RETHINKING NON-PECUNIARY REMEDIES FOR DEFAMATION:

THE CASE FOR COURT-ORDERED APOLOGIES

Wannes Vandenbussche*

Legal scholars have been encouraged to examine alternative remedies with respect to defamation claims in response to an increasing criticism for the remedy of monetary damages. Various types of non-pecuniary relief (such as retraction, right of reply, publication of court decisions or declaratory judgement) have been the subject of elaborate studies. The role of court-ordered apologies as a non-pecuniary defamation remedy has been scarcely discussed in academic literature. The work that has been done focuses either on the remedial role of apologies in East Asian jurisdictions or on apologies as a civil legal remedy aimed at emotional recovery claims for specific kinds of harm (such as personal injury, invasions of privacy or violations of equal opportunity legislation). These studies, which mostly go beyond the scope of defamation law, pay very little attention to the Western legal tradition. The Anglo-American and continental-European legal culture are considered non-apologetic traditions, which are clearly unfamiliar with the remedy of imposing apologies.

Contrary to the conventional wisdom, this article shows that court-ordered apologies are available as a remedy to defamation claims in a non-negligible part of the Western legal tradition. This is demonstrated by a

* Wannes Vandenbussche (Ph.D.) is an assistant professor of civil procedure at Ghent University (BE) and an attorney-at-law at Linklaters Brussels. This article was written while during his time as an associate research scholar (B.A.E.F & Fulbright fellow) at Yale Law School (U.S.). I am particularly indebted to Benoit Allemeersch, Mirjan Damaska, William Eskridge, Mateusz Grochowski, Xinyu Huang, Douglas Kysar, John Langbein, Noah Messing, Joachim Pierer, Ilse Samoy, and James Whitman for their valuable comments and suggestions. I am grateful to Pavel Bachleda, Vojtěch Bašný, Daniela Mozetič, and Maria Vizdoaga for helping me in collecting some of the materials. An earlier version of this paper was presented at the Global Fake News and Defamation Symposium in Los Angeles, the Yale Doctoral Workshop Series, and the 7th Annual Conference of the Younger Comparativists Committee (YCC) of the American Society of Comparative Law (ASCL) in Cleveland. The comments and the suggestions that I received at these meetings were extremely helpful. The views expressed herein are solely those of the author.

profound comparative law analysis of continental legal systems (Western, Central, as well as Eastern European jurisdictions), a mixed legal system (South Africa) and common law systems. Simultaneously, this article allows us to gain a better understanding of why this remedy is still applied in some jurisdictions and why it has disappeared in others.

This article proceeds on the premise that a case can be made for court-ordered apologies as a defamation remedy in the Western legal tradition, and accordingly, it is argued that they are worth consideration in jurisdictions which no longer make use of this legal tool. First, in operating a symbolic reversal of the original defamatory assertion, court-ordered apologies are more likely to produce a shaming effect than other remedies. Second, it is possible to attribute an educational function to court-ordered apologies, allowing courts to inform members of the community about what constitutes an unlawful and injurious statement.

When examining the implementation of court-ordered apologies as defamation remedy, a civil-common law divide comes to the fore. Whereas apologies can be introduced in continental legal systems as a form of reparation, it is harder to import them into Anglo-American legal systems. The same goes for the reconciliation of this type of relief with freedom of expression, which is simpler to attain under the balancing test of the European Court of Human Right than in some common law systems.

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I. INTRODUCTION

After a court has decided to hold someone liable for defamatory statements, the question of which remedy to impose arises. The search for an appropriate remedy is a rather delicate task. Injuries caused by defamation are troublesome. The aggrieved party does not primarily seek monetary damages. Its main interest is to restore its reputation, because the defamatory falsehood has intruded upon its honor, dignity, and self-esteem.[1] Although defamed persons rely on courts to reestablish their social standing and to restore a moral balance,[2] a mere award of monetary damages is often unlikely to achieve that result.[3]

In response to criticism of monetary compensation, legal scholars have been encouraged to examine alternative remedies for defamation.[4] Their objective is to find a remedy which protects and restores the reputational interests of persons confronted with an injurious falsehood, without chilling socially important speech.[5] Hence, various types of non-pecuniary relief have been made the subject of elaborate studies (such as retraction,[6] right of reply,[7]

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[1] Robyn Carroll & Jeffrey Berryman, *Making Amends by Apologising for Defamatory Publications: Developments in the Twenty-First Century*, *in* PRIVATE LAW IN THE 21ST CENTURY 480-81 (Kit Barker et al. eds., 2006); John G. Fleming, *Retraction and Reply: Alternative Remedies for Defamation*, 12 U. BRIT. COLUM. L. REV. 15, 30 (1978); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 485-86 (1986); James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375, 413 (1981).

[2] Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1144 (2003); Gijs Van Dijck, *The Ordered Apology*, 37 OXF J LEG STUD. 562, 573 (2017).

[3] MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 371 (3rd ed. 2010).

[4] "In defamation law, the case for alternative remedies is particularly strong." Robyn Carroll & Catherine Graville, *Meeting the Potential of Alternative Remedies in Australian Defamation Law*, NEW DIRECTIONS FOR LAW IN AUSTRALIA: ESSAYS IN CONTEMPORARY LAW REFORM 311 (Ron Levy et al eds., 2017).

[5] James H. Hulme & Steven M. Sprenger, *Vindicating Reputation: An Alternative to Damages as a remedy for Defamation*, *in* REFORMING LIBEL LAW 152 (John Soloski & Randall P. Bezanson eds., 1992); Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 676, 697 (2000).

[6] Fleming, *supra* note 1, at 15; Hulme, *supra* note 1; Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 COMMUNICATIONS LAWYER 24 (2002); John C. Martin, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEGAL. F. 293 (1993).

[7] Joshua Crawford, *Importing German Defamation Principles: A Constitutional Right of Reply*, 41 FLA. ST. U. L. REV. 767 (2014); Richard C. Donelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); András Koltay, *The Right of Reply in a European Comparative Perspective*, 54 ACTA JURIDICA HUNGARICA 73 (2013); Michael D. Scott, *Would a*

publication of a court decision[8] or declaratory judgement[9]). The role of court-ordered apologies as a non-pecuniary defamation remedy, however, has been scarcely discussed in academic literature.[10] The work that has been done focuses either on (i) compelled apologies in East Asian jurisdictions; or (ii) apologies as a civil legal remedy aimed at emotional recovery claims for specific kinds of injury going beyond the scope of defamation law, such as violations of equal opportunity law or invasions of privacy.

(i) Previous research concentrating on East Asian jurisdictions (Japan[11], South-Korea[12] and China[13]), emphasizes the role of the apology as a critically important behavioral determinant and as a means to rebuild social harmony in the community.[14] Notwithstanding the absence of legal provisions providing for this remedial measure, publication of an apology is used both in- and outside of the court room to settle disputes. Moreover, a court may actually require that parties undertake steps to resolve the dispute by conciliation and compromise.[15] These scholars further comment that American and European societies depict an individualistic culture in which

Right of Reply Fix Section 230 of the Communications Decency Act?, 4 J. INT'L MEDIA & ENT. L. 57 (2011); Kyu Ho Youm, *The Rights of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017 (2007-2008).

[8] Alain Bensoussan et al., *Vie privée, liberté d'expression...une presse à la frontière de la légalité*, GAZ. PAL., Apr. 24, 2003, at 21; Auke Bloembergen, *Onrechtmatige daad: publikatie van het vonnis; recht op rectificatie*, 39 NEDERLANDS JURISTENBLAD [NJB] at 337 (1964).

[9] David A. Barett, *Declaratory Judgements*, REFORMING LIBEL LAW 110 (John Soloski & Randall P. Bezanson eds., 1992); Marc. A Franklin, *A Declaratory Judgement Alternative to Current Libel Law*, REFORMING LIBEL LAW 74 (John Soloski & Randall P. Bezanson eds., 1992); Anna L. Moore, *Defamed Reputation: Will Declaratory Judgment Bill Provide Vindication*, 13 JOURNAL OF LEGISLATION 72, 86 (1986).

[10] According to White, there is a "paucity of discussion on this issue." Brent T. White, *Say you're Sorry:* Court-*Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1270 (2005).

[11] Max Bolstad, *Learning From Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 558 (2000); Noriko Kitajima, *The Protection of Reputation in Japan: A Systemic Analysis of Defamation Cases*, 37 LAW & SOC. INQUIRY 89 (2012); Wagatsuma & Arthur Rosett, *supra* note 1, at 461.

[12] PETER F. CARTER-RUCK, ON LIBEL AND SLANDER 420-21 (5th ed. 1997); Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205 (2000); Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement*, 27 MICH. J. INT'L L. 1, 1 (2005).

[13] Bruce Liebman, *Innovation through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L.J. 33 (2006); Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOBAL L. & BUS. 415 469-70 (2011).

[14] Dean C. Barnlund & Miho Yoshioka, *Apologies: Japanese and American Styles*, 14 INT'L J. INTERCULT. REL. 193, 204 (1990); Mauro Bussani & Marta Infantino, *Tort Law and Legal Cultures*, 63 AM. J. COMP. L. 77, 103 (2015); Lee, *supra* note 12, at 2; Wagatsuma & Rosett, *supra* note 1, at 495.

[15] Masao Horibe & John Middleton, *Chapter 6 Japan*, *in* INTERNATIONAL MEDIA LIABILITY. CIVIL LIABILITY IN THE INFORMATION AGE 225 (Christian Campbell ed., 1997); Wagatsuma & Rosett, *supra* note 1, at 471.

an apology has little significance.[16] Thus, by accenting the enduring cultural contrast between Western and Eastern societies, these studies reinforce the view that court-ordered apologies are deprived of any function or value in Western legal systems.[17]

(ii) Another strand in legal scholarship identifies the circumstances in which an apology could be available as a civil legal remedy and pinpoints the concerns and challenges that would arise as a result.[18] This work is based largely on the established role of apologies in different areas of Australian law and, to a more limited extent, Canadian law. In these jurisdictions, the principal disputes in which apologies have been ordered are equal opportunity violations,[19] but it is also possible to invoke apologies as a remedy for invasions of privacy,[20] juvenile offenses,[21] human rights

[16] Nicola Brutti, *Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology*, 24 EUR. BUS. L. REV. 127, 132 (2013); John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC'Y REV. 499, 505 (1986).

[17] In the same vein, see Haley, *supra* note 16, at 505.

[18] *See* Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317 (2013); Robyn Carroll, *Beyond Compensation; Apology as a Private Law Remedy*, THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW 331 (Jeff Berryman & Rick Bigwood eds., 2010); Van Dijck, *supra* note 2, at 562; Andrea Zwart-Hink et al., *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 U.W. AUSTL. L. REV. 100 (2014); *see also* Sébastien De Rey, *Excuseer?! Afgedwongen excuses in het aansprakelijkheidsrecht*, 54 TIJDSCHRIFT VOOR PRIVAATRECHT [TPR] 1153 (2017).

[19] *See, e.g.*, Anti-Discrimination Act 1977 (NSW) s 108 (3) (Austl.) ("If the Tribunal finds the complaint substantiated in whole or in part, it may do any one or more of the following: (d) order the respondent to publish an apology or a retraction."); *see also* Anti-Discrimination Act 1991 (Qld) s 209 (Austl.).

[20] *E.g.*, the Privacy and Personal Information Protection Act 1998 (NSW) s 55 (2) (e) (Austl.), requiring the public sector agency "to take specified steps to remedy any loss or damage suffered by the applicant." Pursuant to this provision, the New South Wales Administrative Appeals Tribunal ordered a government department to tender a written apology for disclosing personal information about the applicant (NZ v. Director General, Department of Housing [2006] NSWADT 173). *See* Robyn Carroll, *Apologies and Corrections as Remedies for Serious Invasions of Privacy*, in REMEDIES FOR BREACH OF PRIVACY, HART PUBLISHING 205 (Jason NE Varuhas & Nicole Moreham 2018).

[21] *See, e.g.*, Enhancing Online Safety for Children Act 2015 (Cth) s 42 (Austl.) ("…the Commissioner may give the end-user a written notice (an end-user notice) requiring the end-user to do any or all of the following … (i) apologize to the child".).

violations,[22] hate speech,[23] and intellectual property infringements.[24]

Both strands in academic literature give that very same attention to the foundation of apologies in the Western legal tradition.[25] The Anglo-American and continental-European legal culture are considered non-apologetic traditions,[26] and are clearly unfamiliar with the remedy of imposing apologies. [27] Contrarily, this article aims to show that court-ordered apologies are actually playing a role as a defamation remedy in those so-called non-apologetic traditions, and thus are worth considering in jurisdictions which do not (yet) make use of the power of court-ordered apologies.

This argument is based on insights gained from a comparative law analysis of continental legal systems (Western, Central, as well as Eastern European jurisdictions), mixed legal systems (*i.e.* South Africa) and common law systems. The analysis shows that, in all of these systems, the ancestors of court-ordered apologies have played a prominent role in the past.[28] Even though the remedy does not date back to Roman law and its origins remain somewhat obscure,[29] there is no doubt that it has already more than one millennium behind it. Most importantly, in various jurisdictions, court-ordered apologies are still available as a defamation remedy. Significantly,

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[22] *See, e.g.*, Swan v. Canadian Armed Forces (1994), 25 C.H.H.R. 312; Grover v. National Research Council of Canada (1992), 18 C.H.R.R. I.

[23] *See, e.g.*, Promotion of Equality and Prevention of Unfair Discrimination Act § 10 (2) (S.Afr.) ("After holding an enquiry, the court may make an appropriate order in the circumstances, including: (j) an order that an unconditional apology be made."); *see also* South African Human Rights Commission obo South African Jewish Board of Deputies v. Masuku and Another 2017 (3) All SA 1029 (EqC) at para. 60-61.

[24] *See, e.g.*, Copyright Act 1968 (Cth) s 195AZA(1) (Austl.) ("[T]he relief that a court may grant in an action for an infringement of any of an author's moral rights: (d) an order that the defendant make a public apology for the infringement."); *see* Carroll, *supra* note 18, at 227.

[25] Within the framework of this article, the Western legal tradition encompasses the legal families of civil law and common law. MARTIN VRANKEN, WESTERN LEGAL TRADITIONS. A COMPARISON OF CIVIL LAW & COMMON LAW, at 1 (2015).

[26] Brutti, *supra* note 16, at 132.

[27] Jan Hallebeek & Andrea Zwart-Hink, *Claiming Apologies: A Revival of Amende Honorable*, 5 COMP. LEGAL HIST. 194 (2017); Zwart-Hink, *supra* note 18, at 100. Even so, in a decision of Apr. 1, 1991, the Korean Constitutional Court makes a comparative argument discussing that there is no court-ordered public apology for remedying defamation in European countries. *See* Constitutional Court [Const. Ct.], 89 Hun-ma 160, Apr. 1, 1991; *see also* Choi, *supra* note 12, at 220.

[28] MELIUS DE VILLIERS, THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES 178 (1899);

[29] INA EBERT, PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT: VON DER RENAISSANCE DER PRIVATSTRAFE IM DEUTSCHEN RECHT 77 (2004). In Roman law, the injured party could demand monetary damages as a form of private punishment within the framework of the *actio iniuriarum*, which encompassed all attacks on personality rights, as far as they did not fall under a special regulated offense. Rolf Lieberwirth, *Stichwort 'Beleidigung', in* HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE (HRG) 357-58 (Adalbert Erler and Ekkehard Kaufmann eds., 1971).

in the legal systems analyzed for purposes of this article, apologies are applied only in defamation cases to the exclusion of other areas of law.[30] Until now, there has been no comprehensive analysis of this phenomenon in the Western legal tradition. Accordingly, this article serves as a complement to existing studies.

Court-ordered apologies are worth examining nowadays because they are capable of overcoming the objections that have been raised to traditional remedies, such as their limited expressive[31] or restorative[32] power. The idea underpinning court-ordered apologies is to restore the claimant's reputation in the minds of the people who were misinformed by the defamatory statement or publication by compelling the defendant to take back his injurious words and apologize for spreading them.[33] In our increasingly interconnected world, this remedy is even more relevant than before. An award for damages years after a defamatory speech was published can hardly restore the plaintiff's reputation.[34] Publication of a court-ordered apology, reaching the same audience as the one to whom the original material was addressed, is more likely to achieve that result. For instance, in Switzerland, the Supreme Court upheld a decision of a lower judge ordering a millionaire to publish an apology in electronic form on his Facebook profile and internet page, after he had called his ex-girlfriend a liar and a vengeful ex-lover on the same mediums.[35] Likewise, a Dutch court ordered an interior designer to publish a rectification and apology on her Twitter account, Facebook page and LinkedIn page after she had wrongfully accused a competitor of selling illegal copies of her creations.[36]

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[30] Latvian law is a notable exception. The Latvian Supreme Court describes court-ordered apologies as a widespread form of reparation and a popular way for compensating minor emotional losses. Apologies are ordered among others in response to a wrongful incorporation of information in the criminal record, a Ministry of Justice's failure to respond to a person's application, a non-delivery of uniforms to an official or an unlawful refusal to make an incorporation in the birth register for a change of sex. REPUBLIC OF LATVIA SUPREME COURT, COMPENSATION OF MORAL INJURY IN ADMINISTRATIVE CASES 41-42 (2011), http://at.gov.lv/en/court-proceedings-in-the-supreme-court/compilations-of-court-decisions/administrative_law); *see also* TANEL KERIKMÄE ET AL., THE LAW OF THE BALTIC STATES 302 (2017).

[31] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1439 (1993); Robbennolt, *supra* note 2, at 1144.

[32] Carroll & Graville, *supra* note 4, at 312; COLLINS, *supra* note 3, at 371, par. 19.46; Gijs Van Dijck, Emotionele belangen en het aansprakelijkheidsrecht, NEDERLANDS JURISTENBLAD [NJB], no. 36, 2015, at 2531, para. 2

[33] *See also* Eric Descheemaeker, *Old and New Learning in the Law of Amende Honorable*, 132 S. AFRICAN L.J. 909, 910 (2015).

[34] David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 16 (2013); COLLINS, *supra* note 3, at 372, par. 19.47.

[35] Bundesgericht [BGer] [Federal Supreme Court] Nov. 4, 2013, 5A_309/2013 (Switz.).

[36] Rb. Midden-Nederland 18 juni 2014, ECLI:NL:RBMNE:2014:2472 (Neth).

This article will highlight the notion of the court-ordered apology and sketch its main features and its relation to other remedies (I), and will then contrast the current state of court-ordered apologies in three legal cultures (continental law, mixed legal systems, common law) belonging to the Western legal tradition (II). Following this analysis, a case is made for court-ordered apologies as a defamation remedy, with special attention devoted to the rationales for considering this remedy (III). Finally, I examine the further implementation of court-ordered apologies in defamation law in Western legal systems, while paying attention to some major concerns (IV).

II. COURT-ORDERED APOLOGIES

A. *Notion*

As a first step, it is important to clarify what should be understood under the term court-ordered apology. As opposed to spontaneous apologies, which are primarily personal and moral gestures,[37] court-ordered apologies are instructions from a judge directing a party to take certain action, *i.e.* to make an apology to another party. In an attempt to define the concept more narrowly, two approaches can be taken.

First, one could start from theoretical insights regarding true apologies in order to come to a definition of ordered apologies.[38] Although scholars do not fully agree on what a true apology should entail,[39] reference is often made to the basic definition of Lazare: "*an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved*."[40] Yet apology theorists regularly include two additional elements: an action component (which implies an offer to repair) and an articulation of forbearance (which is a commitment to change future behavior).[41] Subsequently, when an apology is introduced in the legal arena, it is subject to the boundaries of the law. On the one hand, this comes down to a tightening of the scope of the apology, because a judge cannot compel

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[37] CLAUDIA SCHUBERT, DIE WIEDERGUTMACHUNG IMMATERIELLER SCHÄDEN IM PRIVATRECHT 251-252 (2013). In his book devoted to apologies, Nick Smith considers such a 'categorical apology' as a rare and burdensome act. NICK SMITH, I WAS WRONG. THE MEANINGS OF APOLOGIES 17-18 (2008).

[38] This approach is taken by Carroll, *supra* note 18, at 321-325; Van Dijck, *supra* note 2, at 565-568.

[39] SMITH, *supra* note 37, at 17-27.

[40] AARON LAZARE, ON APOLOGY 23 (2004).

[41] Luc Bovens, *Apologies*, 108 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 219, 220-234 (2008); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1133 (2002); Van Dijck, *supra* note 2, at 565-566.

emotions or heartfelt feelings.[42] On the other hand, this means that the adjudicator, rather than the apologizer, has the power to determine how and where it should be provided (spoken or in writing, in private or in public).[43] The exact wording obviously depends on the circumstances of the case. In theory, an apology order is comprised of four components: an affirmation or acknowledgment of fault; an expression of regret, remorse or sorrow; a willingness to repair; and a promise to adapt behavior in the future.

Second, one could draw lessons from the way in which apologies were historically conceptualized as self-standing doctrines. This historical approach shows court-ordered apologies as a multi-layered concept. Two early manifestations, which can be seen as the real ancestors of enforced apologies in the field of defamation law, are worth discussing: *die Klage auf Ehrenerklärung, Abbitte oder Widerruf* and the *amende honorable*. Both doctrines arose as an answer to the violent tenor of life in the Middle-Ages and the irascibility of medieval men, who heavily insisted on obtaining satisfaction for their outraged honor.[44]

The request for declaration of honor, apology and revocation (*die Klage auf Ehrenerklärung, Abbitte oder Widerruf*) attained its full development in 16th and early 17th century German law.[45] Its roots date back to medieval canon law and to German customary law.[46] As the name of the remedy suggests, it combined three originally separated elements, which existed before as autonomous variations.[47] First, a declaration of honor (*declaratio honoris* or *Ehrenerklärung*), was a formal declaration on the part of the offender acknowledging that he had made his allegation in anger and without any intention to injure the other.[48] Making such a declaration implied that he that took the other person for a man of honor.[49] The second component was

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[42] Carroll, *supra* note 18, at 322-23.

[43] Carroll, *supra* note18, at 318; Van Dijck, *supra* note 2, at 580.

[44] REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1072 (1990).

[45] EBERT, *supra* note 29, at 63; Dr. Liepmann, *Abbitte, Widerruf und Ehrenerklärung*, 11 DEUTSCHE JURISTEN ZEITUNG [DJZ] 931, 934 (1906); Gerhard Lingelbach, *Stichwort 'Injurienklage', in* HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE (HRG) 1221 (Albrecht Cordes et al eds., 2d ed. 2004).

[46] Hallebeek & Zwart-Hink, *supra* note 27, at 234. In the 16th until 18th century, an aggrieved party could choose between filing this complaint and submitting an *Injurienklage* (*actio iniurarum*), which was adopted from Roman, law, still had a penal nature and enabled the victim to demand the payment of a private penalty. EBERT, *supra* note 29, at 63 & 66-67; Lingelbach, *supra* note 45, at 1221.

[47] Later on, it was mostly referred to as the revocation (*Widerruf*). *See* EBERT, *supra* note 29, at 78.

[48] EBERT, *supra* note 29, at 76-77; ZIMMERMAN, *supra* note 44, at 1072.

[49] Traces of this declaration of honor can be found in the *Edictum Rotharis regis*, the first written compilation of Lombard law, of 643 and the *Lex Bajuvariorium*, a collection of the tribal

an apology (*deprecatio* or *Abbitte*), which was an expression of regret associated with a request for forgiveness. This component found its origins in the teachings of the church.[50] Third, a revocation was required (*recantatio, palinodia* or *Wiederruf*), in which the offender acknowledged the untruthfulness of his statements and recanted his defamatory words.[51]

Another specific and self-standing doctrine is best known by its French name, the *amende honorable*.[52] Despite its appellation, very few authors claim that the *amende honorable* is actually of French origin.[53] Instead, its roots can be traced to ecclesiastical law.[54] Subsequently, the further development of this legal tool in French[55] and Roman-Dutch[56] law received the most scholarly attention. Similar to its German equivalent (*die Klage auf Ehrenerklärung, Abbitte oder Widerruf*), the remedy consisted of several constituent elements: an admission having made false statements (*palinodia, recantation, retractatio*); a confession of guilt, which implied some publicity and appearance; and an apology and a prayer for forgiveness (*deprecatio*). Some authors include a declaration of honor as well.[57]

Whether one takes the path of apology theorists or of historians, both approaches show striking similarities. An apology is always more than simply saying sorry upon instruction of a judge.[58] Instead, it is a multi-layered

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laws of the Bavarii, from the sixth through eighth century. *See* C. von Wallenrodt, *Die Injurienklage auf Abbitte, Widerruf und Ehrenerklärung in ihrer Entstehung, Fortbildung und ihrem Verfall*, 3 ZEITSCHRIFT FÜR RECHTSGESCHICHTE 238, 243 (1864).

[50] EBERT, *supra* note 29, at 76-77; ZIMMERMAN, *supra* note 44, at 1072.

[51] Even as the apology, the revocation was derived from medieval canon law and had developed within the framework of the restitution theory in the 12th and 13th centuries (*restitutio famae*). Subsequently, it was one of the compulsory parts of a penalty (*Buße*), a means to receive divine forgiveness for a sin was to compensate the victim, as much as possible, for his injury. EBERT, *supra* note 29, at 76-77; ZIMMERMAN, *supra* note 44, at 1072.

[52] Other, more remote linguistic calques are "honorable amends," "*emenda honorabilis*," or "*eerlijke betering*." Descheemaeker, *supra* note 33, at 909.

[53] For an overview, see Hallebeek & Zwart-Hink, *supra* note 46, at 196-197.

[54] CHITTHARANJAN FELIX AMERASINGHE, DEFAMATION AND OTHER ASPECTS OF THE ACTIO INIURIARUM IN ROMAN-DUTCH LAW IN CEYLON & SOUTH AFRICA 172 (1968). Some authors refer to a resolution of the Council of Carthage, which provided that clerics could be forced to pray for pardon in case they slandered another person. This resolution was subsequently included in a decretal of Gratian in the 12the century. MELIUS DE VILLIERS, *supra* note 28, at 177-78.

[55] In France, the *amende honorable* can be traced to 1357. In that year, the Latin term '*emenda, honorabilis'* is mentioned in the registers of the *Parlement de Paris*, the most important provincial appellate court of the *Ancien Regime*. *See* Hallebeek & Zwart-Hink, *supra* note 46, at 202.

[56] One of the first sources which refer to the *amende honorable*, are the statutes in force in the Dutch provinces from the mid-16th century, in particular the Ordinance of Utrecht of 1550, introduced by Charles V. *See* Descheemaeker, *supra* note 33, at 324.

[57] Hallebeek & Zwart-Hink, *supra* note 46, at 236; ZIMMERMAN, *supra* note 44, at 1072.

[58] However, this is not always the case. In *Ma Bik Yung v. Ko Chuen*, the Court of Final Appeal of Hong Kong regarded an apology as meaning "simply to say sorry" and defined an apology

concept. An acknowledgement of wrongdoing and a retraction of defamatory words, as well as an expression of remorse, consistently form part of a court-ordered apology. Only the declaration of honor, which is a formal declaration made by a defendant that he considers the person whom he defamed to be a man of honor, seems to have disappeared. One of the last manifestations is a judgement of the Federal Supreme Court of Switzerland in 1919. The Court addressed the request of an employer for a declaration of honor to be made by his former employee, by whom he was falsely accused of being open to bribes. The Supreme Court left unanswered the question of whether or not requiring a declaration of honor violated fundamental constitutional guarantees.[59] Since then, some legal scholars still refer to this declaration as a form of non-pecuniary relief,[60] but there are no applications in case law. The same goes for Article 40 of the Lichtenstein Code of Persons and Companies, which still mentions the *Ehrenerklärung* as one of the remedies the judge can implement.[61] Therefore, one could argue that this component is replaced by the requirement to display a willingness to change behavior in the future or even by the expectation that the apology is accompanied with an attitude of humility.[62] Nonetheless, the declaration of honor remains a thought-provoking concept.

B. *Main Characteristics*

In bringing to light the essence of court-ordered apologies, it is interesting to delve into some of the main characteristics of this defamation remedy.

At the outset, it is important to stress that an apology is only appropriate as a legal remedy if it is expressly sought by the plaintiff.[63] There are two main reasons why an apology needs to be at the request of the injured party. First, as the value of a coerced apology is regularly called into question (*cf. infra*), the recipient of an apology is the most suited actor to determine whether a compelled apology would be beneficial to him, and whether the

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as a "regretful acknowledgement of a wrong done" that can be made privately or publicly. Ma Bik Yung v Ko Chuen, [2002] 2 HKLRD 1, 14-15 ("Ma Bik Yung"); *see also* Carroll, *supra* note 18, at 324.

[59] Bundesgericht [BGer] [Federal Supreme Court] Jan. 16, 1919, 45 II 105 (Switz.)

[60] Hans Stoll, *Consequences of Liability: Remedies*, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. 11 TORTS, PT. 2, CH. 8, 86 para 93 (René David et al. eds., 1973).

[61] Personen- und Gesellschaftsrecht [PGR] [Code of Persons and Companies] vom 20. January 1926, LGBL 1926 no 4, art. 40, para. 3 (Li.).

[62] Bovens, *supra* note 41, at 220.

[63] Carroll, *supra* note 18, at 318. This is also included in article 723 of the Japanese Civil Code, which authorizes the court to order, at the request of the party offended in his honor, suitable measures for the restoration of honor in addition to or in lieu of damages.

apology can repair injuries caused by a defamatory falsehood.[64] Second, establishing the plaintiff's choice as the starting point prevents apologies from being used as a tactical defense. One could imagine a defendant submitting that plaintiff should have sought an apology instead of monetary damages.[65] Hence, a plaintiff's contention that an apology would be inappropriate should incite trial courts to abandon this remedy.[66]

Next, in selecting the method of apologizing, a court can choose between different modalities. A coerced apology can be either oral or written, public or private. Written apologies are currently most common. Oral apologies have more or less fallen into disuse.[67] They are reminiscent of the older practices of *amende honorable* and palinode (*cf. supra*), which combined self-humiliating elements with a spoken apology. Some authors make reference to an example of a defamer who was required "*to stand at church doors, and other places, clothed in sack cloth and say: 'False tongue, I lied*.'"[68] A similar example is found in French legal scholarship, reporting on a defendant who had to appear as a penitent in a public place, barefoot, wearing a linen vest without belt, holding objects such as candles and promising to change his ways in the future.[69] However, even in more recent times, oral apologies were still in use. For instance, in 1964, the Civil Chamber of the USSR Supreme Court recorded an oral apology given by a defendant in front of assembled co-workers as one of the methods to retract a defamatory statement.[70] Nowadays, some scholars still suggest an oral apology as an appropriate sanction if it takes place at a public meeting in front of the same group of people in whose presence the defamatory statements occurred.[71]

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[64] Van Dijck, *supra* note 2, at 575.

[65] This issue already presented itself before the South African courts: "The defendant submitted that the plaintiff should have claimed an apology instead of damages and should have been satisfied with the apology tendered in the plea." Young v. Shaikh 2003 ZAWCHC 50 (C) at para. 15. "The contention by the respondent that the applicant has alternative remedies needs closer scrutiny." Manuel v. Crawford-Browne 2008 (3) All SA 468 (C) at para. 26.

[66] In the McBride-case, the South African Constitutional Court holds that "plaintiff's contention that an apology would be inappropriate weighs against ordering it." The Citizen 1978 (Pty) Ltd v McBride 2011 (4) SA 191 (CC) at para. 134.

[67] Whereas the drafters of the Japanese Civil Code had primarily a public apology before the court in mind, written apologies have come to prevail in practice. Stoll, *supra* note 60.

[68] JOHN BORTHWICK, A TREATISE ON THE LAW OF LIBEL AND SLANDER 181-83 (1826); Jonathan Burchell, *Retraction, Apology and Reply as Responses to injuriae*, *in* INIURIA AND THE COMMON LAW 199 (Eric Descheemaeker & Helen Scott eds., 2014).

[69] Jean-Marie Moeglin, *Pénitence publique et amende honorable au Moyen Age*, 298 REVUE HISTORIQUE 225, 243 (1997); *see also* Hallebeek & Zwart-Hink, *supra* note 27, at 202.

[70] SERGE LEVITSKY, COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW: DE LEGE LATA AC FERENDA 106 (1979).

[71] ANDREJ ŠKOLKAY, MEDIA LAW IN SLOVAKIA 106 (3d ed. 2016).

A private apology is an action which is directed solely at the victim (e.g., a letter with words of apology). It takes place between two individuals, without an external audience.[72] Its primary goal is the healing of relationships.[73] As a consequence, private apologies are more frequently imposed as a remedy for humiliations and insults than for defamation cases in general. For example, a recent decision by the Polish Supreme Court affirmed the judgment of a lower court ordering a bank to send a letter of apology to an 85-year-old man who felt very distressed about an embarrassing incident.[74] Nevertheless, it is possible that a target of defamatory statements may demand a written letter of apology. For example, in the Czech Republic, the court ordered President Miloš Zeman to send a letter of apology to the granddaughter of a journalist whom he had falsely accused of being fascinated by Nazism during a conference on the 70th anniversary of the Holocaust. He was also obliged to publish the same words of apology for a minimum of thirty consecutive days on the Prague Castle website.[75] In the same vein, some plaintiffs ask for a semi-public apology, which does not solely address the victim, nor does it constitute a statement in a newspaper or periodical. Such an apology is intended to target the same audience as the one that was aware of the defamatory falsehood (such as an e-mail to all employees of a company or a letter to all customers of a given service).[76]

For the most part, public apologies are the prevailing practice in defamation cases. They are played out on an open stage (through the press, on a website or on social media) after a court has stipulated the essence and wording of the apology, as well as the period during which the apology should remain accessible to the public.[77] Unlike private apologies, their

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[72] LAZARE, *supra* note 40, at 39; Katarzyna Ludwichowska-Redo, *Compensation in kind for non-pecuniary harm, in particular the finding of a violation. Poland, in* COMPARATIVE STIMULATIONS FOR DEVELOPING TORT LAW 249, 250 (Helmut Koziol ed., 2015).

[73] LAZARE, *supra* note 40, at 39.

[74] During a visit to his bank, an 85-year-old man feels an immediate need to go to the bathroom. Considering that the client bathrooms are closed, the bank employees advise him to go to a nearby restaurant. When it turns out that this is no option, they direct him from one door to another, until he ultimately finds a utility room. As there is no electricity, he soils his clothes, causing an odor. The man is very distressed about this event and goes back home on foot, which is a great effort for him. He feels mentally shaken and broken. A district court awards him a monetary compensation of 1500 EUR and obliges the bank to send him a written apology. The Polish Supreme Court affirms the judgment. Wyrok Sąd Najwyższy z 17.11.2014 (SN) [Decision of the Supreme Court of Nov. 17, 2014] Sygn. akt I CSK 682/13 (Poland).

[75] Městský soud v Praze ze dne 01.09.2016 (MS) [Decision of the Circuit Court in the City of Prague of Sept. 1, 2016], sp.zn. 22 Co 207 /2016 (Czech).

[76] For the Netherlands, see *i.a.* Rb. 's-Gravenhage 22 augustus 2007, ECLI:NL:RBSGR:2007:BB2188, para. 4 (Nl.), Rb. Haarlem 1 Nov. 2006, ECLI:NL:RBHAA:2006:AZ1366 (Nl.).

[77] LAZARE, *supra* note 40, at 39.

objective is to convey an important social message and teach valuable public lessons (*cf. infra*).[78] Public apologies can also serve as a useful tool when a defendant is willing to apologize to the plaintiff, but is not prone to do so publicly.[79] In general, it is likely that courts will tailor the method of dissemination of the apology to the way in which the harmful statements were spread.[80] The underlying idea is to guarantee that thousands of people who were aware of the defamatory falsehood should also be informed of the apology in an equally effective way.[81]

Thirdly, media as well as non-media defendants can be subject to an apology order. Media groups, including daily newspapers and periodicals, can be ordered to publish a statement and a public apology in an upcoming issue or publication. Non-media cases typically involve defendants engaged in political activities or competitors fighting over business. Significantly, in Central and Eastern-European jurisdictions, apologies have been employed as a way to challenge knowingly false attacks made by heads of state. Similar to the aforementioned example of the Czech President are the cases involving the Prime Minister of Slovakia.[82] In 2013, a Slovak District Court issued a ruling compelling Prime Minister Roberto Fico to publish an apology at his own expense in two newswires after calling his predecessor a liar and falsely accusing her of being involved in a corruption scheme linked to the construction of a biathlon stadium. According to the court, a plaintiff's name and reputation can only be cleansed by publishing a rectification and apology informing the general public that those suspicions are unfounded and accordingly untrue.[83] From the recipient's side, no limitations apply with

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[78] *Id.* at 1267.

[79] Rb. Amsterdam 7 Aug. 2008, ECLI:NL:RBAMS:2008:BD9783, par. 3.3 (Nl).

[80] MELIUS DE VILLIERS, *supra* note 28, at 174-75.

[81] Ronny Hauck & Christoph Ann, *Teil I. Grundlagen des Lauterkeitsrechts*, in MÜNCHENER KOMMENTAR ZUM LAUTERKEITSRECHT, at para. 189 (Peter W. Heermann, Jochen Schlingloff eds. 2014); Susanne Johanna Kissich, *§ 1330 ABGB, in* ABGB-ON - KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH, at para. 84 (Andreas Kletečka & Martin Schauer eds., 2016).

[82] In addition, some authors refer to a Kiev Court ordering Prime Minister Viktor Yanukovych to apologize publicly to a man whom he had insulted by using an obscenity. Brutti, *supra* note 16, at 133; Zwart-Hink, *supra* note 18, at 120. However, the official register of court decisions of Ukraine does not seem to contain this case (anymore).

[83] Okresný súd Pezinok ze dne 09.05.2013 [Decision of the District Court of Pezinok of 9 May 2013], 8C/254/2011. In an earlier case, in 2004, the appellate court of Bratislava affirmed a decision imposing Fico to apologize, after he had falsely accused the former minister of finance having acquired wealth upon the privatization of Slovak gas industry, while comparing him with an authoritarian prime minister in the 90s. Krajský súd v Bratislave ze dne 24.11.2004 [Decision of the Regional Court of Bratislava of Nov. 24, 2004], spravy.pravda.sk/domace/clanok/147001-fico-sa-musi-ospravedlnit-miklosovi. Roberto Fico, in his turn, makes use of the power of ordered apologies as well. A Slovak author refers to two cases in 2009 (against a tabloid daily, respectively semi-tabloid weekly), in which a court decided in favor of the Prime Minister as far as demanded apologies were concerned. ŠKOLKAY, *supra* note 71, at 105.

respect to the capacity of parties entitled to receive apologies in court. Obviously, there are inherent, natural restraints. Although some apology theorists submit that apologies to animals, plants, machines and deceased humans may have a deeper significance than first impressions might lead us to believe,[84] these types of apologetic statements would not enter the legal arena. Moreover, in some jurisdictions some specific restrictions apply. Under Bulgarian law on radio and television, public apologies may only be requested by citizens, i.e., natural persons.[85]

A fourth important feature of a court-ordered apology is that it cannot be accomplished without the defendant's participation. The necessity that the action be undertaken by the defendant distinguishes this remedy from some other forms of specific relief (such as a declaratory judgement).[86] Being aware of this essential, if not indispensable, need for collaboration with the adverse party, courts distinguish between various degrees of coerciveness. A recommended apology is less imperative. It signifies that an adjudicator simply suggests one or both parties to apologize, whether or not an apology is part of the formal judgement.[87] For example, in a Dutch case, the district court of Amsterdam did not impose an apology on the defendant, but merely suggested to voluntarily include an apology in the rectification of his false statements.[88] In contrast, formal apology orders are genuinely compelling. Such orders raise the issue of enforcement in case of non-compliance. In the past, diverse sanctions were employed, from imposing a fine which was payable to the State and adjustable in case of continued non-compliance[89] to sending the defendant to a jail or penitentiary until he complied.[90] Contemporary literature pays limited attention to this question.[91] However,

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[84] Those apologies would predominantly have a meaning for the apologizer. SMITH, *supra* note 37, at 126-28.

[85] Law on Radio and Television, Prom. SG. 138/24 Nov 1998, art. 16. Kolev & Petkova contrast the apology remedy from the right of reply, which is a relief available for legal entities and state and municipal bodies as well. BORIS E. KOLEV & TZVETELINA PETKOVA, MEDIA LAW IN BULGARIA 107, para. 406 (2015).

[86] Franz Bydlinski, *Methodological Approaches to the Tort Law of the ECHR*, TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS 120, para. 2/257 (Attila Fenyves et al eds., 2011).

[87] Van Dijck, *supra* note 2, at 578.

[88] Rb. Amsterdam 7 augustus 2008, ECLI:NL:RBAMS:2008:BD9783, para. 4.3.

[89] Olimpiad Ioffe, *The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*, SOVIET LAW REVIEW, A JOURNAL OF TRANSLATIONS, no. 7, 1962, at 54, 61; *see also* LEVITSKY, *supra* note 70, at 108, para. 13. Although LEVISTSKY contends that the pressure of the public opinion, channeled through appropriate organizations, might be more effective than a fine in compelling the offender.

[90] ZIMMERMAN, *supra* note 44, at 1090.

[91] Under Australian law, it is argued that non-compliance with a coercive order may result in fine or imprisonment of the defendant for contempt. As a consequence, court will take this into

from a private law perspective, there is little reason to treat non-compliance with apology orders differently from non-compliance with other forms of specific relief.

C. *Relation to Other Remedies*

Civil remedies for defamation include damages as well as specific relief. As mentioned earlier, court-ordered apologies belong to the category of non-pecuniary remedies, being one option amongst several alternatives (such as retraction and rectification, right of reply, publication of a court decision and declaratory judgement). To become fully aware of its singularities, court-ordered apologies ought to be defined in relation to those other types of non-pecuniary relief. Moreover, as monetary damages and non-pecuniary relief are available as joint remedies in several jurisdictions, it is also interesting to assess the relation to monetary compensation.

1. Non-Pecuniary Relief

It is generally acknowledged in defamation law that non-pecuniary relief is more typical in the continental U.S. than in common law.[92] However, various types of non-pecuniary remedies were proposed in the U.S. between the 1980s and 1990s. These proposals, put forward both by academics and lawmakers, focused on the introduction of declaratory judgement actions,[93] enforced retractions[94] or a combination of both.[95] Significantly, court-ordered apologies did not appear on the spectrum, although this legal tool shows some

account when an apology order is sought. Carroll, *supra* note 18 at 346; Carroll, *supra* note 18 at 373.

[92] In the same sense, see Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 952.

[93] Such as the declaratory judgement action. Marc A. Franklin, *Good Names and Bad Law: A* Critique *of Libel Law and a Proposal*, 5 J. MEDIA L. & PRAC. 91 (1984); *see also* Barett, *supra* note 9, at 110; Barbara Dill, *Libel Law Doesn't Work, But Can It Be Fixe, in* AT WHAT PRICE? LIBEL LAW AND FREEDOM OF THE PRESS 65 (Martin London & Barbara Dill. eds., 1993). See also the Schumer Bill (H.R. 2846), a bill proposed by Representative Schumer. Moore, *supra* note 9, at 86.

[94] Such as the appropriate retraction, suggested by Marc A Franklin in 1992. Franklin, *supra* note 9, at 74. In 1993, there was the Uniform Correction or Clarification of Defamation Act, which required the plaintiff to request correction or clarification of a defamatory statement in order to maintain the right to sue for defamation. Unif. Correction or Clarification of Defamation Act, § 3, 12 U.L.A. 291 (1993).

[95] Such as section 9-107 of the Model Communicative Torts Act (MCTA), which allowed a plaintiff to seek a declaratory judgement or a correction satisfactory to him. Hulme & Sprenger, *supra* note 5, at 160. The Annenberg Libel Reform proposal, which echoed the call for a declaratory judgment and ascribed a powerful role to retraction. The vindication action, proposed by Hulme, which would constitute an adjunct to current defamation remedies and would be available, on an elective basis, to all plaintiffs. Hulme & Sprenger, *supra* note 5, at 153.

deviant characteristics. Accordingly, this section sheds a light on the similarities and differences between court-ordered apologies and those other types of non-pecuniary relief. The overview is not exhaustive, as less-related remedies are left out of the scope of this analysis. This is the case for injunctions, which are invoked to enjoin further publication or spread of statements that have been judicially determined to be defamatory.[96] The same goes for criminal sanctions. In most continental legal systems, if an editor, publisher or author is found guilty, he may be sentenced to a criminal fine payable to the State in addition to civil damages to the aggrieved party.[97] Lastly, notwithstanding their uniqueness, mechanisms intertwining monetary and non-pecuniary relief, such as judicial orders (in Germany,[98] Poland,[99] South Africa,[100] Switzerland,[101] and Lichtenstein[102]) that require defendants to make a donation to a charitable or community purpose shall be disregarded.[103]

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[96] For Belgium, see DANIEL DE CALLATAŸ & NICOLAS ESTIENNE, LA RESPONSABILITÉ CIVILE. CHRONIQUE DE JURISPRUDENCE 1996-2007, VOLUME 2, LE DOMMAGE 481 (2011). For Germany, see Gerald Spindler, *BGB § 253 Immaterieller Schaden, in* BECKOK BGB, at para 4 (Georg Bamberger et al eds., 44th ed. 2017). For Hungary, see 2013. évi V. törvény. a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code), s. 2:51 (1)(b). For Poland, see LUDWICHOWSKA-REDO, *supra* note 72, at 250. In U.S. law, this remedy cannot succeed against First Amendment concerns. Near v. Minnesota, 283 U.S. 97 (1931); *see* JAMES A. HENDERSON JR. ET AL, THE TORTS PROCESS 816 (9th ed. 2017); Moore, *supra* note 9, at 86.

[97] For Belgium, see Book II, Chapter V, Section VIII of the Criminal Code. For France, see Art. 35-41 of the Loi du 29 juillet 1881 sur la liberté de la presse [Law of Jul. 29, 1881 on the Freedom of the Press of 29 Jul. 1881], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jul. 30, 1881, p. 4201.

[98] In a case before the *Landesgerichtshof* of Berlin, a defendant who was found guilty of insult was, upon request of the insulted party, ordered to make a payment of DM 30,000 to a charitable institution (the Protestant Church of Berlin-Brandenburg). Landesgericht [LG] [Regional Court] Berlin, May 30, 1961, 8 O 61/61; *Ssee* Stoll, *supra* note 45, at 89, para. 95.

[99] Section 448 of the Polish Civil Code of 1964 provided that in case of an intentional infringement of personal rights (including defamation) "the injured party may claim from the perpetrator the donation of an appropriate sum of money to the Polish Red Cross." WENCESLAS WAGNER, OBLIGATIONS IN POLISH LAW 259 (1974). This article was changed in the sense that the appropriate amount of money had to be paid for a social cause chosen by him (see article 24 and 448 of the actual civil code). *See* Dorota Głowacka & Beata Konieczna, *The effectiveness of redress mechanisms: case study. Poland, in* RELOADING DATA PROTECTION: MULTIDISCIPLINARY INSIGHTS AND CONTEMPORARY CHALLENGES 25 (Serge Gutwirth et al eds, 2014).

[100] MELIUS DE VILLIERS, *supra* note 43, at 175.

[101] Werly, *infra* note 153, at 99.

[102] Under Art. 40, para. 3 of the Code for Persons and Companies, a court can compel a defendant to grant a sum of money, upon designation of the injured person, to a charitable foundation, a poor people's fund, and the like. Personen- und Gesellschaftsrecht [PGR] [Code of Persons and Companies] vom 20. Jan. 1926, LGBL 1926 no 4, art. 40, para. 3 (Li.).

[103] Although one would consider a donation to a good cause to be more neutral than a court-ordered apology, the reverse can be true. In a Polish case before District court in Lublin, a left-wing politician sued a right-wing politician for defamatory remarks. He demands the court to impose an apology order on defendant as well as an order to pay a sum of the association of former communist

(i) *Retraction or Rectification*

An instruction to retract or rectify a defamatory statement is the most common method used to deal with injurious falsehoods in the continental-European legal tradition.[104] Very often, an explicit legal provision allows plaintiffs to pray for judgements ordering newspapers, broadcasters or other media outlets to retract or rectify their statements.[105] If not, courts make use of a more general legal basis.[106] Common law systems are familiar with this tool as well,[107] but not as a separate cause of action.[108] Apologies are considered a defense[109] or a mitigating factor in calculating the damages.[110] Whereas retraction signifies that the defendant revokes a false and misleading statement, rectification means an acknowledgement of the untruthfulness of the defamatory material and a correction of the facts by including further

soldiers. As a donation to this cause would be too painful for defendant, the court only issues an apology order. Sąd Okręgowy w Lublinie z dnia 5 września 2007 [Decision of the District Court of Lublin of Sept. 5, 2007), I C 460/06.

[104] Carrol & Berryman, *supra* note 1, at 481; CARTER-RUCK, *supra* note 12, at 413; Maryann McMahon, *Defamation Claims in Europe: A Survey of the Legal Armory*, 19 COMM. L. 24, 24 (2002).

[105] For the Netherlands, see the right to rectification, dictated by article 6:167 of the Dutch Civil Code. Nevertheless, a court may also order a rectification as a damages remedy under the basic provision for liability, article 6:162 of the Civil Code. For Italy, see art. 8 of the Italian Press Act (Art. 8 Legge 8 febbraio 1948, n. 47, G.U. Feb., 20, 1948, n. 43). For Switzerland, see article 28a of the Swiss Civil Code (SCHWEIZERISCHES ZIVILGESTZBUCH [ZGB], CODE CIVIL [CC], Codice Civile [CC] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 28a). For the Baltic States, see section 1047 of the Estonian Law of Obligations Act (Võlaõigusseadus [Law of Obligations Act], Vastu võetud 26.09.2001, § 1047), article 2352 of the Lavian Civil Law (Latvijas Republikas Civillikums [Latvian Civil Law] art. 2352) and article 2.24 (2) of the Civil Code of The Republic of Lithuania (Lietuvos Respublikos Civilinio Kodekso [Civil Code of The Republic of Lithuania], 2000 m. liepos 18 d. Nr. VIII-1864, art. 2.24 (2)). For Russia, see article 152, para. 1 of the Russian Civil Code (Grazhdansky kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art 152, para. 1). For Slovenia, see Obligacijski zakonik [OZ] [Obligation Code] Št. 001-22-117/01, art. 178. For Spain, see article 1 of the Retraction Act (Retraction Act art. 1 (B.O.E 1984, 7248)).

[106] For Austria, see section 1330 of the Civil Code which provides for a claim for retraction and publication (*den Anspruch auf Widerruf und Veröffentlichung*). *See also* Kissich, *supra* note 81, at para. 83. For Germany, see Section 1004 of the Civil Code. *See also* Christian Baldus, *BGB § 1004 Beseitigungs- und Unterlassungsanspruch*, in MÜNCHENER KOMMENTAR ZUM BGB, at para 32 (F.-J. Säcker & Roland Rixecker eds., 2017) and Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT'L. L. 283, 289 (1999-2000).

[107] Over half the states have retraction statutes, making retraction the most common form of defamation legislation. These statutes suggest that voluntary retraction compensates the defamation victim better than an award of money damages. Moore, *supra* note 9, at 84.

[108] Bruns, *supra* note 106.

[109] *Id.*

[110] Cal. Civ. Code § 48a (West 2010); HENDERSON, *supra* note 96, AT815.

information.[111] Both are characterized by a wide discretion of the trial court in determining the wording (often on the basis of a draft suggested by plaintiff) and method (e.g., layout and choice of newspaper).[112] In some jurisdictions, this remedy is even dissociated from the conditions for liability and granted to all persons claiming an infringement of their personality rights, regardless of the fulfilment of the requirements of fault.[113]

Court-ordered apologies are closely connected with retraction or rectification, as the latter remedy is generally contemplated as one of components or building blocks of an apology order (*cf. supra*). In addition, both remedies can also be linked to each other on a procedural level: a common method to obtain a court-ordered apology is by demanding a retraction or rectification that includes publication of an apology.[114] A Dutch author calls these orders "affirmation-apologies."[115] The apology component adjoins an acknowledgment of wrongdoing and an act of contrition to the retraction or rectification.[116] Where some jurisdictions (such as the Netherlands) display an openness for affirmation-apologies, other legal systems firmly resist this remedy (such as Germany and Cyprus[117]). In a case heard by the German Federal Court of Justice, a plaintiff complaining about an infringement on his dignity sought retraction of some offensive statements

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[111] Carrol & Berryman, *supra* note 1, at 481; Aurelia Colombi Ciacchi, *Case 1: The corrupt politician. Italy, in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW 108-109 (Gert Brüggemeier et al eds., 2010).

[112] ARTHUR HARTKAMP & CARLA SIEBURGH, MR. C. ASSERS HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT. 6. VERBINTENISSENRECHT. DEEL IV. DE VERBINTENIS UIT DE WET, at para. 301 (2011); Siewert D. Lindenbergh, *Commentaar op art. 6:167 BW*, TEKST & COMMENTAAR BURGERLIJK WETBOEK, at para. 2.c (2017).

[113] For Italy, see Colombi Ciacchi, *supra* note 111, at 75. For Estonia, see Section 1047 of the Law of Obligations providing for the refutation of the information or publication of a correction at the defendant's expense, regardless of whether the disclosure of the information was unlawful or not (Võlaõigusseadus [Law of Obligations Act], Vastu võetud 26.09.2001, § 1047). In Switzerland, a party whose personality rights have been violated, may also claim a rectification, publication of the court decision under article 28 of the Civil code, without being required to prove fault or the seriousness of the infringement. Tribunal federal [TF] [Federal Supreme Court] Sept. 23, 2004, 131 ARRÊTS DU TRIBUNAL FÉDÉRAL [ATF] III 26, at para. C.12.2.1.

[114] Johann Neethling & Johan Potgieter, *The Law of Delict*, 2011 ANN. SURV. S. AFRICAN L. 747, 799 (2011); Zwart-Hink, *supra* note 18, at 111. A South African High Court directed the defendant to publish an unqualified public statement retracting and apologizing for the publication. University of Pretoria v South Africans for the Abolition of Vivisection 2006 ZAFSHC 65 (OPD) at para 1 & 18 (S.Afr.).

[115] Van Dijck, *supra* note 2, at 568.

[116] Brutti, *supra* note 16, at 136.

[117] An aggrieved party demands the court to order a newspaper to publish a statement including an apology. The Supreme Court of the Republic of Cyprus holds that this statement savors of an apology, which is outside the ambit of the right to rectification, as the aim is to give to readers the opportunity to read a truthful version of the facts. Hadjidemetriou v. Telegraphos Publishing Company Ltd and Another [1983] 2 CLR 268; *see* COSTAS STRATILATIS, ACHILLES EMILIANIDE, MEDIA LAW IN CYPRUS 54, para. 150 (2015).

in two letters written by the defendant. The Federal Court of Justice upheld the decision of the lower court denying this request.[118] If a party is offended by an insult, he may ask for an apology, and if the offender fails to oblige, the offended party may file criminal proceedings for insult.[119] However, a civil lawsuit enabling parties to seek retraction of merely offensive words does not exist under German law. Thus, a demand for retraction or rectification can never serve as a means to provide satisfaction to the injured party or to restore their sense of justice.[120] This decision masks another important distinction between these two forms of non-pecuniary relief. In various jurisdictions, the injured party can only demand retraction of untrue factual statements, not of value judgments, even if they are mere nonsense.[121] Croatian law, which embraces both remedies, embeds this distinction unambiguously in its Media Act. Article 22, paragraph 1 of this Act points to the publisher's apology as a substitute for a rectification, if correction of the injurious falsehood is not possible.[122]

Although a joint instruction for apology and retraction or rectification is possible, both remedies are not inseparable from one another. Under most circumstances, courts issue an order to publicly retract or rectify a statement without including an expression of regret, remorse or sorrow.[123] The opposite scenario is also plausible, but less common: defendants are compelled to apologize without being ordered to retract or rectify their statements (such as in the South African case, *Le Roux v. Dey*).[124]

(ii) *Right of Reply*

A right of reply means that a person is entitled to react to inaccurate factual statements in the media which affect his rights.[125] This enables him to rectify factual elements or to defend himself against defamation and

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[118] Bundesgerichtshof [BGH] [Fed. Ct. of Justice] June 17, 1953, Neu Juristische Wochenschrift [NJW] 1386, 1953 (Ger.)"

[119] *Id.*

[120] Bundesgerichtshof [BGH] [Federal Court of Justice] June 17, 1953, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1386, 1953 (Ger.). In an earlier judgment, it even decided that a retraction may never be associated with an apology. Oberster Gerichtshof für die Britische Zone [OGH] [Supreme Court for the British Zone] Oct. 1, 1948, I ZS 25/48.

[121] For Germany, see Hauck & Ann, *supra* note 81, at para. 189. For the Netherlands, see Constant van Nispen, *Commentaar op art. 6:167 BW*, *in* GROENE SERIE ONRECHTMATIGE DAAD, at para. A.2 (2017).

[122] Zakon o medijima [Media Act], NN 59/04, 84/11, 81/13, art. 22, para. 1.

[123] Brutti, *supra* note 15, at 136.

[124] In this judgement of the South African Constitutional Court, defendants were ordered to apologize to claimant (along with the payment of money damages), but this did not include a retraction. *Le Roux v. Dey* 2011 (3) SA 274 (CC) at para. 203 (S. Afr.); *see also* Descheemaeker, *supra* note 33, 916.

[125] Scott, *supra* note 7, at 60.

accordingly, to reestablish the truth.[126] In the continental-European tradition, various jurisdictions (i.e., Austria,[127] Belgium,[128] France,[129] Germany[130] and Switzerland[131]) have enacted statutory rules concerning the right of reply. These rules determine the period within which a reply should be made (for example, three months) as well as the modalities of publication (such as: free of charge, without undue delay, with the same prominence as was given to the original statements).[132] Strictly speaking, the right of reply is not a defamation remedy, because it does not depend on any fault committed by the newspaper or journalist. Even legitimate or objective information can give rise to a right of reply.[133] The underlying idea is to enable anyone who is affected by a factual statement to communicate his or her views on the issue, without prejudice to other remedies.[134] Therefore, if the strict formal requirements are followed, the press can publish the statement without any prior authorization of a court.[135]

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[126] Frederik Swennen & Britt Weyts, *Case 1: The Corrupt Politician. Belgium*, PERSONALITY RIGHTS IN EUROPEAN TORT LAW 80 (Gert Brüggemeier et al eds., 2010).

[127] See the *Gegendarstellung* under section 9, subs. 1 of the *MedienGesetz.* BUNDESGESETZ ÜBER DIE PRESSE UND ANDERE PUBLIZISTISCHE MEDIEN [MEDIENG] [COMMUNICATION MEDIA ACT] BUNDESGESETZBLATT [BGBl] No. 314/1981, as amended, § 9 ¶ 1, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000719.

[128] See art.1 of the Law concerning the Right of Reply. Wet betreffende het recht tot antwoord [Law Concerning the Right of Reply] of June 23, 1963, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], July 8, 1961, http:www.staatsblad.be; *see also* Caroline Cauffman & Britt Weyts, *Privaatrecht en rechtshandhaving, in* PREADVIEZEN 2009, at 336 (Vereniging voor de vergelijkende studie van het recht van België en Nederland ed., 2009).

[129] See article 13 of the Press Act. Loi du 29 juillet 1881 sur la liberté de la presse [Law of Jul. 29, 1881 on the Freedom of the Press of 29 July 1881], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, at 4201.

[130] See *Gegendarstellungsrecht*, codified in the press Acts of the German *Länder*. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 6, 1976, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1198 (Ger.); *see also* Axel Halfmeier & Karl-Nikolaus Peifer, *Case 1: The corrupt politician. Germany, in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW 98 (Gert Brüggemeier et al eds., 2010).

[131] *See* SCHWEIZERISCHES ZIVILGESTZBUCH [ZGB], CODE CIVIL [CC], Codice Civile [CC] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 28g.

[132] Scott, *supra* note7, at 60.

[133] *See* Agnes Lucas-Schlötter, *Case 1: The Corrupt Politician. France*, *in* PERSONALITY RIGHTS IN EUROPEAN TORT LAW 96 (Gert Brüggemeier et al eds., 2010).

[134] Hauck & Ann, *supra* note 81, at para. 190; *see* Hof van beroep [HvB] [Court of Appeal] Gent, Mar. 14, 1995, AUTEURS & MEDIA [A&M] 1996, 159 (Belg) and CALLATAŸ & ESTIENNE, *supra* note 96, at 482.

[135] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 6, 1976, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1198 (Ger.); *see* Axel Halfmeier & Karl-Nikolaus Peifer, *Case 1: The Corrupt Politician. Germany*, PERSONALITY RIGHTS IN EUROPEAN TORT LAW 98 (Gert Brüggemeier et al eds., 2010).

Notwithstanding the common objective of reestablishing the truth, some remarkable differences can be observed between court-ordered apologies and the right of reply. First, unlike apologies, which put a burden on the defendant to acknowledge the untruthfulness and express feelings of regret, the plaintiff has full control over his right of reply. This is both a weakness and a strength at the same time. On the one hand, the reinforcement of a social symbolism between the defamer and the injured party is lacking. On the other hand, it is up to plaintiff to decide how the reply shall be phrased without involving a court.[136] Moreover, as the conditions, modalities of insertion and procedures are laid down in the law, the right of reply implicates a lower threshold and is much faster.[137]

(iii) *Publication of a Court Decision*

Publication of a court decision at the expense of the defendant constitutes another common method of non-pecuniary relief. This remedy aims to generate some media exposure and publicity about a judgment awarding damages for reputational harm. Giving publicity to a judgment may convince some people of the falsity of the defamatory statements and restore the plaintiff's reputation in their eyes.[138] The forum and manner in which the publication takes place differs from case to case (*in extenso* or by extract, and only in the periodical which disseminated the harmful information or in several periodicals, etc.).[139] Sometimes, the remedy is referred to more broadly, such as "*an appropriate public disclosure*"[140] or "*communication to third parties*."[141] Jurisdictions unfamiliar with instructions to retract or rectify false statements (such as France and Belgium) consider publication of court decisions as a particularly suitable remedial tool.[142] In other legal systems,

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[136] Dirk Voorhoof, *Het recht van antwoord in België; een inspirerend voorbeeld voor Nederland? Deel II*, MEDIAFORUM 2001, at 160, para. 24.

[137] *Id.*

[138] COLLINS, *supra* note 3, at 372, para. 19.46.

[139] CALLATAŸ & ESTIENNE, *supra* note 96, at 481. Hence, in some circumstances, there is only a vague line between this remedy and a rectification-order. For instance, a court instructs the publication of the decisive part of a judgement, accompanied by the publication of pictures of a building, clearly indicating the name of the architect whose personality rights were violated. Hof van beroep [HvB] [Court of Appeal] Antwerpen, Sept. 25, 2000, TIJDSCHRIFT VOOR BELGISCH BURGERLIJK RECHT [TBBR] 2001, 618 (Belg.).

[140] 2013. évi V. törvény. a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code), s. 2:51 (1) (c) (Hung.)

[141] SCHWEIZERISCHES ZIVILGESTZBUCH [ZGB], Dec. 10, 1907, SR 210, RS 210, art. 28a.

[142] For Belgium, see Erna Guldix & Annelies A. Wylleman, *De positie en de handhaving van persoonlijkheidsrechten in het Belgisch Privaatrecht*, 36 TIJDSCHRIFT VOOR PRIVAATRECHT [TPR] 1589, 1655, para. 45 (1999); Patrick Wéry, *Les condamnations non pécuniaires dans le contentieux de la responsabilité. Rapport belge*, *in* LE DOMMAGE ET SA RÉPARATION DANS LA RESPONSABILITÉ CONTRACTUELLE ET EXTRACONTRACTUELLE 61 (Bernard Dubuisson & Patrice Jourdain eds.,

both remedies are applied alternatively or independently, whether[143] or not[144] the remedy has an explicit statutory grounds.

Publication of a court decision shows some resemblance to the court-ordered apology.[145] However, like the right of reply, the burden is on the plaintiff to restore his reputation. Moreover, a sense of contrition is lacking. To curb these shortcomings, a joint instruction of apology and a publication of a court ruling is conceivable. This is demonstrated in a Slovenian case[146] in which a weekly newspaper compared the family of a well-known Slovenian politician with the Goebbels's family by printing photographs of both families next to each other, in the same style and layout. After finding a violation of the politician's personality rights, the appellate court yielded a verdict ordering the publication of its decision as well as an apology from defendant to plaintiff.[147]

(iv) *Declaratory Judgment*

A declaratory judgment is a form of specific relief, enabling a court to approve or disapprove certain remedial acts. In defamation cases, this comes down to a determination of whether a statement made by a defendant is

2015). For France, see RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL. TOME IV 161, para 490 (1924); RENÉ DEMOGUE, DE LA RÉPARATION CIVILE DES DÉLITS 44-47 (1898); Patrice Jourdain, *Les droits de la personnalité à la recherche d'un modèle: la responsabilité civile*, GAZETTE DU PALAIS, May 19, 2007, at 52; HENRI MAZEAUD ET AL., TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE, III, 636, para. 2319 (6e ed. 1978). *See* Cour de Cassation [Cass.] [Supreme court for judicial matters] 1re civ., Dec. 16, 2000, Bull. civ. I, No. 321.

[143] For Italy, see art. 9 Legge 8 febbraio 1948, n. 47, G.U. Feb., 20, 1948, n. 43. For Lichtenstein, see Personen- und Gesellschaftsrecht [PGR] [Code of Persons and Companies] vom 20. Jan. 1926, LGBL 1926 no 4, art. 40, para. 3. For Switzerland, *see* SCHWEIZERISCHES ZIVILGESTZBUCH [ZGB], CODE CIVIL [CC], Codice Civile [CC] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 28a. In addition**,** publication of a court decision is considered as one of the methods to provide satisfaction under art. 49, par. 2. Werly, *infra* note 153, at 99; Franz Werro, *Case 1: The Corrupt Politician. Switzerland*, PERSONALITY RIGHTS IN EUROPEAN TORT LAW 139 (Gert Brüggemeier et al eds., 2010).

[144] For the Netherlands, see Bloembergen, *supra* note 8, 338-339; ARTHUR HARTKAMP & CARLA SIEBURGH, MR. C. ASSERS HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT. 6. VERBINTENISSENRECHT. DEEL II. DE VERBINTENIS IN HET ALGEMEEN, at para. 21 (2009).

[145] A Swiss author even considers the publication of a court ruling as the successor of the retraction, declaration of honor and apology. Wilhelm Rötelmann, *Nichtvermögensschaden und Persönlichkeitsrechcte nach schweizerischem Recht*, 160 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 366, 393 (1961).

[146] Obligacijski zakonik [OZ] [Obligation Code] Št. 001-22-117/01, art. 178 (Slov.).

[147] Višje sodišče v Ljubljani [Appellate Court of Ljubljana] Feb. 12, 2014, I Cp 3057/2013 (Slov.), this decision was affirmed by the Supreme Court (Vrhovno sodišče Republike Slovenije [Supreme Court of the Republic of Slovenia] Sept. 10, 2015, II Ips 97/2015 (Slov.).

defamatory or not.[148] In some jurisdictions, an action for declaratory relief can be initiated *ex ante*. If a plaintiff files such an action, a mere finding by the court that certain conduct infringes on a right will prevent the other party from infringing on that right.[149] However, a declaratory judgement is most often prayed for *ex post*, once the violation has been committed or statements have been made.[150] As a type of restitution in kind,[151] it is the judicial disapproval itself which gives plaintiff satisfaction.[152] Therefore, no additional monetary compensation is granted.[153] This explains the core distinction between declaratory judgment and publication of a court decision. In the former case, the trial court requires the publication of a ruling which awards monetary compensation. In the latter case, the court assumes that the harm is remedied by a declaratory judgment of unlawfulness.

2. Monetary Damages

The relationship between court-ordered apologies and monetary compensation can take two different forms: apologies can be issued either as an alternative to or in conjunction with an award for damages.[154] Sometimes it is left to the adjudicator to decide whether this remedy should serve as a substitute or an addition to a monetary award. For example, in Switzerland,

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[148] ALEŠ ROZEHNAL, MEDIA LAW IN THE CZECH REPUBLIC (2d ed. 2016), 50-51, para. 89; Stoll, *supra* note 67, 86, par. 93.

[149] For Belgium, see Caroline Cauffman & Britt Weyts, *Privaatrecht en rechtshandhaving*, PREADVIEZEN 303, 338 (Vereniging voor de vergelijkende studie van het recht van België en Nederland ed., 2009).

[150] For Czech Republic, see ROZEHNAL, *supra* note 146, at 50-51, para. 89. For Hungary, see 2013. évi V. törvény. a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code), s. 2:51 (1) (c). For Poland, see Bydlinski, *supra* note 86, at 120, at para. 2/257 and LUDWICHOWSKA-REDO, *supra* note 72, at 250. In Switzerland, a declaratory judgment is considered as one of the special measures of satisfaction within the meaning of CO art. 49 par. 2. Werro, *supra* note 143, at 139. Significantly, in Germany, practice and prevailing doctrine have not yet endorsed the concept of a declaratory judgment action. *See* Bruns, *supra* note 108, at 290; Hans Stoll, *Band I – Teil I: Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden?*, VERHANDLUNGEN DES FÜNFUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES 140-142 (1964).

[151] Bydlinski, *supra* note 86, at 120, at para. 2/257; LUDWICHOWSKA-REDO, *supra* note 72, at 250.

[152] *See* "*the finding by a judge that some statement is untrue and is violating plaintiff's personality rights can serve as a means to restore the reputational harm*" (Bundesgericht [BGer] [Federal Supreme Court] Dec. 14, 1978, 104 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 225.

[153] Werro, *supra* note 141, at 139. In 1937, the Swiss Supreme Court acknowledges the judicial disapproval in the form of a federal declaratory action. Once a court has established the falsity of a statement, it is doubtful whether the victim is still eligible for a monetary satisfaction. In the case at hand, the court comes to a negative answer. Bundesgericht [BGer] [Federal Supreme Court] June 22, 1937, 63 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 184.

[154] Carroll, *supra* note 20, at 337.

according to article 49 al. 2 of the Code of Obligations, a judge may, on the basis of his judicial discretion, impose a retraction or apology *in addition to* or *in lieu of* monetary damages.[155]

Most often, apologies are ordered as an adjunct to monetary compensation.[156] Such is the case where legislation expressly allows for the accumulation of non-pecuniary relief, including apology orders, with monetary compensation (such as in Bulgaria[157] or Poland[158]). This also occurs when legislation stipulates that a person is also entitled to monetary compensation when moral satisfaction appears to be insufficient (such as in Slovakia).[159] In other jurisdictions (such as Slovenia or South Africa), courts display a willingness to yield verdicts cumulating the payment of damages and issuance of apologies,[160] notwithstanding statutory uncertainty about whether both remedies can actually be combined.[161]

The significant debate over the relation between monetary relief and court-ordered apologies has ensued for decades. For instance, in the course of the late *ius commune*, it was controversial whether *amende honorable* and

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[155] Obligationenrecht [OR], Code des Obligations [CO], Codice Delle Obligzioni [CO] [Code of Obligations], Mar. 30, 1911, SR 220, RS 220, art. 49, para. 2 (Switz.).See also Stéphane Werly, *Le tort moral en cas d'atteinte à la personnalité par la voie des médias, in* LE TORT MORAL EN QUESTION, JOURNÉE DE LA RESPONSABILITÉ CIVILE 79, 99 (Christine Chappuis & Bénédict Winiger eds., 2012). The same goes for Lichtenstein, see Personen- und Gesellschaftsrecht [PGR] [Code of Persons and Companies] vom 20. Jan. 1926, LGBL 1926 no 4, art. 40, para. 3 (Li.).

[156] The Croatian Media Act is somewhat an outlier because it considers a demand for rectification and apology as a prerequisite for an indemnification action (art. 22 (2) of the Media Act): only the persons who previously requested the publisher to publish a rectification or apology shall have the right to file a claim for compensation. PETAR SARCEVIC & IVANA KUNDA, FAMILY LAW IN CROATIA 94, para. 135; Aldo Radolovic, *Right on Personality in the New Law on Obligations*, 27 ZB. PRAV. FAK. SVEUC. RIJ. 129, 133-134 (2006).

[157] Art. 16, para. 3 of the Law on Radio and Television states: "[R]adio and television operators shall owe a public apology to the affected person. This shall not deprive that person of the right to seek compensation before a court." *See also* KOLEV & PETKOVA, *supra* note 85, at 107, para. 407.

[158] Kodeks cywilny [Civil code], Dz.U. 1964 nr 16 poz. 93, § 24 (Pol.); *see also* LUDWICHOWSKA-REDO, *supra* note 72, at 250.

[159] Občiansky zákonník [Civil Code], Zákon č. 40/1964 Zb., § 13.

[160] For Slovenia, *see* Višje sodišče v Ljubljani z. dne 12.02.2014 (VSL) [Decision of the Appellate Court of Ljubljana of Feb. 12, 2014], I Cp 3057/2013 (Slov.). For South Africa, *see Le Roux v Dey* 2011 (3) SA 274 (CC) at para. 203 (S. Afr.).

[161] In Slovenia, the Obligation Code even gives the impression that apologies and other forms of specific relief are alternatives to awards for damages, because they are required to "*do anything else through which it is possible to achieve the purpose achieved via monetary compensation.*" Obligacijski zakonik [OZ] [Obligation Code] Št. 001-22-117/01, art. 178. Although there was some dispute on this matter in the past, in South Africa, a plaintiff can join in one summons a claim for retraction and for apology together with an action for monetary damages. Burchell, *supra* note 68, at 198; JONATHAN M. BURCHELL, THE LAW OF DEFAMATION IN SOUTH AFRICA 11-12 (1985); MELIUS DE VILLIERS, *supra* note 28, at 175.

amende profitable could be combined.[162] An *amende profitable* suggested that amends were made by way of damages. As this remedy was primarily penal in nature (*poenalis*),[163] consolidation was only possible if the *amende honorable* also focused on the reparation of the injured party's honor (*rei persecutoria*),[164] and did not intend to hurt or humiliate the perpetrator (*poenalis*). At that time, there were opposing views on this matter.[165]

Yet there are two scenarios in which court-ordered apologies can conceivably act as a substitute for monetary compensation. First, a substitution may occur when the defamed party has suffered losses which are not serious enough to justify monetary compensation. One could think about minor or mild infringements of personality rights.[166] Second, if a court grants the perpetrator the choice between paying the total amount of damages or reducing them (in full or in part) by taking back his words and apologizing to the plaintiff, the defendant may opt to substitute for the latter [167] For instance, in a South African case, the high court decided that the order to award the plaintiff monetary compensation shall take effect only if the defendant fails to publish an apology in a full-page advertisement in the Business Day newspaper within ten days of the date of the order.[168]

III. CURRENT STATE OF THE WESTERN LEGAL TRADITION

A. *Continental Legal Systems*

Although this article refers to continental legal tradition as a prototype to demonstrate the promise of court-ordered apologies implemented in the Western legal culture, the record should be set straight and expectations not placed too high. While some jurisdictions have taken additional steps to provide court-ordered apologies as a form of specific relief, the impact of this remedy is still limited.[169] Court-ordered apologies are one option among

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[162] ZIMMERMAN, *supra* note 44, at 1073. With respect to Roman-Dutch law, MElius de Villiers asserts that *amende profitable* and *amende honorable* could be joined in one summons. MELIUS DE VILLIERS, *supra* note 28, at 175.

[163] EDWARD POSTE, ELEMENTS OF ROMAN LAW BY GAIUS 458 (3d. ed. 1890).

[164] PATRICK MAC CHOMBAICH DE COLQUHOU, 3 A SUMMARY OF THE ROMAN CIVIL LAW 430 (1854).

[165] ZIMMERMAN, *supra* note 44, at 1073.

[166] REPUBLIC OF LATVIA SUPREME COURT, *supra* note 30, 41; *see also* Wannes Vandenbussche, *Bagatelschade*, 81 RECHTSKUNDIG WEEKBLAD [RW] 322, 322 (2017-2018).

[167] Brutti, *supra* note 16, at 141; Descheemaeker, *supra* note 33, at 916.

[168] Mineworkers Investment Co (Pty) Ltd v. Modimane 2002 (6) SA 512 (WLD) at para. 33 (S. Afr.); *see also* Van Niekerk v Jeffrey Radebe, discussed by Johann Neethling, *Die Amende Honorable (Terugtrekking en Apologie) as Remedie by Laster - Resente Ontwikkeling in die Regspraak*, 42 DE JURE 286, 293 (2009).

[169] Werly, *supra* note 155, at 99.

other types of non-pecuniary relief and should be expressly sought by the plaintiff. Notwithstanding this rather modest role, the continental legal tradition shows two tendencies which deserve further analysis: (i) a disparity between the Romano-Germanic legal systems, and (ii) a continuity in the Central and Eastern-European legal systems.

1. Disparity Between Western-European Legal Systems

The term "disparity" defines the mixed picture that Romano-Germanic legal systems present. Although apology orders have disappeared in some influential jurisdictions (such as France and Germany), they are still employed in others (such as Switzerland and the Netherlands). However, all major jurisdictions were familiar with apology orders in the past.

In France, after the *amende honorable* emerged in the second half of the 14th century,[170] the remedy was included in the Penal Code of 1810. Under article 226 and 227 of that Code, courts were authorized to impose an *amende honorable* in case of contempt of magistrates, juries, ministerial officers or law enforcement officers in the exercise of their functions. Pursuant to these articles, an insulted public servant could demand either a formal written apology or declaration of honor to be made before the court. [171] In Germany, after apologies arose in customary law, the Prussian Code of 1796 (*Preußische Allgemeine Landrecht*) provided for private satisfcation as part of a criminal punishment for intentional attacks on the honor of others, consisting of a declaration of honor (*Ehrenerklärung*), a formal and emphatic reprimand in the presence of the offended (*richterlichten Verweis im Gegenwart des Beleidigten*) and apologies (*Abbitte*).[172] In case a superior was severely insulted by a servant, apprentice or subordinate, the latter could even be compelled to receive the reprimand in a kneeling position.[173]

However, not so many years after their enactment, court-ordered apologies were again abolished.[174] In France, the *amende honorable* was abrogated by the law of December 28, 1894, which repealed articles 226 and

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[170] In 1357, the Latin term *emenda honorabilis* is mentioned in the registers of the *Parlement de Paris,* the most important provincial appellate court of the *Ancien Regime* (Hallebeek & Zwart-Hink, *supra* note 27, at 202).

[171] MAZEAUD, *supra* note 140, at 637, para. 2320

[172] Ekkehard Kaufmann, *Dogmatische und rechtspolitische Grundlagen des § 253 BGB*, 162 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 421, 430 (1963); Otto Küster, *Pona aut satisfactio*, 9 JURISTENZEITUNG [JZ], no. 1/2, 1954, at 1, 4.

[173] Stoll, *supra* note 67, at 92, para. 98.

[174] This is described by Liepmann in a refined way: "Das Mittelalter hat diese Maβregeln zur allgemeinen Herrschaft gebracht, aber die Luft der neuen Zeit hat sie fast durchweg aus den Gesetzbüchern hinweggefegt." Liepmann, *supra* note 45, at 934.

227 of the Penal Code.[175] In Germany, statutory provisions regarding the declaration of honor, the judicial reprimand and the apology had an even shorter lifespan. They were removed from the law as early as 1811.[176] Looking at the inherent justifications for the disappearance of court-ordered apologies, one could first point at their punishing and humiliating nature,[177] which courts no longer regarded as desirable. Moreover, French scholars[178] and case law[179] consider apology orders harmful to the individual freedom of parties.[180] Particularly in the German legal system, there was an increased aversion toward the idea of private satisfaction.[181] This so-called private satisfaction was thought to encourage new insults and excessive litigation.[182] Instead, the prevailing view was to strive for a strict separation between civil wrongs and criminal offenses, with the aim of keeping moralizing and punishing elements out of the law of damages.[183] This resulted in a double system with private law remedies aimed at damages, and criminal prosecution aimed at revenge and punishment.[184] As a consequence, the only role (spontaneous) apologies played in contemporary French and German law affected the court's assessment of damages. More precisely, a court could

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[175] MAZEAUD, *supra* note 140, at 637, para. 2320

[176] Georg Bamberger, *BGB § 12 Namensrecht*, *in* BECK'SCHER ONLINE-KOMMENTAR BGB, at para. 321 (Georg Bamberger et al eds., 43d ed. 2017); Kaufmann, *supra* note 172, 430. According to Zimmerman, the Penal Code of 1872 sounded the ultimate death knell for court-ordered apologies as a legal remedy. ZIMMERMAN, *supra* note 44, at 1089. In Switzerland**,** the *Klage auf Ehrenerklärung, Abbitte oder Widerruf* disappeared during that period. Only in the canton Obwalden, the remedy was still available in 1906 as part of the cantonal law. However, it was not included in the *Entwurf eines schweizerischen Strafgesetzbuchs*. Liepmann, *supra* note 45, at 934.

[177] *See* Liepmann, *supra* note 45, at 932; Rötelmann**,** *supra* note 145, at 393; ZIMMERMAN, *supra* note 44, at 1090; *see also* Burchell, *supra* note 161, at 11-12; MELIUS DE VILLIERS, *supra* note 30, at 178. Only very exceptionally it was argued that these declarations were intended to rehabilitate the aggrieved person in its own feelings and in the eyes of third parties. Liepmann, *supra* note 45, at 932.

[178] DEMOGUE, *supra* note 140, at 163, para 490; MAZEAUD, *supra* note 140, at 637, para. 2320.

[179] Tribunal d'instance [Trib. inst] [district court] Metz, Jul. 1, 1958, D. 1959, somm. 5.

[180] There are some exceptional cases in which a court decides to hamper the individual freedom of parties, for example, by ordering a company to omit a passage of a film and replacing it by a comment. Cour d'appel [CA] [regional court of appeal] Paris, Jan. 5, 1972, D. 1972, 445, note Dutertre.

[181] Hans Peter Pecher, *Der Anspruch auf Genugtuung als Vermögenswert*, 171 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP], no 1/2, 1971, at 41, 61.

[182] Stoll, *supra* note 67, at 92, para. 98.

[183] Pecher, *supra* note 179, at 61.

[184] Hallebeek & Zwart-Hink, *supra* note 27, at 234-235. An additional factor in the disappearance was the lack of interest in protection of immaterial values, which manifested itself into the limited allowance of recovery for non-pecuniary damages. Reinhard Zimmerman, *Nonpecuniary Damage Without Harm, Comparative Report*, *in* DIGEST OF EUROPEAN TORT LAW. VOL 2: ESSENTIAL CASES ON DAMAGE 706 (B. Winiger at al eds., 2011.

take an apology into account as a mitigating factor reducing the amount of damages the defamer had to pay.[185]

In the Western-European legal tradition, some jurisdictions still employ court-ordered apologies as a defamation remedy. Switzerland and the Netherlands are the most prominent examples.[186] To get to this stage, court-ordered apologies had to be deprived of their self-humiliating elements. The Supreme Court of Ceylon, under Roman-Dutch law in 1875,[187] put this need for transition into meaningful words. While redrafting an apology order of a district court, it characterized the order as "*not only inappropriate, but also obsolete*."[188] Compliance could not be insisted upon. Where a court-ordered apology is necessary, the Supreme Court suggests to formulate it in a manner suitable to repair the injurious words, avoiding the ancient barbarous mode of expression.[189]

In bringing to light the conceptual and theoretical underpinnings of this transition, it is helpful to direct our attention to the Swiss legal system. Under Article 49, paragraph 2 of the Swiss Code of Obligations, it is possible to substitute or supplement monetary compensation with other types of satisfaction. Notwithstanding some doubts expressed in legal scholarship,[190] court-ordered apologies (*Entschuldigungserklärungen*) fall into this category

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[185] CARTER-RUCK, *supra* note 12, at 171-76; SCHUBERT, *supra* note 37, at 251; Vick & Macpherson, *supra* note 90, at 946.

[186] In addition, a small jurisdiction, Lichtenstein, still lists the declaration of honor amongst types of satisfaction which can be granted in lieu of or in addition to monetary compensation. Personen- und Gesellschaftsrecht [PGR] [Code of Persons and Companies] vom 20. Januar 1926, LGBL 1926 no 4, art. 40, para. 3. In Spain, under article 465 of the former Spanish Criminal Code, publishers and editors of a journal in which insulting statements (*calumnias o injurias*) were disseminated could be required to publish a declaration of honor (*satisfacción*) upon request of the offended party. CÓDIGO PENAL de 1971 [C.P.] [Criminal Code] art. 465; *see* Stoll, *supra* note 67, at 92, para. 98. The provision was abolished by the Criminal Code of 1995. CÓDIGO PENAL de 1995 [C.P.] [Criminal Code], B.O.E. 1995, 25.444.

[187] The plaintiff, a surgeon by profession, files a civil lawsuit for defamation against the owner, editor and publisher of the Ceylon Observer, charging him to have printed and published the following words in the said newspaper: "the surgeon would better devote his time to his patients than wasting it to party politics." The district court condemns the newspaper to pay a monetary compensation to the surgeon and to make an apology in the form determined by the judge. The Supreme Court annuls this decision.

[188] *Id*.

[189] Boyd Moss v. Ferguson (1875), cited by J. DE LEEMA, REPORTS OF IMPORTANT CASES HEARD AND DETERMINED BY THE SUPREME COURT OF CEYLON 165-67 (1890) (author's translation).

[190] Roland Brehm, *Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR*, BERNER KOMMENTAR - KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT 622, para. 113 (2013). Those reservations would be based mainly on the fear that the wrongdoer is humiliated and that satisfaction is therefore turned into punishment.

of other types of satisfaction.[191] In 2013, the Swiss Supreme Court explicitly affirmed the view that, on the basis of article 49, paragraph 2 of the Code of Obligations, a defendant can be ordered to publish an apology in electronic form on his website page and Facebook profile for an uninterrupted period of 30 days, notwithstanding the decision of an appellate court to reverse the initial order.[192]

In particular, the connection between court-ordered apologies and the notion of satisfaction (*réparation* or *Genugtuung*) deserves further notice.[193] As there is no legal definition for "satisfaction," it may be understood in three different ways. First, it can be interpreted in a broad sense as a form of reparation of the harm suffered,[194] with the intention to place the aggrieved party in the same condition it would have found itself if the harm had not occurred.[195] In some jurisdictions (such as Belgium and France), the basic provisions of tort law refer to an obligation to repair, instead of an obligation to compensate for damage caused by a wrongful act.[196] Understood in this way, the use of the term reparation would just demonstrate an openness for non-pecuniary remedies (such as publication of a court decision[197]) and reparation in kind.[198] Second, in other jurisdictions, satisfaction is primarily associated with non-pecuniary harm,[199] whereas compensation is linked to

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[191] MAX KELLER ET AL., HAFTPFLICHTRECHT 135-136 (3d ed. 2004); Stoll, *supra* note 67, at 86, para. 93. Authors arguing that apologies did not find their entrance into Swiss case law, refer to cases in which courts are hesitant to issue reprimands and declarations of honor. Obergericht Bern [cantonal court of appeal of Bern] Jan. 13, 1926, 24 SJZ 1986. However, the Supreme Court questioned whether declarations of honor (and not court-ordered apologies) were included under other types of satisfaction within the meaning of art. 49, para. 2. Bundesgericht [BGer] [Federal Supreme Court] Jan. 16, 1919, 45 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 105.

[192] Bundesgericht [BGer] [Federal Supreme Court] Nov. 4, 2013, 5A_309/2013. In the same vein, in a judgment of 9 Oct. 1992, the District Court of Zürich considers "other forms of satisfaction, such as a correction or apology, as more appropriate and suitable in cases of violations of personality rights by the press." Bezirksgericht Zürich [ordinary court of first instance of Zürich] Oct. 9, 1992, ZRS 94/1995, 87.

[193] Art. 49, para. 2 is not the only article which employs the notion of satisfaction. It is also included in art. 47 of the Code of Obligations, which provides for damages in cases of homicide and personal injury. *See also* KELLER, *supra* note 191, at 129.

[194] Stoll, *supra* note 67, at 9, para. 10.

[195] JAN RONSE ET AL, SCHADE EN SCHADELOOSSTELLING 209-250 (2d ed. 1984); SOPHIE STIJNS, VERBINTENISSENRECHT, IBIS, at 100, para. 126 (2013); WALTER VAN GERVEN & ALOIS VAN OEVELEN, VERBINTENISSENRECHT, 327 & 453 (4th ed. 2015).

[196] *See* CHARLES AUBRY ET AL, COURS DE DROIT CIVIL FRANÇAIS. TOME VI 501 (6th ed. 1935); DEMOGUE, *supra* note 142, at 16, para. 489; MAZEAUD, *supra* note 140, at 632, par. 2317.

[197] Tribunal federal [TF] [Federal Supreme Court] Sept. 23, 2004, 131 ARRÊTS DU TRIBUNAL FÉDÉRAL [ATF] III 26, at para. C.12.2.1.

[198] Keller interprets another way of satisfaction ("*eine andere Art von Genugtuung*") in the sense of a reparation in kind ("*Naturalleistung*"). *See* KELLER, *supra* note 188, at 135-36.

[199] Stoll, *supra* note 67, at 8, para. 9.

pecuniary losses.[200] This rests upon the assumption that only economic losses can be compensated.[201] However, the former does not exclude providing the aggrieved party with a pecuniary equivalent.[202] Satisfaction encompasses both monetary compensation and any other form of reparation of non-pecuniary harm. Interpreted in this sense, satisfaction would merely have a semantic significance, governing legal redress for non-pecuniary harm.[203] Though this conception, like the previous one, provides little guidance as to why court-ordered apologies are still employed in Swiss law as opposed to other Romano-Germanic legal systems.

Therefore, satisfaction can be understood in a third sense, which is narrower and more specific. This particular understanding can be traced to the learnings of some German authors (Degenkolb, von Jhering, etc.). It purports to attribute a special function to liability which seeks to assuage the aggrieved party's sense of justice by means of a legal reaction to the wrong.[204] In that perspective, satisfaction provides the aggrieved party with an alternative for emotional distress (by enhancing the party's well-being or offering a pleasant emotional experience), serving as a counterpoise to the painful experience which cannot be dispelled. In the same vein, it restores the disturbed equilibrium and makes the impairment more supportable.[205] An authoritative finding that the injured party is in the right, and his opponent in the wrong, aims to cause the injured party to react positively and softens the

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[200] Greek law refers to monetary or any other form of reparation of non-pecuniary harm, by using the term satisfaction (*hikanopoiisis*), in contrast to compensation (*apozimiosis*), which is limited to redress of pecuniary loss. Nevertheless, no special significance is attributed to the notion of satisfaction. The Greek legal literature views satisfaction as nothing more than a form of monetary compensation. Stoll, *supra* note 67, at 90, para. 97.

[201] *Id.* at 9, para. 10.

[202] Although in Germany, for example, under section 253 of the Civil Code, a monetary indemnification for a non-pecuniary harm, may be demanded only in those situations specified by a statute. *See also* Gerald Spindler, *BGB § 253 Immaterieller Schaden*, in BECKOK BGB, at para 4 (Georg Bamberger et al eds., 44th ed. 2017).

[203] *See* WALTER FELLMANN & ANDREA KOTTMANN, SCHWEIZERISCHES HAFTPFLICHTRECHT I, at 927, para. 2609 (2012) (claiming that the foundation of satisfaction can be found in the protection of personality rights).

[204] Eduard Böttlicher, *Die Einschränkung des Ersatzes im materiellen Schadens und der Genugtuungsanspruch wegen Persönlichkeitsminderung*, 17 MONATSCHRIFT FÜR DEUTSCHES RECHT [MDR], 353, 354 (1963); Küster, *supra* note 172, 1-4; Pecher, *supra* note 181, at 62; Stoll, *supra* note 67, at 10, para. 10; Rudolf von Jhering, *Rechtsgutachten in Sachen des Interkantonalen Vorbereitungscomités der Gäubahn gegen die Gesellschaft der schweizerischen Centralbahn, betreffend die Vollendung und den Betrieb der Wasserfallenbahn und ihre Fortsetzung von Solothurn nach Schönbühl, erstattet auf Aussuchen des klägerischen Comités*, in JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS BD. 18, 59 (1880).

[205] Heinrich Degenkolb, *Der spezifische Inhalt des Schadensersatzes*, 76 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 1, 24-25 (1890); FELLMANN & KOTTMANN, *supra* note 201, 927, para. 2614; Stoll, *supra* note 67, at 87, para. 94.

negative upset with respect to the violation.[206] Satisfaction is not immersed in material values, but in the finding that injustice has been done, which explains its difference from a compensatory remedy. Its sanction must have a tangible impact on the personal life of the offender. Although it shares its ethical justification with public law punishment, a penalty function is not intended.[207] Hence, satisfaction provides for an alternative for the conventional dichotomy between compensation and punishment.[208] After putting the three functions next to each other (compensation, punishment and satisfaction), Rudolf von Jhering comes to the conclusion that the assuagement of the injured party for its violated sense of justice should be effectuated as an independent objective of civil liability.[209] Interestingly enough, some scholars[210] assert that this strict interpretation of satisfaction entered Swiss law after it had come to the attention of the drafters of the Swiss Code of Obligations.[211] Further indication for this proposition can be found in a decision by the Swiss Supreme Court that article 49, paragraph 2 of the Code of Obligations has a somewhat vindicatory function.[212] Thus, if Swiss law really adheres to this strict interpretation of satisfaction, this could explain why, as opposed to other jurisdictions, court-ordered apologies are sustained in Swiss law. Court-ordered apologies are pre-eminently aimed at the assuagement of the aggrieved party's sense of justice (cf. *supra*).[213]

Within the Romano-Germanic legal tradition, the Netherlands is undoubtedly the jurisdiction with the largest number of cases dealing with court-ordered apologies and thus the most comprehensive scholarly attention focused on court-ordered apologies.[214] The progression of this remedy in the

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[206] Bydlinski, *supra* note 86, at 120, para. 2/257; HELMUT KOZIOL, BASIC QUESTIONS OF TORT LAW FROM A GERMANIC PERSPECTIVE 299, para. 8/15 (2012).

[207] FELLMANN & KOTTMANN, *supra* note 201, 927, para. 2614; Pecher, *supra* note 181, at 62-63. Public punishment imposed upon the wrongdoer did not always appear sufficient to afford satisfaction to the aggrieved party. *See* Stoll, *supra* note 67, at 9, para. 10.

[208] Stoll, *supra* note 67, at 9, para. 10.

[209] von Jhering, *supra* note 204, at 59.

[210] Stoll, *supra* note 67, at 10, para. 10.

[211] Chr. Burckhardt, *Die Revision des schweizerischen Obligationenrechts in Hinsicht auf das Schadenserszatzrecht*, 22 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT (ZSR) at 469 (1903).

[212] Bundesgericht [BGer] [Federal Supreme Court] Nov. 25, 1948, 74 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 202. Similarly, in a judgment of July 6, 1955, referring to the Swiss notion of satisfaction, the German Supreme Court decides that redress for non-pecuniary harm has a double function: providing an injured party with an adequate compensation, but also, at the same time, making clear that the wrongdoer owes that party a satisfaction for the offense. Bundesgerichtshof [BGH] [Federal Court of Justice] July 6, 1955, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1955, 1675.

[213] In the same sense, see Rötelmann, *supra* note 143, at 393.

[214] Arno J. Akkermans et al., *Excuses in het privaatrecht*, 2008 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE [WPNR], at 778; Hallebeek & Zwart-Hink, *supra* note 27, at 194; Gijs Van Dijck, *Hebben afgedwongen excuses zin?*, NEDERLANDS TIJDSCHRIFT

Netherlands differs from other legal systems, as its predecessors were ingrained in statutory provisions for a longer period of time. After the *amende honorable* prospered in the uncodified system of Roman-Dutch law, it was made available as a remedy in the Dutch Civil Code of 1838.[215] Article 1409 of the Civil Code provided that in cases of defamation, the claimant could request the court to issue a declaration that the defendant had acted in a slanderous, derisive or insulting manner.[216] In addition, article 1410 of the Civil Code allowed the perpetrator to prevent a public dissemination of the judgement by making a public statement in court in which he openly exhibited remorse, asked for exemption and declared taking the victim for a man of honor.[217] In 1992, the Dutch Civil Code changed significantly, and included an abrogation of the provisions concerning declaratory judgement and voluntary recantation. The new Civil Code did not retain any reference to apologies or any other equivalent of the *amende honorable*.[218] Even before the abolition of those statutory provisions, this remedy had fallen into decay and given way to alternatives, such as the public posting of a judgment condemning defamatory statements at the defendant's expense[219] and the retraction or rectification of the aforesaid statements.[220] However, from 2005 onward, plaintiffs sought court-ordered apologies in a myriad number of cases, mainly on the basis of article 6:167 of the Dutch Civil Code, which establishes the right to demand rectification of false statements.[221] Remarkably, courts are usually reluctant to meet such requests and substantiate rejections with various arguments: the lack of statutory basis,[222] the freedom of expression of defendant,[223] the unenforceability of

VOOR BURGERLIJK RECHT [NTBR] at 298 (2017); Van Dijck, *supra* note 2, at 562; Zwart-Hink, *supra* note 18, at 100; Nico Verheij, *Excuus is geen recht*, NEDERLANDS TIJDSCHRIFT VOOR BESTUURSRECHT [NTB], no. 3, 2010, at 12.

[215] Zwart-Hink, *supra* note 19, at 102.

[216] Art. 1409 para 1 BW.

[217] Art. 1410 BW.

[218] Hallebeek & Zwart-Hink, *supra* note 27, at 240.

[219] Zwart-Hink, *supra* note 19, at 102.

[220] Significantly, the 1961, one of the drafters of the new civil code noticed that judges were declining requests to impose, under a penalty, the retraction or rectification of a statement in a newspaper or other periodical. Therefore, a proposal was made to provide for such a legal basis. EDUARD MAURITS MEIJERS, ONTWERP VOOR EEN NIEUW BURGERLIJK WETBOEK. TOELICHTING. 3: BOEK 6, at. art. 6.3.19 (1961); *see also* Constant van Nispen, *Commentaar op art. 6:167 BW, in* GROENE SERIE ONRECHTMATIGE DAAD, at para. A.2 (2017). From 1961 onwards, case law developed that concept of retraction or rectifications, which was finally adopted in the civil code in 1992. HARTKAMP & SIEBURGH, *supra* note 144, at para. 21 (2009).

[221] Hallebeek & Zwart-Hink, *supra* note 27, at 240; Zwart-Hink, *supra* note 17, at 111.

[222] Rb. Leeuwarden 31 augustus 2010, ECLI:NL:RBLEE:2010:BN6133, para. 4.7; Rb. Amsterdam 30 June 2010, ECLI:NL:RBAMS:2010:BO1998, para. 4.20.

[223] Rb. Rotterdam 21 Nov. 2012, ECLI:NL:RBROT:2012:BY4993, para. 5.42; Hof Amsterdam 19 June 2008, ECLI:NL:GHAMS:2008:BE9682, para. 4.6.

apologies,[224] the impossibility of imposing a repentant mental state on the defendant,[225] the belief that enforced apologies are deprived of any value[226] and the disproportionality in relation to the minor losses that plaintiff has suffered.[227]

Yet courts have awarded apologies in a number of cases, always in a setting in which the plaintiff made a claim for rectification with a demand for apologies. The method of dissemination takes different forms, ranging from semi-public apologies addressing the same audience as the one that was aware of the injurious statements (such as a letter to all board members of a scientific society,[228] an e-mail to all employees of a given company,[229] a registered letter to all customers of a particular service offered by an undertaking[230]) to public apologies, either published in a newspaper or periodical,[231] or on the social media account(s) of the defendant.[232] If a plaintiff is not seeking a rectification of false statements, but merely a public apology, a request will not be granted under article 6:167 of the Civil Code.[233]

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[224] Rb. Leeuwarden 14 september 2011, ECLI:NL:RBLEE:2011:BT2357, para. 7; Rb. Amsterdam 7 Aug. 2008, ECLI:NL:RBAMS:2008:BD9783, para. 4.3.

[225] Which implies that people should only offer apologies if they are convinced that they did something wrong. Rb. Leeuwarden 18 augustus 2010, ECLI:NL:RBLEE:2010:BN6111, para. 8; Rb. Alkmaar 15 Dec. 2005, ECLI:NL:RBALK:2005:AU8188, para. 7.12.

[226] Rb. Rotterdam 21 Nov. 2012, ECLI:NL:RBROT:2012:BY4993, para. 5.42; Rb. Leeuwarden 14 Sept. 2011, ECLI:NL:RBLEE:2011:BT2357, para. 7.

[227] Rb. 's-Hertogenbosch 5 september 2008, ECLI:NL:RBSHE:2008:BF3693, para. 4.5.

[228] The district court of The Hague imposes the defendant to circulate a letter containing a rectification and an apology, after having made some unjustified allegations about the plaintiff in a letter sent to the board of the Dutch Society for Pathology. Rb. 's-Gravenhage 22 augustus 2007, ECLI:NL:RBSGR:2007:BB2188, para. 4.

[229] The district court of Haarlem condemns the employer to rectify a statement made about the termination of an employment contract and to apologize for its detrimental effects. This has to be done in the same way as the harmful communication itself, via e-mail to all the employees of the company. Rb. Haarlem 1 Nov. 2006, ECLI:NL:RBHAA:2006:AZ1366.

[230] The district court of The Hague decides that, in seven days after notification of this judgment, the defendant should send a rectification on the company's letterhead via normal and registered post to all addressees which had before received a contested advertisement, apologizing for its careless communication. Rb. 's Gravenshage 17 oktober 2007, ECLI:NL:RBSGR:2007:BB5893, para. 6.

[231] The district court of Zwolle orders to publish an apology in the same periodical (a horse magazine) as the one which disseminated the contested article. Rb. Zwolle-Lelystad 4 Dec. 2007, ECLI:NL:RBZLY:2007:BC2149, para. 2.6 and 5.3.

[232] For instance, an interior designer is condemned to publish a rectification and apology on her Twitter account, Facebook page and LinkedIn page, after she had wrongfully accused a competitor of selling illegal copies of her creations. Rb. Midden-Nederland 18 June 2014, ECLI:NL:RBMNE:2014:247.

[233] After a dispute has arisen on a sports club, the plaintiff prays for a judgement ordering the defendant to publish a statement on the website of the club, taking responsibility and apologizing to everyone for any inconvenience caused by his behavior. The court dismisses this request as it does not deal with the rectification of a statement. Rb. Overijssel 22 Nov. 2017, ECLI:NL:RBOVE:2017:4503, para. 4.2.

An important afterthought about this apology resurgence in the Netherlands is the struggle to give it a place within the broader legal system. One explanation might be that this trend is severely overblown by scholarly literature. Evidence for this proposition can be found in the fact that in a number of cases, the apology was not purposely sought, but was nonetheless included as an insignificant part of the rectification.[234] However, it seems reasonable to assume that Dutch courts set great store by including a statement of contrition in a rectification order. Apart from this connection to rectification, the Netherlands also shows an openness for reparation in kind for non-pecuniary harm (such as reputational damage).[235] Hence, under certain circumstances, a coerced apology may be seen as a reparation for non-pecuniary harm aimed at the actual recovery of the aggrieved party.[236]

2. Continuity in Central and Eastern-European Systems

The trend in Central and Eastern European jurisdictions can best be described as a continuity. Apologies were available as a defamation remedy in the past and are still employed nowadays. Central and Eastern European legal systems are unique in the sense that these jurisdictions confer statutory power upon courts to make apology orders. Some legislation unambiguously dictates that "*plaintiffs are entitled to require an apology*" (Latvian law),[237] that "*radio and television operators shall owe a public apology to the affected persons*" (Bulgarian law)[238] or that "*immaterial damage can be restored by publication of a rectification and an apology*" (Croatian law).[239] In jurisdictions where explicit rules are lacking, the legal framework concerning

[234] "We are sorry having created the false impression with our letter and therefore, we sincerely apologize for the anxiety we may have caused." District Court of Alkmaar 25 Feb. 2010, ECLI:NL:RBALK:2010:BL5634, para. 5."We rectify therefore these statements about LCPL and we apologize for this wrongful act towards LCPL and Dr." Rb. 's-Gravenhage 22 augustus 2007, ECLI:NL:RBSGR:2007:BB2188, para. 4. "We did not have permission from the authors. We have violated their copyrights. We apologize for this." Rb. Zwolle-Lelystad 4 Dec. 2007, ECLI:NL:RBZLY:2007:BC2149, para. 2.6 and 5.3. "We apologize for this negligent communication." Rb. 's Gravenshage 17 oktober 2007, ECLI:NL:RBSGR:2007:BB5893, para. 6.

[235] Although the basic premise of Dutch law is monetary compensation, courts may grant another kind of compensation upon request of the aggrieved party. Notwithstanding some concerns raised by the drafters of the civil code (see C. J. VAN ZEBEN ET AL, PARLEMENTAIRE GESCHIEDENIS VAN HET NIEUW BURGERLIJK WETBOEK: BOEK 6: ALGEMEEN GEDEELTE VAN HET VERBINTENISSENRECHT 362 (1981)), contemporary scholars argue in favor of reparation in kind, especially when this type of compensation is more useful or natural than monetary damages. HARTKAMP & SIEBURGH, *supra* note 144, at para 21; Titia E. Deurvorst, *Commentaar op artikel 103 Boek 6 BW, in* GROENE SERIE SCHADEVERGOEDING, at para. 19 (2011).

[236] Akkermans, *supra* note 212, at 780; Zwart-Hink, *supra* note 19, 109.

[237] Par presi un citiem masu inform cijas I dzek iem [Law on the Press and other Mass Media], art. 21.

[238] Law on Radio and Television, Prom. SG. 138/24 Nov. 1998, art. 16.

[239] Zakon o medijima [Media Act], NN 59/04, 84/11, 81/13, art. 22, para. 1.

the protection of personality rights refers more broadly to concepts such as "*adequate satisfaction*" (Czech[240] and Slovak law[241]), "*a declaration in the appropriate form and substance"* (Polish law[242]) and "*anything else through which it is possible to achieve the purpose achieved via compensation*" (Slovenian law[243]). Legal scholarship and case law make clear that those terms encompass court-ordered apologies.[244] Like Romano-Germanic legal systems, defendants in these jurisdictions are very diverse, ranging from legal entities – such as media groups,[245] television broadcasters[246] and private companies[247] – to natural persons such as political leaders[248]. Remarkably enough, Russian law is somewhat of an outlier, as compelled apologies are not envisaged as a remedy for infringements of honor, dignity or reputation.[249] Nevertheless, it seems that the dismissal of court-ordered apologies is a recent phenomenon in Russia. Before 2005, plaintiffs sought

[240] In Czech law, the Civil Code of 2012 states that monetary satisfaction must be provided unless other remedies can offer a real and sufficiently effective satisfaction (Nový občanský zákoník [New Civil Code], Zákon č. 89/2012 Sb., § 2951). This implies that monetary damages are the primary remedy, whereas in the Civil Code of 1964, monetary compensation only being awarded if other remedies were not satisfactory.

[241] Občiansky zákonník [Civil Code], Zákon č. 40/1964 Zb., § 13. Likewise, Moldovan law requires defendants to restore plaintiff's reputation and honor. OLIVIA PÎRȚAC, APĂRAREA ONOAREI, DEMNITĂȚII ȘI REPUTAȚIEI PROFESIONALE A PERSOANEI ÎN REPUBLICA MOLDOVA 33 (2005).

[242] Kodeks cywilny [Civil Code], Dz.U. 1964 nr 16 poz. 93, art. 24.

[243] Obligacijski zakonik [OZ] [Obligation Code] Št. 001-22-117/01, art. 178.

[244] For Czech Republic, *see* ROZEHNAL, *supra* note 148; THEODOR JAN VONDRACEK, COMMENTARY ON THE CZECHOSLOVAK CIVIL CODE 33 (1988); Theodor Jan Vondracek, *Defamation in Czechoslovak Law as a New Legal Concept*, 1 REV. SOCIALIST L. 281 (1975).

[245] For Poland, see Sąd Apelacyjny w Poznaniu z dnia 27 września 2005 [Decision of the Court of Appeal of Poznan of Sept. 27, 2005], I ACa 1443/03 (apology order against an editor, editor-in-chief and author of a press statement). For Slovenia, see Višje sodišče v Ljubljani [Appellate Court of Ljubljana] Feb. 12, 2014, I Cp 3057/2013 (apology order against weekly newspaper).

[246] For Poland, see Sad Okregowy w Krakowie z dnia 25 kwietnia 2016 [Decision of the Regional Court of Krakow of Apr. 25, 2016], I C 151/14 and Sąd Apelacyjny w Krakowie z dnia 22 grudnia 2016 [Decision of the Court of Appeal of Krakow of Dec., 22, 2016], ACa 1080/16 (Apology order against the German public television network ZDF).

[247] For Poland, see Sad Okregowy we Wroclawiu z dnia 22 lipca 2010 [Decision of the District Court Wrocław of July 23, 2010], I C 144/10 (apology order against a company operating a social network site).

[248] For Czech Republic, see Městský soud v Praze ze dne 01.09.2016 (MS) [Decision of the Circuit Court in the City of Prague of Sept. 1, 2016], sp.zn. 22 Co 207 /2016 (apology order against Czech President Milos Zeman). For Slovakia, see Okresný súd Pezinok ze dne 09.05.2013 [Decision of the District Court of Pezinok of 9 May 2013], 8C/254/2011 and Krajský súd v Bratislave ze dne 24.11.2004 [Decision of the Regional Court of Bratislava of Nov. 24, 2004], spravy.pravda.sk/domace/clanok/147001-fico-sa-musi-ospravedlnit-miklosovi) (apology orders against Prime Minister Roberto Fico).

[249] Natalia Dobryakova, *Defamation in Russian Legislation* 24 (2016), www.law.uw.edu/media/1392/russia-intermediary-liability-of-isps-defamation.pdf.

written apologies under article 152, paragraph 5 of the Civil Code, which served as the basic provision for the protection of honor, dignity and business reputation.[250] However, in a Decree dated February 24, 2005, it was decided that article 152 of the Civil Code could not justify the instruction of court-ordered apologies.[251] This Decree, honoring retraction of incorrect and defamatory information as a means to deal with injurious falsehood, clearly rejects the use of court-ordered apologies under the pretext that no one may be compelled to express or reject their own opinions. Hence, courts are not entitled to require defendants to apologize in any given form.[252]

To explicate the widespread presence of court-ordered apologies in Central and Eastern European legal systems, one should turn to the influence of the legal family these jurisdictions belonged to in the Socialist legal system.[253] Notwithstanding the collapse of the Iron Curtain, traces of this legal tradition are still present in all of the Central and Eastern-European countries, with court-ordered apologies serving as a remarkable posterchild.[254]

Initially, civil law protection of reputation and honor was lacking in the socialist legal tradition. For instance, the Czechoslovak Civil Code of 1950 did not contain a single provision explicitly offering protection against defamatory statements.[255] In contrast, the introduction of the Civil Code of 1964 lead to substantial and, to a certain extent, astonishing changes in defamation law, recognizing defamation as a civil wrong and establishing moral satisfaction (e.g., an apology) as a primary remedy.[256] The leaders of

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[250] CARTER-RUCK, *supra* note 12, at 413; Olga A. Papkova, *Reparation of Moral Damages and Judicial Discretion in Russian Civil Legislation*, 24 REV. CENT. & E. EUR. L. 269 (1998).

[251] This decree, generally considered as a notable milestone in defamation law, further indicates that Article 152 no longer presents an exclusive, self-contained, comprehensive system of rules under Russian law. Elspeth Reid, *Defamation and Political Comment in Post-Soviet Russia*, 38 REV. CENT. & E. EUR. L. 1, 25-27 (2013).

[252] Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 24 Feb. 2005, No. 3 Moscow, "On Judicial Practice on Cases of Defense against Defamation of Character of Individuals and of the Business Reputation of Individuals and Legal Entities," at para. 18, http://www.supcourt.ru/en/files/16428.

[253] Socialist law covered an inhomogeneous territory, previously partly belonging to the border area of the reception of Roman law (East Germany and Bohemia), partly to the Byzantine world (Bulgaria and Romania), and finally to the area occupied only during the 19the century by the natural law codes and the Pandect science (Poland and Hungary). *See* Tomasz Giaro, *Some Prejudices about the legal tradition of Eastern Europe, in* COMPARATIVE LAW IN EASTERN AND CENTRAL EUROPE 46 (Bronisław Sitek et al eds., 2013).

[254] ÅSE B. GRØDELAND & WILLIAM L. MILLER, EUROPEAN LEGAL CULTURES IN TRANSITION 9 (2015); *see also* Alan Uzelac, *Survival of a third legal tradition*, 49 SUPREME COURT L. REV. 377, 377 (2010).

[255] Protection was focusing on criminal law and damages could only be recovered on that basis. Vondracek, *supra* note 244, at 281.

[256] *Id.*

the communist party explained that this change was motivated by the necessities of the new socialist era, and was all the more necessary since the 1950 code represented a regression.[257] Two aspects of the Code are particularly striking. First, it recognizes the protection of honor and dignity on the basis of civil law, although one would expect that the purpose of socialist civil law would be to regulate property relationships between citizens or at least non-property relationships which are connected with the former.[258] Second, it puts forward apologies as a civil legal remedy aimed at recovery for emotional harm, when a public apology was previously only known as a punishment under criminal law.[259]

It seems reasonable to assume that both phenomena can be traced back to the USSR Principles of Civil Legislation, enacted in 1961. Section 7 of the Principles provided that "*A citizen or organization has the right to demand a court retraction of information defamatory of their honor and dignity*." Soviet writers consider this section a notable milestone. For the first time in the history of Soviet civil legislation,[260] an immaterial value (protection of honor and dignity) not connected with a property relationship was legally protected.[261] The idea underpinning this innovation was to provide not only for material and technical foundations of communism, but also for a greater satisfaction of the material and spiritual needs of the citizens.[262] In correspondence with the needs of this period of comprehensive building of communism, Section 7 strengthened the protection of the rights of Soviet citizens and the legitimate interests of socialist organizations.[263]

Although Section 7 of the USSR Principles refers solely to retraction, the Civil Chamber of the USSR Supreme Court clarifies that this retraction

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[257] Giaro characterizes the Czechoslovak code of 1964 as a "truly socialist civil code," even as the civil code promulgated in East Germany in 1975. *See* Giaro, *supra* note 253, at 46. According to Kulkik, the civil code of 1964 was so radical that it represented a unique example of socialist law not only in Czechoslovakia but also in comparison with other countries of the Soviet bloc. JAN KULKÍK, CZECH LAW IN HISTORICAL CONTEXTS 196 (2015).

[258] LEVITSKY, *supra* note 70, at 7.

[259] O. A. KRASAVCHIKOV, SOVETSKOE GRAZHDANSKOE PARVO 218 (1968).

[260] Next to art. 7 of the USSR Principles of Civil Legislation, art. 130 of the RSFSR Criminal Code specifies criminal responsibility for slander, i.e., for dissemination of fabrications damaging to another person and known to be false. Ioffe, *supra* note 89, at 61. The Criminal Code explicitly recognized public apologies as a form of reparation of the injury. Stoll, *supra* note 67, at 94, para. 102.

[261] MARY ANN GLENDON ET AL, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON THE CIVIL LAW, COMMON LAW, AND SOCIALIST LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH, AND SOVIET LAW 690 (1985); John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 791 (1989); LEVITSKY, *supra* note 70, at 7.

[262] Ioffe brings this also in connection with the reinforcement of educative value. *See also* Reid, *supra* note 249, at 7.

[263] LEVITSKY, *supra* note 70, at 3; Reid, *supra* note 251, at 7.

may be actioned by several methods (oral apology, letter of apology and retraction…), possibly at the same time.[264] Hence, the goal pursued by this Section is to compel defendants to restore the good name of plaintiffs, not to compensate the latter for sustaining a moral harm.[265] In other words, under Soviet civil law, restoration of the *status quo ante* was the only permissible method of protecting personal non-property rights.[266] This main focus on retraction and apologies[267] can be explained by reference to a moral and philosophical principle underlying communism, which is, "*money should not be used as a painkiller*."[268] Hence, several scholars assert that evaluation of nonpecuniary harm in monetary terms would be an expression of the bourgeois philosophy that everything has a price.[269] Thus, immaterial harm should be repaired in a non-pecuniary way, as monetary indemnification would be contrary to Marxist teachings on materialism.[270] This thought was initiated in the USSR, but also influenced other Soviet states (such as Poland and Czechoslovakia). As a Polish author implied in 1974: "*everyone who is not deeply imbued with capitalist morality condemns the acceptance of money in connection with an offence against the personal dignity of a man, his esteem and reputation.*" [271] The marginal importance attached to the sincerity of apologies can be related to other characteristics of socialist morality. Communist ideology paid more attention to the question of how

[264] Some scholars raised questions about the admissibility of apologies as a civil remedy because Soviet law knew public apologies only as a punishment under criminal law. In particular, it was questioned whether a legislative amendment was necessary to include apologies under art. 7. KRASAVCHIKOV, *supra* note 259, at 218.

[265] Reid, *supra* note 249, at 7.

[266] Ioffe, *supra* note 89, at 57. However, Levistky claims that in deliberating upon the form of retraction, courts often go beyond mere restoration of the plaintiff's good name by imposing on defendant certain obligations which, under criminal law, are clearly regarded as a punishment. *See* LEVITSKY, *supra* note 70, at 15.

[267] GLENDON, *supra* note 259, at 690.

[268] *Id.*

[269] LEVITSKY, *supra* note 70, at 15; YURI SDOBNIKOV, SOVIET CIVIL LEGISLATION AND PROCEDURE: OFFICIAL TEXTS AND COMMENTARIES 14 (1962).

[270] VONDRACEK, *supra* note 244, at 292. Nevertheless, Vondracek notices that various authors in the 1970s and 80s take the view that pecuniary satisfaction should be allowed when a personality right is violated, because the civil code already admits granting of money for non-pecuniary harm. Vondracek himself also argues strongly in favor of monetary compensation for violations of personality rights, because "[v]indication of a person's legitimate interests should be made worth-while, satisfaction for defamation should not be limited to a simple rectification, an apology or similar relief which in fact tend to be of a "platonic" nature only." VONDRACEK, *supra* note 244, at 302.

[271] As there were no judicial decisions granting damages for defamation during the first ten years of the socialist regime, Wagner believed that the unethical nature of claiming monetary compensation for infringements of dignity had crystalized in the minds of the citizens of the Polish People's Republic. WAGNER, *supra* note 99, at 258.

someone should behave after a wrongful statement than to someone's actual intentions.[272]

B. *Mixed Legal Systems*

Including a mixed legal system in a comparative legal study of court-ordered apologies adds great value to the examination of this phenomenon, as it demonstrates how this remedy can have practical relevance in a legal system relying on the principles of common law. South African law is particularly worth analyzing, as this jurisdiction is confronted with a trend which has become increasingly pronounced, *i.e.* a revival of the *amende honorable*. Since the uncodified system of Roman-Dutch law (*cf.* supra) constitutes the original core of South African law, it is not surprising that the *amende honorable* was employed as a defamation remedy in the past.[273] Yet during the second British occupation of the mid-19th century, courts started to set aside requests for an *amende honorable* and only honored awards for damages when deciding defamation cases.[274] The *amende honorable* was considered to be "*an archaism*,"[275] "*discontinued*" [276] or "*a practice fallen into desuetude*."[277] In the same vein, legal scholarship described the *amende honorable* as obsolete and archaic, the proper remedy being an action for damages.[278]

However, as of 2002, the *amende honorable*, or at least a remedy allowing a plaintiff in a defamation case to demand the publication of a retraction and an apology, has been reinstated in South African law. The origins lie in several judgements of the Supreme Court of Appeal and the Constitutional Court dwelling on this remedy. A first step was taken by the Witwatersrand Local Division, which held that "*the amende honorable was not abrogated by disuse. Rather, it was forgotten: 'a little treasure lost in a nook of our legal attic*" and decided that the defendant should pay the plaintiff monetary damages only in the event that the defendant failed to publish an apology in a full page advertisement in a newspaper.[279] Subsequently, while

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[272] HERBERT KÜPPER, EINFÜHRUNG IN DIE RECHTSGESCHICHTE OSTEUROPAS 450 (2005).

[273] Burchell, *supra* note 68, at 200-201; C. G. VAN DER MERWE & JACQUES E. DU PLESSIS, INTRODUCTION TO THE LAW OF SOUTH AFRICA 41 (2004).

[274] Hendrik Johannes Erasmus, *Ch. 4. The Interaction of Substantive Law and Procedure, in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 141, 160 (Reinhard Zimmermann & Daniel Visser, 1996).

[275] Lianley v. Owen, 1882 (3) NLR 185 at 186 (S. Afr).

[276] It was often found that it had to be enforced by civil imprisonment. *See* Hare v. White 1865, I Roscoe 246 at 246 (S. Afr).

[277] Ward-Jackson v. Cape Times Ltd. 1910 WLD 257 at 263 (S. Afr.).

[278] AMERASINGHE, *supra* note 54, 172; Erasmus, *supra* note 274, at 160.

[279] *Mineworkers Investment Co (Pty) Ltd v. Modimane* 2002 (6) SA 512 (WLD) at para. 24.

the Cape of Good Hope Provincial Division did not take a strong position in 2003,[280] the Orange Free State Provincial Division ruled in a 2006 defamation case that the defendant should publish an unqualified public statement retracting and apologizing for a publication.[281] After a minority judgement of the Constitutional Court showed interest in this remedy,[282] the real breakthrough came about in 2011. While ordering the defendant to tender an unconditional apology to the plaintiff for reputational harm, the South African Constitutional Court found that "*it is time for our Roman Dutch common law to recognize the value of this kind of restorative justice*," pointing at the value of an apology and retraction in restoring injured dignity.[283] The Constitutional Court affirmed this view in that same year: "*the remedies readily to hand when a court considers the relief to which a plaintiff is entitled in a defamation case should include a suitable apology*."[284] Along with this evolution in case law, a vast body of academic literature discusses the subject matter thoroughly,[285] some authors describing the trend as still being in its initial stages.[286]

It is clear that South African law is an outlier in the realm of court-ordered apologies, not only because case law dwells extensively on the question of whether or not apologies are part of the legal system, but also because of the two rationales behind the use of this remedy. First, it has been suggested that court-ordered apologies are better fit to remedy injuries to reputation, dignity or feelings than monetary awards.[287] A public apology is usually far less expensive than an award of damages, can set the record straight, restore the reputation of the victim, give the victim the necessary

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[280] Young v. Shaikh, 2003 ZAWCHC 50 (C) at para. 15 ("[E]ven if the amende honorable was still part of South African law, an apology in the circumstances of that case would not serve the interests of justice.").

[281] University of Pretoria v South Africans for the Abolition of Vivisection, 2006 ZAFSHC 65 (OPD) at para 1 & 18 (S.Afr.)

[282] In *Dikoko v. Mokhatla*, the dissenting judge believes that more could have been done to facilitate an apology. He concludes that "this is a case where it might have been appropriate to order an apology if this had been a majority judgment." Dikoko v. Mokhatla 2006 (6) SA 235 (CC) at para. 70.

[283] Le Roux v Dey, 2011 (3) SA 274 (CC) at para. 195-197 (S. Afr.).

[284] *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) at para. 134 (S. Afr.).

[285] Descheemaeker, *supra* note 33, at 913; Neethling & Potgieter, *supra* note 114, at 799 (putting forward that even if such a remedy has not been reinstated, South African law should be developed in accordance with its equitable principles to provide for such a remedy).

[286] Neethling, *supra* note 168, at 42. Likewise, scholars wonder what the contemporary relevance is of retraction and apology (Burchell, *supra* note 68, at 198) or emphasize that the extent to which the *amende honorable* has revived remains uncertain (Descheemaeker, *supra* note 33, 909).

[287] Descheemaeker, *supra* note 33, at 910.

satisfaction desired, and avoid serious financial harm to the culprit.[288] In addition, monetary compensation could impose restrictions on freedom of expression, as it can financially ruin defendants and restrict information being published.[289] Second, and most importantly, courts emphasize that court-ordered apologies are capable of fostering the values of truth and reconciliation, which are considered to be central to the South African legal system in its democratic age.[290] Simultaneously, reference is made to the influence of ideas of restorative justice and *ubuntu* (or *botho*), both of which merit further clarification.

Although restorative justice, a school of thought focused on undoing a wrong through reparation of harm and reconciliation between parties,[291] is mostly associated with sentencing laws, South African courts partly rely on this concept to justify the issuance of court-ordered apologies in civil proceedings. This is motivated by the assumption that any reconciliation consists of recantation of past wrongs and an apology for them.[292] In addition, an apology would sensitize a defendant to the hurtful impact of his or her unlawful actions. [293] The indigenous concept of *ubuntu* (or *botho*) is an idea based on deep respect for the humanity of another, and thus highlights the interdependence of human beings.[294] A remedy based on *ubuntu* should go much further in restoring human dignity than an award of damages. An apology ties in with the true sense of *ubuntu*, as it serves to recognize the human dignity of the plaintiff, "*thus acknowledging his or her inner humanity, the resultant harmony . . . serv[ing] the good of both the plaintiff and the defendant*." [295] Hence, in ordering a defendant to apologize, the Constitutional Court refers to the respect for the dignity of other human beings as the general principled justification.[296]

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[288] Mineworkers Investment Co (Pty) Ltd v. Modimane 2002 (6) SA 512 (WLD) at para. 25 (S. Afr.).

[289] *Id.*

[290] *See* Dikoko v. Mokhatla, 2006 (6) SA 235 (CC) at para. 68; *Manuel v. Crawford-Browne* 2008 (3) All SA 468 (C) at para. 26; *Le Roux v Dey* 2011 (3) SA 274 (CC) at para. 202. In the same sense, see Burchell, *supra* note 68, at 201; Descheemaeker, *supra* note 33, 909.

[291] Descheemaeker, *supra* note 33, at 917.

[292] Le Roux v Dey, 2011 (3) SA 274 (CC) at para. 202 (S. Afr.)

[293] Dikoko v. Mokhatla, 2006 (6) SA 235 (CC) at para. 69 (S. Afr.). Likewise, in a hate speech case, the Equality court of Johannesburg describes the effect of an unconditional apology as restorative. Even if it is so that such apology will plainly not erase the contents of the impugned statements here, it should, most importantly, recognize the fact that the statements are found to be hurtful and hate speech. *South African Human Rights Commission obo South African Jewish Board of Deputies v. Masuku and Another* 2017 (3) All SA 1029 (EqC) at para. 62.

[294] Dikoko v. Mokhatla, 2006 (6) SA 235 (CC) at para. 68 (S. Afr.).

[295] *Id.*

[296] Le Roux, *supra* note 290.

This double rationale has repercussions on the expectations the South African legal system has vis-à-vis trial courts enforcing apologies. In comparison with continental-European jurisdictions, much more emphasis is placed on the sincerity and adequacy of apologies.[297] Hence, courts decide to dismiss demands for apologies if they do "*not believe that a public apology in this matter will be sincere and adequate in the context of this case*." [298] Even so, academic literature stresses that courts should be encouraged, under appropriate conditions, to facilitate apologies honestly offered and generously accepted.[299] However, this focus on truth, sincerity and reconciliation is subjected to criticism in legal scholarship, especially in the context of media defendants. Because of the impersonal nature of the relationship between media defendants and plaintiffs, interpersonal repair and vindication of reputation are considered hard to attain. Thus, it is argued that harm caused by widespread publication of defamatory imputations substantially outweighs the restorative value of retraction and apologies.[300] Correspondingly, the Constitutional Court refrained from taking a position with respect to a demand for an apology by a media defendant, stating that this "*will benefit from fuller consideration and debate on a future occasion*."[301]

C. *Common Law Systems*

Even as alternative forms of non-pecuniary relief, court-ordered apologies are mainly absent in common law jurisdictions, as defamation law is preoccupied with monetary damages. Under U.K. law, plaintiffs can obtain an apology from a defendant in summary relief procedures[302] or as part of an

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[297] In the minority judgment of *Dikoko v. Mokhatla*, the dissenting judge argues "that once an apology is tendered as compensation or part thereof, it should be sincere and adequate in the context of each case." He proceeds that the true value of a sincere and adequate apology as a compensatory measure restoring the integrity and human dignity of the plaintiff, cannot be exaggerated. Dikoko v. Mokhatla 2006 (6) SA 235 (CC) at para. 67.

[298] As a premise for this assumption, the Cape of Good Hope Provincial Division refers to the following: "the defendant in his papers is remarkably silent that he would apologize unreservedly, retract the statements and do so sincerely, in the event that he failed to justify what the plaintiff alleges is malicious defamation." Manuel v. Crawford-Browne 2008 (3) All SA 468 (C) at para. 26.

[299] Neethling, *supra* note 166, at 42.

[300] Burchell, *supra* note 68, at 202; C. J. Visser, *The Revival of the Amende Honorable as Applied to Defamation by the Media*, 128 S. AFRICAN L.J. 327, 347 (2011). Likewise, Descheemaeker argues that in order to be efficacious, court-ordered apologies need to resort to ideas of humiliation and retribution, instead of focusing on truth and dignity which are incapable of restoring reputation or reconciling parties. DESCHEEMAEKER, *supra* note 33, at 931.

[301] The Citizen 1978 (Pty) Ltd v. McBride, 2011 (4) SA 191 (CC) at para. 134.

[302] *See* section 8-11 UK Defamation Act 1996. This summary relief procedure is applicable where it appears to the court that one or other of the parties has no realistic prospect of success. *See also* Carrol & Berryman, *supra* note 1, 483; COLLINS, *supra* note 3, at 372, par. 19.

offer to make amends,[303] but the use of court-ordered apologies as an actual remedy for defamation is extremely rare.[304] In the U.S., civil jurors do not typically have the ability to tell defendants to accept responsibility by apologizing because of practical as well as constitutional considerations.[305] In a very limited number of cases, defendants were actually compelled to apologize, though these cases fall outside the ambit of defamation law.[306] However, this does not imply that U.S. plaintiffs are never awarded an apology as a defamation remedy. Various judgements report that demands for court-ordered apologies are dismissed because allegations of defamation were determined to be unfounded[307] or because the remedy was considered inappropriate.[308]

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[303] An offer to make amends suggests that, after a conflict has arisen about defamatory statements, defendant makes an offer to the plaintiff to publish a correction, an apology and to pay compensation and expenses. If plaintiff accepts the offer, he is barred from commencing or continuing an action in defamation. If the plaintiff does not accept the offer, the defendant may rely in subsequent proceedings on its offer as a defense. *See* section 2-4 UK Defamation Act 1996; *see also* Burchell, *supra* note 68, at 200; David Goldberg, *To Dream the Impossible Dream – Towards a Simple, Cheap (and Expression-Friendly) British Libel Law*, 4 J. INT'L MEDIA & ENT. L. 48 (2011).

[304] After a hard-fought election, a politician falsely states in a tweet that his opponent had to be removed by police from the polling station. His opponent sued for defamation claiming that the Tweet left him open to ridicule. The High Court in Cardiff agreed and forced the politician to pay over £53,000 in damages and to issue a public apology to his opponent via his Twitter page. *See* Joe Trevino, *From Tweets To Twibel: Why The Current Defamation Law Does Not Provide For Jay Cutler's Feelings*, 19 SPORTS LAW. J. 49 (2012).

[305] Lee, *supra* note 12, at 2; Robbennolt, *supra* note 2, at 1147; Sharon E. Rush, *The Heart of Equal Protection: Education and Race* 23 N.Y.U. REV. L. & SOC. CHANGE 1, 50-57 (1997); White, *supra* note 10, at 1267.

[306] *See, e.g.*, United States of America v. Williams, 2015 WL 10571521 (E.D. Mi. 2015) ("it is hereby ordered that the Government issues a formal, written apology to Ms. Williams for improperly destroying her gun permit"); *see also* Kicklighter v. Evans County School Dist., 968 F. Supp. 712, 719 (S.D. Ga. 1997) (an institution requires an apology from a pupil for truculent and disruptive in school behavior. The court decides that "If the school board can determine what manner of speech is inappropriate in the classroom, it can also dictate what speech is proper when fulfilling its charge to inculcate the habits and manners of civility."); Desjardins v. Van Buren Community Hosp., 969 F.2d 1280, 1281-1282 (1st Cir. 1992) (in response to an employer's wrongful discharge of an employee, the district court grants as further relief to plaintiff an order directing defendant to make a public apology in a local newspaper. The U.S. Court of Appeals does not address this issue on its merits, as defendant waived its objection in the course of the proceedings).

[307] *See, e.g.*, Atiya Kirkland Bey v. Pennsauken Municipal Court et al., 2018 WL 1278303 (D. New Jersey 2018); Lemelson v. Bloomberg LP, 253 F.Supp.3d 333 (D. Mass. 2017) ("Plaintiffs seek an order . . . requiring Defendants to issue a public apology, as well as retraction of the article" and "Plaintiff asks for …a formal written apology from various individuals"); Reeves v. Hampton Forest Apartments, 2017 WL 326020 (D.S.C. 2017) ("Plaintiff seeks a formal and public apology").

[308] *See, e.g.*, Frederick v. Shaw & McClay, 1994 WL 57213 (E.D. Pa. 1994) ("Pennsylvania law provides a remedy for claims of defamation and invasion of privacy in damages, not written apologies"); Wilkinson v. Bensalem Township, 822 F. Supp. 1154, 1156 (E.D. Pa. 1993) ("Szafran could not condition Wilkinson's right to speak at a public portion of a council meeting on his

Other common law systems present the same pattern. In Australia, an apology is ordinarily not considered a common law remedy for defamation.[309] The use of provisions which allow for an offer to make amends require an apology and a reasonable correction as part of the offer, and tend to resemble a court-ordered apology.[310] However, under these provisions, the coercive character of the apology is absent. Occasionally, Australian courts show some openness for compelled apologies in other fields such as privacy violations[311] and equal opportunity law. Likewise, in Canada, it is common knowledge that courts cannot impose apologies on defendants in defamation cases.[312] Yet reference is often made to one remarkable case, *Ottawa-Carlton District School Board v. Scharf*, in which the defendants had to publish a retraction and apology in two local newspapers on behalf of their minor child who made defamatory remarks about a school principal and superintendent online.[313] Finally, in all common law jurisdictions, a (spontaneous) apology for a defamatory statement offered by the defendant can be taken into account as evidence in the mitigation of damages.[314]

Only the experience of history, as opposed to the common practice in continental legal systems, can explain why other defamation remedies hardly played a role in the common law tradition. Most notably, the focus on monetary compensation has only come to the fore some centuries after reputational harm entered the legal arena. The beginning of the story is quite similar to the story of the continental legal tradition, where court-ordered

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complying with the requirement that he utter a public apology for prior speech Szafran found offensive").

[309] *See* Carroll, *supra* note 20, at 345; *see also Summertime Holding Pty Ltd v. Environmental Defender's Office Ltd.* (1998) 45 NSWLR 291 (holding that courts do not have the power to order an apology for defamation and that courts are reluctant to grant interlocutory injunction restraining defamatory statements because of freedom of speech concerns).

[310] *See* Carroll & Graville, *supra* note 4, at 312; see § 15(1)(d) of the Defamation Act 2005 (NSW)),

[311] *See* NZ v Director General, Department of Housing [2006] NSWADT 173 (ordering a government department to tender a written apology for disclosing personal information about an applicant on the basis of s. 55(2)(e) of the Privacy and Personal Information Protection Act 1998).

[312] *See* Burnett v. R. (1979), 94 D.L.R. (3d) 281 (Ont. H.C.) ("The court cannot order a retraction or apology in defamation actions"); Hunger Project v. Council on Mind Abuse (COMA) Inc (1995) 22 OR (3d) 29 (Gen Div) ("a defendant in a libel case has no right to plead or refer to an apology").

[313] Ottawa-Carlton District School Board v. Scharf [2007] OJ No 3030, affirmed 2008 ONCA 154, leave to appeal refused [2008] SCCA No 285; *see also* Moore v. Canadian Newspapers Co (1989) 69 OR (2d) 262 (HC) (deciding that it did have the power to order an apology and that such an act would not violate the Canadian Charter).

[314] For Australia, see s. 38 Defamation Act 2005 (NSW). For Canada, see Jones v. Tsige 2012 ONCA 32, 108 OR (3d) 241. For UK, *see* Monroe v. Hopkins, [2017] EWHC 433 (QB). For U.S., see Jhonson v. Smith, 890 F Supp. 726, 729, n.6 (N.D. III. 1995)

apologies were used as a defamation remedy. The reason is that common law courts had no jurisdiction over defamation cases in the very beginning.[315] Local seigniorial courts and, subsequently, ecclesiastical courts dealt with defamatory statements.[316] The church legitimized its jurisdiction over these cases by pointing to the belief that defamation was a sin which required absolution. This obviously had an impact on the type of remedies which were imposed; defamation was punished with penance.[317] This meant that the injured party received vindication in the form of a public apology from the sinner, provided that proof by compurgation or ordeal resulted in his favor.[318] Usually, the punishment consisted of "*an acknowledgment of the baselessness of the imputation, in the vestry room in the presence of the clergyman and church wardens of the parish, and an apology to the person defamed*."[319] However, ecclesiastical penance did not succeed in satisfying middle-class men whose honor was stained. They continued to settle defamation issues by means of the sword (i.e., a duel). This led to disorder that the Church and the monarch wished to abate.[320] Hence, as a legal substitute for dueling, secular courts began to take jurisdiction over defamation cases. A first step was taken with the Court of Star Chamber, which arose out of an *ad hoc* committee dealing with criminal equity and was made aware of political libels and seditious writings in the 14th century, causing its influence to expand with the spread of printing in the 15th and 16th century.[321] As the Star Chamber only accepted jurisdiction over printed materials (i.e., libel),[322] decisions with respect to oral defamation (i.e.,

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[315] LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 15 (1978).

[316] Until then, defamation had only received limited attention in Anglo-Saxon law. The Laws of Alfred the Great (compiled about 880) were a remarkable exception: "If anyone is guilty of public slander, and it is proved against him, it is to be compensated with no lighter penalty than the cutting off of his tongue, with the proviso that it be redeemed at no cheaper rate than it is valued in proportion to the wergild." Rule 32, ENGLISH HISTORICAL DOCUMENTS 500-1041, at 378 (D. Whitelock ed., 2d ed. 1996).

[317] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 772 (5th ed. 1984); Colin R. Lovell, *the Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962); LINDA L. SCHLUETER, PUNITIVE DAMAGES 690-691 (6th ed. 2010); SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY, AND MORAL RIGHT 3 (3d ed. 1995).

[318] Colin R. Lovell, *supra* note 317, at 1054-55.

[319] Veeder Van Vechten, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 551 (1903).

[320] *Id.* at 1054-59.

[321] Also extending its jurisdiction to non-political libels. *See* RAYMOND E. BROWN, DEFAMATION LAW: A PRIMER 12 (2d ed. 2013); R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 109 (1949).

[322] The Star Chamber considered oral defamation to be too numerous and too fleeting to be of much effect. The non-willingness of the Star Chamber to decide over oral statements also explains the origins of the Great Schism between libel and slander in common law. KEETON, *supra* note 317, at 772.

slander) were absorbed by the common law courts in the 15th century.[323] Accordingly, in the beginning of 17th century, two active juridical systems dealt with defamatory statements. The administrative system of the Star Chamber oversaw libel actions and the common law system oversaw slander actions. With the abolition of the Star Chamber in 1641 and its failed reestablishment in 1661, jurisdiction over libel cases fell into the hands of the common law courts.[324] This absorption of all defamation cases by common law courts at the end of the 17th century constitutes the main explanation for the primary focus on monetary compensation. Common law courts had no power to grant specific relief, such as injunctions, specific performance, etc. Courts of Equity lacked the authority to adjudicate claims for defamation and did not want to intrude on the competences of common law courts. Accordingly, monetary damages were the only available remedy. "*Equity will not enjoin a libel*" is now an oft repeated truism in literature.[325]

IV. THE CASE FOR COURT-ORDERED APOLOGIES AS A DEFAMATION REMEDY

Having explored and canvassed different trends in the Western legal tradition, this study asserts that a case can be made for court-ordered apologies as non-pecuniary remedies for defamation. This central claim does not imply that apologies should be available as the "one and only" form of specific relief. Rather, apologies deserve a place among other non-pecuniary remedies which are used in the realm of defamation law. This also means that court-ordered apologies can make a difference for plaintiffs in comparison with other forms of non-pecuniary relief.

In building a case for court-ordered apologies, it is intuitive to argue that apology orders encourage defendants to show acknowledgement, respect and empathy, and thus are more suitable to meet the psychological needs of aggrieved parties than monetary damages. In that way, apologies would produce a healing effect on the fractured relationship and evoke forgiveness in victims. This position is taken by South African courts, asserting that ordered apologies "knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and

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[323] This possibility of obtaining monetary relief even lead to an inundation of slander actions at the end of the 16th century. This urged the judges to put the remedy under rigid restrictions, some of which still survive today. BROWN, *supra* note 321; at 12; Colin R. Lovell, *supra* note 317, 1062; SCHLUETER, *supra* note 317, at 691.

[324] They refused, however, to create a single tort by extending its doctrines on slander to libel. Instead, they continued to recognize the distinction between libel and slander.

[325] EDWARD D. RE, JOSEPH R. RE, REMEDIES: CASES AND MATERIALS 5 (6th ed. 2005).

social interdependence."[326] This opinion is also held by some South African legal scholars.[327] However, this position implies that an apology must be sincere in order to serve its purpose.[328] Accordingly, courts should use sincerity as a decisive criterion to assess whether it is appropriate to issue an apology order. Again, South African courts,[329] as well as some Dutch courts,[330] have refused demands for apologies when the requested apology would not be sincere or heartfelt. Even so, academic research shows that the sincerity concern is real for some plaintiffs, although this research does not specifically focus on the field of defamation law.[331]

This article makes a threefold argument to explain why the healing effect is unfit to make a case for court-ordered apologies in the Western legal tradition. First, with the exception of South African and Dutch case law, trial courts in all other jurisdictions discussed in this article do not pay any attention to the psychological healing of aggrieved parties, nor do they reject apology requests for the sake of sincerity concerns. Additional evidence for this proposition can be found in the fact that defendants are continually compelled to apologize publicly,[332] whereas one would ordinarily associate a statement of genuine sentiment with private apologies.[333] In particular, it is remarkable that courts occasionally decide that a private letter of apology is not sufficient to give the aggrieved party the satisfaction it is entitled to.[334] Second, within the South African legal system itself, focus on the reconciliatory purpose and on sincerity of apologies is under fierce critique as well. Scholars warn that if this premise is true, an apology could never be

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[326] Dikoko v. Mokhatla 2006 (6) SA 235 (CC) at para. 69; *see also Le Roux v Dey* 2011 (3) SA 274 (CC) at para. 202.

[327] Neethling, *supra* note 166, at 293; Neethling & Potgieter, *supra* note 114, at 799.

[328] Van Dijck, *supra* note 2, at 569.

[329] *Manuel v. Crawford-Browne* 2008 (3) All SA 468 (C) at para. 26; *see also* Young v. Shaikh 2003 ZAWCHC 50 (C) at para. 15.

[330] Rb. Rotterdam 21 Nov. 2012, ECLI:NL:RBROT:2012:BY4993, para. 5.42; Rb. Leeuwarden 14 september 2011, ECLI:NL:RBLEE:2011:BT2357, para. 7; Rb. Leeuwarden 18 augustus 2010, ECLI:NL:RBLEE:2010:BN6111, para. 8; Rb. Alkmaar 15 Dec. 2005, ECLI:NL:RBALK:2005:AU8188, para. 7.12. According to VAN DIJCK, in 52% (n =13) of 25 Dutch defamation cases, courts would have used the lack of sincerity as a reason to reject an apology order. *See* Van Dijck, *supra* note 2, at 569.

[331] The pattern merging from empirical studies conducted in legal and non-legal settings is that sincere apologies are preferred. Van Dijck, *supra* note 2, at 568-73. However, Van Dijck comes also to the conclusion are not necessarily required in order for them to be beneficial to victims. *See infra*.

[332] Even in the case where a court ordered the Czech President to send a private letter of apology, the President had to publish the same words of apology on his website for 30 days.

[333] This is strongly emphasized by Lazare, *supra* note 40, at 39.

[334] For Poland, see Sąd Apelacyjny w Krakowie z dnia 22 grudnia 2016 [Decision of the Court of Appeal of Krakow of Dec., 22, 2016], ACa 1080/16. For Switzerland, see Bundesgericht [BGer] [Federal Supreme Court] Nov. 4, 2013, 5A_309/2013 (Switz.).

coerced, except in the most unusual situations.[335] Moreover, as mentioned earlier, it is argued that the South African outlook on court-ordered apologies is of little use for interpersonal relationships in the media defamation context.[336] Third, a vast body of legal and non-legal literature stresses that if one considers particular emotions (such as regret or sorrow) to be essential to court-ordered apologies, it does not seem worthwhile to make use of this remedy.[337] Likewise, empirical research has shown that if one takes the victim's forgiveness as a starting point, the remedial effectiveness of initiatives to facilitate the provision of apologies can be called into question.[338]

Hence, the premise of the court-ordered apology as a defamation remedy ought to be different. Some scholars have pointed to the signaling and expressive function of this type of non-pecuniary relief.[339] An order to apologize would serve a double function. First, as a legal remedy, it confirms which conduct is wrongful and sends out a message to others that such statements are inappropriate.[340] Second, it illustrates that a court, and not just the plaintiff, determines an apology as an appropriate remedy to the wrong in given circumstances.[341] Accordingly, abiding by an apology order would amount to fulfilling a legal requirement, rather than to expressing heartfelt feelings.[342] Additionally, and closely related to the expressive and signaling function, there is an understanding that apologies allow for the correction of the public record more directly than monetary damages. This is the case when legal systems avail themselves of the opportunity that new technology offers (for instance, by imposing the publication of an apology on defendant's social

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[335] Descheemaeker, *supra* note 33, at 934

[336] *See also* Burchell, *supra* note 68, at 202.

[337] *See, e.g.*, KATY BARNETT & SIRKO HARDER, REMEDIES IN AUSTRALIAN PRIVATE LAW 335 (2014); Zwart-Hink, *supra* note 19, at 119. In an analysis of anti-discrimination cases, Carroll stresses that courts do not appear to be under any illusion that they can order sorriness even where they have been conferred with statutory power to order an apology. Robyn Carroll, *You Can't Order Sorriness, So is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 UNSW L.J. 360, 384 (2010). While wondering whether there is a role for apologies in the law, Smith observes that apologizing has become a vague, clumsy, and sometimes spiteful ritual. NICK SMITH, JUSTICE THROUGH APOLOGIES: REMORSE, REFORM, AND PUNISHMENT 9 (2014).

[338] Christopher P. Reinders Folmer et al, *Rethinking Apology in Tort Litigation - Deficiencies in Comprehensiveness Undermine Remedial Effectiveness* 3 (June 28, 2017). https://ssrn.com/abstract=3113196.

[339] This is in line with the expressive argument for tort law, considering torts as a story about the significance of a court saying this defendant wronged that plaintiff. *See* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 24, 24 (2017).

[340] *Id.*

[341] Carroll, *supra* note 20, at 366; Robbennolt, *supra* note 2, at 1147.

[342] Van Dijck, *supra* note 2, at 580.

media page).[343] Thus, in giving the same prominence to the publication of an apology as to the defamatory statements, apologies would be more likely to achieve the objective of restoring the plaintiff's reputation to the level enjoyed before the injurious publication.[344] There is undoubtedly an element of truth in both conceptions; on the one hand, there is the signaling function and on the other hand, there is the function of correcting the public record. Neither of these, however, is sufficient to justify the case for court-ordered apologies, as other non-pecuniary remedies – such as publication of a court decision or a declaratory judgement – can fulfill these functions as well.

Therefore, this article suggests two alternative foundations that justify the use of court-ordered apologies as a defamation remedy. Both can be inferred from the various judgements issued in the continental legal tradition discussed in this article. First, compelled apologies are more likely to produce a shaming effect than other forms of non-pecuniary relief. It forces the apologizer into a humbling position. This reestablishes the self-respect and social status of plaintiff, and rebalances the relationship.[345] In other words, the public apology serves as "*a degradation ceremony that restores equal footing between victim and offender*."[346] Of course, court-ordered apologies are nowadays stripped of their humiliating aspects.[347] Moreover, the Western legal tradition is founded on guilt rather than shame.[348] Therefore, apologies are much more frequently used in Japan, which is widely described as a shaming society.[349] Nevertheless, academic research in the field of criminal law shows that stigmatizing publicity is considered to be one of the most

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[343] For an example of an order to correct the public record by publishing a statement on a Facebook profile after a competition infringement took place on the same medium, see Handelsgericht [HG] Wien, Sept. 9, 2010, 10 Cg 115/10 g (rk). See also Katharina Schmid, § *25 UWG. Urteilsveröffentlichung, in* UWG. GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB (Andreas Wiebe & Georg E. Kodek eds., 2016).

[344] COLLINS, *supra* note 3, 372, at 371, par. 19.46; Scott, *supra* note 7, at 60. However, referring to a case study of a defamation claim of an actor, Craik asserts that the overlap between readers who scanned the original false and defamatory account of his stage production and those who might have noticed the outcome of the legal case months or years later might be surprisingly small. KENNETH H. CRAIK, REPUTATION: A NETWORK INTERPRETATION 153 (2009).

[345] LAZARE, *supra* note 40, at 62; Prue Vines, *The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?*, 1 PUB SPACE: J.L. & SOC.. JUST 1, 14 (2007).

[346] Robbennolt, *supra* note 2, at 1147.

[347] The public humiliation of defendant before the eyes of the victim (on his knees, stripped of the symbols of his rank, barefoot, holding objects such as candles) is regularly touched upon in this article. *See also* Descheemaeker, *supra* note 33, at 931.

[348] RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD - PATTERNS OF JAPANESE CULTURE 222-23 (1946).

[349] Chung Wei Han, *Japanese and Western Attitudes Towards Law*, 12 SING. L. REV. 69, 73 (1991).

straightforward shaming sanctions.[350] While combining stigmatizing publicity with an element of self-debasement, public apologies are assessed and interpreted as an instrument to achieve such a shaming function.[351] Thus, the reason why defamation law prefers public over private apologies is not only to guarantee that everyone who might have been exposed to the initial defamatory assertion is aware of its untruthfulness,[352] but also to inform the public that the plaintiff is now in a position of power after being denigrated by way of false and injurious statements. The aforementioned defamation case in Switzerland concerning the ex-girlfriend of a millionaire illustrates this point very clearly. The court decided that neither media coverage of the criminal proceedings nor reception of a private letter of apology granted the satisfaction she was entitled to. The plaintiff had an interest in third parties being duly informed about the wrong committed and the apology offered. Therefore the court decided that the millionaire should publish an apology on his Facebook profile and internet page.[353]

Second, it is possible to attribute an educational function to court-ordered apologies. Understood in this way, an apology order conveys the political wisdom of courts as the conscience of the community.[354] By making use of this remedy, the court educates members of the community about what constitutes unlawful and injurious statements.[355] It reassures the aggrieved party that important values are in fact shared and that the offender is bound by a social or moral contract.[356] Here, an analogy can be made with telling young children to apologize. Apologies appear to be crucial for their moral

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[350] Dan H. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-32 (1996).

[351] *Id.* at 631-33; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384-85 (1997). Specifically within the field of criminal law, it is argued that shaming effect of apologies offers a cost-effective and politically acceptable alternative to other sentences for minor crimes, while being an effective deterrent to crime because of its power to impose stigma and to shape social norms. Alfred Allan, *Functional Apologies in Law*, 15 PSYCHIATRY PSYCHOL. & L. 369, 378-79 (2008); Dan M. Kahan & Eric A. Posner, S*haming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 366-68 (1999).

[352] CRAIK, *supra* note 342, at 153.

[353] Bundesgericht [BGer] [Federal Supreme Court] Nov. 4, 2013, 5A_309/2013 (Switz.). Similarly, in a Polish case against ZDF for using the term "Polish death camps", the court of appeals of Krakow compels ZDF to publish an apology on its website (Sad Okregowy w Krakowie z dnia 25 kwietnia 2016 [Decision of the Regional Court of Krakow of Apr. 25, 2016], I C 151/14), overturning a verdict by a lower court which took the fact that ZDF had apologized to the plaintiff in a personal letter a reason into account to dismiss the complaint (Sąd Apelacyjny w Krakowie z dnia 22 grudnia 2016 [Decision of the Court of Appeal of Krakow of Dec., 22, 2016], ACa 1080/16).

[354] The concept of courts as the conscience of society is borrowed from E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781, 783 (1988). *See also* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17 (1981)

[355] *See also* Carroll, *supra* note 20, at 365.

[356] LAZARE, *supra* note 40, 62; Zwart-Hink, *supra* note 18, at 120.

development in the sense that apologies provide them a framework to think about and internalize moral concepts (such as responsibility, self-control and redress).[357] In particular, as with children, coerced apologies require defendants to endorse the values at stake as a member of a normative community.[358] In the past, socialist legal systems specifically pointed to the educational values which came along with court-ordered apologies.[359] Various cases in Central and Eastern European countries, in which even heads of state are obliged to publicly apologize, illustrate that this idea is still present today.[360]

This double function attributed to court-ordered apologies has a number of consequences. First, the curative effect of court-ordered apologies is not to be sought with the plaintiff holding the belief that that defendant actually acknowledges responsibility and is feeling sorrow. In fact, the plaintiff should feel vindicated because the defendant has been required to publicly state that he is sorry.[361] In some sense, he needs to see the offender suffer.[362] This curative effect is built upon a series of deductions. From the issuance of defamatory statements, it can be inferred that the defendant considered the plaintiff to be inferior to him or her.[363] By issuing a public apology, a symbolic reversal of the original defamatory assertion is executed.[364] In order words, the apology symbolizes the restoration of the moral equilibrium between plaintiff and defendant.[365] As a consequence, the plaintiff feels vindicated, which contributes to the restoration of his dignity, honor and self-esteem.[366] Of course, the acceptance of a shaming function entails an important tradeoff between this purpose and other basic principles of our legal system, such as human dignity or the prohibition of inhuman or

[357] SMITH, *supra* note 39, at 129.

[358] Nevertheless, Smith seems to be skeptical about both kinds of coerced apologies (by parents as well as by courts) because they would result in purely instrumental apologies dictated by another party which is typically though to possess authority. SMITH, *supra* note 39, at 150.

[359] Ioffe, *supra* note 89, at 61.

[360] For instance, the District Court of Pezinok court explicitly refers to educating the general public that those suspicions are unfounded and accordingly untrue. Okresný súd Pezinok ze dne 09.05.2013 [Decision of the District Court of Pezinok of 9 May 2013], 8C/254/2011.

[361] *See also* BARNETT & HARDER, *supra* note 331, at 335; Carroll, *supra* note 20, at 326; Van Dijck, *supra* note 2, at 573-74.

[362] "You hurt me and now it is your turn to get what you deserve." LAZARE, *supra* note 40, 62.

[363] Robbennolt, *supra* note 2, at 1147.

[364] Descheemaeker, *supra* note 33, at 931.

[365] Sandra Marshall, *Non-Compensable Wrongs, or Having to Say You're Sorry*, *in* RIGHTS, WRONGS AND RESPONSIBILITIES 201, 225 at para. 22 (Matthew H. Kramer 2001); Robbennolt, *supra* note 2, at 1147.

[366] Van Dijck, *supra* note 2, at 573-74.

degrading treatment or punishment.[367] Moreover, we should be vigilant that a degradation ceremony does not stoke resentment and alienation, rather than reintegrating the offender into the moral community.[368] On the other hand, there is definitely a difference between causing shame and humiliating the offender. Additionally, this concept of the curative effect of court-ordered apologies falls in line with the legal notion of satisfaction, understood in its strict sense (see *supra*). As with apologies, the idea underpinning satisfaction is to provide the aggrieved party with an agreeable emotional experience, which softens the painful experience and restores a disrupted equilibrium.

As indicated before, while imposing a stigma on defendants (the shaming function) and reinforcing social norms (the educational function), the sincerity of court-ordered apologies has become largely irrelevant. This is not an innovative insight. Various scholars have already taken the position that while sincerity might seem important in private situations, this is not the case for mandated public apologies.[369] In addition, there is some empirical research suggesting that apologies can only meet the plaintiff's expectations if emphasis is placed on public validation and personal vindication, rather than on acceptability and sincerity.[370]

Because of this shaming and educational function, trial courts have an important role to play in determining the construction of an appropriate court-ordered apology. In fulfilling this task, courts should take into account the aforementioned trade-off between causing shame and complying with other basic principles of our legal system. Likewise, in educating the offender and the general public, trial courts must be careful not to resort to an excessive infantilization of the defendant.[371] After all, it is just as critical to develop a method for how to make a defendant apologize as it is to mandate the apology in the first place. In that perspective, the four building blocks discussed in part one of this article can serve as a handy yardstick. If necessary, a court should modify and reformulate a requested apology for the purpose of

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[367] Vincent Geeraets & Wouter Veraart, *Over verplichte excuses en spreekrecht*, 46 NJLP 135, 143-44 (2017).

[368] SMITH, *supra* note 39, at 61.

[369] LAZARE, *supra* note 40, at 118; Van Dijck, *supra* note 2, at 577; Zwart-Hink, *supra* note 19, at 120.

[370] In a study that conducted 24 interviews with receivers and respondents in discrimination and harassment cases in Australia, complainants who did not receive an apology found the notion of ordered apologies attractive because they believed that ordered apologies give powerful messages to respondents and society and thus would provide them private and public affirmation. In contrast, participants focusing on sincerity, considered non voluntary apologies as unacceptable. Alfred Allan, Dianne McKillop & Robyn Carroll, *Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints*, 17 J. PSYCHIATRY, PSYCHOL. & L. 538, 544-45 (2010).

[371] Otherwise, this would in its turn amount to a humiliating practice. Veraart & Geeraets, *supra* note 367, at 147.

softening the humiliating function and moderating the educative function.[372] Otherwise, the application of court-ordered apologies risks turning into a sparring match.[373] In fact, the court, plaintiff and defendant should come to an agreement that the court will not honor excessive requests, but will still guarantee that the publication of the apology is as prominent as that of the defamatory statement.[374]

Finally, similar to other forms of specific relief (such as publication of court decision), it is clear that an apology should not be imposed as the sole remedy in a given case. Even so, empirical research challenges the belief that apologies can serve as a substitute for compensation.[375] To ensure the full effectiveness of a defamation claim, combining an apology with monetary compensation is worth pursuing. The next part of this article will highlight how this joint order can work within the broader framework of a legal system.

V. IMPLEMENTATION OF COURT-ORDERED APOLOGIES

Having made a case for court-ordered apologies as a defamation remedy, this section aims to provide deeper insight into how this remedy fits within the broader framework of legal systems. Moreover, for continental-European and Anglo-American jurisdictions which currently do not make use of this legal tool, but might consider introducing this remedy in the future, it important to highlight which concerns should be taken into account. When it comes to framing and importing court-ordered apologies into defamation law, a civil-common law divide again comes to the fore. While it seems easier to embed the remedy in continental-European systems, common law systems provide a greater challenge for assimilation. The same goes for the reconciliation of this type of relief with the principal concern: freedom of expression. As court-ordered apologies present themselves as a type of forced speech, an equilibrium must be found. This is simple to attain under the balancing test of the European Court of Human Rights rather than in some common law systems.

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[372] The aforementioned judgement of the Supreme Court of Ceylon, *Boyd Moss v. Ferguson*, provides a clear example: the court redrafts the apology order of a district court and formulates it in a manner which is suitable to repair the injurious words, avoiding the ancient barbarous mode of expression.

[373] Reference can be made to Roberto Fico saga in Slovakia. While the prime minister is being sued to offer apologies because of defamatory statements (see *supra*), he is claiming apologies from tabloids as well. ŠKOLKAY, *supra* note 73, at 105.

[374] The intervention of courts is important to reduce another risk, i.e., court-ordered apologies equating to the coercive practices of authoritarian states and religious institutions. *See* SMITH, *supra* note 37, at 52-53.

[375] Chris Reinders Folmer et al., *Is it Really Not About the Money? Victim Needs Following Personal Injury and Property Loss and Their Relative Restoration Through Monetary Compensation and Apology* 29 (June 26, 2017), https://ssrn.com/abstract=3156149.

A. *Embedment in Legal Culture*

Continental legal systems are familiar with the notion of reparation. As mentioned earlier, reparation signifies that the injured party should be placed in the same condition it would have been in if the wrongful act had not occurred.[376] Continental law is riddled with this notion. For instance, the basic provision of French tort law, article 1240 of the Civil Code (previously art. 1382), alludes to an obligation to repair damage.[377] Likewise, section 249 of the German Civil Code refers to the term "restoration" in its description of the nature and extent of damages.[378] In contrast to common law, reparation is not inextricably intertwined with monetary damages. Although monetary damages are considered to be one form of reparation (*i.e*. through the delivery of a monetary equivalent[379]) modes of non-pecuniary redress can provide an equivalent as well.[380] In defamation law, those non-pecuniary remedies are even more prominent than in other fields, as the harm caused by defamatory remarks is *in se* incommensurably monetary.[381] As a consequence, this notion creates room for the introduction of court-ordered apologies,[382] because there is no real difference between the implementation of apologies and other forms of reparation, such as publication of a court decision[383] or retraction of defamatory statements.[384]

The idea of reparation also implies that the aggrieved party receives recovery of all of its damages; that is to say, full compensation. [385] A party

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[376] JAN RONSE ET AL., SCHADE EN SCHADELOOSSTELLING 209-250 (2d ed. 1984); SOPHIE STIJNS, VERBINTENISSENRECHT, at 100, para. 126 (2013); WALTER VAN GERVEN & ALOIS VAN OEVELEN, VERBINTENISSENRECHT, 327, 453 (4th ed. 2015).

[377] The lack of any further specification shows the openness of French law for non-pecuniary equivalents. CHARLES AUBRY ET AL, COURS DE DROIT CIVIL FRANÇAIS. TOME VI 501 (6th ed. 1935); DEMOGUE, *supra* note 142, at 16, para. 489; MAZEAUD, *supra* note 142, at 632, para. 2317.

[378] German scholars claim that the Civil Code gives priority to the restoration of violated personality rights and legal interests. SCHUBERT, *supra* note 37, at 251; Hans Stoll, *Band I – Teil I: Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden?*, *in* VERHANDLUNGEN DES FÜNFUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES 138 (1964).

[379] Patrice Jourdain, *supra* note 142, at 54; Stoll, *supra* note 67, at 42, para. 39.

[380] SMITH, *supra* note 37, at 2; Stoll, *supra* note 67, at 42, para. 39.

[381] Stoll, *supra* note 67 at 8, para. 9.

[382] *See also* Akkermans, *supra* note 214, at 780; De Rey, *supra* note 18, at 1173, para. 17; Zwart-Hink, *supra* note 18, 109.

[383] Stoll, *supra* note 67, at 42, para. 39. For Belgium, see CALLATAŸ & ESTIENNE, *supra* note 96, at 481. For France, see Cour de Cassation [Cass.] [supreme court for judicial matters] 1re civ., Dec. 16, 2000, Bull. civ. I, No. 321.

[384] For Austria, see Kissich *supra* note 81, at para. 83. For Germany, see Johannes W. Flume, *BGB § 249 Art und Umfang des Schadensersatzes, in* BECKOK BGB, at para 58 (Georg Bamberger et al eds., 43d ed. 2017); Gerald Spindler, *BGB § 253 Immaterieller Schaden*, in BECKOK BGB, at para 4 (Georg Bamberger et al eds., 44th ed. 2017).

[385] For Belgium, see HUBERT BOCKEN ET AL., INLEIDING TOT HET SCHADEVERGOEDINGSRECHT. BUITENCONTRACTUEEL AANSPRAKELIJKHEIDSRECHT EN ANDERE

seeking a court-ordered apology for its non-pecuniary harm will most likely demand that the court supplement this apology with monetary damages.[386] If the court believes the apology might be insufficient to ensure full compensation, it could allow a mixture of both types of reparation.[387] Theoretically, in deciding the most appropriate method of reparation, courts could also impose a hybrid arrangement on the defendant, giving him the choice between paying the total amount of damages or reducing them (in full or in part) by taking back his words and apologizing to the plaintiff.[388] However, this hybrid arrangement would be largely incompatible with the two functions accorded to court-ordered apologies in this article (i.e., the shaming and educational function).[389]

On this point, common law reveals another dimension. This tradition is highly fixated on converting indivisible disputes (i.e., over injury, over property and over the fulfillment or nonfulfillment of obligations) into disputes over sums of money, which implies that no resolution is possible unless one party can show he has been damaged in a compensable way.[390] In addition, following the common law ideology, when a loss has occurred in the past and is not ongoing, it is hard to imagine why injunctive relief would serve any purpose that cannot be met with an award of damages.[391] Moreover, in this legal tradition, there is a preference for using "rewards rather than force" in the pursuit of a desired outcome. This explains the existence of the offer to amend provisions, turning the issuance of an apology and a reasonable correction into a remedy for a defamation claim, while coercive remedies are generally absent.[392]

SCHADEVERGOEDINGSSYSTEMEN 203 para. 330 (2d ed. 2014). For France, see ALAIN BÉNABENT, DROIT DES OBLIGATIONS 680 (16th ed. 2016).

[386] The compatibility of court-ordered apologies with monetary compensation raises complex questions of calculation of the losses and damages, which go beyond the scope of this paper. *See* Van Dijck, *supra* note 2, at 586.

[387] As already has been done for publications of a court ruling, see Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Brussels, Mar. 23, 1999, ALGEMEEN JURIDISCH TIJDSCHRIFT [AJT] 1998-99, 1004 (Belg.); Cour d'Appel [CA] [Court of Appeal] Liège, May 13, 2002, AUTEURS & MEDIA [A&M] 2002, 532 (Belg.); Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Namur, Apr. 18, 2005, JOURNAL DES PROCÈS [Journ. Proc.] 2005, n° 502, 26. *See also* CALLATAŸ & ESTIENNE, *supra* note 96, at 481-82.

[388] Brutti, *supra* note 18, at 141; Zwart-Hink, *supra* note 18, at 122.

[389] Even so, the German author Liepman was in 1906 quite skeptical vis-à-vis such a hybrid arrangement: If A is sentenced "to say that B is not a scoundrel or to pay 100 pounds", and B decides to rectify his statement, the only conclusion that can be drawn is that B was feeling more comfortable admitting that A is not a scoundrel than paying money. *See* Liepmann, *supra* note 45, at 933-34.

[390] SHAPIRO, *supra* note 352, at 10.

[391] Carroll, *supra* note 20, at 345.

[392] Carroll & Graville, *supra* note 4, at 316.

Undoubtedly, these factors complicate the potential introduction of court-ordered apologies as a defamation remedy. Nonetheless, there are other aspects of common law which are more in line with the use of court-ordered apologies as a defamation remedy. The combination of a compensatory purpose with functions that are more likely to be administered with criminal law (such as shaming, educating) is not completely alien to common law jurisdictions, as defamation remedies already comprise punitive damages which dislocate these functions as well.[393] As a South African court already observed (see *supra*), applying court-ordered apologies takes precedence over punitive damages on some points, not least because it might eliminate the chilling effect or danger of media self-censorship because of the possibility of huge damages awards.[394] Hence, combining court-ordered apologies with compensatory damages would allow common law systems to take an intermediate approach. This approach would be premised on finding tort liability against a defendant, but would limit or eliminate the extensive damages to which plaintiffs are entitled.[395]

In this respect, it is also important to take another feature of common law systems into account. In various jurisdictions, jury trial has nearly disappeared and an overt culture of settlement has arisen.[396] For instance, the percentage of civil cases in the U.S. resolved by trial declined to five or six percent.[397] Apologies and corrections can play a role in defamation claims through negotiated settlements.[398] Obviously this alleviates the shaming and educational functions, though does not completely eliminate them. The defendant is still subject to a degradation ceremony in which he has to acknowledge he was wrong and must make an express apology in the eyes of those who were aware of the defamatory statements. A well-known example in U.S. law is the *Nader* case, in which General Motors agreed to pay $425,000 to settle the case out-of-court and issue a public apology after Ralph

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[393] Brutti, *supra* note 18, at 134-35, 137; KEETON, *supra* note 317, at 9.

[394] David A. Anderson, *Is Libel Law Worth Reforming*, *in* REFORMING LIBEL LAW 1, 17 (John Soloski & Randall P. Bezanson eds., 1992); Jerome A. Barron, *Punitive Damages in Libel Cases--First Amendment Equalizer*, 47 WASH. & LEE L. REV. 105, 108 (1990).

[395] *See also* David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1139 (2014).

[396] For UK law, see Simon Robert, *Institutionalized Settlement in England: A Contemporary Panorama*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 17, 25 (2002). For U.S. law, seeD. Michael Risinger, *Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not with a Bang, but a Whimper)*, 60 UCLA L. REV. 1620, 1648 (2013); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 635 (1994).

[397] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 109 (2001); JAKE KOBRICK & DANIEL S. HOLT, DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY VOLUME III: 1939-2005, at 145 (2018).

[398] Carroll, *supra* note 20, at 206; Carroll & Graville, *supra* note 4, at 314.

Nader sued the company for intimidating him by invading his privacy.[399] Further examples are the official and formal apologies made by a number of right-wing groups in Los Angeles after they settled a libel lawsuit with a survivor of Nazi concentration camps, who claimed emotional distress as a result of earlier statements that the Nazi Holocaust of the Jews never happened.[400] The downside of apologies as part of a settlement agreement is that the defendant can still autonomously decide whether or not to agree to an apology without being forced by an authority.

B. *Freedom of Expression Concerns*

Both from a continental law and a common law point of view, a major concern with respect to court-ordered apologies is the interference with freedom of speech. If a defendant is ordered to offer an apology, he can invoke his negative right not to be compelled to express an opinion, and accordingly not to submit himself to forced speech. Thus, there needs to be a balance between this highly significant aspect of free speech and guaranteeing the effectiveness of this remedy.[401] It seems this balance is easier to attain in the continental legal tradition under the proportionality review of the European Court of Human Rights than in some common law systems, such as U.S. law, where free speech is considered an almost absolute right under the First Amendment of its Constitution.

Within the continental legal tradition, it is not really a matter of debate whether court-ordered apologies constitute a restriction on the right to freedom of speech under Article 10 of the European Convention of Human Rights (ECHR).[402] The question at stake is whether this remedy, under certain circumstances, can be considered a permissible restriction of this fundamental right. On the basis of the second paragraph of Article 10 ECHR, the Court tested whether an interference of freedom of speech is prescribed by law and is not disproportionate to the legitimate aim pursued and therefore necessary in a democratic society. The European Court of Human Rights expressed its stance on the matter of court-ordered apologies on a number of occasions. One of the first judgements in 2009 hinted at a general rejection of court-ordered apologies as a defamation remedy. [403] In deciding a case

[399] WILLIAM A. HANCOCK, LAW OF PURCHASING § 36:9 (2d. ed., 2018); *see also* Nader v. General Motors, 255 N.E.2d 765 (N.Y. 1970).

[400] The settlement is described by Wagatsuma & Arthur Rosett, *supra* note 1, at 481. For an example in UK law, see Richard v BBC described by Carroll, *supra* note 20, at 206.

[401] *See* Carroll, *supra* note 20, at 342; Van Dijck, *supra* note 2, at 582-83.

[402] For Dutch courts rejecting an apology request because it would be an infringement of the right to freedom of expression, see Rb. Rotterdam 21 Nov. 2012, ECLI:NL:RBROT:2012:BY4993, para. 5.42; Hof Amsterdam 19 juni 2008, ECLI:NL:GHAMS:2008:BE9682, para. 4.6.

[403] Zwart-Hink, *supra* note 19, at 114.

involving a Russian military officer ordered to issue a written apology, the Court held that "*to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be necessary*."[404] Yet the court proceeded as follows: "*in view of the foregoing considerations and assessing the text of the letter as a whole and the context in which it was written, the Court finds that the defamation proceedings resulted in an excessive and disproportionate burden being placed on the applicant.*"[405] This could be interpreted as indicating that particular circumstances determined the outcome of the case, rather than that the court taking a fundamental position in rejecting the use of court-ordered apologies as a form of non-pecuniary redress.

This viewpoint is confirmed in later judgements. In 2009, while holding that the punishment imposed on an applicant was appropriate in the circumstances of the case, the Court itself suggested that "*the national courts might instead have considered other sanctions, such as the issuance of an apology or publication of their judgment finding the statements to be defamatory*."[406] In 2010, the Court decided that an apology order imposed on a Russian newspaper was an interference prescribed by law[407] and pursued the legitimate aim of protecting the reputation and rights of others.[408] Indeed, the criterion that an interference be prescribed by law should not necessarily prevent courts from ordering apologies in jurisdictions where explicit statutory provision is lacking. This criterion is interpreted with a certain flexibility and makes use of general rules developed on the sufficient basis of case law.[409]

In most judgements of the European Court of Human Rights, however, the interference complained of is not the obligation to provide an apology,

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[404] Kazakov v Russia, App. No 1758/02, Eur. Ct. H.R, at para. 31 (2008). It further observes that this point of view has also subsequently been acknowledged by the Supreme Court of Russia which considered an apology, whatever its form, to be contrary to the law.

[405] *Id.*

[406] Cihan Öztürk v. Turkey, App. No. 17095/03, Eur. Ct. H.R, at para. 33 (2009).

[407] As regards the applicant's argument that the judicial order to extend an apology had no legal basis in domestic law, the Court emphasizes that it had already found that at the material time, that is, *before* the adoption in 2005 of Resolution no. 3 by the Plenary Supreme Court, *the domestic courts reasonably interpreted the notion of retraction as possibly including an apology*. The Court has accepted that that interpretation of the relevant legislation by the Russian courts was not such as to render the impugned interference unlawful in Convention terms. Aleksey Ovchinnikov v Russia, App. No. 24061/04, Eur. Ct. H.R, at para. 45 (2010).

[408] *Id.*

[409] JOHAN VANDE LANOTTE & YVES HAECK, HANDBOEK EVRM. DEEL 1: ALGEMENE BEGINSELEN 127, nr. 38 (2005); JOHAN VANDE LANOTTE & YVES HAECK, HANDBOEK EVRM. DEEL 2. ARTIKELSGEWIJZE COMMENTAAR, 716, para. 8 (2004).

but the sanctions resulting from alleged defamatory statements.[410] As a consequence, rather than deciding over the apology order itself, the Court assesses whether imposing the measures was appropriate in the circumstances of the case.[411] Though further analysis of those judgements provides some indication as to how to frame apology orders that meet the proportionality review applied by the European Court of Human Rights. In two rulings, the Court took into account that the apology was "*neutrally worded, no bad faith or lack of diligence on the applicants' part being implied*," to decide that the interference may be regarded as necessary in democratic society.[412] In contrast, when publication of an apology entails considerable costs for a defendant (for example, if the combined total comes to about eighteen times the average monthly wage in the given jurisdiction), the Court will most likely conclude that a fair balance is lacking between the legitimate aim of protecting reputation and freedom of expression.[413]

While the continental legal culture resorts to this balancing approach, the application of free speech in the common law culture is more likely to present a barrier to the use of court-ordered apologies as a legal remedy in defamation law.[414] This concern seems to be the strongest in the U.S., where the First Amendment holds free speech in such high regard.[415] Just as the U.S. Supreme Court has previously acknowledged that freedom of speech also includes the right to not speak,[416] ordering a defendant to issue an apology

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[410] Having regard to the circumstances of the case as a whole, the Court is of the view that the interference complained of may be viewed as "necessary in a democratic society" within the meaning of paragraph 2 of Article 10 of the Convention. There has therefore been no violation of that Article. (Błaja News v. Poland, App. No. 59545/10, Eur. Ct. H.R, at para. 71).

[411] *See* Kubaszewski v. Poland, App. No. 571/04, Eur. Ct. H.R, at para. 47 (2010). The Court examines whether the domestic court's judgment, by which the applicant was ordered to make an official apology, amounted to a disproportionate interference with the applicant's right to freedom of expression. The Court finds that the domestic authorities failed to take into consideration the crucial importance of free political debate in a democratic society. *See also Gasior v. Poland*, App. No. 34472/07, Eur. Ct. H.R, at para. 46 (2012). The Court reiterates that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference. In the present case, the applicant was only ordered to publish an apology. *See also* Stankiewicz and Others v. Poland, App. No. 48723/07, Eur. Ct. H.R, at 76-77 (2015). The Court found that the domestic courts, in issuing a judicial order of suppressing the information published in the newspaper and demanding an apology, failed to carefully balance the importance of the right to impart information and the necessity of protecting the reputation or rights of others.

[412] Kania and Kittel v Poland, App. No. 35105/04, Eur. Ct. H.R, at para. 52-56 (2012); *Błaja News v. Poland*, App. No. 59545/10, Eur. Ct. H.R, at para. 71 (2013).

[413] Kurski v. Poland, App. No. 26115/10, Eur. Ct. H.R, at para. 58-59 (2016).

[414] White, *supra* note 10, at 1311.

[415] Lee, *supra* note 12, at 2; Robbennolt, *supra* note 2, at 1147.

[416] In *West Virginia State Board of Education v. Barnette*, the Supreme Court held that compelling public schoolchildren to salute the flag was unconstitutional, and therefore struck down a law that forced school children of the Jehovah's Witness faith to salute the flag and recite the Pledge of Allegiance or face punishment for declining to do so. W. Va. Bd. of Educ. v. Barnette,

that might contravene his own beliefs implicates a reduction of his First Amendment rights. Courts have accordingly taken the view that they may not require a party to apologize[417] unless it can be shown that such enforcement is essential to the constitutionally permissible purpose of the law.[418] There are no precedents in which such a showing has been accepted in the realm of defamation law. Nonetheless, U.S. law has accepted compelled speech after a parallel balancing of interests in other fields. Most known are the forced corrective statement remedies in commercial speech.[419] Closer connected to the issue at stake, judgements that consider a court-ordered apology a probationary condition of a criminal court[420] or a disposition condition of a juvenile court[421] do not violate First Amendment rights, because both are reasonably related to the permissible end of rehabilitation.

VII. CONCLUSION

This article offered a comparative legal study of a *prima facie* unorthodox remedy for defamation: court-ordered apologies. However, further analysis showed that this type of redress is not as unconventional as one might expect. First, a court-ordered apology is always more than just saying "sorry" upon instruction of a judge. Whether the topic is approached

319 US 624, 642 (1943). In *Wooley v. Maynard*, a couple was fined by the state of New Hampshire for covering the state motto on the license plate of their car. The U.S. Supreme Court held that the state could not require the defendants to display the state motto, because displaying "Live Free or Die" was in conflict with their moral, religious, and political beliefs. It proceeded that the right of freedom of thought protected against state action includes both the right to speak freely and the right to refrain from speaking at all. Wooley v. Maynard, 430 U.S. 705, 714 (1977). In *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court decided that it cannot distinguish between cases involving compelled statements of opinion and compelled statements of "fact": either form of compulsion burdens protected speech. Riley v Nat'l Fed'n of the Blind of NC, 487 US 781, 782 (1988).

[417] Although the demeanor exhibited by Thomas Roberts throughout these proceedings suggests that simply having to offer an apology for the frivolous lawsuit would work a hardship on him, First Amendment concerns preclude the Court from ordering the apology originally suggested by Clarke and his counsel. Griffith v. Smith, 30 Va. Cir. 250 (1993).

[418] Imperial Diner, Inc. v. State Human Rights Appeal Bd., 52 N.Y.2d 72, 80 (1980) (Meyer, J., dissenting in part).

[419] In *United States v. Philip Morris USA Inc.*, Judge Gladys Kessler ordered the advertising campaign in 2006 detailing to the public all the damage smoking can do. United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1 (D.D.C. 2006). On appeal, the Court of Appeals for the District of Columbia Circuit upheld the concept of a corrective-statements remedy against RICO and First Amendment challenges. The requirement that companies issue corrective statements did not exceed scope of permissible government restrictions on commercial speech, in violation of First Amendment.

[420] United States v. Clark, 918 F.2d 843 (9th Cir. 1990).

[421] State v. KH-H, 353 P.3d 661 (Wis. 2015), par. 16-20 (although dissenting opinion questions whether the luster of the principles followed in Barnette and Wooley demands that "their sacrifice rest on something more than a presumed rational basis").

from a historical or apology-theoretical perspective, the remedy always consists of various building blocks: an affirmation or acknowledgment of fault, an expression of regret, remorse or sorrow, a willingness to repair, and a promise to adapt behavior in the future. Second, court-ordered apologies are much more deeply rooted in the Western legal tradition than one might assume. Their ancestors (*die Klage auf Ehrenerklärung, Abbitte oder Widerruf*' and the '*amende honorable*') have played prominent roles in the past. Nowadays, coerced apologies are still present as a defamation remedy in several jurisdictions (the Netherlands and Switzerland, Central and Eastern European legal systems and South Africa), while they have disappeared in others (such as France, Germany, and other common law systems). The inherent justifications for these different tendencies are diverse, ranging from the heritage of prevailing social and political thought to the implementation of an indigenous concept emphasizing the interdependence of human beings.

Having explored and canvassed those different trends in the Western legal tradition, this study submits that a case can be made for court-ordered apologies as a non-pecuniary remedy for defamation. This central claim does not imply that apologies should be available as the "one and only" form of specific relief. Rather, court-ordered apologies deserve a place among the available non-pecuniary remedies because of their distinctive features. First, apologies have a shaming function, which allows courts to impose a stigma on defendants. Second, apologies serve an educational function, which enables courts to reinforce social norms. When looking at a further implementation of this remedy, a civil-common law divide again comes to the fore. While it seems easier to embed the remedy in continental legal systems, common law systems provide a greater challenge for assimilation. The same goes for the reconciliation of this type of relief with freedom of expression, which is more easily attained under the balancing test of the European Court of Human Right than in other common law systems.