

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT
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SYMPOSIUM

FAKE NEWS AND “WEAPONIZED DEFAMATION”:
GLOBAL PERSPECTIVES

EDITOR’S NOTE

ARTICLES

RICO As a Case-Study in Weaponizing Defamation and the International
Response to Corporate Censorship
Charlie Holt & Daniel Simons

The Defamation of Foreign State Leaders in Times of Globalized Media and Growing
Nationalism
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Defamation Law in Russia in the Context of the Council of Europe (COE)
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Editor's Note

This issue is the third of three entirely devoted to articles first presented as papers at our 2018 symposium, *Fake News and "Weaponized Defamation": Global Perspectives*. As a complement to the previous two issues, the scholarship in this collection exemplifies the quality and diversity of the ideas and perspectives shared at that remarkable symposium.

The first article, "RICO as a Case-study in Weaponizing Defamation and the International Response to Corporate Censorship," by Charlie Holt and Daniel Simons, laments how corporate use of the U.S.'s Racketeer Influence and Corrupt Organizations Act adds to the corrosive impact of SLAPPs on free speech. Holt and Simons, legal counsel to Greenpeace International, navigate the direct and immediate implications of international human rights law on business interests seeking to use SLAPP actions as a means for private censorship.

In "The Defamation of Foreign State Leaders in Times of Globalized Media and Growing Nationalism," Alexander Heinze uses the example of the *Böhmermann* affair in Germany to argue against the abolishment of laws that criminalize defamation of heads of state. The author, an Assistant Professor at the University of Göttingen, posits that states which criminalize attacks on foreign government officials should also permit actions for defamation, subject to constitutional speech protections.

"Defamation Law in Russia in the context of the Council of Europe (CoE) Standards on Media Freedom," is by Elena Sherstoboeva, an Assistant Professor at the School of Creative Media and the School of Law at the University of Hong Kong. Informed by the CoE standards, Professor Sherstoboeva compares the ways in which defamation is conceived by two of Russia's highest courts, the Constitutional and Supreme Courts, and reviews how defamation cases are adjudicated in Russian's courts of initial jurisdiction.

Wannes Vandenbussche, in "Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies," uses a comparative law analysis to argue that apologies are an overlooked remedy in Western legal tradition that merit reconsideration in jurisdictions that have abandoned it. Dr. Vandenbussche is a research affiliate at the Institute for the Law of

Obligations at KU Leuven in Belgium and a recent Fulbright Fellow at Yale Law School.

As we bring this issue to publication, I want to express my gratitude to outgoing student editors Grace Khanlian and Lauren Landau, who supervised our student staff through the last half-year under less-than-ideal circumstances. The Coronavirus Pandemic has been a challenging time for all of us in 2020. As we begin to emerge from this worldwide calamity, the *Journal* is looking forward to publishing scholarship that engages the pandemic's impact on entertainment and media law and practice.

As always, your comments, suggestions, and feedback are welcome.

Professor Michael M. Epstein
Supervising Editor

RICO AS A CASE-STUDY IN WEAPONIZING DEFAMATION AND THE INTERNATIONAL RESPONSE TO CORPORATE CENSORSHIP

Charlie Holt* and Daniel Simons**

The emergence of the Racketeer Influenced and Corrupt Organization Act (RICO) as a corporate weapon against critical advocacy represents an aggressive new phase in the evolution of Strategic Lawsuits Against Public Participation (SLAPPs) in the United States. RICO enables corporations to act as surrogates for federal prosecutors and smear critics with spurious criminal allegations. As such, it provides a vivid example of how corporations in the USA and beyond are increasingly able to operate in a way analogous to governments, using heavy-handed legal tactics as a means of privatized censorship. In this Article, we will detail the corrosive impact SLAPPs have on free speech, explain how international human rights law has direct and immediate implications for the use of SLAPPs by corporations, demonstrate how existing human rights instruments can be interpreted and applied to meet this new challenge, and highlight where further action is needed by human rights institutions.

I. INTRODUCTION

In recent years, a discernible growth in Strategic Lawsuits Against Public Participation (SLAPPs)¹ have been reported by human rights groups around the world. In India, Amnesty International recognized an “increasing

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¹ SLAPP is “a strategic lawsuit against public participation – that is a suit brought by a developer, corporate executive, or elected official to stifle those who protest against some type of high-dollar initiative or who take an adverse position on a public-interest issue (often involving the environment)”. *SLAPP*, BLACK’S LAW DICTIONARY (10th ed. 2014). See GEORGE PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 8-10 (1996).

use of strategic civil defamation lawsuits” – a practice referred to in the United States as SLAPPs – in its 2014 submission to the Law Commission of India,² while separately noting a similar trend in the Philippines.³ Thai academics and human rights lawyers have called for legal reform to stop a rising tide of SLAPPs.⁴ In South Africa, Otto Saki from the Ford Foundation recently noted that “the use of SLAPP suits in South Africa is becoming a trend”,⁵ while Earth Rights has described the SLAPP tactics used in Ecuador as being “the most extreme” example of a “rise in SLAPP . . . suits by corporate defendants against the human rights attorneys and NGOs that have advocated against them.”⁶ In Canada, meanwhile, EcoJustice pointed to the “worrisome trend of SLAPP suits” in a report detailing the “urgent need for anti-SLAPP legislation in Ontario.”⁷ While less has been written about European SLAPPs, a number of European countries have seen a similar trend: a recent article in the *Malta Independent* noted a “new menace of SLAPP lawsuits being faced by the Maltese media,” with “Malta’s three English language newspapers [all being] SLAPPED with potentially financially crippling lawsuits to the tune of tens of millions of Euros.”⁸

While global in nature, the SLAPP trend is particularly pronounced in countries that lack procedural safeguards, legal aid or otherwise affordable legal services, and measures to sanction abusive legal practices. The USA suffers various degrees of these deficiencies and is therefore particularly fertile ground for SLAPPs. For example, the “American rule” of costs

² See *Amnesty Int’l India Submission to the Law Commission of India*, 7 (June 20, 2014), <https://www.scribd.com/document/231925192/Amnesty-International-India-Submission-on-Media-Laws-With-Summary>.

³ *Amnesty International Report 2010 - Philippines* (Mar. 19, 2011), <http://www.refworld.org/docid/4c03a80946.html>.

⁴ Pratch Rujivanarom, *When Freedom of Speech is SLAPPED By law Enforcement*, SUNDAY NATION (Aug. 6, 2017), <http://www.nationmultimedia.com/detail/politics/30322931>.

⁵ Otto Saki, *How Companies are Using Lawsuits to Silence Environmental Activists—and How Philanthropy Can Help*, FORD FOUND. EQUAL CHANGE BLOG (June 13, 2017), <https://www.fordfoundation.org/ideas/equal-change-blog/posts/how-companies-are-using-law-suits-to-silence-environmental-activists-and-how-philanthropy-can-help>.

⁶ Katie Redford, *Corporate Rights or Human Rights?*, EARTHRIGHTS INT’L BLOG (Oct. 16, 2013), <https://earthrights.org/blog/corporate-rights-or-human-rights>.

⁷ EcoJustice & Can. Envir. Law Ass’n, *Breaking the Silence: The Urgent Need for Anti-SLAPP Legislation in Ontario*, ECOJUSTICE 11 (2010), https://www.ecojustice.ca/wp-content/uploads/2014/11/Breaking-the-Silence_the-need-for-anti-SLAPP-legislation.pdf.

⁸ David Lindsay, *SLAPP lawsuits: Parliament Cannot Prevent Foreign Lawsuits but Maltese Courts Could Limit Damages*, MALTA INDEP. (Dec. 31, 2017), <http://www.independent.com.mt/articles/2017-12-31/local-news/SLAPP-lawsuits-Parliament-cannot-prevent-foreign-lawsuits-but-Maltese-courts-could-limit-damages-6736183102>.

apportionment limits judicial discretion to penalize abusive plaintiffs,⁹ while an absence of legal aid combined with eye-wateringly high legal fees makes it prohibitively expensive for SLAPP victims to defend themselves.¹⁰ Although some form of anti-SLAPP legislation exists in 28 states (along with the District of Columbia and Guam), no procedural safeguards exist on a federal level to protect against SLAPPs.¹¹

Public watchdogs are also likely to be more exposed to SLAPPs in jurisdictions with loosely worded laws targeting speech, allowing SLAPP litigants to disguise or “camouflage” their attacks as standard civil disputes.¹² Given the ambiguity inherent in definitions of “opinion” and “fact,” defamation lawsuits are unsurprisingly the most common vehicle for SLAPPs.¹³ This Article, however, focuses on the corporate exploitation of the more aggressive Racketeer Influenced and Corrupt Organizations Act (RICO), whose broadly worded provisions have been the subject of controversy since its passage into law in 1970. Over the last ten years, the USA’s federal racketeering law has developed into a powerful instrument to shut down the speech of advocacy groups. Today, its abusive application provides a stark illustration of the dangers of unfettered corporate power.

II. THE FEDERAL ABUSE OF RICO

Enacted as Title IX of the Organized Crime Control Act of 1980, the stated purpose of RICO was for “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”¹⁴ It would advance its objectives – described in a Justice Department training memo as being “to hit organized crime in the

⁹See Clara Jeffrey & Monika Bauerleinoc, *Why We’re Stuck With \$650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES (Oct. 23, 2015), <http://www.motherjones.com/politics/2015/10/why-wont-we-get-our-legal-fees-back>.

¹⁰ See Leaders, *America’s Lawyers: Guilty as Charged*, ECONOMIST (Feb. 2, 2013), <https://www.economist.com/news/leaders/21571141-cheaper-legal-education-and-more-liberal-rules-would-benefit-americas-lawyersand-their> (“During the decade before the economic crisis, spending on legal services in America grew twice as fast as inflation.”).

¹¹ Robert T. Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence!: How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 436 (2017).

¹² The term “camouflage” was used in this context by George Pring, who described SLAPPs as “masquerad[ing]” legally and entering the system “camouflaged as one of six ordinary torts.” See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989).

¹³ *Id.* Pring describes how in the 228 cases he and Penelope Canan studied, 53% were defamation. The others were business torts (32%), judicial torts (20%), conspiracy (18%), constitutional/civil rights violations (13%), and nuisance/other (32%).

¹⁴ S. REP. NO. 91-617, at 76 (1969), <https://www.justice.gov/usam/usam-9-110000-organized-crime-and-racketeering#9-110.100>.

pocketbook” – with “enhanced sanctions and new remedies.”¹⁵ As mafia boss Gennaro Angiulo once boasted under federal surveillance, RICO “was only written for people like [me].”¹⁶

As the *Wall Street Journal* put it, RICO ties “the big bosses to the crime of their underlings” by claiming they were all part of a “criminal enterprise.”¹⁷ Given the focus on organized crime, the “enhanced sanctions and new remedies” provided in the Organized Crime Control Act were designed to be severe and punitive.¹⁸ Criminal measures include 20 years imprisonment,¹⁹ a fine of up to twice the gross profits derived from the racketeering,²⁰ the confiscation of legitimate businesses if purchased with illegally obtained money,²¹ and the seizure of funds and property before the trial.²² Meanwhile, in civil cases, treble damages and attorney's fees can be levied.²³ These penalties were deemed so severe that, even as the measure was being approved and signed into law, experts were expressing doubt as to its constitutionality.²⁴ Testifying against the bill in a 1970 subcommittee hearing, Lawrence Speiser of the American Civil Liberties Union (ACLU) warned that the language of the bill was so broad that “offenses of the kind [that] resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill.”²⁵ President Nixon nonetheless signed the bill into law on October 15, 1970, declaring that the new law would “launch a total war against organized crime[, a]nd we will win this war.”²⁶

Despite this bold rhetoric, today RICO is only occasionally put to use against organized crime.²⁷ This has been attributed to the “[last-minute

¹⁵ Karla Spaulding, *Hit Them Where it Hurts*, NW. U. PRITZKER SCH. L. 96. (1989).

¹⁶ *Proposed Rico Reform Legislation: Hearing on S. 1523 Before the H. Comm. Judiciary*, 100th Cong. (1989) (statement of William Weld, Assistant Attorney General, Criminal Division).

¹⁷ Nathan Koppel, *They Call it RICO, and it is Sweeping*, WALL ST. J. (Jan. 20, 2011), <https://www.wsj.com/articles/SB10001424052748704881304576094110829882704>.

¹⁸ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). The legislative history indicates that “the forfeiture provision was intended to serve all the aims of the RICO statute, namely, to “punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.” 116 Cong. Rec. 18,955 (1970).

¹⁹ 18 U.S.C. § 1963(a) (2009).

²⁰ *Id.* § 1963(a)(3).

²¹ *Id.* § 1963(a)(2)(d).

²² *Id.* § 1963(c).

²³ 18 U.S.C. § 1964(c).

²⁴ Spaulding, *supra* note 15.

²⁵ Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 832 (1996).

²⁶ Remarks on Signing the Organized Crime Control Act of 1970, PUB. PAPERS 846 (Oct. 15, 1970).

²⁷ See GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 2-3 (2000).

inclusion] of a civil remedy not confined to governmental plaintiffs,”²⁸ but the abuse of RICO by federal prosecutors long precedes its abuse by corporations and other private plaintiffs. The problem can better be attributed to the law’s vaguely defined scope. Despite the stated purpose of the law, the words “organized crime” were omitted from the statute due to fears that cases would be blocked due to definitional difficulties.²⁹ Some in Congress recognized at the time that this could cause problems given the inclusion of civil remedies: Representative Abner J. Mikva, for example, noted that “[W]hatever [RICO’s] motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach.”³⁰ Helped along by “vaguely worded predicates and . . . a plain meaning that departs from the intention of some of its authors,”³¹ the result is what the *Wall Street Journal* has called “one of the nation’s most powerful and sweeping laws.”³² An editorial in 1989 was even more blunt; it concluded that RICO “is very possibly the single worst piece of legislation on the books.”³³

RICO’s elastic criminal provisions were always reliant on a disciplined exercise of prosecutorial discretion to prevent overreach. This was conceded by Justice Souter in *N.O.W. v. Schiedler*, where he noted that “conduct alleged to amount to Hobbs Act extortion, . . . or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity.”³⁴ The elasticity of these predicate crimes, coupled with the high damages available, created what the RICO scholar Paul Batista called an “in terrorem effect”³⁵ – “ironically arming plaintiffs for mob-like, strong-arm tactics.”³⁶

Prosecutorial discipline was in notoriously short supply during the mafia wars of the 1970s, and it was not long before federal authorities were accused of abusing their powerful new prosecutorial toy. Referring to the transformation of RICO as a “legal monstrosity,” William Safire summarized the problem in the *New York Times*: “politically ambitious prosecutors in

²⁸ *Id.* at 3.

²⁹ See, e.g., PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 2-24 (3d ed. Supp. 2014).

³⁰ 116 CONG. REC. 35204 (1970) (statement of Rep. Mikva) (discussing implications of Organized Crime Control Act of 1970).

³¹ *Application of the RICO Law to Nonviolent Advocacy Groups: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105 Cong. 59-932 (1998) [hereinafter *RICO Law Hearing*] (statement of Rep. Martin Meehan).

³² Koppel, *supra* note 17.

³³ Editorial, *Second Thoughts on RICO*, WALL ST. J., 319 (May 19, 1989).

³⁴ *N.O.W., Inc. v. Schiedler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring).

³⁵ See BATISTA, *supra* note 29, § 1.02.

³⁶ *Id.*

New York, Chicago and elsewhere, ignoring Justice Department guidelines, have been making themselves famous by misapplying RICO to targets who have nothing to do with organized crime.”³⁷

It was Rudy Giuliani’s crackdown on Wall Street white-collar crime in the 1980s that really marked RICO out as amenable to abuse.³⁸ Giuliani was accused in an op-ed penned by the New York Civil Liberties Union’s Richard Emery of resorting to “an array of extreme measures that threaten the presumption of innocence and the right to an adequate defense in six criminal trials.”³⁹ Giuliani “saw RICO’s amorphous language as a potent weapon to rubber-hose and coerce guilty pleas and punish those who refused to cooperate.”⁴⁰ In particular, Giuliani used RICO’s sanctions to freeze the assets of the accused (thereby restricting their ability to pay for attorneys) and used “carefully orchestrated press conferences, news releases and luridly phrased indictments” to convict them in the court of public opinion. After indicting investment firm Princeton/Newport Partners on allegations of tax fraud, for example, Giuliani demanded pretrial forfeitures worth tens of millions of dollars – “prompting spooked investors to abandon the firm, which was consequently liquidated.”⁴¹ The firm’s conviction was later overturned on appeal, with the IRS finding it had actually overpaid its taxes.

III. THE GROWTH OF CIVIL RICO

With the growth of civil RICO in the 1980s, the aforementioned abuse spread nationwide. According to an American Bar Association study in 1990, for example, “more than 90 percent of the private civil cases alleging RICO violations are not brought against organized crime, but against legal businesses, labor unions, spouses, and in one case, feuding rabbis.”⁴² As L. Gordon Crovitz quipped, “The law is ensnaring people whose only connection with a racket is the occasional encounter with a screaming baby.”⁴³

³⁷William Safire, *ESSAY: The End of RICO*, N.Y. TIMES (Jan. 30, 1989), <http://www.nytimes.com/1989/01/30/opinion/essay-the-end-of-rico.html>.

³⁸ See William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 INDEP. REV. 85, 86 (2004).

³⁹ Branko Marcetic, *The Long, Cruel Career of Rudy Giuliani*, JACOBIN MAG. (Dec. 13, 2016), <https://www.jacobinmag.com/2016/12/rudy-giuliani-trump-cabinet-secretary-state-mayor>.

⁴⁰ DANIEL R. FISCHER, *PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION* (1995).

⁴¹ Marcetic, *supra* note 39.

⁴²L. Gordon Crovitz, *RICO and the Man*, REASON MAG. (Mar. 1, 1990), <http://reason.com/archives/1990/03/01/rico-and-the-man>.

⁴³ *Id.*

Given this abuse, it is perhaps surprising that RICO's civil remedies went "virtually unnoticed and unused" in the 1970s and early 1980s.⁴⁴ It wasn't long, however, before potential became a reality. "By 1978 there were only two reported cases involving RICO claims; by 1981, only 13 cases were reported."⁴⁵ By 1984 however, over 100 decisions were published on the matter.⁴⁶ By 1985 RICO had become the "weapon of choice for civil plaintiffs who perceived in the broad language of the statute a means for articulating novel or creative claims and escalating the potential for the litigation equivalent of terror—the availability of treble damages."⁴⁷

This explosive growth was soon recognized by Supreme Court justices. In the 1985 case of *Sedima, S.P.R.L. v. Imrex Co.*, Justice White wrote in his majority opinion that, while the liberal construction advanced by the plaintiffs should be upheld, "we nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."⁴⁸ In his chapter for the 1989 book, "The RICO Racket," Justice William Rehnquist noted that "civil filings under [RICO] have increased more than eight-fold over the last five years to nearly a thousand cases during calendar year 1988" and that "most of the civil suits filed under the statute have nothing to do with organized crime."⁴⁹ Rehnquist made similar arguments in a 1985 *Wall Street Journal* editorial entitled, quite bluntly, "Get RICO Cases Out of My Courtroom."⁵⁰

Despite this plea the use of civil RICO continued to balloon. "From 2001 to 2006 alone, civil RICO plaintiffs filed, on average, 759 private civil claims each year."⁵¹ However much judges were concerned by the proliferation of civil RICO, in many cases they were just "hold[ing] that a federal statute meant exactly what it said."⁵² Its latent potential as a tool for SLAPP litigants was therefore becoming clear: As Justice Thurgood Marshall noted in his dissenting judgment in *Sedima S.P.R.L. v. Imrex Co.*, "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no

⁴⁴ A. Darby Dickerson, *Curtailling Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476, 485 (1996).

⁴⁵ *Id.*

⁴⁶ James A. Doering, *Civil RICO: Before and After Sedima*, 69 MARQ. L. REV. 395, 398 n.17 (1986).

⁴⁷ BATISTA, *supra* note 29, at 1-3.

⁴⁸ *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 500 (1985).

⁴⁹ William Rehnquist, *Reforming RICO*, in THE RICO RACKET (1989).

⁵⁰ William Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J. (May 19, 1989).

⁵¹ Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning Rico to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 3 (2008).

⁵² Craig M. Bradley, *N.O.W. v. Scheidler: RICO Meets the First Amendment*, SUP. CT. REV. 129, 130 (1995).

merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.”⁵³

IV. TURNING RICO AGAINST ADVOCACY GROUPS

RICO appears to have first emerged as a tool against advocacy groups in a series of cases against anti-abortion activists, culminating with the Supreme Court decision in *N.O.W. v. Scheidler*. The path was cleared for *Scheidler* by the refusal of the Supreme Court in October 1989 to consider an appeal of a \$43,000 RICO verdict against 27 activists who demonstrated against a Philadelphia abortion clinic. Edward Tiryak, the attorney for the clinic, said at the time that the “political objective” of including the RICO charge was to “expose these people as not just Mom and Pop demonstrating in front of a clinic and trying to express their views.”⁵⁴

The sole predicate crime cited as the basis for the RICO suit in *Scheidler* was extortion.⁵⁵ Crucially, while the plaintiffs attached an appendix to the complaint listing a series of crimes such as arson and bombing committed in the last 15 years, none were committed by the named defendants and no link with the arsonists and bombers was alleged.⁵⁶ Instead, acts such as sit-ins and blocked entrances (and even “trying to gain media attention”) were treated in the complaint as being extortive conduct.⁵⁷

In response to the *Scheidler* decision, a subcommittee of the House of Representatives in 1998 held a hearing on the “Application of the RICO law to Nonviolent Advocacy Groups.” Bill McCollum, a Republican Representative from Florida, said he was “concerned that some judges may interpret speech which strongly asserts a point of view on an important subject to be extortion simply because some who hear it may believe it to be threatening.”⁵⁸ Perhaps more authoritatively, the author of RICO – George Robert Blakey – warned about the use of RICO against protesters:

Until the applicability of RICO to protests is definitively decided . . . this kind of litigation will unconstitutionally chill political and social protests, of all types, not just anti-abortion demonstrations . . . Few who desire to bring about meaningful social or political change will lightly risk their jobs, homes or pocketbooks to join a group of protesters if they may be named in a RICO suit based on “extortion,” forced to submit to extensive civil

⁵³ *Sedima*, 473 U.S. at 506.

⁵⁴ Crovitz, *supra* note 42.

⁵⁵ Bradley, *supra* note 52, at 136-37.

⁵⁶ *Id.* at 136.

⁵⁷ *Id.* at 137.

⁵⁸ *RICO Law Hearing*, *supra* note 31 (statement of Chairman McCollum).

discovery, and have to pay the huge attorneys fees and costs generated by aggressive litigators.⁵⁹

At the time, a number of advocacy groups warned about the precedent that *N.O.W. v. Scheidler* would set: “a spokesman for ACT-UP, a gay rights organization, declared that not only his organization but environmentalists and animal rights activists would now be vulnerable to RICO suits.”⁶⁰ Meanwhile, People for the Ethical Treatment of Animals (PETA) filed an amicus brief on behalf of the petitioners arguing for the *Scheidler* decision to be reversed on appeal, warning that “this loose application of federal anti-racketeering laws to political advocacy groups threatens PETA’s aggressive advocacy for the benefit of animals.”⁶¹

Within three years, the fears of PETA and others had materialized. In 1997, according to the Civil Liberties Defense Center, PETA became the first non-anti-abortion advocacy group sued under RICO after Huntingdon Life Sciences (HLS) was publicly exposed by the group and charged with 23 counts of violating the Animal Welfare Act.⁶² HLS sued PETA on the basis that undercover investigations and the “subsequent transportation of documents for use in press releases and direct mailings” were sufficient to constitute racketeering crimes.⁶³ The case was eventually settled out of court after the judge denied PETA’s motion to dismiss, finding that HLS had – in treating undercover investigations as “extortionate” – sufficiently pled predicate acts under RICO.⁶⁴

Within two years, a second RICO lawsuit had been filed against animal rights advocates. This time filed by furrier Jacques Ferber Inc., the lawsuit alleged that the animal rights groups in question had “interfer[ed] with his legitimate business enterprise” by, among other things, holding weekly protests and disseminating “defamatory stickers and signs” outside of the store.⁶⁵ While vandalism and threats of violence were also alleged, none of the named defendants were criminally charged with perpetrating the alleged vandalism or harassment.⁶⁶ The case was eventually dismissed, but only after

⁵⁹ *Id.* (statement of G. Robert Blakey Esq., Professor of Law, Notre Dame Law School).

⁶⁰ Bradley, *supra* 52.

⁶¹ *Scheidler*, 510 U.S. at 251.

⁶² Civil Liberties Defense Center, *RICO* (Apr. 24, 2014), <http://www.cldc.org/rico>.

⁶³ *Huntingdon Life Scis., Inc. v. Rokke*, 986 F. Supp. 982, 988 (E.D. Va. 1997).

⁶⁴ *Id.* at 992.

⁶⁵ Civil Liberties Defense Center, *supra* note 62.

⁶⁶ Jaime I. Roth, *Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467, 480 (2002).

the activists had accepted a number of demands to soften their protest activity.⁶⁷

V. *CHEVRON v. DONZIGER*

In 2011, Chevron lost an 8-year legal battle in Ecuador and was hit with an \$18 billion USD liability judgment. The legal case, *Aguinda v. ChevronTexaco*, began in October 2003 in Lago Agrio, Ecuador, after it was transferred from a U.S. federal court at Chevron's request (the case was originally brought in November 1993 in the Southern District of New York against Texaco, which Chevron bought in 2001).⁶⁸ The plaintiffs, consisting of some 30,000 people from five indigenous groups and dozens of communities in Ecuador's Amazon, alleged massive oil contamination of their ancestral lands and waters – including the deliberate dumping of over 18.5 billion gallons of toxic “formation waters” into Amazon waterways.⁶⁹

Instead of paying the damages, Chevron sold its assets in Ecuador to avoid seizure, left the country, and promised the indigenous groups they would face a “lifetime of litigation” if they “dare pursue their claims.”⁷⁰ Chevron's General Counsel, Charles James, told an audience of law students at Berkeley that while he expected to lose the case, Chevron “would fight until hell freezes over – and skate it out on the ice.”⁷¹ After the indigenous groups started enforcement actions in the USA and Canada, Chevron took an innovative approach to making good on these promises: it turned to RICO.

Chevron argued, in short, that the \$18 billion USD judgment had been procured “fraudulently” by the defendants. The basic logic for invoking RICO was simple: while courts are split on whether equitable relief is available in civil RICO claims, Chevron could argue that they were entitled to injunctive relief to prevent the defendants from profiting off their “criminal enterprise.” Chevron's RICO strategy, however, went much further than just capitalizing on the law's provisions for sanctions and remedies. Chevron took full advantage of RICO's public relations opportunities. While the RICO lawsuit was brought against approximately 50 lawyers and activists, (with advocacy groups Rainforest Action Network (RAN) and Amazon Watch named as “non-party co-conspirators”) Chevron put a strong focus on Steven Donziger, the New York lawyer who had worked on the Lago Agrio litigation

⁶⁷ Civil Liberties Defense Center, *supra* note 62.

⁶⁸ Earthjustice, *Understanding Chevron's “Amazon Chernobyl”: Background of the Landmark Legal Case over Chevron's Environmental Contamination in Ecuador*, p3/12 (Spring 2009).

⁶⁹ *Id.*

⁷⁰ Pet. for Writ of Mandamus, *In re: Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje*, No. 11-cv-0691-LAK, at 12 n.8 (S.D.N.Y. June 6, 2011).

⁷¹ *Id.*

as a legal consultant for the Amazon Defense Front. An internal email from 2009 from a Chevron strategist described their public relations strategy as: “demonize Donziger,”⁷² which they proceeded to do through an online newspaper called the “Amazon Post,” a litany of social media accounts in multiple languages, a series of slickly-produced YouTube videos,⁷³ and at least eight public relations firms.⁷⁴ As well as targeting Donziger, Chevron took advantage of RICO to “cast its victims and virtually anyone who has supported their campaign, or been critical of Chevron – including NGOs, journalists, and responsible investors – as criminals.”⁷⁵

As with earlier RICO cases targeting advocacy, Chevron also used an expansive reading of RICO to treat advocacy as extortive or otherwise criminal. Chevron’s complaint alleged that advocates colluded with attorneys to “create enough pressure on Chevron to extort it into paying to stop the campaign against it,”⁷⁶ including through hard-hitting press releases as well as lobbying.⁷⁷ Chevron further stretched the notion of a “criminal enterprise” to encompass the wider movement behind the Lago Agrio litigation. It filed discovery lawsuits against the original Ecuadorian plaintiffs and their consultants in over two dozen U.S. courts and subpoenaed the emails of about 100 environmental activists and other supporters not directly associated with the lawsuit.⁷⁸ Through the discovery process, Chevron attempted to force these groups to turn over all internal planning and strategy documents as well as the identities of their supporters.⁷⁹

Chevron’s RICO litigation is estimated to have cost up to \$2 billion USD in legal fees (even before ancillary costs such as PR firms are factored in), with the company using more than two thousand legal professionals from

⁷² Chevron’s lead PR consultant Chris Gidez in a 2009 email to company officials obtained by Steven Donziger.

⁷³ See Justin Ling, *Meet the Lawyer Chevron Tried to Destroy*, VICE NEWS (Jan. 23 2015), https://www.vice.com/en_ca/article/av4m5k/meet-the-lawyer-chevron-tried-to-destroy-112.

⁷⁴ James North, *Ecuador’s Battle for Environmental Justice Against Chevron*, NATION (June 2, 2015), <https://www.thenation.com/article/ecuadors-battle-environmental-justice-against-chevron>.

⁷⁵ *Institutions, Organizations and Individuals Advocating for Corporate Accountability Condemn Chevron’s Retaliatory Attacks on Human Rights and Corporate Accountability Advocates and See it as a Serious Threat to Open Society and Due Process of Law*, AMAZONWATCH.ORG, <http://amazonwatch.org/assets/files/2014-chevron-threat-to-open-society.pdf>

⁷⁶ *Chevron Corp. v. Steven Donziger et al.*, No. 11. Civ. 0691 (S.D.N.Y. Apr. 11, 2011).

⁷⁷ *How Big Oil is Trying to Tar Lobbying and PR as Extortion*, LAW 360 (Feb. 21, 2014), <https://www.law360.com/articles/511117/how-big-oil-is-trying-to-tar-lobbying-and-pr-as-extortion>.

⁷⁸ *Advocacy Groups Blast Chevron for Retaliation Tactics Against Ecuador Villagers and Their Supporters*, AMAZONWATCH.ORG (JAN. 23, 2014), <http://amazonwatch.org/news/2014/0123-advocacy-groups-blast-chevron-for-retaliation-tactics>.

⁷⁹ *Id.*

sixty law firms.⁸⁰ Nonetheless, it eventually achieved its aim. In March 2014, U.S. District Judge Kaplan issued an injunction against Donziger and two Ecuadorean co-defendants, prohibiting them from attempting to enforce the judgment in any U.S. court and creating a constructive trust for Chevron's benefit to hold any proceeds they obtained elsewhere in the world.⁸¹ Whether or not this result was worth the time and expense (the *New Yorker* reported that the case could have been settled for \$140 million in 2001)⁸² remains arguable: Chevron's CEO John Watson was challenged in three shareholder resolutions in May of this year for "materially mishandling" the Ecuador litigation,⁸³ and an announcement followed a few months later that Watson would be stepping down.⁸⁴ Crucially, however, the result was successfully presented as an unqualified victory in the media.⁸⁵ As such, Gibson Dunn – Chevron's lead law firm (who had 114 attorneys working on the case)⁸⁶ – was able to fully capitalize on this perceived success. At an Energy Litigation Conference in November 2014, a Gibson Dunn partner presented a PowerPoint entitled "A RICO Guide for Energy Litigators" and described it as a means of responding to "fraudulent lawsuits" to the industry representatives present.⁸⁷

⁸⁰ Michael D. Goldhaber, *A Costly Battle: Chevron is Spending \$400 Million a Year in Legal Fees in its Ecuadorian Oil Spill Fight*, AMERICAN LAWYER (May 1, 2013), http://www.americanlawyer-digital.com/americanlawyer/lit2013spring?article_id=1232008.

⁸¹ Daniel Fisher, *Appeals Court Upholds Sanctions Against Donziger Over \$9.5 Billion Chevron Judgment*, FORBES (Aug. 8, 2016), <https://www.forbes.com/sites/danielfisher/2016/08/08/appeals-court-upholds-sanctions-against-donziger-over-chevron-litigation-in-ecuador>.

⁸² Patrick Radden Keefe, *Why Chevron Will Settle in Ecuador*, NEW YORKER (Jan. 4, 2012), <https://www.newyorker.com/news/news-desk/why-chevron-will-settle-in-ecuador>.

⁸³ CSR News, *Shareholders Criticize Chevron CEO Watson for "Materially Mishandling" \$12 Billion Ecuador Environmental Liability*, CSRWIRE.COM (May 30, 2017), http://www.csrwire.com/press_releases/40039-Shareholders-Criticize-Chevron-CEO-Watson-for-Materially-Mishandling-12-Billion-Ecuador-Environmental-Liability.

⁸⁴ Michael Scheetz, *Chevron CEO John Watson to Step Down: Report*, CNBC (Aug. 22, 2017), <https://www.cnbc.com/2017/08/22/chevron-ceo-john-watson-to-step-down-report.html>.

⁸⁵ Michael I. Krauss, *Chevron's (And The Rule of Law's) Triumph: The Supreme Court Declines to Hear Donziger's Appeal*, FORBES (Jun. 20, 2017), <https://www.forbes.com/sites/michaelkrauss/2017/06/20/chevrons-and-the-rule-of-laws-triumph-the-supreme-court-declines-to-hear-donzigers-appeal>; see also *Chevron Shakedown Rout: Steven Donziger suffers another legal humiliation*, WALL ST. J. (Aug. 8, 2016), <https://www.wsj.com/articles/chevron-shakedown-rout-1470698287>; John Shu, *How Chevron's Watson Fought Landmark Legal Battle — And Won*, INVESTOR'S BUSINESS DAILY (Oct. 25, 2017), <https://www.investors.com/politics/commentary/how-chevrons-watson-fought-landmark-legal-battle-and-won>; Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, N.Y. TIMES (Mar. 4, 2015), <https://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html>.

⁸⁶ Goldhaber, *supra* note 80.

⁸⁷ PowerPoint slides obtained from conference participant.

VI. WEAPONIZING DEFAMATION – THE NEW RICO SLAPP SCRIPT

The Chevron litigation made RICO's potential as a weapon against advocacy seductively clear to corporations. Whether or not they were directly influenced by Gibson Dunn's presentations, the decision certainly did inspire and embolden other companies and industry insiders to try their own luck.

Perhaps the first copycat case came on March 27, 2015, courtesy of the Alabama-based coal company Drummond Co. Inc. The lawsuit was filed after the relatives of dozens of slain Colombians sued Drummond, accusing it of making millions in payments to the paramilitary group *Autodefensas Unidas de Colombia* (AUC).⁸⁸ Drummond responded with a RICO lawsuit alleging that several lawyers, an advocacy group, and a Dutch competitor were involved in a criminal campaign to extort money.⁸⁹ Straight from the Chevron playbook, Drummond claimed that "fraudulent lawsuits" had been filed, and that "advocacy groups" were used to spread a "false message" that Drummond collaborated with AUC.⁹⁰

In many of the above cases, RICO's application was a stretch by the plaintiffs, but the required predicate acts were still generally substantiated.⁹¹ This was the case even if, as in the *Chevron* case, the evidence used to substantiate these acts has since been discredited, with new evidence emerging that Chevron's "star witness"⁹² in the RICO trial was fundamentally dishonest.⁹³ A pernicious new phase in the evolution of RICO SLAPPs therefore came the following year when, Resolute Forest Products (RFP) filed a RICO lawsuit against Greenpeace USA,⁹⁴ Greenpeace International, Standearth, and five individual defendants.⁹⁵ While a few vague and unsupported allusions were made to criminal activity (e.g., "cyber-

⁸⁸ *Melo et al. v. Drummond Company*, No. 2:13-cv-00393-RDP (N.D. Ala., Feb. 26, 2013).

⁸⁹ *Drummond Company Inc. and Drummond Ltd. v. Terrence Collingsworth et al.*, No. 2:15-cv-00506-JHH (N.D. Ala., Mar. 27, 2015).

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² Eva Hershaw, *Chevron's Star Witness Admits to Lying in the Amazon Pollution Case*, VICE NEWS (Oct. 26, 2015), <https://news.vice.com/article/chevrons-star-witness-admits-to-lying-in-the-amazon-pollution-case>.

⁹³ See *Chevron Corp.*, PCA Case No. 2009-23 (Apr. 24, 2015) (Grigera Naón, Vaugan Lowe, and Veeder, Arbs.) (stating that the former Ecuadorian judge, Alberto Guerra, admitted under oath in an international arbitration proceeding to having lied to Chevron in order to extract a better deal in exchange for his testimony as well as \$432,000 in monthly payments to Guerra, payment of a housing allowance, a car, and health insurance for Guerra and his extended family, and the payment of Guerra's income taxes).

⁹⁴ See generally *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005 (N.D. Cal. 2017) (consisting of Greenpeace Inc., a nonprofit formed under section 501(c)(4) of the U.S. Internal Revenue Code, and Greenpeace Fund, Inc., a nonprofit formed under 501(c)(3) of the Internal Revenue Code).

⁹⁵ *Id.*

hacking”) the complaint relied almost entirely on treating advocacy as inherently criminal in nature.

Resolute’s main contention was that Greenpeace was a “global fraud” whose campaigns used “materially false and misleading” claims to induce donations and extort concessions from its targets.⁹⁶ In essence, the lawsuit was a garden-variety defamation complaint disguised as a racketeering complaint.⁹⁷ Resolute had already sued Greenpeace Canada in a \$7 million defamation lawsuit in Ontario: the forests at issue and the company’s headquarters were located in Quebec, but Ontario had enacted anti-SLAPP legislation.⁹⁸ When the Ontario legislature subsequently tabled its own anti-SLAPP law, Resolute retained six individuals or companies to lobby the Ontario government and organize opposition to the Bill.⁹⁹ In an email, Resolute’s CEO, Richard Garneau seemingly admitted that the Ontario government’s proposed anti-SLAPP legislation, passed as originally written, “would put [Resolute’s case against Greenpeace Canada] in grave peril.”¹⁰⁰

In focusing the complaint on defamation, the enquiry of Resolute’s Canadian lawsuit was limited to the Canadian Boreal campaign run by Greenpeace Canada campaigners. While Resolute attempted to amend its complaint to encompass the 45 year history of the organization and its international campaigns, in 2016 the Ontario Superior Court of Justice found that this attempt “to expand the proceedings into an inquiry [around] the entire Greenpeace movement” was impermissible.¹⁰¹ However, by recasting its defamation complaints as RICO allegations in the USA, Resolute was able to avoid these limitations.¹⁰² All Greenpeace entities were now presented as part of the same “criminal enterprise,” allowing Resolute to justify their inclusion by arguing they had formed an “association in fact” with the defendants in question.¹⁰³

Invoking RICO in this way allowed Resolute to secure the benefits described above. Most conspicuously, it was able to claim treble damages for the harm it purported to have suffered: as such, a C\$100 million claim was inflated to C\$300 million.¹⁰⁴ Secondly, it was able to use the cloak of fair

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Sean Craig, *Wynne Waters Down Own Bill, Benefiting Own Libel Suit*, CANADA LAND SHOW (Mar. 24, 2015), <http://www.canadalandshow.com/wynne-waters-down-own-bill-benefiting-own-libel-suit>.

¹⁰¹ *See supra* note 93.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

report privilege to launch a PR offensive against Greenpeace based on the criminal allegations made in its complaint.¹⁰⁵ As with Chevron before it, Resolute constructed a dedicated website (www.ResolutevGreenpeace.com) and Twitter handle (@RFPvGP), using developments in the legal proceedings as material.

There was only one problem with this legal strategy: defamation is not a predicate act of RICO.¹⁰⁶ Resolute therefore tested the elasticity of RICO predicate acts such as fraud and extortion by stretching their application to cover Greenpeace's advocacy activities. What was once said to be evidence of *defaming* was now held up as evidence of *defrauding*.¹⁰⁷ What was once said to be evidence of economic interference was now presented as evidence of extortion.¹⁰⁸ By threading this narrative together with conclusory allegations of fabricating evidence and cyber-attacks, Resolute constructed a complaint with a superficial conformity to RICO.

Resolute's RICO camouflage was always tenuous and in October 2017 the case was dismissed.¹⁰⁹ Reframing a defamation complaint as a racketeering complaint, however, brought with it another advantage: Resolute was able to argue that the state anti-SLAPP law, with its mandatory award of attorneys' fees, was inapplicable to the federal RICO claims it had filed. Resolute had originally filed its RICO complaint in the state of Georgia, whose anti-SLAPP law was limited to statements to government bodies or related to official proceedings (the amended anti-SLAPP law, covering any speech "in connection with a public issue or an issue of public concern", came into force a month after Resolute filed its complaint).¹¹⁰ In May 2016, the case was transferred to California, a state with a strong and well-established anti-SLAPP law, with the judge noting that the impugned activities in Georgia "at best support the inference that Defendants organized and held a protest in Augusta."¹¹¹ However, when Judge Tiger of the Northern District of California granted the defendants' motion to dismiss in October 2017, he declined to apply California's anti-SLAPP law to Resolute's federal RICO claims.¹¹² With no federal anti-SLAPP law in place, a crucial deterrent was lost. In the meantime, Resolute pursued its RICO

¹⁰⁵ Kristen Murphy, *Fair Reporting*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, (2004), <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2004/fair-reporting>.

¹⁰⁶ 18 U.S.C. § 1961(1).

¹⁰⁷ *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Cynthia Counts, *Anti-SLAPP Gets a Big Boost in GA*, L. COUNTS, <https://www.lawcounts.com/blog/92-anti-slapp-gets-a-big-boost-in-ga>.

¹¹¹ *Id.*

¹¹² *Id.*

SLAPP in an amended form, stretching out the shelf life of the claims for an additional fifteen months.¹¹³

As with all SLAPPs, the RICO SLAPP model achieves its purpose through the litigation *process*, not the outcome. As such, it can succeed in its objectives even if the lawsuit in question is eventually dismissed (particular when, as in the case of Resolute, such a dismissal is preceded by almost a year and a half of litigation and voluminous legal pleadings). Even before the California judgment, Resolute's abusive application of RICO had set a negative precedent. Indeed, over 100 groups warned that the lawsuit could embolden other corporations to try similar tactics, including 80 organizations who signed onto an advert in the *New York Times* arguing that "attempting to persuade U.S. courts to label environmental advocacy as a criminal enterprise sets a dangerous precedent."¹¹⁴

Such warnings turned out to be all too prescient when, in August 2017, a \$300 million RICO lawsuit (inflated to \$900 million under RICO's provision for treble damages) was filed by Energy Transfer Partners (ETP),¹¹⁵ the owner and operator of the Dakota Access Pipeline (DAPL).¹¹⁶ ETP's central allegation was that the defendants – consisting of Greenpeace US, Greenpeace International, the Dutch non-governmental organization (NGO) BankTrack, and the grassroots movement "Earth First!" – "directed and incited acts of ecoterrorism" during the protests against the construction of the controversial pipeline.¹¹⁷ The complaint applied the same RICO SLAPP script to treat advocacy activity as inherently criminal in nature, and was filed by the same law firm, Kasowitz Benson Torres LLP – a law firm that has rolled out high-profile SLAPP tactics on behalf of Donald Trump, Bill O'Reilly, and Eric Bolling.

One of the most striking things about the lawsuit is how peripheral the stated role of Greenpeace is in the so-called "criminal enterprise." Although the criminal activity in the complaint was said to follow the "Greenpeace Model," the role of Greenpeace is only discussed in twenty-three of the complaint's 187 pages. It therefore appears that the lawsuit represents part of a coordinated attempt to shut Greenpeace down or severely cripple the NGO's capacity to campaign. In recent interviews with CNBC and Valley News Live, ETP CEO Kelcy Warren said he was "absolutely" trying to cease

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 8.

funding for Greenpeace,¹¹⁸ and that his “primary objective” in suing Greenpeace entities was not to recover damages but to “send a message” to the NGO that they “can’t do this in the U.S.”¹¹⁹ Meanwhile, Resolute and ETP’s lead lawyer Michael Bowe told Bloomberg BusinessWeek that he was in touch with other companies that were considering filing their own RICO lawsuits against Greenpeace.¹²⁰

Perhaps even more obvious than the Resolute and Chevron lawsuits, ETP’s RICO lawsuit was clearly directed at the anti-DAPL movement as a whole. ETP’s lawsuit names 10 other advocacy groups and 8 individuals as members of the “criminal enterprise,” leaving the chilling prospect that others would be brought into the lawsuit (indeed, ETP sent document preservation notices to non-parties named in the lawsuit as members of the “criminal enterprise”, threatening legal action if they didn’t comply).¹²¹ On August 6, 2018, ETP amended its complaint to do exactly that, bringing five new individuals into the lawsuit as defendants.¹²² This included Charles Brown, a pipelines campaigner at Greenpeace USA, who had recently joined the organization on May 14, 2018 – a full year after the events that formed the focus of ETP’s RICO complaint. The lawsuit conflates peaceful protest and advocacy with violent acts by claiming them to be part of the same “Greenpeace model”¹²³ and, as with the Resolute complaint, the specific allegations against Greenpeace involve quintessential advocacy work such as press releases and sign-on letters. As such, it could set a devastating precedent for advocacy groups if successful.

While Greenpeace, as a larger NGO, has the capacity and resilience to respond to these SLAPPs, poorly resourced groups would see little alternative but to retract any criticism and apologize in the face of this new RICO SLAPP. As Professor David Ardia of the University of North Carolina has noted, “what’s filed is just the tip of the iceberg.”¹²⁴ The most insidious impacts of the SLAPP phenomenon are generally left unreported, with

¹¹⁸ *We Were Greatly Harmed, Lost Millions of Dollars: Energy Transfer Partners CEO*, CNBC (Aug. 25, 2017), <https://www.cnbc.com/video/2017/08/25/we-were-greatly-harmed-lost-millions-of-dollars-energy-transfer-partners-ceo.html>.

¹¹⁹ *Energy Transfer Partners CEO, Kelcy Warren, Says DAPL was About a Money Raise*, VALLEY NEWS LIVE (Aug. 31, 2017), <http://www.valleynewslive.com/content/misc/Energy-Transfer-Partners-CEO-Kelcy-Warren-says-DAPL-was-about-a-money-raise-442409553.html>.

¹²⁰ Paul Barrett, *How a Corporate Assault on Greenpeace is Spreading*, BLOOMBERG BUSINESS WEEK (Aug. 28, 2017), <https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-greenpeace-is-spreading>.

¹²¹ *Id.*

¹²² *Energy Transfer Equity L.P and Energy Transfer Partners L.P v. Greenpeace International et al.*, No. 1:17-cv-00173-CSM (D.N.D. Aug. 6, 2018).

¹²³ *Id.*

¹²⁴ Peter Hayes, *Green Groups: Suits to Silence Them on the Rise*, BLOOMBERG LAW (Aug. 14, 2017), <https://www.bna.com/green-groups-suits-n57982086728>.

victims intimidated – or alternatively, bound by confidentiality clauses in settlement agreements – into staying silent. The consequences of this silence only emerge when the abuse of power it permits reaches a tipping point: whether it's the legal threats issued by Harvey Weinstein (including a personal threat against Ronan Farrow, which prompted NBC to drop his exposé of Weinstein's sexual harassment and Farrow to take it to the *New Yorker*),¹²⁵ the lawsuits filed by Catholic priests against their child sexual abuse accusers (including against the advocacy group Survivors Network of those Abused by Priests¹²⁶),¹²⁷ or the “bevy of lawsuits” filed by Lance Armstrong in France and beyond (for which he was fined for abusing the judicial system),¹²⁸ the victims of this lack of transparency are everywhere. With its treble damages and criminal connotations, the RICO SLAPP model intensifies these effects and creates an even more poisonous environment for campaigners and public watchdogs to operate.

VII. RECOGNITION OF THE SLAPP CHALLENGE IN INTERNATIONAL HUMAN RIGHTS LAW

The scholars who first observed and coined the SLAPP phenomenon were focused on the situation in the United States, assuming SLAPPs to be a typically American phenomenon and a product of the country's litigious culture.¹²⁹ If that view was correct then, it no longer is. As noted previously, an upsurge in SLAPP cases has been reported in different parts of the world, posing a widespread threat to freedom of expression and peaceful assembly.

The fact that the U.S. First Amendment – commonly regarded as one of the strongest domestic constitutional protections of freedom of expression – has failed to stem the tide of SLAPPs bodes ill for other countries now confronted with this phenomenon. The question emerges whether international human rights law systems can play a role in halting the advance

¹²⁵ Chris Ariens, *Why Did NBC News Hold Off Reporting Harvey Weinstein Story?*, TV NEWSEER (Oct. 10, 2017), <https://www.adweek.com/tvnewser/why-did-nbc-news-hold-off-reporting-harvey-weinstein-story/344678>.

¹²⁶ *SNAP Apologizes to Accused Priest as Part of Settlement*, US NEWS (Nov. 24, 2017), <https://www.usnews.com/news/best-states/missouri/articles/2017-11-27/snap-apologizes-to-accused-priest-as-part-of-settlement>.

¹²⁷ Jean Guccione, *Some Priests Are Suing Their Accusers*, L.A. TIMES (Mar. 5, 2004), <http://articles.latimes.com/2004/mar/05/local/me-priests5>.

¹²⁸ Terri Thompson, Nathaniel Vinton, Michael O'Keeffe, & Christian Red, *Victims of Lance Armstrong's Strong-arm Tactics Feel Relief and Vindication in the Wake of U.S. Anti-Doping Agency Report*, N.Y. DAILY NEWS (Oct. 26, 2012), <http://www.nydailynews.com/sports/more-sports/zone-lance-armstrong-bully-downfall-article-1.1188512>.

¹²⁹ Douglas W. Vick & Kevin Campbell, *Public Protests, Private Lawsuits, and the Market: The Investor Response to the McLibel Case*, 28 J.L. & SOCIETY 204, 205 (2001).

of corporate censorship, particularly in those countries where human rights treaties are directly effective in the domestic legal system.

The term “SLAPP” has only recently begun to enter the international legal lexicon. An early mention occurred in 2015, when the United Nations Working Group on Business and Human Rights recommended “[e]nact[ed] anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities,” as part of its Guidance on National Action Plans on Business and Human Rights, without further elaboration.¹³⁰ Within the United Nations (UN) system, the Special Rapporteurship on the rights to freedom of peaceful assembly and of association (UNSR FoAA) has been the most cognizant of the SLAPP phenomenon. A 2016 report on the proper management of assemblies, issued jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions, commends the anti-SLAPP legislation in twenty-eight US States and the Australian Capital Territory as good practice in ensuring business enterprises respect human rights in the context of assemblies.¹³¹ In 2017, the UNSR FoAA published an “Info Note” specifically on “SLAPPs and FoAA Rights,” warning that SLAPPs are an international trend, and recommending States to adopt anti-SLAPPs legislation “allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse.”¹³² The Info Note also calls on private companies to “refrain from the use of civil lawsuits as a means of shutting down public participation and critical advocacy.”¹³³ At the regional level, the Council of Europe (CoE) recently published a Recommendation draft on the roles and responsibilities of internet intermediaries, which calls on State authorities to consider the adoption of “appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries.”¹³⁴ The Recommendation was elaborated by an expert group and awaits adoption by the CoE’s Committee of Ministers.

Although specific discussion of the SLAPP phenomenon at the international level is still in its infancy, the potential for civil lawsuits – whether brought with abusive intent or not – to have an unacceptable chilling effect on legitimate criticism and advocacy has long been recognized.

¹³⁰ U.N. WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS VERSION 2.0, at 29 (2015).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Eur. Council: Committee of experts on internet intermediaries, Draft Recommendation *CM/Rec (2017) of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries*, at 7/14, MSI-NET (2016) (Sept. 19, 2017).

International human rights mechanisms have interpreted global and regional treaties as imposing obligations on States to prevent such a chilling effect by enacting various substantive and procedural safeguards.

VIII. STATE OBLIGATIONS RELEVANT TO COMBATING SLAPPS

There are many cases in which persons engaged in social criticism or advocacy have complained to international human rights bodies about a failure by the domestic justice system to protect their freedom of expression in civil proceedings. The typical fact pattern involves a successful defamation or privacy suit brought by an influential individual or corporation against a journalist, campaigner, media outlet or NGO. The resulting body of precedent points to a number of measures that States must take to prevent civil remedies from stifling legitimate criticism. Most relevant to the phenomenon of SLAPP suits are the following requirements: (A) to establish a higher defamation threshold in cases involving public figures, including leading business figures and corporations; (B) to ensure damage awards are proportionate; (C) to provide legal aid to defendants in free speech cases if they would otherwise be at an unfair disadvantage; and (D) to protect the freedom of expression of “public watchdogs,” including NGOs, at a high level.

A. *Suits by Public Figures Seeking to Protect Their Reputation Must Meet a Higher Threshold*

There is clear recognition within the UN, as well as the three regional human rights systems, that domestic law should impose a higher threshold for lawsuits by public figures seeking to defend their reputation.

A pertinent UN precedent is *Bodrožić v. Serbia and Montenegro*,¹³⁵ a case brought before the Human Rights Committee (HRC) by a Serbian a journalist and magazine editor. The HRC is responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR),¹³⁶ to which a vast majority of States are parties.¹³⁷ Bodrožić had criticized the manager of a factory who was also a well-known former politician, leading to legal proceedings in which domestic courts had found him liable for defamation.¹³⁸ In agreeing that this outcome was incompatible with the right to freedom of expression as guaranteed under Article 19(2) of

¹³⁵ *Bodrožić v. Serbia and Montenegro*, Comm. 1180/2003; UN Doc. *Bodrožić v. Serbia and Montenegro*, Comm. 1180/2003, U.N. Doc. A/61/40, Vol. II, at 288 (2005).

¹³⁶ Int'l Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

¹³⁷ As of December 22, 2017, there were 169 States Parties to the ICCPR, out of 193 UN Member States. *Id.*

¹³⁸ *Id.*

the ICCPR, the HRC emphasized that “in circumstances of public debate in a democratic society . . . concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.”¹³⁹ The Committee’s reference to “figures in the political domain” might leave some doubt as to whether politically unconnected business figures are included. However, in its subsequent General Comment No. 34 on the freedoms of opinion and expression, the HRC states more generally that “all public figures . . . are legitimately subject to criticism and political opposition.”¹⁴⁰ It adds that, “with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.”¹⁴¹

At the regional level, the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples’ Rights states that domestic defamation laws must conform to the principle that “public figures shall be required to tolerate a greater degree of criticism.”¹⁴² In the case *Media Rights Agenda and Others v. Nigeria*, the Commission explained that “people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.”¹⁴³ This holding was later cited with approval by the African Court of Human Rights.¹⁴⁴

The Inter-American system presents a similar picture. In 2000, the Inter-American Commission on Human Rights adopted a Declaration of Principles on Freedom of Expression¹⁴⁵ which recommends stringent conditions when a “public official, a public person or a private person who has voluntarily become involved in matters of public interest” seeks a civil remedy for defamation.¹⁴⁶ Relief should only be granted if “the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”¹⁴⁷ The Inter-American Court of Human Rights has concurred that a “different threshold of protection for public officials . . . public figures and individuals” must apply in civil

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Afr. Comm’n on Hum. and Peoples’ Rights, Res.62(XXXII)02, Resolution on the Declaration of Principles on Freedom of Expression in Africa (Oct. 23, 2002).

¹⁴³ *Id.*

¹⁴⁴ *Lohé Issa Konaté v. The Republic of Burkina Faso*, Application No. 004/2013.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

disputes concerning privacy or reputation,¹⁴⁸ “due to the fact that they have voluntarily exposed themselves to a stricter scrutiny.”¹⁴⁹

The European Court of Human Rights (ECtHR) made its earliest statement on the matter in the celebrated case of *Lingens v. Austria*, holding that the “limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual,” because a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed . . . and he must consequently display a greater degree of tolerance.”¹⁵⁰ In the UN, African and Inter-American systems, there is a dearth of precedent on the question of who qualifies as a public figure subject to heightened criticism. By contrast, the ECtHR, thanks to an abundant number of subsequent cases, has been able to define varying degrees of tolerance required from different categories of plaintiffs.¹⁵¹

Importantly, the Court has had the opportunity to address the position of major corporations and their managers. In *Steel and Morris v. United Kingdom*, to which we will return later, the Court equated such plaintiffs to politicians, insofar that “large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.”¹⁵² In the subsequent case of *Timpul Info-Magazin and Anghel v. Moldova*,¹⁵³ the Court opined that a smaller company should, in principle, “enjoy a comparatively increased protection of its reputation,”¹⁵⁴ although if it “decides to participate in transactions in which considerable public funds are involved, it voluntarily exposes itself to an increased scrutiny by public opinion.”¹⁵⁵

Taken together, these authorities leave little doubt that States which have subscribed to one of the relevant human rights treaties will be breaching their obligations if they enable public figures to sue for reputational damage under conditions that are no stricter than those facing private individuals. If the European jurisprudence is taken as a guide, the duty to set a higher threshold

¹⁴⁸ *Fontevicchia and d'Amico v. Argentina*, Inter-Am. Ct. H.R. (Ser. C) No. 238, at 59 (Nov. 29, 2011); see *Herrera Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (Ser. C) No. 107, at 129 (Jul. 2, 2004).

¹⁴⁹ *Id.*

¹⁵⁰ *Lingens v. Austria*, 103 Eur. Ct. H.R. (Ser. A) at 42 (1986).

¹⁵¹ Tarlach McGonagle, *FREEDOM OF EXPRESSION AND DEFAMATION – A STUDY OF THE CASE LAW OF THE EUR. COURT OF HUM. RIGHTS*, Chapter 2.2 (2016).

¹⁵² *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) at 94 (2005); see *Fayed v. the United Kingdom*, 294 Eur. Ct. H.R. (ser. A) at 75 (1994).

¹⁵³ *Timpul Info-Magazin and Anghel v. Moldova*, Application No. 42864/05 (2007).

¹⁵⁴ *Id.* at 34.

¹⁵⁵ *Id.*

for such suits extends to leading business figures and corporations, particularly those involved in public works.

B. Domestic Law Must Ensure Damage Awards Are Proportionate

The limitations clauses of the ICCPR and the regional human rights treaties stipulate that any domestic measures which interfere with freedom of expression must be “necessary” or “necessary in a democratic society” for the attainment of a legitimate aim.¹⁵⁶ This implies a requirement of proportionality,¹⁵⁷ which is also applicable to damages awarded in domestic civil proceedings.¹⁵⁸

The ECtHR addressed the appropriateness of high damages for an infringement of reputation in *Tolstoy Miloslavsky v. United Kingdom*.¹⁵⁹ The applicant was the author of a widely-circulated pamphlet accusing Lord Aldington of war crimes.¹⁶⁰ Libel proceedings before domestic courts had resulted in a £1.5 million damage award, about three times the largest amount previously awarded by an English libel jury.¹⁶¹ The defamatory character of the pamphlet was not in issue before the ECtHR; the applicant’s challenge centered on the amount of damages, amongst others on the grounds that the sizeable award was disproportionate to the aim of protecting Lord Aldington’s reputation.¹⁶² The Court held that “under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”¹⁶³ Citing the Court of Appeal’s own observation that English law gave “almost limitless discretion to a jury” to award damages,¹⁶⁴ the Court found that the high level of the award in conjunction with the lack of adequate safeguards against a disproportionate award violated the applicant’s right to freedom of expression.¹⁶⁵

The ECtHR has recently re-emphasized the importance of foreseeability of damages, holding that “unpredictably high damages in libel

¹⁵⁶ See International Covenant on Civil and Political Rights, *supra* note 136.

¹⁵⁷ *Id.*

¹⁵⁸ *Fontevicchia and d’Amico v. Argentina*, *supra* note 148, at 51.

¹⁵⁹ *Tolstoy Miloslavsky v. United Kingdom*, 20 Eur. Ct. H.R. (Ser. A) (1995).

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Id.* at 12.

¹⁶² *Id.* at 38, 46.

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.* at 50.

¹⁶⁵ *Id.* at 51.

cases are considered capable of having a chilling effect and they therefore require the most careful scrutiny and very strong justification.”¹⁶⁶

C. Legal Aid Should Be Available Where Necessary to Ensure a Measure of Equality of Arms

The most paradigmatic SLAPP litigation to end up before an international human rights court was the so-called “McLibel” case.¹⁶⁷ It arose from an anti-McDonald’s campaign launched in the mid-1980s by a small campaign group, London Greenpeace (not connected to Greenpeace International), which included the distribution of a six-page leaflet entitled “What’s wrong with McDonald’s?” accusing the fast food of a range of ills, such as driving economic inequality, deforestation, poor nutrition and the exploitation of workers.¹⁶⁸

In response, McDonald’s deployed seven private investigators to infiltrate the unincorporated group and identify its members. It brought libel proceedings against five of them, claiming damages of up to £100,000 GBP.¹⁶⁹ The claims against three members were withdrawn after they apologized, but the remaining defendants – Helen Steel, a part-time bar worker, and David Morris, a single parent on income support – decided to defend the case. They were forced to represent themselves, as legal aid was not available for defamation proceedings.¹⁷⁰ McDonald’s proceeded to put them through the longest trial in English legal history, which included 313 days in court, about 40,000 pages of evidence and 130 witnesses.¹⁷¹ The Court of Appeals ultimately found that a number of the leaflet’s claims had not been substantiated, and awarded a total of £76,000 GBP against the defendants,¹⁷² a fraction of McDonald’s estimated £10 million GBP in legal expenses.¹⁷³

Before the ECtHR, Steel and Morris argued, amongst others, that the lack of legal aid constituted a violation of the right to a fair trial under Article 6 section 1 of the European Convention on Human Rights (ECHR), given the

¹⁶⁶ *Independent Newspapers (Ireland) Limited v. Ireland*, Application No. 28199/15 (2017), <http://hudoc.echr.coe.int/eng?i=001-174419>.

¹⁶⁷ *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) (2005).

¹⁶⁸ *Id.*; see Paul Lewis and Rob Evans, *McLibel Leaflet was Co-written by Undercover Police Officer Bob Lambert*, *GUARDIAN* (Jun. 21, 2013), <https://www.theguardian.com/uk/2013/jun/21/mclibel-leaflet-police-bob-lambert-mcdonalds>.

¹⁶⁹ *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) (2005).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

resulting gross inequality of arms.¹⁷⁴ The Court held, while “it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms,” it must nevertheless ensure that in civil cases, “each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage.”¹⁷⁵ Although the applicants had benefited from some pro bono legal assistance, the Court concluded that the disparity between the parties “was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness.”¹⁷⁶ Moreover, the Court agreed with the applicants that the lack of procedural fairness and equality also gave rise to a violation of the right to freedom as guaranteed under Article 10 of the ECHR, noting the “general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible ‘chilling’ effect on others.”¹⁷⁷

D. Public Watchdogs Should be Protected at a High Level

While the *Steel and Morris* judgment turned on the issue of legal aid for indigent campaigners, the ECtHR expressed a wider preoccupation with the need for governments effectively to protect campaign groups against corporate censorship. It compared the role of such groups in a democracy to that of the media:

The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.¹⁷⁸

The Court had already drawn a similar parallel a year earlier in *Vides Aizsardzības Klubs v. Latvia*,¹⁷⁹ a case concerning an environmental pressure group that had been ordered to pay compensation after publishing a resolution accusing a local politician of illegally authorizing construction

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Vides Aizsardzības Klubs v. Latvia*, Application No. 57829/00 (2004), <http://hudoc.echr.coe.int/eng?i=001-66349>.

work in a dune area. In that judgment, the Court described the NGO in question as a watchdog (“*chien de garde*”) and observed that the participation of such groups in public debate was “essential for a democratic society” and “similar to the role of the press as defined in its constant jurisprudence.”¹⁸⁰ In *Társaság a Szabadságjogokért v. Hungary*, the Court took the next step, confirming that not only are watchdog NGOs and the press comparable in social function – their activities also “warrant similar Convention protection.”¹⁸¹ This view has been upheld by the Court’s Grand Chamber.¹⁸²

The HRC, presumably influenced by the European case law, has similarly begun to acknowledge the special position of NGOs, using the same watchdog terminology. In *Toktakunov v. Kyrgyzstan*,¹⁸³ the author was a legal consultant for the Youth Human Rights Group, who complained about a refusal by various public officials to disclose information on the number of death sentences and individuals on death row upon request.¹⁸⁴ The Committee recalled its earlier holding that the right to freedom of expression, as protected under Article 19 of the ICCPR, includes a right of the media to have access to information on public affairs, and of the general public to receive media output.¹⁸⁵ However, the role of informing the public based on information obtained from the government could also be exercised by public associations or private individuals.¹⁸⁶ Accordingly, the Committee held that “[w]hen, in the exercise of such ‘watchdog’ functions on matters of legitimate public concern, associations or private individuals need to access State-held information . . . such requests . . . warrant similar protection by the Covenant to that afforded to the press.”¹⁸⁷

The HRC’s finding has a limited scope. It recognizes the equivalence between NGOs, individual campaigners and the press in the specific area of access to State-held information without confirming that similar Covenant protection applies across the board. Nevertheless, such a ruling may only be a matter of time. The HRC, in its General Comment No. 34, had already rejected a narrow approach to enjoyment of the safeguards developed for the media, stating that it understands journalism as “a function shared by a wide

¹⁸⁰ *Id.*

¹⁸¹ *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (2009), <http://hudoc.echr.coe.int/eng?i=001-92171>.

¹⁸² *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11 (2016), <http://hudoc.echr.coe.int/eng?i=001-167828>.

¹⁸³ Human Rights Comm., *International Covenant on Civil and Political Rights*, Communication No. 1470/2006, 101st Sess., UN Doc. CCPR/C/101/D/1470/2006.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication.”¹⁸⁸

In the European context, the ECtHR's ruling that NGO activities “warrant similar Convention protection” has unlocked access to the Court's wide-ranging jurisprudence on the protections that States must afford to the media. For example, NGOs facing SLAPP suits designed to frighten off their sources of information¹⁸⁹ are now likely able to invoke the right to protection of confidential journalistic sources.¹⁹⁰

IX. ARE EXISTING STATE OBLIGATIONS SUFFICIENT TO ADDRESS THE SLAPP THREAT?

The national implementation of international human rights standards is, at the best of times, a slow process, and frequently an incomplete one. But if a government were to put in place all the substantive and procedural safeguards set out in the previous section, would they constitute an effective barrier to SLAPP suits?

SLAPPs are characterized by an intention to harass and intimidate the defendant, often along with a wider group of critics, to drain its resources or a combination thereof. A domestic law imposing the required higher recovery threshold for public figures, even if it covers major corporations and business figures, is unlikely to eliminate suits brought in order to harass. They are, after all, not intended to succeed at law. This fear is borne, to an extent, by the U.S. experience. Corporate defamation plaintiffs in the US have long had to contend with the risk – but not the certainty – of being held to the heightened “actual malice” standard of proof for public figures established by the Supreme Court in *New York Times Co. v. Sullivan*¹⁹¹ and subsequent cases.¹⁹² Indeed, much of this case law predates the coining of the term SLAPP, demonstrating the standard's ineffectiveness in preventing the

¹⁸⁸ Int'l Covenant on Civil and Political Rights, *supra* note 136.

¹⁸⁹ See Peter Lockley, *Campaigning Journalism is Still Journalism: Global Witness and s.32 DPA*, PANOPTICON INFORMATION LAW BLOG (2014), <https://panopticonblog.com/2014/12/23/campaigning-journalism-is-still-journalism-global-witness-and-s-32-dpa>.

¹⁹⁰ In *Goodwin v. United Kingdom*, Application No. 17488/90 (1996), the ECtHR recognized that the ECHR implies a presumptive right of journalists to protection of sources, such a measure “cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.” The case arose from an attempt by a UK company called Tetra Ltd. to compel a journalist to disclose his notes and sources, after he had reported that the company was in the process of raising a loan and was in financial difficulties.

¹⁹¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

¹⁹² For an overview of the development of the “actual malice” standard and its application to corporations, see D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491, 496-500 (2001).

emergence of the phenomenon. The applicants in *Steel and Morris v. United Kingdom* envisaged a more drastic option to prevent corporate harassment: entirely denying multinational companies access to civil remedies against reputational harm. While such a measure would be effective, the ECtHR rejected it on economic grounds.¹⁹³

The heightened threshold for public figures may have some value in blunting the deterrent effect of SLAPP suits by convincing defendants that the prospects of success are sufficient to risk contesting a claim. The manner in which the threshold is implemented in domestic law is important: if it is applicable only to defamation suits, plaintiffs may simply dress their claim up as a different cause of action, as the recent corporate embrace of RICO illustrates.

Clear guidance in domestic law on how damages are calculated, written with the ECtHR's antipathy to "unpredictably high damages in libel cases"¹⁹⁴ in mind, would further reduce the ability of SLAPP plaintiffs to intimidate, as defendants would have more confidence that the astronomic claims often advanced against them were bound to fail. This would far more truthful if "predictably high" damages were also disallowed. The ECtHR's insistence on a "reasonable relationship of proportionality to the injury to reputation suffered"¹⁹⁵ seems to rule out exemplary or punitive damages. To be effective, this too would need to apply to any claim arising out of advocacy activities. The RICO SLAPPs show how plaintiffs can otherwise maximize the intimidating effect of their suit by selecting a cause of action that enables multiple damages.

Establishing a system providing legal aid to certain SLAPP defendants, as required in light of the *Steel and Morris* ruling,¹⁹⁶ might to an extent discourage attempts to harass impecunious defendants. The McLibel litigation stands as a cautionary tale of how a SLAPP can turn into a PR disaster for the plaintiff if the defendants are able to carry on the fight.¹⁹⁷ The availability of legal aid might increase corporate apprehension of protracted "David v. Goliath" legal battles. At the same time, it is inevitable that publicly funded legal aid will pale in comparison to the resources a determined major corporation can bring to bear. Moreover, legal aid would be of little use against SLAPPs designed to drain resources, seeing as a common defendant in a SLAPP suit is a campaign or advocacy group that is

¹⁹³ *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) (2005).

¹⁹⁴ *Independent Newspapers (Ireland) Limited v. Ireland*, *supra* note 166.

¹⁹⁵ *Tolstoy Miloslavsky v. United Kingdom*, 20 Eur. Ct. H.R. (Ser. A) (1995).

¹⁹⁶ *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) (2005).

¹⁹⁷ *See Vick & Campbell*, *supra* note 129.

capable of paying for its legal defence, but does so at the expense of activities that are part of its core mission.

Overall, it is reasonable to say that these international safeguards – the heightened threshold for public figure plaintiffs, the requirement to ensure proportionate and predictable damages, and the duty to provide legal aid – act more as a hindrance than a barrier to plaintiffs bent on SLAPPING their critics, even if diligently implemented at the national level. Their thrust is to ensure plaintiffs in freedom of expression cases are denied inappropriate relief, and that both sides have legal representation along the way. This leaves the central characteristic of SLAPPs unaddressed, namely that the intended effect is achieved through the litigation process, not the outcome of it. Accordingly, to effectively combat the SLAPP phenomenon, defendants must have procedural options to cut abusive litigation process short and to recover any costs they have incurred in the process.

It is entirely possible to argue, however, that a duty to enact “anti-SLAPP” legislation to this effect is already implicit in international law, at least in those countries where the phenomenon has manifested. By recognizing NGOs as “public watchdogs” comparable to the media, the HRC and the ECtHR have signalled, in the words of the latter, that participation of such groups in public debate is “essential for a democratic society.”¹⁹⁸ It reasonably follows that it is incumbent on States to take appropriate measures when that participation is threatened.

The elaboration of anti-SLAPP legislation is undoubtedly a delicate task, touching as it does on the right to a fair and public hearing. There is a clear need for international human rights mechanisms to take up the task of developing appropriate guidance on how to identify SLAPPs and provide effective procedural safeguards against them.

X. THE FUTURE: SLAPPs AS A BREACH OF CORPORATE HUMAN RIGHTS OBLIGATIONS?

By one count, in 2015, sixty-nine of the top 100 economic entities in the world were corporations rather than States.¹⁹⁹ It has long been recognized that this state of affairs raises questions on whether States should remain the sole guarantors and enforcers of human rights, or if corporations should be

¹⁹⁸ *Vides Aizsardzības Klubs v. Latvia*, Application No. 57829/00 (2004), <http://hudoc.echr.coe.int/eng?i=001-66349>.

¹⁹⁹ *Global Justice Now, 10 Biggest Corporations Make More Money than Most Countries in the World Combined* (Sept. 12, 2016), <http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined>.

recognized as bearers of human rights obligations of their own.²⁰⁰ Corporations increasingly possess censorship powers to rival those of the State, whether it be control over internet content or the capability to act as surrogates for federal prosecutors in RICO cases, as described in this article.

The phenomenon of SLAPP suits exposes the limitations of a model in which advocacy groups and individual advocates depend on the State to safeguard their freedom of speech vis-à-vis corporations. As has been observed, “what’s filed is just the tip of the iceberg,”²⁰¹ meaning that in many instances, corporations are able to silence their critics through the mere threat of litigation without any opportunity for the State to intercede, even if it were willing.

The principal achievement to date in the drive to impose human rights duties on corporations are the UN Guiding Principles on Business and Human Rights,²⁰² the product of seven years of consultations by John Ruggie, the Special Representative of the UN Secretary General on the Issue of Human Rights and Transnational Corporations. While stopping short of imposing binding obligations, the Guiding Principles state that corporations must “avoid causing or contributing to adverse human rights impacts through their own activities,”²⁰³ a requirement clearly violated when corporations threaten or pursue SLAPPs.

Enforcement mechanisms, while a necessity, remain a distant prospect. In 2014, the UN Human Rights Council adopted Resolution 26/9, establishing an open-ended working group tasked with elaborating an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises.²⁰⁴ A “zero draft” of a treaty was published on July 16, 2018.²⁰⁵ The proposal does not expressly address the SLAPP phenomenon, but Article 9 would require States’ Parties to impose extensive due diligence obligations on persons engaged in transnational business activities. The required due diligence would include monitoring, identifying, and preventing human rights violations, not only in the relevant person’s own operations, but also those of subsidiaries and other entities under direct or indirect control or directly linked to the operation in question. A corporate group would therefore need to assess the impact on freedom of expression of any proposed litigation against critics of a

²⁰⁰ Danwood Mzikenge Chirwa, *The Long March to Binding Obligations of Transnational Corporations in Int’l Human Rights Law*, 22 S. AFR. J. HUM. RT. 76, 80 (2006).

²⁰¹ Hayes, *supra* note 124.

²⁰² UN Secretary General, *The Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

²⁰³ *Id.*

²⁰⁴ Human Rights Council Res. 26/9, UN Doc. A/HRC/RES/26/9 (Jul. 14, 2014).

²⁰⁵ *Id.*

transnational operation, and a SLAPP suit undertaken by a joint venture partner or key supplier would arguably trigger an obligation to take preventive steps. Nevertheless, ultimate accountability would still lie with governments, as the treaty does not envisage any supranational mechanism to seek redress against corporations that fail to comply with these obligations and who aren't held to account.

XI. CONCLUSIONS

As corporate power grows in the USA and beyond, so too does the similarity between the operations of corporations and government. SLAPPs, a phenomenon which once may have resembled the nuisance of vexatious litigation, now increasingly resemble the menace of privatized censorship. Recent abuses of RICO, which allows corporations to stand in for federal prosecutors and harass critics with spurious criminal charges, provide a powerful example of the oppressive potential of a well-funded SLAPP.

SLAPPs do not just cost their victims time or money; they frequently cost them the opportunity to speak out and exercise their democratic rights. As is being increasingly recognized by international mechanisms on free speech and assembly rights, SLAPPs are therefore fundamentally a matter of human rights. They represent that awkward anomaly: a human rights violation committed by private actors rather than government parties. SLAPPs have therefore naturally attracted little attention within a human rights paradigm that mainly recognizes governments as able to control rights and freedoms.

As we have argued in this article, the rights to freedom of expression and assembly confer a number of obligations on governments that are relevant to SLAPPs: the need to require greater tolerance of criticism from public figures, the need to ensure civil awards for damages are not excessive and the need to ensure legal aid is available to ensure some measure of equality of arms are amongst the examples given. Even with all these measures in place however, the risk of corporations "camouflaging" their attacks as common torts and using the judicial system as a vehicle to silence criticism will remain.

The scope and reach of human rights instruments, long-since moving in a more horizontal direction, need to evolve to accommodate the unique challenge of SLAPPs. As the eye-wateringly expensive *McLibel* and *Chevron* litigations show, money is not a deterrence that matters to SLAPP litigants. The attorney's fees generally available under anti-SLAPP statutes are an aid to defendants, but major corporations can easily internalize these costs. Effective anti-SLAPP measures must include clear authority for courts to provide protection and redress at the earliest stage of proceedings, before

having a chance to wear down their critics. In the longer term, mechanisms must be developed that allow victims of privatized censorship to hold corporations directly responsible for the failure to respect free speech and assembly rights.

In the meantime, all relevant actors need to be vigilant against SLAPPs. Lawmakers must be cognisant of the risk of abuse when drafting laws that implicate speech, amend laws such as RICO that have shown themselves to be susceptible to abuse, and ensure both procedural and substantive protections are in place to guard against SLAPPs. Judges must learn to recognize SLAPPs and, where possible, sanction abusive behavior (e.g. through cost awards). Even bar associations and individual lawyers have a role to play in stigmatizing the use of the tactic in the legal profession. Ultimately, laws such as RICO can only be stretched to cover advocacy activities, because so few people are familiar with the SLAPPs they camouflage. That's something we can all do something about.

“L’État, c’est moi!”

THE DEFAMATION OF FOREIGN STATE LEADERS IN TIMES OF GLOBALIZED MEDIA AND GROWING NATIONALISM

Alexander Heinze*

I. INTRODUCTION

There are numerous things that people associate with Germany. Humor is not one of them. Nevertheless, in March 2016 the German comedian Jan Böhmermann, made a name for himself far beyond the borders of Germany, appearing on *Late Night With Seth Meyers*. To put it bluntly, Böhmermann is not the Jerry Seinfeld of Germany. Quite the contrary, he is more like the noisy neighbor who loves to pick a fight. The reason why Böhmermann garnered worldwide attention was that he picked a fight with the Turkish President Erdoğan, whose only similarity with Germany is his lack of humor. When the Turkish government requested the take-down of a satirical song about Erdoğan which aired on a German television show, it caused an outcry in the German public about the rather blunt attempt to violate the freedom of speech. Böhmermann took this outcry to another level and recited a poem, fittingly titled “Schmähkritik” (“defamatory critique”), on his television show to “educate” his audience about the fine line between acts of speech that are protected by the constitution and those that are not. This short poem had a landslide effect. First, it caused both the Turkish government and president to initiate criminal proceedings against the comedian, based on a law that had gone unnoticed in the German Criminal Code, Article 103, entitled “Defamation of organs and representatives of foreign states.” Second, it created a political crisis, because the German government granted requisite approval for prosecution, very much to the dismay of the German public. Third, it caused Böhmermann to temporarily abstain from all

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television appearances. To restore public support, German Chancellor Angela Merkel announced, within weeks, the government's intent to request that parliament abolish Article 103 by way of an amendment to the German Criminal Code. What followed was an unprecedented demonstration of parliamentary fast-track legislation. On July 7, 2017 – roughly a year after the Turkish President initiated criminal proceedings against Böhmermann – the German parliament voted to abolish the law criminalizing the defamation of heads of state. The law came into force January 1, 2018, and Article 103 is no more.

The author of this Article was one of the appointed experts of the German Ministry of Justice and argued against the abolishment of Article 103 of the German Criminal Code. Only a few weeks after Erdoğan pressed charges, I warned in an op-ed against legislative politicking and against abolishing Article 103 or the ensuing revision to the German defamation law. The op-ed caused readers of the newspaper to submit angry comments where the words “deranged” and “confused” were amongst the milder evaluations of my view. In neither the public debate nor the parliamentary hearing could arguments of reason prevail against political opportunism.

This Article is about these arguments of reason against the abolishment of laws that criminalize defamation of heads of state. My argument is that if states decide to criminalize attacks on foreign heads of state and diplomats, these attacks should – within the confines of the constitution of course – include defamatory attacks, due to the important role of the reputation of states in foreign policy today. After providing a short summary of the case that brought down Germany's law criminalizing insults of foreign state representatives (Part II), sketching both the substantial (Part III) and procedural (Part IV) conditions of the law, I will demonstrate how rarely the law had been applied before its repeal (Part V), which is the direct result of Germany's constitutional protection of free speech (Part VI). The heart of this Article is an evaluation of the decision to repeal Article 103 from both a political and legal perspective (Part VII). As I will show, former United States President George W. Bush and current President Donald Trump had an impact on the repeal decision that cannot be overstated (Part VII-A). The legal analysis of the repeal decision is generally divided into two questions: First, do states have an obligation to criminalize attacks on foreign state representatives (Part VII-B) and did Germany have such an obligation (Part VIII); and second, should these attacks include defamatory attacks (Part IX)?

The answer to the first question is both descriptive and analytic. I describe International Treaty and Customary Law and analyze whether it carries an obligation to criminalize attacks on foreign representatives. The relevant treaty norms are: Article 29 of the Vienna Convention on Diplomatic

Relations, and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (“Protection of Internationally Protected Persons Convention”). Both treaty norms require states to specially protect foreign representatives. Article 29 of the Vienna Convention on Diplomatic Relations explicitly mentions “dignity” as a protected good and that criminal sanctions are an appropriate step to prevent attacks on that good. Nevertheless, no obligation can be derived from Article 29 to enact a distinct libel law that specifically sanctions the defamation of foreign representatives. The same holds true for the Protection of Internationally Protected Persons Convention.

The question of the existence of a Customary International Law norm to criminalize defamatory attacks on foreign representatives is a little harder to answer. It is widely acknowledged that a constant and uniform state practice and a corresponding *opinio juris* can lead to the evolution of a customary norm,¹ obliging states to prevent and punish attacks by private individuals upon the person and liberty of foreign heads of state. However, whether a parallel customary obligation also exists to criminalize private attacks against the *dignity* of foreign heads of state is less clear. Here, I employ an extensive analysis of the existing libel laws of selected states and the case law of the European Court of Human Rights. In fact, many states in the world still criminalize defamatory attacks on foreign heads of state, such as Norway, Denmark, and Portugal. For most commentators, these criminalization tendencies are not sufficient to establish an *opinio juris*. However, even those states that have abolished their laws making defamatory attacks on heads of state a punishable offense either retained some sort of dignity protection for heads of state (as did Sweden)² or completely restructured their defamation laws to also decriminalize attacks on the domestic head of state’s dignity (as did France).³ As shown by the parliamentary debate in Germany regarding the abolishment of Article 103, proponents of abolishment find it hard to resist the temptation to superficially refer to other states’ decriminalization of defamation of foreign heads of state, although these states adjusted their defamation laws. After Germany abolished Article 103, the attempted slap in the face of a foreign head of state is still punishable as a specific offense, while the severe defamation of a foreign head of state is not.

The normative question of whether laws protecting foreign heads of state from being attacked *should* include defamatory attacks warrants an empirical study as to the effects of insulting heads of state in comparison to the effects

¹ JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 18 (2014).

² Org. for Sec. and Co-operation in Eur. [OSCE], *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, at 223 (Mar. 2017), <https://www.osce.org/fom/303181>.

³ *Id.* at 94-95.

of physical attacks. I will show that various sources throughout the world, primarily the mass media, shape states' reputations in the eyes of individuals, organizations, governments, and the general public. A state's reputation often has concrete implications for its population. Via a short trip to the philosophy of Jürgen Habermas, I will show that this reputation is especially relevant in today's global context, one that has been created through modern communication systems and markets. Moreover, the global context also increases the effects of the defamation of heads of state.

II. THE HISTORY OF THE BÖHMERMAN CASE

The case that sealed the fate for Article 103 in Germany started long before comedian Böhmermann recited his now infamous satirical poem "Schmähekritik." It goes back to an episode of another satirical show called "Extra 3." Extra 3 is a weekly political satire show on German television established in 1976, produced by public TV broadcaster Norddeutscher Rundfunk.⁴ Since the German pronunciation of the number "three" is "drei," the name is a pun exploiting the homonymous nature of "three" and "dry," and refers to the "extra dry" humor of the show. In an episode that aired in March 2016, the show presented a parody of German singer-songwriter Nena's song "Irgendwie, Irgendwo, Irgendwann" titled "Erdowie, Erdowo, Erdogan," in which it criticized the Turkish president's treatment of unwelcome journalists and his understanding of freedom of speech. Even though the piece was surprisingly more of an entertaining parody than a bitter satire, Erdoğan weighed in and once again made it very clear that he did not take such criticism lightly. As he had previously done on occasion, he summoned the German ambassador to Ankara. In turn, this prompted the German Foreign Office to state decisively that this type of criticism was protected by freedom of speech in Germany and the government was neither able nor willing to interfere with satirical shows.

These antecedents, especially Erdoğan's rather disproportionate reaction, are crucial because Böhmermann's poem is an immediate reaction to them, and they present the context within which it needs to be interpreted. In his late-night show, "Neo Magazin Royale," Böhmermann used the rising conflict between "Extra 3" and the Turkish president as an opportunity to elaborate on the fine line between protected and unprotected speech under German law. To illustrate this, he presented his poem "Schmähekritik" (which translates to "defamatory critique" – thus explicitly borrowing from legal terminology to illustrate that what he was about to perform was *not* covered by freedom of speech under German law) following an explicitly sarcastic

⁴ Extra 3, IMDB Episode Guide, <https://www.imdb.com/title/tt0073989> (last visited Nov. 22, 2020).

and now infamous introduction: “This is NOT allowed.” Before reading the poem, the host himself and his sidekick Ralf Kabelka staged a mock debate where they weighed the consequences of broadcasting the poem: removal of the episode from the broadcaster’s website, lawsuit, injunction, declaration to cease and desist and so on. Here, Böhmermann demonstrated his desire for revelation and exposure because his predictions proved to be accurate. The TV station did in fact remove the episode from their website merely a day later, and Erdoğan was quick to take action. On April 10, Turkey informed the German Foreign Office of its demands of legal action against Böhmermann. Approximately one month later, on May 17, the Higher Regional Court of Hamburg granted Erdoğan’s request for an injunction, prohibiting Böhmermann from repeating large portions of his poem. What Böhmermann most likely had not predicted were the political consequences of his performance.

On April 3, in a conversation with Turkish Prime Minister Davutoğlu, Chancellor Merkel described the poem as “purposely insulting” – a politically and legally unwise evaluation that she later openly regretted. By making such an evaluation, Merkel antagonized large parts of the population. Furthermore, the legal community criticized a rather blunt violation of the separation of powers, since Merkel used specifically used legal terms that allow acts of speech to be criminalized. This, however, was a judgment for the judicial branch to make, not for the executive. Beyond that, on April 15, the Chancellor authorized the investigation of Böhmermann – as I will show, contrary to other offenses in the German Criminal Code, an investigation into an alleged defamation of a head of state requires the authorization by the government. The public response was intense and declarations of solidarity with Böhmermann poured in from all over the world.

III. ARTICLE 103 AND ITS ELEMENTS

The repealed Article 103 read in its first paragraph:

Whosoever insults a foreign head of state, or, with respect to his position, a member of a foreign government who is in Germany in his official capacity, or a head of a foreign diplomatic mission who is accredited in the Federal territory shall be liable to imprisonment not exceeding three years or a fine, in case of a slanderous insult to imprisonment from three months to five years.⁵

Article 103 requires the insulted person to be in Germany in his or her official capacity and the insult itself to be immediately directed at that

⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], former § 103.

capacity. Both criteria apply to members of a foreign government, while heads of foreign diplomatic missions only need to fulfill the latter criterion (meaning they are *not* required to be in Germany). Foreign heads of state are protected regardless of both criteria⁶ because the position as head of state is one which is held *erga omnes*, at all times.⁷ That means that Erdoğan was neither required to be within German territory, nor was it necessary for Böhmermann's poem to insult him with respect to his position as the president.

The conduct sanctioned by Article 103 does not only include defamation as sanctioned by the regular insult law (Article 185),⁸ but also any acts of speech punishable under Articles 186 (defamation or malicious gossip)⁹ and 187 (slander).¹⁰ In a nutshell, this includes insulting value judgments (Article 185) or assertions of fact uttered in the presence of the victim (Article 190) or to a third person on the condition that the assertion is not proven to be true by the offender when in court (Article 186) or when the assertion is proven to be false and the offender was aware of that.¹¹ Article 103 does not only sanction insults expressed publicly, but also privately.¹² Insofar, this law differs from disparaging the German president (Article 90)¹³ and disparaging the constitutional organs of the German state (Article 90b),¹⁴ which only sanction public acts of speech.¹⁵ The sister-article of Article 103 is Article 188 criminalizing the defamation of "a person involved in the popular political life,"¹⁶ which sanctions defamation in public and private contexts alike.¹⁷

Böhmermann's poem "Schmähekritik" *per se* clearly fits the definition of defamation, as it "entirely or partly negates [President Erdoğan's] basic

⁶ Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH § 102, mn. 4 (Klaus Miebach & Wolfgang Joecks eds., 2012).

⁷ FOAKES, *supra* note 1, at 63.

⁸ STRAFGESETZBUCH [STGB] [PENAL CODE], § 185. The German Penal Code has been translated by Michael Bohlander and is treated as the official translation by the German Federal Ministry of Justice and Consumer Protection: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.). The reference to the translation will not be repeated in similar footnotes.

⁹ STRAFGESETZBUCH [STGB] [PENAL CODE], § 186.

¹⁰ STRAFGESETZBUCH [STGB] [PENAL CODE], § 187; *see generally* Kreß, *supra* note 6, at mn. 5.

¹¹ Hannes Kniffka, WORKING IN LANGUAGE AND LAW 122-123 (2007).

¹² STRAFGESETZBUCH [STGB] [PENAL CODE], § 103.

¹³ STRAFGESETZBUCH [STGB] [PENAL CODE], § 90(1).

¹⁴ STRAFGESETZBUCH [STGB] [PENAL CODE], § 90b (1).

¹⁵ *See* Kreß, *supra* note 6, at mn. 6.

¹⁶ STRAFGESETZBUCH [STGB] [PENAL CODE], § 188 (1). About the expansion of Article 188 through a recent law reform *see infra* note 167.

¹⁷ *See* OSCE, *supra* note 2, at 101-05.

human value or his ethical and social value, thus violating his basic . . . unconditional right to dignity,” which makes it an expression of disregard for him.¹⁸ The fact that Böhmermann might have defended himself by claiming that he never meant to insult Erdoğan is not particularly relevant for the *actus reus*. What matters, rather than the intent behind the utterance, is how its recipients will commonly understand it.¹⁹ Even Böhmermann’s creative trick of embedding the poem into a context which turns it into an illustration of prohibited, as opposed to protected, act of speech has no effect in that regard. As Christian Fahl rightly points out, criminal liability cannot simply be avoided by adding the disclaimer “I’m *not* saying that...” before saying exactly that, because no prolepsis can undo the insult caused by words already spoken.²⁰

The lack of proof that Böhmermann willingly insulted Erdoğan is of course the crux of the case and eventually led to the decision in Mainz (the *ratione loci* of the prosecution in Mainz stems from the fact Böhmermann recited the poem in the studio of the Second German Television, usually shortened to ZDF, a German public service television broadcaster based in Mainz)²¹ not to prosecute Böhmermann.²² Nevertheless, the state of mind, or “mens rea” requirements are met if Böhmermann believed it to be at least realistically plausible that Erdoğan was President of Turkey²³ – which was undoubtedly the case – and his satire was intended as an insult rather than a joke, in particular if it was intended for Erdoğan to understand it as such.²⁴ Indeed, the aggressive use of hyperbole – a rhetoric tool employed by Böhmermann to parody the “humorless knee-jerk indignation” displayed by those who criticize Erdoğan’s continued intimidation of journalists²⁵ – creates an appearance of lacking the seriousness that might be indicative of

¹⁸ Cf. Kristian Kühl, STRAFGESETZBUCH: KOMMENTAR § 103, mn. 4 (Karl Lackner & Kristian Kühl eds., 2014) (translated by author).

¹⁹ Eric Hilgendorf, LEIPZIGER KOMMENTAR STRAFGESETZBUCH § 185, mn. 19 (Wolfgang Ruß & Heinrich Wilhelm Laufhütte, eds. 2009); Christian Fahl, *Böhmermanns Schmähkritik als Beleidigung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT (New Criminal Law Journal), 315 (2016) (Ger.).

²⁰ Fahl, *supra* note 19, at 315.

²¹ STRAFPROZESSORDNUNG [StPO] [CRIMINAL PROCEDURE CODE], § 7 (1), translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html (Ger.).

²² See Bernd Heinrich, *Über die Entbehrlichkeit der Tatbestände der §§ 103, 353a StGB*, 129 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 425, 427 (2017) (Ger.).

²³ Kreß, *supra* note 6, at mn. 6.

²⁴ As decided in an early case by the Higher Regional Court of Bavaria (Bayerisches Oberlandesgericht – BayObLG), NEUE JURISTISCHE WOCHENSCHRIFT [NJW], Oct. 25, 1957, at 1607-1608 (Ger.).

²⁵ Eva Bucher, “‘Ach du Scheiße, es geht wieder los!’ – Jan Böhmermann ist wieder da und so gut wie kein anderer”, DIE ZEIT (Sept. 1, 2016), at 35 (referring to this rhetoric tool as Böhmermann’s “double twist”).

an intent to defame.²⁶ However, the staged debate that took place between Böhmermann and his sidekick Kabelka before and after the performance of the poem quite clearly illustrates that Böhmermann did indeed expect Erdoğan to take the poem seriously, even seriously enough to take legal action.²⁷

IV. THE PROCEDURAL CONDITIONS OF AN INVESTIGATION INTO THE DEFAMATION OF FOREIGN HEADS OF STATE: ARTICLE 104A

Article 104a read in its version that was in force during the Böhmermann case:

Offences under this chapter shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state, reciprocity is guaranteed and was also guaranteed at the time of the offence, a request to prosecute by the foreign government exists, and the Federal Government authorizes the prosecution.²⁸

Article 103 therefore had four procedural conditions: existing diplomatic relations with the other state, guaranteed reciprocity, request to prosecute by a foreign government, and authorization of the prosecution by the German government.²⁹ A law amending Article 104a came into force June 24, 2020 and dispensed of the requirements of guaranteed reciprocity and the authorization of the prosecution by the German government.³⁰

When categorizing these conditions as “procedural conditions,” it should be noted that it is passionately debated as to whether some of these conditions are in fact procedural or so-called objective conditions of liability (“Objektive Bedingungen der Strafbarkeit”). Objective conditions of liability are somewhat “external” to the wrong constituted by the offenses and therefore need not to be included in the defendant’s mens rea.³¹ In a way,

²⁶ Fahl, *supra* note 19, at 317.

²⁷ *Id.*

²⁸ STRAFGESETZBUCH [STGB] [PENAL CODE], former § 104a.

²⁹ In spite of the wording of the law, which states “offences under this chapter *shall only be prosecuted if*,” there is controversy as to whether all of its four conditions are purely procedural requirements or whether some of them are objective requirements of strict liability, i.e., whether they need to be present in addition to mens rea and actus reus.

³⁰ 58TH LAW TO AMEND THE STGB – DISPARAGEMENT OF THE EUROPEAN UNION AND ITS SYMBOLS, CRIMINAL PROTECTION (Bundesgesetzblatt [Federal Law Gazette] 2020 I No. 28, 1247).

³¹ JOHN SPENCER & ANTJE DU BOIS-PEDAIN, APPRAISING STRICT LIABILITY 254 (Andrew Simester ed., 2005); Eric Hilgendorf, LEIPZIGER KOMMENTAR STRAFGESETZBUCH §186, mn. 12 (Wolfgang Ruß & Heinrich Wilhelm Laufhütte eds., 2009); Hendrik Schneider, GESAMTES STRAFRECHT – HANDKOMMENTAR § 186, mn. 13 (Dieter Dölling et al. eds, 2017); Jörg Eisele and Ulrike Schittenhelm, SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR §186, mn. 10 (Adolf

much of the debate about “objective conditions of liability” in German law mirrors the discussion of strict liability in the Anglo-American tradition,³² even though the offenses that use those elements are much rarer in Germany and are much more disputed due to German criminal law’s uncompromising commitment to the culpability principle (*Schuldprinzip*).³³ For our purposes, it should suffice to say that most commentators see the Article 104a conditions as procedural requirements. Consequently, if one of the elements is not fulfilled, the proceedings can be dismissed but they cannot – as would be the case when an objective condition of liability is not fulfilled – result in an acquittal.³⁴

Returning to the Böhmermann case, the first requirement was met, since Germany maintains diplomatic relations with Turkey (and did so at the time Böhmermann performed his poem). As to the reciprocity requirement, already a crucial factor in the Vienna Convention on Diplomatic Relations,³⁵ there had to be a special criminal offense akin to Article 103 in the Turkish legal system.³⁶ This criterion – which has been criticized ever since and has thus been deleted from the current version of the Article – was met by Articles 337 and 340 of the Turkish Criminal Code (as amended on September 26, 2004).³⁷ As to the third condition, the foreign state’s request to prosecute was met by a letter from the Turkish government dated April 7, 2016 that reached the Foreign Office on April 8, 2016. This request for prosecution is not subject to special requirements regarding its form or

Schönke & Horst Schröder eds., 2019); Klaus Geppert, *Zur Systematik der Beleidigungsdelikte und zur Bedeutung des Wahrheitsbeweises im Rahmen der §§ 185 et seq. StGB*, JURISTISCHE AUSBILDUNG, 820, 822 (2002); Ernst Helle, *Die Unwahrheit und die Nichterweislichkeit der ehrenrührigen Behauptung*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 841, 842 (1964) (Ger.); Jörg Tenckhoff, *Grundfälle zum Beleidigungsrecht*, JURISTISCHE SCHULUNG, 618, 622 (1988) (Ger.).

³² Spencer & du Bois-Pedain, *supra* note 31, at 279.

³³ *Id.* at 243, 249.

³⁴ Claudius Geisler, ZUR VEREINBARKEIT OBJEKTIVER BEDINGUNGEN DER STRAFBARKEIT MIT DEM SCHULDPRINZIP 536 (1998).

³⁵ FOAKES, *supra* note 1, at 19.

³⁶ Cf. Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH § 104a, mn. 19 (Klaus Miebach ed., 2017).

³⁷ Article 337 Offenses against the President of a foreign country:

(1) Punishment to be imposed on a person committing an offense against President of a foreign country is increased by one eighth. In case the offense requires punishment of life imprisonment, the offender is sentenced to heavy life imprisonment.

(2) If the felony creates the consequences of an offense of which investigation or prosecution is bound to complaint, the complaint of the foreign country is sought for commencement of investigation and prosecution.

Article 340 Reciprocity condition:

Application of the provisions stated in this section is based on reciprocity condition.

timing, can be withdrawn at any time,³⁸ and must be directed at any state organization that is authorized to represent the German state (i.e., the request cannot be sent to a Public Prosecutor's Office).³⁹

As previously described,⁴⁰ Chancellor Merkel authorized the investigation against Böhmermann in a press statement, fulfilling the last requirement of Article 104a. The peculiarity of that statement was not only that Merkel combined it with an announcement to repeal the law she just applied, but that the statement was not hers to make. The principal competence for granting the authorization lies with "the Federal Minister responsible for external relations"⁴¹ and not the head of government. However, as always, the small print of the statement provides further insights. The authorization was granted by Chancellor Merkel on April 15, 2016 and published under the title "Announcement by Chancellor Merkel regarding the Federal Government's reaction to the Turkish message to the Foreign Office, published on April 15, 2016 in Berlin."⁴² Upon first glance, this may seem like she authorized the prosecution, even though it was not her authorization to give. However, the statement was made "regarding the Federal Government's reaction," and the federal government is allowed to seize the competence comprised by Article 104a.⁴³ The government's decision to act as a whole here is all too understandable taking into consideration the politically explosive nature of the subject matter at hand. The intention was to demonstrate consensus and unity.⁴⁴ In addition to Merkel's lack of competence, the statement in itself displayed irregularities up to the point where a clear misunderstanding of the legal nature of Article 103 and its procedural requirements became visible. At one point, Merkel politically justified her decision to authorize an investigation, declaring that it was up to

³⁸ See STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 77e 77d(1).

³⁹ Kreß, *supra* note 36, mn. 23.

⁴⁰ Section II, *supra*.

⁴¹ Albin Eser, SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR § 104a, mn. 3 (Adolf Schönke & Horst Schröder eds., 2019); Thomas Fischer, STRAFGESETZBUCH: STGB § 97 mn. 5 (2016).

⁴² Bundesregierung, *Erklärung von Bundeskanzlerin Merkel zum Vorgehen der Bundesregierung nach der türkischen Verbalnote an das Auswärtige Amt* (Apr. 15, 2016), <https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2016/04/2016-04-15-erklaerung-bkin.html>.

⁴³ Eser, *supra* note 41.

⁴⁴ Bundesregierung, *supra* note 42. A fitting section of the Federal Government's statement reads:

The government has examined this request according to common state practice. The Foreign Office, the Federal Ministry of Justice, the Federal Interior Ministry and the Federal Chancellery all took part in this examination. There were differences of opinion between the coalition partners, CDU and SPD.

This last sentence probably explains why the Federal Government authorized the request but the Chancellor made the corresponding statement by herself.

the public prosecutor's offices and the courts to balance the individual rights of the victim against protected speech, and that the authorization to prosecute merely meant "that the legal evaluation of the subject matter is delivered to the independent judiciary so that public prosecutors and courts rather than the government will have the final say."⁴⁵ As understandable as it sounds to involve the courts to get legal clarification, Article 104a's procedural condition that the German government must first make a decision to trigger an investigation is based "exclusively on considerations of political expediency."⁴⁶ In other words, the legislator deliberately created a *political* mechanism amongst the procedural requirements – one of which the German government formally triggered while the Chancellor explicitly continued to deny its existence.⁴⁷ For some commentators such as Thomas Vormbaum, the government thereby violated discretionary standards.⁴⁸ As mentioned above, in a recent amendment act the legislator deleted the political mechanism,⁴⁹ precisely to avoid the political ramifications that were created in the Böhmermann case, and to make the matter one for the courts.⁵⁰

V. PREVIOUS CASES OF HEAD OF STATE DEFAMATION IN GERMANY

Until the investigation against Böhmermann, it is doubtful that the broader population of Germany was aware that insulting a foreign head of state would invoke a more severe sentence than insulting just anyone would. Unsurprisingly, the instances where Article 103 was applied were very rare. In fact, there was not a single conviction based on Article 103. By comparison, Germany's 2013 insult law (Article 185) led to 21,454 convictions, its defamation law (Article 186) resulted in 267 convictions, and its slander law (Article 187) had 242 convictions.⁵¹ The defamation of the German president (Article 90) bears the same fate as Article 103 and has never been basis of a conviction.⁵²

⁴⁵ *Id.*

⁴⁶ Fahl, *supra* note 19, at 314.

⁴⁷ See also Thomas Vormbaum, § 103 StGB – bald Rechtsgeschichte? Elf Fragen zur "Affaire Böhmermann" und elf Versuche zu ihrer Beantwortung, 10 JOURNAL DER JURISTISCHEN ZEITGESCHICHTE 47, 49 (2016) (Ger.).

⁴⁸ *Id.*

⁴⁹ *Supra* note 30.

⁵⁰ As emphasized during the deliberations to enact the law, see EXPERT COMMENT BY JÖRG EISELE, at 5, <https://kripoz.de/wp-content/uploads/2020/02/Stellungnahme-Eisele-EU-Symbole.pdf>.

⁵¹ Griffen & Trionfi, *supra* note 2, at 103.

⁵² *Id.*

In 1967, Article 103 received the epithet “Shah-Article”⁵³ – a name that was reactivated by the press during the reporting of the Böhmermann case⁵⁴ – when the Shah of Persia took offense at banners reading “Shah murderer” and “Plundering the Persian People” during his visit to Germany. Just like in the Böhmermann case, the request to prosecute was expressed via a *note verbale*, delivered by Ambassador General Mozaffar Malek.⁵⁵ The preliminary proceedings that followed were discontinued.⁵⁶

Eight years later, a case reached the Federal Administrative Court. In the summer of 1975, during a protest in front of the Chilean embassy in Bonn, police seized a banner that allegedly insulted the Chilean Ambassador.⁵⁷ The banner measured about one hundred by seventy-five centimeters and read: “Italy, Sweden, UK, the Netherlands – No money for a mob of murderers! Why is Germany paying?”⁵⁸ When the organizers of the event initiated legal action against the confiscation of the banner, the Federal Administrative Court seized the opportunity to test for criminal liability according to Article 103 and held that the banner was not protected by freedom of speech, constituting an offense pursuant to Article 103.⁵⁹

On August 12, 2006 during the Christopher Street Day celebrations in Munich banners were shown depicting Pope Benedict XVI wearing condoms and an AIDS solidarity ribbon. The police ordered the removal of the banners and a doll representing the Pope, informing the owners that these depictions might reasonably fall within the scope of Article 103.⁶⁰ In the following proceedings before the Higher Administrative Court of Munich, the Court held that no defamation whatsoever had taken place, and consequently there could have been no defamation of a head of state according to Article 103.⁶¹

⁵³ Bernd Heinrich, *supra* note 22, at 429.

⁵⁴ Vanessa Steinmetz, *Der Moderator und der Shah-Paragraf*, SPIEGEL ONLINE (Apr. 11, 2016), <http://www.spiegel.de/politik/deutschland/boehmermann-rechtliche-grundlagen-moeglicher-ermittlungen-a-1086555.html>.

⁵⁵ *Schah-Reise – Gegen Unbekannt*, DER SPIEGEL (Jan. 5, 2018), <http://www.spiegel.de/spiegel/print/d-46211803.html>.

⁵⁶ Paul Munzinger, *Als 1967 der Shah-Paragraf unterlaufen wurde*, SÜDDEUTSCHE ZEITUNG SZ.DE (Jan. 5, 2018), <http://www.sueddeutsche.de/politik/paragraf-wie-der-schah-paragraf-unterlaufen-wurde-1.2951845>.

⁵⁷ Federal Administrative Court, *BVerwG* NJW 1982, 1008.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1010 *et seq.*

⁶⁰ Bavarian Constitutional Court, *VGH München* NJW 2011, 793.

⁶¹ *Id.* at 795.

Finally, in 2007, a Swiss citizen living in Bavaria was convicted of insulting Swiss President Micheline Calmy-Rey and sentenced to pay a criminal fine. The prosecution was requested by the Swiss Federal Police.⁶²

VI. THE PROTECTION OF FREE SPEECH IN GERMANY AND ARTICLE 103

The way the above-mentioned cases unfolded and eventually disappeared rather inconspicuously demonstrates first that there have been proceedings on the basis of Article 103 in the past that never resulted in an outcry even remotely similar to the one that followed the Böhmermann case; and second, the lack of outcry might be explained by the fact that the Böhmermann case has a unique aspect to it, making it remarkable and complex. Namely, the issue of freedom of speech and of the arts (protected by the German constitution as per Article 5 Paragraph 3 and applicable due to the fact that Böhmermann's medium to insult the Turkish president was a satirical poem).

Even though a large part of the First Amendment doctrine in the United States is not older than the similar doctrine in Germany, the German approach to freedom of speech and the arts is both politically and philosophically very different. For obvious reasons, this Article is not the place to go into much detail – it suffices to say, a deeper analysis would fill an entire bookshelf.⁶³ To understand why Germany retained – until very recently – a law that criminalized the head of state defamation and to find out whether this is model worth being adopted by other states, a look at the culture of free speech protection in Germany *vis-à-vis* the U.S. is not only illuminating, but necessary.

The protection of free speech has ancient roots and is accepted in many human rights covenants today.⁶⁴ At the same time, freedom of speech is rarely

⁶² Felix Schindler, *Schweizer Bundespräsidentin übel beschimpft*, TAGESANZEIGER (Apr. 13, 2016), <https://www.tagesanzeiger.ch/schweiz/standard/schweizer-bundespraesidentin-als-folterschlampe-beschimpft/story/16716749>; see also Griffen & Trionfi, *supra* note 2, at 104.

⁶³ For a very instructive comparison see Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

⁶⁴ THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 34-37 (1998); see Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art. 10, 213 U.N.T.S. 221; Convention on the Elimination of Racial Discrimination, Art. 5, 660 UNTS 195; International Covenant on Civil and Political Rights, Art. 19, 999 U.N.T.S. 171; American Convention on Human Rights, Art.13 (1144 O.A.S.T.S. 123); African (Banjul) Charter on Human and Peoples' Rights, Art. 9, OAU Doc. CAB/LEG/67/3 rev. 5.; Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, 12 HUM. RTS. L. REV. 627, 630 (2012).

absolute and therefore subject to limitations.⁶⁵ In its General Comment No. 10 (about Article 19 International Covenant on Civil and Political Rights (ICCPR)), the Human Rights Committee of the UN emphasized that “[i]t is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”⁶⁶ A restriction of the freedom of expression in Article 20 of the ICCPR requires States’ Parties to prohibit by law “[a]ny propaganda of war” and “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁶⁷ Article 10(2) of the European Convention on Human Rights (ECHR) qualifies Article 10(1) by stating:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Consequently, many states of the world have laws that disallow certain types of speech, such as “directing insults, slurs, or derogatory epithets at such persons or otherwise ridiculing such persons; publicly disseminating ideas based on the inferiority of such persons; and the public use of any words, signs, or symbols that are deeply insulting or offensive to such persons. Instances of this cluster can be found in domestic criminal statutes and penal codes.”⁶⁸

In the U.S., the First Amendment provides for an extreme protection of free speech – much broader than the protection afforded by the human rights

⁶⁵ Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 148 (David Kretzmer & Francine Kershman Hazan, eds., 2000); Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 2 (2008).

⁶⁶ U.N. Office of High Comm’r for Human Rights, *General Comment No. 10: Freedom of Expression (Art. 19)*, U.N. Docs. CCPR General Comment No. 10, ¶ 3 (June 29, 1983), <https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>.

⁶⁷ U.N. Office of High Comm’r for Human Rights, *International Covenant on Civil and Political Rights*, Art. 20, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. About the criticism voiced during the drafting of the provision, see Ineke Boerefijn & Joanna Oyediran, *Article 20 of the International Covenant on Civil and Political Rights*, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 29, 29 (Sandra Coliver, ed., 1992); Bakircioglu, *supra* note 65, at 33.

⁶⁸ ALEXANDER BROWN, HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION 23 (2015).

covenants mentioned above.⁶⁹ There are three prominent justifications for protecting free speech in the United States: (1) it acknowledges human autonomy and dignity, (2) it promotes the marketplace of ideas,⁷⁰ and (3) it is an effective tool of democracy.⁷¹ Only speech that falls into the following categories may be restricted: advocacy intended and likely to incite imminent lawless action (a likelihood to produce illegal action and an intent to cause imminent illegality);⁷² obscenity;⁷³ defamation;⁷⁴ child pornography;⁷⁵ “fighting words”;⁷⁶ fraud;⁷⁷ true threats;⁷⁸ speech integral to criminal conduct;⁷⁹ and speech presenting a grave and imminent threat the government has the power to prevent.⁸⁰ The case law on false speech is less clear. While earlier case law allowed for some “breathing space”⁸¹ for freedom of expression in the face of false remarks about, *inter alia*, public officials (i.e. for a certain degree of protection of false statements), recent decisions tend to be more even favorable to false speech in general.⁸²

The German protection of free speech differs substantially from this approach. Both freedom of expression and freedom of the press enjoy constitutional protection in Germany, under Article 5 of the Basic Law. At

⁶⁹ Texas v. Johnson, 491 U.S. 397, 414 (1989); Winfried Brugger, *Ban on or Protection of Hate Speech - Some Observations Based on German and American Law*, 17 TULANE EUROPEAN & CIVIL L. FORUM, 1, 2 (2002); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003); see also Bakircioglu, *supra* note 65, at 20.

⁷⁰ Alexander Tsesis, *Deliberate Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU L. REV. 495, 496-503 (2019).

⁷¹ Thomas J. Webb, *Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 448-49 (2011).

⁷² Brandenburg v. Ohio, 395 U.S. 444 (1969); Mari Matsuda, *Dissent in a Crowded Theater*, 72 SMU L. REV. 441, 441-56 (2019). About the application of the Brandenburg test to speech acts uttered via social media to incite violent protests, see Alexander Heinze, *Planning and Inciting Violent Protests Through Social Media: A Criminal Law and Comparative Law Perspective*, 2 CRIM. L. & PRAC. REV. 29-51 (2018). Comparing U.S. law and the law in England and Wales on dangerous speech, see Jeffrey W. Howard, *Dangerous Speech*, 47 PHILOSOPHY & PUBLIC AFFAIRS 208 (2019).

⁷³ Miller v. California, 413 U.S. 15 (1973).

⁷⁴ New York Times v. Sullivan, 376 U.S. 254 (1964).

⁷⁵ New York v. Ferber, 458 U.S. 747 (1982).

⁷⁶ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

⁷⁷ Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

⁷⁸ Watts v. United States, 394 U.S. 705, 709 (1969).

⁷⁹ Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

⁸⁰ N.Y. Times Co. v. United States, 403 U.S. 713, 727 (1971) (per curiam); Near v. Minn. ex rel. Olson, 283 U.S. 697, 716 (1931); Chaplinsky, 315 U.S. at 572; see generally Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 380 (2014); G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 519-20 (2019).

⁸¹ See Sullivan, 376 U.S. at 272 (1964).

⁸² For an overview, see White, *supra* note 80, at 516 *et seq.*

the same time, German civil law prohibits and criminalizes incitement of hatred and attacks on human dignity because of race, religion, ethnic origin, or nationality.⁸³ It is not a requirement that speech lead to a clear and present danger of imminent lawless action before becoming punishable.⁸⁴ Rather, a “distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself.”⁸⁵

Admittedly, this descriptive account of free speech protection in the U.S. and Germany does not answer the question of why a provision criminalizing the defamation of a foreign head of state could survive for such a long time in a modern democracy. Nor does it provide an explanation for the open resentment that was expressed when I attempted to justify the existence of such a provision at the Global Fake News and Defamation Symposium. Only a glimpse behind the facade of free speech protection may reveal what is really at hand when the U.S. and Germany protect free speech: both approaches reflect a substantially different political and philosophical tradition and have reached different results through different methods of adjudication.⁸⁶ The ink used to describe these differences could easily fill oceans. It therefore does not do justice to distill the main elements of difference and yet, the confinements of an article require just that: (1) the historical element; (2) the protection of dignity and its constitutional role; (3) the balancing of individual rights versus constitutional interests; and (4) the interpersonal effect of the constitution.

Germany's hate speech laws are widely a result of World War II and the Holocaust.⁸⁷ Conversely, in *New York Times Co. v. Sullivan*, Justice Brennan suggested that free speech protection in the U.S. has Lockean roots.⁸⁸

⁸³ See John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 541 (2006); see Deborah Levine, *Sticks and Stones May Break My Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 FORDHAM INTERNATIONAL L. J. 1293, 1318 (2018).

⁸⁴ See Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 BOSTON UNIVERSITY INTERNATIONAL L. J. 277, 329 (2008); Levine, *supra* note 83, at 1318-19.

⁸⁵ *Id.*

⁸⁶ See generally Quint, *supra* note 63, at 251.

⁸⁷ Rosenfeld, *supra* note 69, at 1525; Levine, *supra* note 83, at 1317; Quint, *supra* note 63, at 251 (“It is perhaps inevitable that a nation with a monarchical and aristocratic tradition that lasted into the twentieth century—along with the catastrophic history of the Nazi period—would develop views of the role of political speech and other forms of expression that to some extent reflected the impact of that experience.”).

⁸⁸ Brennan stressed the premise “that the Constitution created a form of government under which ‘The people, not the government, possess the absolute sovereignty.’ The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was ‘altogether different’ from the British form, under which the Crown was sovereign and the people were subjects.” *Sullivan*, 376 U.S. at 254 (1964); see also Dale A. Herbeck, *New York Times v. Sullivan: Justice Brennan’s Beautiful Lie*, 28

Historically, free speech protection in Germany's Constitution and early case law was more stringent as it was in the U.S.⁸⁹ However – and this is the second element of difference – Germany's Federal Constitutional Court decided that human dignity was so central for Germany's constitutional tradition, that it narrowed the scope of Article 5 over time.⁹⁰ In Germany, “human dignity” is “broadly defined as an attack on the core area of [the victim's] personality, a denial of the victim's right to life as an equal in the community, or treatment of a victim as an inferior being excluded from the protection of the constitution.”⁹¹ The German Federal Constitutional Court found that individuals have a personal constitutional right not to be defamed, protected by Article 2 Paragraph 1 in conjunction with Article 1 Paragraph 1 of the Basic Law.⁹² Dignity is not valued in the United States in the same way as it is in Germany.⁹³ In fact, there are no explicit guarantees of “human dignity” or “the free development of the personality” in the U.S. Constitution.⁹⁴ These guarantees are central in the German constitutional tradition, especially after the experiences during dark Nazi times.⁹⁵ As Quint puts it: “[A]s a substantive matter, the American doctrine views the interest of an individual in remaining free from libel as an interest that generally does not rise to independent constitutional status.”⁹⁶ This foreshadows element

FIRST AMEND. STUDIES (FORMERLY FREE SPEECH YEARBOOK) 37, 48 (1990). Tushnet even recognizes an interplay between the respective history of Germany and the U.S. and their free speech protection. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1278 (1999).

⁸⁹ See, e.g., Federal Constitutional Court [BVerfG], *Lüth*, Urteil vom 15. Jan. 1958 – 1 BvR 400/51 –, BVerfGE 7, 198 (“[G]eneral laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favor of freedom of speech in all areas, and especially in public life.” [translation by Tony Weir, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369>]); see also Federal Constitutional Court in BVerfG, *Schmid/Spiegel*, Urteil vom 25. Jan. 1961 – 1 BvR 9/57 –, BVerfGE 12, 113 (translation by Nomos Verlagsgesellschaft, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=653>); see generally Levine, *supra* note 83, at 1327.

⁹⁰ See Federal Constitutional Court in BVerfG, *Mephisto*, Urteil vom 24. Feb. 1971 – 1 BvR 435/68 –, BVerfGE 30, 173 (translation by J.A. Wier, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1478>); see generally Levine, *supra* note 83, at 1327.

⁹¹ Knechtle, *supra* note 83, at 553; see also Levine, *supra* note 83, at 1320.

⁹² This right was developed by the German Federal Supreme Court in 1954, which was acknowledged by the Federal Constitutional Court in BVerfG, *Soraya*, Beschluss vom 14. Feb. 1973 – 1 BvR 112/65 –, BVerfGE 34, 269-293, juris, mn. 6; the Court has continued to adhere to and elaborate its judicature on this right, for example in its famous decision BVerfG, *Caroline von Monaco III*, Beschluss vom 26. Februar 2008 – 1 BvR 1602/07 juris.

⁹³ Levine, *supra* note 83, at 1320. From a both comparative and philosophical perspective, see PHILIPP GISBERTZ, *MENSCHENWÜRDE IN DER ANGLOAMERIKANISCHEN RECHTSPHILOSOPHIE: EIN VERGLEICH ZUR KONTINENTALEUROPÄISCHEN BEGRIFFSBILDUNG* 109 (2018).

⁹⁴ Quint, *supra* note 63, at 315-16.

⁹⁵ *Id.* at 315.

⁹⁶ *Id.* at 315-16.

three. In Germany, the right of the defamed person – the right to reputation, personality, or the like – is balanced against the right of speech, press, or artistic expression asserted by the defendant-speaker.⁹⁷ By contrast, in the U.S. the conflicting interests are two individual ones. It is the speaker's First Amendment interest against the interest of the state in regulating the kind of speech in question, even though the state may represent the interest of the defamed person.⁹⁸ This leads to what is probably the most important difference between the protection of free speech in the U.S. and Germany (element number four). While free speech is restricted in Germany by countervailing constitutional rights of the defamed person, in the U.S. it is restricted by the state's interests.⁹⁹ It is therefore hardly surprising that the American public is reluctant to interpret these interests broadly, while the public in Germany is less reluctant to grant the defamed person a minimum amount of dignity protection. In other words, allowing the state to restrict my right to free speech for policy reasons feels less intuitive than for reasons that protect the person I am directing my speech at. This goes to nothing less than the relationship between the state and society. In the United States Constitution there is a clear distinction between the state and society – an “essential dichotomy” between state and private action – and adheres to the position that only the state is bound by the fundamental law.¹⁰⁰ To a certain extent, society must be free from constitutional restraint and, “although individuals and private groups can be substantially regulated, that regulation must be undertaken by statutes or other measures of positive law which are subject to continuing contemporary adjustment unlike the more rigid rules of constitutional law.”¹⁰¹ The German doctrine is very skeptical that a clear line can be drawn between the public and the private sphere.¹⁰² As a result, certain constitutional values such as dignity, “permeate state and society.”¹⁰³ In

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 316.

¹⁰⁰ See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974) (“The mere fact that a business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment.”); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (“A major consequence is to require the courts to respect the limits their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.”).

¹⁰¹ Quint, *supra* note 63, at 339.

¹⁰² See generally Heinrich de Wall & Roland Wagner, *Die sogenannte Drittwirkung der Grundrechte*, JURISTISCHE ARBEITSBLÄTTER, 734 (2011); Quint, *supra* note 63, at 340.

¹⁰³ Quint, *supra* note 63, at 340; see Federal Constitutional Court in BVerfG, *Lüth*, Urteil vom 15. Januar 1958 – 1 BvR 400/51 –, BVerfGE 7, 198 (“Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system.” [translation by

practical terms, this means that constitutional values play a certain role when individuals interact with each other – in contractual relations or when one person insults another. Civility, respect, and honor are so central in the German legal tradition that the German legislator decided that protection through civil damages is not enough and declared it as a legal good in the criminal law sphere.¹⁰⁴ Thus, sections 26, 30, 86a, 111, and 185 through 200 address defamatory speech.¹⁰⁵ The protection of reputation and personality through German criminal law becomes an easy target for commentators from the U.S. when the above-mentioned constitutional tradition is disregarded, and when Germany's lack of a system for punitive damages is overlooked.¹⁰⁶

The essence of these rather general remarks on the constitutional tradition in Germany and the U.S. is to serve two purposes: an explanatory and a normative one. First, they attempt to explain why Germany retained a law that criminalized the defamation of a foreign head of state. Second, they are the basis for my argument that this law should not have been repealed.

Summarizing the comments and analyses of the constitutional ramifications of the Böhmermann case, it is certainly fair to say that any balancing of Böhmermann's free speech rights on the one hand and Erdoğan's right to dignity on the other hand goes to the favor of the former.¹⁰⁷

Tony Weir, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369>]).

¹⁰⁴ See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1282-83 (2000); Levine, *supra* note 83, at 1318. About the criminalization of hate speech with a view to the harm principle and offence principle, see RAPHAEL COHEN-ALMAGOR, *SPEECH, MEDIA AND ETHICS* 3 (2001).

¹⁰⁵ Levine, *supra* note 83, at 1320-1321.

¹⁰⁶ See Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis With Respect to the Ordre Republic*, 17 ANNUAL SURVEY OF INT'L AND COMPARATIVE L. 185, 186 (2011); see also Volker Behr, *Punitive Damages in America and German Law--Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHICAGO-KENT L. REV. 105, 106 (2011):

German civil law and criminal law are separate. Punitive damages are punishment, and, while a wrongdoer may be punished exclusively under the concept of criminal law, by no means is such punishment allowed under the concept of civil law. In the course of time, the very idea of punitive damages has become so unfamiliar to German law that blackletter doctrine on damages scarcely gives the notion of punitive damages, or its German equivalent *Strafschadenersatz*.

¹⁰⁷ Alexander Thiele, *Erlaubte Schmähkritik? Die verfassungsrechtliche Dimension der causa Jan Böhmermann*, VERFASSUNGSBLOG (Jan. 5, 2018) <http://verfassungsblog.de/erlaubte-schmaehkritik-die-verfassungsrechtliche-dimension-der-causa-jan-boehmermann>; Thomas Fischer, *Kunst ist strafbar. Warum auch nicht?*, ZEIT ONLINE (Jan. 5, 2018) <http://www.zeit.de/gesellschaft/zeitgeschehen/2016-05/jan-boehmermann-kunst-straft-fischer-im-recht>; Stephan Christoph, *Die Strafbarkeit satirisch überzeichneter Schmähkritik*, JURISTISCHE SCHULUNG 599 (2016); Anja Brauneck, *Das Problem einer „adäquaten Rezeption“ von Satire mit Anmerkungen zum Beschluss des LG Hamburg vom 17.5.2016 im Fall Böhmermann*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 710 (2016); Thomas Vormbaum, *supra* note 47, at 47. Cf. Fahl, *supra* note 19, at 315.

However, on May 17, 2016 the Higher Regional Court of Hamburg – as cited above – reached a different conclusion in a civil suit and prohibited Böhmermann from repeating certain passages of his poem because it considered these passages to have crossed the boundaries of satirical criticism, simple defamation and formal insults. In doing so, the Court – according to Anja Brauneck – removed the poem from its context after all, taking the verses in question “basically ‘literally.’”¹⁰⁸

VII. REPEALING ARTICLE 103 FROM A POLITICAL AND LEGAL PERSPECTIVE

As of January 1, 2018, the infamous Article 103 is no more. On July 7, 2017 – roughly a year after the Turkish president initiated criminal proceedings against Böhmermann – the German parliament voted to abolish the law criminalizing the defamation of heads of state. The law was labeled a relic from the pre-democratic era, akin to *lèse majesté*, a type of offense from a dark era. Within the blink of an eye, the German public handed down its verdict. Article 103 no longer fits into our modern society and needed to be repealed – the sooner, the better. The German government took the opportunity to combine the authorization to investigate Böhmermann with the public announcement to repeal Article 103. A day before the government’s statement was issued, members of Parliament from the Green Party had already drafted a “[l]aw to amend the Criminal Code by abolishing the criminal offen[s]e of *lèse majesté* (§ 103 Strafgesetzbuch (StGB)),” in which they described Article 103 as a “relic from the time when Germany was still a monarchy” and recommended its abolition in entirety from the Criminal Code. Soon thereafter, the federal states Hamburg, Bremen, Nordrhein-Westfalen, Schleswig-Holstein and Thüringen filed a petition with the Bundesrat to repeal Article 103 in which they explained that the punishment imposed by the law was based on “an anachronistic, cooperationist understanding of States which even burdens individual citizens with fulfilling the State’s duties.”¹⁰⁹

A. The Political Explosiveness of Article 103 – The Long Shadows of Bush and Trump

Politically, this makes sense. In times of increased attacks by state leaders on free speech and the press, a law that criminalizes the defamation of foreign heads of state and makes the investigation dependent on a request

¹⁰⁸ Brauneck, *supra* note 107, at 715.

¹⁰⁹ Bundesrat, *Drucksache 214/16, Entwurf eines Gesetzes zur Aufhebung des § 103 des Strafgesetzbuches*, 28.4.2016, at 2.

by the offender's government puts that government in a tight spot. If it decides not to trigger an investigation, it risks diplomatic tensions. Whereas, if it does decide to trigger the investigation, it risks outrage amongst the people it represents. Merkel – as always – tried to find a compromise by first triggering the investigation against Böhmermann to make sure the European Union's deal with Turkey to stem the flow of refugees into Europe would not be harmed, and then announcing the repeal of Article 103 to avoid public outrage. Some say another reason for the incredibly fast repeal of the law was Merkel's fear of Germans insulting Donald Trump, and Trump requesting an investigation on the basis of Article 103. To be clear, the procedural conditions of the law would not be met anyway, because one of the conditions for prosecution (Article 104a) was so-called reciprocity, that is, the victim's (Trump's) home state needs to have a law similar to Article 103. Turkey has such a law (Articles 337 and 340 of the Turkish Criminal Code), but the U.S. does not. Article 103 could therefore not have been triggered. However, there is still a political effect in trying to trigger Article 103: it gets the attention of the respective state, because the government has to deal with it. This would not be the case if Trump just brought a claim under regular rules on libel, since it would become the matter of a regional prosecutor's office and not the government.

The unease of the German government surrounding Article 103 in combination with U.S. politics was made obvious in 2003 when sixty-nine-year-old Franz Becker, a retired butcher, used his vacant butchery in the German city of Marburg to display posters, pictures, newspaper clippings, and comments describing former U.S. President George W. Bush and other members of the U.S. administration as "state terrorists," because of the war in Iraq.¹¹⁰ Becker, who survived an air raid during WWII that turned him into an anti-war activist, also declared that Bush's character showed an "explosive mixture of simplemindedness and stupidity, of sanctimonious obsession and sense of mission, coupled with a delusion of power and a highly developed recklessness."¹¹¹ Following a notice by the local authorities, police seized the posters. A district court judge found that two other posters reached the level of suspicion for the commission of a defamatory offense (Article 103).¹¹² What makes this particular case remarkable enough to warrant such a detailed description is that it disappeared from the German records, even though it

¹¹⁰ Gesa Cordes, *Metzger darf Bush durchgeknallt“ nennen – Strafverfahren gegen Marburger, der in seinem Schaufenster gegen Irak- Krieg protestierte, wird eingestellt* [translated: Butcher is allowed to call Bush "crazy" – Criminal proceedings against the butcher from Marburg, who protested against the Iraq war, were discontinued], FRANKFURTER RUNDSCHAU 27 (Dec. 29, 2003).

¹¹¹ *Id.* at 33.

¹¹² *Id.*

went up to the German Ministry of Justice. Due to the explosive political potential of Article 103, the German Ministry of Justice immediately forwarded the case to the Frankfurt General Prosecutor's Office which quickly stopped the investigation without involving the U.S. government, since the reciprocity requirement had not been met.¹¹³ The case would have been lost forever had it not been for the generous support of a journalist with the *Frankfurter Rundschau* who rediscovered two articles in the newspaper's archives.

B. *The Legal Necessity of Article 103*

The way the fate of Article 103 was sealed is very much reminiscent of the witch scene in *Monty Python and the Holy Grail*: "We have found a witch! (A witch! a witch!) Burn her burn her! – How do you know she is a witch? – She looks like one!"¹¹⁴ Without success, the witch reminds her accusers that she is (a) not a witch and (b) has been given a false nose to make her appear like a witch. Nevertheless, the antagonized mob has already made up its mind: "burn her anyway! (burn her burn her burn!)"

In Germany – as probably in most other states – criminalizing or decriminalizing an act needs to follow the rules and theories of criminalization.¹¹⁵ Within the very complex debate about "what the legislature can and should be able to forbid its citizens under threat of punishment,"¹¹⁶ the two main approaches are: the protection of legal goods (*Rechtsgüter*) in the civil law tradition and the prevention of harm in the common law tradition.¹¹⁷ Both approaches have either a normative and prescriptive or an explanatory and descriptive appearance.¹¹⁸ The protection of legal goods circumscribes the approach that criminal laws should be designed to protect "the essential preconditions for communal living,"¹¹⁹ such as the protection of life and bodily integrity, freedom, and property.¹²⁰ The harm principle was first promoted by John Stuart Mill, who stated, "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to

¹¹³ *Id.*

¹¹⁴ MONTY PYTHON AND THE HOLY GRAIL (Python Pictures, Ltd. 1975).

¹¹⁵ In detail Tatjana Hörnle, *Theories of Criminalization*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 679 (Markus Dubber and Tatjana Hörnle, eds., 2014).

¹¹⁶ KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. 1: FOUNDATIONS AND GENERAL PART 60 (2013).

¹¹⁷ *Id.*

¹¹⁸ CELIA WELLS & OLIVER QUICK, RECONSTRUCTING CRIMINAL LAW 10 (2010).

¹¹⁹ AMBOS, *supra* note 116, at 62; *see also* Markus Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679 (2005).

¹²⁰ Hans-Heinrich Jescheck & Thomas Weigend, STRAFRECHT ALLGEMEINER TEIL 6 (1996).

others.”¹²¹ However, the principle has been somewhat diluted over the years¹²² due to the fact that its application creates some difficulties.¹²³

This is not the place to debate the complicated legal good(s) of Article 103; I have done so elsewhere extensively.¹²⁴ It suffices to say that media reports created the false narrative that Article 103 grants special protection to the dignity of heads of state which can no longer be considered acceptable nowadays – an interpretation which neatly fits the 140-character mold of a Tweet, but frankly mutilates the diversity that is inherent in the discussion about legal goods beyond recognition.

Another question, one that is perhaps more interesting for a non-German audience, is whether states have an obligation to criminalize attacks on foreign state representatives – and if so, whether these attacks should include defamatory attacks.

1. International Treaty Law

With regard to the protection of foreign heads of state and diplomats in general, the following norms of international treaty law become the focus of attention. Article 29 of the 1961 Vienna Convention on Diplomatic Relations (VCDR) (ratified by the U.S. in 1972 and by Germany in 1964),¹²⁵ Article 40 of the 1963 Vienna Convention on Consular Relations (VCCR) (mirroring the aforementioned Article 29; ratified by the U.S. in 1969 and by Germany in 1971),¹²⁶ Article 29 of the 1969 Convention on Special Missions (CSM) (also mirroring the same article; neither ratified by the U.S. nor by

¹²¹ John S. Mill, ON LIBERTY 73 (1869); see WELLS & QUICK, *supra* note 118, at 9-10.

¹²² AMBOS, *supra* note 116, at 113-14.

¹²³ WELLS & QUICK, *supra* note 118, at 9-10 (perceiving the harm principle “neither as ideal nor as explanation, but rather as an ideological framework in terms of which policy debate about criminal law is expressed,” “exceed the harm principle,” or “fail to meet it”).

¹²⁴ Alexander Heinze, *Lex Non Grata – Kann der Rechtsgüterschutz § 103 StGB retten?*, GOLTDAMMER’S ARCHIV 767 (2016); Alexander Heinze, *Mehr Zynismus wagen! Aspekte der causa Böhmermann*, BONNER RECHTSJOURNAL 81 (Feb. 2016); Alexander Heinze, *Expert Comment on the draft law on the abolishment of s. 103 of the German Criminal Code (defamation of organs and representatives of foreign states) For the public hearing of the Committee for Legal Affairs and Consumer Protection of the German Parliament* (May 2017), <https://www.bundestag.de/resource/blob/506908/cacefa19dead7e07a3e85b61f45e404/heinze-data.pdf>; Alexander Heinze, *Der “Schah-Paragraph” § 103 StGB: Bei Nicht-Gefallen Gesetz zurück*, LEGAL TRIB. ONLINE (Jan. 4, 2018), http://www.lto.de/persistent/a_id/19087.

¹²⁵ “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.” See also FOAKES, *supra* note 1, at 18-19.

¹²⁶ “Protection of consular officers: The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.”

Germany),¹²⁷ and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (“Protection of Internationally Protected Persons Convention,” ratified by the U.S. in 1976 and by Germany in 1977). They all require states to protect foreign representatives.

Article 29 of the VCDR, Article 40 of the VCCE, and Article 29 of the CSM explicitly refer to “dignity” as a protected good and that criminal sanctions are an appropriate step to prevent attacks on that good. As Joanne Foakes demonstrates with the example of the UK:

[U]nder the State Immunity Act 1978, those provisions of the VCDR which apply to the head of a diplomatic mission and have the force of law, shall also apply to a head of State with any “necessary modifications.” Accordingly, the UK is obliged to treat a head of State with “due respect and take all appropriate steps to prevent any attack on his person, freedom and dignity.”¹²⁸

In a similar vein, the Supreme Court of the Netherlands, in *JAM v. Public Prosecutor*, found that an insulting attack on a foreign head of state in the local press violated the obligation to prevent attacks on the dignity of such a person.¹²⁹ Nevertheless, no obligation can be derived from Article 29 of the VCDR (or Article 40 of the VCCR or Article 29 of the CSM, respectively) to enact a distinct libel law that specifically sanctions the defamation of foreign representatives. Rather, the receiving state is merely required to treat foreign states’ representatives “with due respect” and to “take all appropriate steps” to prevent attacks on their dignity (amongst the other protected goods). Which steps are appropriate is left open to interpretation. It can be argued that the existence of general laws sanctioning attacks on those goods protected in Article 29 – which *also*, if not *exclusively* or *specifically*, apply to foreign states’ representatives – suffices to fulfill the “appropriate steps” requirement.¹³⁰ This argument is at least sufficiently plausible to conclude

¹²⁷ “[P]ersonal inviolability: The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.” *See also* FOAKES, *supra* note 1, at 19.

¹²⁸ *Id.* at 62, fn. 133.

¹²⁹ *JAM v. Public Prosecutor*, Netherlands Sup. Ct., Jan. 21, 1969, YBIL 222-273 (1970).

¹³⁰ Andreas Zimmermann & Robert Pfeiffer, *President Erdogan versus Jan Böhmermann: Do Bad Poems Make Bad Law? – Reforming the Defamation of Foreign Heads of States Under German Criminal Law*, EJIL: TALK! (June 23, 2017), <https://www.ejiltalk.org/president-erdogan-versus-jan-bohmermann-do-bad-poems-make-bad-law-reforming-the-defamation-of-foreign-heads-of-states-under-german-criminal-law>.

that an obligation to specifically sanction the defamation of state representatives cannot be deduced from Article 29.

The same holds true for the Protection of Internationally Protected Persons Convention,¹³¹ specifically regarding its Article 2. Article 2 Paragraph 1, however, only refers to attacks on the person and liberty of protected persons and omits any dignity protection. Only Article 2 Paragraph 3 states that obligations derived from this convention do not in any way derogate from other existing obligations under international law “to take all appropriate measures to prevent other attacks on the person, freedom *or dignity* of an internationally protected person” (emphasis added). Since Article 2 Paragraph 3 explicitly attributes the protection of dignity to other international treaties, it can be concluded that the contracting parties deliberately excluded the obligation to protect dignity from this Convention and that, consequently, no obligation to enact any type of libel law can be derived from it.¹³²

2. International Customary Law

This leaves the possibility of an obligation for Germany under customary international law to uphold Article 103 German Criminal Code and criminalize attacks on foreign state representatives. A duty to penalize attacks on the physical integrity of state representatives is commonly recognized as part of international customary law. Attacks on their dignity, however, are more controversial – with skepticism on the rise.¹³³ The existence of an obligation to create special criminal offenses according to international customary law is somewhat controversial as well, but mostly negated due to a lack of consistent common practice.¹³⁴ For example, the British Court of Appeals stated in a 2007 judgment that it was “far from convinced of the existence of a rule of customary international law requiring States to take steps to prevent individuals from insulting foreign heads of state abroad.”¹³⁵

It is widely acknowledged that a constant and uniform state practice and a corresponding *opinio juris* can lead to the evolution of a customary norm, obliging states to prevent and punish attacks by private individuals upon the

¹³¹ See *supra* VII.B.1.

¹³² Zimmermann & Pfeiffer, *supra* note 130.

¹³³ See Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH Vorbemerkung zu § 102, mn. 2 (Klaus Mießbach ed., 2017); see also Zimmermann & Pfeiffer, *supra* note 130. In favour of abolishing laws sanctioning head of state defamation, see Jan Oster, MEDIA FREEDOM AS A FUNDAMENTAL RIGHT 156 (2015).

¹³⁴ Claus Kreß, *supra* note 133, at mn. 2, 18 – 20. Cf. Zimmermann & Pfeiffer, *supra* note 130.

¹³⁵ Aziz vs. Aziz et al., Sultan of Brunei Intervening, No. [2007] EWCA Civ 712 (June 2007) <http://www.bailii.org/ew/cases/EWCA/Civ/2007/712.html>.

person and liberty of foreign heads of state.¹³⁶ However, whether a parallel customary obligation also exists to criminalize private attacks on the *dignity* of a foreign head of state is less clear. This question calls for an analysis of existing libel laws (though naturally, only a limited number of selected states can be considered within the scope of this article) and the case law of the European Court of Human Rights.

(i) *Comparison of Existing Libel Laws*

In fact, many States around the world still criminalize defamatory attacks on foreign heads of state. Such states include, for instance, Belgium, Greece, Italy, the Netherlands, Poland, Portugal, and Spain.¹³⁷ Examples of comparably harsh anti-defamation laws protecting (their own) heads of state can be found in Poland, the Netherlands, Spain, Switzerland, Thailand, Saudi Arabia, Venezuela, Lebanon, Norway, Kuwait, Jordan, Morocco and Malaysia.¹³⁸ Amongst European countries, the tendency to strictly enforce defamatory attacks on foreign state representatives prevailed until recently. In 2015, out of the then thirty-one member and candidate states of the EU, twenty-one had laws sanctioning insult with a prison penalty or a large fine.¹³⁹ Still, for most commentators, these criminalization tendencies are not sufficient to establish an *opinio juris*.¹⁴⁰ What contributes to this is the decreasing tendency to criminalize defamation of heads of state. Since the 1990s, the special offense has been removed from the criminal codes of Hungary, the Czech Republic, Belgium, France, and Romania. Where it is still in place, it is rarely enforced and when it is, it is usually with a mild sentence.¹⁴¹

However, even those states that have abolished laws making defamatory attacks on heads of state a punishable offense have either retained some sort of dignity protection for heads of state (as did Sweden)¹⁴² or completely restructured their defamation laws to also decriminalize dignity attacks on the domestic head of state (as did France).¹⁴³ There is, in summary, no

¹³⁶ Zimmermann & Pfeiffer, *supra* note 130.

¹³⁷ Veronika Bilkova, *Thou shalt not Insult the (Foreign) Head of State?*, EJIL TALK! (Apr. 28, 2016), <https://www.ejiltalk.org/thou-shalt-not-insult-the-foreign-head-of-state>. In more detail, see Griffen & Trionfi, *supra* note 2, at 5.

¹³⁸ Joanna Gill, *Beyond A Joke: Seven Countries Where It's A Criminal Offence to Insult A Head of State*, EURONEWS (Apr. 15, 2016), <http://www.euronews.com/2016/04/15/beyond-a-joke-7-countries-where-is-it-a-criminal-offence-to-insult-a-head-of>.

¹³⁹ *Id.*

¹⁴⁰ See Zimmermann & Pfeiffer, *supra* note 130.

¹⁴¹ Bilkova, *supra* note 137.

¹⁴² Griffen & Trionfi, *supra* note 2, at 223.

¹⁴³ *Id.* at 95; Bilkova, *supra* note 137.

uniform state practice which would allow for the conclusion that states are under any obligation to enact distinct libel laws.¹⁴⁴

(ii) *Case Law of the European Court of Human Rights*

These types of laws have been treated rather unfavorably by the European Court of Human Rights (ECtHR). A leading case is *Colombani et al. v. France*.¹⁴⁵ In this case, the applicants, the newspaper *Le Monde*, a journalist, and a managing director of the publication, were prosecuted and convicted under section 36 of a law¹⁴⁶ enacted July 29, 1881, criminalizing insults against foreign heads of state.¹⁴⁷ The applicants had published an article about drug trafficking on Moroccan land that allegedly insulted the King of Morocco.¹⁴⁸ The ECtHR found a violation of Article 10 of the European Convention on Human Rights (ECHR) because “it is not necessary in a democratic society to criminalize such behavior”; where general criminal offenses of defamation exist, these “suffice to protect heads of state and ordinary citizens alike from remarks that damage their honor or reputation or are insulting.”¹⁴⁹ The Court spoke of “a special privilege that cannot be reconciled with modern practice and political conceptions” and concluded that “the offence of insulting a foreign head of state is liable to inhibit freedom of expression without meeting any ‘pressing social need’ capable of justifying such a restriction.”¹⁵⁰

In *Pakdemirli v. Turkey*, the Court did not decide on special legislation, but on a Turkish court’s judgment which had found a politician guilty according to general insult laws.¹⁵¹ He was found guilty because the insulted person was the president and “acts constituting a crime against him cannot

¹⁴⁴ Zimmermann & Pfeiffer, *supra* note 130.

¹⁴⁵ *Colombani et al. v. France* (No. 51279/99), Eur. Ct. H.R. 22 (2002); see generally Dan Kozlowski, *For the Protection of the Reputation or Rights of Others: The European Court of Human Rights’ Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM’N L. & POL’Y 133, 145-46 (2006); Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 INDIANA L.J. 808, 822 (2009).

¹⁴⁶ “Section 36: It shall be an offence punishable by one year’s imprisonment or a fine of 300,000 francs to insult a foreign head of State, a foreign head of government or the minister for foreign affairs of a foreign government.” *Colombani et al. v. France* (No. 51279/99), Eur. Ct. H.R. 22 (2002).

¹⁴⁷ See also Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT’L L. 861, 882 (2003).

¹⁴⁸ *Colombani et al.* (No. 51279/99).

¹⁴⁹ See *Colombani et al. v. France*, ¶ 67.

¹⁵⁰ *Id.* ¶¶ 68-69.

¹⁵¹ Ankara High Court (“Tribunal de grande instance d’Ankara”), Judgment from 12 July 1995 (cited in ECHR Second Section, *Pakdemirli ./. TUR*, No. 35839/97, Judgment, 22 February 2005 ¶ 51, <http://hudoc.echr.coe.int/eng?i=001-68374>) (translated by author).

be considered reasonable . . . Insults of the President do not only hurt the moral personality of the head of state, but also damage the Republic of Turkey's reputation in foreign states.”¹⁵² The ECtHR reiterated that “protection by a special law concerning insult is not, in general, in line with the spirit of the Convention,” and that this holds true even more when the special protection was not afforded by a law but by judges within their margin of appreciation.¹⁵³ The ECtHR in *Artun and Güvener v. Turkey* confirmed its finding that such special protective laws for heads of state “cannot be reconciled with the practices and political conceptions of today.”¹⁵⁴

VIII. REPEALING ARTICLE 103 AND BAD LEGISLATIVE DRAFTING

The extent to which international law imposes a duty upon states to sanction offensive conduct by private individuals is unclear. However, it certainly does not impose a compulsory obligation to create special laws sanctioning private individuals' offensive conduct against foreign heads of state.¹⁵⁵ In spite thereof, many nations choose to do so, as did Germany until the repeal of Article 103. Thus, repealing Article 103 would at least require an in-depth debate about whether it might be warranted to reverse the decision of the German parliament made in 1953 to retain Article 103 in the form as we know it today. Labeling Article 103 as “lèse majesté” and thus a relic from a long-gone era – a “relic from Germany's days as a monarchy,” to quote from the draft law presented by MPs Ströbele et al. on April 14, 2016¹⁵⁶ – therefore rather meets the requirements of populism than those of an informed debate. Nowhere in Article 103 is a reference to lèse majesté,¹⁵⁷ nor does it contain the characteristic conflation of violation of dignity and violation of awe.¹⁵⁸ Moreover and rather unsurprisingly, Articles 102 to 104 share a similar history. Article 102 is also a relic – a “remnant of what used to be a much more extensive criminal law system of protection of foreign states against treasonous acts” – that has its roots in the Prussian Civil Code

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 52.

¹⁵⁴ *Affaire Artun Et Güvener c. Turquie* (No. 75510/01), Eur. Ct. H.R. ¶ 31 (2007).

¹⁵⁵ FOAKES, *supra* note 1, at 69.

¹⁵⁶ Deutscher Bundestag, *Drucks. 18/8123, Gesetzentwurf der Abgeordneten Ströbele et al.*, April 14, 2016, at 1.

¹⁵⁷ See Hans Hugo Klein, *Neue Umgangsformen*, FRANKFURTER ALLGEMEINE ZEITUNG FAZ (Apr. 28, 2016), at 6 (providing, as translated by the author, “Whoever reads these texts [i.e., Articles 103 and 104a as well as the section's title] without prejudice will inevitably find that they have nothing to do with ‘lèse-majesté.’”); see also Vormbaum, *supra* note 45, at 47-48; see also Thomas Vormbaum, *Kurzbeitrag Majestätsbeleidigung*, JURISTENZEITUNG, 413, 414 (2017).

¹⁵⁸ Awe, in contrast to dignity, is defined as “a high degree of esteem, a certain fear of behavior violating a person's dignity based on one's high esteem for said person.” SIEGFRIED BLEECK, *DIE MAJESTÄTSBELEIDIGUNG IM GELTENDEN DEUTSCHEN STRAFGESETZ* 31, 32 (1914).

of 1794.¹⁵⁹ Similarly, Article 103 goes back to the Prussian Criminal Code of 1851, and after briefly being abolished in 1946¹⁶⁰ was reintroduced in 1953 with the intention of demonstrating solidarity to other states and overcoming the legacy of the war.¹⁶¹ Therefore, naturally, in prolonged times of peace these laws' relevance has somewhat dwindled – between 2007 and 2014, only five people were convicted for crimes against foreign states.¹⁶²

Thus, there is nothing wrong with the decision not to criminalize insults of foreign heads of state. However, once this decision has been made, the question remains of what a law repealing Article 103 should look like. This question was left unanswered by the debate leading up to the repeal of Article 103. In other words, Article 103 was simply abolished without amending any of the laws that are now impacted by the repeal. Specifically, no changes were made to the surrounding Articles (Article 102: Attacks on organs and representatives of foreign states; and Article 104: Violation of flags and insignia of foreign states). In fact, Article 104 has even been expanded by the same law that amended the above-mentioned Article 104a.¹⁶³

It is generally ignored that even after Article 103 was removed from the Criminal Code without replacement, attacks on foreign heads of state remain punishable according to separate laws. These attacks may be so weak they even fail to reach the threshold of causing actual harm. Article 102 sanctions *any* attack on a foreign state's representative which *aims* to cause him or her harm, even if no harm is actually done – with the limitation that the attack must in principle be fit to cause the intended harm.¹⁶⁴ In other words, Article 102 created a special criminal offense sanctioning the mere *attempt* at causing any foreign state's representative *some* level of harm. How can it be justified that so much as a failed attempt at slapping a foreign state's representative in the face might be punishable as a special offense, while a grave insult – one that affects both a head of state and an entire country – no longer warrants the same level of legal protection, leaving the representative with no other option than to invoke the general criminal offenses protecting

¹⁵⁹ Hans-Heinrich Jescheck, *Straftaten gegen das Ausland*, in Festschrift für Rittler 274, 278 (Siegfried Hohenleitner, Ludwig Lindner & Friedrich Nowakowski eds., 1957); see also Jenny Gesley, *Lèse-Majesté in Germany – A Relic of a Long-Gone Era*, LIBRARY OF CONGRESS BLOG, (Feb. 23, 2017), <https://blogs.loc.gov/law/2017/02/lse-majest-in-germany-a-relic-of-a-long-gone-era/>.

¹⁶⁰ Repealed by law No. 11 of the Control Council for Germany, Annex C, Article 1 and IV, cited in U.S. War Department, THE STATUTORY CRIMINAL LAW OF GERMANY (August 1946), at 85, 213-15.

¹⁶¹ Gesley, *supra* note 145.

¹⁶² *Id.*

¹⁶³ *Supra* note 30 and main text.

¹⁶⁴ Jürgen Wolter, 3 SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH § 102, mn. 6 (Jürgen Wolter ed., 2019).

his or her *personal* dignity? How can it be justified that disparaging the German president (Article 90) and disparaging the constitutional organs of the German state (Article 90b) are still special offenses while the defamation of the president of a foreign nation is not? If the answer is that Article 103 was so irrelevant that it never once led to a conviction, the same applies to Article 90. It comes as no surprise that disparaging the German president (Article 90) and disparaging the constitutional organs of the German state (Article 90b) still require an official authorization to investigate.¹⁶⁵ The same authorization was deemed politically inappropriate in the context of Article 103. How can Article 188, criminalizing unpublicized defamatory speech against “a person involved in the popular political life,” be retained while unpublicized defamatory speech against the president of a foreign nation is no longer afforded special protection? Unsurprisingly, one of the few public figures that openly criticized the rapid repeal of Article 103 was the then German President Joachim Gauck.¹⁶⁶ In an almost ironic twist of events, as a reaction to an increasing amount of online hate speech against regional politicians, Article 188 – again, providing a *special protection* to political figures – underwent a considerable expansion in the course of the enactment of a new German hate speech law, while a similar special protection to foreign political figures has been repealed.¹⁶⁷

This leads to the main question: given that Germany does provide a framework of special legal protection for representatives of foreign states – is it justified to remove only attacks on the representatives’ dignity from the sphere of this special protection? The removal of Article 103 sent a clear message: bodily harm, however mild, to a foreign state’s representative has a different effect than bodily harm to a German citizen; that is, an effect on that state’s dignity and Germany’s relationship with that state. However, there is no consideration of any such effect with harm to a person’s dignity. Since January 1, 2018, insulting a foreign head of state, no matter how severely, is not even investigated automatically by the prosecution, as most crimes are. In principle, Germany – contrary to the U.S. – rests on the idea of “legality” or “compulsory or mandatory prosecution,” whereby the relevant official agency is expected to act on a formal standard when dealing with all

¹⁶⁵ STRAFGESETZBUCH [STGB] [Penal Code], Article 90(4) and 90b(2).

¹⁶⁶ *Gauck kritisiert vorschnelle Abschaffung von Paragraph 103*, ZEIT ONLINE (Apr. 22, 2016), <https://www.zeit.de/politik/deutschland/2016-04/erdogan-satire-bundespraesident-joachim-gauck-paragraph-103-abschaffung>.

¹⁶⁷ The enactment procedure including the relevant proposals and decisions can be found at <https://kripoz.de/2019/12/19/entwurf-eines-gesetzes-zur-bekaempfung-des-rechtsextremismus-und-der-hasskriminalitaet>. See also Alexander Heinze, *Böhmermann, FC Bayern und eine Strafgesetzgebung auf Zuruf*, LEGAL TRIBUNE ONLINE (Dec. 12, 2019), <https://www.lto.de/recht/hintergruende/h/hate-speech-hass-kriminalitaet-netz-188-stgb-kommunalpolitiker-boehmermann>.

breaches of criminal law which come to their attention.¹⁶⁸ Germany's regular defamation laws, by contrast, are so-called "Antragsdelikte," i.e., they are not "automatically" prosecuted by the State, but only upon special request by the offended party.¹⁶⁹ In the final paragraph of Chapter 5 section 5 of the Swedish Criminal Code, Sweden acknowledges the problem of privately prosecuting the defamation of foreign heads of state, providing: if an offence of defamation or insult is committed against a foreign head of state in Sweden or a foreign diplomatic representative in Sweden, *the case is to be handled by prosecutors upon approval of the government.*¹⁷⁰

IX. THE GRAVITY OF DEFAMATION IN A GLOBAL SPHERE

Rather than rely on superficial international comparisons and flimsy historical arguments, the answer to the normative question should be sought in a comparison of the effects of insulting¹⁷¹ heads of state to the effects of physical attacks. It has been argued that the law in question serves the purpose of promoting Germany's good working relationships with other states.¹⁷² If this is the case, then any attack that is equally fit to perturb such relationships should necessarily be equally sanctionable by law. In an instructive and extensive analysis, Elad Peled demonstrated that "various sources throughout the world, primarily the mass media and nongovernmental organizations, routinely publish reports on the conduct and circumstances of states."¹⁷³ These reports impact states' reputations in the eyes of individuals, publics, organizations, and governments.¹⁷⁴ While most reporting may be presumed accurate, disinformation inevitably finds its way into the international public domain through mass media and especially social media. Jürgen Habermas already spoke of world societies because communication systems and markets have created a global context.¹⁷⁵ Today,

¹⁶⁸ See Alexander Heinze & Shannon Fyfe, *The Role of the Prosecutor*, in 1 CORE CONCEPTS IN CRIMINAL LAW AND JUSTICE 364-66 (Kai Ambos et al. eds., 2020); HANNA KUCZYŃSKA, THE ACCUSATION MODEL BEFORE THE INTERNATIONAL CRIMINAL COURT: STUDY OF CONVERGENCE OF CRIMINAL JUSTICE SYSTEMS 94-111 (2015); Christopher Harding & Gavin Dingwall, DIVERSION IN THE CRIMINAL PROCESS 1 (1998).

¹⁶⁹ Kniffka, *supra* note 11, at 118.

¹⁷⁰ MEDIA LAWS DATABASE SWEDEN (Jan. 4, 2018), <http://legaldb.freemedia.at/legal-database/sweden>.

¹⁷¹ For a general semantic and sociological analysis of insults and their effects, see Ruth Colker, *The Power of Insults*, 100 BULR 9-15 (2020).

¹⁷² Gesley, *supra* note 145.

¹⁷³ Elad Peled, *Should States Have a Legal Right to Reputation? Applying the Rationales of Defamation Law to the International Arena*, 35 BROOK. J. INT'L L. 107, 109 (2010).

¹⁷⁴ *Id.*

¹⁷⁵ Jürgen Habermas, *Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight*, in PERPETUAL PEACE – ESSAYS ON KANT'S COSMOPOLITAN IDEAL 113, 131 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

we are close to what James Bohman describes as a “public sphere” to change and create democratic institutions.¹⁷⁶ I have unfolded the argument elsewhere in detail.¹⁷⁷ This public sphere discusses issues of “tolerance, civic virtue, and public morality.”¹⁷⁸ In complex societies, public debate is mediated “not only by the powerful institutions of the state but also by the mass media, which have the capacity to reach a large and indefinite audience.”¹⁷⁹

It is widely agreed that publicly made false remarks and disinformation may have a considerable impact on both individuals and entire states.¹⁸⁰ As Peled rightly points out, “Whether such disinformation is a product of biased agendas, interests of political actors, omissions of relevant details, or merely a matter of honest mistakes, it might do injustice to the states concerned.”¹⁸¹ Dignity has been described as an antiquated concept on the international level but it is still an inherent characteristic of sovereign states which other states are under a duty to respect.¹⁸² In 2001, the Institute of International Law adopted its resolution “Immunities from Jurisdiction and Execution of heads of state and of Government in International Law.”¹⁸³ Article 1 of the resolution reads:

When in the territory of a foreign State, the person of the Head of State is inviolable . . . The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or *dignity*.¹⁸⁴

A state’s reputation often has concrete implications for its population. Böhmermann’s poem is proof of just that. Turkey’s vice prime minister called the poem a “grave crime against humanity” – a poem, poorly written,

¹⁷⁶ James Bohman, *The Public Spheres of the World Citizen*, in PERPETUAL PEACE – ESSAYS ON KANT’S COSMOPOLITAN IDEAL 179, 187 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

¹⁷⁷ Alexander Heinze, *The Statute of the International Criminal Court as a Kantian Constitution*, in PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: CORRELATING THINKERS 378-381, 399-403 (Morten Bergsmo and Emiliano J. Buis eds, 2018).

¹⁷⁸ Bohman, *supra* note 176, at 189-90.

¹⁷⁹ *Id.* at 196.

¹⁸⁰ For examples, see, *inter alia*, Björnstjern Baade, *Fake News and International Law*, 29 EJIL 1357 (2018); Udo Fink & Ines Gillich, *Fake News as a Challenge for Journalistic Standards in Modern Democracy*, 58 U. LOUISVILLE L. REV. 263, 263-64 (2020); Russell L. Weaver, *Free Speech in an Internet Era*, 58 U. LOUISVILLE L. REV. 325 (2020).

¹⁸¹ Peled, *supra* note 173, at 109.

¹⁸² Foakes, *supra* note 1, at 61.

¹⁸³ Session of Vancouver 2001, Justitia Et Pace Institut De Droit International (Providing Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law), http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf.

¹⁸⁴ *Id.* (emphasis added).

by an average comedian in a television show with a poor audience rating (it was watched by 400,000 people – by way of comparison, the Saturday Sports News in Germany is watched by four million people on average). It has long been established on the basis of findings presented by the political and social sciences that a state's reputation is a crucial factor in the entry into international treaties.¹⁸⁵ This is largely due to the increasing democratization of many countries which prompts them to pay more attention to the reputation other states have with their population.¹⁸⁶ It has been demonstrated that possible human rights violations in particular have a significant effect on other states' willingness to enter contracts with a state.¹⁸⁷ In short, national dignity has become a factor of foreign policy.¹⁸⁸ The German Federal Administrative Court has previously addressed the issue as follows:

Personal dignity is an indispensable prerequisite for the peaceful coexistence of individuals, which is why it is a protected good under Article 5 Paragraph 2 of the Basic Law ("Grundgesetz"). Likewise, the dignity of states partaking in International Public Law – represented by their head of state or the head of their diplomatic representation – is a necessary and indispensable institutional minimum prerequisite for the peaceful coexistence of states and must therefore be protected against violations, not least in the interest of the receiving state . . . This minimum prerequisite is of particular importance for the peaceful relationships between states which differ fundamentally in terms of their societal structures.¹⁸⁹

From a criminal policy point of view, the *raison d'être* of the good protected by Article 103 hinges entirely on whether or not it is possible to harm an entire state's dignity by means of defamation and fallacious allegation of fact.¹⁹⁰ In this regard, the Böhmermann case is a textbook example in that it illustrates exceptionally well how political coverage in the media and the public's political interest paralleled each other. While Western media coverage of conflicts in regions like Africa or the Middle East is only

¹⁸⁵ Peled, *supra* note 173, at 123.

¹⁸⁶ Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 56 (2008); see PHILIP M. TAYLOR, GLOBAL COMMUNICATIONS, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945, at 58 (1997).

¹⁸⁷ JOSEPH S. NYE JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 36-37, 129-130 (2004).

¹⁸⁸ See Anthony Giffard & Nancy Rivenburgh, *News Agencies, National Images, and Global Media Events*, 77 JOURNALISM & MASS COMM. QUARTERLY 8 (2000).

¹⁸⁹ Federal Administrative Court, *BVerwG* NJW 1982, 1008, 1010.

¹⁹⁰ See generally Winfried Hassemer, *Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?*, in DIE RECHTSGUTSTHEORIE 57 (Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers eds., 2003); Heinz Koriath, *Zum Streit um den Begriff des Rechtsguts*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 561, 575 (1999).

fragmentary (which is partly due to repressive measures taken against journalists working in these regions and partly due to a simple lack of financial means),¹⁹¹ the percentage of people – young people, in particular – who obtain their information on foreign states and conflicts mainly from satirical programs has risen dramatically.¹⁹² Taking into consideration the demonstrably direct correlation between media coverage and a nation's reputation with the general public,¹⁹³ it cannot be denied that satirical programs (such as Böhmermann's show) hold a certain power. They influence "actual political events in the world",¹⁹⁴ labelled by the *Time Magazine* as the "John Oliver Effect."¹⁹⁵ The same applies to (legal) documentaries that are becoming increasingly popular.¹⁹⁶ Defamation or fallacious allegations of fact about a state aired on such a program are certainly fit to damage a foreign state's reputation – even more so than, for example, an attempt at inflicting mild bodily harm on a foreign head of state made by a protester during a speech, seeing as a satirical television show typically reaches a large audience (not at least due to its dissemination on the internet). It would be a mistake to confuse the lack of a state in satisfying the burden of showing that a dignity violation took place by a false remark with the fact that a false remark is able to violate a state's dignity or reputation respectively.¹⁹⁷

¹⁹¹ See Andrea Backhaus, *Mittlerer Osten – Diese lauten, unscharfen Bilder*, ZEIT ONLINE (May 26, 2016), <http://www.zeit.de/politik/ausland/2016-05/mittlerer-osten-medien-bilder-journalismus>.

¹⁹² Friederike Haupt, *Böhmermann und Co. – Pubertär statt Politisch*, FAZ ONLINE (Apr. 11, 2016), <http://www.faz.net/aktuell/politik/inland/satire-von-jan-boehmermann-co-pubertaer-statt-politisch-14169614.html>.

¹⁹³ Peled, *supra* note 173, at 132..

¹⁹⁴ For an analysis and more examples, see Daniel Tippens, *Comedy as Socratic Journalism*, BLOG OF THE APA (Feb. 5, 2019), <https://blog.apaonline.org/2019/02/05/comedy-as-socratic-journalism>.

¹⁹⁵ Victor Luckerson, *How the "John Oliver Effect" is Having a Real-Life Impact*, TIME (July 10, 2015), <https://time.com/3674807/john-oliver-net-neutrality-civil-forfeiture-miss-america>.

¹⁹⁶ Victor Li, *Documentaries are shaping public opinion and influencing cases*, ABA JOURNAL (Aug. 1, 2020), <https://www.abajournal.com/magazine/article/documentaries-are-shaping-public-opinion-and-influencing-cases>.

¹⁹⁷ In a case before the East African Court of Justice, for instance, Tanzania made a state-dignity argument to underline the legitimacy of a defamation law: *Media Council Of Tanzania & others v A.G. Of The United Republic Of Tanzania* (Reference No.2 of 2017) [2019] EACJ 2; (28 March 2019), ¶ 88. The Court did not refute this argument but simply found that Tanzania's submission was insufficient (*id.* ¶ 89). For a detailed account of the decision, see Tetevi Davi, *A Victory for Media Freedom and another Blow Dealt to Criminal Defamation and Sedition Laws by the East African Court of Justice*, OPINIOJURIS (Aug. 20, 2019), <http://opiniojuris.org/2019/08/20/a-victory-for-media-freedom-and-another-blow-dealt-to-criminal-defamation-and-sedition-laws-by-the-east-african-court-of-justice>.

X. CONCLUDING REMARKS

It goes without saying that the media is central to democracy as a primary source of information, and citizens must be informed if they are to act effectively as such. Constitutional safeguards make sure that newspaper reports cannot be suppressed just because they reveal an inconvenient truth. In many countries of the world, public officials enjoy less protection from criticism than others, since freedom of the press affords the public one of the best means of discovering and forming an opinion about the ideas and attitudes of political leaders. Nevertheless, there is a difference between the *ought to* and the *is*. In today's global communication context and in the face of nationalist movements, it is a fact that the alleged insult of state representatives, a flag or an insignia, or a state institution triggers strong emotional reactions. Among state leaders today, there seems to be a renaissance of King Louis XIV of France's remark over 300 years ago: "L'État, c'est moi!" – "I am the state." If the *ratio legis* of offenses punishing head of state defamation – that is, the retention of diplomatic relations between states and the protection of state representatives – is taken seriously, the Böhmermann case is just the beginning of an intense struggle to balance constitutional rights and political will.

While there is no obligation under international law to extend special protection – that is, protection by means of special criminal offenses – from attacks by private individuals to foreign state representatives, there are strong arguments to suggest that there should be such laws. What happened in the wake of the Böhmermann affair was a remarkable case of fast-track legislation blindly swayed by the public opinion on daily politics that left behind grave systematic inconsistencies within the German Criminal Code. The decision made by the German parliament can be considered regrettable at best and it can only be hoped that through thorough analysis from a legal and a criminal policy point of view other states can be prevented from making the same mistake.

Repealing a law that criminalizes free speech is a success. Repealing a law for symbolic reasons on the basis of a sham debate that turns the legislative process into its own caricature is something we already experienced in Germany. It did not turn out so well.

DEFAMATION LAW IN RUSSIA IN THE CONTEXT OF THE COUNCIL OF EUROPE (COE) STANDARDS ON MEDIA FREEDOM

Elena Sherstoboeva*

I. INTRODUCTION

Being a legitimate aim for limiting freedom of expression, the right to protect one's reputation has been sometimes used by national governments to shield politicians and civil servants against criticism.¹ Excessively protective defamation laws have a "chilling effect" on freedom of expression and public discussion.² The development of the internet has instigated considerable new challenges for protecting one's reputation, which often becomes the pretext for adopting harsh legal measures that threaten online freedom of expression and defamation.

In Russia, there is a consistently high count of annual defamation cases. Every year, the Russian courts consider 5,800 civil lawsuits on defamation.³ More than half of these lawsuits are against journalists as well as media editorial offices,⁴ and the defendants are typically not the victors.⁵ Russia is among a few European countries keeping criminal liability for libel and insult of public officials. Furthermore, the Russian parliament outlawed "blatant disrespect" of the Russian state, state bodies, society, the Constitution, and

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¹ See Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (2014), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff48>.

² See TARLACH MCGONAGLE, *FREEDOM OF EXPRESSION AND DEFAMATION* (2016).

³ See Presidium of the Sup. Ct. of the Russian Federation, *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation* (Mar. 16, 2016), http://www.supcourt.ru/Show_pdf.php?Id=10733.

⁴ See Free World Centre, *The Russian Federation: Journalists Under Attack* (2013), [https://www.article19.org/data/files/medialibrary/37399/Russia-Report-EN-\(web\).pdf](https://www.article19.org/data/files/medialibrary/37399/Russia-Report-EN-(web).pdf).

⁵ See ANDREI RICHTER, *PRAVOVYE OSNOVY ZHURNALISTIKI: UCHEBNIK* (2016). (Title translated as "Legal Basis of Journalism: A Textbook").

national symbols in 2019.⁶ This sweeping ban is unique for European law, and it has considerably stifled public debate in Russia. In the year of the ban's adoption, administrative proceedings were brought against fifty-one publications, most of which concerned criticism of the Russian president.⁷ According to the Article 19, an international NPO focusing on free speech issues, defamation in Russia is often invoked as a weapon to silence maladministration and corruption among public officials.⁸

This article investigates the extent to which the Russian legal regulation of defamation is in line with the legal standards on freedom of expression developed by the Council of Europe (CoE),⁹ an intergovernmental organization protecting human rights, democracy, and the rule of law. The CoE has forty-seven members including Russia and other post-Soviet countries.¹⁰

Across Europe, the CoE advances and promotes the legal standards on freedom of expressions of the United Nations (UN), the largest international organization on human rights. Both organizations – the UN and the CoE – view freedom of expression as a universal human right and a precondition for democracy. As a legal successor of the USSR, Russia has been a UN member since the creation of the organization.

In 1996, Russia joined the CoE and thereby agreed to fully comply with its legal standards. However, Russia's relationship with the CoE has deteriorated in recent times. Russia's voting right in the Parliamentary Assembly (PACE) – one of the CoE's main governing institutions – was suspended in 2014 because PACE condemned Crimea's accession to Russia. The following year, Russian statutory law empowered the Russian Constitutional Court – one of the highest courts in the country – to challenge any document of any international institution. This step may have considerable ramifications for human rights protection, both inside and outside Russia. However, so far the Russian government has repeatedly

⁶ See Federal Law On Amendments to the Federal Law on Information, Information Technologies and on Protection of Information, No. 30-FZ (Mar. 18, 2019), http://www.consultant.ru/document/cons_doc_LAW_320400.

⁷ See Maria Starikova, *Za God Neuvazhenie k Vlasti Vrazilos' 51 Raz. (Translated as Disrespect to Authorities Was Expressed 51 Times in a Year)*, *Kommersant*, №57 (Mar. 31, 2020), <https://www.kommersant.ru/doc/4308963>.

⁸ See *The Cost of Reputation: Defamation Law and Practice in Russia*, Article 19 (2007), <https://www.article19.org/data/files/pdfs/publications/russia-defamation-rpt.pdf>.

⁹ The Council of Europe (CoE) was founded in 1949 and currently, it unites forty-seven members. For details, see *Council of Europe*, <http://www.coe.int/en/web/portal/home>.

¹⁰ They are Ukraine, Latvia, Lithuania, Estonia, Georgia, Armenia, and Azerbaijan.

claimed that it does respect international standards on freedom of expression.¹¹

To assess the degree of the consistency of Russian national laws as well as judicial practice with the CoE legal standards, this article applies a qualitative comparative analysis. It focuses on Russian legal perspective on media defamation, while the CoE standards are considered to the extent it is necessary to show common or contrasting visions and trends.

The Russian legal concept of defamation has been explored not only through the analysis of the national legislation, but also through the study of a judicial perspective to shed the light on the role of judiciary in making the Russian legal vision of free speech more consistent with the CoE standards. For the first time in the field, the article compares the visions of defamation of the highest Russian courts, the Constitutional and Supreme Courts. Particularly important for this study are the Supreme Court's non-binding interpretations because they addressed the issue of media defamation several times. They are the 2005 Plenum's¹² decree on defamation,¹³ 2010 Plenum's decree on the statute "On Mass Media"¹⁴ as well as a more recent 2016 review¹⁵ on defamation. Richter in 2015 and 2017¹⁶ has argued that the Supreme Court's clarifications have contributed to freedom of expression in Russia and its compliance with the international standards in this field, and Krug has noted that the Constitutional Court has not made a significant

¹¹ See POSTOJANNOE PREDSTAVITEL'STVO ROSSIJSKOJ FEDERACII PRI OTDELENII OON I DRUGIH MEZHDUNARODNYH ORGANIZACIJAH V ZHENEVE, INFORMACIJA ROSSIJSKOJ FEDERACII V SVJAZI S ZAPROSOM SPECIAL'NOGO DOKLADCHIKA SOVETA OON PO PRAVAM CHELOVEKA PO VOPROSU O SVOBODE VYRAZHENIJA MNENIJA, No. 660 (Nov. 3, 2016) (translated as Information of the Russian Federation in Connection to the Request of the Special Rapporteur of the UN Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression Information of the Russian Federation in Connection to the Request of the Special Rapporteur of the UN Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Permanent Mission of the Russian Federation to the United Nations and Other International Organizations), <http://www.ohchr.org/Documents/Issues/Expression/Telecommunications/Russia.pdf>; see also Anastasia Bazenkova, *Putin Urges Global Authorities to Ensure Freedom of Information*, The Moscow Times (June 7, 2016), <https://themoscowtimes.com/articles/putin-urges-global-authorities-to-ensure-freedom-of-information-53193>.

¹² Plenum of the Supreme Court is a body that assembles all Supreme Court judges and whose aim is to ensure the proper and cohesive application of the law by the various courts in the country. It also issues decrees that explain and interpret the law, sometimes relying on international standards. See Plenum of the Supreme Court of the Russian Federation, *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, No. 3 (Feb. 24, 2005).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Andrei Richter, *Judicial Practice on Media Freedom in Russia: The Role of the Supreme Court*, European Audiovisual Observatory (Strasbourg: IRIS Extra, 2017).

impact on free speech in Russia.¹⁷ This paper will update their conclusions with regards to the issue of defamation and compare the contributions of these two Russian highest courts.

To study the application of the CoE standards in practice, this article examines 120 decisions of the Russian general jurisdiction courts from 2012 to 2016. These courts are the lowest courts in Russia. The article examines 120 decisions over the period from 2012 to 2016 available on the SudebnyeReshenija.rf database,¹⁸ a Russian-language noncommercial system that collects and publishes the Russian courts decisions. The results of our analysis are also compared with the results of the study undertaken by the Article 19 in 2007¹⁹ to examine 102 cases on defamation in Russia over the period from 2002 to 2006.

For the CoE standards on media defamation, this study examines the perspective of the main CoE legally binding treaty on human rights, the 1950 European Convention on Human Rights (ECHR)²⁰, as well as its interpretations made by the European Court of Human Rights (ECtHR). This Court is a special independent CoE's judiciary designed to consider individual or state applications complaining on violations of human rights enshrined in the ECHR by member states. The ECtHR decisions are legally binding on all the CoE participants, and is often acknowledged as one of the most effective instruments to protect human rights in the world. The ECtHR judgments on defamation constitute the largest group of all the decisions on free speech in Russia, and the country lost majority of cases. This paper refers to them *ad hoc* because their study is worthy of a separate investigation. The non-binding legal standards of the CoE, such as the recommendations and declarations of its main institutions, the PACE, and the Committee of Ministers, are considered in the study mainly to avoid misinterpretations of the binding standards.

¹⁷ See Andrei Richter, *Russia's Supreme Court as Media Freedom Protector*, FREE SPEECH AND CENSORSHIP AROUND THE GLOBE 273-98 (Peter Molnar ed., 2015); Peter Krug, *Press Freedom in Russia: Does the Constitution matter?*, 58 LAW IN EASTERN EUROPE 79-103 (2008).

¹⁸ RosPravosudie, <https://rospravosudie.com> (title translated as "Russian Justice").

¹⁹ See Article 19, *supra* note 8.

²⁰ Article 10, Part 1 of the ECHR reads: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." See Council of Europe, *European Convention on Human Rights* (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

II. KEY RUSSIAN AND CoE LEGAL STANDARDS ON FREEDOM OF EXPRESSION

Article 10 Part 1 of the ECHR guarantees everyone the right to freedom of expression. It includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”²¹ This implies obligations of national governments to ensure the implementation of this right and to refrain from undue interference.

Although Article 10 in Part 2²² explicitly mentions “the protection of the reputation or the rights of others” among the legitimate aims for limiting freedom of expression, the governmental interference must strictly comply with the three-tier test enshrined in this part. First, the “interference” must be “prescribed by law.” Secondly, it must “pursue a legitimate aim.” Thirdly, the interference must be “necessary in a democratic society.” A similar test is provided in one of the main UN international treaties, the 1966 International Covenant on Civil and Political Rights (ICCPR).²³

The ECtHR allows a certain “margin of appreciation” for CoE member-states to impose limitations in some areas, such as, for instance, public morality or commercials, but it strongly confines such limitations with regards to political expressions or information of public interest because they

²¹ Article 10 Part 1 of the ECHR reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” *Id.*

²² Article 10 Part 1 of the ECHR says: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” *Id.*

²³ ICCPR in Article 19 Parts 3 states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

United Nations, *International Covenant on Civil and Political Rights* (Dec. 16, 1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

are crucial for democracy.²⁴ According to the ECtHR, freedom of expression is applicable not only to inoffensive information and ideas but also to those “that offend, shock or disturb the state or any sector of the population.”²⁵ As the Court clarifies, these are “the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”²⁶

The CoE standards provide nearly no leeway for the protection of public officials from criticism, and its limits of permissible criticism of government or public officials are broader than those of private citizens or politicians.²⁷ Politicians, however, are also less protected from criticism than individuals. A politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and must consequently display a greater degree of tolerance,” as the ECtHR stated.²⁸

Media freedom (or freedom of the press) is inferred from the conventional commitments.²⁹ The ECtHR views journalism as a watchdog of democracy that informs societies on issues of public interest and holds governments to accountability.³⁰ Although the ECtHR notes that the press must not “overstep the bounds,”³¹ it is “nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.”³² Therefore, the Court accepts a certain degree of exaggeration in media content.³³

Article 29 of the 1993 Russian Constitution provides a strong and detailed protection to freedom of speech by guaranteeing freedom of thought and speech, freedom of opinion, the right to access information, freedom of

²⁴ See *Sunday Times v. United Kingdom* No.2, App. No. 13166/87 (Eur. Ct. H.R. Nov. 26, 1991).

²⁵ *Handyside v United Kingdom*, App. No. 5493/72 (Eur. Ct. H.R. Dec. 7, 1976).

²⁶ *Id.*

²⁷ The principle of wider criticism of public figures has been implemented in many ECtHR cases. See, e.g., *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992); *Janowski v Poland* App. No. 571/04 (Eur. Ct. H.R. Jan. 21, 1999); *Nilsen v. Norway*, App. No. 3118/93 (Eur. Ct. H.R. Nov. 25, 1999); *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001); *Karman v. Russia*, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2006); *Lombardo v. Malta*, App. No. 7333/06 (Eur. Ct. H.R. Apr. 24, 2007); *Lepojić v. Serbia*, App. No. 13909/05 (Eur. Ct. H.R. Nov. 6, 2007); *Bodrožić v. Serbia*, App. No. 2550/05 (Eur. Ct. H.R. June 23, 2009); *Renaud v. France*, App. No. 13290/07 (Eur. Ct. H.R. Feb. 25, 2010); *Brosa v. Germany*, App. No. 5709/09 (Eur. Ct. H.R. Apr. 17, 2014); *Stankiewicz and others v. Poland*, App. No. 48723/07 (Eur. Ct. H.R. of Oct. 14, 2014).

²⁸ *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986).

²⁹ See JAN OSTER, *EUROPEAN AND INTERNATIONAL MEDIA LAW* (2017).

³⁰ See, e.g., *Sunday Times v. United Kingdom*, App. No. 6538/74 (Eur. Ct. H.R. Apr. 26, 1979); *Observer and Guardian v. United Kingdom*, App. No. 13585/88 (Eur. Ct. H.R. Nov. 26, 1991); *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992).

³¹ *Sunday Times v. United Kingdom* No.2, App. No. 13166/87 (Eur. Ct. H.R. Nov. 26, 1991).

³² *Id.*

³³ See *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (Eur. Ct. H.R. Feb. 24, 1997).

mass communication, and a total ban on censorship.³⁴ The 1991 Statute “On Mass Media”³⁵ defines freedom of mass communication as including not only freedom of the press but also media-like content. It also bans preemptive and punitive censorship.

The Russian constitutional provisions on free speech are almost completely in line with the international standards.³⁶ Like the main international treaties, the Russian Constitution does not view freedom of speech as absolute. The constitutional criteria³⁷ to assess its limitations are similar to the ones of the three-tier test.

The CoE perspective on the concept of public interest was incorporated into Russian law by the Supreme Court. It states that public interest does not refer to just any interest that the audience may have, but includes, “for instance, the need of society to detect and expose threats to the democratic, legal state and civil society, to public safety, and to the environment.”³⁸ This means that the public’s curiosity or demand for juicy stories would not comprise public interest, while information about illegal actions would always fall into the scope of public concern, which reflects the ECtHR’s viewpoint.³⁹

The Russian Supreme Court also states that disseminating information of public interest is a public duty of the media, thus justifying the strong protection of journalistic expressions of public interest. It explains that even

³⁴ Article 29 of the Russian Constitution states:

1. Everyone is guaranteed the freedom of thought and speech.
2. Propaganda or agitation exciting social, racial, national, or religious hatred and strife is not permitted. Propaganda of social, racial, national, religious, or linguistic superiority is banned.
3. No one may be compelled to express his or her opinions and convictions or to renounce them.
4. Everyone has the right to freely seek, receive, pass on, produce, and disseminate information by any lawful means. A list of information comprising state secrets is determined by federal law.
5. The freedom of mass information is guaranteed. Censorship is banned.

Const. of the Russian Federation, adopted at National Voting (Dec. 12, 1993), <http://www.constitution.ru/en/10003000-01.htm>.

³⁵ See Russ. Fed. L. On Mass Media, No. 2124-1 (Dec. 27, 1991), http://www.consultant.ru/document/cons_doc_LAW_1511.

³⁶ Elena Sherstoboeva, *The Evolution of a Russian Concept of Free Speech*, SPEECH AND SOCIETY IN TURBULENT TIMES: FREEDOM OF EXPRESSION IN COMPARATIVE PERSPECTIVE 213-36 (Monroe Price & Nicole Stremlau ed., 2018).

³⁷ The Russian Constitution states in Article 55(3) that the right to freedom of speech could be limited only by federal laws, and “to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, of morality, health, the rights and lawful interests of other people, and for ensuring the defence and the security of the State” *Supra* note 34.

³⁸ *Decree On the Practice of Application of the Statute of the Russian Federation “On Mass Media” by Courts*, *supra* note 12.

³⁹ See *Couderc and Hachette Filipacchi Associés v. France*, App. No. 40454/07 (Eur. Ct. H.R. Nov. 10, 2015).

the questionable facts on how public officials perform their functions represent public interest may positively affect public debates. The Court also incorporates the CoE concept on wider limits of criticism for public officials or political figures in its 2005 decree.⁴⁰ It directly quotes Articles 3 and 4 of the CoE's Declaration on Freedom of Political Debate in the Media⁴¹ noting that public officials or political figures should tolerate criticism, including criticism in the media, but only with regards to their professional duties, rather than private life.

In line with the ECtHR jurisprudence,⁴² the Supreme Court's decree declared that the Russian courts should balance between the right to protect reputation and freedom of speech.⁴³ The decree reminds Russian courts that they should be guided by Article 10 of the ECHR and pay attention to the legal position of the ECtHR when considering defamation disputes.

However, in most of its judgments on freedom of expression in Russia, the ECtHR found that the national courts had failed to find a proper balance between the protection of freedom of expression and other rights.⁴⁴ In the 2008 case of Dyundin, the ECtHR noted that journalistic claims of police brutality were of public interest and that the applicant was entitled to make them public through the media.⁴⁵ The Court criticized the approach of the national courts that:

⁴⁰ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁴¹ See Eur. Consult. Assemb., *Declaration of the Committee of Ministers on Freedom of Political Debate in the Media* (Feb. 12, 2004), https://avmu.mk/wp-content/uploads/2017/11/Declaration_on_freedom_of_political_debate_in_the_media_angliski.pdf.

⁴² See *Abeberry v. France*, App. No. 58729/00 (Eur. Ct. H.R. Sept. 21, 2004); *Leempoel v. Belgium*, App. No. 64772/01 (Eur. Ct. H.R. Nov. 9, 2006); *Kuliš v. Poland*, App. No. 27209/03 (Eur. Ct. H.R. March 18, 2008); *Bodrožić v. Serbia*, App. No. 38435/05 (Eur. Ct. H.R. June 23, 2009); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Erla Hlynisdottir v. Iceland*, No. 2, App. No. 54125/10 (Eur. Ct. H.R. Oct. 21, 2014).

⁴³ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁴⁴ See *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Porubova v. Russia*, App. No. 8237/03 (Eur. Ct. H.R. Oct. 8 2009); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Andrushko v. Russia*, App. No. 4260/04 (Eur. Ct. H.R. Oct. 14, 2010); *Saliyev v. Russia*, App. No. 35016/03 (Eur. Ct. H.R. Oct. 21, 2010); *Novaya Gazeta v. Voronezhe v. Russia*, App. No. 27570/03 (Eur. Ct. H.R. Dec. 21, 2010); *Ivpress and Others v. Russia*, App. No. 56027/10 (Eur. Ct. H.R. Jan. 22, 2013); *Reznik v. Russia*, App. No. 4977/05 (Eur. Ct. H.R., Apr. 4, 2013); *Nadtoka v. Russia*, App. No. 38010/05 (Eur. Ct. H.R. May 31, 2016); *Grebneva and Alisimchik v. Russia*, App. No. 8918/05 (Eur. Ct. H.R. Nov. 22, 2016).

⁴⁵ See *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008).

[they] confined their analysis to the discussion of the damage to the plaintiff's reputation without giving any consideration to the applicant's journalistic freedom or to the fact that the plaintiff was a civil servant acting in an official capacity and was accordingly subject to wider limits of acceptable criticism than private individuals.⁴⁶

From the ECtHR's perspective and in contrast with international standards, the Russian national authorities tend to provide stronger protection for public officials⁴⁷ and pro-governmental candidates or parties⁴⁸ than for private individuals. The ECtHR also found that even if the Russian national authorities do refer to the CoE's concepts of public interest and broader criticism of public officials or politicians, such references had no effect on making decisions. Nevertheless, this criticism neither prevented Russia from adopting the ban on "blatant disrespect" of the state and state bodies nor from strengthening authorities' legal protection from criticism in general.

III. RUSSIAN AND COE LEGAL STANDARDS ON DEFAMATION

A. *Honor, Dignity, and Business Reputation*

Neither the ECHR nor the ECtHR provide definitions of "defamation" or "reputation." As McGonagle clarifies, the CoE's meaning of "reputation" includes self-esteem as well as the esteem in which a person is held by others.⁴⁹ From his perspective, the act of defamation is viewed under the CoE standards as comprising the expression of a "false or untrue statement about another person that can damage his/her reputation in the eyes of reasonable members of society."⁵⁰

⁴⁶ *Id.*

⁴⁷ See Grinberg v. Russia, App. No. 23472/03 (Eur. Ct. H.R. July 21, 2005); Krasulya v. Russia, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007); Dyuldin and Kislov v. Russia, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); Chemodurov v. Russia, App. No. 72683/01 (Eur. Ct. H.R. July 31, 2007); Porubova v. Russia, App. No. 8237/03 (Eur. Ct. H.R. Oct. 8 2009); Aleksandr Krutov v. Russia, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); Fedchenko v. Russia No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); Saliyev v. Russia, App. No. 35016/03 (Eur. Ct. H.R. Oct. 21, 2010); Novaya Gazeta v. Voronezhe v. Russia, App. No. 27570/03 (Eur. Ct. H.R. Dec. 21, 2010); Ivpress and Others v. Russia, App. No. 56027/10 (Eur. Ct. H.R. Jan. 22, 2013); Nadtoke v. Russia, App. No. 38010/05 (Eur. Ct. H.R. May 31, 2016); Grebneva and Alisimchik v. Russia, App. No. 8918/05 (Eur. Ct. H.R. Nov. 22, 2016).

⁴⁸ See Filatenko v. Russia, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); Andrushko v. Russia, App. No. 4260/04 (Eur. Ct. H.R. Oct. 14, 2010).

⁴⁹ See McGonagle, *supra* note 2.

⁵⁰ *Id.* at 14.

Russian statutory law also does not mention the concept of defamation and uses several different legal notions instead of the one of “reputation,” which may seem confusing. The Russian Constitution acknowledges and shields values such as “human dignity” in Article 21 Part 1,⁵¹ and “human honor” and “good name” in Article 23 Part 1,⁵² but it does not mention reputation at all. Article 152 of the Civil Code of the Russian Federation⁵³

⁵¹ Article 21 Part 1 of the Russian Constitution states: “Human dignity shall be protected by the government. Nothing may serve as a ground for its derogation.” Russ. Fed. L. On Mass Media, Art 21, *supra* note 35.

⁵² Article 23 Part 1 of the Russian Constitution states: “Everyone shall have the right to privacy, personal and family secrets as well as the protection of honor and good name.” Russ. Fed. L. On Mass Media, Art 23, *supra* note 35.

⁵³ Article 152 of the Civil Code of the Russian Federation (“Protection of the Honor, Dignity, and Business Reputation”) states:

1. A citizen shall have the right to claim in court that information discrediting his honor, dignity, or business reputation be rectified unless the person who has disseminated such information proves its consistency with the real state of affairs. Correction shall be made by the same means used for dissemination of the information about the citizen or by other similar means. Upon demand of the interested persons, the protection of a citizen's honor and dignity is allowed after their death.

2. If information discrediting the honor, dignity, or business reputation of a citizen has been disseminated by the mass media, it shall be rectified by the same mass media. A citizen, with respect to whom the mass media has published the said information, has the right to publish his reply in the same mass media, alongside a correction.

3. If information discrediting the honor, dignity, or business reputation of a citizen, is contained in the document, issued by an organization, the given document is subject to an exchange or withdrawal.

4. In cases when information, discrediting the honor, dignity or business reputation of a citizen has become widely known and therefore it is impossible to deliver a correction accessible to a general public, a citizen has the right to seek the removal of the information as well as the prevention and prohibition of further dissemination of the information through seizure and destruction of the copies of tangible carriers containing the information without any compensation, provided that the removal of the information is impossible without destruction of the copies of such tangible carriers.

5. If information discrediting the honor, dignity, or business reputation of a citizen has become available on the Internet, the citizen has the right to request the removal of this information as well as its correction by the means ensuring that the correction would be accessible to the Internet users.

6. In other cases, except from those stipulated in clauses 2–5 of this Article, the procedure of correction of information discrediting the honor, dignity, or business reputation of a citizen shall be established by a court.

7. The application of measures of liability for non-fulfillment of a court decision to an offender shall not exempt him from the duty to execute actions provided by the court decision.

8. If it is impossible to identify the person who disseminated information discrediting the honor, dignity, or business reputation of a citizen, the citizen, about whom the information has been disseminated, has the right to file a lawsuit on recognizing the disseminated information as inconsistent with the real state of affairs.

9. A citizen, with respect to whom information discrediting his honor, dignity, or business reputation has been disseminated, shall have the right, in addition to the correction or a reply to the given information, to claim the compensation of losses and of moral harm caused by its dissemination.

10. The court may also apply the rules of clauses 1–9 of this article, except for provisions on the compensation of moral harm, to cases of dissemination of any untrue information about a citizen

safeguards “the right to protect honor, dignity, and business reputation,” but fails to mention “good name,” like the Statute “On Mass Media” additionally regulating media defamation. The Russian Constitutional Court clarified that a concrete procedure for implementing the constitutional clause on defamation is established in Article 152 of the Civil Code in order to avoid certain ambiguities in these notions.⁵⁴ Therefore, the Russian courts only apply the Civil Code’s notion of “the right to protect honor, dignity, and business reputation.”⁵⁵ The Code qualifies honor, dignity, good name as well as business reputation as intangible, inalienable, and non-transferable values, and guarantees their judicial protection in Russia during lifetime and after death.⁵⁶

In practice, the Civil Code’s notion is considered as comprising the two rights: “to protect honor and dignity” and “to protect business reputation” because they can be separately protected in courts. Russian scholars argue that “dignity” and “honor” are united in one right because the esteem of one’s personal qualities by others influences self-esteem.⁵⁷ The right to business reputation implies only the esteem of “business” qualities of persons in the eyes of members of a society.⁵⁸ Because “dignity” and “honor” are viewed

provided that the citizen proves inconsistency of such information with the real state of affairs. The period of limitation on claims concerning the dissemination of the information in the mass media is one year from the day of publication of such information in the relevant mass media.

11. The rules of the present Article on the protection of the business reputation of the citizen, with the exception of provisions on the compensation of moral harm, shall be correspondingly applied to the protection of the business reputation of a legal entity.

Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

⁵⁴ See Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia’s Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 BROOK. J. INT’L L. 1 (2006).

⁵⁵ Ukr. Const. Art. 3 Part 1.

⁵⁶ Article 150 Part 1 of the *Civil Code of the Russian Federation* states:

1. The life and health, the personal dignity and personal immunity, the honor and good name, the business reputation, the right to private life, the personal and family secret, the right to a free movement, of the choice of the place of stay and residence, the right to the name, the copyright and the other personal non-property rights and intangible values belonging to citizens by the virtue of the birth or law, shall be inalienable and non-transferable in any other way.

Russ. Fed. L. On Mass Media, Art 150, *supra*, note 35.

⁵⁷ See MIKHAIL TIKHOMIROV, ZASHHITA CHESTI, DOSTOINSTVA I DELOVOJ REPUTACII: NOVYE PRAVILA (2004) (title translated as “Protection of Honour, Dignity, and Business Reputation: New Rules”); *Kommentarij k Ugolovnomu kodeksu Rossijskoj Federacii. Osobennaja tchast’* (Yurii Skuratov & Vladimir Lebedev eds., 2004) (title translated as “Comments to the Criminal Code of the Russian Federation”); NICKOLAI VETROV, UGOLOVNOJE PRAVO. OSOBENNAJA TCHAST’ (2000) (title translated as “Criminal law. Special part”); ALEKSANDR ERDLEVSKIY, MORAL’NYJ VRED I COMPENSACIJA ZA STRADANIJA (1998) (title translated as “Moral Harm and Compensation for Suffering”).

⁵⁸ *Id.*

as moral categories, legal entities in Russia are entitled to protect their business reputation only.

While in general this approach may correlate with the CoE's concept of the right to protect reputation, it is insufficiently clear. Especially problematic had been the issue of court jurisdiction until the Supreme Court, in its 2005 Plenum's decree, clarified that cases on protecting business reputation are subject to consideration in *arbitrazh* courts that hear only economic or commercial disputes, rather than in general jurisdiction courts.⁵⁹ Unlike the former courts, the latter are usually criticized by Russian experts for being less professional and more politically biased. Therefore, the issue of court jurisdiction goes beyond just technical concerns. In the 2016 review, the Supreme Court additionally explained that if cases on business reputation do not concern economic or commercial activities of legal entities or individual proprietors, such cases are subject to consideration in general jurisdiction courts.⁶⁰ This means that Russian cases involving criticism towards public officials are considered by courts that tend to be less tolerant of political dissent.

1. Truth v. Factual Basis

The Supreme Court suggests that the ECtHR's vision of defamation is identical to that established in Article 152 of the Russian Civil Code.⁶¹ However, it is not exactly so. According to Article 152 Part 1, the act of defamation comprises dissemination of "discrediting information" that is "not true."⁶² Consequently, Russian law obliges defendants to prove in courts the truthfulness of the information they have disseminated. In contrast, the ECtHR's perspective on applying the legal concept of "truth" in cases on defamation is much more flexible: although truth provides an absolute defense against claims of defamation, it is often difficult or costly to establish.⁶³

Richter notes that, with regards to journalism, the obligation of proving the veracity of information might be underpinned by the journalistic right and duty to verify information before its dissemination, as established in Article 49 of "On Mass Media."⁶⁴ However, from the ECtHR's perspective, accurate

⁵⁹ See Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities, *supra* note 12.

⁶⁰ See Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation, *supra* note 3.

⁶¹ See Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities, *supra* note 12.

⁶² See Russ. Fed. L. On Mass Media, Art 150, *supra* note 35.

⁶³ See DARIO MILO, DEFAMATION AND FREEDOM OF SPEECH (2008).

⁶⁴ Richter, *supra* note 5.

reporting on facts, rather than consistency with the truth, is key in cases on defamation.⁶⁵ Additionally, the ECtHR accepts some leeway in accuracy because news is a perishable commodity, and even a short delay in publication or broadcasting may result in the loss of its value as well as social interest.⁶⁶ In contrast, the Russian Constitutional Court strictly claims that placing the responsibility of proving the veracity of defamatory statements on those who have disseminated them is fully consistent with the constitutional right to free speech.⁶⁷

The ECtHR perspective has many important developments that Russian regulations overlook. For instance, the ECtHR acknowledges the so-called “fair comment defense,” which is inapplicable to Russia because of the “truthfulness” requirement. Fair comment defense gives the widest scope possible for free speech in relation to opinions on the issues of public interest.⁶⁸ In *Thorgeirson v. Iceland*, the ECtHR specified that, although the publications were based on rumors, stories, and the statements of others, they raised public interest – in this case, police brutality.⁶⁹ As a result, the ECtHR found a violation of the applicant’s freedom of expression.

The Supreme Court smooths the strictness of the statutory and Constitutional Court’s perspectives to a certain degree. The Supreme Court stated that lower courts should assess a publication in general rather than verifying separate words or phrases.⁷⁰ It also instructed the courts to check whether the disputed information was true at the moment of publication or broadcast, because the plaintiffs could have remedied the breach at the moment of the lawsuit or court consideration. These visions comply with the ECtHR’s case law,⁷¹ but the ECtHR approach is nevertheless more multifaceted and flexible than Russia’s. To illustrate, the ECtHR examines journalistic practices, such as “fact-checking processes” and ensuring “access to sources and documents that can provide evidence in court if an allegation

⁶⁵ See *Bergens Tidende and Others v. Norway*, App. No. 26132/95 (Eur. Ct. H.R. May 2, 2000); see also *Shabanov and Tren v. Russia*, App. No. 5433/02 (Eur. Ct. H.R. Dec. 14, 2006); *Aleksey Ovchinnikov v. Russia*, App. No. 24061/04 (Eur. Ct. H.R. Dec. 16, 2010); *Novaya Gazeta and Borodyanskiy v. Russia*, App. No. 15438/05 (Eur. Ct. H.R. Mar. 28, 2013); *OOO “Vesti” and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013).

⁶⁶ See *Observer and Guardian*, *supra* note 30.

⁶⁷ See Constitutional Court of the Russian Federation, *Resolution on the Refusal to Consider the Complaint of a Citizen, A.V. Kozyrev* (Sept. 27, 1995).

⁶⁸ See *McGonagle* 46, *supra* note 2.

⁶⁹ See *Thorgeirson v. Iceland*, App. No. 13778/88 (Eur. Ct. H.R. June 25, 1992).

⁷⁰ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

⁷¹ See, e.g., *Grebneva and Alisimchik*, *supra* note 44; *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *OOO “Vesti” and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007).

of defamation arises.”⁷² In *Dyundin*, the ECtHR criticized the Russian legal perspective on this issue and stated that:

the relevant test is not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established.⁷³

Because factual basis proves that defendants acted in good faith and respected journalistic ethics when preparing their publications, their expressions should enjoy stronger protection under Article 10 of ECHR. Therefore, factual basis is key from the ECtHR perspective for correct consideration of defamation disputes, as it contributes to reliable journalism as well as freedom of expression and information.

The ECtHR also suggests that it is unfair to require journalists to prove the veracity of statements if they have used reliable sources of information, because it is prescribed by their professional standards.⁷⁴ Among reliable sources are other media outlets,⁷⁵ parliamentary debates,⁷⁶ judicial hearings,⁷⁷ and official reports.⁷⁸ Article 57 of the Russian statute “On Mass Media” also exempts journalists from liability for publishing defamatory information if they had reproduced it verbatim from the speeches or press releases of public officials, or from information agencies, or if it was disseminated at parliamentary sessions or by guests on live broadcast programs.⁷⁹ However, the ECtHR approach is broader and represents the general principle that implies a thorough analysis of each case and assessment of all journalistic efforts to verify the information, rather than use of a narrowly defined formal rule. Its application is also limited because the statute “On Mass Media” is only applicable to professional media outlets that have been registered in this capacity with the state media regulator, Roskomnadzor. The only exception concerns popular Russian news aggregators that may be exempted from liability for defamation if they have reproduced defamatory information verbatim from governmental websites or another media outlet that has also

⁷² See McGonagle, *supra* note 2.

⁷³ *Dyundin*, *supra* note 44.

⁷⁴ See, e.g., *Colombani and Others v. France*, App. No. 51279/99 (Eur. Ct. H.R. June 25, 2002); *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93 (Eur. Ct. H.R. May 20, 1999); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010).

⁷⁵ See, e.g., *Thoma v. Luxembourg*, App. No. 38432/97 (Eur. Ct. H.R. Mar. 29, 2001).

⁷⁶ See, e.g., *A. v. the United Kingdom*, App. No. 35373/97 (Eur. Ct. H.R. Dec. 17, 2002); *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001).

⁷⁷ See, e.g., *Nikula v. Finland*, App. No. 31611/96 (Eur. Ct. H.R. March 21, 2002).

⁷⁸ See *Bladet Tromsø and Stensaas*, *supra* note 74.

⁷⁹ See Russ. Civ. Code Art. 152, *supra* note 53.

been registered with Roskomnadzor and can be found liable instead of the aggregator.⁸⁰ Needless to say, such regulations can hardly facilitate media freedom.

Russian law cannot protect those contributing to media-like services, including bloggers or other “non-professional” journalists. Even if they acted in good faith when publishing the content, they may still be held liable for defamatory information, which contrasts the CoE perspective. Consequently, Russian laws largely impede the dissemination of news from alternative sources and diminish the potential impact of media-like services to debates on the issues of public interests, which is contrary to the suggestions contained in the CoE Committee of Ministers’ 2011 Recommendation, “On a New Notion of Media.”⁸¹

Nonetheless, the legal notion of truth has become more problematic in Russia since 2019, after it adopted the so-called fake news law.⁸² The law’s vague ban on publishing “false information of public interest, shared under the guise of fake news”, has been used to suppress independent reporting during the COVID-19 pandemic, according to the Independent Press Institute, an international NPO defending press freedom across the globe.⁸³

2. Facts v. Value Judgments

The ECtHR states that it is necessary in cases of defamation to clearly distinguish facts from value judgment because the truth of the former can be demonstrated while the truth of the latter is not susceptible.⁸⁴ The Supreme Court’s 2005 decree incorporates this perspective and confirms that expressions of “subjective opinion and [the] views of a defendant” cannot

⁸⁰ See *Federal Statute of the Russian Federation On Amending the Federal Statute on Information, INFORMATION TECHNOLOGIES, AND THE CODE OF ADMINISTRATIVE OFFENCES* No. 208-FZ (June 23, 2016), <http://cbr.ru/Content/Document/File/33657/208-FZ.pdf>.

⁸¹ See *Recommendation CM/Rec(2011) 7 of the CoE’s Committee of Ministers to Member States On a New Notion of Media* (Sept. 21, 2011), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0.

⁸² See *Federal Law On Amendments to Article 15.3 of the Federal Law On Information, Information Technologies and Information Protection*, No. 31-FZ (March 18, 2019), http://www.consultant.ru/document/cons_doc_LAW_320401/#dst100008.

⁸³ International Press Institute, *New ‘fake news’ law stifles independent reporting in Russia on COVID-19* (May 8, 2020), <https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19>.

⁸⁴ See *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Karhuvaara & Iltalehti v. Finland*, App. No. 53678/00 (Eur. Ct. H.R. Nov. 16, 2004); *Keller v. Hungary*, App. No. 33352/02 (Eur. Ct. H.R. Apr. 4, 2006); *Falter Zeitschriften GmbH v. Austria*, App. No. 3084/07 (Eur. Ct. H.R. Feb. 8, 2007); *Ivanova v. Bulgaria*, App. No. 52435/99 (Eur. Ct. H.R. Feb. 14, 2008); *Axel Springer AG v. Germany* No. 2, App. No. 48311/10 (Eur. Ct. H.R. July 10, 2014).

(and should not) be verified.⁸⁵ However, in its case law on media defamation in Russia, the ECtHR suggested that the failure to make a clear distinction between facts and opinions has remained the most common problem of Russian justice concerning defamation.⁸⁶

Furthermore, the ECtHR does require justifying opinions under some circumstances,⁸⁷ for instance, to impede the dissemination of rumors or gossip that appear to be opinion. The ECtHR checks whether there has been a sufficient factual basis for the impugned statements.⁸⁸ Neither Russian laws nor the highest courts have integrated this approach. As a result, gutter journalism is overprotected in Russia, as the ECtHR's judgments on media defamation in Russia have shown.⁸⁹

3. Discrediting Information

Prior to the Supreme Court's 2005 decree, plaintiffs were not required to prove anything in courts, to the detriment of public debates on critical issues. First, the decree obliges plaintiffs to prove that the information has been disseminated.⁹⁰ Furthermore, the Court's 2016 review clarifies that plaintiffs may use any evidence to confirm the fact of dissemination, but the evidence must be "relevant and admissible,"⁹¹ such as news article copies or records of broadcasts. With regard to online defamation, the Supreme Court

⁸⁵ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁸⁶ See *Grinberg v. Russia*, App. No. 23472/03 (Eur. Ct. H.R. July 21, 2005); *Karman v. Russia*, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2006); *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007); *Dyuldin and Kislov v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); *Chemodurov v. Russia*, App. No. 72683/01 (Eur. Ct. H.R. July 31, 2007); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); *Dyudin v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. Oct. 14, 2008); *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *Kudeshkina v. Russia*, App. No. 29492/05 (Eur. Ct. H.R. Feb. 26, 2009); *Romanenko and Others v. Russia*, App. No. 11751/03 (Eur. Ct. H.R. Oct. 8, 2009); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009); *Fedchenko v. Russia* No. 1, App. No. 3333/04 (Eur. Ct. H.R. of 11 Feb. 11 2010) and No. 2, App. No. 48195/06 (Eur. Ct. H.R. Feb. 11, 2010); *Kunitsyna v. Russia*, App. No. 9406/05 (Eur. Ct. H.R. Dec. 13, 2016).

⁸⁷ See, e.g., *Novaya Gazeta and Borodyanskiy v. Russia*, App. No. 15438/05 (Eur. Ct. H.R. Mar. 28, 2013); *OOO "Vesti" and Ukhov v. Russia*, App. No. 28796/07 (Eur. Ct. H.R. May 30, 2013).

⁸⁸ See, e.g., *Jerusalem v. Austria*, App. No. 26958/95 (Eur. Ct. H.R. Feb. 27, 2001); *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (Eur. Ct. H.R. Feb. 24, 1997).

⁸⁹ See *Aleksey Ovchinnikov v. Russia*, App. No. 24061/04 (Eur. Ct. H.R. Dec. 16, 2010).

⁹⁰ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁹¹ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

suggests that plaintiffs notarize copies of online publications to confirm that they are in fact genuine.⁹²

Second, the Supreme Court notes that plaintiffs must prove that the impugned information explicitly concerns them, rather than any abstract person or social group.⁹³ This stance is also beneficial for public debates because it makes impossible to bring suit for “general criticism,” reflecting the developments in the ECtHR case law on defamation in Russia.⁹⁴

Third, the Supreme Court requires that plaintiffs prove that the information about them was indeed “discrediting.” The 2005 decree defines “discrediting” information as comprising of information on violating the law, committing dishonest acts, or wrongful or unethical behavior.⁹⁵ It also includes allegations about plaintiffs’ unfair business practices or violation of business ethics.⁹⁶ This explanation should have assisted Russian courts in making fair judgements.⁹⁷

Still, the room for media freedom has been narrowed by the 2013 amendments to the Civil Code. The law now allows punishment for the dissemination of any untrue information even if it does not discredit a plaintiff.⁹⁸ Although this approach contradicts the Supreme Court’s clarifications, the statutory vision must prevail nonetheless because Russian law establishes the supremacy of statutes. That is probably why, despite the contrasting vision, the Supreme Court later agreed with the new provision of the Civil Code.⁹⁹

Regarding the dissemination of untrue information, its veracity is proved by plaintiffs. On the one hand, it somewhat reduces the harm to media freedom in Russia; on the other, such approach is nevertheless disproportionate in light of Article 10 of ECHR. It is of the vision that many untrue statements can be just factual mistakes that cause no harm to plaintiffs’ reputation.

⁹² See *id.*

⁹³ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁹⁴ See *Dyuldin and Kislov v. Russia*, App. No. 25968/02 (Eur. Ct. H.R. July 31, 2007); *Filatenko v. Russia*, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007); *Godlevskiy v. Russia*, App. No. 14888/03 (Eur. Ct. H.R. Oct. 23, 2008); *Aleksandr Krutov v. Russia*, App. No. 15469/04 (Eur. Ct. H.R. Dec. 3, 2009).

⁹⁵ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

⁹⁶ *Id.*

⁹⁷ See *Richter*, *supra* note 5.

⁹⁸ See *Russ. Fed. L. On Mass Media*, Art 152, *supra* note 35.

⁹⁹ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

4. Corrections and Replies

According to the Civil Code, citizens or companies may claim corrections of defamatory information in courts,¹⁰⁰ while the statute “On Mass Media” invites them to seek corrections or replies directly with the media editorial office, without initiating a court procedure.¹⁰¹ Such direct communication with the editor would diminish the number of defamation lawsuits against journalists and stimulate media self-regulation and responsible journalism. However, because citizens or companies can choose whether to file a lawsuit or negotiate their corrections with the editorial offices who have defamed or criticized them, the former prefer to sue the latter in practice and apply the Civil Code, which is less favorable for journalists.

The Civil Code provides that the information must be corrected by the same or similar means as those used for its dissemination.¹⁰² Corrections must be published on the same website or outlets that have disseminated false statements. The Civil Code states that the procedure for correction may be established by a court, but the statute lacks criteria for that.¹⁰³

Procedural issues for publishing corrections and replies in the media are established in “On Mass Media.” Seeking to ensure the proper safeguard of the right to protect reputation, it provides that corrections and replies will be published promptly, in the same place and with the same length or duration as the defamatory information.¹⁰⁴ However, Richter fairly notes that these clauses are outdated: it is impossible to apply them to online media, which prevent from the coherent implementation of these rules in practice.¹⁰⁵

Russian statutory law fails to explain when to use the right to reply, so the Supreme Court has tried to fill this gap. It has stated that this right should be provided to correct errors of fact and inaccuracies or to complement incomplete information as well as one-sided value judgment.¹⁰⁶ The Court suggests that replies may justify an opposite perspective.¹⁰⁷ While the Courts’

¹⁰⁰ See Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

¹⁰¹ According to Article 43 of the statute “On Mass Media,” media outlets must disseminate the text of the correction provided by the citizens or companies concerned by the disseminated defamation “if such text complies with the statute.” Radio or TV stations may give the opportunity to citizens or companies to read aloud the text of the correction and provide it to the stations in the form of a recording. Article 44 of “On Mass Media” sets up the order and requirements for publication of corrections. See Russ. Fed. L. On Mass Media, *supra* note 35.

¹⁰² See Russ. Fed. L. On Mass Media, Art 152, *supra*, note 35.

¹⁰³ *Id.*

¹⁰⁴ See Russ. Fed. L. On Mass Media, *supra*, note 35.

¹⁰⁵ See Richter, *supra* note 16.

¹⁰⁶ *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹⁰⁷ *Id.*

suggestions aim at facilitating public debate in the media, as encouraged by the ECtHR, they are insufficiently clear. That is likely why the right to reply is practically useless in Russia. So, is there any need for this right from the international legal perspective?

Unlike the American Convention on Human Rights, the ECHR does not formulate this right at all – however, the ECtHR considers the publication of a reply or a correction as a “normal element of the legal framework governing the exercise of the freedom of expression.”¹⁰⁸ The CoE’s Resolution, “On the Right of Reply—Position of the Individual in Relation to the Press,” states that an individual should “have an effective possibility for the correction, without undue delay, of incorrect facts relating to him.”¹⁰⁹ According to the resolution, if an individual has a justified interest in having corrected this information, this should be done as far as possible in the same scope as the original publication.¹¹⁰

The CoE’s European Convention on Transfrontier Television (ECTT) also addresses the right of reply on television.¹¹¹ The ECTT states that individuals and legal entities must be provided with the opportunity to “exercise the right of reply or to seek other comparable legal or administrative remedies relating to programs transmitted by a broadcaster within its jurisdiction.”¹¹² To that aim, the name of the program service or of its broadcaster “shall be identified in the program service itself, at regular intervals by appropriate means.”¹¹³ Russia signed the ECTT in 2006, but has not ratified it so far, and, most likely, will not ratify it in the near future.

Before the 2013 amendments to the Civil Code, the right to reply had been applied only when the right to correction was inapplicable and the plaintiffs had to seek alternative remedies.¹¹⁴ At that time, replies were mostly used to comment on imprecise or inaccurate information, in line with the CoE standards and the Supreme Court’s perspective. In 2013, however, the Civil Code ambiguously stated that the right to reply may be claimed “in

¹⁰⁸ WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2015).

¹⁰⁹ See Eur. Consult. Assemb., *Resolution (74) 26 of the CoE’s Committee of Ministers to Member States On the Right of Reply—Position of the Individual in Relation to the Press*, adopted by the Committee of Ministers (July 2, 1974), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090001680645b44>.

¹¹⁰ *Id.*

¹¹¹ Council of Europe, *European Convention on Transfrontier Television* (May 5, 1989) STRASBOURG, <https://www.coe.int/ru/web/conventions/full-list/-/conventions/rms/090000168007b0d8>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Richter, *supra* note 16.

addition to” the right to correction,¹¹⁵ which should be seen as a disproportionate interference in media freedom from the CoE’s perspective.

5. Monetary Sanctions

The Russian Civil Code provides that citizens who have been defamed may claim compensations for material losses and moral harm, and legal entities may seek only compensation for losses.¹¹⁶ The amount of compensation is determined by courts. It should be “proportionate” to the harm caused by the defamation and should not curtail the freedom of mass information, as the Supreme Court notes,¹¹⁷ reflective the ECtHR case law vision.¹¹⁸ Accordingly, the Supreme Court instructs the Russian courts to pay attention, when determining such amounts, to the specifics of the publications such as their genre and audience reach.¹¹⁹ The Court also states that citizens had the right to claim in the courts damages for moral harm even if the editorial offices have voluntarily agreed to publish a correction but further states that the courts should consider this fact in their decision about awarding compensation.¹²⁰ Referring to the ECtHR case law, the Supreme Court states that the amount of compensation should be reasonable, fair, proportionate and should be sufficiently justified by courts.¹²¹ As the review noted, it is unlawful to compensate for actions that are “punitive, overburden[ed] or precautionary,”¹²² as was in the case of the renowned Russian news article *Kommersant*.

In 2004, *Kommersant* could become bankrupt as a result of its publication alleging the bank’s financial problems during the banking crisis. A Russian court ordered that *Kommersant* would pay an enormous monetary penalty of an equivalent of more than 9 million euro in rubles to Alfa-Bank, the plaintiff. Later, the appellate court reduced the penalty to an equivalent of 1 million U.S. dollars in rubles, which was still a large sum.¹²³ So, the

¹¹⁵ See Russ. Fed. L. On Mass Media, Art 152 Part 9, *supra* note 35.

¹¹⁶ *Id.*

¹¹⁷ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹¹⁸ See *Tolstoy Miloslavsky v. the United Kingdom*, App. No. 18139/91 (Eur. Ct. H.R. July 19, 1995); *Timpul Info-Magazin and Anghel v. Moldova*, App. No. 42864/05 (Eur. Ct. H.R. Nov. 27, 2007).

¹¹⁹ See *Decree On Court Practice on the Cases on Protection of Honor and Dignity of Citizens as well as on Business Reputation of Citizens and Legal Entities*, *supra* note 12.

¹²⁰ *Id.*

¹²¹ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹²² *Id.*

¹²³ See *High Court Bans “Ruinous” Libel Suits*, MOSCOW TIMES (Sept. 19, 2010), <https://themoscowtimes.com/news/high-court-bans-ruinous-libel-suits-1583>.

Supreme Court sought to instruct Russian courts in detail on how to calculate compensation to prevent the outlets from bankruptcy and to get the Russian legal vision closer to the CoE standards.

In general, Russian law provides a stronger protection from defamation for individuals than for companies. Since 2013, Article 152 of the Russian Civil Code has unambiguously provided that companies can only seek compensation for losses but not for moral harm, and the Supreme Court confirmed this position in its 2016 review.¹²⁴ The Civil Code defines moral harm as “mental or physical anguishes” of individuals¹²⁵ and provides that courts should pay attention to the degree of fault and other factors related to the defamed person when establishing the amount of the award to compensate moral harm.¹²⁶ Losses, however, should be clearly proved by plaintiffs, for instance, with the documents that would show that the publication was the true reason for such losses.

However, Russian courts continue to award compensation for moral harm to legal entities. By doing so, Russian courts either refer to the ECtHR’s concept of “reputational harm”¹²⁷ or to the ambiguous 2003 ruling of the Constitutional Court, which stated that legal entities may claim “compensation for non-material” losses.¹²⁸ Russian lower courts have often interpreted reputational harm as a reward for moral harm suffered by legal entities.¹²⁹ However, these are misinterpretations. In a 2016 Russian high-profile case, the *Arbitrazh* Court of the City of Moscow partly satisfied a defamation lawsuit filed by the giant state-owned oil company *Rosneft*, ordering the *RBC* media company to pay 390,000 rubles – a substantial amount of money equaling approximately 5,200 U.S. dollars – to compensate the “reputational harm.”¹³⁰ The publication concerned Russia’s attempt to privatize a 19.5% share of *Rosneft* and it stated that the *Rosneft*’s CEO Igor Sechin had asked the Russian government to prevent the British oil giant BP from securing greater control over *Rosneft*. Because the publication was of public interest, the court decision is hardly consistent with the CoE standards

¹²⁴ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹²⁵ See Russ. Fed. L. On Mass Media, Art 151, *supra* note 35.

¹²⁶ *Id.*

¹²⁷ See Ekaterina Dobrikova, *Moral'nyj vred i zashhita delovoj reputacii: v kakom sluchae juridicheskie lica mogut trebovat' kompensaciju?* GARANT.RU (Sept. 24, 2015), <http://www.garant.ru/article/652745/#ixzz4WxQWiml7> (title translated as “Moral harm and the protection of business reputation: In which case may legal entities seek compensation?”).

¹²⁸ See Russ. Fed. L. On Mass Media, Art 152, *supra*, note 35.

¹²⁹ See Dobrikova, *supra* note 127.

¹³⁰ *\$6,000 in Damages to Rosneft in Landmark Media Case*, MOSCOW TIMES, (Dec. 12, 2016), <https://themoscowtimes.com/news/court-rules-media-company-must-pay-over-6000-in-damages-to-rosneft-56505>.

on media freedom. Therefore, any reference to the ECtHR's concept of "reputational harm" in similar cases misinterpret the CoE standards on free speech. Furthermore, the ECtHR has never acknowledged that companies may seek compensation for "non-material" losses.

6. Removal of Online Defamatory Content

Seeking to strengthen the protection of reputation, the 2013 amendments to the Russian Civil Code permitted the removal of defamatory information from the internet.¹³¹ If defamatory information becomes "widely known," citizens or companies may request its removal.¹³² They may also seek to ban and prevent its further dissemination, including through such measures as seizure and destruction of the copies containing that information. If a non-identifiable person disseminated discrediting information about citizens, they may request the courts' acknowledgement that this information is untrue as well as its removal.¹³³ Since 2018, the Russian parliament has stepped up a notice-and-takedown system with regards to defamatory information. The Russian statute "On Information, Information Technologies, and Protection of Information" obliges hosting service providers to notify website owners about the decision holding that they must remove defamatory content from their websites within one day. If the owners fail to do so, the hosting service providers must immediately block access to the entire website.¹³⁴ The system is supervised by the state Internet and communication watchdog, *Roskomnadzor*, so it is not an independent body. The law provides the same order for the takedowns of fake news and expressions showing "blatant disrespect" of the state, state bodies, and society.

While it is indeed complicated to fight online defamation, and the scholarly and expert visions of this issue may be polarized, media attorney Galina Arapova argues that the Russian legal framework for online defamation does not meet the ECtHR test.¹³⁵ She suggests that the Russian legislators made no attempt to establish balance online freedom of speech and protection of reputation. For instance, Russian law does not provide an

¹³¹ See Russ. Fed. L. On Mass Media, Art 152, *supra* note 35.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Russ. Fed. L. On Amendments to the Federal Law on Information, Information Technologies and on the Protection of Information, *supra* note 6.

¹³⁵ See Media Rights Defense Centre, *Mediajurist Galina Arapova Oznakomila Sudej, Studentov i Zhurnalystov s Poslednimi Izmenenijami v Zakonodatel'stve, Regulirujushhem Dejatel'nost' SMI*, (Dec.18, 2013), http://www.mmdc.ru/news-div/site-news/mediayurist_galina_arapova_oznakomila_sudej_studentov_i_zhurnalystov_s_poslednimi_izmeneniyami_v_zakonodatelstve_reguliruyuwem_de (title translated as "Media Lawyer Galina Arapova Introduced to Judges, Students, and Journalists the Latest Amendments in the Legislation Regulating the Mass Media").

explanation of what “widely known” means, thus leaving this concept open to arbitrary interpretations. Mikhail Tikhomirov concludes that the Russian courts would have to elaborate criteria for the proper application of the provisions of the Civil Code on online defamation.¹³⁶ However, according to the criteria of the ECHR’s three-tier test, the law should provide more time for website owners and establish clear and foreseeable rules as well as the system of independent supervision to exclude the state interference.

The CoE standards acknowledge that, on the one hand, online media can exacerbate violations of the right to reputation, but on the other, the internet could be seen as a catalyst for freedom of expression. So, apart from additional limitations, online expressions need additional statutory protections. Digital regulation should pay attention to the specific characteristics of the internet. While the ECtHR allows for the removal of defamatory statements,¹³⁷ the three-tier test must be applied in the online context.¹³⁸ Any decisions on website blockings or online content removal must take into account the potential harm they bring to the public’s right to access the internet that comprises the right to access information online, from the ECtHR perspective.¹³⁹

However, the Russian statutory law does not recognize the right to access the internet, unlike the UN and CoE standards. Moreover, the Russian Constitutional Court justified the constitutionality of injunctions, which are removals of allegedly defamatory information before court consideration, without examining the procedural issues and without any acknowledgements of the value of the internet and online expressions for humanity.¹⁴⁰ Yet, it claimed that the “technological opportunities of the internet to disseminate information for unlimited number of people or to retain anonymity justified the need to specifically restrict online speech.”¹⁴¹ The 2016 Supreme Court’s review confirmed the correctness of the Constitutional Court’s vision on this issue.¹⁴²

In 2017, the Lublinskiy Court of the City of Moscow decided on one of the most high-profile cases on removal of defamatory content from the

¹³⁶ See Tikhomirov, *supra* note 57.

¹³⁷ See *Delfi AS v. Estonia*, App. No. 64569/09 (Eur. Ct. H.R. June 16, 2015).

¹³⁸ See WOLFGANG BENEDEK & DR. MATTHIAS KETTEMANN, *FREEDOM OF EXPRESSION AND THE INTERNET* (2014).

¹³⁹ See *Ahmet Yildirim v. Turkey*, App. No. 3111/10 (Eur. Ct. H.R. Dec. 18, 2012).

¹⁴⁰ See Constitutional Court of the Russian Federation, *Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of Paragraphs 1, 5, and 6 of Article 152 of the Civil Code of the Russian Federation in response to the complaint of citizen Ye. V. Krylov* (July 9, 2013).

¹⁴¹ *Id.*

¹⁴² See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

internet – this decision can hardly correlate with the CoE standards. The case concerns the documentary video of Alexey Navalny, one of the opposition leaders in Russia and the head of his Anti-Corruption Foundation. The video titled “He Is Not Dimon to You” alleged corruption involving the Russian Prime Minister Dmitry Medvedev investigating governmental corruption. The video was disseminated on the internet where it became so popular that it even triggered several anticorruption rallies in big Russian cities. The video claimed that a Russian top businessman, Alisher Usmanov, had bribed Medvedev under the guise of a donation and that Usmanov had executed censorship in the media publishing house he owns. The court fully satisfied the lawsuit. It ordered that the video be removed from several websites and to publish corrections instead. The judgments emphasized that Navalny failed to prove its truthfulness and that he had disseminated the defamatory information “in his personal” aims, although it should have been obvious for the courts that the video concerned the issue of public interests and instigated public discussion on this issue. Therefore, even before the ban on public officials' disrespect, Russian law applied to suppress oppositional and critical voices. Nonetheless, the ban has created additional obstacles for their sounding in Russia.

7. Administrative and Criminal Defamation

While the ECtHR has never challenged the legitimacy of criminal laws on defamation, it has expressed concerns regarding the application of criminal laws in cases of defamation, which may “hamper the press in performing its task as purveyor of information and public watchdog.”¹⁴³ The ECtHR stressed that criminal sanctions in such cases have a disproportionately chilling effect on free speech.¹⁴⁴ Therefore, according to the ECtHR, member states should employ non-criminal sanctions to protect reputation unless the content constitutes hate speech or incitement to violence.¹⁴⁵ This perspective has also been expressed in the 2004 Declaration on Freedom of Political Debate in the Media of the CoE Committee of Ministers.¹⁴⁶

¹⁴³ *Lingens v. Austria*, App. No. 9815/82 (Eur. Ct. H.R. July 8, 1986).

¹⁴⁴ *See Cumpăna and Mazăre v. Romania*, App. No. 33348/96 (Eur. Ct. H.R. Dec. 17, 2004); *Azevedo v. Portugal*, App. No. 11296/84 (Eur. Ct. H.R. Mar. 27, 1991); *Mahmudov and Agazade v. Azerbaijan*, App. No. 35877/04 (Eur. Ct. H.R. Dec. 18, 2008).

¹⁴⁵ *See, e.g., Cumpăna and Mazăre v. Romania*, App. No. 33348/96 (Eur. Ct. H.R. Dec. 17, 2004); *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992); *Feret v. Belgium*, App. No. 15615/07 (Eur. Ct. H.R. July 16, 2009).

¹⁴⁶ *See Declaration on Freedom of Political Debate in the Media*, *supra* note 41.

The PACE specifically addressed this issue in its 2007 Resolution “[t]owards decriminalization of defamation.”¹⁴⁷ This Resolution condemns several member states, including Russia, that misuse the prosecution of defamation as a tool “to silence media criticism.”¹⁴⁸ This leads to a “genuine media self-censorship” and causes “progressive shrinkage of democratic debate and of the circulation of general information.”¹⁴⁹

In 2011, before the start of the 2012 presidential campaign, the Russian government abolished criminal liability for defamation but re-criminalized it after the 2012 elections. The authorities also introduced higher criminal sanctions for defamation of judges, prosecutors, investigators, or court bailiffs in a new Article 298.1 of Russian Criminal Code. PACE’s Resolution 1896 (2012) condemned these provisions but they remain unchanged.¹⁵⁰

The Russian Criminal Code criminalizes both libel and slander.¹⁵¹ Unlike in common law countries, such as the UK or the USA, libel and slander in Russia represent the same offense defined as the dissemination of “knowingly false information” discrediting one’s honor and dignity or undermines one’s reputation in a written or oral form.¹⁵² So, if authors of the defamatory information knew it had been untrue but disseminated it nonetheless, such dissemination is criminalized in Russia regardless of the form used to express this information. The punishments vary from monetary penalties of up to five million rubles, or approximately 66,500 U.S. dollars, to compulsory community service of up to 480 hours.¹⁵³ Dissemination of a libel or slander in the media or in public, including online, is an aggravating factor.

The Russian Code of Administrative Offences sets up administrative sanctions for insults. “Insult” is defined as the derogation of a person expressed in an “indecent” form.¹⁵⁴ Although it is generally accepted that an “indecent form”¹⁵⁵ includes obscene language, this article lends itself to much broader interpretations because the law does not define the notion of “indecent form.” The sanctions for insults are monetary penalties. If insults

¹⁴⁷ See Eur. Consult. Assemb., *Resolution 1577 (2007) of the CoE’s Parliamentary Assembly Towards Decriminalization of Defamation* (Oct. 4, 2007), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *Criminal Code of the Russian Federation*, State Duma No 63-FZ (June 13, 1996) Art. 128.1, http://www.consultant.ru/document/cons_doc_LAW_10699.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Code of Administrative Offences of the Russian Federation*, State Duma No 195-FZ (Dec. 30, 2001) Art. 5.61, http://www.consultant.ru/document/cons_doc_LAW_34661.

¹⁵⁵ *Id.*

have been made in public, including in the media or online, they can incur penalties up to an equivalent of sixty U.S. dollars in rubles.¹⁵⁶ Higher sanctions are issued for the failure to stop disseminating insulting statements in public or in the media, which is likely to be a clause against editors.¹⁵⁷ However, insults of public officials “when they are performing their duties” are also criminalized and may lead one year of corrective labor.¹⁵⁸

“Blatant disrespect” of the Russian state or state bodies expressed on the Internet can cause fines up to 100,000 rubles, which is around 1,350 U.S. dollars. Repeat offenders can go to jail for up to fifteen days, according to the 2019 amendments to Article 20.1 of the Russian Code of Administrative Offences.¹⁵⁹

Although administrative sanctions for an insult may not look as severe as those for libel or even less severe, but administrative liability in Russia is applicable to both individuals and companies, unlike criminal liability, which is applied only against individuals. Therefore, the Code of Administrative Offences may be used to punish the entire editorial offices by shutting them down, apart from the individual authors of the impugned expressions. The 2016 Supreme Court’s review confirms that impositions of administrative sanctions does not mean that provisions on civic defamation are inapplicable to the case.¹⁶⁰ Furthermore, unlike criminal sanctions, decisions on administrative liability are in the purview of different bodies – including those overseen by the government – which poses the threat of using this offense as a tool to punish statements criticizing the government.

The cases on libel and insult of public officials in Russia had caused concerns of scholars and human rights activists even before the ban of expressions showing “blatant disrespect” towards them. Defamation regulation in Russia has been often used to punish for criticism against high-ranking public officials, as Arapova suggests.¹⁶¹ These cases exerted a significant chilling effect, and the lawsuits have been often initiated irrespective of sufficient grounds for them.¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *Criminal Code of the Russian Federation* Art. 319, *supra* note 151.

¹⁵⁹ See Russ. Fed. L. On Amendments to the Federal Law on Information, Information Technologies and on the Protection of Information, *supra* note 6.

¹⁶⁰ See *Review of the Judicial Practice on the Disputes concerning the Protection of Honor, Dignity, and Business Reputation*, *supra* note 3.

¹⁶¹ See Media Rights Defense Centre, Galina Arapova: “Uzhestochenie Zakonodatel'stva v Sfere SMI—Jeto Katastrofa” (Dec. 11, 2014), http://www.mmdc.ru/news-div/site-news/galina_arapova_uzhestochenie_zakonodatelstva_v_sfere_smi_eto_katastrofa (title translated as “Galina Arapova: Tightening legislation in the mass Media sphere is a disaster”).

¹⁶² *Id.*

In the last few years, several libel and insult cases have resulted in prosecutions for criticism or satire, such as the cases of the information agency SakhalinMedia for the publication of an open letter by Sakhalin residents criticising one senator from Sakhalin; the journalist Mikhail Afanasjev for criticizing the Deputy Interior Minister of the Republic of Khakassia; the journalist Sergei Reznik from Rostov for criticising a judge and a prosecutor; the agency Ura.ru for criticising a prosecutor; and Vadim Rogozhin for his satire of local politicians. However, one of the high-profile criminal lawsuits on online libel was closed in 2017 after the Russian president Vladimir Putin had been asked to “pay attention” to the dispute.¹⁶³ The case concerned a satirical YouTube video parodying Oleg Tinkoff, who is a top Russian businessmen, rather than a public official or politician.

The Russian Supreme Court has tried to reduce an enormous potential for extensive application of the ban on “blatant disrespect” to takedown satirical and other sensitive publications about Russian public officials and political establishment. When overruling the previous decisions that founded “blatant disrespect” towards a local governor in a critical social media publication, the Supreme Court interpreted the ban as inapplicable to protect local authorities’ reputation. According to the Court’s vision, the legal notion of the “Russian state bodies” excludes local entities because they don’t execute power in the entire Russian state.¹⁶⁴ Nonetheless, the Court has abstained from examining the ban from a free speech perspective.

8. Application of Russian and CoE Legal Standards on Defamation by Russian General Jurisdiction Courts

An analysis of the Russian general jurisdiction courts’ jurisprudence concerning defamation shows that cases on defamation are the most widespread type among those involving Article 29 of the Russian Constitution on free speech. From 2012 to 2016, cases on defamation made up nearly 24% of cases involving the constitutional article on free speech (see Figure 1). Among them, one-fifth were cases against the media, as depicted in Figure 2. Of the total number of cases on defamation, those on libel or insult made up less than 1%.

¹⁶³ See *Delo po Isku Tin'koff Banka k Bloggeram Nemagia Okonchatel'no Zakryto*, Vedomosti, (Nov. 2, 2017), <https://www.vedomosti.ru/politics/news/2017/11/02/740376-delo-tinkoff-nemagia> (titled translated as “The Case in a Claim of the Tinkoff Bank to the Nemagia’s Bloggers is Finally Closed”).

¹⁶⁴ See *VS Prekratil Delo ob Oskorblenii Jeks-glavy Arhangel'skoj Oblasti*, PRAVO.RU (Aug. 27, 2020), <https://pravo.ru/news/225198/> (titled translated as “The Supreme Court Revoked the Case on Insulting the Ex-head of the Arkhangelsk Region”).

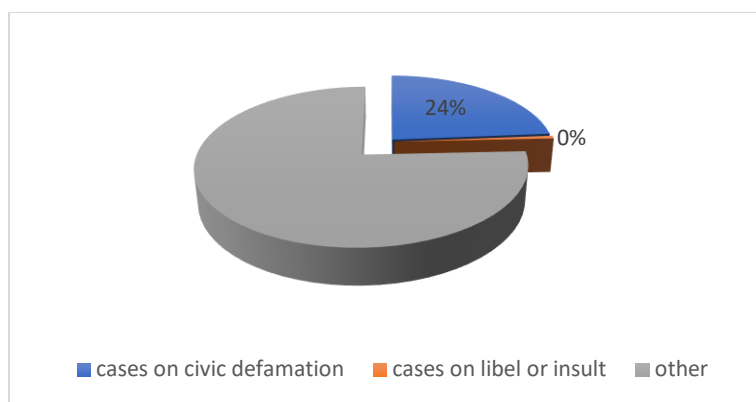


Figure 1. Proportion of cases on civil defamation as well as on libel or insult in the Russian judicial practice involving constitutional Article 29, 2012–2016.

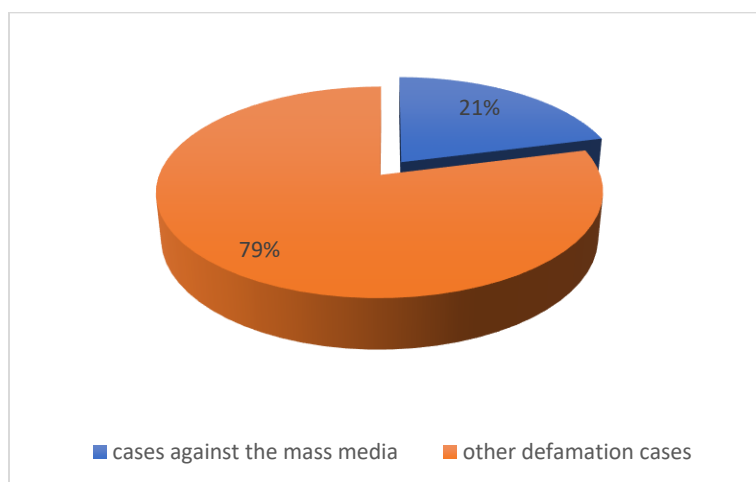


Figure 2. Proportion of cases against the media or journalists and other cases on defamation in Russia, 2012–2016.

Most of the courts' decisions lack sufficient details on the questioned publications to analyze these decisions in light of the CoE standards comprehensively. Therefore, this study focuses on examining whether the argumentative parts of these decisions complied with these standards. It

evaluates the consistency of the concluding parts only if the decision has enough details.

The analysis shows progress in terms of referencing of the CoE standards by the Russian courts in their decisions. The Article 19's report indicates that only 18.6% of cases directly referred to the ECHR in 2002-2006,¹⁶⁵ while my analysis reveals that all cases heard between 2012 and 2016 quoted Article 10 of the ECHR (see Figure 3). From 2002–2006, only six percent of Russian courts' decisions (seven in total) cited specific judgments of the ECtHR, while from 2012–2017, more than half (65) of the decisions directly quoted ECtHR's rulings (see Figure 4). This increase may be explained by the adoption of the Supreme Court's 2005 decree, which is also actively quoted by the Russian courts.

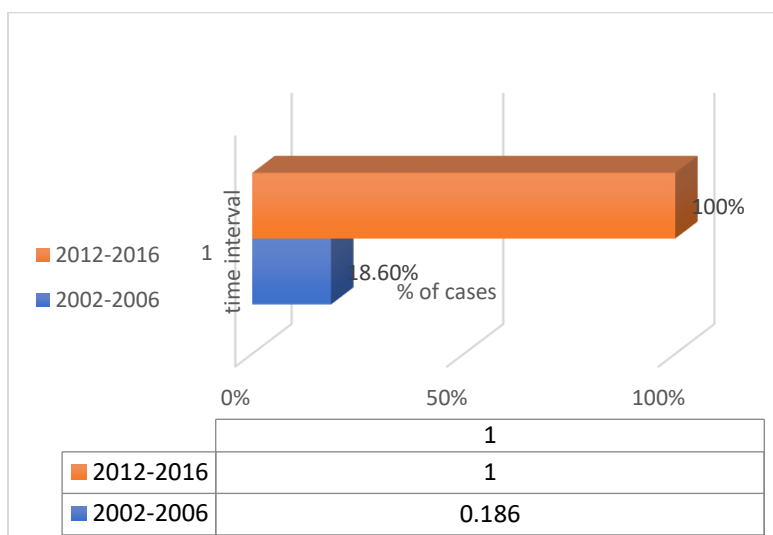


Figure 3. Dynamics in references to ECHR's Article 10 in the Russian judicial practice on defamation.

¹⁶⁵ See Article 19, *supra* note 8.

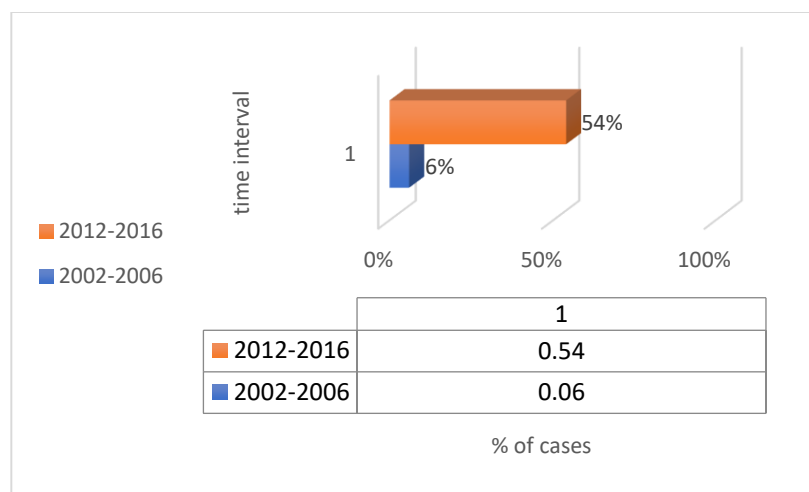


Figure 4. Dynamics in references to ECtHR case law in the Russian judicial practice on defamation.

In almost half of the cases (fifty-five, to be exact) between 2012 and 2016, claimants were public officials or civil servants, while the Article 19's analysis shows that the period from 2002 to 2006 had thirty-nine percent of such cases.¹⁶⁶ Figure 5 illustrates that defamation is still often used by public officials or civil servants to protect themselves from criticism. However, since the Article 19's report, the Russian courts have begun to actively refer to the principle that public officials should tolerate wider criticism. In cases involving public officials, this index has grown from around eighteen percent (eight decisions) to eighty-seven percent (105 decisions) (see Figure 6). Almost all of these decisions referred to the Declaration on Freedom of Political Debate in the Media and to the ECtHR case law.

¹⁶⁶ See Article 19, *supra* note 8.

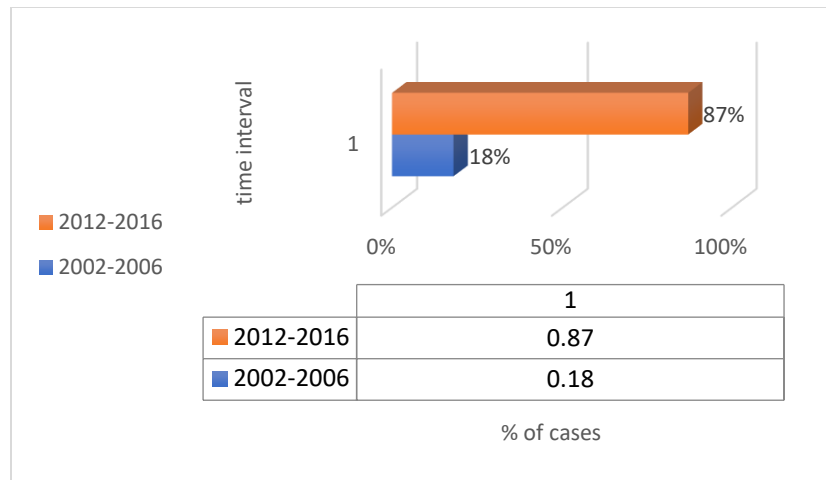


Figure 5. Increase of the number of cases involving public officials and civil servants as claimants in Russian judicial practice on defamation.

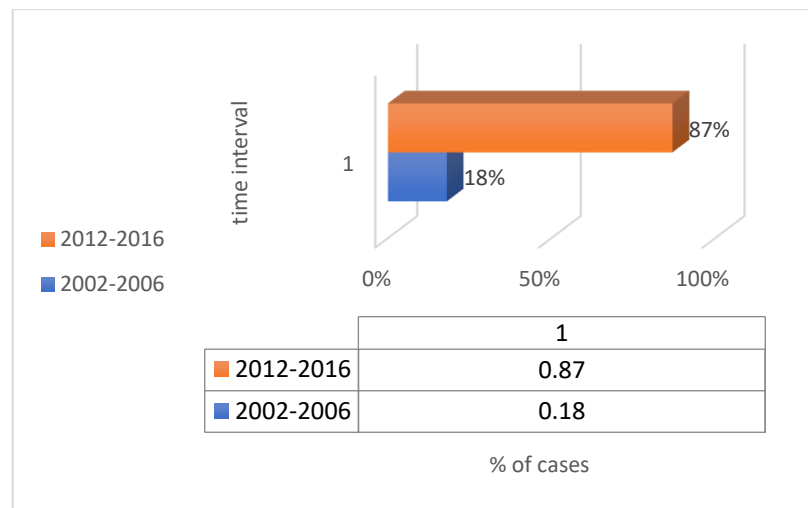


Figure 6. Dynamics in references to the CoE concept of public figures' tolerance of criticism in the Russian judicial practice on defamation.

From 2012–2016, the Russian courts more often and appropriately applied the principle of tolerance to the criticism of public officials or politicians. For instance, in the decision of the Judicial Division for Civil Cases of the Tomsk Regional Court in the action of G. Nemtseva, the head of the deputies' group in the state Legislative Duma of the Tomsk region, against the Pressa company, the court did not protect the claimant because she was a politician.¹⁶⁷ The decision stated that as “a public person, she agreed to become an object of public political discussion and criticism in the media.”

However, in most cases quoting the CoE the principle of tolerance to the criticism of public officials or politicians was mainly a formal gesture. There have been numerous examples where the courts did protect public officials, despite referencing the CoE standards. For instance, in the decision in the action of A. Kuzichkin¹⁶⁸, the head of the Department of Culture of Tomsk, on media defamation, the Kirov District Court of the city of Tomsk claimed that:

[P]roviding the mass media with the right to publish critical materials with respect to government public officials, a legislator does not identify this right with permissiveness and balances between the media freedom to publish critical materials and the need that such publication ensures the open and responsible execution of the public officials' duties.

In this decision, the Russian court misinterpreted the ECtHR ideas of balance and “necessity of limitations.” Instead of balancing between the right to free speech and to protection of reputation, the court intended to achieve balance between the freedom of the media to publish critical materials and the right of public officials to be protected from such criticism. As a result, the court protected Kuzichkin and obliged the defendant to publish a correction and to compensate moral harm.

¹⁶⁷ Reshenie Sovetskogo Rajonnogo Suda g. Tomska po Isku Upravlenija Ministerstva Justicii RF protiv Tomskoj Oblasti Protiv Nekommercheskij Social'nyj Fond Galiny Nemcevoj, App. No. 2-2475/2013. (Sovetskij Rajonnyj Sud g. Tomska. Aug. 19, 2013) (translated as “Ruling of the Soviet District Court of the City of Tomsk on the Lawsuit of the Department of the Ministry of Justice of the Russian Federation in Tomsk Region against Noncommercial Public Fund of Galina Nemtseva”), <http://xn--90afdbaav0bd1afy6eub5d.xn--p1ai/22605632>.

¹⁶⁸ Reshenie Kirovskogo Rajonnogo Suda Goroda Tomska po Isku Kuzichkina Andreja Aleksandrovicha protiv OOO “Pressa”- Redakcii Gazety “Tomskaja Nedelja”, Grigor'eva Nikolaja Viktorovicha, App. No. 2-2212/2012 ~ M-2212/2012 19. (Kirovskij Rajonnyj Sud g. Tomska. Dec. 19, 2012) (translated as “Ruling of the Kirov District Court of the City of Tomsk on the Lawsuit of Kuzichkin Andrej Aleksandrovich against ‘Press’ Ltd, Newspapers ‘Tomsk week’, Grigoriev Nikolay Viktorovich”), https://kirovsky--tms.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=20134305&case_uid=23244fff-043d-466e-8f35-31506561787e&delo_id=1540005.

Another example is the decision of the Krasninsk District Court of the Smolensk region in the suit of A. Shmatkov against the editorial offices of three newsarticles—*Krasninskij Kraj*, *Nasha Zhizn*, and *Za Urozhaj*—for publishing an article about fees for communal public services in which an anonymous person was quoted as calling Shmatkov “an opportunist” and “a liar.”¹⁶⁹ The court paid attention to the fact that the plaintiff Shmatkov was a local deputy when the article was published, and therefore is subject to broader criticism. However, the court then made an opposing statement. It claimed that even the critical opinions towards public officials or politicians should lead to sanctions if it causes harm to their honor, dignity, or business reputation. This perspective might be in line with the ECtHR’s standards if only journalists had overstepped their bounds and it requires thorough consideration of the impugned expressions. The Russian court, however, abstained from such an analysis.

In the decision in the action of local administration against the editorial office of the newsarticle *Tomskaya Nedelja* and others, the Kirov District Court of the city of Tomsk protected a state body. It obliged the news article to correct the allegations that the local administration “is trying to lobby their interests without consideration of the law” and that it re-imposes its duties on the tenants. In many respects, this dispute resembles the ECtHR case of *Krasulya v. Russia*¹⁷⁰ that Russia had lost. However, the Russian local court made no reference to this ECtHR case.

Krasulya was the editor-in-chief of a local news article, and he was charged with libel against Chernogorov, the regional governor and the former applicant’s competitor in the mayoral elections. The news article published an article criticizing the change in the appointment procedure of the mayor. This position could no longer be elected by the town’s residents, but was appointed by the town’s legislative body. The article alleged that that decision was “lobbied” by Chernogorov and referred to him as “loud, ambitious and completely incapable.”

In this case, the ECtHR ruled on a violation of the applicant’s right to free speech. The ECtHR stressed the essential role of the press in a democracy and noted that Chernogorov, as a politician, had to show a greater

¹⁶⁹ Reshenie Krasninskogo Rajonnogo Suda Smolenskoj Oblasti po Isku Shmatkova Andreja Aleksandrovicha protiv Redakcij Gazet “Za urozhaj”, “Krasninskij kraj”, “Nasha zhizn”, “Hislavichskie izvestija”. App. No. 2-9/2014 (2-355/2013;) ~ M-369/2013. (Krasninskij Rajonnyj Sud Smolenskoj Oblasti Dec. 15, 2014) (translated as “Ruling of the Krasny District Court of Smolensk Region on the Lawsuit of Shmatkov Andrej Aleksandrovich against newspapers ‘Za urozhaj’, ‘Krasninskij kraj’, ‘Nasha zhizn’, ‘Hislavichskie izvestija’”), https://krasny-sml.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=61238988&case_uid=10646d75-2616-46ea-b6d6-2e45d637d1f0&delo_id=1540005.

¹⁷⁰ See *Krasulya v. Russia*, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007).

degree of tolerance to criticism. The ECtHR reiterated that Article 10 of the ECHR provided a very little scope for restricting political discussion on the issues of public interest.¹⁷¹ It noted that the publication item raised these issues and contributed to an ongoing debate.¹⁷² The ECtHR observed that it was difficult to determine whether the information concerning the governor's influence was based on fact or judgment – however, they found that the article had a sufficient factual basis to make the impugned allegations.¹⁷³ As seen, Russian courts' interpretations of the notions of “facts,” “factual basis,” and “verification” have been problematic. It will most likely have a direct impact on how Russian courts apply the more recent ban on fake news in Russian law, with negative implications for freedom of expression.

My analysis has shown that the concept of public interest in general is still rarely applied in the Russian court practice on defamation. Article 19 marked the same trend in the 2007 analysis, as Figure 7 depicts. Article 19 noted that although 70% of the seventy-one decisions concerned issues of public interest, only four rulings referred to this legal concept.¹⁷⁴ My analysis arrived at similar results: 74% of cases concerned publications of public interest or political debate, whereas only 17% of the cases incorporated the concept of public interest or political debate.

¹⁷¹ *Id.*

¹⁷² See Anita Soboleva, *Tolkovanie Ponjatija “Ogranichenija, Neobhodimye v Demokraticheskom Obshhestve” v Svete Stat'i 10 Evropejskoj Konvencii o Zashhite Prav Cheloveka i Osnovnyh Svobod* (translated as “Interpretation of the Concept of ‘Restrictions Required in a Democratic Society’ in the Light of Article 10 European Convention for the Protection of Human Rights and Fundamental Freedoms”), *Predely Pravovogo Prostranstva Svobody* Pressy. Moscow: Novaja justicija. (In russ), (2008), at 69, <https://publications.hse.ru/mirror/pubs/share/folder/f21kb7vdsc/direct/59242009.pdf>.

¹⁷³ *Id.*

¹⁷⁴ See Article 19, *supra* note 8.

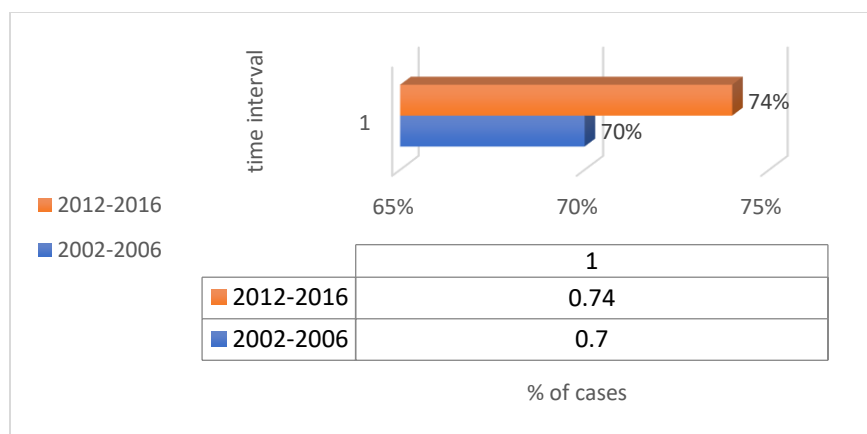


Figure 7. Dynamics in references to the concept of public interest in the Russian judicial practice on defamation.

For example, in the decision by Platonov, a local deputy, against the newsarticle *Delovoy Aleksandrov*, the Alexandrov City Court of the Vladimir region obliged the news article to correct the information that Platonov's family had managed an illegal hotel for migrant workers because the defendant failed to prove the truthfulness of this information.¹⁷⁵ The court failed to examine whether there had been a factual basis to make the allegations or not. Additionally, the court ignored the fact that the case was of public interest.

My analysis shows that the Russian courts almost always try to distinguish statements of facts from opinions, often with the help of linguistic experts. Referring to Article 29 of the Russian Constitution, the courts have stressed that no one can be held liable for his or her opinion, while anyone can be held liable for statements of facts if they are defamatory. In three cases, the courts specifically ruled that the right to an opinion is an inherent right for journalists, according to the statute, "On Mass Media."¹⁷⁶

¹⁷⁵ Reshenie Aleksandrovskogo Gorodskogo Suda Vladimirskoj Oblasti po Isku Platonova Nikolaja Vasil'evicha protiv OOO "Gazeta "Delovoj Aleksandrov", App. No. 2-850/2013 ~ M-617/2013. (Aleksandrovskij Gorodskoj Sud Vladimirskoj Oblasti, Oct 14, 2013) (translated as "Ruling of the Aleksandrov Municipal Court of Vladimir Region on the Lawsuit Platonov Nikolaj Vasil'evich against Newspaper 'Business Aleksandrov' Ltd."), https://aleksandrovsky-wld.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=23003376&case_uid=8e67361a-ea35-4d07-b278-a05d20814fac&delo_id=1540005.

¹⁷⁶ See Russ. Fed. L. On Mass Media, Art. 47 Part 9, *supra* note 35.

Despite this, Russian courts frequently order the correction of opinions, and Article 19 has noted the same problem in their 2007 report.¹⁷⁷ What is more interesting, from 2012–2016, the Russian courts began using the ECtHR case law to justify this approach. However, many decisions misinterpreted the ECtHR's concept of factual basis, and often required the veracity of opinions proven. Otherwise, they claim, such opinions cannot be protected. As observed, this trend has been typical for cases involving public officials, which may evidence that such misinterpretation may be deliberative and politically motivated. In practice, this often results in decisions contradicting to the ECtHR standards on defamation.

This trend can be exemplified by the decision of the Tunkin District Court of the Buryat Republic in the suit of A. Samarinov, the head of local administration to an online media outlet.¹⁷⁸ Its article alleged that Samarinov “works for his own pocket” and “confuses budget money with personal [finances].” It stated that “he does not consider [the] opinions” of the municipal unit directors and that his activities can be described as “an outrage.”¹⁷⁹ These statements were enforced by the statements of several municipal unit directors.

The court ruled in this case that some phrases were statements of facts, but others were opinions. However, referring to the ECtHR case law, the court claimed that the opinions could not be protected because they were based on “untrue facts” that the defendant had failed to prove. The court ordered the defendants to pay damages for moral harm and obliged the online media outlet to publish both a correction and a reply on its main web page, even though the article in question did not initially appear on the main page. Nothing was said about tolerance of wider criticism of public officials in this case. Thus, despite the distinction between statements of facts and opinions, as well as the application of the ECtHR case law, the decision lacks analysis of other elements that were important.

Another illustrative decision was held against A. Ekaev, a prominent human rights activist in the region and a founder and editor-in-chief of the newsarticle *Tverskoy Reporter*. He was found guilty of offending a certain

¹⁷⁷ See Article 19, *supra* note 8.

¹⁷⁸ Reshenie Tunkinskogo Rajonnogo Suda Respubliki Burjatija po Isku Samarinova Andreja Gomboevicha protiv OOO “Izdatel'stvo Burmakina”, App. No. 2-97/2013 ~ M-62/2013. (Tunkinskij Rajonnyj Sud Respubliki Burjatija. May 24, 2013) (translated as “Ruling of the Tunkin District Court of the Buryat Republic on the Lawsuit of Samarinov Andrej Gomboevich against ‘Burmakin Publishing House’ Ltd”), https://tunkinsky--bur.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=89211233&case_uid=12d26875-aa8c-4255-9b91-aa20b6b83838&delo_id=1540005.

¹⁷⁹ Arkady Zarubin, *V Tunke ER Pokidajut Glavy Poselenij* (translated as “Heads of Settlements Leave ER in Tunka”), GAZETA RB, (Jan. 25, 2013), <https://gazetarb.ru/news/section-policy/detail-9818>.

Mr. K. In his open letter to Russia's president Putin, he criticized K. calling him a "swindler" and a "liar" and alleging that K. had "succeeded in creating corruption in the judicial bodies of the region." Ekaev also stated that there had been an attempt on his life and that presumably K. has ordered the assassination. The court ruled that Ekaev was guilty of a libel only because he had been educated as a lawyer and "should have known for certain" that K. was never found guilty for swindling, perjury, or abuse of powers. Therefore, Ekaev's allegations had been deliberately false, as the court concluded. The court overlooked public interest in this case, even though the local press kept track of it. Because Ekaev had been previously convicted for assaulting and insulting a figure of authority, the court compounded the two convictions and sentenced Ekaev to two years in prison and one month in a penal colony.¹⁸⁰

Sometimes the Russian courts' requirements that media editorial offices verify information before disseminating have resulted in decisions that have misused both the "On Mass Media" statute, as well as the CoE standards. An example is the decision of the Serov District Court of the Sverdlovsk region in the suit of A. Silenko against the newsarticle *Serovskij Rabochij* and D. Skrjabin, its editor in chief.¹⁸¹ In this case, the defendant merely reproduced information already published several times in other mass media outlets and he should have been exempt from liability, according to Article 57 of "On Mass Media." However, the court stated that even if the information had already been published elsewhere, the editorial office still had the responsibility to check its veracity. Therefore, the defendant was not exempt from liability.

IV. CONCLUSION

Instead of progressing toward compliance with the CoE standards during Russia's membership in the organization, Russian defamation regulation has mostly had a regression, which is becoming increasingly noticeable in the digital era. More consistency has been identified only regarding expressions that avoid politically sensitive issues and criticism of Russian state

¹⁸⁰ See Elena Panova, *Tovarishhi po Partii ne Podelili Tver'* (translated as "Party comrades have not divided Tver"), ROSBALT (Apr. 19, 2008), <https://www.rosbalt.ru/main/2008/04/19/476223.html>.

¹⁸¹ Reshenie Serovskogo Rajonnogo Suda Sverdlovskoj Oblasti po Isku Silenko Aleksandra Vasil'evicha protiv Glavnogo Redaktora Gazety "Serovskij Rabochij" Skrjabina D.Ju., Gazety "Serovskij Rabochij", App. No. 2-2306/2012 ~ M-2031/2012. (Serovskij Rajonnyj Sud Sverdlovskoj Oblasti. Dec. 4, 2012) (translated as "Ruling of the Serov District Court of the Sverdlovsk Region on the Lawsuit of Silenko Aleksandr Vasil'evich against Newspaper 'Serov worker; and the Editor-in-chief Skrjabin D.'"), https://serovsky-svd.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=114539364&case_uid=a25c3d7f-3e53-49f2-b762-d337a75129ea&delo_id=1540005.

authorities. Therefore, such compliance has mainly been superficial because, in such circumstances, the rights to freedom of expression and freedom of mass information in Russia can hardly be exercised for what they have been guaranteed for in both Russian and CoE key legal standards. Russian legal standards have generally lacked balance between the right to freedom of expression and the right to protect reputation, and this tendency mostly looks deliberate, rather than incidental. As the study has found, the statutory regulation of defamation has suffered from fundamental problems. It has many insufficiently clear and precise excessive rules that are mostly implemented extensively. This legal mechanism lacks independent supervision. In other words, Russian statutory law has mostly mismatched all the criteria provided by Article 10 of the ECHR.

At the same time, the Russian judiciary perspective on free speech is more nuanced. As seen from the analysis, the two highest courts have seen to have major disagreements in getting the Russian statutory regulation of defamation closer to the CoE standards on freedom of expression. The Russian Constitutional Court often applies the international standards selectively or even misinterpret them to justify the legitimacy of excessive statutory measures to regulate expressions. On the contrary, the Supreme Court has attempted to balance freedom of expression with other rights and interests in line with the international standards on defamation. One reason to explain why Russian freedom of expression cannot benefit much from the Supreme Court's interpretations is their advisory function. However, the problem seems to be more profound. As the study has found, even if Russian lower courts apply the CoE concepts, such application has mostly been only a tick-box exercise, especially when the cases concern public interest, political expression, or the criticism of public officials and politicians.

The main implication of this is the encouragement of journalistic loyalty and the maintenance of a vision of journalism as a public relations and propaganda tool. By requiring that journalists prove the absolute truthfulness of the information they publish, Russian law limits journalists' opportunities to discuss publicly important issues, in contradiction to the CoE standards. At the same time, by failing to incorporate the ECtHR requirements for journalists to justify unfounded allegations with a certain factual basis, Russian law and its enforcement highly benefits tabloid journalism, rumors and fabricated news. It would be more appropriate for Russian authorities to fight fake news through encouraging journalists to follow their professional standards, rather than through imposing a vague ban on fake news.

Although it is likely that the current trends will further evolve in the same direction, and the gap between Russian and CoE standards on defamation will only continue to increase, monitoring of Russia's judicial perspectives

seems to be a fruitful area for further work. The role and power of the Supreme Court in Russian free speech issues should not be downplayed. It looks vital to promote the court's interpretations in the Russian judiciary and legal practitioners' communities for those concerned about free speech and press in Russia.

As the study has shown, the Russian legislation on defamation requires significant reformation to be consistent with the CoE standards. However, such a reform would be meaningless in Russia now. Until media freedom is properly institutionalized, legal rules will continue to be ignored or interpreted in any possible way, as tends to happen with a few free-press-oriented provisions of the Russian statute such as "On Mass Media" or the CoE standards. Although the will of Russian government is definitely required for the institutionalisation of media freedom, society and the media industry should also play a large role in the process. It is up to them to fully accept and defend the perspective advanced by the CoE and demand broad legislative reforms. It is therefore recommended that the rights of free speech and reputation be studied in-depth in both social and industrial settings.

International organizations need to develop new measures and tools to resist "weaponized" defamation. Exclusions of members for their non-compliance with international standards does not appear adequate. On the contrary, it may only foster media censorship and escalate international tension. Methods of political pressure with regard to human rights may only be effective if they provide some benefits for the member states in economics, technology, culture, and other fields.

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

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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

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. Donnelly, *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 decision⁸ or declaratory judgement⁹). 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 (Japan¹¹, South-Korea¹² and China¹³), 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. Barrett, *Declaratory Judgments*, 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 Dijk, *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,

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. 1.

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 expressive³¹ or restorative³² 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

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); Robbenolt, *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

³⁷ CLAUDIA SCHUBERT, DIE WIEDERGUTMACHUNG IMMATERIELLER SCHADEN 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

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

⁴³ Carroll, *supra* note 18, 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 Bajuvariorum*, 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 French⁵⁵ and Roman-Dutch⁵⁶ 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

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 12th 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

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

⁶⁴ Van Dijk, *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 injuria*, 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

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 Sądu Najwyższego 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

⁷⁸ *Id.* at 1267.

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

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-compliance⁸⁹ to sending the defendant to a jail or penitentiary until he complied.⁹⁰ Contemporary literature pays limited attention to this question.⁹¹ However,

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 Bydliniski, *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 LEVITSKY 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 retractions⁹⁴ 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 Barrett, *supra* note 9, at 110; Barbara Dill, *Libel Law Doesn't Work, But Can It Be Fixed*, 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 Lichtenstein¹⁰²) that require defendants to make a donation to a charitable or community purpose shall be disregarded.¹⁰³

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 defense¹⁰⁹ 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 Latvian 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 Cyprus¹¹⁷). 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

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

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 Germany¹³⁰ and Switzerland¹³¹) 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

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 STAATSBLED [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* note 7, 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 CALLATAÏ & 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*, in 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,

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, whether¹⁴³ or not¹⁴⁴ 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 case¹⁴⁶ 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 DÉLICTELLE 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 Röttemann, *Nichtvermögensschaden und Persönlichkeitsrechte 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 judgment 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,

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 Bulgaria¹⁵⁷ or Poland¹⁵⁸). 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

¹⁵⁵ Obligationenrecht [OR], Code des Obligations [CO], Codice Delle Oblighzioni [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 & Bénédicte 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

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 satisfaction 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 (*richterlichen 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

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 Maßregeln zur allgemeinen Herrschaft gebracht, aber die Luft der neuen Zeit hat sie fast durchweg aus den Gesetzbüchern hinweggefeht.” 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 scholars¹⁷⁸ and case law¹⁷⁹ 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

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; Röttemann, *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

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 decision¹⁹⁷) and reparation in kind.¹⁹⁸ Second, in other jurisdictions, satisfaction is primarily associated with non-pecuniary harm,¹⁹⁹ whereas compensation is linked to

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

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 MONATSSCHRIFT 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 scholars²¹⁰ 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

²⁰⁶ Bydliński, *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 Schadensersatzrecht*, 22 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT (ZSR) at 469 (1903).

²¹² Bundesgericht [BGer] [Federal Supreme Court] Nov. 25, 1948, 74 ENTSCHIEDUNGEN 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 Röttemann, *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 uncoded 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 expense²¹⁹ 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 Dijk, *supra* note 2, at 562; Zwart-Hink, *supra* note 18, at 100; Nico Verheij, *Excus 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 value²²⁶ 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 undertaking²³⁰) 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

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-Gravenhage 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:ROBOVE: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 Gravenhage 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” (Czech²⁴⁰ and Slovak law²⁴¹), “a declaration in the appropriate form and substance” (Polish law²⁴²) and “anything else through which it is possible to achieve the purpose achieved via compensation” (Slovenian law²⁴³). 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 broadcasters²⁴⁶ and private companies²⁴⁷ – to natural persons such as political leaders²⁴⁸. 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 REPUTĂȚIEI 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 Wrocławiu 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 led 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

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 19th 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

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 apologies²⁶⁷ 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, Levitsky 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 worthwhile, 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 uncoded 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

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, 1 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

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

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 procedures³⁰² or as part of an

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 unfounded³⁰⁷ or because the remedy was considered inappropriate.³⁰⁸

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 violations³¹¹ 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

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. Ill. 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.,

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

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

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:RBL EE:2011:BT2357, para. 7; Rb. Leeuwarden 18 augustus 2010, ECLI:NL:RBL EE: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

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 sorrowfulness even where they have been conferred with statutory power to order an apology. Robyn Carroll, *You Can't Order Sorrowfulness, 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 Herschovitz, *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 Dijk, *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

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

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, *Shaming 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 (Sad 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 other 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 thought 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 Dijk, *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 Dijk, *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

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 Dijk, *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 is 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.

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 equivalent³⁷⁹) 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 decision³⁸³ 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

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 AANSPRAKELIJKHEIDRECHT 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 CALLATAÏ & 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 Liepman, *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

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, see D. 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 law⁴⁰⁷ 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,

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

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. (*Blaja 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); *Blaja 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; Robbenolt, *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 apologize⁴¹⁷ 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 court⁴²⁰ or a disposition condition of a juvenile court⁴²¹ 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*⁶ 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.

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

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