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DECRIMINALIZATION PROCESS OF DEFAMATION: ESCAPING FROM THE LABYRINTH OF CONFLICTING LAWS ON COMPARATIVE ANALYSIS

Abstract

Defamation law is one of the contemporary issues affecting the protection and maintenance of freedom of the press. The laws regulating defamation foster the free expression of thoughts, ideas, opinions, attitudes or emotions and, consequently, take a guarantor role for the development of human beings in a democratic society. Thus, such laws not only decriminalize defamation but also shield the fundamental principles and values. However, taking highly democratic states as role models, most developing countries do not consider the adoption of decriminalization laws on defamation. Meanwhile, common law countries have established specific defamation law practices to protect free speech and the rights of media workers from the superiority of private rights. The Council of Europe also recommended State Parties to take legal actions for decriminalizing defamation. The French and German legal systems, which are top continental law countries in the region, made an effort for the adaptation to that recommendation.

However, Azerbaijan, one of the Member States of the Council of Europe, still contains criminal sanctions prohibiting the dissemination of defamatory statements. Disproportionate punishments and even disproportionate sanctions in civil cases caused European Court of Human Rights to deliberate multiple decisions against Azerbaijan in violation of Article 10. For analytic purposes, two chosen judgments of European Court in violation of freedom of expression are discussed. In the end, recommendations are highlighted for the elimination of those constitutional problems and possible legal solutions are advised.

Annotasiya

Diffamasiya hüququ mətbuat azadlığının qorunması və təmin edilməsi ilə bağlı aktual məsələlərdən biridir. Diffamasiyanı tənzimləyən qanunlar düşüncələrin, ideyaların, rəylərin, münasibətin və ya emosiyaların sərbəst ifadə edilməsinə şərait yaradır və nəticədə, demokratik cəmiyyətdə insanların inkişafını təmin edir. Beləliklə, bu qanunlar təkcə diffamasiyanı dekriminallaşdırmaqla qalmır, həm də əsas prinsip və dəyərləri qoruma altına alır. Buna baxmayaraq, inkişaf etməkdə olan ölkələrin əksəriyyəti qabaqcıl demokratik dövlətləri örnək götürərək diffamasiyanı dekriminallaşdıran qanunları qəbul etməyi nəzərdən keçirmir. Bu əsnada ümumi hüquq sistemi ölkələri söz azadlığı və media işçilərinin hüquqlarını şəxsi hüquqların dominantlığından qorumaq üçün xüsusi diffamasiya hüquq təcrübəsi formalaşdırmışdır. Avropa Şurası da iştirakçı dövlətlərə diffamasiyanın dekriminallaşdırılması üçün hüquqi tədbirlər görülməsini tövsiyə etmişdir. Regionun əsas kontinental hüquq dövlətləri kimi tanınan Fransa və Almaniyanın hüquq sistemləri qeyd olunan tövsiyəyə uyğunlaşmaq üçün bir sıra cəhdlər göstərmişdir.

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Avropa Şurasına üzv dövlətlərdən biri olan Azərbaycanda diffamasiya xarakterli bəyanatların yayılmasını qadağan edən cinayət sanksiyaları hələ də mövcuddur. Qeyri-mütənasib cəza təyinləri və hətta mülki işlər üzrə qeyri-mütənasib cərimə sanksiyaları Konvensiyanın 10-cu maddəsinin pozulması ilə əlaqədar Avropa İnsan Hüquqları Məhkəməsi tərəfindən Azərbaycana qarşı çoxsaylı qərarların çıxarılmasına səbəb olmuşdur. Analitik məqsədlər üçün ifadə azadlığının pozulması ilə bağlı Avropa Məhkəməsinin iki seçilmiş qərarı müzakirə edilir. Sonda məqalə boyu sadalanan konstitusional problemlərin aradan qaldırılması ilə bağlı tövsiyələr vurğulanaraq müvafiq hüquqi həll yolları təklif olunur.

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Introduction

The freedom of the press has an important role in the protection of democracy. The free flow and various types and forms of ideas allow people to seek truth, deepen their knowledge, and participate in decision-making processes. Without freedom of the press, it is not possible to obtain accurate and impartial information about the actions or policies of governments.

The media has to provide truthful news, and accurate information, analyze problems, and commentary to the public. This information is an essential tool for the development of society and for finding solutions to problems. Without freedom of the press, a large segment of society cannot access information, which hinders the right to social development.

The duty of the press to convey information and opinions, which are the subject of debates in political and public areas, is completed with the right of the public to receive these information and opinions. According to the view emphasized by the European Court of Human Rights, only in this way does the press fulfil its duty of being the "public watchdog", which is vital for democracy.[1]

Today, freedom of the press is also one of the fundamental freedoms that is often subject to restrictions. Recently, international human rights organizations have stepped forward to prevent negligence towards the development of the press. In 2021, UNESCO published its Global Report related to the freedom of expression and media development. The global statistics overall indicated that 85% of the world population contemplated a decline in the freedom of the press in their country over the past five years.[2] On June 24, 2022, the UN Special Rapporteur on freedom of opinion and expression, stated in her Report about the significance of the independent press as follows: *"Independent, free, and pluralistic news media is crucial for democracy, accountability, and transparency and should be nurtured by States and the international community as a public good"*.[3] However, in recent years, especially because of the COVID-19 pandemic, the financial support for media outlets has drastically decreased. According to the Global Report, global newspaper circulation declined by 13%, and over one-fifth of the journalists and other media workers have been exposed to salary cuts.

According to the confirmed facts, many countries have adopted bills and regulations and established new legal policies towards the media sector, which put the protection of freedom of the press at stake.[4] Since 2016, 57 laws have been adopted across 44 countries for the application of new standards in the media sector.[5] In general, most of the laws restricted access to certain official documents, as well as the prohibitions on the dissemination of certain materials. Recently, in the time of clash between freedom of expression and other fundamental rights, newly established domestic laws give more weight to the protection of other rights and freedoms than opening the doors for freedom of the press. It should be highlighted that the laws, which distinguished the number of sanctions and punishments that threaten freedom of the press, contained overly unclear language. Therefore, those

[1] *See* Barthold v. Germany, ECHR No. 8734/79, § 58 (1985).
[2] UNESCO Global Report, Journalism Is a Public Good: World Trends in Freedom of Expression and Media Development, 10 (2022). Available at: https://www.unesco.org/en/world-media-trends (last visited Apr. 22, 2023).
[3] Ensuring media freedom and safety of journalists requires urgent concrete action backed by political will: UN expert (2022), https://www.ohchr.org/en/press-releases/2022/06/ensuring-media-freedom-and-safety-journalists-requires-urgent-concrete (last visited Apr. 22, 2023).
[4] *Ibid.*
[5] *Ibid.*

restrictions and prohibitions were substantiated on grounds of privacy rights, the protection of health and morals, and public security.

Considering the mentioned problems, this article is devoted to analyzing defamation – one of the most important press issues in modern society, to reveal the reasons rooted in the problems, to analyze the relationship between press freedom and the right to privacy, to eliminate the ongoing clash between fundamental rights and freedoms, and to present the possible solutions to maintain the effective realization and protection of freedom of the press.

Therefore, in the first paragraph, the actual birth of English defamation law will be discussed broadly. The elements of defamation and the expressions which are controversial and do not fall within the scope of defamatory statements will be enumerated. In the second paragraph, the American Supreme Court methods of dealing with defamation via chosen benchmark cases will be explained. In the third paragraph, the continental legal system will be targeted for comparative purposes, to perceive the existing defamation approach. The final chapter will be devoted to the current situation in Azerbaijani jurisprudence, and selected cases against Azerbaijan ruled by the Strasbourg Court will be contemplated. In the end, some conclusions will be drawn, and recommendations will be outlined about the measures that should be taken as soon as possible. The major goal of the work is to contribute those suggestions to the relevant domestic legal system to prevent uncertainty in the legal texts and to fill the legal spaces in practice.

I. English Law as a Guide in Decriminalization Process of Defamation

The law on defamation is one of the long-debated questions of constitutional law. Defamation in natural law is an ideal repercussion of democracy and a free flow of speech without boundaries in society. In positive law terms, defamation becomes a sort of striking a balance between freedom of expression and individual rights. Even if the positive law on defamation significantly reduces the ideal version of freedom of ideas and opinion, it still makes the defamation legitimate. Whereas today a number of top democratic countries, such as France, Germany, Norway, Sweden, etc. maintain punitive provisions in their criminal laws against defamatory speech.[6] In the United States, at least fifteen states still hold the criminal libel provisions in force despite the decriminalization at the federal level.[7] Meanwhile, according to a principle of unification of laws in international law, developing countries tend

[6] Scott Griffen, Defamation and Insult Laws in the OSCE Region: A Comparative Study, 32-33 (2017). Available at: https://www.osce.org/files/f/documents/b/8/303181.pdf (last visited Aug. 11, 2023).

[7] A. Jay Wagner & Anthony L. Fargo, Criminal Libel in the Land of the First Amendment, Special Report for the International Press Institute, 27 (2015). Available at: http://ipi.media/wp-content/uploads/2017/02/IPI-CriminalLibel-UnitedStates.pdf (last visited Aug. 11, 2023).

to give preference to the legal culture of highly democratic countries and thus, the prior jurisprudences take similar solutions to those of the latter ones whenever a global constitutional issue emerges.[8] However, a chilling effect on fundamental freedom in a clash with another right might result in one of the core rights significantly losing its essence.

From that point of view, the United Kingdom is one of the few countries that succeeded in establishing a special protection mechanism in favour of journalists and other media representatives. In 2013, after receiving the final Royal Assent, the British Parliament collaborated on the case-law experiences in a single Defamation Act.[9] In 2021, a separate Defamation and Malicious Publication Act has been adopted in Scotland as well.[10] In general, those acts, inherently more or less similar to each other, were devoted to the elimination of restrictive provisions on free speech and to the refashioning of existing defamation practices with the requirements of a democratic society.[11] Moreover, being focused on filling in concrete gaps with regard to freedom of the press, the Westminster Act clarifies neither the elements of the act that make it defamatory nor the types of defamation. Whereas the Scottish Act implements a more detailed approach, in terms of the actionability of the defamatory act[12] and thus, it would be useful to briefly discuss the nucleus of the defamatory act before analyzing the justification methods in favour of the defendant side in English law.

Article 1 of the Scottish Defamation Act construes defamation as a statement about a person that causes harm to his/her reputation (that is if it tends to lower the person's reputation in the estimation of ordinary persons).[13] As can be seen from the provision, the definition of defamation indirectly establishes the rights and obligations of parties. Thus, it is a fundamental right to defend people against adverse statements or any other type of communication that is made and pervaded about them (plaintiff-side). On the other hand, people have to take responsibility for information that could accidentally or deliberately have a negative impact on a third party's reputation (defendant side). The first positive side of the 2013 Act is that it

[8] R.H.Graveson, *The International Unification of Law*, 16 The American Journal of Comparative Law 4, 6 (1968).
[9] Defamation Act 2013. Available at: https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted (last visited Aug. 11, 2023).
[10] Defamation and Malicious Publication (Scotland) Act 2021. Available at: https://www.legislation.gov.uk/asp/2021/10/contents (last visited Aug. 31, 2023).
[11] Alastair Mullis & Andrew Scott, *Tilting at Windmills: The Defamation Act 2013*, 77 The Modern Law Review 87, 87 (2014). Available at: https://www.jstor.org/stable/pdf/24029690.pdf?refreqid=excelsior%3Adc411cd852699ed76bfad32184d6641b&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=&initiator=&acceptTC=1 (last visited Aug. 11, 2023).
[12] *Supra* note 10, art.1.
[13] *Id*., art. 1 (4) (a).

imposes "serious harm"[14] criteria for the act to be considered defamatory. To put it with other words, a statement will not be as defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the plaintiff.[15]

The defamatory statements could prejudice the reputation of the plaintiff in various forms. Inherently, there are also specific merits of the defamatory content that could be sued by the plaintiff. A plaintiff is entitled to bring a legal suit for two types of defamatory speech: slander is explained as a form of spoken defamation, and libel is attributed as a written or permanently documented form of defamation.[16] Meanwhile, in the contemporary world, the global integration of Internet communication into the different spheres of society has instigated the classification process of defamation law. Expression of opinions and ideas on Facebook, X, or Instagram happens in a more accelerated way, and those social apps supplement the information to people within seconds without being found in the place of the actual event. Hence, the emergence of social media accounts and other electronic media outlets helped to distinguish libel from slander much more clearly.

The qualification of the committed act, either as libel or as slander, varies depending on the level of public reach, the pervasion speed, and the characteristics of permanency. Firstly, the libel requires a collection of evidentiary documents, while the slander is actionable on its own and the relevant loss and harm sustained can be concluded or assumed from that actual event.[17] Another factor that lessens the slander in comparison with the libel is the episodic character of the former, however, for the action to be considered libel, there must be tangible proof of evidence.[18] To put it in other words, any defamatory speech made spontaneously during the discussion can potentially qualify as slander and is ruled within civil law cases. Thus, the vast majority of the defamatory conduct produced within social media or internet media outlets would possibly be considered libel.[19]

In general, either libel or slander, English law attributes the defamatory actions only under the civil law umbrella and the resolutions are achieved only through the civil litigation methods. Does the dissemination of headings unfairly impact the social network of the plaintiff, the defendant side should

[14] Satisfaction of "serious harm" criteria was discussed in the court practice for a long time. It was only *Lachaux v. Independent Print Ltd.* case that brought final clarification to the issue. Supreme Court decided that a meaning of statement does not suffice for the legal countermeasures, it should have a factual impact on the reputation of plaintiff, or the phrase should have a potential to cause future harm. According to paragraph 2, section 1 of 2013 Act, in the case of trading bodies, "serious harm" will be evaluated on the serious financial loss.

[15] *Supra* note 9, art. 1 (1).

[16] Freedom of Expression, Media Law and Defamation, 6 (2015), https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI.IPI-defamation-manual.English-1.pdf (last visited Aug. 11, 2023).

[17] Kenneth H. Craik, Reputation: A Network Interpretation, 170 (2008).

[18] *Ibid*.

[19] *Id.*, 171.

bear the civil liabilities that came together with the commission of the act. Thus, the production sequences of the defamatory statement and which ingredients contain defamation will be scrutinized in the subsequent subchapter. In the British legal system, the burden of proof lies on the defendant side and he/she has the responsibility to prove the general credibility of the information, meaning that the objected heading is far from biased. This is why the second subchapter will study the ways that the defendant can rule out himself/herself from the obligation of publishing contentious material.

A. Elements of defamatory statements

One of the most interesting points in connection with defamation is the content and execution process of that wrongful act. In the Anglo-Saxon common law system, there are 3 elements to bring an action for defamatory statements*: imputation, publication, and identification.*[20] Those elements alone cannot be considered a potential act of defamation; therefore, the unification of those elements in one committed act is rather essential. The defamatory imputation should be a statement organized such that any sober-minded or reasonable person can elucidate that it is damaging to his/her reputation, or, on the whole, to any other person's reputation. Therefore, a statement should have the capacity to produce an assumed outcome-meaning direction of speech in a way to disrepute relevant personae. For the completion of the imputation phase, it is not necessary to present specific damage as a result of the defamatory speech.[21]

Defamation is generally described as a poison in the body;[22] according to American legal literature, it can revolve dormant and might not cause any negative influence unless it is released.[23] To put it in other words, a plaintiff may become aware of the defamatory speech about themselves after a long period, and that initially could be propagated latently within the reputational network of the relevant person. This is why collecting evidentiary documents for the loss and harm sustained might not be realizable or even obtainable. The legal mechanism for the evaluation of the case is all up to the jury. Historically, in the fifteenth century, in England, there were only limited grounds for taking legal action on the defamatory statements; if the person was accused of criminal commitment, the case was ruled by the civil courts, if the person was guilty of sin, then the case was taken to the ecclesiastical courts.[24] Later, political changes occurred in the society, and the growth of the economy caused the tables to turn; the church had lost its prior reputation and

[20] *Id.*, 149.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] *Id.*, 150.

free people engaged in commercial relations were considered as much more significant for society. Therefore, the progress of trade expanded the legal grounds for accusations of a person's reputation. That tradition could be affirmed by the 1985 case in which lawyers Paul Tweed and Bob McCartney sued Sunday World for publishing them.[25] According to a Dublin newspaper, they had a fight with words in a Holywood bakery shop because of the last chocolate eclair before closing time, and each alleged to the other that he first entered the shop. The newspaper, in turn, confessed that there was no truth share of the so-called act, but rebutted that the act amounted to libel. However, the newspaper was obligated to pay each claimant £50,000 in compensatory damages.[26] Consequently, the legal historical background demonstrates that the premise for defamatory cases has developed from sinful and criminal commission to the extensive protection of personality.

As for the publication element, the plaintiff must present that the defamatory information was published, meaning that the statement crossed the communication between the respondent and the recipient of that information and was at least delivered to the knowledge of one-third party.[27] This requirement might seem minimal at first sight; however, several classic English case law samples show that even the existence of an intended recipient of the information was sufficed to evaluate the action as defamatory as there is an element of circulation.[28] For instance, if the letter is mailed with the indication "confidential" or "for the third addressee's eyes only" on the envelope, the defendant cannot justify himself/herself from the probable disclosure of the mailed letter by an executive secretary.[29] Therefore, as soon as one-third party is involved in the communication, the defamatory statement could be delivered to an unspecified and unrestricted number of persons within the reputational network of the plaintiff; and the latter is not obliged to gather the proof of evidence or document those individuals who became aware of the defamatory statement about him/her.

In the case of online communication systems, Section 5 of the 2013 Act entitles website operators to prove that the dissemination of the statement is not dependent on them.[30] However, upon the plaintiff side's query, if the website intermediary unable to find an actual person who spread the information, then the operator is encountered with 3 options: obtaining the poster's consent to reveal their identity to the claimant, second, if such permission is refused, it must inform the claimant of such refusal and also

[25] Peter Robinson to sue Irish politician for libel over Twitter remarks (2015), https://www.theguardian.com/politics/2015/sep/18/peter-robinson-sue-irish-politician-libel-mick-wallace-twitter-remarks (last visited Sep. 10, 2023).
[26] *Ibid.*
[27] Craik, *supra* note 17, 152.
[28] *Ibid.*
[29] *Ibid.*
[30] *Supra* note 9, art. 5 (2).

possible refusal by the poster about the removal of the offending statement; or, finally, removal of the contentious material.[31] If the website operator does not fulfil one of those conditions, the defence under Section 5 is waived.

The last element that produces potential defamatory information is the identification of the relevant subject. The statement should be structured in such a way that it is addressed directly to the third party and not any other individual. In the same manner as "gossip sessions", the reputational circle of the plaintiff can clearly assume after getting acquainted with the information that the subject of the defamatory topic is only the plaintiff.[32]

As for the harmed party to the case, the claimant is entitled to seek remedies for the loss and damage sustained and, hence, can bring a lawsuit in an open court. The defendant could be obliged to cease and abstain from further publishing the defamatory statements about the plaintiff.[33] Moreover, the defendant party could be sought to refute the libellous declaration, and as a next step, it would be intended to inform society that the information is defamatory and wrong.[34] An official apology should also be covered by the defendant for the harmful allegation subjected to the address of the plaintiff.

Last but not least, three types of monetary compensation could be sought by the plaintiff: 1) compensation for the reputational harm sustained by the plaintiff; 2) aggravated damages, the defendant party attempt to reiterate a libellous allegation in the courtroom; 3) exemplary damages, which is intended to establish a signal effect across the media outlets, to demonstrate that defamatory conducts are punishable by law.[35]

B. Methods of justification

The daily lives of human beings can hardly be imagined without the possibility of talking about other persons. While doing it, the information learnt by people becomes pre-owned, and therefore, the share of credibility and precision gets lowered. Even if any person becomes the cardinal observer of the event about others, the information processed by the brain might be incorrect, misleading, or harmful to the reputation of others.[36] Otherwise, what we contemplate might actually be obviously true, however, with the conveyance of that third-parties we can defame the respective person directly or indirectly.[37] In conclusion, we might be the heroes of the defamed person's victimization and exposure to the disadvantage, harm and attack by the reputational network. Taking into account the abovementioned criteria, the

[31] Mariette Jones, *The Defamation Act 2013: A Free Speech Retrospective*, 24 Communications Law 117, 128 (2019).
[32] *Supra* note 17, 153.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Id.*, 154.
[37] *Ibid.*

defendant's risk can be noticed in two aspects: first and foremost, putting the plaintiff's reputation at stake either accidentally or deliberately, and realizing the loss and harm in the account of the plaintiff either as being aware of libelling and slandering or as a person who is seriously inexperienced and negligent in social communication about other persons.[38]

Once an individual is summoned as a defendant in a civil law case for the conduct of libel or slander, the respondent party is entitled to shield himself/herself with basic elements according to the claimant party's allegations. First of all, the defendant can refute the allegations and notify that the opposite side was misled by the content of the statement, meaning it was not directed to him/her. Secondly, the respondent can argue that the evidentiary documents proving the allegation are insufficient with regard to the publication and dissemination of the contentious announcement to the reputational circle. Thirdly, it can be inferred by the defendant that the plaintiff failed to cover the content of the statement and the correct interpretation of the content was not libellous or defamatory.[39]

If the substantiations by the defendant are not able to be disputed, then, following this, the respondent party has several ways of defence. Such a defence could be realized through the methods of *justification, fair comment, or qualified or absolute privilege.*[40] On the whole, defamatory speech should indicate the reality and the statement must be substantiated with factual background.

1. Justification

In common law, a publisher can not be held responsible if the disseminated material indicates the facts. With the justification method, it can be proven that the statement made about the plaintiff is potentially correct, despite the defamatory content. The respondent has to substantiate the burden of proof, and he is innocent unless proved otherwise. In the English civil law system, the respondent party is obliged with the burden of proof; however, it is the plaintiff who is innocent unless the jury decides otherwise.[41] Pursuant to the Defamation Act, slight incorrect imputations do not harm the plaintiff's reputation unless the material facts of the imputation are incorrect.[42] After successful verification, if the contended material appears to carry out the share of the truth, then the plaintiff carries a heavy risk of facing the judicial endorsement of justification.

[38] *Ibid*.
[39] *Id.*, 154-155.
[40] *Id.*, 155.
[41] *Ibid.*
[42] *Supra* note 9, art. 2 (4).

In the United States, the situation changes reverse: it is the plaintiff's obligation to prove the falsity of information.[43] In case the words have multiple libellous interpretations, a defendant side is entitled to substantiate the one he/she specifically meant or prove that the plaintiff is wrong. However, it is rarely observed that the disseminator of the content succeeded in convincing the proceeding participants of the misunderstanding between him/her and the plaintiff. Thus, statistical results on the media libel action indicated that plaintiffs generally believed the published article about themselves to be false (63%), in comparison with violating their privacy (4%), damaging personal reputation (7%), damaging their professional or business reputation (20%), or other respective criteria (6%).[44] To recapitulate, their main concern was the falsity of the information, and their main target was the correctness of the defamatory statement.[45]

2. Fair comment

The defendant side is also free to give opinions and thoughts when the content casts public interest. In this method, the defendant is protected from defamatory ground because of the involvement in the conversation or communication which allures broad public interest, together with holding opinions or beliefs about the contradictory actions or conduct of public figures.[46] Thus, it turns out that when the issue is in the interest of the public, freedom of expression should possibly prevail over the right to privacy. However, the defence method has been extended to private matters under the Defamation Act 2013. Thus, any fact or any privileged statement that is alleged as fact is protected under the fair comment umbrella.[47] To put it briefly, a statement needs not to only be of public interest, but completely private information might be open for the defence.[48] Whereas special caution should be given when the contentious material pertains to the private sphere of life. A distinction should be made between the fact and the comment. For the private action to be considered as fact, it must be an inference or conclusion of something, secondly, it should have the capacity to be substantiated by the defendant.[49]

[43] Robert Dunne, An Introduction to Basic Legal Principles and Their Application in Cyberspace 69, 69 (2009).
[44] *Supra* note 17, 156.
[45] *Ibid.*
[46] *Id*., 157.
[47] *Supra* note 9, art. 4.
[48] Jason Bosland, Andrew T. Kenyon & Sophie Walker, *Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion*, 74 The Cambridge Law Journal 234, 235 (2015). Available at: https://www.jstor.org/stable/pdf/24693878.pdf?refreqid=excelsior%3Adf52df6c7a4bfe08f18045daa911c809&ab_segments=&origin=&initiator=&acceptTC=1 (last visited Aug. 12, 2023).
[49] *Id.*, 239-240.

When the information is about the public figure, the respondent party can defend himself/herself on the grounds of the corresponding facts, however, the main point was that those facts should be significantly precise.[50] While ruling on the case, a judge might encounter questions about what links the issue to the public interest, who is the public figure, what is the put opinion and what is the fact, and to what extent the relevant information is correct in light of the alleged statement.[51] Moreover, there are certain other criteria that should be taken into consideration within the judge's evaluative decision, such as the kind of malicious conduct committed by the defendant, the fact of the actual loss and harm done to the plaintiff's reputation, the state of mind of the defendant while declaring or disseminating the material, and so on.[52] For the qualification of the conduct on grounds of fair comment, the action should also be realized in a way that it is open to publicity; for instance, on Internet websites, social media accounts, marketplaces, or other types of public forums.

3. Privilege

There are also circumstances where the production and pervasion of information are curtailed and directed to the view of a restricted number of individuals about specific persons. Such situations are encountered within the third method, so-called privilege. The privileged communication is made on the grounds of qualified or absolute privilege. In the qualified privilege method, the respondent should be involved in a situation in which he or she has a social, moral and legal duty to give an answer to the inquiry of another individual in connection with the specific third person.[53] In turn, the recipient should have the right or interest in obtaining such kind of information. For instance, it might be a case where a person submits his/her portfolio to one of the job vacancies and that person's former employer gives his or her recommendation about the candidate to the potential employer. The qualified privilege method protects the defendant from being charged with defamation, even if the dispatched information is misleading and incorrect. That kind of misinformation could be tolerated by the judiciary and thus would qualify as privileged communication made with "honesty of purpose", relieved from malice.[54]

The deliberateness and goodwill of the communication shelter the defendant party in that situation. It must be highlighted that it is the circumstance that enjoys qualified privilege; goodwill and conscientiousness are the two elements that produce the mentioned method.[55] Therefore, one

[50] *Supra* note 17, 157.
[51] *Ibid.*
[52] *Ibid.*
[53] *Id.*, 158.
[54] *Id.*, 159.
[55] *Ibid.*

must make sure that the information will be relayed to the person who has the right and interest in receiving or obtaining that. Any kind of negligence and crossing the borders of those limitations would consequently deprive the respondent party of recourse to that method.

It was the *Reynolds v. Times Newspapers Ltd.* case, where the English Court expanded the rights of the media on freedom of speech and by taking the "public interest" element into account enlisted the ten non-exhaustive factors to be entertained by the press on grounds of qualified privilege.[56] The Court emphasized that media freedom will be shielded once the statements made by the press meet the requirements and are "of sufficient value to the public that, in the public interest, it should be protected...".[57] Those factors covered whether the respondent journalist applied the cardinal requirements such as the credibility of the source, whether he/she took the measures to authenticate the information and if the response was in connection with the material quested from the plaintiff.[58] However, Section 4 of the Defamation Act 2013 abolished the *Reynolds doctrine* and hereinafter any statement that is of public interest or reasonably believed to be of public interest could be defended on grounds of qualified privilege.[59] Thus, Section 4 substituted the "responsible journalism" criteria with that of "reasonableness of belief"[60]; the first one required objective evaluation by the media worker while the latter one gave permission for subjective evaluation.[61]

In cases of absolute privilege, there are a restricted number of grounds for statements that are public, false, defamatory, or leading to malice; however, the action is protected from the qualification of libel or slander.[62] Those kinds of statements include speech made in judicial proceedings by the witnesses, lawyers, and judges, as well as those made in parliamentary proceedings while flowing the opinions and beliefs about something so that to reach out to the legislative deliberations.[63] Taking into account the maintenance of the regular functioning of those bodies, individuals are deprived of legal remedies for the defamatory information made in that case by the enumerated persons.

In the same manner, as considering an act as a defamatory ground, the potential list of persons that could be considered public figures has been exposed to the evolution and, therefore, historically expanded. In the

[56] Jason Bosland, *Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales*, 31 Oxford Journal of Legal Studies 89, 90 (2011).
[57] *Supra* note 17, 159.
[58] *Ibid*.
[59] *Supra* note 9, art. 4 (1).
[60] Jones, *supra* note 31, 17.
[61] *Id*., 19.
[62] *Supra* note 17, 160.
[63] *Ibid.*

contemporary world, any individual might inadvertently or unwillingly appear in the stories of the e-news or find himself/herself on the third page of the gazette. This could suffice for the jury to evaluate the plaintiff as a public figure. It should be mentioned that the spheres of life that can be demonstrated about public figures have also expanded.

"Rumor repetition rule" is not an accessible method for the respondent party to defend himself/herself and in that case, the defendant is fully obliged for the burden of proof.[64] If we elaborate on this method, we can conclude that one cannot justify the publication and dissemination on the grounds that other sources have previously published the relevant material and that the defendant referred to those persons' or media sources' allegations. Meanwhile, it can change depending on the legal system; for instance, in the United States case-law, there is a shelter of so-called "neutral reportage" practice, which is often resorted when the newspapers become the party to the lawsuit.[65]

In general, defamation law embodies the balance between freedom of expression and the right to privacy or protection of reputation. Such balance is obtained through the intrusion of those enumerated methods. Each of the three methods has a protective umbrella from prosecution as long as the speech is made on events that concern the public interest. Justification is an applicable method in cases where the information is generally correct, despite the defamatory content. Unlike justification and privilege methods, a fair comment is a form of defence on its own. It is a statement of one's opinion on a certain set of facts. The produced speech must be an expression of ideas rather than an assertion of facts. However, opinions can only be formed on verified information, since comments on fake news cannot be considered fair. On the other hand, once the goodwill of the disseminator is ensured, qualified or absolute privilege entrenches the guarantee of protection in case the statement is incorrect. Once the information is right within the context, more or less, the person who produced and disseminated that statement is fully protected. If the information is true and at the same time unfavourable with regards to the subject of that information, then the producer should take responsibility for social risks that arise from his/her social role.

II. Case-law Related to the Defamation in American Court System

Despite the First Amendment having the potential to be a defence method in defamation cases, American courts had burdened the proof on the defendant's side for a long time. With the *Sullivan v. New York Times* case, the protection of reputation was restricted in favour of free speech; from then on,

[64] *Supra* note 17, 155.
[65] *Ibid.*

public officials were required to prove the falsehood of the published statement. Whereas the burden of proof was the defendant side's responsibility to the moment that case was ruled by the Supreme Court. Meanwhile, even partly correctness of the information was sufficient for the Court to resolve the dispute in favour of the defendant side. However, the *Gertz v. Robert Welch* case restricted the First Amendment guarantees and once the falsity was revealed, the defence should have been defeated. *Firestone v. Time* case further extended the restrictions to the notion of public figures and the Court decided that public interest in the dispute was not satisfactory to define the defamed person as a "public figure".

A. Sullivan v. New York Times case

American defamation law is specifically distinct for the regulation mechanism of the procedural obligations between the plaintiff and defendant side in freedom of speech cases. Transferral of the proof obligation to the plaintiff side indicates that everyone can publicly spread his/her opinion unless the significant impact of false information on the reputational network is proven. A benchmark case *Sullivan v. New York Times*[66] had an indispensable contribution in that regard, as the burden of the proof on the plaintiff side was the repercussion of to what extent free speech prevail over other grounds.

According to the facts, The New York Times published an article supporting Martin Luther King Jr. on criminal prosecution.[67] However, that statement covered several imprecise and contradictory pieces of information. One of the individuals was L.B. Sullivan, who sustained loss and damage to his reputation because of his subordinates. Despite the fact that he was not explicitly mentioned in the statement, due to the harmful effect on him, he submitted a notification to the New York Times for the article to be withdrawn.[68] He indicated that, as a public figure, Alabama legislation entitled him to claim compensatory damages. Following this, The New York Times rejected the claim, then Sullivan sued in a libel action against the New York Times, and several African American ministers were indicated in the announcement. A state court upheld the complaint and awarded him five thousand dollars in damages.[69] The state Supreme Court also agreed to the first-instance court decision, and then the Times appealed from that decision.

The Supreme Court of the United States, however, decided that the claimant was obliged to demonstrate the falsity and negligence omitted in the statement according to the First Amendment, setting aside the verification of

[66] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Available at: https://supreme.justia.com/cases/federal/us/376/254/#tab-opinion-1944787 (last visited Aug. 14, 2023).
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

the information in advance. Therefore, the Court unanimously ruled in favour of the Times. When an advertisement is linked to public figures, the falsity of the statement is not sufficient for liability, but the respondent party should be aware of the inaccuracy of that information, or it should be published as a consequence of negligent conduct. Brennan J. used the term "actual malice" to define the notion of falsity, and he did not include the ordinary meaning of malice in that definition.[70] In libel law, "malice" had meant knowledge or gross recklessness rather than intent, since courts found it difficult to imagine that someone would knowingly disseminate false information without bad intent.[71]

Later, the *Sullivan* safeguard mechanism for the defendant side was extended to the circle of private persons. It was in the *Rosenbloom v. Metromedia* case that the Court put forward the same protection standard for cases related to private persons. The Court provided that the defamatory statement was made in the discussion of a matter of "public or general concern".[72] To put it in other words, even if the subject matter of the case is private persons, once the action attracts the attention of the public, the defendant side will be protected under libel law.

To recapitulate, the *Sullivan* case was a benchmark case in the history of the United States in terms of establishing a fundamental principle under First Amendment guarantees; it paved the way for the press to openly express their opinions about public officials and criticize government affairs, thereby constitutionalizing the defamation law. Prior to the Supreme Court decision, allegations about defamatory statements were at the disposal of state laws. With the Sullivan case, however, defamation law was liberated from the subjection of state regulations, and its implementation mechanism began to be determined through the First Amendment.

B. Gertz v. Robert Welch case

However, a broad framework for libel cases did not last too long, as some critics adduced that proving the actual malice was a complicated situation for the plaintiff side. Thus, the "public or general concern" standard was also restricted in *Gertz v. Robert Welch, Inc.*[73] and the Court emphasized that the First Amendment does not guarantee such a wider protection of the press.[74] Thus, it was ruled that once the "fault" is discovered, the defendant party is liable for the intrusion into the private matters or privacy of public figures.

[70] *Id.*, § 281.
[71] *Id.*, § 282.
[72] Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 Columbia Law Review 1205, 1211 (1976). Available at: https://www.jstor.org/stable/1121666 (last visited Feb. 18, 2023).
[73] Gertz v. Robert Welch, Inc., 418 U.S. 346, 323 (1974). Available at: https://supreme.justia.com/cases/federal/us/418/323/#tab-opinion-1950909 (last visited Aug. 14, 2023).
[74] Hill, *supra* note 72, 1212.

Another alluring aspect was the definition of fault, what should be understood as fault and to what extent an action is considered libel. In 1975, the American Law Institute clarified that the "fault" requirement is satisfied once negligence is proved.[75] It was also stressed that a lesser malicious act than the "fault" could accordingly amount to a less strict liability.[76]

The Gertz case was also prominent due to the coverage of the "public figure" definition. Pursuant to the ruling of the Court, public figures should be considered individuals who hold a public office or are candidates for such office, and that is why they attract the attention and comment, or individuals who played a significant role in social relations or plunged themselves forward in the midst of specific conflicts so that they could be the ones to tackle the problem and produce a solution.[77] However, those individuals should not be reckoned as public figures in all spheres of their lives, other than in exceptional circumstances.[78]

C. Firestone v. Time case

Contraction of First Amendment guarantees was expanded in the constitutional system of the United States after the *Firestone v. Time* case.[79] It had a substantial impact in two aspects: first and foremost, the case brought clarity that attracting public interest is not a sufficient factor with regards to the injured person to be considered a public figure; secondly, the safeguard mechanism of the First Amendment cannot be taken into account without the existence of "public or general concern" within the coverage of a specific declaration.[80]

Pursuant to the background of the case, the Firestones were one of the affluent families who had a reputational network in "Palm Beach Society". Mrs. Firestone brought a divorce lawsuit before the court, and her husband filed a counterclaim. The court proceeding was intensive, with shocking charges and countercharges, and therefore, the press did not miss that chance in Florida. Mr. Firestone was granted a divorce, and it was illuminated in the headings of Time. Following this, Mrs. Firestone organized some press conferences and filed a lawsuit against Time because of the libellous statements made about her, and she won the case.

The Supreme Court decided that, pursuant to the *Gertz* standard, Mrs. Firestone should be considered a private person. Mr. Justice Rehnquist, who combined the major opinion of the jury in his speech, emphasized that Mrs.

[75] *Ibid.*
[76] *Ibid.*
[77] *Id.*, 1213.
[78] *Ibid.*
[79] Time, Inc. v. Firestone, 424 U.S. 448 (1976). Available at: https://supreme.justia.com/cases/federal/us/424/448/#tab-opinion-1951611 (last visited Aug. 14, 2023).
[80] *Supra* note 72, 1213.

Firestone had not "*thrust herself into the forefront of any public controversy in order to influence the resolution of the issues involved in it*".[81] He additionally highlighted the fact that even if Mrs. Firestone voluntarily plunged herself into the attention and commentaries of the public, she still would be considered a private person since the content of the conflict was not the public one in accordance with the *Gertz* case. He substantiated that despite the fact that the destination of Mrs. Firestone was on the level of public excitement, she neither tackled the problem nor presented a solution to it, within the meaning of public controversy. Mr. Justice Marshall was the only member of the jury who disagreed with the majority and noted that it was "not of the sort deemed 'legitimate' or worthy of judicial recognition".[82] According to him, the case "resurrects the precise difficulties that I thought *Gertz* was designed to avoid".[83]

On the whole, with the *Gertz* case, the Court established a new standard mechanism that the public figure element is more significant than the event that drew the attention of the public. The Court decision on the *Firestone* case availed the society of law to clearly distinguish between "public figure" and "public interest" elements as soon as the plaintiff sues the defendant party. However, it is highly questionable which of those two has more weight in the development of society. From the perspective of the *Gertz* standard, I personally assume the publicity of an actor should be of second-degree importance in comparison with the importance of an actual occasion.

Generally, the cessation of marriage is not a type of case that would attract public interest, and, Mrs. Firestone's private life was involuntarily publicized. However, another point that remained untouched was that Mrs. Firestone had held a press conference during proceedings, and it was not even attempted to be evaluated as thrusting herself into the focus of the press by the Court. Backing to the raised approach in the former paragraph, the abovementioned case was a simple divorce, and it could significantly impact people's moral thoughts. For instance, there can be a situation when a well-known musician, with the action he or she is involved in, obtains more influence in the shaping of the cultural orientation of people than that of a country's prime minister ("public figure"). Thus, I believe the Supreme Court's approach in that direction would be better upheld as it was until the *Rosenbloom* case, since the *Gertz* formula causes the priority of the right to privacy over First Amendment guarantees in cases that require the application of defamation law.

[81] *Supra* note 79, § 454.
[82] *Id.*, § 487.
[83] *Ibid.*

III. Defamation in Continental Law System

Unlike the English common law system, there are criminal sanctions for defamatory statements in continental law system jurisprudence.[84] Depending on the specific country, the punishment alters when the content of the libellous information falls under criminal prosecution. For instance, in Germany, the criminal sanctions are similar to those of English tort law, while in countries like France or Italy, the criminal nature of the offence varies from that of precedence law.[85] Moreover, plaintiffs are entitled to choose the compensation for damages either in collaboration with a criminal prosecution or in a separate civil action in a civil court.[86] Finally, the continental system does not allocate defamation either in civil or criminal legislation. Depending on the level of perilousness, the defamatory content can be scrutinized in connection to one of those two branches.

Another prominent factor is that, unlike English law, one cannot witness the distinction between the definitions of libel and slander. However, analogical distinctions might be observed within the Roman law branch of the continental system, which detaches *iniuria re* and *scriptis et verbis*[87] – delict expressed orally or in writing. This variation was further developed by the numerous elements and entailed the emergence of the following types of defamation: a) whether the injured person is alive or deceased (Italy); b) public or private defamation (France); c) whether the information covers wrong statements or solely humiliation of the party (France and Germany); d) if wrong, whether the information was made in bad faith or merely consciously; e) whether the statement was directed at the personal dignity or social reputation of the injured party.[88]

The continental legal system does not differentiate between the facts of whether the defamatory statement was made in a newspaper, via the internet, or social media, or whether it was made in writing (picture, letter, poster) or verbally, meaning it does not distinguish between libel and slander. Since every single defaming statement is considered defamation in continental law, there is no protection umbrella for justification, fair comment qualified, or absolute privilege as it is in English law.

A. Defamation in French law

The Parliamentary Assembly of the Council of Europe (PACE) affirmed its determination to stand for the decriminalization of defamation in its Resolution 1577 Towards decriminalization of defamation (2007) and the

[84] Paul Mitchell, A History of Tort Law, 334 (2014). Available at: https://doi.org/10.1017/CBO9780511803147.018 (last visited Feb. 19, 2023).
[85] *Ibid.*
[86] *Ibid.*
[87] *Id.*, 335.
[88] *Ibid.*

corresponding Recommendation 1814 (2007).[89] The Council of Europe further challenged its members to repeal the prison sentences for defamation without delay and recommended solely civil procedures for the protection of the dignity and reputation of individuals. Moreover, it was also admonished to the civil courts of State Parties that the proportionality principle should be taken into account with regard to the awards for damages.[90]

France is one of the 46 states that have membership in the Council of Europe. Defamation is criminalized as an offence under French law and is penalized according to the Articles 32 and 33 of the Law on Freedom of Press. Nevertheless, any defamatory act[91] or insult[92] committed by means of criminal provocation will be punished only by a fine of 12,000 euros. Hence, the French defamation system can be considered exemplary, since it was adapted to the Recommendation of the Council. The only issue with that is individuals are still "criminally" prosecuted for the defamatory actions.

French legal system also endorses the fact that 3 separate elements unify the action of defamation: allegation, imputation, and proposal. The notions of allegation and imputation are assessed flexibly by the French judge. According to the definition of the term "allegation" given by Littré, it is an assertion, a proposition put forward by someone else.[93] The Trésor dictionary additionally states that this "proposal" is something ill-founded, even misleading.[94] Imputation, on the other hand, is an act of attributing to someone an action, a fact, or a behaviour that is generally considered blameworthy.[95] Therefore, these two definitions are very close, although the allegation is often perceived as more doubtful and the imputation as necessarily pejorative.

For the sake of precision, an allegation is completed when there is an evocation of a fact exposed by a third party or even by a public rumour. Inherently, the imputation element is satisfied when there is a direct expression of a strictly personal affirmation, or it should be assumed as such.

An allegation or imputation element is also satisfied even in the case of specific language in an undercover manner used by the disseminator, and it will be considered punishable by the judge.[96] With some writing techniques, a propagator can conceal the abrupt or malicious character of the remarks

[89] Reply of Parliamentary Assembly to Recommendation 1814 (2008), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=11944 (last visited Aug. 31, 2023).
[90] *Ibid*.
[91] Law of July 29, 1881, on Freedom of Press, art. 32. Available at: https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006070722 (last visited Aug. 13, 2023).
[92] *Id.*, art. 33.
[93] Mathilde Hallé, Le Délit de Diffamation par voie de Presse, 10 (2007). Available at: https://tribu-ohayon.com/assets/uploads/2014/09/voie-de-presse.pdf (last visited Feb. 25, 2023).
[94] *Ibid*.
[95] *Ibid.*
[96] *Supra* note 91, art. 29.

stressed in the statement. Since it is difficult to distinguish these hypocritical precautions from honestly scrupulous nuances when in doubt, the judge retains the malicious potential of the remarks.[97]

Moreover, even in case of limited interpretation of words, in which an interrogation mark should not be defamatory, the courts consider that the "prosecuted offence" (that offence is defamatory content) is likely to hide under the true meaning of the word.[98] Hence, after the entire examination of the article by the judge, if the statement tends to reveal and bring out polemical, satirical, and even sometimes critical content, the imputations made in interrogative form might be considered to produce defamation.

The French Court of Cassation defines a precise and determined fact as "one which can easily be the subject of proof and a contradictory debate".[99] Therefore, the facts must be precise and detailed. This is the objective side of the assessment of allegedly defamatory statements. The fact must certainly be determined, but not that detailed; the allegation must be clear, significant, and unequivocal.

Precision does not mean accuracy here. Because, in the end, the accuracy of the imputed or alleged fact is irrelevant. It is defamatory information that is punished and not the distortion of facts (despite the fact that the truth share of defamatory facts is rarely admitted), since "the truth is indifferent to the constitution of the defamation".[100]

In general, the publication of a defamatory statement is an offence. Indeed, the comments must have been published, that is, brought to the attention of others, to be prosecuted as defamation. P. Bilger notes in this respect that "the offence of the press does not relate to solitary or wild thought but to the opinion which is intended to be social".[101]

This condition of publicity is absolute. Otherwise, the defamation is non-public and constitutes an offence of a different nature. It is a fine, and its sanction is subject to common law. Consequently, Article 23 of the Law of July 29, 1881[102] lists the methods of advertising. These are "speeches, cries or threats made in public places or meetings", and "writings, printed matter, drawings, engravings, paintings, emblems, images or any other medium of writing, speech or image, sold or distributed, offered for sale or exhibited in public places or meetings".[103] Thus, press publications satisfy this condition of publicity.

[97] Hallé, *supra* note 93, 11.
[98] *Ibid.*
[99] *Id.*, 12.
[100] *Ibid.*
[101] *Id.*, 9.
[102] *Supra* note 91, art. 23.
[103] *Ibid.*

Written expression concerns the sale or distribution – considered not from a commercial angle but as a means of dissemination – in public places or meetings of writings or printed matter of any kind. The purchase of the material is not a necessary element for evaluative purposes by the judge. A diagnosis of defamation is made once the will to deliver the writing to the public is revealed.

Public display of posters or placards is also affected when, in a fixed and public place, they allow passersby to be informed of what is displayed or published. Thus, the image or representation that significantly undermines an individual or collective interest may be prosecuted as public defamation.

In conclusion, French law on the Press holds the criminal sanctions useful with regard to defamatory statements. However, those penalties do not sanction imprisonment and suffice with monetary damages only. Thus, French defamation law is in accordance with the recommendations of the Council, and it successfully steps forward in the decriminalization process.

B. Defamation in German law

As one of the Member States at the Council of Europe, the abovementioned Resolution and Recommendation also cover the German jurisdiction.[104] German legislation preserves the criminal provisions for defamation and further sets prison sentences for the committed act. The cardinal criterion to be considered is whether the statement is false[105] or that it indicates only an insult to the relevant party).[106] While the former one is addressed to third parties, the actual presence of the injured party is significant for the latter. If the wrong statement is made in bad faith, with the entire consciousness that the information has no ground, then the defamatory action falls within a separate category.[107] Regarding the sanctions, they are considered the lowest for insults, higher for standard or ordinary defamation, and the highest for aggravated defamations.[108]

Those sanctions are an indication of the constitutional limitations on freedom of the press for the protection of fundamental rights and human dignity. While guaranteeing a broad spectrum of freedom of speech, Article 5 of the German Basic Law also puts limitations on expression in favour of personal honour and personal integrity.[109] From that perspective, to examine a violation of fundamental rights, it is necessary to record the content of the statement to clarify in what respect, according to the objective meaning of the

[104] *Supra* note 89.
[105] German Criminal Code (Strafgesetzbuch), § 186 (1998). Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1891 (last visited Jul. 22, 2023).
[106] *Id*., § 185.
[107] *Id.*, § 187.
[108] Mitchell, *supra* note 84, 336.
[109] Basic Law for Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland), art. 5 (1949). Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last visited Jul. 22, 2023).

statement, there is an impairment of personality. Since the meaning of a statement impacts the protection of fundamental rights, it must not be determined without considering the personal dignity at stake.

The focus here is on the understanding of an impartial and reasonable third party. The defamatory statement should not be determined solely from the victim's perspective. If there are several equally conceivable interpretations that are not mutually exclusive, the legal assessment should be based on the most favourable interpretation of the utterer.[110] However, in order not to neglect the protection of honour, the following differentiation is necessary: if the plaintiff takes an action against a statement made in the past, the "principle of infringer-friendly interpretation" applies.[111]

This protection is considered for the utterer and is justified by the fact that he or she would otherwise have to fear punishment or damages because of an interpretation that misses the intended meaning. These possible sanctions could have an intimidating effect on the free formation and expression of opinion and thus affect freedom of opinion in its substance. On the other hand, if the plaintiff claims that future statements should not be made, then the legal control must be based on the infringing interpretation.[112] Since the utterer has the opportunity to express himself unambiguously in the future and to clarify which utterance content should be used as the basis for the review, the plaintiff is not shielded in this respect.[113]

Protection of the honour of public figures is another aspect of the determination of the severity of the encroachment on personal rights. In that regard, the question also arises whether the person concerned is a public figure. Anyone who deliberately goes public as a celebrity or politician, or who deliberately tries to influence the formation of opinion in political competition, has to accept greater public interest in his or her person.[114] In this case, freedom of expression prevails over the protection of honour. The protection of privacy is given a back seat, in particular when the objective of statements relates to public interest. According to the January 15, 1958, judgment of the Federal Constitutional Court, there is a presumption of freedom of speech in public life.[115] This results from the fact that communication is a process in which several people are always involved, in which the roles of communicator, deliverer, and recipient are played.

[110] Üble Nachrede und Verleumdung Strafrechtliche Ahndung und zivilrechtliche Abwehr, 6 (2013). Available at: https://www.bundestag.de/resource/blob/407504/dfcdee163a8b5201de6ac33d17bfb524/WD-7-216-13-pdf-data.pdf (last visited Feb. 22, 2023).
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*

Obviously, intensive conflicting interests in a pluralistic society can produce quick statements, spontaneous reactions, and situational adjustments necessary in this process, with the result of unavoidable one-sidedness, sharpening, provisional errors, and inaccuracies. Therefore, unsettling, shocking, exaggerated, and hurtful language would have to be accepted as a matter of principle.[116] However, the presumption rule must not be misunderstood as a priority rule, so a weighing-up must be carried out in each case. If there are special reasons, such as the significant degradation of personal honour and creditworthiness of the respective person, the protection of personal rights can be preferred in individual cases.

Anyone who makes statements in public to contribute to the public opinion struggle must expect that his or her person will become the focus of the dispute. This is the only way to ensure that public opinion is formed with equal opportunities.[117] A sharp or exaggerated statement can provoke comparably harsh criticism in the sense of a counterattack.[118] However, the respondent's utterance must be a proportionate response in content and form.[119] The standard for this proportionality is, in turn, the type and severity of the challenging statement. The limit is exceeded when the only intention is to defame the opponent.[120]

The primacy of freedom of expression ends when the statement violates the dignity of private persons as a formal insult or contains abusive criticism.[121] In these cases, the utterer is no longer concerned with discussing the matter but with the intentional and exclusive disparagement and insult of the person. According to Section 192 of the Criminal Code (Strafgesetzbuch), in the case of defamation against a private person, this disparagement should be premised particularly on the form of the statement or the circumstances on which it is based.[122] Since such statements cannot contribute to intellectual debate and the formation of public opinion from the outset, they take a back seat to the protection of personal rights. However, in order to adequately do justice to the importance of freedom of expression, the term "abusive criticism" must be interpreted narrowly. Sharp devaluations and strong polemics, even through the use of swear words, do not automatically lead to an inadmissible expression of opinion. The extent of what is permissible is determined by the subject of the communication. The more the defamer pursues selfish goals and the less the defamation serves the intellectual battle of opinions, the more likely it is that the "abusive criticism" is inadmissible.[123]

[116] *Ibid.*
[117] *Id*., 7.
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Id.*, 8.

Conversely, the respondent does not have to resort to the mildest means of criticism because he has a legitimate interest in his defamatory statement attracting the desired attention, since only then can he make a contribution to public opinion-forming.

To sum up, decriminalization of defamation still remains as challenge in German law. Especially, Article 5 of the Basic Law stands as a constitutional ground for the possible restrictions on free speech via criminal provisions. An interesting point is that Article 10, Section 2 of the European Convention also permits restrictions on "reputation of others" grounds. Meanwhile, neither the Treaty nor the case law prohibits domestic cases from being ruled on criminal chambers. As can be seen from the abovementioned recommendary texts by the Council of Europe, abolishment of imprisonment for defamation is the key target of the regional human rights organization. On the other hand, German domestic courts generally suffice with setting a certain amount of fine as punishment[124] and presumably, it is because of avoiding the possible clash with the protection standards of Strasbourg Court. In that case, criminal sanctions which considers prison sentences in Article 185, 186, and 187 are inevitably useless. There remains one probability for the maintenance of those sanctions: it is possibly retained in the Criminal Code because of the aggravated circumstances (such as discrimination, hate speech, and threat to public safety, health and morals) on defamation crime.

IV. Legal Approach to Defamation Law in the Azerbaijani Jurisprudence

Defamation remains an offence in the criminal legislation of the Republic of Azerbaijan. Despite being one of the Member States of the Council of Europe, the laws on defamation have not been adapted to the aforementioned Recommendations. Thus, the punishment of imprisonment for a certain number of years still holds a place among the sanctions for criminal defamation. Moreover, there are a number of European Court cases against Azerbaijan on defamation.

The main issue is *criminalization* and *disproportionate sanctions* for publishing defamatory information. In the previous chapter, English and American defamation laws were analyzed, and those systems are distinguished with decriminalized defamation. Such an approach serves to protect freedom of expression from dissolution and to balance fundamental freedom in clash with the protection of reputation. Hence, the recent laws in England and Wales focused on expanding the protection mechanisms in favour of the defendant side (press/media). Meanwhile, Azerbaijani laws

[124] *See* Fuchs v. Germany, ECHR No. 29222/11, 64345/11 (2015), § 33-43. Available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2264345/11%22],%22itemid%22:[%22001-152442%22]} (last visited Apr. 22, 2023).

criminalize the defamation of both public and private parties, Anglo-Saxon countries consider the defamation only as civil liability for private parties, nevertheless.

France, as Azerbaijani legal system, maintains defamatory actions as criminal; however, sanctions deem only a certain amount of fine as monetary damages. In Germany, judges tend to set fines for criminal defamation, despite imprisonment still exists in the sanction part. Therefore, the criminalization of defamation does not become a discussion topic when domestic cases are brought before the European Court. Whereas Azerbaijani courts set disproportionate amounts of fine on defendants even in civil disputes and domestic courts are regularly warned because of that sort of violations.

As an effective solution, the immediate adoption of defamation law is not due while criminal provisions still exist in the Criminal Code. Decriminalization of any "wrongful" act is a long process and a time-lapse is needed for society's adaptation to the required standards. In the first stage, there are lessons to be learned from French and German law practice and in the second stage, adoption of the special law on defamation is recommended and that law should be in accordance with Anglo-Saxon system standards. The legal allocation of defamation and its criminal applicability in the Azerbaijani legal system will be analyzed thoroughly in the next paragraph. Subsequently, the issues that criminal defamation entails in the regional court will be demonstrated and the ways of escaping from those challenges will be thought over.

A. Criminal law provisions related to defamatory statements

In Azerbaijan, personal honour and reputation are protected on a constitutional basis. Article 46 of the Constitution proclaims that everyone has the right to protect his/her honour and dignity.[125] The dignity of a person shall be protected under all circumstances, and there exists no justification for the humiliation of the dignity of a person.[126] The part "all circumstances" entails that human dignity and personal reputation are absolute rights and will always prevail over freedom of expression, irrespective of the reason for the clash of rights. Just like in other continental law countries, historical traditions and conventional rules in the culture preserved personal honour as superior to other rights and freedoms. Therefore, the violation of human dignity concludes with criminal prosecution, and general laws enshrine relevant sanctions about defamatory statements against human beings.

The Criminal Code of Azerbaijan distinguishes three types of criminal provisions in connection with defamation: *slander*, *insult*, and *defamation on the Internet*. According to Article 147 of the Code, slander is the distribution of

[125] Constitution of the Republic of Azerbaijan, art. 46 (1995).
[126] *Ibid.*

obviously false data discrediting the honour and advantage of another person or undermining its reputation in a public statement, publicly shown work, mass media, or, in case of mass distribution, in information resource on the Internet.[127] Insult, which is indicated in Article 148, is the humiliation of honour and advantage of the other person, expressed in the indecent form in a public statement, publicly being shown work, mass media or, in case of mass distribution, in information resource of the Internet.[128] Finally, recently another provision has been added to the Criminal Code against defamatory statements in Internet resources. Slander or insult by public display using false usernames, profiles, or accounts on an Internet resource is punishable by Article 148-1 of the Criminal Code.[129] As can be seen from the provisions, the distinguishing features of slander are as follows:

a) humiliation of honour and dignity;

b) intentional commission of this act;

c) that the spread of information that is false (deliberately, that is, the person who spread the defamatory statement knew that the information was false).

Therefore, defamation is an insult to honour and dignity that involves a deliberate lie but may not be expressed in an obscene manner. Insult implies an obscene form and an insulting expression may not be a lie. However, in all cases, both insult and defamation have a common feature – intention. Defamatory information is produced by biased intention. In the meantime, several questions arise about the definition of defamatory content. When defining defamation, what does defamatory information mean, and how does it relate to disreputable information? Also, can defamatory and disreputable information be equated?

The Plenum of the Supreme Court of the Republic of Azerbaijan in its Decision, "On the experience of applying the legislation on the protection of honour and dignity by the courts", which dates back to May 14, 1999, explains that "*if information related to moral principles, production-economy, service, and social activity creates a negative opinion about a citizen among society, collective or individuals, such information is considered as humiliating honour and dignity*".[130] This is why grounds other than abovelisted ones, such as criticizing a person for his political, economic, or social activities cannot be considered insulting his honour and dignity.

[127] Criminal Code of the Republic of Azerbaijan, art. 147 (1999).
[128] *Id.*, art. 148.
[129] *Id.*, art. 148-1.
[130] Şərəf və ləyaqətin müdafiəsi barədə qanunvericiliyin məhkəmələr tərəfindən tətbiq edilməsi təcrübəsi haqqında Azərbaycan Respublikası Ali Məhkəməsinin Plenumunun qərarı (Decision of the Supreme Court of the Republic of Azerbaijan on the experience of applying the legislation on the protection of honour and dignity by the courts), § 3 (1999). Available at: https://e-qanun.az/framework/17799 (last visited Apr. 22, 2023).

In Azerbaijani legislation, information is considered disseminated when it is communicated to another person, to several persons, or an indefinite circle of persons. Dissemination is committed through various methods: by publishing written material, broadcasting that information on radio and television programs, showing it in newsreel programs, describing it in works, saying it in meetings, demonstrating it in letters, applications, and complaints, mentioning it in documents issued by offices, enterprises, and organizations, etc.[131] It is noteworthy that a private dissemination of information to the person to whom it relates shall not be construed as its disclosure.

The obscene form is given a dual meaning in national dictionaries. First, in general, the violation of the rules of behaviour (especially ethical behaviour in speech) accepted for that situation in the whole society or the social group in question; secondly, the use of words and expressions in an indecent manner, that is, related to the genitals, bodily secretions, or other things offensive to public morals.[132] Both concepts are completely subjective, and the legislative texts do not give a special definition to obscene form.

When a person is found guilty of defamation, he has a right to a remedy. However, the sanctions imposed are often punitive and disproportionate. It has already been seen that prison sentences for criminal defamation are widely considered disproportionate because of their impact on freedom of expression. Similarly, a gross number of fines, whether criminal or civil, are intended to punish the defamer rather than repair the harm done to the defamed. These challenges will be substantiated comprehensively in the next paragraph.

Wherever possible, relief in defamation cases should be non-monetary and aimed directly at redressing the harm caused by the defamatory statement, for example, by issuing an apology or correction. Monetary compensation (the payment of damages) should only be considered when other less intrusive means are insufficient to repair the harm caused. Compensation for harm caused (monetary damages) must be based on evidence quantifying the harm and demonstrating a causal relationship to the alleged defamatory statement.

B. Recent ECHR cases and feasible solutions to tackle the challenges

Human dignity is considered an absolute right in the jurisdictional system of Azerbaijan.[133] Whenever the clash of other fundamental rights and freedoms commences, human dignity and the rights related to it (such as the right to life, the right to freedom, reputational rights, as well as personal honour) reign. However, in the practice of the European Court of Human

[131] *Ibid*.
[132] Azərbaycan Respublikası Cinayət Məcəlləsinin Kommentariyası: I hissə (The Commentary on the Criminal Code of the Republic of Azerbaijan: Part I), 520 (2018).
[133] *Supra* note 125.

Rights, all the fundamental rights are respected, and any right or freedom, including human dignity, is not absolute. Therefore, depending on the case, freedom of expression might prevail over privacy rights or vice versa. With that regard, the Council of Europe emphasized in its recommendations the need to repeal the laws and regulations that withhold freedom of expression, especially in the context of defamation cases. Given the contradiction between domestic laws and international legal regulations, there are considerable violations facts revealed by the European Court against Azerbaijan.

1. Disproportionate damages

In one of the recent cases, *Azadliq and Zayidov v. Azerbaijan*[134], the violation of Article 10 was found in connection with Azerbaijan. According to the case, two defamatory statements were issued, featuring the support given to the former government official (T.A.) together with his relatives, emphasizing that the mentioned parties were involved in corruption.[135] T.A., in turn, brought a civil defamation lawsuit and successfully won the case against the defendant parties. The latter ones were attributed accordingly with 36,000 euros and 22,500 euros in compensatory damages to be paid to T.A. The Supreme Court upheld the decision of appeal. The Strasbourg Court ruled on the case and sanctuary payments directed to the defendants and found a violation of Article 10, in terms of freedom of expression. The Court, first of all, questioned the interference in connection with the "necessary in a democratic society" criteria indicated in Article 10 and if the superiority of protecting the rights of others against the freedom of speech served a legitimate aim. The articles were published in a way that they could attract the public's interest, as the issue was related to the corruption activities of government officials and other persons who run the state office. Moreover, the plaintiff T.A.'s name was enumerated several times throughout the text, blaming him for being a "corruption machine" and having participated in a "scale of corruption".[136] He was accused of taking certain advantages for himself and availing his close relatives to get benefits from the corruption activities. The specific characteristics of those obtained properties and assets were indicated in the statement. The plaintiff explained in his allegation that the expression "blue whales" was addressed to him for engaging in serious criminal conduct, such as embezzlement and corruption.[137] Therefore, the journalists were required to provide a burden of proof for their defamatory statements under the purposes of the European Convention.

[134] Azadliq and Zayidov v. Azerbaijan, ECHR No. 20755/08 (2022). Available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-218077%22]} (last visited Apr. 22, 2023).
[135] *Id.*, § 9.
[136] *Id.*, § 41.
[137] *Id.*, § 42.

In response, applicant journalists were not able to provide sufficient factual sources that supported the authenticity of the information. They referred to the abovementioned properties, claiming that those assets belonged to T.A. However, despite the applicants affirmation that the statements indicate "facts" while publishing the information, when it came to court proceedings, they notified the participants that the statements made by them leaned on "rumours", meaning the respective journalists did not take any specific measures for verifying the authenticity of the allegations.[138] That is why state authorities defended themselves, saying that the defamatory actions realized by the applicants did not fall within the scope of due diligence standards and the responsibility of journalists.[139] The State Party further noted that taking into account the gravity of the conduct of the applicants, the latter entailed the violation of the protected rights of T.A. under Article 8 of the Convention.[140] At the same time, there were no substantial grounds to complicate the authentication procedure for the applicants.

In reasoning its judgment, the Court analyzed another issue about the case: whether the domestic courts were able to strike a fair balance between the right to privacy and the freedom of expression under the Convention. It pointed out that the domestic courts summarized its substantive part shortly and did not dive into the details of the article or comment on the different statements made in the text. On the other hand, the compensatory sanctions of 36,000 euros imposed on the applicants were not proportionate to their regulatory income, especially during the difficult financial period of the newspaper. Furthermore, the second applicant was individually ordered to pay 22,500 euros in damages, which amounted to 9 years of the annual salary of the applicant and was 40 times higher than the minimum yearly wages in the country. Therefore, the Strasbourg Court found the violation of Article 10 of the European Convention, since the restrictions made against the applicant did not accomplish the requirements of a legitimate aim and therefore were not necessary "in a democratic society".[141] Moreover, the Court ruled that the compensatory sanctions directed to the applicants by the relevant judgment of the domestic court were not in accordance with the principles of freedom of expression.[142]

2. Disproportionate sanctions

Another case within the scope of freedom of expression under the European Convention is *Bagirov v. Azerbaijan*[143], in which a lawyer and a

[138] *Id.*, § 44.
[139] *Id.*, § 45.
[140] *Ibid.*
[141] *Id.*, § 50.
[142] *Id.*, § 49.
[143] Case of Bagirov v. Azerbaijan, ECHR No. 81024/12 & 28198/15 (2020). Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22bagirov%20v%20azerbaijan%22],%22docume

member of the Azerbaijani Bar Association was banned from engaging in law in practice due to the defamatory statements about the physical resistance of police and the functioning of the judicial system.

In February 2011, Mr. Bagirov participated in the meeting surrounded by other lawyers so that he could shed some light on the challenging problems that the legal profession faced in Azerbaijan. Following this, he mentioned the police brutality and the passing away of an individual E.A. while in custody, as the latter's mother was one of his clients. Later, those statements were disseminated via the mass media, and the Association initiated a disciplinary proceeding against Mr. Bagirov on grounds of the lawyers' confidentiality principle. The plaintiff was disbarred from engaging in law practice due to the abovementioned confidentiality principle. In response, Mr. Bagirov noted that he did not violate that principle since his client, the mother of E.A., was the first one to publicly speak about the issue.[144]

In 2014, Mr. Bagirov received another disciplinary sanction because of the expression he made while speaking about an opposition politician, I.M. The applicant was banned in July 2015, according to the decision of the domestic court. The domestic court substantiated in its reasoning that the statements made by Mr. Bagirov "cast a shadow over our State" and "tarnished the reputation of the judiciary".[145] The higher-instance courts upheld the decision. The European Court decided that there was a violation in terms of Article 10 of the Convention since the applicant did not breach the secrecy of the judicial investigation by speaking or releasing any documentary file in connection with the investigation, since he only repeated his client's statements.[146] The Court further elucidated that depriving the applicant of his professional legal activity was not in accordance with the domestic courts' justifications, and the sanctuary punishment made against the applicant was disproportionate.[147]

Despite the fact that the European Court found a violation in regard to Article 10 under the Convention, there are some points that should be compared in connection to the English-American case law. While analyzing the English practice in terms of defamation law, it was crystal clear from the common law practice that the correctness or incorrectness of the statements becomes immaterial once the material is published in a full, fair, and disinterested manner. The authors of such defamatory allegations are entitled to justify their statements on grounds of fair comment, qualified, or absolute privilege if there is some impreciseness without damaging or changing the whole context of the facts. Moreover, under the "reportage doctrine", which

ntcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-203166%22]} (last visited Apr. 22, 2023).

[144] *Id.*, § 45.

[145] *Id.*, § 77.

[146] *Id.*, § 93.

[147] *Id.*, § 102.

is widely referred to in previous chapters with regard to the American legal system, the disseminators can give reference to the allegations made by others in a neutral way without exaggerating amendments to the information or personal opinions of the author. At the same time, one of the basic requirements in English traditional law was that the mere repetition of defamatory information without verification or taking any measures on the authenticity of the statement was qualified as defamation and therefore, a violation of the rights of the defamation subject.

The above-discussed decisions of the European Court against Azerbaijan signal the need to decriminalize the laws that create contradiction. There exists a possible solution for the removal of opposition and balancing domestic laws with international standards. According to Article 151 of the Constitution, with the exception of the Constitution of the Republic of Azerbaijan and acts adopted by referendum, the priority of international treaties is stressed in the conflict of domestic and international laws.[148] It means that European Council Recommendations and European Court cases should be taken into account.

Meanwhile, Article 46 of the Constitution requires the defendants to bear the consequences for violating reputation, but it leaves the ground for determining the method of restriction to a legislator. Thus, criminal provisions in Articles 147, 148 and 148-1 are the legislative production of the Constitution's demands. However, criminal sanctions in those provisions are not in accordance with Recommendations by the Council, and therefore, not with the case law of the Strasbourg Court. Hence, I would kindly suggest the lawmakers consider the possible abolishment of defamation provisions from the Criminal Code in the future and conform them to the duties of the State before the European Court. As can be seen from the French sample, simply elimination of imprisonment could be a first step on that road. Finally, the principle of proportionality in Part 2 of Article 71[149] should be applied, and taking into account international obligations, the civil sanctions for violation of reputation and dignity should be proportionate to the due consequences by the State.[150]

Conclusion

Overall, one of the most challenging issues in the field of freedom of the press is related to defamation. In recent years, some of the Azerbaijani media outlets have published headings with regard to the parliamentary discussion on adopting a defamation law. First of all, neither Azerbaijan nor the other

[148] *Supra* note 125, art. 151.
[149] *Id.*, art. 71.
[150] *See* Cumpănă and Mazăre v. Romania, ECHR No. 33348/96, § 111 (2004). Available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2233348/96%22],%22itemid%22:[%22001-67816%22]} (last visited Aug. 13, 2023).

State Parties to the ECHR have adopted defamation laws. Continental law systems, such as France, Germany, and Azerbaijan, while deciding whether the act should be considered liable, first determine whether the information is wrong or is solely defamatory. However, in the American case-law system, not the wrongfulness but the intent of the disseminator ("bad faith") is the evaluative criterion. Nor does the defendant party carry liability under the "neutral reportage" doctrine.

In English defamation law, we can see that the "public interest" criterion and the fact of "indicating the source of allegations" outweigh the verification or correct/incorrect elements. This is why the Anglo-Saxon law system protects the freedom of the press at a more advanced level and preserves the defendant's freedom of expression. Whereas punitive sanctions in the Criminal Code of Germany and Azerbaijan, in relation to defamatory statements are disproportionate to the UN Human Rights Council and the Council of Europe Standards, which seek the decriminalization of defamation. Generally, relief for defamatory acts should be non-monetary; however, monetary sanctions might be allowed only in cases when the initial measures become unsatisfactory.

When it comes to the above-discussed cases of the European Court against Azerbaijan, the Strasbourg Court found the violation of Article 10 merely taking into account the maintenance of the balance between the clashing rights and, additionally, the proportionality of the civil sanctions to the improper conduct of the journalists and their financial situation. The Court further touched on the legitimacy point of the restrictions in the second case. Consequently, the limitations on free speech should only serve as one of the legitimate aims indicated in Article 10.

In conclusion, defamation remains as constitutional challenge in continental law system countries. France has taken prospective measures, thereby repealing all the imprisonment sentences from the Press Law. Meanwhile, punitive sanctions still remain in the German Criminal Code. However, it can be seen from European Court cases against Germany that judges do not apply imprisonment for defamatory statements and therefore, criminal defamation cases do not create a problem for the present. But still, the necessary changes challenge the constitutional systems of Member States. Elimination of imprisonment sentences or refraining from implementing such punishments still makes defamation as criminally existential act. Whenever individuals are prosecuted and found guilty, they are still criminally convicted for such commissions. Monetary sanctions do not free individuals from being criminal and being exposed to conviction. As for Azerbaijan, in order to find a reasonable solution for the removal of the dichotomy derived from national constitutional law, the Council of Europe's recommendations should be taken into account, and possible opportunities for the adoption of

defamation law should be reconsidered. Criminal sanctions for defamation should be eliminated as soon as possible.