

***Case on “Crime of Online Defamation” Prosecutable without
Criminal Complaint by Victim***

[2018Hun-Ba113, April 29, 2021]

In this case, the Court held that the part concerning Section (2) in Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. does not upset the balance in the criminal punishment system, and thus, does not violate the principle of equality. The relevant part provides that the crime of defamation by disclosing a false fact to the public through an information and communications network is an offense prosecutable without a criminal complaint by the victim.

Background of the Case

Complainant was charged with “defamation of another person by disclosing a false fact to the public through an information and communications network to disparage the reputation of such person (crime of defamation under Article 70, Section (2) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.)” and was fined by the court.

During the trial, Complainant petitioned the court to request constitutional review of Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. This section provides that the crime of defamation under Article 70, Section (2) of this Act is an offense prosecutable without a criminal complaint by the victim, as opposed to an offense prosecutable only upon a criminal complaint by the victim. Following rejection of the petition, Complainant filed a constitutional complaint, asserting the unconstitutionality of Article 70, Section (3) of the above Act.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning Section (2) (such part hereinafter referred to as the “Provision at Issue”) in Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (amended by Act No. 9119 on June 13, 2008) (hereinafter referred to as the “Network Act”) violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Network Act (amended by Act No. 9119 on June 13, 2008)

Article 70 (Penalty Provisions)

- (3) The crimes in Sections (1) and (2) may not be prosecuted if the victims explicitly object to the prosecutions (emphasis added).

Summary of the Decision

Article 312, Section (1) of the Criminal Act¹⁾ provides that the “crime of defamation of a dead person (Article 308 of the Criminal Act)”²⁾ and the “crime of insult (Article 311 of the Criminal Act)”³⁾ are both *chingojoe*⁴⁾. Conversely, the Provision at Issue stipulates that the “crime

1) Article 312 (Criminal Complaint and Will of Victim) of the Criminal Act

(1) The crimes in Articles 308 and 311 shall be prosecuted only upon criminal complaint.

2) Article 308 (Defamation of a Dead Person) of the Criminal Act

A person who defames a dead person by publicly alleging false facts shall be punished by imprisonment with or without prison labor for not more than two years or by a fine not exceeding five million won.

3) Article 311 (Insult) of the Criminal Act

A person who publicly insults another shall be punished by imprisonment with or without prison labor for not more than one year or by a fine not exceeding two million won.

4) *Chingojoe* is a type of offense that requires a criminal complaint by the victim or other person in order for a prosecutor to institute the prosecution.

of online defamation by disclosing a false fact (Article 70, Section (2) of the Network Act)⁵⁾ is *baneuisabulbeoljoe*⁶⁾. Accordingly, the issue is whether this stipulation in the Provision at Issue upsets the balance in the criminal punishment system, violating the principle of equality.

Criminal prosecution is divided into two types based on who initiates the criminal lawsuit: state prosecution and private prosecution. Article 246 of our Criminal Procedure Act provides that “A prosecution shall be instituted and executed by a public prosecutor” and thereby declares the principle of state prosecution. This principle is reasonable in that it assures the appropriateness and balance of prosecutions. *Chingojoe* and *baneuisabulbeoljoe* are understood as exceptions to, or limitations on, the public prosecution principle. In prosecution for those types of crimes the will of victims or other persons is respected and the exercise of the authority of the state to impose criminal penalties is thereby restricted. The legislature decides which offenses should be included in the category of *chingojoe* or *baneuisabulbeoljoe* by considering the severity of damage resulting from the crime, the degree of social harm caused by the crime, the benefit of exercising prosecutorial authority, and the benefit of restricting that authority upon request of the victim. In other words, that decision is a matter within the broad discretion of the legislature.

5) Article 70 (Penalty Provisions) of the Network Act

(2) A person who commits defamation of another person by disclosing a false fact to the public through an information and communications network to disparage the reputation of such person shall be punished by imprisonment with labor for up to seven years, by suspension of qualification for up to 10 years, or by a fine not exceeding 50 million won.

6) *Baneuisabulbeoljoe* is a type of offense that a prosecutor may charge without the victim’s or other person’s expressed preference for punishment of the offender but may not do so if the victim or other person makes a clear objection to such punishment.

The “crime of insult” and the “crime of defamation of a dead person” under the Criminal Act and the “crime of online defamation” under the Network Act all share the common feature of protecting interests in “reputation,” i.e. social evaluation of the value of an individual. At the same time, there is a difference between the first two crimes and the latter crime. The first two are less severe offenses than the latter. The “crime of insult” is the expression of abstract opinion and emotion, rather than concrete fact, about the victim, and the “crime of defamation of a dead person” is the publication of false facts about a dead person as opposed to a live one. In comparison, the “crime of online defamation” under the Network Act is more wrongful behavior and produces a more unjust outcome because it is the disclosure of a false fact through an information and communications network for purposes of disparagement.

Since an investigation of and prosecution for *chingojoe* may be instituted only upon a criminal complaint by the victim, the enlargement of the scope of *chingojoe* provides greater respect for the will of victims. This enlargement, however, may dissuade those victims who are in fear of retaliation by the offender or of injury to their reputations from filing criminal complaints. Conversely, the enlargement of the scope of *baneuisabulbeoljoe* facilitates damage compensation by perpetrators, as well as agreement between perpetrators and victims, because an investigation of and prosecution for *baneuisabulbeoljoe* may be initiated without a criminal complaint by the victim. However, an investigation of a relatively minor offense might run counter to the will of the victim if commenced without a criminal complaint by him or her. For these reasons, it cannot be assumed that the enlargement of either type of crime is necessarily reasonable.

The legislature decided whether an offense should be included in the category of *chingojoe* or *baneuisabulbeoljoe*, based on the above-mentioned considerations and the balancing of various factors, such as harmony of the benefit of exercising prosecutorial authority and the benefit of

restricting that authority upon request of the victim. Therefore, the Provision at Issue, which provides that the “crime of online defamation” under the Network Act is *baneuisabulbeoljoe*, does not upset the balance in the criminal punishment system, and thus, does not violate the principle of equality. Accordingly, the Provision at Issue does not violate the Constitution.