

# K-Pop’s Secret Weapon: South Korea’s Criminal Defamation Laws

REBECCA XU\*

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\* © 2022 Rebecca Xu. J.D. Candidate 2023, University of San Diego School of Law; B.A. 2020, University of California, San Diego.

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## ABSTRACT

South Korea’s criminal defamation laws have long been considered an intrusion on the free speech rights of citizens, especially in regard to the usage by politicians against their opponents and journalists to suppress criticisms. This Comment considers the history and effects of these controversial defamation laws through the lens of recent scandals within the Korean entertainment industry, where regular citizens accusing Korean celebrities of past school violence are confronted with threats of defamation charges. To highlight the controversial nature of such laws, comparisons will be drawn between South Korea and other countries to highlight the restrictive nature of Korea’s laws.

## I. INTRODUCTION

The Republic of Korea (also known as South Korea, hereinafter “Korea”) and their controversial defamation laws fell under scrutiny due to Korean celebrities bringing criminal charges against “netizens” (people on the internet) for exposing these celebrities for school violence.<sup>1</sup> The alleged victims accused the celebrities of everything ranging from verbal harassment to sexual assault.<sup>2</sup> The claims were made anonymously, creating an obstacle in these cases.<sup>3</sup> The anonymity of the accusers remains a side effect of Korea’s harsh defamation laws historically used by powerful people to target those who speak out against them.<sup>4</sup> These celebrity scandals mark a new development in the use of Korea’s defamation laws as the focus

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1. Mark Savage, *BTS’s Record Label Sues Over ‘Malicious’ Posts*, BBC (Aug. 27, 2019), <https://www.bbc.com/news/entertainment-arts-49484380> [<https://perma.cc/9VMK-WAJB>].

2. Hyeong Yun, *Inside the Bullying Scandal Cancelling South Korean Celebrities*, VICE NEWS (Mar. 11, 2021, 8:06 AM), <https://www.vice.com/en/article/v7maad/bullying-scandal-south-korea-celebrities-kpop-kdrama> [<https://perma.cc/XW2D-FU8C>].

3. Min Joo Kim & Simon Denyer, *In South Korea, a growing web of childhood bullying claims, upended careers and secret accusers*, THE WASHINGTON POST (May 20, 2021, 5:00 AM), [https://www.washingtonpost.com/world/asia\\_pacific/south-korea-bullying-metoo-accusations/2021/05/14/9ddeaa2a-ad6e-11eb-82c1-896aca955bb9\\_story.html](https://www.washingtonpost.com/world/asia_pacific/south-korea-bullying-metoo-accusations/2021/05/14/9ddeaa2a-ad6e-11eb-82c1-896aca955bb9_story.html) [<https://perma.cc/28UC-EGP9>].

4. Manyan Lai, *South Korea’s Defamation Law: A Dangerous Tool*, PEN AMERICA (Dec. 28, 2016), <https://pen.org/south-koreas-defamation-law-a-dangerous-tool/> [<https://perma.cc/GKF3-S4DT>].

shifts from the political sphere to the entertainment industry intersecting with the modern use of the internet to disseminate information.

Compared to other countries' laws, Korea's criminal defamation provisions discourage exposés and restrict the speech rights of citizens.<sup>5</sup> In Korea, truth fails as an absolute defense in defamation cases, so even truthful statements can be charged.<sup>6</sup> Previously, politicians weaponized these defamation laws against political opponents or news sources who had the platform and ability to "talk back."<sup>7</sup> The repercussions of prosecution under Korea's defamation laws would affect netizens more harshly as these individuals likely do not have a platform and could be easily silenced.<sup>8</sup> Attempts to implement cyber defamation laws continue to deteriorate the ability of regular citizens to speak out on public platforms,<sup>9</sup> and implementing these laws may allow police to investigate "hateful comments" without requiring any reports from a third party.

This comment looks at new developments in Korea's defamation laws and the effects on citizens of Korea through the lens of celebrity bullying scandals. A comparison with the United States will highlight the importance of the freedom of press and the necessity of strict protections. Additionally, paralleling other countries' laws and protections reveals that despite the stated intent of Korea's defamation law to protect the reputation of its people, in reality the laws are used as a suppression tactic to maintain power.

## II. BACKGROUND

### A. Korean Law

Under Korean defamation law, defamatory statements may be punished regardless of whether such statements are true or false.<sup>10</sup> Unlike most

5. *Id.*

6. Ahran Park & Kyu Ho Youm, *Fake News from a Legal Perspective: The United States and South Korea Compared*, 25 SW. J. INT'L L. 100, 110 (2019).

7. Lai, *supra* note 4.

8. Claire Lee, *How #MeToo Movement is Pushing for Revision of South Korea's Defamation Law*, The Korea Herald (Mar. 1, 2018, 7:52 PM), <http://www.koreaherald.com/view.php?ud=20180301000196> [<https://perma.cc/M6FN-JLMR>].

9. Kim Tong-hyung, *Online Portals Face More Regulation, Deeper Scrutiny*, THE KOREA TIMES (Dec. 18, 2008, 7:04 PM), [http://www.koreatimes.co.kr/www/news/biz/2008/12/123\\_36365.html](http://www.koreatimes.co.kr/www/news/biz/2008/12/123_36365.html) [<https://perma.cc/W7XM-LFE9>].

10. Hyeongbeob [Criminal Act] art. 307 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=55948&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55948&lang=ENG) (search required).

countries, Korea governs defamation under criminal law punishable with jail time and/or fines.<sup>11</sup> The Constitution of South Korea “mak[ing] no preferential judgment subordinating reputation to a free press,” paired with the stated intent of the defamation laws to protect reputation effectively renders the press (and other public statements, discussed in detail below) vulnerable to repression.<sup>12</sup> The South Korean Criminal Code (대한민국형법) states in Article 307:

- (1) A person who defames another by publicly alleging facts shall be punished by imprisonment or imprisonment without prison labor for not more than two years or by a fine not exceeding five million won (as of October 2021, this amounts to about \$4,000<sup>13</sup>).
- (2) A person who defames another by publicly alleging false facts shall be punished by imprisonment for not more than five years, suspension of qualifications for not more than ten years, or a fine not exceeding ten million won (as of October 2021, this amounts to about \$8,000<sup>14</sup>).<sup>15</sup>

South Korean Criminal Code Article 309 further outlines the penalties for defamation. Under Article 309, punishments for defamation increases if communicated through “printed materials,” defined in the code as “newspaper, magazine, radio, or other publication.”<sup>16</sup> For true statements, the punishment increases to imprisonment for three years or a fine no more than seven million won (as of October 2021, this amounts to about \$5,875<sup>17</sup>).<sup>18</sup> For false statements, the punishment increases to imprisonment for no more than seven years, suspension of qualifications for no more

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11. John M. Leitner, *To Post or Not to Post: Korean Criminal Sanctions for Online Expression*, 25 TEMP. INT’L & COMP. L.J. 43, 46 (2011).

12. Kyu Ho Youm, *Libel Law and the Press: US and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 232 (1995) [hereinafter *Libel Law*].

13. *South Korean Won (KRW) to U.S. Dollar (USD) exchange rates for 2021*, EXCHANGE RATES UK, <https://www.exchangerates.org.uk/KRW-USD-spot-exchange-rates-history-2021.html> [<https://perma.cc/X3L5-VJTJ>].

14. *Id.*

15. Hyeongbeob [Criminal Act] art. 307 (S. Kor.), *translated in* Korean Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=55948&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55948&lang=ENG) (search required).

16. Hyeongbeob [Criminal Act] art. 309 (S. Kor.), *translated in* Korean Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=55948&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55948&lang=ENG) (search required).

17. EXCHANGE RATES UK, *supra* note 13.

18. Hyeongbeob [Criminal Act] art. 309 (S. Kor.), *translated in* Korean Legislation Research Institute’s online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=55948&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55948&lang=ENG) (search required).

than ten years, or a fine of no more than fifteen million won (as of October 2021, this amounts to about \$12,600<sup>19</sup>).<sup>20</sup>

In spite of harsh penalties for defamation, Korea codified a public interest exception. If true and solely for the public interest, the Criminal Code cannot punish the statement.<sup>21</sup> In practice, this exception is difficult to obtain due to the high standard and narrow construction. In a case before Korea's Supreme Court where a worker truthfully accused his employer of garnishing his wages, the worker failed to satisfy the elements of the public interest defense as he intended to pressure his employer to pay him properly and not to inform the public of his employer's misdeeds.<sup>22</sup>

Not only punished under criminal law, civil defamation in Korea is classified as a tort requiring compensation for damages if found liable. Korea's civil law allows for special damages in the case of defamation in order to make reparations for damages to reputation.<sup>23</sup> Article 764 of the Korean Civil Act allows for the court to order the defendant to take "measures appropriate for repairing the injured party's reputation, either in lieu of, or together with provision of compensation [damages]."<sup>24</sup> Examples of such suitable measures include requiring the defamer to "apologize publicly in a national or local newspaper and to publish a letter of reply from the defamed."<sup>25</sup> In United States' courts, such measures would be unlikely as states tend to focus less on reputation and image and more on actual harm or damages to the victim of defamation.<sup>26</sup>

As evidenced in the Civil Act, Korea places greater emphasis on the protection of reputation.<sup>27</sup> The Korean Constitution itself provides an

19. EXCHANGE RATES UK, *supra* note 13.

20. Hyeongbeob [Criminal Act] art. 309 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=55948&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55948&lang=ENG) (search required).

21. *Id.* art. 310.

22. Kyung S. Park & Jong-Sung You, *Criminal Prosecutions for Defamation and Insult in South Korea with a Leflarian Study in Election Contexts*, 12 U. PA. ASIAN L. REV. 463, 475 (2017) (citing Daebeobwon [S. Ct.], Oct. 15, 2004, 2004Do3912 (S.Kor.)).

23. Minbeob [Civil Act] art. 764 (S.Kor.), *translated in* Korean Legislation Research Institute's online database, [http://elaw.kiri.re.kr/eng\\_service/main.do](http://elaw.kiri.re.kr/eng_service/main.do) (search required).

24. *Id.*

25. Kyu Ho Youm, *Press Freedom under Constraints: The Case of South Korea*, 26 ASIAN SURVEY 868, 876 (1968) [hereinafter Youm, *Press Freedom*].

26. *Wex legal encyclopedia: defamation*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/defamation> [<https://perma.cc/Z5MF-7255>].

27. *See* Minbeob [Civil Act] art. 764 (S.Kor.), *translated in* Korean Legislation Research Institute's online database, [http://elaw.kiri.re.kr/eng\\_service/main.do](http://elaw.kiri.re.kr/eng_service/main.do).

avenue for such protection, stating that “neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics.”<sup>28</sup> Such protections can be further circumvented in the interest of “national security, the maintenance of law and order, or for public welfare.”<sup>29</sup> Therefore, the language of the Constitution forces Korean jurisprudence to balance these competing values.

In a Korean Supreme Court case against six producers of television broadcasting program *PD Notebook*, the court held the “protection of reputation may precede the freedom of speech” in the case of speeches “belong[ing] to a private scope”; however, the judge failed to clarify what kinds of speech belonged in the private domain or those relegated to the public domain.<sup>30</sup> A renowned professor of law at Seoul National University, the premier university of Korea, touched on the increasingly “dramatic and divisive” debate over defamation laws as “honoring traditional notions of reputation” clashing with “rejecting any vestiges of authoritarianism in favor of democratic freedoms.”<sup>31</sup>

Korea must consider privacy. The Korean Constitution contains an article protecting the right to privacy, which states: “[t]he privacy of no citizen shall be infringed.”<sup>32</sup> An underlying reason for such stringent defamation laws stems from the heightened focus on protecting the privacy of citizens. In comparison to other countries, Korea places a heavy emphasis on privacy. According to the International Association of Privacy Professionals, Korea’s Personal Information Protection Act (PIPA) stands as one of the world’s strictest privacy regimes.<sup>33</sup> The penalties under the act “enthusiastically enforced” include civil damages and criminal fines or imprisonment.<sup>34</sup>

Removing defamation punishments may lead to greater infringement on the privacy rights of citizens, causing concern for citizens. In an article by Korean Herald article, an interview with a “professional in Seoul who is skeptical about the possible revision” to criminal defamation laws revealed a general concern that such revisions may lead to the disclosure of “any information about others’ past or private lives, even if [they] are

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28. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 21 (S. Kor.), translated in Korean Legislation Research Institute’s online database, [http://elaw.kiri.re.kr/eng\\_service/main.do](http://elaw.kiri.re.kr/eng_service/main.do) (search required).

29. *Id.* art. 37.

30. Daebeobwon [S. Ct.], Sept. 2, 2011, 2010Do17237 (S. Kor.).

31. Leitner, *supra* note 11.

32. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 17 (S. Kor.), translated in Korean Legislation Research Institute’s online database, [http://elaw.kiri.re.kr/eng\\_service/main.do](http://elaw.kiri.re.kr/eng_service/main.do) (search required).

33. Alex Wall, *GDPR matchup: South Korea’s Personal Information Protection Act*, IAPP (Jan. 8, 2018), <https://iapp.org/news/a/gdpr-matchup-south-koreas-personal-information-protection-act/> [<https://perma.cc/JUD2-FDP8>].

34. *Id.*

not a public figure with a lot of influence on the general public and interest.”<sup>35</sup>

### *B. American Law*

The United States Constitution explicitly protects freedom of speech and freedom of press.<sup>36</sup> Due to no constitutional protection of reputation, the United States' courts generally favor the press and private citizens' right to make public statements in defamation cases.<sup>37</sup>

While the federal legislature chose not to enact a statutory basis for defamation, many states chose to codify civil defamation statutes. The statutes vary between the states but are still governed by the right restrictions of the United States constitution.<sup>38</sup> Unlike Korea, the civil code fully governs defamation in the United States. The landmark case *New York Times v. Sullivan* established the central most element of United States defamation law: truth is an absolute defense to defamation.<sup>39</sup> In order to win a defamation suit, public officials must prove that the defamer published their statements knowing that the information was false or published with a “reckless disregard of whether it was false or not.”<sup>40</sup> This holding aimed to prevent the “chilling” of free speech—very few people, if anyone at all, would ever speak up if they were required to guarantee the veracity of every statement in order to avoid liability for defamation.<sup>41</sup> This case is a clear example of the United States' interest in protecting free speech over reputation.

Later cases have further narrowed the grounds for bringing defamation cases. *Gertz v. Robert Welch, Inc.* distinguished defamation against public figures, defined as those who “have assumed roles of special prominence in the affairs of society” or “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,” from defamation against private figures and established a lower *mens rea* for private figures than *Sullivan* previously required for public figures.<sup>42</sup> This

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35. Lee, *supra* note 8.

36. See U.S. CONST. amend. I.

37. See Youm, *Libel Law*, *supra* note 12, at 231–32.

38. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 295–96 (1964).

39. See *id.* at 279.

40. *Id.* at 280.

41. See *id.* at 279.

42. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–48 (1974); see also *Sullivan*, 376 U.S. at 279–80.

case acknowledged that private figures are more vulnerable than public figures, and so there should be greater interest in protecting them with the law.

*Hustler Magazine v. Falwell* blocked defamation cases for statements that are so over-the-top ridiculous that there is no way such statements could be true.<sup>43</sup> Essentially, if no one believes the validity of an allegation, then there can be no liability on the author's part.<sup>44</sup>

The tort elements of defamation in the Restatement (Second) of Torts are:

- (1) a false statement purporting to be fact; (2) publication or communication of that statement to a third person; (3) fault amounting to at least negligence; and (4) damages, or some harm caused to the person or entity who is the subject of the statement.<sup>45</sup>

The United States defines opinion rather broadly, making it even more difficult to bring a defamation suit. Many of the outcomes in the Korean cases mentioned in Section II.B. may have been more questionable if brought in the United States since the defamers' statements might be considered opinions (and not facts) under the United States definition of opinion.

There is no United States federal criminal defamation law, and it was effectively eliminated from common law by the Supreme Court decision in *Ashton v. Kentucky* when Kentucky's criminal defamation statute was accused of being unconstitutionally vague.<sup>46</sup> A few states still have codified criminal defamation statutes, but the Supreme Court has limited the application of these statutes to cases of "actual malice."<sup>47</sup> Many of these state statutes have been declared unconstitutional, and those that have not are rarely enforced in practice.<sup>48</sup>

### C. The European Union

The European Union (hereinafter "the EU") is the most similarly situated group of nations that can serve as an adequate comparison to both Korea and the United States. Many nations in Europe desire to join the EU for the economic benefits of a uniform currency and an internal single market, and so are required to adapt their legal systems to protect the same rights

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43. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).

44. *Id.*

45. Restatement (Second) of Torts § 558 (Am. L. Inst. 1977).

46. See *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966).

47. *Criminal Defamation Laws in North America*, COMMITTEE TO PROTECT JOURNALISTS, Section III.A., <https://cpj.org/reports/2016/03/north-america/#3> [<https://perma.cc/DGS7-KCDL>].

48. See *id.*



as those under the laws of the EU.<sup>49</sup> Under the European Convention on Human Rights (which must be ratified by all EU members), one of the main rights protected is the freedom of expression, much like how free speech is protected under the United States Constitution.<sup>50</sup>

There are provisions, however, that allow limitations on free speech if justified by “countervailing rights.”<sup>51</sup> Similar to the balance of rights in Korea, a major force influencing the development of defamation laws in both EU member-states and candidates for EU membership is the balance between the right to freedom of expression and the right to protection of reputation.<sup>52</sup>

Notably, only two EU member-states currently have no criminal defamation in their legal code (as of 2020, the United Kingdom is no longer a member of the EU).<sup>53</sup> Aside from Cyprus and Ireland, all twenty-five other EU member-states have some form of criminalized defamation in their legal system, with punishments ranging from small fines to up to ten years in prison.<sup>54</sup> However, these nations are hesitant to jail those guilty of defamation and have heavily favored imposing proportionate damage awards instead to bring the victim closer to whole.<sup>55</sup>

The few Balkan countries currently seeking to join the EU have been requested to decriminalize their defamation laws in order to promote democratization.<sup>56</sup> The Organization for Security and Co-Operation in Europe (“OSCE”) argues that modern democracies have a duty to “encourage public debate without fear of reprisals in criminal court.”<sup>57</sup> Ironically, none of the countries that currently hold member-state status in the EU have been required to make any significant improvements to their defamation laws, and it remains criminalized in most of the EU even today.<sup>58</sup>

49. *Single market*, EUROPEAN-UNION, [https://europa.eu/european-union/topics/single-market\\_en](https://europa.eu/european-union/topics/single-market_en) [<https://perma.cc/W9QA-4WGY>].

50. Aneta Spaic et al., *Decriminalization of Defamation—The Balkans Case a Temporary Remedy or a Long Term Solution?*, 47 INT'L J.L. CRIME & JUST. 21, 24 (2016).

51. *Id.*

52. *Id.*

53. *Id.* at 22–23.

54. *Id.*

55. *Id.* at 26.

56. *Id.* at 27.

57. OSCE Welcomes Montenegro's Decriminalization of Speech Offences, OSCE (July 11, 2011), <https://www.osce.org/montenegro/80808> [<https://perma.cc/W5L7-WNTW>].

58. Spaic et al., *supra* note 50, at 27.

The one big difference, and one that highlights Korea as unique among developed nations, is that despite having criminal defamation laws, the truth still remains an absolute defense in EU countries. In 1992, the European Court of Human Rights struck down the Spanish government's refusal of a defamation truth defense, stating the government's decision would be an "unjustified interference with [the] right to freedom of expression."<sup>59</sup> The European Court of Human Rights has also set a precedent allowing a wider range of potentially defamatory statements to be justified as "acceptable criticism" when the victim is a public figure (as opposed to a private figure).<sup>60</sup> Similar sentiments are corroborated by organizations like the Inter-American Court of Human Rights, the UN Human Rights Committee, and the African Commission on Human and Peoples' Rights.<sup>61</sup>

#### D. Other Countries

Norway has laws against defamation in their criminal code, but an amendment in 2016 banned criminal prosecution for defamation and limits recovery to civil litigation.<sup>62</sup> As a private right of action, if the person making the defamatory statement can prove that there was some justification for their statement, they may have a defense and be exempt from liability.<sup>63</sup> They must have a good faith belief that their statement was justified, and there must be some consideration that the statement was "factually well founded."<sup>64</sup>

In Denmark, a criminal code provision exists that prohibits offensive language against other individuals, with a punishment of a fine or up to four months in jail.<sup>65</sup> However, in reality this provision is rarely enforced and there are no recent cases concerning this criminal law.<sup>66</sup>

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59. Christopher Phiri, *Criminal Defamation Put to the Test: A Law and Economics Perspective*, 9 U. BALT. J. MEDIA L. & ETHICS 49, 55 (2021).

60. *Id.* at 57.

61. *Id.*

62. Michael T. Moran, *Criminal Defamation and Public Insult Laws in the Republic of Poland: The Curtailing of Freedom of Expression*, 26 MICH. ST. INT'L L. REV. 575, 602 (2018).

63. *Questionnaire on the use of legislation, including criminal legislation, to regulate the activities and work of human rights defenders: Input from Norway*, U.N. OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/Documents/Issues/Defenders/Answers/States/Norway.pdf> [<https://perma.cc/A6QU-GXRY>].

64. *Id.*

65. STRAFFELOVEN [CRIMINAL CODE] § 267 (Den.), *translated in* Legislation Online's online database, [https://legislationline.org/sites/default/files/documents/39/Denmark\\_Criminal\\_Code\\_am2005\\_en.pdf](https://legislationline.org/sites/default/files/documents/39/Denmark_Criminal_Code_am2005_en.pdf) [<https://perma.cc/3D5T-VML3>].

66. See Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861, 874 (2003).

The Netherlands' criminal defamation is limited to statements made against the King, but such statements have rarely been prosecuted.<sup>67</sup> Reports from the Council of Europe, indicate that there has actually been some discussion to remove defamation from the criminal code entirely.<sup>68</sup>

Switzerland also has defamation provisions in its criminal code.<sup>69</sup> Under Swiss law, if the defamer is unable to prove that there is some public interest or justification for their statement, they may be charged for their statements regardless of if they are true or not.<sup>70</sup>

### E. The Situation in South Korea

Starting in February of 2021, multiple posts began circulating on Korean social media sites accusing various public figures of bullying.<sup>71</sup> The wave began with anonymous accusations of physical, verbal, and emotional abuse against pseudo-celebrity volleyball twins, Lee Jae-yeong and Lee Da-yeong.<sup>72</sup> The twins quickly apologized on their Instagram, though the posts have since been deleted.<sup>73</sup> Despite their apologies, public sentiment against the twins became impossible to ignore, with a petition to the Blue House amassing over 150,000 signatures.<sup>74</sup> They were subsequently dropped

67. *Draft list of questions for CDMSI members on the implementation of Council of Europe standards related to safety of journalists and other media actors*, Council of Europe (2015), <https://rm.coe.int/09000016804920c7> [<https://perma.cc/J3CU-GQL5>].

68. *Id.*

69. SCHWEIZERISCHES STRAFGESETZBUCH [CRIMINAL CODE] Dec. 21, 1937, SR 311.0 (1938), art. 173 (Switz.), *translated in* The Federal Council's online database, [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en#a173](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en#a173) [<https://perma.cc/RJ2F-BY7K>].

70. *Id.*

71. Yun, *supra* note 2.

72. *K-pop idol stars beleaguered by school bullying accusations*, YONHAP NEWS AGENCY (Feb. 23, 2021, 3:57 PM), <https://en.yna.co.kr/view/AEN20210223008800315> [<https://perma.cc/QY22-6WU9>].

73. Gawon Bae, *Caught in the midst of a bullying scandal, South Korean volleyball twins Lee Jae-yeong and Lee Da-yeong controversially sign for Greek club*, CNN SPORTS (Oct. 1, 2021, 12:00 AM), <https://www.cnn.com/2021/10/01/sport/lee-jae-yeong-lee-da-yeong-south-korea-volleyball-spt-intl/index.html> [<https://perma.cc/6RW5-W48P>].

74. Ben Church & Gawon Bae, *South Korean Volleyball Twins Jae-yeong and Lee Da-yeong Dropped Amid Bullying Scandal*, CNN SPORTS (Feb. 17, 2021, 10:51 PM), <https://www.cnn.com/2021/02/17/sport/south-korea-volleyball-twins-bullying-spt-intl/index.html> [<https://perma.cc/D29S-5698>]; Yeojabaegu Seonsu Hakgyopongryeok Satae Jinsanggyumyeong Mit Eomjeongdaeung Chukguhamnida [Petition urging the government to find out the truth about women's volleyball players' school violence and respond strictly], <https://www1.president.go.kr/petitions/596393> [<https://perma.cc/ZNY5-YSRA>].

from their club teams and the Korean national team.<sup>75</sup> However, the success of the “court of public opinion” did not last for long. In July, merely half a year later, the twins revealed in an interview with Korean Broadcasting System (KBS) that they would be suing for defamation, and within eight months both re-entered the professional volleyball world after signing a year-long contract with Greek club PAOK Thessaloniki.<sup>76</sup>

At the time, the seemingly successful takedown of these pseudo-celebrity volleyball twins appeared to trigger a movement, as an outpouring of similar accusations flooded Korean websites, with the phenomenon soon spreading to real celebrities. Korean pop (known as “K-pop”) idols, like most Korean celebrities, pride themselves on their clean images, so this movement had a devastating effect on their reputations.<sup>77</sup> The list of accused idols ranged from bright-eyed and bushy-tailed rookies, like TOO’s Woonggi who debuted a mere ten months before the incident<sup>78</sup>, to well-established veterans, like soloist Hyuna who had been a member of two high-profile K-pop groups before branching out to work on her own after debuting in 2007.<sup>79</sup> No one was safe, not even the stars with the purist images. Chuu (real name Kim Ji-woo) from mega group Loona, famous for her cute looks and friendly personality, was accused of purposefully ostracizing certain classmates (including the accuser/victim) for insignificant reasons.<sup>80</sup>

While some of these accusations were cleared up over time—for example, Chuu’s accuser eventually admitted that they had “embellished” their memories of their schooldays and apologized for the ruckus they started<sup>81</sup>—others felt the effects more severely. Stray Kids’ Hyun-jin, accused of targeting his

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75. Ben Church & Gawon Bae, *South Korean Volleyball Twins Lee Jae-yeong and Lee Da-yeong Dropped Amid Bullying Scandal*, CNN SPORTS (Feb. 17, 2021, 10:51 PM), <https://www.cnn.com/2021/02/17/sport/south-korea-volleyball-twins-bullying-spt-intl/index.html> [<https://perma.cc/U443-7JZB>].

76. *Id.*

77. See Min Joo Kim, *Sex Scandals Stain the Clean-Cut Image of South Korea’s K-Pop*, THE WASHINGTON POST (Aug. 5, 2019), [https://www.washingtonpost.com/world/asia\\_pacific/sex-scandals-stain-the-clean-cut-image-of-south-koreas-k-pop/2019/07/29/b49d3a8e-a93c-11e9-9214-246e594de5d5\\_story.html](https://www.washingtonpost.com/world/asia_pacific/sex-scandals-stain-the-clean-cut-image-of-south-koreas-k-pop/2019/07/29/b49d3a8e-a93c-11e9-9214-246e594de5d5_story.html) [<https://perma.cc/2M2A-R3EH>].

78. J.K., *Agency of TOO’s Woonggi Denies Allegations of School Bullying*, SOOMPI (Feb. 16, 2021), <https://www.soompi.com/article/1454673wpp/agency-of-toos-woonggi-denies-allegations-of-school-bullying> [<https://perma.cc/5XE3-YFLL>].

79. M. Kang, *Update: Hyuna Personally Denies School Violence Accusations + P NATION Shares Statement*, SOOMPI (Feb. 23, 2021), <https://www.soompi.com/article/1455895wpp/hyuna-personally-denies-school-violence-accusations> [<https://perma.cc/WA49-BV5A>].

80. S. Nam, *Update: LOONA’s Chuu’s Agency Denies School Violence Allegations, Share Plans For Legal Action*, SOOMPI (Feb. 24, 2021), <https://www.soompi.com/article/1455843wpp/loonas-chuus-agency-issues-statement-regarding-school-violence-allegations> [<https://perma.cc/K6EP-UN6B>].

81. *Id.*

female classmates with physical harassment and sexual comments, was put on a hiatus that lasted four months.<sup>82</sup> G-Idle's Soo-jin's case was generally considered the most contentious accusation by far as her victims, numbering in the tens, included child actress Seo Shin-ae, who is considered a household name in Korea.<sup>83</sup> Despite numerous denials of each accusation as they were revealed, eventually Soojin was put on hiatus before ultimately being kicked out of the group.<sup>84</sup>

Each celebrity's agency responded in different ways, but there was a common thread to all their responses and public statements. Every company made some indication of their intent to bring charges of defamation against the accusers.

TOO's company stated they would "take firm action" if "false information" continued to be posted about their artist.<sup>85</sup> Actress and former idol Kim So-hye's agency requested an investigation from the police.<sup>86</sup> Loona's company was even more explicit, sharing in a public statement that they intended to file a criminal complaint and had already retained a law firm to assist them in the matter.<sup>87</sup>

Out of all the accusations, only Chuu's accuser admitted that they had lied in their post.<sup>88</sup> Many of these cases still remain open-ended, and entertainment companies are hesitant to address the status of the case in order to avoid reminding the general public of that period of scandal.

82. Jewelyn Fernandes, *'Stray Kids' Confirms Hyunjin's Return to Group After Four-month Hiatus*, REPUBLIC WORLD (June 28, 2021, 4:20 PM), <https://www.republicworld.com/entertainment-news/music/stray-kids-confirms-hyunjins-return-to-group-after-four-month-hiatus.html> [https://perma.cc/X2N8-68ZV].

83. Admin, *Witness comes forward with first hand testimony of (G)-Idle Soojin's abuse of actress Seo Shin-ae*, DAILY NAVER (Feb. 22, 2021), <https://dailynaver.blogspot.com/2021/02/witness-comes-forward-with-first-hand.html> [https://perma.cc/6HWB-EQZ3].

84. Haley Yang, *Soojin leaves (G)I-DLE following school bullying allegations*, KOREA JOONGANG DAILY (Aug. 15, 2021), <https://koreajoongangdaily.joins.com/2021/08/15/entertainment/kpop/soojin-GIDLE-gidle/20210815103900449.html> [https://perma.cc/8DFM-R545].

85. J.K., *supra* note 78.

86. AKP Staff, *Kim So Hye's label says they've submitted a request for investigations to police about bullying rumors*, ALLKPOP (Feb. 21, 2021), <https://www.allkpop.com/article/2021/02/kim-so-hyes-label-says-theyve-submitted-a-request-for-investigations-to-police-about-bullying-rumors> [https://perma.cc/44XV-E2ZH].

87. Nam, *supra* note 80.

88. See Lee Gyu-lee, *LOONA Chuu's bullying accuser apologizes for false claims*, THE KOREA TIMES (Feb. 24, 2021, 5:42 PM), [https://www.koreatimes.co.kr/www/art/2021/06/732\\_304559.html#](https://www.koreatimes.co.kr/www/art/2021/06/732_304559.html#) [https://perma.cc/AEF4-S7T7].

The cases show the willingness of these celebrities and their representatives to utilize Korea's criminal defamation laws in order to suppress more of such accusations from surfacing. Many accusers indicated in their posts that they purposefully remained anonymous in order to avoid retaliation and were prepared to bear the potential costs of legal action against them.

### III. HISTORY OF DEFAMATION IN SOUTH KOREA

#### A. *Historical Basis for Criminal Defamation*

Even before freedom of speech was a defined concept in the West, King Sejong the Great of Korea's Chosun Dynasty (1392-1897) stressed the necessity of freedom of expression and protected the rights of his citizens to criticize the government.<sup>89</sup> The Chosun Dynasty, despite being founded centuries before many modern democracies even conceived of protecting free speech rights, was well aware of the benefits of maintaining full transparency in the king's decisions to provide commoners with the freedom to criticize the king's methods if they so desired.<sup>90</sup> Unfortunately, such sentiments have failed to last, and modern Korea remains one of the few developed democratic nations with outdated laws that infringe on freedom of speech rights.

Korea officially transitioned to a democracy in 1948 with the establishment of the Republic of Korea and the first general election under the supervision of the United Nations.<sup>91</sup> However, that was not the end of Korea's decades-long struggle to sustain democracy.<sup>92</sup> The Korean War, starting in 1950, put a pause on efforts to fully liberalize the country, and President Rhee Syngman's strong disapproval of the armistice ending the war in 1953 led him to begin resorting to authoritarian methods of maintaining his power.<sup>93</sup> A series of violent protests called the April 19 Revolution and a coup d'état by General Park Chung-hee put an end to President Syngman's reign, and Korea enjoyed a period of economic prosperity under Chung-hee's regime, even as the government remained politically authoritarian.<sup>94</sup>

There then came a series of coup d'états, authoritarian Presidents, and more protests and uprisings until the people elected President Roh Tae-

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89. Park & You, *supra* note 22, at 464.

90. *Id.*

91. *Transition to a Democracy and Transformation into an Economic Powerhouse*, KOREA MINISTRY OF CULTURE, SPORTS AND TOURISM (Feb. 13, 2015), <https://www.korea.net/AboutKorea/History/Transition-Democracy-Transformation-Economic-Powerhouse> [<https://perma.cc/H66Z-CKR6>].

92. *See id.*

93. *Id.*

94. *See id.*

woo in 1987.<sup>95</sup> He instituted major democratic reform and established diplomatic relations with many countries, including the Soviet Union, China, and a few Eastern European countries.<sup>96</sup> However, corruption was still common despite efforts by subsequent Presidents to address the problem.<sup>97</sup>

Despite Korea's move toward democratization, vestiges of the country's authoritarian past still influence the government today. This is especially true for the country's legal system. Criminal defamation laws, at their core, are meant to protect the reputation of public officials and candidates for public office.<sup>98</sup>

### *B. Use Throughout History*

The first Korean president, Rhee Syngman, was elected in 1948 after 36 years of Japanese colonial rule and three years of occupation by American military. The influence of the past half century was not so easily shaken off, however. Despite claims of reform, President Syngman notoriously and ruthlessly suppressed opposition in the press and censorship was heavily enforced as it was under Japanese rule.<sup>99</sup> Despite a military revolution in 1961, the founding of a new republic in 1963, and an assassination and establishing of a subsequent martial law government in 1979, the censorship did not cease.<sup>100</sup>

President Lee Myung-bak is one of the most notorious authoritarian presidents in Korea's history. The sheer amount of censorship and suppression of the freedom of expression in the press was shocking—President Lee's regime in 2007 signified a turnover of power, the second since the democratic transition of 1987, which is usually a sign of “democratic consolidation.”<sup>101</sup> President Lee was also considered to be one of the more moderate, if not liberal, members of the Grand National Party, which leaned right.<sup>102</sup> According to Jong-sung You, a Professor of Public Policy and the Director of the

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95. *Id.*

96. *Id.*

97. *Id.*

98. Park & You, *supra* note 22, at 463.

99. Youm, *Press Freedom*, *supra* note 25, at 869–70.

100. *Id.*

101. Jong-sung You, *The “Cheonan” Incident and the Declining Freedom of Expression in South Korea*, 39 *ASIAN PERSPECTIVE* 195, 196 (2015), [https://www.academia.edu/18650316/You2015\\_Cheonan\\_freedom\\_of\\_expreseion](https://www.academia.edu/18650316/You2015_Cheonan_freedom_of_expreseion) [<https://perma.cc/V9US-XQ2E>].

102. *Id.*

Korea Inequality Research Lab,<sup>103</sup> one of the major contributors and the main tool used by President Lee's regime to suppress dissent was the criminal defamation laws of Korea.<sup>104</sup>

Most notably, after the sinking of Korean naval warship *Cheonan*, President Lee's regime investigated around forty people and indicted ten for their reports on the incident.<sup>105</sup> While he publicly denounced these supposed defamers as threats to democracy and national security, in reality they were mostly detained and convicted on claims that questioning the government's investigations of the *Cheonan* incident "amounted to defaming the naval officers, members of the JIG, and the minister of defense."<sup>106</sup>

At the time, Freedom House reduced Korea's freedom of the press rating from "free" to "partly free" and other organizations updated their evaluations of the status of Korea as a democracy to similar lower grades.<sup>107</sup> Amnesty International considered this a "worrying trend in South Korea of curtailing freedom of expression and association in the name of national security."<sup>108</sup>

Despite the utilization of the rhetoric of threats to national security to justify their heavy-handed treatment of government critics, there was not a single indictment by prosecutors under the National Security Law (NSL).<sup>109</sup> This was apparently due to the difficulties of obtaining a conviction under the NSL and the relatively easier application of defamation laws.<sup>110</sup> Even after President Lee's regime ended, prosecution of defamation cases continued to rise under subsequent authoritarian governments, indicating that the main obstacle to freedom of expression is actually the criminal defamation laws.<sup>111</sup>

Even before her inauguration in 2013, President Park Geun-hye caused investigations, detentions, fines, and indictments for journalists who dared to criticize her candidacy. The victims of President Park's campaign against criticism were not limited to just her critics—those detained included people who criticized her father and former president, Park Chung-hee, and her brother, Park Ji-man—despite their lack of affiliation with her current presidency.<sup>112</sup>

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103. Jong-Sung You, *About*, <https://jongsungyou.com> [<https://perma.cc/283R-8VCU>].

104. You, *supra* note 101.

105. *Id.* at 204.

106. *Id.*

107. *Id.* at 206.

108. *Id.* at 207.

109. *Id.* at 209.

110. *Id.*

111. *Id.* at 210.

112. *Id.* at 482.



President Park's administration turned the clock on the steady upward rise of liberal democracy in South Korea. Following the lead of previous president Lee Myung-bak, Park and her office launched a defamation suit against Tatsuya Kato in 2014, the Seoul bureau chief of Japan's *Sankei* newspaper, after he published an article speculating on President Park's whereabouts during the infamous Sewol Ferry disaster that occurred on April 16, 2014.<sup>113</sup> South Korean government officials brought a criminal suit against reporters and staffers from the Korean newspaper *Segye Ilbo* after they published a story on leaked documents from President Park's office.<sup>114</sup> Although these suits were eventually dropped, it becomes clear that a successful indictment is not the sole purpose (or even the primary purpose) of bringing these suits to criminal courts.<sup>115</sup> The effects on free speech can be felt even without actually sending journalists to jail—sometimes just the fear of such punishment is enough.

A “prominent Korean watchdog organization,” called the People's Solidarity for Participatory Democracy, indicated that the purpose of filing reports and prosecuting journalists under the criminal defamation provisions is not intended to ultimately punish journalists, but to intentionally “chill” their speech and discourage them from speaking up against the government.<sup>116</sup> The report also included accusations against the government of utilizing the defamation laws specifically to silence critics of the current administration.<sup>117</sup> Geoff Cain, the head of research of the Open Government Partnership's Korean team, indicated a rise in self-censorship in the media due to defamation cases.<sup>118</sup>

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113. *Submission to the Universal Periodic Review of South Korea*, HUM. RTS. WATCH (Mar. 30, 2017, 12:00 AM) [hereinafter *UPR*], <https://www.hrw.org/news/2017/03/30/submission-universal-periodic-review-south-korea> [<https://perma.cc/69JU-5EJ5>].

114. *Human Rights Watch Raps Gov't Over Defamation Laws*, THE KOREA TIMES (Dec. 17, 2014, 9:51 PM), [http://koreatimes.co.kr/www/news/issues/2014/12/139\\_170049.html](http://koreatimes.co.kr/www/news/issues/2014/12/139_170049.html) [<https://perma.cc/23XC-BRUK>].

115. *See Choe Sang-Hun, Court Acquits Journalist Accused of Defaming South Korean President*, THE NEW YORK TIMES (Dec. 17, 2015), [https://www.nytimes.com/2015/12/18/world/asia/south-korea-park-geun-hye-defamation-verdict.html?\\_r=0](https://www.nytimes.com/2015/12/18/world/asia/south-korea-park-geun-hye-defamation-verdict.html?_r=0) [<https://perma.cc/VZ6G-RXWY>].

116. Lai, *supra* note 4.

117. Stacey Steele, *Defamation Law, Privacy and the #MeToo Movement in Korea*, ASIAN STUDIES ASS'N OF AUSTRALIA (May 6, 2020), <https://asaa.asn.au/defamation-law-privacy-and-the-metoo-movement-in-korea/>.

118. Andrew Salmon, *Is South Korea's democracy Under Threat from Within?*, AL JAZEERA (Feb. 1, 2015), <https://www.aljazeera.com/features/2015/2/1/is-south-koreas-democracy-under-threat-from-within> [<https://perma.cc/9A52-Z2NE>].

There has also been a chilling effect in the past on accusations of misconduct against high-profile executives of big corporations for fear of retaliation. This has become especially prominent and especially obvious in the wake of the Me-Too movement that has swept the world.<sup>119</sup> Women's rights activists in particular have been calling for a change in the law, as it unfairly targets victims of sexual violence and discourages them from filing reports against their assaulters.<sup>120</sup>

In 2009, an up-and-coming Korean actress, Jang Ja-yeon, committed suicide in her apartment. Allegedly, she wrote a document that listed thirty-one executives by name, and sparked an investigation into allegations that she had been sexually and physically abused by those executives.<sup>121</sup> At the time of the incident, many major media outlets were hesitant to report on the case due to fear of being prosecuted for implicating the names of those executives.<sup>122</sup> The case was closed because police and prosecutors refused to investigate further, but was reopened in 2018 in the wake of the influential #MeToo movement.<sup>123</sup> However, the resurgence of interest here has been dampened by numerous criminal charges being brought against media outlets who are reporting the names on that list and other potential suspects connected to Jang before her death.<sup>124</sup>

### C. Prosecution Practices

In Korea, the prosecutor plays a role in both investigating and charging crimes; thus, the prosecutor has judicial responsibility as subsequent judgment

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119. Lee, *supra* note 8.

120. *Id.*

121. Alexis Carey, *South Korean TV star Jang Ja-yeon's suicide note claimed she was abused by high-profile figures*, NEWS.COM.AU (Apr. 5, 2018), <https://www.news.com.au/finance/business/other-industries/south-korean-tv-star-jang-jayeons-suicide-note-claimed-she-was-abused-by-highprofile-figures/news-story/ff5d5ce717db823c600fcdbe6fa1b995> [<https://perma.cc/XDC2-KWXV>].

122. Park & You, *supra* note 22, at 475.

123. Patricia Franco, *The Case of Jang Ja-Yeon, Sponsorships and the #MeToo Movement in South Korea*, PHILLIPINE DAILY INQUIRER (Apr. 7, 2019), <https://lifestyle.inquirer.net/330815/the-case-of-jang-ja-yeon-sponsorships-and-the-metoo-movement-in-south-korea/>.

124. *See generally* Park Ji-won, *Another Legal Battle Surrounding Late Actress Jang Ja-yeon*, THE KOREA TIMES (July 6, 2021, 4:40 PM), [https://www.koreatimes.co.kr/www/art/2021/11/398\\_311716.html](https://www.koreatimes.co.kr/www/art/2021/11/398_311716.html) [<https://perma.cc/C3NF-D6WH>]; *see also* C. Hong, *Former TV Chosun CEO Files Defamation Lawsuit Against Media Outlets for Claiming Connection Between Him and Jang Ja Yeon*, SOOMPI (Apr. 25, 2019), <https://www.soompi.com/article/1320031wpp/former-tv-chosun-ceo-files-defamation-lawsuit-against-media-outlets-for-claiming-connection-between-him-and-jang-ja-yeon> [<https://perma.cc/BF5H-WZC9>]; Lee Jae-Lim, *JTBC Slams Accusations Producer is Linked to Jang Ja-yeon Suicide*, KOREA JOONGANG DAILY (May 26, 2020), <https://koreajoongangdaily.joins.com/2020/05/26/television/JTBC-producer-Jeon-Changgeun-drama-series/20200526174400185.html> [<https://perma.cc/8DGY-VHF8>].

often relies on the prosecutor's choice to indict.<sup>125</sup> Unlike in the United States, prosecutors in Korea play an active leading role in investigating crimes, and often have the authority to order the police in criminal investigations.<sup>126</sup> Korean prosecutors also have full discretion in deciding whether to bring charges or not.<sup>127</sup> Even if there is enough evidence to prosecute the person, Korean prosecutors have "general and broad authority" to decline to prosecute if they believe the cost of prosecution would be higher than the benefit.<sup>128</sup> This gives Korean prosecutors a unique ability to influence criminal policy, as there is no grand jury to balance their indictment authority.<sup>129</sup> The full power afforded to Korean prosecutors leaves a lot of room for abuse of power, and it is a concern addressed frequently by presidential candidates and their platforms, such as President Moon Jae-in's campaign in 2017.<sup>130</sup>

While the Prosecutor's Office is intended to be an independent body under the Ministry of Justice, there have always been concerns by the public due to Korea's contentious history with corrupt politicians.<sup>131</sup> In a transparency index compiled by the Anti-Corruption and Civil Rights Commission, prosecutors ranked the lowest among state organizations.<sup>132</sup>

In 2012, a high-ranking prosecutor was investigated for taking nearly 800 million won (amounting to about \$613,836<sup>133</sup>) from notorious Korean con-man Cho Hee-pal and a mid-size conglomerate, the Eugene Group.<sup>134</sup> This triggered an intense power struggle between prosecutors and police over investigation rights, with police insisting that they be given rights to independently investigate cases involving prosecutors to prevent conflicts

125. Jung-Soo Lee, *The Characteristics of the Korean Prosecution System and the Prosecutor's Direct Investigation*, 53 UNAFEI ANNUAL REPORT FOR 1997 AND RESOURCE MATERIAL SERIES 83, 83 (1998), [https://unafei.or.jp/publications/pdf/RS\\_No53/No53\\_13VE\\_Soo.pdf](https://unafei.or.jp/publications/pdf/RS_No53/No53_13VE_Soo.pdf).

126. *Id.* at 84.

127. *Id.*

128. *Id.* at 84–85.

129. *Id.* at 85.

130. Julian Ryall, *South Korean government tainted with corruption allegations*, DEUTSCHE WELLE (Oct. 12, 2020), <https://www.dw.com/en/south-korean-government-tainted-with-corruption-allegations/a-55896840> [<https://perma.cc/A956-EN9F>].

131. Lee, *supra* note 125, at 90.

132. *Korea's law agencies ranked most corrupt*, ANTI-CORRUPTION COMMISSION, <https://www.acc.org.bt/?q=node/488> [<https://perma.cc/Z4MV-DW8P>] (last visited Mar. 8, 2022).

133. See EXCHANGE RATES UK, *supra* note 13.

134. Na Jeong-ju, *Police Probe 'Corrupt' Prosecutor*, THE KOREA TIMES (Nov. 9, 2012, 6:38 PM), [http://www.koreatimes.co.kr/www/news/nation/2013/08/113\\_124334.html?gn](http://www.koreatimes.co.kr/www/news/nation/2013/08/113_124334.html?gn) [<https://perma.cc/9ZE4-GCAR>].

of interest.<sup>135</sup> Within a few days of that scandal, another prosecutor was revealed to have had several sexual encounters with a female suspect under investigation for theft charges.<sup>136</sup>

Amid these scandals, another prosecutor publicly called for reform. However, a leaked private text message meant for a friend fell into the hands of a reporter instead, revealing that he was merely “paying lip service” to appease the public and the news media.<sup>137</sup>

Since the uproar of scandals among Korea’s top prosecutors almost a decade ago, the situation remains largely the same. While the current President Moon Jae-in has made attempts to take down corruption, his efforts have been inefficient. Like his predecessors, Moon’s attempts to create an independent investigation agency to check the prosecution’s power has faced strong opposition from (unsurprisingly) prosecutors.<sup>138</sup> Despite Moon’s appointment of the new Prosecutor General Yoon Suk-Yeol to spearhead prosecutorial reform, and replacement of the previously corrupt Justice Minister Cho Kuk (who was exposed for nepotism and financial fraud) with Choo Mi-rae, the resulting power struggle between these two officials has shown that government officials are still mostly concerned with their own power and highlights the lack of dedication to actually reforming the system.<sup>139</sup>

Although a new agency was created in 2019 called the Corruption Investigation Office for High Ranking officials (known as the CIO) with the power to investigate public officials for certain crimes such as bribery and embezzlement, there are concerns that giving such an agency such power can lead to the same problems the country has had with prosecutors.<sup>140</sup> There is also the issue that the agency is not completely independent as originally intended. While the CIO can independently investigate prosecutors, judges, and high-ranking police officers, all other investigations regarding public officials not within those categories must be turned over to the Prosecutor’s Office, which still has the absolute power to decide who to indict.<sup>141</sup> Thus,

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135. *Id.*

136. Choe Sang-Hun, *South Korea’s Top Prosecutor Resigns Amid Scandals and Infighting*, THE NEW YORK TIMES (Nov. 30, 2012), <https://www.nytimes.com/2012/12/01/world/asia/south-koreas-top-prosecutor-resigns-amid-scandals.html> [<https://perma.cc/L2NF-3XL8>].

137. *Id.*

138. *See id.*

139. *See* Vincent Wu, *South Korea’s New Corruption Investigation Office Needs Independent Prosecutorial Power*, THE GLOBAL ANTICORRUPTION BLOG (May 24, 2021), <https://globalanticorruptionblog.com/2021/05/24/south-koreas-new-corruption-investigation-office-needs-independent-prosecutorial-power/> [<https://perma.cc/CMQ3-WSEX>].

140. *See id.*

141. *Id.*

it appears unlikely the CIO will make a big difference in the level of corruption in prosecution.

The nature of the relationship between prosecutors and government officials lends itself to the weaponization of defamation laws. Government officials who desire to suppress the opinions of their critics have easy access to influence prosecutors, but the government seems to have little interest in addressing prosecutors' sweeping authority and reviewing prosecutorial decisions. The discretion allowed to prosecutors naturally increases the risk of politicization of the prosecutorial process.<sup>142</sup> In recent years, criminal defamation cases have been on trend for increasing prosecutions.<sup>143</sup> Since 2014, the number of prosecutions for criminal defamation has greatly increased from past years, more than tripling the number of previously recorded years.<sup>144</sup>

There are heavy suspicions that entertainment companies may be gaining enough political power to have some influence on police investigations and thus prosecutorial discretion. The Jang Ja-yeon case for example, was heavily criticized with suspicions of corruption. Despite the investigation of thirty-one persons of interest, all but two of the suspects were acquitted and the case was eventually closed by police and prosecutors.<sup>145</sup> This was especially suspect as the list of those who had solicited sexual favors from the actress allegedly contained the name of a politician, alongside many high-ranking entertainment and media executives.<sup>146</sup>

K-pop is not unfamiliar with alleged collusion between entertainment company CEOs and the justice system; one of the largest scandals in K-pop history was subject to numerous allegations of police cover-ups and corruption. Known as the "Burning Sun scandal" or "Burning Sun gate," the situation involved various Korean celebrities, a wide array of serious

142. Park & You, *supra* note 22, at 481.

143. Hae-sung Yoon & Jaehyun Kim, *A Study on Anti-criminality Discussion and Alternatives of defamation by publicly alleging facts*, KOREAN INSTITUTE OF CRIMINOLOGY (2018), [https://i.kic.re.kr/international/publications/research/report/view?rpt\\_id=RPT21010230](https://i.kic.re.kr/international/publications/research/report/view?rpt_id=RPT21010230) [<https://perma.cc/M9UB-MGKD>].

144. *Id.*

145. *See Prosecutors to review 2009 suicide of actress Jang Ja-yeon*, YONHAP NEWS AGENCY (Mar. 19, 2019, 3:23 PM), <https://en.yna.co.kr/view/AEN20190319006900325#:~:text=The%20case%20grew%20into%20a,%22enslaving%22%20the%20fledgling%20stars> [<https://perma.cc/6HST-PPBW>].

146. *Id.*

crimes ranging from drug use to human sex trafficking, and eventually the involvement of both the majority and opposition political parties.<sup>147</sup>

The star of the scandal was Seung-ri, a member of one of Korea's most prominent K-pop boy groups, Big Bang. One of the biggest accusations levied against him, was that he had avoided investigation in the past due to the local police assisting in covering up his crimes.<sup>148</sup> Certain chat logs discovered and disseminated to the public through the efforts of investigative journalists suggested that a high-ranking law enforcement officer had been "handling" problems for Seung-ri.<sup>149</sup> This sort of behavior makes it appear evident that corporate executives and celebrities are able to reach the same kind of influence as political figures have in the past.

#### *D. Criticisms by Human Rights Organizations*

The United Nations Human Rights Committee published a report in 2015 specifically calling out Korea's criminal defamation and the lack of a truth defense.<sup>150</sup> International non-governmental organization Human Rights Watch criticized Korea's defamation provisions in its Universal Periodic Review submission, calling it "draconian" and a "disproportionate and unnecessary response to the need to protect reputations."<sup>151</sup>

Article 19, an international human rights organization that focuses on defending and promoting freedom of expression and freedom of information worldwide, had called out the Korean government for its criminal defamation provisions, calling them a "grave threat to freedom of expression in South Korea."<sup>152</sup> Article 19 has long held:

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147. See Kyle Munzenrieder, *Seungri and Jung Joon-Young Retire Amid a K-Pop Scandal That's Rocking South Korea*, W MAG. (Jan. 29, 2019), <https://www.wmagazine.com/story/seungri-jung-joon-young-k-pop-scandal> [<https://perma.cc/6SCN-FGMB>]; see Steven Borowiec, *Commentary: BIGBANG's Seungri's sex scandal and the end of K-pop's innocence*, CHANNEL NEWS ASIA (Jan. 29, 2021), <https://www.channelnewsasia.com/commentary/bigbang-seungri-sex-scandal-end-kpop-innocence-jung-joon-young-894011> [<https://perma.cc/H6M3-55ED>].

148. See Cedarbough T. Saeji, *South Korea's Corruption, Exposed by Burning Sun*, KOREA EXPOSÉ (May 3, 2019), <https://koreaexpose.com/south-korea-corruption-exposed-by-burning-sun-seungri-scandal/> [<https://perma.cc/6F4W-T5WG>].

149. Kyung-yoon Kang, *BIGBANG Seungri's KakaoTalk text message "text the police chief,"* NAVER (Mar. 13, 2019, 5:25 PM), <https://entertain.naver.com/read?oid=416&aid=0000241181> [<https://perma.cc/LL95-QEQL>].

150. See Hum. Rts. Comm., Int'l Covenant on Civ. and Pol. Rts, 122nd Sess, U.N. Doc. CCPR/C/GC/34, at 12 (2011).

151. UPR, *supra* note 113.

152. *South Korea: Criminal defamation provisions threaten freedom of expression*, Article 19 (May 10, 2018), <https://www.article19.org/resources/south-korea-repressive-criminal-defamation-provisions-threaten-freedom-of-expression/> [<https://perma.cc/72PB-TZMY>].

It is imperative that governments restrict fundamental rights only when strictly necessary and using the least restrictive means available. The criminalisation of speech, regardless of its content, runs counter to these principles. Experience has shown that criminal defamation provisions have often been used by those in positions of power to limit public debate, stifle criticism and silence those with less influence. Moreover, carefully drafted civil defamation provisions have proven to be adequate to redress reputational harm from the public statements and communications of others.<sup>153</sup>

#### IV. IMPLICATIONS

##### *A. Chilling Effect on Speech*

The biggest concern with defamation laws is what is known as the chilling effect on speech. When certain behaviors are legally punishable, either through fines or jail time in criminal cases or with monetary damages in civil cases, it effectively discourages that behavior. In the case of defamation, the fight between the right to freedom of expression and the right to reputation or privacy means that there is a constant teetering between allowing too much speech and restricting it too much.

The issue with criminal defamation laws is that it imposes a disproportionately severe punishment with the type of behavior they intend to regulate. Civil damages are usually assessed in a manner to make the plaintiff whole again and to redress the harms caused by the actions of the defendant, but fines and jail times can be sentenced without regard for the actual behavior of the defendant, or the magnitude of harm caused by the defendant. The threat of jail time is also much more intimidating than monetary damages, as it necessarily involves deprivation of life, liberty, and property.<sup>154</sup>

Christopher Phiri's "Criminal Defamation Put to the Test: A Law and Economics Perspective," which debates the nature of criminalized defamation and puts forth reasons for decriminalizing, posits that criminal defamation is essentially a form of censorship as it prevents people from voicing statements that could potentially be defamatory, rather than addressing any harm that might occur as a result of such potentially defamatory statements.<sup>155</sup>

The existence of truth defamation further acts as an additional barrier preventing citizens from feeling comfortable speaking freely. Since defendants may be held liable regardless of if they have told the truth or not, judges have "less incentive to strictly impose the [prosecutor's] burden of proving

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153. *Id.*

154. *See Phiri, supra* note 59, at 60.

155. *See id.* at 61.

the falsity of the statement.”<sup>156</sup> The focus of most defamation suits then becomes whether the defamer has “sufficient bases” for producing the statement, a low bar that can only be overcome if the defendant is able to prove the truth.<sup>157</sup> Speakers then become more likely to be criminally punished for speaking about something contentious and difficult to prove the truth of (such as corruption) if they do not have enough evidence.<sup>158</sup>

Even if charges are eventually dropped, there may still be significant deterrence, creating an atmosphere of fear and danger. Although the Korean Supreme Court case against the producers of investigative television program *PD Notebook* eventually found the defendants not guilty after all three stages of the court, a notable chilling effect was noted.<sup>159</sup> For close to five years after the conclusion of this case, all other broadcasters and television producers were silenced and refused to speak on similar consumer product issues.<sup>160</sup> And to this date, television programs are still hesitant to critique government policies in a healthy and open manner that is typical of democratic systems.<sup>161</sup>

### *B. The Prosecution of Normal, Everyday Citizens*

The new developments in this situation now involve the weaponizing of defamation for a non-political use. There are two issues here. First, there is an indication that celebrities are being considered at such an influential level that their reputations are being protected with the same rigorous methods as politicians. And second, these threats of punishment for defamation are being levied against regular citizens who do not have the same platform as journalists or politicians to protest against unfair treatment.

Parallels may be drawn between the United States and Korea in the willingness of the government to allow these suits by celebrities against regular citizens. In a recent case, “Grammy-award winning musical artist, songwriter, and television personality” Belcalis Marlenis Almanzar, more commonly known as Cardi B, won a defamation suit against an “entertainment and celebrity news blogger” Latasha Transrina Kebe, owner of a Youtube channel entitled “unWinewithTashaK” with approximately 939,000 subscribers.<sup>162</sup> The defendant uploaded at least thirty-eight different videos regarding plaintiff and numerous social media posts across Instagram,

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156. Park & You, *supra* note 22, at 476–77.

157. *See id.* at 477.

158. *Id.*

159. *Id.* at 469–70.

160. *Id.*

161. *Id.*

162. *Almánzar v. Kebe*, 2021 U.S. Dist. LEXIS 210845, at \*1–2 (N.D. Ga. July 8, 2021).



Facebook, and Twitter, many of which contained the allegedly defamatory statements, including claims that plaintiff had herpes, used cocaine, and prostituted herself before she became famous.<sup>163</sup> Plaintiff Cardi B was considered a public figure as she had “reached a level of fame and notoriety that has thrust her into the public eye.”<sup>164</sup>

However, the situation in the United States is vastly different. For public figures, the required *mens rea* is “actual malice” instead of general recklessness or gross negligence.<sup>165</sup> Like discussed above in Section II, establishing the truth is a secondary line of defense so that even if the defendant did publish defamatory statements, they are still protected if the speech is truthful.<sup>166</sup> Therefore, there is a lesser concern that celebrities have the opportunity to abuse the system and suppress their critics through the use of defamation suits.

As these defamation cases in Korea are investigated, it will soon become clear whether Korea is moving towards freedom of speech or away from it. If these accusers are prosecuted for defamation, it becomes a difficult uphill battle for them. Since there is no truth defense, these citizens can easily be indicted for their desire to reveal the true nature of these celebrities worshipped by teens and young adults around the world. The public interest defense is similarly contentious—although the victims are exposing their abusers to show the world the truth, there is also an element of personal vindication that may be difficult to overcome when it comes to the actual lawsuit.

## V. RECENT DEVELOPMENTS

### A. *Movements to Remove Defamation from Criminal Code*

As mentioned in Section III.D., many organizations such as the United Nations Human Rights Committee have called for Korea to revise its defamation laws.<sup>167</sup> Women’s rights activists claim the defamation laws make it difficult for sexual violence victims to file a complaint because the accused are likely to respond by initiating charges for defamation, which are virtually impossible to defend against.<sup>168</sup> Since many sexual violence

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163. *Id.* at 3–8.

164. *Id.* at 15.

165. *Id.*

166. *See* Yoon & Kim *supra* note 143, at Sections II.A.–B.

167. Lee, *supra* note 8.

168. *Id.*

cases rely on witness statements, it would be difficult to establish the absolute truth of a statement, and even then the victim could still be criminally indicted for their truthful statements. In 2018, an online petition was signed by more than 38,600 Korean citizens, calling for the presidential office to revise the defamation laws and abolish Article 307.<sup>169</sup>

Even politicians within Korea have pushed for reform. The ruling Democratic Party has called for revisions of the defamation law, and the Party for Democracy and Peace has publicly called for the abolishment of Article 307 of the Criminal Code altogether.<sup>170</sup> The ruling party's Representative Nam In-soon, a "feminist activist-turned-legislator," and Rep. Keum Tae-sup, a former prosecutor, are two of numerous legislators who have also pushed to revise the defamation law.<sup>171</sup>

### B. Cyber Defamation Laws

To begin, cyber defamation is defamation or slander conducted via digital media. Recently, the Korea Communications Commission (KCC) has been pushing to impose greater scrutiny on Internet sites, most prominently to force them to submit to the same "regulatory framework" as major news organizations.<sup>172</sup> This has led to some support for a Cyber Defamation Law that will require Internet sites to block or remove articles or websites deemed to have spread false or slanderous information.<sup>173</sup>

The KCC also wanted to limit anonymity on the Internet by forcing users to verify their identities in order to comment and interact with websites that have greater than 100,000 daily visitors.<sup>174</sup> This would prove devastating for the state of free expression in Korea, as this requirement, in conjunction with the criminal defamation laws, may lead to an outpouring of reports and indictments making it harder to protect the victims who are forced to reveal their identities by law.

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169. *Id.*

170. *Id.*

171. *Id.*; see also, *Cyber*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cyber> (last visited Dec. 5, 2022) [<https://perma.cc/7AGJ-F6CM>]; see also *Defamation*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/defamation> (last visited Dec. 5, 2022) [<https://perma.cc/ES53-LLHU>].

172. Kim Tong-hyung, *Online Portals Face More Regulation, Deeper Scrutiny*, THE KOREA TIMES (Dec. 18, 2008, 7:04 PM), [http://www.koreatimes.co.kr/www/news/biz/2008/12/123\\_36365.html](http://www.koreatimes.co.kr/www/news/biz/2008/12/123_36365.html) [<https://perma.cc/32K8-6MKF>].

173. *Id.*

174. *Id.*

*C. Press Arbitration Law*

President Moon and his party, which at the time controlled the majority of the Parliament, submitted a bill intended to “stamp out . . . fake news in the media.”<sup>175</sup> This was following the wave of false and unverified news reports relating to the COVID-19 pandemic, part of a misinformation phenomenon that swept the world.<sup>176</sup> The bill included provisions imposing punishments of up to “five times the actual loss” that may result for “untrue reports,” the definitions of which were vague and unclear.<sup>177</sup>

The People Power Party, the main conservative opposition in Korea’s government, called the bill a “dictatorial” attempt to censor media and suppress criticism against the ruling party.<sup>178</sup> Journalists’ unions in Korea have also criticized the bill.<sup>179</sup>

In September 2021, four human rights organizations (Article 19, Human Rights Watch, Korean Progressive Network Jinbonet, and the Open Net Association) came together to write an open letter to the Korean President, asserting their disapproval of the Fake News Law, highlighting their concerns about the severe restriction of freedom of expression that would follow.<sup>180</sup> The groups criticized the language of the bill for being too vague, inviting the possibility of sweeping liability for news outlets, and recommending extreme punishments in the bill which the groups categorized as “excessive” and “disproportionate to the harms suffered.”<sup>181</sup>

As a result of this retaliation, it seems that President Moon and the Democratic Party decided to postpone the bill.<sup>182</sup> However, it appears that the parties cannot agree on *how* to regulate fake news, and not because of the rights violation implications of the law. Despite all the criticisms from prominent international organizations, the President has stuck to his convictions,

175. Choe Sang-Hun, *South Korea Shelves 'Fake News' Bill Amid International Outcry*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/world/asia/south-korea-fake-news-law.html> [<https://perma.cc/X6LA-GNJY>].

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Letter from Article 19, Human Rights Watch, Korean Progressive Network Jinbonet, and Open Net Association, to Moon Jae-in, President of the Republic of Korea (Sept. 16, 2021), [https://www.hrw.org/sites/default/files/media\\_2021/09/210916%20ENG%20%28PRES%29%20Press%20Arbitration%20Law%20Letter.pdf](https://www.hrw.org/sites/default/files/media_2021/09/210916%20ENG%20%28PRES%29%20Press%20Arbitration%20Law%20Letter.pdf) [<https://perma.cc/GG7E-SN42>].

181. *Id.*

182. *Id.*

stating that “fake news and false reporting . . . has caused much harm to the state and individuals.”<sup>183</sup> He has silently distanced himself from the bill, but has made no statement addressing the problems raised by critics.

#### D. President Moon Jae-in

Developments in defamation law charges illustrate that not much has changed. The President of Korea from 2017 through 2022, Moon Jae-in, has not hesitated to use the defamation laws against his critics and naysayers. For example, in 2020, the presidential office initiated charges against political opponents. Korean police began investigating Kim Keun-tae, a politician affiliated with the center-right People’s Party, for a satirical performance he put on involving derogatory actions against the President. This performance showed an actor dressed as the Chinese President Xi Jinping dragging an actor dressed as President Moon by a rope tied around his neck.<sup>184</sup> Other Korean conservatives (direct opponents of President Moon) have also been accused of similar “defamatory” conduct.<sup>185</sup>

In June of the same year, President Moon brought both a civil and criminal action against former prosecutor Koh Young-ju for his comments calling Moon a communist.<sup>186</sup> Despite making his statements in 2013 against Moon, who was the leader of the Democratic United Party at the time, and having criminal charges brought against him in 2015, Koh’s suit has dragged on until 2020.<sup>187</sup> In 2016, Koh was ordered to pay compensation in civil court, appealed, and lost the appeal.<sup>188</sup> The prosecutor on the criminal side delayed proceedings until 2018, after Moon became president, and eventually

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183. Choe Sang-Hun, *supra* note 175.

184. Elizabeth Shim, *South Korea protestor accused of defaming President Moon Jae-in*, UNITED PRESS INT’L (Apr. 28, 2020, 12:21 PM), [https://www.upi.com/Top\\_News/World-News/2020/04/28/South-Korea-protester-accused-of-defaming-President-Moon-Jae-in/2911588090340/](https://www.upi.com/Top_News/World-News/2020/04/28/South-Korea-protester-accused-of-defaming-President-Moon-Jae-in/2911588090340/) [<https://perma.cc/7FB8-KHK3>].

185. *Id.*

186. Tara O, *South Korean President Moon Jae-in Sued Mr. Koh Young-ju for Libel for Calling Him a Communist; the Prosecutor Wants to Jail Him; Suppression of Free Speech via Lawfare*, EAST ASIA RES. CTR. (June 6, 2020), <https://eastasiaresearch.org/2020/06/06/south-korean-president-moon-jae-in-sued-mr-koh-young-ju-for-libel-for-calling-him-a-communist-the-prosecutor-wants-to-jail-him-suppression-of-free-speech-via-lawfare/> [<https://perma.cc/RYA9-FXXW>].

187. ‘Moon Jae-in communist’ remarks Go Young-ju, second trial guilty . . . Imprisonment, TELLER REP. (Aug. 26, 2020, 11:23 PM), [https://www.tellerreport.com/tech/2020-08-27—moon-jae-in-communist—remarks-go-young-ju—second-trial-guilty—imprisonment.Skn\\_Evo47v.html](https://www.tellerreport.com/tech/2020-08-27—moon-jae-in-communist—remarks-go-young-ju—second-trial-guilty—imprisonment.Skn_Evo47v.html) [<https://perma.cc/889D-FDFS>].

188. Tara O, *supra* note 186.

the court found Koh not guilty. However, on appeal, Koh was eventually convicted and sentenced to 10 months in prison and two years of probation.<sup>189</sup>

## VI. POSSIBLE SOLUTIONS

### A. Decriminalization of Defamation with the Entire Removal of Article 307 of the Criminal Code

The most radical and effective way of addressing the issue in Korea is to decriminalize defamation entirely. Since Korea has provisions for both civil liability and criminal sanctions, decriminalizing defamation would preserve some right to freedom of expression while not completely abolishing potential remedies for violations of the right to reputation.

Studies referenced in the Phiri article show empirically that civil defamation is enough to protect the right to reputation without overstepping too much on the toes of the right to freedom of expression through the use of the negligence standards.<sup>190</sup> By having more freedom to adjust the standard of care case-by-case, the law would likely be able to regulate truly defamatory statements without actually discouraging important information from being shared.<sup>191</sup> Doing so would also ensure that any prohibition on expression would be occurring *after* the statement is made, rather than the pre-expression prohibition that is effectively caused by criminal defamation.<sup>192</sup>

There is also a psychological element to decriminalization, as removing criminal sanctions for defamatory statements may suggest to the general public that the government is more tolerable of a wider variety of speech.<sup>193</sup> While civil liability for defamation would still do the job of discouraging statements harmful to reputation, it sends the message that such communications can be freely allowed if the defamer is willing to face the consequences of monetary damages to address the harms caused by their statements.<sup>194</sup>

In an article assessing defamation in Poland, Michael T. Moran argues for the abolishment of criminal liability for defamation claims by following

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189. *Koh Young-ju Who Said "Moon Jae-in is a Communist" Found Guilty, Court Capitulated to Blue House Pressure*, EAST ASIA RESEARCH CENTER (Aug. 28, 2020), <https://eastasiaresearch.org/2020/08/27/koh-young-ju-who-said-moon-jae-in-is-a-communist-found-guilty-court-capitulated-to-blue-house-pressure/> [<https://perma.cc/3M7G-AQFH>].

190. Phiri, *supra* note 59, at 62.

191. *See id.* at 57.

192. *Id.* at 62.

193. *See id.*

194. *See id.* at 62–63.

Ireland's lead.<sup>195</sup> He especially focuses on the “chilling effect” of criminal sanctions and how to remedy that effect through decriminalization:

By imposing only civil penalties and abolishing criminal liability in defamation actions in Poland, the potential for self-censorship and the chilling effect on public debate and matters of public interest will likely decline along with the ‘substantial undesirable effects on freedom of expression and information’ that are associated with criminal sanctions. Additionally, the elimination of criminal penalties in favor of civil relief would eradicate the possibility of a defendant amassing a criminal record, which has the potential to be detrimental to a defendant’s personal and professional reputation and ambitions.<sup>196</sup>

Conversely, a case study done in Montenegro after the country decriminalized defamation has shown no great increase in freedom of expression and the country has not become more “democratic” after implementing such changes.<sup>197</sup> Despite functionally removing provisions allowing for criminal punishments for defamation, courts still continue to award disproportionately high civil damages for defamation cases as a type of stand-in for criminal punishments.<sup>198</sup> Merely decriminalizing defamation is not enough to protect the right to freedom of expression without other safeguards in place to ensure proper enforcement of the country’s values.

However, this is unlikely to be a problem for Korea because there are strong democratic safeguards in place to prevent deterioration of the freedom of expression. The historical lack of imprisonment for defamation and the Korean courts’ general reliance on fines suggests that awards for civil cases most likely will not be used to compensate if defamation is decriminalized.

Proponents of preserving defamation laws may argue that the different burden of proof requirements between criminal and civil court may serve as a strong enough protection for the right to freedom of expression. Much like the United States, Korea has a “proof beyond reasonable doubt” standard in criminal courts and a “preponderance of the evidence” standard for civil courts. The extremely high burden of proof may reduce the number of convictions for criminal defamations, while it would be much more likely to find someone liable in civil court. Thus, it becomes more effective for those harmed by defamatory statements to keep their suits civil and not criminal.

However, this perspective ignores the well-documented and significant chilling effect on speech that is the real problem with criminal defamation laws. Even if there are different standards of proof making it difficult to actually be criminally convicted for defamation, there still exists the influence

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195. Moran, *supra* note 62, at 615–16.

196. *Id.*

197. See Spaic et al., *supra* note 50, at 27.

198. *Id.*

of knowing that it is a possibility. Many people are generally more risk-averse, and those risk-averse people become less likely to speak at all for fear of the disproportionately extreme consequences.

*B. Complete Abolishment of Article 310 in Order to Establish  
Truth as an Absolute Defense*

Complete abolishment of a section of the Penal Code may seem like an extreme action and is likely to be faced by great opposition by the Korean people, who are historically afraid of radical changes. Widespread belief in collectivism and Confucian values lead to a high amount of trust in the government's decisions, which may influence Korean citizens into believing that restraints on freedom are acceptable as long as political authorities deem it necessary to preserve the political process.<sup>199</sup> The lasting influence of the Cold War and Korean War have shaped Korea into being more "susceptible to authoritarian values."<sup>200</sup> Even progressives in Korea tend to view liberalism and liberal democracy negatively, failing to distinguish liberalism from libertarianism.<sup>201</sup>

If abolished, defamation would remain a criminal offense but would require revisions of the actual elements and defenses so that truth defamation can be ended. Allowing the truth to be prosecuted is not conducive to the goals of defamation law, which in Korea is to protect reputation. The truth can harm reputation as much as falsities can. Instead, the law can attempt to discourage people from saying things that intentionally harm reputation, even if they are true. Korea can follow the lead of the United States and add a *mens rea* element to ensure that only those who recklessly (or maliciously) harm others with their statements may be prosecuted and convicted.

An official from the Ministry of Justice has also suggested that preventing a truth defense for criminal defamation is actually in the best interest of protecting victims of sex offenders from having their affairs aired by their abusers. They claim that truth defamation is protecting those who are victims of sexual crimes.<sup>202</sup>

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199. You, *supra* note 101, at 212.

200. *Id.*

201. *Id.* at 213.

202. Yoon So-yeon, *Vicious voices scapegoat victims for speaking out: Korea's legal system makes it easy to target those who have come forward with sex crime allegations*, KOREA JOONGANG DAILY (June 6, 2018), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3049024> [https://perma.cc/FR7U-RHMY].

### C. Limit Enforcement

A simpler alternative to completely removing or amending Korea's criminal defamation laws is to follow the lead of European countries who have declined to enforce criminal liability for defamation actions.<sup>203</sup> Despite keeping defamation provisions in their criminal codes, countries like Germany, France, and Italy do not habitually enforce them.

German courts have held that insults against state symbols, even if they are harsh, must be tolerated in light of the constitutional protection of speech.<sup>204</sup> In France, the one recent attempt of enforcing the criminal law was eventually resolved in the European Court of Human Rights, which ended in the defendant's favor.<sup>205</sup> In Italy, the last time someone was prosecuted for defamation was a lawyer in 1972, whose conviction was upheld in the interest of providing special protection for the prestige of public administration.<sup>206</sup>

## VII. CONCLUSION

A country cannot call itself a democracy that protects the rights of its people if it continues to allow criminal liability for defamation. Preserving such harsh consequences in response to the participation of citizens in the political process can only further oppress the people of the country.

Korea's interests in protecting the reputation of its government officials and public figures can be accomplished through other means. The availability of civil actions for damages to reputation ensure that reputations can still be protected and demonstrate that victims of defamation can be compensated if truly harmed.

In order to maintain its status as a democracy, Korea should decriminalize defamation entirely, as in the United States. Doing so would avoid the "chilling" of legitimate criticisms of public figures, while still preserving the integrity of their position in society and protecting the interests of the people. If decriminalization is not an option due to opposition against extreme changes to the legal system, then Korea should at least abolish truth defamation and allow the truth to become an absolute defense. This way, malicious liars who seek to intentionally damage reputations are still deterred without deterring genuine criticisms of public figures.

Korea can also choose to follow the lead of some European countries and keep criminal defamation on the books while avoiding the necessity

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203. Yoon and Kim, *supra* note 143, at Section II.D.

204. Yanchukova, *supra* note 66, at 873.

205. *See id.* at 874.

206. MICHAEL K. ADDO, FREEDOM OF EXPRESSION AND THE CRITICISM OF JUDGES: A COMPARATIVE STUDY OF EUROPEAN LEGAL STANDARDS 165 (Micheal K. Addo ed., 2000).



of enforcing it. Doing so would avoid criticisms of radicalization while still avoiding the dangers of self-censorship due to over deterrence. However, this approach would require cooperation by the police, prosecutors, and judges when investigating, indicting, and convicting defendants in defamation suits. It is also necessary to ensure that judges presiding over civil suits do not impose disproportionate damages as a stand-in for criminal punishment, as it was in Montenegro after they decriminalized their defamation laws.

For a relatively young democracy who is still currently fighting to shake off the vestiges of its historical authoritarianism, it is more important than ever for Korea to avoid censorship of its people. As Freedom House says on its front page: "Free speech and expression is the lifeblood of democracy, facilitating open debate, the proper consideration of diverse interests and perspectives, and the negotiation and compromise necessary for consensual policy decisions."<sup>207</sup> Thus, it is the responsibility of democratic nations to uphold such freedoms.

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207. FREEDOM HOUSE, <https://freedomhouse.org/issues/freedom-expression> [<https://perma.cc/W452-QRHH>].

