Columbia Freedom of Expression
South Korea

Freedom of Opinion and Expression

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Trends

- "Seditious libel" prosecutions to gag the citizenry criticizing government policies and performance are on the rise in Korea. To that end, the crime of insult, criminal defamation and "truth defamation" laws are still being vigorously enforced in Korea, despite the warnings of international human rights bodies, including General Comment No. 34 of the Human Rights Committee, which condemned incarceration as punishment for defamation, penalization of truthful statements, and penalization of opinions ("statements not subject to verification")[1] and the UN Human Rights Committee's specific recommendation to abolish 'truth defamation' in November 2015 Concluding Observations after the periodic review of the country.
    - Criminal prosecution continues to be a prevailing remedy for defamation or insult. 136 people were incarcerated for defamation or insult over a 55 months period between January 1, 2005 through July 2009 in Korea,[2] while in comparison only 146 people have been incarcerated for defamation in a 20 months period between January 1, 2005 through August 2007 in all other countries combined.[3] On average, Korea accounted for about 30% of the worlds' defamation incarcerations in that 20 month period!
    - The trend continues to date and in greater intensity. In 2013, 11,579 people were indicted for defamation or insult (2,162 for defamation and 9,412 for insult, and excluding 1,233 indicted for online defamation)[4], out of which 111 were incarcerated while the remaining defendants were fined.[5] This is a double-fold increase from 2010, a total of 6,963 people (2,193 for defamation and 4,860 for insult) were indicted, out of which 11 incarcerations for insult and 43 incarcerations for defamation resulted.
    - As Special Rapporteur Frank La Rue pointed out in his report on Korea, many of these criminal prosecutions of private persons instituted in

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[1] Para. 47
[2] MP LEE Chun-Seok's Press Release, October 19, 2009
http://media.daum.net/tvnews/view.html?cateid=100000&newsid=20101006161113668&p=newsis
[3] http://www.article19.org/advocacy/defamationmap/overview.html (no longer available; last accessed in May 30, 2009)
[4] Prosecutors' Office Year Book of 2014, Chapter 6, Pages 926, 966
http://www.spo.go.kr/spo/info/issue/spo_history02.jsp?mode=view&board_no=64&article_no=590945
[5] Courts' Year Book of 2014, Section on Crimes, Chapter 5, Page 89
http://www.scourt.go.kr/portal/justicesta/JusticestaListAction.work?gubun=10

defense of public officials' reputation.[6] We are certain of the political nature of these prosecutions because, as documented in the PSPD's report, most cases result in withdrawal, dismissal, or not-guilty judgments, leaving only the indelible chilling effects on the populace.

    - Such chilling effect is facilitated by the fact that that criminal prosecution applies also to statements not proven to be true, even in absence of privacy concerns, in contrast to the Special Rapporteur's[7] and UN Human Rights Committee's[8] specific mandates to exempt such statements. The defendant can only escape liability by proving that the statements were made solely for public interest, a burden of proof not so easy to sustain. For instance, some Korean courts refused the public interest defense of a worker making a truthful statement about his employer's non-payment of wages since the court found that the worker's such statement also had an intention to harm the employer's reputation to get his wages paid, i.e. the public interest was not the sole motif.[9] The practical effect of this law has been that an individual who has encountered revealing truths about corruptions in the government or other powerful entities could not freely share them with others in fear that they may not be able to sustain the burden of proving that 'public interest' was the speaker's 'sole motif'.
    - Also, the crime of insult has been also used by government officials to crack down on the people who shared their negative feelings and opinions against the officials. In 2013, out of 9,417 indictments for the crime of insult, 1,038 of them or a little more than 10% were for insulting the police officers. That percentage has only grown as the number of indictments for insulting the public officials increased to 1,397 in 2014, which represents a 35% increase from the previous year.[10] (The total number of insult indictments are not available yet) These "police insult" cases have been used to suppress the participants in demonstrations and assemblies concerning the government policies.

- During the current regime of President Park and the former regime of President Lee, there were many criminal and civil lawsuits of defamation aimed at chilling and gagging people's opinions critical of the government, used by the prosecutions, government officials and/or agencies as well as pro-government action groups.
- In addition, online free speech is subject to administrative censorship by Korean Communication Standards Commission whose vague standard of "what is necessary for nurturing sound communications ethics" (about 200K URLs or web pages a year) and subject to intermediaries' mandatory takedown triggered whenever someone alleges that content is defamatory against him or her (about 500K URLs a year).

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[6] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, on his mission to the Republic of Korea (6-17 May 2010), A/HRC/17/27/Add.2, paras. 25, 89 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/34/PDF/G1112134.pdf?OpenElement

[7] SR Frank La Rue's Korea Report, Para. 27 "The Special Rapporteur reiterates that for a statement to be considered defamatory, it must be false, must injure another person's reputation, and made with malicious intent to cause injury to another individual's reputation."

[8] General Comment 34, para. 47, "All. . .penal defamation laws. . . should include such defences as the defence of truth.."

[9] Supreme Court 2004.10.15 Judgment 2004Do3912

[10] MP Park Nam-chun's press release, March 26, 2015, available at http://bit.ly/1FR5YG1

Recently, there are more cases coming out of the Constitutional Court focusing more on the risk of the Internet than the value of the Internet. What the Constitutional Court said in the 2012 decision striking down the online real-name law or what it said in the 2011 decision striking down the online campaign election regulation – basically that the Internet being the great equalizer - simply disappeared without trace.

- Right to assembly is subject to the permit requirement often used by the police not to provide cooperation as required by the Constitution but to cull out the assembly permit applications from what they believe to be anti-governmental organizations. However, the police crackdown continues to violate the tenet that "there is no such thing as illegal assembly and that all peaceful assemblies, even if illegal vis-à-vis the permit process, should be allowed to proceed."
- Workers' freedom of speech continues to be challenged by the infamous crime of interference with business (Article 314 of the Penal Code), which has been interpreted to ban the right to refuse to work *en masse* lest it does not arrest the employers' freedom of choice.

Major Cases in 2015

- **Sankei Editorial Presidential Defamation Case (December 2015)** : The Korean correspondent Japanese newspaper Sankei Shinmun was indicted for defaming the President of South Korea when he wrote that Korean people have questions about the President's whereabouts during the 7 hours following the Sewol ferry disaster, and also people have questions about the President's amorous relationship with a certain individual Chung Yoon-Hwe. These questions were raised by other newspapers as well but what put apart Sankei was that it also dared to relay a rumor that put the two questions in the same sentence. To wit, the President was with his putative boyfriend for the now proverbial "missing 7 hours". Earlier on in the trial, the defendant and the prosecutors agreed that any statement that put the President with CYH for 7 hours was false. The court of first instance ruled, however, that Sankei did not have "an intent to defame" the President, an element of defamation, but only meant to report on the quantity and substance of the unresolved questions that people have over the President. Sankei was found not guilty. The prosecutors chose not to file an appeal. **Analysis:** There is no *neutral reportage* defense explicitly recognized in Korea although the practice does permit local media to freely report whatever defamatory messages, for instance, North Korean government heaps upon the officials of South Korea, without risking prosecution. However, before this case, many speakers and reporters were indicted for reporting on the state of people's skepticism on issues of great public interest. For one, Roh Hwe-Chan was also found guilty of truthfully reporting on the names of corrupt prosecutors as revealed by an illegal wiretap made by the National Intelligence Service. The significance of *Sankei* is that, even where the implied statement is admittedly false, the reporter neutrally reporting on the first speaker's statement can be exempt from liability, opening an opportunity for developing a line of precedents for *neutral reportage*.
- **HONG Ga-Hye Sewol Ferry Defamation Case (January 2015, Open Net Korea-PSPD Law Center Case)** : A volunteer for Sewol Ferry rescue, in an interview with local cable TV in the morning after the disaster, stated the Coast Guards were blocking the volunteer divers from going in, and she was arrested and indicted for

defaming the Coast Guard officials. The case received intense media coverage because she was previously vilified by the media as a case of "self-aggrandizing beauty" and also because the implication of her statement with respect to the infamously fumbling rescue efforts which attracted angry mottos like "Capital caused the Sinking, State caused the Massacre." Before she was released from jail, she was in jail for more than 100 days. The court decided that she did not have "intent to defame" the Coast Guards but she intended to pressure the Coast Guards into expediting its own rescue process and allowing volunteer divers to participate in the rescue, the public interest. The court did find her incidental allegation some survivors false but held that she cannot be deemed intentional with respect to the falsity of the statement, either. The prosecution appealed and the case is pending. **Analysis:** The decision ended up putting the Coast Guards on trial. Jurisprudentially, the case reaffirms NY Times v. Sullivan rule that, when it comes to statements about public officials, even clearly false statements can be exempt from liability.

- **ROKS Corvette Choenan Case (January 2016)** – The court of first instance acquitted of a defamation charge a dissident member of the Joint Commission on the Sinking of Corvette Choenan, who raised questions about the Commission's final findings. He proposed that the bubble jet technology that the Joint Commission claims to have been used by the North Korean submarine is very improbable given the remnants of the accident. He proposed a collision with an Israeli-made submarine as a more probable theory. The case took 5 years and numerous trials and witnesses. The court basically agreed that there is room for reasonable doubt with in the Joint Commission's findings, and that he has the right to raise those doubts without actually proving them. **Analysis:** This was straight application of NY Times v Sullivan which put the onus of proving falsity on the complaining party, in this case, the Navy officials, who could not sew up all the holes in the bubble jet theory.
- **United Progressive Party Dissolution (December 2014) –** The Constitutional Court dissolved a progressive political party for the reasons that (1) its platform, though on the surface supporting legitimate progressive concepts, hides an objective of establishing North Korean style of socialism and therefore does not comply with the democratic principles and also that (2) the party held meetings where some participants attempted to incite subversion against the State. **Analysis:** Its reasoning is in some way much like the U.S. Supreme Court case *Abrams* where the teachings of Marxist-Leninism themselves were punished in absence of any clear and present danger. This case is even worse than Abrams because none of the party's official literature or the officials themselves speaks of M-L ideology or any equivalent of it. The Constitutional Court read into the party officials' intent simply on the basis of some remarks made by non-official participants in party meetings.
- **Constitutional Challenge to Truth Defamation Law (February 2016, PSPD Law Center case):**

  A senior citizen complained aloud online about a senior citizen association's officials who violently disrupted a private gathering of its members, so violently that one of the officials' companions was found guilty of battery. The author of the posting was found guilty of cyber-defamation when his posting, though true, was considered "not solely for the public interest". In the ensuing constitutional challenge, the

Constitutional Court reasoned that the speed and reach of information diffusion allows punishing truth while two justices dissented. **Analysis:** Given that the Court focused on the "dangerousness" of the medium, it left room for a challenge as to off-line truth defamation.

- **Constitutional Challenge to Victimless Virtual Child Pornography (June 2015, Open Net Case):** Korea's child pornography provision punished animations and cartoons showing under the same provision that features or refers to real children, equally as child sex offenders, putting the defendants under 20 years location registration and 10 years employment restriction. The Constitutional Court upheld a virtual child pornography provision constitutional to the extent that its interpretation is limited to the material which can cause extraordinary sexual desires and therefore cause the viewers to commit sexual offenses against children. **Analysis:** This case was important because it put to the test a question whether imagination of an event can be punished the same as the event actually took place, as in the movie *Minority Report*. Fortunately, the Constitutional Court did not depart from the tenet that speech cannot be punished unless it has a clear and present danger of creating physical harm. Although the law was found constitutional, the Constitutional Court read down the provision. As a result, the number of investigations decreased from 2-3,000 a year to 4-500.
- **4Shared.com (January 2016, Open Net Case) :** Korea Communication Standards Commission blocked 4shared.com a P2P file sharing site upon the complaints by copyright holders. In the ensuing judicial review, the court of first instance said that the site did not have any content(narrative?) aiding and abetting copyright infringement and blocking the whole site when many files exchanged are not infringing. The appeal is pending. **Analysis:** This is the first time KCSC's blocking decision was undone. Also, it is a meaningful decision on intermediary liability because it required active aiding and abetting as an element of contributory infringement.