions regarding preemptive rights for existing shareholders or mandatory disclosure obligations. This study therefore proposes that, in principle, existing shareholders be granted priority rights in the disposal of treasury shares. When disposal to a third party is necessary, it should be subject to prior disclosure, board approval, and the demonstration of a legitimate business purpose. These reforms would reinforce the principle of shareholder equality while providing a legal foundation that supports corporate flexibility.

3) Reverse Stock Splits and Protection of Minority Shareholders

Reverse stock splits are a useful tool for improving corporate liquidity and stabilizing share prices. However, when the split ratio exceeds a certain threshold, it can generate a large number of fractional shares, resulting in disadvantages for minority shareholders.[6] In practice, when a reverse split ratio of 10:1 or higher is applied, some shareholders effectively lose their shares, which may function as a de facto "squeeze-out."

To address this risk, the system governing reverse stock splits should be revised to grant appraisal rights to shareholders affected by high-ratio splits. In addition, enhanced procedural requirements—such as prior disclosure and special resolution—should be imposed. The criteria for determining the purchase price should also be rationalized, using recent average market prices as a basis, to prevent the infringement of minority shareholders' property rights.

4) Reform of the Interim Dividend System

Interim dividends serve as an efficient means of returning profits to shareholders; however, unlike regular dividends, the current system lacks provisions for deducting unrealized gains in its accounting basis. Under Article 462(3) of the Commercial Act, regular dividends must exclude unrealized gains—such as valuation profits—from the amount available for distribution. In contrast, no corresponding provision exists for interim dividends, raising concerns about potential harm to a company's financial soundness.

To address this issue, this study proposes amending Article 462-2 of the Commercial Act to apply the principle of excluding unrealized gains to interim dividends as well. Additionally, in cases where interim dividends exceed distributable profits and cause damage to creditors, the introduction of a provision granting creditors a right to claim restitution is proposed. These measures would enhance the reliability of the interim dividend system and represent a significant legislative advancement from the perspective of creditor protection.

3. Conclusion

The legal framework governing finance and accounting is central to maintaining corporate financial soundness, protecting shareholder rights,

6 Kim, Jae-Bum, "The Elimination of Minority Shareholders by a Reverse Stock Split," *Commercial Cases Review* (KCCA), vol. 34, no. 4, The Korea Commercial Cases Association, 2021.; Kim, Ji-Hwan, "A Study on the Squeeze-Outs by Way of Reverse Stock Splits under the Korean Commercial Law," *Korean Commercial Law Review* (KCLA), vol. 40, no. 2, Korea Commercial Law Association, 2021.

and enhancing the predictability of capital markets. The four legislative reforms proposed in this chapter go beyond procedural adjustments; they aim to redesign the legal system in a way that balances managerial autonomy with accountability, while ensuring the substantive protection of rights for minority shareholders and other shareholders. These reforms would improve alignment with global capital market standards and help establish a legal foundation for resolving the structural "Korea Discount" in the Korean capital market.

IV. Corporate Restructuring

1. Introduction

While the current Commercial Act of Korea provides a range of provisions regarding corporate restructuring, it has revealed practical limitations in effectively protecting shareholders and creditors due to regulatory ambiguities and institutional shortcomings. In particular, as spin-offs (physical divisions) are increasingly utilized as a means of altering corporate governance structures in the capital market, concerns have emerged over the infringement of minority shareholders' rights.[7] These developments underscore the urgent need for institutional responses. This chapter focuses primarily on spin-offs as a major form of corporate restructuring. It analyzes the current system's shortcomings and proposes concrete improvements. In particular, it advocates for revisions to the appraisal rights of dissenting shareholders to enhance legal coherence and the effectiveness of shareholder protection mechanisms.

2. Issues and Reform Measures

1) Physical Spin-offs and the Protection of Minority Shareholders

A physical spin-off refers to a corporate restructuring method in which a company transfers a business division to a newly established subsidiary while retaining full ownership and control. This structure is strategically utilized in the governance of large Korean conglomerates. However, under this arrangement, existing shareholders continue to hold shares only in the parent company and do not receive any equity in the spun-off subsidiary. As a result, control becomes increasingly concentrated in the hands of the majority shareholders, while minority shareholders are marginalized. Although this structure has a material impact on shareholder asset value, the current legal framework does not provide adequate compensation mechanisms or procedural safeguards.

This study argues for the recognition of appraisal rights for dissenting shareholders in the context of physical spin-offs as a necessary institutional reform. Such rights should not be viewed merely as procedural in nature, but rather as essential mechanisms to ensure shareholder consent and fair compensation in the event of significant changes to corporate governance structures.

Even if dissenting shareholders are granted appraisal rights in cases of physical spin-offs, a special exemption system should be introduced to support the efficient execution of small-scale corporate restructurings. Such exemptions may include allowing spin-offs to proceed with only a board resolution when the scale of the spin-off falls below a certain threshold or simplifying disclosure requirements.[8] However, to prevent the abuse of such exceptions, institutional

7 A notable example is LG Chem's 2020 split-off of its battery business into a wholly owned subsidiary, LG Energy Solution, which subsequently raised KRW 10.2 trillion through an IPO in January 2022. Existing investors in LG Chem expressed significant disappointment over the split-off, causing LG Chem's stock price to drop by approximately 11.5%, corresponding to a market capitalization loss of around KRW 6 trillion. In contrast, LG Energy Solution debuted on the stock market with a closing day market cap of approximately KRW 118 trillion, becoming the second-largest listed company in Korea. See Jinwoo Park, "Split-off of LG Chem and Spin-off of SK Telecom," *Korea Business Review*, Vol. 26, No. 3, Korean Academic Society of Business Administration, pp. 71–93. After LG Energy Solution's listing, LG Chem's stock declined by 16.57% within a month. See Subin Moon, "'Split-off IPO' of LG Energy Solution Fuels Retail Investor Backlash; Listed Firms' Physical Spin-offs Halved," *Chosun Biz*, March 6, 2024, https://biz.chosun.com/stock/stock_general/2024/03/06/EXZ63PXVTVFI3EUWTWIYYOLSJY/.

8 The 2023 amendment bill to the Commercial Act proposed by the Ministry of Justice grants dissenting shareholders the right to

safeguards must also be established to exclude their application under certain conditions where minority shareholders' rights could be disproportionately harmed.

Furthermore, the current Commercial Act lacks clarity regarding the legal permissibility of spin-off mergers, including both physical absorption-type mergers and physical incorporation-type mergers. Therefore, the law should be amended to explicitly authorize these transactions. In particular, Article 530-12 and other relevant provisions of the Commercial Act should be revised to create a legal framework that accommodates a variety of spin-off structures and procedures.

2) Improving the Appraisal Rights of Dissenting Shareholders

To better protect dissenting shareholders in the course of corporate restructuring, the scope of appraisal rights must be expanded. Under the current system, appraisal rights are only recognized for certain types of restructuring, and not for others—such as physical spin-offs—even when such transactions result in substantial changes in corporate control. This selective application effectively limits shareholders' rights to choose and undermines their property interests.

Therefore, it is necessary to standardize the procedural framework across various forms of corporate restructuring, including physical spin-offs. This should include clear rules regarding prior notice→ expression of dissent→ and submission of appraisal demands. Additionally, provisions should be revised to ensure a fair valuation standard for share buybacks and to establish a reliable dispute resolution mechanism. These amendments would enhance shareholder participation in restructuring decisions and contribute to greater trust in the capital markets.

3. Conclusion

Corporate restructuring serves as a critical mechanism for enhancing market competitiveness and driving structural innovation. However, such efforts must be accompanied by adequate protection for shareholders and creditors. In particular, transactions like physical spin-offs, which significantly affect corporate governance structures, necessitate more sophisticated legal safeguards. It is essential to ensure the protection of dissenting shareholders, prevent abuse of special exemptions, and revise the legal framework through the adoption of foreign legislative models. The reform measures proposed in this section aim to provide a substantive foundation for aligning Korea's corporate restructuring regulations under the Commercial Act with global standards.

Ⅴ. Expansion of Directors' Fiduciary Duty

1. Introduction

Under the current Commercial Act, directors are obligated to perform their duties faithfully "for the benefit of the company" in accordance with applicable laws and the articles of incorporation (Article 382-3 of the Commercial Act). This fiduciary duty, also referred to as the duty of fidelity or duty of loyalty, has gained renewed legislative attention since 2024, amid growing discourse on enhancing managerial accountability and improving corporate governance structures to support corporate value enhancement.

2. Domestic Debate and Comparative Legislative Approaches

There is broad consensus in Korea that shareholder protection should be strengthened, even though opinions differ on whether and how

request share repurchase in the event of a physical spin-off, while also introducing a special exemption for cases where the total assets of the spun-off subsidiary exceed 10 percent of the total assets of the parent company. However, the bill also stipulates that even under such an exemption, the approval of the general shareholders' meeting of the parent company cannot be omitted. (Ministry of Justice, "Legislative Notice on the Amendment to the Commercial Act for Improving the Corporate Environment and Protecting Shareholders," MOJ Press Release, August 24, 2023)

the scope of directors' fiduciary duty should be extended to include shareholders. Supporters of the proposed amendment emphasize its potential to enhance the interests of minority shareholders.[9] In contrast, more cautious perspectives argue that such revisions may be inconsistent with the existing legal framework, and that current laws are already sufficient to protect shareholders.[10]

A more recent compromise position[11] acknowledges that, while the duty to protect shareholder interests can be interpreted under the current law, a confirmatory or declaratory amendment may still hold value in light of the ongoing controversy.

In this context, the Delaware General Corporation Law in the United States clearly distinguishes the duty of loyalty from the business judgment rule and provides standards for determining its breach in specific categories of conduct, such as self-dealing. Similarly, case law and academic theories in Germany and Japan have contributed to clarifying the scope of directors' responsibility toward shareholders in relation to the duty of loyalty.

3. Conclusion

While it is possible to infer a director's duty to protect shareholders under the current law, conflicting court decisions and the potential implications for capital market and adjudicatory standards suggest the need for legislative clarification. A cautious yet declaratory amendment to expand the scope of directors' duty of care, or alternatively the introduction of shareholder protection duties in relation to specific board activities, should be considered as part of a broader effort to enhance corporate governance accountability.

VI. Conclusion

This study systematically analyzed provisions within the Commercial Act (Company Law section) that have caused practical confusion or provided insufficient protection for shareholders. It proposed legislative amendments aligned with global standards. Under the overarching goals of balancing corporate autonomy and accountability, safeguarding the rights and interests of minority shareholders, and restoring trust in the capital markets, the study emphasized the urgent need for legal reforms in key areas such as classes of shares, treasury stock, stock consolidation, interim dividends, corporate restructuring, and directors' fiduciary duties. These findings are expected to serve as foundational material for future legislative revisions to the Commercial Act.

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9 Kim, Woojin, "The Necessity of Introducing Fiduciary Duties Toward Shareholders – A Proposal to Improve Corporate Governance through Enhanced Civil Remedies," *Seminar Materials on Corporate Governance for Capital Market Advancement*, 2024, p. 31; Lee, Sang-hoon G., "Fiduciary Duties of Directors Toward Shareholders – Review of the Bill Specifying 'Shareholder's Proportional Interest' in the Fiduciary Duty Clause," *Korean Commercial Law Review*, Vol. 41, No. 2, Korea Commercial Law Association, 2022, pp. 422–423; Kim, Juyoung, "Value-Up and Directors' Fiduciary Duties," *Proceedings of the 35th Seminar on 'Value-Up and Directors' Fiduciary Duties'*, Korean Corporate Governance Forum, June 20, 2024, p. 31.

10 Lee, Chul-Song, "An Evaluation of the Proposed Amendment to the Commercial Act for the Protection of Shareholders' Proportional Interests," *Korea Listed Companies Association Research*, 2023-3, Korea Listed Companies Association, 2023, p. 13; Kim, Tae Jin, "Analysis and Reconstruction of the Principle of Shareholder Equality: A Study on Shareholder Inequality," *Proceedings of the 2024 Summer Academic Conference*, Korea Commercial Law Association, 2024, p. 64; Kwon, Yongsoo, "The Japanese Legal Framework on Directors' Duties and Its Implications for Korea," *Proceedings of the Special Academic Conference*, Korea Commercial Law Association, 2024, p. 50; Kwon, Jaeyeol, "A Review on the Recognition of Directors' Fiduciary Duties Premised on Shareholders' Proportional Interests," *Commissioned Report*, The Federation of Korean Industries, June 11, 2024; Hong, Bok Ki, "Debate on the Directors' Duty of Loyalty," *Economic Law Review*, Vol. 23, No. 2, Korea Economic Law Association, 2024, p. 16.

11 Chun, Kyung-Hoon, "Directors' Duties and the Protection of Shareholder Interests under Korean Corporate Law," *Proceedings of the Special Academic Conference*, Korea Commercial Law Association, 2024, p. 97; Chung, Joon Hyug, "The Duty of Loyalty of Directors and the Protection of Shareholder Interest," *Autumn Academic Conference*, Korea Business Law Association, 2024, p. 32; Sohn, Changwan, "The Duty of Loyalty of Directors in U.S. Corporate Law and Its Implications," *Proceedings of the Special Academic Conference*, Korea Commercial Law Association, 2024, p. 76.

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International Journal of Criminal Justice

Volume 7 Issue 1 June 2025

A Study on the Criminal Procedures for the Corporate Criminal Responsibility*

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Abstract

Discussions on dual liability provisions have traditionally centered on issues of substantive law, including the relationship between these provisions and the principle of culpability from the perspective of classical criminal law theory, the legal models of Corporate Criminal Responsibility, and whether individuals can be punished under such provisions (e.g., the subjective indivisibility of complaints or accusations). However, there has been relatively little academic discourse on the criminal procedural aspects of prosecuting corporations under these provisions. In practice, many procedural issues under the Korean Criminal Procedure Act remain unresolved or ambiguous. This study seeks to address this gap by analyzing procedural issues involved in corporate punishment and proposing concrete solutions. Specifically, it examines the procedural rights and obligations of corporations under constitutional and criminal procedural law, the procedural challenges raised by dual liability provisions in terms of corporate standing and litigation capacity, representation in litigation, investigative and trial procedures, and compares them with relevant foreign legal systems. Ultimately, the study aims to provide suggestions for improving criminal procedures in cases involving vicarious liability, and to prepare for the potential enactment of a general statute on Corporate Criminal Responsibility in Korea.

Keywords: Dual liability provisions, Corporate Criminal Responsibility, vicarious liability, Procedural rights of corporations, Korean Criminal Procedure Act

* This article is a revised version of part of the research report titled ' A Study on the Criminal Procedures for the Corporate Criminal Responsibility', published on 31 December 2024.
http://dx.doi.org/10.36889/IJCJ.2025.003
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Received 31 December 2024; Revised 18 June 2025; Accepted 30 June 2025
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 7 Issue 1, June 2025, 023-035

I . Introduction

Despite the growing necessity and increasing demand for corporate criminal liability, accompanied by a rapid proliferation of dual liability provisions in recent years, scholarly discussions on this subject have remained largely confined to matters of substantive criminal law. In contrast, discourse on the procedural dimensions of corporate punishment—particularly within the framework of criminal procedure—is notably scarce and underdeveloped. Most debates concerning corporate liability have focused on explaining the criminal act, culpability, and capacity of legal persons within the traditional framework of criminal law theory. This includes questions such as whether the standard of culpability demanded under criminal law differs from that under administrative penal provisions. Additionally, discussions tend to center around the theoretical justifications for dual liability rules, the structural models of such provisions, and comparative examinations of foreign legislative frameworks, especially regarding sanction mechanisms and their diversification. This trend holds true in the context of dual liability provisions as well. That is, academic discussions typically revolve around reconciling such provisions with the principle of culpability in traditional criminal law theory, exploring the models of corporate liability embedded in dual liability rules, and analyzing issues such as the punishment of natural persons under these provisions (e.g., the subjective indivisibility of complaints or accusations). As such, the predominant focus has been on the doctrinal justification and substantive interpretation of dual liability provisions, while procedural concerns have received comparatively little attention.

Admittedly, the Criminal Procedure Act[1] does not entirely lack provisions regarding criminal procedures applicable to the enforcement of dual liability rules. In fact, such provisions contemplating the application of dual liability were already included in the Criminal Procedure Act when it was first enacted by Act No. 341 on September 23, 1954 and came into effect on May 30, 1954. Specifically, with respect to the representation of a natural person sitting in the defendant's seat on behalf of a corporation, Article 27 (Juristic Persons and Representation for Acts of Litigation) and Article 40(2) (Contents of Written Decisions) provide relevant stipulations. Article 276 (Right for Attendance of Criminal Defendant) includes a proviso clause on the authority of a representative of a corporation. Article 328(1)(2) (Ruling on Rejection of Public Prosecution) addresses the legal effect of a corporation's dissolution. Lastly, Article 479 (Execution for Juristic Person after Merger) stipulates provisions concerning the succession of pecuniary penalties imposed on a juristic person.

Nevertheless, a number of procedural uncertainties remain unresolved. For example, once a corporation becomes a criminal defendant, how are its rights as a defendant to be guaranteed?[2] Where should the corporation—or its legal representative—be seated in court? If a natural person mediates the corporation's conduct—whether by directly executing a criminal act or by neglecting the duty to supervise employees—should the criminal trial of such individual (or group) be equated with the corporate criminal proceeding? Furthermore, does a final conviction of the individual result in the automatic application of vicarious liability to the corporation? Evidentiary questions also remain. If the individual who committed the offense or

1 Criminal Procedure Act, Act No. 341, promulgated on Sept. 23, 1954, effective as of May 30, 1954.

2 For instance, if a corporate representative embezzles company funds and flees abroad, questions arise as to whether the corporation—despite being the victim—is nevertheless subject to criminal liability under Article 4(4) of the Act on the Aggravated Punishment of Specific Economic Crimes. This raises the issue of whether corporations should be entitled to assert a defense in criminal proceedings, or whether liability should be imposed on the corporation by attributing the representative's failure in appointment, management, or supervision. These concerns further extend to whether such responsibilities ultimately lie with the board of directors, shareholders, or auditors, and whether compliance officers bear any legal responsibility.

failed in supervisory duties cannot be clearly identified, can vicarious liability still be imposed? (The answer may vary depending on the corporate liability model adopted.) Would punishing the corporation solely based on the occurrence of a statutory result violate the principle of culpability? In cases where the statutory result is disproportionate to the degree of culpability of the individual actor, what legal grounds justify assigning such a result to the corporation? These issues have yet to be definitively resolved.

Other complex questions also arise in relation to the application of vicarious liability. For instance, should a corporation be held criminally liable under such provisions even when the unlawful conduct directly harms the corporation itself? In the case of a one-person company, does the imposition of vicarious liability violate the constitutional principle of ne bis in idem (prohibition against double punishment)? Additional questions concern the possibility of holding trials in absentia, the permissibility of filing an independent indictment against a corporation, and issues of jurisdiction—for example, whether the parent company of a foreign corporation operating only a liaison office in Korea can be prosecuted. Further concerns relate to the establishment of accomplice liability under vicarious provisions and the conduct of such trials. Questions also arise concerning the procedural rights of corporations, such as the privilege against self-incrimination—particularly whether the right to remain silent may be invoked by corporate representatives or whether they may be compelled to testify as witnesses. In addition, when a suspended sentence or suspension of execution is imposed on a corporation, it remains unclear whether a probation office—lacking expertise in corporate governance or taxation—is suitable for overseeing compliance. The Act on the Lapse of Criminal Sentences also contains no provisions regarding the criminal records or past offenses of corporations.

Issues also arise in connection with compulsory investigations, particularly when the legal representative of a corporation is also its agent. Questions include the legitimacy and scope of such compulsory investigative measures, as well as legal challenges regarding in-house counsel—such as their role in litigation representation, the boundaries of confidentiality obligations, and the permissibility of conducting coercive investigations against them. These concerns are inherently tied to the procedural application of vicarious liability provisions. Moreover, it is evident that only after the procedural framework for criminal litigation against corporations is clearly established can concrete investigative guidelines for corporate criminal enforcement be systematically developed. This is exemplified by practices in jurisdictions such as the United States[3] and Australia[4].

Building upon this awareness of the legal and procedural gaps, the present study analyzes the current application of vicarious liability provisions, constitutional and procedural rights and obligations of corporations, and the procedural issues arising under the Criminal Procedure Act. The analysis distinguishes between corporate capacity as a party, its procedural representation, and challenges within both investigative and trial phases. In doing so, the paper reviews major foreign legislative examples and ultimately proposes policy recommendations for improving criminal procedure related to vicarious corporate liability. Additionally, the study anticipates and prepares for the potential introduction of a general provision on corporate criminal responsibility into Korean law.

3 U.S. Attorneys' Manual (USAM) §§9-27.000 and §§9-28.000, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9 (accessed March 15, 2023).

4 See Australian Government Attorney-General's Department, *Commonwealth Criminal Code Guide for Practitioners – Draft*, Part 2.5: Corporate Criminal Responsibility, Division 12, available at https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-25-corporate-criminal-responsibility/division-12 (accessed March 15, 2023).

1. Legal Status of Corporations and Their Representatives in Criminal Procedure under the Application of Vicarious Liability Provisions

1) Rights of Corporations as Parties under the Constitution and the Criminal Procedure Act

Article 27(1) of the Criminal Procedure Act of Korea provides that, "When the criminal defendant or the criminal suspect is a juristic person, it shall be represented by its representative in regard of acts of litigation." This presupposes that a corporation may assume the legal status of a defendant or suspect in criminal proceedings, and accordingly regulates the representation of such entities in litigation. In common law jurisdictions that traditionally recognize corporate criminal liability, the prevailing view is that corporations, as defendants in criminal proceedings, are entitled to constitutional and procedural rights equivalent to those of natural persons.[5]

Consequently, corporations must be afforded the same constitutional and procedural protections as natural persons. These include, inter alia: the right to a fair trial, the right to a speedy trial, the right to a public trial, the presumption of innocence,[6] the principle of personal responsibility,[7] the right against compelled self-incrimination or the privilege against self-incrimination,[8] the right to refuse to testify, the right to the assistance of legal counsel, the right to confront and cross-examine adverse witnesses, the right to be informed of the nature of the charges and of essential rights, the right to court-appointed counsel where necessary (including visitation and communication rights, and the right to have counsel present during interrogation), the right to access and copy relevant documents, the right to submit evidence, the right to appeal decisions or investigate violations of rights before trial, the right to face witnesses, the right to apply for legal aid, and the right to communicate through interpretation and translation. By contrast, certain procedural measures that are inherently applicable only to natural persons—such as arrest, detention, blood testing, or autopsy—are not applicable to corporations by their very nature.[9]

Even in such instances, it is worth considering whether the rights afforded to a corporation by virtue of its status as a defendant should also be protected not only in the criminal proceedings directly targeting the corporation but also in criminal proceedings against the natural person whose conduct constitutes the predicate offense upon which corporate liability is based.

Under current law, in the absence of an explicit provision excluding single-member companies from the scope of vicarious liability statutes, such provisions inevitably apply to them as well. However, in the case of single-member companies or corporations without employees, the risk of violating the principle of prohibition of double punishment remains. Therefore, it may be advisable to introduce a clear statutory exemption from the application of vicarious liability provisions for single-member companies that have no employees. This is because, in such cases, the corporate representative and the corporation are

5 For the U.S., see: Charles Doyle, Corporate Criminal Liability: An Overview of Federal Law, Congressional Research Service, Oct. 30, 2013, p. 13; Brandon L. Garrett, "7 - The Constitutional Rights of Corporations in the United States", in Barnali Choudhury & Martin Petrin (eds.), Understanding the Company: Corporate Governance and Theory, Cambridge University Press, 2017, p. 167; Tracey Maclin, "Long Overdue: Fifth Amendment Protection For Corporate Officers", Boston University Law Review, Vol. 101, No. 1523 (2021), p. 1523.
For Australia, see: Ross Ramsay, "Corporations and the Privilege Against Self-Incrimination", UNSW Law Journal, Vol. 15(1), 1992, p. 300. Note, however, that both the U.S. and Australia deny the privilege against self-incrimination to corporations.

6 Regarding the burden of proof on prosecutors to establish breach of supervisory duty by the corporate representative, see Supreme Court Decisions 2009Do6968, rendered July 8, 2010; and 2009Do5516, rendered July 14, 2011.

7 See the Constitutional Court Decision 2008Hun-Ka14, rendered July 30, 2009 (en banc), which held a vicarious liability provision unconstitutional for lacking an exemption clause.

8 There remains substantial controversy over whether courts may order corporations to submit evidence, even in light of the right against self-incrimination.

9 BT-Drucksache 2020 19/23568, p. 93.

punished simultaneously for the same unlawful act. In this context, although Article 102(4)(d) of the Swiss Criminal Code includes single-member companies (Einzelfirmen, Einzelunternehmen) within the scope of corporate criminal liability, the prevailing interpretation excludes companies without employees from its application.[10]

2. Procedural Standing and Litigation Capacity of Corporations

There is general agreement that a corporation loses its standing as a party to criminal proceedings in the event of bankruptcy. However, it is inappropriate to uniformly interpret the dissolution of procedural standing in cases of division or merger. From a criminal policy perspective, no adequate mechanisms exist to address strategic mergers, divisions, or bankruptcies executed with the intent to evade corporate criminal liability while maintaining economic and operational continuity. If the resulting or surviving entity retains such continuity, it would be incorrect to deem the defendant's identity extinguished. Equating this with the death of a natural person is not a fitting analogy. Moreover, Article 479 of Korea's Criminal Procedure Act explicitly addresses "Execution for Juristic Person after Merger." This provision does not merely imply succession of a "monetary claim" for fines but rather signifies the succession of punishment and, by extension, of criminal liability. It thus represents a significant exception to the principle of the non-transferability of criminal punishment.

Accordingly, as exemplified in Article 10 of the Austrian Act on the Responsibility of Associations, the draft of the German 2020 Corporate Sanctions Act, and Article 234 of Korea's Civil Procedure Act (Interruption due to Merger of Juristic Person), it is worth considering whether the Korean Criminal Procedure Act should allow the surviving corporation to succeed the trial in its procedural capacity.

3. Legal Status of Corporate Representatives and Representation of Procedural Acts

Regardless of the type of procedural act—whether it is an act of litigation that is legal or factual in nature, whether it is aimed at producing or conferring legal effect, or whether it is active or passive—the representative of a corporation must be deemed authorized to perform such acts within the criminal procedure on behalf of the corporation, as a party possessing the rights and obligations of a defendant or suspect.

4. Representation of Procedural Acts by a Corporate Representative Who is a Co-defendant

Article 27 of the Korean Criminal Procedure Act does not explicitly restrict who may represent a corporation in its procedural acts during criminal trials. Accordingly, under the plain text of the statute, it is possible for the corporate representative, who is a natural person and a co-defendant in the same trial, to simultaneously act as a defendant in their own case and represent the corporation in its trial.

However, it is necessary to disallow a corporate representative from representing the corporation if that representative is themselves a co-defendant or suspect. The reason is that, when the corporate representative is being prosecuted as a co-defendant for the same offense for which the corporation is being held criminally liable (e.g., under a vicarious liability provision), the representative is simultaneously acting in the dual role (Doppelrolle)[11] of defending both themselves and the corporation.[11] This situation creates a

10 Niggli, Marcel Alexander / Gfeller, Diego R., Art. 102 N 428 f., in: Niggli, Marcel Alexander / Wiprächtiger, Hans (eds.), *Basler Kommentar Strafrecht / Jugendstrafrecht*, 4th ed., Helbing Lichtenhahn Verlag, 2018 (hereinafter cited as "BSK StGB4–Author").

11 Öner, Stephanie, "Die praktische Anwendung des Verbandsverantwortlichkeitsgesetzes (VbVG) – Anwendungszahlen und prozessuale Besonderheiten im Verfahren gegen Verbände," *Journal für Strafrecht (JSt)*, Heft 6, 2019, p. 506.

significant risk of a conflict of interest between the natural person and the corporation if the same individual is allowed to represent both parties.[12]

Moreover, if the corporation is prosecuted for the same offense as the natural person, and if the corporation does not formally hold the status of a defendant in the natural person's trial, then the corporation (or more precisely, the person representing it in the criminal procedure) would be required to testify as a witness in the natural person's trial. In such cases, the obligation to testify truthfully would effectively amount to compelling the corporation to make incriminating statements about its own conduct, thereby infringing upon its right to remain silent or its privilege against self-incrimination. This risk is particularly pronounced in the Korean legal context, where, under consistent Supreme Court precedent, a co-defendant lacks testimonial competence if the trials have not been severed, but if the trials are separated, the co-defendant gains testimonial competence and can be punished for perjury if they testify falsely in the other trial.[13]

To address this dilemma, many jurisdictions, including Switzerland, Austria, and Germany, explicitly prohibit a corporate representative who is a co-defendant from representing the corporation in litigation. Notably, Article 15(1), second sentence of Austria's Act on the Responsibility of Associations (Verbandverantwortlichkeitsgesetz, VbVG) provides that even if the trials of the legal entity and the natural person are severed, the legal entity retains its rights as a defendant in the natural person's trial.[14] This legislative approach offers significant implications for Korean criminal procedure reform.

Ⅱ. Special Agent

Under the Korean Criminal Procedure Act, when a corporation does not have a person to represent it in litigation, the court is required to appoint a special agent to act on behalf of the corporation in criminal proceedings. In this context, following the 2021 criminal justice reform that reallocated investigative authority between judicial police officers and public prosecutors—expanding the scope of investigations by police and limiting the supervisory power of prosecutors over them—the need for police officers to request the appointment of a special agent during the investigation phase has become increasingly salient. In this regard, the Japanese Criminal Procedure Act serves as a useful reference: Article 29(2) allows the court to appoint a special agent ex officio or upon request by a judicial police officer, public prosecutor, or an interested party, regardless of whether the case is in the investigative or trial stage. Likewise, legal systems such as Austria, Switzerland,[15] and various legislative proposals in Germany[16] also provide that when there is a conflict of interest between the corporation and its representative, the appointment of a special agent is mandatory—offering meaningful guidance for Korean law.

It would thus be appropriate for Korean law to allow the court to appoint a special agent either ex officio or upon petition when the corporate representative is in a conflict-of-interest position with the corporation. This is because the Korean Criminal Procedure Act does not restrict corporate representatives from acting on behalf of the corporation even when they are co-defendants in the same case. As such, in cases where the

12 For a detailed discussion, see Öner, *JSt*, 2019, p. 506 f.
13 See Supreme Court of Korea, Decision 99Do2449, Sept. 17, 1999; Decision 2008Do3300, June 26, 2008; Decision 2023Do7528, Feb. 29, 2024, among others.
14 See Öner, *JSt*, 2019, p. 504; Schumann, Stefan, "Verfahrensgrundrechte für juristische Personen – die strafprozessuale Perspektive," *Journal für Rechtspolitik (JRP)*, Vol. 29 (2021), p. 381.
15 Öner, *Journal für Strafrecht (JSt)*, 2019, p. 506.
16 Kim, Yookeun, "Criminal Responsibility of Corporations – Focusing on the Legislative Bill for Introducing Criminal Responsibility of Enterprises and Other Entities in North Rhine-Westphalia, Germany," *Criminal Policy Studies*, Vol. 25, No. 3 (Fall 2014), Korean Institute of Criminology and Justice, p. 35.

corporation and the individual are prosecuted together, mutual conflicts of interest may arise. Article 62 of the Korean Civil Procedure Act provides for the appointment of a special representative when "the legal representative is unable to exercise his/her power of representation due to a factual or legal impediment," which is interpreted to include situations of conflict of interest between a corporation and its director. Therefore, it would be worth considering introducing a similar provision in the Korean Criminal Procedure Act. Furthermore, Article 62-2(2) of the Civil Procedure Act—which applies mutatis mutandis to corporations—says "Where a special representative under paragraph (1) effects withdrawal of a lawsuit, compromise, waiver or recognition of a claim, or a secession under Article 80, the court may decide not to permit such act within 14 days from the date such act is effected if it is deemed clearly contrary to the principal's interests. No appeal may be made against such decision." In contrast to Korea, where interlocutory appeals or appeals are permitted only in limited circumstances, Switzerland broadly allows appeals against nearly all prosecutorial and judicial decisions. In particular, Swiss law permits an appeal against the court's decision to appoint a special representative (Article 393(1)(a) and (b)[17] of the Swiss Criminal Procedure Code). Moreover, judges are understood to have the authority to dismiss a special agent ex officio if the representative acts against the interests of the corporation.[18]

III. Issues in the Investigation Phase

1. Investigative Authority

Following the 2021 criminal justice reform that restructured the investigative authority between prosecutors and judicial police officers, the authority to investigate is now governed by multiple legal provisions, including Article 195 of the Criminal Procedure Act (Relationship between Public Prosecutors and Judicial Police Officers), Article 4 of the Public Prosecutors' Office Act (Duties of Prosecutors), the Regulations on the Scope of Crimes Subject to Prosecutorial Investigation, the Regulations on Mutual Cooperation between Prosecutors and Judicial Police Officers and General Investigative Guidelines, the Act on the Establishment and Operation of the Corruption Investigation Office for High-ranking Officials, Article 6 of the Act on Persons Who Perform the Duties of Judicial Police Officers and the Scope of Their Duties (Scope of Duties and Investigative Jurisdiction), and other administrative laws that define the duties of judicial police officers. However, even prior to the 2021 reform, investigative authority over corporate crime was not clearly and specifically assigned.

Given that dual punishment provisions are largely intended to respond to corporate crime, it would be worth considering whether investigative authority should be centralized in a specialized investigative agency rather than distributed according to the investigative powers of each individual administrative statute.

2. Compulsory Measures Against Corporations – Particularly the Seizure, Search, and Interception of Communications

Compulsory investigative measures against corporations, particularly the seizure, search, and interception of corporate communications (as defined in Article 2(1) of the Protection of Communications Secrets Act, which includes postal items and telecommunications), raise serious concerns. This is because such investigative actions pose a high risk of infringing upon the privacy of individual members

17 Engler, Marc, Art. 112 N 50, in: Niggli, Marcel Alexander / Heer, Marianne / Wiprächtiger, Hans (eds.), *Basler Kommentar Schweizerische Strafprozessordnung / Jugendstrafprozessordnung*, 3rd ed., Helbing Lichtenhahn Verlag, 2024 (hereinafter cited as "BSK StPO3 – Author").

18 BSK StPO3 – Engler, Art. 112 N 41.

within the corporation. As the corporation's communication systems are inherently linked to communications by its members, the seizure, search, or interception of such systems may result in comprehensive investigative intrusion into the private communications of all corporate members. Therefore, when personal information of individuals is at stake, it is necessary to consider a system in which investigative warrants are applied for and issued individually for each person concerned.

3. The Issue of Independent Prosecution

1) Factual Barriers to Prosecution

Factual circumstances that serve as barriers to prosecution—such as the inability to locate the natural person who committed the offense, the death of the actor, or the actor's lack of criminal capacity—should not preclude the prosecution of the corporation. This is because such barriers do not render the proof of the predicate offense, on which the corporation's liability under the dual punishment provision is based, entirely impossible. By analogy to the principle that a co-perpetrator's criminal liability is not affected by the other perpetrator's incapacity, even if the natural person cannot be punished due to lack of criminal capacity, it is still appropriate to allow independent prosecution of the corporation.

However, when the actor cannot be identified (e.g., due to a failure to prove causation), it must be concluded—absent any contrary legal provision—that the corporation cannot be prosecuted independently. This is because the corporate liability cannot be established without proving that the natural person's conduct satisfies the statutory elements of the offense and is unlawful. An illustrative example is found in Article 102(1) of the Swiss Criminal Code, which adopts a subsidiary model of corporate liability (subsidiäres Model) or vicarious liability. Under this provision, a corporation may be held liable for an offense committed in the course of its business if, due to organizational defects (wegen mangelhafter Organisation des Unternehmens), no individual perpetrator can be identified.[19] This provision is significant in that it assigns independent criminal liability to a corporation whose defective organizational structure prevents judicial authorities from identifying a responsible natural person. This model holds implications for Korea as well. Austria and Germany, through explicit statutory provisions, stipulate that factual barriers to prosecution of natural persons shall not affect the punishment of corporations. In the United States, this principle is upheld by judicial precedent. (Article 3(4) of the Austrian Verbandsverantwortlichkeitsgesetz (VbVG)[20]).[21]

2) Legal Barriers to Prosecution

Legal obstacles to prosecuting a natural person—such as the expiration of the statute of limitations, absence of a complaint in crimes requiring a complaint, pardon, immunity, prosecutorial non-indictment (including conditional suspension of prosecution), or leniency programs that anticipate a reduction in penalty—should likewise be interpreted not to affect the prosecution of a corporation.

Korean case law has held that a judgment of dismissal for the natural person does not affect the punishment of the corporation.[22] This rationale should be equally applicable to the initiation of

19 BSK StGB4-Niggli/Gfeller, Art. 102 N 428.

20 Austrian *Verbandsverantwortlichkeitsgesetz* (VbVG) Article 3(4): "The liability of an entity for a criminal offense and its punishability shall not be excluded by the punishability of its decision-makers or employees." See: Lehmkuhl(Hilf), Marianne Johanna/Zeder, Fritz, § 3 VbVG Rz. 51 ff., in: Höpfel, Frank/Ratz, Eckart, *Wiener Kommentar zum Strafgesetzbuch*, 2nd ed., Manz, 2020; also see: Soyer, Richard (ed.), *Handbuch Unternehmensstrafrecht*, Manz, 2020, Rz. 3.154 ff.

21 Soyer (ed.), *Handbuch Unternehmensstrafrecht* (2020) Rz. 3.84.

22 Korean Supreme Court, Judgment 2021Do701, Nov. 17, 2022. Commentary: Kim Byung-joo, "Whether a Corporation May Be Punished under a Dual Punishment Provision When Its CEO Has Been Dismissed in a Preceding Case," *Interpretation of Supreme Court Precedents*, Vol. 134 (2013), pp. 526 ff.

public prosecution against the corporation.

3) Dual Punishment Provisions and Complaints / Accusations

In the context of crimes requiring a complaint, a question arises as to whether a corporation may be prosecuted and punished under a dual punishment provision even in the absence of a complaint against the natural person. Specifically, where the dual punishment provision itself does not constitute a crime requiring a complaint, but the predicate offense committed by the natural person does, it remains unclear whether a complaint is still required as a procedural condition for prosecuting the corporation.

This question is distinct from whether a complaint filed against the natural person automatically extends its effect to the corporation subject to punishment under the dual punishment provision. The same issue also arises in relation to accusations, regardless of whether one accepts the principle of subjective or objective indivisibility.

Given that the corporate liability under dual punishment provisions is ultimately predicated on the unlawful act of a natural person, the absence of a complaint regarding such an act indicates not only the lack of prosecution against the natural person but also the absence of a demand for punishment for that unlawful act itself. Therefore, it follows that prosecution of the corporation also lacks justification unless a complaint has been made. However, since the absence of a complaint is not equivalent to an inability to establish the unlawfulness of the natural person's conduct, it would be inappropriate to make the prosecutability of the corporation entirely dependent on the prosecution of the natural person.

Nonetheless, because the current Criminal Procedure Act contains no provision expressly allowing the independent prosecution and punishment of a corporation in the absence of a complaint against the natural person, this issue cannot be resolved through interpretation alone. From a legislative standpoint, it is necessary to consider introducing a provision that allows independent prosecution and punishment of a corporation where a complaint has been filed against the corporation, even if no complaint was filed against the natural person, in cases where the natural person's offense is a crime requiring a complaint. The same applies in cases involving accusations.

As for the legal effect of complaints, although some lower court rulings have held that the principle of subjective and objective indivisibility does not apply to the withdrawal of a complaint,[23] the general rule should be that such indivisibility applies, unless there is an explicit statutory provision excluding it.

4) Statute of Limitations

The Criminal Procedure Act does not contain an explicit provision concerning the statute of limitations for offenses punishable under dual punishment provisions. As a result, it remains unclear whether the statute of limitations applicable to a person punished under such provisions should be determined based on the statutory penalty under the dual punishment provision itself, or based on the penalty prescribed for the underlying offense (the predicate offense).[24]

If the statute of limitations were to be determined based on the fine imposed by the dual punishment provision, this could lead to an unreasonable outcome: even if the statutory penalty for the natural person's offense is death, life imprisonment, or imprisonment for a term of at least ten years, the corporation would nevertheless be subject only to a five-year statute of limitations (under Article 249(1) of the

23 Seoul Central District Court, Judgment 2003No2711, Aug. 19, 2005.

24 A special law that explicitly prescribes the statute of limitations for corporations under a dual punishment provision is Article 6 of the *Act on Combating Bribery of Foreign Public Officials in International Business Transactions*, which provides: "The statute of limitations for a corporation subject to punishment under Article 4 shall expire after seven years."

Criminal Procedure Act), equivalent to the period applicable to imprisonment of less than five years.

Given that the dual punishment provision merely establishes the capacity of a corporation to be punished (as a penal subject), and does not constitute an independent set of offense elements, there are limitations in determining the statute of limitations for the corporation based on the predicate offense.

Therefore, to resolve this ambiguity, it is necessary to amend the Criminal Procedure Act to include an explicit provision regarding the statute of limitations applicable in cases involving dual punishment provisions.

Ⅳ. Issues in Trial Procedures

1. Territorial Jurisdiction

Case law in Korea gives the impression that corporations lack criminal capacity but possess only penal capacity, thereby construing corporate liability as ancillary to the criminal liability of natural persons. In practice as well, corporations are often prosecuted as co-defendants with natural persons, and territorial jurisdiction is determined based on the natural person. However, considering that a corporation bears independent criminal liability and is not subordinate to the punishment of the natural person, the possibility of filing an independent prosecution against a corporation should always be recognized. Although the unlawful act of the natural person serves as a triggering condition for corporate liability, this does not mean that the corporation becomes a co-defendant in a subordinate manner. Rather, the corporation must be regarded as an independent defendant in a separate criminal proceeding. Accordingly, in cases involving dual punishment provisions, it is worth considering setting territorial jurisdiction based on the location of the corporation's principal office. This approach is also adopted in major foreign jurisdictions, such as Switzerland (Swiss Criminal Procedure Code, Article 36(2) first sentence),[25] Austria (Austrian Corporate Liability Act, Section 15(1)), and France.

Therefore, a possible legislative approach would be to insert the following provision into Article 4 of the Criminal Procedure Act, with reference to Article 5 of the Civil Procedure Act (Ordinary Jurisdiction of Legal Persons):

"④ If the defendant is a corporation, territorial jurisdiction shall be determined by the location of its principal office or place of business. If neither exists, it shall be determined by the address of its principal responsible officer.

⑤ In applying paragraph ④ to foreign corporations, territorial jurisdiction shall be determined based on the location of the office, place of business, or address of the responsible officer within the Republic of Korea."

2. Establishing Legal Grounds for Joint Trials through Expansion of the Scope of Related Cases

Currently, in practice, persons subject to punishment under a dual punishment provision are indicted as co-defendants alongside the natural person. However, Article 11 of the Criminal Procedure Act does not clearly provide a legal basis for jointly adjudicating cases involving both the person punished under the dual punishment provision and the principal offender responsible for the predicate offense. Accordingly, it may be worth considering amending Article 11 by adding a new subparagraph (No. 5) that expressly includes "offenses under a dual punishment provision and the offense committed by the principal offender."

3. Citizen Participation Trials for Corporations

Under the current law, it is indeed difficult to interpret the Act on Citizen Participation in Criminal Trials as allowing citizen participation trials for corporate defendants, since such entities are not explicitly included among the

25 BSK StPO3-Moser/Schlapbach, Art. 36 N 3.

subjects of application under Article 5 of the Act.

However, if the predicate offense under the dual punishment provision qualifies for a citizen participation trial, it would not contradict the legislative intent expressed in Article 1 of the Act—namely, "to enhance democratic legitimacy and public trust in the judiciary"—to allow the corporate case to be tried as a related case. (Nevertheless, to support this, it would be necessary to amend Article 11 of the Criminal Procedure Act to include offenses under dual punishment provisions and their predicate offenses as related cases.)

4. Appearance of the Defendant

In cases where the defendant is required to appear at trial (i.e., where a trial may not proceed in the absence of the defendant), it would be appropriate to interpret the law such that the trial may proceed without the representative of a corporate defendant if that representative has either waived or abused the right of appearance in a way that obstructs the trial.

This interpretation is unavoidable under the current Criminal Procedure Act, which provides no explicit provisions regarding the non-appearance of legal representatives—particularly in cases where the defendant is a legal entity with no physical form—and which only allows for trials in absentia at the appellate level, assuming the existence of a summons or arrest mechanism for the defendant. The Act thus lacks any express basis for dealing with waiver or abuse of appearance rights by the representative of a corporate defendant.

Of course, it is theoretically possible to interpret the requirements for appointing a special representative more broadly. However, in the absence of a clear statutory provision allowing the costs of such appointment to be imposed on the defendant, a fundamental question arises: should the state bear the cost—using public funds—to appoint a special representative for a corporate defendant whose representative has waived or abused the right of appearance?

5. The Issue of Competence to Testify as a Witness

Under the Criminal Procedure Act, if a defendant is deemed to lack competence to testify as a witness, it naturally follows that the representative of a corporation—who represents the corporation's procedural acts in criminal proceedings in the capacity of a defendant—must also be deemed to lack such competence.[26] This conclusion remains valid even when the criminal proceedings against the corporation and those against the natural person are conducted separately.[27]

Furthermore, even when an agent appears in place of the corporate representative, the agent's legal status as a party does not change. Thus, the agent must also be regarded as lacking competence to testify as a witness.[28]

In criminal trials against natural persons, regarding the witness competence of the corporate representative, several issues arise: the basis for corporate criminal liability is the natural person's offense, and particularly in cases involving the unlawful acts of the representative, the corporation directly bears responsibility. As a result, the trial of the corporate representative is substantively indistinguishable from the trial of the corporation. If the corporate representative is summoned as a witness in the criminal

26 Seong Su-je, §27, p. 227, in: Noh Tae-ak (ed.), *Annotated Criminal Procedure Act (Vol. I)*, Korean Society for Judicial Administration, 2022 (hereinafter cited as *Annotated Criminal Procedure Act (2022)* [Author]).

27 For reference, in a judgment rendered on December 13, 2012, the Supreme Court held that even if a representative of a corporation—who is a party to a civil suit—has taken an oath and testified, "a party to a civil proceeding is not competent to testify as a witness, and even if such a party takes an oath and testifies, they cannot be subject to perjury charges. This principle equally applies to a corporate representative who is a party in civil proceedings."

28 *Annotated Criminal Procedure Act (2022)* (Seong Su-je), §27, p. 227.

proceedings against the natural person, the obligation to testify and to tell the truth may undermine the corporation's right to remain silent.

6. Criminal Procedure in Anticipation of the Introduction of a General Statute on Corporate Punishment

If a special statute on corporate punishment is enacted, the following aspects of criminal procedure for corporations must be considered:

1. Even if such a special statute is enacted, it would not be feasible to abolish all of the approximately 300 existing dual liability (Yangbeol) provisions. Therefore, the special statute should include a clause stating: "Unless otherwise provided in this Act or other laws, the provisions of the Criminal Procedure Act shall apply to criminal proceedings against corporations." This would allow both the special law and the general provisions of the Criminal Procedure Act to govern criminal proceedings against corporations, while accounting for the unique nature of dual liability provisions.
2. In such a case, a provision should be added to exclude application of procedural rules that are inherently applicable only to natural persons.
3. The legal status of corporations should be expressly stated in the law to clarify that corporations possess the rights of suspects and defendants.
4. Provisions of the Criminal Procedure Act that regulate procedural representation by corporations-such as Article 27 (Representation in Procedural Acts), Article 28 (Special Representative in Procedural Acts), Article 40(2) (Matters to Be Recorded in a Judgment), Article 276 (Right of the Defendant to Be Present), Article 328(1)2 (Grounds for Dismissal of Prosecution upon Dissolution of the Corporation), and Article 479 (Enforcement after Merger)—should be revised in accordance with the proposed improvements to criminal procedures under dual liability provisions.
5. It is deemed appropriate to enact a general statute on corporate punishment in the form of a special law.

V. Conclusion

This paper attempts to go beyond the traditional focus on substantive legal issues related to corporate punishment in Korea by analyzing procedural legal issues and proposing practical solutions. Specifically, it reviews the constitutional and criminal procedural rights and obligations of corporations, identifies procedural problems inherent in the current application of dual liability provisions, and examines issues concerning legal standing, litigation capacity, representation in procedural acts, and investigative and trial procedures. Drawing on major foreign legislative examples, it ultimately proposes improvements to the criminal procedure related to dual liability application, as well as measures to prepare for the potential enactment of a general statute on corporate punishment.

Above all, once independent criminal liability of corporations is recognized, it is essential to ensure that corporations are also guaranteed fundamental rights under the Constitution (excluding those that can only apply to natural persons). These include: the right to a fair trial, the right to a speedy trial, the right to a public trial, the presumption of innocence, the principle of culpability, the right not to be compelled to testify or the privilege against self-incrimination, the right to refuse to testify, the right to assistance of counsel, the right to confront and cross-examine adverse witnesses, the right to be informed of the charges and essential rights, the right to state-appointed counsel (including the right to communication and presence of counsel during interrogation), the right to access and copy documents, rights related to evidence requests, the right to appeal against rights violations by the court or investigative agencies prior to sentencing, the right to legal aid, and the right to communicate through interpretation and translation.

In this regard, since numerous unresolved issues remain under current law, legislative reform is necessary.

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International Journal of Criminal Justice

Volume 7 Issue 1 June 2025

A Study on Establishing Systems for the Prevention and Response to International Investment Disputes*

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Abstract

This study analyzes South Korea's legal and institutional framework for the prevention and response to international investment disputes, focusing on Investor-State Dispute Settlement (ISDS). It identifies major limitations in the current system, including the scope of existing regulations—which target only the executive branch and lack provisions for expert training and dedicated research institutions—and the absence of robust mechanisms for early dispute detection and effective resolution. The research highlights challenges such as insufficient cause analysis, limited early intervention, a lack of systematic record-keeping on arbitration outcomes, and low rates of dispute settlement through negotiation. Additional issues include inconsistent or ambiguous treaty definitions, procedural inefficiencies, high arbitration costs, and a shortage of experienced personnel. Recommendations emphasize the need for comprehensive legislation to broaden the legal foundation, increase transparency, strengthen expertise through education and research infrastructure, improve cooperation between government branches, and establish dedicated funding mechanisms. The findings suggest that Korea must enact detailed ISDS-specific laws, reinforce expert networks, and foster both central and local government engagement to effectively manage the complexities of contemporary international investment disputes

Keywords: Investor-State Dispute Settlement (ISDS), International Investment, Bilateral Investment Treaty(BIT), International Investment Arbitration

* This article is a revised version of part of the research report titled A Study on the Prevention and Response System of Investor-State Dispute Settlement', published on 31 December 2024.

http://dx.doi.org/10.36889/IJCJ.2025.004

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Received 31 December 2024; Revised 18 June 2025; Accepted 30 June 2025
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 7 Issue 1, June 2025, 037-043

Ⅰ. Limitations of Korean Legal Systems Related to International Investment Disputes

To establish a legal foundation for building a response system for international investment disputes, Korea enacted the "Regulation on the Prevention and Response to International Investment Disputes (Presidential Directive No. 399)" on April 5, 2019. This directive established a response team within the Ministry of Justice, composed of officials from relevant ministries, to develop response strategies, conduct preventive activities and education, and provide legal advice regarding international investment disputes. When necessary, the Minister of Justice, the heads of relevant ministries, or the Chief of the Office for Government Policy Coordination may convene meetings to coordinate differing views and make key decisions. In addition, relevant agencies must promptly notify the response team if a potential international investment dispute arises or upon receipt of formal notice of a dispute. They are also required to share pertinent data and information, thus forming a close cooperation mechanism for prevention and response. However, the directive is limited in that it only targets the executive branch and related agencies, excluding the participation of the legislative and judicial branches. While it covers general matters for the prevention and response to ISDS (Investor-State Dispute Settlement), it does not mention the training of ISDS experts or the establishment of specialized research institutions. Therefore, it is necessary to establish a more advanced legal foundation that addresses these deficiencies. In other words, securing a budget and establishing research institutions for effective ISDS response requires legal grounds. Some countries, recognizing the serious consequences of poor ISDS responses, have already enacted relevant laws. Korea should also consider enacting a law tentatively titled the "Act on the Prevention and Response to ISDS."

Ⅱ. Issues in Establishing Systems for the Prevention and Response to International Investment Disputes

1. Limitations in Analyzing the Causes of Investment Disputes

International investment disputes typically arise when foreign investors incur losses due to unjust regulations or actions taken by the host government. However, there is a lack of concrete analysis on the specific types of government actions that trigger such disputes. According to UNCTAD ISDS statistics, most cases involve violations of expropriation prohibitions, fair and equitable treatment, and full and safe protection. However, these statistics classify cases based on BIT (Bilateral Investment Treaty) provisions violated by the host government, making it unclear what specific government actions caused the ISDS. Recently, conflicts arising from policy changes related to climate change have made the causes more complex and multifaceted..

2. Limitations of Step-by-Step Response and Strategy

Failures in the early stages of disputes are often due to a lack of awareness about investment disputes and the absence of systematic organizations to address investor complaints. For example, in the Lone Star case, despite persistent complaints from foreign investors to government ministries, the lack of awareness about potential disputes led to a lukewarm response and significant losses, highlighting the importance of proactive early intervention. Another problem is the lack of an archive of international investment arbitration awards. Because major arbitration awards can significantly influence subsequent cases, it is crucial to thoroughly analyze and organize past decisions. Without an archive, it is difficult to take timely and appropriate action in the early stages of a dispute.[1] Additionally, resolving investment

1 The United States has established 'State Department Archives' on its website to analyse and disclose information related to ISDS

disputes through consultation and negotiation is challenging. While investment agreements require efforts to resolve disputes through consultation before arbitration, and provide a cooling-off period of 3 to 18 months, only about 17% of ISDS cases are settled by agreement according to UNCTAD statistics.[2] Korea has yet to resolve any ISDS cases through settlement, partly due to limited negotiation authority and the lack of clear standards or guidelines

3. Problems and Limitations in Conducting International Investment Arbitration

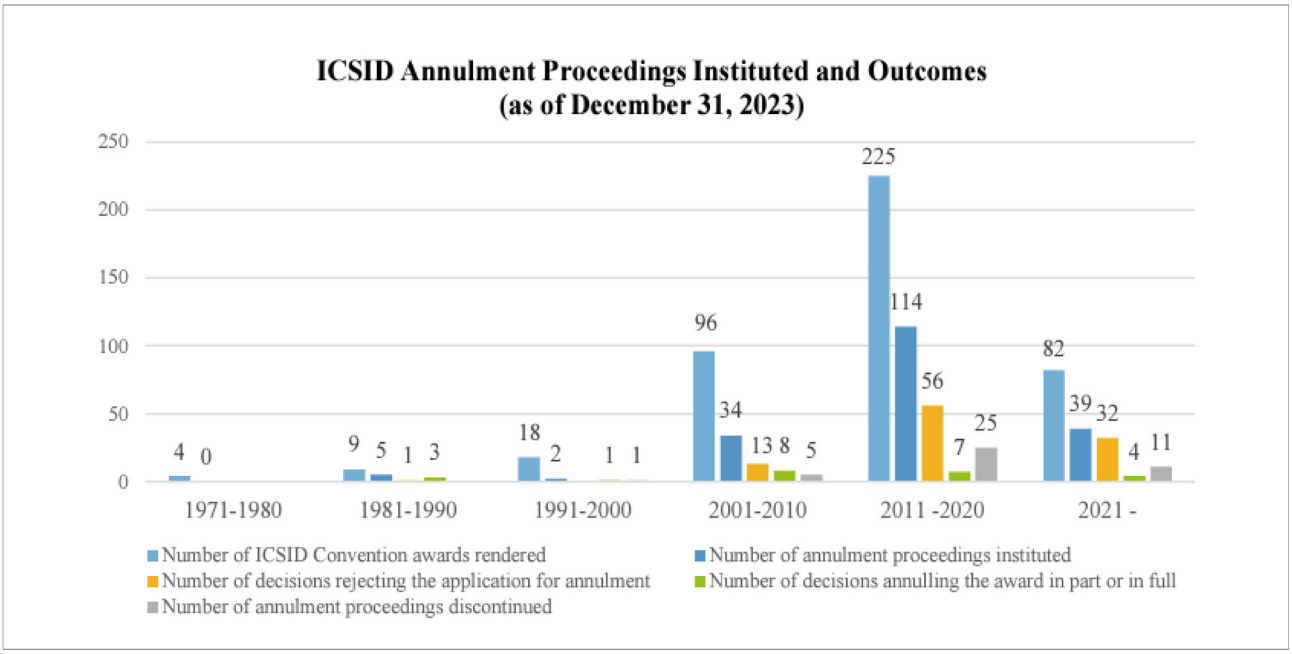
Limitations in Building a Response System: Since 2018, Korea has unified the Ministry of Justice as the lead agency for international investment disputes and established the International Investment Dispute Response Team in 2019. However, concerns remain about the expertise of team members, many of whom are term-based officials with limited time to develop sufficient expertise. There is also concern about the loss of personnel, as lawyers often move to domestic or international law firms after gaining experience.

Lack of Expert Participation: Effective analysis and strategic response from the early stages require experts with deep understanding of international investment law and ISDS precedents. In the Lone Star case, the response task force consisted mainly of officials with limited expertise, with only a few professors and lawyers participating, resulting in a lack of professionalism.

Problems Due to Non-Disclosure of Procedures: The government's non-disclosure policy on investment disputes is seen as a way to avoid accountability and public criticism for unjust actions or regulations. However, excessive non-disclosure limits the participation of various experts and the reflection of diverse opinions.

Issues in Appointing Legal Representatives: Most governments, except for a few countries where officials handle cases directly, appoint law

[Figure] Status of ICSID cancellation proceedings over the past 10 years (as of 31 December 2023)



Resource: Updated Background Paper on Annulment, p.11.

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2 As of 31 December 2024, According to UNCTAD statistics, out of a total of 1,050 concluded cases, 182 cases were settled. Available at Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub.

firms to represent them in ISDS arbitration. The selection of law firms is critical, but in Korea, concerns about unfair collusion have led to minimal discretion in choosing representatives, prioritizing equal distribution among law firms over expertise..

4. Post-Award Follow-Up

Lack of Multi-Faceted Analysis of Arbitration Awards: Except for the Dayani case, most cases where Korea lost resulted in awards significantly lower than the amounts claimed. Arbitration awards are not always fully disclosed, but limited disclosure is necessary for analyzing causes of defeat and reviewing future strategies.

Lack of Manuals for ISDS Award Challenge Procedures: Korea has filed for annulment in all but a few fully successful ISDS cases. However, it is unclear whether there is a manual for such procedures. Given the low rate of successful annulment (2-5%), indiscriminate challenges without thorough analysis can lead to significant legal costs and interest if lost, it is important to take a careful approach.[3]

Ⅲ. Key Issues in International Investment Disputes

1. Substantive Issues

Definitions of "investment" and "investor" play a critical role as preliminary objections in ISDS proceedings. The lack of clear definitions in the ICSID Convention and older BITs has led to legal uncertainty. Recent IIAs (International Investment Agreements) include more concrete definitions, reflecting national policy interests. For example, some agreements exclude natural persons from the definition of "investor" to reduce administrative and financial costs, unlike the ICSID Convention which includes both corporations and individuals.

Regarding the principle of non-discrimination, debates focus on whether the MFN (Most-Favored-Nation) clause can be expansively applied to procedural advantages in third-country treaties. Since the 2003 Maffezini case,[4] most IIAs signed after 2004 explicitly exclude dispute settlement from the MFN clause, reflecting a trend to prevent such expansion. However, many IIAs signed before 2004 remain ambiguous, requiring ongoing monitoring and possible renegotiation.[5]

Close examination of FET (Fair and Equitable Treatment) and expropriation clauses is needed, as these are central to investment protection. The OECD confirms that including language such as "a breach of another provision, another agreement, or of domestic law do not in themselves amount to a breach of FET" helps protect regulatory authority, especially regarding public policy measures like climate change.

2. Procedural Issues

Investor-state arbitration is criticized for its long duration, high costs, and use of ad hoc tribunals, which makes consistent legal interpretation difficult. Issues of transparency, fairness, forum shopping, and treaty shopping are also persistent. To address jurisdictional problems, solutions such as adjusting the jurisdiction between domestic and international courts, including forum selection or waiver clauses in IIAs, and establishing a permanent international investment court are being discussed.

Unlike court judgments, international investment arbitration awards lack binding precedent, leading to inconsistency. The ICSID annulment committee, as a temporary body, cannot function as an appellate court, prompting UNCITRAL to discuss a two-tiered permanent investment court system.[6]

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3 Updated Background Paper on Annulment, Mar 2024, ICSID.
4 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 13 Nov 2000.
5 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, 31 Jan 2006.
6 OECD, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, pp.70-72; UNCITRAL Work-

3. Other Current Issues

With the changing international environment around ISDS, new issues such as the involvement of state-owned enterprises (SOEs) in cross-border economic activities are emerging. According to the ICC, in 2023, 16% of new ICC cases involved states or SOEs. The need for SOEs to actively utilize international investment arbitration is increasingly recognized.

The "Denial of Benefits" clause, designed to prevent companies not engaged in genuine investment activities or those from sanctioned countries from claiming investment protection, is also under discussion at UNCITRAL. The interpretation and application of this clause vary by tribunal, necessitating systematic review and reconsideration of its role in international investment governance.

4. Building Prevention and Response Systems

The following are examples of preventive systems: ①Enhance ISDS awareness among national and local investment officials. ② Expand international investment law expertise (strengthen graduate education, research institute capabilities). ③ Organize and analyze international investment arbitration awards (build an archive). Manage risk when concluding investment agreements (BITs, FTAs). ④ Maintain international arbitration networks (connect renowned international arbitrators with domestic experts). ⑤ Establish a pre-screening system for foreign investment measures (analyze ISDS risk).

Response System: ① Analyze early dispute issues and develop negotiation strategies (form a task force with ISDS experts). ② Develop strategies for appointing legal representatives (clarify roles between domestic and foreign law firms). ③ Facilitate information sharing and cooperation between the Ministry of Justice and relevant agencies. ④ Manage arbitration procedures and develop strategies/tactics. ⑤ Manage third-party participation and public opinion (involve NGOs, manage media). ⑥ Control arbitration costs and secure funding.

Ⅳ. Conclusion and Policy Recommendations

1. Response Measures by Stage

A. Early Dispute Stage

A systematic and organized dedicated response body should analyze disputes, collect information on foreign investors, and assess the likelihood of success based on claims and causes. Efforts should be made to resolve disputes early through negotiation and mediation.[7]

B. Arbitration Proceedings

Once arbitration begins, the selection of arbitrators and tribunal composition is critical. Careful attention should be paid to early evidence collection and document preservation using discovery procedures. While counterclaims are generally allowed in commercial arbitration, investment arbitration typically limits claimants to investors. However, if the agreement defines disputes broadly or involves investment contracts where both parties can breach, the host state should also be able to file for arbitration. The possibility for host states to file counterclaims should be expanded.[8]

C. Post-Award Stage

After an award, the government may seek remedies through requests for correction or interpretation for minor issues, or annulment for erroneous awards. However, as annulments are rare, especially for large awards, careful risk assessment is necessary.

D. Establishing a Fund for Arbitration Costs

Significant costs are incurred for retaining

ing Group III, Report on Possible Reform of ISDS: Appellate Mechanism, 2020, pp.5-7.

7 OECD, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 2012, p.78.

8 Ziad Obeid / Mollie Lewis, "Initial Stages of a Dispute: The State's Perspective, p.11.

law firms and prepaying arbitration expenses. Given Korea's political realities, securing and approving budgets can take time due to political disputes. Therefore, a special ISDS response fund should be established to enable prompt disbursement of costs when disputes arise.

E. Need for Legislation on ISDS Prevention and Response

To systematically build a response system, it is essential to enact the legal foundations.[9] Korea's current presidential directive is limited to the executive branch and does not mention training experts or establishing research institutions. Therefore, this legislation should include the provisions to secure budgets and establish specialized research institutions for effective ISDS response.

2. Response Measures by Stakeholder

A. The State (Government)

First, there is the issue of the review of International Investment Agreements. The government must thoroughly review its IIA network, assess risks, and analyze provisions that could trigger disputes. When terminating IIAs, the implications of survival clauses must be fully understood and addressed in renegotiations.

Second, it is necessary to complete Government Response System. While the International Investment Dispute Response Team exists, its expertise and staffing need strengthening for systematic response.

Third, the government must make efforts to cooperate with the private sector. There are inherent limitations to relying solely on government personnel and resources to respond to ISDS. Therefore, many countries rely heavily on the private sector, such as universities and research institutes, and are achieving good results through collaboration.[10]

B. Law Firms and Arbitrators

Korea relies on external law firms for ISDS defense, but distributing cases among many firms to avoid unfairness hinders consistency and accumulation of expertise. The expertise and capacity of law firms should be strengthened. The number of Korean arbitrators appointed by ICSID is quite limited; therefore, increasing support for research and participation in international conferences is necessary to expand the pool of qualified arbitrators.

C. Local Governments

The importance of prevention and response systems at the local government level is increasing. Local governments, often led by elected officials with agendas that may differ from central authorities, can inadvertently trigger investment disputes through regulatory actions. Close cooperation between central ministries and local governments is essential. Expert review processes should be in place during contract negotiations with foreign investors to assess potential disputes. Policy consistency should also be maintained, as changes in local government leadership can lead to regulatory changes.[11]

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9 Jonathan C. Hamilton, Omar E. Garcia-Bolivar, Hernando Otero, "Latin American Investment Protections", Martinus Nijhoff (2012), p. 198. In the early 2000s, Latin American countries that had experienced numerous ISDS cases began to enact laws to respond to ISDS. Costa Rica enacted the 'Reglamento para la Prevención y Atención de las Controversias Internacionales en Materia de Comercio e Inversión' (Regulation for the Prevention and Management of International Trade and Investment Disputes) in August In 2009. In 2006, Peru enacted the Law Establishing the State Coordination and Response System for International Investment Disputes (Ley que establece el sistema de coordinación y respuesta del Estado en controversias internacionales de inversión, Ley No 28933) and the Implementing Decree of Law No. 28933 Establishing the State Coordination and Response System for International Investment Disputes (Reglamento de la Ley N° 28933 que establece el Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión), Decreto Supremo N° 125-2008-EF).

10 OECD, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, 2012. pp. 78, 92-93; UNCTAD, World Investment Report 2015: Reforming International Investment Governance, pp.126-128.

11 Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1.

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International Journal of Criminal Justice

KICJ Korean Institute of Criminology and Justice

ISSN 2713-5152
e- ISSN 3059-1600