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PRESS LAW IN THE REPUBLIC OF KOREA

KYU HO YOUM*

INTRODUCTION

Almost every nation in the world recognizes the principle of freedom of expression, be it through a written constitution, statutory law¹ or custom. There is often a discrepancy, however, between constitutional guarantees of freedom of speech and the press, and the actual exercise of these freedoms. This disparity led John Stevens to the following cogent observation: "For a visitor from another planet to try to understand our society from reading our constitutions and laws would be almost as misleading as his attempting to do the same from monitoring our network television fare."²

South Korea is a case in point. Freedom of the press is explicitly guaranteed by the present Korean Constitution, as it had also been in previous constitutions.³ Despite these constitutional guarantees, the Korean Government has acted in accordance with the "authoritarian theory of the press."⁴ The Government has constrained the press by

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1. For examples of constitutional and statutory recognition of freedom of expression in various countries, see CONSTITUTIONS OF THE WORLD (A. Blaustein & T. Flanz eds. 1976) [hereinafter WORLD CONSTITUTIONS].

2. Stevens, *Freedom of Expression: New Dimensions*, in MASS MEDIA AND THE NATIONAL EXPERIENCE 14, 27 R. Fiarrar & J. Stevens eds. (1971).

3. For a discussion of press freedom in South Korea from the perspective of constitutional history, see *infra* notes 14, 16, 22-25, 27, 34, 36, 40 and accompanying text.

4. Under the authoritarian theory of press freedom, the press is to support and advance the policies of the Government in the main capacity of a governmental propaganda agency. The authoritarian press system, usually adopted by many a "strong-man" type of government, is based upon the proposition that freedom of the press is a special privilege to be granted by the State, not one of the basic political and civil liberties of individuals. The authoritarian press, although functioning as private enterprise within the individual country, owes its existence to the State. Thus, the press has as much freedom as the government allows it to have. For a detailed discussion of the authoritarian theory of the press, see generally F. SIEBERT, T. PETERSON & W. SCHRAMM, *FOUR THEORIES OF THE PRESS*, 9-37 (1956) [hereinafter FOUR THEORIES].

subjecting it to various legal and nonlegal restrictions, direct censorship and even the use of force.⁵ In fact, Korea's press legislation is regarded as among the most restrictive in East Asia.⁶ Restriction is so tight that, as one American journalist commenting on the Korean situation put it: "[F]reedom of the press is not a reality, despite being guaranteed in the constitution [because] [r]eporters exercise self-restraint in dealing with sensitive topics"⁷

This article explores and discusses the status of freedom of the press in South Korea within a constitutional and statutory context. By examining the constitution and statutes, the article sheds light on the broader question of why Korea epitomizes the great gap between freedom as an ideal and freedom as a fact: a disparity found in many parts of the world. An historical overview of Korean press freedom from a sociopolitical and legal perspective is a constructive preface to the examination of these main topics.

I. KOREAN PRESS FREEDOM: PAST AND PRESENT

In 1945, thirty-six years of Japanese colonial rule in Korea came to an end. The United States Army Military Government in Korea (USAMGIK), installed as a temporary government upon Japan's surrender, ushered in "libertarian"⁸ policies as to press rights.⁹ The USAMGIK's more relaxed policies gave rise to a rapid growth of newspapers, which adhered to both right and left ideologies.¹⁰ In 1946, how-

5. For a concise discussion of these typical government pressures on the press in general, see Merrill, *The Global Perspective*, in *GLOBAL JOURNALISM* 30-35 (J. Merrill ed. 1983).

6. Lent, *Freedom of the Press in East Asia*, in *NEWSPAPERS IN ASIA: CONTEMPORARY TRENDS AND PROBLEMS* 20, 26 (J. Lent ed. 1982).

7. Oster, "Political Freedom": A Hollow Phrase For S. Koreans, *Chi. Sun-Times*, Apr. 11, 1983, at 26. See also ABC television documentary "A Fragile Peace: North and South Korea," Nov. 10, 1983.

8. Under the "libertarian" press theory, the press functions to inform, entertain and sell. The press's main purpose, however, to uncover and present the truth. The press often serves as a fourth estate, supplementing the executive, legislative and judicial branches of government. Press freedom in a libertarian society is a right of citizens, not a special privilege to be accorded by the government to a limited segment of society. Anyone who can pay for it may operate a communication medium, and say whatever he likes, except perhaps for personal defamation, obscenity, invasion of privacy, wartime seditions and the like. For a detailed discussion of the "libertarian" press theory, see *FOUR THEORIES*, *supra* note 4, at 39-71.

9. For a discussion of the Japanese colonial government's repression of the Korean press, see 1 B. KIM, *HISTORY OF KOREAN JOURNALISM* 73-122 *passim* (3d ed. 1967) [hereinafter *KOREAN JOURNALISM*].

10. See HAHN BAE-HO, *COMMUNICATION POLICIES IN THE REPUBLIC OF KOREA* 19 (1978); *THE KOREAN PRESS* 1984, at 12 (1984).

ever, the emergence of communist propaganda and subversion, encouraged by Korean "yellow journalism,"¹¹ prompted the USAMGIK to promulgate Ordinance No. 88, which required the licensing of publications, including newspapers.¹² It is significant that the "libertarian" policies of the USAMGIK introduced the first taste of freedom of the press to a 5000 year-old civilization.¹³

The Korean Constitution of the First Republic, established in 1948, guaranteed press freedom.¹⁴ President Syngman Rhee's government, however, did not safeguard and promote this constitutional right. To the contrary, the Rhee regime kept intact such repressive decrees as the old Newspaper Law, originally enacted in 1907 by the Yi Dynasty, to deal with newspaper licensing.¹⁵

The Second Republic under Premier Chang Myon, which replaced the Rhee government following the student uprising of April 1960,

11. "Yellow Journalism," which flourished in the United States in the late nineteenth century, exploits, distorts or exaggerates the news to create sensations and attract readers. It is a phrase coined as a result of "Yellow Kid Journalism," and it is an allusion to the "Yellow Kid" cartoons in the *New York World* of the 1890's. These cartoons were noted for their social commentary and sensationalism. E. & M. EMERY, *THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA* 285-88 (5th ed. 1984).

12. USAMGIK Ordinance No. 88 stipulated, among other things, that "[n]o person, natural or juridical, shall personally or through any agent, print, publish, issue, circulate, distribute, sell or offer to sell, post, exhibit or display any newspaper or other periodical which is not licensed" USAMGIK Ordinance No. 88, § 1 (May 29, 1946), *reprinted in English Korea, Official Gazette*, at 1-154 (A compilation of laws and ordinances of the United States Army Military Government in Korea).

13. For a discussion of the American Military Government's press policy in South Korea from 1945 to 1948, see C. CHOE, *HANKUK SHIMUN SA [A HISTORY OF THE KOREAN PRESS]* 336-77 (1960). See also Chung, *A Study of the Press Policy of the American Military Government in Korea*, in 1 *EONRON HAKBO [HANYANG COMMUNICATION REVIEW]* 223-47 (1980).

14. "Citizens shall not be subjected to any restrictions on the freedom of speech, press . . . except as specified by law." CONSTITUTION OF THE FIRST REPUBLIC, art. 13, as *reprinted in* 2 A.J. PEASLEE, *CONSTITUTIONS OF NATIONS*, 549-59 (2d ed. 1956). The South Korean Constitution was first promulgated on July 17, 1948. It was amended in 1952 and 1954, during the First Republic. Subsequently, the Constitution was again amended during the Second Republic in 1960. See CONSTITUTION OF THE SECOND REPUBLIC, *infra* note 16. Thereafter, it was amended in 1962 and 1969, during the Third Republic. See CONSTITUTION OF THE THIRD REPUBLIC, *infra* note 22. During the Fourth Republic, the constitution was amended in 1972, and this version is popularly known as *Yushin Honpup* [Revitalizing Reforms Constitution], see *infra* note 27. Finally, on October 27, 1980, through popular referendum, the Korean Constitution was amended to its present form. See CONSTITUTION OF THE FIFTH REPUBLIC, *infra* note 34.

15. Newspaper Law of 1907, *reprinted in KOREAN JOURNALISM, supra* note 9, at 53-59, and in Korean in *HANKUK EONRON BEOPYUNG CHONJIP 1945-1981 [A Complete Collection of Korean Laws and Regulations Governing the Press, 1945-1981]* 15-16 (J. Cheong ed. 1982) (hereinafter *EORON BEOPYUNG*).

amended the Constitution to allow the press unparalleled freedom.¹⁶ The Chang government also enacted new registration procedures for newspapers and other periodicals.¹⁷ In all, the libertarian press policy of the Chang government marked "the advent of unprecedented freedom of the press" in Korea.¹⁸

The 1961 military revolution brought the libertarian climate, fostered by the Chang government, to an abrupt halt. The military junta controlled the press through enforcement of various restrictive decrees.¹⁹ Among these decrees was Decree No. 11, which provided the facility standards to be met by Korean newspapers and news agencies.²⁰ The military rulers invoked the decree to "purify" the Korean press. The era of the military junta (1961-1963) marked the "darkest period" in Korean press freedom, since the end of Japanese rule in 1945.²¹

In 1963, the Third Republic was born. Its President was Park Chung Hee, the chief of the preceding junta. The Park government was greatly concerned with sociopolitical problems that had arisen during the Second Republic and which it felt were directly traceable to the wide-ranging freedom the Chang government had allowed the press. The Park regime's solution was to force a sense of responsibility and self-restraint on the press. Accordingly, the Constitution of the Third Republic, although enumerating among its guarantees the freedom of speech and the press, stipulated: "Neither the press nor any other publication shall impugn the personal honor or rights of an individual, nor shall either infringe upon public morality."²² Despite this warning, the new Constitution did prohibit censorship,²³ except in the areas of mo-

16. "Citizens shall not be subjected to any restrictions on the freedom of speech, and of the press . . ." CONSTITUTION OF THE SECOND REPUBLIC, art. 13 *reprinted in* EONRON BEOPRYUNG, *supra* note 15, at 11-12.

17. Registration of Newspapers Act, Law No. 553 (July 1, 1960), *reprinted in* EONRON BEOPRYUNG, note 15, at 21-22.

18. THE KOREAN PRESS 1984, *supra* note 10, at 13.

19. For the text of numerous decrees issued by the Korean Military Revolutionary Council from 1961-1963 [hereinafter Council Decrees], see EONRON BEOPRYUNG, *supra* note 15, at 780-82.

20. Council Decree No. 11 (May 23, 1961), see *supra* note 19, at 781.

21. *South Korean Press, 1945*, FOI CENTER PUB. No. 119, at 4 (1964). For a discussion of the Korean press under the military junta in 1961-1963, see K. PARK, JAYOO EONRON EUI MYUNG JE [A PROPOSITION ON FREE PRESS] at 28-63 (1963).

22. CONSTITUTION OF THE THIRD REPUBLIC, ch. II, art. 18 (5) (amended 1962), *reprinted in* LAWS OF THE REPUBLIC OF KOREA 1-30 (2d ed. 1969). For a discussion of the evolution of the South Korean Constitution, see *supra* note 14.

23. *Id.* art. 18 (1). The clause reads: "[A]ll citizens shall enjoy freedom of speech and press, and freedom of assembly." *Id.*

tion pictures and dramatic plays.²⁴ With regard to publication standards and facilities of newspapers, the Constitution of the Third Republic authorized a statutory prescription.²⁵

During the early 1970's the climate became even more restrictive than it was during most of the 1960's. In October 1972, the Park regime imposed censorship upon the press through Martial Law Decree No. 1, which prohibited the broadcast or publication of news stories criticizing the Government.²⁶ Two months later, President Park established the Fourth Republic, with a new constitution making him President-for-life. Although this Constitution was identical to its predecessors in its guarantee of freedom of the press,²⁷ President Park frequently disregarded the guarantee through the issuance of draconian emergency measures designed to muzzle the press.

For example, under Emergency Measure No. 1, issued in January 1974, the news media were banned from reporting on acts critical of the Constitution.²⁸ With opposition to the Constitution steadily mounting, Park decreed Emergency Measure No. 9 in May 1975. The measure not only forbade the press from criticizing the Constitution, but it also prohibited advocating its revision or abolition. Furthermore, this decree made it an offense, punishable by a year or more of imprisonment, to report any acts that challenged the Park government in any way.²⁹

The violent death of Park at the hands of his own intelligence chief in 1979 has brought no propitious change in Korean press freedom. Rather, the result has been the opposite. The martial law government, established in the wake of Park's assassination, carried on the "biggest purge" in the history of the Korean press.³⁰ The purification

24. *Id.* art. 18 (2): "[L]icensing or censorship in regard to speech and press, permit of assembly and association shall not be recognized. However, censorship in regard to motion pictures and dramatic plays may be authorized for the maintenance of public morality of social ethics." *Id.*

25. *Id.* art. 18 (3). The clause reads: "[T]he publication standard and facilities of a newspaper or press may be prescribed by law." *Id.*

26. Martial Law Decree No. 1 (Oct. 17, 1972), reprinted in *EONRON BEOPRYUNG*, *supra* note 15, at 786.

27. "No citizen shall be subject to restriction of freedom of speech and the press . . ." YUSHIN HONPUP, art. 18 (amended 1972), reprinted in *LAWS OF THE REPUBLIC OF KOREA 1-17* (3d ed. 1975) [hereinafter *KOREAN LAWS* (3d ed. 1975)]. For a discussion of the evolution of the South Korean Constitution, see *supra* note 14.

28. Presidential Emergency Decree No. 1, art. 4 (Jan. 8, 1974), reprinted in *DOCUMENTS ON THE STRUGGLE FOR DEMOCRACY IN KOREA 89* (Emergency Christian Conference on Korean Problems ed. 1975) [hereinafter *STRUGGLE FOR KOREAN DEMOCRACY*].

29. Presidential Emergency Decree No. 9, art. 7 (May 13, 1975), reprinted in *STRUGGLE FOR KOREAN DEMOCRACY*, *supra* note 28, at 264-67.

30. Pearce, *Korea—Purge On the Press*, in IPI [INTERNATIONAL PRESS INSTITUTE] RE-

campaign resulted in the termination of 172 publications and a merger of six major, private news agencies into one large organization called the Yonhap News Agency.³¹ Moreover, in 1980, the Korean Government enacted the Basic Press Act.³² This press law was designed to give direction to the press clause of the Constitution of the Fifth Republic, amended in 1980.³³

II. CONSTITUTIONAL GUARANTEES OF PRESS FREEDOM

As noted above, the present Constitution of the Fifth Republic does guarantee freedom of the press. Article 20 reads: "All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association."³⁴ This constitutional guarantee is not unusual in Korea in that all the previous versions of the Korean Constitution, which has been amended eight times in the past thirty-eight years, have consistently stipulated the principle of free expression as a right of Koreans.³⁵ Nevertheless, the Constitution of the Fifth Republic is distinctive from its predecessors because of its specific requirement that the press should be socially responsible. That is, the Constitution of the Fifth Republic declares: "Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social

PORT No. 29, at 12 (Oct. 1980).

31. Suh, *South Korea in 1981: The First Year of the Fifth Republic*, in 22 *ASIAN SURV.* 107 (1982). For a discussion of the history of Korean news agencies, including the establishment of the Yonhap News Agency in January 1981, see Won-Soon Paeng, *A Study on the Structural Characteristics of Korean News Agencies (Korean)* 175-221 (unpublished Ph.D. dissertation, Seoul, National University, 1982).

32. The Basic Press Act, Law No. 3347 (Dec. 31, 1980), *reprinted in* 1 *LAWS OF THE REPUBLIC OF KOREA* III-112 to III-135 (4th ed. 1983) [hereinafter *KOREAN LAWS* (4th ed. 1983)].

33. For a discussion of the Basic Press Act, see *infra* notes 48-88 and accompanying text.

34. CONSTITUTION OF THE FIFTH REPUBLIC, art. 20 (1) (amended 1980). The Constitution of the Fifth Republic consists of a preamble, 131 articles and ten supplementary rules. It is divided into ten chapters: General Provisions, Rights and Duties of Citizens, The Executive Branch, The National Assembly, the Courts, The Constitution Committee, Election Management, Local Self-Government, The Economy and Amendments to the Constitution. *Reprinted in* 1 *KOREAN LAWS* (4th ed. 1983), *supra* note 32, at I-1 to I-19, and in 8 *WORLD CONSTITUTIONS*, *supra* note 1, at 1-23. For a discussion of the evolution of South Korea's Constitution, see *supra* note 14.

35. For a discussion of the constitutional framework of press freedom in South Korea prior to the present Constitution of the Fifth Republic, see *supra* notes 14, 16, 22-25, 27 and accompanying text. See also W. PAENG, *MASS COMMUNICATION BEOPJE IRON [A THEORY OF MASS COMMUNICATION LAW]* 86-90 (1984); C. SUH, B. CHA & C. CHOI, *EONRON TONGJE IRON [A THEORY OF PRESS CONTROL]* 109-111 (rev. ed. 1983); Y. PARK, *EONRON UI JAYOO WA KONGJEOK KWAEOP [Press freedom and its duty]* 336-56 (1982).

ethics. *Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.*"³⁶ The clause on the social responsibility of the press is primarily intended to prevent the press from abusing its liberty, while at the same time protecting the rights of Korean citizens to their good names. Unquestionably, it is also an expression of the Korean Government's concern that "citizens in the past often fell victim to unjustifiable behavior by the press" in Korea.³⁷ The constitutional proscription against the press's defaming an individual is not unprecedented in Korean constitutional history. The Constitution of the Third Republic, amended in 1962, for example, prohibited the press from violating an individual's right to his reputation.³⁸ In contrast to the Constitution of the Third Republic, however, the current Constitution makes the press legally liable for damages stemming from violation of the personal honor of citizens.

The press clause of the Constitution of the Fifth Republic expressly guarantees freedom of the press, so long as the press does not abuse corollary constitutional guarantees designed to safeguard an individual's rights to his good name and to preserve societal morality. As Lent has pointed out, however, the constitutional provision guaranteeing a free press can be suspended or dispensed with on a variety of grounds.³⁹ Indeed, the Constitution itself contains a provision that empowers the Government to restrict all constitutional guarantees. Article 35 states: "The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order or of public welfare."⁴⁰ Although article 35 is not, on its face, unreasonable,⁴¹ it has often been wielded as a sword to cut out the heart of the constitutionally guaranteed right to a free press, when no justifying national emergency really existed. Furthermore, similar clauses appeared in the Constitutions of the Third and Fourth Republics and were indiscriminately invoked to restrict the press.⁴² Article 35

36. THE CONSTITUTION OF THE FIFTH REPUBLIC, art. 20 (2) (amended 1980) (emphasis added), *reprinted in* 1 KOREAN LAWS (4th ed. 1983). For a discussion of the evolution of South Korea's constitution, see *supra* note 14.

37. CONSTITUTION (Korean Background Series No. 1, 1980), *reprinted in* INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 230, 232 (S. Song ed. 1983).

38. For a discussion of The Constitution of The Third Republic, see *supra* notes 22-25 and accompanying text.

39. Lent, *A Reluctant Revolution Among Asian Newspapers*, in MASS COMMUNICATION: A WORLD VIEW 112, 113 (A. Wells ed. 1974).

40. CONSTITUTION OF THE FIFTH REPUBLIC, art. 35 (2), (amended 1980). For a discussion of the evolution of the South Korean Constitution, see *supra* note 14.

41. *But cf.* EONRON TONGJE IRON, *supra* note 35, at 111.

42. "[T]he freedoms and the rights of citizens may be restricted by law only when

of the Constitution of the Fifth Republic is subject to the same exploitation and abusive application.⁴³

III. STATUTORY FRAMEWORK OF PRESS FREEDOM

One Korean journalism professor has characterized the press provisions of the Korean Constitution as creating a "logical dilemma," because these provisions guarantee freedom of the press and yet at the same time qualify that freedom.⁴⁴ From a realistic point of view, the dilemma provides a constitutional pretext, which allows the authorities to act against the press, whether such actions are constitutional or not. Consequently, a number of laws and regulations have been enacted and put into force on the grounds that they were needed for "national security, the maintenance of law and order or for public welfare," as constitutionally stipulated.⁴⁵

A. *Direct Press Laws*

Some of the statutes currently in force have a direct impact on the activities of the Korean press; others affect press freedom indirectly. Among the former are the Basic Press Act, enacted in December 1980,⁴⁶ and the Import and Distribution of Foreign Periodicals Act of 1973.⁴⁷

necessary for the maintenance of law and order or for public welfare . . ." CONSTITUTION OF THE THIRD REPUBLIC, art. 32 (2) (amended in 1962), *reprinted in LAWS OF THE REPUBLIC OF KOREA* (2d ed. 1969), *supra* note 22. "Laws which restrict freedoms and rights of citizens shall be enacted only when necessary for the national security, the maintenance of law and order or for public welfare," YUSHIN HONPUP, art. 32 (2) (amended in 1972), *reprinted in KOREAN LAWS* (3d ed. 1975), *supra* note 27, at 1-17.

43. For a discussion of various statutory devices used by the Korean Government against press freedom for reasons of national security, maintenance of law and order and public welfare, see *infra* notes 99-102, 115, 123-24, 131-35, 141, 143-53, 174-94 and accompanying text.

44. Jae Cheon Yu, *The Current Problems of Press Freedom in Korea* 22 (1972) (unpublished M.A. thesis available at the University of Minnesota Library).

45. CONSTITUTION OF THE FIFTH REPUBLIC, art. 35 (2) (amended 1980), *reprinted in 1 KOREAN LAWS* (4th ed. 1983), *supra* note 32. For a discussion of the evolution of the South Korean Constitution, see *supra* note 14.

46. The Basic Press Act, Law No. 3347 (1980), *supra* note 32.

47. Import and Distribution of Foreign Periodicals Act, Law No. 2535 (Feb. 17, 1973), as revised by Law No. 3526 (Dec. 31, 1981), *reprinted in EONRON BEOPRYUNG*, *supra* note 15, at 68-70 [hereinafter *Import Act of 1981*].

1. The Basic Press Act

The Basic Press Act is aimed at honoring human dignity and value, promoting of the public welfare by protecting freedom of expression and the right to know, and by guaranteeing the public function of the press as a molder of public opinion.⁴⁸ More importantly, however, the Basic Press Act supplements and defines the Constitution's guarantee of freedom of the press by actually enumerating rights and restrictions. As it addresses the freedom of the press, the Act provides, *inter alia*, that Koreans shall have the right to express themselves and shall not be interfered with in their right of access to sources of information open to the public generally; that freedom of newspapers and broadcasting shall be guaranteed; that license or censorship of the press shall not be permitted unless prescribed by the Constitution; and that freedom of expression, including that of the press, shall not be restricted except by the Constitution or by law.⁴⁹

Like many other press laws throughout the world, however, the Basic Press Act is actually more restrictive than protective of a free press. For example, it unequivocally requires the press to act responsibly. Article 3 provides:

1. The press shall respect dignity and value of human beings and the basic democratic order;
2. The press shall perform its public duties by contributing to the formation of democratic public opinions concerning matters of public interest by means of news reports, commentary and other methods;
3. The press shall not infringe upon the personal honor or rights of an individual or public morality or social ethics;
4. The press shall not encourage or praise violence and other illegal action which disrupt public order.⁵⁰

This "public responsibility" clause is in accordance with article 20 (2) of the Constitution of the Fifth Republic.⁵¹ In this regard, the law provides that the news media must take "reasonable" care with matters

48. The Basic Press Act, art. 1, sets out the purpose of the Act:

The purpose of the Act shall be to protect the freedom of expression and the right to access to information of the people and to guarantee public function of the press concerning formation of public opinion, thereby esteeming dignity and value of human beings and contributing to realization of public welfare.

Reprinted in 1 KOREAN LAWS, supra note 32, art. 1, at 122.

49. *Id.* art. 2, at 122.

50. *Id.* art. 3, at 122.

51. CONSTITUTION OF THE FIFTH REPUBLIC, art. 20 (2) (amended 1980). For a discussion of article 20, see *supra* note 36 and accompanying text.

relating to the credibility, content and source of all information before it is published.⁵³

Among the rights of the press protected under the Korean statute are those concerning access to public information and protection of news sources.⁵³ One Korean jurist, directly involved in the enactment of the Basic Press Act, extolled the "access to information" provision as a good-faith effort specifically directed toward encouraging and practicing true political democracy in Korea.⁵⁴ These statutory rights, however, are really nothing more than the "trappings of libertarianism."⁵⁵ That is, these rights have very little practical effect because of several vague and overbroad exemptions. For example, if a request for information would unreasonably interfere with the ability of government or public authorities to carry out their functions, or if the information requested is so voluminous that fulfilling the request would impede the normal performance of their duties to a "significant" degree, the request can be denied.⁵⁶ The Act also provides that Korean journalists are not guaranteed the right to protect a news source if the information obtained from the source involves the release of information, the contents of which constitute or relate to a criminal offense.⁵⁷ These

52. The Basic Press Act, art 9, *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at 124. The Act requires due diligence of the press: "The press shall take due diligence with regard to credibility, contents and sources of all released matters before its release." *Id.*

53. *Id.* arts. 6, 8.

54. Park, *Basic Press Act*, in JEONGCHI KWANKYE BEOP [LAWS GOVERNING POLITICAL ACTIVITIES] 131 (C. Kim ed. 1982).

55. J. MERRILL, C. BRYAN & M. ALISKY, *THE FOREIGN PRESS: A SURVEY OF THE WORLD'S JOURNALISM* 264 (1970).

56. The Basic Press Act, art. 6 (1)(4), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at 124. The request can be denied "[w]hen the giving of information may frustrate, hamper or endanger the reasonable performance of duties in a proceeding . . . [w]hen the amount and extent of the demanded information is excessive enough to cause remarkable impediment to normal performance of duties." *Id.* art. 6 (4).

57. *Id.* art. 8 (1). The other exemptions to the press's right to protection of news sources are:

Art. 8 (2) When the published material or information has been obtained in the course of committing a criminal act to be punished by penal servitude or imprisonment for more than one year.

Art. 8 (3) When the writer, informer, or a keeper of the material at issue has obviously committed a crime as prescribed in the Social Security Act, art. 2, considering the contents of the published information.

Reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32 at 124. Article 2 of the Social Security Act provides for crimes concerning insurrection against the Korean sovereignty and the provocation of foreign aggression against the Korean sovereignty and assistance for the enemy in Korea, i.e., North Korea, and crimes concerning anti-state organization. See Social Security Act, Law No. 2769, amended by Law no. 3318 (Dec. 31, 1980), re-

are just two examples of how the Basic Press Act itself provides for the circumvention of the very rights it purports to create and guarantee.

The Act also sets forth limiting qualifications for journalists, publishers and others. Among those disqualified from being journalists are violators of the Social Security Act, article 2,⁵⁸ or the Society Protection Act.⁵⁹ Also disqualified are, inter alios: (1) Persons who do not have Korean citizenship; (2) Foreign juridical persons; (3) Non-residents.⁶⁰

The Basic Press Act also limits foreign investment in the Korean publishing and news industries. Such investment is allowed only "when it is intended for purposes of education, sports, religion, charity and other international goodwill as approved by the Minister of Culture and Information, and of commercial advertisements."⁶¹

The current Korean press law is similar to the Standards for Implementation of the Press Policy, a 1962 decree formulated and put into effect by the Military Revolutionary Council.⁶² The former, like the latter, prescribes the standards for publication facilities, which in effect functions as a regulatory force, daunting the growth of existing papers, as well as the birth of new papers, without a solid financial basis.⁶³ In a way, however, it is distinguished from the 1962 decree in that separate requirements for different administrative units like large

printed in 3 KOREAN LAWS, *supra* note 32, at X-271 to X-277.

58. The Basic Press Act, art. 16 (1), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at 125. For a discussion of the Social Security Act, art. 2 see *supra* note 57.

59. The Basic Press Act, art. 16 (2), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at 125. The Society Protection Act applies to :

1. Persons who have been sentenced to more than one penalty or who have committed more than one criminal offense (excluding those who have committed the offenses by negligence);
2. Leaders and leading members of any organization or group organized for activities involving criminal acts;
3. Mentally deranged persons, drug or alcohol addicts.

See Society Protection Act, Law No. 3286, art. 2. (Dec. 18, 1980), *reprinted in* 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-278 to X-289.

60. The Basic Press Act, art. 17, *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

61. *Id.* art. 14.

62. For the text of Standards for the Implementation of Press Policy Decree of 1962 [hereinafter Implementation Decree], see EONRON BEOPRYUNG, *supra* note 15, at 784-85.

63. A person who desires to publish a general daily newspaper must possess a rotary machine, capable of printing twenty thousand copies averaging four-page newsprint in double tabloid. Special newspapers like foreign-language daily newspapers require more than one rotary machine. The Basic Press Act, art. 21, *reprinted in English in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

cities, medium-sized cities and rural areas, as set forth in the 1962 decree, are now eliminated from the new press law.⁶⁴

The press statute prohibits certain individuals from editing periodicals, including those who are not Korean citizens or do not reside within Korea; those who have forfeited the right to vote or the eligibility for election; and those under age, except for periodicals designed for youngsters.⁶⁵

In connection with its registration clause,⁶⁶ the Act stipulates that the Korean Minister of Culture and Information (MOCI) has the authority to cancel or suspend, for no more than one year, a publication's registration when, *inter alia*, the publication "*repeatedly and flagrantly* violate[s] the law in encouraging or praising violence or other illegal acts disrupting public order."⁶⁷ Because of this provision, the Act effectively grants one single governmental office, MOCI, the power to emasculate or render mute any publication that MOCI deems to have spoken out against the Government. As one critic of this puissant aspect of the press law noted:

It is a matter of great concern whether one administrative office determines the life and death of a press entity.

The life-and-death issue involving the press is a matter of a constitutional nature. Thus, the issue concerning cancellation of registration of periodicals should not be left at the whole discretion of the MOCI. Instead, it should be decided on through deliberation by a constitutional institution, e.g., the Constitutional Committee.⁶⁸

The MOCI also administers the licensing of the foreign press corp.⁶⁹ MOCI can revoke the license of a foreign news bureau on the

64. Cf. arts. 5 and 6 of the Implementation Decree, *supra* note 62.

65. The Basic Press Act, art. 22, *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

66. *Id.* art. 20. Article 20 provides in part: "Any person who desires to publish a periodical shall register . . . particulars with the Minister of Culture and Information." *Id.* art. 20 (1). These particulars include title, classification office, style of print and means of diffusion. *Id.*

67. *Id.* art. 24 (1)-4 (emphasis added).

68. Yu, *The Basic Press Act and Its Problems for the Press*, in SHINMUN KWA BANGSONG [NEWSPAPERS AND BROADCASTING JOURNAL] 133 (Sept. 1981).

69. The Basic Press Act, art. 28, *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32. With regard to its standards for authorizing foreign news media to open branch offices in Korea, the Korean Government denies permit for:

1. Periodicals published in the countries with no diplomatic relations with South Korea, except those published by Korean citizens in those nations;
2. Periodicals published by citizens of countries with no diplomatic rela-

following grounds: (1) the publication has carried stories that undermine the national prestige of Korea or that challenge the basic principles of the Korean Constitution⁷⁰ or (2) the publication has disturbed the order of the domestic Korean press.⁷¹

The MOCI wields its licensing power, vis-à-vis foreign news bureaus, to deal with "hostile" or "undesirable" foreign correspondents and to restrict the flow of foreign publications into the country. Moreover, the MOCI does not hesitate to deport a foreign journalist as persona non grata. The MOCI is well aware that many journalists regard deportation as "[t]he most severe form of censorship imposed on a foreign correspondent."⁷² For example, George John Saar, a British freelance journalist working for the *Washington Post*, was deported by the Korean Government for his reporting on South Korea, which had been described as "consistently inaccurate, biased, subjective and distorted."⁷³ When the Japanese newspaper *Yomiuri Shimbun* rejected the Korean Government's request to retract the paper's article connecting the then Korean Central Intelligence Agency (KCIA) with the kidnapping of an exiled Korean opposition leader from Japan, the MOCI closed down the newspaper's office in Seoul and also expelled its correspondents.⁷⁴ Two American freelance journalists were expelled by the Korean Government for their critical reporting of Korea.⁷⁵

The Basic Press Act, which superseded the 1963 Broadcasting

tions with South Korea;

3. Periodicals purported to carry articles on anti-state ideology and other dangerous thoughts;
4. Periodicals which mostly run obscene or sub-standard articles;
5. Periodicals which are wholly devoted to entertainment;
6. Periodicals which are assumed to be detrimental to the law and order of society.

MOCI Ordinance No. 3 (June 19, 1969), art. 2, reprinted in EONRON BEOPRYUNG, *supra* note 15, at 90-91.

70. The Basic Press Act, art. 28 (2)-3, reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

71. *Id.* art. 28 (2)-4. In terms of the impact which the press law has upon the foreign news media, the law deals with their branch officer only, like the now-repealed Registration of Newspapers Act. See Law No. 1486 (1963), arts. 12-13, repealed by Law No. 3347 (1980), reprinted in EONRON BEOPRYUNG, *supra* note 15.

With regard to statutory regulation of the importation and distribution of foreign periodicals, the Government still invokes the Import Act of 1981. See Import Act of 1981, *supra* note 47. For a discussion of this act, see *infra* notes 89-96 and accompanying text.

72. Kelly, *Access Denied: The Politics of Press Censorship*, in THE WASHINGTON PAPERS NO. 55, at 19 (1978).

73. 7 INDEX ON CENSORSHIP 68 (May-June 1978).

74. 2 INDEX ON CENSORSHIP vii (Winter 1973).

75. 12 INDEX ON CENSORSHIP 47 (Feb. 1983).

Law,⁷⁶ places emphasis upon the "public nature" of broadcasting. The Act requires broadcasters to be impartial and objective and it proscribes the advocacy of any particular interest, organization or faith, "except as permitted for a special purpose."⁷⁷

Although the Basic Press Act is highly restrictive of press freedom, it is relatively solicitous of the rights of individual citizens damaged by defamatory reporting.⁷⁸ In this regard the Act supplements the defamation provisions of the Civil Code⁷⁹ and the Criminal Code.⁸⁰

In relevant part the Act stipulates:

One who has suffered damage from a *factual* assertion published by a periodical or broadcasting network . . . may request in writing to the publisher, editor, chief of the broadcasting network or its program director for printing or broadcasting a correction of the reporting within fifteen days of the publishing by a daily newspaper, news service or a broadcasting network and within one month of its publishing by other periodicals.⁸¹

Accordingly, anyone who has been damaged by the press is legally entitled to recover for the injury so long as the press reports at issue are assertions of fact, not merely expressions of opinion or criticism.⁸²

76. Broadcast Act, Law No. 1535 (1963) *repealed* by Law No. 3347 (1980), *reprinted* in EONRON BEOPYUNG, *supra* note 15, at 290-92.

77. The Basic Press Act, art. 31, *reprinted* in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

78. *Id.* art. 49 (1).

79. Civil Code, Law No. 471 (Feb. 23, 1953), *as revised* by Law No. 3051 (Dec. 31, 1977), *reprinted* in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VII-1 to VII-126.

80. Criminal Code, Law No. 293 (Sept. 18, 1953), *as revised* by Law No. 2745 (Mar. 25, 1975), *reprinted* in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-1 to X-44.

81. The Basic Press Act, art. 49 (1), *reprinted* in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32 [emphasis added].

82. For the purpose of "arbitrating disputes about requests for correction by those who suffer from coverage of the news media, as well as deliberating matters concerning the violation of rights by the press," the law authorizes establishing a press arbitration commission. *See* the Basic Press Act, art. 50 (1) *reprinted* in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32. Such litigation must originate with the press arbitration commission. *See id.* Under the Basic Press Act, those who suffer from press reports cannot appeal directly to the court for correction, without first going through the arbitration commission. *Id.*

Notice that since the arbitration commission was founded in December, 1981, a total of 213 cases were settled through mutual agreement, although no agreement could be reached in 80 cases, 66 cases were withdrawn, and all remaining cases were either dismissed or rejected. *See* Oh, *Problems of Press Arbitration Processes and Suggestions on Their Improvement*, EONRON JUNGJE [PRESS ARBITRATION QUARTERLY] 32 (Winter 1984).

The Act's penal provisions provide for penal servitude or a fine.⁸³ A person who has published periodicals without having first registered with the MOCI or one who has established a foreign news branch office without prior permission from the MOCI shall be subject to penal servitude for not more than two years or a fine of not more than three million *won* (\$3,750).⁸⁴ An editor who fails, "without proper excuse," to exclude information of a kind whose released contents constitute a crime, shall be sentenced to penal servitude for not more than one year or a fine of two million *won* (\$2,500).⁸⁵ Reproduction or circulation of any part of material confiscated by the authorities shall subject the violator to imprisonment for not more than one year or a fine of not more than two million *won* (\$2,500).⁸⁶

Despite the highly touted objective of harmonizing the rights of a free press with the rights of individual citizens to be free from defamation, the Basic Press Act has, nonetheless, been a frequent target of criticism from both within and without the press community.⁸⁷ Critics generally agree that the Act is dominated by restrictive provisions so sweeping and ambiguous that it regulates rather than protects the press. Furthermore, critics charge that the "libertarian" provisions of the Act are merely statutory masks disguising its truly restrictive characteristics. The fact of this masquerade is difficult to refute in that the Korean press has never routinely used its rights of access to information and protection of confidential sources. This criticism gains even more credibility when it is noted that the Act grants the Korean Government the right to cancel or suspend periodicals despite the constitutional guarantee of freedom of the press.⁸⁸

2. The Act Concerning Foreign Periodicals

Using the Import and Distribution of Foreign Periodicals Act (Import Act), the Government regulates the domestic dissemination of for-

83. The Basic Press Act, arts. 52-56, *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

84. *Id.* art. 52 (1), (2).

85. *Id.* art. 53.

86. *Id.* art. 54 (1). The Basic Press Act stipulates: "Periodicals or materials to be used for broadcasting may be confiscated through a warrant issued by a judge only when there is a reasonable ground for confiscation." *Id.* art. 7 (1).

87. See, e.g., Kim, *Elections, Government, and the Press*, Chosun Ilbo [Chosun Daily], Feb. 20, 1985, at 16; DONG-A YEONGAM 1982 [DONG-A ANNUAL 1982] 427-29 (O. Kwon ed. 1982); Harvey, *The Honey and the Rod: Controlling Journalism in South Korea*, in CPJ [Committee to Protect Journalists] UPDATE 2-3 (Nov.-Dec. 1984).

88. THE CONSTITUTION OF THE FIFTH REPUBLIC, art. 35 (2) (1980), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

eign periodicals.⁸⁹ The purpose of this statute is to provide "regulations concerning importation and distribution of periodicals published abroad in order to strive for the sound development of publishing culture and protect law and order and to preserve good morals and manners unique to the nation."⁹⁰ The practical effect of the law goes even further in that it often operates to curb the domestic circulation of certain foreign publications.

The law is noteworthy in that it deals with the importation of foreign publications in a discriminatory way, depending on whether it is for distribution or for sale. That is, in the case of importing periodicals from overseas *for distribution*, a permit from the MOCI is required.⁹¹ On the other hand, a person with the intent to bring in foreign publications *for sale* in Korea should register with the MOCI, as stipulated by the Presidential Decree.⁹²

Pursuant to the Import Act, the MOCI is empowered to take sweeping measures against foreign periodicals that the Korean Government finds to "subvert the constitutional system of the State or undermine the public security and customs" of Korea.⁹³ The Government

89. See Import Act of 1981, *supra* note 47.

For a frame of reference with regard to the degree of importation of periodicals, notice that, as of 1981, *Time* and *Newsweek* magazines had South Korean circulations of 25,000 and 20,000 respectively. The *New York Times*, the *Washington Post* and the *Wall Street Journal* had a combined circulation of less than 150. Lee, *South Korea*, in 1 WORLD PRESS ENCYCLOPEDIA 589 (G. Kurian ed. 1982).

90. See Import Act of 1981, art. 1, *supra* note 47.

91. *Id.* art. 3 (1).

92. *Id.* art. 4. For the text of the Presidential Decree for the Implementation of the Import Act of 1981, Decree No. 6657 (May 2, 1973), as revised by Decree No. 10325 (June 2, 1981), see EONRON BEOPRYUNG, *supra* note 15, at 85-86.

93. *Id.* arts. 7-8. As for the foreign periodicals that the Korean Government assumes to be subversive of the Constitution and detrimental to the public safety and traditional customs of Korea, the MOCI defines those excluded as follows:

1. Periodicals which defame the Constitution or the head of state of South Korea;
2. Periodicals which disavow liberal democracy, advocate and/or promote communism;
3. Periodicals which praise, encourage, collaborate with, promote, or incite the activities of anti-state organization or their members and of communist-oriented organizations overseas and their members;
4. Periodicals which are considerably feared to mislead the judgments of Korean citizens by publicizing or presenting the reality of Korea in a distorted way;
5. Periodicals which undermine the law and order of the public and the good manners and customs of Korea.

MOCI Ordinance No. 50 (Apr. 15, 1976), art. 2 (1), *reprinted in* EONRON BEOPRYUNG, *supra* note 15, at 89-90.

can order that the sale of any such publication be suspended or that the offending contents be deleted,⁹⁴ and it can also revoke the distributor's permit.⁹⁵ Furthermore, importers of foreign periodicals found in violation of the Import Act can be imprisoned or fined, and the publications in question can be confiscated by the authorities.⁹⁶

B. Special Security Acts

The geopolitical climate in South Korea affects the degree of actual freedom exercisable by its press, just as socioeconomic matters do. The uniqueness of Korea as a nation divided, and one which confronts the most belligerent communists across the Demilitarized Zone (DMZ), serves as convincing testimony to the common-sense observation: "A major interest of any society is its national security."⁹⁷ Indeed, national security has been a paramount concern for the majority of South Koreans, particularly since the Korean War. In an attempt to ensure its security, the Korean Government has molded its political and social structures toward maximizing their efficacy. In this context, the Korean press has been playing and is expected to play an edifying role in the pursuit and maintenance of national security.

The Korean Government has employed diverse approaches toward the maintenance of national security. Among the mechanisms used are numerous special laws.⁹⁸ These statutes are primarily designed to control and suppress the anti-state or communist organizations or provocations. Nevertheless, they are in conflict with freedom of the press in that they are often used by the Government to regulate the media.

94. See Import Act of 1981, art. 7, *supra* note 47.

95. *Id.* art. 8. In this regard, the *Newsweek* magazine episode of the late 1960's is a case in point. In a 1968 issue, *Newsweek* erroneously used Japanese names for Korean cities on a map pertaining to its cover story. MOCI's Publication Section ordered *Newsweek's* local distributor to blacken the "offending" portion of the map in all copies of the issue designated for distribution. Sunwoo Nam, A Comparative Study of Freedom of the Press in Korea, Taiwan and the Philippines in the 1960's 56 (1969) (unpublished Ph.D. dissertation available at the University of Wisconsin Library).

96. See Import Act of 1981, arts. 11-12, *supra* note 47.

97. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 55 (1970).

98. See, e.g., National Security Act of 1980, *reprinted in English in 3 KOREAN LAWS* (4th ed. 1983), *supra* note 32, at X-64, *superseding* Anti-Communist Act of 1961, *reprinted in KOREAN LAWS* (3d ed. 1975), *supra* note 27; Martial Law of 1981, *reprinted in 1 KOREAN LAWS* (4th ed. 1983), *supra* note 32; National Security Planning Agency Act of 1980, *reprinted in 1 KOREAN LAWS* (4th ed. 1983), *supra* note 32; Military Penal Code of 1981, *reprinted in 1 KOREAN LAWS* (4th ed. 1983), *supra* note 32.

1. The National Security Act

Typical of the special laws currently in effect is the National Security Act promulgated in 1980.⁹⁹ It provides in part:

Any person who has benefited the anti-state organization by way of *praising, encouraging, or siding with or by other means*, the activities of an anti-state organization, its member or a person who had been under instruction from such organization, shall be punished by penal servitude for not more than seven years.¹⁰⁰

Given the vagueness inherent in the words "praising, encouraging or siding with or by other means" and the ambiguity concerning "anti-state organization," the law carries the risk of being interpreted and applied well beyond its intended parameters, as was its predecessor, the Anti-Communist Act.¹⁰¹

The Anti-Communist Act was in force in the 1960's and 1970's and was frequently invoked against the press.¹⁰² For instance, a leading dissident poet published a satirical poem that condemned the misuse of power by the governing elite. The poet, his editor and publisher were arrested on charges of violating the Act.¹⁰³ In May 1978, two former university professors were each sentenced to three and a half year's imprisonment by a Seoul criminal district court on a similar charge, after they published *Dialogue with 800 Million People*, a collection of essays about life in China, written by John K. Galbraith, Harrison Salisbury, Edgard Snow and other Americans.¹⁰⁴

Under the provisions of the National Security Act, three leaders from the Christian community were arrested for "praising" a North

99. National Security Act of 1980, Law No. 3318, *reprinted in 3 KOREAN LAWS* (4th ed. 1983), *supra* note 32, at X-64 to X-70.

100. *Id.* art. 7 (1) (emphasis added).

101. Anti-Communist Act, Law No. 643 (1961), *superseded by* Law No. 3318 (1980), *reprinted in KOREAN LAWS* (3d ed. 1975), *supra* note 27, at 776-80.

102. For a discussion of the Anti-Communist Act, see Lee, *The Unconstitutionality of the Anti-Communist Act*, Beopyul Shinmun [The Law Times], Apr. 5, 1965, at 7. See also Lee, *Anti-Communist Act v. Freedom of the Press and Correspondence*, in SHINMUN PYUNGRON [JOURNALISM REVIEW] 2-8 (Winter 1967); Lee, *All Pressmen, Do Rouse Yourself (sic) to Alter and Abolish the Laws Restricting the Press*, Shinmun Pyungron 2-6 (Autumn 1976); Chun, *The National Security Act and the Anti-Communist Act Must Be Revised*, SHINMUN PYUNGRON 13-16 (Autumn 1971).

103. 2 INDEX CENSORSHIP 95 (Spring 1973). Notice that the publication involved was *Sasangye*. The opposition party organ, *Minjujunson*, also published the poem and was also prosecuted. *Id.*

104. 7 INDEX ON CENSORSHIP 65 (Nov.-Dec. 1978).

Korean unification plan, which South Korea had rejected.¹⁰⁵

The Korean courts have frequently applied the National Security Act and its predecessor, the Anti-Communist Act, against the press.¹⁰⁶ In interpreting these restrictive laws, however, the courts have been cognizant of the possible adverse impact these laws might have on press freedom. For example, in 1956 the Korean Supreme Court, in *Seokchai Choi v. State*,¹⁰⁷ ruled that an editorial, critical of the Government's mobilization of students for a series of pro-Government demonstrations, did not violate the Anti-Communist Act. The Court observed that the editorial suggested a termination of the mobilization and was not at all in the nature of communist propaganda, as the Government had argued.¹⁰⁸

In *Ikjin Jeong v. State*,¹⁰⁹ the Court found that a publication that reported that the Government had failed to compensate an informant for leading law enforcement officers to a communist spy did not violate the National Security Act. The Court determined that the publication contributed to a clarification of possible mishandling of the compensation fund and did not impede the counter-espionage efforts of the authorities.

In 1970, the Seoul District Court in *Jeyul Kim v. State*¹¹⁰ declared that "[o]nce classified military information is discussed in public, it can [no longer be] categorized as confidential secrets. Thus, the publication of the now non-classified information is not subject to punishment under the Anti-Communist Act and the Military Information Law." In that case, the Dongyang News Agency reported on the three-year combat preparation plan. The plan had been openly debated at a meeting of the National Assembly's National Defense Committee. The Supreme Court upheld the district court's decision and analysis. The Court held that the publication of the national budget plan, as discussed in the Assembly, did not necessarily indicate that the reporters involved intended to serve the interests of the enemy, North Korea.¹¹¹

105. 14 INDEX ON CENSORSHIP 48 (Apr. 1984).

106. For a complete list of cases, see Kyu Ho Youm, *Freedom of the Press in South Korea, 1945-1983*, at 290-95 (1985) (unpublished Ph.D. dissertation available at the Southern Illinois University Library).

107. Supreme Court, May 8, 1956, 4289 Hyungsang 80, Beopyul Shinmun, June 25, 1956, at 3.

108. *Id.* For the text of the district court's and appellate court's opinions on the case, see HANKKUK SHINMUN YEONGAM 1968 [KOREAN PRESS ANNUAL 1968] 516-18 (1968).

109. Supreme Court, Apr. 29, 1969, 68 Da 1631, Beopyul Shinmun May 26, 1969, at 4.

110. Seoul District Court, June 15, 1970, 69 Ko 21972, Beopyul Shinmun Aug. 17, 1970, at 6; Aug. 24, 1970, at 6.

111. Supreme Court, Feb. 29, 1972, 71 Do. 2264, Beopyul Shinmun Mar. 20, 1972, at 4. *But cf.* Cheongjo Lim v. State, Supreme Court, Sept. 12, 1972, 72 Do 1514, PANRAI

2. The Martial Law

The Korean Constitution accords the President the power to "temporarily suspend the freedoms and rights of the citizens," when grave and extraordinary circumstances threatening the security of the state require him to take "emergency measures" with regard to the entire range of state affairs.¹¹² Furthermore, article 52 of the Constitution provides the President with the power to proclaim martial law, when it is necessary to "maintain the public safety and order by mobilization of the military forces in time of . . . national emergency."¹¹³ Under martial law, special measures may be taken to restrict press freedom.¹¹⁴ The special law authorizes the martial law commander, who is appointed by the President, "to take special measures with regard to . . . the press."¹¹⁵

These "emergency measures" and "martial law" clauses of the Constitution have been frequently used by the government to suppress both political freedoms and civil liberties. For example, during the 1970's, the Park Chung Hee Government often resorted to emergency decrees and martial law as all-purpose weapons to prevent the press from criticizing the Government or reporting any dissidence.

Just before Park initiated the October Revitalizing Reforms in 1972, the Government forced the citizens and the press into a terrorized silence through the issuance of Martial Law Decree No. 1; the Decree banned "all indoor and outdoor demonstrations for the purpose of political activities" and made "speeches, publications, press and broadcasts" subject to censorship.¹¹⁶ With opposition to these revitalizing re-

WOLBO [MONTHLY REPORT OF COURT CASES] 76 (Nov. 1972).

112. CONSTITUTION OF THE FIFTH REPUBLIC, art. 51 (1), (2) (1980), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

113. *Id.* art. 52 (1).

114. *Id.* art. 52 (3).

115. Martial Law, Law No. 3442 (Apr. 17, 1981), art. 9 (1), *reprinted in* 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at II-154 to II-156. The Martial Law describes the circumstances under which the President shall enforce the extraordinary measure of martial law:

[E]ither to cope with the military needs or to maintain the public safety and order, in time of war, state of seige, or similar national emergency under which the functioning of the Administrative and Judiciary branches of the government is deemed conspicuously difficult under the state of either armed conflict with the enemy or the extreme disturbance of social order.

Id. art. 2 (2).

116. Martial Law, Decree No. 1 (Oct. 17, 1972), *reprinted in* the Korean Times, Oct. 18, 1972, at 1. The policy guidelines of the Government under this decree were more draconian. Under the guidelines, a news blackout was forced on:

1. Any article that distorts, defames or instigates against the purpose of the Declaration of the State of National Emergency of October 17, 1972;

forms steadily increasing, Park issued a series of presidential emergency decrees. The ninth decree, proclaimed in May, 1975, proved to be the most drastic application of the Constitution's "emergency measure" provision against the press. Emergency Decree No. 9, specifically aimed at curtailing press freedom, prohibited the press from negating or opposing the new Revitalizing Reforms Constitution and also from advocating its revision or abolition. Further, to report, broadcast or publicize any acts critical of the constitutional structure under the Park regime was punishable by a year or more of imprisonment.¹¹⁷

Seven journalists were convicted of charges brought pursuant to Decree No. 9 after they had privately published broadsheets that reported on the arrests of Government critics, as well as on student demonstrations and workers' strikes banned by the decree.¹¹⁸ The sale of the monthly magazine *Taehwa* had been banned and the managing editor was arrested, because the October 1977 issue violated the decree.¹¹⁹ On suspicion of violation of the decree, *Minjujunsong*, the official newspaper of the now dissolved opposition New Democratic Party, was confiscated and its editor was arrested. The seized edition carried the full text of a speech by Kim Young Sam, the leader of the party, calling for Park's resignation.¹²⁰

C. Penal Laws

John Merrill has noted:

Freedom of the press exists in varying degrees in most countries, but in all these the journalist who abuses it and goes beyond certain limits commits an offense under civil and/or criminal law. No country allows the press total freedom with respect to information. Prohibition to publish is found to a greater or lesser degree in the press and/or penal laws of every

-
2. Any article that misleads the public by inciting on the public opinion and sentiments;
 3. Any article that is detrimental to ensuring security of society;
 4. Any article that deals with military information;
 5. Any article that undermines the morale of the military forces;
 6. Any article that is related to the duties of the martial law authorities;
 7. Any article that is harmful to the national interests.

For the text of the Matters Prohibited from Publicity Notice issued by the government on October 21, 1972, see EONRON BEOPRYUNG, *supra* note 15, at 787.

117. Presidential Emergency Decree No. 9 (May 13, 1975), reprinted in STRUGGLE FOR KOREAN DEMOCRACY, *supra* note 28, at 264-67.

118. 8 INDEX ON CENSORSHIP 70 (Sept.-Oct. 1979).

119. 7 INDEX ON CENSORSHIP 63 (Mar.-Apr. 1978).

120. 9 INDEX ON CENSORSHIP 73 (Feb. 1980).

country.¹²¹

Thus, it is hardly surprising that Korea has developed a large statutory apparatus designed to deal with the potential conflicts between a free press and the interests of private individuals. In a way, this is a manifestation of the Government's recognition that "freedom of the press does not exist in isolation; press powers must be reconciled with other interests of the society in which the press functions."¹²² As compared with the country's special security laws, the various penal laws governing the press are aimed mainly at protecting the legal interests of citizens, for example, the right to reputation, protection from invasion of privacy, and obscenity. There can be no denying, however, that these laws are not applied merely to prevent or punish the press for abusing its freedom. These laws can be, and are, enforced in such a manner that their impact can go well beyond striking the intended balance between the conflicting interests of society and the ideal of a free press. This danger is especially real with regard to the Criminal Code.

1. The Criminal Code

a. *Defamation of the State*

In 1975, the Government revised part of the Criminal Code to make it a crime to slander the State.¹²³ The new clause stipulates:

1. Any Korean national, who endangers or is assumed to endanger the security, interest and dignity of Korean Government bodies established under the constitution, by distorting the truth about them or disseminating false information on them or any other way, shall be punished by penal servitude or imprisonment for not more than seven years;
2. Any Korean national who commits such acts as prescribed in the preceding paragraph by use of foreigners or foreign organizations shall be punished in the same way as in the preceding paragraph.¹²⁴

A former leader in the now defunct Democratic Republican Party characterized this legislation as being designed to "clear up 'flunkey-

121. See *The Global Perspective*, *supra* note 5, at 32.

122. Emerson, *Forward to PRESS LAW IN MODERN DEMOCRACIES*, at xiii (P. Lehav ed. 1985).

123. Criminal Code, Law No. 239 (Sept. 18, 1953), as revised by Law No. 2745 (Mar. 25, 1975), reprinted in 3 *KOREAN LAWS* (4th ed. 1983), *supra* note 32, at X-1.

124. *Id.* art. 104-02, at X-13.

ism'—meaning a tendency to depend on foreign powers to influence domestic politics."¹²⁵ Under this provision, it is illegal for Koreans to criticize their government, government officials or the President to foreigners, foreign journalists or representatives of foreign organizations. Furthermore, the law reaches Koreans residing or visiting abroad in that criticism of the Government, even while abroad, constitutes a violation of the law.¹²⁶

In 1983, the Supreme Court in *Churlkee Kim v. State*¹²⁷ considered, for the first time, the Criminal Code's provision regarding the crime of slander against the state. The Court's ruling made clear the extent to which that provision can be used to circumscribe constitutional and statutory guarantees of freedom of expression. In *Churlkee Kim*, the Court overruled the lower court's decision and held that the defendant's distribution of anti-government leaflets to both Korean and foreign journalists violated the Code. The lower court had ruled that, although Kim did disseminate the literature to foreign reporters, no crime was committed under the law because the material distributed was not actually used against Korea or its constitutional bodies.¹²⁸ In an eleven to two opinion, however, the Supreme Court held that the legislative intent was to prevent any and all acts of defamation against the State. This being so, the Court reasoned, the distribution of the leaflets themselves was the kind of activity proscribed by the law in that the content thereof could be said to be defamatory. In a strong dissent, however, Justice Ilkyu Lee took issue with the way the majority applied the anti-defamation provision to the *Churlkee Kim* facts. He stated:

A Korean national cannot be punished under the law until foreigners who receive allegedly prohibited materials have used them within Korea against Korea, by bringing on the damage to the security, interest and prestige of Korea. Furthermore, even if the foreigners used the materials not in Korea but abroad, it cannot subject the Korean to punishment for violating the law.¹²⁹

In a separate dissent Justice Heechang Lee criticized the majority's "overextended interpretation" of the law. He observed that the de-

125. N.Y. Times, Mar. 20, 1975, at 6.

126. For a discussion of the Korean Supreme Court's interpretation of the provision in the Criminal Code dealing with the crime of slander against the state, see *infra* notes 127-30 and accompanying text.

127. Supreme Court, June 14, 1983, 83 Do 515, Beopyul Shinmun June 27, 1983, at 6.

128. *Churlkee Kim v. State*, Seoul Criminal District Court, Feb. 11, 1983, 82 Do 6161.

129. *Churlkee Kim*, in Beopyul Shinmun June 27, 1983, at 6.

fendant *did not use* the foreign correspondents to defame the Korean Constitution and Korean Government, because the foreigners never actually employed the distributed material against Korea. He reasoned that unless the substantively defamatory material is actually used against governmental entities, no criminal violation of the anti-defamation provision exists.¹³⁰ Under the anti-defamation provision of the Criminal Code, defamation of the national flag "for the purpose of insulting the Republic of Korea" carries with it penal servitude or imprisonment for a maximum of one year, suspension of civil rights for not more than five years or a fine of not more than 400,000 *won* (\$500).¹³¹ Similarly, the provision proscribes the profaning of the flag of any friendly nation, the defamation of foreign heads of state or foreign envoys visiting or residing in Korea.¹³² The defamation of a visiting foreign leader carries a maximum penalty of imprisonment or penal servitude of five years. Libel of foreign diplomats present in Korea will result in a maximum imprisonment or penal servitude of three years.¹³³

b. *Obscenity Laws*

Obscenity is forbidden under the Criminal Code. That is, it is a crime to produce, possess, import or export prurient materials¹³⁴ or to distribute, sell or openly display obscene literature, pictures or similar materials.¹³⁵ In a 1965 case, *Chaiman Youm v. State*,¹³⁶ the Korean Supreme Court defined obscenity as "a description vivid and specific enough to excessively stimulate sexual desires or to undermine sexual morality to a great extent."¹³⁷ The Court also observed that the contents of an allegedly lewd publication should be considered as a whole and in context before a determination of criminal obscenity can be properly made. Thus, the Court limited the crime of obscenity to patently offensive sexual depictions and morally decadent expressions.

130. *Id.*

131. Criminal Code, Law No. 239 (Sept. 18, 1953), as revised by Law No. 2745 (Mar. 25, 1975), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, art. 106, at X-13.

132. *Id.* arts. 107 (2), 108 (2), 109.

133. *Id.* arts. 107(2), 108(2).

134. *Id.* art. 244.

135. *Id.* art. 243.

136. Supreme Court, 74 Do 976, Dec. 9, 1975, 23 DAEBEOPWON PANGYOL CHIP [COLLECTION OF SUPREME COURT CASES] 52-54 (1975).

137. *Id.* at 53.

c. *Defamation of Private Persons*

As noted above, the Constitution of the Fifth Republic forbids the press to harm the reputation of an individual. Indeed, prior to the current Constitution, the individual's right to protect his good name had been explicitly recognized in the Constitution of the Third Republic, amended in 1962.¹³⁸ The Korean Government had dealt with the defamation of private citizens through the 1953 Criminal Code¹³⁹ and the 1958 Civil Code.¹⁴⁰

The Criminal Code regulates crimes against reputation. Article 307 of the Code stipulates:

1. A person who defames another by publicly alleging *facts* shall be punished by penal servitude or imprisonment for not more than two years or by a fine not exceeding 15,000 *Hwan*;
2. A person who defames another by publicly alleging *false facts* shall be punished by penal servitude or imprisonment for not more than five years or suspension of civil rights for not more than ten years.¹⁴¹

What is particularly significant about article 307 is that it distinguishes factual defamation from false defamation for purposes of penal severity. Contrary to the common law maxim that "the greater the truth, the greater the libel,"¹⁴² the factual aspect of the apparently defama-

138. For a discussion of the 1962 Constitution of The Third Republic regarding freedom of the press, see *supra* notes 22-25 and accompanying text.

139. See Criminal Code, Law No. 239 (Sept. 18, 1953), arts. 307-10, 312, as revised by Law No. 2745 (Mar. 25, 1975), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-13.

140. See Civil Code, Law No. 471 (Feb. 22, 1958), arts. 751, 764, as revised by Law No. 3051 (Dec. 31, 1977), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VII-79.

141. Criminal Code, Law No. 239 (Sept. 18, 1953) art. 307(1)(2), as revised by Law No. 2745 (Mar. 25, 1975), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-13 [emphasis added]. The specified amount of a fine under the Criminal Code has been changed under the Temporary Act on Fines. The Act stipulates: "When the provisions for fines in the Criminal Code are to be applied, such fines shall be fixed in amounts equivalent to forty times those specified in the provisions; provided, however, that where the monetary unit *hwan* appears in the provisions, it shall be regarded as *won*. See Temporary Act of Fines, Law No. 216 (Sept. 8, 1951), art. 4 (1), as revised by Law No. 2907 (Dec. 22, 1976, reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-49 to X-50. Accordingly, when article 307 (1) of the Criminal Code is applied, the maximum fine for factual defamation will be 600,000 *won* (\$750).

142. The authorship of the maxim has been usually attributed to Lord Mansfield of Great Britain. Thus, "Dost not know that old Lord Mansfield, Who writes like the Bible, Says the more 'tis truth, sir, The More 'tis a libel?" BURNS, THE REPROOF.

tory statement substantially mitigates the potential penalty.

The Criminal Code also distinguishes libel from slander. With regard to libel, article 309 states:

1. A person who, with intent to defame another, commits the crime of section (1) of article 307, *by means of newspaper, magazine, radio, or other publication*, shall be punished by penal servitude or imprisonment for not more than three years or fined not more than 25,000 *Hwan*;
2. A person who commits the crime of section (2) of article 307, by the method described in the preceding section shall be punished by penal servitude for not more than seven years.¹⁴³

Because of the more lasting and pervasive impact of libel as compared with slander, article 309 provides a more severe penalty for libel than for mere oral defamation. This applies whether the libelous publication is factual or false.¹⁴⁴ In addition, unlike the criminal requirements for slander as enunciated by article 307, libel must be made "with intent to defame" for it to constitute a criminal libel. No doubt, this mens rea requirement can be viewed as a libertarian approach toward libel. In other words, unless there is an "intent to defame," an allegedly libelous publication should not be subject to criminal penalties. There need be no proof of criminal intent, however, when the defamatory publication is based on false facts.

Pursuant to article 310 of the Criminal Code, defamation is justified "[i]f the facts alleged under section (1) of article 307 are *true and solely for the public interest*."¹⁴⁵ Thus, to be immune from liability for either libel or defamation, an accused must prove that his stated facts are true *and* that they were set forth in pursuit of the public interest. As a defense against defamation, this clause presupposes that intent to defame may not matter at all. Consequently, the "intent to defame" clause has little practical impact on the degree of freedom realized by the press. This clause does, however, reflect legislative recognition of

143. Criminal Code, Law No. 239 (Sept. 18, 1953), art. 309 (1), (2), *as revised by Law No. 2745 (Mar. 25, 1975)*, reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-36 [emphasis added].

144. For an illustration of penalties that discriminate between libel and slander, compare Criminal Code, art. 309, *see supra* note 143 and accompanying text, with Criminal Code art. 307, *see supra* note 141 and accompanying text.

145. Criminal Code, Law No. 239 (Sept. 18, 1953), art. 310, *as revised by Law No. 2745 (Mar. 25, 1975)*, reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-36 (emphasis added).

the important role the press plays in society.¹⁴⁶

A false and defamatory statement pertaining to a dead person is also a crime. Article 308 reads: "A person who defames a dead person by publicly alleging *false facts* shall be punished by penal servitude or imprisonment for not more than two years or fined not more than 25,000 *Hwan*."¹⁴⁷ Accordingly, a defamatory but true statement is not criminally punishable. Prosecution for this type of defamation can be executed "only upon complaint."¹⁴⁸ This is distinguished from the defamatory crimes stipulated in articles 307 and 309 in that the prosecution for defamation of living persons does not depend on the initiation of the complainant. To the contrary, such a complainant can object to but cannot initiate prosecution.¹⁴⁹

2. The Civil Code

In Korea, the Civil Code also operates to protect individuals from defamation. Although the Criminal Code is largely intended to ensure the social interest in protecting public law and order, the Civil Code is principally aimed at safeguarding the rights of individuals to their reputations. The Civil Code deals with defamation in two ways. First, it provides:

1. A person who has injured another person, his liberty or reputation . . . shall make compensation for any other damages arising therefrom, as well as for damages in property;
2. The court may order the compensation under the preceding section be paid by periodical payments, and may order a reasonable security be furnished in order to ensure the performance of such obligation.¹⁵⁰

Second, under the special rule governing defamation cases, the Civil Code authorizes the court, upon complaint by the injured party, to order the alleged defamer to take "suitable" measures to restore to the injured person his good name, either in lieu of or together with com-

146. Kim, *Reporting and Libel*, in EONRON JUNGE 22 (Autumn 1983).

147. Criminal Code, Law No. 239 (Sept. 18, 1953), art. 308, as revised by Law No. 2745 (Mar. 25, 1975), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-36 (emphasis added).

148. *Id.* art. 312 (1).

149. *Id.* art. 312 (2). The express objection of the alleged defamed person can prevent the prosecution. *Id.*

150. Civil Code, Law No. 471 (Feb. 22, 1958), art. 751 (1), (2), as revised by Law No. 3051 (Dec. 31, 1977), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VII-79.

pensation for damages.¹⁵¹

The Korean courts have deemed several measures "suitable" as attempts to restore the injured party's reputation. Among these measures are the retraction of the defamatory statement or publication and the publication of a notice of apology. Furthermore, the court can enjoin the publication of the allegedly libelous material when such relief is justifiably requested by the complainant.¹⁵²

Notwithstanding that libel litigation in South Korea is still a relatively rare phenomenon, the Korean courts have thus far applied the defamation law in about thirty cases, with one-third of the defendants in these cases being members of the press.¹⁵³

The Supreme Court, in *Woon Song v. State*,¹⁵⁴ ruled on a case involving a news article. The newspaper story reported that the police had violated the civil rights of a girl suspected of prostitution. The writer, knowing his statement to be untrue, contended that the girl was highly virtuous. The policemen involved argued that the story libeled them because it damaged their standing as law-enforcement officers. The Daejun District Court agreed and sentenced the defendant to a six-month imprisonment.¹⁵⁵ The plaintiff then appealed to the Supreme Court, contending that the defendant was guilty of a criminal, not a civil, violation and that, accordingly, his sentence was not lengthy enough. The Supreme Court agreed and held that the status of the defendant as a newspaper reporter and the effect of his allegedly inaccurate publication should be duly weighed in determining the duration of imprisonment. Consequently, the reporter was sentenced to a ten-

151. *Id.* art. 764.

152. For a discussion of various "suitable" measures recognized by the court in civil libel cases, see *infra* text accompanying note 157.

153. See, e.g., Jeonghoon Ko v. State, Seoul District Court, Sept. 20, 1960, 4293 Hyungkong 3959, Beopyul Shinmun Oct. 10, 1960, at 3; Jongyul Lee v. State, Supreme Court, Nov. 16, 1960, 4293 Hyungsang 244, Beopyul Shinmun Dec. 12, 1960, at 3; Woon Song v. State, Supreme Court, Nov. 16, 1961, 4294 Hyungsang 451, Beopyul Shinmun Dec. 11, 1961, at 3; Jeonghoon Ko v. State, Supreme Court, May 17, 1962, 4294 Hyungsang 12, Beopyul Shinmun May 28, 1962, at 3; Juneyun Kim v. State, Seoul District Court, Aug. 11, 1965, 64 Ko 5622, Beopyul Shinmun Aug. 23, 1965, at 6; Hoyoun Kwon v. State, Seoul District Court, Jan. 21, 1969, 67 No. 631, Beopyul Shinmun Jan. 19, 1970, at 6; Jan. 26, 1970, at 6; Heeyoung Lee v. Ilshin Pharmaceutical Manufacturing Co., Seoul District Court, June 20, 1969, 68 Ka 11886, Beopyul Shinmun Sept. 14, 1970, at 6, Sept. 21, 1970, at 6; Euihyang Lee v. Sangkee Kim, Seoul District Court, Apr. 11, 1984, 82 Kahap 734, EONRON JUNGJE 174-77 (Summer 1984).

154. Supreme Court, Nov. 16, 1961, 4294 Hyungsang 451, Beopyul Shinmun Dec. 11, 1961, at 4-5.

155. For the district court's opinion on the case, see Pyunjipin Hyuphoe Bo [Korean Newspaper Editors Association Newsletter], Apr. 5, 1961, at 3.

month term.¹⁵⁶

In a 1969 civil libel case, the Seoul Civil District Court ruled that the defendant should publish a letter of apology for defamation, in addition to paying damages arising from his libelous publication.¹⁵⁷ In passing upon the liability of the defendant for the publication of a defamatory advertisement, the court held that the damage payment was insufficient to compensate the plaintiff for his injuries. Noting that the plaintiff was the leading authority on urinary diseases in Korea, the court held that the best possible way for the defendant to recompense the plaintiff would be to publish an apology in an advertisement in the same newspaper as the one that first carried the libelous statement.¹⁵⁸ This was the first time that the Civil Code's libel provision was invoked against a member of the press.

The Supreme Court in *Byunghak Lee v. State*,¹⁵⁹ a 1972 libel case, held that the allegedly libelous inscription on a tombstone was nonactionable because the substance of the epitaph was most likely true in light of the available historical evidence.¹⁶⁰ This decision demonstrates that truth is a complete defense for defamation in Korea, regardless of whether the challenged statement was made to further the public interest.¹⁶¹

A Korean National Assemblyman was charged with and found guilty of criminal defamation of the President, because of the content of an opinionated political speech. In that case, *Chunha Chang v. State*,¹⁶² the Supreme Court found that Representative Chang, then a member of the now dissolved opposition New Democratic Party, infringed upon President Park Chung Hee's right to a good name.¹⁶³ This decision, and others involving criticism of the presidency, foster the

156. The Korean Supreme Court can quash the original judgment of the lower courts and render a direct judgment on the appealed case. See Code of Criminal Procedure, Law No. 341 (Sept. 23, 1954), art. 396 (1), as revised by Law No. 3282 (Dec. 18, 1980), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-103 to X-165.

157. Heeyoung Lee v. Ilshin Pharmaceutical Manufacturing Co., Seoul Civil District Court, June 20, 1969, 68 Ka 11886, Beopyul Shinmun Sept. 14, 1970, at 6; Sept. 21, 1970, at 6.

158. Beopyul Shinmun, Sept. 21, 1970, at 6.

159. Supreme Court, Sept. 26, 1972, 72 Do 1798, 26 DAEBEOPWON PANGVOL CHIP 19-20 (1972).

160. *Id.*

161. *Id.* at 20. The epitaph read: "The two descendants of the late Chung Pal Gul, who served a king of the Yi Dynasty as vice minister, murdered Kyu Hyung Lee . . ."

For a discussion of the defamation of the dead as provided for by the Criminal Code, see *supra* notes 147-48 and accompanying text.

162. Supreme Court, May 26, 1970, 70 Do 704 (slip op).

163. See also Dukwon Kim v. State, Supreme Court, July 21, 1970, 70 Do 1266 (slip op).

conclusion that prosecutions and convictions are politically motivated.

In recent years, the Korean courts have usually ordered libelous statements corrected or retracted and have been less likely to impose penal servitude on libel defendants.¹⁶⁴ This trend is probably the result of the application of the Basic Press Act, as discussed above.¹⁶⁵ A 1984 civil libel case, *Euihyang Lee v. Sangkee Kim*,¹⁶⁶ is a seminal libel decision in that it indicates a growing judicial inclination toward viewing press freedom as integral to democracy. This case stemmed from a story published in *Dong-A Ilbo*, one of the leading daily newspapers in Korea. According to the report, the plaintiff, manager of an institution for mentally retarded children, received illegal personal gains from the allegedly improper operation of the institution. It was also reported that some of the institution's residents staged a sit-in to protest the mismanagement. The Seoul Civil District Court found the report both partially true and partially inaccurate. The defendant newspaper was required to submit substantive evidence of the truth of its allegations. When the paper failed to present such evidence, the court ruled that the defendant should publish a correction.¹⁶⁷

On appeal, the defendant newspaper was ordered to revise its correction by focusing on the inaccurate aspects of the original report.¹⁶⁸ In so holding, the court, on appeal, rejected the defendant's contention that the adequacy of the correction should be determined in light of statutory tort law.¹⁶⁹

Plaintiff was not satisfied with the court's order compelling the defendant to correct the report. Accordingly, in a second action, he sought, as compensation for the alleged injury to his reputation, damages in the amount of one billion *won* (\$125 million) from the defend-

164. See, e.g., *Hyungshin Lim v. Kuho Jeong*, Seoul District Court, Sept. 3, 1982, 82 Ka 18633, EONRON JUNGJE 137-39 (Autumn 1982); *Chairan Ahn v. Hyungjin Ryu*, Seoul District Court, May 25, 1984, 84 Ka 1598, EONRON JUNGJE 171-73 (Winter 1984); *Euihyang Lee v. Sangkee Kim*, Seoul District Court, Apr. 11, 1984, 82 Kahap 4734, EONRON JUNGJE 174-77 (Summer 1984).

165. For a discussion of the Basic Press Act, see *supra* notes 48-88 and accompanying text.

166. Seoul Civil District Court, Apr. 11, 1984, 82 Kahap 4734, EONRON JUNGJE 174-77 (Summer 1984).

167. See *Euihyang Lee v. Sangkee Kim*, Seoul Civil District Court, Nov. 4, 1982, 82 Ka 27454, EONRON JUNGJE 169-71 (Winter 1982).

168. Seoul District Court, Oct. 20, 1983, 82 Na 4188, EONRON JUNGJE 188-91 (Winter 1983).

169. The Korean Civil Code provides: "Any person who causes damages to another person *intentionally or negligently* by an unlawful act shall make compensation for damages arising therefrom." Civil Code, Law No. 471 (Feb. 22, 1958), art. 750, as revised by Law No. 3051 (Dec. 31, 1977), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VII-79 (emphasis added).

ant newspaper. He also demanded publication of a letter of apology.¹⁷⁰ ruling for the defendant, the Seoul Civil District Court observed:

You will not be liable for a news story allegedly defamatory of a person when you have published it for the public interest and can prove the truthfulness of the story. Moreover, *even when you fail to meet the burden of proof, you are not subject to statutory penalty so far as you can show that you had reasonable ground for believing in the truth of the published story* When you have plausible material or sources to convince you that the story is true, you can satisfy the requirement that to avoid liability for a wrong under the civil law, you should have reasonable ground for your wrongful act.¹⁷¹

The court further noted that the utmost precaution should be taken to ensure that the defamation laws were not being unnecessarily applied so as to seriously undermine freedom of the press.¹⁷²

The reasoning of this second *Euihyang Lee* decision is distinctive from previous libel cases, whether criminal or civil. First, the opinion recognized the possible negative impact on the press resulting from the imposition of strict liability for defamation. Second, it justifies certain instances of defamation, if the publisher has exercised reasonable care in the gathering of news and information and in the reporting of that information—a rather relaxed standard of care. The reasonable care standard provides a more encompassing defense to defamation actions than does the assertion that a challenged report was published in the public interest and that its content was true.

D. Other Legislation Affecting the Press

The Constitution of the Fifth Republic prohibits the press, as well as individuals, from invading the privacy of other persons.¹⁷³ This constitutional provision has a statutory parallel the Minor Offense Punishment Act.¹⁷⁴ Article 1 of the Act stipulates: "Persons who have published in a newspaper, magazine or other publication a false statement

170. *Euihyang Lee v. Sangkee Kim*, Seoul District Court, Apr. 11, 1984, 82 Kahap 4734, EONRON JUNGJE 174-77 (Summer 1984).

171. *Id.* at 176-77 (emphasis added).

172. *Id.* at 177.

173. See CONSTITUTION OF THE FIFTH REPUBLIC, art. 16 (1980), reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32: "No citizen shall be subject to violation of the secrecy and freedom of privacy."

174. Minor Offense Punishment Act, Law No. 316 (Apr. 1, 1954), as revised by Law No. 3329 (Dec. 31, 1980), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-51 to X-55.

concerning the private or business affairs of another person . . . shall be punished by detention or fine."¹⁷⁵ The Act also regulates press coverage of family court proceedings. The press is prohibited from publishing the "names, ages, occupations, appearances and other facts or photographs which may identify those involved."¹⁷⁶

Similarly, the Juvenile Act¹⁷⁷ and the Children's Welfare Act¹⁷⁸ regulate press freedom. The Juvenile Act prohibits the release of the names of juveniles, who are protected under the law, under investigation or being prosecuted.¹⁷⁹ The Children's Welfare Act bars production of books, periodicals or advertisements that are "assumed to be detrimental to the sense of the morality of children."¹⁸⁰ Pursuant to the Protection of Minors Act,¹⁸¹ no one is allowed to distribute, sell, present or show "obscene" documents, books or discs containing the images of children.¹⁸²

Korean election laws also regulate press freedom. The Presidential Election Act¹⁸³ and the National Assembly Election Act¹⁸⁴ make it illegal for the print and broadcast media to publish or broadcast false information regarding elections or candidates. It also prohibits the distortion of fact.¹⁸⁵ Moreover, the statutes prohibit the defamation of candidates, unless the allegations are true and for the public interest.¹⁸⁶

175. *Id.* art. 1 (9).

176. Court Judgments on Family Affairs Act, Law No. 1375 (Jul. 31, 1963), as revised by Law No. 1498 (Dec. 13, 1963), reprinted in DAE BEOPJEON [UNABRIDGED CODE OF LAWS] 1448-50 (Hankuk Panrae Yeonguwon ed. 1982).

177. Juvenile Act, Law No. 489 (July 24, 1958), as revised by Law No. 3047 (Dec. 31, 1977), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-174 to X-183.

178. Children's Welfare Act, Law No. 912 (Dec. 30, 1961), as revised by Law No. 3438 (Apr. 13, 1977), reprinted in DAE BEOPJEON, *supra* note 176, at 3982-84.

179. Juvenile Act, Law No. 489 (July 24, 1958), art. 61, as revised by Law No. 3047 (Dec. 31, 1977), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at X-174 to X-183.

180. Children's Welfare Act, Law No. 912, (Dec. 30, 1961), art. 18 (11), as revised by Law No. 3438 (Apr. 13, 1977), reprinted in DAE BEOPJEON, *supra* note 176, at 3982-84.

181. Protection of Minors Act, Law No. 834 (Dec. 13, 1961), as revised by Law No. 3170 (Dec. 28, 1979), reprinted in DAE BEOPJEON, *supra* note 176, at 856.

182. *Id.* art. 2-2 (2).

183. Presidential Election Act, Law No. 3331 (Dec. 31, 1980), reprinted in DAE BEOPJEON, *supra* note 176, at 70-81.

184. National Assembly Election Act, Law No. 3359 (Jan. 29, 1981), reprinted in DAE BEOPJEON, *supra* note 176, at 85-95.

185. Presidential Election Act, arts. 45, 180 (2); National Assembly Election Act, arts. 66, 68, 170.

186. Presidential Election Act, arts. 194 (1), (2); National Assembly Election Act, arts. 171 (1), (3).

Note that the civil law proscription against defamation of electoral candidates is

As discussed previously, the Import and Distribution of Foreign Periodicals Act regulates those foreign publications that attack or tend to undermine the nation's constitutional structure or the safety and morality of its citizens.¹⁸⁷ Koreans, as well as the foreign press, are also regulated by the Customs Act.¹⁸⁸ Article 146 states: "No books, publications, circulars and pamphlets . . . which will either disturb the constitutional order or which will harm public security or customs and morals shall be imported or exported."¹⁸⁹ Any person who violates the provision of the Customs Act regarding prohibited publications is subject to "imprisonment for one year or more, or fine of not more than two million *Won*" (\$2,500). Additionally, the materials in question are subject to confiscation.¹⁹⁰ The Customs Act is less severe with regard to duration of penal servitude than is the Import Act.¹⁹¹

The Korean press is also restricted from covering the proceedings of the National Assembly sessions. The press is required to obtain prior permission from the Speaker or Committee Chairman in order to "record, videotape, take pictures, or broadcast" plenary sessions of the parliament or committee meetings.¹⁹²

A provision of the Court Organization Act, which is identical to the National Assembly Act, provides: "No person shall videotape, photograph or relay broadcasts of events in a courtroom without permission from the presiding judge."¹⁹³ This law is in accord with the constitutional provision regarding the justification for closing the trial to the

similar to the defamation provisions of the Criminal Code. The Criminal Code, however, sets forth a higher fine. *Compare* Presidential Election Act, art. 194 and National Assembly Election Act, art. 171 (1), with the Criminal Code, Law No. 239 (Sept. 18, 1953), art. 309, as revised by Law No. 2745 (Mar. 25, 1975).

187. For a discussion of the Import Act of 1981, see *supra* notes 47, 89-96 and accompanying text.

188. Customs Act, Law No. 1976 (Nov. 29, 1967), as revised by Law No. 3492 (Dec. 31, 1981), reprinted in 3 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VI-319 to VI-391.

189. *Id.* art. 146 (1).

190. *Id.* art. 179.

191. The Import Act of 1981 provides for a two-year or less imprisonment for violation of the Act. Import Act of 1981, Law No. 2535 (Feb. 17, 1973), art. 11 (3), as revised by Law No. 3526 (Dec. 31, 1981), reprinted in EONRON BEOPRYUNG, *supra* note 15, at 68-70.

192. National Assembly Act, Law No. 3360, (Jan. 29, 1981), art. 147, as revised by Law No. 3423 (Apr. 8, 1981), reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at I-55 to I-80.

193. Court Organization Act, Law No. 51 (Sept. 26, 1949), art. 52-2, as revised by Law No. 3362 (Jan. 29, 1981), reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32, at I-151 to I-168.

public.¹⁹⁴

National legislation accords the press preferential tax treatment. The Value-Added Tax Act provides tax exemptions for the news media; article 12 stipulates that newspapers, magazines, news services and broadcasters, among others, are exempted from the value-added tax, "provided that advertisements shall be excluded therefrom."¹⁹⁵ This tax exemption supplements the Basic Press Act, which provides: "The state and local governments may aid press enterprises with a preference in taxation or financial support."¹⁹⁶

CONCLUSION

If we assume that the press serves as a mirror of "the system of social control whereby the relations of individuals and institutions are adjusted,"¹⁹⁷ freedom of the press in South Korea has obviously been affected by a sociopolitical and economic climate that is peculiar to Korean society. For example, Confucianism, a way of thought and behavior which has greatly influenced Korea's social values, has contributed to the general acceptance of various governmental restrictions on the Korean press. Geopolitically, Korea is still in the process of experimenting with democracy, while facing the possible invasion of the communists from the North. This perennially unstable geopolitical cleavage of the Koreas often provides the power elite in South Korea with the legitimate argument that survival comes before freedom of expression. Additionally, economic backwardness supports the view, openly advocated by South Korean leaders, that libertarian freedoms are luxuries only affordable by advanced Western countries; in developing countries like South Korea, the first priority should be feeding the population. Consequently, these and other aspects of South Korea have, in varying degrees, contributed to a political and legal culture permeated by authoritarianism.

The Korean Government often deviates from the letter and spirit of the Constitution by enacting and stringently enforcing a number of repressive press laws, which disregard the "essential aspects" of free-

194. See CONSTITUTION OF THE FIFTH REPUBLIC, art. 110 (1980), reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32. "[T]rials may be closed to the public by court decision when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals." *Id.*

195. Value-Added Tax Act, Law No. 2934 (Dec. 22, 1976), art. 12 (7) revised by Law No. 3273 (Dec. 13, 1980), reprinted in 2 KOREAN LAWS (4th ed. 1983), *supra* note 32, at VI-265 to VI-282.

196. The Basic Press Act, art. 4, reprinted in 1 KOREAN LAWS (4th ed. 1983), *supra* note 32.

197. FOUR THEORIES, *supra* note 4, at 1-2.

dom of expression.¹⁹⁸ Indirect statutes, such as security laws, martial laws or emergency decrees and penal laws, have been even more restrictive of the media's freedom than have direct press laws. Almost all judicial actions involving freedom of speech and the press have been adjudicated on the basis of such indirect laws.¹⁹⁹ This is especially true of the National Security Act, formerly the Anti-Communist Act, which has been applied to more than half of the expressive activity cases over the past thirty-five years.²⁰⁰ There is little doubt that the security laws have often been applied to situations in which no issue of national security genuinely existed. Indeed, they have often been applied to protect the position and status of the political elite.

In contrast to Western countries, where "most legal limitations on free speech stem from the basic concept of *defamation*,"²⁰¹ defamation laws have not been so detrimental to the actual functioning of the Korean press. This does not necessarily mean, however, that libel laws have been less stringently enforced in Korea. The truth is that few Koreans claim their right to bring defamation actions. This rarity of libel actions is closely related to sociopolitical factors. The public views the press as being too powerful to challenge, and, therefore, it is a rare phenomenon when the press is actually subjected to attack by an individual damaged through a news publication or broadcast. Libel actions are also rare because Koreans do not view the courts as protectors of their political rights and civil liberties. Rather, they see the courts as institutional bodies serving the ruling elite of Korea. Several Korean scholars have noted that Koreans in general have little confidence in the validity and fairness of the judicial process.²⁰² Accordingly, they are reluctant to seek judicial relief. When this public skepticism is combined with the functional nonexistence of an institutionalized political system with checks and balances, the inevitable result is the ever

198. From 1945 to 1982, more than 360 laws and regulations relating to the Korean press have been enforced. EONRON BEOPRYUNG, *supra* note 15, at 2-3.

199. A count of reported cases involving freedom of speech and the press shows: press cases, 5; National Security or Anti-Communist Act cases, 91; Emergency Measures Decree or Martial Law cases, 13; Criminal or Civil Code cases, 60, which include defamation, obscenity and flag-defilement cases. For a complete list of reported cases, see *Freedom of the Press in South Korea*, *supra* note 106 at 275-86.

200. *See id.*

201. Eisendrath, *Press Freedom in France: Private Ownership and State Controls*, in *PRESS CONTROL AROUND THE WORLD* 65 (J. Curry & J. Dassin eds. 1982) (emphasis in original). *But cf.* THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 97, at 519 (libel laws have been limited in their impact on freedom of expression).

202. *See* Lim, *A Study on Legal Values in Korea: An Analysis of Attitude Toward Law*, 2 Soc. Sci. J. 59-79 (1974); Hahm & Yang, *The Attitude of the Korean People Toward Law*, in *LEGAL SYSTEM OF KOREA* 145-201 (S. Chun ed. 1982).

sorry state of Korean press freedom. Furthermore, as far as the role to be played by an "unintimidated judiciary" in protecting the press against the government goes,²⁰³ judicial activism in Korea is more blameworthy than praiseworthy. More often than not, the Korean courts allow the law to play a "subservient role . . . to political and social power," rather than seizing "the role of an independent balance to the highly centralized power structure" of the Korean Government.²⁰⁴

Those provisions of the Criminal Code that prohibit defamation of those foreign leaders and diplomats who are present in Korea are noteworthy in that they illustrate how sensitive the Korean Government is to international criticism, particularly criticism from friendly nations. This is understandable in that Korea is highly dependant on its more economically advanced allies.

Freedom of the press in Korea is more an ideal than a reality, despite the constitutional guarantee. This freedom is largely fettered by a variety of restrictive laws and regulatory measures. Moreover, political pressures are exercised by the Korean Government to facilitate the enforcement of the laws against the press. In this context, the words of one American constitutional law scholar are particularly apt: "[T]he press law of a particular country is not so much determined by the existence of a particular type of constitutional commitment, or by the presence of a special press statute, as by the particular political philosophy which animates it."²⁰⁵

203. Wilcox, *Black African States*, in *PRESS CONTROL AROUND THE WORLD*, *supra* note 201, at 222.

204. Steinberg, *Law, Development and Korean Society*, in 13 *KOREANA Q.* 67-68 (1971).

205. Lahav, *Conclusion: An Outline for a General Theory of Press in Democracy*, in *PRESS LAW IN MODERN DEMOCRACIES*, *supra* note 122, at 347.