

ARTICLES

FREEDOM OF THE PRESS AND RIGHT OF REPLY UNDER THE CONTEMPORARY KOREAN LIBEL LAWS: A COMPARATIVE ANALYSIS

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I. INTRODUCTION

An important task in a democratic society is to strike a balance among essential but conflicting social interests. A government is responsible for the harmonious adjustment of contending rights. Thus, a government is expected to establish legal standards to reconcile competing social interests by weighing their relative significance in society. A government also needs to provide its people with remedies when their rights are unlawfully infringed. This proposition is true for the Korean government.

The Korean government established the Press Arbitration Commission (PAC) to strike a balance between conflicting interests of the media and the public.¹ Since its formation in 1981, PAC has been a central apparatus for resolving libel problems outside the courts and has provided individuals with a means to redress damage to their reputation. PAC has worked as an official forum that helped both the press and the public to resolve

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1. PAC was established as a preliminary legal agency. It is mandatory for a person who wants to ask a court to order a right of reply to first apply to the commission for arbitration. The arbitration process is free of charge for both the public and the press. Right of reply refers to a remedy in libel litigation that awards an opportunity for publication of a counterclaim in the same media in which a defamatory remark was made against an individual. The basis of the right of reply is that the one who has been libeled may answer in kind.

libel disputes. Particularly, PAC demonstrates the basic notion that the ways of achieving reconciliation of press freedom and a person's reputational right vary according to the social and political values that societies place on the importance of reputation and on a free press.²

This article will be guided by mainly three questions: 1) how the press arbitration system in Korea has developed in terms of press freedom and a person's reputational right during the period 1981-1996, 2) what are the features of the right of reply under Korean libel law compared to those in other countries and 3) how is the right of reply related to the rapid growth in the number of libel suits that are in the process of political democratization?

This article is intended to show how press freedom and individuals' right of reputation are reconciled as a society goes through sociopolitical changes.³ The article attempts a macro-level observation of the press arbitration system in terms of sociopolitical changes in Korean society. The changing media environment of South Korea analyzed from a legal perspective is also discussed.

First this article examines the structure, function, and criticisms of the Korean Press Arbitration Commission. Second, the right of reply in four countries – Germany, France, Japan, and the United States – is reviewed to explain how different societies invoke different ways of resolving libel problems according to their social backgrounds. Third, this article historically explores how the relationship among the government, the media, and the public has changed since 1945. The concept of press freedom and how a person's reputational right has been recognized in Korean society is examined. Finally, this article will show how press freedom and reputation rights have been affected by the press arbitration system during the years of democratization since 1987.

2. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA LAW & PRACTICE 1, 3 (1980).

3. See, e.g., Yong-Sang Park, *Panraireul Tonghaebon Jungjungbodoui Silje* [A Reality in the Right of Reply], EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1991, at 51-63; Gwang-Sik Ahn, *Eonron Jungjaiedoui Ginungjuk Gylulhamgwa Gaesun* [Some Shortcomings of the Press Arbitration System], EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1990, at 22-29; Yong-Sang Park, *Jungjung Bodokwonui Ilbanjuk Gochal* [A Close Examination of Press Arbitration Procedure], EONRON JUNGJAI [PRESS ARBITRATION Q.], Fall 1991, at 55-86.

II. THE KOREAN PRESS ARBITRATION SYSTEM

A. STATUTORY FRAMEWORK OF THE RIGHT OF REPLY

Before the right of reply was adopted in Korea, individuals who sought a remedy for reputational injury had to depend on court action under the civil code.⁴ However, because it is hard for people to prove that the press deliberately impaired someone's reputation and for judges to find fault with the media, individuals could not easily gain their remedy through judicial procedures.⁵ Further, individuals find that a prompt remedy is difficult due to time-consuming, intricate litigation procedures.⁶

Unlike the remedies provided by the civil code, the right of reply does not require proof of the story's truthfulness or the media's fault.⁷ The purpose of the right of reply is to provide individuals an opportunity to respond to a factual story, therefore it is not as burdensome to the media as are money damages or the correction of a story.⁸

The Basic Press Act established the press arbitration system as a mechanism to enforce right of reply in 1981.⁹ Right of reply was considered constitutionally proper to "equalize" the power of the media with that of other public interests.¹⁰ Article 21 (4) of the Korean Constitution provides that "[n]either speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics." It also requires that the media pay compensation for damage to the reputation of other people.¹¹

4. Civil Code, art. 764.

5. Kyung-Seung Yang, *Banronbodo Chunggusagunui Jooyo Jaengjum* [Some Issues in the Right of Reply Cases], EONRON JUNGJAI [PRESS ARBITRATION Q.], Winter 1996, at 27.

6. *Id.* at 75. For these reasons, there were few libel suits against the media before the Basic Press Act was enacted in 1980. *Id.*

7. *Ui-Hyang Lee v. Dong-A Ilbo*, Seoul Civil District Court (en banc), Apr. 11, 1982, 82 Gahap 4734, EONRON JUNGJAI [PRESS ARBITRATION Q.], Summer 1984, at 174-177 (The civil code says that individuals cannot acquire the desired remedy when a story is "true and only for the public interest").

8. Yang, *supra* note 5, at 28.

9. Basic Press Act, art. 50 (repealed 1987); Periodicals Act, art. 16; Broadcast Act, art. 41 *translated in* *The Korean Press 1997* 139-191 (Korean Press Institute ed., 1997).

10. The Korean Supreme Court used "equal weapon" theory as a constitutional basis of right of reply. That is, the Supreme Court thought of the right of reply as an appropriate weapon for the public to face the powerful media. *Kyu-Ho Lee v. Dong-A Ilbo*, Supreme Court, Jan. 15, 1991, 90 Daka 25468, *COLLECTION OF MEDIA-RELATED CASES (II)* 13-20 (1995).

11. HUNBOP [KOREAN CONSTITUTION] [hereinafter KOREAN CONST.], art. 21 (4). The media's liability for reputational injury was specifically recognized by the Constitution of the Chun Doo-Whan Government (1980-1987).

In 1986, the Korean Supreme Court ruled on the right of reply under the Basic Press Act.¹² The Supreme Court, discussing *raison d'être* of the right of reply provisions, held that the claim for right of reply is not a right to correction by the media of the challenged stories "in conformity with truth."¹³ Instead, the Court held, the statutory claim is a right for the injured party to request publication of what he claims to be his version of the story. The Court found that the right of reply, unlike mere correction of a wrong story, is intended to provide the public with an opportunity to get access to the media. The Court also said that the truth or falsity of the stories that is required for damages in the civil code is not a determining factor in exercising the right.¹⁴

Since 1987, the right of reply has been justified in both the Periodicals Act and the Broadcasting Act by the notion of "human worth and dignity" recognized in the Korean Constitution.¹⁵ In 1996, the press-related laws were partially revised so that PAC might function with more efficiency and effectiveness in the arbitration process.¹⁶ Because of the concerns about the constitutional problems that expanded authority creates, the law requires "petitions" to reinvestigate decisions.¹⁷

In 1991, the Constitution Court of Korea upheld the right of reply provision in the Periodicals Act and the Broadcast Act. The Court relied on the constitutionally guaranteed right of character and held that the provision allowed an injured party an opportunity to respond to factual allegations. The Court held that it could provide the public with power equal to that which the press possesses in Korean society. Also, the Court claimed that right of reply can contribute to the public's "discovering truth and forming diverse public opinion."¹⁸

The right of reply has a limitation in its actual application. First, who is eligible for the right of reply? According to press laws, "any person who is injured by the media" can request a

12. Chai-Ran Ahn v. Korean Education Union (Saehan Ilbo), Supreme Court, Jan. 28, 1986, 85 Daka 1973, EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1986, at 169-171.

13. *Id.*

14. *Id.*

15. KOREAN CONST., art. 10. "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

16. As a result of the revision, the arbitration process became more like compulsory arbitration. Before the revision, the press arbitration procedure did not have authority to put the decision into effect.

17. Periodicals Act, art. 18 (7) (revised 1996).

18. Constitutional Court, 89 Honma 165; Constitutional Petition for Review of Periodicals Act, arts. 16 (3) and 19 (3), September 16, 1991, Eonron Jungjai [Press Arbitration Q.], Autumn 1991, at 169-77.

counterclaim in the media.¹⁹ The courts defined “any person” to include corporations,²⁰ government bodies,²¹ as well as natural persons.²²

The Seoul Civil District Court ruled that “any body” shall broadly include any social body existing as a unit, including those not eligible for a civil suit.²³ A social body that lacks a decision-making group or formal organization rules, can file a suit for a right of reply.²⁴ Those groups include a union of religious preachers,²⁵ schools with educational facilities that are run by school owners,²⁶ and groups in early stages of organization.

A person is “injured by the media” if ordinary readers who are interested in, but not prejudiced about the incident can identify the persons involved.²⁷ Under this rationale, although the media may use a pseudo-name for the person, if the address, age, family information, and apartment floor is described in a story, the person can claim an injury.²⁸ If English alphabet initials of one’s full name is used in the news, or if one’s career and reputation at work are detailed, he/she is entitled to claim a reply.²⁹ Also, even though a school or workplace may be indicated only by its initials or location, the school has a right to request a reply if pictures of students are broadcasted.³⁰ Although the voice and picture may be camouflaged, if people in the community can

19. See Periodicals Act, art 16 (1); Broadcast Act, art 41; Cable Act, art. 45.

20. Hyundai Investment Lab v. Jeil Gyungje Shinmoon, Seoul Civil District Court, May 25, 1990, 89 Ka 28984, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 21.

21. Boo-Ja Chin v. Joongang Ilbo, Seoul Civil District Court, Sep. 26, 1986, 86 Ka 28755, EONRON JUNGJAI [PRESS ARBITRATION Q.], Winter 1986, at 165-67.

22. Jong-Seo Kim, *Banronkwonui Jaengjumdeul* [Issues in Right of Reply], EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring, 1995, at 9.

23. Jae-Suk Lee v. Korean Ki-Dok Kongbosa, Seoul Civil District Court, Aug. 19, 1983, 93 Ka 9146, COLLECTION OF DOMESTIC & FOREIGN MEDIA-RELATED CASES (II) (1987), at 20-24.

24. Jotong Bumminok Yunhap v. Seoul Shinmoon, Seoul Civil District Court, Nov. 26, 1992, 92 Kagi 649. COLLECTION OF MEDIA-RELATED CASES, vol. 2 (1995), at 111.

25. Korean Jesuit Osoon Church v. Korean Gospel Shinbo, Seoul Civil District Court, Nov. 25, 1983, 83 Ka 22003, EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1984, at 179-182.

26. Chai-Ran Ahn v. Korean Federation of Education Association, Seoul Civil District Court, May 25, 1984, 84 Ka 1598; Seoul High Court, Aug. 16, 1985, 84 Na 2528; Supreme Court, Jan. 16, 1986, 86 Daka 1973. COLLECTION OF DOMESTIC MEDIA-RELATED CASES (II) (1987), at 53.

27. *Id.*

28. Boo-Ja Chin, *supra* note 21, at 173-176.

29. Woo-Ryong Kim et al. v. Korean Journalist Association, Seoul Civil District Court, July 19, 1990, 90 Ka 41568, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 27.

30. Seoul Sillim Elementary School v. Munwha Broadcasting, Seoul District Southern Branch Court, 93 Kahap 792, Sep. 6, 1993, COLLECTION OF MEDIA-RELATED CASES (III), 24 (1996); Hui-Gyung Jin v. Munwha Ilbo, Seoul District Court,

easily identify the plaintiff from the context, the right of reply is granted.³¹

Second, how do the courts distinguish factual statement from subjective expression? Even though it is a technical distinction, the "factual statement" clause in the press laws require the courts to draw a line between objective facts and subjective opinions or criticisms. Korean courts have held:

To decide whether a report or an expression is a factual assertion must be based on whether the content of the story can be verified.³² An article that is eligible for the right of reply must be a factual statement that needs to be evaluated by its accuracy and context.³³

The Seoul High Court acknowledged that if the right of reply is allowed for opinions or criticisms, the normal activities of the press would be chilled and that would violate the right of reply's intended purpose.³⁴ The court held that whether the stories are "factual" assertions must be decided based on objective evidence.³⁵ However, the court did not specify what constitutes objective evidence.³⁶

The Supreme Court ruled that even if a daily newspaper just quotes a person's remarks, the newspaper is responsible for a reply to the factual assertions of the remarks.³⁷ Other factual assertions subject to the right of reply include stories based on a "police report" or a "statement of a police officer" and stories that cite reports in other news media that are derived from the

Oct. 27, 1994, 94 Kagi 3509, COLLECTION OF MEDIA-RELATED CASES (III)(1996), at 96.

31. Moon-Sook Song v. Korean Broadcasting System, Seoul District Southern Branch Court, Nov. 29, 1994, 94 Kahap 1797, COLLECTION OF MEDIA-RELATED CASES (III) (1996), at 108.

32. Silim Elementary School, *supra* note 32.

33. Pasteur Milk Co. v. Kukmin Ilbo, Seoul District Court, Nov. 30, 1991, 92 Kahap 3879, EONRON JUNGJAI [PRESS ARBITRATION Q.], Summer 1993, at 170. See also Pasteur Dairy Co. v. Seoul Shinmoon, Seoul District Court, Jan. 3, 1996, 95 Kagi 5706, COLLECTION OF MEDIA-RELATED CASES (IV)(1997), at 122.

34. Gidokgyo Bokum Baptist Church v. Yong-Jo Ha, Seoul High Court, Aug. 21, 1992, 91 La 161; Seoul Civil District Court, Oct. 10, 1990, 91 Ka 81540, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 35.

35. *Supra* note 32, at 25.

36. *Supra* note 25, at 42. The Seoul High Court held that the distinction should be made based on 1) the intent of the story, 2) the nature of the medium, 3) the reason for the publication, 4) the feature of the main readers, 5) the usage of language, 6) the social perception of the used language, 7) the context of the story, and 8) the meaning implied by the author. *Id.* See also Doo-Ho Yoon v. Jangro Journal Co., Seoul Civil District Court, May 24, 1983, 83 Ka 7933, EONRON JUNGJAI [PRESS ARBITRATION Q.], Winter 1983, at 178-79.

37. Kyu-Hyo Lee v. Dong-A Ilbo, Supreme Court, Jan. 15, 1991, 90 Daka 25468, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 13.

official documents of government agencies or research institutes.³⁸

While most opinions or criticisms are not subject to the right of reply, if they are based on facts or use facts as an example in the statements, they can be subject to the right of reply.³⁹ The courts have held that some subjective statements that contain facts deserve a reply. Further, the courts have ruled that some subjective expressions could be regarded as factual assertions under certain circumstances.⁴⁰ Thus, the distinction between the factual/opinion assertions is up to the court's discretion.⁴¹

However, when a news story quotes experts' remarks or explanations that stem from an interview or results of research, the story is not considered a factual assertion of the media.⁴² If a story is written by someone who has expressed his/her own ideas, the media that published the story need not provide a right of reply.⁴³ A plaintiff who asserted that the place where he lived was depicted as smaller than in the map published in a newspaper did not receive a right of reply.⁴⁴ But a person was granted a right of reply when the plaintiff's interview with a television station was edited heavily before being broadcast.⁴⁵

38. Se-Eung Oh v. Uri Shinmoon Sa, Soo-Won District Sung-Nam Branch Court, July 30, 1993, 93 Kahap 312, COLLECTION OF MEDIA-RELATED CASES (III) (1996), at 17.

39. Cheju Spa v. Cheju Shinmoon, Cheju District Court, June 16, 1994, 94 Kahap 27, COLLECTION OF MEDIA-RELATED CASES (III), 1996, at 81; Sun-Myoung Kim v. Chosun Ilbo, Seoul High Court, Mar. 14, 1996, 95 La 216; Seoul District Court, Nov. 16, 1995, 95 Kagi 5283, COLLECTION OF MEDIA-RELATED CASES (IV) (1997), at 161.

40. Young-Suk Hakwon v. Munwha Broadcasting, Seoul District Southern Branch Court, Oct. 8, 1993, 92 Gahap 16462, COLLECTION OF MEDIA-RELATED CASES (III), 1996, at 36; Sung-Gui Kim et al. v. Chunbook Ilbo, Chunjoo District Court, Oct. 29, 1992, 92 Kagi 50, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 102.

41. See Jin-Tak Park v. Kukmin Ilbo, Seoul District Western Branch Court, Aug. 4, 1995, 95 Tagi 2543; Seoul District Western Branch Court, Aug. 1, 1995, 95 Kagi 609; Seoul District Western Branch Court, July 14, 95 Kahap 1256, COLLECTION OF MEDIA-RELATED CASES (IV) (1997), at 42.

42. Hyundai Investment Lab v. Jeil Gyungje Shinmoon, Seoul Civil District Court, May 25, 1990, 89 Ka 28984, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 21.

43. Doo-Ho Yoon v. Jangro Journal Co., Seoul Civil District Court, May 24, 1983, 83 Ka 7933, EONRON JUNGJAI [PRESS ARBITRATION Q.], Winter 1983, at 178-79; Jong-Soon Choi v. Munwha Broadcasting, Seoul District Southern Branch, February 20, 1992, 89 Ka 8917, COLLECTION OF MEDIA-RELATED CASES (II), 1995, at 86.

44. In-Gyu Lee v. Joongang Ilbo, Seoul Civil District Court, April 3, 1991, 90 Ka 110595, COLLECTION OF MEDIA-RELATED CASES (II) (1995), at 54.

45. Korean Gallery Association v. Munwha Broadcasting, Seoul District Southern Branch Court, Dec. 20, 1993, 93 Kahap 1107, COLLECTION OF MEDIA-RELATED CASES (III)(1996), at 67.

How is a reply statement published? The courts held that the reply statement must be placed at the same location as that of the original story. The size of the reply statement must be the same as that of the original story. When a photo was used with a story, the reply statement must be published with the same photo. At the same time, opinions of the news media in relation with a reply statement are allowed in order to express their stance about the original story.⁴⁶ However, their opinions must neither be included as a part of a reply statement nor can it obscure the content of the reply statement.⁴⁷

B. THE PRESS ARBITRATION COMMISSION

1. *Structure and Procedure*

The Basic Press Act called for a "press arbitration commission" to act as a mechanism to enforce the right of reply provisions.⁴⁸ The arbitration system's main function is to offer the injured an opportunity to respond in the press.⁴⁹ A story that is written by someone who has expressed his/her ideas is not subject to a right of reply. With the foundation of the Press Arbitration Commission (PAC), the Korean government intended to resolve libel problems outside the courts so that an individual could avoid the intricate proceedings involved with suing the news media. Additionally, they could ostensibly avoid spending excessive amounts of money on libel actions.

One concern, however, is whether PAC has imposed a chilling threat on the Korean media. PAC was originally founded and run by the government. Therefore, critics have asserted that PAC was just a way of indirect governmental regulation of the media rather than public regulation.⁵⁰

However, during its formative years, beginning with its establishment in 1981, the press arbitration system was not effective in regulating the media. First, aside from PAC, the government had a host of other legal and political means to con-

46. *Sil-Geun Hwang v. Kyunghyang Shinmoon*, Seoul Civil District Court, Nov. 15, 1993, 93 Kagi 3887, *COLLECTION OF MEDIA-RELATED CASES (III)* (1996), at 48.

47. *Youn-Dae Hwang v. Jangaeyin Bokji Shinmoon*, Seoul Civil District Court, December 11, 1993, 93 Kagi 3786; *Seoul Civil District Court*, March 4, 1994, 94 Tagi 1557, *COLLECTION OF MEDIA-RELATED CASES (III)* (1996), at 59.

48. Basic Press Act, art. 50 (repealed 1987).

49. Periodicals Act, art. 14; Broadcast Act, art. 42; Cable Act, art. 45 (9).

50. WON-SOON PAENG, *EONRON BOPJE SHINRON* [New Perspectives in Mass Media Law] 327 (2d ed. 1991); see also YOUNG-SUN KIM, *HANGUKUI JUGNGCHI GWONRYUKGWA EONRON JUNGCHAEK* [POLITICAL POWER AND MEDIA POLICY IN KOREA] 78-79 (1994) (arguing that PAC was in fact a sort of censorship that stifled the press in the pretext of balancing the interests between the press and the public).

trol the media.⁵¹ Second, the Korean people rarely used the press arbitration system because they were skeptical of its actual effectiveness.⁵² Third, influenced by Confucianism, the Korean people traditionally would not turn to legal agencies such as PAC as a valid means of problem solving.⁵³ The Periodicals Act provides the arbitration procedure for print media.⁵⁴ The basic procedure of arbitration is laid out in the Periodicals Act which is as follows:

1. Any person who is damaged by any press report, may request in writing for the arbitration to the Press Arbitration Commission, with respect to the dispute with a press agency, caused by a request for counterargument report or corrected report, within one month after he/she is informed of such report;

If the aggrieved person makes a request for a counterargument report directly to the press agency concerned, the request for arbitration shall be made within fourteen days after he/she fails to reach an agreement with the press agency;

The proceeding period of the request for arbitration is fourteen days or less from the day on which the request is received, but in the event that the arbitration section makes *ex officio* the arbitration award, it is extended to twenty one days;

The arbitration section shall fix without delay the date of arbitration, have the requesting and requested persons attend to hear the statement of both parties, and arbitrate positively in such manner that both parties reach a mutual agreement;

The head of the arbitration section may, if necessary, order the requested party to present the published materials or copy thereof, which are the object of the request for arbitration, or conduct the taking of evidence necessary for the arbitration;

51. Dae-Kwon Choi, *Eonrongwa Bop* [The Press and the Law], 11 BOPHAK [SEOUL NAT'L U. L. REV.] 16 (1981).

52. Sang-Jae Hwang, *Eonron Whangungui Byunwhawa Eonron Gaenyume Daehan Jaejungrip* [Changes in Media Environments and Reconstructing the concept of the Press], *EONRON JUNGJAI* [Press Arbitration Q.], Spring 1997, at 7; see also *Eonron Bopjeui Irongwa Hyunsil* [The Theory and Reality of the Media Law] 202 (Dong-Min Kim ed., 1994).

53. PAENG, *supra* note 52, at 328.

54. Periodicals Act, art. 18.

The arbitration shall not be open to the public except in special cases.⁵⁵

The same procedure is applied to the broadcast media and cable TV.⁵⁶ Under this system, those seeking a right of reply must go through arbitration procedures before appealing to the courts.⁵⁷ If an injury to reputation is proven, the commission orders the media organization to publish a "reply statement".⁵⁸ Before 1996, if arbitration failed to resolve a dispute, the claim for reply would have been decided by a three-judge panel of a district court having jurisdiction over the media defendant.⁵⁹

The periodicals, broadcast, and cable statutes stipulate the procedures for processing a written request for reply to harmful stories. The Periodicals Act states: "The editor of the daily publication or communication must place free of charge the replies in the same publication or communication periodical within nine days of its receipt."⁶⁰ In non-daily newspapers or periodicals, the editor shall insert the reply "in the following issue the editing of which is not completed" after its receipt.⁶¹ The Periodicals Act provides that after receiving the arbitration committee's decision, the media organization must immediately consult with the injured party or representative on the content and form of the reply statement.⁶²

However, the statutes recognize exemptions to claims for reply or corrected reports. That is, the media organization may reject the claim "if the injured person has no proper interest in a claim for a reply, or the contents of the claimed reply is obviously contrary to the fact, or it aims only at commercial advertisement."⁶³ This qualification of the right of reply protects the press from abuse of the laws. The media organization has the burden

55. *Id.* See Press Arbitration Commission, *Introduction to the Press Arbitration Commission*, EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1997, at 191-192.

56. Broadcast Act, art. 41 & Cable Act, art. 45.

57. Periodicals Act, art. 19 (1) (stating that no claim for a right of reply shall be requested to the court without passing through an arbitration of the Press Arbitration Commission).

58. The term "claim for corrected reports," as first used in the Basic Press Act, was a misnomer because the 1980 press statute in fact provided the injured person with a right to a response to the incorrect news report, not a correction by the news media of their erroneous news stories. The Supreme Court affirmed this point in 1986 in *Chai-Ran Ahn v. Korean Federation of Education*. It can contain any factual counter-statements that a plaintiff would like to make against incorrectly reported parts of the news. *Chai-Ran Ahn v. Korean Federation of Education*, Supreme Court, Jan. 28, 1986, 85 Daka 1973, *reprinted in* KUNGNÆ EONRON KWANKYE PANRAIIP [COLLECTIONS OF PRESS CASES] (II) (1987), at 53-56.

59. Periodicals Act, art. 19 (2) (The same applies to the broadcasting media).

60. Periodicals Act, art. 16 (3); Broadcast Act, art. 42; Cable Act, art. 45 (9).

61. Periodicals Act, art. 16 (3).

62. *Id.*

63. *Id.*; Broadcast Act, art. 41 (7); Cable Act, art. 45 (3).

to justify its refusal of the claim for reply. Right of reply does not apply when the Korean Press publishes stories of governmental agencies, public organizations or judicial proceedings.⁶⁴

Analyzing libel suits from 1987-1994, Jong-Soe Kim, a legal scholar, studied how the right of reply was treated by the Korean courts. He found that first, the courts have not set up a standard to distinguish "factual allegation" from "opinion." Second, the courts failed to measure the degree of injury based on an objective and consistent scale. Third, the courts allowed news companies to publish corrected reports in the "advertisement section," which could minimize the intended effect of the right of reply. Fourth, the courts adopted very subjective standards rather than objective, definitional rules in deciding whether or not a right of reply should be granted. Kim said that Korean courts lacked consistency in its decisions and maintained that the key element to the right of reply's successful operation was to set basic rules by which judges can follow.⁶⁵

2. Commissioners

The commission consists of 15 arbitration panels, five of which are in Seoul, and ten of which are in local metropolitan cities. The Periodicals Act provides that the commission consists of 40 to 80 commissioners including a chairman and two deputy chairmen. All commissioners are appointed by the minister of the Public Information Department "from among those of learning, experience, and high moral repute."⁶⁶ Two-fifths or more of the commissioners must be recommended by the director of the Court Administration Office "from among those having a qualification for court judges."⁶⁷ More than one-fifth of commissioners must be nominated "from among persons in press circles."⁶⁸ Public officials (except for those qualified for court judges and the educational officials), working journalists, and any person who is registered as a member of a political party cannot be a commissioner.⁶⁹

64. Periodicals Act, art. 16 (6); Broadcast Act, art. 51 (7); Cable Act, art. 45 (8).

65. Jong-Soe Kim, *Eonron Jungjai Jedoui Moonjewa Jaengjum* [Issues and Problems in Korean Press Arbitration System], EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1995, at 6-23.

66. Periodicals Act, art. 17 (2). Now, PAC has 15 offices nationwide with 75 commissioners who are composed of working judges, college professors, former journalists, educational officials, and community leaders with reputation in the areas of law, business, and industry.

67. *Id.*

68. *Id.*

69. *Id.* art. 17 (5). There is no research that assesses the independence of appointees from the political actors or to what extent politics affects appointment. This reflects the lack of deep research on PAC's association with politics. A scholar

Each arbitration panel is composed of five commissioners: a panel chief who is an active judge in service, a lawyer, an ex-journalist, a college professor, and a prominent person in the community.⁷⁰ The commissioners are unpaid and their term of office is three years, but is renewable.⁷¹

3. Criticism

The Korean government established the press arbitration system because it was worried about an increasing number of "press violations" against individuals. Thus, the statutory right of reply was mainly intended to provide an "expeditious means" for individuals to recover from their press-related injury.⁷²

About the system, Yong-Sang Park, a judge and media law specialist, noted that the Korean press arbitration system is unique because there is no similar governmental apparatus in European countries where the right of reply is widely recognized. Even in Germany, from which right of reply was imported, there is no statutory agency similar to the Korea Press Arbitration Commission, that can carry out the right of reply.⁷³

According to Sam-Sung Yang, a former commissioner and Seoul High Court judge, the major purpose of the arbitration system is to provide injured people the opportunity to respond in the press rather than to seek money damages.⁷⁴ He emphasized

points out that there should be a legal device to guarantee the "neutrality and objectivity" of the commissioners. Nak-In Sung, *Eonronui Sahojuk Chaekimgwa Eonron Jungjai Jedo* [Social Responsibility of the Press and Press Arbitration System], 14 BOPGWA SAHOI [LAW AND SOCIETY] 30 (1997).

70. PAC, *Jungjai Julcha* [The Process of Arbitration], 17 EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1997, at 190.

71. Periodicals Act, art. 17 (7) (commissioners may receive allowances and compensation for actual expenses under the conditions as prescribed by the law). The variety of backgrounds of the commissioners, the large number of commissioners appointed, and the fact that the commissioners are unpaid, honorary jobs are factors that keep the commissioners' appointment away from the media industry's influence. The situation in Korea is quite different from that in the United States. Some studies found that in the United States, lobbying power of the corporations can affect the governmental regulatory agencies in favor of the corporations. See, e.g., Bethany M. Burns, *Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation*, 5 COMM-LAW CONSPICUOUS 61 (1997); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373 (1993); Sheila Kaplan, *The Powers that be Lobbying: One Special Interest the Press doesn't Cover: Itself*, 20 WASHINGTON MONTHLY, at 36 (Dec. 1988); but see LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987).

72. KYU-HO YOUNG, *PRESS LAW IN SOUTH KOREA* 127 (1996).

73. Yong-Sang Park, *Basic Press Act*, in *LAWS RELATING TO POLITICS* 211 (Chin Kim ed., 1983).

74. Sam-Sung Yang, *Jungjung Bodo Chunggookwon* [Right for Corrected Report: A Legal Perspective], EONRON JUNGJAI [PRESS ARBITRATION Q.], Summer 1982, at 14, 15-20.

that the original intent of the system's builders was to help injured people seek an easy and simple method for recovery. It was not an attempt at government control of the media.

In the same vein, Jin-Sok Jung, a media history scholar in Korea, commented that the Press Arbitration Commission was founded as a legal body that could cope with rapid changes in the media environment. Jung found that through the formation of the commission, the Korean government seemingly intended to solve libel problems outside the courts so that individuals could avoid the intricate proceedings and the excessive cost involved with suing the media.⁷⁵

Initially, the arbitration system did not work as expected. Kyung-Seung Yang, a judge in Cheju district court, attributed the lack of success to two reasons. First, the Korean people were either unaware of or misunderstood the new system. Second, the media did not welcome the new system and were not cooperative in the arbitration process. Thus, the arbitration system faced difficulty in achieving its objective.

Yang said that the right of reply was an appropriate legal means that could help individuals earn prompt recovery for their injured reputations. At the same time, the right of reply would avoid imposing a chilling effect on the media. However, neither the public nor the media used the arbitration system very often for problem solving during the arbitration system's first few years. Nevertheless, Yang concluded that the arbitration system now is firmly rooted as a substantial part of individuals' legal lives.⁷⁶

Even though the press arbitration system was expected to cope with the changing media environment, the structure and efficiency of the system has been questioned by many legal scholars. Particularly, Sung-Nam Kim, a lawyer and former chief prosecutor of the High Prosecutors Office, observed that the Press Arbitration Commission's decisions were not legally binding. Therefore, the commission's proceedings often ended up as repetitious legal processing with neither party agreeing on the arbitration commission's outcome. In other words, he said, there is a reasonable likelihood that the Korean media could be

75. Jin-Sok Jung, *Eonron Jungjai Jedowa Media Whangyungui Byunwha* [Press Arbitration System and Changes in Media Environment] EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1991, at 10-13.

76. Kyung-Seung Yang, *Banron Bodo Sagunui Jooyo Jaengjum* [The Issues in Litigation for Right of Reply] EONRON JUNGJAI [PRESS ARBITRATION Q.], Winter 1996, at 27-78.

subject to two different types of proceedings for the same news story.⁷⁷

Jin-Sok Jung suggested that a single statute, which would affirm the status and scope of the commission, ought to be enacted to consolidate the function of the commission in Korean society. He commented, "the provisions of the Periodicals Act and Broadcast Act are unable to achieve the real aim of the commission while the role of such institution as the Press Arbitration Commission in modern society is quite important."⁷⁸ He maintained that without a firmer legal basis, the commission could not achieve its intended goal.

Joong-Hwa Kwon observed that the press arbitration system was a timely mechanism that systematically prevented the press from violating the rights of the public. Kwon noted that the number of press arbitration cases substantially increased after 1987. He found the increase in press arbitration cases due to two reasons: 1) the government's political reform that enabled a number of new dailies, magazines and a commercial broadcast company to start, and 2) the negative response of the public to sensationalism and reckless press reports.

Kwon added that the quantitative expansion of the media resulted in low quality journalism due to the extreme competition. This resulted in a further increase in the number of right of reply suits. Under this situation, Kwon concluded that the Press Arbitration Commission, despite some shortcomings, worked as a central institution both for the remedy and for the protection of the rights of Korean people.⁷⁹

However, a fundamental problem regarding the function of the commission is that Korean people do not clearly understand the nature of the right of reply. Sang-Jae Hwang observed that many people misunderstood the right of reply as a right to correct false reports. Hwang suggested that the commission should educate people about the exact nature of the remedies available now. Also, he found that whether that application of the right of reply to new media such as electronic newspapers or magazines published on the internet would be a problem.⁸⁰

77. Sung-Nam Kim, *Eonron Jungjai Jedoui Bopjuk Shigak* [A Legal Perspective on Press Arbitration System], *EONRON JUNGJAI* [PRESS ARBITRATION Q.], Summer 1988, at 7-9.

78. Jung, *supra* note 77, at 12-14.

79. Joong-Hwa Kwon, *Choigunui Eonron Jungjai Case Youngook: 1988-1993* [Analysis of Recent Press Arbitration Cases: 1988-1993] 3-5, 95 (1994) (unpublished M.A. thesis, Korean Foreign Language University (Seoul)).

80. Sang-Jae Hwang, *Eonron Whangungui Byunhwawa Eonron Gaenyume Daehan Jaejunrip* [Changes in Media Environments and Reconstructing the concept of the Press], *EONRON JUNGJAI* [PRESS ARBITRATION Q.], Spring 1997, at 6-15.

Won-Soon Paeng, a media law scholar, said that the most fundamental problem is that the Press Arbitration Commission was founded and managed by the Korean government and not by the media. In other words, he added, the commission is not a voluntary institution organized by the media for their own monitoring but is a manipulative governmental institution. Therefore, Paeng argued that the function of the commission should be strictly supervised so that it does not impair press freedom.⁸¹

From a similar viewpoint, Nak-In Sung, a law school professor in Korea, shed critical light on the social function of the press arbitration system in terms of freedom of the press. First, Sung examined how freedom of the press and its responsibility developed in Korean society. Here, he found that as the political system shifted from an authoritarian to a more democratic structure, the concept of press freedom was transformed from that of a passive right to one of an active right. At the same time, Sung said, the consciousness of the public about its basic rights was considerably enhanced during the last decade.

Secondly, Sung asked whether the Press Arbitration Commission played a substantial role in resolving the conflicts between the rising needs of the public and the more liberated press. He found that despite some of the public's suspicions about its effectiveness, especially after 1987, the commission played a crucial role in laying the grounds for citizens to seek restitution if the media violated their rights. He suggested that self-regulation is the only effective way for companies to avoid being sued by the public.⁸²

In addition, Sung stated that the recent legal reform which gave the Press Arbitration Commission more discretionary authority will contribute to more effective "arbitration," not mere "mediation."⁸³

Sung's belief is supported by Im's research about how the press faithfully carried out the commission's publication order for reply statement. Notwithstanding the presence of the arbitration system, Byung-Kuk Im claimed that Korean newspapers seemed to have little social responsibility at least until early 1990. Analyzing how major Korean dailies carried out their duties to the reputationally damaged, Im found that the newspapers were not very faithful in publishing corrected reports. For example, newspapers delivered corrected versions of the stories at the bot-

81. Jong-Soe Kim, *Eonron Jungjai Jedoui Moonjewa Jaengjum* [Issues and Problems in Korean Press Arbitration System], *EONRON JUNGJAI* [PRESS ARBITRATION Q.], Spring 1995, at 6-23.

82. WON-SOON PAENG, *EONRON BOPJE SHINRON* [New Perspectives in Mass Media Law] 327-28 (2d ed. 1991).

83. *Id.* at 329.

tom of pages in small type. Moreover, Im pointed out that the press did not show respect to the decisions of the press arbitrators. Consequently, Im recommended that along with the current arbitration system, some self-regulation devices should be created to prevent publication of reckless stories that could damage individuals.⁸⁴

In December 1996, the Periodicals Act was partially revised to allow the Press Arbitration Commission to function with more efficiency and effectiveness in the arbitration process. As a result of the revision, the Press Arbitration Commission was given more discretion to enforce the commission's decisions. The arbitration commission's decisions are now legally binding. However, this has raised concern about the constitutional problems that expanded authority can provoke. As such, the law provides for "petitions" for the reinvestigation of the decisions.⁸⁵

III. LIBEL LAWS AND THE RIGHT OF REPLY IN OTHER COUNTRIES

A society's libel laws represent a commitment to protect the good name of an individual against insult and scurrilous attacks.⁸⁶ Such laws are expected to provide a peaceful means for individuals to obtain vindication and compensation for reputational harm and resulting pecuniary losses and emotional distress. Moreover, the laws can be a mechanism for punishing and deterring reckless news reporting.⁸⁷ In this context the press arbitration system was created to reflect the social values in Korea. The system attempts to weigh press freedom with the right of an individual to his/her good name.

This section provides a context for understanding libel laws and right of reply in Korea by comparing them with those in four other countries – Germany, France, Japan, and the United States – which, more or less affected Korean legal system. A comparative examination will furnish a clearer perception about the nature of the press arbitration system in Korean society.⁸⁸

84. Nak-In Sung, *Eonronui Sahojuk Chaekimgwa Eonron Jungai Jedo* [Social Responsibility of the Press and Press Arbitration System], 14 BOPGWA SAHOI [LAW AND SOCIETY] 6, 37 (1997).

85. Byung-Kuk Im, *Hanguk Shinmunui Obowa Goojee Gwanhan Yungoo* [A Study on False Reporting of Korean Dailies and Their Remedy for the Damage] 25-30 (1990) (unpublished Ph.D. dissertation, Kyunghee University, (Seoul)).

86. Periodicals Act, art. 18 (7) (revised 1996).

87. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. Media L. & Practice 3, 3-4 (1980).

88. Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 Va. J. Int'l L. 923, 933 (1996).

Among the countries, Germany is the most influential country for comparison because the Korean press arbitration system was modeled after that of Germany. France is also indispensable for the comparison because it is the first country that acknowledged and legalized the people's right of reply. Japan, as the former ruler of the Korean peninsula from 1910 to 1945 has had a great influence on Korea's legal systems. The United States has also played an important role in the development of Korea's legal system especially during the several years after the liberation from Japan.

A. LIBEL LAWS AND RIGHT OF REPLY IN GERMANY

In Germany, freedom of the press is neither greater nor less important than the average citizen's social interests.⁸⁹ Thus, freedom of the press is always balanced with other social interests such as one's reputational right.

A defamatory statement is deemed an affront, in which one's personal honor or dignity is diminished in the eyes of the public.⁹⁰ The Criminal Code imposes fines or imprisonment for the crimes of insult, defamation, and aggravated defamation.⁹¹ In practice, however, criminal sanctions are reserved for "the unusual or flagrant case."⁹² Section 193 of the Criminal Code provides an important defense that applies when a defamatory publication concerns a matter of legitimate public interest and was either taken from normally reliable sources or published only after the information and its source were thoroughly investigated.⁹³

Civil liability can arise under sections 823 and 824 of the Civil Code. The former imposes a general liability, whereas the latter applies when the defendant publishes a statement the defendant either knew or should have known what was printed was

89. Even though the author has some knowledge in reading German and Japanese, due to the limited linguistic ability, the author in most cases depended on the English or Korean-written sources. Especially, for the French, the author used totally English and Korean-written articles and books. For this reason, in chapter two, the author cannot conduct further examination on the legal system of the given countries. However, the collected materials provide a sufficient context of the dissertation.

90. MICHAEL J. CALVEY ET AL., FOREIGN DEFAMATION LAW, IN LDRC [LIBEL DEFENSE RESOURCE CENTER] 50-STATE SURVEY 1987: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW xii (Henry Kaufman ed., 1987).

91. Gregory J. Thwaite & Wolfgang Brehm, *German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity*, 8 EUROPEAN INTELLECTUAL PROPERTY L. REV. 336, 343 (1994).

92. *Id.* at 350. Fines are matched to the offender's income. The maximum fine is DM 10,000 (approximately \$7,600) per day for 63 days, and the maximum imprisonment ranges from one to five years, depending on the specific offense committed.

93. *Id.*

untrue and that damage to the credit, financial standing, or advancement of the plaintiff is likely. Only statements of fact are actionable under either provision.⁹⁴ The expression of opinion, whether reasonable or not, will not generate a defamation claim unless it is scandalous and intended to humiliate.⁹⁵

In Germany, corrective and preventive devices are central to the legal framework, with less emphasis placed on monetary awards.⁹⁶ Right of reply is one of the major civil remedies along with injunctive relief and damages. At a preliminary hearing, the court may order the defendant to publish the plaintiff's reply to a defamatory statement, prohibit further publication of the statement, or require publication of the judgment at the media's expense.⁹⁷ Damages are not awarded at this stage. If the case proceeds to a full hearing (and many do not), the court can order the printing of a retraction and may also award damages.⁹⁸ Awards are usually confined to special (pecuniary) damages. An award of general damages for pain and suffering or other unspecified harms is uncommon and occurs only when plaintiff recovers more than DM 30,000 (approximately \$18,000) in general damages.⁹⁹ Punitive damages are not allowed.¹⁰⁰

There is no federal law that provides a right of reply in Germany presently because German Basic Law (Grundgesetz) endows each state with the power to enforce its right of reply.¹⁰¹ The right of reply is derived from the basic rights of personality and identity as guaranteed by Articles 1 and 2 of the Basic Law, which states that the dignity of man shall be "inviolable" and that everyone shall have the right to the "free development of his personality" unless he violates others' rights, the constitutional order, or the moral code.¹⁰² The Basic Press Law still bars the "essential content" of the basic rights from being restricted by application of the general law.¹⁰³

The right of reply originated in the Baden Press Act (Baden Pressrecht) of 1831, which was modeled after a French press law

94. *Id.* When this defense is applicable, a court will order only a prohibition on the future dissemination of the defamatory matter.

95. *Id.* at 343.

96. *Id.*

97. Ulrich Karpen, *Legal Protection of Individuals Against Encroachments of Media, in Particular Defamation - The Case of Germany*, 14 J. MEDIA L. & PRACTICE 57, 59 (1993).

98. Vick & Mcpherson, *supra* note 90, at 956.

99. Thwaite & Brehm, *supra* note 93, at 348.

100. THE INTERNATIONAL LIBEL HANDBOOK 209 (Nick Braithwaite ed., 1995).

101. *Supra* note 93, at 349.

102. Woon-Hee Park, *Dokileui Banron Kwon (I)* [Right of Reply in Germany (I)], EONRON JUNGJAI [PRESS ARBITRATION Q.], Summer 1995, at 40-41.

103. BASIC LAW OF GERMANY [BASIC LAW], art. 1 & 2.

of 1822. The Baden Press Act allowed the state government to enforce the correction of wrongful news (Berichtigungszwang). Based on the Baden Press Act, the Imperial Press Law (Reichspressegesetz vom 7. 5. 1874) was enacted. This law is the first one that provided a right of reply at the federal level.¹⁰⁴

Since 1949, starting with the Bayern state, each state has included a right of reply provision in its press law.¹⁰⁵ All the German states now have laws that detail the rights and responsibilities of the press in accordance with the Basic Law. Thus, the right of reply is "central to the rules of the state press laws."¹⁰⁶ There are more similarities than differences among the various state laws of Germany, but the procedures in applying the right of reply do differ among the states.¹⁰⁷

The state of Hamburg, Germany's "publishing center", provides a good example of the right of reply law of one state.¹⁰⁸ Hamburg law shows how the right of reply is recognized as a statutory concept in German law.¹⁰⁹ First, under the Hamburg law, like that of any other state, the right of reply is permitted only for a statement of fact (Tatsachenbelauptung). The Hamburg press law provides: "The responsible editor and publisher of a periodical printed work are obliged to publish the reply of a person or body concerned in an incorrect factual statement made in the work."¹¹⁰ Thus, opinion and subjective expression of value judgments are excluded from the right of reply.

Under the Hamburg law, any person or authority damaged by a statement in the press can request the right of reply — individuals, associations, companies, and public authorities — both German and foreign.¹¹¹ All the works appearing in newspapers, magazines, and other mass media such as radio, television, and films "at permanent if irregular intervals of not more than six

104. *Id.* art. 5 (2). A German law professor stated that the underlying rationale of the right of reply was not to protect the democratic process and public opinion but to safeguard individuals against false press reports. Helmut Kohl, *Press Law in the Federal Republic of Germany*, in *PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY* 214 (Pnina Lahav ed., 1985).

105. Basic Law, art. 5 (2).

106. *Id.*

107. URS SCHWARZ, *PRESS LAW FOR OUR TIMES: THE EXAMPLE OF THE GERMAN LEGISLATION* 81 (1966).

108. Park, *supra* note 104, at 55.

109. Hamburg Press Law (enacted 1965), *translated in supra* note 23, at 103-12; *PRESS LAWS: DOCUMENTS ON POLITICS AND SOCIETY IN THE FEDERAL REPUBLIC OF GERMANY* 17-24 (Sigrid Born ed. & Fry Martin trans., 1994).

110. Helmut Kohl, *Press Law in the Federal Republic of Germany*, in *PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY* 214 (Pnina Lahav ed., 1985).

111. Hamburg Press Law, para. 11 (1).

months" are subject to the right of reply provisions.¹¹² The reply must be asserted "immediately and at least within three months" of the publication.¹¹³

The Hamburg law also requires that the reply be published in the next issue if the issue is not yet typeset for printing.¹¹⁴ It states that the news periodical must publish the reply in the same section of the periodical and in the same type as the challenged statement.¹¹⁵ Broadcast media must broadcast immediately to the same receiving areas, and at an equivalent time to that of the precipitating broadcast.¹¹⁶ The law prohibits interpolations or omissions of the reply.¹¹⁷ A letter to the editor cannot be a substitute for the reply. The news medium can publish its own editorial comment on the reply in the same issue as long as it concentrates on factual statements.¹¹⁸ The Hamburg press law exempts from right of reply fair and accurate reports of the open proceedings of the three branches of federal government and local and state governments.¹¹⁹

If a media outlet refuses to comply with the reply request, the reply claim can be enforced through an ordinary judicial process.¹²⁰ The civil court at the place of publication can issue a provisional injunction on distribution until the reply is published.¹²¹ The provisions of the Code of Civil Procedure on obtaining a provisional injunction dictate the court procedure.¹²²

In summary, the right of reply in Germany is differently applied according to each state's press law. First, the right of reply is restricted to factual statements. Second, any person, whether natural, corporate, or associational, can request publication of a reply. Third, if the media refuse to comply with the reply request, the right of reply claim can be enforced by the courts. Fourth, the right of reply is not recognized for purely commercial expression.

112. MARTINE LFFLER ET AL., *DAS GEGENDARSTELLUNGSRECHT IN EUROPA: MOGLICHKEITEN DER HARMONISIEUNG* [The Right of Reply in Europe: Possibilities of Harmonization] 74 (1974).

113. Hamburg Press Law, para. 7 (4).

114. *Id.*

115. *Id.* para. 11 (3).

116. *Id.*

117. *Id.* para. 11 (6).

118. *Id.*

119. *Id.*

120. *Id.* para 11 (4).

121. *Id.*

122. *Id.*

B. LIBEL LAWS AND RIGHT OF REPLY IN FRANCE

Freedom of the press in France has been restricted by a variety of abusive interventions of the government (*les abus d'intervention de l'Etat*).¹²³ More specifically, the French press was limited by a host of legal devices employed by the executive branch of government: prior restraint and censorship, security payment (which required deposit of a fee prior to publication of a newspaper), the laws of seal (imposing an indirect tax), and the institution of legal suits against the media organizations.¹²⁴

However, the social responsibility of the press has been emphasized since the end of the Nineteenth Century.¹²⁵ During the French Revolution, the French press was criticized for its brutal violation of personal reputation and reckless anti-government writings.¹²⁶

After the revolution, a nationwide effort was made to establish a socially responsible press that could deliver true and diverse information and at the same time protect the reputations of its people.¹²⁷

For this reason, it is not surprising that France was the first nation to establish the right of reply as a fundamental civil right. The world's first proposed law that guaranteed a right of reply was submitted to the National Assembly (*Assemblée Nationale*) in 1800 through the efforts of a few French lawmakers. It provided: 1) protection of individuals from an abusive press, 2) protection of readers from biased and unbalanced reports, 3) a device to equalize the power of the press with that of the public, and 4) a means for injury recovery other than punitive solutions.¹²⁸ This act was passed in 1822, when the National Assembly passed the first right of reply law (*droit de réponse*).¹²⁹ The main purpose of the law was to protect the public's rights from any ruthless and defamatory news reporting.¹³⁰

The most important law concerning defamation and press freedom is the law of 1881. More than anything else, the law of 1881 repealed the restrictive press laws that preceded it. However, the law left a provision that suppressed "acts intended to

123. *Id.*

124. Woon-Hee Park, *France Eui Banronkwon* [Right of Reply in France], *EONRON JUNGJAI* [PRESS ARBITRATION Q.], Spring 1995, at 47.

125. Roger Errera, *Press Law in France*, in *PRESS LAW IN MODERN DEMOCRACIES* 137 (Pnina Lahav ed., 1985).

126. FERNAND TERROU, *LEGISLATION FOR PRESS, FILM AND RADIO* 13 (1951).

127. *Id.*

128. Park, *supra* note 126, at 48.

129. HENRY BLIN ET AL., *DROIT DE LA PRESS* [Law of the Press] 4 (1982).

130. *Supra* note 126.

disturb the social order, destroy collective security, and prejudice private interest."¹³¹ Private interest includes the right of reply.¹³²

To constitute libel under the French law, there must be a factual allegation that attacks the personal or professional honor or standing of an identifiable individual.¹³³ Bad faith is indispensable to the offense, but it is assumed from making the defamatory statement. The burden of proof is on the defendant unless the action is initiated within three months of the alleged defamatory assertion. If convicted, the defendant could receive either a prison sentence ranging from five days to six months, or be fined from 150 to 80,000 francs (approximately \$30 to \$16,000).¹³⁴ The defamation of certain institutions or individuals can result in stiffer penalties.¹³⁵

Civil liability may attach to successful criminal prosecution for libel or a separate civil action may be brought. Such actions must be brought under general tort provisions for the recovery of compensation.¹³⁶ In defamation cases, fault might be found if, for example, a reporter fails to take adequate steps to check the accuracy of a statement before its publication.¹³⁷ Injury is not presumed, and damage awards are not generous, although they tend to be somewhat higher in cases involving press defendants.¹³⁸

Any person who is found defamed in a printed publication has the right to respond to the attack in the same publication.¹³⁹ This right of reply is provided regardless of whether the statement is otherwise actionable, and both civil and criminal sanctions attend a wrongful refusal to print a reply.¹⁴⁰ A less expansive "right of rectification" is available to natural persons harmed by a statement made over the state-operated broadcast system.¹⁴¹

A feature of French law is that the law grants people a right of reply to criticisms and evaluations as well as to factual state-

131. *Id.* at 48.

132. Errera, *supra* note 127, at 138.

133. *Id.*

134. *Supra* note 93, at 325-326. The most significant provisions regarding defamation are the criminal offenses set forth in article 29 of the 1881 Press Law.

135. *Id.* at 326-327.

136. *Id.* at 327. For example, defamatory statements about court judges and prosecutors (magistrat) will be punished more severely. *Id.*

137. ROBERT M. KUNSTADT, *THE PROTECTION OF PERSONAL AND COMMERCIAL REPUTATION* 62-68 (1980).

138. *Id.* at 63-67.

139. *Supra* note 93, at 326-327. As of January 1995, the highest damage award in France was 800,000 francs (approximately \$160,000).

140. Alan Ward & Ruth Redmond-Cooper, *The Right of Reply in England, France and the United States*, 4 *J. Media L. & Practice* 205, 211-12 (1983).

141. Vick & Macpherson, *supra* note 90, at 954.

ments. Also, the law provides that any person who is directly or indirectly identified in the alleged article can file a suit against the press.¹⁴²

Another unique aspect of the French libel laws is that a right for a corrected report has been recognized. The 1881 Press Law gives government the right to request a correction (*Le droit de rectification*).¹⁴³ Unlike the right of reply, the right for correction applies only to public officials (*depositaires de l'autorite publique*). The objective is to require the press to publish only accurate and correct accounts of official activities. It allows public officials to request corrections only on erroneous publications about their on-duty activities.¹⁴⁴

As for right of reply, an individual or a group who could be identified by whole or by partial content of the article can request reply opportunities.¹⁴⁵ The right of reply for a deceased person is generally applicable through the representatives of the person's family because the reputations of the deceased are considered to remain in the minds of other people.¹⁴⁶ Statements for the reply must be carried the way that the applicants want unless the courts find them inappropriate or irrelevant in compensating reputational damages.¹⁴⁷ Although the right of reply in France was regarded as a harsh restraint on press freedom,¹⁴⁸ since the 1960s, the number of right of reply cases has decreased.¹⁴⁹

To summarize, the right of reply in France is broadly and rigidly applied. This reflects the social circumstances that emphasize the public responsibility of the press. First, the right of reply applies not only to factual statements, but also to opinion and criticism. Second, the right of apply is even allowed for the deceased. Third, the reply applicants have exclusive control over the style and content of the reply statement. Fourth, the wrongful refusal of reply by the media would lead to criminal punishment. Fifth, right of correction is extended to public officials.

142. Ward & Redmond-Cooper, *supra* note 142, at 213-14 (The right of reply for the broadcast media was not recognized until 1972).

143. Park, *supra* note 126, at 62. Interestingly, the right of reply for medical doctors and police officers is not generally allowed. *Id.*

144. 1881 Press Law, para. 10.

145. 1822 Press Law, para. 10.

146. 1881 Press Law, para. 13.

147. *Supra* note 126, at 49. There have been controversies about the right of reply for the deceased. The time limit for the right has not been set. However, criticisms and comments about historical figures are not subject to the right of reply. *Id.* at 63-64.

148. *Id.* at 50.

149. Charles Danziger, *The Right of Reply in the United States and Europe*, 19 N.Y.U. J. Int'l L. & Politics 183 (1986).

C. LIBEL LAWS AND RIGHT OF REPLY IN JAPAN

Even though Japan protects freedom of the press as a constitutional right, it has developed an approach to defamation weighted more toward protecting individual interests than press interests. Under Japanese law, the media carry the burden of proving the truth of an alleged defamation. Remedies focus less on compensation and more on restoring the defamed individual's place in society.¹⁵⁰ Japanese libel law is very successful in addressing both the truthfulness of the offending statement and the individual's reputation in the larger community.¹⁵¹

The Japanese vision focuses upon restoring the injured individuals' reputation in a group-oriented society by correcting the falsity of an offending statement.¹⁵² Japanese law regards defamation more in terms of the effect it has on reducing respect for the individual in the community, or lowering the person in the estimation of others.¹⁵³ The treatment is mostly based on Japan's cultural emphasis on group cohesion over personal autonomy, and is manifested in the remedies for defamation, including public apology.¹⁵⁴ The expectation that everyone shares similar attitudes and beliefs tends to make the Japanese accept an unproven assertion as if it were self-evident.¹⁵⁵

Japanese libel laws reflect this cultural tendency toward conformity. The conflict between press freedom and Japan's traditional group-oriented culture can both enhance and diminish the rights of individuals.¹⁵⁶ Likewise, the main characteristic of Japanese libel law is the method the Japanese courts use to correct the harm done to individuals by libelous reporting.

150. *Supra* note 126, at 62.

151. Ellen M. Smith, *Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws*, 14 MICH. J. INT'L L. 871 (1993).

152. Judgment of July 4, 1956, SAIKOSAI [SUPREME COURT], 10 Minshu 787, translated in *The Japanese Legal System: Introductory Cases and Materials* 324 (Hideo Tanaka ed., 1988). The Japanese Supreme Court ordered a political candidate to retract defamatory statements he made about his opponent during an election, stating that "reputation is a social concept, and thus this type of notice of apologies can be recognized as a sensible and valid method for the restoration of the reputation of the injured party." *Id.*

153. LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 2 (John O. Haley ed., 1988).

154. Masao Horibe, *Press Law in Japan*, in PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 315-27 (Prina Lahav ed., 1985).

155. MINPO [CIVIL CODE], arts. 709-10, translated in FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 319 (Lawrence W. Beer, 1984).

156. Yosiyuki Noda, *The Character of the Japanese People and Their Conception of Law*, in JAPANESE LEGAL SYSTEM 269 (Hideo Tanaka ed., 1988).

Article 21 of the Japanese Constitution outlines broad press protection.¹⁵⁷ Defamation and libel receive detailed attention under both the Japanese civil and criminal codes. Theoretically, the Japanese system favors civil libel suits to criminal prosecutions except in extreme cases.¹⁵⁸ However, in reality, criminal prosecution is more common because the costs of civil litigation are much higher, and the civil damages awarded are usually nominal. Moreover, the "injured party is usually more interested in prompt vindication than in monetary compensation."¹⁵⁹

Criminal libel prosecution is discretionary in Japan, whereby the defamed party asks the prosecutor to indict the alleged defamer.¹⁶⁰ The Japanese Criminal Code holds the defamer strictly liable for the defamation, regardless of the circumstances.¹⁶¹ A person who injures the reputation of another by publicly alleging facts, regardless of whether such facts are true or not, can be punished by imprisonment with or without forced labor for not more than three years or by a fine of not more than 200,000 yen (approximately \$1,800).¹⁶²

Despite this seemingly harsh order, the Criminal Code distinguishes between ordinary defamation and public interest defamation. In public interest cases, courts impose a negligence standard, rather than strict liability. This distinction, however, does not diminish the force of the statute in cases involving private plaintiffs, where truth is never an adequate defense.¹⁶³

Under Article 230 (2) of the Criminal Code, the press can raise truth as a defense to libel allegations "when the statement relates to matters of public concern and has been made solely for the purpose of promoting the public interest."¹⁶⁴

The Criminal Code is harmonized with Article 21 of the constitution which implies that the press can avoid punishment for defamation upon showing that it had a reasonable, albeit mistaken, belief that the statements were true, in light of the surrounding circumstances.¹⁶⁵ In other words, the courts will not impute criminal intent, and therefore will not find criminal liabil-

157. Beer, *supra* note 157, at 318.

158. KENPO [CONSTITUTION], art. 21 *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1995).

159. Lawrence W. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, 5 *Law in Japan* 192, 192 (1972).

160. *Id.*

161. *Id.* 193. The conviction rate is much lower than for other crimes. Imprisonment is infrequent, fines are generally low, and suspended sentences are often employed. *Id.*

162. Horibe, *supra* note 156, at 328.

163. KEIPO [PENAL CODE], art. 230, para. 1.

164. Smith, *supra* note 153, at 882.

165. KEIPO [PENAL CODE], art. 230.2, para. 1.

ity if the media can prove that they believed the libelous statements regarding public matters were true, and made a good faith effort to ensure they were in fact true.¹⁶⁶

The Criminal Code defines "matters in the public interest" to include details surrounding the acts of accused criminals, and statements concerning public employees or candidates for public office.¹⁶⁷ In some cases, however, some private behavior of a private person can be of public concern, depending on the nature and potential influence of the person's private activities.¹⁶⁸

Under the Civil Code, although there is no formal right of reply,¹⁶⁹ Japanese courts may require a defamer "to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages."¹⁷⁰ Any person who is liable for damages under article 710 of the Civil Code shall make compensation, irrespective of whether such injury happened to a person's right to reputation or property.¹⁷¹

Unlike the Criminal Code, the Civil Code does not have a provision absolving liability for defamation involving issues of the public interest. However, Japanese courts have applied the public interest principle to a civil suit involving libel charges brought against the press.¹⁷²

Japanese courts are not supportive of aggressive reporting that may injure a person's good name. They require the press to demonstrate a good-faith basis for believing the truth of the disputed statement, and emphasize remedies that correct the falsehood and restore the injured person's good reputation.¹⁷³

As a matter of fact, the media in Japan traditionally have not been restricted by any chilling effects that sometimes result from libel suits.¹⁷⁴ The remedies are provided to meet societal needs. Correction rather than punishment or retribution is the principal aim of the criminal justice system. For this reason, public apology is a widely accepted remedy in Japanese society. In the same

166. Judgement of June 25, 1969, Saikosai [Supreme Court], 23 Keishu 7, 259 (1969), translated in CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS:1961-1970 175-77 (Hirosh Itoh & Lawrence Beer eds., 1978).

167. *Id.* at 328.

168. *Id.* at 329.

169. *Id.*

170. Since the Newspaper and Publication Regulation (1869-1949) was repealed, the right of reply has not been invoked. Horibe, *supra* note 70, at 317.

171. MINPO [CIVIL CODE], art. 723.

172. *Id.* arts. 709 & 710.

173. Judgment of Dec. 24, 1958, Chisai District Court, 20 Minshu 1125 (1966) (The Japanese Supreme Court held that even if the alleged article was not entirely accurate, the newspaper had avoided illegality because its reporters and editors had sufficient grounds for believing the veracity of information).

174. *Id.*

vein, an apology of the press for an incorrect report is considered an appropriate remedy.¹⁷⁵

Although the trend of the Japanese courts is to expand the boundaries of protected expression over the past three decades, defamation has become an increasingly important concern of today's media.¹⁷⁶ In Japan, because most legal restrictions are directly and indirectly related to defamation law, libel suits are troubling to the Japanese media.¹⁷⁷

In summary, Japanese libel law reflects a cultural tradition that emphasizes the societal value of reputation of the people. First, criminal suits are still an effective way for the people to recover from reputational injury by the media. Second, correction of the wrongful report with an apology is accepted as an appropriate media policy. Third, a true story that is a matter of public concern cannot be libelous.

D. LIBEL LAWS AND RIGHT OF REPLY IN THE UNITED STATES

An understanding of the libel laws in the United States¹⁷⁸ should begin with the first amendment and its protection of freedom of speech and press. The first amendment states "Congress shall make no law. . . abridging the freedom of speech, or of the press."¹⁷⁹ Since *Near v. Minnesota*, the First Amendment's press clause has been applied to the states as a result of the due process clause of the fourteenth amendment.¹⁸⁰ The guarantee of free speech and a free press in the United States has placed these liberties in a "preferred position."¹⁸¹ About the first amendment's status, Frederick Schauer observed:

175. Akhiko Haruhara, *Current Attitudes of Newspaper Journalists in Japan*, *NEWSPAPER RES.* Oct., 1973: 8, translated in *JAPANESE COMMUNICATION STUDIES OF THE 1970s* 139-42 (Yamanaka et al. eds., 1986).

176. Kyu-Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 *BOSTON U INT'L L.J.* 53, 83 (1990).

177. *Id.* at 82-83.

178. *Id.*

179. Some scholars have proposed reform of the libel laws in the United States. For example, in the Iowa Libel Research Project, which studied non-litigation alternatives, Bezanson et al. pointed out that both the plaintiffs and the defendants were dissatisfied with the current system. Exploring the libel and privacy cases between 1974 and 1984, the authors observed that while the plaintiffs are frustrated by the obstacles in the course of lawsuits and their loss, the media defendants, whether or not they win, always have a risk of being financially threatened. They found that the libel suit so far seems to be a particularly apt candidate for efficient and effective resolution through non-judicial processes. R. Bezanson et al., *Libel Law and the Press* 73-77 (1987).

180. U.S. CONST, amend I.

181. *Near v. Minnesota*, 283 U.S. 697 (1931).

Under the American constitution speech is specifically protected, while reputation is not, and thus liberty of speech becomes a 'transcendent value.' As a result, a wrongful deterrence or punishment of speech is a greater harm than a wrongful injury to reputation. . . . Speech occupies, *ex hypothesi*, a preferred position in American law.¹⁸²

In the United States, each jurisdiction formulates its own libel law, subject to the first amendment.¹⁸³ The main feature of U.S. libel laws is that libel jurisprudence has developed around the theory that robust public debate provides the best safeguard against excessive governmental power. In other words, free and open debate is essential to the workings of a representative government.¹⁸⁴ The harm caused by the occasional falsehood that slips undetected into the marketplace of ideas is simply a cost of free speech.¹⁸⁵

This idea was embraced by the United States Supreme Court in *New York Times v. Sullivan*,¹⁸⁶ which brought the tort of defamation within the ambit of the first amendment. In this case, the Court added actual malice to the elements that must be proved under the common law tort test for libel of public officials. The Court held that public officials cannot prevail in a libel action unless they prove that alleged libelous statements were made with actual malice - "knowledge that it was false or with reckless disregard of whether it was false or not."¹⁸⁷ The media's ability to prove the truth of the offending statement was no longer a necessary defense.¹⁸⁸ *Sullivan* is viewed as an important safeguard to the press' ability to report on controversial government activities.¹⁸⁹

In 1967, the Court extended the actual malice standard in *Curtis Publishing Co. v. Butts* to encompass public figures.¹⁹⁰ The Court said that public figures could only succeed in a libel

182. Kyu-Ho Youm, *U.S. Media and Libel Law: An International Perspective*, 55 GAZETTE 185 (1995).

183. Schauer, *supra* note 2, at 12-13.

184. Seth Goodchild, *Media Counteractions: Restoring the Balancing to Modern Libel Law*, 75 GEO. L.J. 315, 317 (1986).

185. Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 692-693 (1994).

186. Smith, *supra* note 153, at 874.

187. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

188. *Id.* at 283.

189. The U.S. Supreme Court applied the *Sullivan* rule to a criminal libel case. The Court ruled in *Garrison v. Louisiana* that when the defamation of a public official is the basis for a criminal libel suit, the state has to prove actual malice on the part of the defendant. Justice Brennan wrote that the reasons that the first amendment protected criticism of public officials in a civil libel suit apply with equal force in a criminal libel suit. *Garrison v. Louisiana*, 376 U.S. 64 (1964).

190. Harry Kalvin, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 194 (1964); LEE C. BOLLINGER,

suit by demonstrating "a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."¹⁹¹ In 1974, the Court held that plaintiffs who were not public figures could win by showing negligence on the part of the media defendant in reporting a defamatory statement.¹⁹²

Right of reply in the United States as a legal remedy for defamation has a meaning that is different from other countries. In the United States, right of reply has been mainly regarded as a right of the public to access to the media. Government imposed right of reply in the print media was prohibited in *Miami Herald v. Tornillo*.¹⁹³ In *Tornillo*, the Supreme Court held that a forced right of reply for political candidates in a newspaper inescapably "dampens the vigor and limits the variety of public debate."¹⁹⁴ The Court added that the right of reply would increase the cost of printing, require additional composing time and materials, and take up space that could be devoted to other news.¹⁹⁵

The decision in *Tornillo* differs from that of *Red Lion v. FCC* in 1969, in which the Supreme Court upheld the constitutionality of the Federal Communication Commission's fairness doctrine.¹⁹⁶ The Court's decision to uphold a right of reply in the broadcast media was based on the rationale of spectrum scarcity.¹⁹⁷ The fairness doctrine required broadcasters to devote a reasonable percentage of airtime to the discussions of issues of public importance, and to present contrasting views in the case of controversial issues of public importance.¹⁹⁸ The commission established specific applications of the fairness doctrine for personal attacks, editorial endorsements of political candidates, and noncandidate advertising in political campaigns.

IMAGES OF A FREE PRESS 34-37 (1991); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 538 (1991).

191. 388 U.S. 130 (1967). The Court, in *Walker* as well, claims that an athletic director and former United States Army general are not public figures to who the same standard of proof is applied as the *New York Times*.

192. *Id.* at 154-55.

193. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). The Court gave the states options for the standard of fault. Most state laws specify negligence as the standard of fault when private figures are involved in a libel action.

194. 418 U.S. 241 (1974).

195. *Id.* at 257.

196. *Id.*

197. *Red Lion Broadcasting Co. v FCC*, 395 U.S. 367 (1969). The FCC's personal attack rules, the first part of the fairness doctrine, required a broadcaster to give the person or the group an opportunity to respond over their facilities to the attack. *Id.*

198. *Id.* at 389.

The fairness doctrine, unlike the equal time rule, governed discussions of controversial issues and not broadcasts about political candidates. The fairness doctrine did not require that equal time be imposed by section 315.¹⁹⁹ Rather, broadcasters must ensure that diverse ideas be presented.

Only a few policies related to the doctrine remained after the core of the fairness doctrine – that broadcasters must air diverse views on controversial public issues – was repealed as a result of *Syracuse Peace Council* in 1989.²⁰⁰ When the FCC abandoned the doctrine, it said it was not eliminating the personal attack clause of explanation and political editorializing rules, which require equal opportunities for the supporters of opposing political candidates.²⁰¹ The broadcast media are still required to provide time for replies to both personal attacks and political editorials.²⁰²

The personal attack rules emerged in decisions in which the FCC granted a person attacked on the air the right to respond personally to the attack or to designate a spokesperson.²⁰³ The FCC did not establish any criteria to determine what constitutes a personal attack broadcast. Generally, disagreements over political issues and charges of bad judgement or incompetence tend not to be considered personal attacks.²⁰⁴ Similarly, the commission's criteria are unclear for determining whether a personal attack has occurred during broadcasts of controversial issues of public importance.²⁰⁵

The FCC requires that broadcasters provide time to reply not only for personal attacks but also for editorials that oppose a

199. Fairness Doctrine and Public Interests Standards; Handling of Public Issues (The Fairness Report), 48 F.C.C.2d (1974). Issues of public importance arise when parties about the public policies or public activities maintain controversial viewpoints.

200. The equal time provision in Section 315 of the 1934 Communication Act states: "If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford opportunities to all other such candidates for that office in the use of such broadcasting station." However, this provision does not apply to any (1) bona fide newscast; (2) bona fide news interview, (3) bona fide news documentary, or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto). Communications Act, sec. 315.

201. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (1990).

202. *Syracuse Peace Council*, 2 F.C.C.R. at 5063 (1987).

203. 47 C.F.R. sec. 73.123 (1998).

204. 47 C.F.R. sec. 73.1920 (1998). Personal attack rule does not apply to the following: (1) personal attacks on foreign groups or foreign public figures, (2) personal attacks occurring during uses by legally qualified candidates, and (3) bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs. *Id.*

205. STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 86 (1978).

legally qualified candidate or endorse an opponent.²⁰⁶ This rule applies only when the editorial represents the views of the broadcast station owner or manager. It has not been applied to political commentators who are not speaking on behalf of the station.²⁰⁷ Stations must notify either the person attacked or the candidates, provide them with a script or tape of the attack or endorsement, and allow for a reasonable opportunity to respond without charge.²⁰⁸

To sum up, in the United States, the right of reply as a basic right of individuals to challenge the media still exists in the broadcast media. However, it is arguable whether a right of reply serves as an effective legal means to recover from an individual's reputational injury.

IV. PRESS FREEDOM AND REPUTATIONAL RIGHTS IN SOCIOPOLITICAL CHANGES

A. PRESS FREEDOM UNDER KOREAN LAW

It is generally accepted that Koreans were first introduced to the Western concept of press freedom between 1945 and 1948²⁰⁹ under the U.S. Army Military Government in Korea (USAMGIK).²¹⁰ Even though several modern-style newspapers had existed since the end of the 19th century,²¹¹ the concept of "press freedom" in the Western, libertarian sense was incomprehensible to the Koreans until the mid-1940s.²¹²

The media policy of USAMGIK was libertarian and resulted in a rapid growth of the number of Korean newspapers. Particularly, Ordinance No. 19 promulgated by USAMGIK stipulated:

In order that freedom of speech and freedom of the press may be preserved and safeguarded without being perverted to un-

206. Bree Walker Lampley, 7 F.C.C.R. 1385 (1992). The commission said, when evaluating whether an issue has "public importance," it considers the amount of attention given to the issue by the media and community leaders and the probable impact of the issue on the "community at large."

207. 47 C.F.R. sec. 73.1930 (1998).

208. Andy Hilger, 5 F.C.C.R. 466 (1990). Broadcasters must offer time on the air to the candidate opposed or legally qualified opponents of the candidate supported, within 24 hours of a political editorial.

209. *Supra* note 209.

210. Kyu-Ho Youm & Michael B. Salwen, *A Free Press in South Korea: Temporary Phenomenon or Permanent Fixture?* 30 *ASIAN SURVEY* 312, 313 (1990).

211. Although the Republic of Korea Constitution was first proclaimed in 1948 with the establishment of the Korean government, the three-year rule of USAMGIK is worth mentioning in that the measures taken by USAMGIK had a great influence on the formation of the Korean Constitution.

212. JIN-SOK JUNG, *HANKUK EONRONSA* [THE HISTORY OF KOREAN MEDIA] 11 (1991) (stating that the first true newspaper in Korea in the modern sense of the word has been known as Tongnip Shinmun [The Independent]. It appeared as a daily in 1986).

lawful and subversive purposes, the registration of every organization engaged in printing of books, pamphlets, papers or other reading materials in Korea south of 38 North Latitude sponsored, owned, directed, controlled, or managed by any natural or judicial person is hereby ordered.²¹³

However, USAMGIK retreated from its own stated principles and took several authoritarian measures when the drastic growth in the number of the publications gave rise to some social and ideological problems. In order to handle propagandistic and subversive activities brought on by the left-wing press, the American military rulers proclaimed Ordinance No. 88 in 1946, which required licensing of publications.²¹⁴ Ordinance No. 88 remained effective until 1960, even though USAMGIK withdrew from Korea in 1948. The licensing system imposed by USAMGIK was frequently invoked as a powerful means of the Korean government to control the press until the so-called "April Revolution" in 1960.²¹⁵

It can be said that the first contact of Korean society with the Western concept of press freedom was incomplete. Koreans did not learn the real meaning of the concept. According to Barendt, the western vision of press freedom has two basic principles: to establish newspapers free from a licensing system and to run them free from discriminatory taxation on profits or turnover.²¹⁶ In this regard, while USAMGIK introduced the libertarian concept of press freedom to Korean society, imposing licensing on the newspapers weakened the true meaning of press freedom. And this imperfect concept of press freedom instilled by USAMGIK enormously influenced the media-related provisions of the Korean Constitution.²¹⁷

Press freedom was first adopted in the 1948 Constitution.²¹⁸ Article 13 (1) stated: "Freedom of speech and the press of all the citizens shall not be restricted by any means but statute."²¹⁹

This provision said that freedom of speech and the press could be protected within the scope of a statute. At the same time, the 1948 Constitution imposed statutory reservations on the guarantee of freedom of speech and the press. Article 28 (2) provided: "The enactment of laws to restrict the freedom and

213. See JOON CHOI, EONRONS A [A HISTORY OF THE KOREAN PRESS] 342-43 (1960).

214. Ordinance No. 19 (Oct. 30, 1945).

215. Ordinance No. 88 (May 29, 1946).

216. YONG CHANG, EONRONGWA INKWON [THE PRESS AND HUMAN RIGHTS] 123 (1969). The "April Revolution" ignited by college students toppled the Rhee Seung-Man government (1948-1960).

217. ERIC BARENDT, FREEDOM OF SPEECH 69 (1985).

218. CHANG, *supra* note 218, at 124.

219. KOREAN CONST. (promulgated July 17, 1948).

the rights of the citizens will be allowed only on behalf of social order and public welfare.”

This statutory reservation on press freedom provided the government with legitimate authority to suppress press freedom. Due to the reservation, law under the pretext of ensuring national security or political stability could at any time restrict press freedom. Yong Chang wrote that with the legal reservation on press freedom, the government of then-President Rhee Seung-Man (1948-1960) permitted only a comparatively narrow scope of freedom for the press.²²⁰ Since then, this legal reservation has incessantly raised hot disputes about the constitutional status of press freedom. The press freedom provision remained intact until the so-called April Revolution in 1960 toppled the Rhee government.

The 1960 Constitution, adopted after the April Revolution, differed from the 1948 Constitution in terms of the content of the press freedom provision. The new government repealed the statutory reservation provision and guaranteed absolute freedom of the press.²²¹ Article 28 added a clause that banned censorship and the licensing system. The second provision of Article 28 read: “The restriction should not infringe on the basic value of freedom and rights, and license or censorship shall not be allowed.”²²²

This provision can be interpreted as the first indication of the incorporation of the Western idea of press freedom. This is significant in that the government for the first time repealed censorship and the licensing system. However, this constitutional protection for the media would not last long and came to an end with the coup of Gen. Park Jung-Hee in 1961.

The 1963 Constitution, under the Park government, contained more strict regulation of the press than the 1948 Constitution. Article 18 stated:

- 1) All citizens shall enjoy freedom of speech and the press, and freedoms of assembly and association;
- 2) Licensing or censorship in regard to speech and press and permit of assembly and association shall not be recognized. However, censorship in regard to the motion pictures and dramatic plays may be authorized for the maintenance of public morality and social ethics;
- 3) The publication standard and facilities of a newspaper or press may be prescribed by law;
- 4) Control of the time and place of outdoor assembly may be determined in accordance with the provisions of law;

220. *Id.* art. 13 (1).

221. *Supra* note 218, at 31.

222. *Id.* at 32.

- 5) Neither the press nor any other publication shall impugn the personal honor or rights of an individual, nor shall either infringe upon public morality.²²³

Article 32 provided:

Liberties and rights of citizens may be restricted by law only in cases deemed necessary for the maintenance of order and public welfare. In case of such restriction, the essential substances of liberties and rights shall not be infringed.²²⁴

With the provisions of Articles 18 and 32, Yong Chang maintained that the government started to emphasize the "social responsibility" of the press. This became a long-time rationale for the control over the press.²²⁵

Under the Park government, Seong-Hi Yim, then the minister of the Public Information Department, once held that the constitutional provisions concerning press freedom were intended to achieve two conflicting goals at the same time – to "foster freedom of the press" and to "prevent defamation and degradation of public ethics through tyranny of press freedom."²²⁶

Whatever the aim, however, the Park government often deviated from the letter and spirit of the press clause. Under the 1972 Constitution, which immensely strengthened presidential power, the Park government escalated its restriction of the media, ignoring the constitution. Consequently, as Sun-Woo Nam observed, "The shifts in the fortunes of the Korean press were directly related to the whims of the ruling elite and the changing cross currents of the political situation rather than to the Constitution."²²⁷ This situation lasted until President Park was assassinated in 1979.

The 1980 Constitution, adopted under the regime of President Chun Doo-Whan, who took power by a military coup guaranteed press freedom. Article 20 (1) provided:

All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.²²⁸

However, the second clause of Article 20 stated that freedom of the press is not absolute. Rather, it specified the responsibility of the press when it violates other social values. It

223. KOREAN CONST. (amended 1960), art. 28 (2).

224. KOREAN CONST. (amended 1963), art. 18.

225. *Id.* art. 32.

226. *Supra* note 216, at 37.

227. Seong-Hi Yim, *Constitution Guarantees Freedom of the Press in ROK [Republic of Korea]; Its Thorny Past and Bright Future*, 3 KOREAN REPORT 21-24 (1963).

228. Sun-Woo Nam, *Newspapers Under Tribulation: The Present-day Korean Press?*, 27 GAZETTE 109, 110 (1978).

provided: "Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom."²²⁹

This provision about the press's social responsibility gives press freedom in Korea a different emphasis than under the first amendment of the U.S. Constitution.

This view of press freedom was unchanged by the 1987 amendment to the Constitution under then president-elect Rho Tae-Woo. The 1987 amendment to the Constitution contains additional provisions that protect press freedom including explicit restrictions such as licensing or censorship of the press.²³⁰ Article 21 (2) states: "Licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized."²³¹ However, a third clause sets a statutory requirement that the media should start to meet. It reads: "The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by law."²³² In fact, this clause enables the government to control the media.

B. REPUTATIONAL RIGHTS UNDER KOREAN LAW

1. *The Concept of Reputation*

Although the right to reputation is perceived in almost all modern democratic societies as one of the basic human rights, the concept of reputation has remained vague. Neither Korean nor U.S. courts have attempted to define "reputation" specifically.²³³ Black's Law Dictionary says:

Reputation is an estimation in which one is held or the character imputed to a person by those acquainted with him. That by which we are known and is the total sum of how we are seen by others or general opinion, good or bad, held of a person by those of a community in which he resides. . .²³⁴

What can be captured from this legal definition is that reputation is derived from the act of recognition in which one indi-

229. KOREAN CONST. (amended 1987), art. 20(1).

230. *Id.* art. 20(a).

231. KOREAN CONST. (amended 1987), art. 21 (2).

232. *Id.*

233. *Id.* art. 21 (3).

234. Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 440 (1990) (noting that as a result, the balancing of interests in defamation cases is even more uncertain).

vidual takes the role of the other into account.²³⁵ In libel cases, U.S. courts explain reputation by focusing on the individual.²³⁶

Robert Post points out that the term "reputation" can signify at least three different things: property, honor, and dignity.²³⁷ First, reputation is the "property" produced by one's efforts as much as any physical possession, thus any damage to reputation can bring property loss.²³⁸ Such a view of reputation is essential to business and economic relationships, with the good name of the individual being understood to be a form of "capital" that "creates funds" along with "patronage and support."²³⁹ Second, reputation is a form of honor that looks upon the good name of an individual as having its source in the status of the defamed party rather than being earned through his or her labors. Third, reputation is a measure of individual dignity that seeks to ensure individual happiness and community identity.²⁴⁰ Post's perspective emphasizes the inherent individual nature of reputation.

Some sociologists claim that reputation is indelibly social by its nature. This is a perspective of reputation that is socially determined. Robert Bellah argues: "[R]eputation is the extension and elaboration of the recognition of self-realization which lies at the basis of our social existence. . . ."²⁴¹

This statement makes sense in that reputation involves the building over time of a web of connections among individuals. Indeed, individuals establish themselves in various milieu-business associations, communities, families, and schools.

According to Green, reputation is not so much a property or possession of individuals but a relation among persons. Green maintains that injury to reputation, in this sense, should be regarded as injury to the individual's right to general social relations with others.²⁴²

Given the discussions above, the concept of reputation in society can be influenced by the social values shared and emphasized by that society. Put differently, the basic values in a society

235. BLACK'S LAW DICTIONARY 1303 (6th ed. 1991).

236. GEORGE HERBERT MEAD, MIND, SELF, & SOCIETY 141 (1934).

237. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974).

238. Robert Post, *The Social Foundation of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693-94 (1986).

239. Van Vechten Veeder, *The History of the Law of Defamation II*, 4 COLUM. L. REV. 33 (1904) (arguing that one's good name is as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness).

240. Post, *supra* note 23 9, at 694.

241. *Id.*

242. Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 744 (1986).

accentuate the aspects of reputation. Therefore, reputation should be understood with the unique context of a given society in mind.

2. *Constitutional Protection of Right to Reputation*

A person's reputation as related to the press is protected as a constitutional right in Korea.²⁴³ However, the reputational right was not constitutionally guaranteed until 1980. The 1980 Constitution clearly assured a person's protection of reputation by making the press specifically liable for damage stemming from violation of personal honor. Article 21 (2) stipulates:

"Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom."²⁴⁴

This provision emphatically prohibits the infringement on an individual's right to reputation. However, this was not the first attempt to protect a person's reputational right. The constitutional prohibition against violation of an individual's right to reputation by the media was first recognized by the 1962 Constitution, which stated: "The press or publication should not infringe upon the good name of an individual. . ."²⁴⁵

Nevertheless, the 1980 Constitution ought to be understood as the first constitutional requirement obligating the state to assure Koreans of fundamental and inviolable human rights as individuals.²⁴⁶ In line with the constitutional adoption of a person's reputational right, the Korean people have gradually modified the notion of the right to reputation. A social atmosphere that demanded respect for human rights during the 1980's accelerated this change.

Problems occur when a person's reputation is injured by the news media. On the one hand, Korean people were traditionally very reluctant to battle the press, even when their reputations were injured. Koreans, who have long been educated to place harmony and conciliation before legal warfare, still tend to regard public conflict as being beneath their dignity to seek a rem-

243. Alan Green, *Relational Interests*, 31 U. IL. L. REV. 35, 37 (1936) (distinguishing an individual's right to protection from family relations, trade relations, professional relations, and political relations).

244. KOREAN CONST. (amended 1987), art. 20 (4).

245. KOREAN CONST. (amended 1980), art. 21 (2).

246. KOREAN CONST. (amended 1962), art. 18 (5).

edy through the judicial process.²⁴⁷ The late legal scholar Peong-Choon Hahm observed:

To the Korean a litigation is a war. . . A litigious man is a war-like man to the Koreans. He threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity.²⁴⁸

Hahm said that conflict, struggle, and legal resolution are the essence of the Western man, but Koreans seek to avoid legal remedies whenever possible.²⁴⁹ For this reason, it is not surprising that recovery for libel of an injured reputation is unusual in Korea.²⁵⁰ Jae-Chun Yu, a Korean journalism professor, maintained that the legal and ethical issues facing the Korean press are in part a result of the tendency of the defamed to forgo suing the news media.²⁵¹

However, the Korean media have been said to be reckless in regard to a person's right to reputation.²⁵² Analyzing the decisions of the Korean Press Ethics Commission from 1961 to 1980, Yu observed that the media violations of citizens' reputational rights in Korea resulted primarily from the "sensationalism of news reporting," the "unprofessional practices of news reporters," and the "journalists' lack of knowledge of laws and professional ethics."²⁵³ Moreover, Yu added that the violations were caused to a considerable degree by undemocratic political circumstances that did not allow the press to criticize the government or to provoke anti-government activities in Korea.²⁵⁴ In this climate, the Korean media tended to conform to the governmental policy only to become an authoritarian press instead of one that serves the public.

247. KOREAN CONST. (amended 1980), art. 10. Article 10 states: "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

248. WON-SOON PAENG, EONRON BEOPJE SHINRON [A New Theory of Mass Media Laws] 101 (1989).

249. PEONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS, AND CULTURE 117 (1986).

250. *Id.*

251. Hamid Mowlana & Chul-Soo Chin, *Libel Laws of Modern Japan and South Korea are Compared*, 48 JOURNALISM Q. 326, 330 (1971); Kyu-Ho Youm, *Libel Law and the Press in South Korea: An Update*, 1 CONTEMPORARY ASIAN STUDIES SERIES 1, 2 (1992).

252. JAE-CHON YU, HANKUK EONRON KWA EONRON MUNHWA [KOREAN PRESS AND ITS CULTURE] 171 (1986).

253. *Id.* at 173.

254. *Id.*

C. SOCIOPOLITICAL CHANGES DURING 1981 AND 1996

As noted earlier, sociopolitical environments of Korean society have changed drastically since 1981. This was especially true after 1987, when the government set political reforms into practice. Along with political changes, changes in social values have prevailed among the Korean people. Assuming that libel laws are affected by the underlying sociopolitical values of a society, such changes in Korea should bring on broad changes in the libel milieu.

The most significant change has been the improved status of the Korean courts as a more independent branch in the midst of an increasingly functional democracy. In Korea, the judicial department was under the pressure of the powerful executive branch until 1987.²⁵⁵ Jurisprudence about politically sensitive issues was at the mercy of the executive branch. Even though an independent judiciary is considered a key to democracy, the constitutional guarantee of an independent judiciary in Korea was sometimes not upheld.

Chief Justice William Rehnquist of the U.S. Supreme Court points out how important it is to have an independent judiciary in a democracy. He comments, "Many nations have impressive guarantees of free speech, free elections, and the like. But these have not had the same meaning in those countries because of the want of an independent judiciary to interpret them."²⁵⁶

In a similar vein, Clifford Wallace, who studied the influence of the American constitution on Asian countries, maintains that an independent judiciary can best assure democratic progress, increase stability, and lessen the supposed need for a dictator.²⁵⁷ Furthermore, Wilcox, a journalism scholar, emphasizes the independence of courts in a functional democracy in connection with press freedom. He states, "A nation's press system is free, not necessarily because of a constitutional guarantee, but because an unintimidated judiciary protects the press against government encroachment."²⁵⁸

Regarding the guarantee of judicial independence, as noted in chapter two, the Korean Constitution provides: "The judicial power shall be vested in courts composed of judges" and that "[t]he judges shall judge independently according to their con-

255. *Id.*

256. DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* 38-52 (1990).

257. William Rehnquist, *The Constitution: An Independent Judiciary Makes it Work*, 9 TRIAL 69, 74 (1987).

258. Clifford Wallace, *The Influence of the United States Constitution on Pacific Nations*, 16 THE KOREAN JOURNAL OF COMPARATIVE LAW 14, 22 (1988).

science and in conformity with the Constitution and laws."²⁵⁹ While the 1972 Constitution endowed the president the power to appoint all judges, the 1980 Constitution and the 1987 Constitution empowered the chief justice of the Supreme Court to appoint judges of lower courts with the aim of better guaranteeing the independence and autonomy of the judiciary branch.²⁶⁰ These provisions are considered to protect the judicial power from the intervention of other branches.

Despite these constitutional provisions, however, problems still exist in the application of the constitution.²⁶¹ In particular, the independence of the judiciary from the pressure of the executive branch has long been a legal issue in Korea. Dae-Kyu Yoon, a constitutional law scholar, states: "[T]he actual operation of the court will, by and large, rely on the political atmosphere of the day."²⁶²

Considering that the judiciary had been under the influence of the executive branch, Sang-Won Yim observes that Koreans had little confidence in the validity and fairness of the judicial process.²⁶³ Yoon affirms that this social atmosphere (the pressure of the executive branch on the judicial power and people's lack of confidence over legal validity) discouraged libel victims from going to court to seek a remedy through judicial intervention.²⁶⁴ However, now Koreans believe that the established leadership in Korea no longer controls the Korean courts. Furthermore, the possibility of court action against the media has become more of a reality now than in the past.²⁶⁵

Another important factor that affects the current media environment is the change in the attitude of Korean people toward the media. During the Chun government (1980-1987), the Ko-

259. Dennis L. Wilcox, *Black African States, in PRESS CONTROL AROUND THE WORLD* 222 (Jane Leftwich Curry & Joan R. Dassin eds., 1982).

260. KOREAN CONST. (amended 1987), art. 101 (1) & art. 103.

261. *Id.* art. 105 (4).

262. Notes, *The Amended Constitution of South Korea*, 26 INTERNATIONAL COMMISSION OF JURIST REV. 22 (1981) ("[T]he provisions of the newly amended constitution do not seem to provide for any greater independence of the judiciary of the future. Although the power of dismissal by administrative disciplinary action has been removed, transfers to another court of [sic] forced resignations may still be used to punish judges who have displeased the President").

263. Dae-Kyu Yoon, *Judicial Review in the Korean Political Context*, 17 KOREAN JOURNAL OF COMPARATIVE LAW 151 (1989).

264. Sang-Won Yim, *A Study on Legal Values in Korea: An Analysis of Attitude Toward Law*, 2 SOC. SCI. J. 59, 70 (1974); for a more recent study, see Korea Legislation Research Institute, *Korean Attitude Toward Law: A Survey*, translated in KOREAN LAW IN THE GLOBAL ECONOMY 128-175 (Sang-Hyun Song ed., 1996).

265. James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 THE AMERICAN J. COMP. L. 73, 119 (1992).

rean people became aware that the media, controlled by the government, did not serve the public as a watchdog. At the same time, complaints about the media have rapidly increased. Citizen groups publicly criticized reckless reporting that could seriously injure a person's reputation. Traditionally, the Korean people believed the media were too powerful to challenge.²⁶⁶ This attitude gradually changed during the 1980s.

Lee attributes this change in attitude to a declining sense of professional ethics among Korean journalists. Lee argues that the media tends to deviate from the "right path of journalism", considering the expansion in the media industry.²⁶⁷ He also points out that the fast-growing media industry, facing a lack of professionally trained journalists, has hired less qualified people. As a result, the quality of journalistic work has suffered, which has precipitated complaints.²⁶⁸

A distinctive aspect of the media environment in the 1990s are the self-created citizen groups. These groups, concerned about growing complaints about the media, launched a voluntary movement to help the individuals injured by the media to recover their damaged reputations. Further, they began to emphasize the prevention of reputational injury by monitoring the press. In 1991, they established two organizations – the Association for Recovery from Media Violence and the Council for Press-related Damage – aimed at expediting the process of recovery for people who seek legal resolution. These organizations are composed of lawyers, media law scholars, religious leaders, and citizens.²⁶⁹

Members voluntarily investigate the libel conflict, advise the victims, and help the injured people file lawsuits free of charge. These organizations are unprecedented because they were established by ordinary citizens, not by the government. The activities of these citizen groups are likely to continue for the time being, at least until the Korean media becomes more careful with the stories that they publish.²⁷⁰

V. CONCLUSION

Korean people traditionally think of the press as an enormously powerful organization. They have been reluctant to fight

266. *Id.* at 118.

267. CHONG-TAK KIM, EONRON KONGHWAKUK [PRESS REPUBLIC] 223-25 (1991).

268. *Id.* at 18.

269. *Id.*

270. Jin-Sok Jung, *Changes of the Media Environment and Press Arbitration System*, EONRON JUNGJAI [PRESS ARBITRATION Q.], Spring 1991, at 14, 15 (1991).

the media through legal remedies. However, since its establishment in 1981, the Korean press arbitration system has developed to be a substantial weapon for the public to cope with the media's power. Especially since 1988, the Korean press arbitration system has been an effective means to enforce the right of reply by providing the public access to the overbearing Korean media.

A fundamental issue is whether the Press Arbitration Commission has imposed a chilling threat on the freedom of the Korean media. This problem primarily stems from the fact that the commission was originally founded and operated by the Korean government. Most criticisms about the commission have focused on the assertions that the commission is actually a way of indirect governmental regulation, rather than public regulation.²⁷¹

A brief examination with four other different countries shows that whereas libel laws in any society are a reflection of the efforts to strike a balance between two indispensable societal interests, the remedies sought in defamation are quite different depending on the country's social and cultural background. Even though all the countries examined stress the importance of both freedom of the press and an individual's right to his/her reputation, the mode for reconciling them is made in accordance with the society's social and legal bases. It was found that:

First, the way that a nation weighs the relative significance between press freedom and reputational right differs. Whereas Germany and France as well as Korea put a balanced, case-by-case emphasis on both press freedom and reputational right, Japan gives a preferred position to an individual's reputation and the United States favors press freedom.

Second, the pattern by which the remedies for libel are employed varies among the nations. In France and Korea, both a right of correction for false reports and a right of reply to defamatory statements have been adopted as the primary remedies for individuals in libel suits. In Germany, only a right of reply exists. In the United States, right of reply is allowed only in the broadcast media. Correction with public apology is the central type of remedy in Japanese society.

Third, the scope that the right of reply is different among the nations. Right of reply in Germany, Japan, and Korea is limited to factual statements, whereas in France and United States the right of reply applies to opinions and criticisms as well as factual statements.

Fourth, under the libel laws of Germany, France, Japan and Korea, libel can be punished criminally. Especially in Japan,

271. *Id.*

criminal punishment for reporters, even if not frequently invoked, is effective in some cases. However, criminal punishment for libel is declining. In these countries, libel suits are not considered as a clear infringement of press freedom. The press in the United States is seldom bothered by criminal charges in relation with defamation. In conclusion, as Korean society underwent democratization since 1987, the right of reply under the contemporary Korean libel law has become an effective means to reconcile libel disputes between the press and the public.