



September 16, 2021

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## Re: Proposed Amendments to the Press Arbitration Law

Dear President Moon Jae-in,

The 4 undersigned organizations write to express serious concern about the proposed amendments to the Act on Press Arbitration and Remedy for Damages Caused by Press Reports (the “Press Arbitration Law”). As drafted, the proposed amendments would seriously impair freedom of expression, freedom of information and media freedom, and would discourage critical reporting by the media.

The bill containing the amendments was passed by the Culture, Sports and Tourism Committee on August 19, 2021, and was supposed to be voted on at the National Assembly in late August. On August 31, floor leaders of the Democratic Party and the opposition People Power Party agreed to postpone the vote and consider the bill at a plenary parliamentary session set to begin on September 27.

The parties have established a consultative council comprised of two lawmakers from each party and four experts in media law to review the bill.<sup>1</sup>

This letter outlines our concerns about the bill and provides specific recommendations for revisions to the bill to bring it into line with South Korea’s obligations under international law.

## International Legal Standards

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<sup>1</sup> Jung Da-min, “Expert Discussion on ‘fake news’ bill faces complications,” *The Korea Times*, September 8, 2021, [https://www.koreatimes.co.kr/www/nation/2021/09/356\\_315241.html](https://www.koreatimes.co.kr/www/nation/2021/09/356_315241.html) (accessed September 8, 2021).

Under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which South Korea ratified in 1990, restrictions on expression must be (1) provided by law; (2) in pursuit of a legitimate aim; and (3) necessary and proportionate to that aim. To be “provided by law,” any restriction must be formulated with sufficient precision to enable an individual to know what expression would violate the law.<sup>2</sup> Vague laws that confer excessive discretion can lead to arbitrary decision making and are incompatible with international protections for freedom of expression.<sup>3</sup>

As with all restrictions on expression, responses to the spread of disinformation and misinformation need to be grounded in international human rights law.<sup>4</sup> Expression must never be restricted on the grounds of falsity alone but only when the restriction is necessary to protect the rights and reputations of others or to protect national security, public order or public health or morals.<sup>5</sup> As the Special Rapporteur on the protection of the right to freedom of opinion and expression stated in her most recent report:

the right to freedom of expression applies to all kinds of information and ideas, including those that may shock, offend or disturb, and irrespective of the truth or falsehood of the content. Under international human rights law, people have the right to express ill-founded opinions and statements or indulge in parody or satire if they so wish.<sup>6</sup>

General prohibitions on the dissemination of information based on vague and ambiguous ideas such as “false news” are incompatible with international standards for restrictions on freedom of expression and should be abolished.<sup>7</sup>

States need to be particularly careful when imposing restrictions on the media. An independent and diverse media that disseminates a wide range of information and ideas plays a critical role in supporting the functioning of a democratic society. As the United Nations Human Rights Committee stated in its General Comment No. 34, “a free,

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<sup>2</sup> UN Human Rights Committee, General Comment No. 34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed September 7, 2021), para. 25.

<sup>3</sup> Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Irene Khan, April 13, 2021, UN Doc. A/HRC/47/25, para. 40.

<sup>4</sup> UN Human Rights Council, Resolution 44/12.

<sup>5</sup> ICCPR, art. 19(3).

<sup>6</sup> UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, April 13, 2021, UN Doc. A/HRC/47/35, para. 38.

<sup>7</sup> The United Nations Special Rapporteur on freedom of opinion and expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, “Joint Declaration on Freedom of Expression and Fake News, Disinformation and Propaganda,” March 3, 2017, FOM.GAL/3/17. See also UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, A/HRC/38/35 (2018), para. 40 (“The prohibition of false information is not in itself a legitimate aim under international human rights law.”).

uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.”<sup>8</sup>

States also have the duty to ensure that companies respect human rights. They should not compel internet intermediaries to remove or block content that is legitimate under international human rights law, nor require them to make determinations on the legality of content under national laws that should be done by the courts.<sup>9</sup>

### **Suppressing “False or Manipulated” Statements**

Article 30-2 of the proposed bill would permit courts to award damages against “the press, Internet news services, and Internet multimedia broadcasting [business operators]”<sup>10</sup> found to have “caused property damage, the infringement of personality right<sup>11</sup> or any other emotional distress,” intentionally or with gross negligence, due to a false or manipulated report.<sup>12</sup> Article 2(17-3) of the bill defines “false or manipulated report” as “the act of reporting or mediating false information or information manipulated to be misconstrued as facts.”<sup>13</sup>

The vague definition of “false or manipulated reporting” fails to meet the legal requirement that restrictions on expression be formulated with sufficient precision to enable individuals, the media, or internet intermediaries, to know what will violate the law. This phrase “information manipulated to be construed as fact” is particularly vague, and could well be used to penalize opinion pieces, satire, or parody, all of which are protected under international law. The ambiguity of the law leaves it open to abuse.

The vague language of the law has the potential to limit a wide range of expression, including critical news reporting and the reporting of unpopular or minority opinions, because media outlets may self-censor to avoid reports that may trigger lawsuits under the law. In doing so, the law will restrict the free flow information that is so critical in a democracy.

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<sup>8</sup> UN Human Rights Council, General Comment No. 34, para. 13.

<sup>9</sup> UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, A/HRC/38/35 (2018), para. 90.

<sup>10</sup> Bill to Partially Amend the Act on Press Arbitration and Remedies, etc. art. 2(17-3).

<sup>11</sup> The term “personality rights” is used in the Press Arbitration Law to refer to a person’s “life, liberty, body, health, reputation, the secrecy and freedom pertaining to privacy, portrait, name, voice, dialogue, works, personal documents, and any other personal worth.” Press Arbitration Law, art. 5.

<sup>12</sup> Bill to Partially Amend the Act on Press Arbitration and Remedies, etc. art. 30-2.

<sup>13</sup> Ibid., art. 2(17-3).

As the Special Rapporteur for Freedom of Opinion and Expression has commented, expression cannot be punished or suppressed merely for being false.<sup>14</sup> Imposing damages for false report without any other requirement is similar to enacting the universally and timelessly denounced “false news” crime in a civil form. Even in South Korea, already in 2010, the Korean Constitutional Court found that a then existing law punishing spreading false information through the internet to harm the public was unconstitutional.<sup>15</sup>

Furthermore, the newly proposed Articles 2(17-2) and 17-2 also authorize courts to issue takedown orders on “untrue contents” without any other requirement. Article 17-2 does include an exclusion from the takedown order for content relating to “matters of public concern that contribute to the formation of public opinion.” While a welcome exception, the censorship permitted through this article violates the international human rights principle that expression cannot be restricted or punished simply for being false.

### **Disproportionate Damages**

Article 30-2 of the bill would establish grossly disproportionate punitive damages for “false or manipulated reporting.” The bill states that “the court may assess compensation up to five times the damages” if such reporting causes property damage, infringes on personality rights, or causes emotional distress. A maximum penalty of five times the actual loss is excessive and, by definition, disproportionate to the harms suffered.

Moreover, the bill permits the awarding of damages even if the falsity is not material, requiring only that the falsity, however small, cause property damage, infringement of a “personality right,” or any other emotional distress. Thus, under the law, those subject to critical reporting could seek to recover punitive damages on grounds of emotional distress for even minor factual errors.

Disproportionate sanctions such as heavy fines can have a significant chilling effect on freedom of expression.<sup>16</sup> Punitive damages are only appropriate to compensate for harm to reputation in certain exceptional circumstances.<sup>17</sup> The broad language of the amendment does not implicate any concerns that would merit such exceptional treatment.

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<sup>14</sup>UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, A/HRC/38/35 (2018), para. 40 (“The prohibition of false information is not in itself a legitimate aim under international human rights law.”).

<sup>15</sup> Global Legal Monitor, Library of Congress, South Korea: Act of Spreading False Information via Internet Not Punishable, January 10, 2011, <https://www.loc.gov/item/global-legal-monitor/2011-01-10/south-korea-act-of-spreading-false-information-via-internet-not-punishable/> (accessed Sept. 15, 2021)

<sup>16</sup> UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, A/HRC/38/35 (2018), para. 66.

<sup>17</sup> Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf>, principle 15(e).

As there is presently no general punitive damages law in South Korea, it is especially inequitable that, should the bill be passed, punitive damages may be imposed on press reports but not on wrongful acts on which the press may be reporting. For instance, a company condoning at-work sexual harassment will not be subject to punitive damages, while a newspaper reporting on that company's practices may be if the company claims the reporting is "false." The bill will therefore significantly reduce the impact of the press' role in criticizing, monitoring, and therefore rectifying social ills.

South Korea already possesses extensive civil and criminal defamation legislation that provides more than sufficient redress for reputational harms suffered due to false statements. South Korea's criminal defamation law, which should itself be revised, allows for criminal liability for truthful statements unless defendants can demonstrate that their communications were made "solely in the public interest." Individuals may also face up to a year in prison for "publicly insult[ing] another."<sup>18</sup>

### **Use of News Organization's "Social Influence" and Sales to Calculate Damages**

The proposed Article 30-2 also lists the news organization's "social influence" and "previous year's sales amount" as among the factors to be considered by the court in calculating the punitive damages.

The original paragraph 2 of Article 30 simply stipulates that: "If any damage referred to in paragraph (1) is deemed incurred, but it is difficult to calculate the specific amount of such damage, the court shall calculate such amount of damage as may be deemed equivalent thereto, taking into consideration the effect of statements of claim and defense and the results of the examination of evidence." [emphasis added]

While the "social influence" or sales of a news organization may expand the reach of the "damaging" statement, the use of this factor will heighten the risk for influential, mainstream news organizations and could have a serious chilling effect on their willingness to report on corruption or other wrongdoing by powerful figures.

### **Presumption of Intent or Gross Negligence**

Paragraph 2 of the proposed new Article 30-2 creates a presumption that an allegedly "fake or manipulated report" was made "with intention or gross negligence" in several broad and vaguely defined circumstances:

- (1) Where "retaliatory or repetitive" false or manipulated reports have been made;

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<sup>18</sup> Article 19, "South Korea: Criminal defamation provisions threaten freedom of expression," news release, May 10, 2018, <https://www.article19.org/resources/south-korea-repressive-criminal-defamation-provisions-threaten-freedom-of-expression/>.

- (2) When a news publisher quotes the original article “without sufficient verification procedure;”
- (3) Where the headline misrepresents the content or creates “new facts” that differ from the content of the article, or where visual elements (photographs, illustrations, etc.) create “new facts” that differ from the essential contents of the article.

The law does not specify what would constitute a “retaliatory” report, again raising the risk of arbitrary application of the law. It also creates a risk that those subject to critical reporting will claim “retaliatory” reporting to retaliate against the press. In addition, the presumption of guilt may force journalists to choose between revealing their sources to counter the presumption or paying heavy damages.

While the presumption applicable to “retaliatory” reporting does not apply to certain categories of press reports that are in the public interest,<sup>19</sup> that exception is not sufficient to protect press freedom. Creating a legal presumption that the press is guilty of either intentionally, or with gross negligence, reporting false or fabricated news poses a serious risk to press freedom.

### Intermediary Liability

The bill extends punitive damages for “false or manipulated reporting” to “internet news service providers” and “internet multimedia broadcasting business operators.” The imposition of liability on intermediaries for content posted by third parties is extremely problematic.<sup>20</sup> Laws governing intermediary liability should be precise, clear, and accessible, and intermediaries should be immune from liability for third-party content when they have not been involved in modifying that content.<sup>21</sup> The UN Special Rapporteur for Freedom of Opinion and Expression advised that states should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on internet intermediaries, and from requiring the “proactive” monitoring or filtering of content.<sup>22</sup> South

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<sup>19</sup> The exception covers press reports (1) on matters relating to an act “detrimental to the public interest as defined in article 2(1) of the Protection of Public Interest Reporters Act; (2) on matters relating to acts prohibited in the Improper Solicitation and Graft Act; or (3) other press reports on matters relating to the public concern equivalent to items 1 and 2 that are deemed necessary to perform the social responsibilities of the press per article 4(3).” Partially Amend the Act on Press Arbitration and Remedies, etc. art. 30-2(4).

<sup>20</sup> UN Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” March 30, 2017, UN Doc. A/HRC/35/22, para. 49 (noting that “intermediary liability creates a strong incentive to censor; providers may find it safest not to challenge such regulation but to over-regulate content such that legitimate and lawful expression also ends up restricted.”); UN Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” April 6, 2018, UN Doc. A/HRC/38/35, para. 66.

<sup>21</sup> Manila Principles on Intermediary Liability, March 24, 2015, [https://www.eff.org/files/2015/10/31/manila\\_principles\\_1.o.pdf](https://www.eff.org/files/2015/10/31/manila_principles_1.o.pdf); UN Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” April 6, 2018, UN Doc. A/HRC/38/35, para. 66

<sup>22</sup> UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” April 6, 2018, UN Doc. A/HRC/38/35, paras. 66-67.

Korean law already provides for mandatory notice and takedown requirements for a broad range of content. There is no justification for the imposition of punitive damages on those intermediaries.

**Recommendations:**

The undersigned organizations urge you to:

- Fully consult with stakeholders, media companies, internet intermediaries, and civil society groups to determine how to revise the bill to meet the requirements of international law, the standards elaborated by United Nations experts, and the Manila Principles on Intermediary Liability to protect the rights to privacy and freedom of expression.
- Delete Articles 2(17-3) and 30-2 from the bill.
- Delete Articles 2(17-2) and 17-2 from the bill.

Signed by,

ARTICLE 19  
Human Rights Watch  
Korean Progressive Network Jinbonet  
Open Net Association