

인터넷윤리 확보를 위한 사이버모욕죄의 재검토

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Reexamination of the Cyber Insult Crime For securing the Internet Ethics

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요 약

최근 사이버공간에서의 댓글 등에 있어서 사실의 적시 없이 오로지 욕설과 비방만의 목적으로 하는 글들이 마치 유행처럼 난무하여 그에 따른 피해가 급격하게 확산되는 현상에 대하여 사회적으로 우려의 목소리가 높아지고 있다. 한편 사이버공간에서 행해지는 모욕행위로 인하여 인격권의 침해결과가 회복하기 어려운 상태에 이르는 경우가 많고, 특정인 익명과 폄행위 등으로 가해자가 누구인지 특정하기가 어려워 범죄피해에 대한 신고나 고소가 어려운 특징을 지니고 있으므로 형법상 모욕죄로는 대처하기가 어려운 것이 현실이다. 또한 불충분한 영역이 많아 별도로 사이버모욕죄를 신설하여 무분별한 모욕행위에 대하여 그 처벌을 강화하고, 형법상 친고죄로 규정되어 있는 부분을 완화해야 한다는 것이다. 그러나 현행 형법상으로도 처벌이 충분하므로 새로운 특별형법을 신설하는 것은 타당하지 않다. 그러므로 사이버모욕죄 또한 형법 제311조의 모욕죄에서 규율하는 것이 바람직하다.

▶ Keywords : 사이버모욕죄, 사이버공간, 반의사불벌죄, 정보통신망법, 표현의 자유

Abstract

Recently, in the cyberspace, the posts that have only insults and abuses without the fact are getting spread rapidly as a trend, it makes the damage to people also, and the social concerns have been raised about its phenomenon. Meanwhile, because of the insulting actions that performed in cyberspace, the results of infringement of personal rights conditions getting difficult to repair. Also, it is difficult to find who the person who acts as a perpetrator is. So, it is hard to report a crime or sued for damages, also, it is really difficult to deal with a criminal contempt. Also, cause of a lot of deficient areas, the Cyber Insult Crime act is need and strengthened penalties or

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Mitigation about the crime subject to victim's complaint are need. However, give the criminal penalties to criminal is sufficient. So, to construct a new special criminal law, it is not advisable. Thus, governed by the Criminal Code Section 311 is preferably.

- ▶ Keywords : Cyber Insult Crime, Cyber Space, No Punishment Against Will, Information Network Law, Freedom of Expression

I. 서론

History of the Internet of Korea, it is the beginning that connected to the network by developing the network system between the Korea Electronics and Telecommunications Research Institute, and Seoul National University in 1982, but substantially in 1994, is the point of that was commercialized. Since then, the growth of the Internet becomes a part of life as a very positive role. On the other hand, it shows a negative part significantly. as one of them, the crimes by using the internet are increasing.

These cyber space play a positive role in our society and at the same time raises many issues and problems, these occurred problems are become expanding beyond personal area to the Social • Economy • Country area.

Especially, the concept of cyber-crime through the Internet is based on the appearance of technology development as name of computer, as with the existing computer crime. it has all the characteristics of a typical computer crime, and add the crime that has the characteristics as kinds of information network[1], all the criminal activity that occurs in a virtual space, which is perpetrated by cyber space, such as criminal acts that undermine public welfare and harm the culture by exploiting the information In cyberspace, etc. according to the scholars the various type of cyber-crime has been used.

Recently, the social concerns have been raised the phenomenon that damaged from cyber space such as

bad writing which has only insults and abuses without any reason is spread rapidly as like syndrome. Especially in October 2008, the one of the reasons of famous actress's suicide was pointed as "malicious comments", it caused great socially confusion, and accordingly the discussions about need of enhanced penalties for these malicious comments were strong.

Such as the offensive expression acts in cyberspace, its range of criminal damage is getting huge. Therefore, in the recognition that must be handled strongly against the reckless insults act in the cyberspace, the establishment of Cyber-contempt law separately from the criminal contempt is need. Government and the ruling party promote the introduction of the Cyber insult law as a special law and regulate as 'No punishment against will', not 'An offense subject to complaint'. But they cannot establish that pushed by public opinion.

Meanwhile, there are almost never the countries which punish the criminal as cyber insult. So, in this study will try to propose why the Cyber insult law is need in Korea through the precedent with in favor or opposite opinion about the need for establishment of Cyber insult law.

II. The Opinion about the Establishment of Cyber insult law

1. Supporting View about Establishment

In the cyberspace, everyone can say their various opinions anywhere anytime without reveal your

personal identity, and has the advantage of being able to pass the information to many people in a short time. However, sometimes these characteristics can cause damage to other person more than offline by connection of false information or someone's accusations. So the people who in favor of establishment cyber insult law, they think the punishment organization is require preventing the human rights violations and social evils. Actually, in the case of insult or defamation, it takes place in front of each other and most of the issues are handled by the offender and victim. But in cyberspace, these points are not reflected. So, the particularity of moral rights infringement using the anonymity of cyberspace. It presented as the basis.

Recently in cyberspace, the lawlessness acts such as defamation or slander of others occurs frequently, and it causes the social issue. So, in consideration of cyberspace, the additional punishment then offline is need. And in order to applying a criminal penalty to cyber insulting behavior, the victim must accused but if does not, it must be punished as 'no punishment against will' is need. In particular, in view of preference most Koreans characteristics of comments in cyberspace who referred to as the undisputed suzerainty of the Internet, to prevent the serious situation that have side effects such as malicious comments, the cyber insult law is must need[2].

In particular, insulted act in the cyberspace is exposed to everyone. So, it can give the damage to other person easily also, its seriousness is very huge. Also, when someone is berated in front of many people than a few people is more serious as mental shock. Thus, considering that the cyber insult act has more extent of damage compared to the common offline activity, the establishment cyber insult law and give the heavy penalties than Criminal Code that can makes a sound cyberspace also, it will be able to arouse awareness to internet users. So it can bring the effect of the legislation [3].

2. Opposite View about Establishment

Recently, the Professor Gyeong Jae-Song in Kyeong Hee University said "In democratic countries, most of contempt are getting abolished or be a dead letter. because it is democratic values" and "If the Cyber contempt operating incorrectly, most netizen and manager of board can get the fear of punishment and the can be reluctant to criticize the policy"[4]. Like this, those who oppose the establishment of Cyber insult law, there is no reason correctly to give additional punishment as insult in cyberspace. Also, they think the freedom of expression that the biggest advantages of cyberspace are infringed.

The Contempt on the Article 311 of the Criminal Act is defined as an offense subject to complaint by Article 312, it can prosecute a case by only the sue of victims. Meanwhile, if the cyber insult law regulated as 'no punishment against will', it can be undertaken the investigation immediately. Also, can prosecute a case. Without the sue of investigation agency. Then, when the victim do not know or do not feel the insult, the investigation and filed sue can be possible. And only in case of that when victim express that he does not want to punish the perpetrators, cannot be punished. So, only who posted the comment on cyberspace goes and asks to obtain the consent after then he can avoid punishment. This situation will take place [5]. In other words, on the part of the government, the investigation agencies will use it as the shield to keep the criticism of citizens[6]. Moreover, to abolish contempt is a global trend, but rather to strengthen punishment is contrary to international trends [7].

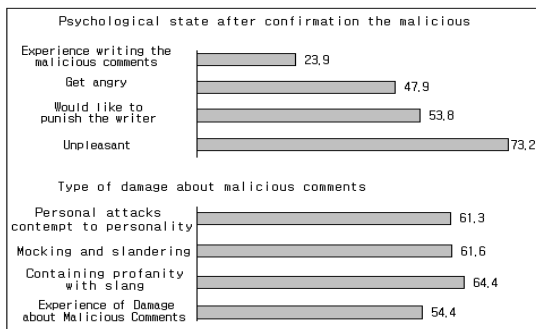
The other hand, Young - Sun Park, who member of Democratic put out the abolition agenda about current criminal contempt through the representing initiative in July 26, 2012[8]. Generally opposed opinion said that despite the law which related to cyber-insult has already established sufficiently,

also, the criminal activities that currently happening on cyberspace can complement by interacting with cyber-culture or enhances the existing Criminal Code and adding new terms, it cannot be understood that amending its nature and level of the cyber insult law extremely.

3. Contents of Actual Condition Survey about Internet Ethical Culture

According to newspaper reports of Seoul Newspaper, the data about 'The Survey of Internet Ethics Cultural Status in 2011' by National Internet Development Agency of Korea shows that Domestic 54.4% more than the half of the Internet users have experienced with the malicious comments. The main damage types (one or more) were swear words • slang (64.4%), mocking captious Post (61.6%), personal attacks • insulting character(61.3%) etc. Among the Internet users, who have posting malicious comments was about 1 person per 4 persons (23.9%). On the Internet, reported cyber violence such as libel • verbal abuse • intimidation was 12,905 in 2007. After then, in the end of 2012 were 10,354. It is steadily more than one million. When see these results of survey, until now it seems like gave the positive direction to creation of cyber insult law.

표, 2011인터넷 윤리문화실태조사, 한국인터넷진흥원
Table, Internet Ethical Culture Survey in 2011, National Internet Development Agency of Korea



III. Analysis for Establishment of Separate Regulations

1. Last Instrumentality of Criminal Law

In opposition to establishment of Cyber insult law, there is no reasonable basis about insult act in cyberspace[9], also, about the insult act in cyberspace, current criminal precedent of the Supreme Court which applies contempt in the Article 311. So, like this way, it cans enough to cope by criminal contempt.

And giving the penalties for malicious comments is possible by Criminal law Article 311 or Network Act Article 70 Paragraph 2. Also, if there are specific facts, it can governed by 'Libel and Slander' in Article 307 of Criminal Law. Seen in this light, the argument for establish the new cyber contempt separately, it have not been able to provide an accurate basis. Rather than punish too hastily to insult act that occurs in cyberspace, it can be punished more easily by criminal contempt or libel. So, overall review about this seems to require.

And the negation is conflict with the last resort principle of criminal, and it means the absence of social tolerance that the guiding ideology of the Criminal Law which make the recognition and respect each other's imperfections and even make overcome self-imperfections.

On the other hand, depending on a positive general prevention theory, rather than how severe the punishment for a criminal act, how much does impose criminal penalties properly is more important to preventive function. Also, the Trust that Law and order is kept be formed across the people, the crime prevention is the most efficient[11]. At least the need for punishment of cyber contempt must be assumed that is bigger than the illegal of criminal contempt. So, malicious comments can exist in cyberspace and the fact that can written is not by

anonymity also, it is wrong that because of the ripple effect by malicious comments legal interests is not bigger than contempt [12].

2. Behavior of Expression in the Cyberspace

2.1 Freedom of Expression

The freedom of expression guaranteed by the Constitution is raise individual personality by some behavior of expression. Also, through the free decision contact between the configurations of the community it formed public opinion. Furthermore, it can be called as the basis for the method to ensure the political integration of society. If any act of expression performed as the purpose of undermine integration of social and bond, it over the limits which ensure the freedom of expression. Then, it cannot guarantee as fundamental right.

Thus, the freedom of expression on cyberspace should be guaranteed, also, when look at the provisions of the Constitution, it is more clear. Also, in accordance with cyberspace, if undermined the reputation of another person by free expression, its result can be changed according to the focus between the freedom of expression and personal reputation. The freedom of expression is regulated in the Constitution Paragraph 1 of Article 21, it is related with posts in cyberspace. Because, there is no limit such as universal media, publishing and internet. However, the freedom of expression is not absolute, the some limit has been set in Article 21 Paragraph 4.

And interpretation of the freedom of the press, and even the Article 21 is appropriate as guarantees of the press or it need revision as the form of new information rights is discussed. Traditionally, only the freedom of expression was discussed. But, the meaning and the proportion of information dissemination and communication are growing, freedom of the media and freedom of information have been recognized as a specific gravity[13].

2.2 Appearance of Mass Media and The Freedom of Expression

The advent of mass media has brought a revolutionary change on the structure of communication. Long time ago, the spread of newspaper or radio, and television it rated as revolutionary changes. But the Internet and mass media are difficult to compare and it has had a major influence in all individuals' areas. like this, the infrastructures that can be used mass media as they prepared, the media impact on our lives increasingly important, also, it can be evaluated as the area of freedom of expression is moved from online to offline. As the medium, the mass media such as newspapers and radio blog and website and also the various forms personal media is utilizing. In recent, its influence been expanding such as Facebook or Twitter, SNS etc. are also, can be seen as a means of expression and new forms of media. In other words, to the new forms of media which could not see in the old days, accept the old legal standard is reasonable or should be made to meet the new standards, the various discussions are being developed[14].

On the other hand, until now the abusive or defamatory expressions that do not allow offline should be allowed generously on the cyberspace are the normal trend. It is same like if they have been insults face-to-face they are not able to forgive, but if they have been to do the same thing with TV and newspapers then, they can skip.

2.3 The Protection of Honor and Freedom of Expression

related to behavior of expression in cyberspace, if the width of the legal restrictions were too widen, After all the Internet users' freedom of expression will atrophied, it should not overlook. However, the behavior of expression on the Internet using as a means of illegal libel rather than the means of healthy communication, the damage is very

extensive and can occur rapidly, also it should be prepared for a proper response .

It means the freedom of expression is a means of self-realization that personal value, also, it contributing to the realization of self-governance. So, it needs the strong protection. And if the honor is tarnished character building and self-realization of the individual can also be difficult. So, the protection of personal honor is contributes to the self-governance and self-realization. Because of this, the need for protection should be recognized[15].

Meanwhile, even though the internet is highlighting the role as a place of communication and information sharing. But, confirm the range of criminal regulatory must be concerned to protection of honor in the new environment as name of internet. Also, repair the attached problem reasonably need[16].

2.4 The Principle of Clarity

The principle of clarity has the particular significance in the legislation to regulate the freedom of expression. The Constitutional Court said, "if what is prohibited is unclear, their express cannot expect and not sure this is not subject to regulation and worried about that, it is likely to be suppressed freedom of expression themselves. The law to regulate freedom of expression, it is required constitutionally as precisely and clearly[17]."

Also, in regulate the principle of interpretation of the law which restrict the freedom of expression, the legal principle will be presented and established clearly. So, the configuration requirements and maintenance of the overall legal framework will be necessary. Especially, the provisions of the cyber insult law can expand the behavior of dual criminality too excessively. So, the careful considerations are required[18].

3. Precedent of Supreme Court

Insult means the act those express personal contempt feelings to someone without the prejudice

of fact[19]. The Supreme Court ruled in 2003, the defendant written to online board of broadcasting station after watching the current affairs program. In particular, among that post the expression that 'You are really great, how do you use your precious son as a shield for criminal activity'. This expression undermines social assessment of victim[20]. This position of the Supreme Court looks like judge the contempt widely and in this position the establishment of a cyber insult law does not need.

About the contempt, it has been suggested to consider that the Supreme Court judged by circumstances precluding wrongfulness as 'The Social Rule'. The Supreme Court said "the insult to say in the contempt not ignore the truth, express feelings to degrade social assessment of the person. If some posts contains the profanity expression of judgment or opinion. In light of the healthy social norms in that times, the expressions does not violate the social norms, the illegality can brake by Article 20 of the Criminal Code[21]."

4. The Ambiguities of Legal Interpretation

If the cyber insult law be introduced, someone worried about the ambiguity of the interpretation of the law, and it may be exploited as a means of arbitrary punishment. In other words, the investigation agency can punishing strongly to netizens who posted an article criticizing the government. Like this, it can be used for political purposes. Above all, the uncertainty about the standards of cyber-insult should be concerned the possibility of the rights of the individual infringement by accused of third parties and particular group. If it is not disgusting insult, it has the possibility to meet the requirements of contempt even if it is sarcastic or polite expressions[22].

IV. A Review of the Relevant Provisions

1. The pending Information Network Act and The Criminal Law

Some of the criminal amendment bill of pending in Congress is stipulated the cyber contempt in Article 311-2. This provision defining that "Who defining commit crimes by computers and telecommunications systems as Article 311, shall be punished as imprisonment of up to three years or under 10 million won". And its requirements of configuration are the same as general contempt. but it regulate the regulations which can severe penalties, and same as the libel that regulated in paragraph 4, it regulated as the no punishment against will which can punish without sue of victim.

In addition, some amended bill of Information Network Act regulates the cyber insult law in paragraph 3 of Article 70 that "who insults a person publicly through information network shall be punished the less than two years imprisonment or the fine of up to 10 million won". Like the Proposed amendment of Criminal law, it severe penalties rather than general contempt and regulate the no punishment against will in Paragraph 4.

2. The Discussion about Punishment

The insult in common living space is almost one-time. And occurring only between the offender and the victim, In other words, sometimes it related only each other. And most cases are taking place in confined space and the case that concerned about spreading damage is few.

However, the posts are remains in the boards, the insulting behavior occurred in the cyberspace is not one-off. It can be known to many people momentarily, also, it has the possibility of expanded reproduction which can be fatal to victim's moral

rights and infringement of honor. Therefore, based on these characteristics there are some opinions that severe penalties as the libel by publication is reasonable.

Due to this high potential for transmission, considering the violations of legal interests to victims is large, severe more penalties about the contempt on the cyberspace better than just contempt. In other words, put the difference statutory punishment looks be valid. And that would be understood in the same context as like that.

In this regard, if newly established the cyber contempt in the Criminal Law, someone argue that the requirements 'the purpose of slander' should be added and leave the upper limit of the statutory punishment like libel is reasonable. But about the express the opinion of contempt, delete the purpose of libelous seems to be appropriate. So, configured requirements of contempt include it is not appropriate.

3. The Feasibility of Regulations of the No Punishment Against Will

The Contempt in Article 311 of the Criminal Act regulated as an offense subject to complaint. But the insult on the Internet that the view about claims of the establishment of cyber contempt. As with the libel on the internet, should be defined as no punishment against will. The damage caused by Cyber insulting behavior is so huge, it cannot see the criminal. The extent of illegal is large and it can be the social issue. Like this it enough to be a social hazard.

About this, it should not be considered be simple. if regulate the cyber insult law as the no punishment against will, it has the advantages that can respond quickly without the accused or the prosecution of party and indictment, investigation is respond to quickly, can stop the spread of the damage. But the number of small and large acts of insults on the cyberspace is immense, and there is no guarantee that the law enforcement agencies

cannot handle all of that. It is the problem that cannot give them some legal right to portal and many private companies. Thus, law enforcement agencies have no choice but to investigate selectively and it is not reasonable to the reason of establishment the cyber insult law[23].

Therefore, in order to prevent the possession of abuse, take the form of current an offense subject to complaint would be appropriate. It means maintain the offense subject to complaint is appropriate because, even if the need of insulting behavior on the cyberspace is accepted, when the criminal penalties proceed, regardless of the decision of victim, it may cause side effects that the country can monitor people's comments[24].

Recently, about the introduction of the cyber insult law, in the National Human Rights Commission, they consider the introduction of cyber insult law contempt cause of that the damage caused by defamation or insult on the cyberspace is getting serious. However, to minimize the atrophy of the freedom of expression that occurred unexpectedly, cautious approach is necessary and in terms of that, to cyber insult law, the form of an offense subject to complaint rather than, no punishment against will[25].

V. Conclusion

In this study looks for the adequacy of establishment the cyber insult law through the analysis of information. In this regard, establishment the cyber insult law to punish cyber comment of insults and accusations ignore the essential characteristics of cyber space it is not fit for the purpose of criminal law that distinguish the libel and contempt. In addition, it conflict with the configuration requirements of criminal law and duplicate legislation will reprehensible. And there is no reasonable reason to add the illegal on the cyberspace, also, it opposed to the principle of proportionality to last resort of Criminal Law by

downplay the social tolerance.

Because the contempt on Criminal law is an offense subject to complaint, if there is no accusation of victim, it is hard to punish the insult on cyberspace by applying criminal law. The opinion that establishment the cyber insult law as the form of no punishment against will that think about the consideration that the reason why the criminal law regulate the contempt as an offense subject to complaint and considered as first the opinion of victim in that case.

Illegal act of Insulting behavior in cyberspace is bigger than the current Insulting. So, even when there is no intent of punish of victim, it is hard to find the reasonable basis that must be punished.

Also, the punishment for criminal contempt is too weak and it regulated as an offense subject to complaint, it is also invalid that in order to prevent the contempt in cyberspace, more powerful punishment is need. And to prevent and suppress the offensive expression that occurs frequently in cyberspace, it needs to increase enforcement that has the effectiveness of existing laws and regulations. On the other hand, without increasing the enforcement of the penalty, only strengthen the punishment and ease the procedure of punishment is looks like pre-modern attitude. Therefore, rather than the establishment of a cyber insult law that to strengthen penalties, find the application Plan to increase the effectiveness of existing laws. And considering the current criminal system that flooding Special Act, add the portion of the configuration criminal contempt rather than the Information Network Act and more attention to figure out the reasonable plan is expected.

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