

## ARTICLES

### PROTECTION OF PERSONALITY RIGHTS UNDER KOREAN CIVIL LAW\*

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## INTRODUCTION

In recent decades, the Republic of Korea has experienced a remarkable development in the field of information technology and digital electronics. The country is currently a world leader in internet and social media services market. While the Korean population enjoys the advent of an era marked with easy and fast access to mass communication, infringement of personality rights including honor,<sup>1</sup> privacy, and personal data has emerged as a serious issue of concern for the legal community.<sup>2</sup> In Korean courts and academia, disputes

<sup>1</sup> In Korean law, the term "honor" (명예) means an objective social evaluation of one's character, virtues, and/or worth.

<sup>2</sup> The number of disputes involving infringement by the press of personality rights ("Press Disputes") has increased on an incremental basis since the 1980s. Press Disputes are primarily resolved through mediation or arbitration by the Press Arbitration Commission ("Commission") and also through court litigation. The trends of these Press Disputes over the years are discernible by probing the Commission statistics. Between the foundation of the Commission in 1981 and 2008, the number of mediations involving the Commission stood at 12,318, out of which 4,112 cases were settled. In 2006, the mechanism of press arbitration was first introduced, and a total of 31 arbitration requests were lodged with the Commission until 2008, with a decision reached on each requested case. The number of mediations was a meager 44 in 1981 and 55 in 1988, but began to climb in 1989: as a result, a total of 602 mediation requests were filed in 1998 and 951 in 2008, respectively. In 2005 and 2006, the Commission received more than 2,000 mediation requests combined. See Eonlonjungjaewiwonhoe (언론중개위원회) PRESS ARBITRATION COMMISSION, Yeondobyeol Jojeongsincheong Cheoli Hyeonhwang (연도별 조정신청 처리현황

surrounding personality rights are taking on new dimensions and unprecedented levels of complexity. The concept of personality rights is taking the center stage on its own, as Korean society shows an increased awareness on the issue of personality rights and looks for legislative guidance.

Reflecting on the past, when the Korean Civil Code ("Civil Code")<sup>3</sup> was enacted in 1958, only minimal attention was paid to the issue of personality rights. The legislature did not properly address the matter. After half a century, the Civil Code still consists of piecemeal provisions, lacking specific provisions focusing on personality rights. Although the Korean Criminal Code ("Criminal Code")<sup>4</sup> attempted to regulate certain aspects of personality rights by defining defamation and verbal insult as crimes, it failed to effectively regulate the area of privacy and unwarranted invasion.

Beginning in the 1980s, the Korean judiciary has attempted to flesh out personality rights by handing down trailblazing decisions. These decisions recognized a right to seek monetary damages and injunctive relief for violations of personality rights. Since the Civil Code is silent on personality rights, illegality of personality infringement was assessed in the context of freedom of expression. This judicial endeavor is embodied in the enactment of the Act on Press Arbitration and Remedies, etc. for Damages caused by Press Reports of 2005.<sup>5</sup>

The purpose of this article is to provide a general analysis on the protection of personality rights under Korean civil law. In particular, this article will examine problems regarding the press and other venues of expression. Towards this end, the meaning of pertinent constitutional and other legal provisions in relation to personality rights is discussed in Part I. The overall scope of legal protection accorded to personality rights is explored in Part II. Part III deals with the issue of conflict between personality rights and freedom of the press or freedom of arts<sup>6</sup> and the

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(1981 년~2008 년)) [STATUS OF ANNUAL MEDIATION REQUESTS PROCESSING (1981-2008)], <http://bit.ly/2sISDQx>. In 2013, 2,433 mediation cases were handled, and in the following year, in the aftermath of the *Sewol* ferry incident, the number of mediation requests literally skyrocketed, resulting in a total of 19,048 cases received and processed, which is the biggest number of mediations ever since the launch of the Commission. See Eonlonjungjaewiwonhoe (언론중재위원회) PRESS ARBITRATION COMMISSION, Eonlonjungjaewiwonhoe 2014 Nyeondoe Jojeongjungjae Cheoligyeolgwa (언론중재위, 2014 년도 조정중재 처리결과) [2014 MEDIATION PROCESSING RESULTS], <http://bit.ly/2sJ0UEr>.

<sup>3</sup> Minbeob [Civil Code], Act No. 471, Feb. 22, 1958, amended by Act No. 13710, Jan. 6, 2016 (S. Kor.).

<sup>4</sup> Hyeongbeob [Criminal Code], Act No. 293, Sep. 18, 1953, amended by Act No. 14178, May 29, 2016 (S. Kor.).

<sup>5</sup> Eonlonjungjae Mit Pihaguje Deung-e Gwanhan Beopryul [Act on Press Arbitration and Remedies, etc. for Damage caused by Press Reports], Act No.7370, July 28, 2005, amended by Act No. 10587, Apr. 14, 2011 (S. Kor.).

<sup>6</sup> Article 22.1 of the Korean Constitution guarantees freedom of arts (예술의 자유). DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 22 (S. Kor.). In this context, freedom of arts means one's freedom to exhibit, perform, and disseminate created works of art to the public. Constitutional Court. (Const. Ct.) 91Hun-Ba17, May 13, 1993 (S. Kor.).

significance of such friction in the context of civil liability in general. Part IV discusses the protection of personality rights of the dead, an area mostly unique to personality rights. I conclude with a brief summary with implications for future study.

## I. THE MEANING OF PERSONALITY RIGHTS UNDER KOREAN CONSTITUTIONAL AND CIVIL LAW

In order to ascertain what position and status personality rights occupy in Korean civil law, it is first necessary to study the meaning of constitutional and other legal provisions governing personality rights.

### A. *Influence of the Constitution on Civil Law*

Article 10 of the Korean Constitution provides "all citizens shall be assured of their human worth and dignity and shall have the right to pursue happiness," while Article 17 of the Constitution sets forth "the right to privacy of all citizens shall not be infringed."<sup>7</sup> Personality rights, which are largely premised on these constitutional norms, are acknowledged as the most basic and central of fundamental rights.<sup>8</sup>

The question of how the constitutional provisions have influenced personality rights under civil law may arise.<sup>9</sup> As will be seen below in Parts III and IV, the Constitution and related jurisprudence are significant for defining the contours and outer limits of personality rights in the context of Korean civil law.

### B. *Tort Liability under Civil Law*

As will be illustrated below, tort liability under the Civil Code can play an influential role in protecting personality rights from infringement. First, Article 750 of the Civil Code provides that "(a)ny person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom," thereby providing a generic and broad prescription on the constitutive elements of a tort.<sup>10</sup> Accordingly, unlike the civil laws of Germany or Japan, a tort is deemed to have occurred as long as the element of illegality is present regardless of whether an absolute right such as property ownership is at stake.<sup>11</sup> According to the majority of

<sup>7</sup> DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION] arts. 10, 17 (S. Kor.).

<sup>8</sup> See Constitutional Court [Const. Ct.], 89Hun-Ma82, Sep. 10, 1990 (S. Kor.)

<sup>9</sup> In Korean constitutional jurisprudence, this issue has been discussed as the effects of fundamental rights against other private parties or the effects of fundamental rights on private relations.

<sup>10</sup> Minbeob [Civil Code], Act No. 471, Feb. 22, 1958, amended by Act No. 13710, Jan. 6, 2016, art. 750 (S. Kor.).

<sup>11</sup> See Kim Gi Sun (金基善)'s commentary in *Minbeobanuihyeonseo* (民法案外見書) [OPINIONS ON THE DRAFT CIVIL CODE] 199 (Minsabeobyehonghoe (民事法研究會) [Civil Law Research Group] eds., 1957).

legal scholars in Korea,<sup>12</sup> the presence of illegality is ascertained by taking into account the co-relation between the nature of infringing act and the type of right infringed, and personality rights are included in the ambit of rights protected under Article 750. Therefore, whether personality rights amount to rights of an absolute nature or not, Article 750 may apply where an infringement of personality rights or related interests has occurred. A more crucial query is usually how to assess the tortfeasor's negligence or willfulness and, if any, accompanying illegality in the context of a tort claim springing from the alleged infringement of personality rights.

Second, Article 751.1 of the Civil Code provides, "(a) person who has injured the person, liberty or fame of another or has inflicted any mental anguish to another person shall be liable to make good damages arising therefrom."<sup>13</sup> This provision confirms that harming one's honor or inflicting mental pain or anguish may be captured under Article 750, and affirms liability for non-property damages in such cases. Under the Korean civil law regime, therefore, personality rights can be protected with relative ease, since there is no significant legal barrier for awarding damages for actual infringement of said rights.

Third, Article 764 of the Civil Code provides, "(t)he court may, on the application of the injured party, order the person who has impaired another's honor to take suitable measures to restore the injured party's honor, either in lieu of, or together with damages."<sup>14</sup> Included among possible legal redresses to restore the afflicted party's honor is the right to request a corrective note,<sup>15</sup> retraction of a defamatory material, or a public apology. However, in a recent case, the Korean Constitutional Court ("Constitutional Court") held that ordering a public apology would be unconstitutional because it contravenes the freedom of conscience and personality rights in general.<sup>16</sup> On the other hand, there is a lower court

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<sup>12</sup> See Kwak Yoon Jik (郭潤直), *Chegwongakron* (債權各論) [THE SPECIAL PART OF THE LAW OF OBLIGATIONS] 709 (NEW ed. 1995) and see also Kim Cheung Han (金曾漢), *Chegwongakron* (債權各論) [THE SPECIAL PART OF THE LAW OF OBLIGATIONS] 464 (1988).

<sup>13</sup> *Minbeob* [Civil Code], Act No. 471, Feb. 22, 1958, amended by Act No. 13710, Jan. 6, 2016, art. 751.1 (S. Kor.).

<sup>14</sup> *Minbeob* [Civil Code], Act No. 471, Feb. 22, 1958, amended by Act No. 13710, Jan. 6, 2016, art. 764 (S. Kor.).

<sup>15</sup> See, inter alia, Supreme Court [S. Ct.], 96Da40998, 842, Feb. 24, 1998 (S. Kor.).

<sup>16</sup> In Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991, (3 KCCR 149) (S. Kor.), the Constitutional Court ruled that, in the context of defamation, it would be unconstitutional for a court to order the wrongdoer to place an advertisement of public apology and then enforce the order, as such a measure would be contrary to the freedom of conscience and personality rights in general. Following this ruling, there have been various discussions, one of which is, interestingly enough, that the scope of legal remedies for infringement on personality rights may be circumvented by none other than the perpetrator's own personality rights. Subsequently, while computing the quantum of damages for a corrective advertisement in Supreme Court [S. Ct.], 93Da40614, Apr. 12, 1996 (S. Kor.), the Court affirmed the Constitutional Court's position by acknowledging the

decision to the effect that, in a case involving infringement of personality rights other than defamation, restitutionary or other measures for the reasonable satisfaction of the victim may be ordered in addition to the usual award of money damages.<sup>17</sup>

There is a lingering question concerning whether it would be proper to use the term personality right as part of the Korean civil law lexicon. While legal academia as well as case laws recognize the term,<sup>18</sup> there is a minority view opposing the inclusion of personality rights into the general legal scheme. This view holds that Article 750 envisages formation of a tort in a broad way and that Article 751 provides "a person who has injured the honor of another person or has inflicted any mental anguish upon another person" shall be liable for damages.<sup>19</sup> As such, the minority view assert that whether a particular act or omission constitutes a tort may be determined in reference to Articles 750 and 751 alone, without recourse to the notion of personality rights.

Yet, while the primary mode of compensation for a tort is monetary damages, where infringement of personality rights is concerned, the complainant would also be entitled to seek injunctive relief along with the pecuniary compensation.<sup>20</sup> The availability of such injunctive relief and the right to seek retraction of an infringing publication evidences the

decision of the court below that "albeit effective, an advertisement of public apology is not available to redress a negative advertisement."

<sup>17</sup> Seoul High Court [Seoul High Ct.], 92Na35846, Sep. 27, 1994 (S. Kor.).

<sup>18</sup> See Kwak Yoon Jik (郭潤直), *Minbeopchoungchik* (民法總明) [THE GENERAL PART OF CIVIL LAW] 51 (7TH ed. 2002); Kim Sang Yong (金相容), *Bulbeophengwibeop* (不法行為法) [THE LAW OF TORTS] 102 (1997); Park Chul Woo (朴哲雨), *Chegwongakchik* (債權各論) [ANNOTATED SPECIAL PART OF THE LAW OF OBLIGATIONS (IV)] 118 (1987); Kang Nam Jin (姜南鎭), *In-gyeog-gwon-ui Boho-e Daehan Hana-ui Je-an* (人格權의 保護에 대한 하나의 提案) [ONE PROPOSAL FOR THE PROTECTION OF PERSONALITY RIGHTS], *Minsabepohak* (民法學) [KOREAN J. OF CIVIL L.], no. 13/14, 1996 at 117; and Kim Jae Hyung (김재형), *Eonron-ui Sasilbodoro Inhan In-gyeog-gwon-ui Chimhae* (언론의 사실보도로 인한 인격권의 침해) [INFRINGEMENT BY THE PRESS UPON PERSONALITY RIGHTS VIA REPORTING OF FACTS], *Seoul Daehakgyo Beobhak* (서울대학교 법학) [SEOUL L. J.], no. 39, 1999 at 1. In terms of case law, see Supreme Court [S. Ct.], 79Da1883, Jan. 15, 1980 (S. Kor.) and Supreme Court [S. Ct.], 93Da40614, Apr. 12, 1996 (S. Kor.).

<sup>19</sup> See Lee Eun Young (李銀榮), *Chegwongakron* (債權各論) [THE SPECIAL PART OF THE LAW OF OBLIGATIONS] 733 (1995).

<sup>20</sup> See Supreme Court [S. Ct.], 93Da40614, Apr. 12, 1996 (S. Kor.). In this case, the appellate court ruled that the nature of personality rights is such that, once such rights have been infringed, it is difficult to ensure full restitution through after-the-fact relief (such as pecuniary compensation and reinstatement of honor) and to anticipate actual practicality of such relief. Consequently, the appellate court recognized a need for interlocutory relief, such as an injunction to thwart an actual or potential violation of personality rights, as a preventive measure, and the Court endorsed such judgment. See also Supreme Court [S. Ct.], 96Da17851, Oct. 24, 1997 (S. Kor.). Subsequently, the Constitutional Court ruled that this type of interlocutory relief in the context of defamation is not against the principle against censorship under the Korean Constitution. Namely, since said principle does not prohibit after-the-fact regulation of a legitimate nature following the publication of a piece of intellectual work, any ex post judicial ban on, for instance, playing of a film would not contravene the constitutional principle of anti-censorship. Const. Ct. 93Hun-Ga13 & 91Hun-Ba10 (consol.), Oct. 4, 1996 (S.Kor.).

exclusive and almost *in rem* nature of personality rights not unlike that of a property right.<sup>21</sup> Accordingly, the notion of personality rights provides rather useful guide in the Korean civil law regime.

### C. *The Criminal Law and Copyright Law.*

First, Articles 307 through 312 of the Criminal Code proscribe the offense of defamation of character and offense of verbal insult. Protection of personality rights in the context of civil law is distinct from the protection of under the criminal law.<sup>22</sup> Nevertheless, the Criminal Code may come handy when it comes to resolving civil disputes concerning personality rights. Indeed, two provisions of the Criminal Code, namely Article 307.1, which states that a statement of fact may constitute defamation and Article 301, which states that an otherwise defamatory statement is not indictable if it should contain true facts solely for the public interest have been influential when determining if a civil defamation had occurred.<sup>23</sup>

Second, the Korea Copyright Act ("Copyright Act") contains detailed provisions on authors' moral rights. Where such rights are infringed, the author may seek a cease and desist order under the Copyright Act.<sup>24</sup> An author's moral rights are protected even after death.<sup>25</sup> Although these moral rights form a separate and independent legal concept from personality rights, they may be relevant where protecting the dead's personality rights is involved in the form of a cease and desist order. In this regard, the Copyright Act may be a more practical source for interpreting personality rights than the Civil Code itself.

### D. *The Act on the Press*

It is increasingly common for personality rights to be regulated through individual enactments. Of these, the flagship legislation is

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<sup>21</sup> See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 14, 1970, (Showa 45) no. 586 HANREI JIHO [HANJI] 41 (Japan). On the other hand, a request for interlocutory relief based on personality rights is basically forward-looking in nature so as to prevent likely infringement of personality rights at some point in the immediate future. As such, unlike a claim for damages under Article 750 of the Civil Code, the element of willfulness or negligence may not factor in here. Yet where infringement of personality rights subsists even after the interlocutory relief has been granted, the perpetrator's negligence or willfulness may be extrapolated therefrom and found present. But when it comes to infringement by the press of personality rights, interlocutory relief should only be granted where the element of illegality is present and clear considering that interlocutory relief can put a far greater restraint on the freedom of expression than an award of money damages and that the Constitution prohibits pre-censorship in general.

<sup>22</sup> Hyeongbeob [Criminal Code], Act No. 293, Sep. 18, 1953, amended by Act No. 14178, May 29, 2016, art. 307-312 (S. Kor.).

<sup>23</sup> *Id.* arts. 307.1, 310.

<sup>24</sup> Jeojakgwonbeob [Copyright Act], Act No. 432, Jan. 28, 1957, amended by Act No. 14083, Mar. 22, 2016, arts. 11-15 (S. Kor.).

<sup>25</sup> *Id.* art. 128.

considered the Act on Press Arbitration and Remedies, etc. for Damages caused by Press Reports (the "Act on the Press"), which was enacted on January 27, 2005. The Act on the Press contains detailed provisions regarding infringement of personality rights by the press. In particular, Article 4.2 of the enactment provides that "(t)he press shall respect human dignity and worth and shall neither defame other persons nor infringe on their rights, public morals, and social ethics."<sup>26</sup> Article 5 then lays out the principles of redress for those who have been victimized by the press.<sup>27</sup> Namely, the press, any internet news service, or any internet multimedia broadcasting (collectively, the "Press") shall not infringe on other persons' personality rights, and, where the Press has infringed them, remedial measures will be undertaken promptly in accord with the procedure set forth in the Act on the Press.<sup>28</sup> The enactment goes on to cite two situations where no liability will attach to the Press for established acts of infringement. The first is where the victim voluntarily consented to infringement.<sup>29</sup> Another possible exception is where the Press did a report related to the public interest, and there is a justifiable ground that such report is true or is believed to be true.<sup>30</sup>

Arguably, the Act on the Press may function as a cure-all for infringement of personality rights involving the Press. Yet, outside the realm of the Press, it is virtually inapplicable. Thus, the Civil Code is an important, generic source of law on the protection of personality rights.

## II. THE CONCEPT OF PERSONALITY RIGHTS AND ITS SCOPE OF PROTECTION

### A. *Concept of Personality Rights*

The judiciary and legal scholars of Korea both acknowledge the concept of personality rights.<sup>31</sup> The notion of personality rights originated from the laws of Germany and the German word "*Persönlichkeitsrecht*." Use of personality rights is commonplace in most continental jurisdictions including Switzerland, Austria, and Japan. By contrast, such use is all but absent in the United States, where a more common approach involves the notion of privacy or slander and libel.

Personality rights are distinguishable from property rights. Korean civil law categorizes property rights into rights based on obligations (債權) and rights over things (物權). A person possesses rights over a variety of

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<sup>26</sup> Eonronjungjae Mit Pihaguje Deung-e Gwanhan Beopryul [Act on Press Arbitration and Remedies, etc. for Damage caused by Press Reports]. Act No.7370, July 28, 2005, amended by Act No. 10587, Apr. 14, 2011, art. 4.2 (S. Kor.).

<sup>27</sup> *Id.* art. 5.

<sup>28</sup> *Id.* art. 5.1.

<sup>29</sup> *Id.* art. 5.2.

<sup>30</sup> *Id.*

<sup>31</sup> See generally the sources cited in note 18, *supra*.



subjects including life, liberty, body, health, honor, name, privacy and dialogue, to name just a few. The civil law system in Korea makes use of personality rights to allude to this spectrum of rights in a generic way. In the context of the Act on the Press, personality rights are defined as those pertaining to "life, liberty, body, health, honor, secrecy and freedom pertaining to privacy, portrait, name, voice, dialogue, works, personal documents, any other personal worth, and etc."<sup>32</sup>

### B. Scope of Protection

The range of subjects protected by personality rights runs the gamut from life and liberty to portrait rights and privacy. Recently, the right to self-determination in the context of personal data also has made inroads into the range of what receives legal protection.<sup>33</sup>

#### 1. Life, Liberty, Body, and Health

Infringing one's right to body, health, honor, name, portrait, private life, and other related interests may give rise to tortious liability. It is not in dispute that personality rights encompass such spectrum of rights. A right to life, liberty, body, and health are only recognizable in relation to natural persons, and not to corporate or non-incorporated entities.

#### 2. Honor

The most frequent form of personality right violations involves defamation. Journalistic reporting of misleading facts would be a notable example.<sup>34</sup> In this context, honor or reputation denotes an objective social evaluation of one's character, virtues, and/or credit. It follows that defamation arguably involves objectively harming the overall societal assessment of a person. In order for defamation to be actionable, merely hurting a person's subjective sentiment or feeling for her reputation will not pass muster. Rather, what is required is a likelihood of inducing odium or contempt from an objective standpoint, as exemplified by a media outlet's reporting of false information,<sup>35</sup> such as publication of an essay with the false elements or character assassination.<sup>36</sup>

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<sup>32</sup>Eonronjungjae Mit Pihaguje Deunge Gwanhan Beopryul [Act on Press Arbitration and Remedies, etc. for Damage caused by Press Reports], Act No.7370, July 28, 2005, amended by Act No. 10587, Apr. 14, 2011, art. 5.1 (S. Kor.).

<sup>33</sup>In Supreme Court [S. Ct.], 2007Da27670, Nov. 20, 2008 (S. Kor.), the dissenting opinion noted that "(o)ne's right to body is the heart and soul of personality rights, and, as such, should be respected not only during one's lifetime but even afterwards to the fullest extent possible."

<sup>34</sup>See Supreme Court [S. Ct.], 85Da-Ka29, Oct. 11, 1988 (S. Kor.); see also Supreme Court [S. Ct.], 94Da33828, May 28, 1996 (S. Kor.).

<sup>35</sup>See Supreme Court [S. Ct.], 94Da33828, May 28, 1996 (S. Kor.).

<sup>36</sup>See Supreme Court [S. Ct.], 85Da-Ka29, Oct. 11, 1988 (S. Kor.).

In terms of relevant jurisprudence, the Korean Supreme Court ("Court") held that:

(t)he term honor under Article 764 of the Civil Code means an objective social evaluation of one's character, virtue, fame, credit, and other related factors, and especially when it comes to corporation, corporate honor is equivalent to its good name and credit. Hurting honor is therefore to hurt how a person is socially perceived and assessed.<sup>37</sup>

The Court further held "the mere claim that one's own feeling of honor has been undermined does not amount to defamation of character per se."<sup>38</sup> In fact, in order for a cause of action for defamation to arise, there ought to be an objective likelihood of inducing the subject to contempt or abhorrence;<sup>39</sup> otherwise, a mere injury to one's subjective feeling or perception of honor would not readily bring about defamation.

Simultaneously, protection is warranted where one is subjugated to verbal insults by others for no good reason. Not unlike defamation, such situation calls for appropriate legal redress. In terms of possible criminal sanctions, where the wrongdoer made insulting or vilifying remarks without the buttress of supporting facts, such a statement may trigger the offense of insult. In terms of civil remedy, such statement could constitute the tort of verbal insult.<sup>40</sup>

### 3. Privacy

The concept of privacy originated in the United States, and it means the right to be let alone.<sup>41</sup> William L. Prosser categorized infringement of privacy into: 1) infringement or intrusion into one's spatial sphere of

<sup>37</sup> Supreme Court [S. Ct.], 93Da40614, Apr. 12, 1996 (S. Kor.). This is also true in the case of unincorporated entities with standing as party to a civil suit such as a *Jong-jung* (宗中), i.e. a party consisting of the descendants of a common ancestor. See also Supreme Court [S. Ct.], 87Da-Ka1450, June 14, 1988 (S. Kor.). Supreme Court [S. Ct.], 89Da-Ka12775, Feb. 27, 1990 (S. Kor.) and Supreme Court [S. Ct.], 96Da17851, Oct. 24, 1997 (S. Kor.).

<sup>38</sup> In Supreme Court [S. Ct.], 92Da756, Oct. 27, 1992 (S. Kor.) and Supreme Court [S. Ct.], 97Ma634, July 9, 1997 (S. Kor.), both involving an injunction against the registration and publication of a family tree for alleged libel of a *Jong-jung*, the Court noted that "even when accepting the applicant *Jong-jung's* cause of action at its face value, aside from the likelihood of the applicant's own sentiment of honor being injured or infringed, there is simply insufficient ground in this case to justify judicial intervention in order to protect the applicant's societal assessment from being somehow denigrated."

<sup>39</sup> Yang Chang Soo (梁彰洙), Jeongboh-wa Sahoe-wa Peuhraibeosi-ui Boho (情報化社會와 프라이버시의 保護) [INFORMATION SOCIETY AND PROTECTION OF PRIVACY], in *Minbeopyeongu I* (民法研究 I) [STUDIES OF CIVIL LAW I] 513f. (1991). In this regard, defamation/libel is arguably distinguishable from the invasion of privacy.

<sup>40</sup> Kim Jae Hyung (김재형), In-gyeong-gwon-e Gwanhan Panrye-ui Donghyang (인격권에 관한 관례의 동향) [*Trends in the Case Law on Personality Rights*], *Minsabeophak* (民事法學) [KOREAN J. OF CIVIL L.], no. 3, 2005 at 362.

<sup>41</sup> S. Warren and L. Brandeis, *The Right to Privacy*, 4 Harvard L. Rev. 193 (1890).

solitude;<sup>42</sup> 2) disclosure of one's private life to the public;<sup>43</sup> 3) placing one in a false light publicly;<sup>44</sup> and 4) infringement of one's name and portrait or likeness, for economic advantages.<sup>45</sup> Prosser's categorization is considered highly useful.<sup>46</sup> In addition, privacy entails publicity, which is a right to commercially appropriate a famous person's name, portrait or profile. Because of its overall commercial trait, publicity is often seen as a proprietary dimension of privacy.

An individual possesses a right to prevent others from interfering with her privacy and to stop unauthorized exposure of privacy. When such a right is infringed, invasion of privacy is said to have occurred. Conceptually, privacy encompasses not only protection of an individual's private life, but also one's legitimate right and expectation to one's name and to one's portrait or image.<sup>47</sup>

In a case where the plaintiff, who had suffered certain side-effects following a breast augmentation surgery, consented to the broadcast of her privacy and portrait through a televised interview, but the interview subsequently aired in a way not meant by the plaintiff, the Court held that "a person has a legal interest not to be exposed to a third party in matters relating to the inmost secrets of her privacy."<sup>48</sup>

Defamation and invasion of privacy differ in several ways, the most salient of which are noted here. First, defamation involves infringement of how a person is socially evaluated, while privacy focuses on a person's

<sup>42</sup> William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

<sup>43</sup> See generally *id.* This includes trespass into a house or residence, illegal search of bags inside a store, wiretapping a conversation, and forced blood drawing.

<sup>44</sup> See generally *id.* This includes mentioning another's name as the author of a book or an editorial, drawing up a petition in someone's name without authorization, and inserting the plaintiff's picture in a book or thesis having no reasonable relationship to the plaintiff.

<sup>45</sup> This is referred to as "appropriation," and it includes using a person's name or portrait for the purposes of commercial advertisement without proper consent.

In Prosser, *supra* note 38, at 389, Prosser analyzed cases on privacy and concluded that they involved not merely a single tort, but an aggregate of four disparate torts. According to Prosser, these torts have nothing in common except for meddling with the right to be let alone. For further information, see W. PAGE KEETON & WILLIAM L. PROSSER, *PROSSER AND KEETON ON TORTS* 851-866 (W. Page Keeton et al. eds., 5th ed. 1984).

<sup>46</sup> RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977) also follows Prosser's categorization. But, in South Korea, where there is no disagreement on treating both Prosser's first two categories under the name of privacy, there has been no consensus on how to classify his third and fourth categories. For further details, see Yang, *supra* note 39, at 513f.

<sup>47</sup> Kim Jae Hyung (김재형), *Ingyeoggwon Ilban - Eonron-e Uihan Ingyeokgwon Chimhae-reul Jungsim-euro* (人格權 一般 - 언론에 의한 인격권 침해를 중심으로) [Personality Rights in General - Focusing on Infringement of Personality Rights by the Press], *Minsapanraeyeongu* (XXI) (민사판례연구 (XXI)) [STUDIES OF CIVIL CASES (XXI)] 645 (1999).

<sup>48</sup> Supreme Court [S. Ct.], 96Da11327, Sep. 4, 1998 (S. Kor.). In a similar vein, the Seoul Southern District Court affirmed liability for damages relating to a press report exceeding the boundaries of consent. See Seoul Southern District Court [Seoul Southern Dist. Ct.], 97Ka-Hap8022, Aug. 7, 1997 (S. Kor.).

inner emotions without taking the element of social assessment into account. Second, when it comes to defamation, proof of truth or of substantiality holds relevant significance. In fact, courts have held that actionable defamation does not arise if the alleged defamer can demonstrate there was a substantial reason to believe in the veracity of the statements made.<sup>49</sup> In contrast, for invasion of privacy, it is irrelevant whether the statement is actually true or if the party making the statement had a substantial reason to believe her statements to be accurate. In other words, an invasion of privacy may be found even where the perpetrator can prove veracity of the press coverage or a substantial reason for thinking the coverage to be truthful, as neither qualifies as a viable defense.

Third, while defamation of character may be pertinent to incorporated or unincorporated entities, invasion of privacy is not. On the other hand, both in defamation of character and invasion of privacy alike, when judging the tortious liability of the media entity involved, it is necessary to consider whether the coverage pertained to a public figure or to a public good. As will be explained more in Part IV, such consideration of public element is not necessarily identical in a defamation setting and in an invasion of privacy setting. Depending on the type of privacy involved, disparate theories of law may emerge and come into play in relation to the subject of public figure and interests.

#### 4. Name and Portrait

One's right to a name means a right to self-determine whether to externally indicate her own name.<sup>50</sup> There are lower court decisions recognizing such a right.<sup>51</sup> And one's right to portrait or image is violated when, for instance, a photo taken without the subject's consent is made available publicly<sup>52</sup> or a picture is obtained and then posted without proper consent.<sup>53</sup> Even when there is consent to the taking of a photograph, there still can be an infringement of right to portrait when the photo is subsequently published in a way that exceeds the subject's expectation.<sup>54</sup>

<sup>49</sup> See, e.g., Supreme Court [S. Ct.], 85Da-Ka29, Oct. 11, 1988 (S. Kor.); Supreme Court [S. Ct.], 94Da33828, May 28, 1996 (S. Kor.); and Supreme Court [S. Ct.], 97Da24207, Sep. 30, 1997 (S. Kor.).

<sup>50</sup> Supreme Court [S. Ct.], 2007Da71, Sep. 10, 2009 (S. Kor.).

<sup>51</sup> Seoul District Court [Seoul Dist. Ct.], 95Ga-Hap60556, Apr. 25, 1996 (S. Kor.).

<sup>52</sup> Seoul Dist. Ct., 92Ga-Dan57989, July 8, 1993 (S. Kor.) and Seoul Dist. Ct., 93Na31886, Mar. 30, 1994 (S. Kor.).

<sup>53</sup> Seoul Dist. Ct., 96Ga-Hap31227, Feb. 26, 1997 (S. Kor.) and its appellate-level decision, Seoul High Ct., 97Na14240, Sep. 30, 1997 (S. Kor.).

<sup>54</sup> See Seoul High Ct., 88Na38770, Jan. 23, 1989 (HAJIP 1989-1, 148) (S. Kor.); Seoul Dist. Ct., 87Ga-Hap6032, Sep. 9, 1988 (S. Kor.); Seoul Dist. Ct., 88Ga-Hap31161, July 25, 1989 (S. Kor.); Seoul Dist. Ct., 92Ga-Hap12051, Sep. 22, 1992 (S. Kor.) and Seoul Eastern District Court, 89Ga-Hap13064, Jan. 25, 1990 (HAJIP 1990-1, 126) (S. Kor.).<sup>54</sup>

## 5. Personal Data

Protection of personal information or data, which is a type of privacy, has been gaining momentum lately. The Court held that, "in a highly information-driven modern society, a person possesses a proactive right to self-regulate the information pertaining to himself."<sup>55</sup> Lawsuits for infringement of personal data are not uncommon when personal data such as name, resident registration number, and pictures are unlawfully disclosed or leaked.<sup>56</sup> The illegality of such unauthorized divulgence is made out if disclosing personal data without suitable consent may be evaluated as eroding the information owner's legally protected personality interests.<sup>57</sup> In Korea, the Protection of Personal Data Act was enacted on March 29, 2011 and came into effect as of September 30, 2011. Under the enactment, personal data is defined as "information that pertains to a living person, including the full name, resident registration number, images, etc., by which the individual in question can be identified, (including information by which the individual in question cannot be identified, but can be identified through simple combination with other information)."<sup>58</sup>

## 6. Voice and Dialogue

Infringing one's voice and dialogue may amount to an infringement of the victim's personality rights. There is a Court decision to the effect that direct transmission of an individual's voice may result in tortious liability.<sup>59</sup>

## 7. Right to Self-Determination

A medical doctor owes a duty to explain the benefits and risks of a procedure to her patient, which in turn forms a basis for recognizing the patient's right to bodily self-determination. Namely, when a physician performs surgery or other acts of medical import without properly discharging the duty to explain, the patient has arguably lost her opportunity to make an informed decision and to exercise the right to bodily self-determination in the process. Consequently, the patient may

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<sup>55</sup> See Supreme Court [S. Ct.], 96Da42789, July 24, 1998 (S. Kor.). This judgment affirms state liability for the intelligence service's act of spying on a group of civilians.

<sup>56</sup> Supreme Court [S. Ct.], 96Nu2439, May 23, 1997 (S. Kor.). In this case, the appellate court found that certain of the materials the plaintiff had asked to be disclosed, contained personal data and details related to property and were, therefore, not disclosable lest the other individual's secrets be revealed and freedom of privacy be violated. The Court subsequently endorsed this finding.

<sup>57</sup> Supreme Court [S. Ct.], 2008Da42430, Sep. 2, 2011 (S. Kor.).

<sup>58</sup> Gaeinjeongbobeob [Protection of Personal Data Act], Act no. 10465, Mar. 29, 2011, amended by Act No. 14107, Mar. 29, 2016 (S. Kor.).

<sup>59</sup> Supreme Court [S. Ct.], 96Da11327, Sep. 4, 1998 (S. Kor.).

choose to sue for pain and suffering.<sup>60</sup> Similarly, where a doctor administers blood transfusion without a proper explanation to the patient, such omission violates the patient's personality right to self-determination in relation to whether to receive any blood transfusion in the first place and also to the blood to be transfused.<sup>61</sup> Also, in its decision on physician assisted suicide, the Court decided that "[w]here a patient has reached the irrevocable phase of death, mercy killing may be permitted if the patient is exercising her right to bodily self-determination based on human dignity and value and on the right to pursue happiness, unless the circumstances overtly dictate otherwise."<sup>62</sup>

In *95Da39533*, the Court viewed sexual harassment as an infringement of personality rights.<sup>63</sup> Namely, "especially in a situation involving opposite sexes, an act of exhibiting sexual attraction may be natural and permissible, unless such act rises to the level of downgrading human dignity and of inflicting mental anguish and pain, at which point, the act becomes verboten and unlawful." Accordingly, sexual harassment is perceived as violating one's right to sexual self-determination, which is a tenet of personality rights. In a similar vein, the Constitutional Court held that, under Article 10 of the Constitution, all fundamental rights aim to guaranty individual personality rights and the right to pursue happiness which together form the backbone of human values, as the ultimate objective (or fundamental principle) of the guaranty and that an individual's personality rights and right to pursuit of happiness are predicated on the right to determine one's own fate, the right to which includes the right of choice when it comes to sexual intercourse and choice of a consenting partner.<sup>64</sup> There is also a Court decision that one's right to self-determination ensures volitional decisions by a capable human.<sup>65</sup> This right to self-determination arguably underpins personality rights encompassing life, body, liberty, fame, privacy, and personal data, as has been noted above.

## 8. Miscellaneous

There are numerous other instances where infringement on personality rights has been recognized. In a case<sup>66</sup> where four defendants A, B, C, and D covered up the torturing to death of the late

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<sup>60</sup> See Supreme Court [S. Ct.], 93Da60953, Apr. 15, 1994 (S. Kor.). In Supreme Court [S. Ct.], 2009Da95714, Mar. 25, 2010, the Court noted that a patient's consent to medical treatment is to ensure one's right to self-determination under individual personality rights and the right to pursue happiness as encapsulated in Article 10 of the Constitution. In this context, the patient retains a right to autonomously determine how to maintain life and bodily functions on her own and also to choose from a possibly array of medical treatment options.

<sup>61</sup> Supreme Court [S. Ct.], 96Da7854, Feb. 13, 1998 (S. Kor.).

<sup>62</sup> Supreme Court [S. Ct.], 2009Da17417, May 21, 2009 (S. Kor.).

<sup>63</sup> Supreme Court [S. Ct.], 95Da39533, Feb. 10, 1998 (S. Kor.).

<sup>64</sup> Constitutional Court [Const. Ct.], 89, Hun-Ma82, Sep. 10, 1990 (S. Kor.).

<sup>65</sup> Supreme Court [S. Ct.], 2007Da27670, Nov. 20, 2008 (S. Kor.).

<sup>66</sup> Supreme Court [S. Ct.], 93Da41587, Nov. 7, 1995 (S. Kor.).

*Jong-Chul Park*, and attempted to make it appear as if defendants E and F were instead responsible for the death, the Court held that the act of cover up on the part of the defendants A through D had infringed the legally protected personality interests of the plaintiffs, who were the late *Park's* parents and siblings. As a result, the four defendants coupled with the defendant Republic of Korea were ordered to make good the plaintiffs' pain and suffering. Given the facts of the case, this type of personality rights may not be categorized as falling within honor or privacy. Also, in 2008Da38288, the Court decided where the religious education of a parochial school exceeds the zone of tolerance under society's sound common sense and prevailing legal norms, it may result in a tort violating the aggrieved student's personality rights in relation to religion.<sup>67</sup> Further in 2009Da19864, the Court noted that:

in the context of a social community including private organizations, a person is entitled to pursue various socioeconomic activities based on personal hopes and attainments, free from sexual discrimination, and such pursuit lies at the core of fulfilling one's right to personality. Violation of the right of equality may be discussed in concrete form as a violation of personality rights that are safeguarded in civil law under the general provisions of Article 750 of the Civil Code. Towards this end, a specific enactment governing the protection of right to equality among private relations is not a *quid pro quo*.<sup>68</sup>

### C. Provisional Summary

Being very broad in scope, the concept of right to personality is also more or less ambiguous in nature, while the remit of protection for personality rights has been gradually broadening. On the other hand, as will be illustrated shortly, right to personality cases also entail the problem of defamation, invasion of privacy, or infringement of the right to portrait. These cases include where a powdered milk manufacturer had engaged in comparative advertising against its competition, which turned out to be a hoax, the competition's character, honor, and credit were adjudged to be injured thereby.<sup>69</sup> Where a news program did an exposé on the unfair trade practice of a luxury wedding dress rental business,

<sup>67</sup> Supreme Court [S. Ct.], 2008Da38288, Apr. 22, 2010 (S. Kor.).

<sup>68</sup> Supreme Court [S. Ct.], 2009Da19864, Jan. 27, 2011 (S. Kor.).

<sup>69</sup> Supreme Court [S. Ct.], 93Da40614 & 40621 (consol.), Apr. 12, 1996 (S. Kor.). For a commentary on this case, see Kang Yong Hyun (姜溶鉉), *Bibanggwanggo-reul Han Ja-e daeha-yeo Sajeon-e Gwanggogeumji-reul Myeoung-haneun Panrye Mit Geu Pangyeoljeolcha-eseo Myeoung-haneun Ganjeopgangje* (誹謗廣告를 한 자에 대하여 事전에 廣告禁止를 명하는 判決 및 그 判決節次에서 명하는 間接強制) [CASE LAW ORDERING THE BEFORE-THE-FACT STOPPAGE OF COMPARATIVE ADVERTISING AND INDIRECT ENFORCEMENT OF THE ORDER IN THE CONTEXT OF CIVIL PROCEDURE], *Daebeobwon Pangyul Haesul* (大法院判例解説) [EXPOSITORY REV. OF SUPREME COURT [S. CT.] CASES], no. 25, 2006 at 69.

with the footage of a wedding wholly unrelated to such practice, the Seoul High Court recognized an occurrence of defamation, injury to honor, and violation of the right to portrait.<sup>70</sup> Lastly, where there was a rumor that an actress and her younger sister are not biologically related and a story was published with the innuendo that there might be a ring of truth after all to the rumor, the High Court found defamation and invasion of privacy, in the affirmative.<sup>71</sup>

Since the scope of legal protection for personality rights is fairly expansive, it may be futile to circumvent or limit its scope.<sup>72</sup> Rather, with the passage of time, the scope of protection is expected to enlarge with discovery and emergence of new spheres warranting legal protection. I am certain that there is a positive aspect to this generic and seemingly floating attribute of personality rights. But, at the same time, there is a concern that legal predictability and certainty may be at risk because it appears uncertain to decide under what specific circumstances, personality rights merit legal protection. As such, although confirming the particulars of personality rights is neither feasible nor necessarily desirable, there still may be a need to place personality rights in different categories and to ascertain the legal effects of each categorized right to personality.

### III. THE PROBLEM OF THE CLASH BETWEEN PERSONALITY RIGHTS AND OTHER FUNDAMENTAL RIGHTS

An important trait of personality rights is that they may clash with other fundamental rights including freedom of the press and publication, freedom of arts, freedom of religion, as well as freedom of learning. The clash of fundamental rights in constitutional law also affects the protection of personality rights in private law: the Court determines in a given case if a violation of personality rights has occurred basically through a balancing test.<sup>73</sup>

<sup>70</sup> Seoul High Ct., 96Na282, June 18, 1996 (S. Kor.).

<sup>71</sup> Seoul High Ct., 97Na14240, Sep. 30, 1997 (S. Kor.).

<sup>72</sup> The term "personality rights" is relatively ambiguous and so are "honor" and "privacy," each of which falls within the remit of protection of personality rights.

<sup>73</sup> For the subject of conflict of fundamental rights, see Kim Chul Soo (金錫洙), *Hangeuk Heunbeobron* (韓國憲法論) [AN INTRODUCTION TO THE KOREAN CONSTITUTION] 298 (New 10th ed. 1998) (Kor.); Young Huh, [KOREAN CONSTITUTIONAL JURISPRUDENCE] 258 (New 9th ed. 1998) (Kor.); Kwon Young Seong (權寧星), *Hangeuk Heunbeobron* (韓國憲法論) [KOREAN CONSTITUTIONAL JURISPRUDENCE] 303 (NEW ed. 1998) (Kor.); and Kwon Young Seong (權寧星), *Gibongwon-ui Galdeung* (基本權의 葛藤) [CONFLICT OF FUNDAMENTAL RIGHTS], *Seoul Daehakgyo Beobhak* (서울대학교 법학) [SEOUL L.J.], no. 36 1, 1995 at 45.



### A. *Conflict with the Freedom of Expression*

#### 1. Significance

Article 21.1 of the Constitution guarantees freedom of speech and of the press, and sub-article 4 of the same provision proscribes: "[t]he press or publishing companies should not infringe other's honor, right, public morality or social ethics. When the press or publishing companies infringe other's honor or rights, the aggrieved may request compensation for damages."<sup>74</sup> While freedom of speech and of the press is guaranteed, this constitutional guaranty is not without limit. On the contrary, when it comes to slander or libel, the Constitution provides for a victim's right to seek and recover damages. This is a highly unique constitutional provision the adequacy of which is in doubt. Nevertheless, as long as it stays part of the Constitution, the provision may not be glossed over. While the theory of the public figure in the United States is grounded upon the First Amendment to the U.S. Constitution, which prevents enactment of any legislation inhibiting freedom of expression, the Korean Constitution has trodden somewhat different path in that while it guarantees freedom of the press on one hand, it also considers compensation of damages arising from slander or libel as an equally important and valid constitutional value.

In South Korea, when determining infringement of personality rights, it becomes necessary to regulate conflicts of personality rights with freedom of expression in a given case. In this regard, the Court held:

[a]ccording to Article 20 and the latter half proviso of Article 9 of the old Constitution (revised as of Dec. 27, 1980), freedom of expression should be protected to the utmost in a democratic society, but private legal interests such as personal honor and privacy deserve equal degrees of protection. So when two competing legal interests of protection of privacy as a personality right and of freedom of expression come to loggerheads, how to mediate such a juridical friction including the scope and methodology of proper redress, is best determined by comparing the various social values at stake in a case and then balancing the benefits and values to be derived from exercise of freedom of expression with the values attainable through the protection of personality rights.<sup>75</sup>

The Court's reasoning is equally sound when applied to cases where media coverage of facts results in an invasion of privacy. On the other

<sup>74</sup>DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 10 (S. Kor.).

<sup>75</sup> Supreme Court [S. Ct.], 85Da-Ka29, Oct. 11, 1988 (S. Kor.). While ruling on the right to a correction notice, the Constitutional Court noted in another case that that "when personality rights, which form the origin and focal point of all rights, should collide with freedom of the press, efforts should be exerted to construe norms of the Constitution in a harmonious way, so as to rationally adapt and harmonize any discord." Constitutional Court [Const. Ct.], 89Hun-Ma165, Sep. 16, 1991.

hand, free expression of opinion generally, as opposed to media reporting and the coverage of facts it entails, should be encouraged and sufficiently guaranteed. But criticizing someone for vilification is not protected.

In what follows, I will divide the subject of conflict between personality rights and freedom of expression into cases involving defamation of character and invasion of privacy, respectively, and probe each in turn.

## 2. Defamation of Character

### i. Media entities

1. According to many judgments of the Court, even where a person has defamed another, when such act of defamation relates to public interest with the sole purpose of furthering public good, no illegality will be deemed to be present if there is proof of truth or in the absence of such proof, if substantial reason can be adduced for the defamer to have believed in the veracity of the statement alleged.<sup>76</sup> This stance is a judicial adoption of a viable defense to the offense of criminal defamation in the context of determining civil liability, and it is undoubtedly one possible way of weighing the competing interests of freedom of speech and personality rights. But, of course, it is not the only way, and additional points of reference may well surface.

2. In relation to the Court's jurisprudence noted above, it is worthwhile to separate the category of "public good" from the category of "proof of truth or substantiality" and examine each identified category. In this context, "only when it is related to public good" denotes that, from an objective viewpoint, the facts conveyed are related to the public good, and the conveyor of the information must have done so for the interests of public good as well. And, in such a context, whether the facts bear on public good or not will be determined from the overall circumstance of the underlying expression including particulars of the facts, the range of audience to whom the facts were conveyed, and the means of expression, and then by balancing these elements against the possible extent of injury to the complainant's honor. In so far as alleged perpetrator's principal objective or motive was related to the public good, any incidental personal motive will not negate the overriding aim of public interest.<sup>77</sup> And where the complainant is a public figure, the substantive requirement that contents of the media coverage be connected to public interests or that the purpose of the coverage be for public good is likely to

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<sup>76</sup> See, *inter alia*, Supreme Court [S. Ct.], 85Da-Ka29, Oct. 11, 1988 (S. Kor.); Supreme Court [S. Ct.], 94Da33828, May 28, 1996 (S. Kor.); and Supreme Court [S. Ct.], 97Da24207, Sep. 30, 1997 (S. Kor.).

<sup>77</sup> Supreme Court [S. Ct.], 95Da36329, Oct. 11, 1996 (S. Kor.) and Supreme Court [S. Ct.], 96Da17257, July 14, 1998 (S. Kor.).

be met with relative ease. Simultaneously, while determining the substantiality of reason on the part of the defamer, the Court exhorted to consider whether speedy coverage was warranted given the nature of the story to be published, if the informant was reliable, and if there was a meaningful chance for face-to-face verification of facts involving the complainant.<sup>78</sup>

Recently, the Court handed down a decision about proving substantiality. In *97Da19038*, it held:

even where a mass media entity injures one's honor by way of reporting facts, if such report is related to the public interest and its purpose is only for the good of the public, there will be no inherent illegality in the face of proof that reported facts are overall accurate and true. And even when there is no such proof, if the entity believed the report to be true and there was substantial reason buttressing that belief, the underlying act must be deemed void of *willful purpose or negligence*.<sup>79</sup>

So, unlike its precedents, *97Da19038* treats proof of substantiality as a question of negligence, as opposed to illegality,<sup>80</sup> which may have spawned controversy since its publication. But it cannot be ascertained if this decision embodies the unswerving position of the Court. This is because even after *97Da19038*, the Court has handed down cases mentioning proof of substantiality as a matter of determining in each instance the presence of illegality or lack thereof.<sup>81</sup>

3. When it comes to defaming public figures, there is a scholarly claim that a media entity ought to be liable for damages only where there is *actual malice* on the entity's part.<sup>82</sup> Such view is apparently in sync with the U.S. Supreme Court decision of *New York Times Co. v. Sullivan*.<sup>83</sup> The gist of the holding in this seminal decision may be summed up as, in a defamation case involving a public official, the official is required to prove that the defamatory statement was made with knowledge of falsity

<sup>78</sup> Supreme Court [S. Ct.], *97Da24207*, Sep. 30, 1997 (S. Kor.).

<sup>79</sup> Supreme Court [S. Ct.], *97Da19038*, Feb. 27, 1998 (S. Kor.) (emphasis added). Similar Court decisions in the past include Supreme Court [S. Ct.], *94Da35718*, June 16, 1995 (S. Kor.) and Supreme Court [S. Ct.], *96Da36395*, May 8, 1998 (S. Kor.).

<sup>80</sup> This is almost identical to the position of the Japanese Supreme Court in *Saikō Saibansho* [Sup. Ct.] June 23, 1966 (Showa 41), no. 20, 5 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ]1118 (Japan).

<sup>81</sup> Supreme Court [S. Ct.], *97Da34563*, May 8, 1998 (S. Kor.). See also Supreme Court [S. Ct.], *97Da57689*, May 22, 1998 (S. Kor.), dealing with the subject of administrative announcement.

<sup>82</sup> Kim Min Joong (김민중), *Wongo-ui Sinbun-gwa Myeongyehweson Beopri-ui Jeogyong* ("원고의 신분과 명예훼손법리의 적용") [THE STATUS OF PLAINTIFF AND APPLICATION OF THE LAW OF DEFAMATION], *Eunronjoongjae* (언론중재) [PRESS ARBITRATION], Summer, 2000, at 32. For an opposing view, see Han Wi Soo (韓渭洙), *Gongjeok Jonjae-ui Jeongchijeok Inyeome Gwan-han Munjejeji-wa Myeongyehweson* (공적 존재의 政治의 理念에 관한 問題提起와 名譽毀損) [TAKING ISSUE WITH THE POLITICAL BELIEFS OF A PUBLIC FIGURE AND DEFAMATION], in *ASSORTED PROBLEMS OF CIVIL CASES V.11 611* (2002) (Kor.).

<sup>83</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

or with reckless disregard of whether the statement was false or not. The Court of Korea, however, has been reluctant to adopt the actual malice theory that has proliferated in the United States. The Court's position has been that, in a civil tort claim for defaming a public figure, the burden of proof is on the media entity, which engaged in an alleged act of defamation, to prove that its misstatements were not illegal.<sup>84</sup>

Ultimately, the Court attempts to resolve the problem of illegality case-by-case. But when it comes to public figures, freedom of the press ordinarily takes precedence. The Constitutional Court held that, in determining the presence of illegality in a criminal defamation context, a case involving a public figure merits a differing standard from that which is applicable in non-public figure proceedings.<sup>85</sup> The Court noted that, in defining boundaries between freedom of the press or publication on one hand and protection of honor on the other, no uniform standard may be applied. As there is a difference between something expressed pertaining to a private matter and something pertaining to a public matter, a more stringent standard is warranted when the allegation is related to the political beliefs of a public figure. When assessing if a subjective assessment of a defamatory expression is true or considering if there was substantial reason to believe the expression to be true, the usual standard of proof, which can be a bit stringent for the press, should not be required; rather, the standard of proof should be loosened and is considered satisfied when the media company adduces specific circumstances that raise doubts or provide a ground for subjective opinionated assessment. Lowering the evidentiary bar for the political beliefs of a public figure is certainly desirable for furthering the freedom of expression. And it would not be advisable for the judiciary to intervene in the arena of political debates and discourse in the form of imposing legal responsibility on a whim. This is because one's political beliefs are usually a hodgepodge of facts and opinions. As such, assessing them would be virtually impossible without engaging in ideological debates.<sup>86</sup>

Entering the 2000s, the Court began to hand down several decisions relating to public figures.<sup>87</sup> The Court's attitude is that it is willing to recognize and assure a broad range of grounds for critiquing a public figure's morality, integrity as well as propriety of work ethics. Accordingly, when it comes to a public figure's official duties, unlike media coverage for public interest, illegality would only be recognized for

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<sup>84</sup> See Supreme Court [S. Ct.], 97Da24207, Sep. 30, 1997 (S. Kor.), Supreme Court [S. Ct.], 97Da34563, May 8, 1998 (S. Kor.), and Supreme Court [S. Ct.], 2001Da53387, Feb. 27, 2004, (S. Kor.).

<sup>85</sup> Constitutional Court [Const. Ct.], 97Hun-Ma265, Jun. 24, 1999 (S. Kor.).

<sup>86</sup> See Kim, *supra* note 36, at 362.

<sup>87</sup> See, *inter alia*, Supreme Court [S. Ct.], 2007Da29379, Dec. 27, 2007 (S. Kor.), Supreme Court [S. Ct.], 2001Da53387, Feb. 27, 2004 (S. Kor.), Supreme Court [S. Ct.], 2002Da64384, July 8, 2003 (S. Kor.), Supreme Court [S. Ct.], 2002Da62494, July 22, 2003 (S. Kor.), and Supreme Court [S. Ct.], 2002Da63558, Sep. 2, 2003 (S. Kor.).

a journalistic assaillment that is "malicious or substantially beyond reason and convention."<sup>88</sup> Where a particular media coverage deviates from the range of ordinary media activities including sound oversight, criticism, and a check and a balance against the community of public officials and its individual constituents, and such deviation is considered a malicious or highly reckless attack that is patently out of proportion, the coverage may constitute libel. Towards this end, courts would consider a totality of circumstances, including particulars of the press coverage and its mode of expression, details of the issues under suspicion, extent of public interest, the degree to which the public figure's social honor has denigrated, how much effort was made to verify the facts covered, and other pertinent elements of interest.<sup>89</sup> Hence, it appears that, when it comes to public figures, courts are trying to produce a more refined and coherent set of legal theories and to apply them.

Also, when the expression in question pertains to a media entity, since media entities generally function as a critic of various social phenomenon backed by far-reaching freedom of the press, a broad zone of tolerance for valid criticism against the press is called for. Considering that media companies employ a built-in mechanism of rebuttal, which contributes to the prevention of distorted public opinion from spreading as a result of misinformation, and that assuring personality rights to one media company may well inhibit freedom of the press for another, the function of overseeing and criticizing the press should not be easily curtailed unless what is involved is a malicious or unwarranted attack. Compared to defamation of a private individual, even euphemistic exaggerations by a media company may be more widely tolerated given that related entities may rebut each other with relative ease and functional vehemence.<sup>90</sup>

4. Provisions on the Act on the Press. Adopting the relevant case law, article 5.2 of the Act on the Press provides that "where the press presents a report related to the public interest and there exists a justifiable ground that such report is true or is believed to be true," there will be no legal liability for infringement of personality rights.<sup>91</sup> To begin, the press

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<sup>88</sup> See Supreme Court [S. Ct.], 2005Da65494, Apr. 9, 2009 (S. Kor.). According to this judgment, it is not illegal per se to express a critical opinion about another person. Yet when the form and content of such an expression amounts to not only mere bluffing, but to an insulting and vilifying assassination of character and a distortion of truth which amounts to a public allegation resulting in infringement of the subject's personality rights, it may end up forming a sui generis tort that is distinguishable from defamation.

<sup>89</sup> See, inter alia, Supreme Court [S. Ct.], 2007Da29379, Dec. 27, 2007 (S. Kor.); Supreme Court [S. Ct.], 2001Da32216, Nov. 9, 2001 (S. Kor.); Supreme Court [S. Ct.], 2002Da63558, Sep. 2, 2003 (S. Kor.); and Supreme Court [S. Ct.], 2004Da35199, May 12, 2006 (S. Kor.).

<sup>90</sup> Supreme Court [S. Ct.], 2006Da53214, Apr. 24, 2008 (S. Kor.).

<sup>91</sup> Eonronjungjae Mit Pihaeguje Deung-e Gwanhan Beopryul [Act on the Press Arbitration and Remedies, etc. for Damage caused by Press Reports], Act No.7370, July 28, 2005, amended by Act No. 10587, Apr. 14, 2011, art. 5.2 (S.Kor.).

report in question ought to be related to interests of the public in order to meet the requirements of this provision. Yet, even if the report contains some ancillary content that is unrelated to the public interest, the report will still not violate the Act on the Press as long as the main content is for the public interest. In addition, the report must be true or there should be a justifiable reason for believing it to be true. Even though the Act on the Press is silent on published pieces questioning or critiquing a public official's morality, integrity or propriety of work ethics, the criterion of "justifiable reason" may be adopted by analogy. Namely, under the Act on the Press, a critical analysis of a public official's morality, for instance, will be adjudged illegal only if it comprises a malicious or substantially skewed attack.<sup>92</sup>

## ii. Cases involving non-press actors

The theory of substantiality of truth is applicable where the police authorities had defamed a criminal suspect in the form of a press release containing the suspect's confession<sup>93</sup> or where a statement by a member of the National Assembly concerning the *Odaeyang* mass suicide incident came under defamation of character,<sup>94</sup> or in the case of injuring an individual's honor by disclosing the real name as part of a public administrative announcement (in the form of a press release) with a view to achieving certain administrative objectives.<sup>95</sup> But when it comes to judicial review of public administrative announcements for determining if there was sufficient reason to believe an announcement to be true, a more stringent standard would be generally required compared to a wholly private case. This is because administrative organs are capable of conducting thorough fact-finding through exercise of public authority, and the general populace tends to place high expectations and trust on the veracity of what a public body announces. Therefore, in the absence of objective and proper corroborative proof that the administrative organ's public announcement is true, it is not possible to ascertain if there were sufficiently substantial reasons for an announcement.<sup>96</sup>

On the contrary, religious expressions are strongly protected under freedom of religion. Namely, Article 20.1 of the Constitution provides

<sup>92</sup> See Kim Jae Hyung (김재형), *Eonron-e Uihan Myeongyae Deung Ingyeokgwon Chimhae-e Daehan Gugesudan-gwa Geu Jeolcha* (언론에 의한 명예 등 인격권 침해에 대한 구제수단과 그 절차) [LEGAL REMEDIES AND RELATED PROCEDURE FOR VIOLATION BY THE PRESS OF PERSONALITY RIGHTS INCLUDING HONOR], *Ingwon-gwa Jeongui* (인권과 정의) [HUMAN RIGHTS AND JUSTICE], no. 399, 2009, at 90.

<sup>93</sup> Supreme Court [S. Ct.], 94Da29928, Aug. 20, 1996 (S. Kor.).

<sup>94</sup> Supreme Court [S. Ct.], 95Da36329, Oct. 11, 1996 (S. Kor.).

<sup>95</sup> Supreme Court [S. Ct.], 93Da18389, Nov. 26, 1993 (S. Kor.) and Supreme Court [S. Ct.], 97Da57689, May 22, 1998 (S. Kor.).

<sup>96</sup> See Supreme Court [S. Ct.], 93Da18389, Nov. 26, 1993 (S. Kor.); Supreme Court [S. Ct.], 97Da57689, May 22, 1998 (S. Kor.).

"[a]ll people have freedom of religion."<sup>97</sup> Such freedom includes freedom of missionary work to proclaim the religious principles of one's choice and to recruit new believers, which in turn subsumes freedom to criticize other belief systems and to suggest religious conversion. Religious proclamations or criticism of other beliefs is also covered by freedom of expression, in which case, by virtue of Article 20.1 of the Constitution on freedom of religion being a special provision vis-à-vis Article 21.1 of the Constitution dealing with freedom of expression, a publication for religious purposes would draw stronger protection than a publication for general purposes.<sup>98</sup> Therefore, one's freedom to criticize other religions or religious groups will be protected to the utmost. And in the event of infringing another's personality rights (including honor) while exercising such freedom, the problem of how to strike a balance between the guarantee of religious freedom and the protection of personal honor would be best resolved by weighing the totality of values to be gained by an act of religious criticism, the extent of religious proclamation, and the employed means of expression, against the degree to which the victim's honor is or is likely to be injured as a result of the criticism.<sup>99</sup>

### 3. Invasion of Privacy

Where the press reports on an individual's private life or matters, it may entail infringement on privacy, but there are times where protection of privacy can collide with freedom of speech. Therefore, what content is actually news or "press worthy" and therefore deserves protection under the freedom of speech and, in what circumstances, such content is nothing more than what kindles public curiosity, can raise thorny issues. And in relation to this problem, relying on the theory of public person may be productive. This theory is used to determine the outer limits of privacy according to the social status of a claimant who insists her right of privacy has been invaded.

In the United States, reporting on a public figure or for public interests does not constitute invasion of privacy as such.<sup>100</sup> This is to ensure freedom of speech on a broad scale and is certainly reflective of the peculiar situations of the United States. I believe that adopting the U.S. theory of public persons wholesale is inappropriate in the Korean context. But since media coverage of public persons may contain the element of public good on occasion, whether a particular coverage pertains to a public person or not, can be a significant consideration when determining infringement upon personality rights. In this context, the press may report on a public figure's private life or publish photographs

<sup>97</sup> DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 20.1 (S. Kor.).

<sup>98</sup> DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION], arts. 20.1, 21.1 (S. Kor.).

<sup>99</sup> Supreme Court [S. Ct.], 96Da19246 & 19253 (consol.), Sep. 6, 1996 (S. Kor.).

<sup>100</sup> Prosser & Keeton, *supra* note 45, at 862.

of a public figure.<sup>101</sup> Yet in relation to recognized types of privacy, the theory of public persons would only apply to an act of "opening up privacy to the public" or of "giving distorted images (of a public figure) to the public." On the contrary, invading into the privacy of a public figure or using such figure's name or portrait for profit-making usually comes under invasion of privacy.<sup>102</sup>

## B. Conflict with the Freedom of the Arts<sup>103</sup>

### 1. Introduction

In novels and films based on true stories or persons, any content degrading a featured character's social status or disclosing that character's private life may amount to infringement of personality rights relating to the person on whom the novel or film is modeled. In this regard, article 22.1 of the Constitution stipulates, "[a]ll people have freedom of study and arts."<sup>104</sup> An infringement of personality rights through novels and other works of literature may cause a collision of fundamental rights between personality rights on the one hand and freedom of expression and arts in general and freedom of literary creation in particular, on the other. In this part, the focus of my analysis is on novels based on real people and events, even though this inquiry may be equally applicable to films, plays,<sup>105</sup> cartoons,<sup>106</sup> television soap operas, and other equivalent genres.<sup>107</sup>

### 2. Specificity of the Victim

In order for infringement of personality rights by a work of literature such as novel to be actionable, a character appearing in the novel and alleged victim should be identical. This is alluded to as the specificity or identity of victim. Even where a novelist has penned a novel based on a real person, if the resulting literary character should differ from its real-life model, infringement of personality rights would be virtually a non-issue. But identity between the characters in the novel and the victim may be found not only where a similar or same name is used, but where, although there is no similarity in name, the novel's background, surrounding circumstances or overall storyline demonstrate identity or close semblance to real life.

<sup>101</sup> See *id.* at 862.

<sup>102</sup> *Id.* at 859.

<sup>103</sup> For detailed information, see Kim Jae Hyung (김재형), Model Soseol-gwa Ingyeokgwon (모델小説과 人格權) [MODEL NOVELS AND PERSONALITY RIGHTS]. Ingwon-gwa Jeongui (인권과 정의) [HUMAN RIGHTS AND JUSTICE], no. 241, at 44 (1997).

<sup>104</sup> DAEHANMINGUK HUNBEOB [HUNBEOB] [CONSTITUTION], art. 22.1 (S. Kor.).

<sup>105</sup> Kammergericht [Berlin High Court] July 13, 1928, JW 1928, 363.

<sup>106</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1987, 1 BvR 313/85 (Ger.).

<sup>107</sup> In the United States and Japan, court decisions regarding infringement of personality rights involving novels or films have played a catalytic role in the development of personality rights law.



### 3. Standard for Determining Infringement of Personality Rights

As has been noted, where identity between a literary character and alleged victim is recognized, finding actual infringement of personality rights can be an issue. Even here a court will need balance the benefits of protecting freedom of arts against the competing interests of protecting personality rights, and, towards this end, some theoretical signposts will prove useful.

Infringement of personality rights has been found where, far from truth, a person is described as a sexual pervert and someone who resorts to abject means for success,<sup>108</sup> or where one's intimate sphere, such as a disgraceful past was divulged, or a person is inadvertently depicted as a delinquent.<sup>109</sup> In each such case, it can be said that the victim's personality rights were seriously violated judging by the shape and extent of infringement. Also, whether the author intended to defame the person on whom the novel is modeled may be a significant consideration.

But where a work of art is considered to form a realm of fiction of its own, there will be no infringement of personality rights. This is because, in such a case, while alleged infringement of personality rights is trivial, there is arguably a far greater need to promote and safeguard freedom of arts.<sup>110</sup>

And because the occurrence of infringement should be determined by an analysis of the work of art in question as a whole, even where such work contains defamatory details in part, it would not constitute an infringement of personality rights per se. In addition, that a certain expression of an artistic work should cause misunderstanding, in and of itself, may not be indisputable infringement of personality rights. For example, it is commonly understood that a satire or a cartoon almost always carries a risk of misunderstanding.<sup>111</sup>

Further, the nature of art work or contents of the right to personality often raises issues. For example, where an art work takes on the character of a factual record, the right to self-determination, a type of personality right, would arguably trump the freedom of arts.<sup>112</sup> Yet, when it comes to the right of publicity or the right of a party to use

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<sup>108</sup> See two German cases: Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 20, 1968 (Ger.); *Neue Juristische Wochenschrift* [NJW] 1968, 1773 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 21, 1971, 1 BvR 435/68 (Ger.).

<sup>109</sup> See *Melvin v. Reid*, 112 Cal. App. 285 (1931); see also Tokyo District Court's precedent of Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Sep. 28, 1964 (Showa 39), no. 385 HANREI JIHO [HANJI] 12 (Japan).

<sup>110</sup> Seoul Dist. Ct., 94Ka-Hap9230, June 23, 1995 (S. Kor.).

<sup>111</sup> See the German case of Bundesgerichtshof [BGH] [Federal Court of Justice], June 8, 1982 BGHZ 84, 237 (Ger.) (Horten-Moritat case).

<sup>112</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 14, 1973, 1 BvR 112/65 (Ger.).

elements of another's personality, such as that person's name or image, commercially for an art work, freedom of arts would normally trump the right to personality. Although from time to time artists cannot help drawing artistic inspiration from their quotidian reality, the extent of infringement of personality rights in such setting is considered de minimus.<sup>113</sup>

### C. *Conflict with Other Rights*

When determining infringement of personality rights, the counterparty's rights are not always limited to freedom of expression or arts as such. For example, a suit was brought on if dismissing an employee because he had distributed fliers allegedly infringing personality rights can be justified. In this case, the Court took the occasion to note that even where a flyer is damaging to other's personality, credit, or honor or likely to foment such damage, and even if the flyer should contain a bit of misinformation or what it conveys is somewhat blown out of proportion or otherwise twisted, provided that the purpose of the flyer distribution was not to violate other's rights or legitimate entitlement but to maintain and improve labor conditions at large and to promote the improvement of workers' socioeconomic status and also that what the flyer avers is found overall true, distributing such flyer falls within the range of legitimate labor activities.<sup>114</sup> Here what was directly in dispute was the justness of a worker dismissal, but we can see that when determining on infringement of personality rights, an individual worker's rights or legal entitlement may be considered as suitable.

## IV. INFRINGEMENT OF PERSONALITY RIGHTS OF THE DEAD

### A. *Significance*

Article 3 of the Civil Code provides, "(a) person becomes the subject of rights and obligations while (s)he is alive."<sup>115</sup> So a dead person cannot become the subject of legal rights and obligations. This point is well-entrenched and overall axiomatic for property rights, but, when it comes

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<sup>113</sup> According to Larenz & Canaris, under German law, distribution of one's portrait or image is permitted without that person's consent if the distribution contributes to a higher artistic purpose. KARL LARENZ & CLAU'S-WILHELM CANARIS, *Lehrbuch des Schuldrecht Bd. II/2 [THE LAW OF OBLIGATIONS VOL. II/2]* 527 (1994); Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie [KunstUrhG] [Act Concerning Copyright of Works of Fine Art and Photography] Sept. 1, 1907, as amended Feb. 16, 2002, art. 23.1 (Ger.), available at <http://bit.ly/2x2QstS>.

<sup>114</sup> Supreme Court [S. Ct.], 93Da13544, Dec. 28, 1993 (S.Kor.); Supreme Court [S. Ct.], 96Nu11778, Dec. 23, 1997 (S.Kor.); Supreme Court [S. Ct.], 98Da23654, May 22, 1998 (S.Kor.).

<sup>115</sup> Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, amended by act No. 14409, art. 3 (S. Kor.).

to personality rights, it remains controversial. Article 308 of the Criminal Code prescribes the offense of defamation of the dead and, whether the bereaved may apply for a civil injunction to stop defamation against the dead, may raise a delicate problem.<sup>116</sup>

An act of defaming the dead is most likely to cause an injury to the honor of the bereaved as well. In that case, if the bereaved have been slandered or libeled to the same extent as the dead, there would be no point in taking issue with the dead's personality rights. This is because what is at stake here would be the personality rights of the living. But there may be cases where although the deceased's personality rights have been infringed, the bereaved's are not or because the infringement is so trivial that it appears counter-intuitive to obtain an injunction based on the bereaved's personality rights when balanced against to freedom of the press or arts. In such a case, arguing about the departed's personality rights may prove meaningful and efficient.

### B. Recognition of the Personality Rights of the Dead

There has been much discussion in Japan and Germany relating to this subject. The judiciary and majority of legal scholars of Germany acknowledge personality rights of the dead. In Japan, while this topic has been hotly debated in the realm of legal academia, lower courts tend to resolve the issue in the form of protecting the bereaved's honor and their sentiment of commemoration. In South Korea, there are competing views so that while certain scholars maintain that the dead's personality rights must be acknowledged,<sup>117</sup> others take the opposing view that violating said rights can be resolved through a tort case brought by the bereaved.<sup>118</sup> And there are lower court decisions recognizing the dead's personality rights.<sup>119</sup> In a 2008 Court case, the dissenting opinion was likewise based

<sup>116</sup> In so far as personality rights of the dead are concerned, what matters in terms of remedy is the right to interlocutory relief, not the award of monetary damages.

<sup>117</sup> Yang Sam Seung (梁三承), *Minbeobjuhae (I) (民法注解 (I))* [ANNOTATED CIVIL CODE (I)] 256 (1992); Son Dong Kwon (손동권), *Eonronbodo-wa Saja-ui Myeongyae Hweson (언론報道와 死者의 名譽毀損)* [*Press Reports and Defamation of the Dead*], *Eunronjoongjae (言論仲裁)* [PRESS ARBITRATION], Spring 1992, at 9.

<sup>118</sup> See Ji Hong Won (池弘源), *Ingyeokgwon-ui Chimhae (人格權의 侵害)* [INFRINGEMENT OF PERSONALITY RIGHTS], *Sabeobronjip (司法論集)* [JOURNAL OF LEGAL STUDIES], no. 10, 1979 at 226. See also Han Wi Soo (韓渭洙), *Myeongyae-ui Hweson-gwa Minsasang-ui Jemunje (名譽의 毀損과 民事上の 諸問題)* [DEFAMATION OF CHARACTER AND RELATED ISSUES UNDER PRIVATE LAW], *Sabeobronjip (司法論集)* [JOURNAL OF LEGAL STUDIES], no. 24, at 401, 402 (1993). See also Lee Eun Young, *supra* note 15, at 740 where he asserts that, in certain cases, the dead's honor is meant to be protected through the law of torts as well not unlike that of the bereaved, but, since a legal right to claim emanating from defamation against the dead, is intended for and should be exercised by qualified beneficiaries or heirs in practice, in the strict sense of the word, only tortious liability for the beneficiaries or heirs would thus arise.

<sup>119</sup> See Seoul Dist. Ct., 94Ka-Hap9230, June 23, 1995 (S. Kor.).

on recognition of personality rights of the dead.<sup>120</sup>

Traditionally in South Korea, people's expectation is such that social evaluation of a person during his or her lifetime would not be distorted even posthumously. Considering that, under copyright law, the moral rights of writers are protected well into death,<sup>121</sup> it would be irrational not to provide some form of legal protection for infringement of personality rights such as honor, involving the dead. And, as we have seen already, protecting the bereaved's honor or the spirit of commemoration alone will only offer a partial solution. In order to protect one's dignity and values under the Constitution effectively during an individual's lifetime, protective measures should come handy to prevent posthumous distortion, which in turn arguably provides a basis for recognizing personality rights of the deceased. In the meanwhile, it would be difficult, if not impossible, to pin down a period of protection for the dead's personality rights. Generally speaking, the longer time has elapsed from the point of death, the more arduous it will be to find an infringement of personality rights. And should the person in question become a historical figure through the passage of time, infringement of such figure's personality rights would be better left denied.<sup>122</sup>

### C. *Range and Enforcement the Dead's Personality Rights*

The range of protection for the dead's personality rights is identical to the range for the living, in principle.<sup>123</sup> What is included in such range of juridical protection spans from defamation of character, personal distortion of the dead, and to the right of self-determination relating to information. For example, even where the press reported on the intimate details of a dead person truthfully, it may come under infringement on personality rights. In addition, disclosing the dead's correspondence or journal in a distorting way may lead to invocation of personality rights.

As a logical corollary to this inquiry, the question then becomes who is entitled to obtain injunctive relief to thwart infringement of personality rights on behalf of the dead, because, apparently, the dead are unable do it on their own. For this issue, a provision of the Copyright Act may be applied by analogy so that the bereaved (consisting of the surviving spouse, children, parents, grandchildren, grandparents, or siblings) or

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<sup>120</sup> See Supreme Court [S. Ct.], 2007Da27670, Nov. 20, 2008 (S. Kor.).

<sup>121</sup> Article 14.2 of the Copyright Act provides, "(e)ven after the death of an author, no person who exploits the author's work shall commit an act that would have been damaging to the author's moral rights were the author alive, except that such an act is deemed to have not defamed the author if it is non-defamatory in view of the prevailing social norms considering the nature and extent of the act in question." And according to Article 96 and Article 14.2 of the Copyright Act, the bereaved can request reinstatement of honor under Article 95 for the reason that the dead author's honor has been injured. Yet the bereaved may not seek money damages on account of such injury.

<sup>122</sup> Supreme Court [S. Ct.], 97Da19038, Feb. 27, 1998 (S. Kor.).

<sup>123</sup> See LARENZ & CANARIS, *supra* note 113, at S. 533.

the executor of the deceased's will are granted standing to apply for and receive interlocutory relief in civil proceedings.<sup>124</sup>

### CONCLUSION

In Korea today, personality rights are becoming established as a key set of rights. In a wide variety of social spheres, the protection of personality rights has begun to appear as a significant issue. Accordingly, it is time that more scholarly research is undertaken to define clearly the content and ambit of personality rights and their legal recognition. Despite this heightened status of personality rights in general, the Civil Code alone would offer incomplete solutions at best when it comes to civil disputes involving the interpretation and enforcement of personality rights. Thus, an amendment to the Civil Code is in order. This author has already suggested a specific recommendation for such an amendment. The concept of and protections for personality rights must be clearly defined in the law. A prophylactic measure in the form of a court order to ban and prevent specific invasion of personality rights should be made available. In addition to the remedies for injury, there should also be rules in place to allow the withdrawal of the aforementioned court ban by the injured party. Finally, there needs to be a clear demarcation of what situations are not included in the invasion of personality rights.

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<sup>124</sup> According to this particular provision of the Copyright Act, after the death of an author, the bereaved family (consisting of the surviving spouse, children, parents, grandchildren, grandparents, and/or siblings) or the executor of will may apply for remedies including injunctive relief under Article 123 against the wrongdoer who has violated or is likely to violate the provision of Article 14.2 with respect to the author's copyrighted work, or, in the alternative, apply for reinstatement of honor against a perpetrator who has infringed on the author's moral rights willfully or negligently or otherwise defamed the deceased author. See *Jeojakgwonbeob* [Copyright Act], Act No. 432, Jan. 28, 1957, amended by Act No. 14083, Mar. 22, 2016. arts. 14.2, 123 (S. Kor.).