

CRIMINAL PROSECUTIONS FOR DEFAMATION AND INSULT IN SOUTH KOREA WITH A *LEFLARIAN* STUDY IN ELECTION CONTEXTS

Kyung Sin Park* & Jong-Sung You**

South Korea has strong laws and practice in criminal defamation and insult, which have affected the creation of equally strong criminal laws and practice in candidate defamation and candidate insult law. Many defamation cases were filed to protect the reputation of public officials, while practically all of the candidate defamation and insult indictments are aimed at protecting the reputation of the candidates for public office. Such a trend has been found at odds with an international human rights standard on freedom of speech that has consistently warned against the anti-democratic potentials of criminal defamation and insult laws. In this Article, the authors engage in an empirical study of South Korean criminal prosecutions for candidate defamation and candidate insult, respectively, to test a postulate underlying human rights standards, namely that criminal defamation law has been abused for political purposes, as the renowned Leflar study has shown in the U.S. context half a century ago, giving rise to such cases as New York Times Co. v. Sullivan and Garrison v. Louisiana.

I. INTRODUCTION	464
II. CRIMINAL DEFAMATION PROSECUTION IN KOREA: INTERNATIONAL CONTEXT	467
1. <i>Volume and Nature of Criminal Defamation</i>	467
2. <i>Truth Defamation</i>	474
3. <i>Insult Prosecutions</i>	478
4. <i>Conclusion</i>	479
III. CANDIDATE DEFAMATION AND INSULT LAW AND PRACTICE	480
1. <i>Candidate Defamation Law and Practice</i>	480
2. <i>Comparison to Japan and Taiwan</i>	484
3. <i>Candidate Insult Law</i>	487
IV. ANALYSIS OF CANDIDATE DEFAMATION AND INSULT	488

* Professor, Korea University Law School.

This author appreciates the efforts of attorney Kelly Khayeun Kim at Open Net Korea and Research Assistant Yaeji Kim, J.D. candidate 2018 in reviewing all the election-related court decisions, and extracting salient data and entering the same into databases for analysis.

** Senior Lecturer, Department of Political and Social Change, Australian National University. This work was supported by the Academy of Korean Studies Grant(AKS-2013-R-67).

1. <i>Research Method</i>	488
2. <i>Frequency of Pro-Ruling-Party Prosecutions</i>	489
3. <i>Rate of Not-Guilty in Pro-Ruling-Party Prosecutions vs. Pro-Opposition Prosecutions</i>	490
4. <i>Prosecutors' Treatment of Cases Referred by Central Election Commission</i>	494
V. CONCLUSION.....	495

I. INTRODUCTION

Two hundred years before John Milton published *Areopagitica* (1644), the first explicit tract on freedom of speech, King Sejong the Great of the Chosun Dynasty was famous for refusing to punish people arrested for seditious remarks. For instance, in 1433, when a debtor falling behind on repayments of a government loan was brought to him for openly complaining that “[t]his King’s throne will not last long. A new king will rise from the Western Province,” King Sejong said “people are bound to blame others when things don’t turn out the way they want. . . . Likewise, he is just blaming me for his hardship. There is no harm done to me” and refused to punish him.¹ Indeed, as early as 1428, Sejong had already issued a judgment that “no one should be punished for criticizing government” on the case of a person who called his throne “the Dark Age.”² 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.”³ He even scolded the ministers calling for austerity: “You want me to punish the people just for speaking their minds truthfully about me? Are you trying to push me into blind ignorance by keeping me from hearing from down under about the real conditions?”⁴ His throne was

¹ SEJONG JANGHEON DAEWANG SILLOK [VERITABLE RECORDS OF KING SEJONG] bk. 18, vol. 59, at 45 [hereinafter SEJONG SILLOK], http://sillok.history.go.kr/id/kda_11503013_002 [<http://perma.cc/P9BN-AP8M>] (statements on Mar. 13, 1433).

² SEJONG SILLOK bk. 13, vol. 40, at 4, http://sillok.history.go.kr/id/kda_11004021_002 [<http://perma.cc/GXD9-F2XW>] (statements on Apr. 21, 1428).

³ SEJONG SILLOK bk. 10, vol. 30, at 21, http://sillok.history.go.kr/id/kda_10712008_001 [<http://perma.cc/22PS-TSGZ>] (statements on Dec. 8, 1425).

⁴ SEJONG SILLOK bk. 19, vol. 61, at 19, http://sillok.history.go.kr/id/kda_11507027_001 [<http://perma.cc/5R4G-CRAW>] (statements on July 27, 1433).

in a way representative of Chosun Dynasty's attitudes toward the relationship between free speech and good government: every king's remark in court was recorded verbatim by official recorders who were guaranteed independence and confidentiality and, most importantly, published the records for the eyes of all 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. Regardless of what little freedom of speech commoners enjoyed, the ruling elite attempted to maintain a healthy dialogue between information and governance.

Unfortunately, despite this head start and even after modernization and the adoption of the more "advanced" Western system, freedom of speech in Korea seems to be on shaky ground,⁵ especially because of the very laws constitutive of the Western system, such as criminal defamation, insult, and "truth defamation." While most of these laws were abolished, became obsolete, or were "tamed" in their countries of origin⁶ over time, their Korean counterparts⁷ are still being vigorously enforced in modern-day Korea, as shown below. The epitome of the instability was the prosecution of the Japanese newspaper *Sankei Shinbun* correspondent

⁵ FREEDOM HOUSE, *South Korea*, in FREEDOM ON THE NET 2012: A GLOBAL ASSESSMENT OF INTERNET AND DIGITAL MEDIA 456 (Sanja Kelly et al. eds., 2012).

⁶ Richard N. Winfield & Kristin Mendoza, *The Abolition Movement: Decriminalizing Defamation and Insult Laws*, 25 COMM. LAW., Fall 2007, at 7, 7–9.

⁷ Hyeongbeop [Criminal Act], Act No. 293, Sept. 18, 1953, amended by Act No. 5057, Dec. 29, 1995, art. 310 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/kor_service/lawPrint.do?hseq=28627 [<http://perma.cc/W4S9-X7ZU>] ("If the facts alleged under Article 307 (1) are true and solely for the public interest, the act shall not be punishable.") [hereinafter Criminal Act];

(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 . . . (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.

Id. art. 307, translated in Korea Legislation Research Institute online database (alteration in original), https://elaw.klri.re.kr/kor_service/lawPrint.do?hseq=28627 [<http://perma.cc/6GSS-LDZE>]; *Id.* art. 311, translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/kor_service/lawPrint.do?hseq=28627 [<http://perma.cc/6GSS-LDZE>] ("A person who publicly insults another shall be punished by imprisonment or imprisonment without prison labor for not more than one year or by a fine not exceeding two million won.").

for defaming Korea's president, which fortunately ended in a not-guilty verdict.⁸

These laws also gave rise to parallels in election regulation, such as crimes of "candidate slander"⁹ and "false election speech."¹⁰ It should be noted that although "false election speech" covers both false self-aggrandizement by the candidates themselves and false accusations against other candidates, as this study reveals that most indicted cases involved the latter. So instead, we will call it "candidate defamation." Also, "candidate slander" punishes spreading facts about a candidate but the prosecutors and courts are using it as a "candidate insult" law whereby hateful epithets against candidates are punished. Hence, we will call it "candidate insult."

A strong impetus for "taming" or otherwise containing criminal defamation laws came from a 1954 U.S. study done by Robert Leflar who found that nearly half the defamation prosecutions between 1920s and 1956 were political in nature, i.e., incumbents with influence over prosecutors attempted to suppress opposition

⁸ Choe Sang-hun, *Court Acquits Journalist Accused of Defaming South Korean President*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/world/asia/south-korea-park-geun-hye-defamation-verdict.html?_r=0 [<https://perma.cc/U2ZX-TBUB>].

Any person who slanders a candidate (including a person who intends to be a candidate), his/her 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 with prison labor 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/she shall not be punished.*

Gongjukseongeobeop [Public Official Election Act], Act No. 7681, Aug. 4, 2005, *as amended*, art. 251 (S. Kor.), *translated in* Korea Legislation Research Institute online database (emphasis added), http://elaw.klri.re.kr/eng_service/lawView.do?hseq=35856&lang=ENG [<http://perma.cc/TF3W-APVU>] [hereinafter Public Official Election Act].

¹⁰

(2) Any person who publishes, or makes another person publish, any false facts on a candidate, his/her spouse, lineal ascendants or descendants, or siblings, so as to be unfavorable to the candidate . . . , with the intention of stopping the candidate from being elected, or persons who possess a propaganda document in which a false fact is entered with the intention of distributing it, shall be punished by imprisonment with prison labor for not more than seven years or by a fine of not less than five million won nor more than 30 million won.

Id. art. 250.

candidates.¹¹ The study influenced the Supreme Court's deliberations on *New York Times Co. v. Sullivan*¹² and *Garrison v. Louisiana*¹³ a year later—the two pillars that established the relationship between democracy and modern defamation laws by making it very difficult for public officials either to become a plaintiff in civil court or influence prosecutors into suppressing their criticism. A similar empirical study was done about half a century later and reconfirmed Leflar's earlier findings.¹⁴

This paper attempts a similar empirical study of the current candidate defamation and insult prosecutions in South Korea between 2005 and 2015. This study tests the postulate that criminal defamation law is indeed subject to political abuse by the incumbents through their control over prosecutors. In Part I, the paper surveys Korean law and practice in criminal defamation and positions it in international comparison. In Part II, the paper surveys Korean candidate defamation/insult laws and compares them against selected countries. In Part III, the methods and findings of the empirical analysis are presented.

II. CRIMINAL DEFAMATION PROSECUTION IN KOREA: INTERNATIONAL CONTEXT

1. *Volume and Nature of Criminal Defamation*

In Korea, private persons are vigorously subjected to criminal prosecution for defamation, often in defense of public officials' reputation.¹⁵ According to the non-profit organization *Article 19*, during a twenty-month period between January 1, 2005 and August

¹¹ Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985 (1956).

¹² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹³ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

¹⁴ Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990–2002*, LIBEL DEF. RESOURCE CTR. BULL., Mar. 2002, at 97.

¹⁵ See Stephan Haggard & Jong-sung You, *Freedom of Expression in South Korea*, 45 J. CONTEMP. ASIA 167 (2015); U.N. Human Rights Comm., *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)*, ¶ 89, U.N. Doc. A/HRC/17/27/Add.2 (Mar. 21, 2011), <https://daccess-ods.un.org/TMP/5006597.04208374.html> [<https://perma.cc/XV2U-HFZ4>] (recommending the removal of defamation as a criminal offense from the Criminal Act).

2007, only 146 people have been incarcerated for defamation,¹⁶ not including Korea, where according to the congressional disclosure made by the Supreme Court, 136 people were incarcerated over a fifty-five month period between January 1, 2005 through July 2009.¹⁷ This suggests that Korea took up close to 30% of all people incarcerated in the relevant periods. This is in stark contrast to the fact that most developed countries have abolished (or engaged in the process of abolishing) criminal prosecution for defamation,¹⁸ due to a concern that the incumbent government or other powerful individuals might influence prosecutors to suppress their opposition or critics—that is, using the taxpayers’ money for political purposes under the pretext of defamation prosecution.¹⁹ For instance, Japan retains criminal defamation²⁰ on the books but uses imprisonment as punishment sparingly (one to four cases annually, according to the *Article 19* statistics). Germany is the exception,²¹ but most of that country’s convictions for criminal defamation and insult represent fines with almost no actual incarcerations while the substantial number of actual incarcerations in Korea are many times longer than six months.

The trend continues to date and with greater intensity. For instance, in 2011, 3,340 people were tried for criminal defamation

¹⁶ See *Advocacy: Defamation Map*, ARTICLE 19 (2007), <http://www.article19.org/advocacy/defamationmap/overview.html> (no longer available; last visited May 30, 2009) (alternatively available at <https://web.archive.org/web/20080124075739/http://www.article19.org/advocacy/defamationmap/overview.html>) [<https://perma.cc/6RXU-4D9W>].

¹⁷ Jung Jae Ho, *Yichunsuk “Myungyehwesonbupjoe, 2-Nyeonsae 46% Jeungga”* [*MP Lee Chun-Seok, “46% Rise in Defamation Crimes in 2 Years”*], DAUM NEWS (Oct. 19, 2009), <http://v.media.daum.net/v/20101006161113668> [<http://perma.cc/MG4S-PP9Q>].

¹⁸ See Winfield & Mendoza, *supra* note 6, at 9 (explaining that “various international organizations and authorities” have criticized and attacked criminal defamation laws “as violating the rights of free press and the rights of people to receive news and information.”); CONFERENCE REPORT, ORG. FOR SECURITY AND COOPERATION IN EUROPE, LIBEL AND INSULT LAWS: WHAT MORE CAN BE DONE TO DECRIMINALIZE LIBEL AND REPEAL INSULT LAWS?, www.osce.org/item/3544.html (alternatively available at https://web.archive.org/web/20091005111908/http://www.osce.org/documents/rfm/2003/11/3346_en.pdf) [<https://perma.cc/LZ86-VUQE>].

¹⁹ Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 477 (2004).

²⁰ KEIHŌ [KEIHŌ] [Pen. C.], Law No. 45 of 1907, art. 230 (Japan), <http://www.japanese-lawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02> [<https://perma.cc/N3HZ-LWMR>].

²¹ International Press Institute, *IPI Special Investigation: The Application of Criminal Defamation Laws in Europe*, MEDIA LAWS DATABASE (Sept. 15, 2015), <http://legaldb.freemedia.at/2015/09/15/ipi-special-investigation-the-application-of-criminal-defamation-laws-in-europe/> [<http://perma.cc/NY5X-7J7E>].

and forty-seven were actually incarcerated (this is a conservative estimate, since the number does not include sixty-three who received deferred sentences).²² In 2010, a total of 2,193 people were indicted for defamation, out of which forty-three incarcerations for defamation resulted.

As U.N. Special Rapporteur of Freedom of Expression and Opinion Frank La Rue pointed out in his report on Korea, many of these criminal prosecutions are cases where private persons are subjected to criminal prosecution for defamation in defense of public officials' reputation.²³ The political nature of these prosecutions is evinced by the fact that most cases resulted in withdrawal, dismissal, or not-guilty judgments, leaving only indelible chilling effects on the populace.²⁴

Famously, in March 2009, six television documentary producers of *PD's Notebook* were prosecuted for producing and broadcasting an investigative piece on the danger of mad cow disease associated with American beef.²⁵ The prosecutors charged that

²² 2012 SABEOB YEONGAM [2012 LEGAL YEAR BOOK], ch. 5, 876 (2012), http://file.scourt.go.kr/AttachDownload?path=001&seqnum=66&gubun=10&file=1444114039639_154719.pdf&downFile=05_2012%B3%E2_%C7%FC%BB%E7_%C0%CE%BD%C5%BA%B8%C8%A3.pdf [<http://perma.cc/G7EB-W839>].

²³ U.N. Human Rights Comm., *supra* note 15, ¶¶ 25, 89.

²⁴ PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY [PSPD], PAK GEON-HYE CHEONGBU UI KUNGMIN IBMAGEUM SARYE ISIP-I SEON [THE 22 CASES OF THE GOVERNMENT'S STRATEGIC PROSECUTIONS AGAINST PUBLIC PARTICIPATION AND EXPRESSION] (2015), http://www.peoplepower21.org/?module=file&act=procFileDownload&file_srl=1359076&sid=0dbc93fdbc92d151cc555e52838b188f&module_srl=505220 [<http://perma.cc/DV95-4LEK>].

²⁵ *PD Notebook: Gingeupchwijae, Miguksan Soegogi, Gwanyeon Gwangoobyeongaeseo Anjeonhanga?* (television broadcast Apr. 29, 2008); *PD Notebook: Miguksan Soegogi, Gwanyeon Gwangoobyeongaeseo Anjeonhanga?* (television broadcast May 13, 2008). On June 20, 2008, the producers of a television documentary *PD Notebook* 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 Notebook* 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 Notebook* episode includes "19 different distortions." *PD Sucheop 19 Got Uidojeok Waegok [Intentional Distortion of 19 PD Notebooks]* http://news.chosun.com/site/data/html_dir/2008/07/30/2008073000061.html [<https://perma.cc/5BVH-B6VJ>]. 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

defaming the American beef actually defamed the agricultural minister who found the cows appropriate for import into the country. The producers were found not guilty through all three stages of the court.²⁶ But the fact of the prosecution alone chilled all other

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 three 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 Notebook* 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 Notebook* 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. Supreme Court [S. Ct.], 2010Do17237, Sept. 2, 2011 (S. Kor.)

²⁶ Supreme Court [S. Ct.], 2010Do17237, Sept. 2, 2011 (S. Kor.) (author translation). The Court spoke on the lack of the requisite malice as follows:

In media defamation cases, the standard of review varies depending on whether the supposed victim of the media report is a public figure or a private figure, whether the report concerns matters of public interest or matters of purely private domain, or whether the report, seen objectively, concerns matters of public and social nature that people must know and therefore contributes to the formation of public opinion or open discussion, etc. As to the speeches belonging to private domain, protection of reputation may prevail over freedom of press. As to the matters of public and social nature, the restriction on freedom of press must be eased (See Constitutional Court [Const. Ct.], 97Hun-Ma265, June. 24, 1999 (S. Kor.); Supreme Court [S. Ct.], 2000Da37524 & 37531, Jan. 22, 2002 (S. Kor.)). 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 [S. Ct.], 2002Da62494, July 22, 2003; Supreme Court [S. Ct.] 2004Da35199, May 12, 2006, (S. Kor.)).

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

broadcasters and television producers into silence for close to five years since then and to date. No longer do we see many television programs healthily critiquing government policies. Especially chilling about the logic of the indictment was that, even a report on consumer products could be closely inspected for any error or inaccuracy by prosecutors to see if such errors or inaccuracies might somehow affect the reputation of government officials who had commended such products.

In 2009, Seoul Mayor Oh Se-hoon filed a charge against, and 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.²⁷ In 2009, the National Tax Services filed a charge against, and prosecutors indicted, one of its employees for revealing a political scandal of its Director.²⁸ These two cases also resulted in acquittals up through the Supreme Court.

Additionally, 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,²⁹ and his trial is ongoing. In April 2014, Hong Ga-hye, a

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

²⁷ PSPD, CH'EONGWADAE DEUNG'E CHINAN ONYEONGAN KUNGMIN IBMAGEUM SOSONG HYEONHWANG POGOSEO MIT P'YEONJI CHEONDAL [REPORTS AND RESPONSE AGAINST THE BLUE HOUSE ON LAWSUITS SHUTTING PEOPLE UP THROUGHOUT THE LAST FIVE YEARS] (2013), http://www.peoplepower21.org/PSPD_press/1032358 [<http://perma.cc/FUH8-SF7J>].

²⁸ *Id.*

²⁹ Barbara Demick & John M. Glionna, *Doubts Surface on North Korea's Role in Ship Sinking*, L.A. TIMES (July 23, 2010), <http://articles.latimes.com/2010/jul/23/world/la-fg-korea-torpedo-20100724> [<http://perma.cc/YQ5R-U9T2>]; see also You Jong-sung, *The Cheonan Incident and the Declining Freedom of Expression in South Korea*, 39 ASIAN

volunteer rescuer, was indicted for falsely accusing the government rescuers of the tragic *Sewol* ferry of incompetence and jailed for a little over 100 days before being found not guilty. Her appellate trials are ongoing.³⁰ Then, in October 2014, a *Sankei Shinbun* correspondent was indicted for defamation for spreading people's doubts about President Park's whereabouts during the seven hours spanning the sinking of the tragic Sewol Ferry, and was later found not guilty.³¹

Even without indictments, the mere charges of defamation filed by public officials add to the chilling effects. In 2008, the Prime Minister's Office filed a charge against Kim Jong-ik, who posted a video clip pejoratively parodying the then President Lee Myung-bak,³² though the 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 trying to hug the figure skating star Kim Yu-na, only to be shunned by her.³³ That charge was also dropped by the prosecutors.

Also, in 2012, the notorious National Intelligence Services (NIS)³⁴ 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.³⁵ While the prosecutors are still investigating those charges, some of the NIS officials were themselves actually indicted for

PERSPECTIVE, 195 (2015) (discussing the sinking of the South Korean warship *Cheonan* and factors that might contribute to the erosion of press freedom in South Korea).

³⁰ *Korean Court Acquits Woman of Lying about Ferry Rescue*, KOREA TIMES (Jan. 9, 2015), <http://www.koreatimesus.com/korean-court-acquits-woman-of-lying-about-ferry-rescue/> [http://perma.cc/A7S4-NR6W].

³¹ *Japan Journalist Found Not Guilty of Defaming S Korean President*, BBC (Dec. 17, 2015), <http://www.bbc.com/news/world-asia-35118701> [http://perma.cc/W9W4-E3E6].

³² *The Prime Minister's Office "Civilian Illegal Inspections,"* KYUNGHANG SHINMUN (Mar. 3, 2012), http://news.khan.co.kr/kh_news/khan_art_view.html?artid=20120305030235 [https://perma.cc/Q8XE-TWW7].

³³ Kwon Mee-yoo, *Culture Minister Yu Upset at Yu-na Video*, KOREA TIMES (Mar. 17, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/03/117_62548.html [http://perma.cc/7D3B-XVT6].

³⁴ *Red-Handed*, ECONOMIST (Mar., 21, 2014), <http://www.economist.com/blogs/banyan/2014/03/south-korean-intelligence> [http://perma.cc/PEF3-LBMR].

³⁵ PSPD, *supra* note 27.

actively conducting other more systematic and extensive online campaigns to manipulate public opinions.³⁶

The very use of criminal defamation has been condemned by international human rights bodies, including U.N. Human Rights Committee in its 2011 General Comment 34,³⁷ for being abused by authoritarian rulers as pretexts for oppressing opponents, especially by misusing prosecutorial resources paid for by taxpayers. The European Court of Human Rights has struck down almost all national courts' criminal judgments against journalists who criticized the government or high officials, for being too excessive or not

36

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.

U.S. DEP'T OF STATE, 2013 HUMAN RIGHTS REPORT: REPUBLIC OF KOREA (2014), <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220204.htm>, [<http://perma.cc/DJ5W-ZPX2>].

³⁷ U.N. Human Rights Comm., *International Covenant on Civil and Political Rights, General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, ¶ 47, U.N. Doc CCPR/C/GC/34 (Sept. 12, 2011), <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [<http://perma.cc/2BH7-ML84>] (“States parties should consider the decriminalization 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.”).

respecting people's right to know.³⁸ Of course, the strongest reaction came from the United States early in *Garrison v. Louisiana*.³⁹

2. Truth Defamation⁴⁰

Criminal prosecution in Korea also applies to truthful statements (or statements not proven to be false)—even in the absence of privacy concerns, in contravention to the Special Rapporteur's⁴¹ and U.N. Human Rights Committee's⁴² specific

³⁸ See *Lyashko v. Ukraine*, App. No. 21040/02, Eur. Ct. H.R. (2006), <http://hudoc.echr.coe.int/eng?i=001-76714> [<http://perma.cc/QU7P-Y5MH>] (regarding a reporter criticizing the Prime Minister); *Scharsach v. Austria*, 2003-XI Eur. Ct. H.R. 123, http://www.echr.coe.int/Documents/Reports_Recueil_2003-XI.pdf [<http://perma.cc/C7M8-JEWS>] (regarding a reporter calling a far-right politician “closet Nazi,” fine overturned); *Colombani v. Fr.*, 2002-V Eur. Ct. H.R. 1 (2002), <http://hudoc.echr.coe.int/eng?i=001-60532> [<http://perma.cc/8PQL-Y4H3>] (regarding a reporter scolding Moroccan government's drug combat policy); *Unabhängige Initiative Informationsvielfalt v. Austria*, 2002-I Eur. Ct. H.R. 271, http://www.echr.coe.int/Documents/Reports_Recueil_2002-I.pdf [<http://perma.cc/HH8H-3TMH>] (regarding a reporter comparing an Austrian politician's immigration policy to that of Nazi's); *Dalban v. Rom.*, 1999-VI Eur. Ct. H.R. 221, http://www.echr.coe.int/Documents/Reports_Recueil_1999-VI.pdf [<http://perma.cc/44VB-V49A>] (regarding a reporter revealing a public agency's corruptions); *Nilsen v. Nor.*, 1999-VIII Eur. Ct. H.R. 57, http://www.echr.coe.int/Documents/Reports_Recueil_1999-VIII.pdf [<http://perma.cc/8UPW-U8MH>]; *De Haes v. Belg.*, App. No. 19983/92, Eur. Ct. H.R. (1997), <http://hudoc.echr.coe.int/eng?i=001-58015> [<http://perma.cc/6RD2-TSMD>] (regarding a critique of a judge's divorce judgment); *Oberschlick v. Austria* (No. 2), App. No. 20834/92, Eur. Ct. H.R. (1997), <http://hudoc.echr.coe.int/eng?i=001-58044> [<http://perma.cc/TUP2-RN8J>] (regarding a reporter calling a conservative politician “a fool”); *Castells v. Spain*, App. No. 11798/85, Eur. Ct. H.R. (1992), <http://hudoc.echr.coe.int/eng?i=001-57772> [<http://perma.cc/U9WJ-Y3SX>] (regarding a report on murder in 1977 Basque); *Thorgeir Thorgeirson v. Ice.*, App. No. 13778/88, Eur. Ct. H.R. (1992), <http://hudoc.echr.coe.int/eng?i=001-57795> [<http://perma.cc/JUE5-Y7VF>]; *Barfod v. Den.*, App. No. 11508/85, Eur. Ct. H.R. (1989), <http://hudoc.echr.coe.int/eng?i=001-57430> [<http://perma.cc/X5SM-M3YN>]; *Lingens v. Austria*, App. No. 9815/82, Eur. Ct. H.R. (1986), <http://hudoc.echr.coe.int/eng?i=001-57523> [<http://perma.cc/8SAD-PFUS>] (regarding a reporter criticizing former Austrian Prime Minister “opportunistic” and “immoral”). See also 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 (2006).

³⁹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁴⁰ Criminal Act, *supra* note 7 art. 307(1).

⁴¹ U.N. Human Rights Comm., *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 Italy (11–18 November 2013)*, ¶ 23, U.N. Doc. A/HRC/26/30/Add.3 (Apr. 29, 2014) (“The Special Rapporteur reiterated that for a statement to be considered defamatory, it must be false, it must injure another person's reputation and it must be made with malicious intent to cause injury to another individual's reputation.”).

⁴² U.N. Human Rights Comm., *supra* note 37, (alteration in original) (“All . . . penal defamation laws . . . should include such defences as the defence of truth . . .”). Upon interview of the members of the Human Rights Committee on October 15, 2016, the

mandates to exempt such statements. Defendants can only escape liability by proving that the statements were made *solely* for public interest, a burden of proof that is difficult to sustain⁴³ unless the speaker is from a media organization. For instance, the Supreme Court refused the public interest defense of a worker making a truthful statement about his employer's non-payment of his wages on the grounds that the worker intended to pressure the employer into paying his wages, i.e., the public interest was not his sole motive.⁴⁴ The same reasoning probably explains the Court's decision convicting a drug wholesaler who truthfully complained about the pharmaceutical companies' unfair trade practices.⁴⁵ The practical effect of this truth defamation is that an individual who has encountered corruption in the government or other powerful entities cannot freely share her knowledge with others for fear that she may not be able to sustain the burden of proving that the "public interest" was her "sole motive."

In a suicide of a celebrity actress who left behind a document that reveals corruption involving sexual bribes and sexual coercions in the entertainment and media industry and enumerates as the main culprits certain powerful individuals, almost no major media agencies reported the real names of the people listed, although it was clear to many that such whistleblowing would be certainly in the public interest.⁴⁶

Criminal prosecution of truthful statements has allowed, for instance, the overreaching interpretation by the 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 statements.⁴⁷ Again, such

members, though wishing not to be named, agreed that the defense of truth must be effective without any other condition such as "public interest."

⁴³ Criminal Act, *supra* note 7, art. 310.

⁴⁴ Supreme Court [S.Ct.], 2004Do3912, Oct. 15, 2004 (S.Kor.).

⁴⁵ Supreme Court [S.Ct.], 2004Do1497, May 28, 2004 (S.Kor.).

⁴⁶ Justin McCurry, *Storm in South Korea over Jang Ja-yeon's Suicide*, GUARDIAN (Mar. 31, 2009), <http://www.theguardian.com/world/2009/apr/01/south-korea-entertainment-jang-jayeon> [<http://perma.cc/VH7Z-NZMK>].

⁴⁷ 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. One individual started an online petition on a *Daum Agora* site, where Governor Kim's remarks, quoted word-for-word, were

discussion of a high official's historical position would have qualified as spoken "solely for the public interest."

Countries such as Norway, Netherlands, Denmark, Finland, and Switzerland⁴⁸ retain truth defamation law, which requires public interest as an element of defense. However, they apply it to disclosure of private facts, not to protect a malfeasor from reputational loss. In Korea, 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.⁴⁹ In fact, the officer's companion was found guilty of battery for her conduct during the violent encounter.

How *Sullivan* has been embraced by Korean courts has been masterfully documented by Professor Youm Kyu Ho.⁵⁰ However, as he himself admits, adoption of the *Sullivan*-like rule has not resulted in a judicial battleground favorable for media organizations.⁵¹ One of the reasons is that truth defamation has silently distorted the burden of proof in favor of the prosecutor/plaintiff in "falsity defamation" cases, the staple of defamation litigation around the world: if one will be held liable regardless of the veracity of the statement, judges have

followed by criticism, such as "nation-destroying remarks" and a plea for resignation. Other netizens could express their agreement or disagreement with the plea for resignation by posting replies on the 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 held legally liable. Park Kyung-Sin, *The "Sin of Truth Propagation" and Governor Kim Moon-su*, HANKYOREH (Feb. 8, 2009), <http://www.hani.co.kr/arti/opinion/column/337639.html> [<https://perma.cc/J4AA-F8QR>].

⁴⁸ *Legal Provisions Concerning Defamation, Libel and Insult*, in DEFAMATION AND FREEDOM OF EXPRESSION 51 (Council of Eur. 2003), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680483b2d#search=%22Legal%20Provisions%20Concerning%20Defamation%22> [<http://perma.cc/W7PK-268R>].

⁴⁹ Supreme Court [S.Ct.], 2012Do11914, Mar. 28, 2013 (S. Kor.). See also Incheon District Court [Dist. Ct.], 2012Go-Dan374, May 30, 2012 (S. Kor.); Incheon District Court [Dist. Ct.], 2012No1630, Sept. 21, 2012 (S. Kor.).

⁵⁰ Kyu Ho Youm, *The "Actual Malice" of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century*, 19 COMM. L. & POL'Y. 185, 201-03 (2014).

⁵¹ Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L. J. 231, 262-63 (1995).

little incentive to strictly impose the plaintiffs' or prosecutors' burden of proving the falsity of the statement. Therefore, trials end up focusing on whether speakers had "sufficient bases" for their statements. This in turn has the effect of chilling the dissemination of often naturally 'imperfect' claims or evidence of corruption, as the speakers can be criminally punished in the event that they cannot prove the truth of those claims.

For instance, a prominent congressman Roh Hwe-chan was found guilty⁵² for simply disclosing the names of the prosecutors who were named in an illegally wiretapped conversation between high-level Samsung Group officials planning bribery payments to the prosecutors because he could not prove whether the prosecutors actually took the bribes. Roh was later found not guilty only at the appeals court. Seungji Ha and Won Sun Choi note:

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 . . . determining 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.⁵³

Significantly, the court decision focused on whether Congressman Roh had reasonable bases for his statement—an

⁵²

In 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.

Seoul Central District Court [Dist. Ct.], 2007Go-Dan2378, Feb. 9, 2009 (S. Kor.), *rev'd*, Seoul Central District Court [Dist. Ct.] 2009No520, Dec. 4, 2009 (S. Kor.).

⁵³ Seungji Ha & Won Sun Choi, *Burden of Proving Falsity in False Defamation Cases*, 6 KOREA U. L. REV. 31, 36 (2009) (alteration in original).

impossible demand when Roh was simply engaging in neutral reportage on the wiretapped conversation and was merely calling for an investigation into the matter. Even more significantly, the court ruled against Roh without making a finding that the prosecutors did not receive the bribes. In a similar case,⁵⁴ a citizen was sentenced to seven months of imprisonment for revealing that a 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 did not committed such offenses.⁵⁵

3. *Insult Prosecutions*

The crime of insult is also vigorously prosecuted in Korea with 9,417 prosecutions in 2013 and 4,860 prosecutions in 2010,⁵⁶ against the U.N. Human Rights Committee's 2011 General Comment 34, which warned against punishing "statements not subject to verification," namely expressions of feelings and opinions.⁵⁷ Korea is not the only such country. However, in Germany, the world's capital of insult prosecution,⁵⁸ insult is processed as private prosecution (*Privatklage*)⁵⁹ where prosecutors are not involved and therefore free of political bias. In Japan, the crime is treated lightly like a civil infraction, involving a maximum fine of 10,000 JPY.⁶⁰

Insult law has been also used by government officials to crack down on the people who shared negative feelings and opinions against the police. In 2013, out of 9,417 indictments for the crime of insult, 1,038 of them (a little more than 10%) were for insulting the police officers. That percentage has only grown as the number of

⁵⁴ Seoul District Court [Dist. Ct.], 2007GoDan3122, Apr. 24, 2008 (S. Kor.).

⁵⁵ *Id.*

⁵⁶ 2014 KEOMCHAL YEONGAM [2014 PROSECUTORS' OFFICE YEAR BOOK] 684-689 (2015), http://www.spo.go.kr/spo/info/issue/spo_history02.jsp?mode=view&board_no=64&article_no=590945 [<http://perma.cc/A49Q-B2U4>].

⁵⁷ U.N. Human Rights Comm., *supra* note 37.

⁵⁸ International Press Institute, *supra* note 21.

⁵⁹ Section 374 of German Code of Criminal Procedure makes a *Privatklage* available, without any requirement of a prior involvement of public prosecution first, in cases involving: (1) trespass into the home, (2) insult, (3) bodily harm, (4) threats, (5) corruptibility or actual corruption in commercial affairs, (6) damage to goods, (7) unfair competition, and (8) a variety of matters of infringement of intellectual property. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 374(1), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2148 [<http://perma.cc/D8VH-6A2F>].

⁶⁰ KEIHŌ, *supra* note 20, art. 15, 231.

indictments for insulting the public officials increased to 1,397 in 2014, which represents a 35% increase from the previous year.⁶¹ These “police insult” cases have been used to suppress participants of demonstrations and assemblies concerning government policies.

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

4. Conclusion

The crime of insult, criminal defamation, and “truth defamation” laws are vigorously enforced by Korean authorities, despite the warnings of international human rights bodies, including the U.N. Human Rights Committee that condemned penalizing an act of making truthful statements as well as using incarceration as a punishment for defamation in General Comment No. 34 issued in 2011.⁶² The Committee specifically recommended in 2015 that Korea’s law be amended.⁶³

⁶¹ Press Release, MP Park Nam-chun, Jaknyeong Haru 4-Myeong Kkollo Kyeongch'al Moyokjoe Ch'eop'eolbad-a . . . 1-nyön Se 35% Chüంగా [Last Year, Four Persons Per Day Were Punished for Insulting Public Officials . . . Increased by 35% in One Year], Mar. 26, 2015, <http://bit.ly/1FR5YG1> [<http://perma.cc/6LCW-RCRD>].

⁶² U.N. Human Rights Comm., *supra* note 37.

⁶³ U.N. Human Rights Comm., *Concluding Observations on the Fourth Periodic Rep. of the Republic of Korea*, U.N. Doc. CCPR/C/KOR/CO/4 (Dec. 3, 2015), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKOR%2fCO%2f4&Lang=en [<http://perma.cc/Q6G4-NLCS>].

III. CANDIDATE DEFAMATION AND INSULT LAW AND PRACTICE

1. Candidate Defamation Law and Practice

Korea's election law provides a pervasive system of restrictions on the time and manner of election campaigning.⁶⁴ These restrictions were justified in the name of fairness between richer and poorer candidates, but they originated under the authoritarian Rhee Syngman regime in the late 1950s and mimicked the Japanese legal system.⁶⁵ A subsequent justification for maintaining this legislation was to reduce opportunities for corruption and vote-buying. The efforts of the Central Election Commission (CEC), which enforces all regulations on election campaigns, and prosecutors are generally credited with reducing vote-buying. Post-election surveys show that the percentage of voters who admitted receiving cash, gifts, free dining, entertainment, or tours before the National Assembly elections has fallen from double digit percentages in the 1990s to 3% in 2004 to 1.4% in 2008.⁶⁶

The Public Official Election Act (POEA) is designed to temporally circumscribe election campaigns in Korea.⁶⁷ Article 93 of the POEA prohibits individuals from distributing or posting advertisements, letters of greetings, posters, or other printed matter, "or the like," supporting or opposing a political party or candidate for a period of 180 days before the election to the election day.⁶⁸ The statute also generally prohibits any campaign activities before a short, fourteen-day legal campaign period prior to the National Assembly and local elections and a twenty-three day period prior to presidential elections.⁶⁹ The sole exceptions are for very limited activities, such as the distribution of name cards, which is allowed from 120 days before National Assembly elections.⁷⁰ Moreover, punishment for

⁶⁴ Haggard & You, *supra* note 15, at 171.

⁶⁵ Song Seog-Yun, *Seon'geo Undong Kyucheppeop eui Yeon weon: 1925-nyeon Ilpon Pot'ongseon'geopeop eui Seongrip kwa Han'guk Puntanch'eche eui Yuip* [The Origin of the Regulatory Election Campaign Law: Japanese 1925 Election Law and Its Importation into the Division System of Korea], 46 SEoul L.J., no. 4, 28, 44–53 (2005).

⁶⁶ JONG-SUNG YOU, DEMOCRACY, INEQUALITY, AND CORRUPTION: KOREA, TAIWAN, AND THE PHILIPPINES COMPARED 112 (2015).

⁶⁷ Public Official Election Act, *supra* note 9.

⁶⁸ *Id.* art. 93.

⁶⁹ *Id.* art. 33, 59.

⁷⁰ *Id.* art. 60–63.

derogations is harsh: individuals and civil society organizations violating these provisions are subject to imprisonment of up to two years or fines of up to four million won.⁷¹

These restrictions on campaigns produce enormous incumbent advantage because challengers are unable to effectively promote themselves before the legal campaign period. Moreover, there is a troubling trend of incumbents using the advantages of office to aggressively prosecute opposition candidates, both for the prohibition on campaigning in the pre-campaign period and on claims of false election speeches and slander, which work like candidate defamation and candidate insult, respectively.

The latter set of violations are of particular concern because of the discretion granted to prosecutors in defining what constitutes false election speech and slander—even negative campaigns based on correct information of a candidates' positions have been deemed slanderous. As with the punishments under the defamation laws described in the previous section, the consequences for illegal campaign speech are grave. The Public Official Election Act stipulates that anyone who publishes false facts about a candidate and his or her family for the purpose of defeating the candidate in the election is punishable by imprisonment of up to seven years or a fine between five million won and thirty million won.⁷² However, even publication of correct information about a candidate that is deemed slanderous could be punishable by imprisonment of up to three years or a fine of up to five million won, although a violator could be immune from punishment if the publication of the true facts is subsequently deemed in the public interest.⁷³

The discretion exercised by prosecutors on when to bring cases presents a risk of politicization of the prosecutorial process. Chung Bong-ju, a former National Assembly member and one of South Korea's most popular political commentators, was imprisoned for a full year in late 2011 after being convicted of spreading rumors about Lee Myung-bak's connection to an alleged stock fraud during the 2007 presidential election.⁷⁴ The Supreme Court's ruling for Chung was criticized by legal scholars as well as opposition parties, human rights groups, and other civil society organizations, for

⁷¹ *Id.* art. 254(2), 255(2).

⁷² *Id.* art. 250(2).

⁷³ *Id.* art. 251.

⁷⁴ FREEDOM HOUSE, *supra* note 5, at 467–68.

discarding the application of the “actual malice” standard and shifting the burden of proof of falsity of the statements from the prosecution to the defendant.⁷⁵ Although Park Geun-hye raised the same issue of Lee’s possible connection to the stock fraud scandal during the campaign for the presidential nomination of the Grand National Party in 2007, the prosecutors did not investigate her case, indicating prosecutorial bias.⁷⁶

After the inauguration of Park Geun-hye as president in February 2013, a number of people who criticized her as a presidential candidate, her late father and former president Park Chung-hee, or her brother Park Ji-man were investigated, detained, fined, and indicted for false statements even when there was reasonable evidence that the claims being made were true. Kim Eo-jun, editor of the online newspaper *Ddanzi Ilbo*, and Ju Jin-woo were indicted for raising suspicion about Park Geun-hye’s brother Park Ji-man’s involvement in the murder of their nephew in their popular podcast *Naggomsu* (“I’m a Petty Trickster”) in June 2013.⁷⁷ Park Jeong-gyu was accused by the Election Commission, investigated, and indicted for posting an article by a Korean-American journalist that exposed the late president Park Chung-hee’s coercive recruitment of sex partners based on an interview with a victim who subsequently immigrated to the United States.⁷⁸ Baek Eun-jong, editor of the *Voice of Seoul*, was arrested and indicted for posting an article on a rumor about Park Geun-hye’s illegitimate child.⁷⁹

⁷⁵ Cho Kuk, *Ilpu Heowi ka P’ohamdoen Kongcheok Inmul Pip’an eui Peopcheok Ch’aekim* [Legal Responsibility for Partially False Criticism of a Public Figure], 53 SEoul L.J., no. 3, 2012, at 175; Kim Jong-cheol, *Kongchikseon ’geopeop Che-250-cho Che-2-hang (Nakseonmokcheok Heowisasil Gongp’yojoe) wa Kwallyeonhan Daepeopweon P’ankyool e taehan Heonpeopcheok Keomt’o* [A Constitutional Review of the Supreme Court Decision on the Article 250-2 of the Public Official Election Act (False Campaign Speech to Defeat an Opponent)], 22 YONSEI L. REV., no. 1, 2012, at 1.

⁷⁶ Haggard & You, *supra* note 15, at 172.

⁷⁷ Kim Dong-ho, ‘Naggomsu’ Kim Eo-jun-Joo Jin-woo Pulgusok Kiso [‘Naggomsu’ Joo Jin-woo and Kim Eo-jun Indicted Without Detention], YONHAP NEWS (June 13, 2013), <http://www.yonhapnews.co.kr/bulletin/2013/06/13/0200000000AKR20130613179300004.HTML?input=1179m> [https://perma.cc/7FMR-D8D3].

⁷⁸ Yoon Sung-hyo, ‘Pak Cheong-heui eui Yeo’in’ K’alleom, Peopweon eui P’antan eun? [A Column on Park Chung-hee’s Sex Partners: What Will Be Court’s Judgment?], OHMYNEWS (July 16, 2013), http://www.ohmynews.com/NWS_Web/view/at_pg.aspx?cntn_cd=A0001886362 [http://perma.cc/RQB6-4MUT].

⁷⁹ Lee Eun-jeong, ‘Pak Chi-man Sal’inch’eonggu euihok’ Podo han Paek Eun-chong, Gusokkiso [‘Paek Eun-jong, Indicted and Detained for Reporting the Suspicion of Park Ji-man’s Involvement in a Murder Case’], SEGYE ILBO (May 23, 2013), <http://www.segye.com/content/html/2013/05/23/20130523003354.html> [http://perma.cc/8YBU-MHLZ].

This problem was felt even more acutely because the Supreme Court,⁸⁰ 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 of the statement, 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, Chung Bong-ju alleged that another politician Lee Myung-bak was involved in stock price manipulation of a company called BBK.⁸¹ Lee Myung-bak later became the President. Once in power, his prosecutors indicted Chung for candidate defamation. Throughout the case, the court did not inquire into the truth of the statement and instead examined 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 would find “sufficient.”⁸²

In comparison, in the United Kingdom, false campaign speech about a candidate’s *personal* (as opposed to *political*) character or conduct remains a criminal offense, punishable by a fine, but only the most blatant and serious false statements are likely to

80

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.

Supreme Court [S.Ct.], 2001Do6138, Feb. 20, 2003 (S.Kor.).

⁸¹ Chico Harlan, *In S. Korea, a Shrinking Space for Speech*, WASH. POST (Dec. 22, 2011), http://www.washingtonpost.com/world/asia_pacific/in-s-korea-a-shrinking-space-for-speech/2011/12/21/gIQAmaHgBP_story.html [<http://perma.cc/EFB8-VCUU>].

⁸² Cho Guk, *Ilbu Heowiga Pohamdoen Gongjeok Inmul Bipanewi Beopcheok Chaegim* [*Legal Responsibility for Partially False Criticism of a Public Figure*], 53 SEUL L.J., Sept. 2012, at 175; Kim Jong-cheol, *Gongjikseongeobeop Je-250-jo Je-2-hang (Nakseonmokjeok Heowisasil Gongpyojoe) wa Gwanhyeonhan Daebeopwon Pangyeol-e daehan Heonbeopjeok Geomto* [*A Constitutional Review of the Supreme Court Decision on the Article 250-2 of the Public Official Election Act (False Campaign Speech to Defeat an Opponent)*], 22 YONSEI L. REV., 2012, at 1.

face prosecution.⁸³ The May 2010 elections resulted in thirty-seven allegations of making false statements about a candidate. Of these, only one case resulted in a conviction.⁸⁴ In relation to the June 2009 local and European elections, there were only four alleged cases and none of them resulted in further action.⁸⁵ For further comparison, Australia repealed its provision about false campaign speech as criminal offense in 2007, following doubts about the law's practicability and consistency with freedom of speech.⁸⁶

2. *Comparison to Japan and Taiwan*

The number of people investigated or indicted for candidate defamation and candidate insult (represented in the table below as "false propaganda") in Korea is overwhelming compared to Taiwan and Japan.

⁸³ Jacob Rowbottom, *Lies, Manipulation and Elections: Controlling False Campaign Statements*, 32 OXFORD J. LEGAL STUD. 507, n.10 (2012).

⁸⁴ ASS'NS OF CHIEF POLICE OFFICERS AND ELECTORAL COMMISSION ANALYSIS, ANALYSIS OF CASES OF ALLEGED ELECTORAL MALPRACTICE IN 2010 26 (Feb. 2011).

⁸⁵ ASS'NS OF CHIEF POLICE OFFICERS AND ELECTORAL COMMISSION ANALYSIS, ANALYSIS OF ALLEGATIONS OF ELECTORAL MALPRACTICE AT THE JUNE 2009 ELECTIONS (Jan. 14, 2010). *See also* Rowbottom, *supra* note 83, n.10 (examining regulation of false statements during campaigns).

⁸⁶ Anne Twomey, *Freedom of Political Communication and Its Constitutional Limits on Electoral Laws*, in ELECTORAL DEMOCRACY: AUSTRALIAN PROSPECTS 189 (Joo-Cheong Tham, et al. eds., 2011).

Table 1. Number and Types of Election Law Prosecutions in Korea⁸⁷

	15th (1996)	16th (2000)	17th (2004)	18th (2008)	19th (2012)	Total
Investigated (Indicted)	1,995 (713)	3,749 (1,552)	3,797 (2,829)	1,990 (1,283)	2,544 (1,448)	14,075 (7,825)
(Detained)	(175)	(139)	(423)	(68)	(115)	(920)
Money, Gift	667 (33.4%)	1,548 (41.3%)	1,609 (42.4%)	575 (28.9%)	828 (32.5%)	5,227 (37.1%)
"Black" Propaganda	287 (14.4%)	502 (13.4%)	564 (14.9%)	400 (20.1%)	655 (25.7%)	2,408 (17.1%)
Illegal Propaganda	90 (4.5%)	666 (17.8%)	470 (12.4%)	272 (13.7%)	121 (4.8%)	1,619 (11.5%)
Violence	279 (14.0%)	208 (5.5%)	105 (2.8%)	58 (2.9%)	77 (3.0%)	727 (5.2%)
Others	672 (33.7%)	825 (22.0%)	1,049 (27.6%)	669 (33.6%)	863 (33.9%)	4,078 (29.0%)

Taiwan's campaign regulation is focused not on restricting political speech but on preventing vote buying. The table below indicates that enforcement is concentrated on prosecuting vote buying cases: about 94% of prosecutions for election-related crimes represented vote buying. Recall that vote buying cases represented only 30–40% of total investigations, and candidate defamation/insult steadfastly increased to a recent high of 25.7% in South Korea.⁸⁸ There are no cases of illegal propaganda and relatively few cases of false propaganda in Taiwan. The standards for prosecution of false campaign speech seem to impose a higher burden of proof to prosecutors in Taiwan than in South Korea. In Taiwan, the judiciary has established "actual malice" standards for criminal defamation, including defamation of candidates, which requires the prosecutors to prove both the falsity of the statements and that the defendant made a false statement knowingly or with reckless disregard.⁸⁹ Hence, the potential for political abuse of prosecuting false campaign speech is lesser in Taiwan than in South Korea.

⁸⁷ Haggard and You, *supra* note 15 (summarizing data from various press releases from Korea's Supreme Prosecution Office).

⁸⁸ See Table 1.

⁸⁹ Jimmy Chiashin Hsu, *Free Speech and Democratic Consolidation in a Divided Polity: Taiwan's Politics of Rumors and Laws of Defamation, 2000–2008* (Aug. 2009) (unpublished J.D. dissertation, University of Chicago), <http://search.proquest.com/openview/42fa5ef633cf6f5ca42125fdd6c0be4b/1?pq-origsite=gscholar&cbl=18750&diss=y> [<https://perma.cc/8PCX-NAYQ>].

Table 2. Number and Types of Election Law Prosecutions in Taiwan (Lower Court)

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total	(%)*
Money, gift	592	85	335	1,471	522	327	164	996	984	184	5,660	93.8%
False propaganda				32	64	23	24	16	38	23	220	3.6%
Violence				13	10			7	6	1	37	0.6%
Others					4	112		1	1		118	2.0%
Unknown	284	40	72	15	20	2					433	-
Total	876	125	407	1,531	620	464	188	1,020	1,029	208	6,468	100%

Note: The percentages (last column) denote the proportion of each type of election-related crime out of total election-related crimes of which the type is known, for the period of 2003-2012.

Source: ROC Court statistics, provided by Dr. Bi-ling Kuan (管碧玲), member of the Legislative Yuan.

The table below presents a comparison of the numbers and percentages of investigated persons during legislative elections from 1996 to 2012 in Korea and Japan (lower house elections), categorized by the type of election crime. Note that the total number of investigated people for election crimes during this period is much larger in Korea (14,075) than in Japan (5,169). Considering that the number of House Representatives in Japan (475) is larger than that of the National Assembly members in Korea (300) and that Japan's population (127.3 million in 2013) is much larger than Korea's (50.2 million in 2013), this shows that prosecution of election crimes is much more rigorous in Korea. A more striking difference is the relative proportions of vote buying versus administrative offenses: while vote buying represents 82% of election crime investigations in Japan, the equivalent figure in Korea is only 30–40%. The proportion of people investigated for administrative offenses in Japan is just 11%, but the equivalent figure in Korea is as high as 40.5%. Another difference is seen in the proportion of prosecution of candidate defamation (and candidate insult in Korea): 0.1% in Japan but 17.1% in Korea.

Table 3. Numbers and Types of Election Law Prosecutions in Korea and Japan 1996–2012⁹⁰

	Japan	Korea
Investigated (Detained)	5,169 (991)	14,075 (920)
Vote buying	4,236 82.0%	5,227 37.1%
Infringement of freedom (interference, violence,---)	375 7.3%	727 5.2%
False campaign speech (candidate defamation/insult in Korea)	5 0.1%	2,408 17.1%
Illegal campaign & others (administrative offences)	553 11%	5,697 40.5%

Note: Japan’s statistics are for six general elections from the 41st (1996) to 46th (2012) House of Representatives. Korea’s statistics are for five general elections from the 15th (1996) to 19th (2012) National Assembly. Infringement on electoral freedom in Japan includes interference in voting, illegal voting, violence, etc. Infringement on electoral freedom in Korea denotes violence only. False campaign speech in Korea includes slander of candidate based on true facts, which is however used by prosecutors and courts as “candidate insult.” “Others” in Korea may include some violations that are classified as “infringement of electoral freedom” in Japan.

3. Candidate Insult Law

As explained earlier, candidate insult law is the prosecutors’ and courts’ adaptation of a provision in election law that punishes statement of facts designed to undermine a candidate’s campaign. On its face, it reads like a truth defamation provision. If it were really treated as such, it likely would be the world’s only legislation banning statements of facts in election periods when all statements of truth about candidates should be deemed to be in the public interest. Probably, due to the courts’ reluctance to let that happen, the provision is being used as candidate insult law.

Recently, there was one exceptional case where the prosecutor tried to use candidate insult law as truth defamation of a candidate. A prominent poet was found guilty of this provision for

⁹⁰ Jong-song You, *The Politics of Electoral Campaign Regulation in South Korea and Japan: Similar but Different?*, (2016) (unpublished manuscript) (on file with author).

alleging that the then Presidential candidate Park Geun-Hye had custody of calligraphy by Ah Joong-geun, an independence fighter who assassinated Ito Hirobumi, the Japanese prince who spearheaded the annexation of Chosun.⁹¹ Although the judgment was later reversed on the grounds that, where falsity has not been proven, the poet had the public interest in mind in making the claims,⁹² the demonstrated legal risk cast a chilling shadow on anyone who may reveal inconvenient truths.

At any rate, most of the prosecutions under this provision involve epithets against candidates. They are indicted and tried like “candidate insult” law, and they account for about half of the false speech cases in Korea.

IV. ANALYSIS OF CANDIDATE DEFAMATION AND INSULT

1. Research Method

This Article attempts to identify if there is evidence that prosecutors’ decisions to indict were influenced by the consideration of protecting the ruling party candidates. We propose three different methods of testing this hypothesis. All 850 candidate defamation court cases and 719 candidate insult court cases decided during the twenty-year period from 1995–2015 were obtained for analysis.

Firstly, we compare the number of prosecutions initiated for protecting the ruling party candidates compared to the opposition candidates. Korean prosecutors can indict *sua sponte* or upon receipt of criminal complaints filed.⁹³ Therefore, the difference in the numbers can depend on other factors, such as people’s willingness to file criminal complaints on election-related statements or people’s greater willingness to make critical comments on the ruling party candidates in a more vocal and risky fashion, which we cannot control. However, assuming that these attitudinal factors are not significant,

⁹¹ Nam Hyun-woo, *Poet Ahn Found Partially Guilty*, KOREA TIMES (Nov. 7, 2013), https://www.koreatimes.co.kr/www/news/nation/2013/11/116_145842.html [http://perma.cc/6NCE-96AV].

⁹² *An To-hyeon Si'in, Kongchikseon'geopeop Wiban 2 simseo 'Mujoe'* [Poet An To-hyön, 'Not Guilty' on 2 Counts of Violation of Public Official Election Act], YONHAP NEWS (Mar. 25, 2014), <http://www.yonhapnews.co.kr/politics/2014/03/25/0505000000AKR20140325076451055.HTML> [http://perma.cc/VZN6-A4LN].

⁹³ Hyeongbeop [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, amended by Act No. 14179, May 29, 2016, art. 257 (S. Kor.)

this study provides a rough outlook on prosecutorial practice, though falsifiable upon proof of the aforesaid factors.

Secondly, we can use the judgments issued on the indictments as a measure of rectitude of the indictments. The assumption here is that the courts are independent and can evaluate the substance of the indictments efficiently. If the frequency of “not guilty” judgments is higher for the indictments protecting the ruling party candidates compared to opposition candidates, it is a sign that the former group of indictments was the result of prosecutorial willingness to indict the statements attacking the ruling party candidates.

Thirdly, we can look at how the prosecutors respond to the cases presented to them through criminal complaints, requests for investigation, etc. There is no public record of criminal complaints or requests for investigations, filed by private individuals, but a record of the same exists as filed by the Central Election Commission. If the prosecutors were more likely to indict the statements attacking the ruling party, that can be evidence of prosecutorial bias. This Article concludes that all three methods showed prosecutorial bias.

2. *Frequency of Pro-Ruling-Party Prosecutions*

To take an example from the latest presidential elections in 2012, the number of indictments initiated upon statements attacking the ruling party candidates outnumber the ones attacking the opposition candidates by wide margins (i.e., 87% vs. 13%).

Table 4. Number of All Candidate Defamation/Insult Cases in the 2012 Presidential Election

	Slander	False	Total	(Proportion)
Ruling Party Candidate	84	69	153	86.4%
Ruling Party (Primary)	1	0	1	0.6%
Opposition Candidates	13	10	23	13.0%
Total	98	79	177	100.0%

Note: appellate levels are counted separately.

The table below shows that the proportion of ruling party candidate-involved trial cases changed from 76.5% in 2002 to 14.5% in 2007 to 87% in 2012 presidential election. The 2007 presidential election number initially appears to be exceptional at 14.5%. However, it should be kept in mind that indictment decisions are usually made after the election, and in 2007, the ruling party changed when the opposition candidate Lee Myung-bak won the election converting all the non-ruling party candidates into the “ruling” category. Therefore, the 2007 numbers are eminently consistent with this Article’s postulate about prosecutorial bias. Thus, we can infer that the prosecution always showed political bias in favor of the president elect.

Table 5. Number of Trials and Convictions for Presidential Elections, by Attacked Candidate’s Party Affiliation

		Ruling	Non-Ruling	Total	(Ruling ratio)
2002	Trial cases	13	4	17	76.5%
	Convictions	7	4	11	63.6%
	(Conviction rate)	53.9%	100%	64.7%	
2007	Trial cases	39	230	269	14.5%
	Convictions	33	200	233	14.2%
	(Conviction rate)	84.6%	87.0%	86.6%	
2012	Trial cases	154	23	177	87.0%
	Convictions	102	15	117	87.2%
	(Conviction rate)	66.2%	65.2%	66.1%	

Note: Saenuri (GNP) was an opposition in the 2002 and 2007 presidential election, but a ruling party in the 2012 election. Saenuri candidates won the 2007 and 2012 elections.

3. *Rate of Not-Guilty in Pro-Ruling-Party Prosecutions vs. Pro-Opposition Prosecutions*

The dependent variable, “Not Guilty,” takes a value of one if the court ruling is either “not guilty” or “suspended sentence.” This Article treats suspended sentence as practically equivalent to a “not guilty” sentence because most criminal defendants and attorneys treat it that way. Our logit regression analysis identifies if and how much the probability of a “Not Guilty” ruling is influenced by various

independent variables. Our choice of independent variables is limited by the data. We do not and cannot include the characteristics of the defendants, except for hiring of private lawyers (“Private”). The copies of court sentences we obtained do not allow identification of the defendants by categories such as their party affiliation and demographic variables, except for occupations that are not standardized and hence not useful for statistical analysis. Fortunately, for most cases, we can identify the candidates who were attacked by the defendants associated with “true but slanderous expressions” or “release of false factual information” about the candidates. By including the characteristics of the candidates who were attacked such as their party affiliation (“Ruling party” and the major conservative “Saenuri” party, or its antecedent, the Grand National Party), incumbency at the time of attack (“Incumbent”), and success or failure at the subsequent election (“Elected”), we can examine whether those defendants who attacked the ruling party candidates, incumbent candidates, and elected candidates are more or less likely to get “Not Guilty” sentences than those who attacked opposition or independent candidates, non-incumbent candidates, and unsuccessful candidates.

The table below shows the results of logistic regressions for the entire sample (column 1), the non-presidential sample (column 2); and the presidential sample (the cases in which the attacked candidates were presidential candidates) (column 3). Note that the average probability of receiving a “Not Guilty” sentence is 21.9% for the cases of defamation via false information (“Defamation”) and 23.2% for the cases of slander via true information (“Insult”). We’ve included the variable “Defamation” to see if there is a systemic difference in the probability of “Not Guilty” between these different types of candidate defamation, but the coefficients for “Defamation” are insignificant in all three columns.

In columns 1 (entire sample) and 2 (non-presidential sample), the coefficients for “Ruling party” are positive and highly significant (at 0.1% level for the entire sample and at 1% level for the non-presidential sample). This means that the defendants who attacked ruling party candidates are significantly more likely to receive “Not Guilty” sentences than those who attacked opposition or independent candidates. It is hard to imagine that Korean courts favor opposition and independent candidates over ruling party candidates; instead, the significantly positive coefficients for “Ruling party” are perhaps due

to the fact that these indictments are due to prosecutorial bias. When prosecutors have too vigorously indicted anyone who attacked ruling party candidates (including rather minor offenses), the court's unbiased decisions, or less biased decisions, will make the coefficients positive. Interestingly, the coefficients for "Saenuri" (or GNP) are negative, although they are statistically not significant. When we consider combined effects of "Ruling party" and "Saenuri," the probability of "Not Guilty" increases more for those who have attacked non-Saenuri ruling party candidates than those who have attacked Saenuri candidates when the party was in power.

Note that the conservative Saenuri (and its antecedent GNP) has been the ruling party before February 1998, and again since February 2008 under presidents Lee Myung-bak (2008–2013) and Park Geun-hye (2013–present). The major liberal parties were in power under presidents Kim Dae-jung (1998–2003) and Roh Moo-hyun (2003–2008). Korean presidents have a five-year single term limit, and their term begins and ends in late February.

On the other hand, the coefficients for "Elected" are negative and significant (at 5% level for the entire sample and at 0.1% level for the non-presidential sample). The defendants are less likely to get "Not Guilty" sentences when the candidates they had attacked have been elected than when the attacked candidates have not been elected. The significantly negative effect of "Elected" probably reflects a court bias in favor of protecting the powerful. Note that the coefficients for "Incumbent" are very small and insignificant. Thus, what matters is not whether the attacked candidate was an incumbent at the time of the attack but whether the attacked candidate wins the subsequent election. In other words, the effect of incumbency status of the attacked candidates differs depending on the time: incumbency status prior to the contested election (and prior to court trials) has no effect, but incumbency status post-election (at the time of court trials) has a significant effect on court rulings.

Considering the effects of the four variables—"Ruling party," "Saenuri," "Incumbent," and "Elected"—together, the probability of a "Not Guilty" ruling is greatest when the attacked candidate was a non-Saenuri ruling party candidate (i.e., the Democratic or Woori candidate between February 1998 and February 2008) who lost the election. That probability is the lowest when the attacked candidate was a Saenuri (or GNP) candidate between February 1998 and February 2008 who won the election, followed those who attacked a

Saenuri (or GNP) candidate after February 2008, who won the election.

However, the effects of these variables differ somewhat when we look at the presidential sample. “Ruling party” is not significant, but the “Saenuri” effect is large and negative (significant at 1% level) and the effect of “Elected” is large and positive (significant at 5% level). This different pattern for the cases of attacking presidential candidates can be understood, by considering the large number of cases in the 2007 presidential election. During the election, GNP was the main opposition party, but then-president Roh Moo-hyun was a lame duck. In fact, there were much higher numbers of indictments for those who attacked the opposition candidates Park Geun-hye who lost the GNP nomination (thirty-two “slander” cases plus eighteen “false” cases) and Lee Myung-bak, who were eventually successful in the election (138 “slander” cases and forty-two “false” cases) than for those who attacked the ruling party candidates, such as Chung Dong-young (nineteen “slander” cases plus two “false” cases). Note that this kind of change in ruling party after the election did not take place for elections other than the presidential election.

Also, the negative effect of “Saenuri” and positive effect of “Elected” are negated for Saenuri candidates who have been elected, such as Lee Myung-bak in the 2007 presidential election and Park Geun-hye in the 2012 presidential election. Considering the effects of the three variables—“Ruling party,” “Saenuri,” and “Elected”—together, the probability of a “Not Guilty” ruling is the greatest when the attacked candidate was a non-Saenuri party candidate who won the election, which practically means Roh Moo-hyun in the 2002 presidential election. Indeed, of the thirteen cases that involved slander of candidate Roh Moo-hyun, six cases, or 46%, got “Not Guilty” rulings, a significantly higher rate than the average “Not Guilty” probability of 23% for the slander cases. Note that “Incumbent” is not included in the logit regression for the presidential sample because there can be no incumbent candidates in presidential elections in Korea due to the single-term limit.

Table 6. Logit Regression Results for Entire, Non, Presidential, and Presidential Samples

	Entire sample	Non-presidential	Presidential
Court	0.2554 * (0.1114)	0.0457 (0.1339)	0.6057 ** (0.2016)
Private	0.2244 (0.1570)	0.4190 * (0.2033)	-0.0688 (0.3078)
E_LEVEL	0.2087 * (0.1062)	0.2200 (0.1829)	
E_YEAR	-0.0332 (0.0188)	-0.0666 *** (0.0204)	0.2052 ** (0.0659)
Ruling party	0.8038 *** (0.1569)	0.6554 ** (0.2117)	-0.1697 (0.3810)
Saenuri	-0.2179 (0.1693)	-0.1229 (0.2134)	-2.1143 ** (0.8079)
Incumbent	-0.0579 (0.1618)	-0.0250 (0.1736)	
Elected	-0.3088 * (0.1493)	-0.5950 *** (0.1808)	1.9569 * (0.8817)
FALSE	-0.0332 (0.1581)	-0.0220 (0.1875)	0.0396 (0.2987)
Constant	64.388 (37.829)	131.861 *** (41.088)	-414.061 ** (132.343)
N	1215	892	323
Log pseudolikelihood	619.76379	438.30238	162.86688
Pseudo R2	0.0407	0.0539	0.1047

Note: Robust standard errors are presented in parentheses below the coefficients. Significance levels are denoted as follows: * $p < 0.05$, ** $p < 0.01$, and *** $p < 0.001$.

4. Prosecutors' Treatment of Cases Referred by Central Election Commission

Table 7. Rate of Indictment on Cases Referred by Central Election Commission in 2012 Presidential Election

	Cases Referred	Rate	Indictment	No Indictment	Rate of Indictment
Ruling Party	15	55.6%	9	6	60.0%
Opposition 1	8	29.6%	3	5	37.5%
Opposition 2	4	14.8%	3	1	75.0%
Opposition					
Total	12	44.4%	6	6	50.0%
	27	100%	15	12	55.6%

As shown in the table above, prosecutors were 10% more likely to indict statements attacking the ruling party candidate than the statements attacking the opposition candidates.

V. CONCLUSION

This empirical study confirms that prosecutors are likely to use their indictment power in favor of ruling party candidates than opposition candidates in prosecuting candidate defamation cases and candidate insult cases. Extrapolating the candidate defamation/insult cases to general defamation/insult cases, the results show that South Korea has reason to mull over whether to adopt the international standard of abolishing or effectively retiring criminal defamation and insult laws.