

Criminal Threats Against Free Speech in South Korea

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Laws protecting right to personality

- Criminal Code, Article 311 – Insult
- Criminal Code, Article 307 (1) – Truth defamation
- Criminal Code, Article 307 (2) - Falsity defamation
- Personal Data Protection Act
- Portrait Right Cases

→ Seems like Strong Protections of Right to Personality but. . .

Insult

- Any public epithet against another is indictable to 1 year in prison or
- Every year about 9,000 indictments and about 50 incarcerations, about 10% for insulting police officers
- Mostly fines
- Requires the supposed victim's filing of criminal complaint
- Origin: Dueling → French solution vs. German solution → Insult crime : requirement of external honor ('You have to be a noble to cry an insult injury') → Nazi
- Cf. German *Privateklage*, Japan petty infractions

Critique of Insult law

- All true evaluations risk insulting those being evaluated. Any evaluation lower than expected causes a sense of insult in the person being evaluated. But, entire civilization is about evaluation, i.e., imputing values to things, people, and places. How can the State ban people from insulting one another?
- Only extremely offensive words? What is extreme? Restricting words for being offensive to another is restricting feelings and thoughts.
- Cf. hate speech regulation – designed to protect the oppressed. How about insult law? – tending to protect the powerful?
- Are not one's evaluations of others and one's feelings and thoughts about others **part of his/her personality**?

Truth Defamation

- Any non-false statement lowering another's reputation is indictable for 3 yrs
- Exemption for stmts made "solely for public interest"
- Critiques:
 - Chilling Effects on even publicly-interested stmts
 - Narrow scope of public interest – Examples
 - a worker criticizing the employer not paying wages
 - a elderly criticizing the elderly association officer's violence against its members
 - a drug wholesaler criticizing pharmaceutical companies monopolizing.

Critique: Pluralistic Ideal of Freedom of Speech

- Why should we be restricted in speaking truths even if uncomfortable to others? – as long as not revealing something otherwise held private - Isn't truth important to various people in various different ways that the collectivity cannot imagine?
- "Public Interest" exception? Who decides on the public interest? If public interest is defined collectivistically, what happens to the pluralistic ideal of freedom of speech ? – such as 'One's vulgarity may be another's lyrics'; 'As long as no harm is clearly and presently forced upon another, one should be allowed to speak freely.'
- Is freedom to speak truths about others essential to **development of one's personality**? - whether internal or external

Falsity Defamation

- Any false stmt lowering another's reputation is indictable
- Practice 1: Every year about 2,000 indictments and about 50 incarcerations → accounted for 28% of all incarcerations for reason of defamation around the world
- Practice 2: Many seditious libel cases
- Critique: Where is "**my**" **personality**? Is it in me? Is it what others think of me? So, if personality is subject to capricious thinking of Others, on what basis can the State put people in jail for disturbing other peoples' thoughts?

UN Human Rights Committee

- General Commitment 34 (2011)
 - No criminal punishment for statements not subject to verification
 - Truth must be sufficient defense
 - Try to stay away
- Human Rights Committee, Concluding Observations on South Korea(2015)
 - Abolish truth defamation
- UN Special Rapporteur on Free Speech La Rue
 - Many prosecutions for defamation are for protecting officials
 - Abolish truth defamation

Portrait Right Cases

- Right to control physical features identifiable with oneself (almost always 'face', hence "portrait" right)
- Critique : Is a face really private? Why do we expose faces when we leave home in the morning? Is it a private information or a public symbol? Is a name really private? Why do we have names?

Personal Information Protection Act

- All data identifiable with a person; applicable only to data processors (i.e. one handling data for business purposes)
- Exception: Media "Institutions" cf. EU "journalistic activities" exception – bloggers?
- Data Breach: Presumed Damages up to about USD 3K for breach w/o actual abuse; Punitive Damages up to 3 times Compensatory Damages
- No "function creep" on Resident Registration Number
→ E.g. court judgments not open to public, all most all news articles pseudonimized,

Critique of PIPA

- Should you actually own data "about you"? E.g. "I had pastrami for lunch with you." Who owns that data? I? You? How about "I had pastrami for lunch with you at a restaurant where persons A, B, C. . . Z were also having lunch." Who owns that data? I? You? A? Z? Is data ownership a proper metaphor? → where does data ownership metaphor come from?

Origins of the concept of data ownership (“I own data about me”)

- Inadequacy of contract law on protecting privacy when powerless individuals turn over private data about themselves to governments or companies (“data transaction”)
- Equalizer for inability to negotiate over or enforce the conditions of that data transaction
- how about publicly available data that is already out there so that there is no data transaction that needs be equalized?
- **Restricting people from sharing publicly available data also cause restriction on those people’s right to develop their personalities!**

Spatial Privacy

Prosser on Four Categories (1960): (1) Intrusion, (2) Disclosure, (3) False Light, and (4) Misappropriation

Prosser: "I Wrote To Catalogue Cases on Warren-Brandeis Notion (1890) of Privacy But Only 2nd Category Corresponds to WB" → Spatial Privacy = taking out what is private to where it is public

Spatial Privacy (1, 2) vs. "Personality-based" Privacy (3, 4)

Communication Surveillance: all about spatial privacy

- Wiretapping – 9.5 times the U.S. per capita – NK Factor? 95% done by NIS
- Search and seizure of stationery content -?? 400K warrants issued a year
- Metadata acquisition – 30-40 million records year --
Demonstration “Cell Tower Search” Factor? – chronological metadata access → 200 K /yr
- Unmasking of “anonymous communication” – about 10 million per year – 50 times the U.S. per capita

Laws protecting privacy (spatial privacy)

- Electronic Communication Privacy Act – judicial order requirement for wiretapping and meta data acquisition for police purposes
- Criminal Procedure Act – warrant requirement for search and seizure
- Telecommunications Business Act – warrantless seizure of identity data of communicating parties
- **Practice: very bad → Weak on spatial privacy**

Conclusion

- **Korea seems strong on personality-based privacy but restricts other peoples' freedom of speech, and yet weak on spatial privacy.**