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## Judicial Interpretation of Press Freedom in South Korea

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# JUDICIAL INTERPRETATION OF PRESS FREEDOM IN SOUTH KOREA

KYU HO YOUM\*

I. INTRODUCTION .....	133
II. ORGANIZATION OF THE COURTS IN KOREA .....	135
III. PRESS LAWS AND REGULATIONS .....	137
A. <i>Direct Press Laws</i> .....	137
1. The Basic Press Act .....	137
2. The Act Governing Foreign Periodicals .....	139
B. <i>Indirect Press Laws</i> .....	140
1. Special Security Acts .....	140
a. <i>The National Security Act</i> .....	140
b. <i>Martial Law</i> .....	140
2. Penal Laws .....	141
a. <i>The Criminal Code</i> .....	141
b. <i>The Civil Code</i> .....	143
3. Other Litigation Affecting the Press .....	143
IV. JUDICIAL INTERPRETATION OF PRESS LAWS .....	145
A. <i>Direct Press Laws</i> .....	145
B. <i>The National Security Act and the Anti-Communist Act</i> .....	147
C. <i>Martial Law and Emergency Decrees</i> .....	152
D. <i>The Criminal and Civil Codes</i> .....	152
V. SUMMARY AND CONCLUSIONS .....	156

## I. INTRODUCTION

To have freedom of the press guaranteed in the Constitution is one thing; to enjoy it in actuality is quite another, as one Korean-born American scholar has put it.<sup>1</sup> The obvious truth of this disparity between constitutional ideals and practical application can hardly be refuted considering that the practice of press freedom in a country is affected by social, political and cultural factors, among others.<sup>2</sup>

One authority has noted, however, that the disparity is not a great concern when there exists a politically functioning system with checks and balances between the executive, legislative and judicial branches of government.<sup>3</sup> In connection with the importance attached to the checks-and-balances principle in the actual practice of press freedom, the role of an independent judiciary is crucial. As one journalism professor stated cogently: "[A] nation's press is free, not necessarily because of constitutional guarantees,

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<sup>1</sup> Nam, *Press Freedom in the Third World*, in *COMPARATIVE MASS MEDIA SYSTEMS* 309 (L. Martin & A. Chaudhary eds. 1983).

<sup>2</sup> Fred Siebert, Theodore Peterson, and Wilbur Schramm commented in 1956 on the press in connection with its sociopolitical milieu: [T]he press always takes on the form and coloration of the social and political structures within which it operates. Especially, it reflects the system of social control whereby the relations of individuals and institutions are adjusted. F. SIEBERT, T. PETERSON & W. SCHRAMM, *FOUR THEORIES OF THE PRESS* 1-2 (1956).

<sup>3</sup> Gastil, *The Comparative Survey of Freedom*, *FREEDOM AT ISSUE*, January-February, 1983, at 5.

but because an unintimidated judiciary protects the press against government encroachment."<sup>4</sup>

Although it is debatable whether South Korea is a functioning democracy in terms of how far Koreans exercise their "political rights and civil liberties" through participatory politics,<sup>5</sup> the Constitution of the Fifth Republic, as amended in 1980, provides for the separation of powers among the three branches of government.<sup>6</sup> To all appearances, the Constitution "upholds the principle of checks and balances in government by restricting presidential powers, strengthening the functions of the legislature and ensuring the independence of the judiciary."<sup>7</sup> It is noteworthy, however, that the turbulent constitutional history of South Korean politics cautions one against taking the words and phrases of the Korean Constitution at face value.<sup>8</sup>

In a 1971 *Journalism Quarterly* article on the libel laws of Korea and Japan, the authors observed: "The desire for the rule of law is heard in Korea . . . but the judiciary there finds its role constrained under the influence of an overpowering executive branch of government."<sup>9</sup> They also noted that Korea lacks a strong constitutional shield for protecting press freedom.<sup>10</sup> This comment on a rather undemocratic aspect of the

<sup>4</sup> Wilcox, *Black African States*, in *PRESS CONTROL AROUND THE WORLD* 222 (J. Curry & J. Dassin eds. 1982). See also Kim, *Freedom of Political Speech vs. National Security in Korea — A Historical Survey*, 5 *INT'L LAW* 488, 489 (1971).

<sup>5</sup> As defined by Raymond Gastil, an authority on the comparative survey of freedom, political rights are "primarily the rights to participate directly or through freely elected representatives in the determination of the nature of law and its administration in society"; civil liberties, which "make possible the organization and mobilization of new alternative, or non-official opinions," include "freedom of the news media and of political, professional, worker, peasant, and other organizations." Gastil, *supra* note 3, at 3.

<sup>6</sup> See Republic of Korea Const., art. 38(4) ("Executive power shall be vested in the Executive Branch headed by the President"); art. 76 ("Legislative power shall be vested in the National Assembly"); art. 102(1) ("Judicial power shall be vested in courts composed of judges"), amended in 1980. For an English translation of the Republic of Korea Constitution, as amended in 1980, see 1 *LAWS OF THE REPUBLIC OF KOREA I-1-I-19* (4th ed. 1983) [hereinafter *KOREAN LAWS 1983*]. See also 8 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1-23* (A. Blaustein & G. Flanz eds. 1985) [hereinafter *WORLD CONSTITUTIONS*].

<sup>7</sup> *FACTS ABOUT KOREA* 89 (16th rev. ed. 1981). In regard to the guarantee of judicial independence, the present Constitution of Korea provides: "Judicial power shall be vested in courts composed of judges" and that "[t]he judges shall judge independently according to their conscience and in conformity with the Constitution and laws." Republic of Korea Constitution, arts. 102(1), 104, amended in 1980. For a discussion of the current Constitution of South Korea, see *WORLD CONSTITUTIONS*, *supra* note 6, at 1-6.

<sup>8</sup> One recent report on human rights in Korea noted: "[I]t would be a mistake to confine any discussion of the prospects of democracy in South Korea to a formalistic treatment of constitutional law since the political history of the country is filled with illustrations of the government's lack of respect for its own constitution . . ." ASIA WATCH COMMITTEE, *HUMAN RIGHTS IN KOREA: AN ASIA WATCH REPORT* 54 (1986).

<sup>9</sup> Mowlana & Chin, *Libel Laws of Modern Japan and South Korea Are Compared*, 48 *JOURNALISM Q.* 326, 348 (Summer 1971).

<sup>10</sup> *Id.* at 330. See also *The Amended Constitution of South Korea*, 26 *INT'L COMM'N JURISTS REV.* 22 (1981) ("[T]he judiciary of South Korea has not enjoyed independence in the past"). Richard L. Walker, former U.S. Ambassador to South Korea in 1981-86, commenting on lack of institutional traditions for modern democracy in Korea, wrote in July 1987: "[T]he absence of a solid basis of law backed by an independent judiciary has hindered political development [in South Korea] . . . [T]here is little historical background to support concepts of equality before the law, which is so essential for democratic procedures and institutions." Walker, *If Seoul Is To Enjoy Democracy*, *New York Times*, July 1, 1987, at A19, col. 3.

Korean political system in the early 1970s is still valid in that the majority of Koreans express doubt about the positive role of their courts in protecting press freedom.<sup>11</sup>

This article examines the way in which Korean courts interpret freedom of the press in the context of the traditionally authoritarian political structure of South Korea. In exploring the judicial interpretation of press freedom in Korea, the article focuses on two specific questions: (1) What kind of press laws have been in force in South Korea?; and (2) How have Korean courts applied these laws?

Before considering the judicial approaches to press freedom in Korea, a brief examination of the structure and function of the Korean judiciary is necessary to understand the questions under study.

## II. ORGANIZATION OF THE COURTS IN KOREA<sup>12</sup>

The court system in Korea functions on three levels; one Supreme Court, three Courts of Appeal, eleven District Courts, and one Family Court. The Korean Constitution provides for one Supreme Court as the highest judicial tribunal.<sup>13</sup> The Supreme Court, as a court of final appeal, hears appeals from the judgments and rulings rendered by the Courts of Appeal.<sup>14</sup> It also hears appeals from decisions or rulings of a three-judge appellate panel of a District or Family Court in the second instance.<sup>15</sup> As in the American judiciary, the decisions rendered by the Supreme Court in the exercise of its appellate jurisdiction "form the judicial precedents which are binding upon all other inferior courts."<sup>16</sup> The three-judge District or Family Court is ordinarily a court of the first instance, but the judgment of a single-judge District or Family Court is appealed to a three-judge District or Family Court panel as a court of the second instance.<sup>17</sup> The judgment of a three-judge District and Family Court panel in such second instances is appealed to the Supreme Court as the court of last resort. A "jumping appeal," (*biyak sango*) carried directly to the Supreme Court against a judgment of a single-judge court or three-judge panel of a District or Family Court in the first instance, is recognized in Korea.<sup>18</sup>

<sup>11</sup> See Hahm & Yang, *The Attitude of the Korean People Toward Law*, in LEGAL SYSTEM OF KOREA 145-201 (S. Chun ed. 1982); Lim, *A Study on Legal Values in Korea: An Analysis of Attitude Toward Law*, 2 Soc. Sci. J. 59-79 (1974).

<sup>12</sup> For preparation of this section, the author has relied upon Woong Shik Shin's article entitled *Judicial Organization in Korea*, in BUSINESS LAWS IN KOREA 64-107 (C. Kim ed. 1982).

<sup>13</sup> Republic of Korea Constitution, art. 102(2), amended in 1980. See also Court Organization Act, Law No. 51 (Sept. 26, 1949), art. 13, amended by Law No. 3362 (Jan. 29, 1981). For an English translation of the Court Organization Act, as amended in 1981, see KOREAN LAWS 1983, *supra* note 6, at I-151-I-169.

<sup>14</sup> Court Organization Act, art. 17(1).

<sup>15</sup> *Id.* art. 17(2).

<sup>16</sup> Shin, *supra* note 12, at 67. Article 7 (2) of the Court Organization Act stipulates: "A ruling in a judgment of an appellate court shall bind inferior courts in respect of subsequent proceedings in that case." Court Organization Act, art. 7(2) (emphasis added). Thus, Korean courts do not recognize the doctrine of *stare decisis*, as understood and practiced by the courts in the United States. For a discussion of the *stare decisis* principle in the context of the Korean legal system, see INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 17-18 (S. Song ed. 1983) [hereinafter INTRODUCTION TO KOREAN LAW].

<sup>17</sup> Court Organization Act, arts. 29(2), 32-5(2).

<sup>18</sup> The Code of Criminal Procedure provides the following grounds for a "jumping appeal":

The Courts of Appeal in Korea hear and adjudicate cases in panels or divisions designated as criminal, civil, or special, depending upon the nature of the case.<sup>19</sup> Each division is composed of a collegiate body of three judges, one of whom acts as the presiding judge.<sup>20</sup> District Court judges are sometimes designated and assigned to the Court of Appeals<sup>21</sup> in order to dispose of pending appeals expeditiously.<sup>22</sup> Although the Court of Appeals on occasion exercises original jurisdiction over administrative cases,<sup>23</sup> it is largely the court of intermediary appellate jurisdiction which reviews the judgment of the three-judge panel of a District or Family Court in the first instance. In addition, that court hears the appeals from rulings or orders of the three-judge court of a District or Family Court in the first instance.<sup>24</sup>

The District Courts in Korea are the courts of general and original jurisdiction.<sup>25</sup> Judicial power of the District Court is exercised either by a single-judge court or by a collegiate body of a three-judge court.<sup>26</sup> The three-judge District Court exercises original jurisdiction over prescribed "important" cases. However, it is also vested with the power to exercise appellate jurisdiction in that a ruling or an order of a single-judge District Court is to be appealed to the three-judge panel of the same District Court.<sup>27</sup> Only a judgment, ruling, or order of a three-judge District Court in the first instance is appealed to the Court of Appeals.<sup>28</sup> The decision of the three-judge District Court is appealed directly to the Supreme Court, not to the Court of Appeals.<sup>29</sup>

The Family Court in Korea is the court of the first instance and is held at the same level as the District Court. It is concerned not only with the protection of an individual citizen's legal rights, but also with the maintenance of the welfare of juveniles and families. All decisions are reviewed by the Court of Appeals and subsequently by the Supreme Court.<sup>30</sup>

The Korean Constitution provides that trials must be open to the public.<sup>31</sup> Public trials may be closed, however, by means of a court ruling when publicity is likely to affect

When the court fails to apply facts which are recognized in the original judgment, or where there is an error in the application of laws and ordinances; When the penalty has been abolished or changed or general amnesty has been proclaimed subsequent to the rendition of the original judgment.

Code of Criminal Procedure, Law No. 341 (Sept. 23, 1954), art. 372(1), (2), amended by Law No. 3282 (Dec. 18, 1980). For an English translation of the Code of Criminal Procedure, as amended in 1980, see KOREAN LAWS 1983, *supra* note 6, at X-103-X-165.

<sup>19</sup> Court Organization Act, art. 24(1).

<sup>20</sup> *Id.* art. 24(3).

<sup>21</sup> *Id.* art. 6.

<sup>22</sup> Shin, *supra* note 12, at 77.

<sup>23</sup> Code of Administrative Procedure, Law No. 213 (Aug. 24, 1951), amended by Law No. 1339 (May 2, 1963). For the text of the Code of Administrative Procedure, as amended in 1963, see DAE BEOP JEON [UNABRIDGED CODE OF LAWS] 1446 (Hankuk Panrae Yeonguwon ed. 1982).

<sup>24</sup> Court Organization Act, art. 25.

<sup>25</sup> *Id.* art. 29.

<sup>26</sup> *Id.* art. 7.

<sup>27</sup> *Id.* art. 29(2)-1.

<sup>28</sup> *Id.* art. 25.

<sup>29</sup> *Id.* art. 17(2).

<sup>30</sup> *Id.* art. 53(1).

<sup>31</sup> Republic of Korea Constitution, art. 26 (3), amended in 1980. See also Court Organization Act, art. 53.

national security, injure public welfare, or disturb social morals.<sup>32</sup> In court, whether open or closed, no one is allowed to videotape, photograph, or broadcast the proceedings without first obtaining the permission of the court.<sup>33</sup>

### III. PRESS LAWS AND REGULATIONS

Between 1945, when Korea was liberated from Japan's colonial rule, and 1982, more than 360 laws and regulations have been adopted that restrict the Korean press in one way or another.<sup>34</sup> Some of the laws and regulations have directly dealt with freedom of the press. The Basic Press Act,<sup>35</sup> enacted in 1980, and the Act Governing Import and Distribution of Foreign Periodicals<sup>36</sup> are examples of direct restrictions on the press. Other laws and regulations affect the press indirectly.<sup>37</sup>

#### A. Direct Press Laws

##### 1. The Basic Press Act

Like many press laws throughout the world, the Basic Press Act of Korea is restrictive rather than protective of press freedom. For example, it makes public responsibility a legal requirement of the press. Article 3 provides:

1. The press shall respect the 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 actions which disrupt public order.<sup>38</sup>

This "public responsibility" clause is in accordance with Article 20(2) of the Constitution.<sup>39</sup> In this connection, the law provides that the news media must take "reasonable" caution with regard to the credibility, contents, and sources of all information before it is published.<sup>40</sup>

<sup>32</sup> Court Organization Act, art. 53(1).

<sup>33</sup> *Id.* art. 54-2.

<sup>34</sup> HANKUK EONRON BEOPRYUNG CHONJIP 1945-1981 [A COMPLETE COLLECTION OF LAWS AND REGULATIONS GOVERNING THE KOREAN PRESS 1945-1981] 2-3 (J. Cheong ed. 1982) [hereinafter EONRON BEOPRYUNG].

<sup>35</sup> Law No. 3347 (Dec. 31, 1980) [hereinafter Basic Press Act]. For an English translation of the Basic Press Act, see KOREAN LAWS 1983, *supra* note 6, at III-122-III-135.

<sup>36</sup> Law No. 2535 (Feb. 17, 1973), *amended* by Law No. 3526 (Dec. 31, 1981). For the text of the Act Governing Import and Distribution of Foreign Periodicals, as amended in 1981, see EONRON BEOPRYUNG, *supra* note 34, at 68-70.

<sup>37</sup> For a discussion of the laws indirectly affecting the Korean press, see *infra* notes 58-103 and accompanying text.

<sup>38</sup> Basic Press Act, art. 3.

<sup>39</sup> The Korean Constitution explicitly prohibits speech or press activities from violating the "honor or rights of other persons" or from undermining "public morals or social ethics." Republic of Korea Constitution, art. 20(2), *amended* in 1980.

<sup>40</sup> Basic Press Act, art. 9.

Among the rights of the press under the Korean Basic Press Act are those concerning access to public information and protection of news sources.<sup>41</sup> However, the statutory rights of the press are not unlimited. Indeed, they are qualified in various ways. The Korean press, for example, cannot claim a right to request information of public concern when, in providing the requested information, the government or public authorities cannot carry out their normal functions in a "reasonable" way, and when the amount and extent of the requested information impedes the normal performance of duties to a "significant degree."<sup>42</sup> Moreover, Korean journalists are exempt from the "protection of news sources" clause of the law when they release information which constitutes a criminal offense.<sup>43</sup> The other exemptions to the press's right to protection of news sources are:

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; [and] when the writer, informer, or a keeper of the material at issue has obviously committed a crime as prescribed in Article 2 of the Social Safety Act, considering the contents of the published information.<sup>44</sup>

In connection with its registration clause,<sup>45</sup> the Basic Press Act stipulates that the Korean Ministry of Culture and Information (MOCI) has authority to cancel registration of publications or to suspend them for less than one year for several reasons, one of which is: "When the contents of the publications fail *repeatedly and flagrantly* to serve the purpose declared in the registration or to perform their public responsibility for refraining from encouraging or praising violence or other illegal acts disrupting public order."<sup>46</sup> The MOCI is also empowered by law to oversee permission and revocation of licenses over Korean branch offices of foreign news media.<sup>47</sup>

<sup>41</sup> *Id.* arts. 6, 8.

<sup>42</sup> *Id.* art. 6(1), (4).

<sup>43</sup> *Id.* art. 8(1).

<sup>44</sup> *Id.* art. 8(2). Article 2 of the Social Safety Act enumerates crimes concerning insurrection against the Korean sovereignty and provocation of foreign aggression against Korea; crimes concerning military insurrection against the Korean sovereignty and assistance for the enemy of Korea; and crimes concerning anti-state organizations. Social Safety Act, art. 2, Law No. 2769 (July 16, 1975), amended by Law No. 3318 (Dec. 31, 1980). For an English translation of the Social Safety Act, as amended in 1980, see KOREAN LAWS 1983, *supra* note 6, at X-271-X-277.

<sup>45</sup> *Id.* art. 20.

<sup>46</sup> *Id.* art. 24(1)-4 (emphasis added). On August 23, 1985, the Ministry of Culture and Information (MOCI) canceled the registration of *Silcheon Munhak* for allegedly violating Article 24(1)-4 of the Basic Press Act. This was the first time that the registration of a periodical had been canceled by the Korean government under the Basic Press Act since 1980, when the Act was enacted. The MOCI charged that the quarterly publication carried articles focusing on socio-political issues rather than on literature and art, the kind of topics which were specified by the magazine in its original registration. In January 1987, *Silcheon Munhak* challenged the constitutionality of the Basic Press Act by filing suit with the Seoul Court of Appeals, claiming that the law infringes on the "essential substance" of press freedom by allowing the government to "practically license" the media to operate. *Munhak Jeongui Jeongbu Ka Nairinuncheon Budang* [Government Not Justified in Setting Forth the Definition of Literature], DONG-A ILBO, Feb. 2, 1987, at 3. For a discussion of the statutory power of the MOCI as recognized by the Basic Press Act to cancel the registration of the Korean media, see Paeng, *Eonron Kibon Beop Un Kaejeong Daeiya Handa* [The Basic Press Act Should be Revised], SHIN DONG-A, October, 1985, at 226-32.

<sup>47</sup> *Id.* art. 28. Among the grounds for the rescission by the MOCI of the foreign news bureaus

The Basic Press Act also provides for individual relief from those suffering from press violations by recognizing requests for correction of such press reports.<sup>48</sup> Notwithstanding the fact that Korea already has two statutes — the Civil Code<sup>49</sup> and the Criminal Code<sup>50</sup> — dealing with defamation by the press of individuals, it should be noted that the Korean government has sought yet another statutory mechanism for redressing issues involving the conflict between the interest of the press and that of individual citizens. In this regard, Korean law stipulates:

One who has suffered damage from a *factual* assertion published by a periodical or a 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 15 days of the publishing by a daily newspaper, news service or a broadcasting network and within one month of its publishing by other periodicals.<sup>51</sup>

Accordingly, anyone who has been damaged by the press is legally entitled to recover damages as long as the press reports at issue are wrongful assertions of fact, not expressions of opinion or criticism. 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 press law authorizes the establishment of a press arbitration commission.<sup>52</sup>

## 2. The Act Governing Foreign Periodicals

The South Korean government regulates incoming foreign publications through the Act Governing Import and Distribution of Foreign Periodicals.<sup>53</sup> The statute is aimed at “providing regulations concerning the importation and distribution of periodicals published abroad in order to strive for the sound development of culture and the protection of law and order, as well as the preservation of good morals and manners unique to the nation.”<sup>54</sup> However, the practical effect of the law obviously goes further in that it often serves as legal pressure to curb the domestic circulation of certain foreign publications. Under the Act Governing Foreign Periodicals, the MOCI can take sweeping measures against foreign periodicals which the Korean government finds may “subvert the constitutional system of the state or undermine the public security and customs” of

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in Korea are: (1) that their publications carry stories undermining the national prestige of Korea and challenge the basic principles of the Korean Constitution; (2) that they disturb the order of the domestic Korean press. *Id.* art. 28(2)-3, (2)-4.

<sup>48</sup> *Id.* art. 49(1).

<sup>49</sup> Law No. 471 (Feb. 22, 1958), amended by Law No. 3051 (Dec. 31, 1977). For an English translation of the Civil Code, as amended in 1977, see 3 KOREAN LAWS 1983, *supra* note 6, at VII-1-VII-126. For a discussion of the Civil Code, see *infra* notes 79–81 and accompanying text.

<sup>50</sup> Law No. 239 (Sept. 18, 1953), amended by Law No. 2745 (Mar. 25, 1975). For an English translation of the Criminal Code, as amended in 1975, see 3 KOREAN LAWS 1983 *supra* note 6, at X-1-X-44. For a discussion of the Criminal Code, see *infra* notes 66–78 and accompanying text.

<sup>51</sup> Basic Press Act, art. 49(1) (emphasis in text added).

<sup>52</sup> *Id.* art. 50(1). Under the Basic Press Act, those who allegedly suffer from damaging press reports cannot appeal directly to the court for correction without first going through the press arbitration commission. *Id.* art. 51.

<sup>53</sup> Law No. 2535 (Feb. 17, 1973), amended by Law No. 3526 (Dec. 31, 1981).

<sup>54</sup> *Id.* art. 1.



Korea.<sup>55</sup> The government can order them suspended from sale or their contents deleted,<sup>56</sup> and retract the permit for distribution of the periodicals.<sup>57</sup>

### B. *Indirect Press Laws*

#### 1. Special Security Acts

The uniqueness of South Korea as one-half of a divided Korea explains why national security has always been of paramount concern for Koreans in general, and for the Korean government in particular. Thus, the Korean government has resorted to diverse approaches toward maintenance of national security.

##### a. *The National Security Act*

Typical of the special laws currently in effect is the National Security Act, enacted in 1980.<sup>58</sup> It provides, in part:

Any person who has benefited anti-state organizations *by way of praising, encouraging, or siding with or by other means*, the activities of the anti-state organizations, their members or the persons who had been under instruction from such organizations, shall be punished by penal servitude for not more than seven years.<sup>59</sup>

##### b. *Martial Law*

The Korean Constitution accords the President the power to "temporarily suspend the freedoms and rights of the citizens" when grave or extraordinary circumstances threatening the security of the state require him to take necessary "emergency measures".<sup>60</sup>

Furthermore, Article 52 of the Constitution grants the President the power to proclaim martial law to "maintain the public safety and order by mobilization of the military forces in time of . . . national emergency."<sup>61</sup> Special measures may be taken with respect to press freedom,<sup>62</sup> as well as other matters relevant to the enforcement of martial law.<sup>63</sup> The special law authorizes the martial law commander appointed by the

<sup>55</sup> *Id.* arts. 7,8.

<sup>56</sup> *Id.* art. 7.

<sup>57</sup> *Id.* art. 8.

<sup>58</sup> Law No. 3318 (Dec. 31, 1980), *superseding* Anti-Communist Act, Law No. 643 (July 3, 1961). For an English translation of the National Security Act, see KOREAN LAWS 1983, *supra* note 6, at X-64-X-70.

<sup>59</sup> *Id.* art. 7(1) (emphasis added).

<sup>60</sup> Republic of Korea Constitution, art. 51(1), (2), *amended* in 1980.

<sup>61</sup> *Id.* art. 52(1).

<sup>62</sup> *Id.* art. 52(3).

<sup>63</sup> Martial Law, Law No. 3442 (Apr. 17, 1981). For an English translation of the Martial Law, see KOREAN LAWS 1983, *supra* note 6, at II-154-II-156.

President "to take special measures with regard to . . . the press" when martial law is enforced.<sup>64</sup>

## 2. Penal Laws

It is not surprising that Korea has a number of statutory apparatuses to deal with potential conflicts between press freedom and the interests of individuals. This is a recognition on the part of the Korean government that "freedom of the press does not exist in isolation from the rest of society; press power must be reconciled with other interests of the society in which the press functions."<sup>65</sup> As compared with the special security laws of Korea, various penal laws now in force governing the Korean press are mainly aimed at protecting the legal interests of citizens, e.g., the right to a good reputation, the right to privacy, and the right of free speech.

### a. *The Criminal Code*

In 1975 the Korean government revised part of the Criminal Code<sup>66</sup> to make it a crime to slander the State. The newly added clause of the statute, prohibiting the seditious defamation of the Korean government, stipulates:

1. Any Korean national, who endangers or is assumed to endanger the security, interest and dignity of Korean governmental bodies established under the Constitution, by distorting the truth about them or disseminating false information concerning them or in 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.<sup>67</sup>

Under the provision, it is illegal for Koreans to criticize the government, government officials, or the President while speaking to foreigners or representatives of foreign organizations, including foreign journalists. Furthermore, the law is applicable to Koreans residing or visiting abroad in that their criticism of the Korean government will constitute a violation of the law.

Under the criminal law of Korea, defamation of the national flag "for the purpose of insulting the Republic of Korea" may bring penal servitude or imprisonment for a maximum of one year, suspension of civil rights for not more than five years or a fine

<sup>64</sup> *Id.* art. 9(1). The Martial Law provides that the President shall declare martial law: [E]ither to cope with the military needs or to maintain the public safety and order in time of war, state of siege or similar national emergency under which the functioning of the administrative and judicial branches of the government is deemed conspicuously difficult under the state of either armed conflict with the enemy or of the extreme disturbance of the social order.

*Id.* art. 2(2).

<sup>65</sup> T. EMERSON, *PRESS LAW IN MODERN DEMOCRACIES*, xiii (P. Lahav ed. 1985).

<sup>66</sup> Law No. 239 (Sept. 18, 1953), amended by Law No. 2745 (Mar. 25, 1975). For an English translation of the Criminal Code, as amended in 1975, see *KOREAN LAWS* 1983, *supra* note 6, at X-1-X-44.

<sup>67</sup> *Id.* art. 104-2.

of not more than 400,000 *Won* (U.S. \$500.00).<sup>68</sup> Similarly, it is statutorily forbidden to "profane" a foreign national flag.<sup>69</sup> The law also prohibits Koreans from defaming foreign heads of state or foreign envoys in Korea. For defamation of foreign leaders visiting Korea, a maximum of five years imprisonment or penal servitude of three years or less is imposed.<sup>70</sup>

Obscenity is forbidden under the Criminal Code. Thus, it constitutes a crime to produce, possess, import, or export prurient materials.<sup>71</sup> In addition, it is illegal to distribute, sell, or openly display obscene literature, pictures or similar goods.<sup>72</sup>

As noted above, the Korean Constitution forbids the press to injure the reputation of an individual. Prior to the current Constitution, the Korean government had dealt with the defamation issue statutorily when it enacted the Criminal Code in 1953 and the Civil Code in 1958.

The Criminal Code provides for crimes against reputation. Article 307 of the Code, while making a distinction between factual and false defamation, 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.<sup>73</sup>

The Criminal Code clearly distinguishes libel (written defamation) from slander (spoken defamation), as indicated by the separate provisions for each. With regard to libel, the Code 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 or suspension of civil rights for not more than ten years.<sup>74</sup>

In light of the more lasting and pervasive impact of libel as compared with slander, Korean law provides that written defamation carries a more severe penalty than spoken

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<sup>68</sup> *Id.* art. 106. The amount of the fine under the Criminal Code has been changed by the Temporary Act on Fines, which stipulates: "When the provisions for fines in the Criminal Code are to be applied, such fines shall be fixed in amounts equivalent to 40 times those specified in the provisions; provided, however, that where the monetary unit *Hwan* appears in the provisions, it shall be regarded as *Won*." Law No. 216 (Sept. 8, 1951), *amended* by Law No. 2907 (Dec. 22, 1976), art. 4(1). For an English translation of the Temporary Act on Fines, as amended in 1976, see KOREAN LAWS 1983, *supra* note 6, at X-49-X-50.

<sup>69</sup> *Id.* art. 109.

<sup>70</sup> *Id.* arts. 107(2), 108(2).

<sup>71</sup> *Id.* art. 244.

<sup>72</sup> *Id.* art. 243.

<sup>73</sup> *Id.* art. 307(1), (2) (emphasis added).

<sup>74</sup> *Id.* art. 309(1), (2).

defamation. This applies when the libelous publication is factual, as well as when it is false.<sup>75</sup>

The Criminal Code recognizes a justification for defamation “[i]f the facts alleged under Section (1) of Article 307 are *true and solely for the public interest*.”<sup>76</sup> Thus, if an alleged defamer is to be immune from prosecution for his defamatory act(s), either spoken or written, he is statutorily required to prove that his stated facts are true *and* only in the public interest. This “true and solely for the public interest” requirement as a defense against defamation presupposes that it does not matter whether a defamatory statement was made with or without intent to defame on the part of the defamer.

The Criminal Code permits a criminal action against a defamatory falsehood on the dead. 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*.”<sup>77</sup> Thus, the truthful defamation of the dead is not subject to prosecution. With regard to prosecution for defamation of the dead, it can be executed “only upon complaint.”<sup>78</sup>

#### b. *The Civil Code*

In Korea, the Civil Code<sup>79</sup> also provides for protection of individuals from defamation. 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 damages in the property;
2. The court may order the compensation under the preceding section paid by periodic payments, and may order reasonable security furnished in order to ensure the performance of such obligation.<sup>80</sup>

Second, under the special rule for defamation cases, the Code authorizes the court, on the complaint of the injured party, to order the alleged defamer to take “suitable measures to restore the injured good name of the defamed, either in lieu of or together with compensation for damages.”<sup>81</sup>

### 3. Other Legislation Affecting the Press

The Korean Constitution prohibits the press, as well as individuals, from invading the privacy of others.<sup>82</sup> This constitutional provision is specifically codified in the Minor

<sup>75</sup> For a discriminating penalty for defamation depending on libel or slander, compare Article 309 (see *supra* note 74 and accompanying text) with Article 307 (see *supra* note 73 and accompanying text).

<sup>76</sup> Criminal Code, art. 310 (emphasis added).

<sup>77</sup> *Id.* art. 308 (emphasis added).

<sup>78</sup> *Id.* art. 312.

<sup>79</sup> Law No. 471 (Feb. 22, 1958), amended by Law No. 3051 (Dec. 31, 1977). For an English translation of the Civil Code, as amended in 1977, see KOREAN LAWS 1983, *supra* note 6, at VII-1-VII-126.

<sup>80</sup> *Id.* art. 751(1), (2).

<sup>81</sup> *Id.* art. 764.

<sup>82</sup> Republic of Korea Constitution, art. 16, amended in 1980.

Offense Punishment Act,<sup>83</sup> which states: "Persons who have published in a newspaper, magazine, or other publication a false statement concerning the private or business affairs of another person . . . shall be punished by detention or fine."<sup>84</sup> Concerning coverage of judicial proceedings involving family matters, the Korean press is statutorily regulated and is prohibited from publishing the "names, ages, occupations, appearance and other facts or photographs which may identify those involved."<sup>85</sup>

Similarly, the Juvenile Act<sup>86</sup> and the Children Welfare Act<sup>87</sup> also regulate the press. The former prevents juveniles under the protection of the law, or those under investigation from being identified in the media.<sup>88</sup> The latter bars production of books, periodicals, or advertisements which are "assumed to be detrimental to the sense of morality of children."<sup>89</sup> Under the Act Governing Protection of Minors,<sup>90</sup> no one is allowed to distribute, sell, present, or show obscene documents, books or records.<sup>91</sup>

Korean election laws have provisions affecting press activities. The Presidential Election Law<sup>92</sup> and the National Assembly Election Law<sup>93</sup> make it illegal for the print and broadcast media to publish or broadcast false information on elections and their candidates or to distort facts about them.<sup>94</sup> Moreover, the statutes prohibit the media from defaming candidates publicly by alleging facts, unless the allegations are true *and* only for the public interest.<sup>95</sup> The proscription against defamation of election candidates under the laws is similar to the provisions of the Criminal Code governing crime of defamation, except that the former stipulates a higher fine than the latter.<sup>96</sup> As discussed above, the Act Governing Foreign Periodicals regulates foreign publications.<sup>97</sup> Nevertheless, the law is not the only statutory tool used by the Korean government to deal

<sup>83</sup> Law No. 316 (Apr. 1, 1954), *amended* by Law No. 3329 (Dec. 31, 1980). For an English translation of the Minor Offense Punishment Act, as amended in 1980, see KOREAN LAWS 1983, *supra* note 6, at X-51-X-55.

<sup>84</sup> *Id.* art. 1(9).

<sup>85</sup> Act Governing Court Judgments on Family Affairs, Law No. 1375 (July 31, 1963), art. 8, *amended* by Law No. 1498 (Dec. 13, 1963). For the text of the Act Governing Court Judgments on Family Affairs, as amended in 1963, see DAE BEOP JEON, *supra* note 23, at 1448-50.

<sup>86</sup> Law No. 489 (July 24, 1958), *amended* by Law No. 3047 (Dec. 31, 1977). For an English translation of the Juvenile Act, as amended in 1977, see KOREAN LAWS 1983, *supra* note 6, at X-174-X-183.

<sup>87</sup> Law No. 912 (Dec. 30, 1961), *amended* by Law No. 3438 (Apr. 13, 1981). For the text of the Children Welfare Act, as amended in 1981, see DAE BEOP JEON, *supra* note 23, at 3982-84.

<sup>88</sup> Juvenile Act, art. 61.

<sup>89</sup> Children Welfare Act, art. 18(11).

<sup>90</sup> Law No. 834 (Dec. 13, 1961), *amended* by Law No. 3170 (Dec. 28, 1979). For the text of the Act Governing Protection of Minors, as amended in 1979, see DAE BEOP JEON, *supra* note 23, at 856.

<sup>91</sup> *Id.* art. 2-2(2).

<sup>92</sup> Law No. 3331 (Dec. 31, 1980). For the text of the Presidential Election Law, see DAE BEOP JEON, *supra* note 23, at 70-81.

<sup>93</sup> Law No. 3359 (Jan. 29, 1982). For the text of the National Assembly Election Law, see DAE BEOP JEON, *supra* note 23, at 85-95.

<sup>94</sup> Presidential Election Law, arts. 45, 180(2); National Assembly Election Law, arts. 66, 68, 170.

<sup>95</sup> Presidential Election Law, art. 194(1), (2); National Assembly Election Law, art. 171(1), (3).

<sup>96</sup> Compare Presidential Election Law, art. 194 (see *supra* note 95 and accompanying text) and National Assembly Election Law, art. 171 (see *supra* note 95 and accompanying text) with Criminal Code, art. 309 (see *supra* note 74 and accompanying text).

<sup>97</sup> For a discussion of the Act Governing Import and Distribution of Foreign Periodicals, see *supra* notes 53-57 and accompanying text.

with foreign periodicals. The Customs Act also directly affects the press.<sup>98</sup> 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 . . ." <sup>99</sup> Any person who violates the provisions of the Customs Act regarding foreign publications is subject to "imprisonment for one year or more, or fine of not more than two million *Won*" (U.S. \$2,500), in addition to having the materials in question confiscated.<sup>100</sup>

The Korean press is restricted from covering the proceedings of the National Assembly sessions. The news media is required to obtain prior permission from the speaker of the Assembly or chairman of its committees in order to "record, videotape, take pictures, broadcast" the plenary sessions of the Korean parliament or its committee meetings.<sup>101</sup>

A provision of the Court Organization Act, which is identical to the National Assembly Act, provides: "No person shall videotape, photograph, or broadcast events in a courtroom without permission from the presiding judge."<sup>102</sup> This law is in accord with the constitutional provision regarding the justification for closing the trial to the public.<sup>103</sup>

#### IV. JUDICIAL INTERPRETATION OF PRESS LAWS

##### A. *Direct Press Laws*

In comparison to indirect penal laws and special statutes,<sup>104</sup> direct press laws have been less frequently invoked by the Korean courts. Nevertheless, several cases involving the press laws indicate how the Korean courts have interpreted press freedom in the context of direct press legislation. The *Kyunghyang Shinmun* case of 1959 is one of the best known press cases because it best illustrates the resistance of a Korean newspaper in court to the suppressive South Korean government.

*Kyunghyang Shinmun*, then a leading opposition paper, was ordered by the government under President Syngman Rhee to close, on the ground that it violated U.S. Army Military Government Ordinance No. 88.<sup>105</sup> The paper refused to follow the government-

<sup>98</sup> Law No. 1976 (Nov. 29, 1967), amended by Law No. 3492 (Dec. 31, 1981). For an English translation of the Customs Act, as amended in 1981, see KOREAN LAWS 1983, *supra* note 6, at VI-319-VI-391.

<sup>99</sup> *Id.* art. 146(1).

<sup>100</sup> *Id.* art. 179.

<sup>101</sup> National Assembly Act, Law No. 3360 (Jan. 29, 1981), art. 147, amended by Law No. 33423 (Apr. 8, 1981). For an English translation of the National Assembly Act, as amended in 1981, see KOREAN LAWS 1983, *supra* note 6, at I-55-I-80.

<sup>102</sup> Law No. 51 (Sept. 26, 1949), art. 54-2, amended by Law No. 3362 (Jan. 29, 1981). For an English translation of the Court Organization Act, as amended in 1981, see KOREAN LAWS 1983, *supra* note 6, at I-151-I-169.

<sup>103</sup> The Korean Constitution states: "[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." Republic of Korea Constitution, art. 110, amended in 1980.

<sup>104</sup> For a discussion of the indirect press laws, see *supra* notes 58-103 and accompanying text.

<sup>105</sup> Ordinance No. 88 of the U.S. Army Military Government in Korea (1945-48) provided for the revocation or suspension of licenses of the print and broadcasting media for any of the following reasons: "The making of any false or misleading statement or omission in the application for a license; [f]ailure to report any change in the information furnished in the application . . ." USAMGIK Ordinance No. 88, § IV. For an English translation of Ordinance No. 88, see MI KUNJEONG

tal order, challenging it as having been largely politically motivated. In *Chang Woo Han v. Sung Cheon Cheon*,<sup>106</sup> the Seoul Court of Appeals granted *Kyunghyang Shinmun* an injunction temporarily suspending the order. The court held that the articles in question did not constitute a "clear and impending danger to the nation" and so the government's order to shut down the newspaper was an abuse of administrative power in violation of the law.<sup>107</sup>

The authoritarian Syngman Rhee government then issued a new order indefinitely suspending *Kyunghyang Shinmun* from publication shortly after withdrawing its first action in accordance with the court ruling invalidating the government order. The new order of the government against the embattled paper in essence overrode the decision of the Seoul Court of Appeals.

*Kyunghyang Shinmun* again filed suit with the same Seoul Court of Appeals, refusing to follow the second government order suspending its publication. However, the Seoul Court of Appeals dismissed the paper's suit. It ruled that "the government action was legally appropriate and the U.S. Military Government Ordinance No. 88 was not unconstitutional."<sup>108</sup> The newspaper then appealed to the Supreme Court.

The Supreme Court decided to refer the appeal to the Constitution Committee, which was empowered under the Constitution of 1948 to determine whether any laws to be applied to the present case would be in conflict with the Constitution.<sup>109</sup> The formation of the Constitution Committee was delayed, due in part to the constant wrangling among the three branches of government over the number of legal members to sit on the Committee. Consequently, the Committee failed to meet until after the April Students' Uprising of 1960, which toppled the Rhee government. The Supreme Court, which had been largely subordinate to the executive branch of the now defunct Rhee regime, became more bold in asserting its independence. On the appeal of *Kyunghyang Shinmun*, the Court overruled the decision of the lower court.<sup>110</sup>

BEOPRYUNG CHONGRAM [A COMPLETE COMPILATION OF LAWS AND ORDINANCES OF THE U.S. ARMY MILITARY GOVERNMENT IN KOREA] 189-91 (1975).

<sup>106</sup> Seoul Court of Appeals, June 26, 1959, 1959 Haingso 26, HANKUK SHINMUN YEONGAM 1968 [KOREAN PRESS ANNUAL 1968] 519-28 (1968) [hereinafter YEONGAM].

<sup>107</sup> *Id.* at 527.

<sup>108</sup> *Chang Woo Han*, Supreme Court, Feb. 5, 1960, 1959 Haingsang 110, YEONGAM, *supra* note 106, at 528.

<sup>109</sup> The Republic of Korea Constitution of 1948 states with reference to the function and structure of the Constitution Committee:

Whenever the decision of the case depends on the determination of the constitutionality of the law, the Supreme Court shall proceed in accordance with the decision of the Constitution Committee. The Vice President shall be the chairman of the Constitution Committee and five justices of the Supreme Court and five members of the National Assembly shall serve as members of the Constitution Committee. A decision holding that a law is unconstitutional requires a two-third majority of the Committee.

The organization and the rules of procedure of the Constitution Committee shall be determined by law.

Republic of Korea Constitution, art. 81, *ordained and promulgated* in 1948. For an English translation of the Constitution of 1948, see 2 CONSTITUTIONS OF NATIONS 549-59 (A. Peaslee ed., 2d ed. 1956). For a discussion of the "judicial review" function of the Constitution Committee in 1948-60, see D. Choi, *Law and Social Change: The Korean Experience* 209-16 (Ph.D. dissertation, University of California, 1976).

<sup>110</sup> *Kyunghyang Shinmun v. State*, Supreme Court, Apr. 26, 1960, 1960 Haingsang 110, Y. Chang, EONRON KWA INKWON [THE PRESS AND HUMAN RIGHTS] 155 (1969).

The Korean press generally has fared better than in the case of *Kyunghyang Shinmun* in court decisions involving the application of direct press laws. This explains in part why the Korean media often turned to the court for an injunction against the enforcement of administrative measures suspending their registrations. In *Seok Hun Ham v. Minister of Culture and Information*,<sup>111</sup> for example, the plaintiff contended that the government violated his press freedom in violation of the Constitution. The government suspended the registration of Ham's monthly publication *Sial Ui Sori* on the ground that the periodical was not printed by the printer specified in the registration application form, but by others. The Seoul Court of Appeals ruled for Ham, holding that the cancellation of the registration of the plaintiff's periodical went beyond the authority of the government, and hence violated the press freedom of the plaintiff.<sup>112</sup> This Court of Appeals ruling was affirmed by the Supreme Court, which held that the mere change in printers could not be a justifiable cause for cancellation of the publication.<sup>113</sup>

The Supreme Court again rendered a judgment for the press when it ruled in *Wan Hyuk Bu v. Minister of Culture and Information*<sup>114</sup> that the government could not exercise its discretionary power in cancelling a publication's registration "just because the publisher did not own his printing facilities" for the publication.<sup>115</sup> This case arose from the MOCI's order to revoke the registration of Bu's monthly *Sasangye* on the ground that the plaintiff registered with the MOCI as printer, though he did not have printing equipment at the time of registration.

#### B. *The National Security Act and the Anti-Communist Act*

The Korean courts have applied the Anti-Communist Act, which is now superseded by the National Security Act, in numerous cases involving the press.<sup>116</sup> In applying the restrictive laws, however, the courts have been notably aware of the possibility that the legislation would be abused in restricting the press.

In *Seok Chai Choi v. State*,<sup>117</sup> a 1956 case, for example, the Supreme Court affirmed the ruling of the Taegu Court of Appeals for the newspaper defendant who was charged with violating the Anti-Communist Act. The Court stated that Choi, who criticized the government in an editorial that appeared in *Maeil Shinmun*, wrote the editorial as a constructive suggestion for the authorities and not to serve the interests of North Korean communists.<sup>118</sup> This case stemmed from Choi's criticism of the ruling authorities' mobilization of young students for a series of government-sponsored rallies in protest of the communist nationals who were then supervising the ceasefire of the Korean War. In the editorial, Choi pointed to the undesirable side effects of forced attendance on primary and secondary school children at the rallies.

<sup>111</sup> Seoul Court of Appeals, May 4, 1971, 70 Ku 194, BEOPYUL SHINMUN [THE LAW TIMES], May 17, 1971, at 6.

<sup>112</sup> *Id.*

<sup>113</sup> *Seok Hun Ham v. Minister of Culture and Information*, Supreme Court, July 6, 1971, 71 Nu 62, 19 DAEBEOPWEON PANGYOL JIP [SUPREME COURT CASE REPORTS] 2 (1971): 32-33 [hereinafter DAEBEOP PANGYOL].

<sup>114</sup> Supreme Court, Apr. 25, 1972, 71 Nu 183, BEOPYUL SHINMUN, May 8, 1972, at 6.

<sup>115</sup> *Id.*

<sup>116</sup> For a discussion of the National Security Act, which has superseded the Anti-Communist Act, see *supra* notes 58-59 and accompanying text.

<sup>117</sup> Supreme Court, May 8, 1956, 4289 Hyungsang 80, BEOPYUL SHINMUN, June 25, 1956, at 3.

<sup>118</sup> *Id.*



When an article advocating the proletariat movement in Korea is published as an expression of opinion, it does not violate the National Security Act. This was how the Seoul District Court interpreted the law with regard to an article published in a campus journal of Seoul National University in 1958. In *Keun Ill Yoo v. State*,<sup>119</sup> the court held that the defendant wrote the article for a purely academic purpose, although the tone of the article appeared too radical. The court also noted that the defendant merely presented his ideas on socialist democracy. Thus, the court ruled that the defendant did not violate the National Security Act.<sup>120</sup>

In 1967, a Taegu district court used the "clear and present danger" test in ruling for the press.<sup>121</sup> In *Sang Kwan Lee v. State*,<sup>122</sup> Judge Byung Chai Han ruled that the defendants, who published a news story on an espionage search operation allegedly in violation of the Anti-Communist Act, were justified in reporting the operation since their story did not pose the kind of present and immediate danger that would irreparably jeopardize the spy operation then under way. Judge Han, who emphatically noted that press freedom could not be curtailed merely on the ground that anti-communism happened to be a policy of the State, noted:

Freedom of the press is most important for the survival of a political democracy. Only press freedom can ensure an ideal national consensus for us. It can also protect civil rights from being infringed by the government. It contributes to our playing a creative role for the overall national development through its criticism and factual reporting. Indeed, press freedom is a *life-and-death issue* for our democracy.<sup>123</sup>

The *Sang Kwan Lee* case arose from a newspaper article reporting that the Yungdok County police began a search for North Korean espionage agents after being alerted to the discovery of spy equipment. *Taequ Maeil Shinmun* published the story, notwithstanding a request from the police for a news blackout on the espionage operation. The government argued that the publication assisted North Korea by helping the communist agents to flee. In rejecting the government's arguments, Judge Han observed that first, despite the "news blackout" request, the newspaper received no "formal written request" from those in a responsible governmental position. Second, the information published in the newspaper had been common knowledge in the area for one week prior to the

<sup>119</sup> Seoul Criminal District Court, Apr. 3, 1958, 4291 Hyungkong 74, BEOPYUL SHINMUN, July 28, 1958, at 3.

<sup>120</sup> *Id.*

<sup>121</sup> In *Schenck v. United States*, Justice Oliver Wendell Holmes, Jr., writing for the Supreme Court of the United States, set forth the "clear and present danger" test in determining when the constitutionally guaranteed freedom of speech and the press can be restricted by the government. Justice Holmes defined the test:

The character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of speech would not protect a man in falsely shouting fire in a theatre causing a panic . . . . *The question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.*

*Schenck v. United States*, 249 U.S. 47, 52 (1919) (emphasis added).

<sup>122</sup> Taegu Criminal District Court, Oct. 18, 1967, 65 Ko 8762, BEOPYUL SHINMUN, Nov. 6, 1967, at 6.

<sup>123</sup> *Id.* (emphasis in original).

publication of the article. Third, there was no evidence indicating the intention of the defendants to assist North Korea through the publication of the article. The ruling of the single-judge district court of Taegu was appealed by the government to the three-judge appellate panel of the same district court.<sup>124</sup> In rejecting the appeal, the appellate panel of the Taegu District Court affirmed the decision of Judge Han.<sup>125</sup>

When a reporter of *Dong-A Ilbo*, a leading Korean daily newspaper, wrote an article alleging that the government had not paid compensation money to an informant for one and a half years after he provided them with information concerning an espionage suspect, it was held that he did not violate the Anti-Communist Act. The Supreme Court in *Ik Jin Jeong v. State*<sup>126</sup> held that the reporter was not aware that his article could affect the counter-espionage operation or benefit the anti-state organization as proscribed by the law. Furthermore, the Court held that the news article contributed to the clarification of possible mishandling of the compensation fund by the government.

In 1970, one year after *Ik Jin Jeong*, the Seoul District Court in *Je Yul Kim v. State*,<sup>127</sup> declared that "once classified military information is discussed in public, it can be no longer categorized as secret. Thus, the publication of information no longer classified is not subject to punishment under the Anti-Communist Act and the Military Information Law."<sup>128</sup> The *Je Yul Kim* case involved Dongyang News Agency, which reported on the three-year combat preparation plan debated at an open meeting of the National Defense Committee of the Korean National Assembly. The court held that the request by the government for a news blackout was no more than a type of mutual cooperation between the government and the press. Therefore, the court ruled that "even though the press did not comply with the request of the government, it could not be subject to penal punishment."<sup>129</sup>

These favorable decisions of the Korean courts with reference to press freedom suffered a setback, however, when the Supreme Court ruled in 1972 that information, even though published in newspapers or broadcast through radio and television, is protected by the National Security Act as a confidential national secret when it is known to North Korea and found useful to it.<sup>130</sup>

In another 1972 case, however, the Seoul District Court refused to invoke the Anti-Communist Act in ruling on an article published in *Dong-A Ilbo*.<sup>131</sup> The newspaper reported that some Koreans living near a military base cut up military tanks and sold them as scrap. The court reasoned that the reporter did not harm the overall confidence of the people in the Korean Army while benefiting the enemy.<sup>132</sup>

<sup>124</sup> For a discussion of the jurisdiction of the district courts in Korea, see *supra* notes 25–29 and accompanying text.

<sup>125</sup> See Sang Kwan Lee v. State, Taegu District Court, Nov. 7, 1969, 68 No. 451, KIJIA HYUPHOE BO [KOREAN JOURNALISTS ASSOCIATION NEWSLETTER], Nov. 21, 1969, at 2.

<sup>126</sup> Supreme Court, Apr. 29, 1969, 68 Da 1631, BEOPYUL SHINMUN, May 26, 1969, at 4.

<sup>127</sup> Seoul District Court, June 15, 1970, 68 Ko 21972, BEOPYUL SHINMUN, Aug. 17, 1970, at 6; BEOPYUL SHINMUN, Aug. 24, 1970, at 6.

<sup>128</sup> *Id.* BEOPYUL SHINMUN, Aug. 24, 1970, at 6.

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., Cheong Jo Lim v. State, Supreme Court, Sept. 12, 1972, 72 Do 1514, PANRAI WOLBO 76 [MONTHLY REPORT OF COURT CASES](Nov. 1972).

<sup>131</sup> See Bong Jin Chang v. State, Seoul Criminal District Court, Sept. 27, 1972, 72 Kohap 315, KIJIA HYUPHOE BO, Sept. 29, 1972, at 6; KIJIA HYUPHOE BO, Oct. 6, 1972, at 6.

<sup>132</sup> KIJIA HYUPHOE BO, Oct. 6, 1972, at 6.

Because it is often difficult to evaluate the contents of a publication, whether academic or artistic, a number of cases arose from publications dealing with sensitive subjects. Among those was a 1974 Supreme Court case, *Cheong Bin Lim v. State*.<sup>133</sup> In that case, the State asserted that the defendant, who contributed an article to *Dari* magazine, praised and benefited the communists outside the country by way of advocating the so-called May Revolution of the ultra-leftist French students. Rejecting the argument of the State, Justice Young Seop Lee wrote for the Court:

The article examines the past Korean student movements as compared with those of foreign countries . . . . It principally concluded that the Korean student movement should be changed to a cultural one to establish a national welfare society. Thus, it is a far cry from praising, encouraging, or siding with the activities of foreign communists or of North Korean communists.<sup>134</sup>

However, Yong Joo Hwang, former president of Munhwa Broadcasting Corporation in Seoul, was found by the Seoul Criminal District Court to be benefiting anti-state organizations when his article, *Our Firm Determination for a Unified Government in Korea*, was published in *Saidae* magazine. In *Yong Joo Hwang v. State*,<sup>135</sup> the court ruled that the ideas presented in his article were identical to those advocated by North Korea.<sup>136</sup> The district court held that Hwang depicted North Korea as another political entity on the Korean peninsula, in negation of the basic constitutional principle proclaimed by the Korean government that South Korea is the one and only legitimate government of the divided country. The court also noted that the article in question damaged the normally amicable relationship between South Korea and the United States. In addition, the court ruled that the implication of Hwang's article was that which the North Korean communists had been hoping for — the creation of a favorable environment for a military revolution in South Korea.<sup>137</sup>

The Anti-Communist Act also punished the act of copying books containing communist propaganda.<sup>138</sup> The Supreme Court in *Uh Soo Han v. State*,<sup>139</sup> for example, ruled that the defendant probably assisted the communists by duplicating a Chinese book on acupuncture. The Court noted that the book, though it primarily dealt with acupuncture as a medical procedure, contained a number of paragraphs in praise of Mao Tse-tung, then the chairman of the Communist Party in China. Although cognizant of the possibility that those with access to copies of the acupuncture book would have been affected by the favorable discussion of the Chinese leader, the defendant went ahead copying

<sup>133</sup> Supreme Court, May 28, 1974, 74 Do 3423, PANRAI WOLBO 80 (Nov. 1974).

<sup>134</sup> *Id.*

<sup>135</sup> Seoul Criminal District Court, Apr. 30, 1965, 64 Ko 1811, BEOPYUL SHINMUN, May 17, 1965, at 6.

<sup>136</sup> In the article, Hwang maintained: (1) that North and South Korea should be admitted to the United Nations simultaneously; (2) that the United States stations its troops in South Korea only for its own interests; (3) that it is doubtful whether South Korea benefits from the U.S. military base in Okinawa, Japan; (4) that North and South Korea should sign a nonaggression pact and reduce their military forces on an equal basis; (5) that North and South Korea should schedule a conference aimed at reducing tensions and relaxing hostile relations between them. *Id.*

<sup>137</sup> BEOPYUL SHINMUN, May 17, 1965, at 6.

<sup>138</sup> Law No. 643 (July 3, 1961), *superseded* by National Security Act, Law No. 3318 (Dec. 31, 1980). For an English translation of the Anti-Communist Act, see LAWS OF THE REPUBLIC OF KOREA 776-780 (3rd ed. 1975).

<sup>139</sup> Supreme Court, Oct. 31, 1978, 78b Do 2254, 26 DAEBEOP PANGYOL 3 (1978): 82-85.

and selling the book. The Court declared that the act of the defendant apparently contributed to the communist cause in violation of Korean law.<sup>140</sup>

The Anti-Communist Act also prohibited South Koreans from listening to North Korean broadcasts and reading leaflets disseminated by the communists. In adjudicating such cases, the Korean courts have considered the circumstances involved.<sup>141</sup>

Under the Anti-Communist Act, for “keep[ing] in custody . . . documents, drawings and any other similar means of expression in support of the activities of an anti-state organization,”<sup>142</sup> the Seoul Criminal District Court sentenced a defendant who acquired allegedly seditious literature and passed it among several people, without notifying the authorities, to six months in prison.<sup>143</sup> The court ruled that the defendant’s dissemination of leaflets and books on a South Korean soldier who defected to North Korea advanced the subversive activities of the enemy against South Korea.

For the first time since it took power in 1980, the Chun Doo Hwan government tried to invoke the National Security Act in the famous *Mahl* case in June 1987. The *Mahl* case, which attracted attention in both Korea and abroad, arose from the publication in September 1986 of the press guidelines issued by the Korean government in the underground magazine called *Mahl* — Korean for “words.”<sup>144</sup> The bimonthly magazine, published by the Council for Democratic Press Movement (CDPM), an association of banned journalists, devoted an entire 63-page special issue to a chronological listing of the texts of hundreds of daily instructions issued by the Korean Ministry of Culture and Information to the Korean press between October 19, 1985, and August 8, 1986.<sup>145</sup> In December 1986, three months after the politically embarrassing information was published in *Mahl*, the Korean police arrested two CDPM officials allegedly involved in the publication, as well as a journalist said to have leaked the guidelines to the CDPM, for violating the National Security Act.<sup>146</sup> They were charged with disseminating the kind of “groundless rumours” proscribed by the law. However, the guidelines, as published in *Mahl*, had little to do with national security or foreign relations, but they had a great deal to do with politically sensitive topics. For example, the directives instructed the editors not to print “damaging” news stories, such as the United States government’s criticism of the human rights record of South Korea. In addition, they were told, among other things, to minimize coverage of the dissident activities of the opposition leaders, and to depict the anti-government demonstrations in a negative way.<sup>147</sup>

On June 4, 1987, in his verdict in the Seoul District Criminal Court, Judge Park Tae Bum sentenced the two journalists to suspended prison terms and set aside a penalty

<sup>140</sup> *Id.* at 83-84. See also *Eul Kyung Pyo v. State*, Supreme Court, Dec. 13, 1978, 78 Do 2243, 26 DAEBEOP PANGYOL 3 (1978): 131-40.

<sup>141</sup> See *Deuk Woo Nam v. State*, Supreme Court, Oct. 22, 1968, 68 Do 1118, slip op.; *Kyu Shin Park v. State*, Supreme Court, Jan. 28, 1975, 74 Do 3488, 23 DAEBEOP PANGYOL 1 (1975): 3-6.

<sup>142</sup> Law No. 643 (July 3, 1961), art. 4(2), *superseded* by National Security Act, Law No. 3318 (Dec. 31, 1980).

<sup>143</sup> See *Chong Kuk Hwang v. State*, Seoul Criminal District Court, Feb. 6, 1969, 68 Ko 1080, BEOPYUL SHINMUN, Feb. 24, 1969, at 6.

<sup>144</sup> For a detailed account of the *Mahl* case, see Lim, “*Mahl*”: *Ji Saekon Kongpan Shimal* [*The Beginning and the End of the Trial of the Mahl Case*], SHIN DONG-A 480-93 (July 1987).

<sup>145</sup> For an English translation of part of the Korean government’s press guidelines, see *Korea: “Guiding” the Press*, INDEX ON CENSORSHIP 30-36 (May 1987).

<sup>146</sup> *McBeth*, “*Guidelines*” for the Press, FAR EASTERN ECONOMIC REVIEW, Mar. 19, 1987, at 34.

<sup>147</sup> *Korea: “Guiding” the Press*, *supra* note 145, at 30-36. See also *South Korea: Voices for Democracy*, 4 WORLD POLICY J. 161, 166 (Winter 1986-87).

for the third journalist, as a gesture of "judicial generosity."<sup>148</sup> In finding the defendants guilty of violating the National Security Act, Judge Park observed that their publication of the press guidelines was used by North Korea "for propaganda, and thus their actions had harmed the national interest."<sup>149</sup> The judge noted, however, that the journalists were motivated by a "deep interest" in the South Korean press<sup>150</sup> and sought to normalize the Korean press system.<sup>151</sup>

### C. Martial Law and Emergency Decrees

As discussed above,<sup>152</sup> the Korean press has been subject to restrictions imposed by martial law and emergency decrees. Indeed, the scope of the restrictions created by these extraordinary measures was far more extensive than other statutory restrictions. As a result, more often than not, the martial law and emergency decrees had been enforced by the government in a sweeping manner without being challenged in court.

Presidential Emergency Measure No. 9, proclaimed in May 1975,<sup>153</sup> for example, prohibited any person from fabricating and disseminating groundless rumors or from diffusing distorted facts. What is noteworthy about the emergency decree in the context of judicial interpretation is that the Supreme Court limited its applicability when it declared that a person who told only one other person allegedly distorted facts should not be found guilty of "a disseminating or diffusing act."<sup>154</sup> On the other hand, the definition of the martial law phrase "groundless rumors" was expanded by the Supreme Court in *Seong Churl Park v. State*.<sup>155</sup> In this 1981 decision, the Court interpreted "groundless rumors" as not only false statements but also those which exaggerated or distorted facts. Furthermore, the court stated "[i]t is an act of disseminating groundless rumors when you mention them or distribute the books containing them, though they have been already known to some people."<sup>156</sup>

### D. The Criminal and Civil Codes

The revision of the Criminal Code in 1975 made it a crime to slander the State.<sup>157</sup> A 1983 Supreme Court case, which was the Court's first ruling based upon the "Crime of Slander Against the State" provision of the code, showed how far the law could go in circumscribing freedom of expression in South Korea. The Supreme Court in *Churl Kee Kim v. State*<sup>158</sup> overruled the lower court's decision, holding that the distribution by the defendant of anti-government leaflets to Korean and foreign correspondents in Korea

<sup>148</sup> McBeth, *Judicial Generosity*, FAR EASTERN ECONOMIC REVIEW, June 18, 1987 at 24.

<sup>149</sup> Haberman, *Press Censorship Case is Resolved in South Korea*, N.Y. Times, June 5, 1987, at A5.

<sup>150</sup> *Id.*

<sup>151</sup> McBeth, *supra* note 148, at 24.

<sup>152</sup> For a discussion of the Martial Law and Emergency Decrees, see *supra* notes 60-64 and accompanying text.

<sup>153</sup> Presidential Emergency Measure No. 9 (May 13, 1975). For an English translation of Emergency Measure No. 9, see DOCUMENTS ON THE STRUGGLE FOR DEMOCRACY IN KOREA 264-67 (1975).

<sup>154</sup> See *Man Song Cho v. State*, Supreme Court, May 11, 1976, 76 Do 876, PANRAI WOLBO 92-93 (Oct. 1976).

<sup>155</sup> Supreme Court, Apr. 14, 1981, 81 Do 543, BEOPYUL SHINMUN, May 18, 1981, at 6.

<sup>156</sup> *Id.*

<sup>157</sup> For a discussion of the revision to the Criminal Code in 1975, see *supra* notes 66-67 and accompanying text.

<sup>158</sup> Supreme Court, June 14, 1983, 83 Do 515, BEOPYUL SHINMUN, June 27, 1983, at 6.

was against the Criminal Code. The lower court had ruled that Kim's act of passing out literature to foreign reporters did not constitute a crime under the law because the allegedly seditious material was not yet used against Korea and its constitutional bodies.<sup>159</sup> The Supreme Court disagreed. In an 11-2 opinion, the Court held that the spirit of the law was to prevent any act defaming Korea. In this regard, the Court observed, the distribution of the leaflets at issue constituted the kind of activities proscribed by the law. The Court noted that the printed material was intended to defame the State.

Strongly dissenting from the majority opinion, however, Justice Il Kyu Lee took issue with the manner in which the majority of the Court had interpreted the law:

A Korean national, who has distributed allegedly prohibited materials to foreigners, cannot be punished under the law until the foreigners have used them against Korea within Korea, by damaging the security, interest, and prestige of Korea. Furthermore, even if the foreigners used the materials not in Korea but abroad, . . . the Korean [cannot be punished] for violating the law. This is because the allegedly criminal act of the Korean was not committed within Korea.<sup>160</sup>

Justice Hee Chang Lee, criticizing the "overextended interpretation" of the law by the majority of the Court, also dissented from the majority opinion. He observed that the defendant did not use foreign correspondents to defame the Korean Constitution and government, since the foreigners did not use the distributed material against Korea. Thus, according to Justice Lee, it would not constitute a crime under the law merely to pass the material to foreigners unless it is actually used against Korean governmental entities.<sup>161</sup> As the *Churl Kee Kim* case shows, it is now a criminal offense for Koreans to either criticize South Korea to a foreign correspondent or for Korean residents abroad to question the legitimacy of Korea as a sovereign state or Korea's constitutionally established bodies.

In a 1971 study on the libel laws of Japan and Korea, it was noted that libel litigation in Korea is generally a rare phenomenon.<sup>162</sup> This observation is still true. Indeed, over the past thirty years, only thirty libel and slander cases have been adjudicated.<sup>163</sup> Of those cases, one-third have, in varying degrees, involved the press.<sup>164</sup> In libel litigation, the Criminal Code has been invoked much more frequently than the Civil Code, at least until recently.<sup>165</sup>

<sup>159</sup> *Churl Kee Kim v. State*, Seoul Criminal District Court, Feb. 11, 1983, 82 Do 6161.

<sup>160</sup> *Churl Kee Kim*, BEOPYUL SHINMUN, June 27, 1983, at 6.

<sup>161</sup> *Id.*

<sup>162</sup> Mowlana & Chin, *supra* note 9, at 330.

<sup>163</sup> For a list of cases, see K. Youm, *Freedom of the Press in South Korea, 1945-1983: A Sociopolitical and Legal Perspective* 296-99 (Ph.D. dissertation, Southern Illinois University, 1985).

<sup>164</sup> *Id.*

<sup>165</sup> Won-Soon Paeng, professor of communication law at Hanyang University in Seoul, South Korea, explains:

First, the opinion has been prevalent in Korean society that a man who has injured another's reputation should be subjected to penal punishment as part of retributive justice. Second, it has not been our tradition in Korea that the infringement on the reputation of another person should be recompensed for in terms of monetary damages.

W. PAENG, MASS COMMUNICATION BEOPJE IRON [A THEORY OF MASS COMMUNICATION LAWS] 139 (1984).

The libel case of *Jong Yeol Lee v. State*<sup>166</sup> is noteworthy because the Supreme Court interpreted "specificity" as a libel element in a somewhat tortuous way when used in the context of group libel. This case arose from a magazine article which depicted the people of Cholla Province in a disparaging way. The author of the article, in giving "flesh and blood" to his article, referred to the plaintiff as being typical of the Cholla people. On the question of whether the article constituted group libel, the Court held that it could not because it lacked specificity concerning the identification of the target. Nevertheless, the Court stated that it was libelous of the person specifically mentioned in the publication.

In *Jeong Hoon Ko v. State*,<sup>167</sup> a 1962 libel case, the Supreme Court held that the evidentiary truth of a defamatory statement made by a defendant must be presented in order for the defendant to be exempt from liability. By requiring that the "truth" defense be supported by concrete evidence germane to the libel, the *Jeong Hoon Ko* case made the burden of proof enormously heavy. Incidentally, in connection with the proceedings of the case, newspapers which ran the allegedly defamatory statement were not prosecuted. This demonstrates that Korean courts put the primary liability of defamation on its originator, rather than on its disseminator.

The Supreme Court in *Woon Song v. State*<sup>168</sup> ruled on a case involving a news story which reported that police allegedly violated the civil rights of a suspected prostitute taken into custody. The article further stated that the policemen would be subject to some complaint from family members of the woman. Although the writer of the story had allegedly been aware of the fact that the woman was a prostitute, he wrote erroneously that she was highly reputed for her "womanly virtues." The policemen involved argued that the story was libelous because it damaged their professional reputation as law enforcement officers. The Seoul Court of Appeals agreed and sentenced the defendant to imprisonment for six months. The plaintiffs were not satisfied with the sentencing of the Seoul court. On appeal to the Supreme Court, the plaintiffs contended that the penalty handed down by the lower court was too lenient, considering the fact that it concerned a libelous act by a reporter. The Supreme Court, holding for the appellants, ruled that the status of the defendant as a reporter, coupled with 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-month jail term.<sup>169</sup>

In a 1969 civil libel case, the Seoul Civil District Court ruled that the defendant must publish a letter of apology for defamation, in addition to paying damages arising from his libelous publication.<sup>170</sup> In passing upon the liability of the defendant for publishing a defamatory advertisement in a newspaper, the court held that the damage payment was insufficient for the loss suffered by the defamed. The court stated that the best possible way for the defendant to recompense the plaintiff was by the publication

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<sup>166</sup> Supreme Court, Nov. 15, 1960, 4293 Hyungsang 244, BEOPYUL SHINMUN, Dec. 12, 1960, at 3-4.

<sup>167</sup> Supreme Court, May 17, 1962, 4294 Hyungsang 12, BEOPYUL SHINMUN, May 28, 1962, at 3.

<sup>168</sup> Supreme Court, Nov. 16, 1961, 4294 Hyungsang 451, BEOPYUL SHINMUN, Dec. 11, 1961, at 1.

<sup>169</sup> *Id.*

<sup>170</sup> See Hee Young Lee v. Ilshin Pharmaceutical Manufacturing Co., Seoul Civil District Court, June 20, 1969, 68 Ka 11886, BEOPYUL SHINMUN, Sept. 14, 1970, at 6; BEOPYUL SHINMUN, Sept. 21, 1970, at 6.

of an apology in an advertisement in the same newspaper which first carried the libelous statement.<sup>171</sup> This was the first time that the Civil Code provision for libel was utilized in a defamation case involving the press.

In recent years, Korean courts have tended to order libelous statements corrected or retracted rather than imposing penal servitude on libel defendants.<sup>172</sup> This is largely related to the application of the Basic Press Act.<sup>173</sup> A 1984 civil libel case, *Eui Hyang Lee v. Sang Kee Kim*,<sup>174</sup> is the seminal decision in the libel law of Korea because it indicates a new judicial approach, viewing press freedom in the context of its role in a political democracy. This case stemmed from a story published in *Dong-A Ilbo*. The plaintiff, who was operating an institution for mentally retarded children, allegedly made illegal personal profits from improper operation of the institution. It was further contended in the story that some inmates of the institution staged a sit-in to protest its mismanagement. The Seoul Civil District Court, i.e., the court of first instance in the case, found part of the publication true, but not completely accurate. The defendant newspaper was required to prove the truth of its allegations under a "substantial evidence" standard. When the newspaper failed to present the necessary evidence, the court ruled that it must publish a correction of the article as requested by the plaintiff.<sup>175</sup>

On appeal, the appellate panel of the Seoul District Court ruled that the correction should be revised so that it could better focus on the inaccurate portion of the story.<sup>176</sup> The court rejected the defense argument that the application for a correction of a published news story should be adjudicated on the basis of the statutory requirement of torts.<sup>177</sup>

Lee did not let his legal battle against *Dong-A Ilbo* end with the "correction of the report" ruling. He asserted that the article in question defamed him. For alleged injury to his reputation, he asked the defendant newspaper for one billion Won (U.S. \$125 million) in damages. In addition, he asked for the publication of a formal letter of apology.<sup>178</sup> Ruling for the defendant, the Seoul Civil District Court held:

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 as long 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

<sup>171</sup> BEOPYUL SHINMUN, Sept. 21, 1970, at 6.

<sup>172</sup> See, e.g., *Hyung Shin Lim v. Ku Ho Jeong*, Seoul District Court, Sept. 3, 1982, 82 Ka 18633, EONRON JUNGJE [PRESS ARBITRATION QUARTERLY] 137-39 (Autumn 1982); *Chai Ran Ahn v. Hyung Jin Ryu*, Seoul District Court, May 25, 1984, 84 Ka 1598, EONRON JUNGJE 171-73 (Winter 1984); *Eui Hyang Lee v. Sang Kee Kim*, Seoul District Court, Apr. 11, 1984, 82 Kahap 4734, EONRON JUNGJE 174-77 (Summer 1984).

<sup>173</sup> For a discussion of the Basic Press Act, see *supra* notes 38-52 and accompanying text.

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

<sup>175</sup> *Eui Hyang Lee v. Sang Kee Kim*, Seoul Civil District Court, Nov. 4, 1982, 82 Kahap 27454, EONRON JUNGJE 169-71 (Winter 1982).

<sup>176</sup> Seoul Civil District Court, Oct. 20, 1980, 82 Na 4188, EONRON JUNGJE 189-91 (Winter 1983).

<sup>177</sup> 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, art. 750.

<sup>178</sup> *Eui Hyang Lee*, 82 Kahap 4734, Apr. 11, 1984, EONRON JUNGJE 174-77 (Summer 1984).



requirement that to avoid liability for a wrong under the civil law, you should have reasonable grounds for your wrongful act.<sup>179</sup>

The court further noted that utmost care should be exercised not to restrict freedom of the press when the press is required to assume liability for an allegedly defamatory publication.<sup>180</sup>

Concerning the statutory crime of obscenity, Korean courts have taken various approaches in applying the Criminal Code. In *Kee Hong Han v. State*,<sup>181</sup> for example, the Supreme Court ruled that the viewing of pornographic films at a private home would not be an act of "open display" and so it was not against the law governing obscenity. With reference to the meaning of the phrase, "openly displays obscene . . . pictures," as provided for in the Criminal Code,<sup>182</sup> the Court held, "[t]o display obscene pictures openly means to expose those pictures to the situation where many and unspecified persons can watch them. Accordingly, it is not the case for a few and specified people to watch them."<sup>183</sup>

In dealing with the commercial use of nude pictures, the Supreme Court in 1970 focused on the fact that those involved in the manufacture or sale of such pictures must have "put them to commercial use" because they knew the obscene aspect of the pictures.<sup>184</sup> The Court further held that the standards of obscenity should be objective, not merely the subjective value judgments of those who deal in nude pictures.<sup>185</sup>

#### V. SUMMARY AND CONCLUSIONS

"For a visitor from another planet to try to understand our society from reading our constitutions and laws," one American scholar has observed, "would be almost as misleading as his attempting to do the same from monitoring our network television fare."<sup>186</sup> The sheer number of press-related laws, which have been in force in South Korea during the past four decades, therefore, may not present a totally accurate picture of press freedom in terms of actual practice in this Asian country. Indeed, numerous restrictive Korean press laws and regulations illustrate how press freedom, though constitutionally guaranteed, carries little practical meaning in authoritarian South Korea.

In comparison with direct press laws, numerous indirect statutes are even more restrictive of press freedom in Korea. That is, security laws, martial laws, emergency decrees, and penal laws are more frequently employed against the press. The National Security Act, which has superseded the much criticized Anti-Communist Act, and the anti-State defamation provision of the Criminal Code stand out as the most articulated threat to the Korean press freedom.

<sup>179</sup> *Id.* at 176-77 (emphasis added).

<sup>180</sup> *Id.* at 177.

<sup>181</sup> Supreme Court, Aug. 21, 1973, 73 Do 409, 21 DAEBEOP PANGYOL 2 (1973): 47-49.

<sup>182</sup> Law No. 239 (Sept. 18, 1953), art. 243, *amended* by Law No. 2745 (Mar. 25, 1976).

<sup>183</sup> See *In Wi Jeong v. State*, Supreme Court, Oct. 23, 1973, 73 Do 2178, 21 DAEBEOP PANGYOL 2 (1973): 25.

<sup>184</sup> See *Sang Churl Shin v. State*, Supreme Court, Oct. 30, 1970, 70 Do 1879, PANRAI WOLBO 79 (Jan. 1971).

<sup>185</sup> *Id.*

<sup>186</sup> Stevens, *Freedom of Expression: New Dimensions*, in *MASS MEDIA AND THE NATIONAL EXPERIENCE* 27 (R. Farrar & J. Stevens eds. 1971).

The Korean judiciary, which has traditionally failed to play an important role in balancing the highly centralized power structure in Korean society, has been far from forceful as a protector of civil liberties and political rights as understood in most open democratic societies.<sup>187</sup> In this regard, the judicial interpretation of press freedom in Korea demonstrates that the courts have often tried to respond to political pressure, rather than acting as a "vital or experimental body" in the protection of the sociopolitical rights of Koreans.<sup>188</sup> Despite a minority of cases in which the Korean courts have clearly understood the affirmative function of the press, the Korean judiciary tends to be overly timid in protecting the press from even overt repression by the government. This is particularly true in respect to the rulings of the Supreme Court, as exemplified by the *Kyunghyang Shinmun* case. In contrast, some district courts have looked at press freedom from a somewhat more "libertarian" perspective.<sup>189</sup>

In drawing the statutory parameters of press freedom, the Korean courts have failed to establish precedentially consistent reasoning in their rulings. This has confounded the problem of defining the extent to which the Korean press can expect to be statutorily protected by the courts in exercising its freedom. Nevertheless, three concluding observations can be made on how the Korean courts have applied press laws in Korea.

First, in interpreting libel laws, Korean courts have seldom considered the intentions of the defamers in making the libelous statements or publications. In connection with the statutory justification of defamation, the courts have focused on the question of whether the defamatory publications or statements were proven true by convincing evidence *and* whether they were made in the interest of the public. The courts have punished the originators of the allegedly defamatory remarks, not the disseminators of the defamation. This is contrary to the widely understood principle in adjudicating defamation litigation that "talebearers are as bad as talemakers."<sup>190</sup> Insofar as statutory and case law of media defamation is concerned, Korea does not distinguish between situations in which the defamed person is a public official/figure and those in which he is a private figure, an important distinction in U.S. libel law.<sup>191</sup>

<sup>187</sup> INTRODUCTION TO KOREAN LAW, *supra* note 16, at 67–68, reprinting Steinberg, *Law, Development, and Korean Society*, 13 KOREANA Q. 43–80 (Fall 1971).

<sup>188</sup> *Id.* at 68. For illuminating discussions of the current status of judicial independence in Korea, see Hwang, *Sabeopbu Dokrip Eun Minjueui Eui Kicho* [*The Independent Judiciary is the Foundation of Democracy*], SHIN DONG-A 304–09 (Feb. 1987); *Sabeopbu Wa Dokripseong* [*The Judiciary and Its Independence*], SHIN DONG-A 234–67 (Oct. 1985).

<sup>189</sup> Under the "libertarian" press theory, the press functions to inform, entertain, and sell. The main purpose of the press, however, is to uncover and present the truth. The press often serves as the 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 sedition, and the like. For a detailed discussion of the libertarian press theory, see Siebert, Peterson & Schramm, *supra* note 2, at 39–71.

<sup>190</sup> W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 799, n.23 (5th ed. 1984), citing *Cavalier v. Original Club Forest*, 59 So. 2d 489 (La. App. 1952).

<sup>191</sup> In the "federal" constitutionalization of libel law, the U.S. Supreme Court has set forth a distinction between public persons and private persons in the status of libel plaintiffs: A public person — "public figure" or "public official" — must prove constitutionally defined "actual malice," that is, that the defendant published false defamatory material with knowledge or reckless disregard of its falsity, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A "private" person, on the other

Second, in applying security-related laws to the Korean press, more often than not, the Korean courts have been notably circumspect, obviously aware of the prejudicial implications of their decisions upon press freedom. In such cases, the courts have focused on the concept of "publicly or openly" when dealing with acts banned by the laws and decrees.

Third, in invoking direct press laws, the Korean courts have generally ruled for the press. Particularly in minor violations of press laws, the courts have dismissed as unjustifiable the government's cancellation of the registration of the allegedly libelous publications. Consequently, direct press laws have not been as worrisome to the Korean press as such indirect laws, as *inter alia*, penal statutes and martial laws.

On the other hand, the recent "breathtaking" political developments in Korea since July, 1987 may bring about an overall positive change in the sorry status of press freedom in this Asian country.<sup>192</sup> The Korean government has taken a giant step toward a more open democracy in adopting the June 29, 1987, proposal of Roh Tae Woo, then chairman of the ruling Democratic Justice Party, for sweeping sociopolitical reforms.<sup>193</sup> The sudden turnabout in the vicious circle of political violence in Korea has already brought the Korean press "blinking into a world of relative freedom."<sup>194</sup> Undoubtedly, the "epochal democratic development" for "an advanced form of democracy" in Korea, which was enunciated by President Chun Doo Hwan on July 1, 1987,<sup>195</sup> cannot be realized without a fundamental revision of a number of repressive laws and regulations governing the press.<sup>196</sup> In connection with the need for revising the statutory framework of press

hand, need only show that the defendant was "at fault" in publishing the defamatory falsehood, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>192</sup> See McBeth, *Roh's Bold Stroke*, FAR EASTERN ECONOMIC REVIEW, July 9, 1987, at 8-11. *South Korea's "Miracle" Week*, NEWSWEEK, July 13, 1987, at 26.

<sup>193</sup> Among Roh's proposed reforms are the speedy amendment of the current Constitution allowing for direct presidential election and a peaceful transfer of power in February 1988, revision of the Presidential Election Law to guarantee freedom of candidacy and fair competition, maximum promotion and protection of basic rights including press freedom, and guarantees to allow the free and democratic growth of political parties. *Text of Roh's Statement on Proposed Reforms*, Korea Herald, June 30, 1987, at 3. [hereinafter *Roh's Statement*].

<sup>194</sup> Kristof, *New [sic] From South Korea: Printing All of the News*, N.Y. Times, July 26, 1987, at A11. See also Burgess, *S. Korean Media's Brave News World*, Wash. Post, July 6, 1987, at A18; Chira, *Korea's Press Awaits the Promised Freedom*, N.Y. Times, July 1, 1987, at A6; Hiatt, *Clamor for Liberties Grows in Korea*, Wash. Post, July 18, 1987, at A19; Sneider, *South Korea Press Spreads Its Wings*, Christian Science Monitor, July 1, 1987, at 9.

<sup>195</sup> *Excerpts From Speech by South Korea President*, N.Y. Times, July 1, 1987, at 6 [hereinafter *President's Speech*].

<sup>196</sup> The Korean government is currently in the process of revising the Basic Press Act in the context of Roh Tae Woo's June 29, 1987, statement on proposed political reforms. In his statement, Roh, then chairman of the ruling Democratic Justice Party, declared:

[F]or the promotion of the freedom of the press, relevant systems and practices must be drastically changed.

However good its intention may be, the Basic Press Law, which has been the target of criticism by most journalists, needs drastic revision or repeal as early as possible. This could be replaced by another.

The autonomy of the press must be guaranteed through the permission (of Seoul's newspaper and broadcasting companies) to assign their reporters to local areas and by revoking the system of issuing press cards.

freedom in the "new era of democratic development and mature politics,"<sup>197</sup> it is equally important that the separation of powers theory should be put into more general practice in Korean politics. Given that press freedom in Korea has been more often threatened by the heavy-handed extra-legal governmental agencies than anything else,<sup>198</sup> the *functioning* system of checks and balances in Korean politics can serve as one of the institutionalized mechanisms to which the press may turn for protection when it is in danger of being suppressed by the authorities.

In summary, the recent sociopolitical changes in Korea may be an auspicious sign that the Korean press, which has been for so long subject to various types of suppression, may gain more freedom. These positive developments should lead, for example, to concomitant changes in the judicial status of press freedom in Korea by forcing the revision of a number of restrictive direct and indirect press statutes, in accordance with the dominant theme of the proposed political advances in Korea. As Roh noted, "People are the masters of the country, and the people's will must come before everything else."<sup>199</sup>

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The government cannot and must not attempt to control the press. The press must not be restricted unless it threatens national security. Let's be reminded that an independent judiciary and the people only judge the press.

*Roh's Statement, supra* note 193, at 3. On July 30, 1987, a "senior" official at the Korean Ministry of Culture and Information reportedly said the Basic Press Law will be replaced by two separate statutes governing newspapers, news agencies and broadcasting services, adding, "[t]he drafting of bills is likely to be completed next week after consultations with the ruling Democratic Justice Party and they will be tabled at a National Assembly session expected in August." *Establishment of Mass Media by Biz Groups to Be Discouraged*, Korea Times, July 31, 1987, at 2. *See also 2 New Laws to Replace Basic Press Law This Month: Minister Lee*, Korea Herald, July 15, 1987, at 1.

<sup>197</sup> *President's Speech, supra* note 195, at 6.

<sup>198</sup> For up-to-date accounts of various instances of extra-legal repression of Korean press, see COMMITTEE TO PROTECT JOURNALISTS UPDATE, INDEX ON CENSORSHIP, and INTERNATIONAL PRESS INSTITUTE REPORT, among others.

<sup>199</sup> *Roh's Statement, supra* note 193, at 3.