**Crisis of Seditious Libel in Korea**

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**Abstract**

It goes without saying that SULLIVAN‘s true meaning on the “seditious libel” jurisprudence, the area of law concerning how much freedom should be allowed to the citizenry criticizing and therefore defaming their own government policies and performance, will be fully grasped only in conjunction with *Garrison v. Louisiana* which crippled though not slayed criminal libel. Criminal libel, or more appropriately its abolition, has a special meaning for SULLIVAN for its ready availability as a tool for the incumbents to chill the opposition can potentially wipe out all the benefits of SULLIVAN, which operate only on the trials and therefore cannot affect the chilling effects caused at the prosecutorial levels.

Past several years, Korea has witnessed a dark and fierce debate on that area of law occasioned by actual criminal libel prosecutions brought by the prosecutors for the ostensible purpose of protecting the reputations of high public officials, sometimes that of the President. In *MBC PD Diary* case, a documentary raising concern over mad cow disease risk of American cows was prosecuted for defaming the agricultural minister who found the cows sufficiently safe for full-out importation. In *Jung Bong Joo* case, a politician raising doubt over a presidential candidate’s stock price manipulation was prosecuted when that candidate won the subsequent election and actually imprisoned for one full year when the Korean Supreme Court shifted the burden of production over to the speaker, finding election “too short for a free market of ideas to operate properly”. Although the impact of SULLIVAN is thoroughly absorbed by Korean law on “public figures/officials”, the underlying political rationale of SULLIVAN has been poorly understood and its obvious ramifications on seditious libel, the efficiency of truth as defence, and burden of proof have yet to be closely examined, with due concern for the fate of the country’s democracy.

**Introduction**

More than five hundred years before New York Times v. Sullivan (1964)[[2]](#footnote-2), and even two hundred years before John Milton published Areopagitica (1644), the first explicit tract on freedom of speech, King Sejong the Great of Chosun Dynasty[[3]](#footnote-3) was famous for not punishing people arrested for remarks criticizing him. 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”, 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 damage to me” and refused to punish him.[[4]](#footnote-4) Indeed, in 1418, Sejong had already issued a judgment that “no one should be punished for criticizing government” on a person who called his throne “the Dark Age”.[[5]](#footnote-5) Often he implored to his ministers, “I am neither virtuous, nor skillful in administration. Some of my acts will surely contravene Heaven’s wills. You should look hard for my shortcomings and thereby help me reflect on and act rightfully on Heaven’s lessons.”[[6]](#footnote-6) When the ministers called for punishment on people criticizing him, he once said “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?”[[7]](#footnote-7) 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 records[[8]](#footnote-8) 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.

Unfortunately, despite this head start on freedom of speech to criticize the government, when Chosun was colonized in 1909 by Japan who had previously adopted the “advanced” Western laws during her own modernization during the Meiji period, many of the West-originated laws suppressing free speech were forcefully planted in Korea such as criminal defamation and “truth defamation”. Since then, most of those laws were abolished or became obsolete or “tamed” as a remedy for reputation in the countries of origin[[9]](#footnote-9) as these countries caught up with the modern concept of free speech over time.

However, they are still being vigorously enforced in Korea, threatening freedom of speech. These laws also gave rise to parallels in election regulation such as crimes of “candidate slandering” and “false slandering of candidates”, which will be discussed at appropriate moments together with related classical criminal laws. Together, these laws are being used as the tools of the government to suppress the speeches critical of it, which operate *de facto* like “seditious libel” law of which does not exist.

Seditious libel is the heart of *Sullivan*. The spirit of *Sullivan* will not be well inherited if healthy critiques of the governance are not robustly protected even if the Korean courts fully adopt the letters of *Sullivan*.

1. **Criminal prosecution for defamation[[10]](#footnote-10)**

**Criminal Code, Article 307 (Defamation)[[11]](#footnote-11)** 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. <Amended 95.12.29>
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>

**Public Officials Election Act, Article 250 (Publication of False Facts)**[[12]](#footnote-12)

(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>

Korea is one of the very few liberal democratic countries where private persons are vigorously subjected to criminal prosecution for defamation, especially in defense of public officials’ reputation.[[13]](#footnote-13) Most developed countries have abolished (or engaged in the process of abolishing) criminal prosecution for defamation[[14]](#footnote-14) due to a concern that the incumbent government or other powerful individuals influence the prosecutors to suppress their opposition or critics --- that is, using not their own resources but the taxpayers’ money for the pretext of defamation prosecution.[[15]](#footnote-15)

[Summarize]Many countries do retain criminal punishment but only in theory. 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 defamation[[16]](#footnote-16), not including Korea where 136 people were incarcerated over a 55 months period between January 1, 2005 through July 2009.[[17]](#footnote-17) This means Korea takes close to 30% of all people incarcerated in the relevant periods. 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, 63 received deferred sentences).[[18]](#footnote-18)

What is diabolical, some of these prosecutions are exactly the ones that the international human rights bodies have warned against. 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.[[19]](#footnote-19) The crime charged?  Defamation.  Wait a minute, for calling American cows dangerous?  Whose reputation was harmed?  The American cows?  Well, the prosecutors concocted an argument that defaming the cows actually defames the agricultural minister who found the cows okay and decided to import them.  Yes, the producers were found not guilty through all three stages of the court[[20]](#footnote-20).  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, the merchants leasing store space from the City for demonstrating against and criticizing the City’s new lease policies allegedly favoring big businesses.[[21]](#footnote-21) 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.[[22]](#footnote-22) 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-up[[23]](#footnote-23), and his trial is still continuing.

Though short of indictments, 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,[[24]](#footnote-24) 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 her[[25]](#footnote-25), which was dropped by the prosecutors.

Also, in 2012, the notorious National Intelligence Services[[26]](#footnote-26) 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.[[27]](#footnote-27) 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.[[28]](#footnote-28)

Criminal defamation has been condemned by international human rights bodies[[29]](#footnote-29) 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 very often 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.[[30]](#footnote-30) Of course, the strongest reaction came from the U.S. early in Garrison v. Lousiana.[[31]](#footnote-31)

However, there has been no categorical denunciation of criminal defamation. Countries with safely democratic governments, say, European countries where criminal defamation originated from, refused to get rid of criminal defamation laws since their prosecutors are supposedly more independent and will not be commandeered to suppressing speech critical of the incumbent governments.  For instance, Japan also retains criminal defamation[[32]](#footnote-32) but Japan’s prosecutors are known for independence from political pressures,[[33]](#footnote-33) and uses imprisonment as punishment only very sparingly (1 to 4 annually according to the Article 19 statistics). The European Court of Human Rights has overturned many guilty criminal defamation judgments on various grounds but none of them is categorically condemning the law.[[34]](#footnote-34)

Looking at the Korean case, I think that we should now make a straightforward argument against criminal defamation, not an argument based on the possibility of abuse because that argument is apparently not convincing the countries to actually abolish the law, which can be abused at any time.

The argument can go like this: Criminal defamation is usually justified by emphasizing the value of reputation and its importance to dignity.  Reputation is what other people think of you.  Your reputation is in other people’s heads and under their control.  Reputation doesn’t belong to you as your limbs belong to you or as your private information belongs to you.  You cannot control or assume what other people think of you before the supposedly defamatory remark has been made.  No matter how well you behaved, people may not have thought nicely of you anyway for other reasons.  Having said that, shall we really apply criminal law against an injury, the existence of which is not as certain as an injury, say, to your limbs?  For comparison, criminal prosecution of privacy breach is a different matter.  Police officers illegally wiretapping others or vengeful people leaking sex videos made with their lovers should be criminally punished for taking away what clearly belongs to the victims.  Reputation on the other hand does not belong to you the same way.

If outright abolition is difficult, add at least a provision that officials cannot claim for criminal libel for statements on what they did at work.  Such criminal libel prosecution ends up becoming a service done by prosecutors to their fellow officials, throwing their fairness in doubt.

1. **Truth Defamation[[35]](#footnote-35)**

**Criminal Code, Article 307 (Defamation)**

(1) A person who derogates another person’s reputation by stating facts publicly shall be subjected to imprisonment for up to 2 years or a fine of up to 5 million won. <Amended 95.12.29>

(2) A person who derogates another person’s reputation by making publicly false factual allegations 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.

**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.

Korea is one of the very few liberal democratic countries where even truthful statements are vigorously imposed legal liability if the statements are found to derogate another person’s reputation, even in absence of privacy concerns.[[36]](#footnote-36) The defendant can escape liability only by proving that the statements were made *solely* for public interest, a burden of proof not so easy to sustain. The requirement, “solely”, limits the application of truth defense too narrowly and falls short of the UN Human Rights Committee’s standard.[[37]](#footnote-37) Some Korean courts have refused to accept the proof that public interest is the sole motif where it was shown that the person making the statements had any intention of harming the reputation of the subject of the statements: For instance, a worker making a truthful statement about his employer’s non-payment of wages could not benefit from the defense.[[38]](#footnote-38)

The practical effect of this law has been that a private person who has encountered revealing truths about corruptions in the government or other powerful entities could not freely share them with others in fear that they may not be able to sustain the burden of proving that ‘public interest’ was the speaker’s ‘sole motif’. The chilling effect of this law has been aggravated by the fact that defamation is criminally punished in Korea, as shown above.

In a suicide death of a celebrity actress who left behind a document that reveals corruptions involving sexual briberies and sexual coercions in the entertainment and media industry[[39]](#footnote-39) and 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.[[40]](#footnote-40) Again, such talk on a high official’s historical position would have qualified as spoke ‘solely for public interest.’

Recently, a prominent poet was found guilty of “candidate slandering” for alleging that the then Presidential candidate Park Gun-Hye has the custody of calligraphies of Ah Joong-Geun, an independence fighter who assassinated Ito Hirobumi, the Japanese prince that spearheaded the annexation of Chosun.[[41]](#footnote-41) Although the judgment was later reversed for the reasons that, where falsity has not been provide, the poet had public interest in mind in making the claims[[42]](#footnote-42), the demonstrated legal risk will cast a chilling shadow on anyone who may reveal inconvenient truths.

True, some countries like Norway, Netherlands, Denmark, Finland and Swiss[[43]](#footnote-43) 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 malfeasor from reputation loss. For instance, we can easily approve a law against disclosing against one’s will his physical injury resulting from an accident[[44]](#footnote-44) but 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 malfeasor 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.[[45]](#footnote-45)

1. **Burden of Proof in Falsity Defamations and *Sullivan***

How Sullivan has been embraced by Korean courts has been masterfully documented by Professor Youm Kyu Ho.[[46]](#footnote-46) However, as he himself admits, adoption of the Sullivan-like rule has not resulted in a judicial battleground favorable for media organizations.[[47]](#footnote-47) This author believes that it is because truth defamation seriously distorts how *Sullivan* or its Korean equivalent is applied in the country.

A huge problem with truth defamation is that its existence silently distorts 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.

The chilling effect is aggravated by the fact that, in most defamation cases it is usually the supposedly defamed party that has overwhelmingly more resources than the speaker/defendant in proving truth/falsity of a statement about him/herself.  Therefore, it will be very difficult for the speaker to prove “sufficient basis” for his statements when all he wanted to do and all he could do was to raise a doubt on another’s secretly conducted behavior.

For instance, a prominent congressman Roh Hwe-Chan was found guilty[[48]](#footnote-48) 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:[[49]](#footnote-49)

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 case[[50]](#footnote-50), 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.”

As to the “false candidate slandering”, this problem was felt even more acute because the Supreme Court,[[51]](#footnote-51) while holding the burden of proof over the prosecutors, recently imposed something like a “burden of production” on the defendant speaker on the truth/falsity, for the reason that election is “too short for a free market of ideas to operate properly”. Such precedent, of course, does not take into account how much ‘untruths’ will distort elections if people do not volunteer information about candidates albeit with insufficient bases. In that case, Jung Bong-Ju[[52]](#footnote-52) alleged that another politician Lee Myung Bak was involved in stock price manipulation of a company called BBK, who later became the President.  Once in power, his prosecutors indicted Chung for “false candidate slandering”.  Throughout the case, the court did not inquire into the truth of the statement and instead interrogated upon whether Jung had sufficient basis to say what he said.  Jung, who merely wanted to cast doubt over Lee Myung Bak’s financial deals, was not prepared to produce a basis that the judge now equipped with the benefit of hindsight will find “sufficient.”

I suspect that this will be a problem for all countries that have truth defamation in their books.  It will corrupt the judicial process for falsity defamation cases.  It is true that some European countries like UK place the onus of proving truth on the speaker in falsity defamation cases but the level of burden imposed differs widely from Korea’s. We looked at in the previous section how one risks criminal punishment for not proving “unprovable” facts such as the mad-cow-disease communicability of American beef or who has sunk ROKS Corvette *Cheonan*, although the first ended in a not guilty verdict and the second has yet to reach a verdict in the court of first instance.

1. **Conclusion**

*Sullivan* was meant to create a “breathing space” for critique of the rulers, and encourage a healthy dialogue on the government between the governed. The stringent elements of liability and the standard of proof, all favorable for the speaker, was meaningful only to the extent that it will generate such vibrant discussions in the public sphere. *Sullivan*’s promise will be kept only when we see the legal space for those vibrant discussions.

In that sense, *Sullivan* lives on in Korean defamation jurisprudence but only in letters. Vigorous criminal punishment, especially of the speeches criticizing the government policies, has caused the chilling effects threatening the “breathing space” that *Sullivan* tried to protect for the citizenry. “Truth defamation”, though rare, still punishes people for stating ‘inconvenient truths’ about others unless they can prove that they made the statement “solely for public interest.” Furthermore, the existence of truth defamation not infrequently causes the burden-shifting from the prosecutor to the defendant, especially in “false candidate-slandering”, in a trend diametrically opposing *Sullivan*.

[Sewol ferry]

1. Professor, Korea University Law School [↑](#footnote-ref-1)
2. [New York Times Co. v. Sullivan, 376 U.S. 254 (1964)](http://international.westlaw.com.oca.korea.ac.kr/find/default.wl?mt=51&db=780&findtype=Y&tc=-1&rp=%2ffind%2fdefault.wl&spa=KoreaUni-2000&ordoc=0106121342&serialnum=1964124777&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=97C210B3&rs=WLIN14.04) [↑](#footnote-ref-2)
3. http://en.wikipedia.org/wiki/Sejong\_the\_Great [↑](#footnote-ref-3)
4. Sejong Annals, Year 15 March 13, Vol. 59, p. 144, [↑](#footnote-ref-4)
5. Sejong Annals, Year 10 April 21, Vol. 40, p.146 [↑](#footnote-ref-5)
6. Sejong Annals, Year 7 December 8, Vol. 30, p.123 [↑](#footnote-ref-6)
7. Sejong Annals, Year 15 July 27, Vol. 61, p. 147 [↑](#footnote-ref-7)
8. http://en.wikipedia.org/wiki/Annals\_of\_the\_Joseon\_Dynasty [↑](#footnote-ref-8)
9. Winfield, et al., "The Abolition Movement: Decriminalizing Defamation and Insult Laws," Communications Lawyer, Fall 2007 [↑](#footnote-ref-9)
10. Much of this section is from my article here <http://m.riss.kr/search/detail/DetailView.do?p_mat_type=1a0202e37d52c72d&control_no=2d2fa4be5a17fb18ffe0bdc3ef48d419> (Korean) Park Kyung Sin, “Reputation and Arguments for or against Criminal Defamation - In Wake of Indictment of PD Diary Mad Cow Disease Episode”, 11:1 *Seogang Beophak* 357 (2009) [↑](#footnote-ref-10)
11. https://elaw.klri.re.kr/kor\_service/lawPrint.do?hseq=28627 [↑](#footnote-ref-11)
12. https://elaw.klri.re.kr/kor\_service/lawPrint.do?hseq=25035 [↑](#footnote-ref-12)
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> [↑](#footnote-ref-13)
14. 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> [↑](#footnote-ref-14)
15. Gregory C. Lisby, “No Place in the Law: the Ignominy of Criminal Libel in American Jurisprudence”, Communication Law and Policy, Autumn 2004. [↑](#footnote-ref-15)
16. <http://www.article19.org/advocacy/defamationmap/overview.html> (no longer available; last accessed in May 30, 2009) [↑](#footnote-ref-16)
17. MP Lee Chun-Seok’s Press Release, October 19, 2009 [↑](#footnote-ref-17)
18. <http://www.scourt.go.kr/portal/justicesta/JusticestaListAction.work?gubun=10&searchWord=&searchOption=&currentPage=0&pageSize=10>

    <http://www.spo.go.kr/spo/info/stats/stats02.jsp> [↑](#footnote-ref-18)
19. 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 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. [↑](#footnote-ref-19)
20. 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 (Se 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. . . “. [↑](#footnote-ref-20)
21. PSPD Public Interest Law Center (2013), Reports and Responses on Lawsuits Shutting People Up, “<http://www.peoplepower21.org/PSPD_press/1032358> (korean) [↑](#footnote-ref-21)
22. Ibid. [↑](#footnote-ref-22)
23. http://articles.latimes.com/2010/jul/23/world/la-fg-korea-torpedo-20100724 [↑](#footnote-ref-23)
24. http://www.worldyannews.com/news/quickViewArticleView.html?idxno=1891 [↑](#footnote-ref-24)
25. http://www.koreatimes.co.kr/www/news/nation/2010/03/117\_62548.html [↑](#footnote-ref-25)
26. <http://www.economist.com/blogs/banyan/2014/03/south-korean-intelligence> [↑](#footnote-ref-26)
27. PSPD, supra. [↑](#footnote-ref-27)
28. <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 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.” [↑](#footnote-ref-28)
29. 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.” [↑](#footnote-ref-29)
30. 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 Unabhängige 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 Gijsels 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, Judgement 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. [↑](#footnote-ref-30)
31. 379 U.S. 64 (1964) [↑](#footnote-ref-31)
32. 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> [↑](#footnote-ref-32)
33. J. Mark Ramseyer & Eric B. Rasmusen, Measuring Judicial Independence: The Political Economy of Judging in Japan 170 (2003); Salil K. Mehra, “Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States”, University of Colorado Law Review, Summer 2007. [↑](#footnote-ref-33)
34. For instance, Eur. Ct. H.R., Case of Colombani and Others v. France, Judgment of June 25, 2002, Application No. 00051279/99 [↑](#footnote-ref-34)
35. Much of this section is drawn from my article here <http://m.riss.kr/search/detail/DetailView.do?p_mat_type=1a0202e37d52c72d&control_no=f20e74ea49565fb7ffe0bdc3ef48d419> Park Kyung Sin, “Unconstitutionality of Truth Defamation Laws”, Segye Beophap Yeongu, Vol. 16, No.4 (2010) 35-70. [↑](#footnote-ref-35)
36. 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.” [↑](#footnote-ref-36)
37. General Comment 34, para. 47, “All. . .penal defamation laws. . . should include such defences as the defence of truth.. . .” [↑](#footnote-ref-37)
38. Supreme Court 2004.10.15 Judgment 2004Do3912 [↑](#footnote-ref-38)
39. http://www.theguardian.com/world/2009/apr/01/south-korea-entertaiment-jang-jayeon [↑](#footnote-ref-39)
40. 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. [↑](#footnote-ref-40)
41. https://www.koreatimes.co.kr/www/news/nation/2013/11/116\_145842.html [↑](#footnote-ref-41)
42. http://www.yonhapnews.co.kr/politics/2014/03/25/0505000000AKR20140325076451055.HTML [↑](#footnote-ref-42)
43. 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> [↑](#footnote-ref-43)
44. William Roos, Case Comment, NETHERLANDS: COPYRIGHT: RIGHT TO PRIVACY AND PORTRAIT RIGHT, Ent. L.R. 1998, 9(8), N146-147 [↑](#footnote-ref-44)
45. Supreme Court Judgment, March 28, 2013, 2012Do11914 [↑](#footnote-ref-45)
46. 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 [↑](#footnote-ref-46)
47. Youm Kyu Ho, “Libel Law and the Press: U.S. and South Korea Compared”, 13 UCLA Pacific Basin Law Journal 231 (1995). [↑](#footnote-ref-47)
48. 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.” [↑](#footnote-ref-48)
49. 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 [↑](#footnote-ref-49)
50. Seoul District Court Apr. 24, 2008 Judgment 2007GoDan3122 [↑](#footnote-ref-50)
51. Supreme Court February 20, 2003 Judgment 2001Do6138 En Banc

    “Allowing people to cast doubts with insubstantial evidence contradicts public interest because, even if such doubt has been cleared, the voters will have been misled by the defamatory statements. Casting doubts on the candidates’ corruptions should not be allowed without any limitation even if it aims at checking the candidate’s qualifications for public offices. Such doubt-casting should be allowed only when there is a substantial reason to believe that the doubts may be true. However, if the doubts were based on substantial reasons, one cannot be punished even if the doubts are later proved to be false.” [↑](#footnote-ref-51)
52. http://www.washingtonpost.com/world/asia\_pacific/in-s-korea-a-shrinking-space-for-speech/2011/12/21/gIQAmAHgBP\_story.html [↑](#footnote-ref-52)