ARTICLES

LIBEL LAW AND THE PRESS: U.S. AND SOUTH KOREA COMPARED

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I. INTRODUCTION

Freedom of the press is not absolute; it must be balanced against other competing social interests. As the U.S. Supreme Court stated: "[A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."[1] Legal protection against injury of a person's reputation is an "intersubjectively reasonable transcultural goal of the law."[2] The libel law of a society, however, indicates to a large extent how that society views the relative importance of reputational interest vis-à-vis freedom of the press.[3]

In the United States, press freedom is protected as a constitutional right, but reputation is not.[4] First Amendment scholar Frederick Schauer has written: "The American approach . . . reflects a society in which the press is considered to occupy a much more important role in the resolution of public issues. The press occupies a special position in the American system, a posi-

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1. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967).

2. LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 314 (1984).

3. Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 1, 3 (1980).

4. One commentator noted: "American constitutional law is distinguished by its protection of defamers, rather than the defamed." Oscar S. Gray, *Constitutional Protection of Freedom of Expression in the United States as it Affects Defamation Law*, 38 AM. J. COMP. L. 463, 463 (1990).

tion that accounts for its strong protection against inhibiting defamation laws."[5]

By contrast, South Korea does not protect freedom of the press as a transcendent value. The Constitution of South Korea makes no preferential judgment subordinating reputation to a free press. It provides that "[a]ll citizens shall enjoy freedom of speech and the press"[6] but that "[n]either speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of the persons, claims may be made for the damage resulting therefrom."[7]

It is widely accepted that American libel law is more favorable to the press than any other legal system.[8] Indeed, the media-oriented defamation law of the United States has led an increasing number of libel plaintiffs to sue American media organizations in foreign courts.[9] Despite First Amendment protections, however, "libel has been the principal legal threat" to the freedom of the American press.[10]

In Korea, however, where libel law is considered to be much more strict than in the United States, the media have yet to perceive libel litigation as a major problem.[11] Nevertheless, the explosion of libel and related actions in Korea since the mid-1980s

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5. Schauer, *supra* note 3, at 18.

6. HŎNBŎP [CONSTITUTION] art. 21(1), (amended 1987). The translated version of the entire text of the Hŏnbŏp can be found in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3-24 (Korea Legislation Research Institute ed., 1991) [hereinafter CURRENT LAWS OF KOREA].

7. *Id.* art. 20(4).

8. *See, e.g.*, Ronald Dworkin, *The Coming Battles Over Free Speech*, N.Y. REV. BOOKS, July 11, 1992, at 55 (noting the impact of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in "free[ing] the American press to play a more confident role in protecting democracy than the press plays anywhere else in the world"); TODD F. SIMON & TUEN-YU LAU, WHEN SYSTEMS COLLIDE: TRIAL OF FOREIGN COMMUNIST MEDIA IN U.S. COURTS 7 (1987) (stating that "[n]o other country routinely applies anything like the American 'actual malice' standard").

9. For a discussion of libel litigation against American media in foreign countries, see Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?* 16 HASTINGS COMM. & ENT. L.J. 235 (1994).

10. David A. Anderson, *Is Libel Law Worth Reforming? in* REFORMING LIBEL LAW 2 (John Soloski & Randall P. Bezanson eds., 1992); *see also* KENT R. MIDDLETON & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 70 (3d ed. 1994) (characterizing defamation as "one of the most important issues" in U.S. media law).

11. Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 83 (1990) (noting that "as compared with such direct restrictions as censorship and physical intimidation, libel law is far from sweeping in its impact upon the Korean press. Thus, the Korean media may feel that the law of defamation, in relation to other threats, does not present a grave concern for them") [hereinafter Youm, *South Korea and Japan*].

has begun to impact the press and the general public.[12] Korean courts, for instance, have started examining the press as an institution in a democratic Korea. Increased libel litigation has also led to a more prudent approach by Korean publishers in printing potentially defamatory stories.[13]

In the context of the sociocultural differences between the United States and South Korea, this study compares U.S. and Korean defamation laws to examine "how the particular rules chosen reflect differing assumptions respecting reputation and a free press."[14] Three questions are explored: (1) What is the constitutional and statutory or common-law status of reputation as an individual interest in the United States and Korea?; (2) How have U.S. and Korean courts interpreted their libel laws?; and (3) What has been the impact of libel laws on the U.S. and Korean press?

II. REPUTATION: CONSTITUTIONAL AND STATUTORY STATUS

Harm to reputation has been a criminal offense or civil wrong in human civilization since the earliest times, but social and cultural approaches to reputation as a value vary from society to society.[15] Professor Robert C. Post elaborates:

> Defamation law would operate differently in a deference society than in a market society. In the latter, reputation is a quintessentially private possession; it is created by individual effort and is of importance primarily to those who have created it. Reputation's claim to legal protection is neither greater nor less than the claim to public protection of similar private goods. The preservation of honor in a deference society, on the other hand, entails more than the protection of merely individual interests. Since honor is not created by individual labor, but instead by shared social perceptions that transcend the behavior of particular persons, honor is a "public good, not merely a private possession."[16]

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12. While eight of the 30 reported libel cases involved the Korean press during the 1954 through 1980 period, 48 court rulings between 1981 and 1991 resulted from defamatory and similar publications in the Korean news media. Kyu Ho Youm, *Libel Law and the Press in South Korea: An Update*, 110 CONTEMP. ASIAN STUD. 1, 2 (1992) [hereinafter Youm, *Libel Law Update*]. From 1992 through 1994, *Ollon Chungjae* [*Press Arb. Q.*] published 40 court opinions relating to the Korean press.

13. Youm, *Libel Law Update*, *supra* note 12, at 21-22 (citations omitted).

14. Schauer, *supra* note 3, at 4.

15. ARTHUR B. HANSON, LIBEL AND RELATED PROBLEMS: CASES AND COMMENT 1 (1969); *see also* PETER F. CARTER-RUCK ET AL., CARTER-RUCK ON LIBEL AND SLANDER 1 (4th ed. 1992) (noting that libel has been recognized "as a wrongful act from the very earliest times and as an actionable wrong in nearly every modern system of law").

16. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 702 (1986) (citation omitted).

In the United States, defamation is "one of the earliest legal actions available" against the press and it is "still the most common type of legal danger" that can befall the news media.[17] The American concept of reputation as an individual right is distinguished from what Koreans view to be their reputational interest "in relation to the groups to which they belong."[18] Contrary to the American view that a defamatory statement is a harm to the "general social relations" of an individual, Koreans consider the statement as a "loss of face" to the individual's "familial" group.[19]

A. UNITED STATES

Libel law does not only protect the relational interest of individuals in the United States, but it also serves other important values of American society. U.S. libel law, for example, aims at compensating defamed individuals for economic and emotional injury resulting from libelous attack. In addition, it promotes human dignity by providing a civilized forum in which a court declares that the libel was unwarranted and it imposes an economic penalty on the wrongdoer.

Most importantly, American libel law serves two social functions: (1) it acts "as a deterrent on the publication of false and injurious speech" through the award of punitive damages and (2) it provides "a check and balance on the media's great power by opening up the media's news-gathering and decision-making processes to public scrutiny and accountability" during the course of libel litigation.[20]

As already discussed, reputation is not recognized explicitly as a right under the Constitution of the United States. Nevertheless, the value of "good name" in society has been noted by American courts. Justice Potter Stewart of the U.S. Supreme Court characterizes the individual's right to protection of his or her reputation as "a concept at the root of any decent system of ordered liberty." In an often quoted opinion, Justice Stewart says, "The protection of private personality, like the protection

17. T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA 82 (6th ed. 1994); *see also* DON PEMBER, MASS MEDIA LAW 113 (6th ed. 1996) (calling libel "undoubtedly the most common legal problem" facing American media).

18. YOUNG C. KIM, JAPANESE JOURNALISTS AND THEIR WORLD 71 (1981).

19. PAENG WON-SUN, MAESU K'OMYUNIKEISYÖN IRON [A THEORY OF MASS COMMUNICATION LAW] 155 (rev. ed. 1988) (based on the Korean Confucian tradition).

20. RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.06[6] (1995); *see also* BRUCE W. SANFORD, LIBEL AND PRIVACY § 1.1 (2d ed. 1994) (noting that libel lawsuits provided the American public with "a soapbox . . . for diatribes about the unaccountability and unfairness of the press").

of libel itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."[21]

In 1990, the Supreme Court held that although the First Amendment guarantees a free press, "there is another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognize that 'society has a pervasive and strong interest in preventing and redressing attacks upon reputation.' "[22]

The Federal Constitution is not the only source of law on libel and press freedom. Given the increasingly prominent role that state constitutions have played in the past twenty years in defining press freedom and other individual rights of Americans, the "new federalism" epitomizes U.S. constitutionalism:

> [T]he federal judiciary, by applying the federal Bill of Rights to the states through the Fourteenth Amendment, has established the minimal levels of protections for individual rights. States are free to establish local climates of increased deference and vigilance for these freedoms "above and beyond this federal constitutional floor."[23]

While the First Amendment provides a stronger alternative to the common law defenses to libel, e.g., truth, fair report privilege, and fair comment and criticism,[24] the states' libel laws cannot be dismissed as irrelevant. The common law on libel remains significant in that states can protect reputation "in whatever manner they see fit" so long as they do so within the boundaries of the First Amendment.[25] Further, in comparison with First Amendment standards, state libel laws can increase press protection from libel suits.

State statutes also affect the conflict between the interest in redressing injury to reputation and an uninhibited press.[26] Among the statutes directly relating to the press are statutes of limitations and retraction statutes. The statute of limitations is designed to prevent defamation claims from being filed after a

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21. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

22. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990) (citation omitted).

23. James R. Parramore, *State Constitutions and the Press: Historical Contest and Resurgence of a Libertarian Tradition*, 69 JOURNALISM Q. 105, 118 (1992) (citations omitted).

24. *See infra* notes 102-13 and accompanying text.

25. CARTER ET AL., *supra* note 17, at 83.

26. For the text of various state libel statutes, see ARTHUR B. HANSON, LIBEL AND RELATED TORTS: STATUTES OF THE UNITED STATES AND CANADA 2 (1969 & Supp. 1976).

certain period of time.[27] The statute of limitations varies from state to state, typically ranging from one to three years.[28] Half of the fifty states and the District of Columbia have one-year statutes of limitations.[29] In twenty states, the statute of limitations is two years.[30] In six states, libel actions are barred after three years.[31] In three states, the statute of limitations for oral defamation (slander), as distinguished from written defamation (libel), is six months (Tennessee) to one year (Arkansas and Rhode Island).[32]

At common law, retraction or withdrawal of a defamatory statement was allowed as a mitigation of damages. In recent years, common law retraction has been largely replaced by statutory versions. Retraction statutes in thirty-three states set forth the procedure for libel plaintiffs to demand a published retraction, and the effect such a retraction has upon recoverable damages.[33] A compulsory retraction or right of reply is, however, unconstitutional.[34]

The First Amendment principle that prior restraints are presumptively unconstitutional is absolute in media libel cases.[35] Criminal libel is rarely an issue for the American press.[36] One legal scholar contends, however: "A criminal defamation prosecution and conviction remains constitutionally viable in many jurisdictions where it is sanctioned by state law."[37] Indeed, the U.S. Supreme Court has not yet repudiated criminal libel *in*

27. SANFORD, *supra* note 20, § 13.2.4.
28. *Id.* at 837-41 app. c.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 9.2 (2d ed. 1994). For the text of various retraction statutes, see *id.* at 837-65 app. 2. *See also* Sanford, *supra* note 20, at 773-812 app. b.
34. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding a Florida statute on right of reply unconstitutional).
35. As the New York Court of Chancery stated in 1839:

> New York's Chancellor Walworth said that the power to enjoin a libel "cannot safely be entrusted to any tribunal consistently with the principles of a free government." This is in accord with the more recent line of Supreme Court cases holding such prior restraints to be presumptively unconstitutional.
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> The absoluteness of the rule is crucial. It forecloses the possibility of frequent lawsuits based upon a person's suspicion or fear that adverse commentary is about to be published. A more flexible rule would encourage inadequate reporting in an effort to keep knowledge of an impending derogatory article away from potential plaintiffs, thereby avoiding litigation.

Brandreth v. Lance, 8 Paige Ch. 24 (N.Y. Ch. 1839), *quoted in* REX S. HEINKE, MEDIA LAW 328 (1994).
36. *See* SACK & BARON, *supra* note 33, § 3.2 n.11.
37. DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE 13 (1993).

toto.[38] As many as twenty-one states still have criminal libel statutes.[39] The statutes allow the government to prosecute defamation of public officials, libel of the dead, and racial or ethnic disparagement.[40] A 1990 study of criminal libel concluded:

> The law of criminal libel, of course, can be used to harass and intimidate if not to convict . . . but if any danger remains for the press, reported cases suggest that relatively weak (and relatively insolvent) communicators, especially those connected with weekly newspapers, seem to run the greatest risks of harassment or prosecution in the states still recognizing libel as a crime.[41]

B. South Korea

As noted previously, in Korea, reputation is guaranteed as a constitutional right of individuals to protection from an abuse of press freedom.[42] Additionally, an individual's constitutional right to protect their reputation from injury by the press is recognized by a required state obligation to assure Koreans of their "human worth and dignity." "Human worth and dignity" is a part of Koreans' "fundamental and inviolable human rights" as individuals.[43]

Like the laws in most other countries,[44] Korean law prohibits unjustifiable defamation. In Korea, defamation is considered

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38. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 n.6 (1984) (citing with approval a New Hampshire criminal libel statute in recognizing the state's interest in protecting an individual's reputation and "safeguarding its population from falsehoods").

39. George E. Stevens, *Criminal Libel After Garrison*, 68 Journalism Q. 522, 525 (1991).

40. For citations to the criminal libel statutes, see *id.* at 525 n.27. In American law, civil libel does not recognize liability for defamation of the dead, either to the estate of the deceased or to the deceased's descendants or relatives. *See* Gugliuzza v. KCMC Inc., 20 Media L. Rep. (BNA) 1866, 1867 (La. 1992):

> Once a person is dead, there is no extant reputation to injure or for the law to protect. Since the cause of action is intended to redress injuries flowing from harm to one's reputation, we conclude that to be actionable defamatory words must be 'of and concerning' the plaintiff or, directly or indirectly, cast a personal reflection on the plaintiff.

For a discussion of libel of the dead under American law, see Kyu Ho Youm, *Survivability of Defamation as a Tort*, 66 Journalism Q. 646, 646 (1989).

41. Stevens, *supra* note 39, at 527 (citations omitted).

42. *See supra* note 7 and accompanying text.

43. Hönböp [Constitution] art. 10. Article 10 of the Korean Constitution states, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

44. For recognitions of reputation as a legal right in various countries, see Carter et al., *supra* note 15, at 267-395. *See also* Michael J. Calvey et al., *Foreign Defamation Law*, *in* LDRC [Libel Defense Resource Center] 50-State Survey 1987: Current Developments in Media Libel and Invasion of Privacy lxiii-lxxxiii (Henry R. Kaufman ed., 1987).

a criminal offense under the Criminal Code[45] and an "unlawful act" under the Civil Code.[46] Article 307 of the Criminal Code imposes sanctions for defamation:

> 1. A person who defames another by publicly alleging facts shall be punished by penal servitude or imprisonment for not more than two years or by a fine not exceeding 15,000 *hwan*;
> 2. A person who defames another by publicly alleging *false* facts shall be punished by penal servitude or imprisonment for not more than five years or suspension of civil rights for not more than ten years.[47]

Consequently, the punishment for defamation turns upon whether the allegedly defamatory statement is false.[48]

The Criminal Code expressly distinguishes between libel (written defamation) and slander (oral defamation). Article 309 states:

> 1. A person who, with intent to defame another, commits the crime of Section (1) of Article 307, *by means of newspaper, magazine, radio, or other publication*, shall be punished by penal servitude or imprisonment for not more than three years or fined not more than 25,000 *hwan*;
> 2. A person who commits the crime of Section (2) of Article 307, by the method described in the preceding section shall be punished by penal servitude for not more than seven years or suspension of civil rights for not more than ten years.[49]

The Criminal Code punishes the commission of libel more severely than the commission of slander on the theory that the impact of written defamation is likely to be more lasting and per-

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45. *See* HYŎNGBŎP [CRIMINAL CODE], Law No. 293 of 1953, *amended by* Law No. 4040 of 1988. The translated version of the entire text of the Hyŏngbŏp can be found in 2 CURRENT LAWS OF KOREA, *supra* note 6, at 761-812. For a discussion of the Criminal Code on defamation, see *infra* notes 47-58 and accompanying text.

46. *See* MINBŎP [CIVIL CODE], Law No. 471 of 1958, *amended by* Law No. 4199 of 1990. The entire text of Minbŏp is translated in 2 CURRENT LAWS OF KOREA, *supra* note 6, at 401-556. For a discussion of the Civil Code on defamation, see *infra* notes 59-63 and accompanying text.

47. HYŎNGBŎP [CRIMINAL CODE] art. 307 (emphasis added). The amount of fines imposed under the Criminal Code has been changed by Pŏlkum Dŭng Imsi Choch'ibŏp [Temporary Act on Fines], Law No. 216 of 1951, *amended by* Law No. 4296 of 1990, *reprinted in* PŎPCHŎN [COMPENDIUM OF CODES] 1827 (1994). Article 4(1) of the Temporary Act on Fines provides:

> When the provisions of fines in the Criminal Code are to be applied, such fines shall be fixed in the amount equivalent to 40 times those specified in the provisions; provided, however, that where the monetary unit *hwan* appears in the provisions, it shall be regarded as *won*.

48. Rather than following the once prevalent Anglo-American common law maxim, "The greater the truth the greater the libel," Tollett v. United States, 485 F.2d 1087, 1098 n.27 (8th Cir. 1973), the Korean Criminal Code recognizes truth as a mitigating factor in determining liability. *See* HYŎNGBŎP [CRIMINAL CODE] art. 307(2).

49. HYŎNGBŎP [CRIMINAL CODE] art. 309 (emphasis added).

vasive than the impact of slander.[50] Furthermore, to constitute criminal libel, publication of the statement must be made "with intent to defame." The requirement of criminal intent is protective of the rights of the press, reflecting a recognition that the press should only be punished if it acts with "malice."[51] However, the criminal intent requirement applies only if the allegedly defamatory statement is truthful. If the statement is false, no showing of criminal intent is required.

The Criminal Code provides an affirmative defense to prosecutions under Articles 307 and 309. Article 310 stipulates that "[i]f the facts alleged under Section (1) of Article 307 are true and solely for the public interest, the act shall not be punishable."[52] Therefore, a defendant is immune from liability if the statements attributed to him are true *and* made in the public interest. Because this defense may be used irrespective of the defendant's intent in making the statement, the "intent to defame" clause is of little practical value to the press as a possible defense to defamation. The libel defense is viewed as a statutory mechanism to resolve the conflict between protection of reputation and freedom of expression.[53]

The Criminal Code also permits a criminal action for a falsehood which defames the dead.[54] Article 308 provides: "A person who defames a dead person by publicly alleging false facts shall be punished by penal servitude or imprisonment for not

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50. In determining whether defamatory statements are libel or slander in U.S. libel law, one media attorney noted:

> [T]he courts look to how widely the communication was disseminated and how long it will persist. The stronger these factors are, the more likely a statement will be found to be libel rather than slander.
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> The most important issue in this area for the media is whether radio and television broadcasts are libel or slander. The majority view is that both are libel. However, several states have statutes providing that such communications are slander.

Heinke, *supra* note 35, at 86 (citations omitted).

51. One authority defines "malice" as "[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent." It adds that in libel law, malice "consists in intentionally publishing, without justifiable cause, any written or printed matter which is injurious to the character of another." BLACK'S LAW DICTIONARY 956-57 (6th ed. 1991).

52. HYŎNGBŎP [CRIMINAL CODE] art. 310.

53. *See* Judgment of June 22, 1993 (Chŏng Myŏng-su v. State), Taebŏpwon [Supreme Court], 92 To 3160, *reprinted in* ŎLLON CHUNGJAE [PRESS ARB. Q.] [hereinafter PRESS ARB. Q.], Fall 1993, at 170, 171-72. Professor Choe Dae-kwon of Seoul National University has drawn a parallel between the truth defense in Korean law and the fair comment defense in American libel law. *See* Choe Dae-kwon, *The Press and Law*, 28 PŎBHAK [SEOUL L.J.] 84, 113 (1987).

54. For a recent discussion of libel of the dead in Korean law, see Son Tong-kwon, *Press Reports and Libel of the Dead*, PRESS ARB. Q., *supra* note 53, Spring 1992, at 6.

more than two years or fined not more than 25,000 *hwan*."[55] However, a defamatory statement about the dead that is truthful is not actionable under the Criminal Code. Prosecution for defamation of the deceased can only be initiated by complaint.[56] Conversely, prosecution for defamatory crimes under Articles 307 and 309 does not require a complainant. Only the "express objection" of the allegedly defamed individual can prevent the defamer from being prosecuted by the state.[57]

The statute of limitations for criminal libel actions in Korea is three years for truthful defamation and five years for false defamation. Libel of the dead has a three-year statute of limitations.[58]

In Korea, the Civil Code also protects individuals from defamation. Although the Criminal Code is largely intended to ensure the social interests in public peace and order, the Civil Code is primarily aimed at safeguarding the rights of individuals to their reputations. The Civil Code provides victims of defamation with two possible means of redress. First, Article 751 authorizes monetary compensation for damages resulting from the defamation:

> 1. A person who had injured another person, his liberty or reputation . . . shall make compensation for any other damages arising therefrom as well as damages in the property;
> 2. The court may order the compensation under the preceding section paid by periodical payments, and may order a reasonable security furnished in order to ensure the performance of such obligation.[59]

Second, Article 764 authorizes the court, upon the injured party's application, to order the defamer "to take suitable measures to restore the injured party's reputation, either in lieu of or together with compensation for damages."[60] Korean courts have recognized several "suitable" measures for restoring the reputa-

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55. HYŎNGBŎP [CRIMINAL CODE] art. 308.

56. *See id.* art. 312(1) ("The crimes of Article 308 and the preceding Article shall be prosecuted only upon complaint").

57. *Id.* art. 312(2) ("The crimes of Articles 307 and 309 shall not be prosecuted over the express objection of the complainant").

58. *See* HYŎNGSA SOSONGBŎP [CODE OF CRIMINAL PROCEDURE], Law No. 341 of 1954, *amended by* Law No. 3955 of 1987, art. 249. The translated version of the entire text of the Hyŏngsa Sosongbŏp can be found in 3 LAWS OF THE REPUBLIC OF KOREA X-103 to X-165-1 (4th ed. 1993) ("Public prosecutions shall expire after lapse of the following terms . . . (4) Five years for crimes punishable with penal servitude or imprisonment for a maximum term of less than ten years; (5) Three years for crimes punishable with penal servitude or imprisonment for a maximum term of less than five years, or suspension of qualifications for a maximum term of ten years or more, or fines of 10,000 won or more.").

59. MINBŎP [CIVIL CODE] art. 751.

60. *Id.* art. 764.

tion of the injured, such as retraction of the defamatory statement or publication of a notice of apology.[61] Courts can also issue injunctions against publishing the challenged libelous material when it is justifiably requested by the complainant.[62] The statute of limitations for libel actions under the Civil Code is three years.[63]

III. JUDICIAL INTERPRETATIONS OF LIBEL LAW

A. UNITED STATES

U.S. libel law, which has been called "one of the most complicated,"[64] has evolved as state common law. Since 1964, however, "the history of the law of defamation has in large measure been the history of the establishment of First Amendment doctrine to govern the torts of libel and slander, and the application of that doctrine to long-established, frequently contrary, common-law principles."[65]

The law of defamation in the United States is often characterized by the First Amendment principle requiring that "speech be overprotected in order to assure that it is not underprotected."[66] The "actual malice" rule, established by the U.S. Supreme Court in its landmark decision, *New York Times Co. v. Sullivan*,[67] epitomizes America's unique constitutional standard on libel law.[68] Under the "actual malice" rule, a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct "unless he proves that the state-

61. *But cf.* Judgment of Apr. 1, 1991, Hŏnbŏp Chaepanso [Constitution Court], 89 Honma 160, *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1991, at 162 [hereinafter Constitutional Review] (ruling that compulsory apology for libel under the Civil Code is unconstitutional). For a discussion of the Constitution Court's ruling on Article 764 of the Minbŏp [Civil Code], see *infra* notes 150-66 and accompanying text.

62. *See* Kim O-su, *Types of Compensation by the Press for Liabilities*, PRESS ARB. Q., *supra* note 53, Spring 1983, at 39; Yang Sam-sung, *Accident Reporting and Legal and Ethical Issues*, PRESS ARB. Q., *supra* note 53, Autumn 1990, at 13.

63. MINBŎP [CIVIL CODE] art. 766 ("The right to claim damages which has arisen from an unlawful act shall elapse by prescription if not exercised within three (3) years from the time when the injured party or his legal representative becomes aware of such damage and of the identity of the person who caused it.").

64. MIDDLETON & CHAMBERLIN, *supra* note 10, at 70.

65. SACK & BARON, *supra* note 33, § 1.1.

66. Harry Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 191, 213.

67. New York Times v. Sullivan, 376 U.S. 254 (1964). For an excellent discussion of *Sullivan*, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

68. Professor Alan Dershowitz of Harvard Law School states, "The United States is the only country in the world whose law requires 'actual malice' before a public person can win a libel suit." ALAN M. DERSHOWITZ, TAKING LIBERTIES 62 (1988).

ment was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[69]

Sullivan, which precipitated a revolutionary change in U.S. libel law,[70] is derived from the constitutional right of Americans to express themselves about matters of public concern. Against the background of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[71] the Supreme Court declared: "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' "[72] Noting that truth for one person could be error for another, the Court warned against the chilling effect of penalizing honest mistakes of the press: "A rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions—and to do so on pain of libel judgment virtually unlimited in amount—leads to a comparable 'self-censorship.' "[73]

As a result of the *Sullivan* rule, public officials are now required to establish the defendant's actual malice with "convincing clarity,"[74] in addition to proving the common law elements of liability for defamation.[75] Actual malice, as defined in *Sullivan*, does not mean "hatred, ill-will or enmity or a wanton desire to injure" in its common law sense.[76] Rather:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[77]

Who is a "public official" under the actual malice standard? And what is the scope of the comment on the "official conduct" of the public official to be protected by the *Sullivan* rule? The definition of public official does not raise serious problems for

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69. *Sullivan*, 376 U.S. at 279-80.

70. SLADE R. METCALF, 1 RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS 1-5 (1994).

71. *Sullivan*, 376 U.S. at 270.

72. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

73. *Id.* at 279.

74. *Id.* at 283.

75. In claiming damages for libel at common law, the plaintiff was required to prove as part of his prima facie case that "the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984).

76. Garrison v. Louisiana, 379 U.S. 64, 78-79 (1964).

77. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

the actual malice cases. It is "in fact, one of the few areas of modern defamation law marked by relative stability and certainty."[78] Smolla asserts that there are few government-related libel plaintiffs "who are held *not* to be public officials" subject to the "actual malice" rule.[79] The Supreme Court has stated: "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[80] The trial judge determines in the first instance whether the proof shows that a plaintiff is a public official.

As the definition of public official is broad, so is the parameter for commenting on "official conduct." In *Garrison v. Louisiana*,[81] a criminal libel case, the Supreme Court held:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.[82]

In 1967, the *Sullivan* rule was extended to include "public figures" not holding government office. Justice John Marshall Harlan, writing an opinion for the plurality of four justices in *Curtis Publishing Co. v. Butts*,[83] argued for a standard less restrictive than actual malice when the libel plaintiffs are not public officials. He stated:

> We consider and would hold that a "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes a substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[84]

Chief Justice Earl Warren, however, filed a pivotal separate opinion, which drew support from four other justices (Hugo Black, William Brennan, William Douglas and Byron White). He concurred in the finding of the plurality of four justices, but disagreed with the reasons given in Justice Harlan's plurality opinion. Chief Justice Warren argued that the actual malice rule

78. SMOLLA, *supra* note 20, at 2-89.
79. *Id.* § 2.25(1).
80. Rosenblatt v. Baer, 383 U.S. 75 (1966).
81. Garrison v. Louisiana, 379 U.S. 64 (1964).
82. *Id.* at 77.
83. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
84. *Id.* at 155 (plurality opinion of Harlan, J.).

should apply to public figures as well as to public officials. He could not differentiate between public figures and public officials and thus saw no legal, logical, or First Amendment policy justification for adopting different standards of proof for public figures and public officials.[85] He reasoned that: "[M]any who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[86] In a number of subsequent decisions the Supreme Court adopted the actual malice rule in public figure cases.[87]

The actual malice doctrine was further extended in 1971 to apply to any defamatory story involving matters of "public or general interest." The plurality opinion of Justice William Brennan in *Rosenbloom v. Metromedia, Inc.*[88] maintained: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[89] The Court thus applied the *Sullivan* standard to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[90]

Rosenbloom, which served as the high water mark of the *Sullivan* rule,[91] was repudiated by a 5-4 majority of the Supreme Court in 1974. In *Gertz v. Robert Welch, Inc.*[92] the Court held that the actual malice rule does not apply to libel actions involving private persons. *Gertz*, the most important libel case since *Sullivan*,[93] established a set of guidelines for balancing the constitutional right to a free press against the common law's concern for reputational interests.

First, *Gertz* held that public officials and public figures must meet the actual malice requirement in libel cases relating to matters of public concern:

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85. *Id.* at 163 (Warren, C.J., concurring).

86. *Id.* at 163-64.

87. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

88. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

89. *Id.* at 43 (plurality opinion of Brennan, J.). Chief Justice Warren Burger and Justice Harry Blackmun joined Justice Brennan in the plurality opinion.

90. *Id.* at 44.

91. Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 480 (1986).

92. *Gertz*, 418 U.S. at 323.

93. CARTER ET AL., *supra* note 17, at 118. Smolla notes that *Gertz* offers "most of the framework" for the modern U.S. libel law. SMOLLA, *supra* note 20, § 1.05[3]. For a detailed account of *Gertz*, given by Elmer Gertz, the plaintiff in the 1974 libel case, see ELMER GERTZ, GERTZ V. ROBERT WELCH, INC.: THE STORY OF A LANDMARK LIBEL CASE (1992).

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.[94]

Second, the *Gertz* Court held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual,"[95] at least where the content of the defamatory statement "makes substantial danger to reputation apparent."[96]

Third, the Court also stated that the states may not permit recovery of presumed or punitive damages against publishers or broadcasters where liability is not based on a showing of actual malice. Those who cannot prove actual malice may be compensated only for actual injury.[97] The *Gertz* requirement that actual malice should be proved to support an award of presumed or punitive damages does not apply to speech on matters "of purely private concern."[98]

In response to the Court's invitation to devise their own standard of fault in private libel actions, at least thirty-four states seem to have applied a negligence standard.[99] As many as four states appear to have adopted variations of the actual malice standard in matters of public or general interest.[100] New York follows its own "gross irresponsibility" standard, which states that where a news report relates to a matter of legitimate public concern, a private person may recover only if it is established by a preponderance of evidence that the publisher acted in a grossly

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94. *Gertz*, 418 U.S. at 342. The Court identified public figures, "for the most part," in two classes: those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

95. *Id.* at 347.

96. *Id.* at 348 (citation omitted).

97. *Id.* at 349-50. Actual injury includes, in addition to out-of-pocket loss, "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

98. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2946 (1985).

99. SACK & BARON, *supra* note 33, § 5.9.1.

100. *Id.* at § 5.9.2; *see* Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975), *cert. denied*, 423 U.S. 1025 (1975); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. 1974), *cert. denied*, 424 U.S. 913 (1976); Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986); Gay v. Williams, 486 F. Supp. 12 (D. Alaska 1979). *But cf.* Sisemorre v. U.S. News & World Report, Inc., 662 F. Supp. 1529 (D. Alaska 1987).

irresponsible manner without due consideration for standards of information gathering and dissemination ordinarily followed by responsible journalists.[101]

The actual malice rule has, to a considerable extent, diminished the practical effectiveness of truth at common law. Libel law attorneys Robert Sack and Sandra Baron note: "Truth is usually now not a *defense*. Proof of falsity is instead part of the plaintiff's case, at least in defamation suits brought by public plaintiffs, or involving communications about public issues, or both."[102] In *Philadelphia Newspapers, Inc. v. Hepps*,[103] the Supreme Court held: "[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."[104] The *Hepps* ruling does not affect the common law rule that truth is a defense to be proved by the defendant in private-plaintiff cases where the challenged speech is a matter of private interest.[105]

On the theory that "tale bearers are as bad as tale makers,"[106] the common law of libel does not make a distinction between publishers and republishers of defamatory statements. However, the common law does make an exception to the restrictive republication rule by recognizing the "fair report privilege." The *Restatement (Second) of Torts* sets forth the common law defense:

> [T]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.[107]

The purpose of the fair report privilege, which is statutory in nearly every state,[108] is to enable the public to be informed about what is transpiring in governmental proceedings. The fair report privilege is still viable as a libel defense in that it affords broader protections than the actual malice rule. The privilege often applies even when the publisher knows the falsity of the defama-

101. Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975). The New York standard, which falls somewhere between negligence and actual malice, is similar to the "prudent-publisher" test, proposed by Justice Harlan in *Curtis Publishing Co.*; *see Butts*, 388 U.S. at 155.

102. SACK & BARON, *supra* note 33, § 3.1.

103. Philadelphia Newspapers, Inc. v Hepps, 475 U.S. 767 (1986).

104. *Id.* at 778.

105. *See* Ramirez v. Rogers, 540 A.2d 475 (Me. 1988).

106. Barry v. Time, Inc., 584 F. Supp. 1110, 1112 (N.D. Cal. 1984).

107. RESTATEMENT (SECOND) OF TORTS § 611 (1977).

108. *See* SANFORD, *supra* note 20, at 701-72 app. a.

tory statement published. Further, its application is not affected by the status of the plaintiff.[109]

A third common-law libel defense was the "fair comment privilege." An English court stated: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history, and the advancement of science."[110] The fair comment defense is recognized only if it is based on facts "truly stated" or on facts that are common knowledge or readily accessible to the reader. The privilege protects opinions about matters of public concern based on true facts, whether they were reasonable or not.[111] The privilege is lost when an opinion is published with "malice" in the common-law sense. The fair comment defense has regained its importance since the U.S. Supreme Court in *Milkovich v. Lorain Journal Co.*[112] refused to recognize a First Amendment privilege for "opinion." Rejecting a separate constitutional protection of statements of opinion, the Court ruled that statements of opinion may be actionable if they can be interpreted as stating or implying false facts.[113] For example, state courts can use a broader set of criteria on the fact-opinion distinction than those in the *Milkovich* test.

B. South Korea

Although there has been a growing trend against application of the Criminal Code to defamation actions since 1981,[114] libel is still punished as a crime in Korea.[115] For example, in a 1989

109. For a comparative analysis of the fair report privilege in American and English libel law, see Kyu Ho Youm, *Fair Report Privilege versus Foreign Government Statements: United States and English Judicial Interpretations Compared*, 40 Int'l & Comp. L.Q. 124 (1991).

110. Tabart v. Tipper, 170 Eng. Rep. 981, 982 (1808).

111. Restatement (Second) of Torts § 566 cmt. a (1977).

112. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990); *see* Cassidy v. Merlin, 582 A.2d 1039 (N.J. Super. Ct. App. Div. 1990) (holding that the fair comment privilege under New Jersey common law provides absolute protection for opinion based on stated or generally known facts on matters of public concern).

113. 110 S. Ct. at 2706.

114. *See* Kyu Ho Youm, Freedom of the Press in South Korea, 1945-1983: A Sociopolitical and Legal Perspective 189 (1985) (unpublished Ph.D. dissertation, Southern Illinois University (Carbondale)) (noting that in libel litigation, the Criminal Code had been far more often invoked than the Civil Code "at least until recent years ago").

115. Of the 39 libel cases reported between 1981 and 1994, nine cases were decided under the Criminal Code. *See, e.g.*, Judgment of Sept. 24, 1994 (Yi Ik-sun v. State), Taebŏpwon [Supreme Court], 93 To 1732, *reprinted in* Press Arb. Q., *supra* note 53, Winter 1994, at 155; Judgment of Apr. 12, 1994 (Yi Chŏn-su v. State) Taebŏpwon [Supreme Court], 93 To 3535, *reprinted in* Press Arb. Q., *supra* note 53, Fall 1994, at 156; Judgment of Nov. 14, 1994 (State v. Chang Kŏn-sŏp), Taebŏpwon [Supreme Court], 89 Do 1744, *reprinted in* Kungnae Ŏllon Kwangye Pally-

decision, the Supreme Court applied the Criminal Code in *State v. Chang Kŏn-sŏp*.[116] This case resulted from a magazine publishing a picture provided by Defendant Chang. The picture was used to falsely show airborne paratroopers who allegedly killed civilians during the Kwangju Uprising of 1980.[117] The Seoul District Court, sentencing Chang to eighteen months in jail, ruled that the defendant offered the picture to the magazine "with intent to defame" those in the picture as murderers of civilians.[118] The Seoul High Court reduced the jail sentence to ten months.[119] The Supreme Court affirmed the lower court's decision *in toto*.[120] In applying the Criminal Code in *Chang Kŏn-sŏp*, the Supreme Court agreed with the Seoul High Court that the defendant intended to injure the reputation of those in the picture.[121]

In recent years, however, the Civil Code has been applied in an overwhelming number of libel cases.[122] *Kwon Sun-jong v. Newsweek, Inc.*[123] is one of the most recent libel decisions adjudicated under the Civil Code. In this 1993 media libel case, three Korean women sued Newsweek, Inc. in a Seoul district court for publication of an allegedly defamatory caption together with a

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ECHIP [COLLECTION OF COURT DECISIONS ON KOREAN PRESS] [hereinafter KOREAN PRESS CASES] 330 (1990); Judgment of June 22, 1993 (Chŏng Myŏng-su v. State), Taebŏpwon [Supreme Court], 92 To 3160, *reprinted in* PRESS ARB. Q., *supra* note 53, Fall 1993, at 170; Judgment of Nov. 16, 1993 (State v. Yi Kong-sun), Hyŏngsa Chibang Pŏpwon [Criminal District Court], *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1994, at 160; Judgment of May 16, 1990 (State v. Ko Yong-su), Chibang Pŏpwon [District Court], 89 Kodan 3303, *reprinted in* KOREAN PRESS CASES, at 332; Judgment of Feb. 26, 1991 (State v. Choe Myŏng-jae), Chibang Pŏpwon [District Court], *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1991, at 168; Judgment of Dec. 4, 1990 (State v. Chŏn Kum-sŏng), Hyŏngsa Chibang Pŏpwon [Criminal District Court], *reprinted in* PRESS ARB. Q., *supra* note 53, Spring 1991, at 163; Judgment of Sept. 14, 1992 (State v. Ham Yun-sik), Hyŏngsa Chibang Pŏpwon [Criminal District Court], *reprinted in* PRESS ARB. Q., *supra* note 53, Winter 1992, at 165.

116. Judgment of Nov. 14, 1989, Taebŏpwon [Supreme Court], 89 Do 1744, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 330.

117. Originally the picture was that of the special airborne troopers who killed armed espionage agents from North Korea in 1969. Judgment of Mar. 29, 1989 (State v. Chang Kŏn-sŏp), Hyŏngsa Chibang Pŏpwon [Criminal District Court], 88 Kodan 8891, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 326.

118. *Id.*

119. Judgment of July 14, 1989 (State v. Chang Kŏn-sŏp), Kodŭng Pŏpwon [High Court], 89 No 2338, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 327-30.

120. Judgment of Nov. 14, 1989, *Chang Kŏn-sŏp*, Taebŏpwon [Supreme Court], *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 331.

121. *Id.*

122. Nearly 77% of the libel cases from 1981 through 1994 have been adjudicated under the Civil Code. Of the 39 libel actions, the Civil Code was applied in 30 cases (notes on file with author).

123. Judgment of July 8, 1993, Minsa Chibang Pŏpwon [Civil District Court], 92 Kadan 57989, *reprinted in* SHINMUN KWA PANGSONG [NEWSPAPERS AND BROADCASTING], Sept. 1993, at 130.

picture of them.[124] In their action against Newsweek, plaintiffs demanded 100 million *won* (US$125,000) each in damages for defamation and invasion of privacy.[125] Judge Pak Si-hwan of the Seoul Civil District Court held that Newsweek violated the plaintiffs' right of reputation and privacy and ordered Newsweek to pay each of the plaintiffs 30 million *won* (US$37,500) in damages.[126]

In applying the Civil Code, Korean courts have defined several libel rules. In *Yi Ui-hyang v. Dong-A Ilbo*,[127] the Seoul Civil District Court enunciated a new defense for libelous stories on public matters. The court ruled that "it constitutes no unlawful act for a newspaper to publish a defamatory story for a public interest when the newspaper has a sufficient reason to believe it to be true."[128] The court stated that the "sufficient reason" re-

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124. The caption, which read " 'Slaves to Money': Students at Ewha Women's University," and the picture ran as part of the cover story of Newsweek, Pacific edition, on Nov. 11, 1991. The story focused on the notorious spending spree of Koreans. *See* Tony Emerson, *Too Rich, Too Soon*, NEWSWEEK, Nov. 11, 1991, at 12 (Pacific ed.).

125. Judgment of July 8, 1993, (Kwon Sun-jong v. Newsweek, Inc.), Minsa Chibang Pŏpwon [Civil District Court], 92 Kadan 57989, *reprinted in* SHINMUN KWA PANGSON [NEWSPAPERS AND BROADCASTING], Sept. 1993, at 130. The plaintiffs claimed:

> 3. The content of the Article and the caption of the Photo give misleading impression that Plaintiffs, as the Article or the caption of the Photo describes or implies, spend too much and are slaves to money. The Magazine were [sic] widely distributed in Korea and in other countries and stirred sensational attention due to the Article and the Photo. The Photo also appeared at Korean newspapers.
> 4. Defendant, by taking the Photo without the consent of Plaintiffs and publishing it at the Magazine at its will, infringed upon Plaintiffs' rights of portrait and of privacy.
> 5. And Defendant by publishing the Photo at its will also damaged Plaintiffs' reputation feeling and caused social appreciation of Plaintiffs to be degraded, thus damaging the reputation of Plaintiffs.
> 6. Due to the above-mentioned torts committed by Defendant, each of Plaintiffs has suffered mental and physical pains incalculable in terms of money; and their social activities have been impaired to a great extent.

Complaint of Plaintiff, Kwon Sun-jong v. Newsweek, Inc., 92 Kadan 57989 (filed May, 1992).

126. *Kwon Sun-Jong*, *supra* note 125, at 131. In March 1994, the three-judge appellate panel of the Seoul Civil District Court affirmed Judge Pak's ruling, but reduced the damage award to 20 million *won* (US$25,000) for each plaintiff. Judgment of Mar. 30, 1994 (Newsweek, Inc. v. Kwon Sun-jong), Minsa Chibang Pŏpwon [Civil District Court], 93 Na 31886, *reprinted in* PRESS ARB. Q., *supra* note 53, Fall 1994, at 152. Newsweek, Inc. did not appeal the decision of the Seoul Civil District Court, Appellate Panel, to the Supreme Court of Korea. Letter from Kim Song-yong, attorney for Newsweek, Inc., to the author (May 28, 1994) (on file with author).

127. Judgment of Apr. 11, 1984, Yi Ui-hyang v. Dong-A Ilbo-sa), Minsa Chibang Pŏpwon [Civil District Court], 82 Kahap 4734, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 229.

128. *Id.* at 233. This case originated from a story published in the *Dong-A Ilbo* newspaper, which claimed that Yi Ui-hyang, who operated an institute for the handi-

quirement is met when the newspaper has a provable source or evidence for its belief in the truth of the article.[129] In recognizing the news media's reasonable belief in the truth of a libelous story as a ground for avoiding liability, the Seoul court argued that to ask the press for an extraordinary level of certainty in its belief of the truth of its news reports would interfere with its proper function as an expeditious channel of information. The court noted that an excessive desire to protect an individual's right to reputation from infringement of the press should not chill freedom of the press, which is the "foundation of democratic politics."[130]

Four years later, the Supreme Court of Korea extended the media defendant's state of mind defense to criminal libel cases. In *Yi Il-jae v. Hakwonsa*,[131] the Supreme Court held:

> Under the *Criminal* and the Civil Codes, when an injury to a person's reputation relates to a matter of public concern and is only for the public interest, verification of the defamatory statement justifies the injury. Further, even when there is no proof as such, *the defamation cannot constitute an unlawful act if the defamer has sufficient reasons for believing his statement to be true.*[132]

The Court, affirming the lower court's ruling against Hakwonsa, concluded that the magazine publisher had no good reason for believing the defamatory statement to be true because Hakwonsa made no effort to verify the defamatory allegations prior to publication.[133] The Court further stressed that publication in a monthly magazine was not as time-constraining as a daily newspaper article, and so the defendant should have verified its material before publication.[134] In *Yi Il-jae*, the Court has recognized a distinction between "hot news" and news with little deadline pressure. In other words, while absence of deadline pressure at the time of publication of defamatory information makes a media organization more accountable for libel, news

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capped, embezzled public funds. The news reporter prepared the story after being convinced that his story was truthful after interviewing several handicapped people staging a sit-in against Yi, after checking on the complaint filed with police against Yi, and after attempting unsuccessfully to contact Yi for his responses to the complaint. *Id.* at 232-33.

129. *Id.*

130. *Id.* at 234.

131. Judgment of Oct. 11, 1988, Taebŏpwon [Supreme Court], 85 Taka 29, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 224.

132. *Id.* at 227 (emphasis added).

133. *Id.* at 228. The memoir at issue in *Yi Il-jae* was written by a person who retained Yi as an attorney. Yi was described as immoral, unethical, and dubious as a lawyer. The memoir was published in *Chubu Saengwhal* magazine, owned by Hakwonsa. *Id.* at 225.

134. *Id.* at 227.

that requires immediate dissemination does not necessarily do so.[135]

Plaintiffs bringing suits based on alleged defamation of family members have had mixed results. In *Yi Du-sik v. Tak Myŏnghwan*,[136] a Seoul district court ruled that "colloquium"[137] was not established where the plaintiffs claimed that they were emotionally distressed by an allegedly defamatory statement in a book published by the defendant. The statement claimed that the plaintiffs' deceased mother had an "unusual relationship" with the Rev. Sun Myung Moon of the Unification Church while her husband was seriously ill.[138] The court, depicting reputation as "a high degree of individual character," reasoned that the statement did not name the plaintiffs implicitly or explicitly. The court then dismissed the libel suit.[139]

On the other hand, the Seoul High Court in *Sin Hyŏn-sun v. Kukmin Ilbo*,[140] a 1991 media libel case, stated that the plaintiff's family members were entitled to damages for a libelous article about their father although they were not directly implicated in the story. The court said that because of their relationship with the article's subject they suffered emotional pain.[141] The court concluded that the defendant did not take proper care in verifying the story.

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135. The Supreme Court's reasoning in *Yi Il-jae* relating to the nature of news as an actionable factor is strikingly similar to the standard of liability as recognized by American courts. *See* Associated Press v. Walker, 388 U.S. 130 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). As attorney Sanford succinctly noted:

> [C]ourts evaluating whether a libel defendant exercised due care must consider the time constraints under which the defendant operated. If the publication at issue constituted "hot news"—*i.e.*, information of immediate news value requiring prompt dissemination—courts have excused news organizations from any obligation to undertake extensive efforts at verification.

Sanford, *supra* note 20, § 8.4.7 (citation omitted).

136. Judgment of Oct. 15, 1984, Minsa Chibang Pŏpwon [Civil District Court], 83 Kadan 7668, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 241.

137. One authority on libel law explains "colloquium" as the following: "If there is no explicitly literal reference, the plaintiff must sustain the burden of pleading and proof, by way of 'colloquium,' that the defamatory statement refers to him. If the burden is not met there is no defamation and the case is dismissed." SMOLLA, *supra* note 20, § 4.09[2] (citations omitted).

138. *Yi Du-sik*, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 243.

139. *Id.* at 244.

140. Judgment of Sept. 25, 1991, Kodŭng Pŏpwon [High Court], 91 Na 27320, *reprinted in* PRESS ARB. Q., *supra* note 53, Winter 1991, at 166.

141. *Id.* at 169. The story complained of in the case asserted that the plaintiff was the actual assassin of Yuk Young-su, the late First Lady of President Park Chung Hee, in 1974.

Although not as extensive as Anglo-American libel law,[142] Korean law now recognizes the "fair report privilege"[143] as a defense for libelous publication of governmental records. A good illustration is the 1988 case of *Kwak Chŏl-am v. State*,[144] in which the Seoul Civil District Court ruled:

> In reporting on a suspected crime of the plaintiff, the other defendants [i.e., six newspaper companies] relied on the official announcement of the Seoul Police Department. . . . They believed the defamatory false information on the plaintiff to be true and they had sufficient ground for their belief. Accordingly, we cannot find that the defendants were intentional or negligent in libeling the plaintiff.[145]

The court, while dismissing the suits against the media organizations, held that the state must pay 10 million *won* (US$125,000) in damages for the plaintiff's reputational injury.[146]

For the first time in the history of Korean libel law, fair comment and criticism was accepted as a libel defense in 1990. The Seoul District Court (South Branch) in *Labor Union of Munhwa Broadcasting Corp. v. Dong-A Ilbo*[147] held that derogatory reviews or comments are justifiable and protected as freedom of criticism so long as they concern matters of public interest, irrespective of whether they are "objectively proper" or acceptable to a majority of people in society.[148] The court stated:

> The comment should not be an exposé of an individual's private life unrelated to his public activities or an attack on his personal character. Further, the opinion about him need not be objectively correct and is lawful if it is subjectively believed to be appropriate. Even though the comment is not neutral, and is so partisan as to be one-sided, or the words and tone are

142. For a detailed discussion of the fair report privilege in U.S. libel law, see DAVID A. ELDER, THE FAIR REPORT PRIVILEGE (1988).

143. *See supra* notes 106-09 and accompanying text.

144. Judgment of Apr. 29, 1988, Minsa Chibang Pŏpwon [Civil District Court], 87 Kahap 3739, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 262.

145. *Id.* at 265-66. Each of the six newspapers respectively owned by the six defendants published a false story stating, on the basis of police information, that the plaintiff had been convicted seven times, instead of once. The plaintiff sued the Korean government and the six news media organizations for libel.

146. *Id.* at 266.

147. Judgment of Dec. 12, 1990, Chibang Pŏpwon [District Court], 89 Kahap 18505, *reprinted in* PRESS ARB. Q., *supra* note 53, Spring 1991, at 164.

148. *Id.* at 171. The *Labor Union of Munhwa Broadcasting Corp.* case began when *Dong-A Ilbo* published a story and an editorial about the sit-in strike by the labor union of the Munhwa Broadcasting Corp. in Seoul in September 1989. The strike related to a dispute between the management and labor of the broadcasting company. *Id.* at 165.

violent and harsh enough to damage its subject in his social esteem, it cannot be dismissed as unfair.[149]

Through the years, a public apology has been recognized by Korean courts as a "suitable measure" for the defamed to vindicate their reputation under the Civil Code.[150] In April 1991, however, the Constitution Court of Korea ruled in a 9-0 decision that the Civil Code was unconstitutional insofar as the Code applies to a notice of apology.[151] The Court struck down the "unlawful act" provision of the Code[152] as a violation of the Constitution on freedom of conscience and as a restriction of freedoms for public welfare.

The Court emphasized that the Constitution guarantees freedom of conscience separately from freedom of religion. This separate recognition of freedom of conscience, the Court said, indicates unambiguously that the Constitution prevents the government from interfering with the value judgments of individuals.[153] The Court also stated that freedom of conscience includes the right not to be forced by the government to express publicly, or to remain silent, on moral judgments.[154] The Court added that "the [freedom of conscience] provision is designed to secure a more complete freedom of spiritual activities as the moral foundation of democracy, which has been indispensable to the progress and development of humankind."[155]

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149. *Id. See also* Judgment of Feb. 20, 1992 (Choe Chŏng-sun v. Ŏm Hyo-sŏp), Chibang Pŏpwon [District Court], 89 Kahap 13975, *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1992, at 161, 166-67.

150. *See* Judgment of Jan. 17, 1991 (Kwon In-suk v. Seoul Munhwasa), Minsa Chibang Pŏpwon [Civil District Court], 90 Kahap 15896, *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1991, at 152; Judgment of May 4, 1990 (Kim Song-hi v. Dong-A Ilbo), Kodŭng Pŏpwon [High Court], 89 Na 36528, *reprinted in* PRESS ARB. Q., *supra* note 53, Summer 1991, at 155, *aff'g*, Judgment of July 25, 1989, Chibang Pŏpwon [District Court], 88 Kahap 31161, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 301.

151. Constitutional Review, *supra* note 61. For a discussion of the Constitution Court's decision on compulsory apology for defamation under Korean law, see Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 23-27 (1994).

152. For a discussion of the "unlawful act" provision of the Civil Code, see *supra* notes 59-63 and accompanying text.

153. Constitutional Review, *supra* note 61, at 164.

154. *Id.*

155. *Id.* The Constitution Court noted the United Nations Universal Declaration of Human Rights of 1948, which South Korea ratified in 1990, for its guarantee of freedom of thought and conscience. The Declaration reads in relevant part: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." For the text of the United Nations Universal Declaration of Human Rights, see HUMAN RIGHTS READER 197-201 (rev. ed., Walter Laqueur & Barry Rubin eds., 1989).

The Constitution Court argued that compulsory apology forces one to accept guilt for libel against one's will. Thus, the apology curtails an individual's freedom of conscience, including their right of silence.[156] The Court observed:

> A notice of apology is for a person to publicize to the general public a humiliating expression of mind in his name against his will by publishing it in the mass media like newspapers, magazines, etc., in violation of his freedom of conscience. While its specific contents are determined by the state authorities as part of the judicial proceedings, the humiliating message still appears to have been a voluntary opinion of the person involved.[157]

Secondly, the Constitution Court expressed strong reservations about the effectiveness of apology as a means to recover from a reputational harm. Given that an apology is forcibly imposed by the state upon the media organization which has no will to apologize or believes in the innocence of its publication, the apology is similar to "the return of evil for evil."[158] The Court characterized the justice of retribution in libel law as anachronistic and primitive and thus incompatible with the humanitarianism to be protected in a civilized society.[159] The Court regarded the forcible apology for libel as a punitive sanction derived from ancient law which valued the satisfaction of vendetta.[160] Accordingly, it should be limited to criminal law. Examining its impact on the application of the Civil Code, the Court asserted that "apology is used as a principal means of recovery for libel while it makes damage awards a supplementary decoration of the Civil Code."[161] Consequently, the damage award tends to be so small that the apology measure proves an impediment to the constitutional requirement of just compensation for reputational injury.[162]

Finally, the Constitution Court addressed the question of whether a notice of apology is a necessary and compelling method to restrict freedom of the press to promote the public welfare. Analyzing the issue from a comparative perspective, the

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156. Consitutional Review, *supra* note 61, at 164.

157. *Id.* at 164-65.

158. *Id.*

159. *Id.*

160. *Id.* In this context, the apology sanction is punitive in the sense of penal retribution rather than compensatory under civil law. *See* YU IL-SANG, ŎLLON YULLI PŎPCHERON [A DISCOURSE ON PRESS ETHICS AND LAW] 277 (1991).

161. *Id.*

162. *Id.* The Constitution Court shares Professor Lawrence Beer's view on the public apology requirement under Japanese libel law. Beer has noted: "When apology is ordered, the [Japanese] courts may tend to refrain from awarding substantial damages which might be more likely to dissuade the media from future violations." BEER, *supra* note 2, at 315.

Court said that apology is recognized only in Japan, where arguments against its constitutionality are "vigorously" raised.[163] The Court, noting the libel laws of several Western countries including the United States,[164] set forth three alternatives to apology under the Civil Code:

> (1) Publication in newspapers, magazines, etc., of the court opinions on damages in civil libel cases at the expense of the defendant; (2) Publication in newspapers, magazines, etc., of the court opinions against the defendant in criminal libel cases; (3) A notice of retraction of defamatory stories.[165]

The Court said that judicial impositions of these measures would not raise constitutional issues as did the compulsory apology for libel because they would not involve a forcible judgment on conscience or a violation of the defendant's right of character.[166]

IV. THE IMPACT OF LIBEL LAW UPON THE PRESS

A. UNITED STATES

The late Professor Alexander Meiklejohn, whose "absolutist" theory on political speech has been enormously influential to current thinking on the First Amendment,[167] termed the *Sullivan* ruling "an occasion for dancing in the streets."[168] Professor Richard Epstein, however, said in 1986 that "the dancing has stopped,"[169] arguing that "the onslaught of defamation actions is greater in number and severity than it was in the 'bad old days' of common law libel."[170] Media law scholar Donald Gillmor at the University of Minnesota explained:

> Abuse of process is the alarm sounded in this book, abuse of the libel laws by the rich and famous, the politically powerful,

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163. *Id.* For a discussion of the compulsory public apology for libel under the Civil Code of Japan, see Youm, *South Korea and Japan*, *supra* note 11, at 68-70.

164. The Constitution Court discussed the libel laws of England, the United States, Germany, France, and Switzerland. The Court said that in England and the United States, damages are awarded as a rule while a voluntary apology by the defendant is recognized as a mitigating factor in reducing the damage award and that in Germany, France, and Switzerland courts order a retraction of the defendant's statements, rule on the truth of defamation, or award damages. For a succinct discussion of libel laws in England, Germany, and France, see Calvey et al., *supra* note 44, at xvi-xxxi, lxi-lxxi, lxxi-lxxx. For a concise discussion of libel laws in the United States and Switzerland, see CARTER-RUCK ET AL, *supra* note 15, at 353-58, 348-49.

165. Constitutional Review, *supra* note 61, at 166.

166. *Id.*

167. Meiklejohn is described as "the father of modern first amendment theory." *See* Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986).

168. Kalven, *supra* note 66, at 221 n.125 (quoting Alexander Meiklejohn).

169. Epstein, *supra* note 167, at 783.

170. *Id.*

> the anointed of our society. Libel litigation has become a devastatingly effective weapon for silencing those who dare to challenge the morality of power, privilege, and prestige.[171]

The litigational abuse of process by libel plaintiffs, particularly by public plaintiffs, has resulted in an often intimidating cost of libel defense, which was an unintended consequence of *Sullivan*. One libel law expert has noted: "[L]itigation defense costs consume in the range of 80 percent of all out-of-pocket expenses in media litigation, dwarfing what is spent on actual payments of awards and settlements. In blockbuster suits, the defense costs can be in multiple millions of dollars."[172] Thus, *Sullivan* and its progeny have brought about a "chilling effect" on the American press. The effect is even more direct and severe on smaller media organizations.

The chilling effect of libel law on the press through litigational excesses is largely related to the discovery process. The possibility that a burdensome discovery process can be turned by litigants into "tactics of attrition" is likely. In *Herbert v. Lando*,[173] however, the U.S. Supreme Court refused to recognize First Amendment protection of the press from discovery into the editorial process of those involved in publishing the defamatory statements in question.[174] Justice Thurgood Marshall expressed concern about the impact of excessive discovery on the press in libel actions: "Faced with the prospect of escalating attorney's fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication."[175]

The libel-induced chill of discovery processes on the media was described by J. Moor-Jankowski, the "victorious" defendant

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171. DONALD M. GILLMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW ix (1992).

172. SMOLLA, *supra* note 20, § 13.02(1) (citation omitted). Gillmor provides statistics on libel defense costs:

> The American Society of Newspaper Editors estimates the minimum cost of defending a libel suit at $95,000 and insurance carriers at $150,000. At least one jurist suggests a figure of $200,000, with appeals to the U.S. Supreme Court doubling that amount. A summary judgment, a decision by a judge that a defendant is entitled to prevail as a matter of law, there being no facts in dispute for a jury to decide, may require $25,000 in legal fees and court costs, with some estimates doubling that sum. A successful motion to dismiss may also cost $25,000.

GILLMOR, *supra* note 171, at 20.

173. Herbert v. Lando, 441 U.S. 153 (1979).

174. 441 U.S. at 169.

175. 441 U.S. at 205 (Marshall, J., dissenting).

in *Immuno, A.G. v. Moor-Jankowski*,[176] which a noted First Amendment commentator has characterized as "the single most outrageous libel case—the worst abuse of the legal process" in American law:[177]

> For the last seven years . . . I have been sued. . . . So far, my legal expenses exceed $1 million.
>
> I underwent 14 days of depositions over a year and a half in this country and was ordered by the lower court to participate in extremely costly depositions in Austria and Sierra Leone, Africa. [T]he seven years of proceedings consumed most of my time, curtailing my scientific activities.
>
> The court victory may still not effectively protect me or other editors of small professional journals from the chilling effect of suits by wealthy corporations using our legal system to discourage criticism of their activities. We need a legal deterrent to prohibitively costly, meritless libel suits that misuse the court system to undermine our First Amendment.[178]

American courts have been wary of the adverse impact of abusive libel litigation on the media. Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia said in 1984: "It arouses concern that a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion."[179]

In the context of increasingly vindictive libel litigation in recent years, it is of little surprise that many libel actions against the media have been filed on seemingly unmerited grounds. In response, media defendants are increasingly fighting back by bringing countersuits. A recent study of media countersuits in libel litigation has noted:

> The media countersuits, which gained notoriety in the early and mid-1980s as another weapon in the media's legal repository, became increasingly common later in that decade and in the early 1990s. The majority (33) of the 50 countersuits examined . . . have been decided since 1986. It is especially significant that media countersuits have been 70 percent successful between 1980 and 1993. . . . The press seems to be sending a message to parties who seek merely to stifle them:

176. 567 N.E.2d 1270, *cert. denied*, 111 S. Ct. 2261 (1991). For a discussion of *Immuno, A.G. v. Moor-Jankowski*, see Donna R. Euben, Comment, *An Argument for an Absolute Privilege for Letters to the Editor after* Immuno AG v. Moor-Jankowski, 58 BROOK. L. REV. 1439 (1993).

177. LEWIS, *supra* note 67, at 211.

178. J. Moor-Jankowski, letter to the editor, *View from Inside a Landmark Libel Case*, N.Y. TIMES, Jan. 25, 1991, at A14.

179. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

> Sue at your peril because we are going to come back after you.[180]

While American media organizations complain about what they perceive to be the chilling effect of the current libel law,[181] many plaintiffs are not satisfied with the way the law has worked since *Sullivan*. "Libel law in the United States is at a critical juncture," media attorney Barbara Dill wrote in 1993. "The old broken formula of sue-and-be-sued is not working well for anyone but lawyers. It costs too much, takes too long, and clogs the courts with fencing matches that end most often in technical decisions that bypass the fundamental issues and satisfy neither side."[182]

The libel law makes it extraordinarily difficult for plaintiffs to win in libel actions. According to a 1989 study of 614 reported media libel cases during 1982-1988, media defendants won libel cases more than 80 percent of the time.[183] The study reported:

> Aggregating motions to dismiss, summary judgments and jury trials, and looking at cumulative trends of defendant "wins," defendants won at those points in the judicial process 77.9 percent of the time, plaintiffs 22.1 percent. First appeals were decided in favor of defendants in 79.2 percent of cases, 20.8 percent of cases in favor of plaintiffs. Second appeals went 81.5 percent in favor of defendants, 18.5 percent in favor of plaintiffs. Third appeals were 81 percent in defendants' favor, 18.7 percent in plaintiffs' favor.[184]

The restrictive constitutional rules explain why plaintiffs are heavily disadvantaged in suing the press for libel. The "actual malice" requirement, when it must be proved with "convincing clarity," is often too high a constitutional hurdle for many public plaintiffs to overcome. Further, the independent appellate review mandated in "actual malice" cases[185] has reduced a libel victim's possibility of winning a case.

Private plaintiffs may settle for their actual injury by establishing negligence on the part of the media defendant in publishing defamatory stories of public concern. "In practice," however, "few suits proceed under the negligence standard because plaintiffs rarely sue for actual injury only. This may be because they

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180. Kyu Ho Youm & Douglas A. Anderson, *Media Countersuits in Libel Law: A Statutory and Judicial Framework*, 17 HASTINGS COMM. & ENT. L.J. 383, 413 (1995).

181. *See generally* Michael Massing, *The Libel Chill: How Cold Is It Out There?* COLUM. JOURNALISM REV., May-June 1985, at 31.

182. Barbara Dill, *Libel Law Doesn't Work, But Can It Be Fixed? in* MARTIN LONDON & BARBARA DILL, AT WHAT PRICE? LIBEL AND FREEDOM OF THE PRESS 35 (1993).

183. GILLMOR, *supra* note 171, at 135.

184. *Id.*

185. *See* Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

are unable to prove actual injury and thus must seek presumed damages, or because they wish to punish the defendant and thus seek punitive damages."[186] Thus, private plaintiffs must meet the "actual malice" test in claiming presumed damages or punitive damages.

The burden of proof on falsity is now on public and private plaintiffs in libel cases involving speech about matters of public interest. The shift in the burden of proof implies that true statements are constitutionally immune if they concern matters of public interest.

The pro-media libel law in America, which rejects the strict liability principle, has led prominent persons to file libel suits in British and other foreign courts for publications published and distributed primarily in the United States. Smolla asserts: "Plaintiffs with the wherewithal to do so now often choose to file suit in Britain in order to exploit Britain's strict liability laws, even when the plaintiffs and the publication have little connection to that country."[187] Geoffrey Roberts, a British media law specialist, argues that the restrictive British law of defamation has made London "the libel capital of the world, as foreign public figures queue" up to claim damages for reputational injury that cannot be won at home.[188]

B. South Korea

A study of decisions from 1961 to 1980 by the Korean Press Ethics Commission[189] concluded that media violations of citizens' reputational rights in Korea resulted from the sensationalism of news reporting, the unprofessional practices of news reporters, and the journalists' lack of consciousness of law and ethics.[190] The study emphasized that the legal and ethical issues facing the Korean press are in part ascribable to the usual tendency of the defamed to forgo suing the media.

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186. Anderson, *supra* note 10, at 8.

187. Smolla, *supra* note 20, at 1-8.1 to 1-8.2 (citation omitted).

188. Geoffrey Robertson, *Two Cheers for the First Amendment*, 9 Comm. Law. 8 (1991). *See generally* Youm, *Suing American Media in Foreign Courts*, *supra* note 9.

189. The Korean Press Ethics Commission, established as a *voluntary* organization operating "with a strong support" of Korean news media since 1961, "acts on libelous comment and reporting and other irregularities" and "[i]ts decisions range from mere warnings to orders for retraction and public apology." Hamid Mowlana & Chul-Soo Chin, *Libel Laws of Modern Japan and South Korea Are Compared*, 48 Journalism Q. 330 (1971).

190. Yu Chae-chon, Han'guk Ŏllon kwa Ŏllon Munhwa [Korean Press and Media Culture] 171-74 (1986). For a discussion of press ethics in Korea, see Chang-Sup Choi & Sueng-Soo Kim, *A Critical Perspective on Media Ethics in Korea*, *in* Communication Ethics and Global Change 159 (Thomas W. Cooper ed., 1989).

Obviously aware of the "do-nothing" attitude of most libel victims in Korea, one Korean law commentator argued in 1985: "Korean news media will remain relatively free from libel litigation though the press may be subject to severe nonlegal and political restraints more characteristic of an authoritarian government."[191] He considered three sociopolitical factors in speculating on the limited impact of libel law on the Korean press.

First, he called attention to the still pervasive influence of Confucian ethics in Korea, which "place[s] harmony and conciliation before legal battle" as a way to resolve disputes among individuals.[192] Second, the traditional perception of many Koreans who view the press as "too powerful to challenge" tends to create a strong incentive against suing the news media for libel, whether real or perceived.[193] Finally, he contended that Koreans rarely expect their courts to be institutionally competent to exercise their rule-of-law authority in deciding on their claims. The Korean judiciary, traditionally controlled by the executive branch,[194] was viewed as being unduly influenced by the ruling class, including media organizations.[195]

As indicated in the previous section, however, the explosive increase in media libel actions in Korea in recent years leaves these observations in doubt. There are several possible explanations for the recent strong tendency for Koreans to sue media organizations. To a large extent, the unprecedented changes in the media industry as well as in the body politic of Korea since mid-1987 are directly related to the growing litigious *zeitgeist* sweeping Korea.

Yi Hye-bok, president of the Korean Journalists Club in Seoul, reported in his 1990 study that there had been an explosion in the number of claims for press arbitration since mid-1987,[196] when the Korean government initiated several liberalizing meas-

191. Kyu Ho Youm, *The Libel Law of the Republic of Korea*, 35 GAZETTE 183, 194 (1985) [hereinafter Youm, *Korean Libel Law*].

192. *Id.* at 193.

193. *Id.*

194. *See generally* YI HYOK-CHU & KIM CHANG-SU, POPKWAN KWA CHAEPAN [JUDGE AND TRIAL] (1986).

195. Youm, *Korean Libel Law*, *supra* note 191, at 193. Journalist David Halvorsen, who studied the Korean press as a Fulbright scholar and participated in various journalism workshops in South Korea over the years, has observed: "The [Korean] journalists consider themselves a part of the ruling class. . . . A top official of the Korean Federation of Newspaper Unions looked me in the eye and said exactly that: 'We are part of the ruling class.' " David E. Halvorsen, Remarks at the Korean Journalists Workshop (July 22, 1991) (text on file with author).

196. Yi Hye-bok, *Analysis of News on Accidents and Violations of Individual Rights*, 36 PRESS ARB. Q., *supra* note 53, Fall 1990, at 16-17 [hereinafter Yi, *News on Accidents*]. The number of newspapers and magazines in Korea rose from 2,236 in July 1987 to 7,430 in November 1994, an increase of nearly 330%. *See Status of*

ures to expand press freedom.[197] In discussing the rapidly growing complaints to the press arbitration committees,[198] Yi pointed out positive and negative aspects of the changing relationship between the press and the public. On the positive side of the issue, he said:

> [O]ur citizens' consciousness [of rights] has enormously risen. In the past, people were so intimidated by the power of the news media that they dared not assert their rights against the media although they had their rights violated by the media. At present, however, they claim their rights openly enough to confront the press.[199]

Yi also attributed the growing number of press arbitration cases to a declining sense of professional ethics among Korean journalists.[200] Due to their anxiety concerning a shrinking audience as a result of the expanded media industry, Yi argued that the Korean media tend to deviate from the "right path of journalism."[201] He also maintained that the fast growing media industry, facing a lack of professionally trained journalists, hire less qualified people.[202] As a result, the overall quality of journalistic work has suffered, often precipitating complaints against the press.

Periodical Registrations, SHINMUN KWA PANGSONG [NEWSPAPERS AND BROADCASTING], Jan. 1995, at 166.

197. For commentaries on the emergence of a libertarian press in Korea since mid-1987, see Kyu Ho Youm, *South Korea's Experiment with a Free Press*, 53 GAZETTE 111 (1994); Kyu Ho Youm, *Press Freedom in 'Democratic' South Korea: Moving From Authoritarian to Libertarian?* 43 GAZETTE 53 (1989); Kyu Ho Youm & Michael B. Salwen, *A Free Press in South Korea: Temporary Phenomenon or Permanent Fixture?*, 30 ASIAN SURV. 312 (1990). For an overview of the Korean press, see Chin Sok Chong, *The South Korean Press*, *in* KOREA BRIEFING, 1992, 117 (Donald N. Clark ed., 1991); Jae-won Lee, *South Korea*, *in* 1 WORLD PRESS ENCYCLOPEDIA 579 (George T. Kurian ed., 1982). *See also South Korea*, *in* JON VANDEN HEUVEL & EVERETTE E. DENNIS, THE UNFOLDING LOTUS: EAST ASIA'S CHANGING MEDIA 10 (1993).

198. Under the current Korean press statutes, enacted in 1987, press arbitration committees are authorized "to arbitrate disputes borne from claims for corrected reports and deliberate infringement cases by the contents carried in periodicals." *See* Act Relating to Registration of Periodicals (Periodicals Act), Law No. 3979 (1987), *amended by* Law No. 4441 (1991), art. 17(1), *translated in* THE KOREAN PRESS 1994, at 121-31 (1994). For a discussion of the current Korean press statutes, see Kyu Ho Youm, *South Korea: Press Laws in Transition*, 22 COLUM. HUM. RTS. L. REV. 401 (1991).

199. Yi, *News on Accidents*, *supra* note 196, at 17.

200. For an American journalist's reasoned criticism of the Korean press, see DAVID E. HALVORSEN, CONFUCIANISM DEFIES THE COMPUTER: THE CONFLICT WITHIN THE KOREAN PRESS (1992).

201. Yi, *News on Accidents*, *supra* note 196, at 17-18. *See also* HANS VERPLOEG & TONY WILTON, PRESS FREEDOM IN KOREA: THE SEARCH FOR PROFESSIONALISM 14-17 (1991).

202. Yi, *News on Accidents*, *supra* note 196, at 18.

Since 1980, the right of reply litigation, under the Korean press statutes, has brought about libel cases on similar grounds and for different purposes.[203] More often than not, plaintiffs in right of reply actions sue the media for damages for reputational injury under the Civil Code. For example, *Yi Ui-hyang* was one of those cases which involved both right of reply claims under the press statutes[204] and damages for libel under the Civil Code.[205] Thus, now there is a reasonable likelihood that the Korean media can be subject to two different suits for the same news stories. Equally important is the improved status of the Korean courts as a more independent branch in the midst of an increasingly functional democracy in Korea since 1988.[206] More Koreans realize that Korean courts are no longer dictated by the "established leadership" in Korea in their judicial proceedings. In this regard, the increasingly assertive Constitution Court epitomizes the restructuring process of rule of law in Korea. One Korean constitutional law scholar has said:

> [T]he actual operation of the court will, by and large, rely on the political atmosphere of the day. The Constitutional [sic] Court, fortunately, has already shown its willingness to resolve many legal issues before it, by making decisions of unconstitutionality and admitting petitions against public authorities in favor of citizens. Its start seems, so far at least, to reveal a good prospect.[207]

Korean libel law, as applied by courts in the past ten years, has had an impact on both the press and the general public. On the one hand, libel jurisprudence indicates that the courts recognize the institutional function of the press as the cornerstone of democracy in Korea. Now the media can utilize the "reasonable belief in truth," the "fair report privilege," or "fair comment and

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203. The right of reply under Korean press law provides an *expeditious* means for individuals to recover from their press-related injury by way of a response to the news stories complained of. On the other hand, libel litigation under the Civil Code enables the defamed party to recover damages for reputational injury through an often time-consuming process. For a detailed discussion of the right of reply under Korean press law, see Kyu Ho Youm, *Right of Reply Under Korean Press Law: A Statutory and Judicial Perspective*, 41 AM. J. COMP. L. 49 (1993).

204. *See* Judgment of Nov. 4, 1982 (Yi Ŭi-hyang v. Dong-A Ilbo-sa), Minsa Chibang Pŏpwon [Civil District Court], 82 Ka 27454, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 44; Judgment of Nov. 17, 1982, Kodŭng Pŏpwon [High Court], 82 Na 4188, *reprinted in* KOREAN PRESS CASES, *supra* note 115, at 50.

205. *See supra* notes 127-31 and accompanying text.

206. For a discussion of South Korea's democratic transition since 1987, see DEMOCRACY IN KOREA: ROH TAE WOO YEARS (1992).

207. Dae-Kyu Yoon, *Judicial Review in the Korean Political Context*, 17 KOREAN J. COMP. L. 151 (1989). For an excellent discussion of judicial review in Korea since 1987, see James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?* 40 AM. J. COMP. L. 73 (1992).

criticism" in claiming protections from libel actions. These newly recognized libel defenses indicate a deepening sensitivity of the Korean courts to the conflict between the press and the individual.

Libel defendants including media organizations, however, often lose libel actions. From 1981 through 1994, Korean courts ruled against the media in thirty-one of thirty-nine libel cases. That is, the rate of success for libel plaintiffs was nearly 80% during the fourteen-year period. Moreover, the size of damage awards tends to be growing rapidly.[208] There is no question that the possibility of court action against the media is more of a reality now than in the past.

Another notable development in the libel explosion in Korea in the 1980s relates to the long-term impact of the rejuvenated libel law on the psyche of Koreans. The dramatic changes in the law have awakened the reluctant public to the legal mechanisms to employ against media organizations. This is due considerably to the wide publicity surrounding media libel cases involving politicians and others of fame or notoriety.[209] Consequently, Koreans have become more conscious of their reputation as a constitutional and statutory right.

V. SUMMARY AND CONCLUSIONS

In the American constitutional jurisprudence, freedom of the press is accorded a preferred position. In Korea, however, press freedom and an individual right to reputation are balanced against each other on an equal footing.

Criminal libel, though still on the books in more than twenty states, is not a major concern to the American media. As a rule, libel suits are for monetary damages in the United States. The status of plaintiffs is crucial under the unique "actual malice" rule. The constitutional standard requires public plaintiffs to prove that a precipitating statement was published with knowledge of its falsity or with reckless disregard of its truth. Under

208. *See* Yi Sang-kyong, *A Study of Assessment of Damage Awards in Media Libel Litigation*, PRESS ARB. Q., *supra* note 53, Spring 1992, at 43.

209. The impact of growing libel litigation on the public's awareness of libel law in Korea is similar to English libel law. *See* Russell L. Weaver & Geoffrey Bennett, New York Times Co. v. Sullivan: *The 'Actual Malice'—Standard and Editorial Decisionmaking*, 14 J. MEDIA L. & PRAC. 2, 6 (1993) (noting that "[t]he spectacular cases [in England] might . . . be expected to enhance public awareness of libel as well as raising or maintaining expectations of its utility to individuals"). In this context, it is noteworthy that some American newspaper publishers in the late 19th century agreed to "a conspiracy of silence" on pending or ongoing libel cases for the purpose of discouraging libel suits. *See* Timothy W. Gleason, *The Libel Climate of the Late Nineteenth Century: A Survey of Libel Litigation, 1884-1899*, 70 JOURNALISM Q. 893, 894 (1993).

common law, truth, fair report privilege, and fair comment are recognized as defenses.

In Korea, criminal libel law is still enforced but not as frequently as in the past. Civil libel is becoming more predominant. Written defamation and oral defamation are distinguished in Korean law in that the former is more severely restricted than the latter. Truthful defamation for the public interest does not give rise to a cause of action. Korean libel law does not recognize punitive damages, which U.S. law does.

Under U.S. law, right of reply is unconstitutional, but the majority of states have statutes accepting retraction. Injunctions against libelous publications are prohibited. In Korea, compulsory apology for libel is no longer suitable as a means to vindicate injured reputation under the Civil Code. Also in Korea, libelous statements can be subject to prior restraint.

In the United States, the press prevails in most libel suits, but defense costs and damage payments create a chilling effect on the media. Frivolous libel suits are emerging as an issue for the American press, and media countersuits are pursued in increasing numbers. On the other hand, plaintiffs complain about the time-consuming and costly libel litigation. They perceive American libel law as unfairly structured against their right to a good name. More and more Americans bypass American libel law by suing the media in foreign courts.

Korean courts have ruled on a growing number of libel claims in recent years. Korean judges endeavor to formulate a set of constitutional and legal standards on the balancing of press freedom against protection of reputation. Recently they have embraced the fair report privilege and fair comment defenses as developed under Anglo-American common law. Yet, Korean media organizations lose often in libel suits and are paying heftier damage awards than ever. A more free Korean press is now awakening to a more litigious Korean society in which the libel law is in transition.