

# The Growing Influence of Private Expressions and Public Responsibility in Advanced Information Society: A Socio-Legal Approach to the Minerva Case\*

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*By examining the Minerva case from 2008-10 this paper deals with the issues surrounding freedom of expression that arise from the increased influence of private expressions on public bulletin board systems in the context of a technically and socially developed Internet. In section 2 we review the legal context of the Internet bulletin board system, especially public Internet bulletin board systems, and introduce the Minerva case in the social context of the year 2008-9 in section 3. In section 4 we discuss the legal process of the Minerva case at courts, and present a socio-legal consideration of the Constitutional Court's decision in section 5. We conclude by arguing for the necessity of rebalancing freedom of expression and public interest, and properly specifying the meaning of public interest in the social public in a democratic Internet society.*

**Keywords:** *freedom of expression, public interest, sociology of law, public Internet BBS, the Minerva case*

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## Influential Power of Private Expressions and Its Free Expression in Advanced Information Society

As the Internet becomes one of the key social infrastructures in society, it not only produces many new social problems, but also makes existing ones more complex. These diverse social problems call for a new normative and legal approach to regulate it appropriately. Hence, the conventional approach to legal rights and duties has been to bring a fundamental reformation as this continuous change calls for a new paradigm for ethical-normative and legal-institutional governance<sup>1</sup>. In particular, freedom of expression on the Internet has been a critical issue since the early stages of Internet society. Its development has provided a new online realm for private expressions, and it has become an important factor in the promotion of new social movements and democracy (Rheingold 2002; Kim 2008). Freedom of expression – as a fundamental right on the Internet, especially at the early age of the information society has become one of the most controversial rights in relation to the development of the Internet, often conflicting with issues such as invasion of privacy and defamation in the private sphere. These problems are leading to a fundamental rebalancing of freedom expression and of privacy (Solove 2004; 2007; 2008; Levmore and Nussbaum 2010).<sup>2</sup>

What is more critical now is not the misuse of freedom of private expression on the Internet, which traverses into privacy and defamation, but the problem of freedom of private expression itself coming from its more greatly influential power in the technically and socially developed Internet. The Internet leads to the development of an advanced network society facilitating higher speeds of delivery and broader reach of information by multiple devices, stronger and broader interactivity of communication and higher complexity, including an “Internet of Things”, in a global context. Therefore, the extremely strong impact of private expressions on the Internet

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<sup>1</sup> Sociology of law or legal sociology, which is oriented to law in society, so-called ‘living law’ (Lebendiges Recht) (Raiser 1999), contributes at first to reveal not only social situation of law but also legal influence to social life. Second, it makes a contribution to new interpretation of previous legal words and logics in changing social context and a social necessity of developing new legal words and logics in new social context (Cotterrell 2001; Woodiwiss 2011). The latter is a research case about social process of making Hate Crime Law (Phillips and Grettet 2000).

<sup>2</sup> Because privacy problem in an advanced information society becomes more mixed with other rights such as freedom of expression, public interest etc., it should be contextualized and more specified for its legal consideration, which is conceptually named as ‘embedded privacy’ (Suh and Son 2011).

can threaten an entire society, so that, at the minimum, the so-called 'public' interest should be newly recognized – with net-citizens needing to take greater social responsibility for protecting the 'social common' interest of social communities, under an assumption of freedom of expression.<sup>3</sup>

Until now problems of public interest conflicting with freedom of expression have been discussed in the context of dictatorships or authoritarian countries like China and the Arab states, where state-level public interests (the state public) such as state-system or national security issues, the protection of government organization or political process are easily abused for the oppression of socially and politically diverse expressions of net-citizens (Kalathil and Boas 2003).<sup>4</sup>

However, the development of the Internet in democratic countries also causes new conflicts between freedom of expression and public interest, especially the social-level public interest (the social public) in protecting the social common interest.<sup>5</sup> The Internet is currently not only used by individuals who want relevant communicative tools or space, but also by many commercial corporations, including mass-media companies, and public entities looking to pursue the public interest. Thus, with the diverse differentiation of the public sphere and the confusion and reorganization of the public and private spheres, the notion of public interest on the Internet has achieved a more diverse and complicated status. As such, a special situation is emerging in which freedom of expression as a basic right of the Internet age may be vulnerable and needs to be given greater theoretical specification with regards to its relationship with public interest. Therefore, this paper tries to show the social and legal necessity of protecting freedom of expression through a greater specification of public interest in the social public in a democratic Internet society through an examination of the Minerva case study in Korea.

We argue this through a documentary content analysis of legal decisions before and after the Minerva case.<sup>6</sup> In section 2 we review the socio-legal

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<sup>3</sup> The legal concept of 'public interest' has yet to be thoroughly studied in the context of complex contemporary society (Choi 2002, p. 38), as was shown by the Yahoo! case, where a French court tried to ban Nazi-like expressions on the Internet (Youm 2004).

<sup>4</sup> The assumption of total oppression of socially and politically private expressions in mainland China was refuted by Guobin Yang (2009) and Xiao Qiang (2011) (Suh and Tang 2013; Suh 2014).

<sup>5</sup> Free Speech and Expressions have been historically transformed according to social and ideological change (Graber 1991), as all human rights come to be diachronically and contextually emerging and changing (Galtung 2011).

<sup>6</sup> Main usage of documentary content analysis of legal decisions in this paper comes from their interpretation in a relation with changing social context (Platt 1981). Besides this there can be

context of the Internet bulletin board system (henceforth, “BBS”) in Korea, and introduce the Minerva case in the social context of the year 2008 in section 3. The legal process of the Minerva case is critically discussed in section 4, and a socio-legal consideration of the Constitutional Court’s decision in section 5.

## The Minerva Case in the Legal Context of the Internet BBS

### *Legal Decision of the Public Sphere of the Internet BBS*

The Internet has been defined as a tool for private communication since late 1995 when it was first commercialized in Korea. To understand the early structure and characteristic of Internet regulation, we review the 99Hun-Ma480 constitutional case which declared Section 53 of the Act on Electric Communication Business to be unconstitutional in 2002.

First, the Internet was included in regulation because it is relevant to the public sector. Before the information highway was set up, modem and telephone-lines were used for online access. The early Internet was just one of several forms of online communication media. There was also “PC communication”, for instance, which was mostly composed of text-based BBS. At the beginning, they just delivered private communication between individuals and they were not regulated. But the situation changed dramatically after they began to deliver information to anonymous people - that is, to the public. And although they used telephone lines originally designed for private communication, the Constitutional Court focused on this extended function of delivering information to the public.

Second, this was old regulation being applied to new media. The legal approach taken by the government towards the Internet was still based on old media, failing to understand the new technology and the change in the communication environment. The expansion of the communication function of the Internet led to new regulation with an old regulation mind-set. It was, however, the first time for this section to be applied to new media.

Third, there was a dual approach to regulation - one direct, the other indirect. The old regulatory approach could usually be aimed just at contents

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methodologically language analysis, which is specified only to content analysis without relation to changing social context, and quantitative content analysis such as statistic analysis and mixed content analysis such as keyword network analysis.

delivered by the Internet because technological change was too fast to be fully understood and was usually supported by the state government. Hence, the regulation of “online media” was focused on content rather than form. The primary judgment of contents was made by the administrative office in charge of communication policy. The content regulation was directly controlled by an administrative power. But this regulation was aimed not at users, who were usually individuals, but at service providers (henceforth, “SPs”) who were usually commercial corporations. Hence, this regulation formally took an indirect approach. It was possible because there was a triad relationship between the Ministry of Communication and Information (an administrative power), the Service Provider, and the user. For example, under this system, if a user uploads an article that is judged upon administrative inspection to include inappropriate contents, the SP receives an immediate administrative measure to block or delete the article. If the SP defies the order then they are punished. It is especially serious when related to a criminal case. The problem caused by this triad relationship still exists and a case in the Constitutional Court is now ongoing (2008Hun-Ma500).

Fourth, the regulation of “online media” was a de facto pre-censorship even though it was formally post-censorship. It seemed to be post-censorship because private expression was restricted by public authority after it had been uploaded. But, because of the asymmetrical power relationship of the triad system (the “triangular system”) – users and SP, SP and authority – there was a high possibility that the formal post-censorship would function like a pre-censorship when the authority’s regulation of the SP was implicit in the service contract between users and the SP.

In short, though the Internet was exposed to regulation as its newly-extended functions were related to the public, the means used to regulate the Internet were outdated and many complex problems occurred because of the triad system of the Internet censorship policy - “users – SP – public authority”.

The regulation of the Internet now needs to be changed because the current situation is very different to the early stage of the Internet. The Internet has now been extended to almost every aspect of our life; in the private sphere this includes private communication, commercial activities and news/broadcasting services.. In the public sphere it includes exchanges of public opinion, debates over government policy and participation in election campaigns. In particular, the extension of the sphere of public opinion on the Internet makes it inevitable that the foundation of Internet regulation must be changed. According to the constitutional decision of 99Hun-Ma480, the Internet is included in the legal realm because it

functions, not only as a means of private communication, but also as a means of delivering information to the anonymous public. The latter part, “means of delivering information to the anonymous public”, would be “public communication” rather than private communication. Now then, how is Internet-based public communication different from earlier forms of public communication such as newspapers or broadcasting?

In the 99Hun-Ma480 decision the Constitutional Court emphasized that the Internet has particular traits which are different from the public broadcasting system. Traits such as “participative”, “expressive”, “interactive”, “active and premeditative” can be related to the user-driven aspect of the Internet. On the other hand, the trait of “low entry-barrier” can be related to the SP-driven aspect of the Internet. These dual aspects of user and SP are fundamental to justifying the necessity of regulation that is different from the old regulation for broadcasting. That is an equal treatment principle - “equal to equal, different to different”. The decision shows this point well by mentioning that the strong regulation of public broadcasting is justified because of its public responsibility and public interest.

As shown above, public broadcasting is different from the Internet because of both user-related aspect such as “permeability” or “lack of control” and SP-related aspects such as “rarity”. Meanwhile, though it is mentioned only in comparison to broadcasting, the press media have less strong regulation because it has weaker traits in every aspect compared to broadcasting. In short, according to the 99Hun-Ma480 decision, the regulation of the public communication media should be determined in a consideration of the dual aspects of user and SP, and the strength of regulation would be – in order from strong to weak: public broadcasting, press-media and the Internet.

### *Legal Decision of the Portal Site as a Convergence of Public and Private Space*

However, public communication on the Internet became more sensitive with the convergence of the Internet with conventional media forms and the oligopoly of the portal sites. As is shown in the 99Hun-Ma480 decision, the traits of media are important in the regulation of the Internet. Currently, the Internet produces diverse services due to the more diversified desire of users and the advance in technology. As this convergence is promoted by the centralization of both economic and social capital, it makes the entrance barrier much higher than before in the supply aspect (this is shown, for example, by the centrality of the portal on the Internet and the convergence

of services on the portal). In addition, the service convergence of the Internet began to take on most of the traits of the conventional mass media because the Internet delivered the same contents to the public. Because of this, the user-related aspect of the media traits of the Internet has changed considerably.

Consequently, the regulation of the Internet needs to be debated from a new dimensional approach that is different from the previous approach based on the separate traits of each media form in consideration of the portal driven service convergence on the Internet. Some changes in the Internet regulation are applied to the decision-making of the courts and the Korean Constitutional Court.

The regulation of the Internet portal has significance. In 2009 the Korean Supreme Court approved of the responsibility of the Internet portal for managing the contents of web-based bulletin boards or “web-boards”<sup>1</sup>. There is a very detailed legal explanation of the Internet portal in this decision. It is a very important case because it mentioned not just “Internet” but “portal site” which is a more concrete example of the Internet; it also discussed “portal site” from a legal viewpoint for the first time in a leading case in Korea. In the decision, a “portal site” is called as “Internet total information providing space”, meaning a place in which “portal service” is offered.

The portal service includes functions such as the arranging and searching of information according to fields, Internet BBS, email and game services. Among them, “the Internet uploading space” (so-called Internet BBS) is the most important in relation to Internet regulation. Using the Internet BBS, users not only write and save their opinions and diverse information on their own, but also share and exchange it with other users. In this case, “the news uploading space” (so-called news BBS) - the main issue in the case - is regarded to be something different from the Internet BBS because it is mainly used for delivering the news service transmitted by the conventional broadcasting or news-reporting media. For the Internet BBS only “private Internet uploading space” (so-called, private Internet BBS) is included in the case, but conceptually and logically there should also exist “public Internet uploading space” (so-called, public Internet BBS) (Suh 2009).

The suggestion of “public Internet uploading space” (so-called, public Internet BBS) is crucial for dealing with the legal issues of the service convergence of the Internet portal. As it is different from private Internet BBS, freedom of expression in public Internet BBS will be treated as a primary issue, because - from the first - Internet users ‘publicly’ write and

save, and additionally share and exchange their opinions or information mostly on public issues. For example, those sites for commenting (*daetgul*) on news articles, the open spaces for debating public issues (*toronbang*), and the answers to information-searching BBS would all be termed “public Internet BBS”. In the decision, these examples are dealt with differently from those of the private Internet BBS.

However, there exists a common trait between the private and the public in that, as a general rule, any harmful action toward other people is not accepted. It results from a general trait of Internet BBS that has dual functions; namely, diffusion.

According to this case, the diffusion of the Internet BBS produces both danger and profit. As it is possible that the public Internet BBS could contribute to public interest when the subject or method of its operation works positively, the profit is not limited to the portal business. For example, the volunteer campaign for the Tae-an oil spill accident or the social funding for developing new ideas. We will examine the public Internet BBS further through the Minerva case.

Additionally, as the Internet BBS is a very common service in Korea (and not just in the portal but in the governmental websites and many homepages for businesses), so the issue of the public Internet BBS should be debated more extensively. On the other hand, basically, SNS such as Twitter or Facebook could be regarded as private Internet BBS. But the situation might be changed dramatically depending on the legal decision regarding its public nature.

## Social and Political Characters of the Minerva Case

### *Progress of the Minerva Case*

‘Minerva’ is the pen name of an Internet user who wrote many articles criticizing the fragility of the Korean economy and explaining the process of the global financial crisis during 2008 in an open economic issue debating room (the Gyeongje [“economy”] *toronbang*) provided by Daum (www.daum.net), one of the biggest portals in Korea. He was arrested on January 15, 2009 on accusation of public endangerment by intentionally providing false-communication to the public. Now, we will look over the story of Minerva.

(1) 'Minerva' began to write articles: Mr. Park Dae-Sung began writing articles from March of 2008 under the pen name called "Minerva", analyzing and predicting the trends of both domestic and global economies in an economic issue discussion BBS called "Agora" on the Daum portal site. His articles warned of the danger to the Korean economic situation in relation to the USA during the financial crisis. In 2007, there was a possibility of bankruptcy of financial companies such as Bear Stearns and Merrill Lynch due to the crisis of derivative securities of mortgage loan. The possibility of a financial crisis in the USA was top news globally as Bear Stearns Co. was merged with J.P. Morgan on March 17, 2008. As there was a controversy over the global financial crisis, Mr. Park uploaded articles of economic implication that were potentially important to domestic net-citizens. Relatively, however, he gained little public attention because, in the early part of 2008, there was great controversy over the importation of US beef potentially infected with BSE (or Mad Cow Disease) after the FTA between Korea and the USA.

(2) He predicted the bankruptcy of Lehman Brothers: 'Minerva' actively forecast the possibility of a financial crisis in the USA and wrote articles warning of the danger to the Korean economy. On August 8, 2008, his article titled "MB (Myung-Bak Lee, the then President) said that all national people have to make sacrifices for 2 years". It caused a great sensation and began to gain much attention as it received more than 1,000 replies. He continued to write about the possibility of a rapid rise in the exchange rate between KRW to USD and the potential for a foreign exchange crisis. On July 30, 2008, he posted a shocking article on 'Agora' online forum for economic issues, under the title "On August 1, currency exchange will be fully halted" in which he wrote that the danger of foreign exchange had been realized. In particular, on August 25, he predicted the bankruptcy of Lehman Brothers after the failure of an investment agreement with Korea Development Bank and his prediction appeared to come true when Lehman Brothers went bankrupt on September 15. Since then, his articles began to gain huge attention with hundreds of thousands of article views followed by thousands of replies.

(3) He became famous: The social influence of his articles became more powerful with his newly-gained trust as the global financial crisis spread after the bankruptcy of Lehman Brothers. On September 18, his article titled "Operation name: Wolf Hunting (code name of hedge-fund in 1997)" gained over 200,000 article views. He began to lead public opinion on 'Agora'.

Following that day, most of his articles recorded views between 100,000 and 200,000 and as the number of replies also continually increased. Moreover, he became famous enough to gain an online nickname, “President of the Economy”, after his predictions about the bankruptcy of Lehman Brothers and the rapid rise of the KRW-USD exchange rate came true in late 2008.

(4) He criticized the government more strongly: His criticism of the government got much stronger after he became famous. His articles were

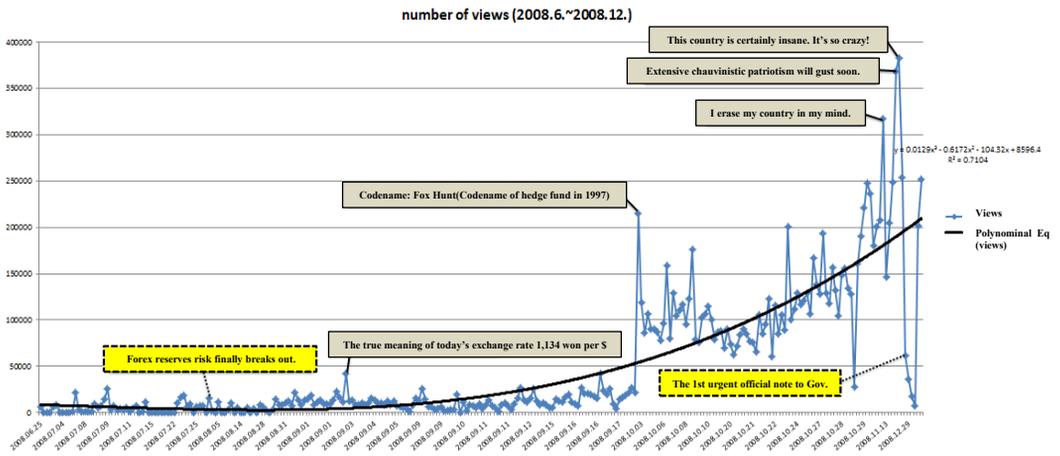


FIG. 1.—Number of views of Minerva’s articles

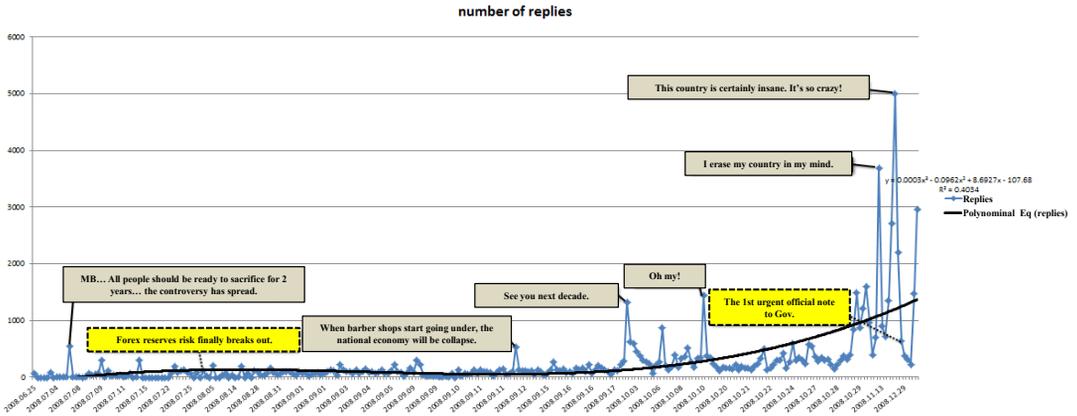


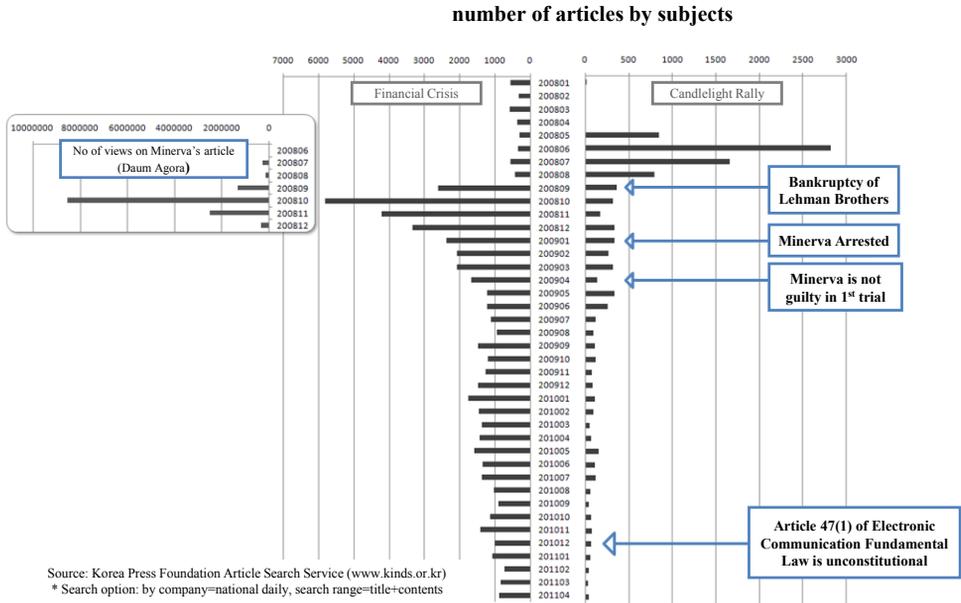
FIG. 2.—Number of replies to Minerva’s articles

becoming more critical, as seen in titles such as “Now, I erase Korea from my mind (November 4)”, “Sooner or later, there will be a huge madness of patriotism”, and “This country is surely going mad. How truly mad it is”. Also, he got even more attention with 300,000 to 400,000 article views and 4,000 to 5,000 replies. On December 29, 2008, he was confronted by the government just after he exposed the fragility of the government’s economic policy by posting an article titled “the first emergency notice from the government”, in which he claimed that the Korean government ordered seven major Korean banks and other major export companies to halt dollar purchase.

(5) He was arrested for breaking the law: On January 7, 2009, the prosecution arrested him for violation of Article 47 (1) of the Electric Telecommunication Act which prohibits public false communication by electric telecommunications facilities and equipment with the intent to harm public interest. He was detained on January 10. On January 22, he was officially prosecuted for violating Article 47 (1) of the Electric Telecommunication Act. The prosecution demanded detention for one and a half years at the final hearing on April 13 but the district court denied the motion and rendered a verdict of innocence. The ‘Minerva case’ became more unique and famous when Mr. Park filed a motion requesting a review of the constitutionality of the provision and the prosecutor filed a notice of appeal.

### *Social and Political Background of the Minerva Case*

The Minerva case holds an important position in Korean society. First of all, politically, it focuses on a crucial position. As ‘Minerva’ became famous, the government had a strong need to resolve the coming economic crisis, as it reminded people of the 1997 IMF nightmare. At the same time, the Myung-Bak Lee (MB) government was searching for a new approach to recover political popularity following huge candle-lit demonstration against the import of US beef that the government had tried to arrange in accordance with the Korea-USA FTA. So, from the viewpoint of the MB government, the economic crisis was a potential key to regain popularity, as it had been suffering from strong anti-governmental activities for almost the entire time since the 2007 presidential election. By 2008, the demonstration against the import of US beef had weakened – the number of news reports about the demonstrations decreased to 2,800 in June, to 1,700 in July and to 800 in August respectively. On the other hand, the discourse for the economic crisis such as ‘the second IMF financial crisis’ had been rising continually – the



SOURCE.—www.kinds.or.kr (Korea Press Foundation)

FIG. 3.—Number of News Reports by Issue Keywords

number of news reports were 120 to 200 from January 2008 – and strengthened dramatically just after the bankruptcy of Lehman Brothers. This situation gave the MB government a chance to switch the public attention from political to economic issues. As Korea had been experiencing a government-driven economic development, the change to economic issues could be powerful enough to work well as a national agenda. Simultaneously, Mr. Park’s criticism of government was greatly increasing too - his article view count was 1,300,000 in August, and 8,300,000 in September respectively. The claims of his articles contributed to an alternative economic agenda against the government-driven resolution to the global economic crisis. Consequently, ‘Minerva’ and his claims functioned as a barrier to the MB government for changing the national agenda to recover political popularity.

Second, as a spatial issue, the public Internet BBS or Internet forum of portal site is the core space of Minerva’s activities. It would seem to be proven that the social influence of the Internet - not a reproduction of mass media’s influence but as an alternative - could be well reinforced by the public Internet BBS. Agora is the most popular Internet forum in Korea, and is operated by Daum, one of the biggest portal sites (over 20,000,000 people

visit Daum per month).

Though there are many specialized forums such as politics, economy, society, real asset and securities. in Agora, the economic forum was the most active during the global financial crisis. 'Minerva' achieved great popularity by posting his articles critical of economic policies on this public Internet BBS.

Third, his articles noted and warned about the dangers of Korea's economic operating system during the global financial crisis. He pointed out that the crisis could be easily made worse by the government's failures in the market - regardless of the purpose behind their interventions. His prediction was based on the possibility of failure in managing the foreign exchange. He claimed that if the government failed to manage foreign exchange and the exchange rate and inflation became severe, the second IMF crisis could happen in the immediate future. In one article, he claimed that the exchange rate would rise rapidly up to 1,400 KRW/USD in the early part of October 2008, and that Lehman Brothers could go bankrupt after acquisition plan was withdrawn by the Korea Development Bank. He also made predictions such as the fall of stock prices, the fall of real asset prices, increase of interest rate, inflation etc. He became so influential and his claims were so powerful that even the government operating the economic system could not ignore him.

The Minerva case takes an important position in Korean society because it brings together three issues: domestic politics, the development of information technology and, in particular, public Internet BBS run by portal sites and discussing new aspects of the global economy.

## Legal Disputes and Progress of the Minerva Case

### *Disputes on the Arrest of 'Minerva' and an Application for Bail*

On January 7, 2009, Park Dae-Sung, known as "Minerva", was arrested for violating Article 47 (1) of the Electrical Telecommunication Act, which prohibits individuals from providing publicly false communication with intent to harm public interest through electric telecommunications facilities and equipment. The prosecution began to investigate him following a petition made on October 30, 2008, and they requested that DAUM provide his access data in order to find a legal reason to arrest him. The prosecution noted that they arrested him on January 7, 2009, and were trying to find an accomplice. The press described him as a person who "graduated from only a

2-year college and has no job”, and pointed out that, according to his statement to the prosecution, he had “no work experience in a foreign financial company, never studied abroad, and studied economics only on his own”

On January 9, 2009, the Seoul Central District prosecutor’s office requested a warrant for his arrest and the Seoul Central District Court approved it on January 10 following a detailed examination. As a result, Mr. Park was detained in a Seoul detention facility located in Uiwang city. Some net-citizens became very angry upon hearing the approval of his detention, and criticized the judge severely. Again, on January 13, 2009, lawyers for Mr. Park requested the court to review the legality of the detention but this also failed too. Though the judge in charge of reviewing the case said that the detention of ‘Minerva’ was legally relevant, there was a major controversy over the legality of his detention within the legal arena.

On January 22, the prosecution submitted a written arrangement to the court. The case was assigned to the 5th single criminal justice of Seoul Central District Court.<sup>7</sup> The alleged crime was identified as “violation of the Electric Telecommunication Act.” Judge Yoo Young-Hyun presided over the trial. The defense lawyers were composed of people related to the non-governmental party or former politicians.<sup>8</sup>

The lawyers submitted an application for bail to the court on January 28, 2009, and claimed that Mr. Park should be allowed bail in order to defend himself because “he recognizes the fact that he wrote those articles and his articles are already available by the Internet.”

However, on March 9, 2009, the judge dismissed it because “there was a possibility of his running away.” Though the dismissal of an application of bail could be a good example of legal debate among attorneys, it was another big shock to net-citizens when the review of the legality of detention was dismissed. On the other hand, there was a rumor when the same judge ultimately dismissed the case.

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<sup>7</sup> The prosecution’s case number was “2009Hyung-Je4050” and the court’s case number was “2009Go-Dan304”.

<sup>8</sup> For example, Lee Jong-Gul and Moon Byong-Ho are former congressperson of Open Woori party, Park Jae-Seung is a famous former president of the Korea Bar Association and a former chief of the recommendation committee of general election of Democratic (Minjoo) party, Park Byong-Kwon is a nephew-in-law of the former President Kim Dae-jung. Law firms such as Don-Suh Partners and Min-woo are both known to be related to the *Progressive Lawyers Group (Minju-Byunhosa-Hyuphoi)*. But there was one exception, former congressman Park Chan-Jong.

*The Decision of 'Not-guilty' and an Appeal by the Public Prosecutor*

Finally, on April 20, 2009, Internet economist 'Minerva' was given a verdict of 'not-guilty' and released from the detention facility. Before the decision, in the final hearing on April 13, 2009, the prosecutor demanded a penalty of imprisonment with labor for one and a half years, for his posting of an article on July 30, 2008, in which he stated that "all the foreign budget exchange will be halted on August 1" and also of an article on December 29, stating "the government transmitted an urgent official notice of the purchase banning of USD to big 7 financial companies and major import and export companies". Both were later found to be false.

The judge said, because 'Minerva' wrote an article dealing with the foreign exchange problem with some misunderstanding, it was ascertained that his articles contained a type of false communication. Nevertheless, the judge said it was difficult to say that he wrote articles with intention or recognition that the story was false, considering the unique situation of foreign exchange rate at the end of the year and the traits of an Internet forum on economic issues, in spite of the exaggerations or approximations and misunderstanding in his articles. For example, even the *Chosun-Ilbo*, one of the major newspapers in Korea, concluded that some of Minerva's predictions were later found to be true.

The judge concluded that he was not guilty because he did not have any intention or recognition of giving false communication, and as a result it was difficult to say that he had any intention to harm public interest, not to say that freedom of expression includes false communication. Moreover, the judge also said, if the intention were to be accepted, it was still difficult to say that the rapid increase of USD demand was only due to Mr. Park's posting an article titled "Government which was sending urgent official order - 1st report" on December 29, 2008, because there were unaccountable possible causes in addition to the article.

After the verdict of innocence on April 20, 2009, the prosecutor made an appeal against the decision on April 23, 2009. The case was allocated to the 9th judge of the criminal justice department of Seoul Central District Court on May 4. But the trial process was halted because Mr. Park filed a motion on May 14, 2009, to request a review of the constitutionality of the provision at issue. On December 30, 2010, at last, the case was finally dismissed when the prosecutor cancelled the appeal after the Constitutional Court declared on December 28, 2010, that Article 47 (1) of the Electric Telecommunication Act

was unconstitutional.

Additionally, there were many in the legal profession who criticized the prosecutor's investigation of 'Minerva' on the basis that it could have a chilling effect on criticism of the government and result in regression of the rule of law; indeed, according to the professionals' opinion survey of *Law Times* (the *Bubryul-Shinmun*), 75.6% of legal professionals took this critical view. This survey was taken on the 46<sup>th</sup> commemoration of Law Day, April 25, 2009, just five days after the judge's decision on April 20. Few in the legal profession agreed with the investigation – only 17.4% according to the survey. The survey results are important as they represented great criticism from the legal profession itself. It could be said that, not only could the government affect the prosecutor's investigation, but the Supreme Court's decision, which took the responsibility of ISP or portal sites for the tort of defamation on April 16, 2008, could also actively influence the public prosecution.

The court rejected a motion to request a review of constitutionality of the provision which aroused legal debate. On January 28, 2009, the lawyers of 'Minerva' requested bail for him and a review of the constitutionality of the provision, Article 47 (1) of Electric Telecommunication Act. The lawyers raised problems such as the rule of clarity, the equality or appropriateness of penalty, and the rule against excessive restriction. However, both were rejected by the judge. He stated that the necessity to employ indefinite concepts in legislation could not be denied altogether and that any ambiguity might be resolved by case laws accumulated by the court's organized and reasonable interpretation of law from the perspective of their historical background. He also stated that Article 47 (1) of the Electric Telecommunication Act was unclear because the purpose of the provision was to prohibit 'false communication' as 'distribution of false information'. He also said that 'the public interest', which was pointed out to be unclear, was not related to the rule of clarity because it was intended to reduce the scope of an element of the crime.

The judge finally rejected the request for the constitutional review of the provision because other aspects also did not restrict or infringe upon freedom of expression. Nevertheless, the Constitutional Court later concluded that the provision was unconstitutional because both 'false information' and 'public interest' could restrict freedom of expression if they were not more specific, and that 'public interest' – rather than 'false information' – violated the rule of clarity.

## The Decision of the Constitutional Court of the Minerva Case and Its Implication

### *The Request to Review the Constitutionality of the Provision*

On May 14, 2009, ‘Minerva’ submitted an application requesting a review of the constitutionality of the provision by the Constitutional Court following the appeal of the prosecution. The request was based on Article 68 (2) of the Constitutional Court Act, by which a person, whose constitutionally protected basic right has been violated by an exercise or non-exercise of governmental power, can directly file a constitutional complaint to the Constitutional Court when the request was already rejected by the referring or pending court. Although the result of the trial could be influenced by the decision of the Constitutional Court, it is not a direct effect of the Constitutional Court’s decision, for it did not deal with a case itself – which is different from German Constitutional Court – but the constitutionality of any act or law which referred to the case. The Constitutional Court considered the case but took charge of the constitutionality of the Act itself.

The case number was “2009Hun-ba88” and the case name was “the constitutional complaint against Article 47 (1) of the Electric Telecommunication Act.” Though the Minerva case was merged with another case referring to the same provision by another person (2008Hun-ba157), the Constitutional Court continued to refer to the case as “the Minerva case” since July 16, 2009 in an official briefing document which announced an open trial would be held on December 10, 2009. Approximately one year after the open trial, on December 28, 2010, the Constitutional Court concluded that Article 47 (1) of the Electric Telecommunication Act was unconstitutional.

### *Merged with Another Case*

On July 11, 2008, when the demonstration against the import of USA beef had weakened, a net-citizen known as Mr. Kim was arrested with detention by the Seoul Central District Prosecutor’s office on suspicion of posting an article with malicious intent to harm the public interest by creating a false ID using falsified personal information. The article reported that a woman was violently raped by a police officer. On December 22, 2008, the court declared him guilty and a request to review the constitutionality of

the provision was also rejected. There was a substantial difference between Mr. Kim's case and the Minerva case because in the former it could be said that the falsification was more serious – for he used another person's identifying information and made partly falsified photographs. Though Mr. Kim filed a constitutional complaint on December 12, 2008, the appeal court declared him guilty on January 15, 2009, without waiting for the decision of the Constitutional Court. The Constitutional Court decided to merge this case with the Minerva case and examine them together on December 9, 2009.

### *The Point of the Minerva Case – Focusing on Public Interest*

According to the Constitutional Court, three points of the Minerva case were legally disputed: (1) whether the meaning of 'purpose to harm public interest' and 'false communication' in Article 47 (1) of the Electric Telecommunication Act violated the rule of clarity, (2) whether 'false communication' could be included in the scope of freedom of expression, and (3) whether the instant provision violated the rule against excessive restriction in that 'false communication' could be included in the scope of freedom of expression. We will mostly discuss (1), which refers to 'public interest', because it is the main purpose of this article.

Before we move forward, let us look at Article 47 (1) of the Electric Telecommunication Act (revised by Act No. 5219, Dec. 30. 1996): "A person who has publicly made a false communication through the electric telecommunications facilities and equipment with the intent to harm public interest shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won."

The Article is discusses both elements of crime and penalties. The elements of crime are: "with the intent to harm public interest", "through the electric telecommunications facilities and equipment", "publicly", and "false communication." The penalties are "imprisonment for not more than five years" or "a fine not exceeding fifty million won." In this article, we will focus on "public interest" itself. Additionally, according to the Constitutional Court, Article 47 (1) was de facto forgotten and never applied to any case in the forty years since its legislation, but it began to be applied as social influence of private expressions increased and related social problems was created with the recent development of the Internet.

*Judgment of the Courts on "Public Interest"*

The courts took two approaches to the public interest problem. One focused on the clarity of the concept of "public interest" itself. The other focused on the meaning of "with the intent to harm public interest" as an element of crime. According to the courts' reason for rejecting the request to review the constitutionality of the provision, the former approach was found in the Kim case and the latter in the Minerva case.

Although the latter should be discussed from the theoretical aspect of criminal law, it surely depends on the issue of the meaning of 'public interest'. Therefore, the interpretation of 'public interest' is of critical importance.

The court said that the meaning of 'public interest' was clear because 'public interest' represents 'the interest of all or a majority of citizens who live in Korea and the interest of a state composed of those citizens' (as a kind of 'interest of social common') which excludes and takes precedence over both individual's interest and 'the interest of a specific social group and its members.' There are two characteristics of public interest.

First, public interest is something referring to "Korea" as a national society and all, or a majority of, "a nation's people." That is, public interest represents a nation and that nation's people in general. Next, public interest is superior to "individual" or "specific social group." That is, there exists private interest inferior to public interest. How can these two characteristics of public interest be justified?

According to the provision, it seems that the courts took the premise that public interest is a prerequisite to the composition of a community and a social life. That is, public interest is ontologically based on the 'state', and could not possibly exist without community life. And it is difficult to debate public interest if there were not the state even though there was community life. Therefore, it could be said that 'public interest' is justified only by the existence of the state and takes precedence over other interests.

On the other hand, how could 'individual interest' or interest of 'special social groups' be considered inferior? It seems easy to say that 'individual interest' is like private interest, but how about the interest of 'specific social groups'? The key difference between this kind of interest and public interest is the 'state.' For the former lacks the state, which is a prerequisite for public interest, and the courts regard it as something different from public interest.

However, there are diverse aspects of the state and there are diverse 'groups' in the state. If there were a conflict between those groups and they

insist that they try to contribute to the state or public interest, how could we say which group represents public interest? On which ground could we restrict their activities? The courts seemed to be unclear about this point. The situation could become more serious if the public interest issue refers to an element of crime that could restrict freedom of expression. Therefore, this approach to public interest taken by the courts has a crucial fault in that it gives no clear indication as to the basis for the restriction of freedom of expression. But the Constitutional Court seems to approach this point differently.

### *The Constitutional Court's Decision on Public Interest*

The Constitutional Court previously reviewed a similar case. It was a constitutional complaint against Article 53 and parts of Article 71 (vii) concerning Article 53 (3) of the Telecommunications Business Act as well as Article 16 of the Enforcement Decree of Telecommunication Business Act (99Hun-ma480). In this case, the element of 'improper communication' such as "public peace and order" and "social morals and good customs" was related to public interest. The reasoning of the clarity issue is partly re-cited and more developed in the Minerva case by a majority of justice of the Constitutional Court. As a result, 'public interest' of the Electric Telecommunication Act faced the same fate as 'improper communication' in the Telecommunication Business Act - both were 'unconstitutional.' Considering "public interest" in the Minerva case, the Constitutional Court seemed to go a step further than 99Hun-ma480.

We will consider public interest more deeply. According to the Constitutional Court's decision in the Minerva case, the approach to public interest is composed of a subjective aspect which refers to a person who judges what public interest is<sup>9</sup> and an objective aspect which refers to a social structure of diverse and relative values.

First, subjective aspects are found because "the public interest drastically varies depending on individuals' value systems and ethical standards". The subjective aspect is divided again by two factors. One refers to something commonly and easily perceived by ordinary people as "certain interests clearly perceived to be public interest by ordinary people", the other refers to something differently perceived and unclear as "certain interests in a gray

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<sup>9</sup> The Constitutional Court considered it as over-subjective to limit crime components to criterion such as harming public interest (2008Hyun-Ba157 decided at 28<sup>th</sup> Dec. 2010).

area where the constitution of public interest may be different depending on who judges it.” For the latter, even legal professionals could fail to reach a consensus. Because of the latter factor of the subjective aspect of public interest, the meaning of public interest could hardly be defined clearly enough to satisfy the rule of clarity.

Secondly, there is an objective aspect of public interest that is related to the complexity of social structures. That is, it is hard to reach a consensus when a certain problem originates from diverse social contexts. The Constitutional Court said, “In the current pluralistic and value subjective society, the public interest at issue is not monolithic when a certain act becomes an issue”. In this case, public interest could be discussed from the perspective of the balance of interest even within the public interest itself. From this perspective, various types of public interest could be inter-contradictory; a certain act could be positive to some type of public interest but negative to other type of public interest at the same time. No matter which type of public interest is infringed upon by an act, it would inevitably be true that the issued act is harmful to one of the referring type of public interest as a result of balancing of interests, which is called for to resolve the conflict of diverse public interests. Ultimately, the lack of clarity regarding public interest caused the vagueness regarding “the intent to harm public interest”, which violates the rule of clarity in the principle of *nulla poena sine lege*.

Public interest has subjective and objective aspects, as the subjective aspect is composed of universal and non-universal factors. Public interest is so unclear because it is dependent both on the subject who judges it and the evaluation of conflicting interests. Consequently, the Constitutional Court declared Article 47 (1) of the Electric Telecommunication Act unconstitutional because it violates the rule of clarity according to a majority of 7 justices out of 9. The decision implies that freedom of expression on the Internet could be severely infringed upon in the name of public interest which is too conventional and abstract, not enough to be eligible for the highly developed Internet in which private and public space are both diversified and converged. According to the court, ‘Minerva’ posted his articles with an intention of preventing damage to individual investors due to the fluctuating exchange rate. Article 119 (1) of the Constitution of Korea says, “The freedom and creativity of individuals and companies is basically respected by the economic order of Korea” and, Article 119 (2) says, “the government should maintain the growth as well as the stability of the national economy with balance and appropriate distribution of income, prevent a monopoly of

market and abuse of economic power, and manage and control the economy for the democratization of economy through the harmony of economic subjects.” If the claims made by Mr. Park had been correct, his writing could have been evaluated as an act for the purpose of promoting public interest, as a democratization of the economy and the harmony of economic subjects through the economic freedom and creativity of the individual. But, the government arrested him on the accusation of harming public interest.

The freedom and creativity of the individual are especially needed in the economy of an information society. There could be thousands of Minervas making countless predictions and posting articles full of unverified hypotheses on the Internet BBS for economic or stock market issues. They could criticize the governmental policy or defame the major companies or quarrel with one another. It could be because there are Internet BBS such as the economic forum as a social space in which “everybody can have access to post his article and debate”; also the economic issue becomes most important in Korean society, which has become greatly diversified with a “multi-polarized and value-relative” social structure. Accordingly, for some, it is quite natural that the economic issue could be regarded as being related to public interest.

Consequently, according to the Constitutional Court, a more specified and detailed concept of public interest is essential to the restriction of freedom of expression on the Internet, especially, as the convergence of the public and the private is in progress, for example, in a BBS for economic issues.

## A New Type of Social Public interest in Advanced Information Society

The Minerva case suggests that there needs to be a new kind of thinking from the perspective of sociology of law, which refers to the more specified and complex phase of rights on the Internet. The legislation should be considered appropriately in accordance with the advancement of networks of the Internet itself as well as its evolution of the social space including diverse communication and services through both on- and offline.

A more diversified approach is necessary – one which reflects both the new technological advancement and new service, overcoming the unified conventional approach to the Internet alone. With new legal and normative thinking, a new approach from the social system perspective is needed

according to individual media such as news service, community service, mini-homepage and SNS (e.g. Facebook, Twitter etc.). For this purpose, what is necessary is an approach from the perspective of sociology of law that refers to the diversity, complexity, and convergence of the changing reality of the information society.

The Minerva case resulted from an individual's expression of his views about economic issues by posting in an open Internet BBS. In modern society, the private and the public is converging and we can see this in the economic realm because the result of individual trading can more easily have a global effect and vice versa, though there is no change in the fact that economic activities are basically composed of the participation of individuals. It is always possible that some people could pursue only their own interest using an information monopoly or spreading false information or moving capital. Moreover, there may be interruptions to economic stability and pseudo-harmonic interest constellations, so that seemingly 'rational' expectations of profit fail to materialize.

And it is also possible that governmental failure could causes huge disadvantage to individuals who participate in the market. The realm of economy itself is both a field of private interest and simultaneously a field in which there is conflict between public and private interests. For the importance of the economy, sometimes the "social public" is at issue; including the harmony of economic order and the economic democratization. Because of the convergence of the public and the private, the economic field needs a new kind of legal approach over the conventional public-private dichotomy. In particular, it is highly necessary when a sensitive economic issue is raised and debated on the Internet that converges public and private, and it makes a huge impact on society.

Unfortunately, a new approach seems to be remote because all five bills for revising Article 47 (1) of the Electric Telecommunication Act according to the Constitutional Court's decision, *de facto* misunderstand or ignore this concept except for one proposed by Assembly member Cho, Bae-Sook. The others merely repeat similar terms or still use highly abstract concepts, such as "national security", "public welfare" etc., which seem to stick to the conventional concept of public interest originating from the state-centered dichotomous approach. Given the changing relationship between the public and the private due to the diversity and complexity of late modern society and its highly advanced information society, without an appropriate concept of the relationship between the public and the private and a detailed specification and definition of the public interest, private rights, including

freedom of expression, may be more susceptible to infringement. And this can result in the regression of society. Different from the early modern society, the public sector has been newly organized according to the development of the social sector (i.e. the civil society) which has resulted in the rapid privatization of the public and the extension of the public into the private sector – the latter is the ‘social public’ sector (Turkel 1992; Weintraub and Kumar 1997; Boyd 1997).

The conversion of the public and the private is prominent, not only in social policy referring to family, women, and pregnancy/childbirth (Boyd 1997), but also in the new online space appearing with the development of the Internet. That is, the Internet has evolved from a simple space for individual expression or individual communication means, to a diversified life space of news media, business, and public activities in an advanced information society. Hence, public space and public interest must be developed into more specified, complex, and pluralistic types, that is, a multi-dimensional balancing could be possible both inside and outside of public space and public interest, not to mention between public and private interest.

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