Commonalities in the English Tort and French Criminal Wrong of Defamation

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Abstract

This article considers the extent to which the nature of the regulation – tortious or criminal – influences the substantive content of the rules in England and France. It argues that the English and French regulatory features are the result of path dependence. Consequently, while they have led to substantive differences, they do not prevent the emergence of a shared approach to the wrong.

Keywords: defamation, tort, crime, comparative, path dependence.

A Introduction

The purpose of the law of defamation is to hold a balance between freedom of expression and the right to reputation.[1] In recent years, cross-border violations of the right to reputation have been facilitated by the increased accessibility of means of publication,[2] including international newspaper circulation and Internet posting.[3] However, there exist no European rules determining which law should apply to defamation cases involving an international element.[4] The answer to this question is found in each Member State's domestic choice of law rules.

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1 *Panday v. Gordon* [2005] UKPC 36; [2006] 1 AC 427, [12].

2 Cross-border litigation in defamation is relatively rare. *See* Ministry of Justice, *Report of the Libel Working Group* (2010) Annex B: Cases with a foreign connection issued in the High Court in 2009. However, Svantesson argues that 'what is interesting is not the number of cases currently brought before the courts. After all, the small number of cases may be directly attributable to the complexity of the system... The significance of the problem is more accurately assessed by reference to the number of instances of cross-border violations of privacy and personality rights [including defamation].' *See* D. Svantesson, 'The Rome II Regulation and Choice of Law in Internet-Based Violations of Privacy and Personality Rights – On the Wrong Track, But in the Right Direction?' *Austrian Review of International and European Law*, Vol. 16, 2014, p. 276.

3 *See, e.g. Berezovsky v. Michaels* [2000] UKHL 25; [2000] All ER 86.

4 The 'Rome II' Regulation contains general rules on choice of law for torts and other non-contractual obligations. However, violations of privacy and rights relating to personality, including defamation, are expressly excluded from its scope in article 1(2)(g). *See* European Parliament and Council Regulation 864/2007, OJ L199/40.

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This creates a complex framework for cross-border defamation claims. The substantive rules on defamation vary from one jurisdiction to the other.[5] Yet, in the absence of unified choice of law rules, the law governing the parties' liability cannot accurately be predicted. One regular suggestion to simplify this state of affairs is to harmonize the substantive laws of defamation in the European Union.[6] But the feasibility of such harmonization is doubted. This is due to the perceived existence of 'wide divergences' in the conception of the right to reputation across the 28 Member States and in the content of domestic defamation laws.[7]

One major such difference is the existence of two types of liability for defamation: tortious and criminal. The standards vary from one jurisdiction to another. Only in England has criminal defamation been fully abolished. Trends found in other Member States include the partial abolition of criminal defamation or, as is the case in France, the more limited measure of abolishing the imprisonment penalty while preserving a criminal type of regulation.[8] In the other 20 jurisdictions, defamation remains a criminal wrong punishable by imprisonment.[9] Beyond the issue of decriminalization of defamation, this highlights the existence of substantive disparities between the Member States' legal systems. And in the words of Glenn, "difference implies isolation".[10]

The purpose of this article is to consider the extent to which the nature of the regulation, tortious or criminal, influences the substantive content of the rules on defamation in England and France. The hypothesis is that despite substantive differences owing to the regulatory features of each system, England and France adopt a shared approach to the wrong of defamation. This proposition is put to the test, and ultimately confirmed, by examining central aspects of the English and French laws of defamation.

B Path Dependence in the English and French Regulatory Features

On a cursory view, the way in which the English and French wrongs of defamation are constructed appears to differ significantly, the most noticeable difference

5 European Parliament, Committee on Legal Affairs, 'Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II),' 2010, p. 5.

6 Steering Committee on the Media and New Communication Services, 'Working Paper on the Alignment of Defamation Laws with ECHR Case-law' CDMC(2005)007 (2006); High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy* <http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf>, accessed on 14 July 2015, p. 22.

7 *See, e.g.* 'Working Document on the amendment of Regulation (EC) No 864/2007' (*supra* note 5), p. 5.

8 'Out of Balance: Defamation Law in the European Union and its Effect on Press Freedom' (*Free Media*, 17 July 2014) <www.freemedia.at/fileadmin/uploads/pics/Out_of_Balance_OnDefamation_IPIJuly2014.pdf>, accessed on 14 July 2015, pp. 12-13.

9 *Ibid.*

10 H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn), Oxford University Press, Oxford, 2010, p. 45.

being the nature of the regulation (tortious in England and criminal in France). The recent decriminalization movements in these jurisdictions had opposite outcomes. In England, Section 73 of the Coroners and Justice Act 2009 abolished various offences of criminal libel, including that of defamatory libel. In France, on the other hand, proposition n.°12 of the Guinchard Commission, recommending the decriminalization of defamation,[11] never came to anything. From a comparative perspective, this distinction between tortious and criminal liability supports a generally held view that the national particularisms of the laws of defamation resist any possibility of harmonization.

Contrary to this, I argue that the type of liability found in England and France is not the result of a conscious and reasoned choice. Rather, it is the result of a difference in the way in which each system structures legal rules. This suggests that the distinct regulatory features in the English and French laws of defamation do not exemplify fundamentally different approaches to the right to reputation.

I Justifying Tortious and Criminal Liability

This section analyses the reasoning that led to these regulatory outcomes and considers the factors which have shaped the current laws of defamation in England and France.

1 English Law: Crime as an Instrument of Repression

Historically, there were two wrongs of defamation in English law – one civil and one criminal. The offence of criminal libel was formally established in 1606, in the case *de libellis famosis*. Such offence encompassed various types of libel (seditious, blasphemous and defamatory) and was divided into two classes: political libels (posing a threat to the security of the state) and private libels (likely to cause private disorders).[12] Private or personal libels were "instituted by or on behalf of private persons in order to protect their personal reputation", while public or political libels were an instrument used "by the state for political reasons".[13] In this context, the criminal regulation of libel acquired a negative reputation for two main reasons.

First, criminal prosecutions for public libel had an 'overtly political' character.[14] Political libels were characterized by an "arbitrary mode of initiating a prosecution".[15] Indeed, they began on the Attorney General's *ex officio* information;[16] this contrasted with the rules on criminal information for private libels, for which private individuals needed to apply for the discretionary leave of the court. It is also clear that the jury was biased in favour of the prosecution. The procedure of

11 Commission sur la répartition des contentieux présidée par Serge Guinchard, *L'ambition raisonnée d'une justice apaisée*, Paris, La documentation française: Rapports officiels, 2008, p. 290 *et seq.*

12 Law Commission, *Working Paper No. 84, Criminal Libel*, Her Majesty's Press Office, London, 1982, 2.5.

13 J.R. Spencer, 'The Press and the Reform of Criminal Libel', *in* P.R. Glazebrook (Ed.), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, Stevens & Sons, 1978, p. 266.

14 Law Commission 1982, *supra* note 12, 2.9.

15 J.L.J. Edwards, *The Law Officers of the Crown*, Sweet & Maxwell, London, 1964, p. 263.

16 *Ibid.*, p. 262 *et seq.*

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selection of the jurors depended on their support of the Government, lacking such support jurors were stricken from the list before the beginning of the trial.[17] As such, political libels effectively acted as an instrument of political censorship for the government. In the words of Harling, "there was an arbitrariness in the exemplary prosecutions under the law of libel that made it a formidable instrument of harassment, if ultimately not an efficient instrument of repression".[18]

Second, the development of the two parallel distinctions between libel and slander and criminal and tortious defamation led to an inevitable understanding of the criminal offence of private libel as an instrument muzzling the press. There are two main causes for this. Written defamation was treated more severely than oral defamation, at a time when newspapers were the main source of writing. Such severe treatment of writings led to the view that defamation acted as an instrument of censorship.[19] In spite of the practical recognition of freedom of the press in 1679 when the Parliament allowed the Licensing Act 1662 to lapse, and no prior restraints on publication subsisted, defamation was *de facto* allowing the government to exercise control over newspapers. Further, defamation claims against newspapers commonly chose the path of criminal rather than civil liability. This was for a variety of reasons. One major reason was the fact that political news and social gossip concerned primarily the aristocracy. The aristocrats generally opposed newspapers; they looked down on a civil action as they did not need the compensatory award and overall preferred a criminal action which shared some characteristics with political libels, none the least its more public character.[20]

These factors resulted in a growing dissatisfaction with criminal libel, which was widely seen as an instrument of repression. Legislative changes in the second half of the 19th century resulted in the gradual decline of criminal libel, which was formally abolished in 2009.

2 *French Law: A Rights-Based Philosophy of Criminal Law*

Defamation, which is one of the so-called French 'press wrongs', is expressly regulated in Article 29 of the law of 29 July 1881 on freedom of the press. In France, the advent of the Third Republic in 1870 brought about a significant movement of liberalization for the press. Following the *Radicaux*'s victory in the 1876 elections, a press reform project was entrusted to a commission of 22 members. The nature of the regulation was considered a preliminary issue by the commission; its main focus was to record and give content to the freedoms of speech and of the press.[21] In doing so, the commission rejected a purely civil form of liability, based on three separate considerations. First, under a framework of civil liability, claims would be brought against individual authors. Their likely insolvency would,

17 P. Harling, 'The Law of Libel and the Limits of Repression, 1790-1832', *Journal of Legal History*, Vol. 44, 2001, p. 116-117.

18 *Ibid.*, p. 111.

19 R.C. Donnelly, 'History of Defamation', *Wisconsin Law Review*, Vol. 99, 1949, p. 121.

20 Spencer 1978, pp. 267-268, 273.

21 H. Celliez & C. Le Senne, *Loi de 1881 sur la presse, accompagnée des travaux de rédaction*, Marescq Aîné, Paris, 1882, p. 3, p. 12.

in most cases, result in an illusory framework of liability, *de facto* creating immunity from liability.[22] To the contrary, the 1881 law aimed at establishing a regime whereby the primary defendant was not the author, but rather the publisher or editor who were more likely to be solvent. Second, the fundamentally public character of press wrongs, threatening public peace, was considered incompatible with the private character of civil remedies.[23] Finally, establishing a system of civil liability for press wrongs would have conflicted with pre-existing provisions of the Criminal code.

The commission therefore took the view that abuses of freedom of expression and of the press should generate criminal liability. In fact, the criminal regulation of defamation was an undisputed state of affairs. This is probably because press wrongs (including defamation) had always been seen as a threat to public peace,[24] which the criminal law was designed to regulate. It is clear that, just as was the case in England, the instrumental use of the criminal law as a censorship tool was considered an issue. However, this did not lead to a genuine debate on decriminalization. Rather, the reflection focussed on whether press wrongs should be regulated under ordinary criminal law or under a special regime, derogatory to the general criminal law rules.[25] Although the importance of freedom of expression and of the press had long been recognized, it had never been fully or lastingly implemented. The law of 29 July 1881 sought to effectively establish it, marking a split with the years gone by since the French Revolution. In a context in which the criminalization of defamation was not questioned, it was felt that a derogatory regime would allow for a better protection of such freedoms.

This derogatory regime took the form of a unique procedural framework accounting for the specificities of press wrongs. One of its best-known procedural guarantees is the three-month limitation period established in Article 65 of the law of 29 July 1881 (contrary to the ordinary prescription period for this category of wrongs, which is of three years).[26] Such short prescription period is justified on the basis that the impact of the wrong on the plaintiff's reputation or on the public order is often short-lived. As such, it would be unfair to allow a claim to be brought when the negative effects of a statement are no longer felt.[27] It has important practical consequences on the evidential level, not the least that of acting as a liability limiting mechanism. With this in mind, three months is considered to be a reasonable period of time for which a person making a living out of his freedom of expression, such as a journalist, can be expected to be held accountable.[28]

As a result of this process, the law of 29 July 1881 regulates press wrongs as criminal wrongs. They possess the ordinary criminal wrongs' basic definitional characteristics – they require a specific type of intention, involve societal harm,

22 *Ibid.*, p. 25.
23 *Ibid.*
24 *Ibid.*, p. 12.
25 *Ibid.*, p. 25.
26 Article 8, *alinéa* 1 of the Criminal procedure code.
27 Guillaume Lécuyer, *Liberté d'expression et responsabilité*, Dalloz, Paris, 2006, p. 242.
28 *Ibid.*, p. 241.

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and their definition is sufficiently precise so as to not leave space for arbitrary decisions.[29] In fact, despite their regulation under a special law on the press rather than in the Criminal code, they are considered to be ordinary criminal wrongs.[30] However, they are characterized by a specific procedural framework that strives to guarantee freedom of expression and of the press.[31]

II The Influence of the Structuring of Legal Rules on the Regulatory Features

The reasoning processes that preceded the regulatory outcomes in England and France therefore diverge significantly. At different times in the 19th century, each system was pressured by a combination of historical and social factors to reconsider the nature of defamation liability. Both systems strove to protect fundamental freedoms (that of expression and, relatedly, that of the press); in doing so, one rejected the criminal framework, while the other adopted and adapted it.

1 A Difference in Method

As a matter of fact, the divergence in the reasoning underlying the regulatory features owes much to each system's tradition of structuring legal rules. In rejecting the civil regulation of press wrongs, the French legislator was striving to accommodate the specific challenges and difficulties they raised. In order to treat each case on its facts, he was effectively departing from the traditional system of civil liability whereby press wrongs would have been treated as illustrations of a general principle of responsibility found in Article 1382 of the Civil code.

This method corresponds to the English tradition of structuring legal rules, which does not accommodate a similar *clausula generalis*; tort law has historically tended to define rights in precise terms. To some extent, the modern law of tort has departed from this traditional Blackstonian common law view of liability as a list of distinct nominate torts protecting specific rights. Indeed, the tort of negligence has abandoned tort law's fragmentary approach in favour of a fault-based standard of liability; consequently, it may protect a variety of legal interests. Nevertheless, it is submitted that while this may have had an impact upon the common law tradition by introducing a new approach to liability, it has come to complement rather than replace the previous one. Indeed, it is only in rare instances that the introduction of a tort of negligence has made other causes of action redundant. Rather, aspects of negligence have infiltrated individual torts.[32] Therefore, insofar as English tort law has become bifocal,[33] the definition of nominate torts in precise terms is still a characteristic feature of the common law tradition.

So, although in both England and France the criminal regulation of speech had historically been used as an instrument of repression, the characteristics of each legal system have led them to address this issue in different ways. In Eng-

29 Celliez & Le Senne 1882, p. 181.

30 *Ibid.*, pp. 181-182.

31 *Ibid.*, p. 25.

32 D. Nolan & J. Davies, 'Torts and Equitable Wrongs', *in* A. Burrows (Ed.), *English Private Law* (3rd edn), Oxford University Press, Oxford, 2013, 17.09-17.13.

33 *Ibid.*, 17.14.

land, criminal libel fell into disuse and was later abolished; in France, the legislator created procedural safeguards within the criminal law system. In other words, the current state of affairs in which legal systems are opposed at the level of labels but not in their general approach to the wrong results from a difference in method.[34]

2 An Illustration of Path Dependence: The Internal Dynamic of the Law

In that sense, the English and French regulatory features in respect of defamation owe a great deal to the mould of legal history and, more importantly, legal culture. This reveals that they are symptomatic of path dependence. Bell examined the importance of this concept for the comparative lawyer in a recent article, in which he defined it as follows:

> [Path dependence] suggests that established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future. Legal development is explained ... by the internal dynamic of the law, the pressure of established ways of dealing with issues.[35]

The different regulatory features are the result of the internal characteristics of the common law and the civilian traditions in the way they structure legal rules. For this reason, their development in England and France is a telling illustration of path dependence in legal development.

III Denying the Existence of Fundamentally Different Approaches to Defamation

The consideration of the framework of liability developed above is useful to understand how the wrong is conceptualized in each country. Indeed, the justifications for choosing tortious or criminal liability give important indications as to the comparability of the English and French wrongs. A conscious and reasoned choice might have revealed fundamentally different approaches to the right to reputation; on the contrary, this type of path-dependent development with lasting consequences suggests that more common grounds can be uncovered. And indeed, in the following section, three examples are considered, which suggest that the link between the type of liability – tortious or criminal – and the substantive content of the rules on defamation must be nuanced.

C Assessing the Impact of the English and French Regulatory Features on the Substantive Content of the Rules

At first sight, the nature of the regulation – tortious in England and criminal in France – can explain three discrepancies found in the substantive rules on defa-

34 This endorses Weir's conclusion. *See* P. Catala & J.A. Weir, 'Delict and Torts: A Study in Parallel (pt. 2)', *Tulane Law Review*, Vol. 38, No. 2, 1964, p. 237.

35 J. Bell, 'Path Dependence and Legal Development', *Tulane Law Review*, Vol. 87, No. 4, 2013, pp. 787-788.

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mation in England and France in relation to the treatment of fault, truth and remedies. Indeed, these discrepancies appear to be linked to the specific type of liability found in each system. However, on closer analysis, the link between the type of liability and the substantive content of the rules must be nuanced.

I Three Discrepancies: Fault, Truth and Remedies

Broadly speaking, the mechanisms protecting reputation in England and France involve similar considerations. Nevertheless, three features of the law – the role of fault and truth and the remedial aspects of defamation – differ significantly between the English and the French legal systems. At first sight, the way in which each jurisdiction approaches these features seems to be justifiable on the basis of their disparate regulatory features.

1 Fault

Despite marked structural differences relating to the nature of the liability, the English and French wrongs possess similar constituent elements. In the English law of defamation, the *prima facie* cause of action consists in proving the publication of a defamatory statement, which designates the claimant and has a tendency to harm his reputation, subject to any defences. Remarkably, this cause of action is exempt from any fault element. Thus, defamation is commonly described as a tort of strict liability, both in the case law[36] and in doctrinal works.[37] In other words, liability is imposed in the wrong of defamation without the claimant having to prove that the defendant was at fault. The cause of action is broadly similar in French law. However, in the French wrong of defamation, the imposition of liability requires proof of an additional element – the defendant's intention (*mauvaise foi*).[38] And thus fault is officially required to ground liability in the French law of defamation.

At first sight, these standards of liability are aligned with each jurisdiction's regulatory features. In England, civil liability is historically disconnected from considerations of fault. Under the writ system, there was no need to plead the state of mind or culpability of the defendant, and there existed no freestanding principle of liability for fault. Once the writs were abolished at the end of the 19th century, such principle became embodied in the tort of negligence. Nevertheless, despite the importance that the wrong of negligence acquired, the nature of tort liability never became rationalized on the basis of fault. Rather, civil wrongs are commonly characterized as a breach of duty.[39] Thus, there is no gene-

36 The strict liability doctrine is commonly understood to have its roots in the English case of *E Hulton & Co v. Jones* [1910] AC 20, 79 LJKB 198. It has been endorsed in other common law jurisdictions: *e.g.* in *Grant v. Tortstar Corp* [2009] SCC 61; (2009) 3 SCR 640, the Supreme Court of Canada considered that the common law of defamation is "in effect a regime of strict liability".

37 *See, e.g.* E. Barendt, 'What Is the Point of Libel Law?', *Current Legal Problems*, Vol. 52, 1999, p. 110; R. Stevens, *Torts and Rights*, Oxford University Press, Oxford, 2007, p. 100; R. Parkes *et al.*, *Gatley on Libel and Slander*, Sweet & Maxwell, London, 2013, 1.8.

38 B. Beignier *et al.*, *Traité de droit de la presse et des médias*, LexisNexis, Paris, 2009, p. 743.

39 P. Birks, 'The Concept of a Civil Wrong', *in* D.G. Owen (Ed.), *The Philosophical Foundations of Tort Law*, Oxford University Press, Oxford, 1995, p. 33, p. 37.

ral requirement for civil liability to arise that the claimant be at fault. Tort law can ground liability for conduct that was not intentional, negligent or sometimes even deliberate: these are instances of strict liability.[40] There exist various categories of strict liability. Defamation is generally understood to fall within the conduct-based category of strict liability,[41] where liability attaches to the voluntary doing of an act: the publication of a statement. Thus, Cane's analysis of the wrong is that "the basic rule ... is that a person can be liable for defamation even if they did not know and had no reason to suspect that they were publishing a defamatory statement or even that the defamed person existed".[42]

The same solution cannot be adopted in respect of criminal law. The severity of criminal liability warrants the principle that all criminal offences should contain a fault element.[43] In France, criminal law rests on a tripartite classification of wrongs, based on their seriousness. *Crimes* are the most serious offences, *délits* are major offences and *contraventions* are minor ones.[44] The principle laid out in Article 121-3 of the Criminal code is that the most serious offences (all *crimes* and most *délits*) require intention. In French criminal law, defamation is a *délit* and is generally understood to be an intentional wrong, requiring both general and special intent. The former consists in the will or conscience that the statement may adversely affect someone's reputation, and the latter in the intention to publish the defamatory statement.[45]

2 *Truth*

On a cursory view, there are great differences between England and France on the way in which they approach truth. In the English tort of defamation, truth is an absolute defence. On the other hand, in the French criminal wrong of defamation, the traditional approach was that the *exceptio veritatis* defence was only available if an element of public interest could be proven.[46] These traditional approaches to the role of truth in England and France can be rationalized very clearly if we consider the different goals pursued by tort and crime.

The tort of defamation is designed to protect an individual's interest in his reputation. It is, in itself, a limit placed on the right to freedom of expression to protect a private right. The main device for balancing these competing interests is found in defamation defences, including truth. Truth is an absolute defence, although not all true information is relevant to an individual's reputation. This is because the public interest in discovering and knowing the truth has historically underlined the right to freedom of expression. Truth is alternatively "regarded as

40 P. Cane, *The Anatomy of Tort Law*, Hart Publishing, Oxford, 1997, p. 45.

41 Note, however, that the strict liability nature of defamation is doubted by some authors. *See, e.g.* J. Goudkamp, *Tort Law Defences*, Hart Publishing, Oxford, 2013, p. 55.

42 Cane 1997, p. 45.

43 Contra: J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford University Press, Oxford, 2007, p. 227.

44 Article 111-1 of the Criminal code.

45 Beignier *et al.* 2009, p. 744.

46 *See*, already: Article 20 of the law of 17 May 1819; Article 35 *alinéa* 2 of the (original) law of 29 July 1881.

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an autonomous and fundamental good, or its value may be supported by utilitarian considerations concerning progress and the development of society".[47] Consequently, while the protection of one's private interest in reputation is a valid limit to the right to freedom of expression, the value of truth justifies that its exposure be considered the paramount interest.[48]

By contrast, the issue of truth or falsity of the defamatory statement was largely irrelevant to the criminal law of defamation. The criminalization of defamation was originally grounded in the harmful consequences that a defamatory statement could have for the public. In France, the wrongful interference with the victim's reputation had harmful consequences on the plaintiff's social standing.[49] This type of injury commonly provoked duels, over the course of which the defamed person tried to restore his reputation. Significantly, the interests protected by the criminal wrong therefore differed from those protected by the tortious wrong. The focus was not on the injury to the claimant but rather on the potentially harmful consequences for the public order. So in that context, the paramount interest was the preservation of the public peace rather than the exposure of the truth. Consequently, the issue of falsity was generally disregarded by the criminal law of defamation. This justifies the original attitude of the French legislator to the defence of truth: treating it as an exception kept within strict bounds.

3 *Remedial Aspects of Defamation*

Finally, the English and French remedial aspects of defamation exemplify the modern tortious and criminal sanctions. In the English tort of defamation, a successful plaintiff can receive two kinds of remedies: an award of damages and an injunction.[50] The Defamation Act 2013 has established two further remedies. Sections 12(1) and 13 allow a court giving judgment for the claimant to order the defendant to publish a summary of the judgment and to remove the statement or to cease the distribution of the material containing the statement. By contrast in France, the primary responses to the wrong of defamation consist in a fine and/or (exceptionally, for aggravated forms of the wrong) in a prison sentence.[51]

A comparison of the English and French responses to the wrong of defamation reveals significant differences in each system. Due to the nature of the regulation of defamation in England and France, each system has a different focus. The English tortious action focusses primarily on vindicating and compensating the claimant.[52] On the other hand, the very nature of the French criminal action mandates a focus on punishing the defendant. While in both jurisdictions, the primary remedy is monetarized, in England it consists in a damage award and in France it represents a fine. In practice, this means that the former focusses on the harm suffered by the claimant, with the award serving a compensatory purpose;

47 E. Barendt, *Freedom of Speech*, Oxford University Press, Oxford, 2005, p. 7.

48 M. Tugendhat & I. Christie, *The Law of Privacy and the Media*, Oxford University Press, Oxford, 2011, 7.34.

49 M.-L. Rassat, *Droit pénal spécial* (6th edn), Dalloz, Paris, 2011, p. 515; Beignier *et al.* 2009, p. 785.

50 *John v. MGN* [1997] QB 586, [1996] 2 All ER 35, p. 607.

51 Article 32, *alinéa* 1; Article 33, *alinéa* 2; Article 24, *alinéa* 6 of the law of 29 July 1881.

52 *John v. MGN* (*supra* note 50), p. 607.

whereas the latter focusses on the defendant's wrongful act, and the fine is paid to the Public Treasury as a punishment.

These characteristics are distinguishing traits of tortious and criminal types of regulation, respectively, and correspond to each system's regulatory features. In view of this observation, the respective responses to the wrong appear to have been dictated by such features.

II Elements of Commonality in the English and French Laws of Defamation

In the previous section, I argued that at first sight, the way in which each jurisdiction regulates fault, truth and remedial aspects of defamation seems to be justifiable on the basis of their disparate regulatory features. However, on closer analysis, the link between the type of liability – tortious or criminal – and the substantive content of the rules must be nuanced. In fact, despite these substantive differences, elements of commonality in the English and French wrongs of defamation can be identified.

1 Fault and the Hierarchy of Responsibility: Similar Standards of Liability

In both England and France, there exists a hierarchy of responsibility. However, liability is organized along different hierarchical lines in each jurisdiction. In England, there are two categories of defendants. Primary defendants are those who intend to publish the defamatory statement; this category includes the author, editor and commercial publisher.[53] Their liability is commonly described as strict. By contrast, secondary defendants are those who did not intend to publish the statement. Their actions vary from repetition or distribution to the omission to prevent publication, and their turns on a fault-based standard of liability: negligence.[54] In France, Article 42 of the 1881 establishes a system of *responsabilité en cascade* (literally: cascading responsibility). This means that there is a hierarchical order in which one's liability will be engaged as the principal author of the offence: (1) the publisher or editor, (2) the author, (3) the printer and (4) the vendor or distributor. While the author's liability requires that an element of fault be proved, the publisher's liability is strict.[55]

The comparison made in the previous subsection – arguing that defamation is a strict liability tort in England and a fault-based criminal wrong in France – focusses on the author's liability. There is, however, a problem with this comparison. Authors do not belong to the same category of defendants in both jurisdictions: they are primary defendants in England but only secondary defendants in France.

The comparability of the regimes appears when the terms of the comparison are amended to reflect the hierarchical lines along which responsibility for defamation is organized in English and French law. Each jurisdiction recognizes that

53 This category is defined *a contrario* in s. 1 of the Defamation Act 1996: 'In defamation proceedings a person has a defence if he shows that (a) he was not the author, editor or publisher of the statement complained of'.

54 *See* s. 1 of the Defamation Act 1996.

55 Cass. Crim., 29 November 1994, *Bull. Crim.* 1994, 384 ('*responsabilité de plein droit*').

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there is one type or class of defendants whose responsibility is sought in the first place; other defendants' liability is only secondary. In order to reflect this factual situation, the comparators change from author/other defendants to principal/secondary wrongdoers.[56] The latter category in England covers the author, the publisher and the editor; in France, the sole primary responsibility falls upon the publisher or editor. Secondary defendants in England only cover third parties with a lesser degree of involvement in the wrong; the category is wider in France since it includes not only those with such lesser involvement but also the author.

By changing the terms of the comparison, a common feature appears: England and France adopt comparable standards of liability. Indeed, in both England and France, principal wrongdoers are held strictly liable; secondary wrongdoers are subjected to a negligence standard, whether in the cause of action or as part of a defence. Beyond the simple recognition that each jurisdiction relies in part on notions of fault that do not correspond to their regulatory features, this finding fundamentally rejects the possibility of a link between the nature of the regulation and the standard of liability. Indeed, it becomes clear that English and French law share the same distinctive approach to the standard of liability in defamation regardless of the nature of their regulation.

2 *Truth and 20th Century Legal Developments: A Common Approach*

This is equally true with regards to the treatment of truth. We have seen that for a long time the truth of the statement did not prevent liability from arising in the French law of defamation, except in the limited circumstances where a public interest in knowing the truth was shown. There are nonetheless indications of a paradigmatic change in the attitude of the French legislator to the *exceptio veritatis*. On 6 May 1944, an ordinance was enacted, which established a liberal approach to the defence of truth by recognizing its availability in all defamation cases, subject to three exceptions.[57] In the wake of the enactment of the ordinance, it was suggested that the broad truth defence should only apply to the specific instances of defamation regulated by Articles 30 and 31 of the 1881 law, which concern public officials. Contrary to this suggestion, the courts adopted a broad interpretation of the rules contained in the ordinance. The *Cour de cassation* thus considered that the *exceptio veritatis* should apply to all instances of defamation, including those involving private individuals.[58] Further, recent decisions in the *Conseil constitutionnel* have significantly reduced the number of exceptions to the principle that truth is a complete defence, only preserving that relating to the

56 The term 'principal' is used in a literal sense, independently of the connotations it carries in the law of accessory liability. It does not suggest an interpretation of the law of defamation as one form of accessory liability in torts (in the sense suggested by P. Davies, 'Accessory Liability for Assisting Torts', *Cambridge Law Journal*, Vol. 70, No. 2, 2011, pp. 353-380), and is therefore not couple with the notion of 'accessory' but rather with that of 'secondary defendant'.

57 These circumstances were listed in Article 35, *alinéa* 3 of the law on the press. They covered statements that (a) related to the claimant's private life; (b) referred to facts which were over ten years old; or (c) had been pardoned, had been the subject of a judicial revision or were covered by the rules on limitations.

58 *See* Cass. Crim. 12 November 1954, *D.* 1954, p. 765.

individual's private life.[59] This signals a new approach, similar to the English one, whereby the availability of the truth defence is no longer an exception but is the principle.

Further, two major parallels may be drawn between the English and the French approaches to truth. First, in both English and French law, the defence of truth is designed to defeat the presumption of falsity. The effect of such presumption is that once the claimant has proven that a defamatory statement designating him has been published, a presumption arises that the statement is false. It is then the defendant who bears the burden of proving that the statement was true. This illustrates the fact that England and France have balanced the conflicting rights to reputation and freedom of expression in a similar fashion, revealing a similar underlying value system. This is best described in Dworkin's words:

> [W]hen the burden of proving truth is placed on the defendant in a defamation suit ... after the plaintiff has proved defamation, this may represent some collective determination that it is a greater moral harm to suffer an uncompensated and false libel than to be held in damages for a libel that is in fact true.[60]

Second, in the same way that the existence of a presumption of falsity reveals a shared underlying value system, the English and the French exceptions to the truth defence are grounded in similar policy principles. In England, Section 8(5) of the Rehabilitation of Offenders Act precludes reliance on the truth defence when the disclosure of a spent conviction is actuated by malice. There is no clear policy underlying the Act: the competing interests are non-disclosure of spent convictions and the right to tell the truth.[61] But a generally accepted view is that the Act prevents invasions of privacy.[62] In France, following the enactment of the 1944 ordinance, the defence of truth is available in all defamation cases involving private individuals, except in specific circumstances listed in Article 35, *alinéa* 3 of the law on the press. These circumstances nowadays only cover statements that relate to the claimant's private life.

Both these exceptions to the truth defence protect the individual's right to privacy as a means to promote the end goal of social cohesion. Indeed, McNamara interprets reputation as a factor of inclusion in, or exclusion from, a community. The test of defamatoriness relies on a conceptualization of what constitutes the

59 Cons. const., 20 May 2011, decision n°2011-131 QPC, cons. n°6; Cons. const. 7 June 2013, decision n°2013-319 QPC, cons. n°9.

60 R. Dworkin, *A Matter of Principle*, Oxford University Press, Oxford, 1985, p. 89.

61 In this sense, *see* Parkes *et al.* 2013, 18.17, n. 77.

62 *See*, for instance: G. Dworkin, 'Rehabilitation of Offenders Act 1974', *Modern Law Review*, Vol. 38, No. 4, 1975, p. 429; J. Eady, Speech delivered at City University (London, 11 March 2010), available online at <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/eady-j-city-university-10032010.pdf>, accessed on 14 July 2015, p. 9; E. Descheemaeker, '"Veritas non est defamatio?" Truth as a Defence in the Law of Defamation', *Legal Studies*, Vol. 31, 2011, pp. 16-17.

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said community, grounded in moral judgments of the community's members.[63] On this view, the law of defamation recognizes an overarching public interest in social cohesion. This has implications for the permissibility of the truth defence. Indeed, there may be instances in which this public interest in social cohesion qualifies the importance of the notion of truth.

If we understand the process of rehabilitation as one that is undertaken with the goal of reintegrating the offender into society,[64] Section 8(5) of the Rehabilitation of Offenders Act and Article 35, *alinéa* 3 of the law of 29 July 1881 therefore protect the individual's privacy *as a means* to promote the public interest in social cohesion. The protection that is afforded to privacy interests ultimately seeks to further the law of defamation's own goals.

The role of truth has significantly evolved in France since the mid-20th century. Due to societal changes, defamation is no longer a threat to the public peace. This has resulted in the gradual privatization of the action, bringing the rules on truth closer to their English counterpart. Thus, the link between the regulatory features and the substantive content of rules has been broken. This makes truth the clearest practical example of a shared approach to defamation liability.

3 *The Functional Convergence of the Remedial Aspects of Defamation*

The link between the regulatory features and the substantive content of rules must also be nuanced in respect of the remedial aspects of defamation. At first sight, the sanctions in the English and French laws of damage correspond to the traditional tortious and criminal types of responses and so are not comparable. A successful tort suit leads to an award that aims to compensate and vindicate the claimant; indeed, in the English law of defamation the primary remedy is an award of damages. By contrast, a successful criminal prosecution leads to a punishment that is not intended to benefit the individual victim; in the French law of defamation, the main remedy is the imposition of a fine to be paid to the Public Treasury. However, contrary to this simplistic account, the remedial aspects of defamation are functionally comparable in England and France.

First, the French wrong of defamation has come to recognize a goal of compensation, thus growing closer to its English counterpart. French doctrinal writers recognize that wrongful interferences with the right to reputation cause pecuniary losses.[65] These are usually compensated on the basis of an *action civile*. This mechanism allows the victim of a criminal wrong to obtain civil damages during the course of a criminal process, as if she were bringing a claim before a civil court. It is available in respect of all criminal wrongs. However, in relation to the wrong of defamation (and press wrongs more generally), such *action civile* departs from traditional principles. The action is not brought on the basis of Article 1382 of the Civil code as is classically the case, but on the basis of the 1881

63 L. McNamara, *Reputation and Defamation*, Oxford University Press, Oxford, 2007, p. 31.

64 J. Law & E.A. Martin (Eds.), *A Dictionary of Law* (7th edn), Oxford University Press, Oxford, 2009, 'Rehabilitation'.

65 *Ibid.*, p. 35.

law.[66] This rule was established in order to ensure that victims do not bring an *action civile* on the basis of Article 1382 as a way of circumventing the procedural constraints established in the 1881 law. Its consequence is that a general goal of compensation has been integrated in the 1881 law on the press.

Second, English tortious proceedings have grown to accommodate a punitive goal, thus growing closer to their French counterpart. From a comparative perspective, the quantum of English damage awards is extremely high. In France, damages awards are historically considerably lower than in England.[67] To this day, damages in England are very high, with a current 'ceiling' figure of around £275,000.[68] On the other hand, in France, the awards are typically in the few thousands of euros.[69] Yet the method of calculating the quantum of damages is rather similar to the English one and takes into account the same factors. There are various ways in which to interpret such discrepancy in the quantum of damages. It could be the result of the arbitrary pricing of a lost reputation in two different countries. It could also be a legacy of jury trials, whereby in the absence of a reasoned judgment (which typically concludes a judge only trial); a higher sum was needed to vindicate the claimant's name.[70] Alternatively (or perhaps in conjunction with the previous interpretations), the lower quantum of compensatory awards in France may account for the fact that the defendant has already been punished. Under this view, the award of general damages in the tort of defamation can be split into two. The first part is indeed compensatory; the second, which is in excess of compensation, is punitive.

The consequence of such functional convergence is the creation, in both jurisdictions, of a hybrid model of liability. It focusses both on the damage suffered and the wrong committed and justifies the sanctions it imposes by reference to both the claimant's damage and the defendant's wrong.

III Elements of Commonality in the English and French Laws of Defamation

On a cursory view, the substantive differences relating to fault, truth and remedies seem to be linked to the type of liability found in English and French law. The standards of liability – strict liability in England, fault-based in France – reflect standards commonly found in tort and criminal law. The traditional rules on truth – that it is an absolute defence in England, but can only be availed in France where an added element of public benefit is proven – echo the objectives of tortious and criminal liability. The English remedies and French penalties are directly prescribed by nature of their regulation. But a more precise analysis reveals that such link is not as strong as was originally suggested. And indeed, commonalities emerge when analysing the issues of fault, truth and remedies. Thus, the link between the nature of the regulation and the substantive content of the rules on defamation must be nuanced. Further, these commonalities suggest that the Eng-

66 Cass. Civ. 2, 10 March 2004, *Bull.* n°114; Cass. Civ. 1, 11 February 2010.

67 I. Rothenberg, 'Damages for Libel in the United States and on the European Continent', *Journal of Comparative Legislation & International Law*, Vol. 24, No. 1, 1942, p. 12.

68 *Cairns v. Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015, [25].

69 Patrick Auvret, *JCl. Communication*, Fasc. n°3705, p. 94.

70 In this sense, *see Cairns v. Modi* (*supra* note 68), [30].

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lish and the French laws in fact share a common approach to the wrong of defamation, despite their substantive differences.

D Conclusion

In recent years, there have been various calls to decriminalize defamation on account of the fact that criminal libel produces a 'chilling effect' on freedom of expression.[71] Further, there is a perception that the domestic laws of defamation are fundamentally different across the European Union. In this article, I developed an analysis which informs our understanding of these issues. I argued that path dependence has determined the different regulatory outcomes of each jurisdiction's reasoning process. The consequence is that the English and French laws of defamation are comparable despite their different regulatory features; in fact, I identified a number of substantive commonalities. Overall, the English and French laws of defamation are therefore not so divergent as it initially appeared. Thus, undermining the recurring calls to decriminalize defamation, this article proves that the nature of the regulation is not the sole, or sometimes even the primary determinant of the substantive rules. Further, the article's findings nuance the perception that the 'wide divergences' in the legal systems across the European Union jeopardise any possibility of harmonization.

71 For recent calls for reform, *see*: Parliamentary Assembly, *Resolution 1577: Towards decriminalisation of defamation* (Council of Europe 2007) <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>; Parliamentary Assembly, *Recommendation 1814: Towards decriminalisation of defamation* (Council of Europe 2007) <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1814.htm>; Commissioner for Human Rights, *Human rights and a changing media landscape* (Council of Europe 2011) <www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf>; all accessed on 14 July 2015.