

DEFAMATION LAW AND THE INTERNET IN SOUTH KOREA

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[141] The socio-cultural and legal approach to reputation as a value varies from society to society. Unlike the Anglo-American concept of reputation as an individual right, the Korean concept is that reputational interests are perceived 'in relation to the groups to which they belong'.² South Korea does not protect freedom of expression as a transcendent value. The Constitution of Korea makes no preferential distinction subordinating reputation to a free press. Article 21 states:

Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of the persons, claims may be made for the damage resulting therefrom.³

The Korean government and courts have balanced the right to free speech and free press against the right to protect one's reputation differently over the years. Arguments in favour of a more expansive freedom of the press over reputational interests have not fared as well as the Korean press wanted. Recently Korean courts, however, have considered the status of plaintiffs (private versus public) and the nature of matters in question (private versus public) in libel law to prevent the press from being excessively chilled into silence.⁴

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² Young C Kim, *Japanese Journalists and Their World* (1981) 71.

³ Constitution, art 21(4) (amended 1987).

⁴ See Supreme Court (2000, Ta 37524, 22 January 2002), in which the Supreme Court of Korea stated:

In establishing the boundaries between freedom of speech and the press and protection of reputation, the court should take into account the fact that there is a difference between a private and a public matter discussed in defamatory expression. That is, after examining whether the libel victim is a public figure or private figure, whether the statement relates to a matter of public concern or falls into the purely private sphere, whether or not it contributes to formation of public opinion or to public debates as it is connected with a matter of public and social interest for the public to know objectively, the court should recognize a different standard of review when the defamatory allegation is about a public figure involving a matter of public concern on the one hand and when it is about a matter belonging to the private zone. When the expression complained of deals with a matter of private interest, protection of reputation can be given priorities over freedom of speech. But the review standard should be different when a matter of public and social concern is involved, and limitations on freedom of the press thus should be reduced. Further, it should be considered whether the libel victim has provoked the defamatory statement himself.

See generally, Park Yong-sang, 'Freedom of Expression in Korea: Theory and Practice' (2002) 1 *Journal of Media Law, Ethics, and Policy* (Korean) 26.

[142] While lawsuits against the press for libel had been a rarity in Korea up to 1980, the number of suits against Korean news media for libel and related complaints has increased exponentially during the past 10 years. During the period of 1980–89, about 60 libel lawsuits were filed against the news media in Korea. By contrast, the number of libel suits stood at 139 in 1990–99, recording an increase of 250 per cent.⁵ The libel explosion in Korea during the past two decades relate to the long-term impact of the rejuvenated libel law on the psyche of Koreans. The dramatic changes in the law have awakened the reluctant public to the legal mechanisms to employ against the media.⁶

With the breathtaking growth of the internet, defamation in cyberspace has emerged as a pressing legal issue in Korea, which has built 'the world's most comprehensive internet network'.⁷ Cyberlibel of government officials, business executives, lawmakers, and labor unionists has been increasing sharply. The Counter Cybercrimes Department of the National Police Agency reports that complaints over internet defamation totalled 4359 in July-December 2001 — up 554 per cent from 666 in 2000, and criminal trials for cyberlibel rose from 109 in 2000 to 1116 in 2001.⁸ Defamatory statements 'flood' the online bulletin boards, which provide anonymity.⁹

This update examines internet libel law in South Korea. The first part focuses on various libel laws of Korea, whether they relate directly or indirectly to defamation on the internet. The update then discusses several court cases, including the 2002 landmark case of the Constitutional Court, which involved cyberlibel. The last section offers the author's critical analysis of the Korean government's legislative and judicial experimentation with balancing freedom of expression with reputational interests in cyberspace.

⁵ *Study of Ten Years of Media Litigation* (Korean) (2001) 15–16.

⁶ For a recent comprehensive discussion of libel law and the press in Korea, see Kim Chae-hyop et al, *The Press and Libel Lawsuits in Korea* (Korean) (2002).

⁷ Ken Belson with Mat Richtel, 'America's Broadband Dream is Alive in Korea', *New York Times* (5 May 2003) at <<http://www.nytimes.com/2003/05/05/business/worldbusiness/>>.

⁸ Shin Dong-heun, 'Cyber Slandering Increases', *Digital Chosun Ilbo* (English edition), 23 February 2002, at <<http://sch.xhosun.com>>.

⁹ Lee Hae-won, 'Government Regulations of Subversive Communications and Freedom of Expression' (2002) 1 *Journal of Media Law, Ethics, and Policy* (Korean) 37.

Statutory Framework: Online and Off-line Defamation

Reputation is guaranteed as a constitutional right of individuals to protection from an abuse of freedom of expression.¹⁰ Like the laws in most other countries, Korean law prohibits unjustifiable defamation. Defamation is a criminal offence under the *Criminal Code*¹¹ and an ‘unlawful act’ under the *Civil Code*.¹²

Criminal Code

Article 307 of the *Criminal Code* imposes sanctions for defamation: [143]

- 1) A person who defames another by publicly alleging facts shall be punished by imprisonment with or without prison labor for not more than 2 years or by a fine not exceeding 5 million *won* [US\$4167];
- 2) A person who defames another by publicly alleging *false* facts shall be punished by imprisonment with prison labor for not more than 5 years, suspension of civil rights for not more than 10 years, or a fine not exceeding 10 million *won* [US\$8334].
[Emphasis added]

Consequently, the punishment for defamation does not necessarily turn upon whether the allegedly defamatory statement is true or false.

The *Criminal Code* expressly distinguishes between libel and slander. Article 309 states:

- 1) A person who, with intent to defame another, commits the crime of Article 307(1), *by means of newspaper, magazine, radio, or other publication*, shall be punished by imprisonment without prison labor for not more than 3 years or a fine not exceeding 7 million *won* [US\$6251];
- 2) A person who commits the crime of Article 307(2), by the method described in paragraph (1), shall be punished by imprisonment for not more than 7 years, suspension of civil rights for not more than 10 years, or a fine not exceeding 15 million *won* [US\$12,501]. [Emphasis added]

¹⁰ See above n 3 and accompanying text.

¹¹ *Criminal Code*, Act No 293 (1953), last revised by Act No 6543 (2001).

¹² *Civil Code*, Act No 471 (1958), last revised by Act No 6591 (2002).

The *Criminal Code* punishes the commission of libel more severely than the commission of slander on the theory that the impact of written defamation is likely to be more lasting and pervasive than the impact of slander. Furthermore, to constitute criminal libel, publication of the statement must be made 'with intent to defame'. The requirement of criminal intent is protective of the rights of the press, reflecting a recognition that the press should only be punished if it acts with 'malice'. However, the criminal intent requirement applies only if the allegedly defamatory statement is truthful. If the statement is false, no showing of criminal intent is required.

The *Criminal Code* provides an affirmative defence to prosecutions under arts 307 and 309. Article 310 stipulates that '[i]f the facts alleged under Article 307(1) are true and solely for the public interest, the act shall not be punishable'. Therefore, a defendant is immune from liability if the statements attributed to him are true and made in the public interest. Because this defence may be used irrespective of the defendant's intent in making the statement, the 'intent to defame' clause is of little practical value to the press as a possible defence to defamation. The libel defence is viewed as a statutory mechanism to resolve the conflict between protection of reputation and freedom of expression.¹³

The *Criminal Code* also permits a criminal action for a falsehood which defames the dead. Article 308 provides: 'A person who defames a dead person by publicly alleging false facts shall be punished by imprisonment without prison labor for not more than 2 years or by a fine not exceeding 5 million *won*' (US\$4167). However, a defamatory statement about the dead that is truthful is not actionable under the *Criminal Code*. Prosecution for defamation of the deceased can only be initiated by complaint.¹⁴ Conversely, prosecution for defamatory crimes under arts 307 and 309 does not require a complainant. Only the 'express objection' of the allegedly [144] defamed individual can prevent the defamer from being prosecuted by the State.¹⁵ The statute of limitations for criminal libel actions is three years for truthful defamation

¹³ Supreme Court of Korea (92 To 3160, 22 June 1993).

¹⁴ *Criminal Code*, art 312(1) ('The crimes of Article 308 and the preceding Article shall be prosecuted only upon complaint').

¹⁵ *Criminal Code*, art 312(2) ('The crimes of Articles 307 and 309 shall not be prosecuted over the express objection of the complainant').

and five years for false defamation. Libel of the dead has a three year statute of limitations.¹⁶

Civil Code

The *Civil Code* also protects individuals from defamation. Although the *Criminal Code* is largely intended to ensure the social interests in public peace and order, the *Civil Code* is primarily aimed at safeguarding the rights of individuals to their reputations. The *Civil Code* provides victims of defamation with two possible means of redress. First, art 751 authorises monetary compensation for damage resulting from the defamation:

- 1) A person who had injured another person, his liberty or reputation . . . shall make compensation for any other damage arising therefrom as well as damage in the property;
- 2) The court may order the compensation under the preceding paragraph paid by periodical payments and may order a reasonable security furnished in order to ensure the performance of such obligation.

Second, art 764 authorises the court, upon the injured party's application, to order the defamer 'to take suitable measures to restore the injured party's reputation, either in lieu of or together with compensation for damages'. Korean courts have recognised several 'suitable' measures for restoring the reputation of the injured, such as retraction of the defamatory statement or publication of a notice of apology.¹⁷ Courts can also issue injunctions against publishing the challenged libelous material when it is justifiably requested by the complainant. The statute of limitations for libel actions under the *Civil Code* is three years.

Relevant Statutory Provisions

The offline libel statutes tend to be often used as the primary legislation governing internet defamation in Korea although the National Assembly passed relevant statutes

¹⁶ *Code of Criminal Procedure*, Act No 341 (1954), last revised by Act No 6627 (2002), art 249.

¹⁷ Compulsory apology as a suitable measure for recovery of reputational injury under the *Civil Code* was held unconstitutional by the Constitutional Court in April 1991. See, Constitutional Court (89 Honma 160, 1 April 1991). For a discussion of the Constitutional Court's ruling on the notice of apology for libel under the Civil Code, see Kyu Ho Youm, 'Press Freedom and Judicial Review' (1994) 30 *Stanford Journal of International Law* 23–7.

to address various cyberlaw issues in the early 1990s. Cybercommunication is considered to fall within 'other publication' under art 309 of the *Criminal Code* on libel. Law professor Park Son-yong of Catholic University in Seoul stated:

I think it is not seriously disputable that electronic communications should be covered by the 'other publication' provision of the *Criminal Code*, given that electronic communications can be linked through their broad reach if their internet addresses are known, that they can be kept for an extended period of time like newspapers, magazines, radio, TV, etc, and that they have a potential of being disseminated to a wider audience.¹⁸

Further, because internet communication is deemed to be a type of telecommunication, it is subject to several statutory restrictions on telecommunications as a whole. The *Basic Telecommunications Act* is a good example. Its penal provisions punish 'false' communications through telecommunications:

- 1) A person who has publicly made a false communication over the telecommunications facilities and equipment for the purpose of harming the public interest shall be punished by imprisonment for not more than 5 years or by a fine not exceeding 50 million *won* [US\$41,670]; [145]
- 2) A person who has publicly made a false communication over the telecommunications facilities and equipment for the purpose of benefiting oneself or the third party or inflicting damage on the third party shall be punished by imprisonment for not more than 3 years or by a fine not exceeding 30 million *won* [US\$25,002].¹⁹

The *Telecommunications Business Act* is another statute bearing on cyberlibel in varying degrees.²⁰ Article 53 of the statute, before it was held unconstitutional by the Constitutional Court in June 2002, provided:

- 1) A person in use of telecommunications shall not make the communication with contents of harming the public peace and order or the public morals;

¹⁸ Park Son-yong (2002) 1 *Study of Korean Communication Law: Freedom of Expression in the 21st Century* (Korean) 360-1.

¹⁹ *Basic Telecommunications Act*, Act No 4393 (1991), last revised by Act No 6656 (2002).

²⁰ Act No 4394 (1991), last revised by Act No 6656 (2002).

- 2) The objects, etc., of the communication, which are deemed harmful to the public peace and order or the public morals under paragraph (1), shall be determined by the Presidential Decree;
- 3) The Minister of Information and Communication may order a telecommunications business operator to refuse, suspend, or restrict the communication under paragraph (2).

Article 16 of the Enforcement Decree of the *Telecommunications Business Act*²¹ defined the prohibited telecommunications under art 53(2) of the *Telecommunications Business Act* as those with the contents aimed at a criminal act or at instigating a criminal act and with the contents directed at committing the anti-State activities and at impairing ‘the good morals and other social orders’.

Article 53 of the *Telecommunications Business Act* was revised in late December 2002 in response to the Constitutional Court’s invalidation of the clause.²² The newly titled ‘Regulations of Illegal Communications’ provision of the revised Act, art 53(1)2, prohibits use of telecommunications for defamation:

A person in use of telecommunication shall not make communications in such a way as to publish defamatory contents by publicly stating facts or false facts with intent to injure the reputation of another person.

Further, internet service providers are required to take corrective measures when they are made aware of defamatory publications. The *Act on Promotion of Information and Communications Network Utilization and Information Protection* (Information and Communications Network Act)²³ reads:

- 1) Any person whose legal interest is infringed on by the information which is provided for the public via information and communications networks may ask the provider of information and communications services handling the relevant information to delete the information or run his refutation of such information;

²¹ Enforcement Decree No 13558 (1991), last revised by Enforcement Decree No 17237 (2001).

²² For a discussion of the Constitutional Court’s ruling on the *Telecommunications Business Act*, see below nn 40–8 and accompanying text.

²³ Act No 6360 (2001), last revised by Act No 6585 (2001).

- 2) The provider of information and communications services shall, upon receiving the request for deleting the relevant information, etc., forthwith take necessary measures and promptly serve a notice thereon on the requester.

[146] Cyberlibel is more specifically stipulated as a crime under art 61 of the Information and Communications Network Act. The penal provisions relating to cyberlibel under the Act are clearly derived from the *Criminal Code* on offline libel, but impose more severe penalties than the *Criminal Code*:

- 1) Any person who has defamed any other person by publicly alleging facts through information and communications networks with the purpose of defaming him shall be punished by imprisonment with or without prison labor for not more than 3 years or by a fine not exceeding 20 million *won* [US\$16,668];
- 2) Any person who has defamed any other person by publicly alleging false facts through information and communications networks with the purpose of defaming him shall be punished by imprisonment with prison labor for not more than 7 years, the suspension of civil rights for not more than 10 years, or by a fine not exceeding 50 million *won* [US\$41,670];
- 3) The offense described in paragraphs (1) and (2) shall not be charged against the will expressed by the victim.

Judicial Interpretations of Libel Law in Cyberspace

A Korean law commentator in 2001 noted a lack of judicial opinions or scholarly analyses of the legal liabilities of internet service providers.²⁴ The observation is still valid insofar as case law on cyberlibel is concerned. Nonetheless, judicial interpretations of libel law on cybercommunication are noteworthy in that Korean courts have more often applied the Criminal and Civil Codes than telecommunication statutes in adjudicating internet libel lawsuits — at least up to now. Here, several notable example cases are outlined.

The first *civil* internet libel case in Korea in October 2000 arose from a derogatory comment by Ahn Eun-gyong about Hahm Chi-ung. Hahm, a fan of singer Park Chi-yoon, responded with a threat to take a legal action against Ahn, who was critical of

²⁴ Han Sang-hi, 'Legal Liabilities of Internet Service Providers for Defamation' (Winter 2001) *Press Arbitration Quarterly* (Korean) 44.

Park in *Plaza*, the electronic bulletin board operated by Korea Telecommunication Hitel. When Ahn described Hahm as a 'paid' fan to put in 'good words' about the singer, Hahm sued Ahn for libel. Hahm claimed 10 million *won* (US\$8334). Judge Hong Chun-ho of the Seoul District Court (East Branch) held that Ahn inflicted emotional distress on Hahm when she 'intolerably insulted' him by calling him one of those 'people wildly crazy' about singer Park and when she asserted without verification that Hahm 'looks like being paid by the singer's PR agency to help the singer with a few words of support'.²⁵

In her countersuit against Hahm subsequent to the Seoul District Court's (East Branch) ruling, Ahn claimed a damage award of 30 million *won* (US\$25,002). She contended that she had suffered psychological and physical pain 'beyond description' due to Hahm's prior civil and criminal litigation for libel. Judge Oh Ki-du of the Suwon District Court dismissed the lawsuit on ground that Ahn and Hahm were both in the wrong and the Seoul District Court's decision had taken into consideration the claims and counterclaims of the parties. Most important, Judge Oh was aware of the internet as a significant element in balancing reputation with freedom of expression. He stated that electronic communications should be granted more leeway because of the internet's role in facilitating unfiltered, real time discourse:

Consider the unique nature of the electronic bulletin boards. In the boards many users connect with one another [147] via the computer network and express or eliminate their views quickly with no geographical limitations and with certain anonymity, while other users access and respond to the messages easily, and those messages on the boards do not enjoy that much credibility. Thus, the messages posted on the computer bulletin boards should be accorded the maximum degree of freedom of expression. Further, cyberlibel should be examined by sufficiently considering the uniqueness of the bulletin board messages. Accordingly, indulgence should be exercised even when the messages are somewhat wild, crude, or exaggerated.²⁶

Hahm also sued Hitel, the internet service provider, whose electronic bulletin board *Plaza* was used by Ahn to post defamatory statements about him. He contended that

²⁵ Seoul District Court (East Branch) (99 Kadan 42644, 25 May 2000); affirmed: Seoul District Court (2000 Na 40161, 26 October 2000).

²⁶ Suwon District Court (2000 Kaso 32813, 19 January 2001).

Hitel had left Ahn's statements on the bulletin board notwithstanding his demand for its deletion of the statements and that Hitel had taken no more actions than sending a warning to Ahn after the Information and Communication Ethics Commission requested it to address his complaint. The Seoul District Court applied the *Telecommunications Business Act*, art 53, in connection with its enforcement decree. The court also considered the information service use agreement between Hitel and its subscribers. Article 18(2) of the use agreement stated:

In case the company considers the opinions and complaints submitted by its customers legitimate, it shall handle them immediately; Only when it is difficult to respond to the customers' opinions and complaints immediately, the company shall notify its customers of the reasons and the dates for its actions.

Article 21 of the agreement allowed the ISP to delete messages from the BBS

when they relate to: (1) contents that defame other users or third parties in a disparaging and calumnious way; (2) contents that violate the public peace and order and the public morals; or (3) contents that are judged in contravention of relevant laws and regulations.

The Seoul District Court held:

Generally speaking, a telecommunications business operator must take suitable measures including deletion of a defamatory message on its electronic bulletin board when the system operator was aware or could be aware that a system user has posted the defamatory statement about another to the board.²⁷

In this light, the Court concluded that Hitel was liable to Hahm for his 'substantial emotional suffering' due to the ISP's failure to take appropriate actions for five to six months about the defamatory contents on its bulletin board after it learned of the messages from the plaintiff and the Information and Communication Ethics Commission.²⁸ The Seoul District Court's ruling in favour of the plaintiff in the

²⁷ Seoul District Court (99 Na 74113, 27 April 2001).

²⁸ Ibid.

internet libel case of April 2001 was affirmed by the Supreme Court of Korea in *toto*.²⁹

Two months before the Seoul District Court (East Branch) ruled in *Hahm Chi-ung v Ahn Eun-gyong* in May 2000, Judge Kim Chol-hyon of the Seoul District Court sentenced newspaper publisher Pae Pu-jon to a year in prison for libel of anchorwoman Paek Chi-yon of the Munhwa Broadcasting Co (MBC) [148] through the internet. Pae posted an article about Paek on his internet home site in 1999. The article maintained falsely that the anchorwoman's baby was not fathered by her former husband.³⁰ In imposing an unusually severe penalty on Pae, Judge Kim stated that he imprisoned the accused because of the 'irreparable injury' he had inflicted on Paek, who 'values her unblemished image like her own life' as a newscaster, and on her family, through publishing rumors through the internet with no verification. Judge Kim added:

While injury caused by rumors on the internet and PC communications is growing, there is no legislation on point. Thus, I had to rule on the issue at bar on the basis of the 'stating false facts' element of the crime of 'defamation through written publications [under the Criminal Code].'³¹

More recently, an internet libel case of the Seoul District Court revolved around the issue whether the Information Communication Ethics Commission should be made liable for closure of a website. In January 2001, when Chi Man-won, a military analysis, posted an article critical of the unification policy of President Kim Dae-Jung of South Korea and his intelligence chief Lim Dong-won, the Information Communication Ethics Commission demanded his ISP to terminate his use of the internet account. Chi claimed damages from the Commission, arguing that it had interfered with his business. In July 2002, the Seoul District Court held the Commission immune from liability for the damage that the owner of the Web home page allegedly suffered when the page was closed by its internet service provider at the Commission's request.³² The court reasoned:

²⁹ Supreme Court (2001 Ta 36801, 7 September 2001).

³⁰ Seoul District Court (99 Kahap 64112, 2 February 2000).

³¹ *Ibid.*

³² Seoul District Court (2001 Na 62983, 3 July 2001).

The plaintiff's Web page message, 'I suspect that DJ [President Kim Dae-Jung] and Lim Dong-won [director of the National Intelligence Service] intend to unify Korea under a communist rule', was defamatory of other people. The message violated the deliberation provision of the Enforcement Decree of the Telecommunications Business Act. And we find no serious error in the Information Communication Ethics Commission's decision to request termination of the plaintiff's use of the computer service.... The Commission's request for corrections [of the plaintiff's internet message] was no more than advisory, thus there was no need for the Commission to explain its decision to the plaintiff, who was not the internet business operator.³³

The Constitution on Freedom of Cybercommunication

Technological innovations in communications have inevitably created pressures on various constitutional doctrines of freedom of expression. As noted US constitutional law scholar Rodney A Smolla wrote: 'Forms of communication are converging, collapsing the legal distinctions that once brought a semblance of order to free speech policies'.³⁴ In this light, Korea is no exception. Justice Lee Yong-mo of the Constitutional Court of Korea pointed out in 1998 that the *Election Act's* proscription against publication of opinion surveys on candidates³⁵ was an anachronism in the era of globalisation.³⁶ In his strenuous dissent from the Constitutional Court's decision to uphold the *Election Act*, Justice Lee [149] wondered aloud whether the Court's thinking was out of sync with the internet's ability to overcome the traditional governmental control of communication. Citing the internet and satellite broadcasting as examples, he observed that people are able to access a great amount of information quickly through various communication media beyond the traditional State control.³⁷

³³ Ibid.

³⁴ Rodney A Smolla, *2 Smolla and Nimmer on Freedom of Speech* § 27:17, at 27-34.5 (2003).

³⁵ The *Election Act*, art 108 prohibits publication of election polls thus:

No one shall publish or report by quoting the details or result of a public opinion poll (including a mock voting or popularity poll; the same shall also apply in this Article hereinafter) that may result in a presumption of a support rate of a political party or a winning candidate in connection with an election, from the beginning day of an election campaign period to the close of balloting on the election day.

³⁶ Constitutional Court (97 Honma 362, 394 (consolidated), 28 May 1998) (Lee Yong-mo J dissenting). For a discussion of the Constitutional Court on the *Elections Act* on ban on publication of election opinion surveys, see Kyu Ho Youm, 'South Korea', *Democracy and the Internet* (in print).

³⁷ Ibid.

The Constitutional Court of Korea in 2002 confronted, as the US Supreme Court did in *Reno v American Civil Liberties Union* in 1997,³⁸ the reality that ‘traditionally, the law has found it difficult to respond to new technologies’.³⁹ In its landmark decision on freedom of expression in cyberspace under the Constitution of Korea, the Constitutional Court borrowed heavily from the US Supreme Court’s reasoning of the First Amendment right of the internet to free expression. The Constitutional Court held unconstitutional art 53(1) of the *Telecommunications Business Act*, as revised in 1996, and the Act’s Enforcement Decree, art 16, because they failed to meet the ‘precision’ principle, both substantive and definitional.⁴⁰ The Constitutional Court, describing the precision principle as ‘of especial importance’ in legislation restricting freedom of expression, discussed the nexus between the precision requirement and free speech jurisprudence:

If proscribed speech is imprecise, an individual who is guaranteed fundamental rights is not sure whether the speech he considers engaging in is or is not subject to regulation. Accordingly, there is a high possibility that he’ll refrain from expressive activities for fear of being regulated [by the authorities]. Thus, the Constitution requires that legislation affecting freedom of expression be specific and precise in defining its targeted expression.⁴¹

The Constitutional Court has applied the precision principle to determine whether freedom of expression is unduly infringed by the *Telecommunications Business Act*, art 53(1), which forbids use of telecommunications, including the internet, in disseminating the contents harmful to ‘the public peace and order or the public morals’.⁴² The Court pointed out that the ‘subversive’ concept such as ‘harm to the public peace and order or the public morals’ are too ‘imprecise and vague’. The Court continued that they were in no way ‘specified’ and were as good as repetitive of several synonyms from the Constitution. That is, the Constitutional Court made a

³⁸ 521 US 844 (1997).

³⁹ Daniel A Farber, *The First Amendment* (2nd ed, 2003) 226.

⁴⁰ Constitutional Court (99 Honma 480, 27 June 2002). For a thoughtful discussion of the Constitutional Court ruling on the *Telecommunications Business Act* in June 2002, see Lee, above n 9, 52–65. The author is indebted to Lee for his broader understanding of the constitutional law issues facing cybercommunication as a free speech issue in Korea.

⁴¹ *Ibid.*

⁴² For a discussion of art 53 of the *Telecommunications Act*, see above nn 19–21 and accompanying text.

textual comparison of 'public law and order' and 'public morals' of the *Telecommunications Business Act* with 'national security, the maintenance of law and order' under art 37(2) of the Constitution and 'public morals and social ethics' of art 21(4) of the Constitution. The Court added that the terms used to identify proscribed speech under the challenged statute were so abstract that they could vary with each individual depending on their value [150] judgments and ethical standards. Also, they made it difficult for law enforcement officers to determine the meaning of the stipulated terms through their ordinary understanding. The Court was troubled by lack of the 'definitional precision'⁴³ of the *Telecommunications Business Act*.

The Constitutional Court also found that art 53(1) of the *Telecommunications Business Act* was unconstitutionally overbroad. The Court stated that the 'subversive communications', which covers the prohibited speech under the statute, violates the 'overbreadth principle' because it will inevitably restrict constitutionally protected speech due to its 'vagueness, abstractness, and all-inclusiveness'. The Court was concerned that the statute's broad prohibitions would violate the 'essential functions' freedom of expression. The law might extend to constitutionally protected 'indecent' expression or to the 'sensational' materials that are potentially harmful to minors but not obscene to adults, or to expressions concerning 'sensitive' political and social issues because they might violate the 'good morals' and 'public peace and order' regulations.⁴⁴

The Constitutional Court also declared unconstitutional art 53(2), which provided that the objects of proscribed communications under art 53(1) would be determined by the Presidential Enforcement Decree. The Court held that art 53(2) was in violation of the 'prohibition against delegation of broad legislative power' doctrine that bars the grant of unbridled administrative discretion to law enforcement officials in administering laws regulating speech. The Court explained that 'public peace and order' and 'public morals' were so 'abstract and imprecise' as concepts that citizens could not know what standards to follow in ascertaining what contents the Presidential Enforcement

⁴³ Rodney A Smolla, *Free Speech in an Open Society* (1992), 51, defined 'definitional precision' as a free speech principle, which requires that:

[T]he terms used to identify proscribed speech be defined with a meticulous exactitude well beyond that of other routine legislation, so that speakers know in advance what speech is and is not permitted, thereby avoiding the self-censorship that may be caused by uncertainty.

⁴⁴ Constitutional Court (99 Honma 480, 27 June 2002).

Decree would provide for regulation. Further, art 53(2) furnished administrative legislators with few proper guidelines as to enforcement of the statute, and thus it failed to supervise administrative proceedings in accordance with the statute. Such standardless delegation of administrative discretion, the Court wrote, would lead administrative agencies to suppress constitutionally protected speech because they would use their own subjective definitions of ‘public peace and order’ or ‘public morals’.

The Constitutional Court, aware of little textual change in the ‘subversive communications’ provision of the *Telecommunications Business Act* from the 1961 *Telecommunication Act*, remarked that the regulation at issue was not compatible with the changed circumstances in which communications through online media such as the internet have taken on a heightened importance. The Court then focused on a new framework for internet regulations under the Constitution of Korea:

One of the key target media for regulation of subversive communications [under the Telecommunications Business Act] is the internet. Unlike over-the-air broadcasting, the internet is the ‘most participatory marketplace [of ideas] and the expression-promoting medium.’ Over-the-air broadcasting is subject to the strict regulations, which are non-existent in the print media, due to its public responsibility and public interest. Broadcasting is characterized by the scarcity of air spectrum, its invasive quality, and lack of the audience’s control over information. But the internet does not share the special attributes of broadcasting media. Indeed, the internet presents low barrier to entry, it guarantees interactive communication, and its use requires affirmative, deliberate actions. If communication in the internet, which has now established itself as the largest and most important medium of expression, is regulated by order-centric notions, it will create a big impediment to the evolution of freedom of expression. Development of communication media technologies expands the forum for free expression and brings about a qualitative change. Thus, the regulatory modes for [151] this ever changing sphere of communication also should be explored within the framework of the Constitution in a diverse and innovative way.⁴⁵

⁴⁵ Ibid. One Korean commentator stated that the Constitutional Court’s emphasis of the differences between the internet and over-the-air broadcasting follows the US Supreme Court in *Reno v American Civil Liberties Union* (1997). Lee, above n 9, 34.

Because of its unique nature as a means of communications, the internet has been a challenge to policy makers and courts interested in giving precise definition to freedom of expression in cyberspace and to the scope of permissible regulatory intervention by government. The Constitutional Court's optimistic view of the positive role the internet can play in communication is refreshingly forward-looking. The Court agrees with MIT professor Ithiel de Sola Pool, author of *Technologies of Freedom*, who argued: '

The legal system ... invented for each new technology may in some instances, like the First Amendment, be a *tour de force* of political creativity, but in other instances it may be less worthy. The system created can turn out to be inappropriate to more habile forms of the technology which gradually emerge as the technology progresses.'⁴⁶

And the Court is unmistakably wary of the 'democratic impulse to regulate evils'⁴⁷ amidst the instinctual fears about technological changes in the way individuals communicate. The Court cautions the Korean government against legislating the fears about the internet as a new mode of communication. More specifically, it advises the lawmakers in Korea to consider more prudently 'how technologies alter the way in which [people] communicate ... and to understand how technologies may alter even the relationship of the individual to the state'.⁴⁸

Summary and Conclusions

In South Korea regulation of the internet is still evolving as in many other areas of law.⁴⁹ This is all the more true in Korea's approach to libel law in cyberspace, for it showcases how Korean legislators and courts respond to the relatively new and puzzling technology of cybercommunication. Thus, the statutory framework for cyberlibel is in no small measure a work in progress. The Civil and Criminal Codes on defamation, which were enacted in the pre-internet era, are old rules, but Korean courts have adapted and stretched them to cover the emerging technologies and methods of communication in cyberspace. In this connection, they seem to have tried

⁴⁶ Ithiel de Sola Pool, *Technologies of Freedom* (1983) 7.

⁴⁷ *Ibid* 251.

⁴⁸ Smolla, above n 43, 338.

⁴⁹ For a discussion of various changes in law and legal institutions in South Korea, see Dae-Kyu Yoon (ed), *Recent Transformation in Korean Law and Society* (2000).

— with mixed results — ‘to fit technological innovations under conventional legal concepts’.⁵⁰

The adaptation of the Criminal and Civil Codes to cybercommunication should come as no surprise, regardless of whether it has been an adequate response to technological challenges in libel law. More intuitively than experientially, academics, lawyers, and judges in Korea have turned to their [152] familiar and well established statutes in locating a legal mechanism for internet libel. To them, the internet, although it is irrefutably transformative as a communication technology, has little impact on the applicational validity of the traditional law of defamation.

Not until the early 1990s did the Korean government try to grapple with the actual or perceived problems with dealing with dissemination of information through new media telecommunications such as the internet. More often than not, the legislative efforts of the Korean government have been a clumsy process. The *Telecommunications Business Act* of 1991, for example, is little different from the *Telecommunication Act* of 1961. As the Constitutional Court noted pointedly in 2002, it is not the kind of innovative regulations that Koreans need to deal with libel on the internet, one of the most rapidly developing areas of technology.

Likewise, Information and Communications Network Act of 2001 is geared more toward regulation than toward promotion of communications through cybernetworks. The law is not protective but restrictive of freedom of internet communication — again in sharp contrast with what the Constitutional Court suggested in 2002. The law allows any aggrieved person to demand an ISP to delete any defamatory posting from its websites or to post his reply to the disparaging message. Regardless of whether the complained-of message is true, protected opinion, or privileged, the ISP is required to take immediate action on the request to remove the allegedly offending message. And it makes little difference whether the complaint is frivolous, malicious, or harassing.

What then would be the option for the ISPs under the Information and Communications Network Act? There is a substantial probability that the ISPs will

⁵⁰ Pool, above n 46, 4.

comply the aggrieved party's demand instead of investigating its merits. Given that the statute recognises no alternative defences against the demand, the possible cost of rejecting the demand is too high for the ISP to bear. The Korean statute should serve as a classic example of the 'chilling effect' of *private* prior restraint on internet speech.

The Information and Communications Network Act's penal provision on libel is constitutionally questionable. The Act sets forth substantially harsher penalties for defamation in cyberspace than the *Criminal Code* does for offline libel (written defamation). It's not clear what policy justifications Korean lawmakers might have considered in punishing internet libel more severely than libel in newspapers, broadcasting, and other 'old' media. No matter what those policy justifications might have been, they were hopelessly ill-advised. The National Assembly of Korea seems to have followed blindly statutory precedents from older communication technologies. The Information and Communications Network Act and the *Criminal Code* are identical except that there are variances in their stipulations of prison terms and amounts of fine.

Singularly problematic about the punishment of internet libel under the Information and Communications Network Act is that it does not provide for any defences for libel through cybercommunication similar to what the *Criminal Code* recognises — publication of truthful defamation for the public interest. Furthermore, the internet libel statute has no textual indication of whether the libel defences under the *Criminal Code*, art 310, will be adopted by the courts in adjudicating cyberlibel litigation under the internet law. This is a serious flaw of the 2001 statute which can be one of the possible grounds for invalidation by the Constitutional Court if opportunity arises.

When compared with the decade-old legislative experimentation with libel law (or lack thereof) in South Korea, Korean courts as a whole and particularly the Constitutional Court have demonstrated their willingness to 'develop the kind of legal

theories and concepts that will meet the needs of a fast changing information society, which Korea is' rather than rigidly adhere to the relevant statutes.⁵¹

When the Civil and Criminal Codes have applied to libel in cyberspace, the internet context has factored into the court rulings as an important element. But Korean judges do not consider the internet [153] as dispositive of the guilt or liability issue in libel cases especially when individuals are defamed through the internet.

On the other hand, Korean courts place emphasis on the internet as a determinative element in balancing freedom of expression with individual reputation when 'anti-sites' result in libel lawsuits. The courts reject the constrictions of the libel law based on offline media in protecting the anti-sites from liabilities. They recognise the internet's unique function and value in facilitating open debates among diverse social groups through cybercommunication as a public forum on matters of public concern. Also, the Korean courts take a critical look at the anti-site visitors and their tendency to accept what they read at the anti-sites with skepticism. This judicial way of assessing the social context of the anti-site messages will likely carry profound implications for freedom of expression in cyberspace. Instead of concentrating on the infrastructure of internet communications, courts will examine the impact of the messages on the particular audience in connection with the purpose of the cybersites at issue.

Notwithstanding the ongoing development of statutory and decisional law on internet libel, the Constitutional Court's 2002 analysis of the constitutional status of internet communication is thoughtful and informative. In distinguishing the internet from over-the-air broadcasting, the Court has drawn a parallel between the internet and print media. In so doing, the Court has adopted the print model of communication regulation, that is, freedom from state regulation in general. The Court is as solicitous about guarding freedom of expression in cyberspace as it has been about expanding freedom of expression in the 'real' world since 1987.⁵² The Court's clear-cut

⁵¹ Kyu Ho Youm, 'Mass Communications Law in Transition: Defining Freedom and Control of the Media' in Dae-Kyu Yoon (ed), *Recent Transformation in Korean Law and Society* (2000) 128.

⁵² For a discussion of the constitutional jurisprudence of Korea in relation to press freedom since 1987, see Kyu Ho Youm, 'The Constitutional Court and Freedom of Expression' (2001) 1 *Journal of Korean Law* 37-70.

Youm, 'Korean Defamation Update'

explication of the free speech doctrine informed by the marketplace of ideas theory is expected to provide a directional point for judges, lawmakers, policymakers, and ordinary individuals in defining the internet's key role in expanding freedom of expression in South Korea.