10

The Battle against Disinformation

Legislative Challenges in South Korea

Ahran Park

10.1 INTRODUCTION

In the digital age, the landscape of information dissemination has undergone a profound transformation. The traditional boundaries between information and news have become increasingly blurred as technology allows anyone to create and share content online. The once-exclusive realm of authoritative media outlets and professional journalists has given way to a decentralized public square, where individuals can voice their opinions and reach vast audiences regardless of mainstream coverage. The evolution of the digital age has dismantled the conventional notions of journalism and reshaped how news is obtained and interpreted. This shift has paved the way for the proliferation of fake news and online disinformation. The ease with which false information can be fabricated, packaged convincingly and rapidly disseminated to a wide audience has contributed to the rise of fake news. This phenomenon gained global attention during the 2016 US presidential election, prompting nations worldwide to seek strategies for tackling this issue.

In South Korea, the regulation of disinformation has emerged as a significant concern, particularly during election periods, and the impact of disinformation intensified amidst the backdrop of the COVID-19 pandemic. The extent of disinformation's influence has prompted considerable attention. According to a 2023 global survey conducted by the Reuters Institute for Journalism at Oxford University,[1] 66 percent of Korean respondents expressed concern about disinformation. This places South Korea as the ninth highest among the forty-six countries surveyed, underscoring a significant degree of concern within the population. Notable is the focus on disinformation in the political sphere. Among Korean respondents, 40 percent identified politics as a prime target of disinformation, which

[1] Reuters Digital News Report 2023, Reuters Institute for the Study of Journalism, https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023.

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is twice the percentage for disinformation concerning the economy (21 percent) or COVID-19 (21 percent). This emphasis on political disinformation suggests a considerable weariness among the public and a heightened sense of apprehension regarding the potential repercussions of disinformation on democratic processes and values.

The increasing need to address disinformation has led to a call for the regulation of media platforms. The Korean National Assembly has proposed more than forty bills aimed at regulating disinformation since 2017, but those bills faced challenges in passing due to various reasons. This chapter delves into the legislative struggle aimed at regulating disinformation in South Korea. Commencing with a historical overview of disinformation regulation, the chapter proceeds to scrutinize the existing legal framework employed to counter disinformation. It further categorizes the fake news bills introduced since 2017. Subsequently, it investigates the delegation of responsibility to digital platforms for regulating disinformation, evaluating the current state of self-regulation and potential avenues for enhancement.

10.2 HISTORY OF REGULATING ONLINE FALSE EXPRESSIONS

The Constitution of Korea has consistently enshrined the principle of freedom of expression. However, this freedom has undergone revisions to different degrees during the nine instances of constitutional amendment. On occasion, the scope of freedom of expression was subject to qualifications, contingent upon the inclusion of the phrase 'except as specified by law' within the constitutional text.[2] In the context of this constitutional history, efforts to fight against disinformation have been underway since the 1970s.

The most notable historical attempts to regulate disinformation occurred during the dictatorship in the 1970s. On 17 October 1972, President Park Chung Hee issued a special presidential declaration, which dissolved the National Assembly and suspended the constitution. This proclamation effectively established a long-term dictatorship. The regime, concerned about the dangers of free speech and a free press to its stability, adopted a series of emergency measures, with the first being Emergency Measure No. 1 in 1974. This measure explicitly forbade the 'fabrication or dissemination of rumors' (Article 3) and also prohibited the act of 'broadcasting, reporting, publishing, or otherwise communicating rumors to others' (Article 4). The autocratic government, under Emergency Measure No. 1, utilized its provisions to arrest and punish critics of the regime who were accused of spreading rumors. Similarly, Emergency Measure No. 9, enacted in 1975, criminalized the act of 'fabrication and disseminating rumors or distorting facts'.

[2] Ahran Park and Kyu Ho Youm, 'Freedom versus Regulation: An Evolving Free Press in South Korea' in Paul Wragg and András Koltay (eds.), *Global Perspectives on Press Regulation*, Vol. 2 (Oxford: Hart, 2024).

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These Emergency Measures were primarily aimed at restricting criticisms of the president and the government through regulating rumors. They also provided a convenient means of stifling dissent and punishing dissenters. In addition, the Emergency Measures went as far as prohibiting any debate of constitutional revision, effectively suppressing citizens' expression of political views and infringing upon their fundamental rights. The enforcement of the Emergency Measures led to the prosecution of over 1,100 people, primarily consisting of those who expressed dissent against the dictator and the government. For instance, a man who criticized President Park Chung Hee was subject to a seven-year term of imprisonment on charges of fabricating rumors.

More than thirty years later, the South Korean Supreme Court made significant rulings declaring the Emergency Measures, which severely restricted people's freedom of expression, unlawful. In a retrial held in 2010, the Supreme Court acquitted a defendant who had previously been sentenced for spreading falsehoods. The court ruled that Emergency Measure No. 1 was unconstitutional and invalid due to its excessive restriction on an individual's freedom of expression and physical integrity.[3]

After the Supreme Court's ruling, the Constitutional Court further solidified its stance in 2013 by declaring Emergency Measures Nos. 1, 2 and 9 unconstitutional, citing the same constitutional concerns the Supreme Court identified when it invalidated Emergency Measure No. 1.[4] The Constitutional Court's decision stemmed from its assessment that the provisions punishing rumor-mongering were not only abstract and vague in their criminal elements but also exhibited an excessively broad scope of application. As a result, the Court elucidated, this provision made it challenging for citizens to anticipate which conduct would be deemed prohibited under the law. These historical instances illustrate how the criminalization of disseminating falsehoods can be wielded to stifle dissenting voices critical of the government. In reaction to this, the Korean courts have held that laws seeking to curb freedom of expression through the criminalization of falsehood dissemination must be narrowly drawn to be constitutional.

Although the prohibition on spreading rumors was limited to a specific period through the Emergency Measures, under normal circumstances the spreading of falsehoods could fall under the purview of regulation through the Basic Telecommunications Act. Article 47(1) of the Act states that 'any person who issues a false communication through telecommunications facilities with the intention of harming the public interest shall be subject to punishment, including imprisonment for up to 5 years or a fine up to 50 million Won (approximately $37,600)'. Initially, this provision was crafted to penalize individuals who used landline phones by adopting a fabricated identity or using another person's name.

[3] Supreme Court, decided on 16 December 2010, 2010Do5986, en banc.
[4] Constitutional Court, 21 March 2013, 2010HunBa70.

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Since its enactment in 1961, Article 47(1) of the Basic Telecommunications Act had remained inactive for over forty years, with no recorded instances of its application for actual penalties. This inactivity can be attributed to the absence of documented cases involving deceptive communications using someone else's identity. Nonetheless, the emergence of the Internet in the 2000s revitalized this provision, reinstating its significance in overseeing online communications. Article 47(1) of the Act was employed to punish online users who propagated false information.[5]

An illustrative case highlighting the implementation of Article 47(1) was the notable *Minerva* case. The individual behind the username 'Minerva' gained online prominence for astute predictions and insightful economic analyses. However, Minerva found himself facing charges subsequent to posting on a popular portal site that the government's foreign exchange reserves had been depleted, and currency exchange had been prohibited. These posts incited panic among online users and triggered a decline in stock prices. In the aftermath, the finance minister accused Minerva of spreading falsehoods regarding financial policies, leading to Minerva's arrest. The charges against Minerva were based on the alleged spread of falsehoods that were deemed harmful to the public interest, as stipulated under Article 47(1) of the Basic Telecommunications Act.

The Constitutional Court, however, ruled that Article 47(1) was unconstitutional.[6] The Court held that this clause, as it restricts freedom of expression and imposes criminal penalties, must adhere to a rigorous standard of protecting free expression. This includes a requirement that it must be narrowly drawn to address potentially serious social harms. Although the provision prohibited misleading communication with the intention of 'harming the public interest', the Constitutional Court found that the definition of 'public interest' was too ambiguous and imprecise, making it challenging for even legal experts to determine whether particular speech activity harms the 'public interest' or not. The Court noted that such judgments of 'public interest' are likely to vary significantly based on the individual values and ethics of each person. Consequently, the Constitutional Court concluded that the provisions failed to inform the accused which purposes of communication were prohibited among the generally allowed online communications. This lack of clarity violated the requirement for clear guidance demanded by free expression and the principle of clarity in criminal justice.

The Justices expounded on the legality of spreading falsehoods as follows:

> The evolution of Internet communication into the 'most participatory marketplace' and a 'medium for fostering expression' empowers recipients of information to access a diverse array of sources, while also facilitating real-time challenges or rebuttals to certain assertions. It proves arduous to assume that the aforementioned

[5] Ahran Park, 'A Critical Perspective on Regulating "Fake News" and Disinformation' (2021) 56 (2) *Press Information Research* 113–55 (in Korean).

[6] Constitutional Court, decided on 28 December 2010, 2008HunBa157.

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> possibilities will be entirely obstructed by the inherent attributes of communication, encompassing elements such as anonymity and indiscriminate dissemination. Therefore, it cannot be conclusively asserted that there exists a distinct risk of encroaching upon the public's entitlement to accurate information of fomenting criminal activities or disturbances in the national order solely due to the dissemination of false facts.[7]

The Justices pointed out that false information does not inherently jeopardize the public interest or undermine the advancement of democracy. It also serves the additional function of directing societal attention towards pertinent matters and encouraging public engagement. Even if false communication itself does not inherently inflict societal damage, according to the Court, the state's broad and paternalistic intervention, employing vague criteria such as 'for the purpose of harming the public interest', lacks sufficient justification. The Justices emphatically elucidated in their supplementary opinion that assessing the value and detriment of expression or information 'ought not to be initially determined by the state; instead, it should be entrusted to the self-correcting dynamics of civil society and the competitive interplay of ideas and viewpoints'.[8]

Following the Constitutional Court's ruling that Article 47(1) was invalid, the clause lost its effectiveness and Minerva was finally acquitted. However, a significant concern arose from the absence of a comprehensive rule that had formerly penalized online dissemination of falsehood jeopardizing public safety. To rectify this legal loophole, several amendments have been put forth in the National Assembly but the provision remains unmodified as of now.

Article 47(1) of the Basic Telecommunications Law necessitates a more precise and constitutionally sound amendment, particularly in light of the absence of adequate regulation over disinformation that jeopardizes societal security or impairs the public interest. A more meticulous and constitutionally grounded amendment to Article 47(1) is imperative, one that mandates penalties solely when specific harm is inflicted, rather than merely targeting those who disseminate false information. Nevertheless, considering the legislative backdrop of the Act, it is prudent to address disinformation through other pertinent internet-related legislation. In the subsequent sections, we will delve into the various legal frameworks within South Korea that hold potential for regulating disinformation.

10.3 REGULATING DISINFORMATION UNDER THE CURRENT LAW

In South Korea, intentional dissemination of falsehood is rigorously prohibited across a range of statutes. Three primary categories of current laws are commonly used to regulate various forms of disinformation. First, there are laws targeting

[7] Ibid.
[8] Ibid.

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disinformation specifically related to elections. The Public Official Election Act governs the dissemination of false information about political candidates and their families. Those who publish such incorrect information may face penalties, including imprisonment with labor or fines, under Article 250 of the Public Official Election Act. Similarly, the Political Parties Act penalizes individuals who publish or distribute falsehoods about candidates or their families in connection with an intraparty competitive election for selecting a political party representative (Article 52), as well as false registration applications of a party (Article 59).

Second, there are laws that counter disinformation that poses a threat to the security and stability of the nation. Given South Korea's divided status and its ongoing situation with North Korea, the imperative to combat disinformation that threatens national security is of paramount importance. The National Security Act imposes punishments on members of anti-state organizations or persons under their command who fabricate or disseminate a false statement likely to disrupt social order (Article 4). In a similar vein, the Act penalizes members of anti-state organizations who fabricate or disseminate false statements concerning a matter that is likely to disrupt social order (Article 7).

Third, defamation laws can be employed to combat disinformation that harms the reputation of others. Defamation in South Korea falls under the purview of both criminal and civil law. Consequently, individuals who spread defamatory disinformation may face penalties under both legal systems. The Criminal Act addresses defamation in Article 307, distinguishing between penalties for 'stating the truth' (Article 307(1)) and 'stating a falsehood' (Article 307(2)). Additionally, those who publish false facts to defame the deceased are subject to punishment under Article 308. When defamatory disinformation is disseminated through mass media such as newspapers, magazines or radio with an intent to harm someone's reputation, Article 309 of the Criminal Act prescribes even more severe punishment. Beyond criminal consequences, defamation is recognized as a tort under the Civil Act.

Especially within the context of internet defamation, the Information and Communications Network Act imposes enhanced penalties (Article 70).[9] Article 44-7 specifically addresses the dissemination of unlawful information, encompassing defamatory online content that is intended to tarnish the reputation of others.

[9] Article 70(1) of the Act provides: (1) A person who commits defamation of another person by disclosing a (true) fact to the public through an information and communications network purposely to disparage his/her reputation shall be punished by imprisonment with labor for up to three years or by a fine not exceeding 30 million Won.

(2) A person who commits defamation of another person by disclosing a false fact to the public through an information and communications network purposely to disparage his/her reputation shall be punished by imprisonment with labor for up to seven years, by suspension of qualification for up to ten years, or by a fine not exceeding KRW 50 million Won.

(3) The public prosecutor may not prosecute a defamer against the victim's will.

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Defamation is granted immunity if the statement accused of being libelous is proven to be true and serves the public interest. Article 310 of the Criminal Act outlines that if the facts presented are verified as true and solely intended to serve the public interest, they shall not be subject to punishment. This truth-based defense does not necessitate absolute accuracy; it may encompass inaccuracies or hyperbolic expressions to afford greater leeway for freedom of speech and the press. In determining whether a statement of fact is false, the Supreme Court clarified that (1) it should be considered in its entirety and (2) if the statement aligns with objective facts in significant aspects, even if it contains minor discrepancies or slight exaggerations in detail, it should not be deemed a false statement of fact.[10] In addition, if a defamatory statement involves only opinion, it cannot be actionable.[11]

When a speaker genuinely held a belief in the truth of their statement, even if later proven false, the speaker may be granted immunity if their belief was grounded in a 'reasonable belief' in the accuracy of the statement.[12] Hence, a statement made in the public interest, based on a reasonable belief in its truthfulness at the time of utterance, can still be shielded under the 'reasonable belief' standard. This standard strongly safeguards freedom of expression by affording protection to statements that, although ultimately proven false, were made with a genuine belief in their accuracy.[13] The standard of 'reasonable belief' applies to the media domain as well. In one case where a journalist was sued for defamation, the Supreme Court ruled that the journalist should be exempt from liability for defamation because he had 'reasonable belief' in his report as he tried to verify all the facts and contact witnesses in a criminal case.[14] Conversely, in another case, where a journalist conveyed a conviction without engaging in additional interviews with relevant people, the court denied his reasonable belief in the news report.[15]

As the severity of penalties depends on the veracity of the statement, it is critical for the court to assess whether a statement is true or false in defamation cases. The Supreme Court has established that if the primary essence of an expression aligns with the objective facts, even minor discrepancies or slight exaggerations in the details do not render it false.[16] As long as the key element of the expression is true, any minor exaggerations or differences in how the factual relationship is portrayed should not lead to severe penalties for false expression.[17] The Supreme Court has ruled that when determining falsity, the overall impression should serve as the standard.

[10] Supreme Court, decided on 25 February 2000, 99Do4757.
[11] Supreme Court, decided on 9 February 1999, 98Da31356.
[12] Supreme Court, decided on 11 October 1988, 85DaKa29.
[13] Yongsang Park, *Freedom of Expression* (Seoul: Hyunamsa, 2002; in Korean).
[14] Supreme Court, decided on 23 August 1996, 94Do3191.
[15] Supreme Court, decided on 28 May 1996, 94Da33828.
[16] Supreme Court, decided on 19 January 2001, 2000Da10208.
[17] Supreme Court, decided on 27 February 2004, 2001Da53387.

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These criteria for evaluating truth are crucial when considering authenticity in the context of disinformation. In order for someone to be subject to penalties for disseminating false information, a significant portion of the content must be proven to be factually inaccurate, rather than merely constituting a minor error or exaggeration. Furthermore, even if the content is proven to be untrue, it may not lead to punishment if the person had a 'reasonable belief' in truth and the content is determined to contribute to the public interest.

In a case where several people were indicted for spreading false rumors about allegations of bribery and fraud involving competing candidates, the Court was tasked with determining whether they held a reasonable belief in the truthfulness of these rumors. The Seoul High Court emphasized the importance of fair elections through democratic procedures, which 'establish the legitimacy of state power and foster the development of democratic politics'. The Court further emphasized that the propagation of 'fake news' that undermines these principles requires utmost attention.[18] Its judgment delineated that the defendants systemically and intentionally propagated 'fake news' through widely circulated media channels shortly prior to the election, with the aim of misleading voters regarding their choice of candidates. Given the gravity of their actions, the Court held that the defendants lacked a reasonable belief in the truth of their claims and must face severe punishment for defaming the victim. This case illustrates how spreading disinformation that tarnishes someone's reputation can lead to serious legal consequences.

10.4 MAKING NEW LAWS AGAINST DISINFORMATION

The debate on regulating 'fake news' began in South Korea in early 2017, ahead of the nineteenth Korean presidential election. The fake news controversy surrounding the US presidential election in 2016 raised concerns that fake news could become prevalent in Korean presidential elections as well. In fact, former UN Secretary-General Ban Ki-moon, a prominent conservative presidential candidate at that time, announced his withdrawal from the race in February 2017, citing damage caused by fake news. During a subsequent meeting with the National Assembly, Ban highlighted his fake news cases to advocate for government regulation and legislation against fake news.

Since 2017, the National Assembly has introduced dozens of bills aimed at regulating fake news. There are three main types of legislation that have been proposed to regulate fake news. First, standalone bills have been put forward, focusing solely on the regulation of fake news. An example of such a bill is the Act on the Composition and Operation of the Fake News Countermeasures Committee.[19] This proposal suggests the establishment of such a committee under

[18] Seoul High Court, decided on 12 August 2022, 2022No594.
[19] Bill No. 2013495 (9 May 2018).

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the Prime Minister's authority to oversee fake news regulation. Additionally, it suggests designating the Ministry of Culture, Sports and Tourism as the primary agency responsible for preventing the dissemination of fake news in print and online newspapers, while assigning the Communications Commission with similar responsibilities for broadcasting and digital networks. The bill, aimed at tackling the problem of fake news, provides a definition for it as follows: 'Fake news refers to information, whether distributed via print media, online newspapers, broadcasts, or communication networks, that is deliberately fabricated or manipulated for political or economic purposes, with the deliberate aim of misleading the public into believing it to be genuine news'.

Second, legislative efforts against disinformation have been made by proposing amendments to the Information and Communication Network Act, which serves as the overarching law governing online communication and safeguarding online users. Several proposed amendments to this Act assign responsibilities to platform operators.[20] These proposals involve monitoring disinformation, along with the requirement to promptly remove or temporarily take down such content. Penalty surcharges are also proposed to be levied upon platform operators in case of failure to fulfill these obligations. For instance, a bill from 2018[21] proposed that platform operators must undertake 'necessary measures' to remove or block fake news that harm others' privacy and reputation. A bill from 2022[22] specified that in case an online content is requested to be removed, the platform operator has the option to request a review by the Online Dispute Resolution Committee.

Third, bills have been proposed to amend the Press Arbitration Act, aiming to establish heightened accountability for inaccurate reporting.[23] These bills are designed to ensure that traditional media outlets are held responsible for disseminating disinformation. Notably, some of these bills propose the imposition of punitive damages on media entities for the publication of false information. These bills to amend the Press Arbitration Act sparked considerable opposition from media companies and organizations, triggering social controversies.[24]

The Press Arbitration Act stands out among press statutes worldwide.[25] This legislation, applied to news reports in print, broadcasting and on the Internet, affords individuals the right to request the correction of inaccuracies in factual news and to reply to factual claims within a news article if they have suffered harm due to such

[20] See, e.g., Bill No. 2100815 (22 June 2020); Bill No. 2107093 (31 December 2020); Bill No. 2107285 (11 January 2021).
[21] Bill No. 2013251 (25 April 2018).
[22] Bill No. 2115428 (27 April 2022).
[23] See, e.g., Bill No. 2102829 (7 August 2020); Bill No. 2107949 (4 February 2021); Bill No. 2110702 (9 June 2021); Bill No. 2111047 (23 June 2021).
[24] Soyoung Cho, 'Issue of Legislative Process and Contents of the Revision: Bill of Act on Press Arbitration and Remedies Etc. for Damage Caused by Press Reports' (2021) 20(3) *Press and the Law* 157–88, doi:10.26542/JML.2021.12.20.3.157 (in Korean).
[25] See note 2 above.

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allegations. Furthermore, the law mandates the right to demand a follow-up story following a previous report about an individual involved in criminal proceedings, especially when the individual has been acquitted of criminal charges. Operating as a distinct form of media regulation, the Press Arbitration Act serves as an effective remedial system, facilitating the delicate balance between safeguarding press freedom and upholding an individual's right to reputation and privacy.

The distinctive feature of the Press Arbitration Act lies in its provision for expedient and cost-effective redress for those who have suffered harm due to media content, enabling them to pursue resolution through press arbitration prior to resorting to the legal system. However, endeavors to regulate disinformation via the press arbitration mechanism underscore a prevailing societal distrust toward the Korean press. A longstanding history of ideological confrontations between conservative and liberal factions have given rise to a media landscape that is similarly divided along these lines. This polarization has bred a deep-seated skepticism regarding media coverage, especially when politicians, often engaged in fierce political struggles, denounce critical media as purveyors of fake news. The media itself is not safe from criticism for occasionally intervening in political battles through biased reporting.

Amidst this deeply divided context, the suggested revision to the Press Arbitration Act has emerged, aiming to establish punitive penalties for media outlets disseminating falsehoods. For instance, a bill proposed in February 2021[26] seeks to address false news content by categorizing it as fake news. Notably, Article 30(2) of this amendment introduces the concept of punitive damages, specifying that the amount of compensation should surpass the actual damage incurred if such damage stems from the public dissemination of erroneous or manipulated information through media reports, with the intention of defaming others. Moreover, the amendment incorporates a presumption of malicious intent on the part of the press.

Another bill[27] introduces the provision that if a media entity inflicts harm upon an individual through the dissemination of false facts leading to defamation, the court holds the authority to grant damages up to three times the actual amount of harm incurred. The bill's objective revolves around preventing the media from propagating fake news.

A proposed bill in June 2021[28] exhibits increased stringency compared to earlier amendments. Article 2(17) delineates 'false or manipulative reporting' as 'the act of disseminating or conveying false facts or information manipulated to appear as facts through media outlets, Internet news services, or online multimedia broadcasts'. This definition has garnered criticism due to its exclusion of disinformation propagated on social media and platforms like YouTube. The amendment also provides

[26] Bill No. 2107949 (4 February 2021).
[27] Bill No. 2110702 (9 June 2021).
[28] Bill No. 2111047 (23 June 2021).

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for the victims to seek compensation ranging from no less than three times to no more than five times the amount of damage resulting from false reports by the news media (Article 30-2).

In sum, despite the introduction of numerous anti-fake news bills since 2017, none of the bills have successfully passed through the National Assembly. Many of these bills had to encounter challenges in defining the elusive concept of 'fake news', while others faced backlash for potentially infringing the freedom of expression online. The proposed amendments to the Press Arbitration Act were met with significant opposition from the media industry, as they appeared to target media outlets as primary purveyors of fake news. While the impact of fake news remains a concern, particularly with the advancement of artificial intelligence, the failure of fake news bills indicates that the task of regulating disinformation with legislation will likely continue to pose challenges in the future.

10.5 DIGITAL PLATFORMS AS GATEKEEPERS AGAINST DISINFORMATION

With the evolution of the Internet, various challenges have emerged in the realm of online communication. Digital platforms, which serve as intermediaries for online expression, have assumed the role of digital gatekeepers, entrusted with the duty and responsibility to address these issues. In the dynamic landscape of the digital world, these platforms have increasingly shouldered a range of obligations.

The Information and Communication Network Act, serving as a fundamental statute governing internet regulation, is designed to offer online users an effective means of safeguarding their privacy and reputation. Article 44-2 of the Act mandates that the information service provider, when it receives a request from the alleged victim, must expeditiously delete or block the harmful contents and subsequently notify both the requester and the poster about the actions taken. Should the information service provider fail to remove harmful content from its platform, it can potentially face liability for defamation or invasion of privacy, in conjunction with the original poster. However, in cases where the information service provider can demonstrate a sincere effort to remove or block injurious content, the provider may be eligible for a reduction or even exemption from liability for damages arising from such content (Article 44-2(6)). Hence, this law creates a robust incentive for digital platforms to promptly remove harmful content.

In cases where digital platforms encounter challenges in ascertaining whether the information in question infringes upon the right of others, they are empowered to exercise discretion to restrict access to the information for a period of thirty days. The question of whether such takedown decisions by platforms may encroach upon freedom of online expression has been raised. Nonetheless, the Constitutional Court ruled that the temporary takedown process did not infringe upon online

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users' freedom of expression.[29] The Court's rationale for this decision was based on the rapid and extensive dissemination of harmful expression, where a temporary takedown was deemed the most effective means to prevent the propagation of defamatory content. The Constitutional Court further asserted that the significance of safeguarding reputation and privacy outweighed the complainant's freedom of expression. In the Court's view, the thirty-day period of temporary takedown was an appropriate means of protecting the reputation of a potential victim.

Moreover, the Supreme Court rendered a landmark decision regarding the liability of digital platforms in 2009. In the case of *Kim* v. *NHN Corp.*,[30] the Supreme Court established a key precedent by holding that digital intermediaries may be held liable even in instances where they had not been notified by the plaintiff about the existence of defamatory content. The case revolved around a plaintiff, Kim, who took legal action against three major Korean internet platforms on grounds of online defamation. Kim contended that these intermediaries had disseminated news articles alleging his betrayal of a pregnant ex-girlfriend. Additionally, Kim asserted that these intermediaries had facilitated various individual blogs where users disclosed his workplace and phone number, leading to relentless harassment. The intermediaries countered by asserting that they had simply distributed news articles originally published by legacy news media, and that they were bound by legal agreement with these media outlets not to modify news stories at their discretion.

The Supreme Court, however, rejected the intermediaries' argument. It clarified that these intermediaries were more than mere search engines; they received news articles from various sources, stored this news in their database, curated stories for online publication, and ultimately shared these stories with the public. In light of their role as news aggregators, the Court held that these intermediaries should be held accountable akin to offline news media that had initially published the contentious articles.[31]

In the current legal landscape, as shown above, existing Korean laws and precedents establish the legal responsibility of digital platforms for online content. This led to a heightened emphasis on platform operators to take on the role of regulating disinformation. An illustrative example is the proposed amendment to the Information and Communications Network Act on 22 June 2020.[32] The amendment provides a definition of disinformation as 'false information presented in the guise of a journalistic report, crafted with the intent to mislead recipients through a communication network'. In line with this amendment, platform providers are bound by an obligation to promptly remove such disinformation. Failure to fulfill this duty may

[29] Constitutional Court, decided on 31 May 2012, 2010Hun-Ma88.
[30] Supreme Court, decided on 16 April 2009, 2008Da53812.
[31] Ibid.
[32] Bill No. 2100815 (22 June 2020).

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result in a penalty of up to 30 million Won. This legal framework signifies a robust effort to empower operators with the responsibility to curtail the spread of disinformation, underscoring the importance of accountability and accuracy in online communication.

Another proposed amendment[33] to the Information and Communications Network Act incorporates the term 'fake news'. According to this amendment, fake news constitutes 'false or distorted information with the aim of achieving political or economic gains and presented in a manner that resembles a news report'. This definition underscores the deceptive nature of such content, highlighting its potential to mislead the public while masquerading as legitimate news coverage. Under this provision, if adopted, platform providers must continuously monitor content to identify instances of fake news. Upon receiving a request to remove fake news or identifying it through monitoring, the proposed statute would obligate platform providers to remove such false information. The amendment further establishes penalties for noncompliance with the obligation of continuous monitoring. Should platform providers fail to fulfill this obligation, their employees and corporate officers would potentially be subject to imprisonment for up to one year or a fine of up to 10 million Won.

There are several other amendments, but they all suffer from a similar set of challenges. First, the proposed amendments lack clarity regarding their definition of 'fake news' or 'disinformation'. In order to comply fully with the governing Constitutional Court precedents on freedom of expression and the press, legislation aimed at penalizing publishers and disseminators of fake news must provide explicit and specific guidelines, allowing citizens and platform providers alike to anticipate which actions are potentially unlawful. However, most bills create ambiguity that hinders individuals from comprehending the boundaries of prohibited conduct. Particularly concerning is the difficulty in determining the threshold for categorizing information as 'false'. Indeed, court precedents have illustrated that the concept of truth encompasses even minor inaccuracies and nuances, making it complicated for the general public to gauge the threshold at which misinformation state authorities would deem to be 'false'. Consequently, defining the precise boundaries of 'fake news' and 'disinformation' within the framework of the law becomes a formidable challenge, as attempting to encompass all forms of erroneous information under the label of fake news is impractical.

Second, obligating platform providers to monitor and take down fake news raises concerns about potential encroachments on online freedom of expression. Granting platform providers unchecked authority for private censorship, devoid of clear guidelines, jeopardizes the integrity of the online environment. Many of these legislative proposals entail substantial fines for platforms failing to remove flagged false posts swiftly. Consequently, platform providers may opt for a conservative

[33] Bill No. 2107093 (31 December 2020).

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approach by removing or blocking flagged content without comprehensive verification, thereby posing a substantial risk to online freedom of expression. To mitigate this, it is imperative that the law not only authorize platforms to engage in monitoring but also establishes a structured framework encompassing criteria and protocols for identifying disinformation. Procedural guidelines would also be necessary to permit someone accused of posting disinformation or misinformation to contest this characterization meaningfully. Further, ensuring transparency in the determination of disinformation is essential to strike a balance between combating fake news and protecting freedom of expression (as well as other forms of expressive freedom).

Third, excessively stringent penalties for fake news creators and disseminators also present a constitutional problem. Several legislative proposals punish people for generating or spreading fake news, but this potentially infringes upon the 'principle of proportionality'.[34] As previously explained, the propagation of falsehoods is subject to aggravated punishment within the confines of defamation laws or the Information and Communication Network Act. Under these laws, the imposition of sanctions for falsehood should be limited to cases where tangible rights such as reputation or privacy have been violated. Therefore, it is inappropriate to impose penalties solely on the grounds of crafting and then disseminating false information. Instead, to avoid potential constitutional objections, a regulation that levies sanctions or imposes financial liability for damages may constitutionally do so only when the intentional creation or dissemination of falsehood actually results in demonstrable harm to others.

10.6 LIMITATIONS OF SELF-REGULATION

Pure self-regulation, which grants operators autonomy at all stages from rule-making to post-management, remains an ideal model but faces challenges in practical implementation. The European Union has introduced a 'regulated self-regulation' or 'co-regulation' approach that enhances the efficacy of self-regulation. This is achieved by providing a foundational framework for platform operators' self-regulation through legal and institutional mechanisms, as exemplified by the enactment of digital-related laws like the Digital Service Act.[35] These legislative measures render self-regulation more enforceable. The Information and Communication Network Act mandates that platform operators establish codes of conduct and self-regulatory guidelines to ensure user protection and provide safe and reliable

[34] The 'principle of proportionality' is a constitutional principle. Under this principle, any laws that limit the rights of citizens (1) must be suitable to achieve the desired end, (2) must be necessary to achieve the desired end, (3) must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved.

[35] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance).

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communication service (Article 44-4). In accordance with this law, self-regulation is mainly overseen by the Korea Internet Self-Governance Organization (KISO), a consortium consisting of sixteen platform companies, including major players such as Naver and Kakao.

In 2018, the KISO introduced a self-regulatory policy targeting 'fake news presented in the format of news reports', known as 'False Posting Policy in the Form of Media Reports'.[36] Amidst the COVID-19 pandemic, the KISO also devised and put into action a policy aimed at addressing misleading information related to the treatment and prevention of and vaccination against COVID-19.[37] This policy involves appropriate actions, including content removal, in cases where posts are definitely identified as false and manipulative information based on official announcements from authoritative bodies such as the World Health Organization or the Center for Disease Control and Prevention. Nevertheless, due to the fact that the KISO's activities are initiated based on requests from its member platform companies, the scope of posts subject to moderation remains limited. Consequently, although the KISO operates effectively as a self-regulatory mechanism, its impact in countering disinformation is somewhat limited. Overseas platforms such as Google, Meta and TikTok have not joined the KISO, preventing a collective effort to combat disinformation on YouTube and Facebook and further limiting the efficacy of KISO's self-regulation efforts.

Under existing legislation, platform operators bear the responsibility of independently blocking illicit posts. Article 44-3 of the Information and Communications Network Act provides platform operators with the discretion to temporarily block posts for a maximum of thirty days. Platform operators may employ this measure when they determine that the information being disseminated on their platforms violates the rights of others, such as privacy infringement or defamation. However, in practice, this provision is infrequently invoked due to the considerable difficulty faced by platform operators in discerning whether a post genuinely infringes upon those rights. Although platform operators possess the technical and economic capacity to function as administrators of internet communication, imposing the exclusive duty of moderation upon them could potentially result in an excessive number of takedowns or disregard for harmful content. Although promoting platform operators' self-regulation constitutes a laudable policy, the devil lies in the detail. Establishing clearer legal norms would provide more effective protection against the social harms caused by disinformation and misinformation. Moreover, better and more transparent fundamental regulatory frameworks and procedures would also help to ensure the effective implementation of these mandatory moderation policies.

[36] KISO Fake News Report Center, https://report.kiso.or.kr/fakenews.
[37] COVID-19 False Information Policy (terminated on 31 March 2023).

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10.7 CONCLUSION

Disinformation that is skillfully crafted to appear authentic can have dire consequences for democracy. It can infringe upon individual rights and cloud the rational judgment of citizens on crucial political matters as well. Furthermore, the term 'fake news' has cast a shadow on media credibility by associating it with 'news', thereby eroding trust in traditional journalism and undermining its very foundation. These issues have fueled the call for regulating fake news – that is, disinformation – promoting global efforts to devise legal remedies. South Korea also has been attacked by fake news, which raised concerns during the presidential election and escalated in severity during the COVID-19 pandemic.

In South Korea, where freedom of speech does not hold the same prominent position as it does in the United States,[38] a range of bills aimed at amending defamation law, internet law and press arbitration law have been employed to combat the dissemination of disinformation. However, South Korea's endeavors to combat fake news through legislative means have proven to be less effective than anticipated, leading to increased social controversy. This highlights that the creation of new laws targeting fake news may not be the optimal solution. Instead of attempting to delineate a clear boundary between truth and falsehood under the banner of 'fake news', it is crucial to establish a transparent and inclusive mechanism for discerning authenticity. Strengthening the self-regulation of platform operators and providing a structured framework for self-regulation by government are pivotal steps in this direction. As digital technology and artificial intelligence continue to advance, the demand for regulation becomes even more pronounced.

[38] Ahran Park and Kyu Ho Youm, 'Fake News from a Legal Perspective: The United States and South Korea Compared' (2019) 25(1) *Southwestern Journal of International Law* 100–19.

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