

# TO POST OR NOT TO POST: KOREAN CRIMINAL SANCTIONS FOR ONLINE EXPRESSION

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## I. INTRODUCTION

The Republic of Korea (also known as South Korea, but referred to herein simply as Korea) is by all outward appearances a modern democratic society with a stable civil law tradition imported from Europe, via Japan.<sup>1</sup> However, Korea's

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democracy was forged in the crucible of military junta rule.<sup>2</sup> In the approximately twenty years since Korea transitioned to government based upon democratic and procedurally fair elections, it has significantly revised its system of government, and judicial reform has gained momentum. Current initiatives include the introduction of jury trials for defendants accused of certain criminal offenses<sup>3</sup> and a major reform of legal education and training.<sup>4</sup> Also noteworthy are changes in substantive law, which touch upon various aspects of Korean society.<sup>5</sup> Litigation challenging the constitutionality of Korean laws has increased, and the Korean

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1. Japan occupied Korea from approximately 1910 to 1945, during which time it introduced near-facsimiles of codified Japanese laws to Korea. See MICHAEL J. SETH, *A CONCISE HISTORY OF MODERN KOREA: FROM THE LATE NINETEENTH CENTURY TO THE PRESENT* 43 (2010) (describing Japanese colonial rule of Korea). The Japanese codes, in turn, were based on the civil law codes of continental European nations, especially Germany and France. Tom Ginsburg, *Introduction: The Politics of Legal Reform in Korea*, in *LEGAL REFORM IN KOREA 2* (Tom Ginsburg, ed. 2004). After the Japanese occupation ended, Korea largely retained the legal system that Japan had introduced, in part because of the benefits of administrative stability in the tumultuous years (including, by 1961, the Korean War and a military *coup d'état*) following Korean liberation. *Id.* at 2-3.

2. *Id.* at 3.

3. Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. REV. 177, 183-84 (2009); *South Korea: First Trial by Jury*, N.Y. TIMES, Feb. 13, 2008, <http://www.nytimes.com/2008/02/13/world/asia/13briefs-JURY.html>.

4. Korea is now in the process of introducing a graduate-level law school system and will abolish its post-bar exam judicial research and training institute. Beophakjeonmundaeahagwon Seolchi Unnyeong-e Gwanhan Beomnyul [Act on the Establishment and Operation of Law School] Law No. 8544 of 2007, amended by Law No. 8852 of 2008 (S. Korea), translated at <http://www.moleg.go.kr/english/korLawEng.jsessionid=ofAAKgx0PrNOJRBWwh8hfYaoDcP2jZNVcxaFJ6WrAPaaLMarmT1oz7VMxnSRQ0C?pstSeq=52252&pageIndex=34>; see also Jasper Kim, *Socrates v. Confucius: An Analysis of South Korea's Implementation of the American Law School Model*, 10 ASIAN-PAC. L. & POL'Y J. 322, 323-24 (2009) (stating that the Graduate Law School Implementation Act "introduced a new legal educational system from its traditional four-year undergraduate bachelor's in letters-in-law ("LLB") system to the U.S.-style three-year graduate law school program . . . . The new South Korean graduate law schools are substantially distinguishable from the former system . . . .").

5. When Korean democratization began in earnest in 1987, early legal reforms included the introduction of an anti-monopoly law, newfound freedoms of the press, criminal procedure reform, and vast administrative law reforms. See Chang-Hee Lee, *Democratization & Globalization of the Legal System*, 31, 76-84, in *KOREAN LAW & GLOBALIZATION* (Sung Nak In & Kim Jae Hyung, eds.) (2006); Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 6 (1994) ("In 1987, a year of epoch-making political changes for Koreans, the Constitution was amended to bring a pluralistic democracy to Korea. The new Constitution . . . explicitly prohibited the licensing and censorship of the press, and guaranteed freedom of expression."); see also Amy Choe, Note, *Korea's Road Toward Respecting Intellectual Property Rights*, 25 RUTGERS COMPUTER & TECH. L.J. 341, 363 (1999) ("Prior to his election [in 1987], President Roh announced a program of reforms including direct presidential elections, the restoration of civil rights for political prisoners, freedom of the press, local autonomy, and, in general, 'bold social reform.' A new constitution, encompassing these ideas, was adopted [in Korea in 1987]. The constitution enjoins the military from engaging in political activity [and] provides new safeguards against official abuse of civil and human rights . . . . This constitution is the most liberal in Korea's history.").

courts have been called upon to examine and resolve a wide spectrum of social conflicts.<sup>6</sup>

Underlying many of these debates is an effort to balance traditional social norms with the liberties and individual prerogatives of a democratic society, and this challenge has become particularly significant in the context of internet-based expression. Korea has been frequently cited throughout the past decade as a nation with one of the highest rates of internet access.<sup>7</sup> It is not surprising, then, that Korea as a society has experienced both the social benefits and detriments of online expression in unusually large measure. On the one hand, Korean social and political activism through online networking has produced remarkable examples of participatory democracy.<sup>8</sup> On the other, the Korean government has argued that

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6. The expanding role of judicial review by the Korean Constitutional Court (the “Constitutional Court”) can be seen in the growing number of cases heard and laws overturned. In 1999, for instance, 924 cases were heard, and 20 laws were ruled unconstitutional. CONSTITUTIONAL COURT OF KOREA, <http://english.ccourt.go.kr/> (follow “Decisions” hyperlink; then follow “Statistics” hyperlink; then follow “Case Statistics of the Constitutional Court of Korea” hyperlink). In 2009, by comparison, 1,487 cases were heard, and 49 laws were overturned as unconstitutional. *Id.* A couple noteworthy examples illustrate the Constitutional Court’s impact on social and political affairs. The Constitutional Court, reluctant in the past to review laws involving traditional morals and values, ruled in 2009 that the portion of Article 304 of the Korean Criminal Code, which makes it a crime to induce into sexual relations “a female who is not habitually engaged in sexual intercourse under pretence of marriage or through other fraudulent means[,]” was unconstitutional. Sexual Intercourse under Pretence of Marriage Case, 2008 Hun-Ba 58, 2009 Hun-Ba 191 (Nov. 26, 2009) (consolidated), *available at* <http://english.ccourt.go.kr/> (follow “Decisions” hyperlink; then follow “Recent Decisions” hyperlink; then follow “Sexual Intercourse under Pretence of Marriage Case” hyperlink). In a very different area of law, the Constitutional Court has several times examined the constitutionality of a proposal to move the capital of Korea from the city of Seoul to a not-yet-developed proposed site, Yeonki-Gongju. Relocation of the Capital City Case, 16-2(B) KCCR 1, 2004 Hun-Ma 554, 566 (Nov. 26, 2009) (consolidated), *available at* <http://english.ccourt.go.kr/> (follow “Decisions” hyperlink; then follow “Search” hyperlink; then search “20041021” in both “Decision Date” fields; then follow “Relocation of the Capital City Case” hyperlink). After several legislative acts and rounds of review by the Constitutional Court, the Korean National Assembly is slowly progressing on its current plan to relocate certain government functions to a planned urban development, Sejong City; a recent decision was made to move the prime minister’s office to the new city by May 2012. Park Yeon Mi, *Sejongsi yijeon noon ape, 2012 nyun 12 kae kikwan 4139 myeong omkinda* [Relocation to Sejong City Nearing, 4139 Personnel from 12 Departments by 2012], December 17, 2010, ASIA KYEONGJAE [ASIA ECONOMY], <http://www.asiae.co.kr/news/view.htm?idxno=2010121707243872369>.

7. Some studies have found Korea to have the world’s highest internet access rate. See S. Korea Tops OECD in Internet Penetration, KOREA TIMES, June 17, 2008, [http://www.koreatimes.co.kr/www/news/biz/2008/06/123\\_26007.html](http://www.koreatimes.co.kr/www/news/biz/2008/06/123_26007.html); OpenNet Initiative, *Internet Filtering in South Korea in 2006-2007* at 2, *available at* <http://opennet.net/research/profiles/south-korea> (May 10, 2007); Rob Frieden, *Lessons from Broadband Development in Canada, Japan, Korea and the United States*, 29 TELECOMM. POL’Y 595, 597 (2005). Internet connection speeds are also relatively fast in Korea. John D. Sutter, *Why Internet connections are fastest in South Korea*, CNN (March 31, 2010), [http://articles.cnn.com/2010-03-31/tech/broadband.south.korea\\_1\\_broadband-plan-south-korea-broadband-internet?\\_s=PM:TECH](http://articles.cnn.com/2010-03-31/tech/broadband.south.korea_1_broadband-plan-south-korea-broadband-internet?_s=PM:TECH).

8. One example is the role of internet activism in the unexpected victory of Roh Moo-hyun

Korean society has a serious problem with defamation, contempt, and other offensive statements made online.<sup>9</sup> Government officials have also attributed social unrest to false information disseminated through online channels.<sup>10</sup> Korea has struggled to balance both the positive and negative consequences of widespread internet use; the result has been a legal environment that frequently criminalizes online expression and utilizes novel tools for enforcing the law against internet users.

This article focuses on Korea's use of criminal law to punish internet-based expression, especially defamation and contempt law. Enforcement is strengthened through internet-management measures that reveal the identities of users. In Korea, debate over punishing expression is made more dramatic and divisive by the perceived conflict between honoring traditional notions of reputation and rejecting any vestiges of authoritarianism in favor of democratic freedoms.

This article will first examine the social and legal background for laws criminalizing expression in Korea. It will briefly describe the origin of such laws shortly after World War II and their continuing use in Korea's post-democratization era. This history of suppression has placed a special and socially urgent value on political speech in Korean society, yet criminal expression laws have remained in force to the present day. I will further demonstrate how certain recent events in Korean society have helped create the political motivation and societal will necessary to strengthen the enforcement of laws related to internet-based expression.

The article will then elaborate upon two major notions in modern Korean criminal law: "Cyber Defamation" and "Cyber Contempt."<sup>11</sup> Of special note is the

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in the 2002 Korean presidential election. See DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* 110-135 (2006); see also John Leitner, *A Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation*, 22 COLUM. J. ASIAN L. 1, 45-49 (2008) (discussing the relationship between online freedoms and the growth of democracy in Korea).

9. According to the Korea Communications Commission, an executive agency of the Korean central government, 14% to 16% of posts and comments on Korea-based internet portals are legally objectionable. BANGSONGTONGSINWIWONHOE, JAEHANJEOK BONIN WAKINJAW HYOGWABUNSEOEKUL WIHAN JOSA BOGOSEO [KOREA COMMUNICATIONS COMMISSION, ANALYSIS OF THE EFFECT OF LIMITED REAL NAME VERIFICATION] 1-2 (2007) (S. Korea); John Leitner, *Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals*, 9 J. KOR. L. 83, 98 (2009) (citing Yong-Suk Hwang, *Internet kesipan silmyeongjee daehan bipanjeok yeongu* [Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet], 15 EONRONKWA SAHWE [PRESS & SOC'Y] 97, 129 (2007)).

10. Michael Fitzpatrick, *South Korean government looks to rein in the Net*, N.Y. TIMES, Sept. 5, 2008, <http://www.nytimes.com/2008/09/05/business/worldbusiness/05iht-sknet.html> (quoting current President Lee Myung-Bak as stating that online rumors have been "prompting social unrest that spreads like an epidemic" within Korea).

11. For the purposes of this article, "Cyber Defamation" refers to a statement posted in public view on the internet that makes a factual assertion about another person and harms her reputation. "Cyber Contempt" refers to a statement posted in public view on the internet that insults another person, without alleging a particular fact or set of facts.

currently proposed “Cyber Contempt Law,”<sup>12</sup> which would increase penalties for Cyber Contempt and grant prosecutors the power to initiate criminal cases without a formal complaint from the alleged victim. The article next explains Korea’s new system for requiring operators of certain popular websites and government-operated sites to verify the identities of individuals who contribute content using the sites (known as the “Real Name Verification System”).<sup>13</sup> The Real Name Verification System is the only nationwide system for verifying internet user identities in the world.

To enrich the analysis, I compare the legal regime in Korea to internet-related laws in the United States and China. While the United States has also become more aggressive in some areas of “cyber law,” its regulations provide a useful baseline as a relatively permissive approach to online expression, with narrow and defined applicable criminal laws.<sup>14</sup> China falls near the other end of the spectrum of expressive restriction. *Ex ante* internet censorship is far more pervasive in China than in Korea, but I explore certain similarities between the two nations in the use of criminal punishment and in the powers granted to prosecutors. I further evaluate the development of methods for tracking individual identity in the online space in both countries and note Korea’s more aggressive and advanced implementation of online identity verification.

By probing Korea’s challenge to balance competing social values, I offer several proposals for reform. In particular, I recommend: (1) a focus on civil remedies for Cyber Defamation and Cyber Contempt; (2) narrow and precise language for any criminal law regarding expression (including Cyber Defamation, Cyber Contempt, and other laws limiting the expression of views and opinions); and (3) significant reform to the Real Name Verification System. While these issues pertain most directly to Korea, regulation of online expression is a growing concern in many nations. As such, Korea provides a particularly interesting case

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12. Two similar kinds of Cyber Contempt proposals have been introduced in the National Assembly, with slightly different statutory structures: (1) Partial Amendment of Criminal Law, Bill No. 1637 (proposed Oct. 30, 2008); (2) Two proposals to define Cyber Contempt in the Information and Communications Act: Partial Amendment for the Act on Promotion of Information and Communications Network Utilization and Information Protection, Bill No. 1683 (proposed Nov. 3, 2008); Partial Amendment for the Act on Promotion of Information and Communications Network Utilization and Information Protection, Bill No. 3197 (proposed Dec. 24, 2008). Seon-Jung Kim, ‘*Cyber moyokzueui*’ *doibnonran* [Introduction of Cyber Contempt Law Becomes a Controversy], YTN, Oct. 3, 2008, [http://www.ytn.co.kr/\\_ln/0101\\_200810031757416822](http://www.ytn.co.kr/_ln/0101_200810031757416822); Sang-Eon Lee, *Cyber Terror Sleuths Planning Internet Crackdown*, KOREA JOONGANG DAILY, Oct. 6, 2008, <http://joongangdaily.joins.com/article/view.asp?aid=2895724>; see generally Open Net Initiative, *Country Profile South Korea*, available at [http://www.access-controlled.net/wp-content/PDFs/part2/028\\_South%20Korea.pdf](http://www.access-controlled.net/wp-content/PDFs/part2/028_South%20Korea.pdf) (discussing proposed changes to criminal cyber defamation laws).

13. At the time this article went to press, a Korean Constitutional Court decision on the constitutionality of the Real Name Verification System was pending. 2010 Hun-Ma47.

14. As discussed *infra*, some American criminal laws related to expression are written with specificity and a narrow scope, while others have been read narrowly and limited by the courts.

study because both cultural conditions and the role of the internet in social life have made regulation of online expression a high public policy priority. This analysis may help other nations gain perspective on similar conflicts within their own societies as internet use and misuse continues to increase worldwide.

## II. SOCIO-LEGAL BACKGROUND FOR LAWS TARGETING EXPRESSION

In the years following Korean independence from Japanese rule in 1945, the United States military helped to establish a new government under Rhee Syngman, who served as president of Korea from 1948 until 1960.<sup>15</sup> Early in the Rhee administration, laws restricting certain kinds of expression were promulgated, most notably the National Security Law in 1948.<sup>16</sup> The National Security Law's stated objective is to "restrict anti-state acts that endanger national security and to protect [the] nation's safety and its people's life and freedom."<sup>17</sup> It contains provisions that, among other things, criminalize organizing or joining an anti-state group,<sup>18</sup> praising or encouraging an anti-state group,<sup>19</sup> and corresponding or otherwise communicating with an anti-state group.<sup>20</sup>

The National Security Law was immediately used as a tool for silencing dissent. Within one year of implementation, 188,621 people were jailed and 132 political parties and social organizations were dissolved.<sup>21</sup> The National Security Law was also used by President Rhee's administration to eliminate left-leaning

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15. See generally Seth, *supra* note 1, at 89-94 (describing U.S. occupation and trusteeship of the Republic of Korea); DAVID I. STEINBERG, *THE REPUBLIC OF KOREA: ECONOMIC TRANSFORMATION AND SOCIAL CHANGE* 50-54 (1989) (describing Rhee's tenure as president of the Republic of Korea).

16. Seth, *supra* note 1, at 97. The National Security Law was effectively the successor to a law imposed during the Japanese occupation and was introduced following the Yeosun riot, where numerous civilians died. *Id.*

17. Gukgaboanbeop [National Security Act] Law No. 10 of 1948; amended by Law No. 5454 of 1997, art. 1 (S. Korea).

18. *Id.* art. 3.

19. *Id.* art. 7.

20. *Id.* art. 8.

21. Kuk Cho, HANGUK GEUNHYEONDAESAHOE SASANGTONGJEBEOB [LAW LIMITING OPINIONS DURING KOREA'S RECENT HISTORY], Yeoksabipyong 332 (1998). Diane Kraft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 WIS. INT'L L.J. 627, 631 (2006). One scholar explained how the National Security Law limited political discourse:

[The National Security Law (NSL)] caus[ed] the activities of the moderate left and right, as well as the far left, to lose political ground in South Korea. Anti-communism, or anti-North, ideology became a sacred and inviolable principle. Any reunification policy, except for the Rhee government's official policy of reunification by force, was strictly prohibited. The NSL targeted advocates for peaceful reunification by negotiation as pro-North sympathizers who echoed the North's propaganda. The execution of Cho Bong-Ahm, social democrat presidential candidate, and the disbanding of his Progressive Party in 1958, evinced the fanatical anti-communist and anti-North ideology prevalent in South Korea.

Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?*, 15 B.U. INT'L L.J. 125, 132 (1997).

newspapers and indict their operators and employees<sup>22</sup> in the name of national security.<sup>23</sup> During Rhee's presidency, political dissent was in some cases violently suppressed, as when opposing party leader Cho Bong Am was accused of being a spy and executed.<sup>24</sup> Rhee lost power in 1960, and in 1961 General Park Chung-hee installed a junta government. He ruled Korea until his death twenty years later.<sup>25</sup>

Under Park's regime, the executive branch increasingly dominated the government and manipulated the judiciary to achieve political ends, including the elimination of political expression against the incumbent junta.<sup>26</sup> The "Inhyeokdang" cases help to illustrate the expansion of executive power applied against political dissidents and the dangerous conditions under which the pro-democracy movement struggled. In 1964, members of the People's Revolution Party (abbreviated in Korean as "Inhyeokdang"), most of them pro-democracy student activists, were accused of violating the National Security Law by coordinating their efforts with the North Korean government.<sup>27</sup> However, the prosecutor refused to cooperate with the Korean Central Intelligence Agency,

22. The media was also targeted under several other laws, such as the Newspaper Law and the U.S. Interim Government Act No. 88. See Won-Sun Park, GUKGABOANBEOP YEONGU (2) [STUDY OF NATIONAL SECURITY LAW (2)], Yeoksabipyongsang 102 (1992); see also *A Movement for Press Freedom Then and Press Reform Now: The 37-year history of the Journalists Association of Korea: 1964-2001*, JOURNALISTS ASS'N OF KOREA, [http://ifjseoul.journalist.or.kr/english/presshistory\\_2.html](http://ifjseoul.journalist.or.kr/english/presshistory_2.html) (last visited Feb. 23, 2011) (stating that in 1964, "the Park Chung-hee military regime created the press ethics committee law, under which the government could suspend the publication of newspapers at will"); Yong-Pyo Hong, STATE SECURITY AND REGIME SECURITY: PRESIDENT SYNGMAN RHEE AND THE INSECURITY DILEMMA IN SOUTH KOREA: 1953-60 132 (2000) (describing U.S. Military Ordinance 88, designed "to protect the 'security of [Korea] and safeguard the legitimate right of the free press'" and "legislated in order to block Communist propaganda in 1946").

23. HONG, *supra* note 22, at 132.

24. Jung-Seok Seo, CHOBONGAMKUA 1950 NYUNDAE (SANG): CHOBONGAMUI SAHUEMINZUZUIWA PYEONGHWATONGILRON [CHO BONG-AM AND THE 1950S: CHO BONG-AM'S THEORY OF SOCIAL DEMOCRACY AND PEACEFUL REUNIFICATION], Yeoksabipyongsang 215 (1999); Park, *supra* note 222, at 362; Si-Soo Park, *Cho Bong-am, Case Reopened After 51 Years*, KOREA TIMES, November 19, 2010, [http://www.koreatimes.co.kr/www/news/nation/2010/11/113\\_76660.html](http://www.koreatimes.co.kr/www/news/nation/2010/11/113_76660.html).

25. General Park was assassinated by his security director in 1979. Ilpyong J. Kim, *Introduction*, in TWO KOREAS IN TRANSITION: IMPLICATIONS FOR U.S. POLICY 1, 9-10 (Ilpyong J. Kim ed., 1998).

26. See STEINBERG, *supra* note 155 (explaining how Park restructured the executive branch of the government so he could exercise centralized control over economic policies and how he controlled the judicial and legislative branch by suspending elections). The National Security Law was frequently applied even in cases that seemingly posed little danger to the government. Some have called the law the "Makgoelli kukkaboaneob" (named after a traditional Korean alcoholic beverage) because of numerous applications of the law against drunken men singing a song about North Korean leader Kim Il Sung (67go10291). Park, *supra* note 222, at 100-12.

27. In-Sup Han, JUNGUIBIEOP YANGSHIMUIBIEOP INKWONUIBIEOP [LAW OF JUSTICE, LAW OF CONSCIENCE, LAW OF HUMAN RIGHTS], Bakyongsang 140-41 (2004); Gavan McCormack, *Court Clears Victims Executed for Treason in 1975*, THE ASIAN-PACIFIC JOURNAL: JAPAN FOCUS, Jan. 29, 2007, <http://www.japanfocus.org/-Gavan-McCormack/2339>.

which made the original allegations, and ultimately the defendants were convicted of only minor crimes.<sup>28</sup>

A decade later, executive control over the judiciary had increased significantly. An organization called the Democratic Youth Student Union was accused of being related to the Inhyeokdang, and in 1974,<sup>29</sup> 23 members were arrested for violating the National Security Law.<sup>30</sup> Fifteen of the defendants were pronounced guilty and sentenced to prison terms ranging from fifteen years to life; eight were sentenced to death. The sentences were confirmed by the Korean Supreme Court<sup>31</sup> and the executions were carried out the next day.<sup>32</sup> A symbolic retrial<sup>33</sup> of the defendants was held in 2005 and they were all found not guilty.<sup>34</sup>

After President Park's assassination in 1980, the temporary power vacuum was filled by another general, Chun Doo-Hwan. Under Chun, the Korean government continued to suppress political and social expression,<sup>35</sup> even

28. Han, *supra* note 27, at 140-41.

29. That same year, President Park instituted Emergency Decree No. 1, which criminalized expression that criticized the Yushin Constitution. Mi-Ju Kim, *Park Chung Hee's Decree No. 1 was Unconstitutional*, KOREA JOONGANG DAILY, Dec. 17, 2010, <http://joongangdaily.joins.com/article/view.asp?aid=2929800>. The Decree banned "opposing, distorting, and criticizing the Korean Constitution," as well as any attempts to spread critical opinions on abolishing or revising the Constitution. *Id.* If caught violating this law, a person could face up to fifteen years in jail and the loss of an occupational license for fifteen years. *Id.* The Emergency Decrees were issued by President Park under broad executive authority established in the Yushin Constitution. 1972 DAEHAN MINKUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 53 (Dec. 27, 1972) (S. Kor.), available at <http://contents.archives.go.kr/next/content/listSubjectDescription.do?id=001478&pageFlag=>.

30. McCormack, *supra* note 27.

31. Korea's Supreme Court was the court of last resort during the Park regime, but Korea has subsequently created the Constitutional Court to render final decisions on constitutional law, with the Supreme Court serving as the court of final appeal in other cases. *The Judiciary: Introduction*, SUPREME COURT OF KOREA, <http://eng.scourt.go.kr/eng/judiciary/introduction.jsp> (last visited Feb. 6, 2011).

32. Han, *supra* note 27, at 141 (2004); Park, *supra* note 22, at 579; see also Bruce Cumings, *Families of Eight Wrongfully Executed South Korean Political Prisoners Awarded Record Compensation*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS, Oct. 1, 2007, <http://www.japanfocus.org/-Bruce-Cumings/2534>.

33. As all the original defendants had either died or been previously released, the significance of the retrial was to provide an official public declaration that the defendants were not criminals and had been falsely accused and punished. Cumings, *supra* note 32; see also Myo-Ja Ser, *District Court Reopens Cases of 8 Executed for Treasons*, KOREA JOONGANG DAILY, Dec. 28, 2005, <http://joongangdaily.joins.com/article/view.asp?aid=2663492> (stating that Seoul Central District Court ordered a new trial on the treason charges against eight convicted criminals executed in 1975).

34. Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 PAC. RIM. L. & POL'Y J. 579, 594 (2007), available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/582/16PacRimLPolyJ579.pdf?sequence=1>; *Payouts Set on Korean Executions*, THESTANDARD.COM (Aug. 22, 2007), [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=6&art\\_id=51770&sid=150036770&con\\_type=1&d\\_str=20070822&fc=4](http://www.thestandard.com.hk/news_detail.asp?we_cat=6&art_id=51770&sid=150036770&con_type=1&d_str=20070822&fc=4).

35. After General Chun came to power, he deployed police and military units around the

strengthening the language of the National Security Law.<sup>36</sup> However, during the 1980s, the pro-democracy movement gained significant momentum,<sup>37</sup> and in the face of growing internal and external pressure,<sup>38</sup> the Korean government introduced a series of reforms, including a presidential election in 1987. A Chun ally, Roh Tae-Woo, won the election.<sup>39</sup> In 1992, an open election awarded the presidency to a democratic leader, Kim Young-Sam, and the transition to fair elections and representative government appeared complete.<sup>40</sup>

Since democratization, the National Security Law has been amended but remains in force<sup>41</sup> despite efforts to repeal it.<sup>42</sup> It has been applied in various cases regarding expression about North Korea<sup>43</sup> or the Korean War.<sup>44</sup> Several new

country to suppress democratic demonstrations. George Katsiaficas, *1980: The Kwangju Uprising*, LIBCOM.ORG (Sept. 19, 2006), <http://libcom.org/history/1980-the-kwangju-uprising>. The most infamous episode took place in the city of Gwangju, where an unknown number of civilians rallying for democracy (perhaps 200 or more) were killed by soldiers. See Hae-In Shin, *Korea Marks 1980 Gwangju Uprising*, THE KOREA HERALD, May 18, 2010, <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20100518000650> (explaining details of the uprising and its suppression). Subsequent discussion of the events at Gwangju was punishable on the grounds that such people were spreading false rumors. Hyo-Jin Oh, *Kwangju, That Changed My Destiny*, in THE KWANGJU UPRISING: EYEWITNESS PRESS ACCOUNTS OF KOREA'S TIANANMEN 199 (Henry Scott-Stokes & Lee Jai Eui eds., 2000).

36. Gukgaboanbeop [National Security Act], Act No. 3318, Dec. 31, 1980 (S. Korea).

37. One key moment was the death, under police torture, of Seoul National University student Park Jong-cheol January of 1987. Clyde Haberman, *Seoul Student's Torture Death Changes Political Landscape*, N.Y. TIMES, Jan. 31, 1987, <http://www.nytimes.com/1987/01/31/world/seoul-student-s-torture-death-changes-political-landscape.html>. Pressure from demonstrators crowding the streets of Seoul, many of them middle-aged office workers, mounted as details of the drowning/asphyxiation became known to the public, and erupted upon further revelations in June. Editorial, *Police Torture: Time to Respect Human Rights of Suspects*, THE KOREA TIMES, June 17, 2010, [http://www.koreatimes.co.kr/www/news/opinion/2011/01/202\\_67809.html](http://www.koreatimes.co.kr/www/news/opinion/2011/01/202_67809.html).

38. Seoul hosted the 1988 Summer Olympics, and political liberalization measures may in part have been undertaken to avert political demonstrations and other episodes embarrassing to the government on the Olympic world stage. See Moo-Jong Park, *Seoul Olympics Gave Powerful Impetus to Great Changes in South Korea*, THE KOREA TIMES, July 14, 2010, [http://www.koreatimes.co.kr/www/news/biz/2010/09/291\\_69415.html](http://www.koreatimes.co.kr/www/news/biz/2010/09/291_69415.html).

39. Three progressive "democratization" candidates effectively split the pro-reform vote, facilitating Roh's victory. Bret L. Billet, *South Korea at the Crossroads: An Evolving Democracy or Authoritarianism Revisited?*, 30 *Asian Survey* 300, 302-03 (1990).

40. Hong-Yung Lee, *South Korea in 1992: A Turning Point in Democratization*, 33 *ASIAN SURVEY* 32, 32-33 (1993).

41. Certain provisions have been repealed, narrowing the scope and severity of the National Security Law to some extent. Gukgaboanbeop [National Security Act], Act No. 4373, May 31, 1991 (S. Korea); see Cho, *supra* note 21, at 136 ("The Roh Tae-Woo government partly amended the NSL in a slightly moderate form in 1991 in order to appease the NSL's critics and smooth over diplomatic relations with socialist countries.").

42. Yeon-Gun Jeong, *'Boanbeob paeji' junkeok jaekihan roh daetongryeong, uei?* [*President Roh Repealing National Security Law, Why?*], NAVER NEWS, Sept. 6, 2004, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=086&aid=0000005205>.

43. Suk-Chul Roh, *Inteonet bangsong gwangyeja boanbeobwiban hyeomui cheot yeongjang*

measures have been implemented to both strengthen the substantive law limiting expression and to bolster enforcement of those laws.<sup>45</sup> To contextualize Korean debate surrounding criminalization of expression, certain fundamental issues should be noted. One is the conflict between preserving laws that accord with cultural and historical tradition<sup>46</sup> and the “westernizing” trend that has resulted from the introduction of democracy. Importing democracy transplanted a framework for increasing individual liberties and independence of action within the society. This framework contemplates accountability through *ex post* (and often party-driven) dispute resolution, rather than bureaucratic management and control of the society. However, such mechanisms may be relatively ineffective at preventing initial infliction of reputational harms or at least some measure of social disturbance, which may directly conflict with the traditional Korean value system.

On a more immediate level, Korea’s bitter experiences with authoritarianism and the brutal suppression of free expression under the junta have sharpened the value and urgency of possessing and exercising personal freedoms, especially the freedom of expression.<sup>47</sup> But in constant tension with such freedoms is the reality of Korea’s perpetual state of war with its sole territorial neighbor, North Korea. The Korean War (active from 1950 to 1953) effectively terminated with a cease-fire agreement, but Korea and North Korea have never entered into a peace treaty to formally end the hostilities.<sup>48</sup> Since 1953, the nations have been divided by a

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[*First Warrant for Suspect for Violation of the National Security Law for Internet Broadcasting*], KUKMIN ILBO, Oct. 26, 2000, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=005&aid=0000028272>. During the presidency of Kim Dae Jung (1997-2002), himself a leading figure in the pro-democracy movement against the junta, three people responsible for Chung Chun internet broadcasting were arrested by the Seoul District Police for violation of articles 5 and 7 of the National Security Law. *See id.* (discussing the arrests).

44. A sociology professor was prosecuted for his comments that America was to blame for joining the Korean War and preventing North Korea from uniting the peninsula under a single communist regime. Eun-Jung Jung, *Gukbobeop wiban gangjeonggugyosu jingyeok 2 nyeontwichibyu 3 nyeon seongo* [*Violation of National Security Law by Professor Kang Jungku, Sentenced to 2 years of Imprisonment and 3 years of Probation*], HERALD KYUNGJAE, May 26, 2006, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=016&aid=0000209879>.

45. Such measures, including the Cyber Defamation Law, the law creating the Real Name Verification System, and the proposed Cyber Contempt Law, are discussed in detail. *See* discussion *infra* Part IV.

46. Of frequent note in the Korean case are “Confucian culture” values, as well as the related role of personal and family reputation within the society. U.S. LIBRARY OF CONGRESS, SOUTH KOREA: A COUNTRY STUDY (Andrea Matles Savada & William Shaw eds., 1990), available at <http://countrystudies.us/south-korea/34.htm>.

47. “Demands for freedom of expression . . . were displayed more than anything else when Korea moved from an authoritarian rule to democracy. The Constitutional Court took an active attitude while drawing the boundaries for the constitutional guarantee of freedom of expression.” Jong-Sup Chong, *Hangukui minjuhwaee isseoseo heonbeopjaepansowa kibonkwonui silhyeon* [*The Constitutional Court and the Attainment of Fundamental Rights in the Democratization of Korea: 1988-1998*], 40 SEOUL DAEHAKGYO BEOPHAK [SEOUL L. J.] 226, 241 (1999).

48. Sang-Hun Choe, *North Korea Calls for Peace Treaty Talks with U.S.*, N.Y. TIMES, Jan.

principally unoccupied and heavily guarded demilitarized zone, violent skirmishes periodically recur between the navies of the two nations, and well-documented international fears of North Korean nuclear arms development serve as a constant and significant threat to Korean security.<sup>49</sup> Korea continues to mandate male military service to maintain constant war readiness.<sup>50</sup> Korean policy must be understood in light of the conflict between embracing democratic society and simultaneously functioning as a state under real military threat.

### III. RECENT REACTIONS TO INTERNET EXPRESSION

A number of recent events have provided proximate and society-specific reasons why Korean government officials and citizens alike have become more inclined to heighten restriction of online expression in particular.<sup>51</sup>

#### A. *Beef Protests*

Modern Korean protest demonstrations have heavily utilized the internet to disseminate information and organize events. One famous example occurred in 2002, when OhmyNews<sup>52</sup> accurately reported that two Korean girls were

12, 2010, at A8, <http://www.nytimes.com/2010/01/12/world/asia/12korea.html>.

49. Two incidents in 2010 provide a stark illustration of the provocative state of affairs on the Korean peninsula. On March 26, 2010, the Korean warship Cheonan sank in the area of disputed territorial waters in the Yellow Sea, resulting in the death of 46 sailors; Korea publicly presented forensic evidence of a North Korean torpedo attack on the Cheonan. See Choe Sang-hun, *South Korea Publicly Blames the North for Ship's Sinking*, N.Y. TIMES, May 19, 2010, <http://www.nytimes.com/2010/05/20/world/asia/20korea.html?>. On November 23, 2010, North Korea bombarded the Korea-occupied Yeonpyeong Island with artillery fire; four South Koreans (including two civilians) died in the exchange of shells. See Mark McDonald, *'Crisis Status' in South Korea After North Shells Island*, N.Y. TIMES, November 23, 2010, <http://www.nytimes.com/2010/11/24/world/asia/24korea.html?>; see also Thom Shanker & David E. Sanger, *U.S. to Aid South Korea with Naval Defense Plan*, N.Y. TIMES, May 31, 2010, at A1, <http://www.nytimes.com/2010/05/31/world/asia/31koreanavy.html?pagewanted=1>.

50. Under the express terms of the Constitution, "All citizens shall have the duty of national defense under the conditions as prescribed by Act." DAEHAN MINKUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 39(1) (S. Kor.), translated at [http://korea.assembly.go.kr/board/down.jsp?boarditemid=1000000155&dirname=/eng\\_data/1000000155E1.pdf](http://korea.assembly.go.kr/board/down.jsp?boarditemid=1000000155&dirname=/eng_data/1000000155E1.pdf); see also Howard W. French, *South Korea Faces a Test of Conscience Over the Draft*, N.Y. TIMES, May 8, 2002, <http://www.nytimes.com/2002/05/08/world/south-korea-faces-a-test-of-conscience-over-the-draft.html>.

51. Specific events in Korea provide a powerful and lasting catalyst for reform measures for several reasons. One factor, as discussed *supra*, is the distinctively central role of internet use and communication in the everyday lives of many Koreans. This may heighten the profile and increase the impact of a particular social event. Another Korea-specific consideration is the role of the city of Seoul as the center of Korean population, government, economics, and culture. Approximately half of the population of Korea lives in the Seoul metropolitan area, making the disruptive force and impact of, for instance, a large demonstration, particularly great. See THE NATIONAL ATLAS OF KOREA, POPULATION AND SETTLEMENT, [http://atlas.ngii.go.kr/english/explanation/population\\_1\\_2.jsp](http://atlas.ngii.go.kr/english/explanation/population_1_2.jsp) (estimating that in 2005, the Seoul Capital Region accounted for more than 48% of the Korean population).

52. OhmyNews is an internet-based news source that utilizes information gathered by users

accidentally killed by an American army vehicle.<sup>53</sup> Koreans organized online and quickly staged the largest anti-U.S. demonstrations in Korean history up to that time.<sup>54</sup> More recently, President Lee Myung-Bak agreed to lift Korea's five-year ban on importation of American beef in 2008.<sup>55</sup> Online social networking helped provoke and facilitate forty days of growing protests in the streets of Seoul.<sup>56</sup> Ostensibly health-related, but influenced in fact by broader issues of sovereignty and self-determination,<sup>57</sup> the demonstrations continued even after all the members of President Lee's cabinet offered to resign.<sup>58</sup>

Government officials blamed much of the fervor on the dissemination of misinformation online,<sup>59</sup> particularly the rumor that American beef could infect consumers with mad cow disease.<sup>60</sup> In the wake of the demonstrations, the National Assembly increased the liability of internet portals<sup>61</sup> and proposed broadening the scope of the recently-implemented Real Name Verification System,

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to provide a popular alternative source of information in Korea. See GILLMOR, *supra* note 8, at 125-129 (describing the development and ongoing operations of OhmyNews); Howard W. French, *Online Newspaper Shakes Up Korean Politics*, N.Y. TIMES, Mar. 6, 2003, <http://www.nytimes.com/2003/03/06/international/asia/06SEO.html?pagewanted=2> (stating that "Only 20 percent of the paper each day is written by staff journalists.").

53. Jonathan Watts, *World's First Internet President Logs On*, THE GUARDIAN, Feb. 24, 2003, Technology Guardian Section, at 16, <http://www.guardian.co.uk/technology/2003/feb/24/newmedia.koreanews>.

54. *Id.*

55. Sang-Hun Choe, *South Koreans Press Anti-Government Protests*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/world/asia/20korea.html>.

56. See Sang-Hun Choe, *S. Korean Cabinet Offers to Quit After Beef Protests*, N.Y. TIMES, June 10, 2008, <http://www.nytimes.com/2008/06/10/world/asia/10korea.html> (describing the daily demonstrations in Seoul in reaction to the importation of American beef); Jin-Sea Cho, *Portals Turning Into Rumor Mills?*, KOREA TIMES, May 14, 2008, [http://www.koreatimes.co.kr/www/news/biz/2008/05/123\\_24189.html](http://www.koreatimes.co.kr/www/news/biz/2008/05/123_24189.html) (stating that online postings about the beef importation issue led to the uprising of thousands of middle and high school students).

57. See Sang-Hun Choe, *An Anger in Korea over More Than Beef*, N.Y. TIMES, June 12, 2008, <http://www.nytimes.com/2008/06/12/world/asia/12seoul.html> (explaining how the anger of many South Koreans in response to the lifting of the ban on imported American beef was partly due to suspicions that the ban was lifted because the government was overly eager to please superpowers such as the United States).

58. See Choe, *supra* note 56 ("South Korea's entire cabinet offered to resign on Tuesday as President Lee Myung-bak struggled to find a breakthrough in the biggest political crisis to face his young government, one set off by fears that an agreement to reopen markets to American beef could expose the public to mad cow disease.").

59. See Moon-Seok Park, *Saibeo moyogjoe-ui sinseol-e daehan bipanjeog gochal [A Critical Study About the Cyber-Crime of Contempt Legislation]*, 17 KYEONGSUNG DAHAKKYO BEOBHAKYEONKUSO [KYEONGSUNG U. L. REV.] 139, 142 (2008).

60. See Cho, *supra* note 56 (describing the South Korean government's concern that false rumors about the U.S. beef controversy were so easily spread over the internet).

61. See Park, *supra* note 59, at 142 (explaining how the National Assembly heightened the liability of internet portals for false rumors posted online after the demonstrations over the U.S. beef controversy).

in spite of public criticism.<sup>62</sup> Public opinion on these measures was swayed shortly thereafter by an event that upset and angered many Koreans.

### B. *Choi Jin-sil Suicide*

Choi Jin-sil was a famous Korean actress nicknamed “the Nation’s Actress.”<sup>63</sup> Ms. Choi committed suicide in October of 2008,<sup>64</sup> and many Koreans attributed the suicide to rumors and insulting comments made about her on internet portals.<sup>65</sup> Cyber Defamation and Cyber Contempt are considered widespread problems in Korea,<sup>66</sup> and the government argued that legal reform was necessary to combat online anonymity and deter the posting of insulting comments.<sup>67</sup> Public support for restricting online expression was significantly increased by the death of Ms. Choi.<sup>68</sup>

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62. See Fitzpatrick, *supra* note 10 (explaining the proposal of the Grand National Party, Korea’s current governing party, which would require all forum and chat room users to make verifiable registrations using their real names, and the subsequent critical reactions from large news services such as Naver and OhmyNews). See also Park, *supra* note 59, at 142 (describing the National Assembly’s proposal to broaden the scope of the Real Name Verification System to crack down on the dissemination of false rumors over the internet).

63. Jean H. Lee, *S. Korean Actress Found Dead in Apparent Suicide*, USA TODAY, Oct. 2, 2008, [http://www.usatoday.com/news/world/2008-10-02-3818550031\\_x.htm](http://www.usatoday.com/news/world/2008-10-02-3818550031_x.htm).

64. *Id.*

65. See, e.g., Sang-Hun Choe, *Web Rumors Tied to Korean Actress’s Suicide*, N.Y. TIMES, Oct. 3, 2008, at A9, <http://www.nytimes.com/2008/10/03/world/asia/03actress.html?em> (explaining how police linked the suicide of the Korean actress to vicious online rumors that she had driven another actor to commit suicide a month earlier over an unpaid loan); *Choi jin-sil, agepeul-i jug-yeossda donglyo netijeun gongbun* [Malign Replies Kill Choi, Colleague and Netizen All Get Angry], SPORTSKHAN, Oct. 2, 2008, [http://sports.khan.co.kr/news/sk\\_index.html?cat=view&art\\_id=200810022225376&sec\\_id=562901](http://sports.khan.co.kr/news/sk_index.html?cat=view&art_id=200810022225376&sec_id=562901) (describing how police believed that vicious rumors spread online about Ms. Choi contributed to her suicide).

66. The Korean police reported 10,028 cases of online libel in 2007, which was a substantial increase from the 3,667 cases reported in 2004. Sang-Hun Choe, *Korean Star’s Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 13, 2008, at B7, <http://www.nytimes.com/2008/10/13/technology/internet/13suicide.html>.

67. See Park, *supra* note 59, at 142 (explaining the government’s position that legal reform was necessary to combat the spread of false rumors online).

68. Examples of editorials and other news outlets arguing in favor of the expanded law in light of Ms. Choi’s death are numerous. See, e.g., Editorial, *A Law for Choi Jin-sil*, KOREA JOONGANG DAILY, Oct. 4, 2008, <http://joongangdaily.joins.com/article/view.asp?aid=2895644> (arguing that the Korean government should increase use of the Real Name Verification System to combat the spreading of false rumors online); Tong-Hyung Kim, *More Limits Planned on Internet Anonymity*, KOREA TIMES, Oct. 3, 2008, [http://www.koreatimes.co.kr/www/news/biz/2008/10/123\\_32121.html](http://www.koreatimes.co.kr/www/news/biz/2008/10/123_32121.html) (stating that Agora, a popular Korean discussion site, was “overflowing with articles supporting the expansion of real-name use on the Internet” after Choi Jin-sil’s death).

#### IV. PRESENT KOREAN LAW RESTRICTING ONLINE EXPRESSION

Under current Korean law, a number of categories of expression-related crimes exist.<sup>69</sup> Having discussed the historical roots of such laws, I now focus on recently promulgated laws significantly related to online expression.<sup>70</sup>

##### A. *Cyber Defamation and Cyber Contempt*

###### 1. Korean Constitution

The Constitution of Korea (Constitution) provides a foundational protection for personal reputation: “[n]either speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.”<sup>71</sup> The Constitution further provides that constitutional rights may be limited, if doing so is necessary “for national security, the maintenance of law and order, or for public welfare.”<sup>72</sup> The inclusion of this language in the Constitution speaks to the sensitivity of issues such as defamation<sup>73</sup> in Korean society.<sup>74</sup> Faced with difficult decisions and compromises between competing values, Korea has a substantial

69. See Hyeongbeop [Criminal Act] (Act No. 293, Sep. 18, 1953, amended by Act No. 7623, Jul. 29, 2005), arts. 87, 116, 152, 156, 307-316, 243-245 (S. Korea), translated at <http://elaw.klri.re.kr/> (stating the statutory provisions for crimes of insurrection, failure of dispersion of masses, perjury, false accusation, crimes against reputation, violation of secrecy, and obscenity, respectively); see also Kraft, *supra* note 21, at 629 (describing some of the restrictions on expression found in the National Security Law). Further criminal restrictions on expression are found in such laws as the National Security Law and the Law on Military Secret Protection. Il-Sang Ryu, *Mass Communication Law in Criminal Law*, MASS COMMUNICATION LAW 42-45 (2007).

70. See BYOUNGIL OH, GLOBAL INFORMATION SOCIETY WATCH, GLOBAL INFORMATION SOCIETY WATCH 2009: FOCUS ON ACCESS TO ONLINE INFORMATION AND KNOWLEDGE 150-53 (2009) (discussing increased restrictions, prosecutions, and censorship related to internet participation in South Korea).

71. DAEHAN MINKUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 21(4) (S. Kor.).

72. *Id.* art. 37(2). It has been argued that the Constitutional Court hesitates to contradict the National Assembly in national security-related cases, even where freedom of expression is concerned. See Kyu-Ho Youm, *The Constitutional Court and Freedom of Expression*, 1 J. KOREAN L. 37, 70 (2001) (asserting that the Constitutional Court is most deferential to the government’s position when national security is involved).

73. Criminal Act (S. Korea) arts. 307-308 (providing for criminal punishment of defamation). An interesting illustration of the Korean view of defamation can be seen in Korea’s statutory criminalization of defamatory statements made about a deceased person. Under Art. 308 of the Criminal Code, “[a] person who defames a dead person by publicly alleging false facts shall be punished by imprisonment without prison labor for not more than two years or by a fine not exceeding five million won.” *Id.* art. 308. This penalty matches the penalty for defaming a living person by alleging true facts, and is less than the penalty for defaming a living person by alleging false facts, indicating through the choice of punishment that this crime is regarded as serious, but not as serious as defaming a living person. *Id.* arts. 307(1)-307(2).

74. See, e.g., Young-Joon Kwon, *Tortious Liability of Internet Service Providers for Defamation: A Korean Perspective*, 5 J. KOREAN L. 121, 127 (2006) (contrasting Article 21 of the Korean Constitution, which protects citizens’ right to free speech and press and is qualified by limitations against violating a person’s honor or their rights, or undermining morals or ethics, with the first amendment of the U.S. Constitution, which has no explicit limitations).

body of jurisprudence seeking to balance freedom of expression against effective enforcement of laws.

## 2. Statutory Law<sup>75</sup>

### a. Defamation

The Korean Criminal Code addresses defamation in Article 307:

- (1) A person who defames another by publicly alleging facts shall be punished by imprisonment or imprisonment without prison labor for not more than two years or by a fine not exceeding five million won;<sup>76</sup>
- (2) A person who defames another by publicly alleging false<sup>77</sup> facts shall be punished by imprisonment for not more than five years, suspension of professional qualifications for not more than ten years, or a fine not exceeding ten million won.<sup>78</sup>

Cyber Defamation is specifically addressed under the Act on Promotion of Information and Communications Network Utilization and Information Protection (Information and Communications Act):<sup>79</sup>

- (1) A person who commits defamation of another person by disclosing a fact to the public through an information and communications networks purposely to disparage his/her reputation shall be punished by imprisonment with or without prison labor for not more than three years or by fine not exceeding 20 million won;

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75. Codified provisions generally criminalizing defamation and contempt exist in some other civil law countries. *See, e.g.*, C. PÉN. art. 433-5 (Fr.) (codifying France's law against contempt). *See also* Gwan-Ho Choi, *A Critical Study on Legislation of "Cyber Contempt" – in relation to the Principle of Subsidiarity of the Criminal Law and the Freedom of Speech*, 39 MINJU BEOPHAK [DEMOCRATIC LEGAL STUDY] 93, 116 (2009); Scott Sterling, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. L. REV. 327, 338-345 (2001) (describing various countries' defamation laws and liability under them).

76. Article 310 provides an affirmative defense to art. 307(1) for true statements made "solely for the public interest." *Id.* art. 310.

77. Compare the penalties of Criminal Act (S. Korea) art. 307(1), where the defamer alleges true facts, and art. 307(2), where the defamer alleges false facts. Under Korean law, alleging true facts can still amount to a crime. Falsity of the defamatory statement is not an essential element of the offense, but rather is an additional element that increases the maximum penalties.

78. Criminal Act (S. Korea) art. 307.

79. Jeongbotongsinmang I-yongchokjin Mit Jeongboboho Deung-e Gwanhan Beomnyul[Act on Promotion of Information and Communications Network Utilization and Information Protection] (Act No. 6360, Jan. 16, 2001, *amended by* Act. No. 10166, Mar. 22, 2010), art. 70 (S. Korea) [hereinafter the Information and Communications Act], *translated at* <http://elaw.klri.re.kr/>. The Cyber Defamation Law was introduced on January 16, 2001 as article 61, and it was changed to article 70 on December 21, 2007 as part of Act No. 8778. *See also* Hyun-Chul Kim, *Cyber moyokzueui hunboebzuk zengzum* [*Constitutional Issues of Cyber Contempt*], 10 GONGBOEBHAKYEUNGU [PUB. L. REV.] 208 (2009) (explaining that the Supreme Court has already applied criminal contempt law against online expression).

- (2) A person who commits defamation of another person by disclosing a false fact to the public through an information and communications networks purposely to disparage his/her reputation shall be punished by imprisonment with prison labor for not more than seven years, by suspension of qualification for not more than ten years, or by fine not exceeding 50 million won;
- (3) The public prosecution may not prosecute the crime under paragraph (1) or (2) against the victim's will explicitly manifested.<sup>80</sup>

Cyber defamation is therefore punished with stronger penalties than defamation expressed through other channels,<sup>81</sup> providing that the evidence establishes the perpetrator's intent to defame the victim.<sup>82</sup>

### *b. Contempt*

Contempt is addressed in article 311 of the Criminal Act: "A person who publicly insults another shall be punished by imprisonment with or without prison labor for not more than one year or by a fine not exceeding two million won."<sup>83</sup> Pursuant to article 312, a criminal action for contempt can only be initiated when the alleged victim first submits a complaint.

On October 30, 2008, a proposal was made by a National Assembly member<sup>84</sup> to amend the Criminal Act to designate Cyber Contempt as a distinct crime with higher penalties than other forms of contempt under article 311.<sup>85</sup> On November 3, 2008 a similar proposal<sup>86</sup> was made as an amendment to the Information and Communications Act (the "Cyber Contempt Law").<sup>87</sup> Both proposals were advanced approximately one month after the death of Choi Jin-sil.<sup>88</sup> Under the

80. This corresponds to the complaint standard established in art. 312 of the Criminal Code for defamation in general and is significant because it does not require a complaint from the alleged victim in order for the prosecutors to initiate a criminal case. *Compare* Criminal Act (S. Korea) art. 312(2) (stating that art. 307 shall not be prosecuted over the express objection of the victim), *with* Information and Communications Act (S. Korea) art. 70(3) (stating that art. 70 shall not be prosecuted "against the victim's will explicitly manifested").

81. *See* Criminal Act (S. Korea) art. 309 (providing that libel is punishable by imprisonment for no more than seven years or suspension of qualifications for no more than ten years or a fine not exceeding fifteen million won).

82. *Compare* Criminal Act (S. Korea) arts. 307, 309 (not including intent to defame as an element of the defamation offense), *with* Information and Communications Act (S. Korea) art. 70 (providing for intent to defame as an element of the offense).

83. Criminal Act (S. Korea) art. 311.

84. "Partial Amendment of criminal Law" (bill no. 1637), October 30, 2008.

85. *See* Park, *supra* note 59, at 144.

86. 'Partial Amendment for the Act on Promotion of Information and Communications Network Utilization and Information Protection,' (Bill no. 1683), Nov. 3, 2008.

87. Hyang-Sun Lee, *Internetsangui pyohyonkyujaeae kwanhan bikyobeobjuk kocal – cybermoyokjue doibkwa housasilyupojue yuziui beobljuk jungcheksung tadangsungae kwanhayo* [A Comparative Analysis of Speech Regulation on the Internet: Focusing on the Legal and Regulatory Validity of the Adoption of the "Cyber-Defamation Law" and the Maintenance of the "False Information Dissemination Law"], 8 EUNRONKWA BEOB 171, 174 (2009).

88. *See* discussion *supra* Part III.B (discussing how many Koreans attributed her suicide to

proposed Cyber Contempt Law introduced to the National Assembly on February 25, 2009, online insults could result in a three-year prison sentence or a ten million won fine, and prosecutors would be granted the power to initiate charges against a defendant.<sup>89</sup> At the present time, the fate of the Cyber Contempt Law is undetermined.

### ***B. Dissemination of False Information***

The powerful impulse to safeguard “national security” and its complex relationship with both political motivations and potential incursions on freedom of expression can be seen from a recent criminal case.<sup>90</sup> The Framework Act on Telecommunications<sup>91</sup> was invoked to prosecute<sup>92</sup> Park Dae-sung (a widely read blogger on financial issues who posted his writings under the internet alias “Minerva”<sup>93</sup>) on the theory that he violated the law by disseminating false information. The Framework Act on Telecommunications states: “A person spreading a false rumor maliciously intending to damage the public interest by using an electronic machine can be sentenced to imprisonment for under five years or given a fine under fifty million won.”<sup>94</sup> Mr. Park was arrested on January 7, 2009<sup>95</sup> after he was accused of spreading online rumors asserting that the government prohibited Korean banks from buying U.S. dollars in late 2008 in order to combat the falling value of the Korean currency (the won).<sup>96</sup>

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distress over insulting comments made about her online).

89. Cf. Criminal Act (S. Korea) art. 311-12. Under art. 311 of the Criminal Act, contempt carries a maximum sentence of one year or fine of two million won, and a complaint from the alleged victim is required to initiate a prosecution. *Id.*

90. For a survey of constitutional issues and social policy considerations related to criminalizing the dissemination of false news, see generally Kyoung-Shin Park, *Heouisasilyujoiui uihonseonge daehan bigyoboepjeokin punseok* [A Comparative Study on the Unconstitutionality of Crime of Dissemination of False News], 12 INHA L. REV. 1 (2009).

91. Jeongitongsingibonbeop [Framework Act on Telecommunications] (Act. No. 4393, Aug. 10, 1991, amended by Act No. 10393, Jul. 23, 2010), art. 47 (S. Korea), translated at <http://elaw.klri.re.kr>.

92. The use of this law was particularly surprising because this provision had never been used in a prosecution in the twenty-seven years since the law was passed. See *A Brake For The Limitation on Freedom of Expression*, MBC TV, April 20, 2009, <http://news.naver.com/main/read.nhn?mode=LPOD&mid=tvh&oid=214&aid=0000101881>; Park, *supra* note 59, at 3 (claiming the investigation was politically motivated).

93. Minerva is the goddess of wisdom in Roman mythology. See generally *Minerva*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/383802/Minerva> (last visited Mar. 2, 2011).

94. Framework Act on Telecommunications, *supra* note 91, at art. 47(1).

95. See Christian Oliver, *Financial Blogger Arrested in South Korea*, FIN. TIMES, Jan. 8, 2009, [http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?nckick\\_check=1](http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?nckick_check=1) (describing the nature of Park’s arrest); Jane Han, *Foreigners Puzzled over Minerva’s Arrest*, KOREA TIMES, Jan. 11, 2009, [http://www.koreatimes.co.kr/www/news/biz/2009/01/123\\_37648.html](http://www.koreatimes.co.kr/www/news/biz/2009/01/123_37648.html) (describing disapproval in the international community over the arrest and imprisonment of a blogger).

96. See Ju-Min Park and John M. Glionna, *Case of Internet Economic Pundit Minerva Roils*

At trial, the prosecution alleged that Mr. Park had spread a false rumor with the intent to damage public interest. He was acquitted by the Seoul Central District Court on April 20, 2009.<sup>97</sup> Judge Yoo Young-hyun stated that “when considering all the circumstances, it is hard to conclude that Park was aware that the information was misleading when he wrote the postings” and concluded that Park had not intended to damage the public interest.<sup>98</sup> Some Korean observers saw this decision as opposition by the court to further expanding the use of “public interest” to limit the freedom of expression.<sup>99</sup> Despite the acquittal, the prosecution of Mr. Park in the first place raises the specter of invocation of novel or “dead letter” legal provisions to target and punish specific and controversial expression.

The legal provision in question was recently declared unconstitutional by the Constitutional Court.<sup>100</sup> The Court concluded that the requirement that the communication has the purpose of harming the public interest is too vague, fails to provide the legal clarity necessary for a restriction on freedom of expression, and generally violates the legal principle of *nulla poena sine lege*.<sup>101</sup> While the decision has been described by Korean activists as a victory for individual rights protections, the holding itself is narrow. While it is unconstitutionally vague to ask courts to divine whether or not a defendant intended to damage public interest, this legal defect has limited application in other cases, including the challenge to the Real Name Verification System, and is curable by more careful statutory drafting. The ruling party in the National Assembly is currently proposing to clarify the concepts of “public good” and “national security” in an effort to address the vagueness objection.<sup>102</sup> To the same end, the Ministry of Justice is formulating a proposal that would define the scope of legally actionable false facts to include those relating to war (including expressions pertaining to North Korea) or terrorism; it is not clear whether the proposed legislation will also include economics-related facts, such as the ones at issue in the Minerva case.<sup>103</sup>

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*South Korea*, L.A. TIMES, Jan. 16, 2009, <http://articles.latimes.com/2009/jan/16/world/fg-korea-minerva16> (describing the alleged economic implications of Mr. Park’s postings).

97. *S. Korean Court Finds “Minerva” Not Guilty*, KOREA TIMES, Apr. 20, 2009, [http://www.koreatimes.co.kr/www/news/nation/2009/04/113\\_43467.html](http://www.koreatimes.co.kr/www/news/nation/2009/04/113_43467.html).

98. *Id.*; Choe Sang-hun, *Economic Blogger Who Angered Seoul is Acquitted*, N. Y. TIMES, Apr. 20, 2009, <http://www.nytimes.com/2009/04/21/business/global/21blogger.html> (stating that Mr. Park was acquitted because “there was no proof that Mr. Park had the intention to undermine the public interest” and it was “difficult to believe that Mr. Park knew that some of his statements were false at the time he wrote them”).

99. See *A Brake for the Limitation on Freedom of Expression*, *supra* note 92 (explaining the rationale behind the Court’s decision to acquit Park).

100. 2008Hun-Ba157, 2009Hun-Ba88 (consolidated) (Dec. 28, 2010), *available at* [http://www.ccourt.go.kr/home/view2/xml\\_content\\_view02.jsp?seq=10&cname=□□□&eventNo=2008□□157&pubflag=2&eventnum=25749&sch\\_keyword=&cid=01010002](http://www.ccourt.go.kr/home/view2/xml_content_view02.jsp?seq=10&cname=□□□&eventNo=2008□□157&pubflag=2&eventnum=25749&sch_keyword=&cid=01010002).

101. This maxim roughly translates as “no penalty without law.”

102. Chung-Hye Park, *Hannaradang, minerva sakeun'daechepbeop' chujin* [Grand National Party Pushing for “Substitute Legislation” for the Minerva Case] MBC, Dec. 29, 2010, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=214&aid=0000164738>.

103. Don-Hoon Kim, *‘Minerva beop’ uheonkyolzeong orenkayeo* [Is the Unconstitutional Decision Made in the Minerva Law Right?], HANKOOKKYEONGJAE [KOREA ECONOMY], Feb. 11,

### C. *Real Name Verification System*

In 2007, Korea became the first (and so far only) nation in the world to implement a national name verification requirement for online postings.<sup>104</sup> The measure was introduced as an amendment of the Information and Communications Act and passed on January 26, 2007.<sup>105</sup> Under this law, internet portals with more than 100,000 users per day may be required by executive decree<sup>106</sup> to confirm the identities of content contributors by requiring them to disclose their Korean national identification numbers;<sup>107</sup> the data is preserved so that a legal identity can be matched in the future with the username associated with a particular post.<sup>108</sup> The original executive enforcement decree required internet portals with more than 300,000 users per day and news sites with more than 200,000 viewers per day to comply with the Real Name Verification System.<sup>109</sup> In early 2009, the president issued a new enforcement decree that expanded the Real Name Verification System to include all websites with more than 100,000 users per day.<sup>110</sup> The Information and Communications Act provides that sites are to respond to complaints of allegedly defamatory content<sup>111</sup> by following certain takedown procedures.<sup>112</sup> Korean internet portals generally describe their responsive steps in online “terms of use” agreements.<sup>113</sup>

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2001, <http://www.hankyung.com/news/app/newsview.php?aid=2011020998421>.

104. At one time it appeared that China would attempt a similar system in the city of Hangzhou. See Qiu Lihua and Yue Deliang, “Wang Luo Shi Ming Zhi” Wei He Nan? - Hang Zhou Shi Shi “Wang Luo An Bao Tiao Li” Diao Cha [Internet Real-Name Registration System: Why So Difficult To Implement? An Investigation Into The Implementation Of The Hangzhou Regulations For Network Security Protection], XINHUA NEWS AGENCY, May 19, 2009, [http://news.xinhuanet.com/newscenter/2009-05/19/content\\_11399392.htm](http://news.xinhuanet.com/newscenter/2009-05/19/content_11399392.htm) (discussing how Hangzhou appeared to plan a user identity verification system but citizens complained the rules lacked clarity and infringed their ability to communicate openly and honestly).

105. Information and Communications Network Act (S. Korea) art. 44-5.

106. *Id.*

107. *Id.*; see also Hyung-Eun Kim, *Do New Internet Regulations Curb Free Speech?*, JOONGANG DAILY, Aug. 13, 2008, <http://joongangdaily.joins.com/article/view.asp?aid=2893577> (explaining the verification requirements and the rationale behind them, as well as criticism of the requirements).

108. Jeongbotongsinmang I-yongchokjin Mit Jeongboboho Deung-e Gwanhan Beomnyul Sihaengnyeong [Enforcement Decree on Information and Communications Network Act] (Presidential Decree No. 20668, Feb. 29, 2008), art. 29 (S. Korea).

109. *Id.* art. 30. Initially, the Real Name Verification System requirement applied to 37 internet portals and news sites. Kim, *Internet Anonymity*, *supra* note 68.

110. Jeongbotongsinmang I-yongchokjin Mit Jeongboboho Deung-e Gwanhan Beomnyul Sihaengnyeong [Enforcement Decree of the Information and Communications Network Act] (Presidential Decree No. 21278, Jan. 28, 2009), art. 30 (S. Korea).

111. The scope of defamatory materials to be taken down is established in the Information and Communications Network Act (S. Korea) at art. 44-7(1), (2).

112. The Information and Communications Network Act requires that internet portals delete obviously offensive posts, while removing posts of ambiguous legality for thirty days during a review period. *Id.* art. 44-2(4).

113. See, e.g., NAVER CONNECT CENTER, [http://help.naver.com/claim\\_main.asp](http://help.naver.com/claim_main.asp) (last

Initial research has shown that in the first two years of Korea's experience with the Real Name Verification System, the number and frequency of defamatory comments have not significantly decreased. A study examined comments and replies on a popular internet portal's bulletin boards and found that the number of total comments decreased after the introduction of the Real Name Verification System,<sup>114</sup> but the decrease in the number of defamatory comments was minimal.<sup>115</sup> A more general survey of online user behavior has found that, contrary to common assumption, the rate at which user behavior deviates from a particular social norm is not impacted by user anonymity, challenging the basic assumption that legally objectionable expression can in principle be effectively deterred by stripping users of anonymity.<sup>116</sup>

A Korea Communications Commission study<sup>117</sup> of the first phase of real name verification (for web portals with 300,000 or more users per day) found that there was a decrease in the rate of "malign" internet posts<sup>118</sup> from 15.8% to 13.9%.<sup>119</sup> This is generally consistent with other research, which showed a small decrease in defamatory replies.<sup>120</sup> However, as a best case evaluation of the initial success of the Real Name Verification System, this study indicates that the law has produced little improved protection of private reputation.

visited Feb. 28, 2011).

114. This result supports the contention that the Real Name Verification System has a "chilling effect" on internet expression in general. See discussion *infra* note 117.

115. Ji-Suk Woo et al., *Internet kaeshipan shilmyeongjaeui hyokwae daehan siljeung yeongu: Jaehanjukboninhwakinjae sihenge ddaren kaeshipan nae keulsseuki haengui mit bibangkwa yokseului byeonhwareul jungsimeuro* [An Empirical Analysis of the Effect of Real-Name System on Internet Bulletin Boards: Focusing on How the Real-Name System and Users' Characteristics Influence the Use of Slandorous Comments and Swear Words], HENGJEONGNONCHONG Vol. 48(1), SEOUL DAEHAKGYO HANGUKHENGJEONGYEONGUSO [SEOUL NAT'L U. KOREAN ADMIN. INST.] 20-21(2009). According to the conclusions of the study, rates of illegal posting were determined by user behavior and not systematically reduced by the Real Name Verification System.

116. Hwang Yong-suk, *Internet Kesipan Silmyeongjee daehan Bipanjeok Yeongu* [Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet], 15 EONRONKWA SAHWE [PRESS AND SOC'Y] 97, 108 (2007) (S. Korea).

117. This study evaluated the rate of malign reply; sought to gauge the "chilling effect" of the law, or the degree, if any, to which it discouraged online expression; and also attempted to measure the "balloon effect," or the degree, if any, to which the law caused netizens to switch from using large internet portals subject to the Real Name Verification System to smaller ones not subject to the requirement. Korea Communication Commission, JAEHANJEOK BONINHWAKINJAE HYOGWABUNSEOEKUL WIHAN JOSA BOYOSO [KOREA COMMUNICATIONS COMMISSION, ANALYSIS OF THE EFFECT OF LIMITED REAL NAME VERIFICATION], 1-2 (October 2007) (S. Korea). The study asserted that the relatively stable number of internet posts from month to month and the continuing popularity of large internet portals demonstrated a lack of chilling effect and balloon effect. *Id.* at 18-20.

118. The study uses the Korean term "akseongdaetgeul," which I describe in English as "malign reply." It is defined in the study to include libel, sexual harassment, invasion of privacy, and contempt. *Id.* at 9.

119. *Id.*

120. See Woo et al., *supra* note 115, at 20-21.

On July 8, 2010, the Constitutional Court heard oral arguments in a challenge to the Real Name Verification System based on assertions that the System violates the constitutional rights of Korean citizens, including their rights to free expression, privacy, and equality.<sup>121</sup> The arguments focused in particular on four assertions: violation of freedom to express anonymously,<sup>122</sup> violation of the constitutional prohibition on censorship,<sup>123</sup> failure to satisfy the least restrictive means principle,<sup>124</sup> and undervaluation of the weight of individual private interests against the public interest.<sup>125</sup> As an alternative theory, the complainants asserted that the right to control one's own personal information, an element of the Korean privacy right, is violated by the risk that identification information will be leaked or hacked.<sup>126</sup> Finally, the complainants argued that those wishing to express themselves online are treated unequally compared to those expressing themselves in the offline world, where no equivalent to the Real Name Verification System operates.<sup>127</sup>

In focusing on the freedom of expression issue, the respondents<sup>128</sup> countered that the Real Name Verification System promotes a more responsible and respectful online culture for public expression and stimulates more use of online channels of expression by reducing the apprehension of individuals that they will be the object of malign comments.<sup>129</sup> The respondent asserted that these

121. 2010 Hun-Ma47. For general information about the arguments advanced by the plaintiffs and the defense, see PRESS RELEASE, PUBLIC RELATIONS DEPARTMENT OF THE CONSTITUTIONAL COURT (July 8, 2010), [http://www.ccourt.go.kr/home/storybook/storybook.jsp?seq=30&eventNo=2010□□47&sch\\_code=BYUNRON&sch\\_sel=&sch\\_txt=&nScale=10&sch\\_category=&list\\_type=01](http://www.ccourt.go.kr/home/storybook/storybook.jsp?seq=30&eventNo=2010□□47&sch_code=BYUNRON&sch_sel=&sch_txt=&nScale=10&sch_category=&list_type=01).

122. Korean citizens have a constitutional right to freedom of speech, but such speech is explicitly limited by the condition that it not violate the honor or rights of other persons or undermine public morals or social ethics. DAEHAN MINKUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 21 (S. Kor.).

123. *Id.* art. 21(2).

124. For a discussion of the special status (to utilize non-Korean parlance, “heightened scrutiny”) that freedom of expression formally receives under Korean law, see 89Hun-Ma165, 3 KCCR 518, 534 (Sept. 16, 1991).

125. Under art. 37 of the Constitution, the rights of citizens may be restricted by the government when such restrictions are necessary for national security, maintenance of law and order, or for public welfare. The Constitution asserts that such restrictions cannot violate the “essential aspect” of the right in question. DAEHAN MINKUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 37 (S. Kor.).

126. 2008Hun-Ma324, 2009Hun-Ba31 (consolidated), 161 KCCG 595 (Feb. 25, 2010).

127. *Id.*

128. In this dispute, the respondent is a governmental agency, the Korean Broadcasting Commission.

129. The respondent analogized the case to a recent precedent, 2008Hun-Ma324, 2009Hun-Ba31 (consolidated), 161 KCCG 595 (Feb. 25, 2010), in which several complainants challenged a law that requires “internet news sites” to verify the names of individuals posting politically relevant content during a several week period preceding elections. The sites are required to delete posts where the author has not verified her real name. The Constitutional Court, after considering claims that the law was void for vagueness, constituted prior censorship, violated the least restrictive means principle, and compromised privacy, upheld the law.

government purposes are a sufficient basis for upholding the Real Name Verification System as a reasonable condition for online expression and that the system does not compromise personal privacy, especially because the identity of the posting individual is not publicly displayed on the internet portal.<sup>130</sup>

At the time that this article went to press, the Constitutional Court had not yet rendered a decision in this case. A ruling in favor of the complainants could potentially resolve expression-related concerns pertaining to the Real Name Verification System. The policy analysis within this article proceeds on the assumption that the Real Name Verification System remains in legal force.

## V. CYBER DEFAMATION, CYBER CONTEMPT, AND OTHER EXPRESSION-RELATED CRIMES: COMPARING KOREA TO THE UNITED STATES AND CHINA

Before considering specific policy proposals for reform of Korean criminal law targeting expression, it is useful to establish comparative reference points to contextualize Korean policy within an international perspective. The United States generally provides a helpful “baseline” as a nation with relatively permissive laws regarding online expression. China provides an intriguing comparison with Korea because of several similarities between Korean and Chinese law, including some similar civil law-based statutes and their mutual interest in real name verification as a legal enforcement mechanism online. Some parallels with China are surprising considering China’s reputation for restriction of expression in general and online censorship in particular.

### A. *Comparing the United States and Korea*

While the United States has general defamation law applicable to online speech, the only criminal defamation laws are state laws.<sup>131</sup> Many of these U.S. state laws are limited to specific kinds of defamation, such as “teacher insult statutes”<sup>132</sup> and “cyber-bullying statutes,”<sup>133</sup> and do not generally criminalize

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130. Balancing interests under Korean law reflects a distinctly utilitarian character. According to the Korean Supreme Court, “When the protection of a person’s reputation and the freedom of expression are in conflict, how the two rights should be mediated depends on the comparison of various social interests by comparing the benefit of free expression and the values achieved through the protection of personal rights.” 85Da-Kha29, Gong 1988.11.15. (836), 1393 (Oct. 11, 1988).

131. American defamation law is further limited, in terms of criminal punishment and civil liability, by a number of constitutional law holdings. For example, there is generally an “opinion exception” to defamation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (stating that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas”). The U.S. Supreme Court has found “strict liability” for defamatory statements to be unconstitutional and therefore the defendant must be shown to have a culpable mental state. See *id.* at 347 (reasoning that states cannot “impose liability without fault” for defamation). A statement that is false but obviously untrue does not result in liability because the statement is held to cause no injury if no reasonable person would believe it. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (holding that defamation-related recovery is not available because the parody in question did not depict events that were reasonably believable).

132. For example, under Arizona statute A.R.S. 15-507, “[a] person who knowingly abuses

defamatory statements. Between 1992 and 2004, only 6 persons in the United States were convicted of defamation, and only three of those convictions were upheld on appeal.<sup>134</sup> In contrast, Korea has criminal statutes for defamation and contempt. Defamation using true facts is also a criminal offense in Korea, while the defense of truth of the underlying facts generally shields defendants in American courts, even from civil liability.<sup>135</sup>

The U.S. criminal law approach to expression against the state is significantly different from that of Korean law. Sedition (promoting or inciting rebellion against the government) is criminalized by the Alien Registration Act of 1940,<sup>136</sup> better known as the “Smith Act.”<sup>137</sup> The Smith Act was effectively narrowed by the Supreme Court in 1957.<sup>138</sup> The majority opinion stated that violations of the Smith Act are “few and far between.”<sup>139</sup> In light of subsequent U.S. Supreme Court jurisprudence, it seems relatively clear that the Smith Act could now only be constitutionally applied to expression that is directed towards, and is likely to cause, “imminent lawless action.”<sup>140</sup> The Smith Act was last invoked in court in

a teacher or other school employee on school grounds or while the teacher or employee is engaged in the performance of his duties is guilty of a class 3 misdemeanor.” ARIZ. REV. STAT. ANN. § 15-507 (1989).

133. Most explicit cyber-bullying laws are actually laws to mandate school policy and action to combat cyber-bullying with school district-level discipline. *See, e.g.*, MINN. STAT. ANN. § 121A.0695 (2007) (establishing that under Minnesota state law, “[e]ach school shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use.”); *cf.* MEGAN MEIER CYBERBULLYING PREVENTION ACT, H.R. 1966, sec. 3(a), 111th Cong. (2009), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966>: (introducing a proposed federal cyber-bullying statute, formally as an amendment to the United States Code: “Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.”).

134. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, LIBEL AND INSULT LAWS: A MATRIX ON WHERE WE STAND AND WHAT WE WOULD LIKE TO ACHIEVE (2005), *available at* [http://www.osce.org/documents/rfm/2005/03/4361\\_en.pdf](http://www.osce.org/documents/rfm/2005/03/4361_en.pdf).

135. The “truth” defense is older than the United States itself, having been famously invoked to defend John Peter Zenger, in contravention of English precedent, in 1736. *See generally* VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (1957) (recounting the story of Zenger’s trial).

136. Alien Registration Act, 18 U.S.C. § 2385 (2006).

137. The Smith Act states, in relevant part, that it is a crime when someone “with intent to cause the overthrow or destruction of any . . . government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so . . .” *Id.*

138. *Yates v. United States*, 354 U.S. 298, 322-23 (1957) (overturning convictions because the Smith Act prohibits seditious actions, not ideas).

139. *Id.* at 327. This case can be read to signal the Supreme Court’s disapproval of politically motivated trials, but the Court did not actually hold that the conviction was unconstitutional, but rather was outside of the scope of the Smith Act. *Id.* at 319-20.

140. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (introducing this constitutional

1961,<sup>141</sup> though it has never been formally repealed. Even if the Smith Act were currently invoked as active law, Korea's combination of political expression-related laws, as applied in the post-democratization era, significantly exceeds the scope of the Smith Act's proscription of expression.

### **B. Comparing China and Korea**

Chinese criminal law, according to scholarly analysis, has approximately thirty-nine expression-based offenses,<sup>142</sup> most involving statements made against the national interest or the public interest.<sup>143</sup> Online expression can be punished under any of these laws.<sup>144</sup>

Like Korea, China has criminal laws that can be applied to defamatory statements alleging false facts<sup>145</sup> and to contempt expression.<sup>146</sup> Korea also

standard as a minimum requirement for the crime of incitement).

141. In that case, the U.S. Supreme Court upheld the conviction of a former member of the Communist Party. *See Scales v. United States*, 367 U.S. 203 (1961) (affirming petitioner's conviction where petitioner had been an active member of an organization involved in illegal advocacy and petitioner had culpable knowledge and intent, making him criminally responsible for the illegal advocacy of the organization). The defendant's sentence was commuted by President John F. Kennedy after he served fifteen months in prison. *See Ari L. Goldman, Junius Scales, Communist Sent to U.S. Prison, Dies*, N.Y. TIMES, Aug. 7, 2002 (reporting the death of Scales and recounting his activities when he was alive, including his conviction and Kennedy's commutation).

142. Liu Shoufen & Niu Guangji, *Shixi Woguo Xianfa Zhong De Yanlun Ziyou Zai Xingfa Zhong De Guizhi [Regulation and Protection of Freedom of Expression in China's Criminal Law]*, FAXUEJIA [JURIST] 121-23 (2006). According to Liu and Niu, there are forty-seven crimes related to freedom of expression under the Chinese Criminal Code, of which eight are intended to protect freedom of expression, and thirty-nine restrict it. *Id.*; *see generally* Mindy K. Longanecker, *No Room for Dissent: China's Laws Against Disturbing Social Order Undermines Its Commitments to Free Speech and Hamper the Rule of Law*, 18 PAC. RIM L. & POL'Y J. 373, 379-84 (2009) (discussing how the "[v]arious constitutional and statutory provisions limit or work contrary to legal guarantees of free speech in China.").

143. Of 39 expression-related crimes, Liu and Niu categorize them as prohibiting expression related to: the national interest, 19 (48.7%); the public interest, 17 (43.8%); and the interest of individuals, 3 (7.7%) (2 of these 3 are defamation and contempt laws). Liu & Niu, *supra* note 140, at 121-23.

144. This issue is clarified by Quanguo renmin daibiao dahui changwu weiyuanhui guanyu weihu hulianwang anquan de jue ding [Decision of the Standing Committee of the NPC Regarding Safeguarding Internet Safety] (Enacted by Standing Committee of 9th NPC at 19th Session on December 28, 2000), art. 5, which states generally that acts criminalized under existing law and utilizing the internet will be investigated and prosecuted in accordance with the relevant laws. *See also* Longanecker, *supra* note 140 (discussing the control of internet speech under the civil and criminal laws prohibiting "disturbance of the social order").

145. The Chinese Criminal Law uses the term "诽谤" to identify the crime of "defamation," a term which itself indicates that the asserted facts should be false to constitute a crime. Xingfa [Criminal Law] (Adopted by NPC on July 1, 1979, amended by NPC on March 14, 1997), art. 246 (PRC). The criminal law of Korea and Japan use the term "名誉毁损" to identify the crime of "defamation," and the underlying meaning of this term focuses on the consequences of the statement in question, making detriment to the victim's reputation the key element of the offense. Hyongbeop [Criminal Act], art. 307 (S. Korea); Keihō [Criminal Code] (Law No. 45 of 1907), art. 230 (Japan).

punishes defamation using true facts.<sup>147</sup> Unlike Korea, China does not distinguish Cyber Defamation as a distinct offense; rather, legislation specifies that online expression falls under the basic criminal laws regarding defamation and contempt.<sup>148</sup> If Korea's proposed Cyber Contempt Law is ultimately enacted, Korea would identify Cyber Contempt as an additional online expression-specific crime. Korea has already imposed heightened maximum penalties for Cyber Defamation, and may do so for Cyber Contempt, while China, by not creating new statutory offenses, uses the same punishment guidelines for defamation and contempt, regardless of the medium used for the offending expression. Korea gives prosecutors the right to initiate investigations and prosecutions related to defamation while, under Chinese law, prosecutors can only initiate prosecutions where the defamation or contempt relates to the "public interest."<sup>149</sup> In China, one outcome arguably related to the policy of empowering prosecutors in "public interest" cases is that many Chinese cases of online defamation involve government officials as alleged victims.<sup>150</sup>

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146. The Chinese, Korean, and Japanese criminal codes all use the same Chinese term, "侮辱", to identify the crime of "contempt." Chinese Criminal Law art. 246; Korean Criminal Code art. 307; Japanese Criminal Code art. 231.

147. *See also* Japanese Criminal Code art. 230 (stating Japan's similar defamation standard that "[a] person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished . . .").

148. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Weihe Hulianwang Anquan De Jueding [Decision of the Standing Committee of the National People's Congress on Preserving Computer Network Security] (Adopted by NPC on Dec. 28, 2000), article 1-5 (PRC), translated at [http://www.gov.cn/english/laws/2005-09/22/content\\_68771.htm](http://www.gov.cn/english/laws/2005-09/22/content_68771.htm).

149. In China, standards for issuing warrants in defamation cases have been argued to be inconsistent and subject to local pressure; in response to such criticisms, the Supreme People's Procuratorate has announced new rules for requiring prosecutors to seek approval from superiors before issuing warrants in defamation cases. *See* *Zuigaojian Jiang Jianli Pibu Feibang Anjian Bao Shangyijiyuan Shenpi Zhidu* [Supreme People's Procuratorate will establish stricter approval system for the issuance of arrest warrant for defamation cases], <http://www.spp.gov.cn/site2006/2010-08-09/0002128686.html>; *see also* *China Orders Stricter Arrest Warrant Approval for Defamation Suspects after Reporter "Wanted,"* <http://english.peopledaily.com.cn/90001/90776/90882/7097101.html>.

150. *See* Li Fenfei, *Na Shenme Lai Zhongjie "Feibang Zhengfu An"* [How Can an End be Put to the "Defamation of Government" Cases], *JIANCHA FENGYUN* [PROSECUTORIAL VIEW] 42 (2009-10); *see also* Zhou Mingjie, *Yin "Die" Huo Zui: WangLuo Shidai de Wenzhiyu?* [Receiving Criminal Sanction on "Post": Literary Inquisition in the Age of Internet?], *ZHENGFU FAZHI* [GOV. LEGALITY] 65 (2009-10) (describing cases where seemingly legitimate criticism of government officials provoked criminal investigations, but with the results swayed by public opinion). For example, in the Wang Shuai "Lingbao" case, in Henan province, a man who posted pictures on the internet to demonstrate nonfeasance by a government official was arrested and detained for eight days. After much public criticism, the relevant officials, including the vice governor of Henan Province, made a public apology, and the man was even paid a small amount of symbolic compensation for his ordeal. *Id.* Professor Zhou Guangquan of Tsinghua University, a member of the National People's Congress, used a number of recent cases to argue at the NPC assembly that many local government officials "localized the judicial power" and prosecuted citizens who simply exercised a legitimate supervisory role. *See Renda Daibiao Zhou Guangquan: ying dui "feibang guanyuan zui" chutai sijajieshi* [NPC representative Zhou

### C. *Real Name Verification System*

The United States has no comprehensive system for the *ex ante* identification of individuals who post content online. However, there have been a number of criminal investigations and civil litigations where subpoenas have been utilized to compel an internet service provider (ISP) to release identifying information about a particular user.<sup>151</sup> For instance, the ISP Twitter was served with a subpoena in December 2010 that demanded a variety of information related to the accounts of individuals connected to the website WikiLeaks.<sup>152</sup> In another example, a court ordered Google, the corporation controlling the subsidiary blogging service used by the “Jane Doe” defendant, to reveal the identity of the anonymous blogger.<sup>153</sup> Google complied.<sup>154</sup>

Comparison with China warrants special attention because China has devoted significant resources to developing different name verification programs on the internet.<sup>155</sup> So far, the city of Shenzhen and four Chinese provinces have required

*Guangquan: judicial interpretation should be promulgated to address the “Crime of defaming officials”*], NANFANG DAILY, Mar. 08, 2010, <http://news.hexun.com/2010-03-08/122889963.html>. He calls for an official judicial explanation of how to define the “public interest” exception for prosecutorial initiation of investigations. *Id.*

151. A recent federal district court judge took a critical view of such identity-revealing tactics in denying subpoenas sought in order to obtain ISP subscriber information in connection with a class-action copyright infringement lawsuit. *VPR Internationale v. Does 1-1017*, No. 2:11-cv-02068-HAB-DGB (C.D. Ill. 2011), available at [http://scholar.google.com/scholar\\_case?case=7067176521786518150&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=7067176521786518150&hl=en&as_sdt=2&as_vis=1&oi=scholarr).

152. See Scott Shane & John F. Burns, *U.S. Subpoenas Twitter Over WikiLeaks Supporters*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/world/09wiki.html>.

153. An anonymous blogger created a page called “Skanks in NYC” and made a series of disparaging remarks about a particular woman, who subsequently brought suit. *Matter of Cohen v. Google*, No. 100012/09, slip op. (N.Y. App. Div. Aug. 17, 2009) (holding that because the plaintiff established the merits of her defamation she was entitled to know the identity of the blogger); see also Randy Cohen, *Is It O.K. To Blog About This Woman Anonymously?*, N.Y. TIMES, Aug. 24, 2009, <http://ethicist.blogs.nytimes.com/2009/08/24/is-it-ok-to-blog-about-this-woman-anonymously/> (commenting on the arguments for and against the disclosure of the blogger’s identity).

154. The suit was dropped after Google provided the identity information of the defendant, raising suspicions that the legal process was used purely to unmask a personal rival, and that the suit itself may have been spurious. See kdawson, *Model Drops Lawsuit After Outing Anonymous Blogger*, SLASHDOT (Aug. 24, 2009, 7:09 AM), <http://yro.slashdot.org/story/09/08/24/1026205/Model-Drops-Lawsuit-After-Outing-Anonymous-Blogger> (questioning the use of the legal system to oust an anonymous blogger without pursuing a legal cause of action).

155. Several Chinese local governments and related departments have experimented with real name verification. In July 2005, Shenzhen began to verify the real identities of online bulletin board (“BBS”) moderators who operated in the city, and similar practices have since begun in Ningxia, Gansu, and Jilin provinces, as well as Chongqing City. The Ministry of Public Security also indicated that such regulations would be promoted nationwide. See Li Tui Wangluo *Shiming Zhi, Gei “Xuli Shehui” Zhuang Ge “Anquan Fa” [Pushing Internet Real Name Verification System, To Install A Safety Valve For The “Virtual Society”]*, THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA (Mar. 3, 2010). Li Yizhong, the national minister of the Ministry of Industry And Information Technology, delivered a report

providers of internet information services<sup>156</sup> to reveal their identities, but internet users who utilize ISPs do not need to reveal their identities.<sup>157</sup> In addition, certain major internet portals have agreed to individually implement real name verification, having been encouraged to do so by certain Chinese civic organizations.<sup>158</sup> China has also imposed a mandatory real name verification system for certain portals used by university students.<sup>159</sup>

The “Regulation on Computer Information Network Security Protection and Management” for the city of Hangzhou<sup>160</sup> was implemented as of May 1, 2009<sup>161</sup>

regarding China’s economy in February of 2010 in which he stated that internet safety is a major concern and the department is currently examining the implementation of an internet real name verification system. *Li Yizhong Zuo Jingji Xingshi Zhuanti Baogao [Li Yizhong’s Feature Report on Current Economic Situation]*, MINISTRY OF INDUSTRY & INFORMATION TECH. OF THE PEOPLE’S REPUBLIC OF CHINA (Feb. 22, 2010), <http://www.miit.gov.cn/n11293472/n11293832/n11293982/13027223.html>.

156. Examples of such “internet information services” include electronic bulletin boards, network games, and instant messaging services. See Jonathan Watts, *Behind the Great Firewall*, GUARDIAN, Feb. 9, 2008, <http://www.guardian.co.uk/technology/2008/feb/09/internet.china>.

157. See *Pushing Internet Real Name Verification System*, *supra* note 153 (describing name registration requirements imposed by local jurisdictions).

158. The Internet Society of China (<http://www.isc.org.cn>) issued a self-discipline pledge on August 21, 2007, encouraging blog service providers to implement a real name verification system to verify the identity of internet users who register for a blog service. *Boke Fuwu Zilu Gongyue [Convention on Self-Discipline of Blog Service Providers]*, art. 11, Aug. 21, 2007, <http://www.isc.org.cn/doc/bkgy.doc>; see also Anita Chang, *China: Bloggers Should Use Real Names*, USA TODAY, Aug. 22, 2007, [http://www.usatoday.com/money/topstories/2007-08-22-1543352646\\_x.htm](http://www.usatoday.com/money/topstories/2007-08-22-1543352646_x.htm) (describing the self-discipline pledge and noting that “[o]nline bulletin boards and blogs are the only forum for most Chinese to express opinions...in a society where all media are state-controlled”).

159. The Chinese Ministry of Education issued a joint administrative document with the Central Committee of the Communist Youth League on December 31, 2004, ordering all “higher education institutions” within China to impose name verification systems on their campus BBSs. See Guanyu Jinyibu Jiaqiang Gaodeng Xuexiao Xiaoyuan Wangluo Guanli Gongzuo de Yijian [Opinion on Further Strengthening the Campus Network Management of Higher Education Institutions] (Education and Social Affairs [2004] No. 17), art. 7 (PRC). The alleged purpose is to maintain those BBSs as safe networks for internal information sharing. See *id.*; see also Philip Pan, *Chinese Crack Down on Student Web Sites*, WASH. POST, Mar. 24, 2005, at A13, <http://www.washingtonpost.com/ac2/wp-dyn/A61334-2005Mar23> (describing the Communist Party campaign to “tighten controls on student-run Internet discussion” in order to “strengthen what it calls ‘ideological education’ on campuses”).

160. Hangzhou is the capital of Zhejiang province of China, includes eight administrative regions, and has a population of approximately 6.43 million people. See *Hangzhou China: Administrative Districts and Population*, HANGZHOU, <http://www.hangzhou.gov.cn/main/zpd/English/statistic/abriefsurvey/briefsurvey/T197434.shtml> (last visited Feb. 7, 2011) (listing the administrative districts governed by Hangzhou and the size of the population).

161. Hangzhoushi Jisuanji Xingxi Wangluo Anquan Baohu Guanli Tiaoli [Hangzhou City’s Regulation on Computer Information Network Security Protection and Management] (adopted by 11th Hangzhou Municipal People’s Congress at 12th session on December 23, 2008, and approved by standing committee of 11th Zhejiang Provincial People’s Congress at 10th session on April 1, 2009), art. 19(3) (PRC), <http://hzdaily.hangzhou.com.cn/hzrb/html/2009->

and was interpreted by many at that time as a real name verification system aimed at revealing the identity of all individuals providing content on the internet.<sup>162</sup> A statement of legislative intent subsequently maintained that the law had been misread by the public<sup>163</sup> and that no comprehensive real name verification of internet users was planned for Hangzhou.<sup>164</sup> Under existing law, identity information relating to Hangzhou internet information service providers is gathered.<sup>165</sup> China's present policy stops far short of a nationwide system for verifying the identity of every internet content contributor,<sup>166</sup> as Korean law requires for popular internet portals.

Certainly, Korea and China do not utilize identity information in the same way or restrict the same kinds of online activities. However, in terms of identity verification itself, Korea's current model is significantly more comprehensive than the Chinese approach.

## VI. POLICY RECOMMENDATIONS

In this section, I offer a number of policy proposals related to the Korean criminalization of online expression. In general, these suggestions derive from the belief that criminalization of expression should be consistent with legitimate penological purposes, rare, statutorily narrow, and limited to specifically remedying actual injury to private victims. Such measures would represent meaningful steps in the direction of assuring Koreans a broader and more robust

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04/26/content\_658670.htm.

162. Qiu Lihua & Yue Deliang, *supra* note 104; David Bandurski, *Xinhua: Hangzhou's "Real-name Web registration system" is "on the shelf,"* CHINA MEDIA PROJECT, May 20, 2009, <http://cmp.hku.hk/2009/05/20/1632/>.

163. See *Zhengque jiedu hangzhou wangluo guanli tiaoli* [*Accurate Interpretation of Hangzhou Internet Management Regulation*] (promulgated by Municipal People's Congress of Hangzhou City, July 1, 2009), [http://www.hzrd.gov.cn/zxzx/rdxw/200907/t20090701\\_193292.html](http://www.hzrd.gov.cn/zxzx/rdxw/200907/t20090701_193292.html) (denying that the name verification requirements apply to general internet users).

164. See *Interview*, HANGZHOU PEOPLE'S CONGRESS (July 1, 2009), <http://www.hzrd.gov.cn/hzrd/InfoBox/InfoViewNonDiscuss.aspx?docid=22901> (transcribing an interview with an official who denies that the name verification requirements apply to general internet users).

165. This is the same requirement imposed in Shenzhen and certain provinces. See *Pushing Internet Real Name Verification System*, *supra* note 153 (describing the name registration requirements imposed in the city of Shenzhen and the provinces of Ningxia, Gansu, Jilin, and Chongqing).

166. The possibility of localized comprehensive real name verification continues to arise. As reported by the Chongqing Evening Post, the Secretary of the Politics and Law Committee of Chongqing City, Liu Guanglei, stated that the public security department of the city would gradually introduce a comprehensive real name verification system. *Chongqing Jiang Qidong Wangluo Shiming Zhi* [*Chongqing Will Launch Internet Real Name Verification System*], XINHUA NEWS AGENCY, Mar. 19, 2010, [http://news.xinhuanet.com/legal/2010-03/19/content\\_13200082.htm](http://news.xinhuanet.com/legal/2010-03/19/content_13200082.htm). The system would link the internet ID to the user's real identity (name and national ID). *Id.* Under this system, internet activity within a wide range, including QQ (instant messenger), micro-blog, SMS, etc., would all be subject to the verification requirement. *Id.* No official announcement has been made so far.

freedom of expression.<sup>167</sup> I also suggest that it is in the best interests of the Korean people to publicly resolve these disputes in a process that is driven by the parties involved, rather than one managed by the bureaucracy.

#### ***A. Decriminalization of Defamation and Contempt***

In the context of a ruling on the constitutionality of the death penalty,<sup>168</sup> the Constitutional Court has identified three legitimate legislative purposes of punishment: retribution, general deterrence, and specific deterrence (the latter having obvious and irrevocable force in the case of capital punishment in particular).<sup>169</sup> While these purposes were discussed in the specific context of death penalty jurisprudence, the reasoning in general, and the language regarding general deterrence and retribution in particular, form the bedrock of Korean judicial pronouncements on the purposes of punishment. While no punishment can be said to impose so greatly on the convicted person as the death penalty, all criminal sanction involves state action that deprives the offender of something she presumably values, be it liberty or property. Korean criminal sanctions in general should be scrutinized on the basis of whether they succeed or fail in advancing recognized legitimate purposes.

In the context of punishments for expression, I would pose a further question: does criminal sanction provide greater retribution or deterrence than is otherwise available, such as through the channel of civil remedies? In general, criminal laws targeting expression are blunt instruments that often fail to provide the public notice necessary for general deterrence due to legal ambiguities surrounding the proscribed conduct and standards of enforcement. Further, the punishments lack plausibility as proportionate retribution. Contrasted with criminal punishments, civil remedies for defamation and contempt are reasonable and attractive.<sup>170</sup> These actions implicate private reputations and private feelings. In cyberspace, the injury is caused by the ongoing presence and public display of defamatory or insulting

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167. In the words of the Korean Constitutional Court, “[n]ot only is the internet different from public broadcast in that it is ‘the most participatory market’ and ‘a media which promotes expression,’ it has a low barrier for expression which guarantees bilateral communication. As such, to regulate it only with the thought of putting social order as a priority is a huge hindrance to the freedom of expression.” 99 Hun-Ma 480 (June 27, 2002).

168. That rich analysis of legitimate penological purposes often appears in death penalty cases is a characteristic Korean law shares with American law. In *Gregg v. Georgia*, for example, the U.S. Supreme Court identified and analyzed deterrence and retribution as the social purposes advanced by capital punishment. 428 U.S. 153, 183 (1976).

169. 2008Hun-ka23 (Feb. 25, 2010).

170. An interesting comparison may be made to criminal prosecution for copyright infringement. In Korea, criminal sanctions are often available in cases of copyright infringement, and the Korean legal system has been relatively active in imposing criminal sentences on infringers, despite concerns that such measures are less socially efficient than civil remedies and may conflict with notions of democracy and the fundamental penological purposes of punishment. See Sang- Jo Jong, *Criminalization of Netizens for Their Access to On-line Music*, 4 J. KOREAN L. 51, 64 (2004) (noting that severe criminal sanctions stifle appropriate exploitation of copyrighted works and “contradict the policy goal of copyright law”).

words. Under Korean law, strict take-down rules<sup>171</sup> require that internet portals rapidly respond to complaints of defamatory or insulting statements by taking down the content in question for a thirty day period; these statements are permanently deleted unless the material is found not to be illegal during that period.<sup>172</sup> For alleged victims who seek more than just elimination of the offensive statement, such as compensation or a public opportunity to obtain vindication, civil remedies can provide opportunities for public justice and a determination that the victim has been treated wrongfully by the defendant.<sup>173</sup> Some in Korea criticize civil remedies as too compensation-focused, thus missing the deeper concern that the defendant's behavior be publicly condemned and that the victim receive an emotional or social benefit. However, Korean civil law also provides for restorative remedies,<sup>174</sup> such as a public statement<sup>175</sup> providing correct information.<sup>176</sup> In light of these available measures and remedies, criminal law

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171. See Information and Communications Network Act (S. Korea), art. 44-2 (providing that any person whose legal interest is infringed by online information may ask an internet service provider to delete the information or take other necessary measures). Under the current rules, an ISP must block content upon complaint of an alleged victim, including in cases where it is difficult to judge if the content infringes a legal right. *Id.* art 44-2(4). In practice, this standard results in take-downs nearly every time someone objects to particular content. See Kyung-Sin Park, *Unconstitutionality of Korea's Temporary Blinds on Internet- "Thou Shall Not Speak for 30 days What Others Do Not Like,"* 11 CHUNG-ANG L. REV. 7, 49-50 (2009) (surveying and commenting upon ISP takedown law and practice in Korea). See generally *A Look At How Many People Have Been Kicked Offline In Korea On Accusations (Not Convictions) Of Infringement*, TECHDIRT (Oct. 26, 2010), <http://www.techdirt.com/articles/20101025/18093711583/a-look-at-how-many-people-have-been-kicked-offline-in-korea-on-acusations-not-convictions-of-infringement.shtml> (discussing Korea's strict responses to accusations of copyright infringement). In 2008, the Korea Communications Commission proposed a legal amendment to art. 44-2 that would impose a fine of thirty million won when ISPs fail to take down content as requested by an alleged victim. Korea Communications Commission, KOREA.KR, [http://www.korea.kr/newsWeb/pages/brief/partNews2/view.do?\\_nfls=false&\\_pageLabel=policyinfo\\_page\\_02&\\_windowLabel=portlet\\_partnews2\\_1&\\_nfpb=true&datald=155310164](http://www.korea.kr/newsWeb/pages/brief/partNews2/view.do?_nfls=false&_pageLabel=policyinfo_page_02&_windowLabel=portlet_partnews2_1&_nfpb=true&datald=155310164).

172. It is questionable whether this procedure, which places the evidentiary burden on the contributor of the challenged content, is fair to the contributor or in the interests of a society that values open social discourse.

173. See John Leitner, *Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals*, 9 J. KOREAN L. 83, 106-108 (2009) ("To deter defamation without stifling internet expression, civil remedies provide an efficient and minimally intrusive means.").

174. Under the Civil Code, "Upon the request or the victim, the court can order the perpetrator engaged in defamation to carry out appropriate measures to restore the victim's impaired reputation, either in lieu of, or together with, damages." Minbeop [Civil Act] (Act No. 9650, Aug. 9, 2009), art. 764 (S. Korea).

175. A common Korean practice of ordering public apology was found by the Constitutional Court to violate the freedom of conscience in 1991. 89 Hun-Ma 160 (Apr. 1, 1991); see Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205 (2000) (examining the freedom of conscience under the Korean constitution).

176. As one might imagine, this particular remedy is principally useful in the case of defamation using *false* facts. See Hyeongbeop [Criminal Act] (Act. No. 7623, July 29, 2005), art. 307(2) (S. Korea) ("A person who defames another by publicly alleging false facts shall be punished by imprisonment for not more than five years, suspension of qualifications for not more

seems, at best, unnecessary.<sup>177</sup> Therefore, Korea should consider decriminalizing defamation and contempt.

However, if criminal law continues to be applied in these areas, the statutory criminal provisions should be narrowed to specifically target particular kinds of expression that are clearly identified, carefully limited, and openly justified on the basis of penological policy.<sup>178</sup> Firstly, precise statutory language provides important public notice of what particular forms of online expression are considered criminal. Furthermore, the process of promulgating the statutes will compel a public, legislative examination of what cases of defamation or contempt may justify criminal punishment. This may also stimulate a debate over what combination of punishment and rehabilitation is appropriate for a given action. In the areas of defamation and contempt, public discourse should be engaged to consider the appropriate fit between potential harm to victims and appropriate punishments or legal remedies to combat the underlying problems. “Cyber-bullying” laws, such as the ones in force in approximately nineteen American states,<sup>179</sup> illustrate the kind of specific situation in which criminal justice intervention may be, on balance, socially beneficial.<sup>180</sup> Such a law targets a precise form of online contempt statement that is particularly likely to cause harm to the victims, who are frequently young and vulnerable individuals. Because perpetrators of cyber-bullying are often youths themselves, court-ordered counseling and education may be a promising alternative or supplement to punishment. Such an approach may minimize future occurrences of cyber-bullying and achieve a humane and socially useful result for both victim and perpetrator.

In contrast, Korea’s Cyber Defamation Law unhelpfully singles out online expression for especially serious (and potentially prosecutor-driven) punishment.

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than ten years, or a fine not exceeding ten million won.”).

177. Some Korean and American scholars of Korean law of expression have been particularly critical of the criminal law of contempt. *See, e.g.,* Choi, *supra* note 74, at 116; Kyu Ho Youm, *News Media and Defamation Law in South Korea: A Case of the ‘Positivist, Instrumentalist Interaction’*, ALLACADEMIC.COM, [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/1/2/2/9/pages112292/p112292-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/2/2/9/pages112292/p112292-1.php) (last visited March 2, 2011) (describing defamation law in Korea, particularly regarding the news media).

178. On a related note, the selective application of other legal provisions against expression, as occurred in the Minerva case, should not be pursued in the future. The unpredictable possibility that seemingly “dead letter law” could be revived for the purposes of a specific prosecution against an individual whose expression government officials find objectionable seriously heightens concerns of a chilling effect, especially on expression relating to the socially sensitive issues most central to a vibrant democratic society. *See* discussion *supra* Part IV.B.

179. *See* State Cyberbullying Laws, CYBERBULLYING.US, available at [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_laws.pdf) (last updated Feb. 2011) (charting the States with current or forthcoming cyberbullying legislation).

180. A Korean scholar has drawn inspiration from cyber-bullying statutes in his proposal to make the law on dissemination of false information more narrow and specific. *See* Lee, *supra* note 87, at 202-03.

The law may purport to combat especially hurtful expression, but it in fact threatens to chill expression that utilizes the most accessible and potentially potent medium for achieving a more democratic culture. Korea's proposed Cyber Contempt Law would exacerbate this problem and, in the process, distinguish Korea's treatment of contempt from the entire rest of the world. As noted by the Human Rights Commission of Korea, Korea is the only nation in the world seeking to differentiate and more severely punish Cyber Contempt, when in fact the international trend is towards decriminalizing contempt altogether.<sup>181</sup> The Cyber Contempt Law has been criticized as unnecessary (because contempt committed online is punishable under the existing law of contempt)<sup>182</sup> and its negative impact on socially meaningful expression should not be dismissed.

Permitting prosecutors to initiate Cyber Contempt investigations is particularly objectionable, as it does not advance the interests of victims and could result in inconsistent or even politically motivated prosecutions. The provision is inconsistent with the traditional notion that a contempt crime results from the personal offense and injury experienced by the victim herself.<sup>183</sup> Likewise, defamation is a crime based on personal suffering from potential reputational damage, so a determination from the purported victim that she has suffered a wrong should be a minimum condition to for a criminal investigation. Permitting prosecutors to initiate investigations and prosecutions of either defamation or contempt is at best illogical; at worst, it invites politicized abuse.<sup>184</sup>

### ***B. The Future of Real Name Verification***

Korea's Real Name Verification System is the world's only nationwide program for recording netizen<sup>185</sup> identity, and Korea's use of this technology remains uniquely distinctive as China hesitates and debates the use of identity verification for internet content contributors, even on a regional scale. The Real Name Verification System challenges the concept of the Korean society as fundamentally free and, utilized alongside increased enforcement of anti-expression laws, could have a dramatic chilling effect.

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181. *Information Network Act Amendments Review*, NATIONAL HUMAN RIGHTS COMMISSION OF KOREA (Feb. 5, 2009), [http://www.humanrights.go.kr/subject/common/body01\\_1\\_v.jsp?id=1605&page=1&maincate=258&cate=673](http://www.humanrights.go.kr/subject/common/body01_1_v.jsp?id=1605&page=1&maincate=258&cate=673).

182. See Kim, *supra* note 79 (noting that the Supreme Court has already applied the law of contempt to cyberspace); Choi, *supra* note 74; see also *Cyber Contempt*, CENTER FOR FREE ENTERPRISE (Dec. 4, 2008), <http://eng.cfe.org/mboard/bbsDetail.asp?cid=mn2007713123749&pn=8&idx=998> (describing the potentially negative repercussions of a Cyber Contempt law in Korea).

183. See Kim, *supra* note 79 (noting that it is "non-sense" for prosecutors to infer the subjective indignity that may have been suffered by the alleged victim).

184. For a more detailed analysis of concerns that the Cyber Contempt proposal is politically motivated, see *id.* (noting the "great probability that the Cyber Contempt clause . . . can be used willfully and selectively to protect public figures").

185. See *generally Netizen*, *n.*, OXFORD ENGLISH DICTIONARY, <http://oed.com/view/Entry/245641> (last visited Feb. 8, 2011) (defining "netizen" as "[a] person who uses the Internet, esp. habitually").

Recent prosecutions, such as the “Minerva” case, raise the possibility that existing laws, even those that have not been recently invoked in the context of personal expression, could be selectively applied against individuals who stimulate political controversy. In any such efforts, Real Name Verification could be used to facilitate prosecution and the subsequent suppression of expression. Considering this measure in tandem with the Cyber Defamation Law, the Korean government has the ability to verify identities and to initiate defamation prosecutions; the same prosecutorial power for alleged Cyber Contempt cases may soon follow.

The Real Name Verification System is also susceptible to the criticism that it is ineffective.<sup>186</sup> As discussed *supra*, it has provided only a minimal or non-existent deterrent to “malign” replies on the internet so far. One significant problem is that a Korean person can easily obtain someone else’s national identification number with a simple internet search.<sup>187</sup> Therefore, any user who premeditates a wrongful act, such as posting a defamatory or contemptuous comment, can easily use another’s identification number.

Another problem might be described as “leakage.” Due to jurisdictional constraints, Real Name Verification cannot be applied to foreign-based ISPs, many of which Koreans can freely use anonymously. Some ISPs have even made explicit statements or accommodations to offer anonymous alternatives to Korean users. For instance, Google announced that it would not implement any real name verification measures under Korean law.<sup>188</sup> For this reason, the use of a Google service, such as “Blogger” for blogs, provides a viable alternative for Koreans hoping to effectively circumvent the Real Name Verification System.

The most obvious and direct mechanism to eliminate the detrimental effects of this law is to repeal it.<sup>189</sup> Granting for a moment that such a step is unlikely at the present time, Korean policy in general must at least seek balance in its cyber laws: balance between freedom of expression and the protection of reputations, as well as balance in forging politically and socially viable compromises. The Real Name Verification System may be well-situated for such a compromise. I have

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186. For a general discussion of these issues, *see* Leitner, *supra* note 173, at 101-02.

187. A google.com search conducted by the Korean Information Security Agency produced well over a hundred thousand usable Korean ID numbers that could be obtained for free online. *Google Exposing Thousands of Korean ID Numbers*, CHOSUNILBO, Sept. 22, 2008, <http://english.chosun.com/w21data/html/news/200809/200809220010.html>.

188. Because Google’s Korean YouTube site was arguably subject to the Real Name Verification System, Google deactivated uploads and commenting features and provided Korean-language instructions for instantaneously resetting one’s country preference for the YouTube site (for instance from Korea to the United States). *See* THE OFFICIAL YOUTUBE KOREA BLOG, [http://youtubekrblog.blogspot.com/2009/04/blog-post\\_08.html](http://youtubekrblog.blogspot.com/2009/04/blog-post_08.html) (last updated Apr. 8, 2009) (providing instructions for changing country preference). Korean users are now only a click away from freely and anonymously uploading and commenting. *Id.*

189. The Constitutional Court is presently considering a complaint asserting that the Real Name Verification System is unconstitutional. A ruling in favor of complainants, depending upon the precise holding, could nullify the legal requirement of identity verification as contrary to expressive freedom or personal privacy. *See supra* Part IV.C.

previously proposed an ISP opt-in Real Name Verification System.<sup>190</sup> My suggestion is that Korean ISPs be given the choice to either opt into the Real Name Verification System, and to thereby require their users to register their real names, or to remain outside of the system, retaining anonymity for the ISP's users. It might be contended that, under such a system, very few ISPs would opt into the Real Name Verification System. However, one of the primary arguments for name verification on the internet is that the public desires online accountability. If many members of the public really prefer the protection of the Real Name Verification System, there should be large demand for the services of internet portals that opt in. If no such demand resulted, it would demonstrate that netizens have rejected internet identity verification in practice, in essence "voting" with their mouse-clicks. In any case, the resulting situation would provide alternatives that respect the preferences of both individuals sensitive to offensive remarks and those who value anonymous expression.<sup>191</sup>

## VII. CONCLUSION

Much of what distinguishes Korean law and policy regarding online expression as urgent and important, from an international perspective, is Korea's diverse social experience with the internet as a means of networking and information-sharing. A foreign audience should not demonize Korea or dismiss the possibility that Korean society may, after a thoughtful social debate, embrace a different balance between competing social values than that of the United States or other western countries. The tensions between providing personal freedom and protecting public reputations of private individuals, and the more general conflict between maximizing open and democratic debate and preserving an established and valued social order, have become more crystallized and unavoidable in the digital information age. When one further considers Korea's complicated position as a young democracy developing in the shadow of an effective state of war, the social dilemma becomes even more complex and resistant to simple and sweeping solutions.

At the same time, Korean law imposes numerous criminal sanctions for expression that are being enforced with increasing frequency, while other democratic societies have tended to liberalize both the letter and practice of their expression-related law. Where cyber expression runs afoul of criminal law, it is punished more harshly than expression through other channels. The powerful new enforcement tool that is the Real Name Verification System, a technology and government policy unique in the world, poses a real and meaningful threat to the

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190. See Leitner, *supra* note 173, at 105-06 (arguing that an opt-in system "would permit posters to seek the System's protections while also respecting others' preferences for privacy and open expression").

191. One might object that an opt-in system would allow those initiating offensive posts to migrate to portals that do not opt into the Real Name Verification System. However, much of the problem in Korea lies with replies and discussion threads (the very term "akseongdaetgeul" means "malign reply," Leitner, *supra* note 173, at n. 83), so posters who do not want to subject themselves to anonymous commentators can seek the relative protection of the Real Name Verification System in exchange for verifying their own identity.

freedom of expression and other democratizing online activities, especially when understood in the context of Korea's substantive criminal law.

This article is intended to offer thoughts and recommendations for Korea in its consideration of new proposals and its review and reconsideration of existing laws. I have suggested that passing the Cyber Contempt Law would be a clear step in the wrong direction, and that the Cyber Defamation Law, as well as the criminalization of defamation and contempt in general, should be reconsidered. Such broad criminal laws cast a wide net and are poorly supported by social policy considerations. However, if criminal laws in these areas are retained, they should be made narrow and specific, incorporate and emphasize remedial measures outside of the realm of conventional criminal punishment, and be enforced only in response to victim complaints. The Real Name Verification System is likewise overbroad and poorly calibrated to achieve a socially meaningful purpose, especially when weighed against the resulting limitations placed upon individual expressive freedom.

The Korean treatment of these issues should be of more than an academic interest to a foreign audience. This article has also attempted to provide general insight into the role of cultural context and social conflict for societies making policy decisions related to online expression. The story of Korean regulation is, in the abstract, the story of a society coping with socially complex consequences of a rapidly evolving and generally thriving internet culture. As online communities interact and intertwine with traditional communities, with all that this merger of the virtual and physical worlds portends, Korea faces many serious challenges. However, these are challenges that all democratic societies must confront. The Korean situation is a case study of the difficulties of maintaining a democratically sound digital culture that policy-makers and jurists of other nations would be wise to consider.