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Elements of Protecting the Reputation of Public Figures in European Legal Systems

I Introduction

Personality rights enjoy strong protection under the various legal systems as a result of 20th century legal developments. For a long time, it did not even occur to anyone that the level of this protection should be differentiated according to the type of statements that are harmful to an individual's reputation, or that this level should be reduced for certain types of persons. False statements and statements that are harmful to an individual's reputation were naturally regarded as constitutionally unprotected statements, until the emergence of the idea that certain statements relating to public debates and which may be harmful to the reputation of public figures should be afforded special protection. Such special protection is necessitated by the paramount importance of the freedom to engage in public debates. The development of the protection of reputation in modern times is difficult to reconcile with the recognition of privileged statuses and the fact that an individual is active in public life is regarded as one that automatically reduces the scope of such protection. This approach is essential to a fundamental feature of democratic societies: open debates on public matters are more important – up to a certain limit – than the protection of the personality rights of the persons being criticised. Persons participating in public life voluntarily waive their opportunity to enforce their personality rights in general. The limited protection of the reputation and honour of public figures thus became acknowledged in all legal systems which recognise the above distinction.

It is an almost uniform feature of European legal systems that this reduction of the scope of the protection of the reputation of public figures is not provided for in codified law; the manner of the application of the law in this special case is left to the case law of the courts. Only a couple of states form an exception to this but, even in their case, it is usually only in the field of criminal justice that the legal code of the branch of the law offers any guidance. Common European law, respecting the specific, organically evolved solutions applied by the member states, has not attempted a uniform resolution of this issue; however, the European Court of Human Rights, which is traditionally very active in these areas, has successfully drawn up the foundations that the various states are required to take into account when applying the law.

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II Issues of Terminology, Clarification of Concepts

The protection of the honour and reputation of public figures constitutes a complex set of legal problems, because it requires the identification of the rules and the limits of the application of several branches and areas of the law (criminal law, civil law, media regulation), as well as several distinct personality rights that can be interpreted independently of each other: reputation, honour and human dignity. As a result, even the internal coherence of some of the individual legal systems may be wanting; the overall European picture is certainly diverse and not free from contradictions.

Reputation, honour and human dignity are personality rights closely related to each other. Different legal systems protect these rights in different ways. Certain systems differentiate between several different rights (thereby giving them different meanings), and view them as independent rights, whereas others do not define them independently but protect them collectively, under their anti-defamation rules, without any differentiation.

Reputation protects the individual from (society's) external value judgement, which can primarily be harmed by the statement of falsehoods, within either the system of civil law or criminal law. The exact meaning of the term 'honour' is hard to grasp in terms of the law. While it is not appropriate to generalise, honour refers to the individual, innate values of the personality; harming these does not demean the external perception of the given person, but causes 'internal' harm to him/her. Hence, reputation fundamentally means the value judgement of other persons about one's personality, while honour means the *immanent* core of one's personality, which is rather hard for the law to grasp.

The notion of human dignity can only be defined in law with great difficulty. However, its breaches can easily be identified. The right to human dignity, where it is protected as a personality right, can be violated (similarly to honour) by seriously offensive, unjustifiably harmful or humiliating opinions. The protection of reputation, honour and dignity are therefore strongly connected as far as freedom of speech is concerned, and in most instances they cannot actually be separated from each other.

The manner of the discussion of the subject here does not allow a separate examination of the right to reputation and the right to honour; the reason for this is that several legal systems regulate these two together and identically and so differentiating them is an issue that belongs more to jurisprudence than to the legal provisions themselves. (The purpose of this study is primarily to explore the solutions provided by codified law.) The law of defamation or law of libel is thus viewed in its totality.

Another important preliminary remark to be made is that we have tried to dwell as little as possible on the general aspects of the protection of honour and reputation, not because these topics are not worthy of consideration in themselves, but simply because this would have broadened the scope of the problem under examination to an unmanageable extent. As such, we shall only deal with general issues not related to the protection of the personality of public figures inasmuch as these are required for an understanding of our subject, or if such general provisions have a significant effect with regard to public figures.

III Comparative Overview of Certain Issues Related to the Protection of the Reputation and Honour of Public Figures[1]

1 The Nature of the Branch, Area and Source of Law Regulating the Protection of Personality

Characteristically, several different branches and areas of the law play a role in the defence of honour and reputation. It is clearly common to all European legal systems that natural and, in parallel, legal personality enjoy the protection of both civil and criminal law. That is, in the member states of the European Union, it is characteristically the large general codes, the civil and the criminal codes, that contain the general rules on the protection of personality. In England and Ireland special laws on defamation (the Defamation Act) deal with this issue, intentionally leaving the resolution of certain important problems to judicial legislation. In the states of Europe, therefore, the violation of reputation and/or honour exists generally as both a civil law and a criminal law delict, although the intensity of the application of these rules in practice may vary significantly.

The previous provisions on criminal libel have only been abolished or repealed in a few of the legal systems of the Member States. The English, Irish,[2] Romanian, Estonian and Latvian regulations and the regulations of Cyprus are among these.[3] In Estonia the new criminal code of 2001 contained no general provisions on libel; however, it did provide for special instances: the criminal offence of libel may still be committed against representatives of the state, protectors of law and order and courts and judges.[4] The amendment of the Latvian criminal code of 9th December 2009 abolished the offence of criminal libel; however, it should be noted that the act still provides for the criminal offence of 'bringing into disrepute', which consists of making injurious statements that are known by the imparter to be false.

At the same time, the provisions on the protection of reputation and honour may also appear within the regulations that are specific to the media. This may be realised in one of two ways: either the provision over and above the general protection of personality is present in a press law or similar that is applicable to all media, or it is only present with regard to certain media (eg audio-visual services) in a sectoral act of law regulating that given type of media. At the same time, it can be misleading that certain countries (France, for example) include criminal law regulations in their press laws; thus, in actual fact, the press law not only consists of independent 'sectoral' regulations, but also overlaps with the field of criminal law.

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1 In our review of the regulations of the various individual states we have relied heavily on the international study conducted for the Hungarian National Media and Communications Authority by DLA Piper Hungary in 2011–2013.

2 Article 35 of the Defamation Act of 2009 abolished the common law offences of defamatory libel, seditious libel and obscene libel.

3 Aidan White, 'Ethical Journalism and Human Rights' in *Human Rights and a Changing Media Landscape* (Council of Europe Publishing 2011, Strasbourg) 57.

4 Criminal Code of Estonia (6 June 2001), arts 275 and 305.

Beyond this, there exist provisions directed at the protection of honour and reputation in the various self- and co-regulatory codes too.

Furthermore, it is important to stress the actual or quasi-legislative role of the courts, too. Under the system of common law, due to the conscious retreat of legislative regulation (whereby the law only settles certain issues related to the protection of reputation), the courts may take on the role of de facto legislator (in England and Ireland). At the same time, as we shall see, in most countries of the continental legal system there is no special legislation on the protection of the personality of public figures either, and so its outlines are also shaped by judicial practice.

It should also be stressed that in Europe, in general, the application of the provisions on the protection of personality does not fall under the powers and responsibilities of the media authorities; the individual legal systems usually leave this to the courts.

The following section reviews the regulations of those states where the issues of the protection of reputation and honour are (inter alia) provided for within the regulation of the media.

The Austrian media act[5] provides for the sectoral rules for the protection of reputation and honour in general, with regard to all media. According to the act, in ongoing criminal proceedings the injured party may demand indemnification if the defendant is a media enterprise. If criminal proceedings have not been launched, the injured party may initiate this independently.[6] In addition to civil and criminal law, the act provides for a set of regulations governing the protection of certain inherent personal rights and remedies. Section 6 states that 'if an offence is committed in the media, such as defamation, libel, slander, insult or ridicule, the person affected is entitled to claim from the media owner indemnity for the injury suffered'.

Similarly, the French press act[7] establishes general (criminal law type) rules for all media. According to Article 29 of the Press Act, defamation is defined as 'any allegation or imputation of a fact affecting the honour or reputation of a person'. It is considered as a criminal offence committed by means of the press.

Luxembourg's free expression act[8] also prohibits defamation in all media. The prohibition of defamation and infringement of good reputation (*droit au respect de son honneur et de sa reputation*) must at all times be complied with. When this obligation is not complied with, a judge can take all necessary measures to end such non-compliance, at the cost of the party responsible.

In Malta, the Press Act[9] makes it an offence, punishable by a fine, for anyone to libel any person by means of the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast.

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5 Media Act (*Mediengesetz*), Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette.

6 Media Act (*Mediengesetz*), Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette, art 8(a). See Cameron Doley, Alastair Mullis (eds), *Carter-Ruck on Libel and Privacy* (6th edn, LexisNexis 2010, Butterworths) 1090.

7 Press Act of 1881.

8 Act of 8 June 2004 on the Freedom of Expression in the Media, Chapter V., art 16.

9 Act XL of 1974, art 11.

In Italy, under the Press Law, libel is punishable.[10] The criminal responsibility rests on the author of the article, and also on the editor if the latter failed to carry out the necessary checks to prevent the libel.[11]

Certain provisions of the Greek media regulations apply exclusively to audio-visual services; others to all media services (television and radio), while some of them are only applicable to public service media. Article 7 of Presidential Decree 109/2010 provides for the obligation of all programmes transmitted by the audio-visual media to respect personality, honour and reputation. The same provisions are included in article 3 of law no. 2328/1995 regarding the Greek National Council for Radio and Television, which expands these obligations, in relation to personal rights, to commercial communications broadcasted by the radio and television stations. In addition, according to article 3 of law 1730/1987, the programmes transmitted by the public broadcaster should respect, inter alia, the personality and privacy of people.

In chapter 7 article 4 para 14 of the Swedish Freedom of the Press Act,[12] there is a special provision which states that defamation is an offence against the freedom of the press, and as such is punishable.

Spanish media regulations only prescribe the respect of honour with regard to audiovisual services. Article 4.4 of the General Audiovisual Law[13] requires audio-visual communications to respect the honour of individuals.

The Slovakian media regulations also only provide for obligations additional to the general civil and public law rules with regard to the audio-visual media, and do not expressly cite the protection of reputation and honour. The protection of personal rights is stipulated in Article 19 of the Act on Broadcasting and Retransmission: according to the provisions of this Article, media services must not, through their processing and content, impact on human dignity and the basic rights and freedoms of others.

The Danish and the Irish legal systems are examples of the relegation of the protection of reputation and honour to the area of self- and co-regulation. The Danish Ethical Guidelines[14] contain the following clause:

> Safeguarding freedom of speech in Denmark is closely connected to the freedom of the mass media to collect information and news and to publish it as correctly as possible. Free comment is part of the exercise of the freedom of speech. In attending to these tasks, the mass media should recognise that the individual citizen is entitled to respect for his personal integrity [...] and the need for protection against unjustified violation thereof.

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10 Law 8 February 1948, no. 47 (Printed Press Law), art 13.

11 Roberto Mastroianni, Amedeo Arena, *Media Law in Italy* (Kluwer Law International 2011, Alphen a/d Rijn) 51–52.

12 Freedom of the Press Act [In Swedish: *Tryckfrihetsfördningen (2002:908)*].

13 General Audiovisual Law 7/2010.

14 A detailed set of ethical guidelines (in Danish *Reglerne for god presseskik*) can be found in an annex to the Media Liability Act (no. 85 of 9 February 1998).

As these guidelines have a serious impact on the interpretation of section 34 of the Media Liability Act, this provision might be deemed violated if particular mass media do not respect the inherent rights. The Press Council[15] has the right to commence a case regarding violation of the ethics of journalism on its own volition if the Ethical Guidelines have obviously been violated.

In Ireland, the Code of Practice for the print press (supervised by the Press Council) also contains protection for individual rights in the Press Media. Principle 4 obliges member publications to respect certain personal rights, and notes that 'everyone has constitutional protection for his or her good name' and goes on to state that 'newspapers and periodicals shall not knowingly publish matter based on malicious misrepresentation or unfounded accusations, and must take reasonable care in checking facts before publication.'[16]

In summary, the regulation of the protection of reputation and honour may appear in the following branches and sources of law:

– civil law (civil code);
– criminal law (criminal code);
– media regulation (press or media acts);
– self-regulation or co-regulation (codes of conduct);
– judicial practice (in common law countries by intentionally passing the role of lawmaker to the courts, elsewhere by providing the appropriate interpretation of the legal provisions).

2 The Definition of Public Figures

I have found no example of the legal definition of the category of public figures in Europe. The absence of such a definition is not surprising, since the sphere of public figures is constantly changing in parallel with the changing world of the media and the public; accordingly, it is up to judicial practice to define this group of people, since judicial practice is able to adapt to this state of constant flux. Where the codified norm does apply taxonomy to define a given sphere of persons, the purpose of this is usually to provide additional protection. An example of this, albeit one independent of freedom of speech issues, is the definition of public officers, against whom violent conduct applied during the performance of their public functions is punishable more severely. As we shall see later on, somewhat surprisingly, we have even encountered in Europe a legal system that provides a stricter than general protection of the personality rights, including honour and reputation, of a certain circle of individuals.

German jurisprudence and legal literature differentiate between absolute public figures (*absolute Personen der Zeitgeschichte*) and relative public figures (*relative Personen der Zeitgeschichte*).[17] To allocate a person under these classifications it is necessary to conduct an individual

[15] The Danish Press Council handles complaints from all media under the Media Liability Act. The Council can start a case of its own volition if the Ethical Guidelines have been violated.

[16] Eoin Carolan, Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010, Dublin-Haywards Heath) 502–504.

[17] Horst-Peter Götting, Christian Schertz, Walter Seitz (eds), *Handbuch des Persönlichkeitsrechts* (CH Beck 2008, München) 225–234.

assessment of the information interest of the public and the personal rights of the person depicted.

Absolute public figures are those who stand out from the masses due to their exceptional behaviour or particular roles. Irrespective of a particular event, those persons receive public attention. This category includes, inter alia, important politicians, high ranking representatives of the economy, members of reigning royalty, well-known actors, TV presenters, musicians, athletes and scientists. However, photographs of absolute public figures may only be published without their consent if such publication aids in the formation of opinions in regard to questions of general interest.

Relative public figures only become visible to the wider public for a certain period of time in connection with an event in contemporary history. The information of interest in this category is limited to the respective event which renders the person a public figure. This category includes, inter alia, criminals, if their offence is out of the ordinary and causes general sensation, other participants in spectacular criminal proceedings, such as judges and lay judges, prosecutors and counsels for the defence, witnesses and victims of crimes. Furthermore, family members and partners of absolute public figures are relative public figures but may only be depicted in connection with the absolute public figure.

The Spanish Constitutional Court has, on a subjective basis, made a triple classification of public figures: (i) in a strict sense, public figures are those people with a public job (eg public authorities or other people indirectly related to them); (ii) public figures are those individuals who are not connected to public institutions but who are well-known because of their occupation; and (iii) celebrities, 'famous' people without any other feature or profession, at least known, than the fame or notoriety with which they are attributed, which usually arises from the public exhibition of their private lives.[18]

While the extension of the group of public figures is a worldwide trend, the theoretical foundations of this – sometimes apparently boundless – expansion are yet to be clarified. As discussed above, the limited personality protection afforded to public figures is justified by the effectiveness of democratic order and by the need to conduct public debates. However, this argument is hardly applicable to certain new waves of expanding the group of public figures (eg to include 'celebrities'). It is not possible to determine, with absolute certainty, who has an impact on the development of public matters and to what extent. While persons who are unknown to the public but, in the background, make important decisions for society enjoy unlimited personality protection, other people who become known for a short period of time as celebrities and have no influence on public matters whatsoever qualify as public figures.

This imbalance may be eliminated if the legal focus – and the scope of limited protection – shifted from people to matters of public interest. The practice of the European Court of Human Rights clearly emphasises the definition of those situations where lesser than customary protection of personality is called for, rather than the public figure status of individuals. In other words, the fact of appearing publicly (public matter) is more important than the public figure

[18] Constitutional Court judgments 165/87, 107/88, 20/92, 320/94.

(the person) him- or herself.[19] The scope of activities and information about public figures, persons exercising state powers, and persons carrying out public functions that may be disclosed to the public is of fundamental importance. The protection of the personality rights of such persons may be limited occasionally, even beyond the scope of carrying out their public functions and public appearances. For example, the family life of a Member of Parliament may be regarded as information of public interest if it may influence the decisions of voters.

3 The Measure of the Protection of Public Figures

There are hardly any European states where a codified rule – a legal act – provides for the decreased level of protection of honour and reputation granted to public figures and the differentiated application of certain procedural rules in their case.

According to the Finnish Criminal Code,[20] criticism that is 'directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously overstep the limits of propriety' does not constitute criminal defamation. There is no clear-cut rule as to what is considered as obviously overstepping the limits of propriety. Instead, this is assessed by the court on a case by case basis. The criticism can be sharp and pejorative but, in order to be acceptable, it must limit itself to the public activities of the person and not relate to their personality.

In Poland, pursuant to article 213 section 2 of the Criminal Code,[21] whoever raises or publicises a true allegation regarding the actions of an individual holding a public function or in defence of a justifiable public interest shall be deemed to have not committed an offence. Therefore, if the allegation is true but none of the other conditions apply, the statement may constitute an offence. (This rule applies as truth on its own is not a defence against criminal libel; the defendant also has to prove that the publication served the public interest.)

In Luxembourg, similar rules apply to criminal libel cases. With regard to libel, defamation and infringement of good reputation against persons of public life, article 447 of the Criminal Code[22] provides for specific rules. The suspect accused of such an offence 'for allegations based on facts relating to their functions, either against persons in authority or any public person, or against a legal person' has, at all times, the right to prove the alleged facts. These rules apply, for example, to members of parliament.[23]

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19 See *Bladet Tromsö and Stensaas v. Norway* (no. 21980/93. judgment of 20 May 1999); *Nilsen and Johnsen v. Norway* (no. 23118/93. judgment of 27 February 2001); *Thorgeirson v. Iceland* (no. 47/1991/299/370. judgment of 28 May 1992). See also Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005, Oxford – New York) 222–225.

20 Finnish Criminal Code (39/1889) ch 24 s 9.

21 Criminal Code of 6 June 1997, (1997) 88 (553) Journal of laws.

22 Luxembourg Criminal Code (Loi du 16 juin 1879).

23 Cour 30 janvier 1904, Cass. 25 mars 1904, P. 8, 395.

In Denmark, the Criminal Code contains a special defence which can be applied in cases concerning public or political debates. Section 269 of the Criminal Code provides for the 'lawful protection of obvious public interests', and therefore open public debate, when a publication breaches one's right to reputation or honour.[24]

Despite the fact that the principle of the reduced protection of the honour and reputation of public figures is generally prevalent in European legal systems, some states define certain special legal cases whereby – contrary to the general European approach – certain public figures of prominent importance are granted additional protection with regard to their personality rights. In practice these rules are not applied or are applied only very rarely, and their compatibility with the judicial practice of the European Court of Human Rights is, at best, doubtful.

Despite the fact that the position of the Bulgarian Constitutional Court favoured the broad protection of opinions directed against politicians, government officials and the government,[25] the amendment of the Criminal Code in 2000 provides for stricter penalties in the event of slander against official persons or the members of popular representative organs.[26]

The Estonian Criminal Code does not prohibit libel in general; however, it does constitute an offence if it is against representatives of the state, defenders of law and order and the judges; i.e. in their case, the law provides for a higher level of protection than for private individuals.[27]

In Malta, under the Press Act[28] it is an offence for anyone, by means of the publication or distribution in Malta of printed matter, to 'impute ulterior motives to the acts of the President of Malta', or to 'insult, revile or bring into hatred or contempt or excite disaffection against, the person of the President of Malta', and shall be liable on conviction to imprisonment for a maximum term of 3 months and to a fine.

The German Criminal Code[29] contains a very widely applicable differentiation between public figures and private persons. According to section 188 StGB, if the defamation or intentional defamation is directed against a person standing in political life, stricter sanctions may apply.

> If an offence of defamation (section 186) is committed publicly, in a meeting or through the dissemination of written materials […] against a person involved in popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult, the penalty shall be imprisonment from three months to five years. (...) An intentional defamation (section 187) under the same conditions shall entail imprisonment from six months to five years.

The defamation of other persons in public life is not covered by this increase in the penalty. Section 115 of the Danish Criminal Code prescribes that the maximum penalty be doubled if

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24 Sören Sandfeld Jakobsen, Sten Schaumburg-Müller, *Media Law in Denmark* (Kluwer Law International 2011, Alphen a/d Rijn) 64.

25 Judgment no. 7 of 1996 of the Constitutional Court.

26 Criminal Code, s 148 para 1(3), see Doley, Mullis (n 6) 1118.

27 Criminal Code (6 June 2001), arts 275 and 305.

28 Chapter 248 of the Laws of Malta, pt II s 5(1).

29 Criminal Code (*Strafgesetzbuch, StGB*), 15. 05. 1871.

the defamed person is the king, or the head of the Danish government. According to the literature, this section has never been applied in practice.[30]

In summary, it may be said that the various legal systems typically leave the task of deciding the most important issues concerning the protection of the reputation and honour of public figures to the courts to a much larger extent than is customary for the tasks and responsibilities routed to the judiciary. The handful of relevant legal provisions – coupled with the (also rare) provisions for the protection of personality that deviate from, and are stricter than, the main rule – are exceptions. Also typical is that, even within the given legal system, these are not meant to provide general solutions and are only relevant to the limited application of criminal law.

4 The Distinction between Statements of Fact and Statements of Opinion

The distinction between statements of fact (or allegations) and statements of opinion is one of the most important issues related to the protection of reputation and honour. Usually, however, the provisions of codified law do not deal with this issue but leave it to the courts to consider the content of statements found to be injurious. It makes a major difference to the judgement of the infringement whether the court qualifies a piece of content as fact or opinion. Statements of fact may be subjected to demonstration, i.e. both the communicator and the injured party are granted the opportunity to prove or refute their veracity. As such, exemption from legal liability in cases involving the publication of assertions that cannot be proven to be true is only possible in exceptional cases. At the same time, opinions cannot be subjected to demonstration; the most that can be examined is whether they have any factual basis or not. Moreover, with regard to certain opinions, even this factual basis cannot be subjected to examination (e.g. if a politician is called a Nazi then it is possible to examine whether any parallels exist between the politician's activities and Nazi politics, but if the opening performance of a play is deemed to be terrible then – due to the very nature of this opinion – no such factual basis may be sought). In such cases, as well as when the opinion is based on factual grounds, criticism is granted broader protection than false statements of fact, since its publication is accompanied by a significant interest of society. At the same time, extremist and abusive opinions may not meet this condition. These general principles, however, rarely appear in codified legal provisions. The libel laws of the various European countries typically forbid libel and defamation in general but it is usually clear which of the possible grounds for exemption are applicable to statements of fact and which apply to statements of opinion.[31]

A distinction between facts and opinions is not a main characteristic of the English law of libel. Opinions enjoy protection (on the basis of 'honest opinion') if they are grounded in fact

[30] Sandfeld Jakobsen, Schaumburg-Müller (n 24) 66.

[31] E.g. the English protection of 'honest opinion' obviously extends over opinions, while the protection of the 'truth' concerns statements of fact.

and are not expressed in bad faith.[32] That is, abusive opinions that transgress the limits of admissible criticism do not enjoy protection as they are not grounded in fact. Defining the limits of admissible criticism is not easy. For example, the actor Steven Berkoff prevailed in a libel civil action against a critic who wrote that he was 'hideously ugly'.[33] The English law of libel does not, then, separate the protection of honour and the protection of reputation.[34] Libel is possible even if the statement cannot be proven (e.g. saying that someone is ugly is a subjective value judgement).

5 Causes of Exemption from Liability

The various legal systems in Europe provide for the grounds for exemption from liability in cases of communications injurious to honour or reputation; legal liability for injurious communications is therefore not objective and not unlimited.

The causes of exemption are not codified in all states; where no legal provisions define these causes they are shaped and defined by judicial practice. In the following review we shall not discuss these, and limit ourselves to causes of exemption as defined by statutory law with the exception of the English common law system (where the law – in fact, several legal acts – also provides for defamation, but these do not cover the entirety of the field of libel law).

A general cause of exemption is if the content of the communication is proven to be true, i.e. if the communicator is able to demonstrate, before a court of law, the truth of the statements made (see, e.g. England,[35] Austria,[36] Cyprus,[37] Luxembourg,[38] Sweden,[39] France[40]). At the same time, under some of the legal systems, proof is only admitted in criminal procedures if the publication served a valid public interest (eg an expression related to a public issue), or, perhaps, an appreciable private interest. In the absence of such an interest, even statements of fact that are demonstrably true may qualify as libellous (and according the procedural rules, the demonstration of their truth is not admitted).[41]

An extenuating circumstance may be if the libelled party had previously consented to publication[42] or if the party against whom the lawsuit was initiated had only indirectly contributed to the injury

32 Defamation Act 2013, s 3.
33 *Berkoff v. Burchill* [1997] EMLR 139, CA.
34 Barendt (n 19) 228.
35 Defamation Act 2013, s 2.
36 Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 2(a).
37 Civil Wrongs Act, ch 148 s 19.
38 Luxembourg Criminal Code (Loi du 16 juin 1879) art 443, Act of 8 June 2004 on the Freedom of Expression in the Media, ch V art 17.
39 Freedom of the Press Act [*Tryckfrihetsfördningen (2002:908)*], ch 7 art 14 para 14.
40 Press Act of 1881, art 35, pp 55–56.
41 See e.g. Hungary *1998. évi XIX. törvény a büntetőeljárásról* (Act XIX of 1998 on Criminal Procedure); Danish Criminal Code, s 270; in Sweden, Freedom of the Press Act [*Tryckfrihetsfördningen (2002:908)*], ch 7 art 14 para 14.
42 English common law, and Irish Defamation Act 2009, s 25.

(i.e. was an 'innocent' party to it), and so newsagents, postmen and printers are not liable for any libellous statements published in a press product.[43]

It is important to note that – presumably not independently from the ever-growing case law of the European Court of Human Rights – some of the legal systems that had previously applied extremely strict rules and only provided exemption from legal liability in very few cases when the published statements were not proven (i.e. were false) now exempt the party making the defamatory statements, even if such statements are factually false, but were made in good faith and concern public affairs. That is, in certain clearly defined cases, even false statements may be granted protection; in the majority of cases the considerations to be taken into account are shaped by case law, although under certain legal systems they have already become part of codified law.

The generally prevalent rule is that fair criticism (i.e. criticism based on facts, or value judgements that require no proof as they have no factual basis), however injurious or damaging it may be, cannot be considered to be defamatory if its publication was necessitated by the public interest;[44] setting the limitations is also left to judicial practice in most legal systems.

A basis for exemption, recognised by several legal systems, is if the given medium does not itself make the slanderous statement, but merely reports on the slanderous opinion of someone else, i.e. it only passes on that opinion. We shall examine this exception in more detail later on (see section 3.6.).

a) Special circumstances

Some legal systems provide for certain special circumstances, under which exemption from liability is even granted in the event of the publication of slanderous statements. Under English law, *absolute privilege* protects certain statements made under special circumstances and provides full immunity from legal liability to the publisher (such statements include those made in Parliament, during court proceedings or government work, as well as the re-publication of such).[45]

Danish judicial practice accepts the right of lawyers to make defamatory remarks when defending their clients in the courtroom or during a legal procedure.[46] The Danish Criminal Code contains a unique exemption from liability: Section 272 provides that if the offensive (defamatory or abusive) remarks are retaliatory (ie the person who made the remarks was reacting to a previously made, similarly offensive remark made against him or her) they may not be sanctioned.[47]

43 England's Defamation Act 1996; s 1; Irish Defamation Act 2009, s 27.

44 English Defamation Act 2013, s 4 'publication on matter of public interest,' 'honest opinion' in Ireland's Defamation Act 2009, s 20, Civil Wrongs Act of Cyprus, s 19.

45 Bill of Rights 1688, art 9, Defamation Act 1996, s 14. See also Ireland's Defamation Act 2009, s 17.

46 Sandfeld Jakobsen, Schaumburg-Müller (n 24) 64.

47 Ibid 65–66.

In Austria, there is a defence for the broadcaster if the defamatory remarks were made during a live broadcast and employees or agents of the broadcaster were not guilty of neglecting the journalistic diligence required.[48]

b) Public interest and good faith

As has been noted, under certain legal systems statements concerning public affairs may enjoy protection, even if they are proven to be false, if they were made in good faith.

Under English law, if certain conditions are met, *qualified privilege* provides exemption from liability (the basis of such exemption is always the interest of the community and the good of society).[49] The scope of statutory *qualified privilege* was substantially expanded by application of the 'Reynolds defence'.[50] According to the judgement, the protection of freedom of speech must be expanded, subject to certain conditions, to those events when the disclosing party publishes false allegations in matters of public interest. However, this cannot mean total protection independent from the circumstances of the given disclosure.[51]

The Defamation Act 2013 however brought about radical changes in this field. The Act guarantees statutory defence regarding allegations published on a matter of public interest.[52] The precondition of this exemption is that their publication must be made on a matter of public interest, and also that the disclosing party must reasonably believe that publication is in the public interest. Originally, the bill (draft law) intended to enact certain points of the Reynolds judgement almost word-for-word but, in the end, the final text only stipulated that in examining the defence to an action for defamation 'the court must have regard to all the circumstances of the case'. This probably means that the courts will keep on investigating the cases according to the criteria of the Reynolds judgement, since that ruling used great effort and circumspection to enumerate the scope of circumstances that are relevant and hence can be examined. Probably this is expected to happen, even though the Defamation Act 2013 [Section 4 para (6)] abolished the Reynolds defence (being a common law excuse from liability) with due consideration of the new statutory defence. At the same time, the criteria specified there can also be taken into account upon making a reasoned judgement by the judge, at the time of application of the statutory provisions.

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48 Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 3.

49 Defamation Act 1996, s 15 and sch 1.

50 *Reynolds v. Times Newspapers* [2001] 2 AC 127.

51 Lord Nicholls, the judge drawing up the explanation (reasoning), in order to make court decisions uniform and consistent, added a list of ten criteria against which attempts to use the Reynolds defence should be judged. For further details, see András Koltay, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban. [The Basic Aspects of the Freedom of Speech in Hungarian, British, American and European Comparison]* (Századvég 2009, Budapest) 388-389.

52 Defamation Act 2013, s 4.

The protection of *honest opinion* is also considered to serve the public interest.[53] This protects the freedom of opinion, but only if the opinion is grounded in fact and the party making the statement is acting in good faith.

Ireland's Defamation Act[54] is rather similar to the laws of England; it is the codification of the previous common law judicial practice. Accordingly, the instances of exemption are also very similar (*truth, absolute privilege, qualified privilege, honest opinion, consent, innocent publication*). Exemption on the basis of '*fair and reasonable publication*' is most often applicable in cases of defamation against public figures; this rule has incorporated most elements of the English *Reynolds* decision and has elevated them to the status of an act of law. The Reynolds rule, then, is in a certain sense also present in the Irish legal system.[55]

Examples of the protection of false (unproven) statements made in good faith regarding public affairs may be found in other states, too.

In Denmark, section 269 of the Criminal Code provides that there is no liability 'if the issuer of the allegation in good faith has been under an obligation to speak or has acted in lawful protection of obvious public interest or of the personal interest of himself or others'; this exemption only applies to false and defamatory statements, and not to abusive remarks.[56] As such, good faith and public or private interest are both needed for this exemption from legal liability to be applied. Apart from the exemption set out in section 269(1), the Criminal Code, in section 269(2), provides an opportunity for the courts to reprieve the defendant from punishment 'where evidence is produced which justifies the grounds for regarding the allegations as true'. It means that, even when the allegations are not true and there was no public/private interest in publishing them, the person who made the allegations may have the sentence remitted if he or she had serious reasons to believe that the allegations were true (and thus acted in good faith).[57]

In Austria, under the media legislation, no claims may be raised by the injured party if the public had a predominant interest in the publication or when in the application of the journalistic diligence required, there was sufficient reason to take the statement for true.[58]

In Poland, under article 12 of the Press Act,[59] journalists are excused from liability, even in the event of untrue publications, provided they acted fairly and with due care.

In Luxembourg, when a publication to the public entails the defamation of a person, the person responsible for that publication cannot be held liable if the responsible party proves that it has sufficient reasons for concluding that the facts were accurate and when it is justified by the right

53 Defamation Act 2013, s 3.
54 Defamation Act 2009.
55 Carolan, O'Neill (n 16) 165–181.
56 Sandfeld Jakobsen, Schaumburg-Müller (n 24) 61.
57 Ibid 61–62.
58 Media Act (*Mediengesetz*, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 2(b).
59 Press Act of 26 January 1984.

of the public to have knowledge of such facts.[60] The demonstration of the truth in criminal procedures is only possible in certain instances permitted by the law, such as the publication of injurious statements about the representatives of the authorities or other persons in public service.[61]

The Portuguese Criminal Code also exempts imparters of false statements who acted in good faith and had compelling reason to believe the statements to be true from liability.[62] In Italy, too, the media are exempted from criminal liability if they exercised their right to provide information or formulate dissenting opinions.[63] Italian judicial practice has extended this rule to procedures related to the protection of personality rights, providing that anyone (i.e. not only journalists proper) publishing statements in the media may plead this.[64] In Estonia the public interest served by the publication may be grounds for exemption from civil law liability.[65]

Finally, in Sweden, media outlets are exempt from legal liability in cases in which – in the circumstances – it is justifiable to communicate information in the press, and 'if proof is presented that the information was correct or there were reasonable grounds for the assertion.'[66]

6 Dissemination

In cases where information received from others is passed on or slanderous statements made by others are reported on (dissemination), certain legal systems grant exemption to the imparter (usually the media) of such statements. At the same time, a large proportion of such rules belong to the domain of case law and are rarely part of the written sources of law.[67]

The English and Irish rule of *absolute privilege* described in the previous section may be regarded as similar; according to this, the media's reporting on defamatory statements made under certain special circumstances (during court proceedings, in Parliament, etc.) is granted exemption from legal liability.

In Austria a similar absolute privilege exists: in the event of a true report on a hearing in a public session of the National Council, the Federal Council, the Federal Assembly, a State Parliament or any committee of the above general bodies of representation, no claims can be

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60 Act of 8 June 2004 on the Freedom of Expression in Media (*Loi du 8 juin 2004 sur la liberté d'expression dans les medias*), s 17para (1)item b), Criminal Code art. 443.

61 Criminal Code, art 445, s 2. See Doley, Mullis (n 6) 1266.

62 Criminal Code, art 180, no. 2. See Doley, Mullis (n 6) 1299.

63 Criminal Code, art 51. See Doley, Mullis (n 6) 1239.

64 Ibid 1241.

65 Law of Obligations Act, ss 1046(1), (2). See Doley, Mullis (n 6) 1187.

66 Freedom of the Press Act [*Tryckfrihetsfördningen (2002:908)*], ch 7 art 4 para 14.

67 For example, in Denmark (see Sandfeld Jakobsen, Schaumburg-Müller (n 24) 65) and in Hungary in certain cases judicial practice grants exemption to slanderous statements without relying on codified law. On the basis of Hungarian case law the media's presentation of information published by the Parliament, local governments, national and local public administration bodies, the courts and the public prosecutor's office cannot serve as the basis for defamation cases (see Supreme Court Decisions No. EBH 2001. 407., BH 2002. 51., BH 2003. 357., EBH 2005. 1289.). In the present section, however, we shall mainly deal with the provisions of codified law.

raised.[68] Apart from this rule, a much wider – general – defence exists in the media law for defamatory allegations originally made by third parties: if it is a case of an accurate quotation of the statement of a third party and the public had a predominant interest in obtaining knowledge of the statement quoted, then no claims may be raised by the defamed person.[69] The wide protection that Austrian statutory criminal law provides for defamatory statements is unique in Europe.

In Luxembourg, the defendant cannot be held liable if the defamatory publication concerns a communication previously made to the public, on the condition that all measures are taken to avoid such defamation and provided that the identity of the person responsible for the communication concerned is mentioned. There is also no legal liability when the publication concerns the correct reproduction of a quote by a third party, on the condition that it is clearly indicated as such, the identity of the author of the publication is mentioned, and the publication of the quote is justified by the right of the public to have knowledge of it.[70]

IV Protection of the Reputation of Public Figures in Hungary

In Hungary, reputation and honour are protected by civil law and criminal law in parallel. However, the limited protection of the personality rights of public figures has only a very narrow statutory basis (under the new Civil Code entering into force in spring 2014). The starting point in the Hungarian legal system is Decision 36/1994. (VI. 24.) of the Constitutional Court. The decision was based on a motion challenging the constitutionality of the crime of 'defamation of authorities or official persons', a crime specified in the old Article 232 of the Criminal Code. This Article threatened persons who used expressions capable of harming the honour of authorities with more severe punishment than for the crime of defamation committed against other private persons. The provision was found unconstitutional and was repealed because the Constitutional Court established that the freedom of expression and of the press are requisites – and therefore fundamental rights of utmost importance – for the existence and development of a democratic society (statement of reasons, point II/1). According to this decision,

> it follows from the positions taken so far by the Constitutional Court on the constitutional value of the freedom of expression and the freedom of the press, as well as the significant roles they fulfil in the life of a democratic society, that this freedom requires special protection when it relates to public matters, the exercise of public authority and the activity of persons with public tasks or in public roles (statement of reasons, point III/1).

[68] Media Act, s 6 para (2) item 1.
[69] Media Act, s 6 para (2) item 4.
[70] Act of 8 June 2004 s. 17 para 2. Luxembourg Criminal Code (*Loi du 16 juin 1879*), art 443.

As such, while the constitutionality of protecting the honour and reputation of the above-mentioned persons by means of criminal law may not be excluded, the freedom of the press – in comparison to private persons – may be limited to a rather narrow extent, and only in order to protect persons exercising state powers.

Furthermore, the Constitutional Court laid down certain constitutionality requirements as to the applicability of the crimes of libel and defamation, the examination of which was otherwise not requested by the petitioner, and, accordingly, was not examined any further. A 'constitutionality requirement' specified in the operative part that:

> An expression of a value judgement capable of offending the honour of an authority, an official, or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the person who states a fact, or spreads a rumour capable of offending one's honour, or uses an expression directly referring to such a fact, knew the essence of his or her statement to be false, did not know of its falsehood because of his or her failure to pay attention or exercise the caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.

Accordingly, the expression of an opinion is unlimited within the scope thus defined, while the statement of a fact may not be punished, unless the perpetrator was aware of the fallacy thereof, or was not aware of such a fallacy due to their failure to exercise the level of due diligence that may be expected from them. This test establishing the liability of the perpetrator for deliberate lies or in the event of negligence is rather similar to – but is not identical with – the Sullivan rule developed by the US Supreme Court.[71]

Jurisprudence shows that the influence of the 1994 Constitutional Court decision can be detected. However, this does not mean that the test used there has been exclusively and consistently used ever since. For instance, contrary to the intentions of the above-mentioned decision, defamatory opinions are most often considered by the courts to constitute a breach of the law, even in the lawsuits of public figures.

Criminal law (including the Criminal Code that was in effect until the summer of 2012, as well as the new Criminal Code replacing it) does not contain any explicit provisions regarding the reduced protection of the personality rights of public figures. As such, criminal law judges have only one reference point; the Constitutional Court decision.

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[71] See *New York Times v. Sullivan*, 376 U.S. 254 (1964). On the universal significance of the decision and its impacts on foreign legal systems see András Koltay, 'Around the World with *Sullivan* – The *New York Times v. Sullivan* Rule and its Universal Applicability' (2006) 3–4 Iustum Aequum Salutare 101–115; András Koltay, 'The Development of Freedom of the Media in a Newborn Democracy: The Hungarian Perspective' (2010) 2 (1) Journal of Media Law 25–41; Kyu Ho Youm, '"Actual Malice" in U. S. Defamation Law: The Minority of One Doctrine in the World?' (2011) 4 (1) Journal of International Media & Entertainment Law 1-30.

The new Civil Code (Act CXX of 2009, which was passed in 2009 but not put into force, then withdrawn in 2010), intended to introduce a test similar to that used in Constitutional Court decision no. 36/1994. (V. 26.) and also by the US Court in the *New York Times v. Sullivan* case, for the violation of reputation and defamation committed by the media. Anyone proving that 'his/her actions [conduct according to the facts of the case] were not wilful or grossly negligent' (Article 2:94) would have been exempted from the possibility of the sanctions being applied.

A newer draft of the new Civil Code, published in early 2012, contained a general clause regarding the limited protection of the personality rights of public figures. According to the original draft:

> Article 2:44 *[Protection of the personality rights of public figures]* The protection of the personality rights of public figures shall not pose unnecessary restrictions on the fundamental rights guaranteeing the free discussion of public affairs.

It should be noted that this text aimed to protect the 'free discussion of public affairs' so that, in addition to a stronger statutory protection of freedom of speech, and with an instance of judicial practice supporting this kind of interpretation, the scope of 'public affairs' and 'public figures' which evolved during previous judicial practice would be restricted and 'tabloid events' and 'celebrities' would thereby be excluded from it.

The respective provision of the adopted and promulgated new Civil Code (Act V of 2013) was changed as a result of a motion for amendment and the approved and final text is as follows:

> Article 2:44 *[Protection of the personality rights of public figures]* The exercise of fundamental rights guaranteeing the free discussion of public affairs may limit the protection of the personality rights of public figures on the grounds of legitimate public interest, to a necessary and proportionate extent, without violating human dignity.

Similarly to the original draft, the amended, final text allowed the scope of 'public figures' and 'public affairs' to be restricted, as long as the general scope of personality rights is restricted only to serve the 'free discussion of public affairs'. However, the text adopted raises several concerns.

The head of the codification committee, Lajos Vékás, put forward his concerns immediately before the final vote on the Act. This is confirmed by the first commentary to the new Civil Code, edited by him.[72] These concerns are:

– the necessity/proportionality test is inapplicable in private law disputes (with the content established by the Constitutional Court); it does not have any private law content;
– the 'legitimate public interest' represents an unnecessary and problematic restriction;
– any violation of personality rights necessarily harms human dignity; hence, if the addition of the words '[may limit ...] without violating human dignity' is interpreted literally, freedom of

[72] Lajos Vékás, 'Bírálat és jobbító észrevételek az új Ptk. Törvényjavaslatához (a zárószavazás előtt)' ['*Criticism and recommendations to the draft law of the new Civil Code (prior to the final vote)*'] (2013) 1 Magyar Jog 1-7. László Székely, Lajos Vékás, 'Személyiségi jogok' ['Personality Rights'] in Lajos Vékás (ed), *A Polgári Törvénykönyv magyarázatokkal* [*The Civil Code with explanations*] (CompLex 2013, Budapest) 58-59.

speech should be subordinated to personality rights in all disputes, although this could not have been the aim of the legislator.

In the summer of 2013, Máté Szabó, Commissioner for Fundamental Rights, filed a motion on the grounds of the unconstitutionality of the provision.[73] According to him, the part of the provision which requires a 'legitimate public interest' for the personality rights of public figures to be restricted represents an unconstitutional restriction of freedom of speech. According to the motion, the requirement of public interest represents a sufficient restriction in itself. The further requirement of being 'legitimate' represents an unjustified and disproportionate limitation and moreover, due to its problematic interpretation, it violates the requirement of clear norms and legal certainty. The motion had not been judged by the Constitutional Court by the time the present manuscript was finalised.

V Conclusions

This comparative review yields certain general conclusions on the nature and application of the provisions on the protection of the reputation and honour of public figures in Europe (or, more specifically, in the Member States of the European Union that form the primary subject of our investigations).

A) In the legal systems of the various states, the provisions on the protection of reputation and honour are dispersed and appear in several different places; as such, the parties suffering the infringement may initiate several different proceedings in parallel with each other. Criminal law prohibits the violation of reputation and honour in almost all European states, usually threatening the offenders with fines and imprisonment.

B) The role of judicial practice is definitive with regard to the issues of the protection of the reputation and honour of public figures, irrespective of the branch of law applied. This is equally true with regard to the definition of the scope of persons concerned and the standards applicable to them.

C) The scope of public figures is not precisely defined; rather, it is constantly changing and growing; furthermore, the protection extended to such people may also be differentiated depending on their personal status.

D) Very few states provide for stricter standards applicable to the protection of the reputation and honour of public figures in legal acts; such provisions only appear in the criminal codes (one exception is the new Hungarian Civil Code). The provisions also leave much to the interpretation and application of the law by the courts.

[73] The text of the motion (in Hungarian) can be downloaded from the website of the Commissioner for Fundamental Rights (in Hungarian): <http://www.ajbh.hu/documents/10180/111959/201302249Ai.pdf/a767f7f2-1a6d-4360-9240-8e8465a1057e?version=1.0> accessed 04 November 2013.

E) A slightly surprising finding of the research is that, in certain states, there still exist rules that provide for stronger than standard protection of the personality rights (and, consequently, the honour and reputation) of public figures. According to the legal literature, these provisions are not applied in practice; however, their very existence is hardly compatible with the practice of the European Court of Human Rights.

F) The distinction between and the differentiated legal treatment of facts and opinions is one of the fundamental issues regarding the protection of reputation and honour. In the various states this differentiation is also left to judicial practice.

G) In instances of conduct that constitutes a violation of reputation and honour, the possibility of exemption from legal liability is always given. That is, liability is not objective; sometimes the grounds for exemption are provided for by law, but much more often they are shaped by judicial practice.

H) The examination of the public interest involved (and, in several countries, the issue of good faith) is of paramount importance in the proceedings related to public figures. If a publication is deemed to be of public interest because it serves the interests of democratic publicity then even the publishers of false statements of fact may be exempted from liability.