

Urgent Appeal to Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Submitting Organization:

People's Solidarity for Participatory Democracy (PSPD)
6/February/ 2009

A. Case- An internet pundit was arrested

1. Allegation regarding persons:

- Park Dae Sung(30), no current job, graduate of a two-year college

An internet financial pundit Park Dae Sung¹ known under the identification name *Minerva* was arrested and indicted for violating the law against dissemination of false information. Mr. Park requested a review on legality of custody for not satisfying facts constituting a crime. But a challenge on his arrest warrant was denied on January 15 and he is still in prison.

Starting March 2008 and before his arrest, he had achieved fame by correctly predicting the bankruptcy filing of Lehman Brothers and other changes in macroeconomic indicators in Korea such as exchange rates and stock market prices.

Part of his fame was due to his scathing criticism of the government's economic policies, including a contemplated decision to purchase Lehman Brothers. All of this, he did through 280 or so entries he posted on the Agora discussion site of *daum.net* under the pseudonym *Minerva* until December 2008.

In the January criminal proceeding, Mr. Park was charged for posting an entry on December 29 stating that the Korean financial ministry had issued an official order to stop banks from purchasing U.S. dollars and another entry on July 30 stating that foreign exchange dealing has come to a halt, both of which the prosecutors claimed to be false.

2. Information related to State actions:

After Mr. Park wrote the article on the Agora' on Dec. 29, 2008 the administration strongly denied the allegation, the prosecution arrested him for disseminating false information. The law the prosecutors applied to *Minerva* reads: Article 47 of the Framework Act on Electronic Communications punishing dissemination of false information through internet with intent to hurt public interest.

Framework Act on Electronic Communications, Article 47 (Penalty), Section 1 reads: A person who publicly makes a false communication using electronic communications facilities for the purpose of derogating public interest shall be subjected to imprisonment or confinement of up to 5 years or a fine of 50 million won. <Amended 96.12.30>

2-1. Additional comments or background relevant to the case

The law, Article 47 was enacted in 1983 during the time of the military dictatorship under President Chun Doo Hwan who had gained power through a military coup in 1980 amid a chaos following the previous dictator Park Chung Hee's assassination in the immediately preceding year. Except that its application is limited to electronic communications, the law looks very much like President Park's Emergency Decree No. 1 under which many private citizens critical of the authoritarian regime were persecuted for making what Park's regime claimed to have been inaccurate statements. In any case, the law has been hardly used for over 30 years until President Lee Myung Baik took power in 2008, whose prosecutors began to use the law and applied the law *only* against private citizens critical of his policies. One junior high student was prosecuted for disseminating a text message stating "School Holiday Demonstrations" after some newspapers reported on the possibility of such holiday when a massive number of secondary school students participated in demonstrations against President Lee's decision to import U.S. beef. Three adult participants in the demonstrations are also being prosecuted for publicly spreading inaccurate statements about the police conduct during the anti-import demonstrations. For this historical reason many people have raised doubt on the constitutionality of the law.

Others have raised doubt on the legality of his prosecution even assuming that the law is valid. On or around January 11, the financial ministry officials confirmed that they indeed had made phone calls to banks requesting them to exercise restraint in purchasing U.S. dollars lest the won-to-dollar exchange rate rises too high. Also, it was widely known that the foreign exchange dealing has practically come to a halt because the exchange rate has changed too drastically during the relevant period. Yet others have raised doubt on whether his information, even if found to be inaccurate to an extent, has hurt (or can be said to be posted on the internet for the purpose of hurting) public interest. The prosecutors argue that his entries have lowered the credit rating of the country by telling the world that the Korean government has manipulated exchange rates. However, it is widely known that the government, through informal pleas made to foreign exchange banks, has tried to influence exchange rates, as the financial ministry officials themselves have acknowledged. Furthermore, his entries have contributed to the public interest in fair foreign exchange trade because they alerted people to the fact of exchange manipulation that some may not have known.

Finally, others have questioned the validity of his arrest and continued confinement, even assuming the culpability under the law, for all the evidence of his culpability have been already published and therefore obtained by the prosecutors and there is not apparent danger of Park's flight. It is reported that Park's arrest has caused many internet pundits to stop criticizing the government's economic policies.

3. Our requests to the Special Rapporteur

Korea is probably the only liberal-democratic country that criminally punishes dissemination of false information even if the information did not cause any specific harm or result in any illegitimate gain. The internet pundit Minerva was indicted under the law Article 47 that does exactly that. The UN Human Rights Committee has recommended that the law against dissemination of false information be abolished at least five times back in

1990s in fear that this law is used to punish and suppress speech critical of government.

We request that the UNHCHR recommend that this law criminally punishing dissemination of falsity be abolished.gain.

B. Case- Twenty four people encouraging boycott were indicted.

1. Allegation regarding a person:

On August 29, 2008, twenty four people were indicted, and two of them arrested, for posting entries on the Daum internet café² proposing and encouraging boycott of those businesses advertising on pro-government newspapers, which have been criticized widely for the distorted coverage of the government policies.

The entries mainly proposed that phone calls be made to those businesses to persuade them to stop advertising the pro-government newspapers.

On January 20, the prosecutors requested sentences as high as three years in imprisonment against the defendants. The judgment on these 24 people will be announced on February 19, 2008.

□ List of 24 defendants and penalty

- Lee 00 (Male, 40), three years in imprisonment
- Yang 00 (Male, 41), three years in imprisonment
- Kim 00 (Male, 40), two years six month in imprisonment
- Lee 00 (Male, 42), three years in imprisonment
- Lee 00 (Male, 28), three years in imprisonment
- Lee 00 (Male, 36), three years in imprisonment
- Lee 00 (Male, 29), three years in imprisonment
- Park 00 (Male, 35), two years in imprisonment
- Kim 00 (Female, 24), two years in imprisonment
- Hong 00 (Male, 32), two years in imprisonment
- Jung 00 (Female, 28), two years or one year six month in imprisonment
- Choi 00 (Female, 18), two years in imprisonment
- Lee 00 (Female, 30), two years in imprisonment
- Ahn 00 (Female, 27), two years in imprisonment
- Kim 00 (Female, 25), one year six month in imprisonment
- Lee 00 (Female, 29), one year six month in imprisonment
- Song 00 (30), three million won fine (about \$ 2,300)
- Shin 00 (22), three million won fine (about \$ 2,300)
- Park 00 (31), three million won fine (about \$ 2,300)
- Kang 00 (41), five million won fine (about \$ 3,800)
- Kim 00 (37), five million won fine (about \$ 3,800)
- Kim 00 (26), five million won fine (about \$ 3,800)
- Youn 00 (21), three million won fine (about \$ 2,300)
- Jeon 00 (42), three million won fine (about \$ 2,300)

² A group of web pages maintained by the users of the internet portal Daum where the café participants could upload and download information for other café participants.

2. Information related to State actions:

The arrest followed KCSC's(the Korean Communication Standards Commission) 'delete' recommendation on July 1 that those entries fall under 'information aiding and abetting a crime' under Article 44-7 Section 1 Item 9 of the Information Communication Network Act.

The Act Regarding Promotion of Use of Information Communication Networks and Protection of Information, Article 44-7 (Ban on Exchange of Illegal Information) reads:

Section 1. No one shall exchange through electronic communication networks any information falling under one of the following:

1. [omitted : obscenity]
2. Information, aimed at defamation of another person, derogating that person's reputation by disclosing publicly true or false statements
3. [omitted: stalking]
4. [omitted: material harmful to children]
5. [omitted: interference with network, data, or program]
6. [omitted: gambling]
7. [omitted: classified information]
8. [omitted: national security]
9. Any other information aimed at and aiding or abetting a crime.

Section 2. As to Items 1 thru 6 of Section 1, Korean Communications Commission may order the information communication service provider or the manager or operator of the relevant bulletin board to refuse, suspend, or restrict the exchange of that information pursuant to the review of the Korean Communication Standards Commission. Provided, information falling under items 2 through 3, may not be banned against the concretely demonstrated wishes of the person injured by the said information.

Section 3. As to Items 7 thru 9 of Section 1, Korean Communications Commission shall order the information communication service provider or the manager or operator of the relevant bulletin board to refuse, suspend, or restrict the exchange of that information in case (1) a relevant national administrative body has requested (2) the Korean Communication Standards Commission has deliberated upon that request within 7 days and issued a correction order pursuant to Article 21 Section 4 of the Act Regarding Installation and Operation of the Korean Communications Commission and (3) the information communication service provider and the manager or operator of the relevant bulletin board did not comply with that order. <wholly revised 08.06.13>

2-1. Additional comments or background relevant to the case

The prosecutors initially noted that these entries constituted 'information aiding and abetting a crime of *interference with business operation*'. In Korea, like other countries, consumer boycotts are considered the activities protected under freedom of speech and therefore do not constitute a crime even if they produce the results unfavorable to the businesses targeted by the boycotters. Therefore, the prosecutors in this case, pointing out

that the defendants here boycotted the businesses in order to pressure them into boycotting the newspapers, characterized defendants' actions as *secondary boycotts*, and invoked the laws in other countries such as the U.S. and Australia banning secondary boycotts. However, those secondary boycott laws are part and parcel of antitrust regulations applying only to businesses or labor organizations (such as unions) and therefore cannot be applied against consumer boycotts, as many have noted. In response, the prosecutors produced a list of court cases where secondary consumer boycotts were imposed civil liability. However, even a cursory reading of these cases shows that these boycotts were imposed liability not because they were *secondary* but because these boycotts involved the elements of violence, coercion, or economic motivation, a kind that secondary boycott by businesses would have. Therefore, these liability decisions could not be analogies to the instant boycotts conducted only in the form of telephone calls made to the businesses advertising on pro-government newspapers. Then, the prosecutors changed their reason for indictment during the trial, from that of secondary boycott to that of causing too many phone calls disruptive to the operation of the advertisers. However, no principle of law has imposed liability on consumers for calling the businesses too many times, where they were calling to purchase goods and services or to complain about goods and services they have purchased or they are about to purchase. What is even more problematic, the defendants in this case were not charged for making these calls but merely encouraging other consumers to make the calls. There is no evidence that the café administrators had any independent relationship, financial or otherwise, with the consumers who made the calls. Indicting the defendants for advocating for making such calls is in clear contravention of the principle of *a clear and present danger*, a principle that mere advocacy cannot be punished even when what is advocated is criminal.

3. Our requests to the Special Rapporteur

We urgently request UNHCHR's action because the judgment on these 24 people will be announced on February 19, 2008. A judgment of guilt will basically toll a death knell for any effective consumer boycott. We also request that UNHCHR recommend on the danger of administrative censorship conducted by KCSC for the instant criminal prosecution was inspired by the KCSC action.

4. Information on the source of the communications:

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5. ANNEX

- Report on Korea, July 2008- January 2009: Need to Preserve Free Speech from Government Suppression (Kyungsin Park, Executive Director, PSPD Public Interest Law Center/ Professor of Law, Korea University)

**Report on Korea, July 2008- January 2009:
Need to Preserve Free Speech from Government Suppression**

Report Prepared by:

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The Public Interest Law Center, the legal arm of People's Solidarity for Participatory Democracy would like to report to the UNHCHR the following incidents violative of Article 19 of the UN International Covenant on the Civic and Political Rights. In Section A of this report, the details of four widely publicized incidents which we believe contravene the prevailing interpretations of ICCPR. In Section B of this report, we introduce the laws that made possible the occurrence of these incidents, and whose existence in the country's statutes *per se* contravene the prevailing interpretations of ICCPR.

To state the conclusion first, we believe that the Korean law leaves free speech systematically vulnerable to government suppression and Lee Myung Baik's regime has used these systemic elements to suppress threatening critiques, resulting in the incidents we would like to report. We believe that UNHCHR's urgent intervention in the

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A. Incidents Violating ICCPR

1. Minerva – Dissemination of Falsity Case

On January 9, 2009, an internet pundit Park Dae Sung³ known under the identification name *Minerva* was arrested and later indicted for violating the law against dissemination of false information. A challenge on his arrest warrant was finally denied on January 15 and he is still in prison. Starting March 2008 and before his arrest, he had achieved fame by correctly predicting the bankruptcy filing of Lehman Brothers and other changes in macroeconomic indicators in Korea such as exchange rates and stock market prices. Part of his fame was also due to his scathing criticism of the government's economic policies, including a contemplated decision to purchase Lehman Brothers. All of this, he did through 280 or so entries he posted on the Agora discussion site of *daum.net* under the pseudonym *Minerva* until December 2008. In the January criminal proceeding, he was charged for posting an entry on December 29 stating that the Korean financial ministry had issued an official order to stop banks from purchasing U.S. dollars and another entry on July 30 stating that foreign exchange dealing has come to a halt, both of which the prosecutors claimed to be false.

The law the prosecutors applied to *Minerva* reads: Article 47 of the Framework Act on Electronic Communications punishing dissemination of false information through internet with intent to hurt public interest (**See B-4 below**).

The law was enacted in 1983 during the time of the military dictatorship under President Chun Doo Hwan who had gained power through a military coup in 1980 amid a chaos following the previous dictator Park Chung Hee's assassination in the immediately preceding year. Except that its application is limited to electronic communications, the law looks very much like President Park's Emergency Decree No. 1 under which many private citizens critical of the authoritarian regime were persecuted for making what Park's regime claimed to have been inaccurate statements. In any case, the law has been hardly used for over 30 years until President Lee Myung Baik took power in 2008, whose prosecutors began to use the law and applied the law *only* against private citizens critical of his policies. One junior high student was prosecuted for disseminating a text message stating "Schools Declare Official Holidays" after some newspapers reported on the possibility of such holiday when a massive number of secondary school students participated in demonstrations against President Lee's decision to import U.S. beef. Three adult participants in the demonstrations are also being prosecuted for publicly spreading inaccurate statements about the police conduct during the anti-import demonstrations. For this historical reason and the reason set forth in Section B-4 below, many people have raised doubt on the constitutionality of the law.

Others have raised doubt on the legality of his prosecution even assuming that the law is valid. On or around January 11, the financial ministry officials confirmed that they indeed had made phone calls to banks requesting them to exercise restraint in purchasing U.S. dollars lest the won-to-dollar exchange rate rises too high.⁴ Also, it was widely known that the foreign exchange dealing has practically come to a halt because the exchange rate has

³ In this report, a Korean full name appears with its family name first, in accordance with the Korean custom. One or two words following the family name together constitute the person's own name. In the Korean custom, there is no counterpart to a middle name. For instance, the name *Park Dae Sung* breaks into a family name *Park* and the personal name *Dae Sung*.

⁴ <http://www.cbs.co.kr/nocut/show.asp?idx=1034370>

changed too drastically during the relevant period.⁵ Yet others have raised doubt on whether his information, even if found to be inaccurate to an extent, has hurt (or can be said to be posted on the internet for the purpose of hurting) public interest. The prosecutors argue that his entries have lowered the credit rating of the country by telling the world that the Korean government has manipulated exchange rates. However, it is widely known that the government, through informal pleas made to foreign exchange banks, has tried to influence exchange rates, as the financial ministry officials themselves have acknowledged. Furthermore, his entries have contributed to the public interest in fair foreign exchange trade because they alerted people to the fact of exchange manipulation that some may not have known.

Finally, others have questioned the validity of his arrest and continued confinement, even assuming the culpability under the law, for all the evidence of his culpability have been already published and therefore obtained by the prosecutors and there is not apparent danger of Park's flight. It is reported that Park's arrest has caused many internet pundits to stop criticizing the government's economic policies.

We request the UNHCHR to intervene and free Mr. Park Dae Sung whose only crime is to criticize the government's economic policies too eloquently and in the process made very marginally inaccurate statements.

2. Daum Agora Petition - Governor Kim Moon Soo Case:

On January 2, Governor Kim Moon Soo during a public speech asked rhetorically, "Would today's Korea have been possible had she not gone through the Japanese colonial period, the division, and the war?" A public uproar followed criticizing Governor Kim for providing justification for the nation's tragedies, and one of them opened a petition web page at Daum Agora site where Governor Kim's above remarks, quoted word-for-word, were followed by such criticism as "nation-destroying remark" and a plea for resignation, and where other netizens could express their agreement or disagreement with the plea for resignation by posting replies at that page.

Governor Kim requested the Korean Communication Standards Commission ("KCSC") to censor the petition web page for 'defamation' under Article 44-7 Section 1 Item 2 of the Information Communication Network Act (**see below B-6**) and, on January 20, KCSC issued a recommendation that the Daum corporation delete the web page, which was promptly followed, as is usually the case because non-compliance with a KCSC recommendation calls for a binding order from the more powerful agency with punitive authorities, Korean Communications Commission ("KCC"), anyway.

KCSC's ruling that such webpage constitutes 'defamation' is contrary even to the established law of the country. A principle that expression of mere opinions cannot be imposed any legal liability has been firmly established and several times reconfirmed by the highest courts of the country. So has been the principle that a true statement made solely for public interest (e.g., a statement challenging the qualification of a public official) cannot be imposed any legal liability. The petition page only (1) quoted word-for-word what the elected official actually said and merely added (2) the speaker's opinion that Governor Kim's remark is so against the nation as to justify a demand for his resignation and (3) a bulletin board whereby others could express support for or opposition to that opinion. None of three

⁵ <http://news.moneytoday.co.kr/view/mtview.php?no=2008073016381652373&type=2>

components gives rise to any liability. The only explanation is that the web page was taken down for revealing truth on a public official, an explanation unacceptable to a country that ratified ICCPR and uphold a principle that one's mere opinion cannot be punished.

In explaining why this KCSC has taken this irrational action, critics pointed to the fact that six (6) of the nine(9)-member KCSC commissioners were the appointees of President Myung Baik Lee and his ruling party to which Governor Kim also belongs to.

Some of these critics believe that KCSC's action is a classic example of abusing a censorship body for political purposes which only reconfirms the danger inherent in *administrative censorship* itself. The prevailing human rights practice followed by ICCPR member countries is that no administrative body is allowed to determine the legality or propriety of an expression, a job reserved for the independent judiciary (**See below B-6**).

We submit this report urgently because KCSC's previous 'delete' recommendation was followed by the criminal indictment and arrest of those who posted the deleted entries (**See below A-3**). We request the UNHCHR to intervene and comment on KCSC's action before it escalates again into criminal prosecution of innocent people who merely wanted to express their outrage at a politician's irresponsible statement.

3. Pro-Government Newspaper Advertiser Boycott Case

On August 29, 2008, twenty four people were indicted, and two of them arrested, for posting entries on the Daum internet café⁶ proposing and encouraging boycott of those businesses advertising on pro-government newspapers, which have been criticized widely for the distorted coverage of the government policies. The entries mainly proposed that phone calls be made to those businesses to persuade them to stop advertising the pro-government newspapers. The arrest followed KCSC's 'delete' recommendation on July 1 that those entries fall under 'information aiding and abetting a crime' under Article 44-7 Section 1 Item 9 of the Information Communication Network Act (**See below B-6**).

The prosecutors initially noted that these entries constituted 'information aiding and abetting a crime of *interference with business operation*'. In Korea, like other countries, consumer boycotts are considered the activities protected under freedom of speech and therefore do not constitute a crime even if they produce the results unfavorable to the businesses targeted by the boycotters. Therefore, the prosecutors in this case, pointing out that the defendants here boycotted the businesses in order to pressure them into boycotting the newspapers, characterized defendants' actions as *secondary boycotts*, and invoked the laws in other countries such as the U.S. and Australia banning secondary boycotts. However, those secondary boycott laws are part and parcel of antitrust regulations applying only to businesses or labor organizations (such as unions) and therefore cannot be applied against consumer boycotts, as many have noted. In response, the prosecutors produced a list of court cases where secondary consumer boycotts were imposed civil liability. However, even a cursory reading of these cases shows that these boycotts were imposed liability not because they were *secondary* but because these boycotts involved the elements of violence, coercion, or economic motivation, a kind that secondary boycott by businesses would have. Therefore, these liability decisions could not be analogies to the instant boycotts conducted

⁶ A group of web pages maintained by the users of the internet portal Daum where the café participants could upload and download information for other café participants.

only in the form of telephone calls made to the businesses advertising on pro-government newspapers. Then, the prosecutors changed their reason for indictment during the trial, from that of secondary boycott to that of causing too many phone calls disruptive to the operation of the advertisers. However, no principle of law has imposed liability on consumers for calling the businesses too many times, where they were calling to purchase goods and services or to complain about goods and services they have purchased or they are about to purchase. What is even more problematic, the defendants in this case were not charged for making these calls but merely encouraging other consumers to make the calls. There is no evidence that the café administrators had any independent relationship, financial or otherwise, with the consumers who made the calls. Indicting the defendants for advocating for making such calls is in clear contravention of the principle of *a clear and present danger*, a principle that mere advocacy cannot be punished even when what is advocated is criminal.

On January 20, the prosecutors requested sentences as high as three years in imprisonment against the defendants. On the same day, about 80 legal scholars have submitted a petition to the court pointing out the unconstitutionality of the prosecution.

We urgently request UNHCHR's action because the judgment on these 24 people will be announced on February 19, 2008. A judgment of guilt will basically toll a death knell for any effective consumer boycott. We also request that UNHCHR recommend on the danger of administrative censorship conducted by KCSC for the instant criminal prosecution was inspired by the KCSC action.

4. PD Diary-Agricultural Minister Case

On June 20, 2008, the producers of a television documentary *PD Diary* were accused of defamation by the Minister of Agriculture, Forestry, and Fishery for producing and having broadcast a special episode on mad cow disease and its occurrence in the U.S. beef on April 30, 2008. *PD Diary* is a popular weekly documentary by MBC, one of the three premier broadcasting stations. The theory was that the documentary exaggerated the susceptibility of U.S. beef to mad cow diseases, and thereby derogating the reputation of the agricultural minister who had decided to import U.S. beef.

The prosecutors accepted the accusation by the agricultural minister and announced on July 29, 2008 that the *PD Diary* episode includes "19 different distortions" and summoned the producers of the episode for interrogation, who have thus refused to comply. One such distortion is as follows: the mother of a human mad cow disease victim in the televised interview uttered in English the similar sounding name of another disease as the reason for her daughter's death but the Korean subtitle said 'a mad cow disease.' The producers changed the Korean translation because the mother used the names of the two diseases interchangeably in previous conversations and there were ample circumstances to believe that the mother meant 'mad cow disease.' Even so, the prosecutors appear to believe, the mother's mistake should not have been corrected by the producers to augment the emotional value of the mother's interview. Another alleged distortion is the comparison of Koreans' genetic susceptibility to mad cow disease to other races, which shows Koreans to be 3 times more susceptible. The prosecutors claim that the comparison left out other relevant factors. In general, the prosecutors' investigations reveal at most sensationalizing and editorializing of the data but not outright falsities.

Many have been outraged, firstly by the fact that the agricultural minister has asked

fellow government officials (prosecutors) to protect his reputation using the tax payer's money, and secondly by the fact that the prosecutors will apply criminal punishment of journalists as a method of providing such protection. It is one thing to point out distortions by the media but it is another for the prosecutors to intervene with their machines of criminal punishment to protect the reputation of the fellow government officials. **(See below, B-2)**

Others are outraged that even a scientific documentary program on consumer products will be closely inspected for any error or inaccuracy by the prosecutors to see if such error or inaccuracy will somehow affect the reputation of government officials who commend such products. In such legal environment, once a government official decides to take a favorable action toward certain company or goods, people should be very careful to criticize those goods or companies lest such criticism may affect the government official's reputation.

On December 29, 2008, the prosecutor in charge of the *PD Diary* case resigned for an unknown reason. It has been rumored that he has disagreed with the top leaders of the Prosecutors' Office and has refused to indict the producers for the reason that PD Diary constitutes criticism of a government policy and therefore cannot be punished for defamation of government officials in accordance with freedom of speech.

So far no indictment has been filed but the Prosecutors' Office has maintained its intent to continue investigations, and such limbo situation has caused the chilling effect on the Korean media.

We request that the UNHCHR intervene to stop the prosecutorial investigation of *PD Diary* producers and clear the chilling effect arising therefrom.

B. Korean Laws Per Se Violative of ICCPR

1. Defamation liability for truthful statements

Criminal Code, Article 307 (Defamation), Section 1 reads: A person who derogates another person's reputation by stating facts publicly shall be subjected to imprisonment or confinement of up to 2 years or a fine of up to 5 million won. <Amended 95.12.29>

Criminal Code, Article 310 (Exculpation) reads: The act under Article 307 Section 1 shall not be punished if it constitutes a truthful statement made solely for public interest.

Korea is one of the very few OECD countries where even truthful statements are vigorously imposed legal liability if the statements are found to derogate another person's reputation, in absence of any concern for privacy or publicity rights.⁷ The defendant can escape liability only by proving that the statements were made *solely* for public interest, a burden of proof difficult to sustain. Under this provision, for instance, a worker stating a truthful statement about his employer's non-payment of wages has been punished. Some Korean courts have even refused to accept the proof that public interest is the sole motif where it was shown that the person making the statements had any intention of harming the reputation of the subject of the statements. The practical effect of this law has been that a private person who has encountered revealing truths about corruptions in the government or other powerful entities could not freely share them with others in fear that they may not be

⁷ The only other country, Japan's stance may be forgiven for the relative neutrality and independence of the prosecutors and the judiciary J. Mark Ramseyer & Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* 170 (2003)

able to sustain the burden of proving ‘public interest as the sole motif’. The chilling effect of this law has been aggravated by the fact that defamation is criminally punished in Korea, as it shall be explained below.

This law has allowed, for instance, the overreaching interpretation by KCSC against the Daum-agera petition page which only restated Governor Kim’s own words and added at the end the petitioner’s own negative evaluation of Kim’s words(**A-2, see above**).

We do not request that UNHCHR take any action on this issue for other actions are more urgent, however, if possible UNHCHR should comment on the propriety of broadening the defensive effect of truth in defamation lawsuits.

2. Criminal prosecution for defamation

Criminal Code, Article 307 (Defamation) reads:

Section 1. A person who derogates another person’s reputation by stating facts publicly shall be subjected to imprisonment or confinement of up to 2 years or a fine of up to 5 million won. <Amended 95.12.29>

Section 2. A person who derogates another person’s reputation by making publicly false factual statements shall be subjected to imprisonment for up to 5 years, disqualification for up to 10 years, or a fine of up to 10 million won <Amended 95.12.29>

Korea is one of the very few OECD countries where private persons are vigorously subjected to criminal prosecution for defamation. Most developed countries have abolished (or engaged in the process of abolishing) criminal prosecution for defamation⁸ due to a concern that the incumbent government or other powerful individuals influence the prosecutors to suppress their opposition or critics --- that is, using not their own resources but the taxpayers’ money.⁹ It is under this law that the television documentary producers are being currently prosecuted for producing and broadcasting a scientific piece on the danger of mad cow disease on the theory that the piece defames government officials (**See above, A-4**).

We request that the UNHCHR recommend that criminal prosecution for defamation be either abolished completely or at least partially abolished for cases where the government officials are the supposed victims of defamation.

3. Insult law

⁸ See Richard N. Winfield, Kristin Mendoza, “The Abolition Movement: Decriminalizing Defamation and Insult Laws”, *Communication Lawyer*, Fall 2007; “Libel and Insult Laws: What More can be Done to Decriminalize Libel and Repeal Insult Laws”, a joint statement of the Conference on Libel and Insult Laws, organized by the Organization for Security and Cooperation in Europe <www.osce.org/item/3544.html>

⁹ Gregory C. Lisby, “No Place in the Law: the Ignominy of Criminal Libel in American Jurisprudence”, *Communication Law and Policy*, Autumn 2004. The only other country - Japan’s criminal prosecution for defamation may be forgiven for the relative neutrality and independence of the prosecutors and the judiciary⁹ but even there commentators have proposed abolition for fear of abuse. Salil K. Mehra, “Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States”, *University of Colorado Law Review*, Summer 2007.

Criminal Code, Article 311 (Insult) reads: A person who publicly insults another person shall be subjected to imprisonment or confinement of up to 1 year or a fine of up to 2 million won. <Amended 95.12.29>

Many countries do have the law criminally punishing insult of the King or the heads of the government but the international human rights organizations have for many years asked abolition of these laws in fear that these laws are used only to suppress speech critical of the government.¹⁰

We believe that the general insult law of the kind preserved in Korea presents an even greater threat because even government officials and powerful individuals can invoke protection under this law and thereby suppress speech critical to them. Other than Germany, Japan, and Taiwan, Korea is the only country in the whole world where insulting another private person is criminally punished. In Germany, the last conviction for insult was in 1960s¹¹ and in Japan, the crime is treated lightly like a civil infraction.

Now, we have not seen this law being vigorously used by the Korean government for the specific purpose of suppressing criticism of the government. The reason is that insult is a crime that requires a formal accusation to be filed with the police by the insulted, and the socially established, who are the likely victims of the insult, have been deterred from filing such formal accusation in fear that such filing may only trigger negative publicity.

However, the existing insult law is being used by the ruling party a springboard for legislating a stronger cyber-insult law, which is likely to be vigorously used for suppression of dissension. The proposed law applies the enhanced punishment of up to 2 years of imprisonment and allows prosecution *even when a supposed victim has not come forward*. This means that the police and prosecutors can monitor the internet looking for entries insulting to others, and even before the supposed victims have reported any injury to the police and prosecutors, apply pressure on the speakers through investigations, etc. These investigations can be very well used by the police and prosecutors again to chill the criticism of the government.

We request that the UNHCHR recommend that the insult law be abolished, or in their alternative, recommend that the legislative attempt to make prosecution for insult easy (i.e. without the victim's report of injury) through the new cyber-insult law be stopped.

4. Dissemination of false information

Framework Act on Electronic Communications, Article 47 (Penalty), Section 1 reads:

¹⁰ "It's A Crime: How Insult Laws Stifle Press Freedom", A 2006 Status Report by the World Press Freedom Committee, edited by Marilyn Greene, available at <<http://www.wpfc.org/Publications.html>>; "Libel and Insult Laws: What More can be Done to Decriminalize Libel and Repeal Insult Laws", a joint statement of the Conference on Libel and Insult Laws, organized by the Organization for Security and Cooperation in Europe <www.osce.org/item/3544.html>; Richard N. Winfield, Kristin Mendoza, "The Abolition Movement: Decriminalizing Defamation and Insult Laws", Communication Lawyer, Fall 2007

¹¹ "Insult Law in the European Union: A Silent Threat", A Report from International PEN's Writers in Prison Committee <<http://freenewsreespeech.blogspot.com/2008/07/defamation-and-insult-writers-react.html>>.

A person who publicly makes a false communication using electronic communications facilities for the purpose of derogating public interest shall be subjected to imprisonment or confinement of up to 5 years or a fine of 50 million won. <Amended 96.12.30>

Korea is probably the only liberal-democratic country that criminally punishes dissemination of false information¹² even if the information did not cause any specific harm or result in any illegitimate gain. The internet pundit Minerva was indicted under this law. (See above A-1) the UN Human Rights Committee has recommended that the law against dissemination of false information be abolished at least five times back in 1990s in fear that this law is used to punish and suppress speech critical of government.¹³

We request that the UNHCHR recommend that this law criminally punishing dissemination of falsity be abolished.

5. Laws Abrogating Right to Anonymous Communications

The Act Regarding Promotion of Use of Information Communication Networks and Protection of Information, Article 44-5 (Self-identification of Bulletin Board User) reads:

Section 1. Anyone falling under one of the following and installing and operating a bulletin board shall administer the methods and procedure, etc., whereby the users identify themselves, and other necessary measures specified by the Presidential Decree (hereinafter, “user self-identification measures”). 1. State agencies, local self-government bodies, public companies and semi-public companies set forth in Article 5 Section3 of the Act Regarding Management of Public Entities and local companies and local industrial complexes set forth in the Local Public Companies Act (“public entities”, hereinafter)

Section 2. Those information communication service providers whose per-service-type daily average users exceed 100,000 in number and meet the requirement set forth in the Presidential Decree. Section 2. The Korean Communications Commission may order the information communication service providers meeting the requirement of Section 1 Item 2 and not administering user self-identification measures to administer those measures [omitted] [wholly revised 2008.6.13]

Korea is probably the only OECD country that requires all postings on the selected internet sites to be accompanied by the poster’s real identification, which translates in Korea into the name and resident registration number, the unique identification number given to all Korean nationals for welfare and tax purposes. This requirement has basically exposed private individuals’ identity to the police and prosecutors without any constitutional protection such as warrant requirement. In other countries, the speaker’s identity has been

¹² *R. v. Zundel* [1992] 2 SCR 731, p. 766

¹³ UN Human Rights Committee. *Mukong v. Cameroon*, views adopted 21 July 1994, No. 458/1991, para. 9.7.; Annual General Assembly Report of the Human Rights Committee, UN Doc. A/50/40, 3 October 1995, para. 89.; Annual General Assembly Report of the Human Rights Committee, UN Doc. A/51/40, 16 September 1996, para. 154.; Concluding Observations of the Human Rights Committee: Armenia, UN Doc. CCPR/C/79/Add.100, 19 November 1998, para. 20.; Concluding Observations of the Human Rights Committee: Uruguay, UN Doc. CCPR/C/79/Add.90, 4 August 1998.

considered part of private information which, as long as the speaker continues to maintain private, the government can access only pursuant to the warrant procedure. According to the law above, Korean nationals must identify themselves before speaking in cyberspace. This forced self-identification is unprecedented and will again chill the speech critical of the government and powerful individuals. The right to anonymity has been one of the essential tools of free speech that made possible the development of democracy¹⁴ and for this reason the courts have struck down laws compelling self-identification as a requirement for speech¹⁵ and some legislatures made it into a statutory protection.¹⁶

We request that the UNHCHR recommend that this law compelling self-identification and destroying the right to anonymous communication be abolished in order to prevent the government from facilitating the tracking-down of dissenting views.

6. Comprehensive administrative censorship

The Act Regarding Promotion of Use of Information Communication Networks and Protection of Information, Article 44-7 (Ban on Exchange of Illegal Information) reads:

Section 1. No one shall exchange through electronic communication networks any information falling under one of the following:

10. [omitted : obscenity]
11. Information, aimed at defamation of another person, derogating that person's reputation by disclosing publicly true or false statements
12. [omitted: stalking]
13. [omitted: material harmful to children]
14. [omitted: interference with network, data, or program]
15. [omitted: gambling]
16. [omitted: classified information]
17. [omitted: national security]
18. Any other information aimed at and aiding or abetting a crime.

Section 2. As to Items 1 thru 6 of Section 1, Korean Communications Commission may order the information communication service provider or the manager or operator of the relevant bulletin board to refuse, suspend, or restrict the exchange of that information pursuant to the review of the Korean Communication Standards Commission. Provided, information falling under items 2 through 3, may not be banned against the concretely

¹⁴ Jonathan D. Wallace, "Nameless in Cyberspace: Anonymity on the Internet", Cato Institute Briefing Papers, No. 54 (December 1999) <www.cato.org/pubs/briefs/bp-054es.html>

¹⁵ *McIntyre v. Ohio Campaign Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995); *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. GA) (1997)

¹⁶ The Law on the Freedom of Communication of September 30, 1986, as amended on June 16, 2000, France.

demonstrated wishes of the person injured by the said information.

Section 3. As to Items 7 thru 9 of Section 1, Korean Communications Commission shall order the information communication service provider or the manager or operator of the relevant bulletin board to refuse, suspend, or restrict the exchange of that information in case (1) a relevant national administrative body has requested (2) the Korean Communication Standards Commission has deliberated upon that request within 7 days and issued a correction order pursuant to Article 21 Section 4 of the Act Regarding Installation and Operation of the Korean Communications Commission and (3) the information communication service provider and the manager or operator of the relevant bulletin board did not comply with that order. <wholly revised 08.06.13>

Korea is probably the only OECD country where an administrative body conducts comprehensive censorship on the internet. Australia also has an administrative censorship body but it censors only pornographic or child-abusive material. Korea's administrative censorship body, Korea Communication Standards Commission, censors potentially an unlimited range of material, including but not limited to defamatory material and material aiding and abetting a crime. This law has allowed KCSC to censor internet even those contents which are likely to turn out to be lawful had the speakers or the internet service providers pursued judicial review of KCSC's actions. The reality is that once KCSC speaks no internet service provider has challenged it in court and the speaker himself or herself is not guaranteed a right to challenge KCSC's decision.

This makes freedom of speech in Korea vulnerable to government suppression as shown by the Pro-government Newspaper Advertiser Boycott Case and the Governor Kim Moon Soon Case (**See above A-2 and A-3**). KCSC, a body controlled by a majority of commissioners appointed by the ruling party and the president, uses the authority not to cull out defamatory or crime-aiding-or-abetting material as accurately as it can but to suppress the voices critical of the government. This danger has been considered threatening and sufficiently inherent to the nature of administrative censorship that no other liberal-democratic country allows administrative censorship of speech even if it takes place after the speech has been made.

We request that the UNHCHR recommend that administrative censorship of speech be stopped or in the alternative (a) the scope of administrative censorship be narrowed to only the clear categories such as obscenity and child pornography and (b) government officials are excluded from the permitted complainants in the KCSC proceedings since their complaints present a danger of abusing the censorship body for suppressing dissenting views.

C. Conclusions

Korea, largely democratized in the late 80's, has not fully cleared itself of the vestiges of the authoritarian form of government, which is only rarely found in other liberal-democratic countries, and where found, moderated with strong safeguards.

Truth is still not considered a defense to defamation unless the speaker sustains a heavy burden of proving 'public interest' as the purpose of the speech. Against this backdrop, ordinary citizens expressing their dislike of a politician's remark on the internet were censored (the Governor Kim Moon Soo Case). Defamation is still criminally punished, leaving wide open a possibility for the government and powerful individuals to expend the state resources (i.e., prosecutors) in protecting their reputation and thereby suppressing

dissenting views. Under this system, two television producers are being investigated for defamation and threatened with imprisonment for producing and broadcasting a scientific expose on U.S. beef which the agricultural minister tried to import (the PD Diary Case). Insult law is also vigorously prosecuted, with the accompanying danger of prosecutorial suppression of dissenting views. The Korean ruling party is trying to pass a tougher new insult law, namely the cyber-insult law, which will realize this danger. Korea also punishes dissemination of false information itself even when it does not result in any unfair gain or any specific harm to anyone. Like criminal libel and insult, the law against false information is another venue through which the prosecutors can suppress the critics of the powerful individuals and the government. It is under this law that a financial pundit was arrested for making correct predictions on the country's economic outlook and eloquently criticizing the government's economic policies (the Minerva Case). Korea effectively abolished the right to anonymous communication on internet, violating the principle of search and seizure pursuant to a warrant. Korea also maintains administrative censorship of speech on the internet, leaving open the danger that the censorship body is used for the political purpose of suppressing dissenting views. That danger actually materialized when the Korean Communication Standards Commission ordered 'deleted' the discussion sites critical of a politician and pro-government newspapers (Governor Kim Moon Soo Case; Pro-Government Paper Advertiser Boycott Case). One of the KCSC action did not end with take-down of the dissenting material: it inspired criminal prosecution of the administrators of the discussion sites, 24 ordinary people, on grounds that are clearly against the prevailing principle of freedom of speech, a clear and present danger test and the rights of consumers to boycott products they dislike.

We again request that UNHCHR take actions to (1) terminate the prosecutorial actions against Minerva, PD Diary producers, and Pro-Gov. Paper Advertiser Boycotters, (2) undo the KCSC action against the cyber-space critics of Governor Kim Moon Soo, and (3) repeal or restrain the laws imposing liability for truth-libel, criminally punishing libel, insult, and dissemination of false information, abrogating the right to anonymous communication in internet, and authorizing administrative censorship in internet. For specific requests, please review the relevant parts of the main text.