

Criminal Defamation and Insult Prosecutions in South Korea

PARK Kyung Sin (Professor, Korea University Law School)
kyungsinpark@korea.ac.kr

Abstract

South Korea has strong laws and practice in criminal defamation and insult. Many of defamation cases were filed to protect the reputation of public officials while theoretically all of the candidate defamation and insult indictments are aiming to protect the reputation of the candidates to public officialdom. Such trend has been found at odds with an international human rights standard on freedom of speech that has consistently warned against the anti-democratic potentials of criminal defamation and insult laws.

Introduction

Two hundred years before John Milton published *Areopagitica* (1644), the first explicit tract on freedom of speech, King Sejong the Great of Chosun Dynasty¹ was famous for refusing to punish people arrested for seditious remarks. For instance, in 1433, when a debtor falling behind on repayments of a government loan was brought to him for openly complaining, “This King’s throne will not last long. A new king will rise from the Western Province”, King Sejong said “people are bound to blame others when things don’t turn out the way they want. Likewise, he is just blaming me for his hardship. There is no harm done to me” and refused to punish him.² Indeed, as early as 1418, Sejong had already issued a judgment that “no one should be punished for criticizing government” on the case of a person who called his throne “the Dark Age”.³ He even scolded the ministers calling for austerity: “You want me to punish people just for speaking their minds truthfully about me? Are you trying to push me into blind ignorance by keeping me from hearing from down under about the real conditions?”⁴ His throne was in a way representative of Chosun Dynasty’s attitudes towards the relationship between free speech and good government: every king’s remark in court was recorded in verbatim by official recorders who were guaranteed independence and confidentiality and, most importantly, published the records⁵ for the eyes of all but the kings so that people of the next generation could use them to monitor and criticize the previous king’s performance on the basis of the records not adulterated in any way by the kings themselves. Regardless of what little freedom of speech commoners enjoyed, the ruling elite attempted to maintain a healthy dialogue between information and governance.

Unfortunately, despite this head start, even after modernization and adoption of the “advanced” Western system⁶, freedom of speech in Korea seems to be on a shaky ground⁷,

¹ http://en.wikipedia.org/wiki/Sejong_the_Great

² Sejong Annals, Year 15 March 13, Vol. 59, p. 144,

³ Sejong Annals, Year 10 April 21, Vol. 40, p.146

⁴ Sejong Annals, Year 15 July 27, Vol. 61, p. 147

⁵ http://en.wikipedia.org/wiki/Annals_of_the_Joseon_Dynasty

⁶ the Japanese Governor-General’s Ordinance on Penal Matters in Korea in March 1912 [조선총독부제령 제11호, 1912.3.18., 제정], Article 1

⁷ Freedom House, 2012a, Freedom on the Net: South Korea.

especially because of the very laws constitutive of the system such as criminal defamation, insult, and “truth defamation”. While most of those laws were abolished or became obsolete or “tamed” in the countries of origin⁸ over time, they are still being vigorously enforced in the modern day Korea^{9,10}. The epitome of the instability was the prosecution of the Japanese newspaper *Sankei Shinmum* correspondent for defaming the country’s president, which ended in a not-guilty verdict.

These laws also gave rise to parallels in election regulation such as crimes of “candidate slander”¹¹ and “false election speech”¹². (Note: Although “false election speech” covers both false self-aggrandizing by the candidates themselves and false accusations about the candidates, more than 99% of the indicted cases about the latter. So instead we will call it “candidate defamation” instead. Also, “candidate slander” punishes spreading facts about a candidate but the prosecutors and courts are using it as a “candidate insult” law whereby hateful epithets against candidates are punished. Hence we will call it “candidate insult”.)

I. Criminal Defamation Prosecution in Korea: International Context

1. Volume and Nature of Criminal Defamation

⁸ Winfield, et al., "The Abolition Movement: Decriminalizing Defamation and Insult Laws," Communications Lawyer, Fall 2007

⁹ **Criminal Code, Article 307 (Defamation)** reads: (1) A person who derogates another person’s reputation by stating facts publicly shall be subjected to imprisonment or confinement of up to 2 years or a fine of up to 5 million won. (2) A person who derogates another person’s reputation by making publicly false factual statements shall be subjected to imprisonment for up to 5 years, disqualification for up to 10 years, or a fine of up to 10 million won <Amended 95.12.29> **Criminal Code, Article 310 (Exculpation)**

The act under Article 307 Section 1 shall not be punished if it constitutes a truthful statement made solely for public interest.

https://elaw.klri.re.kr/kor_service/lawPrint.do?hseq=28627

¹⁰ **Criminal Code, Article 311 (Insult)** A person who publicly insults another person shall be subjected to imprisonment or confinement of up to 1 year or a fine of up to 2 million won. <Amended 95.12.29>

¹¹ **Public Officials Election Act Article 251 (Slanders against Candidates)**

Any person who slanders by making factual allegations a candidate (including a person who intends to be a candidate), his spouse, lineal ascendants or descendants, siblings by pointing out any fact openly through a speech, broadcast, newspaper, communication, magazine, poster, propaganda document, or other means, with the intention of getting elected, or getting another person to be or not to be elected, shall be punished by imprisonment for not more than three years or by a fine not exceeding five million won: Provided, That where it is a true fact and concerns a public interest, he shall not be punished.

¹² **Public Officials Election Act, Article 250 (Publication of False Facts)** (2) Any person who publishes or makes another person publish any false facts on a candidate (or his her family) so as to be unfavorable to the candidate . . . , with the intention of stopping the candidate from being elected, , shall be punished by imprisonment for not more than seven years or by a fine of not less than five million won and not more than 30 million won. <Amended by Act No. 5262, Jan. 13, 1997>

https://elaw.klri.re.kr/kor_service/lawPrint.do?hseq=25035

In Korea, private persons are vigorously subjected to criminal prosecution for defamation, often in defense of public officials' reputation.¹³ According to *Article 19* the non-profit organization, in a 20 months period between January 1, 2005 through August 2007, only 146 people have been incarcerated for defamation¹⁴, not including Korea where according to the congressional disclosure made by the Supreme Court 136 people were incarcerated over a 55 months period between January 1, 2005 through July 2009.¹⁵ This means Korea took up close to 30% of all people incarcerated in the relevant periods. This is in stark contrast to the fact that most developed countries have abolished (or engaged in the process of abolishing) criminal prosecution for defamation¹⁶ due to a concern that the incumbent government or other powerful individuals influence the prosecutors to suppress their opposition or critics --- that is, using the taxpayers' money for political purposes for the pretext of defamation prosecution.¹⁷ For instance, Japan also retains criminal defamation¹⁸ in the books but uses imprisonment as punishment only very sparingly (1 to 4 annually according to the Article 19 statistics). There is that German exception¹⁹ but most of the numbers are from minimally short sentences for insult²⁰ where most of the incarcerations in Korea are more than 6 months.

The trend continues to date and in greater intensity. For instance, in 2012, 3,340 people were tried for criminal defamation and 47 were actually incarcerated (For avoidance of doubt, the number does not include 63 who received deferred sentences).²¹ In 2013, 2,162 people were indicted for defamation (excluding 1,233 indicted for online defamation)²², out of which

¹³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, on his mission to the Republic of Korea (6-17 May 2010), A/HRC/17/27/Add.2, para. 89 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/34/PDF/G1112134.pdf?OpenElement>

¹⁴ <http://www.article19.org/advocacy/defamationmap/overview.html> (no longer available; last accessed in May 30, 2009)

¹⁵ MP Lee Chun-Seok's Press Release, October 19, 2009

¹⁶ See Richard N. Winfield, Kristin Mendoza, "The Abolition Movement: Decriminalizing Defamation and Insult Laws", Communication Lawyer, Fall 2007; "Libel and Insult Laws: What More can be Done to Decriminalize Libel and Repeal Insult Laws", a joint statement of the Conference on Libel and Insult Laws, organized by the Organization for Security and Cooperation in Europe <www.osce.org/item/3544.html>

¹⁷ Gregory C. Lisby, "No Place in the Law: the Ignominy of Criminal Libel in American Jurisprudence", Communication Law and Policy, Autumn 2004.

¹⁸ Japanese Criminal Code Article 230

<http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=penal&x=62&y=17&ia=03&ky=&page=3>

¹⁹ 10/22/2015 IPI special investigation: The application of criminal defamation laws in Europe | Defamation Laws

<http://legaldb.freemedia.at/2015/09/15/ipispecialinvestigationtheapplicationofcriminaldefamationlawsineurope/>

²⁰ Interview at Article 19 meeting

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<http://www.scourt.go.kr/portal/justicesta/JusticestaListAction.work?gubun=10&searchWord=&searchOption=¤tPage=0&pageSize=10>

<http://www.spo.go.kr/spo/info/stats/stats02.jsp>

²² Prosecutors' Office Year Book of 2014, Chapter 6, Pages 926, 966

111 were incarcerated while the remaining defendants were fined.²³ This is a two-fold increase from 2010 when the total of 2,193 people were indicted for defamation, out of which 43 incarcerations for defamation resulted.

As UN Special Rapporteur of Freedom of Expression and Opinion Frank La Rue pointed out in his report on Korea, many of these criminal prosecutions are the very cases where private persons are subjected to criminal prosecution for defamation in defense of public officials' reputation.²⁴ The political nature of these prosecutions is evinced by the fact that most cases result in withdrawal, dismissal, or not-guilty judgments, leaving only indelible chilling effects on the populace.²⁵

Most famously, in March 2009, six television documentary producers of *PD's Notes* were prosecuted for producing and broadcasting an investigative piece on the danger of mad cow disease associated with American beef.²⁶ The prosecutors charged that defaming the American

http://www.spo.go.kr/spo/info/issue/spo_history02.jsp?mode=view&board_no=64&article_no=590945

²³ Courts' Year Book of 2014, Section on Crimes, Chapter 5, Page 89
<http://www.scourt.go.kr/portal/justicesta/JusticestaListAction.work?gubun=10>

²⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, on his mission to the Republic of Korea (6-17 May 2010), A/HRC/17/27/Add.2, paras. 25, 89 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/34/PDF/G1112134.pdf?OpenElement>

²⁵ People's Solidarity for Participatory Democracy, Governments' Strategic Prosecutions Against Public Participation (2015) [참여연대, <국민입막음 소송 보고서> (2015)]

²⁶ On June 20, 2008, the producers of a television documentary *PD Diary* were accused of defamation by the Minister of Agriculture, Forestry, and Fishery for producing and having broadcast a special episode on mad cow disease and its occurrence in the U.S. beef on April 30, 2008. *PD Diary* is a popular weekly documentary by MBC, one of the three premier broadcasting stations. The theory was that the documentary exaggerated the susceptibility of U.S. beef to mad cow diseases, thereby derogating the reputation of the agricultural minister who had decided to import U.S. beef.

The prosecutors accepted the accusation by the agricultural minister and announced on July 29, 2008 that the *PD Diary* episode includes "19 different distortions" and summoned the producers of the episode for interrogation, who have thus refused to comply. One such distortion is as follows: the mother of a human mad cow disease victim in the televised interview uttered in English the similar sounding name of another disease as the reason for her daughter's death but the Korean subtitle said 'a mad cow disease.' The producers changed the Korean translation because the mother used the names of the two diseases interchangeably in previous conversations and there were ample circumstances to believe that the mother meant 'mad cow disease.' Even so, the prosecutors appear to believe, the mother's mistake should not have been corrected by the producers to augment the emotional value of the mother's interview. Another alleged distortion is the comparison of Koreans' genetic susceptibility to mad cow disease to other races, which shows Koreans to be 3 times more susceptible. The prosecutors claim that the comparison left out other relevant factors. In general, the prosecutors' investigations reveal at most sensationalizing and editorializing of the data but not outright falsities.

On December 29, 2008, the prosecutor in charge of the *PD Diary* case resigned for an unknown reason. It has been rumored that he has disagreed with the top leaders of the

beef actually defames the agricultural minister who found the cows okay and decided to import them. The producers were found not guilty through all three stages of the court²⁷. But the fact of the prosecution alone chilled all other broadcasters and television producers into silence for close to 5 years since then and to date. No longer do we see many television programs healthily critiquing government policies. What was especially chilling about the logic of the indictment, even a report on consumer products would be closely inspected for any error or inaccuracy by the prosecutors to see if such error or inaccuracy might somehow affect the reputation of government officials who had commended such products.

In 2009, Seoul City Mayor Oh Se-hoon filed a charge against, and the prosecutors indicted,

Prosecutors' Office and has refused to indict the producers for the reason that PD Diary constitutes criticism of a government policy and therefore cannot be punished for defamation of government officials in accordance with freedom of speech. In the end, the case resulted in not-guilty verdict at the Supreme Court.

²⁷ Korean Supreme Court, September 2, 2011 Judgment, 2010Do 17237

The Court spoke on the lack of the requisite malice as follows:

“In media defamation cases, the standard of review varies depending on whether the supposed victim of the media report is a public figure or a private figure, whether the report concerns matters of public interest or matters of purely private domain, or whether the report, seen objectively, concerns matters of public and social nature that people must know and therefore contributes to the formation of public opinion or open discussion, etc. As to the speeches belonging to private domain, protection of reputation may prevail over freedom of press. As to the matters of public and social nature, the restriction on freedom of press must be eased (See Constitutional Court 1999. 6. 24. Judgment 97Hun-Ma65, Supreme Court 2002. 1. 22. Judgment 2000Da37524, 37531). Especially, matters concerning the government's or state agencies' policy making or performance of their duties must be subject to people's constant monitoring and critique, which can be properly conducted only if the freedom is sufficiently guaranteed to the press whose main duties are such monitoring and critiquing. The government or state agencies cannot be deemed the victims of criminal defamation, and therefore, even if a media report mainly concerning the government's or state agencies' policy-making or work performance reduces the social reputation of the official involved in such policy-making or work, such report cannot be held to defame the official unless such report is malicious or a very rash attack against the official as an individual (Supreme Court 2003. 7. 22. Judgment 2002Da62494, Supreme Court 2006. 5. 12. Judgment 2004Da35199).

“The lower court found some part of the defendant's media report to be a false proposition incongruent with objective facts but ruled against attributing the crime of defamation to the defendants for the following reasons: The overall intent and content of the report is to point out the problems with American beef's food safety and the government's beef trade negotiation and to criticize the Korean government for rushing to conclude the negotiation without review of sufficient time. Considering that the report concerns the matters of public and social nature contributing to the opinion-making and open discussion on the government policies on national food stocks, the standard of finding defamation should be different from the one applicable to the matter of private nature. The part of the report found to be false is about American beef's communicability of mad cow disease and therefore is not directly related to the official's reputation. Neither can it be viewed as malicious or an attack prominently lacking substance against the supposed victim. Under these circumstances, the defendants cannot be attributed knowledge that they were defaming the victims and cannot be held to have the mens rea.

“We find the lower court's decision proper. . .”.

the merchants leasing store space from the City for demonstrating against and criticizing the City's new lease policies allegedly favoring big businesses.²⁸ In 2009, the National Tax Services filed a charge against, and the prosecutors indicted, one of its employees for revealing its Director's political scandal.²⁹ These two cases also resulted in acquittals up through the Supreme Court but left many people hesitating with their questions and criticisms.

Also, in 2010, Shin Sang-chul, the operator of online media *Surprise*, was indicted for alleging that the government investigation into the sinking of ROKS Corvette *Cheonan* was a cover-up³⁰, and his trial is still continuing. In April 2014, Hong Ga-Hye, a volunteer rescuer was also indicted for falsely accusing the government rescuers of the tragic *Sewol* ferry of incompetence and actually jailed for a little over 100 days before found not guilty, and her appellate trial is still continuing.³¹ Then, in October 2014, *Sankei Shinmum* Correspondent was indicted for defamation for spreading people's doubts about President Park's whereabouts during the 7 hours spanning the sinking of the tragic Sewol Ferry, and was later found not guilty.³²

Though short of indictments, merely the charges of defamation filed by public officials add to the chilling effects. In 2008, the Prime Ministers' Office filed a charge against Kim Jong-ik who posted a video clip pejoratively parodying the then President Lee Myung-bak,³³ which charge was deferred indefinitely by the prosecutors. In 2010, the Minister of Culture filed a charge of defamation against a netizen for posting a video clip of the Minister who tried to hug the figure star Kim Yuna only to be shunned by her³⁴, which was dropped by the prosecutors.

Also, in 2012, the notorious National Intelligence Services³⁵ filed charges against three different groups of individuals (Pyo Chang-won, *Nakkomsu* members, Suh Young-Suk) for alleging that NIS secretly financed an online campaign supporting the conservative candidate Park Geun-Hye in the 2012 Presidential Election.³⁶ While the prosecutors are still investigating those charges, some of the NIS officials were actually indicted for actively conducting other more systematic and extensive online campaigns to manipulate public opinions themselves.³⁷

²⁸ PSPD Public Interest Law Center (2013), Reports and Responses on Lawsuits Shutting People Up, "http://www.peoplepower21.org/PSPD_press/1032358 (korean)

²⁹ Ibid.

³⁰ <http://articles.latimes.com/2010/jul/23/world/la-fg-korea-torpedo-20100724>

³¹ <http://www.koreatimesus.com/korean-court-acquits-woman-of-lying-about-ferry-rescue/>

³² <http://www.bbc.com/news/world-asia-35118701>

³³ <http://www.worldyannews.com/news/quickViewArticleView.html?idxno=1891>

³⁴ http://www.koreatimes.co.kr/www/news/nation/2010/03/117_62548.html

³⁵ <http://www.economist.com/blogs/banyan/2014/03/south-korean-intelligence>

³⁶ PSPD, *supra*.

³⁷ <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220204.htm>

“National Assembly and presidential elections in 2012 were viewed as free and fair; however, during the year there was increasing evidence of broad efforts by government agencies to use social networking services to interfere in the elections in favor of candidates from the incumbent conservative party. Prosecutors indicted former NIS chief Won Sei-hoon for violating the NIS law and the Public Official Election Act, charging that the NIS agents tried to sway voter opinion through more than 22 million postings on the internet, on Twitter, and on other social media sites. The indictment stated the NIS began online activities to influence politics in 2009, and interfered in the 2010 local elections and the 2011 Seoul mayoral

The very use of criminal defamation has been condemned by international human rights bodies, including UN Human Rights Committee in its 2011 General Comment 34³⁸ for being abused by authoritarian rulers as pretexts for oppressing the opponents, especially using prosecutorial resources for free. The European Court of Human Rights has struck down almost all national courts' criminal judgments against journalists who criticized the government or high officials, for being too excessive or not respecting people's right to know.³⁹ Of course, the strongest reaction came from the U.S. early in *Garrison v. Louisiana*.⁴⁰

One of the strong impetus for "taming" or otherwise containing criminal defamation laws came from a 1954 U.S. study done by Dean Leflar⁴¹, who found that nearly half the defamation prosecutions between 1920s and 1956 were political in nature, i.e., the incumbents with

election. These activities were, however, outside the six-month statute of limitations for the election law. Authorities indicted at least five other NIS officials on similar charges. Prosecutors indicted former Seoul Metropolitan Police Chief Kim Yong-pan on charges of violating the Police Officers Act and the Public Official Election Act for abusing his authority in hampering a police investigation into the NIS, which led to a police announcement three days before the presidential election that claimed NIS was clear of wrongdoing."

³⁸ U.N. Human Rights Committee, General Comment 34, September 12, 2011
<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

para. 47, "States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."

³⁹ Eur. Ct. H.R., Case of Lyshanko v. Ukraine, Judgment of August 10, 2006, Application No. 00024040/02 (a reporter criticizing the Prime Minister); Eur. Ct. H.R. Case of Oberschlick v. Austria (no. 2), Judgment of June 25, 1997, Application No. 00020834/92 (a reporter calling a conservative politician "a fool"); Eur. Ct. H.R., Case of Lingens v. Austria, Judgment of July 8, 1986, Application No. 00009815/82 (a reporter criticizing former Austrian Prime Minister "opportunistic" and "immoral"); Eur. Ct. H.R., Case of Unabhangige Initiative Informationsvielfalt v. Austria, Judgment of Feb. 26, 2002, Application No. 00028525/95 (a reporter comparing an Austrian politician's immigration policy to that of Nazi's); Eur. Ct. H.R., Case of Colombani and Others v. France, Judgment of June 25, 2002, Application No. 00051279/99 (a reporter scorning Moroccan government's drug combat policy); Eur. Ct. H.R., Case of Castells v. Spain, Judgment of April 23, 1992, Application No. 00011798/85 (a report on murder in 1977 Basque); Eur. Ct. H.R., Case of Scharsach and News Verlagsgesellschaft v. Austria, Judgment of November 13, 2003, Application No. 00039394/98 (a reporter calling a far-right politician "closet Nazi"; a fine overturned); Eur. Ct. H.R., Case of De Haes and Gijssels v. Belgium, Judgment of February 24, 1997 (a critique of a judge's divorce judgment), Application No. 00019983/92; Eur. Ct. H.R., Case of Dalban v. Romania, Judgment of September 28, 1999, Application No. 00028114/95; Eur. Ct. H.R., (a reporter revealing a public agency's corruptions); Case of Thorgeir Thorgeirson v. Iceland, Judgment of June 25, 1992, Application No. 00013778/88; Eur. Ct. H.R., Case of Nilsen and Johnsen v. Norway, Judgment of November 25, 1999, Application No. 00023118/93; Case of Barford v. Denmark, Judgment of February 22, 1989, 149 Eur. Ct. H.R. (Ser. A); Dan Kozlowski, For the Protection of the Reputation or Rights of Others: The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2), 11 COMM. L. & POL'Y 133.

⁴⁰ 379 U.S. 64 (1964)

⁴¹ Robert A. Leflar, The Social Utility of the Criminal Law of Defamation, 34 Texas Law Review 984 (1956)

influence over prosecutors attempting to suppress or avenge upon the opposition forces. The study influenced the Supreme Court Justices deliberating on *New York Times v. Sullivan* first⁴², and finally *Garrison v. Louisiana*⁴³ a year later, the two pillars that established the relationship between democracy and modern defamation laws by making it very difficult for public officials either to become a plaintiff in civil court or influence the prosecutors into suppressing their critics or critiques. A similar empirical study was done about half a century later and reconfirmed the earlier findings.⁴⁴ The pattern emerging from South Korea resembles the Lefla study and its progeny.

2. Truth Defamation

Criminal prosecution applies also to truthful statements (or statements not proven to be false) -- even in absence of privacy concerns, in contravention to the Special Rapporteur's⁴⁵ and UN Human Rights Committee's⁴⁶ specific mandates to exempt such statements. The defendant can only escape liability by proving that the statements were made *solely* for public interest, a burden of proof not so easy to sustain. For instance, the Supreme court refused the public interest defense of a worker making a truthful statement about his employer's non-payment of wages for the court found that the worker's such statement also had an intention to pressure the employer into paying his wages, i.e. the public interest was not the sole motif.⁴⁷ The same reasoning was applied to a drug wholesaler who truthfully complained about the pharmaceutical companies' unfair trade practices: according to the Court, the wholesaler had an obvious interest in protecting his business from the companies' wrongdoing.⁴⁸ The practical effect of this law is that an individual who has encountered corruptions in the government or other powerful entities could not freely share her knowledge with others for fear that she may not be able to sustain the burden of proving that 'public interest' was the speaker's 'sole motif'.

In a suicide death of a celebrity actress who left behind a document that reveals corruptions involving sexual bribes and sexual coercions in the entertainment and media industry⁴⁹ and

⁴² 376 U.S. 254 (1964)

⁴³ 379 U.S. 64 (1964)

⁴⁴ Russell Hickey, A Compendium of U.S. Criminal Libel Prosecutions: 1990-2002, Libel Defense Resource Center Bulletin, Mar. 27, 2002, 97쪽

⁴⁵ Special Rapporteur Frank La Rue's Korea Report, Para. 27 "The Special Rapporteur reiterates that for a statement to be considered defamatory, it must be false, must injure another person's reputation, and made with malicious intent to cause injury to another individual's reputation."

⁴⁶ General Comment 34, para. 47, "All. . .penal defamation laws. . . should include such defences as the defence of truth.." Upon interview of the members of the Human Rights Committee on October 15, 2016, the members, though wishing not to be named, agreed that the defense of truth must be effective without any other condition such as "public interest".

⁴⁷ Supreme Court 2004.10.15 Judgment 2004Do3912

⁴⁸ Supreme Court 2004.5.28 Judgment 2004Do1497

⁴⁹ <http://www.theguardian.com/world/2009/apr/01/south-korea-entertainment-jang-jayeon>

enumerates as the main culprits certain powerful individuals, almost no major media agencies reported the real names of the people enumerated although it was clear to many that such whistleblowing would be certain in public interest.

Also, the law has allowed, for instance, the overreaching interpretation by Korean Communication Standards Commission (“KCSC”) against the DAUM Agora petition page, which only restated Governor Kim Moon-soo’s own allegedly unpatriotic words and added at the end the petitioner’s own negative evaluation of Kim’s words.⁵⁰ Again, such talk on a high official’s historical position would have qualified as spoke ‘solely for public interest.’

Some countries like Norway, Netherlands, Denmark, Finland and Swiss⁵¹ do retain truth defamation law which requires public interest as an element of defense but they apply it to disclosure of private facts, not to protect a malfeasant from reputation loss. For instance, they may invoke the law to regulate the visual disclosure by the media of the physical injury of an individual unconscious from an accident, which is protected by privacy since he or she obviously could not have consented to such disclosure.⁵² But relief is available not because his reputation is lowered upon people’s visual contact with the body parts but because his privacy is infringed. In Korea, the truth defamation law is actually used by a malfeasant to prevent people from talking about his or her malfeasance. For instance, a member of an elders association was found guilty of truth defamation when he alerted other members about violent behavior that the association’s officer exhibited toward other members with no intention of keeping it private.⁵³ In fact, the officer’s companion was found guilty of battery for her conduct during the violent encounter.

How Sullivan has been embraced by Korean courts has been masterfully documented by Professor Youm Kyu Ho.⁵⁴ However, as he himself admits, adoption of the Sullivan-like rule has not resulted in a judicial battleground favorable for media organizations.⁵⁵

⁵⁰ On January 2, 2009, Governor Kim Moon-Soo during a public speech asked rhetorically, “Would today’s Korea have been possible had she not gone through the Japanese colonial period, the division, and the war?” A public uproar followed criticizing Governor Kim for rationalizing the nation’s tragedies, and one of them opened a petition web page at Daum Agora site where Governor Kim’s above remarks, quoted word-for-word, were followed by such criticism as “nation-destroying remarks” and a plea for resignation, and where other netizens could express their agreement or disagreement with the plea for resignation by posting replies at that page. KCSC censored the petition page for ‘defamation’, contradicting even established principles. A principle that expression of mere opinions cannot be imposed any legal liability has been firmly established and several times reconfirmed by the highest courts of the country. So has been the principle that a true statement made solely for public interest (e.g., a statement challenging the qualification of a public official) cannot be imposed any legal liability.

⁵¹ Council of Europe, "Legal Provisions Concerning Defamation and Insult in Europe" <[http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm\(2003\)006rev_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm(2003)006rev_EN.asp)>

⁵² William Roos, Case Comment, NETHERLANDS: COPYRIGHT: RIGHT TO PRIVACY AND PORTRAIT RIGHT, *Entertain. Law Review* 1998, 9(8), N146-147

⁵³ Supreme Court Judgment, March 28, 2013, 2012Do11914

⁵⁴ Kyu Ho Youm, “The ‘Actual Malice’ of *New York Times Co. v. Sullivan*: A Free Speech Touchstone in A Global Century,” *Communication Law and Policy* 19, no.2 (2014): 185-210

⁵⁵ Youm Kyu Ho, “Libel Law and the Press: U.S. and South Korea Compared”, 13 *UCLA Pacific Basin Law Journal* 231 (1995).

One of the reason is that truth defamation has silently distorted the burden of proof in favor of the prosecutor/plaintiff in “falsity defamation” cases, the staple of defamation litigation around the world: If you will be held liable regardless of whether your statement is true or not, judges will be naturally not so strict about the plaintiff’s or prosecutors of burden of proving that what you said is false. Therefore, trials end up focusing on whether the speaker had “sufficient bases” to say what he said. This in turn has the effect of chilling one away from disseminating her or another’s often naturally ‘imperfect’ claims or evidence of corruption as she can be criminally punished in event that she cannot prove the truth of those claims.

For instance, a prominent congressman Roh Hwe-Chan was found guilty⁵⁶ for simply disclosing the names of the prosecutors who were named in a conversation between high-level Samsung Group officials planning bribery payments to the prosecutors, illegally wiretapped by the Korean intelligence agencies for the reason that he could not prove whether the prosecutors actually took the bribes, to be found not guilty only at the later appeals court. Some commentators opined:⁵⁷

There is no evidence presented to confirm the falsity of statement in this court ruling, therefore it is unsure whether the court examined any evidence on. . . the veracity of the statement. Even if the prosecutor had [somehow] successfully proven that the defaming statements were in fact false, it is necessary for the court to state the evidence it based its ruling on.

What was significant, the court decision focused on whether Congressman Roh had reasonable bases for his statement, an impossible demand when Roh was simply engaging in neutral reportage on the wiretapped conversation and was merely calling for an investigation into the matter. What was even more significant, the court ruled against Roh without making a finding that the prosecutors did not receive the bribes! In a similar case⁵⁸, a citizen was sentenced to seven years (!) of imprisonment for revealing that a certain prosecutor had engaged in illegal dealings with organized criminals to purchase an expensive property at a low price. Again, the court, without much evidentiary analysis, simply ruled that “Prosecutor Lee has not committed such offenses.”

3. Insult Prosecutions

⁵⁶ Seoul District Court Feb. 9, 2009 Judgment 2007GoDan2378

“[i]n this incident, the defendant deduced that Samsung gave money to Ahn through illegally recorded materials and articles from the press. The illegally recorded conversation only implies list of names of the prosecutors who “planned” to receive the money, but the defendant went further to make a false statement by claiming that the prosecutors on the list actually “received” money from Samsung. Since the articles from the press and recorded materials all contain information achieved from illegal recording, there is no way to prove the authenticity of Roh’s claim. . . [T]hough the defendant himself tried to investigate whether the prosecutors actually received money from Samsung, we shall conclude that the defendant was fully aware of making false statements.”

⁵⁷ Seungji Ha and Won Sun Choi, “Burden of Proving Falsity in False Defamation Cases”, 6 Korea University Law Review 31 (2009)

http://english.hani.co.kr/arti/english_edition/e_national/391645.html

⁵⁸ Seoul District Court Apr. 24, 2008 Judgment 2007GoDan3122

The crime of insult is also vigorously prosecuted in Korea with 9,417 prosecutions in 2013 and 4,860 prosecutions in 2010, again against the UN Human Rights Committee's 2011 General Comment 34 which warned against punishing "statements not subject to verification", namely expressions of feelings and opinions. Korea is not the only such country. However, in Germany, the world's capital of insult prosecution⁵⁹, insult is processed as private prosecution (*Privateklage*)⁶⁰ where prosecutors are not involved and therefore free of political bias. In Japan, the crime is treated lightly like a civil infraction, involving a maximum fine of 10,000 JPY.⁶¹

Insult law has been also used by government officials to crack down on the people who shared their negative feelings and opinions against the police. In 2013, out of 9,417 indictments for the crime of insult, 1,038 of them or a little more than 10% were for insulting the police officers. That percentage has only grown as the number of indictments for insulting the public officials increased to 1,397 in 2014, which represents a 35% increase from the previous year.⁶² These "police insult" cases have been used to suppress the participants in demonstrations and assemblies concerning the government policies.

Now, we have not seen this law being vigorously used by the Korean government for the specific purpose of suppressing criticism of the government. The reason is that insult is a crime that requires a formal accusation to be filed with the police by the insulted, and the socially established, who are the likely victims of the insult, have been deterred from filing such formal accusation in fear that such filing may only trigger negative publicity. However, the presence of insult law has justified the existence of "candidate insult" law, which practically bans the constituency from criticizing candidates in emotional tones or share emotional views of candidates with fellow constituency.

4. Conclusion

The crime of insult, criminal defamation and "truth defamation" laws are vigorously enforced by the authorities, despite the warnings of international human rights bodies, including of the UN Human Rights Committee that condemned penalizing an act of making truthful statements as well as the court's use of incarceration as a punishment for defamation in General Comment

⁵⁹ 10/22/2015 IPI special investigation: The application of criminal defamation laws in Europe | Defamation Laws
<http://legaldb.freemedia.at/2015/09/15/ipispecialinvestigationtheapplicationofcriminaldefamationlawsineurope/>

⁶⁰ Section 374 Strafproze<<beta>>ordnung [StPO] [German Code of Criminal Procedure] (F.R.G.) makes a Privatklage available, without any requirement of a prior involvement of the state's attorney, in cases involving (1) trespass into the home; (2) insult; (3) bodily harm; (4) threats; (5) corruptibility or actual corruption in commercial affairs; (6) damage to goods; (7) unfair competition; and (8) a variety of matters of infringement of intellectual property.

⁶¹ Japan's Criminal Code, Article 231

⁶² MP Park Nam-chun's press release, March 26, 2015, available at <http://bit.ly/1FR5YG1>

No. 34 issued in 2011⁶³ and specifically recommended in 2015 that Korea's law be amended.⁶⁴

⁶³ General Comment No. 34 of the UN Human Rights Committee, Para. 47, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

para. 47, "Defamation laws. . . should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions. . . not. . . subject to verification. . . States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. . ."

⁶⁴ Concluding Observations of the UN Human Rights Committee's Fourth Period Reports of the Republic of Korea,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKOR%2fCO%2f4&Lang=en

"Para 47, The State party should consider decriminalizing defamation, given the existing prohibition in the Civil Act and should in any case restrict the application of criminal law to the most serious of cases, bearing in mind that imprisonment is never an appropriate penalty It should ensure that the defence of truth is not subjected to any further requirements. . . ."