

Converging Approaches to Defamation Law in the United States and South Korea

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ABSTRACT

One's personal reputation affects almost every aspect of one's life, including social relationships, employment opportunities, and business outcomes. The internet has made a person's reputation vulnerable to attacks from many more sources than ever before, and this has resulted in a surge of defamation cases. This article compares approaches to defamation law in the United States and South Korea to highlight the convergences and divergences of law and legal culture in each country. It concludes that, although there are substantial differences between the two nations' treatment of defamation laws, South Korea is trending toward assimilating the legal standards regarding Freedom of Speech that protect defendants of defamation cases in the United States.

Introduction

Since the beginning of human civilization, personal reputation and the perceptions that others have of an individual have been a crucial aspect of a person's identity. Nonetheless, a person's reputation is fragile, and therefore laws are required to maintain it. In modern society, the popularization of the internet and social media have led to rapid dissemination of information, including defamatory claims and statements (Chung et al., 2015). The consequences of such defamation have also become graver, as the recent spate of suicides among South Korean celebrities targeted online shows (Byung-chan, 2022; Min-je et al., 2019; Na-young, 2022). This has naturally triggered an immediate response from the public who have called for strengthening defamation laws, considering the ease and anonymity with which defamation occurs online. As legal expert David Ardia has pointed out, the internet has made reputation both more enduring, because of the information available through search engines, and more ephemeral, on account of the possibility of attacks from many more, often untraceable sources (Ardia, 2010). Consequently, the number of defamation lawsuits has grown exponentially. This surge is particularly evident in South Korea. In 2013, there were 14,678 defamation cases, with this number increasing continuously. In 2019, there were 19,388 cyber defamation cases and thousands of other defamation cases (Chung et al., 2015). Many of these cases involve public figures and celebrities.

However, defamation does not enjoy the same legal attention and societal significance in the United States, where a strong emphasis on freedom of speech under the Constitution protects many defendants who would face criminal charges in other countries. In fact, although certain state laws prohibit defamation, no laws against defamation exist at the federal level (Passaportis, 2004), and the number of plaintiffs that win defamation suits is extremely low (Ardia, 2013). The stark legal contrast between South Korea and the United States offers a compelling lens through which to view the most salient aspects of defamation law. This article explores defamation law in both nations to compare what principles the legal frameworks of both countries emphasize in addressing the social and legal variables entailed in the increase of defamation cases.

Landmark Defamation Cases in the U.S.

Beginning first with the landmark judicial precedents set in the United States, one sees they are based on the First Amendment, which protects the right to Freedom of Speech. The legal system has measured defamation against the strength of the First Amendment and the bar for what constitutes defamation has been set exceptionally high. The result has been that there is no criminal code against defamation in the United States and plaintiffs must make recourse to civil courts and lawsuits for reparations. Even then, defamation lawsuits have proven difficult to win.

The first landmark case to frame defamation law in the U.S. with the First Amendment is *New York Times v. Sullivan*. In 1960, Montgomery County Commissioner L.B. Sullivan sued the *New York Times* for allegedly publishing libelous remarks against the police department and him as the department head. The *New York Times* had published an advertisement by supporters of Dr. Martin Luther King Jr. that criticized the Montgomery police for the maltreatment of civil rights protestors. However, the advertisement contained some factual errors and misjudgements, although the general premise of the advertisement was true in that the Montgomery police had indeed mistreated Dr. Martin Luther King and his supporters. The Supreme Court of Alabama ruled that the *New York Times* was liable for publishing libel against Sullivan and the Montgomery Police Department (*The New York Times Company et al. v. L.B. Sullivan*, 1962). However, the United States Supreme Court overturned this ruling and established that a statement in the form of an advertisement does not lose constitutional protection by the First Amendment. Rather, even if the statement contains factual errors, the plaintiff must prove that the errors result from “actual malice” or “reckless disregard” in order to be defamatory. The “actual malice” standard, as it became known, has appeared continuously in defamation cases with the burden of proving “reckless disregard of the truth” placed upon the plaintiff, and making such cases difficult for the plaintiff to argue and win (*New York Times Co. v. Sullivan*, 1964).

Standards set in the *New York Times* case were further nuanced in a case that followed ten years later known as *Gertz v. Robert Welch Inc.* The judgment of this case did establish lenience for plaintiffs without public profiles, albeit limited, but also reinforced the stringent standards of the *New York Times* case for public individuals. The case began when a Chicago police officer, Richard Nuccio, shot and killed Robert Nelson and was convicted of second-degree murder. The Nelson family hired Elmer Gertz as their attorney to represent them in civil litigation against Nuccio. Later, a publication of the John Birch Society, the *American Opinion*, accused Gertz of being a communist and Leninist because he represented clients who were suing a law enforcement officer. Gertz denied the charges and sued, claiming that the article had damaged his reputation as a lawyer and citizen. The John Birch Society argued that Gertz would have to show “actual malice”, because he was both a public figure and the article was a matter of public interest. The lower courts agreed and held that the *New York Times* standard applied. However, on appeal, the United States Supreme Court held that despite Gertz’s public service in the past, he was not a public individual. The court doubted that one could involuntarily become a public figure and noted that, unlike public officials who are susceptible to criticism regarding public matters, private individuals do not face this expectation (*Gertz v. Robert Welch, Inc.*, 1974). Hence, according to *Gertz v. Robert Welch Inc.*, the *New York Times* standard does not extend to individuals who are not public figures, since they have “less effective opportunities for rebuttal” than public individuals and, therefore, have an “increased risk of injury” from defamatory falsehoods, requiring protection under the law (*Gertz v. Robert Welch, Inc.*, 1974). However, the Supreme Court did not judge the case to be criminal and ruled that it could only award Gertz reimbursements for “actual injuries” and not presumed or punitive damages because he had not proven “actual malice”, but only negligence. The Court thus established that, in defamation suits, society should hold public figures to higher standards than private individuals (*Gertz v. Robert Welch, Inc.*, 1974).

Hence, in the United States the standards for establishing defamation are high and seem to heighten continuously, as it is becoming more and more challenging to prove a defamation lawsuit, especially for public individuals. As legal experts Russel Weaver and David Parlett observe, “Sullivan struck a mortal blow against the restraints imposed by civil defamation rules.” (Weaver & Parlett, 2006). *Sarah Palin v. New York Times* illustrates this extremely high standard (Peters, 2022). The *New York Times*, in an editorial published in 2017, had falsely linked Sarah Palin to

a shooting in Arizona in 2011, and had quickly corrected the editorial with the writer stating that it was a “mistake”. Although the judge recognized that the reporting was “unfortunate editorializing” and that the suit brought by Palin did not *surprise him*, he stated that there was insufficient evidence to meet the high standards of actual malice under the *New York Times v. Sullivan* case (Peters, 2022).

Defamation Law in South Korea

Studies on Korean defamation, however, seem to offer a contrasting legal perspective to that of the United States. There is a consensus that Korean criminal defamation laws strictly limit legally protected speech. The Constitution of Korea does limit Freedom of Speech when it infringes on the rights of individuals, providing the grounds for such defamation laws to exist (Cho, 2013). This does contrast significantly with the United States, yet the last two decades have brought about significant changes, especially in the perception of such rights in South Korea.

Examining Korean laws more closely, one sees that there are stark differences between defamation laws in South Korea and the United States. Defamation suits are usually matters for criminal court in South Korea, with the sentences for convicted defendants being relatively more severe than in the United States. However, the most significant difference compared to the United States stems from Article 307 (1) of the Korean Criminal Code, which mandates a sentence of up to two years and a fine of up to five million won for a person who defames another by “publicly alleging facts” (The Republic of Korea, 1953). Thus, in contrast with the United States, where plaintiffs must prove that even false claims have the intent of “actual malice” to meet the defamation standard, in Korea, under Article 307(1) a statement may meet the standard for defamation even if the defendant proves that the statement is true, though such proof could lead to a decrease in the severity of sentencing.

Article 307 (2), on the other hand, which governs defamation due to false facts, offers some similarity to the defamation laws of the United States. Under Article 307(2), plaintiffs must prove false facts to be so, *and* that the defendant deployed them with malice. This has opened the door to the use of the *New York Times* defense in Korean courts as well. In one instance, a major broadcasting company used the *New York Times* defense in a Korean lawsuit against the government, which had accused the broadcaster of defamation. The broadcasting company had claimed in a 2008 investigative report that American beef, which was to be imported into Korea under a new contract between the Korean and American governments, was more likely than Korean beef to cause mad cow disease. Furthermore, the broadcaster alleged that the ministers and officials involved in the meetings had signed the contracts hastily with no regard for the concerns of the public. The government sued the producers for defaming government ministers involved in the meetings and spreading libel to obstruct the import of American beef. The Korean Supreme Court, which issued a ruling in September 2011, viewed the case from a different perspective (2010Do17237, 2011). It stated that such statements could not be defamatory under the law because, even though they included hyperbole and exaggerations, the defendant did not make them in malice, but only intended to benefit the public, thereby applying the *New York Times* defense.

Although this was one of the most well-known defamation cases, the *New York Times* defense was first applied in Korea in 2000 (99Do4757, 2000). The case involved some university professors, the foundation funding the school where they worked, and the head of school. In a complex set of events, the professors accused the head of school and the board of conspiring to gain full authority over the school’s leadership by disseminating posters and pamphlets. The court stated that although the disseminated information contained some false information, the premise of the statements was true, especially regarding the major accusations. Therefore, similar to the findings in the *New York Times v. Sullivan* case, the court ruled that minor falsities and exaggerations within a true statement do not constitute false statements of defamatory facts under Article 307 (2) of the Korean Criminal Code if there is not the intent of malice.

The foregoing cases regarding defamation of the government or public figures show that the acceptance of the *New York Times* defense has recently gained significance in South Korean law. This suggests that the judicial

system is moving towards a stronger protection of the Freedom of Speech. Therefore, one could conclude that, although there are substantial differences between American and South Korean laws regarding defamation, The use of the *New York Times* defense in South Korea has narrowed the gap between the two.

Striking a Balance between Defamation Law and Freedom of Speech

As stated in the introduction, in South Korea there have been significant increases in the amount of defamation cases, fueled by the internet and social media. The issue has gained more attention because of the effects of high-profile suicides resulting from online defamation, and consequent outcries from the public to create new legislation. Due to these demands, several changes occurred on the societal level. Naver, one of South Korea's largest online platforms, eliminated the comments section in entertainment or sports news as a measure to decrease the number of negative comments online (Hyun-su, 2020). In addition, after public petitions to enact stricter laws regarding online defamation, the government introduced new laws to hold hateful speech online criminally liable, under the Act on Promotion of Information and Communications Network Utilization and Information Protection in the Criminal Code (2016). However, these movements conflict with current trends which are moving towards protecting Freedom of Speech more than the rights of public individuals.

Therefore, it is likely that Korean defamation law will seek an appropriate balance between Freedom of Speech and the rights of individuals, although there is little doubt that defamation will continue to be held criminally liable, especially because of the importance of one's reputation in Korean society. Private individuals will continue to have protection against defamation provided by the Korean Criminal Code. However, as current trends suggest, the standards to constitute defamation regarding public figures will continue to heighten, as the public, similar to the United States, seem to value Freedom of Speech and Freedom of Press more and more.

Methods

This paper has sought to trace trends in the legal environments of the United States and South Korea surrounding defamation by examining landmark cases. It then evaluated these trends considering the increase in defamatory activity because of online interaction and social media, particularly in South Korea. The preceding observations are not a comprehensive statistical or historical analysis of defamation cases in either country, though such an analysis could be complementary. Regarding future studies, more extensive research into how lower courts have applied the standards highlighted in this study would enable more detailed conclusions. In addition, as there is continuous change in defamation law, especially in South Korea, where the legal system is relatively new, there will continue to be significant changes in the future, which should be studied. Additionally, a study of the social effects of online defamatory activity and cyber-bullying could further inform the legal landscape in formulating fair and effective laws and policies regarding defamation.

Conclusions

Given the aforementioned, one may conclude that the differences in Korean and American laws are definite, but that recent trends suggest a convergence. The *New York Times* standard and protecting Free Speech have become hallmarks of legal practice in the United States and have gained influence in the South Korean legal system. Recent social trends in South Korea, however, suggest a divergence between the general interpretation and application of defamation laws and the preponderance of dire effects caused by online defamation. As defamation-driven suicides and harms to individual rights have sparked public outrage, it will be challenging for Korea to establish an effective standard which provides a positive balance between people's individual rights and the Freedom of Speech.

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