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Criminalizing online defamation in Estonia

Master Thesis

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I hereby declare that I am the sole author
of this Master Thesis and it has
not been presented to any other
university for examination.

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Table of Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISP	Internet service provider
LOA	Law of Obligations Act (Estonian)
MPC	Model Penal Code (U.S.)
MSM	mainstream media
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
U.S.	United States of America
UDHR	Universal Declaration of Human Rights

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Introduction

The emergence and rapid advance of technologies have changed the way people interact, communicate and participate in social and political life. Different internet platforms and means of online communication provide us possibility to exchange information, express thoughts, opinions and ideas without barriers, merely having computer and access to the Internet. Evolution of cyberspace has made a tremendous impact on social, ecomonic and political development in different countries all over the world. Today different communication services provide people possibility to share information within shortest time, communicate online with physical persons, private companies, state authorities, express oneself and influence political decisions.

Facilitating our lives and accelerating performance of our everyday activities,serving as an enabler of exercising users' fundamental human rights such as freedom of expression and information, freedom of assembly, etc., the Internet brings new risks and challenges for its users, policy makers, legal scholars and practitioners.Social and legal problems involving the Internet cannot be ignored today, as online activities have become not only necessary, but even vital part of everyday life for the people throughout the world.Despite the degree of involvement of the Internet in our lives and our experience with online activities, cyberspace still remains the least regulated area, where social relationships take place.The law is still not good at regulating technology. Therefore, the Internet it is often called "lawless frontier",becausethe law operates on the basis of delimited territorial jurisdiction using frameworks and doctrines developed in an era of physical things and slow communication.[1]

Internet users mostly oppose any intention to regulate the Internet, as according to existing opinion the regulations will stifle the Net as a unique powerful medium.[2] However, the specific nature and the power of the Internet call on governments to address the risks and fears arising in the field of cyberspace. Among the main fields which can be affected by illegal and harmful content on the Internet and which therefore need special attention are the followings: -

[1] Bowal, P., Horvat, K.Defamation by Hyperlink. LawNow, Vol. 37, Issue 3, 2013, p.44.
[2] Ang, P.H. How Countries Are Regulating Internet Content. Nanyang Technological University, Singapore, 1997. Available at: https://www.isoc.org/inet97/proceedings/B1/B1_3.HTM(18.12.2015).

national,economic and informationsecurity; - intellectual property; - protection of human dignity;- protection of privacy; - protection of minors; - protection of reputation.[3]

This paper represents a research devoted to the problems related to the protection of reputation or, in the context of this work, the protection of the right to honor and good name in cyberspace in Estonia. More precisely, the author considers the phenomenon of online defamation and existing legal tools for protecting individuals from growing infringements of the right to honor and good name in the Internet.

The relevance of the chosen topic is caused by growing development of technology and thetoday's internet influence on our real life. The problem of online defamation is gaining more and more attention among legal scholars and practitioners during last years. New challenges in defamation law deriving from online communication need to be addressed given the role of the Internet today, its importance and unique characteristics. It shall be taken into account that online defamation is different from real-life defamation. Therefore, more careful study of the phenomenon, its main differences from defamation in real life and the relevance of existing legal tools provided for the protection of reputation is needed.

The author got the inspiration for making the research on present topic from the U.S. scientist's Susan Brenner's article „Should Online Defamation be criminalized? ".[4] After the general study of the legal tools of protection of the right to honor and good name in Estonia,the author came to conclusion that existing law of defamation does not take into consideration new risks and dangers of online defamation such as:- the scope of possible harm it can cause to individuals and private companies;- the fact that internet content can be even more pervasive and persistent than that published in printed editions;- new challenges caused by online anonymity.

Therefore, the author is on opinion that stronger protection for the right to honor and good name in online environment is needed. The author assumes thatcriminalization of online defamation can provide proper protection and contribute better to the prevention of infringements of the right to reputation. The author makes a suggestion to consider online defamation as a new cybercrime given the features of defamation in cyber space.

[3] Ang, P.H. How Countries Are Regulating Internet Content. Nanyang Technological University, Singapore, 1997. Available at: https://www.isoc.org/inet97/proceedings/B1/B1_3.HTM(18.12.2015).
[4] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007.

Defamation is not a crime in Estonia since invalidation of the old Criminal Code.[5]Todaythere is only civil liability established by Estonian law for infringements of the right to honor and good name. However, in most European countries such as Germany, Latvia, Lithuania, Finland, etc. it can be chosen by the victim whether to bring civil or criminal proceedings in a particular case of defamation.

Current work contains the overview of legal tools established by Estonian law for the protection of the right to honor and good name and examines whether and why these tools are or are not sufficient for the protection ofthis right in the Internet. In case if existing legal protection is not sufficient, the possibility of criminalization of online defamation is regarded. The author considers in detail advantages and disadvantages of criminal defamation. As for the latter, it shall be taken into consideration that the Internet is the most powerful enabler of exercising of the right to freedom of expression. Online defamation represents an abuse of this right, as it infringes the right to honor and good name of others. Criminalization of online defamation is often regarded as a strict restriction of the right to freedom of expression. There is an existing opinion that strict restrictions such as that can have a chilling effect on freedom of expression and shall therefore be avoided.

The author is on opinion that criminalization of online defamation shall not be regarded as a strict restriction of the right to freedom of expression. Defamatory speech as such does not have legal protection. Freedom of expression is not an absolute right and is a subject to certain restrictions needed in the society for the protection of legitimate interests including reputations. As defaming online is an illegal activity, appropriate restricting measures shall be taken. Defamation in cyber space is of such a complicated character that existing civil tools for the protection of the right to reputation seem to be not enough.

The most comprehensive issue that arises while discussing the need to criminalize online defamation is finding the right balance between the right to freedom of opinion and expression and the right to reputation. Author assumes that it is possible to do with clear legal provisions establishing exact definition of criminal online defamation, that will exclude speech which is acceptable in certain culture and society from being qualified as defamatory, thus at the same momentpreserving freedom of speech, restricting activity unacceptable in society and providing appropriate level of protection of the right to honor and good name.

[5] KrK. RT I 2002, 56, 350.

The term„defamation" is not legally defined in Estonian legislation. The protection of the right to honor and good name being affected by defamatory speech is established in Article 17 of the Constitution of the Republic of Estonia, according to which "no one's honor or good name may be defamed".[6] More precisely the right to honor and good name is dealt with in Articles 1046 and 1047 of Estonian Law of Obligations Act, which prescribe unlawfulness of damaging personality rights and disclosure of incorrect information.[7]In Estonia the phenomenon of online defamation has not been separately regarded in legal literature. Relevant provisions of Estonian Law of Obligations Act do not provide differences between real-life and online defamation. Nevertheless, the provisions are applicable in both cases.

Though the topic is new in Estonia, there are enough foreign legal sources to base the research on. Estonian legal acts and number of Estonian sources are still used in the thesis. Articles to which the author refers in the research are peer-reviewed articles from legal journals. The author considers reports and opinions from international and EU institutions, primary and secondary legislation of the EU, legislation of EU member states,the U.S. and Canada. The author refers to relevant case-law of the EU, the U.S.,Estoniaand other countries. Few other sources of information needed are included as well.

The author underlines that this thesis is restricted to research devoted only to infringements of the right to honor and good name of ordinary people. Violations by online defamation of the state, state institutions and public figures are generally excluded from this research. The kind of information mentioned is mostly of public interest and in Estonia there are special rules governing publication and dissemination of it.[8]Also, the protection of legitimate interests other than reputation of a person, such as that in area of privacy, public order, national security, etc. is not the subject of this thesis. Issues concerning jurisdiction are out of scope of the research as well, as the thesis is devoted to criminalization of online defamation on domestic level. However, jurisdictional questions play a very important role in the area of defamation law and can be the subject of future research.

The methodology used in the present thesis is qualitative analysis which is traditionally used in social science research. The author will mostly base research on comparing defamation laws of some EU member states and the U.S. where an approach towards the need for criminalization of

[6] The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2.
[7] Law of Obligations Act. RT I, 11.03.2016, 2.
[8] For example the rules established in the Code of Ethics of the Estonian Press. Estonian Newspaper Association. Available at: http://www.eall.ee/code.html(20.11.2015).

online defamation is on its rise. According to Alice E. Marwick and Ross Miller many states have repealed their criminal defamation laws, but "there has been a recent revival of using criminal defamation laws to prosecute people for their conduct online."[9] In the U.S., as well as in Estonia defamation is not criminalized. Therefore, in the present research the reasons for the interest towards criminalization of defamation in the U.S. are regarded. It shall be also noticed that the United States' defamation law has dealt better with both traditional and internet libel than, for example, the corresponding English law, regardless of the fact that in England protecting reputations is favored more than protecting free speech.[10]

The hypothesis of the thesis is that online defamation should be criminalized in Estonia, because existing civil legal protection for the right to honor and good name is not sufficient for online environment. The aim of the thesis is to gain familiarity with, to describe a phenomenon of online defamation and to test whether online defamation is worth criminalization in Estonia.

The research questions which are answered in this thesis are:

1) How online defamation is different from real-life defamation?
2) How is the right to reputation protected by Estonian civil law and whether this protection is sufficient in the context of cyber space?
3) Why online defamation should be a subject to criminalization?

The thesis is divided in three main parts. The first is devoted to the concepts of defamation and online defamation and differences between them. The author regards new risks and harms important from the legal viewpoint brought by defamation in cyber space, emphasizing the scope of possible harm done by such kind of online activity. It is described in what way and to what extent the right to honor and good name can be infringed in the Internet and how it can influence individual or company in real life.

The second section will cover the legal protection of the right to honor and good name in Estonia. The author regards legal tools provided by Estonian civil law considering whether existing civil legal protection extending on cyber space is enough for adequate redress for the victim and elimination of the infringements in question. The author will also touch upon an issue

[9] Marwick A., Miller, R. Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape. Fordham Law School. Center on Law and Information Policy, 6 October 2014, p. 18, supra note 106.
[10] McFall, M. American and English Libel Law - Which Approach is Best? European Journal of Law and Technology, Vol.3, No. 3, 2012, p. 1.

of ISP’s liability in defamation cases mentioning positive and negative sides of this tool for struggling with defamatory speech in the Internet.

In the third section the author, underlining the need for stronger protection of the right to honor and good name in cyber space in Estonia, considers the possibility of criminalization of online defamation pointing out its positive as well as negative sides.

1.Concepts of defamation and online defamation

1.1 The right to honor and good name

Before starting to regard the concept of defamation the author finds it relevant to consider the right being infringed by this activity and the concept of reputation and honor and good name as it is understood worldwide and in Estonia in particular.

As Article 1 of the Universal Declaration of Human Rights states,„all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[11]The right to reputation or the right to honor and good name is a fundamental human right that represents an important moral claim that everyone, including the state, is obliged to respect.[12]Reputation shall be understood as an esteem in which an individual is generally held within a particular community.[13] The term „reputation"is not used neither in fundamental legal documents of the EU, nor in Estonian legislation. However, the Universal Declaration of Human Rights (the UDHR) and the International Covenant on Civil and Political Rights (the ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (the ICESCR) clearly establishes the protection of honor and reputation. According to Article 12 of the UDHR „no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."[14]The same wording is used in the ICCPR and ICESCR in their Articles 17.

Despite that the protection of the right to honor and reputation is not clearly mentioned in Article 8 of the European Convention on Human Rights (the ECHR), it was established by the case law of the EU that the right to reputation falls within the scope of the protection under Article 8 of the ECHR as a part of the right to respect for private life. In 2004 in *case Chauvy and Others v. France* it was stated by the European Court of Human Rights (the Court) that person's right to reputation affected by the publication of a book is a right which is protected by Article 8 of the

[11] The Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly on 10 December 1948.
[12]Raz, J. Human Rights in the Emerging World Order.Transnational Legal Theory.Vol. 2010, No. 1, 2015, p.36.
[13] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation. Internetional Standard Series. 33 Islington High St., London, 2000, p.1.
[14] UDHR, Art. 12.

Convention as part of the right to respect for private life.[15] Later in 2007 in case *Preifer v. Austria*the Court reaffirmed that „a person's right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life.“[16]According to Article 10 of the ECHR protection of reputation of others is a legitimate aim which might justify the restriction of freedom of expression.[17]

In Estonia the right to honor and good name is analogous to the right to reputation.[18]The Supreme Court of Estonia has stated that person's honor and good name reflects the estimation the public has for a person. The estimation depends on person's behavior and acts and can change over time. The Court underlined that,in general,the society estimates the person on the basis of his acts.[19]

On the constitutional level the right to honor and good name is protected by Article 17 of the Constitution of the Republic of Estonia (the Constitution) according to which „no one's honor or good name may be defamed.“[20]Honor and good name belong to spiritual and moral values with ethical and social importance and, therefore, need legal protection.[21]In the Commented edition of the Constitution it is stated that honor and good name is a part of dignity.[22] In the opinion on decision of the Supreme Court of Estonia in case 3-2-1-53-07 from 2007 it has been stated that honor means two valuable aspects of dignity: 1) honor is inalienable property of a human being; 2) all are equal in honor.[23]

However, in the comments to Article 10 of the Constitution it is stated that honor and good name is not directly related to human dignity.[24] The right to dignity means an innate right of every individual to be valued and respected for the sole reason that he/she is a human being, regardless the conduct and actions. The concept of the honor and good name reflects the estimation in which the person is held by the community.[25] The estimation depends on the conduct of the person. It means that the person has as much honor as he deserves from the community which

[15] EIKo 29.06.2004, 64915/01, *Chauvy and Others v. France*, Rec.70.
[16] EIKo 15.11.2007, 12556/03, *Preifer v. Austria*., Rec.35.
[17]ECHR, Art.10.
[18] Maruste, R. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne, 2012. Tartu Ülikool. Paragrahv 17. Available at: http://www.pohiseadus.ee/ptk-2/pg-17/(25.01.2016).
[19] RKTKo 30.10.97. nr 3-2-1-123-97.
[20] The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2.
[21] Maruste, R. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne, 2012. Tartu Ülikool. Paragraph 17, komm.1. Available at: http://www.pohiseadus.ee/ptk-2/pg-17/(10.02.2016).
[22] Ibid.
[23] J. Luige eriarvamus, RKTK 10.10.2007 otsusele nr 3-2-1-53-07, p.3.1.
[24]Ernits, M. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne, 2012. Tartu Ülikool. Paragraph 10, komm.3.1. Available at: http://www.pohiseadus.ee/ptk-2/pg-10/(10.02.2016).
[25] Ibid.

judges the person basing on his/her actions.[26] For example, if the person involves into criminal activities, it can lower him/her in the estimation of the community and some respect for this person can be lost.

Infringements of the right to honor and good name and violations of human dignity shall be regarded separately, as violation of human dignity can be of such a nature that it does not infringe the reputation of a person in the eyes of others (spitting upon another person).[27] Lowering estimation of a person in the eyes of community is a requirement for defining the activity as defamation and, accordingly, as an infringement of the right to reputation or of the person.

More specific provisions providing the protection for the right to honor and good name are established by Articles 1046 and 1047 of Estonian Law of Obligations Act.[28]Estonian law does not provide criminal liability for defamation of a person, perhaps because civil liability in defamation cases is regarded as an appropriate legal instrument for the protection of the right to honor and good name and a justified restriction on freedom of expression. However, Article 149 of Estonian Penal Code establishes criminal liability for debasement of memory of deceased, which can be regarded as infringement of honor and good name of deceased.[29]According to Article 149 (1)„interference with a funeral or any other ceremony for the commemoration of a deceased person, desecrating of a grave or other place designated as a last resting place or a memorial erected for the commemoration of a deceased person, or stealing of objects from such placesis punishable by a pecuniary punishment or up to one year of imprisonment".But *corpus delicti* established in the Article refers mostly to certain active actions directed against the ceremony, grave, memorial or other objects from last resting places and not to dissemination of defamatory speech, much less to online publications. Therefore, the author does not analyze this Article in the context of this work.

[26] Ernits, M. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne, 2012. Tartu Ülikool. Paragraph 10, komm.3.1. Available at: http://www.pohiseadus.ee/ptk-2/pg-10/(10.02.2016).
[27] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.3.
[28] Law of Obligations Act. RT I, 11.03.2016, 2.
[29]Penal Code.RT I, 17.12.2015, 9.

1.2 The concept of defamation

Defamation affects one's reputation and infringes person's right to honor and good name.There is no legal definition that can be found in Estonian legislation. Different legal scholars and institutions give different definitions of defamation. In its report from 2015 International Press Institute (the IPI) defines defamation as „malicious dissemination of false information about another person that seriously lowers his or her standing within a community."[30]In the report of Committee of Legal Affairs and Human Rights it is stated that „defamation may be an affirmation of facts in written or other form, or an oral or gestural expression of what is referred to as slander", and such affirmation is public, harms person's reputation and is false."[31]

There are also definitions that can be found in defamation laws of different countries. Section 559 of American Restatement of Torts defines defamatory communication as communication that „tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[32]In section 47 of the criminal libel statute of the State of Louisiana it is stated that defamation is „the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends either to expose any person to harted, contempt, or ridicule, or to deprive him of benefit of public confidence or social intercourse; or to expose the memory of one deceased to hatred, contempt or ridicule; or to injury any person, corporation, or association of persons in his or their business or occupation."[33]

According to § 184 of the Criminal of Code of Czech Republic, defamation means „communicating false information that can seriously endanger another person's respect among his fellow citizens, in particular damaging his position in employment, and relations with his family, or causing him some other serious harm."[34] Under the Criminal Code of the Republic of Finland defamation is understood as „spreading false information or a false insinuation of

[30]International Press Institute. Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers, 2015, p.7.
[31] Council of Europe Parliamentary Assembly.Committee on Legal Affairs and Human Rights. Towards decriminalisation of defamation. Doc. 11305. Report. Rapporteur: Mr Jaume Bartumeu Cassany, Andorra, Socialist Group, 25 June 2007, para. C(II)(8). Available at: http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11684&Lang=EN(25.01.2016).
[32] Restatement (Second) of Torts (1977), §559. Available at: http://www.columbia.edu/~mr2651/ecommerce3/2nd/statutes/RestatementTorts.pdf(26.01.2016).
[33] La. Rev. Stat.1950, Tit.14 § 47. Available at: http://law.justia.com/codes/louisiana/2011/rs/title14/rs14-47/(26.01.2016).
[34] Cited by International Press Institute. Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers, 2015, p. 38.

another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt or disparaging a person in any other mean."[35] Accordijng to French criminal law, defamation is „any allegation or accusation of a fact that causes an attack on the honor or consideration of a person."[36] In Germany two types of defamation are distingushed and defined in German Criminal Code. According to § 186 of the Criminal Code defamation is assertion or dissemination of a fact related to another person which may defame him or negatively affect public opinion about him. Article 187 of the Code states thatthe second type of defamation - intentional malicious defamation - consists of a defamatory statement that the speaker knows to be false and that is aimed at damaging person's reputation or endanger his creditworthness.[37]

Defamation can be either libel or slander.[38] Both forms are regarded as attempts to infringe one's reputation, but are different in their strategies. Slander means oral defamation in which someone tells other person or persons untrue information about another person that can infringe his/her reputation. Libel assumes infringing one's reputation in written or print form.[39] It shall be mentioned that words spoken on television or radio shall be treated as libel and not slander because broadcasting reaches a large audience comparable in amount withthat reached by printed publications.[40]

The aim of defamation is actual or presumed damage to the reputation flowing from publication.[41]According to the Principles on Freedom of Expression and Protection of Reputation (the Principles) elaborated by Article 19, the sole purpose and demonstrable effect of defamation laws shall be the protection of reputations of individuals.[42]Thus, the aim of defamation law is to protect individuals against false statements unfairly damaging their reputations and to provide a suffered party with appropriate means of redress in case of infringement of the right to honor and reputation. According to the Principles defamation laws

[35] Cited by International Press Institute. Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers , 2015, p. 40.
[36] Ibid.
[37]German Criminal Code (Strafgesetzbuch, StGB) as promulgated on 13 november 1998, amended in 2013. Available at: http://germanlawarchive.iuscomp.org/?p=752 (26.01.2016).
[38] HG.org Legal Resources. Defamation Law – Guide to Libel and Slander Law. Available at: https://www.hg.org/defamation.html (26.01.2016).
[39]Law Dictionary. Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Available at: http://thelawdictionary.org/defamation/ (26.01.2016).
[40]Free Dictionary by Farlex. Slander. Available at: http://legal-dictionary.thefreedictionary.com/slander (26.01.2016).
[41]Marwa, C.W., Stephen, A. Difficulties in establishing liability in online defamation: Tanzania's experience. US-China Law Review, Vol. 11, Issue 3, 2014, p. 351.
[42] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation. Internetional Standard Series. 33 Islington High St., London, 2000, p. 5.

shall not be aimed at the protection of reputations of entities other than those which have a right to sue and to be sued. Thus, defamation law should not protect „reputation"of objects such as State symbols, flags, national insignia, State or nation, reputation of a group (and not certain individual) and reputation of deceased.[43]

Definition of defamatory statement contains certain elements.In the U.S. the elements that must be proved for the establishment of liability in defamation cases are set out in Article 558 of the Restatement of Torts. According to the Article, to create liability for defamation there must be: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the part of the publisher; 4) either action ability of the statement irrespective of special harm or the existence of special harm caused by publication.[44]

According to Article 19defamatory statement should: 1) be false; 2) be of a factual nature; 3) cause damage to a person; 4) be communicated to a third party or parties.[45] However, the requirements established by defamation laws of different countries vary from state to state. The research conducted by IPI has shown that defamation laws of different EU member states contain very expansive and overbroad provisions that punish value judgments or statements not specifying that defamatory allegations must be false.[46]

In relation to value judgments the defense of truth is irrelevant[47], as value judgments do not contain facts that can be either true or false. In some EU member states defense of truth in certain defamation cases is not possible at all. For example, in Belgium, according to Article 444 of the Criminal Code of Belgium defamation is regarded as „slander, when proof is impossible or legally inadmissible".[48]Moreover, according to Article 449 malicious disclosure of facts proven truth but committed without any private or public motive but with a genuine aim of causing harm to reputation is a criminal offense.[49]However, IPI's research has indicated that the number of national courts of the EU member states has adopted ECtHR's principle according to

[43] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, London, 2000.Principle 2 (b), p.5.
[44]Restatement (Second) of Torts, §558 (1977).
[45]Article 19.Defamation ABC.A simple introduction to key concepts of defamation law.Defamation Campaigning Tools series. London, 2006, p. 1.
[46] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p. 16.
[47] ECtHR 23.04.1992, 11798/85, *Castells v. Spain*.
[48] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p. 38.
[49] Ibid., pp. 38-39.

which defamatory opinions, even those that shock, offend or disturb, shall be allowed in democratic society unless lacking any connection to fact.[50] Hungarian Constitutional Court in its decision from 2014 stated that in contrast to factual allegations, value judgments, almost without limitation, fall within the scope of the protection of freedom of expression.[51]The similar approach was taken by the Czech Supreme Court which ruled that value judgments enjoy a presumption of constitutionality and as a rule they are to be allowed.[52]

What is more, according to the information reported by IPI, in some member states broadly worded provisions of defamation law do not restrict themselves to allegations of facts. Thus, the concept of defamatory material includes all statements that undermine individual's honor and reputation, regardless whether they contain factual information or value judgments.[53] It also has been stated in the report that in some countries surveyed, insult is a criminal offence and falls under an umbrella of defamation. Thus, for example, in criminal laws of such countries as Poland, Germany and Denmark it is explicitly stated in the law that in cases where true statements cannot be punished as defamation can be punished as insult depending on the circumstances of certain case.[54]

The author of the present thesis is on opinion that insult shall not fall under the umbrella of defamation, and the concepts shall be regarded separately, because insult does not contain factual information, and it is more about infringement of human dignity and not the right to reputation. Public insult can infringe the reputation of a person, but it still does not have any direct connection with untrue facts. In the author's view the element of falsity in defamatory statement is essential and shall not be excluded in the definition of defamation. Therefore, the author also finds that criminal sanctions for undue value judgment based on factual information, even untrue, shall be regarded as a strict restriction on freedom of expression, because value judgments as such do not contain factual information, cannot be provedand pursue the aim to express oneself more than maliciously defame a person as like in case of intentional publication of false information. Undoubtedly, undue value judgments depending on the circumstances of a case can seriously infringe the reputation of individual. However, it seems that imposition of

[50] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p. 17.
[51]13/2014. (IV. 18.) Hungarian Constitutional Court decision. Cited by Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p.17.
[52] Czech Supreme Court decision of 2005/11/11 - I. ÚS 453/03. Cited by Article 19 (2000). Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, p.17.
[53] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p. 18.
[54] Ibid.

criminal and not civil liability for undue value judgments is too severe and contradicts to the principle of the protection of the right to freedom of expression.

In Estonian civil law both types of infringements of the right to honor and good name are deemed to be unlawful under Estonian Law of Obligations Act. The provisions make distinction between violations of person's right to honor and good name by undue value judgment and disclosure of factual information.[55]Thus, in Estonia the concept of defamation encompasses passing undue value judgments and disclosure of untrue factual information. According to Estonian law, defamation of a person can occur either maliciously or negligently. Negligence in defamation arises when a person was not careful enough in checking the information he or she has published.[56]

1.3 Online defamation

Given the ever-increasing influence of the Internet and growing tendency of moving of most of people's activities online, the phenomenon of defamation occurring in cyberspace shall be regarded separately. Many issues concerning the way of application of existing legal provisions arise in the field of the protection of the right to honor and good name in the Internet. It shall be taken into account that activities performed online have certain features which make them different from their analogues we are get used to deal with in offline world.

The concept of online defamation can be defined as internet publication or disclosure in the Internet of the content that harms person's honor and reputation, lowers the person in the estimation of the community and deters third persons from associating or dealing with him or her, thus causing to that person emotional, professional or personal damage. The question what arises here is what doesthe concept of publication in the Internet encompass? Publication, in the context of defamation, is communicating defamatory material to a third party (other than defamed person).[57]In real-life the person can be defamed by oral statements at public meetingsor

[55] Law of Obligations Act. RT I, 11.03.2016, 2.Art. 1046, 1047.
[56] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, 1047 komm-d.
[57] The Law Dictionary. How Does Libel differ from Slander? Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Available at: http://thelawdictionary.org/defamation/(28.01.2016).

in public places or, in case of broader audience, in the means of mainstream media (MSM): radio, television, cinema or print media (books, magazines, newspapers).[58]

In case of online defamation „publishment"of defamatory material assumes either: 1) sending e-mail; 2) posting messages on web forums, newsgroups, bulletin boards or online discussion groups; 3) inserting text on web sites; 4) creation of files that can be downloaded.[59]Different authors also mention such defamatory publications as uttering defamatory words during video online conference,[60]uploading one's video to a file-sharing site[61]and even creating special site allowing others to share information (including defamatory information)concerning other persons.[62]Publication takes place when oral or written words are seen or heard and comprehended by the reader or hearer.[63] In online environment publication can take form of audio, video, text or multimedia file.[64]

It shall be pointed out that online defamation (as well as real-life defamation) is not restricted to the words either spoken or written. Distorted picture (photoshopped picture),which „lie" about the person they depict, can qualify as defamatory material. According to Joshua Fisher, the image is „lying" when there is „an untrue or inaccurate representation of who or what it purpots to be".[65] For example, in case *Myers vs. Afro-American Publishing Co.* where the issue concerned the photographs accentuating the plaintiff's seminudity, the Court has held that „a photograph or pictoral representation tending to expose the subject to public ridicule or contempt is libelous".[66]

As for the falsity of photo, in case *Kiesau v. Bantz*, the defendant, deputy sheriff altered the photo of fellow officer Crystal Kiesau in such a way, that photos depicted her standing with her dog in front of her sheriff's vehicle with her breasts exposed. The defendant showed and electronically emailed photos to third persons during approximately ten months from February

[58] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76,2007, p.12.
[59]Gole, T. Employer Liability of Employee Use of the Internet. Cited by Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu. Magistritöö. Tartu Ülikooli õigusteaduskond, Tsiviilõiguse õppetool, 2003, lk. 79.
[60] Marwa, C.W., Stephen, A. Difficulties in establishing liability in online defamation: Tanzania's experience. US-China Law Review, Vol. 11, Issue 3, 2014, p. 351.
[61] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p. 14.
[62] Ibid., pp. 23-24.
[63]Pearson, M.et. al. The cyber boundaries of reputation: implications of the Australian High Court's Gutnick decision for journalists. Humanities and Social Sciences Papers, ePublications@bond, Bond University, 2003, p. 101. Available at: http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1080&context=hss_pubs(3.02.2016).
[64] Marwa, C.W., Stephen, A. Difficulties in establishing liability in online defamation: Tanzania's experience. US-China Law Review, Vol. 11, Issue 3, 2014, p. 352.
[65] Fisher, J.S. Can a Photograph lie? Remedies for an Age of Image Alteration. Seton Hall Law eRepository, 2013, p.8.
[66]*Myers v. Afro-American Co*., 5 N.Y.S.2d 223,224 (N.Y. Sup.Ct. 1938).

2001. The plaintiff was entitled to damages for defamation, as the Supreme Court of Iowa found the photograph to be libelous.[67] In this case the Court recognized the danger attached to the publication of false defamatory photos already in the beginning of XXI century.

Today, given technological advancements available almost to everyone, the forms and the scope of digital manipulations can differ significantly from those of 2001. Susan Brenner in her article brings the example of situation illustrating how online publication of morphed picture depicting individual with certain reputation within his community can be used to damage or even destroy the reputation. This example concerns the infringement of the reputation of a minister of a conservative Baptist church, whose views reflect the principles of his faith also shared by other members of congregation. Brenner gives an example where a person, who has decided to cause damage to the minister, goes to a strip club, makes digital photographs of men being there, uses software to morph an image of one of these men into the photo of the minister, posts the altered photo on the website under the caption announcing that the minister visits strip clubs and emails the link to the website to the members of minister's congregation and other websites.[68]Such kind of material published online can cause almost irreparable harm to the reputation of the minister destroying the „picture" of him he was creating in his community during years. Online dissemination of the morphed photograph could result in minister's removing from his position, at least until the falsity of the facts depicted on the photograph would be proved.[69]It is also stated that in the nearest future it will be equally possible to create and use morphed videos, post them on a site like YouTube for the purposes such as that described above.[70]

The gist of online defamation is actually the same as that of real-life defamation – the damage to the reputation deriving from publication. But specific nature of the Internet alters the forms in which defamation can appear and, consequently, the scope and the nature of harm done to the victims.Given the features cyberspace adds to the phenomenon of defamation, the main differences between real-life defamation and online defamation need more careful research and shall be taken into account when establishing appropriate means for the protection of the right to honor and reputation and determining the scope of liability for the infringements.

[67]*Kiesau v. Bantz*, 686 N.W.2d 164 (Iowa 2004).
[68] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.44.
[69] Ibid.
[70] Ibid.

1.4 Main differences between real-life and online defamation

1.4.1 The features of online communications

According to Berkley D. Sells, new challenges posed by the Internet with respect to defamation laws are rooted in the nature of the technology itself.[71]For the avoidance of confusion which can be caused by technical definition of the Internet and for the purpose of this thesis the Internet can be defined as „a system linking computers across the world enabling the transmission of information at very high speed."[72] There are some unique characteristics of cyberspace that should be mentioned for the purpose to understand how defamatory speech in online world is different from real-life defamation. The following features of the Internet in respect for online communications can be pointed out:[73]

Global characterof the Internet. The fact that hundreds ofmillions people today are living in interconnected world without borders brings new challenges for legal scholars such as that related to appropriate forum and application of defamation laws in different countries.For example, the problem can arise if the person whose right to reputation has been damaged in the Internet commences proceedings in some far away jurisdiction where libel laws are unsympathetic or non-existent.[74]Moreover, there are different cultures in different countries. The statement that is deemed as discrediting and defamatory in one country (culture), in other countries can be found quite normal and legal. Therefore, while dealing with online defamation, given the fact that Internet is global and trans-jurisdictional, cultural features of the communities of the persons involved in the proceedings shall be taken into account.

Interactivity. Internet users can post whatever content they want, easily and within the shortest time sharing information with each other on different internet platforms. The possibility to post information attracts users, but creates wrong feeling of absolute freedom in regard to publication of statements, thoughts and opinions.

[71] Sells, B.D. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.3.
[72] Crombie, K. F. Scots Law Defamation on the Internet. A consideration of new issues, problems and solutions for Scots Law. Scottish Law online. Scots Law Student Journal. Issue 1, 2000, p.5.
[73] Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu. Magistritöö. Tartu Ülikooli õigusteaduskond, Tsiviilõiguse õppetool, 2003, p. 78.
[74] Sells, B.D. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.2.

Availability of network access.Unlimited access to the Internet provides everyone possibility to make information (including defamatory statements) concerning others public. In case of media or newspapers, access to which is restricted to certain amount of publishers, publication of defamatory statements to broader audience is least probable comparing to the Internet, where everyone can become a„publisher".

Online anonymity.The ability to be anonymous (hiding real identity of oneself under a pseudonym) online affects internet users behavior in such a way that they lose feeling of responsibility for their online actions. Easiness with which internet users can post material without revealing their real identity contributes to the emergence of the sense of impunity and the idea that Internet provides the possibility to be immune for the consequences of the conduct.[75]This feature of the Internet is one of the greatest differences between traditional media (i.e. newspapers), where the authors of published material are readily identifiable.[76] It should be mentioned that online anonymity of perpetrators affects the effectiveness and the result of investigation.[77]For example, few victims of defamation even would like to sue anonymous infringers for defamation because of resulting costs and other difficulties related to revealing of real identity of anonymous infringers (sometimes identifying is not even possible).[78]

The Ontario Court of Appeal in its decision in case *Bahlieda v. Santa* has stated: „Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that defamatory statements are to be believed.“[79] It was pointed out that the Internet has a „distinctive capacity...to cause instantaneous and irreparable damages to business reputation of an individual or corporation“[80] and it is „...a medium of virtually limitless international defamation.“[81]

[75] Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu. Magistritöö. Tartu Ülikooli õigusteaduskond, Tsiviilõiguse õppetool, 2003,pp. 78-79.
[76] Sells, B.D. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.11.
[77] This issue is regarded below in the present thesis.
[78] Stiles, A. Everyone's a Critic: Defamation and Anonumity on the Internet. Duke Law and Technology Review, Vol.1, 2001, p. 3.
[79]*Bahlieda v. Santa*, [2003] O.J. No. 4091, para.44. Cited by Berkley D. Sells. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.10.
[80]Ibid.
[81]Ibid.

1.4.2 Online defamation vs. Real-life defamation

Online environment has brought new risks in relation to defamation and infringements of the right to honor and good name. The author would like to underline some aspects which in her view have to be analyzed and taken into account while deciding upon the scope of liability for online defamation. The following aspects affecting the nature and the scope of harm done by defamation in cyberspace are touched upon in the present section: 1) content published in the Internet is mostly uncontrolled and unfiltered; 2) online anonymity affects the quality of content published online and complicates identification of the author; 3) infringements of the right to honor and reputation can be repeated uncertain times by different persons reposting defamatory material; 4) defamatory content can be rapidly and massively disseminated in the network; 5) the content is easily accessiblein the Internet to unlimited number of people.

Before starting to analyze the main points that make online defamation different from its traditional analogue, the author will mention the similarities between the Internet and Traditional Broadcast Media(in relation to posting a message) which explain why the scope of harm done by internet publication is comparable to that inflicted by publication in print or media and not by that done by oral statement. The similarities were suggested to Ontario Superior Court of Justice and taken into account while deciding whether the publication in the Internet constitutes broadcasting within the meaning of Ontario Libel and Slander Act.[82] According to the opinion, posting a message on the Internet website, radio and TVare similar in the following ways: 1) immediacy of access; 2) transient nature; 3) the same manner of electronic distribution; 4) potential to be received by large audience.[83] Basing on this approach it can be stated that the harm done to a person by publication of defamatory material in the Internet is comparable to that done by defamation in the means of traditional media (radio, TV). Estonian Supreme Court has stated that in case if discrediting value judgments and/or factual information concerning a person are published in mass media, there is a basis to assume that the reputation of the person has been violated significantly.[84]

However, such assessment of the scope of harm done by online publication is not relevant in case of every defamatory publication in the Internet. It shall be taken into account that online defamation can cause serious reputational damage, but it does not necessarily do so. In case of

[82] Libel and Slander Act, RSO 1990, c L.12. Last amendment: 2015, c. 23, s. 4. Available at: http://canlii.ca/t/2gh(2.02.2016).
[83] *Bahlieda v. Santa*, 2003 CanLII 12856 (ON SC). Available at: http://canlii.ca/t/1bqlb (2.02.2016).
[84] RKTKo 3-2-1-11-04, p.19.

internet publication widespread dissemination of information and making it available to broader audience can occur in case if information is of such a nature that arouses interest of a large number of peopleand is published on the web site which is visited by large number of people.For example, video of a person popular within a community posted on YouTube will attract attention of more people than defamatory statement posted in a chat room about a person unknown for the majority of people in his/her community. The Internet does not have such a "common platform" which is usually visited by the majority of users. The information is being disseminated by different means (be email, on web forums, bulletin boards, etc.), and it is not directly delivered to all internet users (users can find the material occasionally while surfing the Internet or have to seek it), as in case of radio or television. Therefore, while evaluating the severity of harm done to one's reputation by online defamation all the circumstances of a certain case shall be taken into account.

In some cases specific features of online defamation deriving from the way the content is posted and disseminated via the Internet can make online defamation even more harmful for the victim than that occurring in media. The author considers the main points which distinguish publication in the Internet from other publications and which shall be taken into account while dealing with defamation in cyberspace regarding the risks and harm it can pose to reputation.

One of the most important aspects mentioned in scientific literature is that the content posted and disseminated via the Internet is mostly uncontrolled and unfilteredunlike that reported on TV or radio or published in books or newspapers, where the editorship "creates extrinsic valueas an indicator of quality"[85], and where the dissemination of the material being published is controlled by regulatory authorities through license conditions, import control, domestic censorship and criminal laws.[86] According to Lauren Guicheteau, blogs or websites containing whatever user-generated content, which have become a popular sources of information and commentary, are different from traditional media in two ways: 1) professional journalists follow neutral style of writing unlike bloggers, who often write from a personal point of view; 2) in traditional media checking of information is a part of news reportingwhile bloggers often do not follow this

[85] Shirky, C. Weblogs and the Mass Amateurization of Publishing. Clay Shirky's Writings About the Internet. Economics & Culture, Media & Community, 2002. Open Source. Available at: http://www.shirky.com/writings/herecomeseverybody/weblogs_publishing.html(4.02.2016).
[86]Coroneos, P. Internet Content Control in Australia: Attempting the Impossible? University of New South Wales Law Journal 17, 2000. Available at: http://www.austlii.edu.au/au/journals/UNSWLJ/2000/17.html(3.02.2016).

standard, as uncensored nature of blogging allows information to be published without a factual basis, what creates the best environment for defamation.[87]

Before the development of internet communication technology real-world publication by MSM, which includes publications in newspapers, magazines, books, radio, television and movies, was the only model of publication.[88] According to Brenner, this model's reliance on professional staff discourages publication of defamatory material, as before the publication the content is filtered to ensure the accuracy and fairness of the material.[89]MSM publications are much less likely to contain defamatory material because of the nature of material and the method used to disseminate it.[90]

Firstly, the information published by MSM focuses on public interest, and even if defamatory material was published, it would concern public figure.[91]As it has been mentioned above, the activities of public figures are mostly matters of public concern. There are special rules on domestic as well as on international level establishing that public officials should tolerate more criticism.[92] What is more, it has been stated by Article 19 that in case of publication of discrediting content concerning public figure, the publisher can benefit from a defense of reasonable publication even in case if a statement of fact has been shown to be false.[93]Publication of the material which is defamatory in nature is justified under defense of reasonable publication if the publisher has acted in good faith, in accordance with journalistic standards, or in defense of legitimate interest or right, which can include the right to free expression and the right of the public to receive information related to matters of public concern.[94]If MSM publications of defamatory material concerning public figure are justified, MSM should not be held liable for defamation. It is likely that MSM try to exclude publications which could infringe individual's right to reputation desiring to avoid liability for defaming someone.

[87] Guicheteau, L. What is the Media in the Age of the Internet? Defamation Law and Blogosphere. Washington Journal of Law, Technology and Arts. Vol. 8, Issue 5, 2013, pp. 576-577.
[88] Brenner, S. W. Should online defamation be criminalized?Mississippi Law Journal, Vol. 76, 2007, p.25.
[89] Ibid.
[90] Ibid.
[91] Ibid., p.26.
[92] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation, 2000, p. 11.
[93] Ibid., p. 12.
[94] International Press Institute. Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers, 2015, p.27.

Secondly, the method which is used by MSM for dissemination of content includes accurate filtering and checking of the material to be published.[95]MSM has always been a closed commercial system with lots of investments involved in printing and broadcast production.[96] MSM entities have the ability and the need to filter content, as MSM entity is interested in keeping their production commercially viable and in avoidance of being held viable for the content which infringes the rights of others.[97]

The things are absolutely different in case of user-generated content published online. In cyberspace there are no hierarchical structures, neither financial nor other barriers which can create a closed system such as MSM which takes responsibility for that what is being published. Filtering content is not peculiar to the Internet (except for ISPs who check and filter the content). Anyone who is literate enough can become a publisher in the Internet. Internet user does not have to convince a professionally skeptical system to take the risk associated with mass publications as published author of print publications has to.[98]As the content published by internet users is not controlled or filtered by professional stuff, and online "publisher"does not actually presume that the readers or those who access the content rely on its quality, it becomes obvious that the content can contain whatever information which can be untrue, misleading, discrediting, etc.

Online anonymity.In case of MSM publication the author of the content is identifiable. If defamation of any person takes place, no problem arises concerning the issue who is liable for the infringement and whom the victim shall sue. The same is in case of oral defamation. As for online infringements, additional problems related to identification of infringer can occur. Online authors can be either identifiable (publish under their real name), or remain anonymous (hide their real identity under pseudonym), or pretend to be someone else (use the identity of other person).[99] While the use of other person's identity without the permission of that person is illegal,[100] the right to internet anonymity is covered by European legislation and legislation of different countries.On the EU level the right to online anonymity is covered by the provisions

[95] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.27.
[96] Alexander, A. et.al. Media Economics: Theory and Practice, 3th edition. LEA's Communication Series, Lawrence Elrbaum Associates, 1998, pp.17-21.
[97]Alexander, A. et.al. Media Economics: Theory and Practice, 3th edition. LEA's Communication Series, Lawrence Elrbaum Associates, 1998, pp.17-21.
[98] Shirky, C. Weblogs and the Mass Amateurization of Publishing, 2002. Available at: http://www.shirky.com/writings/herecomeseverybody/weblogs_publishing.html(4.02.2016).
[99] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.28.
[100] For example, in Estonia use of another person's identity is a criminal offence according to § 157^2 of the Penal Code.

establishing the right to data protection, freedom of expression, freedom of impression.[101]For instance, the right to anonymity falls within the scope of the protection established in Article 8(the right to privacy) and Article 10 (the right to freedom of expression) of the ECHR. In its submission to the ECtHR the International Organization Access has stated that „the loss of anonymity and pseudonymity in online spaces has a chilling effect on freedom of expression, undermines privacy, and threatens people's lives and livelihoods".[102]

The laws of the U.S. establish the right to speak and to read anonymously on the Internet.[103]In case *Columbia Ins. Co. v. Seescandy.com* the U.S. District Court has stated that „people are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate".[104] The U.S. Supreme Court has held that „anonymity is a shield from the tyranny of the majority that exemplifies the purpose to protect unpopular individuals from retaliation...at the hand of an intolerant society" and the right to anonymous free speech is protected by the First Amendment.[105]

Taken into account the value of anonymity in cyberspace, it shall nevertheless be stated that anonymity has its negative effects on online speech. In some scientific literature the ability to operate under a pseudonym concealing users' real identity is considered as intoxicating and providing opportunity to exploit anonymity for the purpose to commit cybercrimes and inter alia publish harmful problematic content.[106]

Susan Brenner points out two factors related to anonymous online publications that differentiate online content from the content generated in real world. Firstly, if the content is published by unknown person, it is not actually possible to assess the merits of what that person actually wanted to say.[107] In case of publication by MSM entity, such as newspaper, the author is known

[101]Paganini, P. The right to anonymity on Internet and legal implications.Security Affairs by Pierluigi Paganini, 2012. Available at: http://securityaffairs.co/wordpress/6452/intelligence/the-right-to-anonymity.html(4.02.2016).
[102] Access.Third Party Intervention. Submission to European Court of Human Rights Grand Chamber, 2014. Application no. 64569/09, Delfi AS v. Estonia. Available at: https://www.accessnow.org/cms/assets/uploads/archive/docs/Third%20Party%20Intervention%20-%20Access%20-%20Delfi.pdf(4.02.2016).
[103] Paganini, P. The right to anonymity on Internet and legal implications. Security Affairs by Pierluigi Paganini, 2012. Available at: http://securityaffairs.co/wordpress/6452/intelligence/the-right-to-anonymity.html(4.02.2016).
[104] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).
[105] McIntyre v. Ohio Elections Comm'n (93-986), 514 U.S. 334 (1995).
[106] Brenner, S. W. Should online defamation be criminalized?,Mississippi Law Journal, Vol. 76, 2007, p.29.
[107] Ibid.

or at least identifiable for the audience gaining access to the material published.[108] The person, who reads or sees such publication, credits the content according to the characteristics and the reputation of its author or publisher. In case of MSM publication the publisher takes responsibility for the content, and the receiver of information can rely on this fact while crediting the information. In case of online publication, the lack of knowledge concerning anonymous author of the material posted in the Internet can lead to the situation, where the person who accesses the material can accept and credit information even if it is absolutely false.[109]The receivers of the information contained in anonymous online publication do not know anything about the personality of the author including his/her motives and aims of publishing. It provides to those, who want to infringe one's honor and reputation the best possibility to do it. For those who read or see the content posted anonymously it is difficult to analyze and assess the accuracy and the value of information. If there is no rebuttal, it is more likely that the information will be credited by the receivers or at least by some of them.

The second factor according to Brenner is about informal standards which are analogous to the formal standards and procedures that govern MSM publications and which have been historically used by the communities in communications for structuring behavior in the real physical world.[110] While the members of community in real world normally try to act according to the rules and morals existing within this community and pursue to avoid acts that contradict normal acceptable behavior, unidentifiable members of virtual „community" do not have any standards that could prevent them from uncivil and harmful conduct.[111] Therefore, it can be stated that cyberspace serves as a catalyst of antisocial behaviour of internet users, who do not believe that there should be any rules or laws governing activities in the Internet. Anonymity in cyberspace can give the people a sense of immunity which would not normally arise in real world. Online anonymity in conjunction with other factors, such as availability of Internet access and the easiness of publishing of the content in the Internet, stimulates growing emergence of online problematic speech including defamation. It is logical that if the author is identifiable, like in case of MSM publication, it is less likely that he/she will publish under his/her name defamatory material, that violates the rights of others, at least because of the barriers usually preventing people from harmful conduct in real life - the awareness of possible consequences (inter alia legal consequences) and the fear of liability.

[108] Sells, B.D. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.11.
[109] Brenner, S. W. Should online defamation be criminalized?Mississippi Law Journal, Vol. 76, 2007, p.29.
[110] Ibid.
[111] Ibid.

One more issue that will be considered below in the present thesis is, that in case of infringement of one's personality rights by online publication the problems caused by internet users' expectations of privacy, as well as certain technical problems, can arise due to the need of revealing real identity of anonymous infringers[112] These problems are not peculiar to publications in real world, where the question of revealing anonymity does not arise at least in such a way as it does in cyberspace.

Persistence of online content. As Lyrissa Lidsky has stated, online communications are communicated through a medium more pervasive than print.[113] Given the transient nature and immediacy of access to the internet content, as well as the amount of potential receivers of communicated information,online defamatory material have tremendous power to harm one's reputation. As it has been stated above, the features mentioned are attributed to MSM publications as well. However, unlike media, the Internet provides possibility to everyone not only to gain access to the content, but it also allows republications, downloading and storage by others of the content once posted by any person. The nature of online publication is different from its real-life analogue, as "real-world publication involves a single, simultaneous release of content by MSM", when online publication "involves a repetitive series of cascading events, each initiated by a different person or persons".[114]

In case of media publications, the information can be reported one or several time. If making this information public unreasonably infringes someone's right to honor and good name, it is possible to terminate the infringement by excluding the content from media reports. In case of publication in print editions, exclusion of the information from being published is not possible, if it has been already published and disseminated. Printed editions such as books, magazines or newspapers are tangible assets which can be collected and stored by the readers for years. But the readers of printed editions do not have an ability to disseminate the material and share it with the audience, as it is possible in the Internet.

It shall be mentioned here, that in some countries there is a multiple-publication rule used to be applied in the off-line world, which allows an affected party to sue many years after the

[112] Sells, B.D. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.11-13.
[113]Lidsky, L.B. Silencing John Doe: Defamation and Discourse in Cyberspace. Duke Law Journal, Vol.49, No. 4, 2000, p. 863.
[114] Brenner, S. W. Should online defamation be criminalized?Mississippi Law Journal, Vol. 76, 2007, p.30.

statement was published.[115]According to multiple-publication rule, each copy of a book or magazine is a separable case of defamation with its own limitation period (a set period of time in which a claimant can bring an action). In case where the rule applies, the limitation period will run from the date of last publication. Thus, an aggrieved person can get redress for the violation of the right to reputation even after several decades from the date of the first publication of defamatory statements in printed editions.[116] However,the application of this rule to online publications raises certain difficulties.

As for possible termination of infringements in case of publications in printed editions, it shall be noticed that the number of printed editions is limited. The information could be disseminated once and, most possibly, it will not happen again,especially if defamation case has arisen from the publication, and the publisher has been held liable for violation. Thus, termination of further infringement is possible in case of defamation in printed editions.

The picture is different in cyberspace. Online content is not only more pervasive, but also more persistent than publications in print or media. According to David S. Ardia, reputation in digital age is more enduring because information about us, whether good or bad, can exist forever being easily retrievable.[117] Search engines scour and index photos, videos and texts. Different pieces of information are linked to individuals whose information in turn is linked to other individuals, etc. Once defamatory message is posted in the Internet, it becomes available to millions of people all over the world, as the Internet has no borders and no barriers restricting the flow of information. In case if the message is provocative enough, it can be republished and instantly forwarded by uncertain number of internet users to different discussion forums, websites, etc. The process of reposting and forwarding does not have time limits, as it is actually impossible to delete infringing material from all internet sources where it has been published. Internet archiving websites that allow users to view publications on specific dates in the past may preserve the defamatory materials.[118] Even if some publishers and/or Internet Service Providers (ISPs) will delete postings, acknowledging that they are defamatory, others might not. Moreover, defamatory information can stay in cyberspace and remain accessible for internet users for years

[115] Connolly U. Multiple Publication and Online Defamation - Recent Reforms in Ireland and the United Kingdom. Masaryk University Journal of Law and Technology, Vol. 6, Issue 1, 2012, pp. 35-36.
[116]Connolly U. Multiple Publication and Online Defamation - Recent Reforms in Ireland and the United Kingdom. Masaryk University Journal of Law and Technology, Vol. 6, Issue 1, 2012, p. 35.
[117] Ardia, D.S. Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law. Harvard Civil Rights-Civil Liberties Law Review. Summer 2010, Vol. 45 Issue 2, p.262.
[118] Turner, R. J. Internet Defamation Law and Publication by Omission: Multi-jurisdictional Analysis. University of New South Wales Law Journal, Vol. 37 Issue 1, 2014, p. 56.

without possibility to remove it. According to Ryan J. Turner, as a result of Internet technology, the scope of harm to reputation is incalculable.[119]

The example which could illustrate ineffectiveness and inefficacy of existing protection of personality rights from harmful online publications was brought by Susan Brenner.[120] In spite of the fact that the victim in the incident in question did not suffer from defamation but from ridicule, the author finds it relevant to bring this example in the present work, because it illustrates best the persistence of online publication which can infringe personality rights of an individual. The case mentioned by Brenner and called „Star Wars Kid saga"concerned publication on a file-sharing site of a video taped in 2002 by Ghyzlain Raza, a Canadian high-school student, who videotaped himself pretending to be a Star Wars character.[121] The video was found by three other students and published in the Internet, where it gained an immense popularity and, by the present moment, it has been viewed by over one billion people. Because of the video, which made Raza a target of constant bullying and ridicule, the student suffered serious emotional distress, was diagnosed with depression and had to change schools.[122] His parents settled with the families of the classmates who had posted the video in the Internet. The details of settlement have not been revealed until now.[123] However, the tape is still online and, probably, will remain available for large internet audience for years. There is actually no possibility for the victim neither to get adequate redress for suffering from cyber bullying, nor to terminate the infringement of his personality rights.

Certain wrongs committed on the Internet are of such a nature that it is almost impossible in some cases to restore the situation prior to the infringement. Once posted, the article, photo or video can be reposted many times, gain attention worldwide, thus causing almost irreparable damage to reputation and/or other personality rights of a person. It can be almost impossible in some cases, for example, in such as that described above, to make infringing material completely inaccessible for others, as it can be republished on plenty of different online websites by different users, as well as stored on other internet users' personal computers, in saved emails, on USB flash drivers, etc. In case of online defamation, when infringing material enters the Internet,

[119]Turner, R. J. Internet Defamation Law and Publication by Omission: Multi-jurisdictional Analysis. University of New South Wales Law Journal, Vol. 37 Issue 1, 2014, p. 56.
[120] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.30.
[121]Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.14.
[122]Pasternack, A. After Lawsuits and Therapy, Star Wars Kid is back. 2010. Available at: http://motherboard.vice.com/blog/after-lawsuits-and-therapy-star-wars-kid-is-back(9.02.2016).
[123] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.14.

it is remarkably difficult "to put the cat back in the back".[124] Online defamation will not disappear in future. The phenomenon needs study, because defamation in cyberspace will persist and increase in incidence and virulence and „will only be further exacerbated as communication technologies increase in sophistication and in pervasiveness."[125]

1.4.3 Decision upon criminalization of defamation in the U.S.

Taking into account the features of online publications and the scope of possible harm done to the reputation of a person by online defamation, the question arises whether imposition of civil liability on those infringing one's rights is enough. According to Brenner, in the U.S. criminal defamation was caused to fall into disrepute because of recommendation of the drafters of the Model Penal Code (MPC) not to criminalize defamation coupled with Supreme Court decisions applying First Amendment to libel laws.[126] Brenner underlined that the recommendation of the drafters was issued in 1961, when the only type of publication was publication by MSM.

The drafters of the U.S. Model Penal Code (MPC) based their arguments against criminalization of defamation on three main assumptions: 1) defamatory material, if published, would concern public figure and it would normally be an issue of general public interest; 2) MSM entities would not publish defamatory material about non-public figures; 3) defamatory material not published by MSM would not be disseminated to large audience.[127]The assumptions of the drafters of the MPC were valid in XX century. Today internet technology provides the possibility of online publication, which has significantly altered the concept of "publication" which existed in 1961. The drafters of the Model Penal Code did not take into account the features of online publication and online defamation.[128] Online defamation, given the way the material is published and disseminated in cyberspace, differs from real-life defamation. The features of online defamation undermine the rationale for not criminalizing this activity based on the assumptions concerning the nature of libel in XX century.[129]

[124]Ibid., p. 30.
[125]Ibid., p. 32.
[126]Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p. 1.
[127] Ibid., p.26.
[128] Ibid., p.31.
[129] Ibid.

There was a test based on which the drafters of the MPC decided whether defamation is worth criminalization. The crime assumes „harmful behaviour which exceptionally disturbs the community's sense of security".[130] The drafters examined whether libel falls into this category for either of two reasons: 1) whether the harm done by defamation is very grave (such as in case of murder); or 2) whether there is a higher likelihood that the harm done by defamation will be inflicted (as in case of petty theft).[131] In 1961 the drafters came to conclusion, that defamation falls into neither category, and therefore it is inappropriate for penal control.[132]According to Brenner, they were right that defamation does not fall into the first category, and there is no doubt it does not. But as regards the higher likelihood of the infliction of the harm, it can be stated that twenty-first century version of defamation thriving in cyberspace nowadays falls into the second category, as there is a strong likelihood that the harm done by online defamation will be inflicted by those internet users, who manifest disregard of other people's right to honor and reputation. The simplicity of publishing in cyberspace and access to the Internet as well as online anonymity contribute to emergence and dissemination of online defamatory content. Unlike defamation in MSM publication and routine defamation (gossip), which according to the architects of the MPC, could not occur in such an aggravated form which could justify criminalization,[133]online defamation, on the contrary, can, as online publication has changed the „unitary nature of traditional MSM publishing"[134] and the forms of defamation migrated online.

The author of the present thesis is on opinion that the rationale and the criteria upon which the drafters of the U.S. MPC decided that defamation should not be criminalized, and that civil liability as a control mechanism is enough, were right. However, the rationale is not applicable in case of online defamation. The same concerns existing legal protection of the right to honor and good name and liability for online defamation in Estonia, as online publications alter the nature of traditional publishing in Estonia (as well as in other countries) in the same way as they do in the U.S. According to the U.S. Center for Democracy and Technology, unique characteristics and capabilities of the Internet suggest that the laws that were appropriate for traditional media

[130] Model Penal Code §250.7, comment at 44. Tentative draft no 13, 1961. Cited by Brenner, S. W. Should online defamation be criminalized? University of Dayton School of Law, p.8.
[131] Model Penal Code §250.7, comment at 44. Tentative draft no 13, 1961. Cited by Brenner, S. W. Should online defamation be criminalized? University of Dayton School of Law, p.8.
[132]Model Penal Code §250.7, comment at 44. Tentative draft no 13, 1961. Cited by Brenner, S. W. Should online defamation be criminalized? University of Dayton School of Law, p. 8.
[133] Brenner, S. W. Should online defamation be criminalized?Mississippi Law Journal, Vol. 76, 2007, p.32.
[134] Ibid., p.33.

may not always be suitable for the wired world.[135] In his article Kyu Ho Youm has noticed that American defamation law has not changed despite recent development of Internet technology, except for the statutory immunity for Internet service providers (ISPs), some tests elaborated by the courts for unmasking cyber bloggers, and jurisdictional analysis.[136] The latter concerns Estonian defamation law as well. Therefore, there is a need to test whether existing legal tools for the protection of the right to honor and good name in Estonia are sufficient and effective in application to online defamation cases.

[135] Center for Democracy and Technology. Defamation in the Internet Age: Protecting Reputation Without Infringing Free Expression. Washington DC, 11 of September 2012. Available at: https://cdt.org/files/pdfs/Defamation-Internet-Age.pdf(11.03.2016).
[136] Youm, K. H. *Do We Need a New Law for Online Defamation?* Communications Lawyer, Vol. 28, Issue 4, 2012, p. 22.

2. Legal protection of the right to honor and good name in Estonia

2.1 Law of Obligations Act

On the constitutional level the protection of the right to honor and good name is established by Article 17 of the Constitution of the Republic of Estonia (the Constitution). The Article reads as follows: „No one's honor or good name may be defamed".[137] The legal norm establishes a negative right for everyone not to be subjected to defamation. At the same time it sets out the subjective right to honor and good name for everyone.[138]Article 17 is formulated as a prohibition. However, it shall be underlined that the Article does not absolutely preclude any interference with a person's honor and good name, but only prohibits defamation thereof.[139]

The right to honor and good name is a right conflicting with the right to freedom of expression which is restricted by the prohibition on infringing one's honor and good name. According to second sentence of Article 45(1) of the Constitution, freedom of expression can be restricted by law in order to protect a person's honor and good name.[140] For the purposes of the protection of the right to honor and good name Articles 1045(1)(4), 1046(1), 1047(1)(2)(4), 1055(1)(2), 131 and 134(2) of Estonian Law of Obligations Act (LOA) may be regarded as restricting the right to freedom of expression.[141]

As it has been stated above in the present thesis, in Estonia defamation is a civil charge and the right to honor and good name or the right to reputation enjoys only civil legal protection. The right to honor and good name is one of personality rights. The unlawfulness of injuring person's reputation (as well as other personality rights) is established in Articles 1046 and 1047 of the LOA. According to these Articles, the right to honor and good name of a person can be infringed by passing undue value judgment about the person (Article 1046(1)) and/or by disclosure of incorrect, incomplete or misleading information (Article 1047(1)(2)).

LOA provides that fault-based tort liability is based on the general elements of tort: objective elements of an act, unlawfulness and fault. Article 1043 of LOA provides that "tortfeasor who

[137] The Constitution of the Republic of Estonia.RT I, 15.05.2015, 2.
[138] Maruste, R. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne, 2012. Tartu Ülikool. Paragraph 17, komm.1. Available at: http://www.pohiseadus.ee/ptk-2/pg-17/(10.02.2016).
[139] RKTKo 3-2-1-43-09, p.15.
[140] The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2.
[141] Law of Obligations Act. RT I, 11.03.2016, 2.

unlawfully causes damage to a victim shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law."[142] Objective elements of act are fulfilled if defendant's action is unlawful, and as a result of this action the plaintiff has suffered harm (the act, the consequence, the causal relationship between the act and the consequence). When the right to honor and good name is infringed by passing undue value judgment or defamatory publication of false information, the plaintiff has to prove that the harm he/she has suffered and compensation of which the plaintiff demands, was caused by publication (making available to third person(s)) of this value judgment or factual information by the defendant.

2.1.1 Infringements of the right to honor and good name by passing undue value judgment

Article 1046 sets out additional requirements of unlawfulness of causing damage by violations of personality rights established in Article 1045(1) 4).[143] Article 1046 states that:

1) The defamation of a person, inter alia by passing undue value judgment, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is unlawful unless otherwise provided by law. Upon the establishment of unlawfulness, the type of violation, the reason and motive for the violation and the gravity of the violation relative to the aim pursued thereby shall be taken into consideration.

(2) The violation of a personality right is not unlawful if the violation is justified considering other legal rights protected by law and the rights of third parties or public interests. In such case, unlawfulness shall be established based on the comparative assessment of different legal rights and interests protected by law.[144]

Article 1046 protects personality rights of a natural person only. Legal person due to its nature does not have personality rights and can not suffer moral damage.[145]Article 1046(1) establishes the general principle, according to which, in the presence of objective composition of tort, every act which violates personality right of a person is unlawful, unless otherwise provided by the

[142] Law of Obligations Act. RT I, 11.03.2016, 2.
[143] Ibid. Article 1045(1)(4) states that: „causing of damage is unlawful if, above all, the damage is caused by violation of a personality right of a victim".
[144]Law of Obligations Act.RT I, 11.03.2016, 2.
[145] RKTKo 3-2-1-35-97.

law.[146] In establishing unlawfulness of passing value judgment it shall be first checked whether this value judgment, taking into account the context of the text, is discrediting in certain cultural environment. Secondly, it shall be established whether this value judgment was reasonable or due. The Supreme Court of Estonia has stated that Article 1046(1) assumes that petty infringements, which the person shall normally tolerate in everyday life, can be regarded as not unlawful and shall not be the subject of legal sanctions.[147]In assessing the unlawfulness of value judgment, only Article 1046(1) applies and Article 1047 is not applicable, as prerequisites of unlawfulness of passing value judgment and disclosure of defamatory factual information are different.[148] In case of disclosure of factual information the unlawfulness derives from the falsehood of facts and from negligence of the person who discloses the facts.[149] The unlawfulness of value judgment is assessed based on irrelevance of the judgment, circumstances of passing it and balancing of interests.[150] If the right to honor and good name is infringed also by disclosure of false data, unlawfulness shall be ascertained pursuant to Article 1047(1-3) additionally.

In Estonian case law there have been cases, where the question arose whether the publication shall be qualified as containing factual information or it represents a value judgment.[151] In case nr 3-2-1-161-05 there were four statements, which according to the plaintiff infringed his honor and good name, and should therefore be refuted by the defendant. It was important to ascertain whether the statement contains factual information or it represents value judgment, because remedies in these two cases are different. Value judgments, unlike statements containing facts, cannot be refuted, as it is impossible to prove whether they are true or false. Value judgment is expressed in assessment given to a person, which can, due to its content or form of expression, be discrediting in certain cultural environment.[152] In case nr 3-2-161-05 the Supreme Court of Estonia regarded the nature of some statements made by the defendant. One of the statements addressed to the plaintiff was the following: „You came herewith lots of proxies, and having the majority of voices, have forced us to pay contribution of 2 million krone“.[153] This statement was qualified as containing factual information, and the defendant was obliged to refute the statement by Tallinn Circuit Court. However, the Civil Chamber of the Supreme Court of Estonia has

[146] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.1.
[147] RKTKo 3-2-1-161-05, p.15.
[148] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.3.
[149] RKTKo 3-2-1-161-05, p.16.
[150] Ibid.
[151] RKTKo 3-2-1-53-07, p. 17-20; RKTKo 3-2-1-161-05, p. 11-12.
[152] RKTKo 3-2-1-53-07, p.18.
[153] RKTKo 3-2-1-161-05, p.16.

found that in case of the statement in question Article 1047(4) is not applicable, as the statement does not contain facts. Facts being disclosed have to be specific. In that case, as it was clarified by the Supreme Court, the statement represented the opinion, which left an impression that the defendant knew the facts on which the opinion was based, but the statement itself did not contain facts.[154] Also, the Supreme Court has underlined that it is possible to show a person in a false light by disclosure of information concerning some circumstances based on which it can be reasonably concluded that there are some specific facts related to the person about whom the information is disclosed.[155] In such a case the conclusion that the text which was made available contains factual information derives from the general context of the publication. The Civil Chamber has found that Article 1047(4) is applicable in case of such publication and the plaintiff can demand to refute the factual information on the expense of a person who has disclosed it.[156] In case nr 3-3-1-3-12 the Administrative Law Chamber of the Supreme Court of Estonia has stated that based on the context and the way of publication of factual information, the information can contain value judgment as well.[157]

What else shall be noticed here is, that it is important to clarify whether value judgment was passed about a certain person or about a group of persons to which the plaintiff belongs. In Estonia the protection of the right to honor and good name is granted only to a certain individual and not to a group of individuals.[158] The Supreme Court has noticed that value judgments or statements of facts, which actually do not infringe person's honor and good name, should not be regarded as defamation.[159] If undue value judgment is addressed not to a certain person, but to a group of individuals, it is assumed that personality right to honor and good name of an individual is not infringed, as this statement does not affect his/her reputation. Such statement can affect reputation of a group, but a group, due to its nature, does not have personality rights. In case resolved in 2000 by Tartu Circuit Court, it has been stated by the court that the fact that executive board member told that „all Czech workers are thieves"does not give the basis for holding board member liable for defamation, as the statement was impersonal, and it was not proved that the statement has been directed exactly at the plaintiff.[160] In this case the court has actually expressed an idea that the person being a member of a certain group cannot defend

[154] RKTKo 3-2-1-161-05, p. 12.
[155] Ibid.
[156] Ibid.
[157] RKHKo 3-3-1-3-12, p.42.
[158] Leppik M., Vutt M. Õigus aule kui igaühe õigus. Kui palju au on autul? Mõned ebatraditsioonilised remargid au ja väärikuse aspektidest ja subjektidest. Kohtute aastaraamat 2012, lk. 97.
[159]RKTKo 3-2-1-11-04, p.12.
[160] Tartu Rko 31.01.2000 nr II-s-100/2000.

himself from infringement of the right to honor and good name if defamatory statement was impersonal and was directed at the whole group.[161]

In the second sentence of Article 1046(1) it is clarified that the decision upon the establishment of unlawfulness must be made taking into account the type of infringement, the reason and the motive of infringement, the relation between the aim pursued by infringement and the gravity of infringement. Thus, it shall be assessed whether the act of infringer has been provoked by the act of the victim; whether the act of the infringer is justified by his/her motive to ensure the observance of other rights and interests or the protection of goods or assets, etc.[162] For example, the infringement of the right to honor and good name can be justified, if there is a general public interest in being aware of the information, even defaming, which has been communicated to the audience.[163] Such kind of information can, for instance, concern the details of private life of, orinformation concerning criminal proceedings against a public figure. In this case the infringment is justified by reasonable publication. In case of publication of the material defaming public figure, it shall be assessed (regardless whether the reputation of a public figure was infringed either by passing of undue value judgment or disclosure of incorrect information) whether there was a public interest in publication of defaming material and whether the public interest prevailed over the personality rights of the public figure.[164] Thus, passing undue value judgment about a public figure concerning, for instance, his profession, department, etc. with the purpose of offending cannot be regarded as that made in the public interest.[165]

As for defamation cases involving public figures, it shall be mentioned that according to the principle adopted in most democratic countries, certain statements relating to public debates, which can be harmful to the reputation of a public figures should be afforded special protection, as the status of public figures as persons who actively participate in public life assumes automatic reduction of the scope of protection of the right to reputation.[166] According to this approach, open debates in public matters are more important – up to certain limit – than the protection of personality rights of the persons being criticized.[167]This approach is used in

[161] Leppik M., Vutt M. Õigus aule kui igaühe õigus. Kui palju au on autul? Mõned ebatraditsioonilised remargid au ja väärikuse aspektidest ja subjektidest. Kohtute aastaraamat 2012, lk.97.
[162] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.1.
[163] Ibid., komm. 3.2.
[164] Ibid.
[165] Ibid.
[166]Koltay, A. Elements of Protecting the Reputation of Public Figures in European Legal Systems.ELTE Law Journal.ELTE Eötvös, 2013. Available at: http://eltelawjournal.hu/wp-content/uploads/2014/03/ELJ_Separatum_koltay.pdf(14.02.2016).
[167] Koltay, A. Elements of Protecting the Reputation of Public Figures in European Legal Systems. ELTE Law Journal. ELTE Eötvös, 2013.

Estonian legal system as well. The Supreme Court of Estonia has found that public figure, given the importance of his/her activities, gains more attention from the public and has to tolerate more criticism than ordinary person.[168]

At the same time public figures are the ones that can more likely become the victims of „problematic"speech, as information concerning them usually reaches wide audience and is the most frequently discussed in the society. Before the development of Internet technology public figures or those who can gain public attention due to their professional activities were the only persons, information concerning whom could reach broader audience.[169] Nowadays the things have changed and one publication in the Internet containing information about absolutely unknown person can make him/her popular worldwide within days. This aspect is important in the field of regulation of problematic speech in the Internet, and it seems that it was not taken into account while deciding upon the scope of liability for defamation.

Article 1046 also provides legal protection for personality rights other than the right to honor and good name. For example, the right to privacy is under the scope of protection from violations under the provisions of Article 1046. The right to privacy is a fundamental human right and its protection is guaranteed by Article 26 of the Constitution. The Article states that:„Everyone is entitled to inviolability of his or her private and family life. Government agencies, local authorities, and their officials may not interfere with any person's private or family life, except in the cases and pursuant to a procedure provided by law to protect public health, public morality, public order or the rights and freedoms of others, to prevent a criminal offence, or to apprehend the offender."[170] There are series of offences established in Estonian Penal Code for the purpose of providing adequate protection for the right to privacy. Article 156 of the Penal Code provides that violation of confidentiality of messages is a criminal offense.[171] According to Articles 157, 157^1, 157^2 illegal disclosure of personal data, illegal disclosure of sensitive personal data and illegal use of another person's identity are subjects toadministrative or criminal sanctions. Thus,

[168] RKTKo 3-2-1-123-97.
[169] It shall be mentioned that in case 3-2-1-161-05 the Supreme Court has stated that a board member of Housing Corporation, cannot be regarded as a public figure due only to his professional activity (RKTKo 3-2-1-161-05, p.15). There is no legal definition of „public figure" in Estonia. However, relevant provisions concerning the publications about public figures and definition of the concept of public figure are established in the Code of Ethics of the Estonian Press. According to Article 1.6 of this Code „individuals in possession of political and economic power and information important to the public shall be considered as public figures" and „media shall also consider as public figures individuals who earn their living through publicly promoting their persona or their work." (The Code of Ethics of the Estonian Press. Estonian Newspaper Association. Available at: http://www.eall.ee/code.html(16.02.2016).
[170]The Constitution of the Republic of Estonia. RT I, 15.05.2015, 2. Art. 26.
[171] Penal Code. RT I, 17.12.2015, 9.

some violations of personality rights mentioned in Article 1046, but not the right to honor and good name, are subjects to either civil or criminal (or administrative) sanctions.

As this research is restricted to the protection of the right to honor and good name being infringed by defamation, the protection of other personality rights is out of the scope of the present thesis. However, it shall be noticed that infringements of the right to honor and good name can sometimes be accompanied with invasions of privacy. It can occur, for example in such situations, where the infringer publishes defamatory content which contains information concerning private life of the person being defamed. But it shall be taken into account that mere disclosure of private information does not assume defamation of a person. The fact that information disclosed is shaming or embarrassing does not provide sufficient basis for establishing that this information is defamatory.[172] To qualify as defamatory, informationdisclosed has to be false, incomplete or misleading and the disclosure has to inflict reputational harm.It is important that privacy becomes an issue only when the information disseminated is true.[173]

Estonian law provides a defense of truth in case of infringement of the right to honor and good name by disclosure of information as Article 1047 provides. As for Article 1046, defense of truth is not provided, however defense of opinion is possible. Value judgment cannot be true or false, but baseless or undue. Unjustified is infringement of the right to honor and good name by that value judgment, which does not have adequate rationale based on defamed person's actions, statements, decisions, or other activities which deserve negative assessment of others, or if the value judgment is based on false factual information.[174] If the person, who is publicly shown in a negative light, has given a reason for it (by his/her activities), the justification for passing such value judgments is assumed. The Supreme Court of Estonia has stated that value judgment, which infringes the reputation of a person, is due, if the person who has passed the judgment had a reasonable justification for showing that person in a negative light.[175] If undue value judgment is based on untrue factual information concerning the person being defamed, the justification for passing such kind of judgment depends on the fact whether the information has been sufficiently checked by the defendant.[176]

[172] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p.40.
[173] Ibid.
[174] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.3.
[175]RKTKo 3-2-1-161-05, p. 12.
[176]Law of Obligations Act.RT I, 11.03.2016, 2. Art. 1047(1)(3).

2.1.2 Infringements by disclosure of incorrect information

Article 1047 concerns violations of the right to honor and good name by disclosure of incorrect information and sets out additional requirements of unlawfulness of causing damage by violations of personality rights (Article 1045(1)4)) and interference with the economic or professional activities of a person (Article 1045(1)6)). This Article deals with infringements of personality rights attributable to a natural person, as well as it adds the provisions protecting the reputation of legal personswhich do not have personality rights. Article 1047 reads as follows:

§ 1047. Unlawfulness of disclosure of incorrect information

(1) The violation of personality rights or interference with the economic or professional activities of a person by way of disclosure of incorrect information or by the incomplete or misleading disclosure of factual information concerning the person or the activities of the person is unlawful unless the person who discloses such information proves that, upon the disclosure thereof, the person was not aware and was not required to be aware that such information was incorrect or incomplete.

(2) The disclosure of defamatory facts concerning a person or facts which may adversely affect the economic situation of a person is deemed to be unlawful unless the person who discloses such facts proves that the facts are true.

(3) Regardless of the provisions of subsections (1) and (2) of this section, the disclosure of information or facts is not deemed to be unlawful if the person who discloses the information or facts or the person to whom such facts are disclosed has legitimate interest in the disclosure and if the person who discloses the information has checked the information or facts with a thoroughness which corresponds to the gravity of the potential violation.

(4) In the case of the disclosure of incorrect information, the victim may demand that the person who disclosed such information refute the information or publish a correction at the person's expense regardless of whether the disclosure of the information was unlawful or not.[177]

Provisions of Article 1047(1) set out that violation of personality rights by the way of disclosure of incorrect information is unlawful. In case of natural person in addition to Article 1047, Article

[177] Law of Obligations Act. RT I, 11.03.2016, 2.

1046 shall be applied as well.[178] Legal person does not have personality rights, and therefore Article 1046 cannot be applied in cases, where the disclosure of incorrect information can affect the reputation of a legal entity. In the Official Comments to Article 1047 it is clarified that in case of infringement of reputation of legal person Article 1047 shall be applied by analogy.[179] Legal person does not have personality rights, but it can be held in a high esteem by its customers, business partners and community in general. Disclosure of defamatory, incorrect information concerning a legal person can damage the reputation which the legal person deserves, deter business partners from dealing with this entity, reduce popularity of the production, cause the decrease of income, etc.

The author finds it relevant to regard some terms used in the Article, as it is important for the correct application of the provisions. The Civil Law Chamber of the Supreme Court of Estonia has clarified that term "disclosure" in the context of Article 1047 means whatever act as a result of which the information has become known to third persons.[180] In other case the Chamber explained that for the purposes of Article 1047 of the LOA, disclosure means communication of information to third parties, and the discloser is a person who communicates the information to third parties.[181] Incorrect information means incorrect facts or circumstances the truth value of which can be checked.[182] The possibility to check the truth of facts differentiates statement of fact from value judgment. Whether the material published contains facts shall be verified by the way of interpretation.[183]As it has been stated above, the statement can be classified as containing incorrect information if it contains both indirect statements of facts and value judgments from the composition of which the existence of certain circumstance can be concluded.[184]

It is important to consider who bears civil responsibility for unlawful disclosure of incorrect information. Official comments to Article 1047 (as well as to Article 1046) do not contain mentions concerning disclosers and disclosure of information in the Internet. However, the issues of responsibility ofpublishers of printed media are touched upon. It shall be noticed that the Committee of Ministers, underlining developments in information and communication technologies, in its Recommendation CM/Rec(2011)7 on a new notion of media, recommended that member states „adopt a new, broad notion of media which encompases all actors involved in

[178] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.1.
[179] Ibid.
[180] RKTKo 3-2-1-95-05, p.25.
[181] RKTKo 3-2-1-43-09, p.14.
[182] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.1.
[183] Ibid.
[184] RKTKo 3-2-1-161-05, p.12.

the production and dissemination, to potentially large numbers of people, of content and applications which are designed to facilitate interactive mass communication (for example, social networks) or other content-based large-scale interactive experiences (for example, online games), while retaining editorial control or oversight of the contents."[185] In Estonian case law the issues concerning disclosure of information in the Internet have arisen, however the application of existing legal provisions to user-generated content and persons liable for publication seems to have been complicated at least in the first case in this field- *Delfi v. Leedo*.[186]

There is a general rule that the person who has disclosed untrue factual information is liable for the disclosure.[187] The person who discloses untrue information is the person under whose control communicating information to the third parties actually is. For example, in case of publication in newspaper or magazine it can occur that the information which is published was reported to the actual publisher by a third person. Also, publication can contain citations of a third person who reveals untrue information about other person. In such cases liable for the disclosure of incorrect information is nevertheless the newspaper or magazine publisher. However, the Supreme Court of Estonia has come to conclusion that in some cases not media entity (publisher) but the person who has provided untrue information to the media entity can be held liable.[188] The Court has stated that Article 1047 does not provide that the person who discloses information can be only media entity. For example, in case nr 3-2-1-61-98 the action for defamation has been brought against both the newspaper and the author of the article.[189] Even if a person, who discloses information, is neither a publisher nor an author of an article containing infringing material, this person can disclose untrue facts in other ways (i.e. the person makes public statement during the interview).[190]

In case *Delfi v. Leedo* the Civil Law Chamber of the Supreme Court of Estonia has clarified that publishing of news and comments on an Internet portal is also a journalistic activity.[191] However, Internet portal cannot be expected to edit the content before publishing in the same manner as it is being done by the publisher of a printed media. The Chamber has noticed that because of

[185] Council of Europe. Committee of Ministers. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media. Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies. Para. 7.
[186] RKTKo 3-2-1-43-09; TlnRnKo 21.12.2012, 2-08-76058; TlnRnKo 27.06.2013, 2-10-46710.
[187] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.1.
[188] RKTKo 3-2-1-95-05, p.25.
[189] RKTKo 3-2-1-61-98.
[190] RKTKo 3-2-1-95-05, p.25., Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.1.; RKTKo 3-2-1-99-97.
[191] RKTKo 3-2-1-43-09, p.14.

economic interest in the publication, both a publisher of printed media and an Internet portal operator are disclosers as entrepreneurs.[192]

Article 1047(4) sets out that disclosure of whatever untrue information about natural or legal person, regardless of unlawfulness of such disclosure, can be claimed (by the victim) to be refuted or the victim can demand a person, who has disclosed this untrue information, to publish corrections. As this thesis is about defamation, the author will mostly concentrate on unlawful disclosure of defamatory facts. Article 1047(2) concerns the unlawfulness of disclosure of false statements of facts, which can damage personality right or economic situation of a natural or legal person.

The aim of Article 1047(2) is to address the need to prove whether the facts disclosed are true in case if the disclosure of these facts violates personality rights or is harmful to economic situation of a person.[193] Thus, according to Article 1047(2) the unlawfulness of disclosure of defamatory facts does not come from the infringement of reputation but from the falsity of facts. If the defendant proves that the facts disclosed are true, so the disclosure is not unlawful and the defendant shall not be held liable. According to the Official Comments to Article 1047(2), defamatory facts are whatever statements of fact which cause community's negative attitude to the person.[194] For example, these can be statements that a person is a criminal or the person uses physical violence against his wife, etc. In case of legal person defamatory facts are whatever statements of facts in relation to its commercial activity which cause decrease of level of customer's and business partner's trust (i.e. statement that company has lost most of its customers, has lots of debts, the quality of production has worsened, etc.).[195]

As for the burden of proof, Estonian law provides that in case of violation of the right to honor and good name by disclosure of information, the burden of proof is on defendant. The person who has disclosed information has to prove that information is true. In case if the defendant cannot prove that information in question is true, he has to prove that he has acted in accordance with Article 1047(3), what means that there is either a justification for the disclosure of the facts basing on person's legitimate interest, or the person has checked the facts with due thoroughness.

The issue of checking the facts with due thoroughness seems to be complicated and controversial. As concerns checking of facts by media entity, it is clear that it is expected to

[192] RKTKo 3-2-1-43-09, p.14.
[193] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.2.
[194] Ibid.
[195] Ibid.

check the information more carefully due to its status. Also, it is more likely that media entity checks information because it is in the interests of the entity. As far as ordinary person who discloses information is concerned, it seems that it can be difficult to establish whether the information has been checked accurately enough before the disclosure. For example, in the Official Comments it is stated that in case if person A has incorrectly stated that person B has criminal records, A's act can be regarded as not unlawful if A has acted with due thoroughness, even if A cannot prove that information concerning B's criminal records is true.[196] It is not clear what does due thoroughness mean in this case. Information concerning criminal records is contained in Estonian Criminal Records Database. If information is untrue, it is not contained in this database. Even if person A had a legitimate right to access and disclose information concerning criminal records of person B, due thoroughness is excluded, because B does not have criminal records. Consequently, it can be assumed that A makes the statement which is based on rumors. Even if A has read this information in a newspaper, it is based on rumors, as information is false, and obviously not checked. It could be stated that A has checked information in case if A has gained (from some not trustworthy sources) information that B has criminal records, and asked B whether it is true. But it is less likely that B himself provided false information concerning the existence of his criminal records. In this case the question arises whether untrue information, such as that disclosed by A, can be checked with due thoroughness at all. In author's opinion due thoroughness shall not assume that rumors or other unchecked sources of information are enough for appropriate checking of facts, especially if they can cause damage to reputation.

Article 1047 provides that infringements of the right to honor and good name by disclosure of untrue information can be committed either intentionally or negligently.[197] It means that defendant can be held liable for infringement under Article 1047(2) in case if he did not exercise the care that sensible person would exercise in similar circumstances. Intentional disclosure of incorrect information is unlawful according to Article 1045(1)8) regardless of provisions of Article 1047.

[196] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.2.
[197] Ibid.

2.1.3 Possible remedies for infringements of the right to honor and good name

When it is established that infringement of the right to honor and good name has taken place, the plaintiff can use remedies provided in the LOA. There are different remedies in case of infringement by passing undue value judgment and in case of infringement by disclosure of incorrect information. In case of undue value judgment the plaintiff has a legal right to claim:

1. Compensation for patrimonial and non-patrimonial damage (Article 131, Article 134(2) and Article 1043 of the LOA);

2. Termination of infringement (Article 1055(1));

3. Refraining from future infringements (Article 1055(1)). The claim is not often used in practice, as it is difficult to assess the future conduct of the parties and the aims of their acts. For example in case *AS Estonian Air v. AS Reta LG* the Supreme Court has stated that based on the fact that the rights of the plaintiff are not infringed yet, the Court cannot make decisions concerning future malevolence of the defendant.[198]

If the plaintiff has suffered reputational harm because of disclosure of incorrect, incomplete or misleading information he/she can impose the following claims:

1. Compensation for patrimonial and non-patrimonial damage (Article 131, Article 134(2) and Article 1043). In case of interference with economic or professional activities as a result of which the rights of a legal person have been infringed, compensation for non-patrimonial damage cannot be claimed due to the nature of legal person. As for patrimonial damage, it has been mentioned by the Supreme Court of Estonia as well as in legal literature that the circumstances in which the exact amount of patrimonial damage cannot be calculated does not deprive the aggrieved person from satisfying the claim.[199] However, in practice it appears that when the proof of patrimonial damage is difficult, claims available for the plaintiff are restricted to non-patrimonial damage claims.[200] In such a case if an aggrieved person is a legal person, non-patrimonial damage claim is not possible as well.

2. Termination of infringement (Article 1055(1)).

[198] RKTKo 3-2-1-85-00.
[199] Tampuu, T. Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus. Juridica II, 2003, lk.71-82; RKTKo 3-2-1-81-02, p.12.
[200] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1047, komm. 3.4.

3. Refraining from future infringements (Article 1055(1)).

4. Refutation of information or publishing a correction on defendant's expense (1047(4)). The Supreme Court has clarified that refutation is not possible in case of infringement by passing value judgment, as value judgment does not contain data, but the plaintiff can use it in case of disclosure of false information.[201] This remedy can be used also in cases if disclosure was not unlawful. It does not matter whether the defendant was careful enough while disclosing infromation. The only requirement for application of Article 1047(4) is that the information claimed to be refuted or corrected has to be untrue.

The remedies provided by the LOA are not mutually exclusive. The victim can use one or several remedies depending on the circumstances of a particular case, except for those cases where the use of a remedy is excluded according to the law. Article 1055(2) provides that the victim cannot demand behavior which causes damage be terminated if it is reasonable to expect that such behavior can be tolerated in human co-existence or due to significant public interest.[202]

In some member states the victim of defamation can choose either civil or criminal remedies (whether to bring civil or criminal proceedings against the infringer). Before the adoption of the Penal Code there was such an alternative in Estonia as well. Estonian Criminal Code (Eesti kriminaalkoodeks) established two offences:defamation (Article 129 of the Criminal Code) and insult (Article 130).[203] Defamation was defined as dissemination of knowingly false dishonoring fabrications concerning a person; and insult – as a humiliation of person's honor and dignity in an obscene form. Today the victim of defamation can only use remedies provided by the LOA.

It shall be noticed that in general, in Estonian court practice compensation for damages is not deemed to be appropriate and justified remedy in defamation cases. In case of infringements of the right to honor and good name by passing value judgment, compensation claims in practice cannot provide sufficient legal protection.[204] It is too difficult to prove that patrimonial damage was caused to the plaintiff by passing value judgment. Recovery of non-patrimonial damage assumes that personality rights of the plaintiff have been violated significantly and the infringement was grave.[205] Compensation in the form of money is not regarded as an appropriate

[201] RKTKo 3-2-1-161-05, p.10.
[202] Law of Obligations Act. RT I, 11.03.2016, 2.
[203] KrK. RT 1992, 20, 288.
[204] Käerdi, M., Võlaõigusseadus. Kommenteeritud väljaanne III, 2009, § 1046, komm. 3.3.
[205]Ibid.

remedy especially in cases where the defendant apologizes to the plaintiff.[206] However, apology claims in defamation cases are denied by the Supreme Court of Estonia, as there is no legal basis for obliging the defendant to apologize.[207]The Supreme Court has also stated that court proceedings and court decision, in which it is ruled that the act of the defendant was unlawful, are themselves enough for eliminating negative consequences of infringement of the right to honor and good name.[208] The Court underlined that the damage caused by defamation is mostly moral damage, and there is no need to recover monetary compensation in every defamation case.[209] Inappropriateness of monetary compensation in defamation cases has been underlined also by some U.S. scholars which have argued that defamation law aims not only to protect the proprietary interest in one's good reputation, but also to vindicate the honor of the person defamed and to enforce society civility norms.[210] According to David A. Anderson "reducing defamation to a remedy for economic loss would exalt commercial values that the law serves, not only in defamation but in tort law generally."[211] However, monetary compensation seems to be the most effective remedy civil law provides for the victims of defamation, especially if the damage is significant and return to the prior situation is impossible.

The Supreme Court of Estonia has stated that when the right to honor and good name is infringed in the means of media, there is a basis to assume that the rights are infringed significantly.[212] It means that compensation for non-patrimonial damages is justified in case of such infringement. However, even in these cases monetary obligations imposed on media entities are rather small and are often significantly lower than claimed by the plaintiffs. The same concerning the use of remedies of damages can be stated in relation to infringements by disclosure of incorrect information. In the latter case the plaintiff can still demand to refute information or make corrections at the defendant's expense. Such remedy as termination of infringement is possible to use in case where the infringement is continuous. However, the person can suffer damage from a single statement, especially in case if it was published by the means of media.

[206]Ibid.
[207]RKTKo 3-2-1-17-05, p.28.
[208]RKTKo 3-2-1-17-05, p.29.
[209]Ibid.
[210] Post, R.C. Social Foundations of Defamation Law: Reputation and the Constitution. 74 Cal.L.Rev., 1986, pp. 691-693.
[211] Anderson, D.A. Rethinking Defamation. Arizona Law Review, Vol. 48, Issue 4, 2006, p.1049.
[212]RKTKo 3-2-1-11-04, p. 19.

2.2 Application of the provisions to online defamation cases and insufficiency of legal protection

The questions arise how the provisions establishing the legal protection of the right to honor and good name shall be applied to defamation in the Internet, and whether the remedies provided by the LOA can be regarded as sufficient for adequate redressfor the victim and for the elimination of negative consequences of defamation in cyberspace.

As for the first question, though internet communication technology is a new phenomenon, most legal acts dealing with the protection of personality rights are applied to actions in cyberspace in the same way as in real life.[213] That is illegal in real life, is illegal in cyber world, as the law is uniform regardless of technology.[214] It means that if undue value judgment or statement of false fact, communication of which infringes the right to honor and good name of a person, have been published (disclosed) on an internet platform, the victim, according to Estonian law, can bring civil proceedings against tortfeasor and use legal remedies (regarded above) provided by the LOA. However, it shall be mentioned that according to Article 1(c) of the Joint Declaration of freedom of expression and the Internet „approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet, but, rather, need to be specifically designed for it.“[215]

The new challenge that makes application of defamation laws to cyberspace complicated is the presence of the third party – Internet Service Provider (ISP). Speech on the Internet has become more popular through message boards, chat rooms and blogs.[216] Online speech is usually made possible through a business relationship between a speaker, who is a customer of ISP, and the ISP which provides communication services.[217]

In cases of real-life defamation it is more clear who has to be liable for infringement: it is either the person who infringes the right to honor and good name by communicating of undue value judgment or false statements of fact to third parties, or (in case of media publications) the publisher of defamatory material, who due to his professional editorial duties is regarded as a

[213] Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu. Magistritöö. Tartu Ülikooli õigusteaduskond, Tsiviilõiguse õppetool, 2003, lk.79.
[214] Dempsey, J.X. Application of Defamation Laws to the Internet, 2001. Cited by Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu, 2003, lk.79.
[215] United Nations Human Rights Office of the High Commissioner Joint Declaration on Freedom of Expression and the Internet from 1 June 2011. International Mechanisms for Promoting Freedom of Expression.
[216] Martin J. A. Return to the Marketplace: Balancing Anonymous Online Speech and Defamation. University of Baltimore Journal of Media Law and Ethics, Vol. 1, Issue 3-4, 2009, pp. 248-249.
[217] Ibid.

person liable for publications (alone or with the person who has communicated the information to him/her). In case of online publications the issue of the person liable for the infringement of personality rights shall be regarded differently. ISP is a third party which is involved in online publications. But the trouble here is, that ISP is neither the author nor the initiator of publishing of user-generated content.

There are special legal provisions dealing with ISP's liability at the EU level which have been transposed into Estonian legislation as well. Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in Internal Market (Directive on electronic commerce)[218] establishes the limitations of the liability of intermediary service providers, which for the purposes of the Directive are defined as natural or legal persons providing an information society services.[219] Exemptions of liability are established in Articles 12-14 of the Directive. Relevant provisions of these Articles are transposed in Estonian Information Society Services Act (Infoühiskonna teenuse seadus) in Articles 8-10.[220]According to these provisions service provider shall not be considered liable for online publications, if its role was neutral, in the sense that its conduct was merely technical, automatic and passive, and the information society service provider had neither knowledge of, nor control over the information which was transmitted or stored. Article 11 of the Information Society Services Act states that service providers specified in Articles 8-10 are not obliged to monitor the information that they transmit or store, nor service providers are obliged to actively seek information or circumstances indicating illegal activity.[221]

In Estonian court practice there have been cases where service providers have been held liable for online defamatory comments posted by the readers of Internet news portals, as according to the assessment of the courts, the role played by service providers in publications was beyond mere conduit, and the defendants did not satisfy the criteria for a passive service providers.[222] It is worth mentioning, for the purposes of this thesis, that though service providers have been held liable for defamation by the national courts, and defamatory comments have been deleted, the victims have not received any compensation for damage.

[218] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1–16.
[219] Ibid.
[220] Information Society Services Act. RT I, 12.07.2014, 48.
[221] Ibid.
[222] RKTKo 3-2-1-43-09; TlnRnKo 2-08-76058; TlnRnKo 2-10-46710.

As regards the second question concerning the sufficiency of the protection, the author assumes that legal remedies provided by the LOA: - do not actually provide sufficient protection for the right to honor and good name in the Internet;- do not provide possibility of adequate redress for the victim of online defamation; - do not contribute to elimination of online defamation. Firstly, as it has been mentioned above, monetary compensations are not deemed to be relevant in defamation cases, and even if imposed, the amount of damages is usually lower than that claimed by the plaintiff. For example, in case *Delfi v. Leedo* the defendant, which was a service provider, was claimed by the plaintiff to pay approximately EUR 32000 in compensation for non-pecuniary damage. However, according to the court's decision the plaintiff was awarded only EUR 320 in compensation. It shall be taken into account that, given the nature of cyber space, the harm done to the victim by infringement of the reputation in the Internet can be even more severe than that caused in case if the person has been defamed by traditional means of media. In court practice of different countries there have been cases where the proceedings were brought against a tortfeasor whose fault was proved and who was held liable for publication of defamatory material, but he remained „judgement-proof" for the sole reason that he did not have enough assets to satisfy court decision and to cover damages to the plaintiff.[223]

What is more, the information published in the Internet cannot be effectively refuted or completely deleted from the network given its interactiveness and global nature, and if defamatory content is provocative enough, it can remain in different internet sources for years without possibility to remove it. Termination of infringement and refraining from future infringements cannot be used in practice in such cases. Moreover, sometimes it can be impossible for the plaintiff to identify who has first published the material and against whom he/she has to bring proceedings. By the time when the plaintiff sees the content it can be copied and republished by different people who can live in different countries of the world. Even if the plaintiff decides to bring proceedings against the service provider, it does not guarantee that defamatory publications will be removed from the Internet, as they can be republished by different internet users and posted on other internet sites. In such cases the plaintiff would have to bring proceedings against all service providers who have an ability to remove the material, but some of them can be immune from liability.

Furthemore, removing infringing material from the Internet contributes to termination of infringement, but does not provide sufficient redress for the victim. All mentioned above in this

[223] Brenner S. W. Should online defamation be criminalized?Mississippi Law Journal, Vol. 76, 2007, p.20.

section shall be considered taking into account the fact that the reputation of the victim has already been infringed, and sometimes even significantly infringed. The latter can occur for example in cases when the infringer intentionally disseminates online knowingly false defamatory material with the aim to damage victim's reputation because of revenge or envy, and the aim of these actions is being achieved. It seems that in such cases, where perpetrator's form of fault, the motive and the actual reputational, emotional, professional or economic harm done to the victim, (in case of legal person) and even probably the harm caused to the health of the victim, can justify imposition of criminal liability.

Taking into account all above-mentioned, the author assumes that online defamation can be a subject of criminalization, given: - the nature and the scope of harm done to the victim;- the insufficiency of existing civil legal remedies for adequate redress to the victims;- and the existing need for elimination of online defamation for the purpose of stronger protection of the right to the honor and good name in cyberspace.

Speaking of a general idea to hold (in certain circumstances) service providers liable for user-generated content, the author finds that imposition of liability on service providers contributes to reduction of the so-called „problematic speech" in the Internet. However, it turns out that, firstly, in this case actual infringers, who are the authors of infringing publications and the initiators of publishing, can merely escape from responsibility for their actions. Secondly, it still seems to be disputable whether it is reasonable to hold service providers liable for unlawful acts they have not committed, especially in cases if they have not even been aware about such acts. However, in its recent judgment from 2015 the Grand Chamber of the European Court of Human Rights in case *Delfi AS v. Estonia*, basically accepting the arguments of Estonian courts and creating general principles for resolving future cases emerging in the same field, has found that Delfi (service provider) was liable for infringing comments posted by its readers. Some aspects concerning service provider's liability for user-generated defamatory content highlighted in the *Delfi* case are regarded below.

2.2.1 Delfi AS v. Estonia

In case *Delfi AS v. Estonia* the applicant company, a public limited liability company registered in Estonia, alleging that its freedom of expression had been violated in breach of Article 10 of ECHR by the fact that Delfi had been held liable for publications of third-party comments on its Internet news portal, brought a case before the European Court of Human Rights (the Court) against the Republic of Estonia.[224] In 2013 the First Section of the Court delivered its judgment holding that there had been no violation of Article 10 of the Convention. In 2014 the applicant company requested the case to be referred to the Grand Chamber. In 2015 the Grand Chamber delivered its judgment holding that there had been no violation of Article 10 of ECHR and reaffirming the considerations of Tallinn Court of Appeal and the Supreme Court of Estonia that applicant company had been liable for the publications of its readers' comments which impaired claimant's (Mr. Leedo, the plaintiff in proceedings against Delfi AS in Estonia) honor, dignity and reputation.

In the case in question, in year 2006 the applicant company, which is the biggest Internet news portal in Estonia, published an article about the destruction of planned winter ice roads (public roads over the frozen sea between the Estonian mainland and some islands) by Saaremaa Shipping Company (SLK), which provides a public ferry transport service between the mainland and certain islands. In two days the article gained 185 comments, 20 of which had content derogatory personally to Mr. Leedo (a member of the supervisory board of SLK), contained threats, insults and obscene expressions and vulgarities, incited illegal activities, hostility and violence. Delfi deleted the comments after Mr. Leedo's letter of 9 March 2006. For six weeks the comments were available on the news portal. On 13 Aprill Mr. Leedo brought civil proceedings against Delfi in Harju Country Court. The Court first found that Delfi was excluded from liability in accordance with the provisions of the Information Society Act, because Delfi could not be considered as a publisher of the comments, as its role in publications was of a mechanical and passive nature. However, later, after re-examining the case, the Country Court, in accordance with the Court of Appeal instructions, relied on the Obligations Act andconcluded that the measures taken by Delfi for removing inappropriate comments were insufficient for adequate protection for the personality rights of others, and Delfi itself had to be considered the publisher of the comments and could not avoid responsibility for the content of the comments. In

[224]ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*

2008 Tallinn Court of Appeal upheld the decision of the Country Court and stated that Delfi was not a technical intermediary in respect of the comments and its activity was beyond merely technical, automatic and passive nature, because it invited users to add comments and had to be regarded as a provider of content services rather than of technical services. In 2009 the Supreme Court of Estonia upheld the Court of Appeal's judgment partly modifying its reasoning.

The Civil Chamber of the Supreme Court of Estonia has agreed with the conclusion of the Court of Appeal according to which Delfi should not be excluded from liability under Article 10 of the Information Society Act.[225] The Chamber has also stated that Delfi's activity does not consist of mere provision of intermediary services and Delfi has an economic interest in the posting of comments, because the number of visits to the portal depends on the number of comments, and the revenue earned from advertisements published on the portal depends on the number of visits.[226] Delfi has integrated comment environment in its news portal, created the rules for this environment. Delfi had control over the comments, as it could change or delete them, and the users of the service in contrast could neither change nor delete the comments they have posted. Thus, Delfi could determine which content be published andwhich not.[227] As for the question whether Delfi shall be regarded as a publisher, the Chamber has explained that under the meaning of Article 1047 of the LOA the discloser or publisher can be a media company as well as the person who transmitted the information to media publication.[228] The Chamber has stated that publishing of news and comments on an Internet portal shall be classified as journalistic activity. Even though portal operator shall not edit the comments before publishing in the same manner as media publisher, both a publisher of printed media and Internet portal operator are publishers as entrepreneurs because of their economic interest in the publication of comments.[229] The Chamber has stated that Delfi should have been aware about the unlawful content of the comments and should have prevented the publication of comments, but failed to remove the comments after they had been disclosed by the readers. Therefore, it was concluded that Delfi's inactivity was unlawful and the defendant was liable for the damage caused to the plaintiff (Mr. Leedo) as Delfi has not proved the absence of culpability in accordance with Article 1050(1) of the LOA.[230]

[225] RKTKo 3-2-1-43-09, p.13.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.
[230]RKTKo 3-2-1-43-09, p.16.

In its submission to the Grand Chamber of the ECtHR (the Grand Chamber) Delfi argued that it should be regarded as an intermediary, and not as a publisher of the comments in question. The applicant company has stated that it should have been entitled „to follow the specific and foreseeable law limiting the obligation to monitor third-party comments".[231] As it derived from courts decisions, Delfi had been demanded to determine the unlawfulness of the comments and to prevent their publication on its own initiative. Delfi argued that intermediaries are "not best suited to decide upon the legality of user-generated content" and obliging service providers to monitor user-generated content and prevent publishing would amount to the establishment of an obligation to censor private individuals. Delfi has stated that there is neither law nor relevant case-law imposing obligation on the company to actively monitor users' comments. What is more, Delfi argued that it had to benefit from a limitation liability according to recital 46 of the Directive 2000/31/EC,[232]because it had acted expeditiously to remove comments after it had been notified by Mr. Leedo about inappropriate content of the comments (comments had been removed on the same day). According to Delfi the measures which were applied by the company were sufficient for the protection of the rights of third parties: notice-and-take-down system was in place; there was a system of automatic deletion of comments; the victim of inappropriate comments could directly notify Delfi, and after that the comments were removed immediately. Delfi argued that implementation of additional measures would mean that service provider exercises private censorship over the material posted by users. The applicant company objected private censorship and argued that actual authors of the comments should bear responsibility for their contents. Otherwise, it turns out that ordinary readers are provided with an opportunity to freely disseminate the content without bearing any responsibility for their actions. Delfi has also stated that difficulties in respect for establishing real identities of the authors should not be regarded as a reason for not holding the original authors liable. This point of view has also been shared by the third-party intervener – the Helsinki Foundation for Human Rights, which has stated that „intermediary service providers should not be subject to the same liability regime as traditional media" and "the authors should be accountable for their defamatory comments and the State should provide a regulatory framework making it possible to identify and prosecute

[231] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.34

[232] Directive 2000/31/EC, Article 2(b), OJ L 178, 17.7.2000, Rec. 46. It is stated in the recital that „in order to benefit from a limitation liability, the provider of an information society service, containing of the storage of information, upon obtaining actual knowledge of awareness of illegal activities, has to act expeditiously to remove or to disable access to the information concerned."

online offenders."[233] The applicant company argued that its right to freedom of expression had been infringed by imposition on the company of liability for user-generated content.

According to the Government making remarks in respect of the scope of the case, the interference with the applicant company's right to freedom of expression was prescribed by the law. The Government has stressed that domestic courts had paid sufficient attention on the role of Delfi as service provider and had correctly found that Delfi could not be classified either as a cache or as a host, because the role played by Delfi was an active one: - Delfi chose the articles and their titles published by it; - Delfi invited users to comment; - Delfi created rules on commenting and selectively monitored and deleted inappropriate comments; - Delfi profited from advertising revenue the more comments were posted.[234] The Government pointed out that the publication of the comments on the articles had been part of the applicant company's professional activity as a discloser of information. Furthermore, the Government emphasized that the measures taken after days or weeks later (as in this case, comments were deleted after six weeks from the publication) to protect person's honor and reputation were not sufficient because given the speed of the spread of information in the Internet, offensive comments had already reached the public and damaged person's rights.[235] The Government argued that imposition of liability on actual authors of the comments was not a reasonable alternative in this case, basing its arguments on the problems arising from revealing identities of the authors.[236] The Government has noticed that non-pecuniary damage Delfi had been obliged to pay (EUR 320) was negligible and that in general the courts had held that finding a violation or deleting a comment could be a sufficient remedy in cases like the present one.[237] Therefore, the Government concluded that there had been no "chilling effect" on the freedom of expression of service providers and the interference with applicant company's rights under Article 10 of the ECHR was justified and appropriate.

The Grand Chamber of the ECtHR (the Court) has noticed that the case in question concerned "duties and responsibilities" of Internet news portal under Article 10 § 2 of the Convention. The Court had to determine whether the interference by the domestic courts of the applicant company's rights provided by Article 10 had been justified. The Court has reiterated that it is not its task to interpret and apply domestic law, but the Court has to examine whether the application

[233] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.41.
[234] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.38.
[235] Ibid., p.39.
[236] Ibid., p.40.
[237] Ibid.

by the Supreme Court of the domestic rules could be foreseeable for the purposes of Article 10 § 2 of the Convention. Concerning this issue, the Court has concluded that, as a professional publisher, the applicant company should have been aware about applicable legal rules and relevant case-law, as well as it could have sought legal advice.[238] Therefore, Delfi should have assessed the risks related to its activities and possible consequences. In its assessment the Court has actually agreed with all the main arguments of the Government and the Supreme Court of Estonia in respect for the necessity of the interference with Delfi's right to freedom of expression in a democratic society, appropriateness of the measures taken by the domestic courts and justification of interference. The Court also considers that a large news portal's obligation to take effective measures to limit dissemination of inappropriate speech cannot be equated to private censorship as it had been stressed by the applicant company.[239] Moreover, in its assessment the Court has stated that "in cases such as the present one….the rights and interests of others and of a society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties."[240] Basing on its assessment the Court has concluded that the measures taken by the national courts of Estonia did not constitute a disproportionate restriction on the applicant company's right to freedom of expression, and the Court has held by fifteen votes to two that there had been no violation of Article 10 of the Convention.[241]

Speaking of the judgment delivered by the Court, the author finds it relevant to consider some aspects of the Court's assessment, as well as to mention some considerations from judges' dissenting opinion on the decision. Looking at the judgment as a whole, it seems that imposition of liability on Internet service providers who have an actual ability to monitor user-generated content posted on their internet platforms can be regarded as reasonable for some considerations. Firstly, such measure will reduce the appearance of "problematic" speech in the Internet. As the Court has noticed, the ability of a potential victim of „problematic"speech to continuously monitor the Internet is more limited than the ability of Internet news portals to prevent and rapidly remove infringing content.[242] But on the other hand, if the material is immediately removed by service providers monitoring the content, the original infringers will not be accused and held liable for their actions. Thus, harmful content will be removed and, perhaps, no

[238] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.49.
[239]ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*,p.59.
[240] Ibid.
[241] Ibid., pp.60-61.
[242] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.59.

reputational or other personal damage will be caused to the victims, but the author of the present thesis is not sure that such measures will really have sufficient preventive effect on the infringers who are consiously dealing with dissemination of infringing content in the Internet, as they will not bear any responsibility for the consequences of their doings and more likely will continue to defame others online.

Furthermore, the author thinks that is not fair enough to impose on service providers an obligation to „protect" the rights and interests of others by monitoring all user-generated content and removing inappropriate material, thus providing the possibility for actual authors of the material to merely escape from liability. It seems to be especially unfair in cases such as Delfi case, where the content posted by internet-users is in the form of hate speech and direct threats to the physical integrity of individuals. Moreover, the author is on opinion that the courts' arguments for shifting the risk of the defamed person obtaining redress in the proceedings to the service provider, which (arguments) concern impossibility of identification of original infringers and service provider's better financial position, are not relevant. The fact that the actual infringer cannot be identified shall not be regarded as the reason for holding service providers liable for users' actions, but rather as an obstacle in proceedings. Also, better financial position of service providers cannot serve as a basis for their liability, as well as a guarantee for victim's redress or as a mean providing the possibility for original infringers to shift the responsibility for their actions on someone else, who has a real ability to satisfy court's decision. The author does not mean that service providers shall be exempted from any liability, as there are cases where there is a sufficient basis for imposition of such liability, and it is reasonable to hold service providers liable for user-generated content, as for example, in *L'Oreal* case. But the author is on opinion that original infringers shall not be allowed to escape from liability for their own actions committed by their initiative.

In Delfi case Mr Leedo had a choice of bringing a claim against the applicant company or against the authors of the comments. It is logic that Mr Leedo decided to bring a claim against Delfi basing on the same considerations that the company, unlike the authors, is identifiable and it is more likely that it is in better financial position. However, in the beginning of investigation Mr Leedo had claimed EUR 32000 for non-pecuniary damage, but finally he was awarded with only EUR 320. The Supreme Court of Estonia and the ECtHR have added that „the compensation Delfi had been obliged to pay for non-pecuniary damage (EUR 320) was

negligible"[243]and corresponded to the interference with the applicant company's right to freedom of expression. It seems to be questionable whether the amount of compensation to suffered party shall depend on balancing of service provider's rights and the rights of the victim in cases where the harm to the victim has been caused by the actions of third parties (internet-users).

Judges Sajó and Tsorsoria in their dissenting opinion on the Court's decision in case Delfi v. Estonia argued that imposition of obligation to monitor and prevent publications on those who control technological infrastructure will inevitably result in emergence of collateral or private-party censorship.[244] According to the judges the latter will in turn lead to: - deliberate overbreadth; - limited procedural protection; - shifting of the burden of error costs: the entity which has to monitor the content will rather protect its own liability than freedom of expression.[245] The judges underlined that "imposition of liability on intermediaries was a major obstacle to freedom of expression for centuries."[246] What is more, it has been stressed in the opinion that "in genuine democracies all over the world, the regulatory system is based on the concept of actual knowledge" and "a safe harbor is provided by the rule of notice and action."[247] In *Delfi* case the Supreme Court of Estonia has created a standard (endorsed by the ECtHR) according to which active intermediaries must remove the content "without delay" after the publication by a user, without being notified of and without having any knowledge about the illegality of the content being published.[248]

The author of the present thesis rather agrees with the arguments brought by the judges dissatisfied with the Court's decision, and shares the point of view according to which actual infringers and not service providers shall be held liable for the content which: - has been created by the actual infringers; - has been posted by them and on their initiative; - about illegality of which service provider does not have any knowledge. Also, it shall be underlined that unlike service providers, media publishers are always aware about the nature of the content they publish, and therefore service providers shall not bear liability for user-generated content analogously to media entities.

Coming back to the issue of criminal liability for defamatory online publications, it shall be noticed that if civil liability of service providers for user-generated content can be regarded as a

[243] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p.40.
[244] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, Joint dissenting opinion of Judges Sajó and Tsotsoria, para. 2, p.68.
[245]Ibid., p.69.
[246]Ibid.
[247] Ibid., p.70.
[248] Ibid., p.71.

proportionate interference with service providers' right to freedom of expression, imposition of criminal liability is obviously disproportionate and irrelevant. The author of the present thesis is on opinion that the victims of online defamation shall have an alternative to legal protection instruments provided by the civil law. The alternative can be the possibility to bring criminal proceedings against the original infringer of the right to honor and good name. In the next section the author regards some issues in respect for criminalization of online defamation.

3. The possibility of criminalization

3.1 The balance between the right to freedom of expression and the right to reputationin case of criminal defamation

Possibility of criminalization of online defamation causes lots of disputes in regard to balancing of fundamental human rights. In case of traditional media balancing of the right to freedom of expression on the one hand and the right to reputation on the other hand is required. Where the case is about defamatory communications in the Internet, additionally to the right to freedom of expression, the right to privacy of the internet users shall be balanced with the right to honor and good name of others, because the matter is often about unmasking anonymous online speakers.[249] In the present section the author considers whether finding the right balance between the protection of the right to freedom of expression and the right to honor and reputation is possible in case if online defamation is criminalized.

The right to freedom of expression is one of the most essential human rights itself, as well as it serves as a prerequisite of exercising other rights such as the right to freedom of association or assembly, the right to participate in cultural and political life, etc.[250] The right to freedom of expression is not an absolute right and is a subject to certain limitations.

The right to freedom of expression is guaranteed in international and regional human rights instruments and in almost every national constitution. Articles 19 of UDHR sets out that „everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[251] In Article 19 of ICCPR it is specified that the exercise of the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to certain restrictions which are provided by law and are necessary for

[249] Nell, S. Online Defamation: The Problem of Unmasking Anonymous Online Critics. Comparative and International Law Journal of Southern Africa, Vol. 40, Issue 2, 2007, p. 193.
[250] Nyman-Metcalf, K. Freedom of expression. Political and institutional developments. Annual Human rights Report. Human rights in Estonia 2013. Human Rights Centre. Available at: http://humanrights.ee/en/annual-human-rights-report/human-rights-in-estonia-2013/freedom-of-expression/(3.03.2016).
[251] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

respect of the rights and reputations of others and for the protection of national security, public order, or public health or morals.[252]

Article 10 of the ECHR provides the right of everyone to freedom of expression and information, which includes the freedom to hold opinions and the freedom to receive and impart information and ideas.[253]According to paragraph 2 of Article 10 the right to freedom of expression can be subject to certain restrictions or penalties for inter alia the protection of the reputation or rights of others.

In the Constitution of the Republic of Estonia the right to freedom of expression, which includes the right to freedom of speech, the right to information, the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means, is protected by Articles 44-46. The Articles contain provisions according to which the right to freedom of expression can be limited according to the law to protect the rights and freedoms of others including honor and good name of others.

In Estonia the limitations on freedom of expression can come from established by the law civil or criminal liability for certain actions. For example, the Personal Data Protection Act and the Penal Code set out liability for violations of requirements regarding security measures to protect personal data.[254] Article 157(1) of the Penal Code states that illegal disclosure of information, obtained during performance of the professional activities by a person obliged by the law not to disclose such information, is punishable by a fine of up to 300 fine units, and if the act is committed by a legal person – by a fine of up to 32000 euros.[255] A prohibition on speech or other activities which publicly incite to hatred, violence or discrimination is also the limitation on the freedom of expression. Liability for such activities is established in Article 151 of the Penal Code which sets out the punishment for incitement of hatred which can be either a fine of up to three hundred fine units or detention, or pecuniary punishment or imprisonment, depending on certain circumstances provided in the Article. The provisions establishing civil liability for the infringements of the right to honor and good name shall also be regarded as a limitation on freedom of expression, as these provisions deter individuals from unjustified disseminating of

[252] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[253] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. 4 November 1950.
[254]Personal Data Protection Act.RT I, 06.01.2016, 10, Art. 42; Penal Code. RT I, 17.12.2015, 9, Art. 157.
[255] Penal Code. RT I, 17.12.2015, 9.

discrediting information about a person for the purpose of preventing violations of that person's right to reputation.

Article 11 of the Constitution provides that limitations on the rights and freedoms must be in accordance with the Constitution, must be necessary in a democratic society and may not distort the nature of the rights and freedoms being circumscribed.[256]According to Ülle Madise the claim that the provisions governing liability for defamation in Estonia constitute excessive limitations and prove detrimental to the nature of journalism would not be a feasible one, because of the fact that in many other states defamation is punishable pursuant to criminal procedure in addition to being awarded damages by way of civil proceedings.[257]

As about criminalizing of online defamation, the trouble here is, that more severe sanctions for defamation can be regarded as an excessive limitations on the right to freedom of expression. This assumption is reiterated by legal scholars and different EU and international institutions. In its Resolution 1577(2007) the Parliamentary Assembly of the Council of Europe urges member states to apply anti-defamation laws with the "utmost restraint", because they can seriously infringe freedom of expression.[258] It is also stated that "in a number of member states prosecution for defamation is misused".[259] According to paragraph 10 of the Resolution "the Assembly welcomes the efforts of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe in favor of decriminalizing defamation".[260] In the Resolution on Criminal Defamation and Insult Laws it is mentioned that "there is growing international consensus that criminal defamation infringes fundamental rights to freedom of expression".[261] In its Joint Declaration the UN, OSCE and OAS special mandates have called for the abolition of criminal defamation laws finding that "criminal defamation is not a justifiable restriction on freedom of expression" and criminal defamation laws shall to be replaced with appropriate civil laws.[262]

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[256] The Constitution of the Republic of Estonia, RT I, 15.05.2015, 2.
[257] Madise, Ü. Freedom of expression. Human rights in Estonia 2010. Annual Human Rights Report. Human Rights Centre. Available at: http://humanrights.ee/en/annual-human-rights-report/human-rights-in-estonia-2010-2/freedom-of-expression/(7.03.2016).
[258] Council of Europe Parliamentary Assembly (2007b), Resolution 1577(2007). Towards Decriminalization of Defamation, adopted 4 October 2007, para. 6.
[259] Ibid., para. 8.
[260] Ibid., para. 10.
[261] Assembly of Delegates of PEN International. Resolution on Criminal Defamation and Insult Laws. Meeting at its 80th World Congress in Bishkek, Kyrgyzstan 29th September to 2nd October 2014.
[262] Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression from 10 December 2002. International Mechanisms for Promoting Freedom of Expression. London.

Criminal defamation laws are more widely known for their inhibitive effect on freedom of expression than for the protection of reputation.[263] It has been stated by different legal scholars that criminal defamation laws have frequently been abused by governments and public figures to suppress criticism. However, most countries follow the principle mentioned above according to which public figures have to tolerate more criticism than ordinary person. The U.S. civil law establishes an additional requirement for bringing a defamation claim for public figures which requires a public figure to show that the statement was posted with actual malice, with knowledge of its falsity or reckless disregard for the truth.[264]

It is extremely important to avoid disproportionate limitations on the right to freedom of expression, as it is stated that when "freedom of expression comes under attack, it is often an early warning that all human rights are at risk and of a deteriorating security situation."[265] However, the author of the present thesis is on opinion that criminal defamation shall not be regarded as a strict restriction on freedom of expression. Firstly, the fact that anti-defamation criminal laws are misused in some countries does not mean that prosecution for defamation itself is not an appropriate mean for the protection of the right to honor and good name. Secondly, looking at the documents which call governments for abolition of criminal defamation laws, it can be noticed that in general they are directed at the protection of the freedom of press or freedom of media or the protection of journalistic activities concerning publications which are, as a rule, of a general public concern. For example, in the Resolution on Criminal Defamation and Insult Laws, the examples illustrating the use of criminal defamation laws to stifle free speech are all about sentencing of journalists whose publications were mostly of a public interest.[266] In the Resolution 1577(2007), the emphasis is placed on freedom of expression in the media and freedom of expression of journalists. The Parliamentary Assembly draws attention to Recommendation 1589(2003) on freedom of expression in the media in Europe, Resolution 1535(2007) on threats to the lives and freedom of expression of journalists, Resolution 1003(1993) on the ethics of journalism.[267]As it has been already stated in the present thesis

[263] Yan, M. N. Criminal defamation in the new media environment – the case of the people's Republic of China. International Journal of Communications Law and Policy. Vol.1, Issue 14, 2011, p. 3.
[264] Marwick A., Miller, R. Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape. Fordham Law School. Center on Law and Information Policy, 6 October 2014, p. 20.
[265] United Nations Human Rights Office of the High Commissioner. Joint Declaration on Universality and the Right to Freedom of Expression from 6 May 2014. International Mechanisms for Promoting Freedom of Expression, preamble.
[266] Assembly of Delegates of PEN International. Resolution on Criminal Defamation and Insult Laws. Meeting at its 80th World Congress in Bishkek, Kyrgyzstan 29th September to 2nd October 2014, pp.1-2.
[267] Council of Europe Parliamentary Assembly (2007b), Resolution 1577(2007). Towards Decriminalization of Defamation, adopted 4 October 2007, paras. 1,3.

publications by journalists shall enjoy special protection, as these publications are mostly of a public concern. Parliamentary Assembly calls on journalists' professional organizations to draw up codes of journalistic ethics.[268] In Estonia has been already done.

The author of the present thesis does not regard liability of media organizations for online defamation, because it is less likely that professional journalists would engage in the activities involving online defamation which is the subject of the research of this thesis. For instance, the author does not think that journalists will defame a person in such a way and for the same reasons as it was done in case *Kiesau v. Bantz* or in case illustrated by Susan Brenner, where the minister of a conservative Baptist church was defamed by online dissemination of morphed photos because of revenge.[269] However, the author does not exclude the probability of emergence of situations, where the journalists can misuse their right to freedom of expression and maliciously publish false material which may cause a serious emotional, professional and/or economic harm to the person. The author does not think that in such cases criminal liability of journalists shall be unconditionally excluded because of assumed possibility of misuse of criminal defamation laws or the principle of promoting freedom of expression. Nevertheless, the author totally agrees with the statement of Parliamentary Assembly and other institutions according to which imprisonment, detention, excessive fines or pecuniary punishments are never appropriate sanctions for breach of defamation laws.[270] Similarly, criminal liability of ISPs for user-generated content cannot be regarded as an appropriate restriction of the right to freedom of expression of ISPs.

In its Principles on Freedom of Expression and Protection of Reputation Article 19 has stated that the offence of criminal defamation shall not be made out unless it has been proven that infringing statements: 1) are false; 2) were made with actual knowledge of falsity, or recklessness as to whether they were false; 3) were made with a specific intention to cause harm.[271] It derives from the principle that criminal sanctions can be imposed only for communication of false statements of facts, as proof of truth of value judgment or opinion is not possible. According to paragraph 9 of the UN Human Rights Committee's General Comment to

[268] Council of Europe Parliamentary Assembly (2007b), Resolution 1577(2007). Towards Decriminalization of Defamation, adopted 4 October 2007, para. 18.
[269] See pp. 19-20 of the present thesis.
[270] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation. International Standard Series. 33 Islington High St., London, 2000, p.7, Principle 4(b)(iv); Council of Europe Parliamentary Assembly (2007b), Resolution 1577(2007). Towards Decriminalization of Defamation, adopted 4 October 2007, para. 17.1.
[271] Article 19. Global Campaign for Free Expression. Defining Defamation. Principles on Freedom of Expression and Protection of Reputation. International Standard Series. 33 Islington High St., London, 2000, p.7, Principle 4(b).

Article 19 of the ICCPR freedom of opinion is „a right to which the Covenant permits no exception or restriction“and„it is incompatible with Article 19(1) to criminalize the holding of opinion.”[272]

It shall be noted that value judgment and opinion are not the same thing. The distinction can be made on the basis that opinion is not necessarily based on facts and just reflects person's beliefs, views and thoughts. Value judgment is about assessment which forms basing on the facts. Value judgment reflects personal assessment of something. By passing value judgment a person can express his/her attitude to event, situation, person, etc. Therefore, value judgment, unlike opinion, can be a subject to restrictions, but it shall not be the subject to criminal sanctions.

According to David Erdos irrespective of whether the statements are ones of opinion or alleged fact there is a consensus that the right to reputation is in necessary and fundamental tension with the right to freedom of expression.[273] Obviously, reconciliation between these two rights in question is always necessary. However, as it concerns malicious dissemination of factual information, it seems to the author of the present thesis that such communications of knowingly false made up facts about a person is not so much related to the intention to express oneself (as it is in case of passing value judgment), but rather to the intention to harm the reputation of a person.

In the U.S. internet speech is protected under the First Amendment. However, there are certain categories of speech which are not protected. For example, for a statement to fall into the category of defamatory speech, it must be false statement of fact and not a matter of opinion.[274] Specifics of language are important in this field. For example, calling someone a "rapist" is a statement of fact (whether the person has been convicted of rape) because it is verifiable. But calling someone a "fool"is a matter of opinion, that is not defamatory, and is therefore protected speech.[275]

Malicious dissemination of knowingly false information targeted at causing harm never falls under the scope of protection of the right to freedom of expression. American courts have never viewed speech, even if it is anonymous political speech, as absolutely protected by the First

[272] United Nations Human Rights Commitee, 102nd session. General Comment No.34, Article 19: Freedoms of opinion and expression. 12 September 2011, CCPR/C/GC/34.
[273] Erdos, D. Data Protection and the Right to Reputation: Filling the „Gaps“ after the Defamation Act 2013. The Cambridge Law Journal. Vol.73. Issue 03, 2014, pp. 540.
[274] Marwick A., Miller, R. Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape. Fordham Law School. Center on Law and Information Policy, 6 October 2014, p.7.
[275] Ibid.

Amendment.[276] In case *Chaplinsky v. State of New Hampshire* the Court explicitly stated that in many cases defamatory speech, whether anonymous or not, is not protected.[277]Similarly, the ECtHR has held that "speech that is incompatible with the values proclaimed and guaranteed by the ECHR is not protected by Article 10 by virtue of Article 17 of the ECHR."[278] In the Internet it is often forgotten that unrestricted free speech in cyberspace shall exist to the extent that it does not infringe upon the rights of others.[279]The aphorism, which is often ascribed to U.S. Supreme Court Justice Oliver Wendell Holmes, and which can sum up the philosophy of John Stuart Mill on Liberty, illustrates best the actual scope of freedom stating that „the right to swing the fist ends where the other man's nose begins."[280] In other words, it means that the freedom of one person ends where the freedom of another person begins. This principle reflects the main idea of the entire law of human society.

Based on above mentioned considerations the author of the present thesis assumes that online defamatory communications and publications of false statements of facts may be subject to criminal liability. Imposition of criminal sanctions for online defamation shall not be regarded as a strict restriction on freedom of expression in case if criminalized is only an act of malicious dissemination of knowingly false factual information which is committed for the sole purpose of causing harm to the person being defamed in result of the publication.The rationale of this opinion is based on the fact that firstly, dissemination of defamatory material which infringes the rights of others is not protected by Article 45 of the Constitution of the Republic of Estonia, neither by Article 10 of the ECHR. Moreover, it seems to the author that lying about a person with the aim to harm the reputation of this person does not refer to the exercising of the right to freedom of expression in its original meaning. Secondly, new risks in respect of the nature and the extent of harm to the victims of online defamation posed by advance of Internet technology make criminalization of certain types of online defamation sensible. Criminal sanctions can be more appropriate and effective means for the protection of the right to honor and good name and elimination of unjustified dissemination of defamatory content in the Internet, especially in cases where civil legal tools for some reasons cannot provide sufficient protection and redress for the victims.

[276] Martin J. A. Return to the Marketplace: Balancing Anonymous Online Speech and Defamation. University of Baltimore Journal of Media Law and Ethics, Vol. 1, Issue 3-4, 2009, p. 250.
[277]*Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572(1942).
[278] ECtHR 16.06.2015, 64569/09, *Delfi AS v. Estonia*, p. 51.
[279] Crombie, K. F. Scots Law Defamation on the Internet. A consideration of new issues, problems and solutions for Scots Law. Scottish Law online. Scots Law Student Journal. Issue 1, 2000, p.7.
[280] Lee, D. E., Lee, E. J. Human Rights and the Ethics of Globalization. Cambridge University Press, 2010, p. 26.

3.2 Criminal remedies vs civil remedies from the perspective of appropriate protection of the right to reputation and redress for the victim

The main difference between criminal and civil law is in legal remedies provided. While civil remedies are aimed at restoration of the situation that existed prior to the violation and compensation for damages, criminal law is more concentrated on prosecution and punishment of a perpetrator and prevention of recurrence of illegal acts. Civil and criminal actions opposed to each other have both advantages and disadvantages mentioned in legal literature by different scholars. For example, according to Alice Marwick and Ross Miller, civil action in contrast to criminal action can be brought at any time within the statute of limitations.[281] In case of criminal action it can take several years before the perpetrator is prosecuted.[282]

Some would argue that defamation does not fall into the category of socially dangerous acts which need state intervention for its investigation, and that such intervention is not feasible and economically expedient.[283] Furthermore, it can be stated that civil remedies contribute more to reparation, as they provide the possibility to claim refutation of defaming information and compensation for damages, while criminal law provides only prosecution of infringer.[284] Therefore, civil legal remedies are regarded as more appropriate in defamation cases.

The question of social danger of online defamation has been mentioned above in the present thesis. Even if the harm done by online defamation is not so grave as, for example, in case of murder or robbery, there is nevertheless a higher likelihood that reputational harm will be inflicted in cyberspace by those who disregard others' personality rights.[285] This likelihood can be compared with that existing in cases of petty thefts or threats. Moreover, as it has been described in the present thesis, the scope of harm done by online defamation can be great given the specifics of cyberspace. The victim of online defamation can suffer not only economic loss and emotional abuse, but also mental health problems. According to Brenner until last century criminal law was only concerned with physical harm, but over last decades scholars and

[281] Marwick A., Miller, R. Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape. Fordham Law School. Center on Law and Information Policy, 6 October 2014, p. 18.
[282] Ibid.
[283] Luide, S. Au tsiviilõiguslik kaitse ja selle erisused au teotamisel interneti kaudu. Magistritöö. Tartu Ülikooli õigusteaduskond, Tsiviilõiguse õppetool, 2003, lk. 18-19.
[284] Ibid., lk. 21.
[285]The present thesis, p. 31.

legislators have accepted that psychic„harms“ unaccompained by physical injury can warrant imposition of criminal liability.[286]

The issue of appropriateness of civil remedies provided by Estonian civil law has been regarded in the second section of the present thesis. In case of online defamation it can be almost impossible to terminate the infringement in practice, because once the content enters cyber space, it becomes available to millions of people within a short time. Defamatory information can be republished by uncertain number of internet users in different jurisdictions and there can be no possibility to completely remove the content. Imposition of obligation to refrain from similar activities in future does not seem to be an effective remedy in case of infringement of the right to honor and good name in the Internet. The possibility to stay anonymous online and other opportunities provided by online communications contribute to repetition of infringements. There is actually no guarantee that the infringer will satisfy the obligation to refrain from defaming the person in future. Also, it has been stated that monetary compensations are rare and deemed as not appropriate in defamation cases, and even if imposed, the sums are relatively small. Apology is not a remedy in defamation cases as well. As for the possibility to claim to refute or correct information in case of disclosure incorrect incomplete or misleading information, the author thinks that it is an effective remedy in case of publications by MSM. But as concerns the Internet, it shall be taken into account that even if the statement will be refuted or corrected by the discloser, there is no so-called „common platform“in cyberspace which could allow informing about the corrections every internet user who has read or seen the content published first. Secondly, when the content has been already posted in the Internet and reputational damage has occured, it is difficult to return to the situation prior to the infringement even if the information is refuted or corrected later. Before the corrections will be made, most of those to whom the content has been made available will already adopt the information delivered to them. According to information psychology the material posted first is normally that, what people believe more.[287] Taking into account above considerations the author assumes that legal protection for the right to honor and good name provided by Estonian civil law is not sufficient for online environment.

One way of providing stronger civil legal protection for the right to honor and reputation in cyberspace, as practiced by Canadian judges, is to increase fines. In case *Bahlieda v.*

[286] Brenner, S. W. Should online defamation be criminalized? Mississippi Law Journal, Vol. 76, 2007, p. 43.
[287] Leppik M., Vutt M. Õigus aule kui igaühe õigus. Kui palju au on autul? Mõned ebatraditsioonilised remargid au ja väärikuse aspektidest ja subjektidest. Kohtute aastaraamat 2012, lk.96.

*Santa*Justice Blair representing the majority of the Court of Appeal has acknowledged that online defamation has to be treated differently from defamation in other media sources given the quantum of damages.[288] Taking into account the nature of the Internet and its capacity to cause tremendous damage to corporation's and individual's reputation the judge increased the award to the plaintiff from $15000 for general and compensatory damages to $75000 for general and compensatory damages plus a further $50000 for punitive damages.

However, increasing fines for the infringements in question does not seem to be the best solution for the victims of online defamation. Firstly, monetary compensations do not correspond much to the aim of defamation laws.[289] In some cases it can be reasonable to impose big fines on the infringers (i.e. in cases of defamation of a legal person), as it can be appropriate for achieving the aims pursued by imposition of these fines (company will get monetary compensation corresponding to losses caused by defamation), but in other cases increasing of fines will be senseless. For instance, if the defendant does not have enough assets to compensate damages, there will be no redress for the injured party.

The author is on opinion that criminalization of online defamation is one solution the law can offer for providing sufficient protection of the right to honor and good name in cyberspace. For elimination of the infringements stronger preventive effect is needed. Imposition of criminal liability for dissemination of defamatory content in the Internet can have such an effect. It is more likely that in face of fear of criminal sanctions internet users will better deter from unjustified damaging one's reputation. Furthermore, the possibility of a victim of online defamation to use criminal remedies will contribute to creation of stronger confidence in the society that personality rights are being protected in cyberspace as well.

The victim of online defamation seeks for moral and property restitution. Moral restitution assumes, firstly, that the action committed by the infringer of the victim's rights is condemned by the state and the society. The condemnation provides confidence for the victim that the infringement of his/her rights has been illegal and reprehensible.[290]Secondly, the victim can reasonably wish the prosecution of the perpetrator to follow the infringement of the rights.It shall be noticed that in case of criminal online defamation criminal conviction and punishment of the perpetrator itself is not necessarily the only form of reparation available for the person suffered from defamation. The victim can claim compensation for damage using his/her right to file a

[288]*Bahlieda v. Santa*, [2003] O.J. No. 4091, para.44.
[289]The present thesis, p. 49.
[290] Kärner, M. Kannatanu huvide realiseerimine kriminaalmenetluses. Juridica VII, 2015, lk. 508.

civil action against the accused and/or civil defendant according to clause 2 of subsection 1 of section 38 of Estonian Code of Criminal Procedure.[291]What is more, the author thinks that it could be possible to regard victim's possibility to file claims other than compensation for damage in case of online defamation, as the Code of Criminal Procedure does not specify what the victim can claim in a civil action and on what basis.[292] Also, the interpretation according to which it is only possible to claim compensation for damage caused by a criminal offence in a civil action filed in a criminal proceeding has been rejected by the Supreme Court.[293]The author assumes that it could be reasonable to regard the possibility of the victim to claim a removal and correction of published defamatory informationin a civil action filed in criminal proceeding. Thus, in case of bringing criminal proceedings the victim will not be left without opportunity to claim defamatory content to be removed, refuted or corrected, what is needed for the termination of infringement, if the latter is possible and effective in online environment in a certain case.

Imposition of criminal sanctions on those infringing one's right to honor and good name in the Internet will also contribute to raising awareness of the fact that online anonymity is not absolute and is granted only until illegal actions have been committed. The author regards the issues concerning identification of anonymous posters of defamatory material in more detail in the next section. Online anonymity does not provide possibility of escaping from liability for the harm done to others in the Internet. The situations where the victims of online defamation do not address the court in case of online infringements because of high costs for lawyers, court fees, the time which has to be spent on the proceedings, ambiguity of the outcome of court proceedings, are not rare.[294] Without addressing the court the victim does not have possibility to legally reveal the real identity of the infringer if the latter was hiding behind a mask of anonymity. It means that in such cases the victim is left even without possibility to respond to the perpetrator or ask him/her to delete posted material, as the perpetrator is not identifiable and can merely "disappear"in cyberspace just after defamatory material is published.

In case if online defamation is a criminal charge such situations would probably be rarer. Firstly, it is more likely that the victims of online defamation will be more active in fighting for their right to online reputation, as in case of criminal defamation they would not spend money and time for beginning court proceedings, but would address police authorities which would start

[291] KrMS, RT I, 06.01.2016, 19.
[292] Sarv, J. Claims of Action in Criminal Proceedings. Juridica V, 2011, p. 365.
[293] Ibid.
[294] Marwick A., Miller, R. Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape. Fordham Law School. Center on Law and Information Policy, 6 October 2014, p. 19.

investigation. This procedure is easier for complainants comparing to addressing the court. Secondly, it would be the task of the police authorities to determine whether the publication of allegedly defamatory material shall be qualified as criminal defamation. Thus, there would be less ambiguity in respect for the outcome of the case already before the court proceedings. The court's workload would be reduced, as the court itself should not determine whether the publication was defamatory, as the court normally doesin civil proceedings, because in case of criminal defamation the evidence has to be presented and the perpetrator's guilt has to be proved by the police authorities and the prosecutor's office.

Also, there would be no need to impose an obligation to control online speech and assess whether it is defamatory on ISPs, as this task would be performed by specially trained professionals from the police office. It has been repeatedly mentioned in the legal literature that the obligations to assess the legality of speech and to protect individuals' rights in the Internet should not be imposed on ISPs, as ISP areconcentrated on providing services to the customers, and not on controlling online content. Moreover, these also would be the tasks of the police authorities to decide whether to unmask and to unmask online anonymity in case if it is determined that online defamation has taken place.

There are lots of disputes arising in the field of revealing real identity of anonymous internet users. The complexity of the issue of unmasking online anonymity from the legal viewpoint is caused by the need for balancing of the rights to privacy and freedom of expression of anonymous users on the one hand, and the right to honor and reputation of an individual or legal person, on the other. Perhaps, in case of criminal online defamation, if the task of revealing infringer's identity is performed by specially trained staff, the uncertainties concerning balancing of the rights in question will reduce. It will be determined by the police authorities from the beginning whether the crime has taken place, and, depending on it, it will be decided whether the real identity of the infringer has to be revealed. In such a case less time will be spent on identifying infringers, as there will be no need to obtain the court order.

The author assumes that criminalizing of online defamation will provide better redress for the victims and stronger protection of the right to honor and good name in cyberspace. The possibility to address police authorities instead of court is more preferable for the victims of online defamation, will motivate them to struggle for their rights instead of ignoring violations and dealing with „self-defence", because the procedure will not burden injured persons with expenditure of time and expense. Also, the use of criminal remedies will contribute to the

emergence of confidence that personality rights of the citizens are protected in cyberspace as well as in real life, and that the perpetrators are bearing responsibility for their illegal activities.

3.3 Unmasking online infringers

The Internet provides the possibility to post whatever information freely and without frontiers. Enjoying online anonymity in the Internet, communicators can choose how much information about themselves they disclose. Simply speaking, anonymity can be defined as the absense of identity, the ultimate in privacy.[295] The actors on the Internet can remain anonymous or shelter under a screen name (pseudonym). The pseudonym is used for concealing the real identity of a person from other internet users. On the one hand, the possibility to stay anonymous on the Internet has a great social benefit of encouraging uninhibited speech, as hiding under a cloack of anonymity, internet communicators feel free to express their views and opinions without fear of harming their own reputations.[296]On the other hand, online anonymity affords to internet users the possibility to publish, not seldom with a feeling of impunity, illegal content even to global audience. Online anonymity is problematic in the area of online defamation. Anonymity can undermine accountability, because very often anonymous internet users face no consequences for publication of unacceptable in the society or even illegal statements and dissemination of information which can infringe one's rights.[297]

In case of publication of defamatory content by anonymous poster the victim of online defamation faces a problem of identifying the infringer, as in order to institute an action for defamation, the identity of the infringer has to be established.[298] Even if the legal counsel, whom the victim of online defamation addresses, founds that the client's rights have been harmed in a legal sense, nothing can be done before the identity of the anonymous poster have been learned so that a lawsuit may be served.[299] Where defamation takes place in cyberspace and the infringer

[295] Detweiler, L. Identity, Privacy and Anonymity on the Internet, 1993, para.3.1. Available at: http://cyber.eserver.org/identity.txt(13.04.2016).
[296] Nel, S. Online Defamation: The Problem of Unmasking Anonymous Online Critics. Comparative and International Law Journal of Southern Africa, Vol. 40, Issue 2, 2007, p.193.
[297] Ibid., p.198.
[298] Ibid., p.195.
[299] Rosen, R.M., Rosenberg, C.B. Suing Anonymous Defendants for Internet Defamation. Los Angeles Lawyer, October 2001, p.19. Available at: http://rmrlaw.com/suing-anonymous-defendants-for-internet-defamation-los-angeles-lawyer/ (14.04.2016).

is anonymous, it makes it difficult for the injured person to know whom to sue and how to sue the wrongdoer.[300] For example, until recent times in the UK and the U.S. the victims of online defamation instituted actions for defamation against ISPs directly instead of real infringers.[301] However, the adoption of the legislation conferring immunities on internet intermediaries has made this approach less attractive.[302] Suing ISP is not always an option, and some victims of online defamation would have to pursue the posters of defamatory content. If the user is not technically skilled and careful enough, in most cases, he/she will leave a trail of digital footprints. In such cases it is possible to identify the infringer, but it will always require the co-operation of user's ISP.[303]

In the proceedings anonymous or pseudonymous infringer is usually called „John Doe".[304] Identifying of the infringer needs determination of the source of an anonymous defamatory e-mail, web posting or other electronic communication which usually involves bringing a „John Doe" motion or application to compel each link in the internet chain of electronic communication to disclose the next link until the identity of the infringer is revealed.[305] For the purpose of identification of the anonymous poster the suit has to be filled. Also, the plaintiff has to obtain the order from the court authorizing the issuance and service of an identification-seeking subpoena directed to the ISP that the defendant used to post actionable matter.[306] Only after that the ISP should provide the information concerning the anonymous infringer available to it. Most of ISPs are concerned about the customers' privacy. Also, many defendants in online defamation actions claim that revealing their identity constitutes a violation of their constitutionally protected rights to free speech and privacy.[307] Nevertheless, in the face of a court order ISPs are obliged to disclose the information needed for the proceedings. The internet users should also be aware about the fact that absolute anonymity in the Internet does not exist, and the Internet is not a lawless realm, where everything is allowed behind a mask of anonymity.

[300]Nel, S. Online Defamation: The Problem of Unmasking Anonymous Online Critics. Comparative and International Law Journal of Southern Africa, Vol. 40, Issue 2, 2007, p.194.
[301] Ibid., p.195.
[302] Ibid., pp.195-196.
[303]Ibid., p. 194.
[304]Berkley D. Sells. Recent developments in Internet Defamation Law. Journal of International Trade Law and Policy. Vol. 5 No.1, 2006, p.11.
[305] Ibid.
[306] Rosen, R.M., Rosenberg, C.B. Suing Anonymous Defendants for Internet Defamation. Los Angeles Lawyer, October 2001, p.19. Available at: http://rmrlaw.com/suing-anonymous-defendants-for-internet-defamation-los-angeles-lawyer/ (14.04.2016).
[307] Nel, S. Online Defamation: The Problem of Unmasking Anonymous Online Critics. Comparative and International Law Journal of Southern Africa, Vol. 40, Issue 2, 2007, p.194.

However, in some cases the scope of „John Doe"motions can be restricted because of the privacy concerns of internet users. Thus, in case *BMG Canada Inc. et al. V. John Doe et al.* Justice von Finckenstein, acknowledging that privacy cannot trupm the application of civil or criminal liability to a wrongdoer, however, concluded that in that case the public interest did not outweigh the privacy concerns of users.[308] In that case the plaintiffs, the largest music producers in Canada, sought to compel ISPs to disclose the real identities of the customers who had used 29 internet protocol (IP) addresses registered with the ISPs and, as it was alleged by the plaintiffs, had infringed copyright laws by illegally trading in music downloaded from the internet. After quoting the submissions of one ISP which was obliged to disclose IP addresses of alleged infringers, it has been found out by the court that: 1) the required information was not routinely kept by the ISPs, but had to be retrieved from their data banks; 2) the older the information sought, the more difficult it would be to retrive it; 3) it might be impossible to link some IP addresses to account holders; 4) the ISPs could generate some of the account holders but the account holder could be an institution or linked to a local area network of many users.[309]

ISP MediaSentry, with which IP address used by the alleged infringer under pseudonym „Geekboy@KaZaA" was registered, has determined that that IP address at the time of its investigation was assigned to private company Sham Communicationc Inc. The court has found that there was no evidence how the pseudonym in question was linked to the determined IP address, as well as there was no reliable evidence how this IP was traced to Geekboy@KaZaA. Consequently, the court concluded that it was irresponsible for the court to order the disclosure of the identity of the account holder of the IP in question and expose this person to a law suit by the plaintiffs.[310]

In can be extremely difficult for individuals to obtain enough evidence in case of online infringements. Nevertheless, violations committed via the internet can be severe and the harm done can be very significant. In case of online defamation the victim suffering emotional, professional and economic harm would most likely regard the application of liability to the infringer the only adequate mean of protection of that victim's rights. Criminalizing of online defamation would mean that the evidence needed for an investigation is collected by specially trained in a specific area cyber policeman, and not by the victims of online defamation who face

[308] BMG Canada Inc. v. John Doe, [2004] 3 FCR 241, 2004 FC 488 (CanLII), para.39. Available at: http://www.canlii.org/en/ca/fct/doc/2004/2004fc488/2004fc488.html (15.04.2016).
[309] Ibid., para. 42.
[310] Ibid., para. 20.

significant problems with obtaining the information needed, including information concerning the identities of anonymous infringers.

Conclusion

Online defamation is different from its traditional analogue occurring in real life. Therefore, the phenomenon needs separate study and legal regulation adapted for online environment. Defamation injures one's reputation and damages good name. The right to honor and good name is one of fundamental human rights established on domestic, EU and international levels. Unjustified infringements of this right are illegal and can lead to imposition of civil or criminal liability. In Estonia violation of the right to honor and good name is a civil wrong. Defamation does not have legal definition in Estonia, but it can be found in legislation of some EU and other states. The concept of online defamation has not been regarded in detail in Estonian legal literature. Therefore, the study of cyber defamation is mostly based on foreign legal sources.

Online defamation can be defined as internet publication or disclosure in the Internet of the content that harms person's honor and reputation, lowers this person in the estimation of the community and deters third persons from associating or dealing with him or her, thus causing to that person emotional, professional or personal damage. The gist of online defamation is the same as that of real-life defamation – the damage to reputation of a person caused by disclosure of discrediting information. However, Internet technology with its unique features has altered the forms in which infringements of the right to honor and reputation can occur.

Before, publications and disclosure of information to broad audience was only possible by the means of mainstream media (MSM) such as radio, television, newspapers. At that time publication of defamatory material was less probable because of the quality of the material being published and the desire of professional publishers to avoid liability for infringements of one's reputation. The emergence and development of internet technology provides everyone with the possibility to become a „publisher"in cyberspace. Every person who has a computer and an access to the Internet can post whatever content which will reach a large number of people all over the world in the shortest possible time. Possibility of online anonymity contributes to the creation of the sense of impunity among those internet users who disregard others' personality rights and complicates identification of the author of defamatory content. The absense of control and filtering mechanisms provides the possibility of free dissemination of illegal content, including „problematic" speech, via the Internet. Imposition of liability for user-generated content on ISPs and obliging them to exercise certain amount of control over the material being posted by creating special rules for using their services and monitoring the content can be

regarded as an effective measure directed at elimination of incidence of online defamation and reduction of other illegal publications in cyberspace. While this measure is effective for elimination of defamation, it still does not guarantee enough redress for the victims. Also, holding ISPs liable for the material posted by other persons allows the possibility for actual infringers to merely escape from liability for their actions.

It is disproportionate to impose big fines on IPSs which do not originate defamatory material, do not initiate publication of it and sometimes are not even aware about the publication and its illegal content. Moreover, monetary compensations which are often claimed by the victims of defamation are not generally deemed appropriate remedy in defamation cases. The best ISPs can do is to terminate the infringement by deleting the content which harms person's reputation. However, in case of internet publication, the latter does not necessarily mean that the infringement will be terminated. Online publications are even more pervasive and more persistent than publications by MSM. Once defamatory message, picture, video, etc. enters cyberspace, and if the content is provocative enough, it can be easily accessed by millions of people, copied, reposted or saved on personal computers and storage devices by uncertain number of internet users. In such a case the victim of online defamation does not actually have the possibility to completely remove that material from all the sources. Thus, in some cases it can turn out that infringement cannot be terminated in practice.

Difficulties arising in the area of application of existing legal norms to internet wrongs in the area of defamation, as well as to any other area where social relationships can take place in the Internet, represent an inevitable problem in the digital era. Technology normally develops faster than regulating law. Estonian civil defamation law was developed for regulation of real-life defamation. Cyber defamation is a relatively new phenomenon. Therefore, the features of defamation conducted via the Internet have not been taken into account and, consequently, some civil legal remedies provided by the LOA seem to be inappropriate and not effective for the protection of the right to honor and good name in cyberspace.

The protection of the right to honor and good name is established by Article 17 of the Constitution of the Republic of Estonia.The unlawfulness of infringement of the right to honor and good name is set out in Articles 1046(1) and 1047(1)(2)(4) of the LOA. Estonian law distinguishes infringements of the right to honor and good name by passing undue value judgment (Article 1046 of the LOA) and infringements by disclosure of incorrect, incomplete or misleading information (Article 1047 of the LOA). The person whose personality right to honor

and good name has been infringed files the lawsuit against the perpetrator. Legal remedies which can be used by the plaintiff suing the defendant for infringement by passing undue value judgment or disclosure of false information are different. In case of infringement by passing undue value judgment the suffered party can claim: 1) compensation for patrimonial and non-patrimonial damage; 2) termination of infringement; 3) refraining from future infringements. If the plaintiff has suffered harm from disclosure of false factual information concerning him/her, the plaintiff can claim: 1) compensation for patrimonial and non-patrimonial damage; 2) termination of infringement; 3) refraining from future infringements; 4) refutation of information or publishing a correction on defendant's expense. Refutation of information or publishing a correction cannot be claimed in case of value judgment, as value judgment does not contain information or facts which can be true or false. Also, while Article 1046 can be applied only in cases of infringement of the right to honor and good name of a natural person, Article 1047 assumes possibility for using legal remedies by legal persons as well. Legal person does not have personality rights due to its nature. Therefore, Article 1046 is not applicable in case of legal person. However, defamation of a legal person can unjustifiably cause damage to that person which in result of disclosure of defamatory, false information can suffer economic loss. For the purpose of protection of the reputation of a legal person in case of defamation thereof Article 1047 shall be applied by analogy to application of Article 1046 of the LOA.

Theoretically, Estonian civil law provides protection for the right to honor and good name. Relevant provisions set out in the LOA can be applied to cyber defamation. But when it comes to practice some issues concerning effectiveness of civil legal remedies and provision of appropriate redress for the victims of online defamation can arise. Firstly, it seems that in cyber defamation cases the most relevant remedies for the victim are termination of infringement and compensation for damages. Refraining from future infringements is rarely used in defamation cases, as it is difficult for the courts to make decisions in respect for future conduct and malevolence of the defendant. Publishing corrections can in many cases be senseless, as defamatory content has already been made available for internet users and has been adopted by them. The information can be reposted several times by internet users on different bulletin boards, chat rooms, web sites, etc. There is no „common platform" in the Internet which would allow the audience to see and credit corrected statements of fact. In case of value judgment the remedy is not used at all.

Termination of infringement by publications in the Internet means removing of defamatory content. As it has been stated it is not always possible to completely remove the material causing

reputational harm from the Internet or make it inaccessible for third persons. Removing the content will mean termination of infringement in the sense that it will not be available at certain source from which removing is claimed. However, there is no guarantee that it will not appear in any other internet source if posted by other people who have downloaded or copied the content before. Thus, the remedy is not effective in case of internet violations. Compensation for patrimonial and non-patrimonial damage assumes monetary compensations being paid by the defendant to the plaintiff. It is important to note that monetary compensations in defamation cases are deemed inappropriate. Defamation laws pursue more to vindicate the honor of the person defamed than to protect the proprietary interest in one's good reputation. The same approach is adopted by the Supreme Court of Estonia. In Estonia monetary compensations are regarded appropriate if the right has been infringed significantly like in case of defamation in the means of media. However, even in these cases compensations, even if imposed, are much smaller than claimed by the plaintiffs.

In case of infringements of the right to honor and good name in cyberspace the damage caused to reputation of the person can result in serious emotional, professional and economic harm. Existing legal remediesneither allow the person suffered from online defamation to obtain adequate redress, nor guarantee the protection of the reputation from future infringements. Criminalization of online defamation can be regarded as a real possibility to contribute to elimination of online defamation and provide stronger protection for the personality rights. Providing of moral and propriety restitution for the victim will not be excluded as well, because he/she can use the right to claim compensation for damage caused by an offence in a civil action filed in a criminal proceeding.

The fear of criminal liability has stronger preventive effect on those committing internet wrongs. Criminalizing defamation will contribute to reduction of infringements. The victims of online defamation will be more motivated to struggle for their online reputation. In case of criminal defamation persons who feel that their rights have been violated will have possibility to address police authorities instead of filing a lawsuit. This procedure is easier for complainants, as their active participation in investigation will not be needed and they will not have to spend money and time for starting court proceedings. It will be the task of the police authorities to determine whether the actions of alleged infringer shall be qualified as defamation. It will be also the task of the police to reveal the identity of the infringer. The victims often face problems with obtaining information concerning the poster of defamatory content. Obtaining the court order obliging ISP to disclose the information about assumed infringer can take time,what

reduceseffectiveness of the identification. In the presence of a regulatory framework making it possible to identify and prosecute online offenders, the identity of anonymous infringers can be revealed more successfully and faster by the police authorities, what will facilitate the investigative procedures. Also, if defamation is a criminal offence, there will be no infringers which cannot fulfill the judgment made in civil litigation and are therefore „judgment-proof", since they do not have enough assets. In criminal proceedings the infringer would normally not have an opportunity to avoid the punishment. Moreover, there will be no need to hold ISPs liable for user-generated content, as the users will bear responsibility themselves.

As for negative sides of criminalizing defamation, it is assumed that imposition of criminal sanctions for defamation has "chilling effect" on freedom of expression as the experience of some countries has shown. However, criminal liability for infringements of the right to honor and good name does not necessarily mean that humans' right to freedom of opinion and expression will be undermined. If defamation laws are applied correctly, and the right balance between the right to reputation and the right to freedom of expression is found, criminal sanctions will not constitute a threat to free expression. Defamation does not enjoy legal protection, as defamation of a person is unlawful. However, for the purpose of avoidance of possible strict restrictions on freedom of expression, definition of criminal defamation shall be limited. Thus, for example, infringements by value judgments shall not be the reason for imposition of criminal sanctions. Criminal liability for defamation committed negligently and criminal liability for user-generated content seem to constitute strict restrictions on freedom of expression of internet users and ISPs, etc. The act of cyber defamation which can be worth criminalization shall constitute an act of malicious dissemination of knowingly false factual information which is committed for the sole purpose of causing harm to the person being defamed in result of the publication or disclosure of that information. Also, for the purpose of providing appropriate protection of the right to honor and good name in every defamation case, there shall be an alternative of opting criminal or civil proceedings. This approach is followed in some EU member states and can be adopted in Estonia as well, as imposition of criminal liability for cyber defamation is reasonable in the digital age with its instantaneous development of technology.

Kokkuvõte

Käesoleva lõputöö eesmärk on uurida internetis laimu olemust ning au ja hea nime kaitset tagavaid õiguskaitsevahendeid. Internetitehnoloogia kiire areng ja Interneti roll meie igapäevases elus on muutnud laimu levitamise ja au teotamise viise ja vorme. Lõputöös on käsitletud laimu levitamise kriminaliseerimise võimalust Eestis.Laimu levitamine digikeskkonnas põhjustab isikule moraalset, ametialast ja/või majanduslikku kahju.

Laimu levitamist Internetis ei käsitata uue küberkuriteona, vaid laimamisena Interneti kaudu. Laimu levitamine kahjustab isiku õigust aule ja heale nimele ehk õigust reputatsioonile. Õigus aule ja heale nimele on üks peamistest põhi- ja inimõigustest. Eestis on au teotamise õigusvastasus sätestatud Põhiseaduse paragrahvis 17 ja Võlaõigusseaduse paragrahvides 1046 ja 1047. Eestis, erinevalt mitmetest teistest EL liikmesriikidest, on vastutus auja hea nimele reguleeritud tsiviilõigusnormidega ning laimu levitamine ei ole Eestis kuritegu.

VÕS-is sätestatud õiguskaitsevahendid ei taga piisavat kaitset inimese aule ja heale nimele Internetis. Eestis eristatakse au teotamist ebakohase väärtushinnanguga jafaktilist laadi andmete mittetäieliku või eksitava avaldamisega. Isikliku õiguse rikkumise korral võib kannatanu kasutada järgmisi deliktõiguslikke õiguskaitsevahendeid: 1) varalise ja mittevaralise kahju hüvitamise nõue; 2) kahjustava tegevuse lõpetamise nõue; 3) ebaõigete andmete avaldaja kulul ümberlükkamise või paranduse avaldamise nõue; 4) kahjustavast tegevusest tulevikus hoidumise nõue. Kuigi VÕS-s sätestatud õiguskaitsevahendid sobivad isiklike õiguste kaitseks reaalmaailmas, ei ole nende kasutamine eesmärgipärane ja effektiivne sel juhul, kui tegemist on laimu levitamisega virtuaalmaailmas.

Digitaalajastul, millal tehnoloogiad arenevad kiiresti ja pidevalt, muutub laimamine digikeskkonnas aina sagedamaks. Kontrollimata ja filtreerimata materjal võib talletuda küberruumi ning tekitada teotavale isikule olulist kahju. Mõnikord ei ole kannatanul võimalust taastada olukorda, milline oli enne kahju tekkitamist. Teotav sõnum, tekst või video võib olla kopeeritud ja uuesti avaldatud erinevate interneti kasutajate poolt erinevates foorumites, jututubades, veebilehtedes, jne.

Internetis laimu levitamise kriminaliseerimine võimaldab tagada tugevamat õiguskaitset inimese aule ja heale nimele digikeskkonnas ning vähendada laimu ilmumist ja levitamist Internetis.

Samuti pakub kriminaliseerimine kahju kannatanud isikule alternatiivset võimalust pöörduda mitte tsiviilkohtu vaid politsei poole. Selleks, et rangemate sanktsioonide kehtestamisel ära hoida õigustamatuid piiranguid väljendusvabadusele, võib laimu levitamise mõiste olla sõnastatud kitsamalt. Näiteks, laimu levitamise all tuleks mõista teadvalt vale faktilist laadi teabe pahatahtlikku avaldamist kolmandatele isikutele, mis tekitab isikule, kelle kohta andmeid avaldati, olulist moraalset, ametialast ja/või majanduslikku kahju.

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