



RIGA
GRADUATE
SCHOOL OF
LAW

Defamation: Criminalization of Freedom of Expression

BACHELOR THESIS

Author: Laura Gūtmane
LL.B 2015/2016 year student
student number B015016

SUPERVISOR: *(CHRISTY L., KOLLMAR)*
(JD, LL.M, MBA, MGM)

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2018

Abstract

The right to Freedom of Expression, as guaranteed by the Article 10 of the European Convention of Human Rights, is one of the most fundamental elements for the perseverance of democracy and further development of the society. Without the right to receive, and therefore, impart information, most other rights are rendered useless. However, significance of the same degree is also afforded to the right to Private Life and Reputation, which can be found to be protected by the Article 8 of the respective Convention. This thesis will argue that particularly these two rights have to be balanced out in order to create a comprehensible law that is able to efficiently tackle defamation, while at the same time not disproportionately restrict the free flow of information and ideas.

Furthermore, this thesis scrutinizes the situation in the European Union regarding defamation, addressing the overwhelming amount of member states choosing to eliminate defamation by prosecuting the press under the national criminal codes. Such approach does not comply with the international standards thus demands for complete abolishment. For the purpose of examining the potential for the civil law achieving the desired ends, three different approaches (the UK, Ireland and the US) are chosen and the best elements each of them can offer are determined. In the conclusion the view that criminal provisions dealing with defamation constitute a threat to democracy is affirmed and some minimum essential elements necessary to be included in a potential civil legislation are set forth.

List of Abbreviations

ECHR, the Convention – European Convention of Human Rights

ECtHR, the Court – European Court of Human Rights

EU, EU28– the European Union

The UK – The United Kingdom

The US – the United States of America

Table of Contents

1.	Introduction.....	4
2.	The scope of freedom of expression as established by the echr case law.....	5
2.2	Conflict with Article 8 and restrictions laid out in paragraph 2 of the Article 10.....	5
2.3	Conclusion	10
3.	Criminal law approach to defamation.....	11
3.1	Introduction.....	11
3.2	As far as imprisonment.....	12
3.3	Distinguishing between public and private persons	13
3.4	Vagueness of laws	13
3.5	Dangers of Criminal Provisions addressing defamation.....	14
3.6	Conclusion	16
4.	Civil law approach to defamation.....	17
4.1	Introduction.....	17
4.2	UK Defamation Act 2013	17
4.3	Irish Defamation Act 2009.....	19
4.4	Situation in the US.....	21
4.4.1	First Amendment and its historical development.....	21
4.4.2	Defamation in the US	23
4.4.3	Conclusion	28
5.	Responsible journalism.....	30
5.1	Reynold’s defence	30
5.2	The possibility of self-regulatory bodies as first instance in defamation cases	30
5.3	Conclusion	33
6.	Conclusion	33
7.	Bibliography.....	37

1. INTRODUCTION

Research statement: Existence and potential abuse of criminal laws addressing defamation limits and endangers the right to freedom of expression, which is necessary in a democratic society, and the possibility of civil laws tackling defamation.

In the 21st century, when the press is being attacked, threatened and even discredited by governments around the western world, another look at the so-called Fourth Estate¹ of democracy has to be taken. The right to Freedom of Expression has been one of the driving elements in the development of society as it is today. The ability to impart and receive information, especially concerning matters of public interest, is of utmost importance if any progress is to take place. However, equal significance is also afforded to the right to private life and reputation. This liberty provides the ability to lead a life without undue interference from the government, as well as that from other members of the society. Evidently, these two rights collide, and such conflict requires putting limits upon each of them, and as a result some forms of expression fall outside the scope of protection, and must be followed by legal consequences. One of such reasonably unprotected types of expression is “defamation of character”, it can be described as a

[...] false statement someone makes about you, which they publish as a statement of fact, and which harms your personal and/or professional reputation or causes you other damages, including financial loss and emotional distress.²

However, the definition and understanding of defamation vary around the developed world as some countries place more weight on the right to freedom of expression, but others offer stronger protection to the right to reputation and are willing to eliminate potentially “defamatory statements” even by enacting criminal provisions in their national legislation. Such position taken by the courts and governments in European Union is fairly alarming and demands comprehensive change in overall approach to this issue. The fact that almost all EU member states lack behind in universal standards of freedom of expression is an indicator that some form of legislation, applying minimum requirements to bring a defamation case in courts and also laying out basic legal tools available to defendants for battling such claims, is necessary.

This paper will argue where the right balance between the two competing rights mentioned above is, and how this balance could be enforced in the EU member states. For this purpose, the first part of the thesis will determine the scope of freedom of expression, which is afforded by the European Convention of Human Rights by examining the respective case law produced by the European Court of Human Rights, which is binding upon the European Union members, therefore shall be adequately

¹The term fourth estate is used to describe the press. Describing journalists and the news outlets for which they work as members of the fourth estate is an acknowledgment of their influence and status among the greatest powers of a nation. [online] Available at: <https://www.thoughtco.com/what-is-the-fourth-estate-3368058>, Accessed May 17, 2018

² Goguen, David, and J.D. "What Is Defamation of Character?", [online], Available at: <http://www.alllaw.com/articles/nolo/civil-litigation/defamation-character.html>, Accessed at: May 14, 2018

followed. The second part will clarify the unacceptable defamation situation that currently prevails in the EU, where the law goes as far as provides imprisonment, and why such approach can threaten the foundation of democracy. The third part will begin with an overlook of comprehensive civil defamation legislations of two European jurisdictions, namely the United Kingdom and Ireland, and then turn to the approach of the United States to present a considerably different method of handling claims of potential defamation. Forth part will consider the possibility of introducing self-regulatory bodies in the field of journalism, which are able to enforce “responsible journalism” practices as laid out by the journalistic code of ethics, and consequently address potential defamation claims. In the conclusion, the thesis will answer the research statement that has been posed by looking at its two parts and introduce a draft proposal that highlights the necessary elements of defamation specific legislation.

2. THE SCOPE OF FREEDOM OF EXPRESSION AS ESTABLISHED BY THE ECHR CASE LAW

2.1 Introduction

The first paragraph of Article 10 of the European Convention of Human Rights (hereinafter – the ECHR or the Convention) states that everyone has the right to freedom of expression, i.e. “hold opinions and receive and impart information without interference”, however, the second paragraph puts constraints on this right by adding that this freedom carries with it duties and responsibilities.³ To understand what this right covers in practice and what does not fall under its protection, European Court of Human Rights (hereinafter – the ECtHR or the Court) has developed a substantial amount of case law that establishes binding and persuasive precedents within its jurisdiction. This chapter will look at some of the more significant ones in the field of freedom of expression and defamation of character, insult and infringement of rights under the Article 8⁴ of the respective Convention, which protects the right to respect for private and family life to arrive at a theoretical and practical conclusion of what constitutes a violation of laws concerning defamation of character.

2.2 Conflict with Article 8 and restrictions laid out in paragraph 2 of the Article 10

Article 10 is far from the only right that is protected by the Convention, one of the most cited rights concerning defamation is safeguarded by Article 8 of the ECHR, which sets forth the right to respect for one's private and family life. This Article applies to everyone with disregard to their public standing or level of recognition, however; also this right is not absolute as the second paragraph of Article 8 narrows

³ European Convention of Human Rights, Article 10

⁴ ECHR, Article 8

the given protection by stating that it could be limited in accordance with the law and if such limitation is necessary in a democratic society.⁵

To balance these two rights in *Von Hannover*⁶ case the Court developed a five – step analysis that provides assistance to further explain the reasoning in a particular case concerning the limits of the right to freedom of expression and the right to private life. This case has to do with a public figure appearing in a publication that with the help of pictures shows the scenes from person's private life rather than the exercise of her official duties. This applicant brought the case to German Court system claiming the right to private life and received a dissatisfactory ruling referring to the freedom of press and the legitimate interest of society to observe how public persons behave. The case afterwards was brought to the ECtHR, which had to determine whether the rendered decision by German Courts violated person's rights under the Article 8 of the Convention by exercising a lack of protection in regards to her personal life. The Court, however, took a different approach to the case and as mentioned above established 5 points to go through to balance the two conflicting rights present in this case: (1) Whether the information contributes to a debate of general interests; (2) Whether the concerned person is well known; (3) The prior conduct of the concerned person; (4) The content, form and consequences of the relevant publication; (5) The circumstances under which the photos were taken.⁷ These points have been further reflected in case law of the Court as well as national courts throughout the Union. This case also established a precedent in regards to distinction between photographs and text as the Court claimed that these particular photographs did not concern dissemination of "ideas", but rather intimate "information" about the applicant and had nothing to do with the article itself.

Several elements concerning freedom of expression have been added with the case law in this respect, for example, in the case *Armoniene v. Lithuania*⁸ the Court ruled that there had been a violation of Article 8 of the Convention although the case already was decided in favour of the applicant, the amount awarded in pecuniary damages was contested in the Court and when addressing the specific point, the decision stated that the respective publication "cannot be deemed to contribute to any debate of general interest of society"⁹. It was strongly emphasized that this was partially because the case concerned a publication uncovering the information of a family member having HIV/AIDS, this family; furthermore, lived in a small village, therefore information of such nature could lead to "opprobrium and the risk of ostracism"¹⁰. Furthermore, the fact that such information can be found in a large national newspaper could have impacted the eagerness of somebody willing to test himself for the particular virus¹¹. This case shows that dramatic effect on somebody's

⁵ European Convention of Human Rights, Article 8 s 2

⁶ *Von Hannover v Germany*, (no. 2), nos. 40660/08 and 60641/08, 7 February 2012

⁷ *Ibid.*, para 109-113

⁸ *Armoniene v. Lithuania*, no. 36919/02, 25 November 2008

⁹ *Ibid.*, para 44

¹⁰ *Ibid.*, para 40

¹¹ *Ibid.*, para 44

private and family life, including possible exclusion from society, outweighs the public's right to information, even if it is found to be factually true. Another precedent set forward by the Court in this case manifests the significance of rights protected under Article 8 of the Convention as the Court found that award in defamation cases should not only be about “redressing the damage suffered by the victim” but also about “sufficiently deterring the recurrence of such abuses”¹².

Furthermore, In *Petrencu v Moldova*¹³ case the Court clarified its position on the difference of public and private persons in respect to defamation in paragraph 55 of the decision stating that:

in cases concerning debates or questions of general public interest, the extent of acceptable criticism is greater in respect of politicians or other public figures than in respect of private individuals: the former, unlike the latter, have voluntarily exposed themselves to a close scrutiny of their actions by both journalists and the general public and must therefore show a greater degree of tolerance¹⁴.

In the same case, the Court also repeated the distinction between statements of fact and value judgments by asserting that

[...]while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10¹⁵.

This gives journalists and other press and media workers, as well as outlets themselves available defence when it comes to opinions, which may infringe upon someone's right to reputation or not reflect the factual truth fully, at least not in a way which requires objective proof. Nevertheless, even value judgments cannot be created out of thin air; there must be a sufficient factual basis to support the claims. This distinction, however, must be determined by the domestic courts as it is considered to fall under margin of appreciation principle established by the ECtHR.

Another view that the Court has taken in its rulings such as *Fressoz and Roire v France*¹⁶ is that the Article 10 of the Convention leaves the decision to determine the credibility of available information and whether such information should then be made accessible to much wider public in the hands of the press. Paragraph 54 of the respective decision states that Article 10

[...]protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.¹⁷

¹² Ibid., para 47

¹³ *Petrencu v Moldova*, no. 20928/05, 30 March 2010

¹⁴ Ibid., para 55

¹⁵ Ibid., para 56

¹⁶ *Fressoz and Roire v France*, no. 29183/95, 26 May 1997

¹⁷ Ibid., para 54

This wording grants some armour to press as it does not have to guarantee the truth of the facts already publicly available. The Court also reiterated that people of certain public standing do not have the same protection as private individuals in regards to publication of financial assets and their availability. This is only logical as the society's interest in transparency of those holding high offices outweighs the right to complete financial privacy.

One of the landmark rulings in cases touching upon the freedom of expression is the *Handyside v UK*¹⁸, where the Court considered the legality of confiscation of a book targeting teenagers, which contained chapters on sex, masturbation, contraceptives, menstruations, pornography, homosexuality, abortion and other matters of high sensitivity in the year of 1976. Although the confiscation was found not to violate freedom of expression as established by the Convention, because of the Obscenity laws in force at the time in the United Kingdom, this particular ruling still set an important precedent as it was one of the first cases concerning Article 10 of the Convention. In the ruling, the Court made it clear that

[its] supervisory functions oblige[s] it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man¹⁹.

The Court went even further saying that it

[..] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"²⁰.

If the state, however, decides in favour of restricting the right to expression in a form including those of "formality", "condition", "restriction" or "penalty", it is responsible to ensure that the restriction is proportionate and adequate in achieving the legitimate aim that is pursued.

Furthermore, regarding the adequacy of proposed restrictions, in the case *Plon v France*²¹ the Court found a violation under Article 10 by the French Courts in their decision to prohibit the distribution of a book containing sensitive information about former French president Mitterrand. The book did contain confidential medical information about the deceased president's diagnosis and treatment of cancer, however, an infinite ban on information of public interest that has already been made available and consumed by readers does not constitute a pressing social need to protect deceased's right to intimacy and honour as ruled by the Court. As an interim

¹⁸*Handyside v UK*, no. 5493/72, 7 December 1976

¹⁹*Ibid.*, para 49

²⁰*Ibid.*

²¹*Plon v. France*, no. 56148/00, 18 May 2004

measure it was deemed appropriate, but almost nine months later the ban already created a restriction that was no longer legal under ECHR.²²

Another case important for understanding the legal limits of freedom of expression is concerned with the publication of an image of a suspect of an ongoing criminal investigation *Sciacca v Italy*²³. A newspaper in Italy publicized a photograph containing a private school teacher, which was a suspect of criminal activities committed while managing the school affairs. The Court makes a distinction between private and public person in this case, concluding that "that the applicant was not someone who featured in a public context (public figure or politician)"²⁴, but more importantly she was the subject of ongoing criminal proceedings, therefore publication could possibly lead to biased outcome of this trial²⁵.

Case *Dzhugashvili v Russia*²⁶ established two principles of the Court that could be applied in similar cases. It has to do with the grandson of Joseph Stalin claiming violations under Articles 6, 10 and 14 of European Convention on Human Rights, the Court, however, found the claim to be examined under Article 8 of the Convention. The claim was brought to the Court, because Russian courts did not find a violation of applicant's rights in regards to an article addressing the Katyn tragedy in 1940 and referring to Stalin as "a bloodthirsty cannibal". The Court acknowledged that discussion of Stalin generates

[..]exceptional public interest and requires additional reflections and a profound historical study, and that is why it cannot be restricted as it lies beyond the sphere of law as a manifestation of the elements of the civil society in the Russian Federation.²⁷

However, the term "a blood cannibal" in Court's opinion was clearly "metaphorical and figurative, given the article's context"²⁸. This reaffirms that the publicised information has to be viewed from the perspective of a reasonable reader and cannot be taken literally every time. Furthermore, the Court also saw fit to mention that one cannot rely on other's right under Article 8 as it is non-transferable in nature.²⁹

Continuing with the principle of a reasonable reader, in the case *Nikowitz & Verlagsgruppe News v Austria*³⁰ the Court found violation under Article 10 by Austrian courts as they did not protect the journalist's right to contribute to a debate of general interest with means of satirical commentary. The article at hand concerns athlete's injury and his competitor's imaginary words "Great, now I'll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too". The competitor sued the outlet for defamation and won the proceedings on the

²² Ibid., para 51

²³ *Sciacca v Italy*, no. 50774/99, 11 January 2005

²⁴ Ibid., para 28

²⁵ Ibid., para 27

²⁶ *Dzhugashvili v Russia*, no. 41123/10, 9 December 2014

²⁷ Ibid., para 9

²⁸ Ibid.

²⁹ Ibid., para 24

³⁰ *Nikowitz & Verlagsgruppe News v Austria*, no. 5266/03, 22 February 2007

basis that some readers would misunderstand the satirical article and would think that there is relevant basis for such statement. The ECtHR disagreed with national courts and ruled based on the fact that satirical publication cannot be judged by focusing on those readers that are unable to understand a clear humorous passage.³¹

However, in case *Chauvy & Ors v France*³² the Court set a clear constraint and duty on Article 10 of the Convention by ruling in essence that one cannot contest history or allege a different version of historic events without adequate research and sufficient critical analysis of sources.³³ It concerned a book written based on testimony of Klaus Barbie (the infamous Gestapo regional head) in regard to arrests of Resistance leaders in 1943. The claims in book were written in bad faith and the right of reputation of individuals in this case outweighed the right to freedom of expression.³⁴

2.3 Conclusion

ECHR case law helps to determine the scope of the Article 10 and its interaction with other rights given by the Convention and national legislations. With the help of aforementioned cases, it is easier to define where the line can be drawn when it comes to freedom of expression. The Court has established a test to balance the two rights of the same standing, respectively, Article 10 and Article 8. The test includes determining (1) whether the information contributes to a debate of general interests; (2) whether the concerned person is well known; (3) the prior conduct of the concerned person; and (4) the content, form and consequences of the relevant publication. Notwithstanding, there are several other factors worth considering, for example, if photos are part of the publication, it has to be determined whether they concern the publication and whether they themselves contribute to a general interest of public and are necessary in a democratic society. Furthermore, the Court also has established the fact that the damages paid under Article 8 are not only there to address the violation, but also for further deterrence of violations of the same kind. The difference between public and private persons has been addressed a lot by the Court, clarifying that in its opinion the right to private life should be much higher to those that only operate in private capacity as oppose to those that use or have used media and press for their own gain and benefit. ECHR case law has also laid out the important distinction between value judgements (opinions) and factual information as long as the publication is written in good faith and using reliable and precise data.

Moreover, offensive and shocking information is also protected under Article 10, if its necessity in a democratic society can be justified. Likewise, unreasonably long and disproportionate ban on information even of sensitive and confidential nature cannot be justified under Article 10. Additionally, Court has reiterated that any publication has to be viewed from the view-point of a reasonable reader, therefore metaphorical and satirical texts cannot be taken literally and fall under protection of the right of expression. The Court has also stated that the right to claim violation under ECHR are

³¹ Ibid., para 9

³² *Chauvy & Ors v France*, no. 64915/01, 29 June 2004

³³ Ibid., para 19

³⁴ Ibid.

not transferable in nature. However, there are some circumstances that fall outside the protection of Article 10, such as publication about someone involved in ongoing criminal proceedings, especially regarding private persons, as it can influence the end result of the case. The right of freedom of expression also does not protect those contesting history without proper research and adequate critical analysis of the respective information. The Court has also left a lot of factual determinations to national state's margin of appreciation as the state courts are in a better position to judge the facts. Further this work will go into national laws and compare them to each other and international standards regarding the right to freedom of expression.

3. CRIMINAL LAW APPROACH TO DEFAMATION

3.1 Introduction

Although European states, especially those forming European Union, advocate for democracy and fundamental freedoms around the globe, they still lack behind in international standards on freedom of expression. According to IPI (International Press Institute) report³⁵ only two³⁶ out of twenty-eight Union member states have changed their legislation to fit the situation nowadays, other twenty-five have kept some form of defamation and insult laws as a part of their Criminal Codes. Professionals in the legal field and press have called for de-criminalization of the respective offenses and provision of adequate legal tools for defendants against possible abuses of the existing vagueness of laws. Too often the nature of the violation does not match the proposed penalty; in short, the punishment disproportionately restricts the freedom of expression. This has a chilling effect on press, which holds a fundamental role in educating public, demanding the responsibility from public servants and contributing to public debate in general. However, this is not to say that infringement upon somebody's right to reputation and public image should not be followed by fair consequences, but it is necessary to weigh out the effect of the punishment against the legitimate aim of the law in a democratic society. Although it may seem that criminal penalties exist only on paper and in reality other laws are applied in the relevant cases, the IPI report has found that in the last five years only in at least fifteen EU countries journalists have been convicted under criminal defamation laws (i.e., a criminal punishments such as fines or prison terms were imposed).³⁷ This chapter will start with describing the current situation in the European Union member states that have criminal provisions addressing

³⁵ International Press Institute (IPI) (2015). *Out of Balance: Defamation Law in the European Union*. A comparative overview for journalists, civil society and policymakers. Vienna, Austria. [online] available at: <https://ec.europa.eu/digital-single-market/en/news/out-balance-defamation-law-european-union>, Accessed at: May 14, 2018

³⁶ United Kingdom, Ireland, Romania. Defamation and insult were repealed as criminal offences in Romania with the adoption of the new Romanian Criminal Code in January 2014, however, no civil legislation addressing defamation has been adopted, and the laws continue to be abused. [online] available at: www.balkaninsight.com/en/article/romania-at-odds-over-controversial-law-02-10-2016, Accessed at: May 17, 2018

³⁷ International Press Institute (IPI) (2015), p.11., para 3

defamation by focusing on three factors – imprisonment, distinction between public and private persons and the threat that is vague laws. In the second chapter of this part the danger of such approach and the need to abolish it will be discussed.

3.2 As far as imprisonment

Although the European Court of Human Rights has clearly ruled opposite of imprisonment in cases of defamation, the above mentioned IPI report has found some form and term of imprisonment to be applicable in 20 Member states of the European Union.³⁸ The highest possible prison sentence is to be found in Section 373 of Slovakian Criminal Code³⁹, which prescribes for up to 8 years of imprisonment for defamation. Furthermore, this provision also does not excuse situations such as satire, or possible contribution to debate of societal interest, where the communicated information is of high credibility and as precise as thorough research would provide. It also does not distinguish between protection of public and private persons, which, as already discussed, should be a universal standard in democratic societies. As the IPI report points out

[...] because criminal proceedings necessarily involve the power of the state and often involve no financial risk to the offended party, there is a real danger that such provisions will be misused by prominent figures or invoked for inappropriate purposes⁴⁰.

However, a maximum of 2 years of imprisonment is applicable in as many as 15 Member states.⁴¹ Furthermore, this type of punishment is not only archaic remains of the past, such states as Italy still sentences journalists with prison sentences. In 2015 Roberto D'Agostino was sentenced to 9 months in prison for

[...]defaming a Genoa prosecutor, Alberto Lari, after republishing an article from the Italian newspaper L'Espresso that raised questions over the prosecutor's wife's recent promotion.⁴²

Only 2 years prior to this ruling another one involving prison sentence was rendered by Italian Courts. In *Belpietro v Italy*⁴³ the defendant was sentenced four months in prison, the ECtHR, however, found that although "plaintiff's conviction as such was not contrary to Article 10"⁴⁴ a violation of freedom of speech had occurred nevertheless "due to the degree and nature of the sanction imposed"⁴⁵.

³⁸ International Press Institute (IPI) (2015, p.11., para 1

³⁹ Slovakian Criminal Code, s 373

⁴⁰ International Press Institute (IPI) (2015), p.7., para 2

⁴¹ International Press Institute (IPI) (2015)

⁴² International Press Institute, (2015). Italian journalist given prison sentence for defamation. [online] Available at: <http://legaldb.freemedia.at/2015/03/05/italian-journalist-given-prison-sentence-for-defamation/>, Accessed at: 6 May 2018

⁴³ *Belpietro v Italy*, no. 43612/10, 24 September 2013

⁴⁴ *Ibid.*, para 3

⁴⁵ *Ibid.*, para 4

3.3 Distinguishing between public and private persons

Democracy is based on the principle of holding those in power accountable for their behaviour and actions in public as well in private context. Acceptable criticism in regards to public persons must be considerably higher than that regarding private individuals. Directly as well as indirectly elected offices must be open to scrutiny as in their hands rest the powers of the state. However, that is not fully reflected in the laws of the majority of member states of the EU. Moreover, in six European Union member states instead of lessening the punishment in regards to public officials, they choose to go the other direction and elevate the criminal punishment for defamation.⁴⁶ Furthermore, fourteen states have separate provisions protecting public officials and figures against reputational harm, and a dozen states have codified separate provisions against insulting the head of the state together with state “objects”, including the state itself, its institutions and traditional symbols (e.g. flag, anthem, coat of arms etc.).⁴⁷ Moreover, the aforementioned Report claims that more than ten states provide for procedural advantages to public officials in cases of defamation, which:

[typically mean] that whereas private individuals must bring criminal cases to court on their own or must file a complaint in order to initiate a police investigation, public prosecutors can take action on their own initiative when the offended party is a public official.”⁴⁸

Only Croatia, Cyprus, the Czech Republic, Finland, Ireland, Latvia, Romania and the United Kingdom out of twenty-eight states do not specify for any of the two types of above-mentioned form of firmer protection for public officials.⁴⁹

3.4 Vagueness of laws

The IPI Report also points out that alarmingly many criminal codes contain defamation provisions, which are dangerously broad and penalize vague and uncertain claims and even value judgements that may harm “dignity” or “honor”, which as concepts by themselves are not clearly defined, therefore open to possible abuse. Moreover, some states do not provide for “dissemination of false information and ideas” as a requirement for bringing a defamation claim, possibly protecting public officials from necessary scrutiny in a democratic society.

For example in Portugal defamation is defined as vaguely as “alleging a fact or formulating a judgment (or reproducing such) about a third person that is offensive to that person’s honour or reputation”⁵⁰. Furthermore, in case of Portugal, one of the foremost experts on free expression and Lisbon-based human-rights attorney Teixeira da Mota, when interviewed, expressed the view that Portuguese courts

⁴⁶ International Press Institute (IPI) (2015), p. 13, para 4

⁴⁷ International Press Institute (IPI) (2015), p. 13, para 4

⁴⁸ International Press Institute (IPI) (2015), p. 13, para 5

⁴⁹ International Press Institute (IPI) (2015), p. 13, para 6

⁵⁰ Portuguese Criminal Code s 181

[..]has traditionally placed a high value on the rights to honour and reputation and considered freedom of expression a second-class freedom compared to those rights. Even today there remains in many cases a tendency to place too much value on the words, image, and reputation of powerful figures when weighed against critical opinions about those figures. Courts continue, at times, to not distinguish between assertions of fact and value judgments, which obviously ends up harming freedom of expression.⁵¹

Similarly, Polish defamation laws provide for attribution “to another person, a group of persons, an institution or organisational unit, conduct or characteristics that may discredit them in the face of public opinion”⁵². This provision is clearly dubious and open to misuse and abuse by the applicants and neglects any tools for protection to journalists, as it does not prescribe for neither intention, nor falsity, nor proof of harm done and does not draw distinction between factual information and value judgements

Next chapter will argue why such attitude towards defamation threatens the most basic principles of democracy and human rights in general, as well as address the need for abolishing such practice.

3.5 Dangers of Criminal Provisions addressing defamation

Many scholars have written about the important role of freedom of expression, expert Mogens Schmidt⁵³ claims that it “constitutes a cornerstone in any democratic society and forms a solid and fundamental basis for development”⁵⁴. Without such fundamental principle, societies would not be able to achieve progress and development of most kind. It can be even claimed that “the right that guarantees freedom of expression underpins all other human rights and democratic freedoms.”⁵⁵ If one is not entitled to the right to freely seek, receive and impart ideas and opinions, it is hardly possible that he will benefit from other rights that have been granted to him.⁵⁶ Furthermore,

[it] is more and more generally accepted that freedom of expression and freedom of the press are of importance for the "three D's": Development, Democracy and Dialogue. In many studies researchers have documented the correlations between a free press and the three D's. Without an open space for the marketplace of ideas to

⁵¹ Expert: Portuguese Libel Laws reflect ‘authoritarian Concept of Power’. Report. “Notes from the Field: EU Defamation Laws and Journalism”, September 5, 2014, [online] Available at: <https://ipi.media/portuguese-defamation-laws-still-reflect-authoritarian-concept-of-power-expert-says/>, Accessed May 7, 2018.

⁵² Article 212. § 1 of Polish Criminal Code

⁵³ Deputy Assistant Director-General, Communication and Information Sector, UNESCO

⁵⁴ Schmidt Mogens, (2010), Limits to the Restrictions to Freedom of Expression - Criteria and Application, 5 Religion & Hum. Rts. p 148, [online], Available at: HeinOnline, Accessed May 14, 2018

⁵⁵ Ibid.

⁵⁶ Ibid.

flourish, societies fail to progress by any measure on the human, social, and economic development scale.⁵⁷

Democracy “requires citizens to reflect and debate in order to enable the political leadership to transform their will into policy”. It is about accountability and good governance, which demands utmost scrutiny, when it comes to actions of leaders and allows to “engage in full and open debate about priorities and actions”⁵⁸. Evidently, objective criticism, even when harsh and controversial, can foster understanding and expand knowledge, which ultimately leads to better and more informed decision making. Nevertheless, in the meantime, the law also pursues to safeguard one from the harm that could result from defamatory allegation directed towards him, and at that point, if it or the facts on which it is based is untrue, the law may intervene and decide that it becomes illegitimate. However, as discussed above the right to freedom of expression has to be treated as one that supports the democratic foundation of the state, so for any restrictions to be introduced, they have to be specifically designed to eliminate only the cases, where real threats of unjustified harm have or are likely to come about. Moreover, the restrictions “have to be derived from the relevant international legal standards”⁵⁹.

Consequently, from the right to freedom of expression follows the doctrine of freedom of the press as it is the continuation of the respective individual’s right, which is extended to the media.⁶⁰ “Freedom of the press is nothing more, nothing less, than the right of the people to know.”⁶¹ The function of the media is to provide information to those, who want to know, and therefore, together with such function it also has to accept the accompanying duties and responsibilities. As important as the right to free speech is, it cannot be used to justify infringement upon the rights of others, each right has to interact with the rest, and therefore, while exercising free speech, one has to respect the dignity of fellow humans, particularly those already on the margins of the society.⁶² However, offence by itself is not a legitimate ground to restrict free speech.⁶³ Joaquin P. Roces⁶⁴ claims that the main responsibility of the press is to report on the opinions and views of the minority, and groups that usually identify themselves with dissenting sentiments.⁶⁵ Nonetheless, if restrictions are imposed they have to comply with the following principles:

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Schmidt Mogens, Limits to the Restrictions to Freedom of Expression - Criteria and Application, 5 Religion & Hum. Rts. (2010) p 147, [online] Available at: HeinOnline, Accessed May 14, 2018

⁶⁰ Francesca Klug, Freedom of Expression Must Include the License to Offend, 1 Religion & Hum. Rts. (2006) p 227, [online] Available at: HeinOnline, Accessed May 14, 2018

⁶¹ Joaquin P. Roces, Democracy and Press Freedom, 2 Phil. Int'l L.J. (1963) p 601, [online], Available at: HeinOnline, Accessed May 14, 2018

⁶² Francesca Klug, (2006) p 227

⁶³ Ibid. p. 225

⁶⁴ Joaquin "Chino" Roces (June 29, 1913 – September 30, 1988) was the founder and owner of Associated Broadcasting Company and the Manila Times.

⁶⁵ Joaquin P. Roces (1963) p 603

(1) they must be clearly and narrowly defined; (2) they must be applied by a body which is independent of political, commercial or other unwarranted influences, and (3) in a manner which is neither arbitrary nor discriminatory, and which is (4) subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal.⁶⁶

The freedom of speech should abide by the general standard that true statements cannot be followed by penalties, and moreover, that even hate speech⁶⁷ cannot be addressed by criminal provisions, unless the author has the intention to incite discrimination, hostility or violence.⁶⁸ Mogens Schmidt even emphasizes the fact that no “offenses involving freedom of expression should ever be considered under a penal code”⁶⁹. This is due to the fact that “compared to civil defamation, criminal defamation takes the protection of reputation to a more serious level, bringing the state into its enforcement”⁷⁰. Robert C. Post⁷¹ claimed that in democratic societies the need for criminal laws battling reputational harm would disappear. These developments are the result from the understanding that public officials are subservient to the public. Therefore, criminal defamation laws, especially those providing wider protection for officials should be left to the authoritarian past of Europe. If not, progress will resist taking place.⁷²

3.6 Conclusion

Criminal defamation laws are still very much alive in Europe and that should raise a concern within the democratic community. Even provisions on paper should be enough for alarm; however, it is the reality as the press continues to be prosecuted and convicted under criminal codes in the past several years in the majority of EU member states. Most states also have kept imprisonment in their laws as the possible punishment in defamation cases, and Italy has precariously issued two prison sentences over the last five years. Besides, the majority has further chosen to provide for more protection in cases regarding public officials than private ones, raising questions about the most basic societal rights in democratic regimes. As one more significant problem, it is worth mentioning the broadness and ambiguity of existing laws addressing defamation and insult, which give the possibility of abuse for the purpose of “saving face” in cases, where ideally public officials and figures should be held under the utmost scrutiny. This presents a threat to the democratic societies in the

⁶⁶ Schmidt Mogens (2010) p 150

⁶⁷ It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like.

⁶⁸ Schmidt Mogens (2010) p 148

⁶⁹ Ibid.

⁷⁰ Post, Robert C., (1986), "The Social Foundations of Defamation Law: Reputation and the Constitution" Faculty Scholarship Series. Paper 217, [online] available at: http://digitalcommons.law.yale.edu/fss_papers/217/, Accessed May 14, 2018

⁷¹ Robert Post is a Sterling Professor of Law at Yale Law School.

⁷² Anstey, Benedict John, Criminal defamation and reputation as ‘honour’: a cross-jurisdictional perspective, *Journal of Media Law*, 2017 vol. 9, No. 1, 132–153, [online], available at: <https://www.tandfonline.com/doi/abs/10.1080/17577632.2017.1311467>, Accessed May 14, 2018

European Union and demands for abolishment of current practices. However, one definitely has an interest in an effective mechanism of defence against false and malicious attacks from the press in cases resulting in no public benefit; therefore, the next paragraph tries to argue for the efficiency of civil law provisions protecting from reputational harm.

4. CIVIL LAW APPROACH TO DEFAMATION

4.1 Introduction

Firstly, it is important to state that victims of deceitful allegations, especially those imparted to public, can and often do experience negative consequences of professional and personal nature, which ought to be adequately addressed. Lacking the mechanism for effective defense against false or intimate claims about one's life can lead to serious consequences that otherwise would not likely occur, e.g., loss of a job, exclusion from society, discrimination etc. Information of this kind can subject the wider public to biased and inaccurate conclusions about a particular person, which can ultimately lead to erroneous decisions. However, instead of applying archaic criminal provisions to deal with such situations, countries should transform and update the relevant laws and make them a part of the Civil Code, while at the same time giving legal tools to defendants to balance the right of freedom of expression with the right of reputation. This chapter will first go through defamation legislation of the two European states, which have shifted from criminal approach to comprehensive civil approach, namely the United Kingdom and Ireland in detail, and then turn to American method of addressing potential reputational harm by going through the history and relevant decisions of the Supreme Court concerning freedom of speech and defamation. All three of these nations have been chosen to highlight their best practices and to examine the ability of efficient tackling of defamation with the help of the civil law in order to achieve the ends of this paper and present a draft proposal that would fit the current situation in European Union in regards to defamation.

4.2 UK Defamation Act 2013

In the year of 2013 United Kingdom drastically changed their defamation laws partly because it was seen as a “libel⁷³ tourism” destination as it was very easy to bring a claim in courts (also for foreigners) and partly because journalists and press lobbyists finally won the fight for adequate protection and a right to impart information of societal interest.⁷⁴ The government claims that the new law reverses the chilling effect on freedom of expression that the old law was tolerating even when a legitimate debate was at stake. UK Justice Minister Shailesh Vara acknowledged that

⁷³ Term used for written defamation in common law countries

⁷⁴ Aglionby, J. (2018). *UK Defamation Act aims to end trivial claims and libel tourism*. [online] Available at: <https://www.ft.com/content/afe77e0c-7204-11e3-bff7-00144feabdc0>, Accessed 5 May 2018

[..] some journalists, scientists or academics have faced unfair legal threats for fairly criticizing a company, person or product. These laws coming into force represent the end of a long and hard-fought battle to ensure a fair balance is struck between the right to freedom of expression and people's ability to protect their reputation.⁷⁵

Firstly, the new law does not provide for any criminal penalties regarding defamation. Secondly, previously the burden of proof on the applicant was only to prove that the public's estimation of the claimant would be lowered as a result of the comment, but with the new Act coming into force, the applicant has to additionally prove that the defamatory comments "has caused serious harm or are likely to serious cause harm to the reputation of the claimant"⁷⁶ Furthermore, when it comes to commercial bodies, the new Act has added the requirement of serious financial loss caused by the statement for it to be even considered defamatory.⁷⁷ This section raises the bar for bringing a claim so that only appropriate cases can be adjudicated in courts.⁷⁸

Moreover, the defenses of 'justification' and 'fair comment' have been replaced with 'truth' and 'honest opinion' in the new law.⁷⁹ The defence of truth is necessary in any democratic society as it safeguards not only the press freedom, but also underlines the assertion that malicious publication claiming false and unverified information should not be covered by the right of freedom of expression. This subsection even goes further and allows the defendant to reasonably protect him/herself, if some of the claims in the publication do not amount to absolute truth and does not infringe upon the right of reputation as long as the disputed ones are substantially true.

The second defence in Act of 2013 concerns the distinction between factual information and value judgement, the importance of which has been already mentioned in the Chapter 1 and 2 of this thesis. It puts the burden of proof upon the defendant to demonstrate that the disputed statement was not factual information, but an honest opinion, and the third subsection additionally requires a demonstration of the substantial basis for such claims.⁸⁰ Fourth subsection makes it clear that not only there has to this basis, but it also needs to either come as a result of existing facts or anything asserted to be a fact in a privileged statement⁸¹ prior to the disputed

⁷⁵ Conservative and Liberal Democrat coalition government of the UK (2018). *Defamation laws take effect*. [online] Available at: <https://www.gov.uk/government/news/defamation-laws-take-effect>, Accessed 6 May 2018

⁷⁶ Defamation Act 2013 (UK) s 1

⁷⁷ Ibid.

⁷⁸ The government of the UK (2018). *2013 c. 26, Explanatory Notes, Commentary on Section 1*. [online] Available at: <http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/1>, Accessed 6 May 2018]

⁷⁹ Defamation Act 2013 (UK) s 2

⁸⁰ Defamation Act 2013 (UK) s 3

⁸¹ (7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defenses if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);

(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

publication. It also points out the importance of “honest person” as the defense would fail if the defendant did not him/herself hold the opinion expressed in the publication, but claimed it to be his/hers as oppose to somebody else’s, and even then he/she has the responsibility of reasonably ensuring the truthfulness of the opinion that has been published in the disputed publication⁸².

Moreover, as it should apply in a democratic society, the third defense of imparting “publication on matter of public interest” to society has been laid out in the UK Defamation Act 2013. This defense provides protection for the defendant if he/she demonstrates that the disputed publication or part of it was of societal interest and he/she had a basis to reasonably believe so.⁸³ Later subsections concern the duties of the courts to determine the fulfilment of conditions laid out in subsection (1) of this defense. Such as, while determining whether the statement was in public interest and whether it was reasonable to think so, the court must seek for editorial judgement⁸⁴ if necessary as well as apply this defense irrespective of whether the statement complained of is a statement of fact or a statement of opinion.⁸⁵

In conclusion, this legislation reasonably complies with the international standards on freedom of expression. The law provides for adequately strong requirements to bring a claim in court, and also arms the defendant with tools that could be used to protect his right to impart information while at same time sets standards for the honesty, factual credibility, accuracy and necessity of such information. This defamation - specific legislation has managed to strike a fair balance between the two competing rights provided by the European Convention of Human Rights. It has to be mentioned that this chapter only analyses a part of the Defamation Act 2013 as the law goes further in detail in regards to possible defenses, which were omitted from this paper due to lack relevance in regards to the chosen topic. Further this chapter will turn to Irish legislation to look at their technique in achieving the same ends.

4.3 Irish Defamation Act 2009

Irish Defamation Act 2009 shares a lot of similar provisions with the current UK legislation on this subject. However, the definition of “defamatory statement” for the purposes of Irish law is “a statement that tends to injure a person’s reputation in the eyes of reasonable members of society”⁸⁶. Unlike in the UK, there is no requirement for serious harm to be done, but additionally there is a requirement to determine

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

⁸² Defamation Act 2013 (UK) s 3

⁸³ Defamation Act 2013 (UK) s 4

⁸⁴ The decision of the editor on the worthiness of the particular journalistic piece

⁸⁵ Defamation Act 2013 (UK) s 4

⁸⁶ Defamation Act 2013 (IE) s 2

whether reasonable person would see such statement as defamatory for it to be actionable under law. Furthermore, to claim tort of defamation⁸⁷ in Ireland the defamatory statement has to be published by any means to at least one person, other than the one concerned.⁸⁸ Irish Defamation Act also provides for many of the same defenses that can be used by the defendants during proceedings, such as the truth, absolute and qualified privilege⁸⁹, honest opinion, differentiation between allegation of fact and opinion and fair and reasonable publication on a matter of public interest.⁹⁰ Nonetheless, there are several other defenses one can plead in Ireland. In section 22 of the Act an “offer to make amends”⁹¹ is introduced as a defense, the amends shall:

- (a) be in writing, (b) state that it is an offer to make amends for the purposes of this section, and (c) state whether the offer is in respect of the entire of the statement or an offer [...] in respect of— (i) part only of the statement, or (ii) a particular defamatory meaning only.

Anyhow, pleading under this section takes away the right to plead any other defense.⁹² Furthermore, Irish law also grants the defense of “Apology”, which can be used for the purpose of mitigating the damages caused by the defamatory statement. This legal tool is particularly helpful, if the defendant has made a mistake, when publishing the article, and does feel either responsible or party responsible, and is willing to take some blame for the statement, or for the consequences thereof. Moreover, under law this apology does not imply any liability of the defendant and is not taken into account, when deciding on liability for the statements made⁹³, nor it can be provided as evidence of the liability of the defendant in any civil proceeding therefrom⁹⁴.

Furthermore, this Act also acknowledges the “defense of consent”, where the burden

⁸⁷ The tort of libel and the tort of slander jointly for the purpose of the Act

⁸⁸ *Defamation Act 2013 (IE)* s 6

⁸⁹ If a statement is privileged, a potential plaintiff has no cause of action. There are two types of privilege: absolute privilege and qualified privilege. In the case of absolute privilege, the intentions of the publisher are irrelevant; it can also be led by malice. Qualified privilege attaches to communications where the informant has a legal, moral or social duty to communicate the information and the recipient has a similar duty to receive it. If the allegations are made in good faith, even if they are factually wrong, the communication is not actionable. This privilege is defeated by proof of malice. [online], Available at: <http://www.rotlaw.com/legal-library/what-is-the-privilege-defense-to-defamation/>, Accessed May 14, 2018

⁹⁰ *Defamation Act 2013 (IE)* ss 16-21, 27

⁹¹ 5) In this section “ an offer to make amends ” means an offer—

(a) to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer,

(b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances, and

(c) to pay to the person such sum in compensation or damages (if any), and such costs, as may be agreed by them or as may be determined to be payable (*Defamation Act 2013 (IE)* s 22)

⁹² *Defamation Act 2013 (IE)* s 23

⁹³ *Defamation Act 2013 (IE)* s 24

⁹⁴ *Defamation Act 2013 (IE)* s 24

of proof lies on the defendant to demonstrate that the plaintiff had given his consent in regards to the statement in question⁹⁵. Last defense that has been included into Irish Defamation Act, but not in the UK one, can be found in Section 27 of the respective law and it is the “defense of innocent publication”. This Section gives the defending party the ability to submit evidence to prove the fact that he or she did not play a role in the publishing of the defamatory statement.⁹⁶ In deciding on the eligibility of this defense, the relevant court has to determine the extent in which the person could be held responsible for the content of the statement in question or the choice to publish it, as well as circumstances surrounding the publication and defendant’s previous conduct or character.⁹⁷

Ultimately, Irish Defamation Act 2009 provides sufficient legal tools for defendants to prove under law the lack of their liability in regards to defamation that occurred, or the necessity and benefit of the respective statements to appear in democratic society. Furthermore, from the act analyzed above, it would be important to emphasize the additional defenses of “offer to make amends”, “apology”, “consent”, “defense of innocent publication”, and the requirement to consider each claim in regards to defamation from the perspective of “a reasonable member of society”. Now the chapter will shift from European jurisdictions to the situation in the US, and go through the historical development of the current scope of freedom of expression as well as address the preconditions needed to satisfy for the defamation case to be actionable under law.

4.4 Situation in the US

4.4.1 First Amendment and its historical development

To comprehend standards regarding freedom of expression and defamation outside the European Union, this chapter will look at and analyze the relevant statutory laws and precedents in the United States of America (hereinafter referred to as the US or the United States) as the direction taken by the respective government and courts are substantially different from that of the rest of the developed world. First and foremost, as the standards set by ECHR is not directly binding upon the US; the beginning of this chapter will look at the Constitution, respectively the First Amendment of the Bill of Rights and its history, and afterwards the case law with reference to this provision. The First Amendment reads as following:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances⁹⁸.

For the purposes of understanding the scope of this provision, it must be mentioned that the Supreme Court has extended the protection afforded under this right to apply

⁹⁵ Defamation Act 2013 (IE) s 25

⁹⁶ *Defamation Act 2013* (IE) s 27

⁹⁷ *Defamation Act 2013* (IE) s 27 (3)

⁹⁸ U.S. Const. amend. I

to the entire federal government even though it was only expressly applicable to the Congress.⁹⁹

However, James Madison¹⁰⁰, who participated in the creation of the Constitution, produced the first and following draft version of the First Amendment, which is important as it addressed the freedom of speech explicitly (the religion clauses were later added by the Senate)¹⁰¹:

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.¹⁰²

The presence of the Founding Father's concern with such provision of freedom proves the different view that the US leaders held in that moment of its history in respect to their European counterparts, who placed reputation and the right of state to interfere and restrict higher than this personal liberty. Furthermore, the strong protective view taken by the American judicial system of the right laid out in the Bill of Rights has a long history and has been highlighted as very essential even by legal scholars in eighteenth century. Sir William Blackstone¹⁰³ in his work wrote:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.¹⁰⁴

However, only in recent times complete recognition and acceptance of the theory that the freedom of expression, particularly freedom of speech, is protected by the First Amendment by prohibiting not only prior constraints, but also most possible consecutive penalties and punishments has come about. This advance started short after the First World War as the Court's shift toward this position began in its consideration of limitations on speech and press. Moreover, in a landmark case *New York Times Co. v. Sullivan*¹⁰⁵, which concerns an ad placed in a newspaper (New

⁹⁹ LII / Legal Information Institute. (2018). *First Amendment*. [online] Available at: https://www.law.cornell.edu/wex/first_amendment, Accessed 6 May 2018

¹⁰⁰ James Madison (1751-1836) was a founding father of the United States and the fourth American president, serving in office from 1809 to 1817. An advocate for a strong federal government, the Virginia-born Madison composed the first drafts of the U.S. Constitution and the Bill of Rights and earned the nickname "Father of the Constitution."

¹⁰¹ LII / Legal Information Institute. (2018). *First Amendment*. [online] Available at: https://www.law.cornell.edu/wex/first_amendment, Accessed 6 May 2018

¹⁰² Findlaw. (2018). Annotation 6 - First Amendment. [online] Available at: <https://constitution.findlaw.com/amendment1/annotation06.html>, Accessed 6 May 2018

¹⁰³ Sir William Blackstone (10 July 1723 – 14 February 1780) was an English jurist, judge and Tory politician of the eighteenth century.

¹⁰⁴ Blackstone, William, *Commentaries On the Laws of England*. Boston: Beacon Press, 1962. p. 151, [online], Available at: <https://archive.org/details/commentariesonla04blac>, Accessed May 14, 2018

¹⁰⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

York Times) regarding violations of rights of black people in Montgomery, Alabama in the year of 1964, the Court could say with full consensus:

[...]we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.¹⁰⁶

After considering the scope of protection provided to freedom of expression and requirements needed to satisfy if any form of restriction is to be introduced, it is clear that the scope is wide and the Court places a significant value on the First Amendment rights. Nonetheless, there are several categories of free speech that enjoy none or partial protection in the US courts, these categories have developed through case law. However, regarding defamation, it can be deduced that as long as the concerned statement in defamation case is not directed to incite imminent danger and is not likely to produce such danger, words constituting respective statement is not inflicting injury or do not tend to incite an immediate breach of the peace as well as the statement is not considered to fall under the prohibition of obscenity, such statement is protected by the First Amendment. However, a “potentially defamatory” statement constituting a part of publication of pure commercial-nature will be much harder to defend in the Court room. Further this chapter will go into pre-conditions under which one is able to sue for defamation and what protection is provided for the defendant in such situation within the jurisdiction of American courts.

4.4.2 Defamation in the US

Private Individuals

In order to claim for a statement or a publication to be defamatory and receive a satisfactory ruling in the US, the plaintiff, who is a private individual, is required to prove four elements: (1) concerned statement has to be false; (2) concerned statement must be ‘published’ to a third party, who cannot also be the person who is being defamed; (3) if the concerned statement is ‘of public concern’ the person who has published it must also be guilty of negligence regarding the publication; (4) the person about whom the defamatory statement is made must be ‘damaged’¹⁰⁷ by the statement.¹⁰⁸ As oppose to European jurisdictions, the burden of proof rests upon the plaintiff, which is a major difference as the possible satisfaction of these four elements requires a fair amount of evidence and a substantial damage done to the victim of defamation. The paper will now go into these elements to understand why and how they came about, and why it would be necessary to include such components in European Union legislation.

¹⁰⁶ New York Times Co. v. Sullivan, 376 U.S. 254 (1964), page 376 U. S. 270

¹⁰⁷ Either financially or morally, depending on the state

¹⁰⁸ Lawfirms.com. (2018). Elements Required for Defamation. [online] Available at: <http://www.lawfirms.com/resources/personal-injury/libel-and-slander/elements-required-defamation.htm>, Accessed 6 May 2018.

False requirement

This requirement owes its existence to the case *Crown v. John Peter Zenger*¹⁰⁹, which was brought to the Court as early as 1735. Peter Zenger was a printer of the New-York Weekly Journal, which was the Province's first independent newspaper. The newspaper with the help of articles, lampoons and satire made accusations of the Governor William Cosby¹¹⁰, calling him tyrant and claiming his administration is violating the rights of people. Governor's lawyers were leading an examination to determine whether the statements constituted the crime of seditious libel.

Seditious libel was defined as the intentional publication, without lawful excuse or justification, of written blame of any public man or of the law, or any institution established by the law.¹¹¹

For the purpose of issuing an indictment against Zenger, two grand juries were established and the evidence was presented, but they did not find him guilty of the crime. Following this, the Governor ordered to publicly burn the issues of the newspaper. However, after applying to the Court of Quarter Sessions for authorization of such act, such permission was not received. The Cosby administration then resolved to proceed against Zenger without the necessary grand jury indictment, and Cosby's allies on the court issued the warrant for arrest and Zenger was put in New York's Old City Jail in 1734. However, after several mistakes by Zenger's counsels, he was appointed a new lawyer – Mr. Chambers, who empaneled an unbiased jury for the upcoming trial. At the ending of Zenger's counsel's speech, Andrew Hamilton¹¹² gave his famous speech; he asked the jury to consider the truth of the published statements and finished with these famous words:

The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.¹¹³

The jury, unsurprisingly, found him “not guilty” of the crime of defamation. The case did not, however, establish a binding precedent regarding freedom of expression, but, more importantly, it changed the legal thought regarding what constitutes defamation,

¹⁰⁹ *Crown v. John Peter Zenger*, 1735

¹¹⁰ Brigadier-General William Cosby (1690–1736) was an Irish soldier who served as the British royal governor of New York from 1732 to 1736.

¹¹¹ Zechariah Chafee, Jr. *Free Speech in the United States* (1941)

¹¹² Andrew Hamilton (c.1676 – August 4, 1741) was a Scottish lawyer in the Thirteen Colonies, where he finally settled in Philadelphia. He was best known for his legal victory on behalf of the printer and newspaper publisher John Peter Zenger. This 1735 decision in New York helped to establish that truth is a defense to an accusation of libel.

¹¹³ *Crown v. John Peter Zenger*, 1735, HISTORICAL SOCIETY of the NEW YORK COURTS, para 10, [online] Available at: <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>, Accessed 6 May 2018

and long after that was responsible for the enactment of protection embodied in the First Amendment.¹¹⁴

To conclude, it is worth mentioning that the general requirement of “the truth” is still unfortunately not popular in European jurisdictions. However, it most definitely should be included in all laws devoted to defamation, because one of the most important elements of functioning democracy is the ability and the need to inform the public on matters of factual accuracy and the right to receive impartial and truthful information.

“Made public to third party” requirement

This requirement is universal and also found in most other jurisdictions; however, in the United States one of the first cases establishing such requirement is *Simpson v. Mars, Inc.*¹¹⁵. Case concerns Mrs. Simpson’s termination from her position in the Ethel M. Chocolates, Inc. factory, which is a subsidiary of Mars Inc. Senior Supervisor contacted her and told she was terminated based of sexual harassment allegation made by another female employee in the company. Mrs. Simpson brought a defamation case to court claiming that the alleged sexual misconduct was published to Simpson’s co-workers; however, the defendant responded that this information was only made available to necessary agents of the company, so it has to be considered under the privileged statement exception. Nevertheless, the Court rejected that position by adopting the rule that for defamation case to be accepted by court the plaintiff only needs to prove that the defendant made the concerned statement available to someone else than the plaintiff. It is, however, a defense for corporate bodies to prove privileged right to the information in question.¹¹⁶

Negligence

This element requires for the plaintiff to prove, if not defendant’s intention to publish the defamatory statement, at least negligence on his or her part to stop such statement from being published. This element came about in the case *Barnes v. Clayton House Motel*¹¹⁷, where the defendant, a manager of a motel, wrote a letter and sent in to the plaintiff’s address accusing him of not paying the bill and taking the property of the motel with him. The letter was sent as certified mail with return receipt requested. However, it was picked up by the maid, who brought it to the plaintiff’s wife, who took it upon herself to read it. Afterwards, she introduced it also to the maid and her husband, who brought the case to the court claiming defamation. This general rule was mentioned in the case:

If one sends a libelous statement through the mails, addressed to the person defamed, with the expectation or intention that it will be read by another person as a matter of course, and such other person so reads it, there is a publication; but where the sender is "not reasonably chargeable with knowledge that a third person might 'intercept' and

¹¹⁴ Ibid.

¹¹⁵ *Simpson v. Mars, Inc.*, 929 P.2d 966 (Nev. 1997)

¹¹⁶ Ibid.

¹¹⁷ *Barnes v. Clayton House Motel*, 435 S.W.2d 616 (Tex. 1968)

read the libelous matter before it reached the person allegedly defamed," there is no publication.¹¹⁸

Taking into account the wording of the ruling, it can be concluded that the statement cannot be understood as "published"(therefore the claim is not actionable), if the author or the distributor took all reasonable action to ensure that the statement is only communicated to the addressee, and could not anticipate its availability to a third person.

Requirement of "special damages"

Firstly, exception to the main rule has to be laid out, and this is the case with a special category of defamatory statements that - namely "defamation per se"¹¹⁹ This category includes four types of false allegations that by themselves constitute such great harm to someone's reputation that they are actionable without any evidence of incurring "special damages". The false defamatory statements for which damages are presumed are:

(1) indications that a person was involved in criminal activity; (2) indications that a person had a "loathsome," contagious or infectious disease; (3) indications that a person was unchaste or engaged in sexual misconduct; (4) indications that a person was involved in behavior incompatible with the proper conduct of his business, trade or profession¹²⁰

These four types of allegations generally tend to be accepted in courts as defamatory even without evidence of actual harm done, however, this principle varies from state to state, and therefore different definitions apply as well as different requirements from jurisdiction to jurisdiction. Nevertheless, other statements claimed under defamation require comprehensible proof. In the case *Briggs v. Brown*¹²¹ the court gave its opinion of "special damage" requirement, and it states as following:

If the publication is not privileged and is not actionable per se because the publication as ordinarily understood will not naturally and necessarily cause injury, damages may be recovered upon proper allegations and proofs for such special injury as is the natural and proximate, though not necessary, consequence of the wrongful publication.¹²²

Furthermore, the plaintiff has higher chances of receiving a satisfactory judgement if the injury sustained is of pecuniary¹²³ nature. This principle has evolved through history and is strictly applied today, therefore it is

¹¹⁸ Ibid., para 6

¹¹⁹ a Latin phrase meaning "by itself" or "in itself"

¹²⁰ Findlaw. (2018). *What Is Defamation Per Se?*. [online] Available at: <https://injury.findlaw.com/torts-and-personal-injuries/what-is-defamation-per-se-.html>, Accessed 6 May 2018

¹²¹ *Briggs v. Brown*, 55 Fla. 417 (1908)

¹²² *Briggs v. Brown*, 55 Fla. 417 (1908), p. 46 s 325, 330

¹²³ Relating to or consisting of money.

[..] not usually enough for the plaintiff to plead that the publication of the slander has humiliated or embarrassed him, or has been productive of mental anguish, or even that actual sickness has been brought on.¹²⁴

However, the standard for private individuals to provide proof of “special damages” is considerably lower than that of public figures as opportunities for the former ones are not as effective for possible rebuttal against defamatory statements in question. Therefore, the state is interested in providing wider protection to plaintiffs, who appear in private sphere only, in this regard.¹²⁵

Public figures¹²⁶

The main difference in protection of public and private individuals, in regards to freedom of expression and defamation, is the conflict with the right of a public person, rather than that of a private one, to be secure from injury to reputation resulting from the publication of defamatory material.¹²⁷ It is only logical in a democratic society to be focusing on the public’s right to be informed, to know and to discuss issues of public interest, so people involved in political affairs and administration of the state have to satisfy few extra elements.

Additional requirement regarding proof of “special damages”

This element clarifies the fact that for public figures in the US it is close to impossible to collect damages for anything else than tangible financial losses that have occurred as a result of the published defamatory statement in question. In the famous case *Falwell v. Flynt*¹²⁸ the Court ruled that public figures, who sue for defamation, cannot collect damages for emotional distress.¹²⁹ This principle does not apply for private persons as it is possible to collect damages for emotional harm suffered.

Actual Malice

This is another additional element for which one has to provide proof in order to bring a claim for defamation. As mentioned above, this is an element only applicable to public figures. “Actual malice” includes such actions as publishing statement that one knew not to be true at the time of publishing or having a reckless disregard whether the statement was in fact true.

¹²⁴ McCormick, C. (1934). The Measures of Damages of Defamation. *North Carolina Law Review*, [online] 12(2), p.124. Available at: <http://scholarship.law.unc.edu/nclr/vol12/iss2/3>, Accessed 6 May 2018

¹²⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), page 418 U. S. 323

¹²⁶ A public figure is a person of great public interest or fame, such as a politician, celebrity, or sports hero, however, the determination is made on a case-by-case basis, taking the particular facts into account. (<https://definitions.uslegal.com/p/public-figure/>)

¹²⁷ Sidler, B. (1966). Defamation of Public Officials. *Chicago-ent Law Review*, 43(1), pp.97, para 1, [online] Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol43/iss1/14>, Accessed 6 May 2018.

¹²⁸ *Falwell v. Flynt*, 797 F.2d 1270 (1986)

¹²⁹ *Ibid.*

In the case *St. Amant v. Thompson*¹³⁰ the Court affirmed the precedent established in *New York Times Co. v. Sullivan*¹³¹ in cases of public interest that

[..]reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.¹³²

Conclusion

It can be drawn from this sub-chapter that a private individual can bring charges against a personal responsible for the defamatory action if he/she satisfies four conditions: (1) statement has to be false; (2) statement must be published; (3) the personal responsible for the defamatory statement has to be proven to be negligent; and (4) “special damages” incurred by the defamatory statement has to be proven. However, a public figure must also satisfy the additional requirement of (5) proof of actual malice as well as for the “special damage” requirement considerably more proof of pecuniary loss has to be provided

4.4.3 Conclusion

The civil approach to defamation and the different elements thereof of the three nations considered in this chapter are sufficient for determining an efficient way of dealing with conflicting rights that have to be addressed in the respective cases. Primarily, from the information above it can be concluded that the jurisdiction, where it is the most difficult to bring a case, is the United States. This comes as a result of the fact that in the US mainly the plaintiff has to bear the burden of proof and provide most evidence of the “defamation” occurring as oppose to both European jurisdictions, where generally the defendant is required to provide defense against such offense taking place. Nevertheless, the UK does place it upon the plaintiff, who is a private person, to prove that the comments, claimed to be defamatory, were published, therefore available to a third person, and caused serious harm or are likely to cause serious harm, and furthermore, if the action is brought by a commercial body, the plaintiff has to provide evidence of serious financial loss caused by the statement.

However, in Ireland the plaintiff only needs to prove that the published statement tends to injure the reputation of a person from the perspective of a reasonable person. As to available defenses, both, UK and Ireland, equip the defendant with the “defense of the truth”, “honest opinion based on a reasonable assumption”, “absolute and qualified privilege”, and “fair and reasonable publication on a matter of public interest”. Furthermore, Ireland gives four following additional defenses - “offer to make amends”, “apology”, “consent” and “defense of innocent publication”. In

¹³⁰ *St. Amant v. Thompson*, 390 U.S. 727 (1968)

¹³¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

¹³² *St. Amant v. Thompson*, 390 U.S. 727 (1968), page 390 U. S. 731

regards to United States, firstly, it has to be mentioned that potentially “defamatory statement” is not protected under the scope of freedom of speech as afforded by the First Amendment if it constitutes a part of form of expression directed to incite imminent danger and is likely to produce such danger, words constituting the potentially “defamatory statement” are inflicting injury or tend to incite an immediate breach of the peace as well as if the respective statement is considered to fall under the prohibition of obscenity. Additionally, if the potentially “defamatory statement” is a part of commercial speech, the scope of protection will also be considerably smaller.

Secondly, the US courts, instead of giving a list of defenses as legal armor to defendant, have developed a substantial amount of case law establishing requirements for the plaintiff, which comes to be longer in case of public figures. Private persons, who claim to be victims of defamation, have to provide evidence that satisfies these four pre-conditions only in order for a case to be actionable within US courts: (1) concerned statement has to be false; (2) concerned statement must be ‘published’ to a third party, who cannot also be the person who is being defamed; (3) if the concerned statement is ‘of public concern’ the person who has published it must also be guilty of negligence regarding the publication; (4) the person about whom the defamatory statement is made must be ‘damaged, with exception in cases, where the statement happens to be “defamatory per se”. However, as already discussed, extra pre-condition of (5) proof of actual malice has to be fulfilled if a public figure wants to bring a case in court. Such situation has resulted from the rationally held belief that presumes that the position of a private person falling victim of defamation is inherently worse than that of a public one.

Combination of the approaches taken by all the three countries above by choosing the most appropriate method in addressing each of the requirements and elements related to defamation, as well as picking the best possible legal tools for defense against wrongful allegations and against illegitimate limitations on freedom of expression, while at the same time taking into account the ECtHR case law, will serve as the material basis for the draft proposal of harmonized approach to defamation in the EU, which will be laid out in the concluding part of the Thesis.

However, the next chapter will propose the possibility of implementation of self-regulatory bodies that are concerned with the enforcement of “responsible journalism”, i.e. rules composing journalistic code of ethics, for further prevention of cases having to do with illegitimate defamation and other violations. Such bodies could serve the purpose of unburdening the courts from cases concerning journalistic rights and obligations, as well as, thanks to field-specific specialists, they could manage to do so without the threats of limiting press freedom that could arise from outside regulation.

5. RESPONSIBLE JOURNALISM

5.1 Reynold's defence

Almost 20 years ago in the historic decision of *Reynolds v Times Newspapers Ltd*¹³³, the judges knew the significance of striking an appropriate balance between the two possibly-conflicting rights – the right of freedom of expression and the right to reputation. The most important contribution concerning the judgement belongs to the Lord Nicholls, who formulated ten considerations of “responsible journalism”, observance of which could lead to a release from civil liability for the false defamatory statement published.

This defense crystallized into a two-part test. A newspaper or broadcaster has to show (1) that the article in question concerns a matter of public interest; and (2) that the newspaper engaged in responsible journalism in creating and distributing the article.¹³⁴

This is a non-exhaustive list of those considerations: (1) the seriousness of the allegation; (2) the nature of the information, and the extent to which the subject-matter is a matter of public concern; (3) the source of the information; (4) the steps taken to verify the information; (5) the status of the information; (6) the urgency of the matter at hand; (7) whether comment was sought from the plaintiff; (8) whether the article contained the gist of the plaintiff's side of the story; (9) the tone of the article; (10) the circumstances of the publication, including the timing.¹³⁵

All ten of these factors provide considerable assistance when deciding a case concerning defamation; however, such requirements are nothing new to the journalists themselves as all of these are covered by the code of ethics for the members of the profession. Undoubtedly, it is important to safe-guard the right to free speech, but it is just as important to make sure that the information society receives is of high quality and credibility, especially nowadays, when the diversity and amount of it have increased tenfold. This well-known decision provided for the law to understand and evaluate journalistic practices in regards to defamation. However, the next sub-chapter will argue that courts are not always the most efficient bodies determining whether the particular defamatory statement has been published by taking into account “responsible journalism” practices and that different bodies have to be established/developed for this purpose.

5.2 The possibility of self-regulatory bodies as first instance in defamation cases

As with most professions, journalists are also taught and expected to abide by a professional code of ethics. It is no surprise that the “rules” in this code already covers

¹³³ *Reynolds v Times Newspapers Ltd*, 28 October 1999

¹³⁴ Matthew A. Woodley, Public Interest Responsible Journalism, 32 *LawNow* [51] (2008), p. 2, [online] Available at: HeinOnline, Accessed May 14, 2018

¹³⁵ *Reynolds v Times Newspapers Ltd*, 28 October 1999 (Conclusions)

all ten of the aforementioned considerations. The idea of self-regulatory¹³⁶ institutions for journalists is nothing new as their main social justification for existence consists in controlling the public and de facto powers for the benefit of society.¹³⁷ The purpose of such self-regulatory bodies is the exercise of social responsibility to ensure that neither journalists nor their employers violate the society's right to information.¹³⁸

Society of Professional Journalists¹³⁹ has outlined four general parts of its code of ethics applicable in this field. First confirms the necessity to be accurate and fair, as well as requires honesty and courage in gathering, reporting and interpreting information. The second part highlights the importance of minimizing harm, which is of highest relevance in regards to the subject of this paper. It claims that ethical journalism needs to treat sources, subjects, colleagues and members of the public as human beings deserving respect, and that journalists should weigh out the need for information of the society against the potential harm and discomfort of individuals. Furthermore, it points out that the "pursuit of the news is not a license for arrogance or undue intrusiveness"¹⁴⁰ for journalists. This part of the code also provides for respect for the reasonable assumption that private people should have greater ability to control information about themselves than public figure and those, who seek power, influence or attention. Afterwards the code goes into the obligation of journalists to serve primarily to the public, and this demands independence of representatives of the profession as well as institutions employing such professionals. The last part concerns accountability and transparency in the field. Such behavior means assuming responsibility for one's work and explaining one's decisions to the public. This part encourages the specialists to develop a dialogue with the public about journalistic practices, coverage and news content thereof. Such activity would be essential if the press and media have interest in educating the public of their right to receive quality information and the necessity of critical analysis of any such information. It also further asks for acknowledgment of mistakes and prompt and prominent correction of them, while explaining such corrections and clarifications with carefulness and clarity to those seeking them. Such obligation is also directly

¹³⁶ A self-regulatory organization (SRO) is a non-governmental organization that has the power to create and enforce industry regulations and standards. [online] Available at: <https://www.investopedia.com/terms/s/sro.asp>, Accessed May 14, 2018

¹³⁷ Campbell, Angela J., Self-Regulation and the Media (June 15, 1999). Federal Communications Law Journal, Vol. 51, No. 3, 1999. [online], Available at SSRN: <https://ssrn.com/abstract=184279/> González-Esteban, J.-L., García-Avilés, J.-A., Karmasin, M. and Kaltenbrunner, A. (2011): "Self-regulation and the new challenges in journalism: Comparative study across European countries", Accessed May 14, 2018

¹³⁸ Campbell, Angela J., Self-Regulation and the Media (June 15, 1999). Federal Communications Law Journal, Vol. 51, No. 3, 1999. [online] Available at SSRN: <https://ssrn.com/abstract=184279> Accessed May 14, 2018

¹³⁹ The Society of Professional Journalists is the US most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behaviour.

¹⁴⁰ SPJ Code of Ethics [online] Available at: <https://www.spj.org/ethicscode.asp>, Accessed May 14, 2018

related to defamation instances by press, where the damage can be undone by means of accountability and awareness of the need to make right the committed errors.¹⁴¹

A self-regulatory body in the field of journalism, which is capable of enforcing such virtues and behavior as those constituting above-mentioned professional code of ethics, would be of great help to the judicial system as it would provide alternative path to determine whether defamation has been committed in any particular instance, whether the concerned statement has been published out of “responsible journalism” practices as well as in seeking damages for defamatory publications. This alternative procedure could be less expensive and time-consuming, but it would also allow the applicant to get necessary reparations without the involvement of the judicial system.

[...] the fact that a profession wants to regulate itself means, positively, that it is a living and very dynamic body”, because “self-regulation has nothing to do with self-censorship”.¹⁴²

However, if a decision by the self-regulatory body is dissatisfactory, one could turn to courts to seek an appropriate remedy. In this case, the court needs not to start the considerations of the involved factors from a scratch; it could just correct the conclusions of the respective body if necessary.

Furthermore, the High Level Group on Media Freedom and Pluralism produced a report titled “*A free and pluralistic media to sustain European democracy*”, where it argued that the desired preference of media is understandably some system of self-regulation rather than control from outside institutions. This could be based on the potential threat of censorship and unnecessary restrictions on freedom of expression. However, it also laid out the unpleasant reality that was reflected in the Leveson report (GB)¹⁴³, which offered evidence of multiple ways the concept of “self-regulation” has been interpreted as “no regulation”, and has led to abuses of privileges offered to journalists, breach of ethics standards and even acts prohibited in criminal provisions of the state. Such findings are alarming and prove that pro-journalistic bias are as disconcerting as biases created out of political conviction or financial interests. The report also concluded that there are no universally-fitting institutional setup at the moment, which would help greatly with the issue at hand, as the results produced by such self-regulatory bodies, even dealing with the same complaint, would be rich in diversity from state to state due to local culture, development and interpretation of ethical norms.¹⁴⁴

¹⁴¹ Ibid.

¹⁴² González-Esteban, J.L., García-Avilés, Jose, Karmasin, Matthias, Kaltenbrunner, Andy (2011), p 3

¹⁴³ The Right Honourable Lord Justice Leveson, (November 2012), AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS, [online], Available at: <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>, Accessed May 14, 2018

¹⁴⁴ The High Level Group on Media Freedom and Pluralism produced a report titled “A free and pluralistic media to sustain European democracy”, January 2013, [online] Available at: <https://ec.europa.eu/digital-single-market/en/high-level-group-media-freedom-and-pluralism>, Accessed May 14, 2018

5.3 Conclusion

The judicial system has taken some interest in the protection of what can be called “responsible journalism” on matters of public interest and has assumed partial role in the development of this practice. Already in the end of the last century the right to exercise “responsible journalism” was defended by British courts, where 10 factors for consideration (Reynold’s defence) were drafted in order to provide for similar cases in the future. However, it can be argued that courts are not the best fit for this important task and institutions able to self-enforce the journalistic code of ethics could achieve these ends better. Furthermore, such self-regulatory bodies could provide an alternative mechanism to first instance courts, and may make the process cheaper and faster, which is important in situations, where reputation is at stake. Nevertheless, no one-fits-all solution in the EU is possible due to tradition and cultural differences in member states, however 28 able institutions would relieve the courts if additional burden and may ensure more efficient tackling of the problem. However, now the thesis will turn to the concluding part, which will address the research statement posed in the beginning as well as propose the minimum necessary elements regarding defamation legislation that should exist in the European Union jurisdictions.

6. CONCLUSION

The concluding chapter will start with giving a brief overview of the findings related to the first part of the research statement presented in the introductory chapter, and then the second part will offer an outline, where necessary elements of civil defamation-specific legislation will be laid out.

The research statement: The existence and potential abuse of criminal laws addressing defamation limits and endangers the right to freedom of expression, which is necessary in a democratic society, and the possibility of civil laws tackling defamation.

As to the first part of the statement, which concerns the existence of criminal provisions penalizing defamation and what such approach means for democracy in the EU, several factors should be mentioned. Firstly, the finding that only two countries out of EU28 have repealed criminal defamation provisions and have created comprehensive legislation, which is capable of tackling defamation with the help of the civil law, is an alarming tendency that requires the greatest attention. Such situation neither complies with the internationally recognized standards on freedom of expression, nor does it comply with the binding precedents of the European Court of Human Rights. The respective Court has ruled over and over that criminal penalties are not applicable as a legitimate restriction on freedom of expression, as they are disproportionately restrictive and does not meet the desired ends. Furthermore, it should be mentioned that the goal of defamation laws should be the action of balancing out the right to freedom of expression, on the one hand, and the right to reputation, which falls under the right to private life, on the other hand. Both of these rights are protected under the European Convention of Human Rights, therefore,

given an equal importance that must be respected and enforced by the legislators and the judiciary in the relevant jurisdictions. Besides, it can be argued that without adequate protection of the right to freedom of expression, many other rights cannot be utilized. The basic ability of the society to receive information is closely tied to the freedom of the press, which is the continuation of the respective individual's right to freedom of expression. The right of the public to obtain precise, credible and quality information on the matters of public interest shall be taken into account when designing any form of legislation that would potentially restrictive the free flow of information and ideas. Moreover, the thesis referred to an idea that the more democratic a society grows to be, the less need for criminal defamation laws there should be. From this it could be drawn that a reverse situation should raise an alarm in the European community. By this reasoning, the author holds the first part of the research statement to be true - the existence and potential abuse of criminal laws addressing defamation does limit and endanger the right to freedom of expression, which is necessary in a democratic society.

After addressing the first issue posed in the research statement, it is now time to turn to the second one and analyze the ability to tackle defamation with the help of the civil law. In essence, each member of society has an interest in protecting and defending his private life, and for the reasons of this thesis, particularly the right to reputation. Reputation can take time to be built, but it can be ruined by very few words, therefore, an effective protection mechanism to deal with such situations has to be created. To find out examples of such mechanism, this thesis looked at two strong civil defamation legislations namely, the United Kingdom Defamation Act 2013 and Ireland Defamation Act 2009. Additionally, for a point of reference outside the EU, the United States was chosen as it has developed a powerful case law in this regard, which offers considerably wider protection to freedom of expression than its European counterparts. To answer the second half of the research statement, the latter part of the conclusion will propose elements, which have been determined to be essential in order to address defamation. First off, minimum requirements, which have been deemed to be necessary for the plaintiff to bring the case in court, will be looked at.

Requirements for the plaintiff to bring a case in court:

For the purpose of upholding one of the most basic principles of democracy, which is the right to receive truthful and precise information, as a general rule (1) the concerned potentially "defamatory statement" has to be false in order for it to be considered in the courtroom. Additionally, if such statement reflects opinion rather than fact, it has to be based on wrong or unreasonable factual basis, or one that a reasonable person would not believe to be truth. Such element emphasizes the principle that statement claiming false and unverified information shall not be protected under law. Moreover, as to this requirement in relation with private persons exceptions can apply based on circumstances and at discretion of the court. Some exceptions would include cases, where the plaintiff has suffered serious harm as a result of personal fact being published to a wider public, and where the availability of this information is of less importance than the violation of the right to a private life. These exceptions rest upon the rulings of the European Court of Human Rights, which

have stressed the different protection levels regarding private and public figures.

As the next requirement, (2) the concerned statement has to be published, therefore available to a third party. Although relatively straightforward, this element encompasses the principle that even the most offensive remark is not sufficient to claim defamation, if it has been intended to be only seen or heard by the addressee. This requirement calls for evidence that the potentially “defamatory statement” has been published as a result from either intention or negligence, implying the possibility of further harm occurring to the reputation.

Thirdly, (3) proof of serious harm to reputation that has resulted from the concerned statement or is likely to result therefrom has to be provided. Furthermore, to receive pecuniary damages, a sum based on reasonable and clear calculations with factual basis has to be presented; enforcing some limitations on possible damages that can be awarded and reaffirming that disproportionate restriction are a threat to freedom of press. Moreover, in case of commercial body suing for defamation, the serious harm must be complemented by proof of financial losses resulting from the concerned statement. Such element acknowledges the non-personal factor of a claim of this kind, and asserts that commercial bodies cannot receive damages for some types of harm such as injury to feelings, or moral detriment. In regards to public figures, the damages, especially, if the concerned statement is of public matter must be tangible and clear, speculations of the possibility of partially directly or indirectly related harm that may take place shall not be accepted by the court.

Fourthly, the plaintiff has to prove that (4) the statement has affected him directly. This has been included for the purpose of maintaining the precedence set by the European Court of Human Rights, which has stated that the right to reputation is of non-transferable character. Lastly, (5) the defendant has to be the author of the concerned statement, or the person under whose supervision the publishing of such statement took place. Such requirement has been deemed necessary, because cases, where the defendant has not been directly involved in publishing of the statement or has not committed negligence in relation to the respective publishing, should not be of burden to the judicial system. Now the thesis will turn to the minimum number of defenses that shall be provided for the defendant.

Minimum defense mechanisms for the defendant:

Firstly, the defendant (1) shall be able to claim the defense of qualified and absolute privilege, which have been afforded by all three of the analyzed jurisdictions. This defense covers situations, where the publication has occurred due to moral, social or legal duty or where the publication is made in relation to parliamentary, judicial, military occasion or where the expression is absolutely protected by the state. Necessity for such defense can be explained by the need for certain types of information to be fully protected under law.

Furthermore, it is a defense for the defendant to argue that (2) the concerned statement was of public interest, and that it was published by taking into account “responsible

journalism” practices. This defense has developed as a result of the judicial system acknowledging the significance of the need for accountability in democracy. Especially important is the principle of holding those in power responsible for their behavior and actions in public as well in private context. Thesis supports the idea that acceptable criticism in regards to public persons must be considerably higher than that regarding private individuals as their actions are much closely tied with matters of public interest. Direct as well as indirect public offices must be open to scrutiny as in their hands rest the powers of the state. However, the press also has a duty to comply with the standards of “responsible journalism” and ensure that the information the society receives is of high quality and credibility. No one has an interest in protecting defamatory form of expression, which does not contribute its share to the overall intelligence of the public. By stringently enforcing the journalistic code of ethics, the levels of qualitative journalism would increase, and the illegitimate defamation instances could be better avoided.

Thirdly, sufficient (3) proof may be presented by the defendant of the prior consent of the plaintiff to the publication of the concerned statement. Fourthly, it is a defense for the defendant to provide evidence that he has published an apology in regards to the concerned statement or that he has offered to do so. Such defense may lead to mitigation of damages. The defense of apology is useful if some error has been committed by the defendant and he does feel partially responsible, and is willing to take some blame for the statement, or for the consequences occurring thereof. It has to be noted that the defense of “apology” does not constitute an express or implied admission of liability by the defendant, and is not relevant to the determination of liability thereof.

All in all, the second part of the research statement has been proven to be attainable and there is a possibility of sufficient and efficient tackling of defamation with the help of the civil law. Combination of elements found in the three respective jurisdictions has led to an overview of necessary requirements as well as defenses presented above in the conclusion. Moreover, the thesis also raises the idea of introducing specialized self-regulatory journalistic institutions able to monitor the rights and duties of the press and serve as potential first instance in defamation cases, which would further lead to relieving courts of considerable amount of burden.

7. BIBLIOGRAPHY

Primary Sources

European case law:

1. Armoniene v. Lithuania, no. 36919/02, 25 November 2008
2. Belpietro v Italy, no. 43612/10, 24 September 2013
3. Chauvy & Ors v France, no. 64915/01, 29 June 2004
4. Dzhugashvili v Russia, no. 41123/10, 9 December 2014
5. Fressoz and Roire v France, no. 29183/95, 26 May 1997
6. Handyside v UK, no. 5493/72, 7 December 1976
7. Nikowitz & Verlagsgruppe News v Austria, no. 5266/03, 22 February 2007
8. Petrenco v Moldova, no. 20928/05, 30 March 2010
9. Plon v. France, no. 56148/00, 18 May 2004
10. Sciacca v Italy, no. 50774/99, 11 January 2005
11. Von Hannover v Germany, (no. 2), nos. 40660/08 and 60641/08, 7 February 2012

The US case law:

12. Barnes v. Clayton House Motel, 435 S.W.2d 616 (Tex. 1968)
13. Briggs v. Brown, 55 Fla. 417 (1908)
14. Crown v. John Peter Zenger, 1735
15. Falwell v. Flynt, 797 F.2d 1270 (1986)
16. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), page 418 U. S. 323
17. New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
18. Reynolds v Times Newspapers Ltd, 28 October 1999
19. Simpson v. Mars, Inc., 929 P.2d 966 (Nev. 1997)
20. St. Amant v. Thompson, 390 U.S. 727 (1968)

Law acts:

21. Criminal Code of the Republic Poland (1997, amended 2016)
22. Criminal Code of the Slovak Republic (2005)
23. Defamation Act 2013 (IE)
24. Defamation Act 2013 (UK)
25. European Convention of Human Rights (1950)
26. The Portuguese Penal Code (2006)
27. U.S. Const. amend. I (1791)

Secondary Sources

Journal Articles:

28. Aglionby, J. (2018). UK Defamation Act aims to end trivial claims and libel tourism. [online] Available at: <https://www.ft.com/content/afe77e0c-7204-11e3-bff7-00144feabdc0>, Accessed 5 May 2018
29. Anstey , Benedict John, Criminal defamation and reputation as ‘honour’: a cross-jurisdictional perspective, *Journal of Media Law*, 2017 vol. 9, No. 1, 132–153, [online], available at: <https://www.tandfonline.com/doi/abs/10.1080/17577632.2017.1311467>, Accessed May 14, 2018
30. Campbell, Angela J., Self-Regulation and the Media (June 15, 1999). *Federal Communications Law Journal*, Vol. 51, No. 3, 1999. [online] Available at SSRN: <https://ssrn.com/abstract=184279> Accessed May 14, 2018
31. Francesca Klug, Freedom of Expression Must Include the License to Offend, 1 *Religion & Hum. Rts.* (2006), [online] Available at: HeinOnline, Accessed May 14, 2018
32. <https://www.investopedia.com/terms/s/sro.asp>, Accessed May 14, 2018
33. Joaquin P. Roces, Democracy and Press Freedom, 2 *Phil. Int'l L.J.* (1963), [online], Available at: HeinOnline, Accessed May 14, 2018
34. Matthew A. Woodley, Public Interest Responsible Journalism, 32 *LawNow* [51] (2008), p. 2, [online] Available at: HeinOnline, Accessed May 14, 2018
35. McCormick, C. (1934). The Measures of Damages of Defamation. *North Carolina Law Review*, [online] 12(2), p.124. Available at: <http://scholarship.law.unc.edu/nclr/vol12/iss2/3>, Accessed 6 May 2018
36. Post, Robert C., (1986), "The Social Foundations of Defamation Law: Reputation and the Constitution" Faculty Scholarship Series. Paper 217, [online] available at: http://digitalcommons.law.yale.edu/fss_papers/217/, Accessed May 14, 2018
37. Schmidt Mogens, (2010), Limits to the Restrictions to Freedom of Expression - Criteria and Application, 5 *Religion & Hum. Rts.* p 148, [online], Available at: HeinOnline, Accessed May 14, 2018
38. Sidler, B. (1966). Defamation of Public Officials. *Chicago-ent Law Review*, 43(1), pp.97, para 1, [online] Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol43/iss1/14>, Accessed 6 May 2018.

Reports:

39. International Press Institute (IPI) (2015). Out of Balance: Defamation Law in the European Union. A comparative overview for journalists, civil society and policymakers. Vienna, Austria. [online] available at: <https://ec.europa.eu/digital-single-market/en/news/out-balance-defamation-law-european-union>, Accessed at: May 14, 2018
40. The High Level Group on Media Freedom and Pluralism produced a report titled “A free and pluralistic media to sustain European democracy”, January 2013, [online] Available at: <https://ec.europa.eu/digital-single-market/en/high-level-group-media-freedom-and-pluralism>, Accessed May 14, 2018
41. The Right Honourable Lord Justice Leveson , (November 2012), AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS, [online], Available at: <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>, Accessed May 14, 2018

Books:

42. Blackstone, William, Commentaries On the Laws of England. Boston: Beacon Press, 1962. p. 151, [online], Available at: <https://archive.org/details/commentariesonla04blac>, Accessed May 14, 2018
43. Zechariah Chafee, Jr. Free Speech in the United States (1941), [online] Available at: <http://www.hup.harvard.edu/catalog.php?isbn=9780674493728>, Accessed May 14, 2018

Website Articles:

44. Chiriac, Marian (2016), Law Against Defamation Splits Romanian Media, [online] Available at: www.balkaninsight.com/en/article/romania-at-odds-over-controversial-law-02-10-2016, Accessed at: May 17, 2018
45. Crown v. John Peter Zenger, 1735, HISTORICAL SOCIETY of the NEW YORK COURTS, para 10, [online] Available at: <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>, Accessed 6 May 2018
46. Expert: Portuguese Libel Laws reflect ‘authoritarian Concept of Power’. Report. “Notes from the Field: EU Defamation Laws and Journalism”, September 5, 2014, [online] Available at: <https://ipi.media/portuguese-defamation-laws-still-reflect-authoritarian-concept-of-power-expert-says/>, Accessed May 7, 2018.
47. FindLaw. (2018). What Is Defamation Per Se?. [online] Available at: <https://injury.findlaw.com/torts-and-personal-injuries/what-is-defamation-per-se-.html>, Accessed 6 May 2018

48. Gill, Kathy, (2018) What is the Fourth Estate?, [online] Available at: <https://www.thoughtco.com/what-is-the-fourth-estate-3368058>, Accessed May 17, 2018
49. Goguen, David, and J.D. "What Is Defamation of Character?", [online], Available at: <http://www.alllaw.com/articles/nolo/civil-litigation/defamation-character.html>, Accessed at: May 14, 2018
50. International Press Institute, (2015). Italian journalist given prison sentence for defamation. [online] Available at: <http://legaldb.freemedia.at/2015/03/05/italian-journalist-given-prison-sentence-for-defamation/>, Accessed at: 6 May 2018
51. Lawfirms.com. (2018). Elements Required for Defamation. [online] Available at: <http://www.lawfirms.com/resources/personal-injury/libel-and-slander/elements-required-defamation.htm>, Accessed 6 May 2018.
52. LII / Legal Information Institute. (2018). First Amendment. [online] Available at: https://www.law.cornell.edu/wex/first_amendment, Accessed 6 May 2018
53. What is the privilege defence to defamation?, [online] Available at: <http://www.rotlaw.com/legal-library/what-is-the-privilege-defense-to-defamation/>, Accessed May 14, 2018

Others:

54. Conservative and Liberal Democrat coalition government of the UK (2018). Defamation laws take effect. [online] Available at: <https://www.gov.uk/government/news/defamation-laws-take-effect>, Accessed 6 May 2018
55. SPJ Code of Ethics [online] Available at: <https://www.spj.org/ethicscode.asp>, Accessed May 14, 2018
56. The government of the UK (2018). 2013 c. 26, Explanatory Notes, Commentary on Section 1. [online] Available at: <http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/1>, Accessed 6 May 2018]