‘Equality of arms’ versus ‘Editorial freedom’: Replying to the press in Germany and England & Wales

by

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Abstract

This thesis adopts a comparative approach as it examines which rules and practices in Germany and England & Wales perform an equivalent function to that of the 'right of reply' under the European Convention on Human Rights (ECHR), allowing a person to frame their own answer in response to press reports 'affecting' them. Furthermore, it aims to identify and explore the reasons for any differences and similarities between the legal systems in relation to this question. In doing so, it seeks to offer an original investigation of how the right of reply (or a 'functional equivalent' to it) works in action and why the respective lawmakers chose to implement (or refrained from implementing) the remedy in the way they did. In order to address the set aims, this thesis analyses the relevant scholarly literature, self-regulatory complaints (in England & Wales) and case law (in Germany). It also relies on novel empirical evidence in order to evaluate whether the right of reply's supposed 'chilling effect' on press freedom is a 'mere academic argument' or if those working in the media perceive it. This includes an unparalleled thematic analysis of 25 elite interviews with judges, lawyers and editors. From this, this thesis draws significant and sometimes surprising conclusions about the practical application of the statutory right of reply remedy in Germany and its 'functional equivalent' in England & Wales. Therefore, this research not only makes a significant contribution to the literature by detailing the relevant implications for contracting states under Articles 8 and 10 of the ECHR, but also provides a comparative analysis of contentious and topical issues in relation to the right of reply in both legal systems. Additionally, it assesses whether the right of reply is suited to guaranteeing 'equality of arms' for the 'ordinary citizen' against press reporting.

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List of Abbreviations

ACHR	American Convention on Human Rights
AfP	*Archiv für Presserecht*
ASCL	American Society of Comparative Law
BCLR	University of British Columbia Law Review
BGB	*Bürgerliches Gesetzbuch* – German Civil Code
BGH	*Bundesgerichtshof* – Federal Court of Justice for Civil Matters
BVerfG	*Bundesverfassungsgericht* – Federal Constitutional Court
BVerfGG	*Gesetz über das Bundesverfassungsgericht* – Law for the BVerfG
CCH	Complaints Committee Handbook
CJLSC	Columbia Journal of Law and Social Problems
CJR	Columbia Journalism Review
CL	Communications Law
CoE	Council of Europe
CR	*Computer und Recht*
CUP	Cambridge University Press
DCC	Decision of the Complaints Committee

DCMS	Department for Digital, Culture, Media and Sport
DNH	Department of National Heritage
DVBL	Deutsches Verwaltungsblatt
ECHR	European Convention on Human Rights
ECP	Editors’ Code of Practice
ECPC	Editors’ Code of Practice Committee
ECtHR	European Court of Human Rights
EE	Edward Elgar
EGZ	*Europäische Grundrechte-Zeitschrift*
ELR	Entertainment Law Review
EUP	Edinburgh University Press
GG	*Grundgesetz* – German Basic Law
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
GRUR-Prax	*Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter und Wettbewerbsrecht*
GVG	*Gerichtsverfassungsgesetz* – Courts Constitution Act
GWLR	George Washington Law Review
HJLS	Hungarian Journal of Legal Studies

HLR	Harvard Law Review
IAS	Iustum Aequum Salutare
IJQM	International Journal of Qualitative Methods
IMPRESS	Independent Monitor of the Press
IPAR	International Public Administration Review
IPSO	Independent Press Standards Organisation
JFRC	Journal of Financial Regulation and Compliance
JML	Journal of Media Law
JuS	*Juristische Schulung*
JZ	*JuristenZeitung*
K&R	*Kommunikation & Recht*
KritV	*Kritische Vierteljahresschrift für Gesetzgebung und Rechtssprechung*
LG	*Landgericht* – Regional Court
LS	Legal Studies
MDStV	*Mediendienste-Staatsvertrag* – Interstate Treaty on Media Services
MH	Media History
MJECL	Maastricht Journal of European and Comparative Law

MLR	Modern Law Review
MRC	Media Reform Coalition
MRR	Media Regulation Roundtable
NHSC	National Heritage Select Committee
NILQ	Northern Ireland Legal Quarterly
NJW	*Neue Juristische Wochenschrift*
NJW-RR	*Neue Juristische Wochenschrift – Rechtsprechungs-Report*
Ofcom	Office of Communications
OJLS	Oxford Journal of Legal Studies
OLG	*Oberlandesgericht* – Higher Regional Court
OUP	Oxford University Press
PUP	Princeton University Press
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
RCP	Royal Commission on the Press
RDL	*Die Regierungschefs der Länder* – Minister president's of the Federal States
RFC	Regulatory Funding Company
RFS	Regional and Federal Studies

RISJ	Reuters Institute for the Study of Journalism
RR	Routledge Revivals
RStV	*Staatsvertrag für Rundfunk und Telemedien* – Interstate Treaty on Broadcasting and Telemedia
SMA	Scheme Membership Agreement
S&M	Sweet & Maxwell
UCP	University of Chicago Press
UIP	University of Illinois Press
ZPO	*Zivilprozessordnung* – Code of Civil Procedure
ZStW	*Zeitschrift für die gesamte Strafrechtswissenschaft*
ZUM	*Zeitschrift für Urheber- und Medienrecht*

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Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag*)

Telecommunications Act (*Telekommunikationsgesetz*)

Telemedia Act (*Telemediengesetz*)

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Norwich, December 2019

Felix Hempel

Für Faye

und meine Eltern

Chapter 1: Introduction

1. Background

In 2019, Germany's best-selling newspaper, *BILD*,[1] published an article criticising the activities of '*Mission Lifeline'*, a non-governmental organisation (NGO) that operates a rescue ship to save refugees from drowning.[2] As part of this story, the newspaper accused Claus-Peter Reisch, a pensioner and volunteer captain of the NGO's ship, of being 'on trial in Malta for allegedly engaging in human trafficking' (*Schleußerei*).[3] However, the trial was actually concerned with the alleged false registration of a vessel. Therefore, Reisch took up legal advice and invoked the statutory right of reply (*Gegendarstellung*), which enabled him to speedily and promptly present his differing view of the story in the same forum. Under this legislation, newspapers may be forced to print a person's right of reply without them having to provide evidence for the veracity of the original statement or the reply itself. This right to frame one's own answer in response to factual assertions may be granted despite a newspaper's constitutionally underpinned editorial freedom. As a result, just two weeks after the original article was first published, *BILD* had to print Reisch's reply.

Whilst in this scenario the statutory right of reply was used in 'good faith', this is not always the case. After *Der Spiegel*, a German news magazine, had published an article reporting that Jan Ullrich, a former *Tour de France* winner, had allegedly been using illegal substances,[4] the cyclist took up legal advice and invoked the statutory right of reply. In contrast to the first example, the veracity of Ullrich's reply was heavily disputed by the news magazine. *Der Spiegel* emphasised that since the article was based on reliable sources, they should not be forced to print the cyclist's supposedly inaccurate denial of the allegations.[5] However, as the statutory right of reply is not concerned with an examination of the truth or falsity of the statements involved, the news magazine had to publish Ullrich's reply across half a page.[6] Almost 14 years after this was published, Ullrich's

[1] See Statista, 'Überregionale Tageszeitungen in Deutschland nach verkaufter Auflage im 2. Quartal 2019' (2019) <https://de.statista.com/statistik/daten/studie/73448/umfrage/auflage-der-ueberregionalen-tageszeitungen/>.
[2] See <https://mission-lifeline.de/>.
[3] Bildblog, 'Seenotretter wehren sich gegen „Bild"' (2019) <https://bildblog.de/106712/seenotretter-wehren-sich-gegen-bild/>.
[4] Matthias Geyer et al., 'Die Werte spielen verrückt' *Der Spiegel* (Hamburg, 12 June 1999).
[5] Matthias Geyer et al., 'Der letzte Lügner' *Der Spiegel* (Hamburg, 24 June 2013) 104.
[6] Jan Ullrich, 'Gegendarstellung' *Der Spiegel* (Hamburg, 16 August 1999) 116.

lawyers announced that their client no longer upholds the denial made in said reply.[7] When confronted with the fact that he had helped the cyclist to enforce the publication of a reply containing inaccuracies against *Der Spiegel's* will, one of Ullrich's former attorneys simply noted that he had, regrettably, been lied to.[8]

These examples of a (German) right of reply highlight the diverging interests that may be present in such scenarios. On the one hand, an individual who has been made the subject of allegations printed by a newspaper wants to swiftly publish his contrasting position to the same audience, without having to undergo lengthy proceedings to establish the veracity of his statement in reply or the falsity of the original allegation. On the other hand, a right of reply may obligate editors to give up space in their newspaper against their will. This is significant, considering the publishers' argument that such a remedy may lead to a 'flooding' of the press with replies and thus unjustifiably interferes with their editorial freedom.[9] Against this background, historically, the value of a right of reply has been the subject of controversy in academia and in practice.[10] As the obligation to print a reply interferes with a publisher's freedom to determine what to publish in a newspaper, the remedy is often seen as an unjustifiable restriction on the freedom of the press with a 'chilling effect' on editorial independence.[11] At the same time, however, a right of reply enables a person 'affected' by statements made in the press to publish their own viewpoint in the same forum.[12] Thus, the remedy is often considered as the guarantee of 'equality of arms' and the 'right to be heard' for those who are in a weaker position than the media whilst also enhancing both public discourse and reliable media coverage. This position stems from the assumption than an individual cannot, as a rule, counter the news media

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[7] Geyer et al. 2013 (n 5) 110.
[8] Per Hinrichs, '"Ich habe eine Menge verpasst"' *Welt am Sonntag* (Berlin, 12 September 2016) <https://www.welt.de/regionales/hamburg/article158071359/Ich-habe-eine-Menge-verpasst.html>.
[9] See Chapters 3 and 4.
[10] See e.g.: *NY Times Co v Sullivan* 376 US 254, 279 (1964); *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974); Andrew Martin, 'The Right of Reply in England' in Martin Löffler et al. (eds), *The Right of Reply in Europe* (C.H. Beck 1974) 34–40; Committee on Privacy and Related Matters, Report of the Committee on Privacy and Related Matters (Cm 1102, 1990) 44; Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) MLR 87, 107–108; Emanuel Burkhardt, 'Gegendarstellungsanspruch' in Karl Wenzel et al. (eds), *Das Recht der Wort- und Bildberichterstattung* (Dr. Otto Schmidt 2018) 847 et seq.
[11] See e.g.: Charles Danziger, 'The Right of Reply in the US and Europe' (1986) 19(1) NYU JILP 171, 176–180; Eric Barendt, *Freedom of Speech* (OUP 2005) 422–26; Andras Koltay, 'The Right of Reply – A Comparative Approach' [2007] IAS 203; Stephen Gardbaum, 'A Reply to the Right of Reply' (2008) 76(4) GWLR 1065; Andras Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54(1) HJLS 73.
[12] The exact scope and requirements of a right of reply depend on the provisions of each legal system.

with the prospect of the same level of publicity.[13] Striking a balance between these two diametrically opposed interests has led to several issues in practice.

Indeed, since the concept of a right of reply was first introduced in Europe as a result of the French revolution in the late 1700s, legal systems have found different solutions of how to balance those converging interests. Germany and England & Wales are two examples of jurisdictions where the concept of allowing a person who has been made the subject of a story in a newspaper or magazine to speedily and promptly publish their own view in the same forum seems to have been implemented very differently. As a result, both systems face different problems in relation to the right of reply. In Germany, the statutory right of reply, which is underpinned by the codified constitution and can be judicially enforced, has often been criticised by practitioners and journalists,[14] as being open to abuse and therefore having the potential to unjustifiably limit a newspaper's freedom of expression. Most importantly, it runs the risk of newspapers being forced to print inaccurate replies against their will on their front page. In fact, since 1945 numerous parliamentary debates in the UK have used the German *status quo* as a negative example of how to implement a right of reply into a legal system due to its supposed 'paralysing effect' on press freedom.[15] Additionally, due to a lack of case law and only little guidance from the lawmaker, there is an ongoing debate amongst practitioners and scholars about if, and how far, the right of reply should be extended to online content.[16]

Contrastingly, although some elements of the remedy are seen to exist in Defamation Law,[17] scholars have repeatedly highlighted that English law does not have a statutory right of reply in the press.[18] Instead, the press is primarily subject to self-regulation, with the vast majority of newspapers and magazines (both print and online) having signed up with the 'Independent Press Standards Organisation' (IPSO), which was established after

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[13] See e.g.: David Björgvinsson, 'The Right of Reply' in Josep Casadevall et al. (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza* (WLP 2012) 164.
[14] See Chapter 3.
[15] See Chapter 4.
[16] See Chapter 3.
[17] See e.g.: Alastair Mullis and Andrew Scott, 'Reframing libel: taking (all) rights seriously and where it leads' (2012) 63(1) NILQ 5, 19; Andrew Scott, '"Ceci n'est pas une pipe": The Autopoietic Inanity of the Single Meaning Rule' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2013) 52; Mullis and Scott 2014 (n 10) 107–108.
[18] See e.g.: Martin (n 10) 34–40; Alan Ward et al., 'The right of reply in England, France and the United States [1983] MLP 205; Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 GWLR 1017, 1059; Koltay 2013 (n 11) 78; The Leveson Inquiry, An Inquiry into the Culture, Practices and Ethics of the Press: Report (HC 2012–13, 780) 1667 (hereafter: Leveson Report); Mullis and Scott 2014 (n 10) 107–108; Andrew Kenyon, 'Protecting Speech in Defamation Law: Beyond Reynolds-Style Defences' (2014) 6(1) JML 21, 31 et seq.

the Leveson Inquiry.[19] However, as highlighted in the literature,[20] it is yet to be determined whether this self-regulatory system provides for a right of reply. Additionally, there have been numerous (unsuccessful) attempts to introduce a statutory right of reply using the Private Members' Bills (PMB) procedure in the House of Commons. Furthermore, several government-initiated commissions on, and inquiries into, the press have discussed whether such a statutory remedy should be implemented, with the Leveson Inquiry as the most recent example. Despite its potential 'chilling effect' on a newspaper's freedom of expression, the continued absence of 'mandated discursive remedies' such as the right of reply has been criticised by some scholars and practitioners.[21] Those commentators suggest that such a remedy 'could serve to vindicate reputation' swiftly without claimants becoming 'embroiled in expensive and lengthy litigation'.[22] Also, if no other rule or practice fulfils a similar normative purpose, this is seen to run the risk of endangering the pluralism of information and reliable media coverage.[23]

2. Aims and objectives of contribution

Against this background, this thesis adopts a comparative approach as it aims to examine which rules and practices in Germany and England & Wales perform an equivalent function and serve a similar purpose to that of the 'right of reply' under the European Convention on Human Rights (ECHR). Furthermore, it is set out to go beyond the 'law in the books' and explore how they work in practice as well as identify the reasons for any differences and similarities between the legal systems in relation to this question. In doing so, it seeks to offer a unique and original investigation of how the right of reply in those jurisdictions works in action and why the respective lawmakers chose to implement (or refrained from implementing) the remedy in the way they did. In examining these issues, it relies on novel and original empirical evidence to evaluate whether the right of reply's supposed 'chilling effect' on press freedom is a 'mere academic argument' or if those working in the media perceive it. Also, it provides a unique assessment into whether the practical application of the right of reply in either legal system supports the claim that it

[19] Leveson Report (n 18) 1667.
[20] See e.g.: See Damien Carney, 'Up to standard? A critique of IPSO's Editors' Code of Practice and IMPRESS's Standards Code: Part 1' (2017) 22(3) CL 77, 82.
[21] See e.g.: Mullis and Scott 2014 (n 10) 87, 107–108; Media Reform Coalition, 'Media Manifesto 2019', p 11 (2019) <https://www.mediareform.org.uk/wp-content/uploads/2019/03/MRC_MediaManifesto_0305_web.pdf>.
[22] Mullis and Scott 2014 (n 10) 107, 108.
[23] See Chapter 2.

is suited to guaranteeing ‘equality of arms’ for the ‘ordinary citizen’ against media reporting.

The methodology employed by this thesis to achieve these aims is set out in the subsequent part of this chapter (section 3.1). There, this chapter also outlines the reasons behind the choice of legal systems for comparison and the theoretical framework underpinning the research (section 3.2). The following sections delimit the thesis’ scope (section 4) and summarise this study’s four significant, original contributions to the existing literature (section 5). Lastly, section 6 summarises how this thesis will achieve its aims and provides an overview of its structure.

3. Methodology

3.1. How and what to compare?

In order to address the set aims, it is crucial to determine the ‘yardstick for comparison’ (*tertium comparationis),* i.e. the benchmark and criteria which will drive the comparative inquiry.[24] In order to establish what is meant by the term ‘right of reply’ for the purposes of the comparison between the two legal systems, this thesis adopts a functional approach. As highlighted by van Hoecke, the idea behind functionalism is ‘to look at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems’.[25] The core element of this approach is that the comparison should go beyond a simple evaluation of rules in both jurisdictions that have the same label or share a similar definition.[26] Instead, after identifying the purpose or function of the rule or practice under investigation (here: the right of reply), one may then evaluate whether the legal systems chosen for comparison provide ‘functional equivalences’, i.e., rules and practices that have similar functions and serve a similar purpose.[27] Following this approach, it is therefore seminal to specify in what particular manner the rules and regulations compared are comparable, i.e., what qualities can be compared sensibly.[28]

In order to determine this framework, the starting point of this thesis is a doctrinal analysis of the normative purpose and the main functions of the ‘right of reply’ under the ECHR.

[24] Uwe Kischel, *Comparative Law* (OUP 2019) 5.
[25] Mark van Hoecke, ‘Methodology of Comparative Research’ [2015] Law and Method 1, 16.
[26] Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 122.
[27] Esin Örücü, ‘Methodology of Comparative Law’ in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (EE 2006) 443, 444.
[28] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (OUP 1998) 122.

This allows a set of criteria and benchmarks to be identified for what can be considered a 'functional equivalence' to this remedy for the purposes of this study. These findings can then be employed to inform the subsequent examination of the *status quo* in Germany and England & Wales.

This *modus operandi* has three main benefits. First, it allows the comparison between the legal systems to go beyond rules in England & Wales that use the exact same terminology as the German statutory right of reply and vice versa. This is necessary, given that there is no universal definition of the term right of reply, with both case law and literature struggling to find a common ground.[29] Thus, it would be methodologically wrong to assume that each jurisdiction interprets the term 'right of reply' in the exact same way. Therefore, using the normative purpose and functions of the right of reply under the ECHR as the common denominator (i.e. the *tertium comparationis*) provides the necessary link between the different rules that legal systems tend to employ and hence allows comparability.[30] Perhaps even more importantly, it ensures that the analysis is not misled by the different legal language in either country and it avoids the mere analysis of 'false friends', which appear linguistically similar, but may differ significantly in content.[31]

Second, using the ECHR as a starting point for this thesis allows an evaluation of whether both legal systems meet the aspirational norms of international human rights in relation to the right of reply. This is significant, since both legal systems have signed and ratified the Convention.[32] Whilst the Human Rights Act 1998 afforded the ECHR further effect in the English legal system,[33] the Convention has the rank of a statute in Germany and may also be employed to interpret the country's codified constitution (Basic Law – *Grundgesetz*).[34] Thus, a failure to meet the standards set under the ECHR may ultimately impact on domestic legislation and jurisprudence.[35] Also, this approach can serve as a test to see whether the guidance given by the European Court of Human Rights (ECtHR) and

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[29] See e.g.: Koltay 2013 (n 11) 73.
[30] Mathias Siems, *Comparative Law* (CUP 2018) 32.
[31] Oliver Brand, 'Language as a Barrier to Comparative Law' in Frances Olsen et al., *Translation Issues in Language and Law* (Palgrave 2009) 22 et seq.
[32] See CoE, 'Chart of signatures and ratifications of Treaty 005' (2019) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>.
[33] See e.g.: John Wadham et al., *Blackstone's Guide to the Human Rights Act 1998* (OUP 2015).
[34] See e.g.: Thomas Haug, 'Die Pflicht deutscher Gerichte zur Berücksichtigung der Rechtsprechung des EGMR' [2018] NJW 2674.
[35] For further detail see e.g.: David Harris et al., *Law of the European Convention on Human Rights* (OUP 2019) 24 et seq.

the Council of Europe (CoE) resulted in a similar approach for these countries towards this remedy.

Third, due to recent developments in case law,[36] there is a gap in the literature relating to the right of reply's normative purpose and its main functions under the ECHR. Therefore, using the right of reply under the ECHR as a starting point for this study allows it to go beyond the existing knowledge in this topical area of law. This is because it enables this thesis to conduct a rigorous, theory based and uniquely comprehensive analysis of the ECtHR's jurisprudence as well as the relevant recommendations and resolutions issued by the CoE. By doing so, it provides a significant contribution to the literature as it also details the implications for contracting states in relation to the right of reply under Article 8 and 10 of the ECHR.

However, to answer the set research questions, this thesis not only doctrinally analyses the relevant scholarly literature, legislation, regulatory complaints (in England & Wales) and case law (in Germany) on the right of reply (or a functional equivalent to it), but also employs empirical methods. More specifically, it reports on unique fieldwork in England and Germany, which investigated the impact of the right of reply on the work of the press as well as the differences and similarities of both jurisdictions. This novel research provides an original thematic analysis of 25 semi-structured elite interviews conducted with judges, journalists, editors, solicitors, barristers and in-house lawyers working for newspapers, focusing on their views and experiences with the right of reply in the press. Also, this thesis advances the existing knowledge by undertaking an original systematic analysis of IPSO's complaints resolution. The justifications, limitations and procedures for conducting these studies are outlined separately in Chapters 5 and 4 respectively. Most importantly for this comparative thesis, it ensures that the comparison between the legal systems goes beyond a pure black-letter comparison of legal rules, concepts or systems and, instead, aims at understanding how the law works in practice.[37] Thus, instead of merely looking at the 'law in the books' it equally focuses on the 'law in action',[38] and thus provides an 'overall account of legal reality'.[39] This prevents the thesis from obtaining a misleading picture of how the right of reply works in practice.[40]

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[36] *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017).
[37] van Hoecke (n 25) 16.
[38] See Roscoe Pound, 'Law in Books and Law in Action' [1910] ALR 12.
[39] van Hoecke (n 25) 19.
[40] See Örücü (n 27) 449.

Additionally, this thesis pays particular attention to the historical background of the rules and practices under evaluation in Germany and England & Wales. This choice can be rationalised by the fact that fully understanding the law as it functions in today's society is only possible when one knows where it comes from and why it is as it is today.[41] Indeed, a comparative study necessarily involves a historic element,[42] as it reveals the social and political dynamics which have shaped the rules in the respective legal system.[43] Thus, it provides an insight into the rationales underpinning the characteristics of the relevant rules and practices.[44] Also, it allows the evolution of and justifications for, the distinct nature of press regulation in Germany if compared to England & Wales to be addressed. Including such a historic examination within the research is necessary to explain the reasons for differences and similarities between the chosen countries.[45] Further detail regarding the research methods is delineated in section 6.

3.2. Choice of legal systems

There are three main reasons for the choice of Germany and England & Wales as comparators. First, as noted above, the English and German legal system have adopted different approaches to the regulation of newspapers and magazines. For example, whilst in England & Wales the press is primarily subject to self-regulation, Germany has had statutory Press Acts (*Landespressegesetze*), including a right of reply, in each of the 16 Federal States (*Länder*) since the end of the Second World War.[46] Therefore, this thesis can examine if and how these differences impact on the practical application of the right of reply (or a functional equivalent to it). Crucially, comparative law then enables this thesis to look at the specificities of the solutions in both jurisdictions with some distance and, hence, also find out why the law in question became what it is.[47] Thus, the adopted comparative approach will help to clarify and amplify the law in both systems and has a critical function that can be used to challenge national legal prejudices.[48] Indeed, solutions of one's own legal system can appear in a new light when compared to solutions devised in other systems.[49]

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[41] van Hoecke (n 25) 18.
[42] Zweigert and Kötz (n 28) 8.
[43] Wiliam Twining, 'Globalisation and Comparative Law' (1999) 6(3) MJECL 217.
[44] Kischel (n 24) 14.
[45] John Reitz, 'How to Do Comparative Law' (1998) 46(4) ASCL 617, 626.
[46] See Chapters 3 and 4.
[47] Kischel (n 24) 29.
[48] Zweigert and Kötz (n 28) 19.
[49] H. Patrick Glenn, 'The aims of comparative law' in Jan Smits (ed), *Elgar Encyclopaedia of Comparative Law* (EE 2014) 65 et seq.

Second, both jurisdictions have had a significant impact on each other's decision-making process on how to implement (or why one should refrain from implementing) the concept of a right of reply in their respective legal system. As demonstrated in Chapter 3, German legislation in this area of law has been heavily influenced by the Allies after the Second World War, which turned out to have a lasting impact on the understanding of the domestic right of reply in today's media landscape. Furthermore, as demonstrated in Chapter 4, both parliamentary debates and government-initiated inquiries in England & Wales have repeatedly referenced the German statutory right of reply when debating the implementation of such a remedy. Thus, this historical component suggests that those jurisdictions are of particular interest for a comparative study in this area.

Third, issues relating to the right of reply are contentious and topical in both legal systems. For Germany, the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), which is the highest court in matters concerning this remedy, has handed down several recent and controversial decisions concerning the statutory right of reply in the press and its potential pitfalls.[50] Considering the court's narrow remit,[51] this underlines how contemporary and fast-moving this area of law is. Also, as noted above, there is an ongoing debate amongst practitioners and scholars concerning the right of reply's scope for online content.[52] For England & Wales, in response to the Leveson Report,[53] the self-regulatory landscape for the press has undergone drastic changes, which also included an update of the rules and regulations employed by the relevant self-regulatory bodies. However, as highlighted in the literature, it is yet to be determined whether this updated ruleset provides for a right of reply (or a functional equivalent to it).[54] Furthermore, with regards to English Defamation Law, there have been lively debates amongst practitioners and in the academic literature if and why it would be desirable to introduce 'mandated discursive remedies' such as the right of reply.[55] This thesis adds on to this discussion as it investigates which rules in English Defamation Law (if any) may serve a similar function as the right of reply as set out by the ECHR. Thus, by carrying out a comparative examination of the right of reply in both countries, this thesis provides further insight into these debates, goes beyond the existing knowledge and hence provides an original and significant contribution to the existing literature.

[50] BVerfG NJW 2017, 1537; BVerfG NJW 2018, 1596; BVerfG NJW 2019, 419.
[51] See Chapter 3.
[52] ibid.
[53] see n 18.
[54] Carney (n 20) 82.
[55] Mullis and Scott 2014 (n 10) 87, 107–108.

4. Scope

This thesis primarily focuses on rules and practices concerning print and online publications associated with regional and national newspapers and magazines, as well as the implications for similar content online.[56] Therefore, it does not examine rules concerning audiovisual content, i.e. television broadcasts and on-demand services. This approach has four main benefits. First and perhaps most importantly for both legal systems, it ensures that the research is kept focused and manageable. Covering all media services would have to come at the expense of the depth of this inquiry. However, as highlighted by Husa, it is crucial for comparative studies that are set out to compare legal rules or institutions 'not to gather too many study objects because one can become lost in the depth of the analysis'.[57] Instead, he recommends that in order to ensure an in-depth inquiry and a focused comparison, 'it is often worth saying a lot about a little, not a little about a lot'.[58]

Second, as highlighted by Oderkerk, factors like whether the research is conducted by a single person or as part of a group of researchers must be considered when assessing the feasibility of the project.[59] Considering that conducting the thematic analysis of 25 in-depth elite interviews focused on the right of reply in the press required several flights to, and overnight stays in, Germany, it would have been difficult to extend the study's scope to broadcast given the limited resources during a PhD. Thus, any insight into how the right of reply for television content works in practice beyond the 'law in the books' would have always been a very limited one.

Third, different to newspapers and magazines, broadcasters in the United Kingdom (UK) are subject to regulation by the 'Office for Communications' (Ofcom), an independent statutory regulator which was set up in 2002.[60] Ofcom has statutory powers (and duties) under the Communications Act 2003,[61] which were formally vested in December 2003. Since then, the regulatory body has been responsible for licensing and regulating all UK commercial radio and television services.[62] In other words, the regulatory landscape for

[56] For an in-depth discussion of what may be classified as 'similar content' see Chapters 2 and 3.
[57] Husa (n 26) 101.
[58] ibid.
[59] Marieke Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research' (2015) 79 RabelsZ 589, 602–614.
[60] Office of Communications Act 2002, s 1.
[61] Also, two earlier statutes, as amended by the Communications Act 2003 remain relevant: the Broadcasting Act 1990 and the Broadcasting Act 1996.
[62] As of 3 April 2017, Ofcom has also become the BBC's first independent external regulator. However, Ofcom has always had the direct regulatory authority over certain aspects of the BBC's license fee-

broadcasting has not undergone drastic changes comparable to those for newspapers and magazines since the Leveson Inquiry. Thus, this thesis' scope is focused on an in-depth discussion of contentious and topical issues rather than a merely descriptive analysis of existing research. Furthermore, the legal systems' approach to the regulation of broadcasting seems to be more similar than that for the press, with both countries subjecting the former primarily to statutory regulation.[63] This may render a comparative study less meaningful compared to providing a detailed study of the different regulatory features of newspapers and magazines and their impact on the practical application of the right of reply.[64] Indeed, insights gained from such a comparison seem to be limited, since both legal systems have been under a duty stemming from EU legislation to provide for a 'right of reply' (or equivalent remedy) in response to 'an assertion of incorrect facts in a television programme'.[65] In contrast, similar legislation does not exist for content published in newspapers or magazines.[66]

Fourth, for Germany, whilst there are controversial discussions surrounding the statutory right of reply in the printed press and online content, the same cannot be said for broadcasting. This is primarily because historically, the issue of whether a right of reply is needed first arose in relation to content published in newspapers and magazines.[67] Therefore, although a statutory right of reply also exists for television content, it is based on its counterpart in the press and therefore subject to the same requirements and characteristics.[68] Most importantly, the vast majority of decisions by the *BVerfG* have concerned the exercise of the statutory right of reply in response to content published in newspapers or magazines. In the last two years alone the *BVerfG* has handed down three of such decisions,[69] which highlights the timeliness and current relevance of this area of law. Con-

funded services even before that, see Eric Barendt et al., *Media Law: Text, Cases and Materials* (Pearson 2014) 91.

[63] For an overview see e.g.: Barendt et al. 2014 (n 62) ch 3; Robert Rook, *Der Öffentlich-Rechtliche Rundfunk in Deutschland und im Vereinigten Königreich* (Springer 2019).

[64] See van Hoecke (n 25) 4, who notes that a 'good reason' for comparing two legal systems is if they seem to have 'opposed views' on a matter.

[65] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1, art 28. This provision remained unchanged during the latest amendment of the AVMSD in 2018, see Jenny Weinand, 'The revised Audiovisual Media Services Directive 2018 – Has the EU learnt the right lessons from the past?' (2018) 82(1) UFITA 260. A similar duty derives from Article 8 of the European Convention on Transfrontier Television.

[66] See e.g.: Koltay 2013 (n 11) 73 et seq.

[67] See Chapter 3.

[68] See e.g.: Jörg Soehring et al., *Presserecht* (Otto Schmidt 2019) 664.

[69] BVerfG NJW 2017, 1537; BVerfG NJW 2018, 1596; BVerfG NJW 2019, 419.

trastingly, the last decision where the statutory right of reply concerning content publicised on television was regarded the central issue of the decision was handed down more than 14 years ago.[70] Therefore, this thesis' focuses on in-depth discussion of contentious and topical issues. Similarly, since this thesis pays special attention to the right of reply under the ECHR, it should be noted that all applications under the said Convention where the right of reply was regarded as the central issue of the decision have concerned the 'traditional print media'.[71] Therefore, one may claim that the conclusions gained from analysing right of reply under the ECHR predominantly apply to this type of content.

For England & Wales, this thesis focuses on the rules and regulations employed by IPSO. This is even though another self–regulatory body, the 'Independent Monitor of the Press' (IMPRESS), has been established. Whereas IMPRESS has been recognised as an 'approved regulator' by the 'Press Recognition Panel', under powers granted by Royal Charter,[72] IPSO has not sought approval and is unlikely to do so in the future. This objection is based on its members 'theological objection to the Royal Charter',[73] and its aim of not having any formal link with the state or the government.[74] Nevertheless, this thesis' focus on IPSO can be rationalised by the fact that it is by far the largest press regulatory body in the UK.[75] In fact, all the national press – apart from *The Guardian* and the *Financial Times* who have not joined either of the regulatory bodies – and the vast majority of regional newspapers have signed up to it.[76] Furthermore, IMPRESS has made a deliberate decision against requiring publishers to give individuals a 'so-called right of reply'.[77] Contrastingly, IPSO enforces the Editors' Code of Practice, which includes an 'opportunity to reply' in Clause 1(iii) 'when reasonably called for'. Nevertheless, the reasons behind this omission from the IMPRESS Standards Code were further investigated during

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[70] BVerfG NJW 2005, 1343.
[71] See Chapter 2.
[72] Royal Charter on Self-Regulation of the Press 2014.
[73] Select Committee on Communications, *Press Regulation: Where Are We Now?* (HL 2014–15, 135) para 92.
[74] John Lloyd, 'Regulate Yourself' (2015) 86(3) The Political Quarterly 393.
[75] Also note that the governing Conservative Party plans to repeal section 40 (which is not yet in force, but already enacted by the parliament) of the Crime and Courts 2013. This is crucial, as this section was meant to serve as an incentive for publishers to join an 'approved regulator' like IMPRESS. For further detail see e.g.: The Conservative and Unionist Party, 'Manifesto 2019', p 48 (November 2019) <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf>.
[76] IPSO, 'Who IPSO regulates' (2019) <https://www.ipso.co.uk/complain/who-ipso-regulates/>; IMPRESS, 'Regulated Publishers' (2019) <http://impress.press/complaints/regulated-publishers.html>. Whilst IPSO regulates 'over 1500 print and 1100 online titles', IMPRESS regulates 131 publications.
[77] IMPRESS emphasised that an opportunity to reply, 'should not be used as a way to open debate on a particular issue.' See IMPRESS, 'Guidance on the IMPRESS Standards Code' (2017), p 11 <http://www.impress.press/downloads/file/code/impress-code-guidance.pdf>.

an interview with Jonathan Heawood, Chief Executive Officer of IMPRESS, as part of the empirical investigation in Chapter 5.

Also, this thesis does not examine the rules and practices employed by the German Press Council (*Presserat*), which exists beside the statutory Press Acts of the *Länder* as a form of voluntary self-regulation.[78] There is a consensus in the literature that the right of reply is separate to the scope of the Press Council, primarily because of the already existing statutory rules.[79] Indeed, this was confirmed during an interview with Lutz Tillmanns, the Chief Executive Officer of the German Press Council as part of the empirical investigation in Chapter 5.

5. Summary of significance and originality

As highlighted throughout this introductory chapter, this thesis provides four main original contributions to the literature and thus advances the existing knowledge significantly. First, it conducts a comprehensive, and thus unique, analysis into the right of reply under the ECHR. Due to recent developments in case law,[80] there is a gap in the literature relating to the right of reply's normative purpose and its main functions under the ECHR. Therefore, this study goes beyond the existing literature in this topical area of law, as it conducts a rigorous and theory based in-depth analysis of the jurisprudence of the ECtHR and the relevant recommendations and resolutions issued by the CoE. By doing so, it also provides novel insight into the implications for signature states in relation to the right of reply under Articles 8 and 10 of the ECHR.

Second, as outlined in sections 3 and 4, the recent developments in both legal systems render the existing comparative work in the area (which is mainly focused on providing a general overview of the right of reply in Europe,[81] as well as the US,[82] rather than conducting an in-depth study like the present thesis) outdated.[83] Thus, this thesis provides a unique and up-to date analysis of the ongoing debates relating to the right of reply in both

[78] See e.g.: Carolin Schmidt, 'Die Selbstregulierung der Presse im Wandel – Der Deutsche Presserat, seine Kritiker und Lösungsmöglichkeiten' (2018) 133(22) DVBL 1460.
[79] See e.g.: Walter Seitz, *Der Gegendarstellungsanspruch* (C.H. Beck 2017) 231; Lara Fielden's oral statement about her work with European Press Councils in Transcript Oral Hearing Leveson Inquiry Day 92 pm, p 76, 77 (*Discover Leveson*, 13 July 2012) <https://discoverleveson.com/hearing/2012-07-13/1110/?bc=15>.
[80] *Eker* (n 36).
[81] See Koltay 2013 (n 11).
[82] See Youm (n 18).
[83] Volker Schmits, *Das Recht der Gegendarstellung und das right of reply* (PUV 1997).

jurisdictions including a comprehensive insight into the historical origins, which goes beyond the 'law in the books' and equally focuses on the 'law in action'.

Third, it undertakes a unique systematic analysis of IPSO's complaints handling. This original approach allows significant conclusions to be drawn about what factors are decisive for IPSO's decision-making and, in combination with an analysis of the regulator's rules, regulations and membership agreements, gives an unparalleled insight into how the regulatory system works in practice.

Fourth, the thematic analysis of 25 in-depth elite interviews with judges, journalists and their lawyers gives a novel insight into the right of reply's practical applications in Germany and England & Wales. More importantly, it fills gaps in the existing literature as to whether the supposed 'chilling effect' of the statutory right of reply on press freedom is a 'mere academic argument' or if those working in the media perceive it. Considering that researchers, especially early stage researchers, are faced with a number of challenges when attempting to conduct empirical research involving the judiciary,[84] this thesis provides a rare insight and thus advances the existing knowledge significantly.

6. Structure and outline of thesis

After this introduction, **Chapter 2** sets the scene for this study by doctrinally analysing the normative purpose and main functions of the 'right of reply' under the ECHR. This identifies the heart of this thesis: what is meant by the term 'right of reply' for the purposes of this research? The answer to this question identifies a set of criteria and benchmarks for what can be considered a functional equivalence to this remedy, which informs the subsequent examination of the *status quo* in Germany and England & Wales.

Subsequently, using the definition and characteristics of a right of reply as established in Chapter 2, **Chapter 3** examines whether there are rules and practices within the German legal system that enable a person who has been made the subject of a story in a media outlet to publish their own view in the same forum. Furthermore, it evaluates how those rules work in practice. In order to achieve this, this part of the thesis conducts a doctrinal analysis of the relevant case law as well as the accompanying literature including an investigation into the constitutional background and the historical origins of the statutory

[84] See Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart 2011) 3.

right of reply (*Gegendarstellung*), which could be traced back to the early 1800s. Therefore, this chapter highlights the characteristics, benefits and potential pitfalls of this statutory remedy.

Chapter 4 pursues similar aims as Chapter 3. Its main objective is to identify the relevant rules and practices in England & Wales that fulfil a similar purpose to that of the right of reply under the ECHR, as established in Chapter 2. This is followed by an assessment of their practical application. In order to achieve this, this part of the thesis conducts a doctrinal analysis of the relevant (self-)regulatory mechanisms, legislation and the accompanying literature. Furthermore, it provides a significant contribution to the existing literature by undertaking a novel and original systematic analysis of IPSO's complaints resolution. It also carries out an investigation into the historical reasons for why England & Wales does not have a statutory right of reply in the press. This encompasses an evaluation of the arguments brought forward in all relevant parliamentary debates and government-initiated inquiries since the Second World War.

After the analysis undertaken in Chapters 3 and 4, the primary aim of **Chapter 5** is to fill gaps in knowledge that have been identified in the previous parts of the thesis. In order to achieve this, it reports on the unique fieldwork in England and Germany, which investigated the impact of the right of reply on the work of the press as well as the differences and similarities of both jurisdictions. This novel research provides an original thematic analysis of 25 semi-structured elite interviews. Subsequently, it discusses the findings in light of the research conducted in the previous chapters, fills in said identified gaps in knowledge and thus provides a significant contribution to the existing literature.

The purpose of the final **Chapter 6** is to bring together the analysis in the preceding chapters to draw conclusions and reflect on the consequences of the thesis' findings. Therefore, this part of the thesis carries out a comparative analysis between the relevant rules and practices identified in both jurisdictions, using the definition and criteria of the right of reply established under the ECHR as a benchmark.

Chapter 2: The 'right of reply' under the European Convention on Human Rights*

1. Introduction

This chapter sets the scene for the comparison between Germany and England & Wales. It does so by critically analysing the normative purpose and main functions of a 'right of reply' under the ECHR. Most importantly, this chapter identifies the heart of this thesis: what is meant by the term 'right of reply' for the purposes of the comparison between the two jurisdictions? This allows a set of criteria and benchmarks to be identified for what can be considered a 'functional equivalence' to this remedy, which informs the subsequent examination of the *status quo* in Germany and England & Wales in Chapters 3 and 4.

Significantly, a right of reply is not expressly provided for in the Convention.[1] Hence, investigating the set research question requires a rigorous and uniquely comprehensive analysis of the ECtHR's jurisprudence, the relevant recommendations and resolutions issued by the CoE, and the scholarly literature. By doing so, this chapter also critically analyses the characteristics, benefits and potential pitfalls of the right of reply under the ECHR. Furthermore, it highlights the implications for contracting states in relation to the right of reply under Article 8 and 10 of the ECHR.

More specifically, this chapter pays particular attention to the latest judgment of the ECtHR dealing with the right of reply in *Eker v Turkey*.[2] In this decision, the ECtHR combines disparate approaches from previous case law concerning the right of reply,[3] and reinterprets the remedy's normative foundation. Additionally, the Court in *Eker* provided significant guidance regarding the admissible scope of a right of reply, and the extent of procedural guarantees required in court proceedings under the ECHR. Thus, the decision

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* An earlier version of this chapter was published in the Journal of Media Law, see: Felix Hempel 'The right of reply under the ECHR: an analysis of *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017)' (2018) 10(1) JML 17.

[1] In contrast to e.g. Article 14 of the ACHR. Similar to the ECHR, the right of reply is not expressly guaranteed under the ICCPR or the UDHR. Also note that neither Germany nor the UK have signed the UN Convention on the International Right of Correction. For further detail see e.g.: Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 GWLR 1017, 1021 et seq.

[2] App no 24016/05 (ECtHR, 24 October 2017).

[3] *Ediciones Tiempo SA v Spain* App no 13010/87 (ECHR, 12 July 1989); *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005); *Kaperzyński v Poland* App no 43206/07 (ECtHR, 3 April 2012).

has wider implications for the remedy's impact on freedom of expression, the right to a private life, and further contains numerous aspects that are significant for the interpretation of domestic law on the right of reply. Crucially, it concerns the balance between the (editorial) freedom of the press, the public interest in access to accurate and plural information and the reputational rights of a person affected by a statement made in the media.

After setting out the facts of *Eker v Turkey*, this chapter highlights how the Court reached its ruling (section 2). It then focuses on why this decision is significant for the remedy's normative foundation as well as what it adds to the ECtHR's jurisprudence regarding the right of reply's scope, admissible content and promptness (section 3). The following sections examine who should be able to exercise the right of reply under the ECHR (section 4) and whether there is a positive obligation on contracting states to afford a right of reply (section 5). Lastly, section 6 comes to a conclusion.

2. *Eker v Turkey*

2.1. Facts

The case concerns an editorial, published by Mustafa Eker in his newspaper *Bizim Karadeniz*, circulated in *Sinop*, Turkey.[4] In his contribution, Mr Eker criticised the local journalists' association. He alleged that particular actions of the association contravened the organisation's main objective and that it was no longer fit for its intended purpose. The association demanded the publication of a reply in the newspaper to set out their contrasting position, but Mr Eker denied this request. Subsequently, the president of the association applied to the local Magistrate's Court, seeking an order for the reply to be published. Both the domestic court of first instance and the appellate court ordered Mr Eker to print the reply. These proceedings were held without a public hearing involving the parties. Ultimately, Mr Eker had no option but to publish the reply in his newspaper.

Following these events, Mr Eker applied to the ECtHR on 9 June 2005. He claimed that the lack of a hearing had resulted in a violation of his rights to a fair trial (Article 6), the right to respect for private and family life (Article 8) and the right to an effective remedy (Article 13). The Court was also asked to consider whether the compulsion to print the reply in his newspaper had amounted to a violation of his right to freedom of expression under Article 10.

[4] *Eker* (n 2) paras 5–13.

2.2. The ECtHR's judgment

The ECtHR adopted two lines of reasoning. First, it examined whether the lack of a public hearing had resulted in a violation of Convention rights, applying Article 6(1). Subsequently, the judges analysed whether the obligation to publish the reply had violated Mr Eker's freedom of expression under Article 10.

As neither of the domestic courts had held an oral hearing, the ECtHR investigated whether this resulted in an unfair trial. The judges, consistent with previous case law,[5] reiterated that despite the importance of the public character of the proceedings, the obligation to hold a public hearing is not absolute.[6] Instead, this should be examined on a case-by-case basis. Consequently, in cases that raise no question of credibility or do not give rise to sufficient controversy over the facts, courts may decide such disputes in a fair and reasonable manner solely by the submissions made by the parties.[7] Recalling that news is a perishable commodity and even a short delay in its publication might well deprive it of all its value and interest,[8] the Court applied this rule here and found that the legal issues had not been especially complex. Hence, they did not require oral presentation of evidence.[9] Therefore, the ECtHR did not consider the domestic court's conclusions or procedures to be arbitrary or patently unreasonable. Rather, the judges emphasised that the promptness in the present case was a necessary and justifiable element of these proceedings to enable untruthful information published in the media to be contested.[10] According to the ECtHR, this swiftness also ensures a plurality of opinions in the exchange of ideas on matters of general interest.[11] Concluding, the judges stressed that the applicant had still been able to present his arguments against publication of the reply to the domestic court in writing.[12] Hence, the ECtHR unanimously held that the lack of a public hearing did not violate Article 6(1).

As the Turkish courts had limited the editor's right to determine the content of his newspaper, the ECtHR subsequently examined whether the compulsion to print a reply had

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[5] See e.g.: *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006) para 41.
[6] *Eker* (n 2) para 24.
[7] ibid.
[8] ibid, para 30
[9] ibid, para 31.
[10] *Eker* (n 2) para 30. Right of reply proceedings under Turkish law require national courts to rule within three days.
[11] ibid.
[12] ibid.

interfered with Mr Eker's rights under Article 10 of the Convention. The judges found that the domestic court order had restricted the editorial power of the publisher to decide whether to include contributions from individuals in his newspaper.[13] Therefore, this interfered with the applicant's freedom of expression. However, under Article 10(2), the exercise of this right may be subject to lawful restrictions. Consequently, the Court examined whether the obligation to print the reply had been prescribed by law, had pursued a legitimate aim, was necessary in a democratic society and was proportionate to that aim. Reiterating that the interference with the publisher's freedom of expression had been prescribed by Turkish law,[14] the ECtHR focused on the aim of the reply in the present case. The ECtHR held that the remedy is 'intended to afford all persons the possibility of protecting themselves against certain statements or opinions disseminated by the mass media that are likely to be injurious to their private life, honour and dignity'.[15]

Hence, by giving the affected association the ability to defend themselves against allegations in the press, the restriction of Mr Eker's rights was found to have the legitimate aim of protecting the 'reputation or rights of others' as set out in Article 10(2).[16] Significantly, the Court also stressed that the publication of the reply enabled the affected journalist association to exercise their own right to freedom of expression.[17] The ECtHR emphasised that the right of reply is a necessary guarantee of the pluralism of information, which must be respected in a democratic society.[18] It thus considered the remedy addressed not only the social need to allow false information to be challenged, but also to ensure a plurality of opinions.[19] However, reinforcing previous case law,[20] the judges highlighted that a limitation of the applicant's freedom of expression must also be proportionate to the aim pursued. As there had been no obligation for the publisher to amend the original article and he still had the opportunity to republish his version of the facts, the Court found that the requirement to publish the reply was proportionate.[21] Hence, the ECtHR, unanimously concluded that the order to print a reply did not amount to a violation of the applicant's freedom of expression.

[13] ibid, para 45.
[14] Turkish Constitution, art 32 and Turkish Press Act No 5187, art 14.
[15] *Eker* (n 2) para 47.
[16] ibid, paras 47, 50.
[17] ibid, paras 45, 46.
[18] ibid, para 48.
[19] ibid, para 43.
[20] *Karácsony and others v Hungary* App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016) para 132.
[21] *Eker* (n 2) para 51.

3. How *Eker*'s findings fit in with previous case law

First, this section considers the significance of the judgment for our understanding of the right of reply's normative foundation under the ECHR (sections 3.1 and 3.2). Second, it examines the Court's findings regarding the right of reply's admissible content, scope and promptness (section 3.3). To date, *Eker* marks only the third time that a newspaper has claimed that an obligation to publish a reply under domestic law violates the ECHR. Additionally, there have been two cases where an individual has alleged a violation of his rights after a newspaper had rejected his demand to publish his reply and the domestic courts had not compelled them to do so.

3.1. The normative foundation for a right of reply under the ECHR prior to *Eker*

In the first of these cases, *Ediciones Tiempo SA v Spain*,[22] a newspaper claimed an unlawful violation of their Convention rights caused by the compulsion to print a reply. The European Commission of Human Rights (the Commission),[23] saw the main aim of the right of reply as protecting 'private life, honour or dignity' against 'certain statements or opinions, disseminated by the mass media'.[24] Significantly, these rights are guaranteed under Article 8.[25] Despite briefly mentioning the remedy's importance in serving the public's right to information and the pluralism of information,[26] the Commission did not determine whether a right of reply is a part of the freedom of expression of an individual.[27] Ultimately, the Commission refuted the suggestion that the judicially enforced insertion of the aggrieved individual's reply was a disproportionate interference with the publication's right to freedom of expression.[28] Particularly, the Commission pointed out that the publishing house was not obliged to modify the content of the impugned article and moreover, it was allowed to republish its version of the facts alongside the aggrieved individual's reply.[29]

[22] *Ediciones Tiempo* (n 3).
[23] The European Commission of Human Rights became obsolete with the restructuring of the ECtHR in 1998.
[24] *Ediciones Tiempo* (n 3) p 253.
[25] Ronan Ó Fathaigh, 'The Recognition of a Right of Reply under the European Convention' (2012) 4(2) JML 322, 325.
[26] *Ediciones Tiempo* (n 3) p 254.
[27] See also John Hayes, 'The Right to Reply: A Conflict of Fundamental Rights' (2004) 37 CJLSC 551, 574.
[28] *Ediciones Tiempo* (n 3) p 253.
[29] ibid.

Remarkably, in the subsequent case of *Melnychuk v Ukraine*,[30] where an individual applied to the Court after a newspaper had rejected his demand to publish his reply to a critical review of a book written by the applicant and the domestic courts had not compelled them to do so, the ECtHR deviated from the previous conclusions made in *Ediciones Tiempo*. Instead of deriving the right of reply from Article 8, the judges characterised it as an aspect of the complainant's freedom of expression.[31] Not even mentioning *Ediciones Tiempo*, the Court highlighted that a remedy that allows an individual to 'submit a response to a newspaper for publication […] falls within the scope of Article 10 of the Convention'.[32] According to *Melnychuk*, the basis for this finding was the need to be able to contest untruthful information and the need to ensure a plurality of opinions in literary and political debate.[33] Ultimately, the Court declared the application inadmissible, primarily because of the content of the reply in question.

The later case of *Kaperzyński v Poland* concerned the application of an editor-in-chief of a local newspaper who had been convicted for failing to publish a reply to an article he had written.[34] The article had highlighted the health risks associated with a poor sewerage system maintained by a municipality and it criticised the Mayor for failing to deal with this.[35] In response to this article, the Mayor requested the publication of a right of reply with the aim of rebutting some of the allegations in the article and adding his view to the story.[36] Despite being obligated to do so under the Polish Press Act, the editor-in-chief neither published the requested reply nor explained the reasons for his refusal in writing to the Mayor. Consequently, the municipality brought a private bill of indictment against the editor for his failure to publish a reply. As a result, the journalist was sentenced to four months' 'restriction of liberty in the form of 20 hours of community service per month',[37] and he was further barred from working as a journalist for two years.

In its judgment, the ECtHR recalled *Melnychuk's* conclusions that the right of reply 'as an important element of freedom of expression, falls within the scope of Article 10'. As

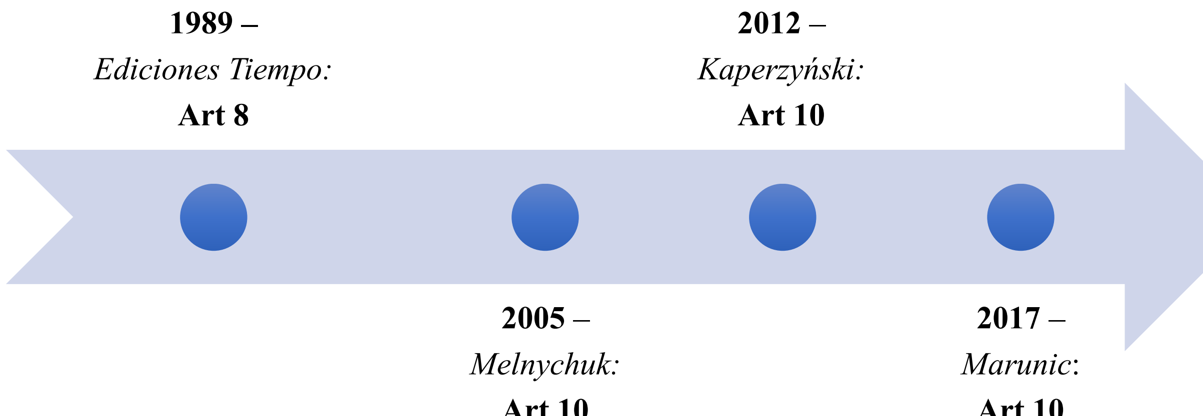
[30] *Melnychuk* (n 3) para 2.
[31] Andras Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54(1) HJLS 73, 76.
[32] *Melnychuk* (n 3) para 2.
[33] ibid.
[34] *Kaperzyński* (n 3).
[35] ibid, para 7.
[36] ibid, paras 5–19.
[37] ibid.

in *Melnychuk*, the Court in *Kaperzyński* failed to refer to *Ediciones Tiempo* and its findings regarding Article 8. Instead, the Court emphasised that the remedy has the purpose of contesting untruthful information and ensuring the plurality of opinions.[38] Although the ECtHR described a right of reply as a 'normal element of the legal framework governing the exercise of the freedom of expression by the print media', the Court decided the case in favour of the applicant. The judges found that the criminal conviction imposed on the journalist had not been 'necessary in a democratic society' and was therefore disproportional to the pursued aim.

In the final case relevant to this section, *Marunic v Croatia*,[39] the ECtHR very briefly touched upon the normative basis of the right of reply being mainly concerned with the issue of whether the dismissal of the applicant over statements she had made in the media had been lawful. By simply reiterating that the remedy 'falls within the scope of Article 10', the Court came to the same conclusions as *Kaperzyński* and *Melnychuk*,[40] again failing to refer to *Ediciones Tiempo.* The following figure provides a brief overview of the key ECtHR judgments on the normative foundation for a right of reply.

[38] *Kaperzyński* (n 3) para 66.
[39] App no 51706/11 (ECtHR, 28 March 2017).
[40] ibid, para 50.

Figure 1: Development of the ECtHR's jurisprudence on the right of reply's normative foundation



Apart from these key decisions for the remedy's normative foundation, there have been a few additional cases where issues relating to the right of reply have been discussed. However, since the right of reply was not the central issue of the application in any of these cases and the Court had not discussed the remedy's normative foundation,[41] they are not of further interest for the purposes of this section. Nevertheless, two decisions from this category made noteworthy remarks regarding whether there is a positive obligation on contracting states to provide for a right of reply: *Winer v UK*,[42] and *Vitrenko and others v Ukraine.*[43] They are separately examined in section 5.

3.2. The normative foundation for a right of reply under the ECHR post *Eker*

The previous section has shown that the case law provides contrasting findings for the right of reply's normative foundation under the European Convention. Since 1989, no ECtHR decision has derived the right of reply from Article 8 and the last three judgments on this issue solely rooted the remedy in Article 10 whilst omitting the findings from previous case law. This has caused uncertainty over whether this approach has been abandoned and whether rooting the right of reply solely in Article 10 should be seen as settled

[41] See *Rusu v Romania* App no 25721/04 (ECtHR, 8 March 2016); *Saliyev v Russia* App no 35016/03 (ECtHR, 21 October 2010).
[42] App no 10871/84 (ECHR, 10 July 1986).
[43] App no 23510/02 (ECtHR, 16 December 2008).

case law. *Eker* makes a significant contribution to our understanding of the right's normative foundation. Instead of placing the remedy within either Article 8 or Article 10, *Eker* convincingly establishes that the protective purpose of the right of reply is (at least) twofold. By holding that the right has its normative foundation in both Article 8 and Article 10, it combines the two approaches from previous case law.[44]

3.2.1. Article 8

According to *Eker*, a right of reply is intended to enable any individual to protect himself from information or opinions, disseminated by means of mass communication, that is likely to infringe one's private life, honour and dignity,[45] as well as reputation.[46] Significantly, these rights are guaranteed under Article 8. Though not expressly noted in the ruling, the right to reputation has been recognised as a part of the right to private life under Article 8 since 2004.[47] Most importantly, this judgment is the first to reiterate the conclusions made in *Ediciones Tiempo*.[48] Hence, these statements suggest that the right of reply invoked by the person who sought to respond to the article published by the newspaper was an exercise of his rights under Article 8.

Beyond the reliance on the conclusions made in *Ediciones Tiempo,* one may suggest a historical argument for why a right of reply (also) derives from Article 8. In a resolution published in 1974, the Committee of Ministers, one of the CoE's administrative bodies,[49] highlighted that they see the aim of the right of reply as being to give a 'remedy against the publication of information […] that constitutes an intrusion in his private life or an attack on his dignity, honour or reputation'.[50] Since these rights are guaranteed under Article 8, it is possible that the ECtHR has simply given effect to the historical will of the

[44] *Eker* referred to *Melnychuk*, *Kaperzyński* and *Ediciones Tiempo*.
[45] *Eker* (n 2) para 47.
[46] ibid, paras 47, 50.
[47] *Radio France v France* App no 53984/00 (ECtHR, 30 March 2004), para 31; see also *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004), para 70; *Pfeifer v Austria* App no 12556/03 (ECtHR, 15 November 2007); David Harris et al., *Law of the European Convention on Human Rights* (OUP 2019) 531 et seq. For the question of why a 'right to reputation' should be considered to fall within Article 8 see Alastair Mullis and Andrew Scott, 'Reframing Libel: Taking (all) Rights Seriously and Where It Leads' (2012) 63(1) NILQ 5, 10.
[48] *Eker* (n 2) para 47.
[49] Simon Palmer, 'The Committee of Minsters' in Stefanie Schmahl et al. (eds), *The Council of Europe: Its Laws and Policies* (OUP 2016) ch 6.
[50] CoE Committee of Ministers Resolution (74)26 on the Right of Reply – Position of the Individual in Relation to the Press (Adopted by the Committee of Ministers on 2 July 1974 at the 233rd meeting of the Ministers' Deputies). Section 3.3 discusses the binding effect of this resolution.

CoE. However, as detailed in section 3.3, the Court in *Eker* deviated from other recommendations made by the Committee of Ministers of the CoE, which one could see as an indication that the ECtHR has not been terribly concerned with the content of this resolution.

Nevertheless, from the point of the 'affected' person, a right of reply offers an extra level of protection for one's right guaranteed under Article 8.[51] A right of reply allows a person 'affected' by a newspaper report to vindicate their Article 8 rights *beyond* a possible right to damages.[52] It does so by creating a forum for the person who has been made subject of a story in a media outlet to express his or her own point of view publicly in the same publication.[53] Koltay argues that since it is 'is widely accepted that the award of damages cannot efficiently restore the harmed reputation' a right of reply 'can offer a somehow more efficient tool to restore reputation'.[54] Similarly, Mullis and Scott argue that 'discursive remedies such as the right of reply' are beneficial for vindicating a person's reputation.[55] Since harm to reputation can be 'debilitating and perpetuating', society has an 'interest in facilitating redress' especially if such harm was caused by the 'circulation of falsehoods'.[56]

Based on the right of reply's purpose to provide protection for a person's reputational interests, scholars have repeatedly argued that the remedy can be employed to establish a 'level playing field' and 'equality of arms' between the 'weaker individual' and the more powerful mass media.[57] This position stems from the assumption than an individual cannot, as a rule, counter the news media with the prospect of the same level of publicity,[58] and thus does not possess any power to make his voice heard in response to an allegation published in the media.[59] The origins of this position can be traced back to the 18th century and have since been adopted by both German scholars and the relevant domestic case

[51] See e.g.: Jan Oster, *Media Freedom as a Fundamental Right* (CUP 2015) 79 et seq.
[52] See e.g.: David Björgvinsson, 'The Right of Reply' in Josep Casadevall et al. (eds), *Freedom of Expression: Essays in Honour of Nicolas Bratza* (WLP 2012) 164; Youm (n 1) 1061, 1064.
[53] See e.g.: Andras Koltay, 'The concept of media freedom today: new media, new editors and the traditional approach of the law' (2015) 7(1) JML 36, 41.
[54] Andras Koltay, 'The Right of Reply – A Comparative Approach' [2007] IAS 203, 205. A similar stance is taken by John Fleming, 'Retraction and reply: Alternative Remedies for Defamation' (1978) 12 BCLR 15, 16.
[55] See e.g.: Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) MLR 87, 107–108.
[56] Alastair Mullis and Andrew Scott, 'Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation' (2009) 14(6) CL 173, 174.
[57] See e.g.: Björgvinsson (n 52) 164; Youm (n 1) 1061; Koltay 2007 (n 54) 204.
[58] See e.g.: Björgvinsson (n 52) 164.
[59] See e.g.: Koltay 2007 (n 54) 204.

law.[60] Following this line of argument, a right of reply could then be employed as a speedy and prompt opportunity to allow the 'weaker individual' to add his own viewpoint to a story.[61] Furthermore, respect for the right to private life also requires that every individual must be able to determine the details of their identity.[62] This extends to various aspects of an individual's 'social identity', including name and image as well as religion, ethnicity and sexual orientation.[63] Thus, a right of reply may be justified by the need to provide a person with the opportunity to determine, or at least influence,[64] how their identity is being discussed in public.[65]

Nevertheless, the Court's finding that the right of reply may be justified by the protection of the affected person's *private* life may also be criticised. Replying to a statement in the press will not usually result in private matters remaining private – it might even cause the opposite effect. As the affected person will necessarily add his or her view to the already existing story published in the media, it becomes possible that even more people will take notice of the original allegation, which is somewhat similar to the 'Streisand Effect'.[66] Achieving similar publicity as the statement that gave rise to the complaint is one of the key elements of the right of reply to establish a level playing field between the individual and the publisher. Thus, the remedy allows a claimant the opportunity to 'set the record straight',[67] but is unlikely to keep information about the affected person out of the public eye.

3.2.2. Article 10

However, drawing upon the rulings of both *Melnychuk* and *Kaperzyński*, the Court went beyond reliance solely on Article 8. Citing both cases, the judges in *Eker* added that the right of reply is needed, not only to allow false information to be challenged, but also to ensure a plurality of information and opinions, particularly in areas of general interest.[68]

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[60] See Chapter 3.
[61] This is further explored in section 4.
[62] William Schabas, *The European Convention on Human Rights – A commentary* (OUP 2017) 376 et seq.
[63] ibid.
[64] This is similar to what is argued by German scholars in relation to the protection of 'personality rights', see Chapter 3.
[65] For further detail on the 'psychological impact of perceived reputational harm' see Mullis and Scott, Reframing Libel (n 47) 11.
[66] For further detail see e.g.: Rebecca Moosavian, 'Jigsaws and Curiosities: The Unintended Consequences of Misuse of Private Information Injunctions' (2016) 21(4) CL 104.
[67] Andrew Scott, '"Ceci n'est pas une pipe": The Autopoietic Inanity of the Single Meaning Rule' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2013) 53.
[68] *Eker* (n 2) para 43.

In other words, the Court highlighted that enabling a person who has been made the subject of a story in a newspaper to publish their own view in the same forum not only serves their own personal interest but also 'the greater good'. This is because it allows the public to get to know both sides of a story and therefore enhances both public discourse and reliable media coverage. Consequently, the ECtHR emphasised that a right of reply is part of a person's right to freedom of expression, which is why the publication of the journalists' association's reply in Mr Eker's newspaper also concerned the exercise of their rights under Article 10.[69]

The Court's view that the exercise of a right of reply acts as a safeguard for the 'much prized'[70] pluralism of information and opinions is a logical conclusion as it is consistent with previous case law,[71] and acknowledges that the remedy can go further than merely the retraction of incorrect facts. Similar to the ECtHR's findings regarding Article 8, one could claim that by placing the right of reply within Article 10, the Court may have given effect to the historical will of the CoE. In addition to the document mentioned earlier, the Committee of Ministers of the CoE published another recommendation on the right of reply in 2004.[72] There, the CoE linked the remedy to the public's interest in receiving 'information from different sources, thereby guaranteeing that they receive complete information'.[73]

From a philosophical point of view, the existence of a right of reply under Article 10 could be justified by relying on the argument underlining the freedom of speech theory: 'discovering of truth'. As detailed by Barendt, this theory is linked to the 'most durable argument for a free speech principle', which has been based on the 'importance of open discussion to the discovery of truth'.[74] Although there are a number of versions of the arguments relating to this theory,[75] the basic thesis is that 'truth' is most likely to emerge from free and uninhibited discussion and debate.[76] As further emphasised by Barendt,

[69] ibid, paras 43, 45, 46.
[70] Tarlach McGonagle, *Minority rights, freedom of expression and of the media: dynamics and dilemmas* (Intersentia 2011) 541.
[71] *Melnychuk* (n 3) para 2 and *Kaperzyński* (n 3) para 66.
[72] Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).
[73] ibid.
[74] Eric Barendt, *Freedom of Speech* (OUP 2005) 7.
[75] For an overview see ibid, 7–12.
[76] Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 14. However, some scholars have questioned whether free discussion necessarily leads to the acceptance of truth and argued that this this theory rests 'on a philosophically naive realist view about facts and values'. See e.g.: Larry Alexander, *Is There a Right to Freedom of Expression?* (CUP 2005) 128 et seq.

‘the arguments […] from truth attach particular weight to the interests of recipients; ideas, as well as information, should be freely communicable in order to enable recipients to discover the truth’.[77] Thus, the existence of a right of reply could be justified with the argument that rules of this kind promote the access of readers to information and views, which the press should provide as the ‘eyes and ears’ of the public.[78] This rationale is connected to the point that without rules and practices fulfilling the function of a right of reply, there might be a danger that potentially false statements are left as the only source of information for the public.[79] Once the individual referred to in a press report has invoked his right of reply and thus set out his own view of a story, the reader could then decide for himself which side they believed to be true. As *Eker* and the other relevant decisions of the ECtHR justified the existence of a right of reply under Article 10 with the need to ensure ‘a plurality of information and opinions’, *and* to ‘allow the challenge of false information’,[80] it seems reasonable to suggest that the Court’s conclusions can be linked to this theory. Nevertheless, one may argue that the right of reply’s ability to enhance the pluralism of information could be very limited as it is a reactive mechanism, it does not set its own terms; it responds to terms set by others.[81] However, this thesis argues that the suitability of a right of reply to fulfil its normative purpose depends how its concept has been implemented in each contracting state.[82]

In order to justify the existence of a right of reply, one may further rely on the arguments relating to the freedom of speech justification theory: ‘participation in a democracy’. Barendt describes this theory as ‘the most fashionable free speech theory in modern Western democracies’, and concludes that ‘it has been the most influential theory in the development of 20th century free speech law’.[83] At the core of this theory lies the argument that citizens cannot participate fully in a democracy unless they have a reasonable understanding of political issues, and therefore, open debate on such matters is essential.[84] Fenwick and Phillipson further note that this justification for freedom of speech is particularly marked in the Strasbourg jurisprudence, with the case of *Handyside v UK*, where the

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[77] Barendt 2005 (n 74) 25.
[78] ibid, 418; Jerome Barron, ‘Access to the Press: A New First Amendment Right’ [1967] HLR 1641.
[79] See Koltay 2007 (n 54) 205.
[80] *Eker* (n 2) para 43 citing *Melnychuk* (n 3) para 2.
[81] McGonagle (n 70) 545.
[82] Similarly noted by Thomas Scanlon, ‘Content Regulation Considered’ in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP 1990) 350.
[83] Barendt 2005 (n 74) 18, 20.
[84] Fenwick and Phillipson (n 76) 16.

Court *inter alia* held that 'freedom of expression constitutes one of the essential foundations of […] a [democratic] society',[85] as its most telling example.[86] Crucially, promoting the free flow of information is particularly relevant for the arguments coming from this justification theory, as it serves the audience's interest in having 'enough material' available before it to make informed choices and to participate fully in the democratic process.[87] Without knowledge about both sides of an argument, the public's knowledge about a particular scenario may be distorted or incomplete.[88]Against this background, a right of reply could be seen as a vehicle to make all sides of a story available to the public and thus as suited to enhance the public discourse.

However, deriving the remedy from Article 10 leads to the situation that the right of reply constitutes both the exercise of and interference with the right to freedom of expression at the same time. By invoking a right of reply (partially) based in Article 10 with the aim of replying to an allegation contained in a press article, it would simultaneously interfere with the concerned newspaper's rights, which are also guaranteed under Article 10. This is because although some member states of the CoE have a codified constitution that covers the press separately from the individual's right to freedom of expression,[89] but this is not the case under the ECHR. In fact, the freedom of the press is not explicitly guaranteed by the ECHR. Instead, those rights that are understood as being part of the freedom of the press have been recognised as part of a newspaper's right to freedom of expression under Article 10,[90] which is why those two terms are often presented as if they were synonymous.[91]

The most relevant aspect of press freedom under Article 10 for the purposes of this chapter is the notion of 'editorial freedom',[92] which has also been referred to by *Eker*.[93] Editorial freedom is understood to be part of a newspaper's rights under Article 10,[94] and guarantees that 'as a general principle, newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments

[85] *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) para 48.
[86] Fenwick and Phillipson (n 76) 38.
[87] Barendt 2005 (n 74) 25.
[88] See Koltay (n 54) 205.
[89] Like e.g. in Germany, see Chapter 3.
[90] See e.g.: *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979).
[91] Schabas (n 62) 457.
[92] Often alternatively referred to as 'editorial discretion' or 'editorial independence'.
[93] *Eker* (n 2) para 45.
[94] Barendt 2005 (n 74) 420.

and letters submitted by private individuals'.[95] A right of reply interferes with this freedom as under certain circumstances it might require editors to publish material they would prefer not to. However, in both *Eker* and *Melnychuk*, the ECtHR has clarified that the right to editorial freedom is not absolute and thus the existence of a right of reply in domestic law can be justified. Thus, even though *Eker* stressed that editorial freedom could only be limited in 'exceptional circumstances',[96] the ECtHR allows an exception to this supposed rule for the right of reply.

Given the structure and requirements of Article 10(2), it is only logical that editorial freedom is not absolute. The right of reply's interference with editorial freedom may be justified because there is no need for the media outlet to admit the falsity or inaccuracy of the allegations that gave rise to the right of reply. Instead, they are free to let their readers know that under certain circumstances they are obligated to publish a reply even though the veracity or falsity of the statement in reply or the original statement has not been established. In other words, rather than admitting a mistake, they are simply allowing the person who has been made the subject of an article in the media to add their own view to the story. This is one crucial aspect of distinguishing a right of reply from a simple correction or apology,[97] and, following the ECtHR's line of argument, it lowers the impact on a newspaper's editorial freedom. Furthermore, the right of reply under the ECtHR itself is not absolute. Instead, if certain requirements are not fulfilled, a newspaper can rightfully refuse the publication of a reply.[98] This becomes apparent when investigating the remedy's scope, admissible content and length.[99]

Nevertheless, there are certain situations in which the remedy might amount to a disproportional interference with a newspaper's freedom of expression and risk a 'chilling effect' on press freedom. This is explored in section 3.3.2.

3.2.3. Intermediate conclusion

By holding that the right has its normative foundation in both Article 8 and Article 10, *Eker* reinterprets the normative foundation of the remedy. This 'two-pillar theory' suggests that a right of reply requires more than merely the retraction of incorrect facts as it

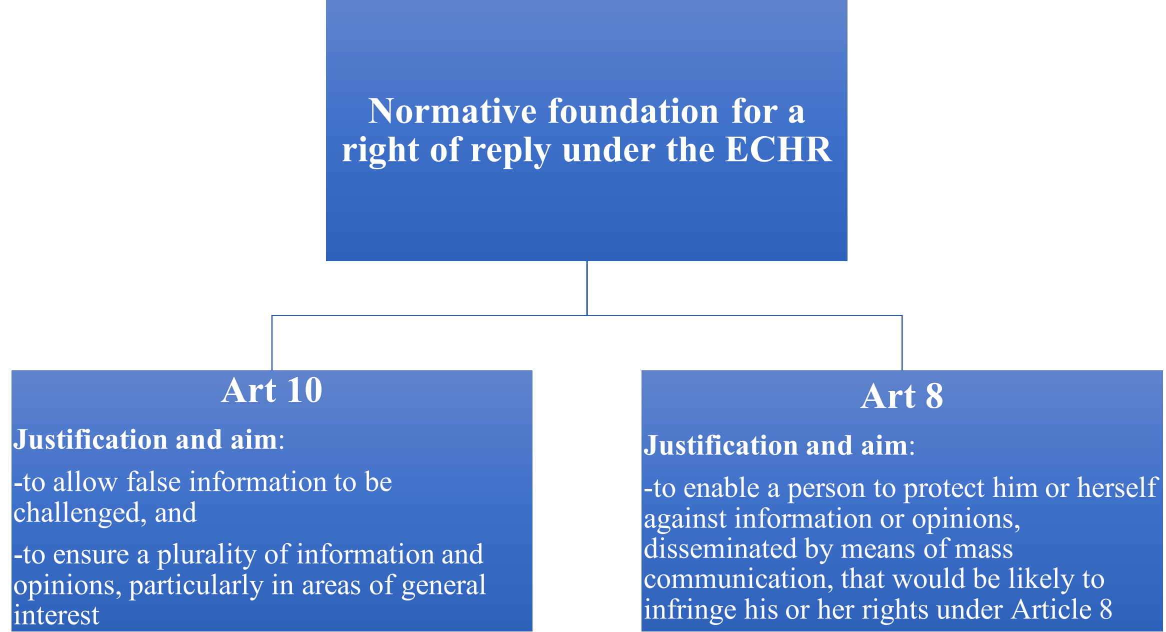
[95] See e.g.: *Eker* (n 2) para 45 and *Melnychuk* (n 3) para 2; see also *Saliyev* (n 41) para 52.
[96] ibid.
[97] See e.g.: Youm (n 1) 1017.
[98] See *Melnychuk* (n 3) para 2.
[99] See section 3.3.

offers an opportunity to vindicate reputational rights. In other words, instead of being limited to pointing out erroneous information published earlier, a right of reply allows the affected person to defend themselves against public criticism in the same forum as the original criticism,[100] thus ensuring 'equality of arms' between the press and the individual. Further, it acknowledges that the remedy enhances public discourse in general, whilst ensuring plural, reliable media coverage. Hence, after almost 20 years of uncertainty over whether the right of reply also derives from Article 8 or if rooting the remedy solely in Article 10 should be seen as settled case law, the Court introduced a new interpretation, which clarifies that both options are viable. Notably, Mullis and Scott took a stance similar to the ECtHR, as they argued that 'mandated discursive remedies' such as a right of reply could serve 'to vindicate reputation, to promote freedom of expression, and to secure the provision to the general public of the fullest possible information […]'.[101]

These findings relating to the right of reply's normative foundation are likely to have repercussions for future applications concerning the right of reply and are crucial for the research carried out in the remainder of this chapter. Particularly, they are relevant for determining the remedy's characteristics such as its scope and admissible content, which are detailed in the subsequent section. Additionally, the right of reply's normative foundation impacts on the question of who should be able to exercise the remedy. As detailed in section 4, contrasting answers may be given to this question due to the nuances between invoking a right of reply based on Article 8 or Article 10. One may further conclude from the judgment that individuals can claim protection under Article 8 through a right of reply in relation to allegations, regardless of the truth or falsity of the statement complained about.[102] This strengthens the position of the affected person against the editorial freedom of a publisher to determine what (or what not) to publish. Hence, it can be seen as a reinforcement of the argument that the remedy is crucial to guarantee 'equality of arms' and a 'right to be heard' for a person who is in a weaker position than the media.

[100] Björgvinsson (n 52) 163.
[101] Mullis and Scott 2014 (n 55) 107–108.
[102] See section 3.3.3.

Figure 2: The right of reply's normative foundation post *Eker*



3.3. *Eker's* findings regarding the scope, admissible content and promptness of the right of reply

This section outlines why *Eker's* findings on the right of reply's scope (section 3.3.1), admissible content (section 3.3.2) and its promptness (section 3.3.3) are significant, as well as how they fit in with previous case law. This includes an examination of whether and to what extent the case law deviated from the recommendations made by the CoE.

3.3.1. The right of reply's scope

In *Eker*, the Court came to significant conclusions regarding the question of whether a right of reply should only be available to counter factual assertions or whether it should also be extended to opinions. Reiterating *Ediciones Tiempo*,[103] the ECtHR emphasised that the remedy is not only intended to enable individuals to protect themselves against factual statements, but also against 'opinions disseminated by means of mass communication'.[104] The Court justified the extension to opinions by referring to the need to protect an individual's rights guaranteed under Article 8.[105]

[103] *Ediciones Tiempo* (n 3) p 247.
[104] *Eker* (n 2) para 47.
[105] ibid.

Ultimately, this aspect of the ruling is remarkable for several reasons. First, it provides another example of why the Court's decision to also derive the right of reply from Article 8 is significant. Second, *Eker's* conclusions go beyond what was said in *Melnychuk,* where the judges noted that the right of reply does not provide 'an unfettered right of access to the media in order to put forward opinions'.[106] However, this is only logical given that the Court in *Melnychuk* saw the normative foundation of the remedy to be solely in Article 10. Contrastingly, the judges in *Eker* also derived the right of reply from Article 8, which allowed them to base their thoughts regarding the scope of the remedy on said Convention right. This is because rights guaranteed under Article 8 can be harmed by both factual assertions and opinions.[107] Third, this finding is remarkable given that although in some ECHR jurisdictions a right of reply against an opinion has been around for a while,[108] other contracting states have expressly limited the scope of this remedy to factual assertions.[109]

Fourth, these findings contradict the 'Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment' issued by the CoE Committee of Ministers.[110] There, the CoE recommended that the right of reply be limited to 'any information presenting inaccurate facts' and to leave 'the dissemination of opinions and ideas [...] outside the scope' of a right of reply.[111] However, recommendations issued by the CoE are *not* binding for either member states or the ECtHR.[112] Instead, they are mere soft law mechanisms, whose purpose is to set the same (minimum) standard across all contracting parties.[113] The same applies to the 'Resolution (74)26 on the Right of Reply' ('Res(74)26'), which was also issued by the CoE Committee of Ministers in 1974.[114]

Nevertheless, despite the non-binding nature of these recommendations and resolution,

[106] *Melnychuk* (n 3) para 2.
[107] See Schabas (n 62) 385.
[108] See e.g.: France, 1881 Press Act, art 13.
[109] See Chapter 3.
[110] See n 72.
[111] Rec(2004)16 (n 72).
[112] Agnė Andrijauskaitė, 'Creating Good Administration by Persuasion: A Case Study of the Recommendations of the Committee of Ministers of the Council of Europe' (2017) 15(3–4) IPAR 41, 43.
[113] See Christoph Grabenwarter et al., *Europäische Menschenrechtskonvention* (C.H. Beck 2016) 431. The constitutional foundations underpinning the CoE are detailed in the 'Statute of the Council of Europe'. The legislation enshrines the CoE's instruments, which according to Article 15(a) includes the power of the Committee of Ministers to 'make recommendations to the governments of members'.
[114] See n 50. Recommendations issued by the CoE have been formally adopted as 'Resolutions' until 1979 and thereafter as 'Recommendations', see Steven Greer et al., 'The Council of Europe' in Steven Greer et al. (eds), *Human Rights in the Council of Europe and the European Union* (CUP 2018) 61.

they are not entirely irrelevant to member states and the Court. Article 15(b) of the Statute of the CoE empowers the Committee of Ministers to request that the governments of member states inform it of actions taken by them with regard to such recommendations.[115] Additionally, the ECtHR has clarified that it can, and under circumstances will, take these recommendations into consideration when interpreting the freedoms guaranteed under the ECHR.[116] For example, the ECtHR in *Melnychuk* was the first of the relevant decisions on the right of reply to recite some provisions from both Res(74)26 and Rec(2004)16 in its citation of 'relevant international and domestic law'.[117] This allows the assumption that the ECtHR at least considered the recommendations issued by the CoE during its decision-making process. This was recalled by the Court in *Eker*, who simply referred to *Melnychuk* when outlining 'the relevant European law concerning the right of reply'.[118] However, as demonstrated in this section, this did not prevent *Eker* from deviating from the recommendations provided by the CoE.

From a normative point of view, one may argue that extending the right of reply's ambit to opinions is necessary to afford a comprehensive protection of an individual's rights guaranteed under Article 8 and thus the 'equality of arms' against press reporting. However, the downsides of such a broad scope still prevail. This thesis argues that extending the right of reply to value judgements may support the arguments of those who claim that the remedy is likely to lead to a 'flooding' of the press with replies. This is linked to the fear that broadening the scope could result not only in an unjustified interference with a newspaper's right to freedom of expression, often also referred as the 'chilling effect' (explored in the subsequent section) but also in the right of reply becoming 'a dull and overused' remedy.[119] Most importantly, restricting the remedy's scope, and thus keeping it in proportionate bounds, is necessary to safeguard the media's interest in publishing comments and opinions sanction free. Ultimately, this serves the preservation of the public discourse in the media. Following this line of argument, allowing a right of reply against an expression of opinion runs the risk of obstructing the press' task to scrutinise and criticise public events.[120] Additionally, it would support the position of those who

[115] See Andrijauskaitė (n 112) 43.
[116] See e.g.: *MHB v Hungary* App no 18030/11 (ECtHR, 8 November 2016).
[117] *Melnychuk* (n 3) section B.
[118] *Eker* (n 2) para 16.
[119] Walter Seitz, *Der Gegendarstellungsanspruch* (C.H. Beck 2017) 153.
[120] See Chapter 3 for further discussion.

argue that a right of reply creates a cost burden for the publisher and possibly a loss of profits.[121]

3.3.2. The content of the reply

Closely related to the question of whether a right of reply should only be available to counter factual assertions or whether it should also extend to opinions is the issue of what may be contained in the reply itself. Again, *Eker* comes to significant conclusions as it goes beyond previous case law and the recommendations made by the CoE.

In *Eker*, the ECtHR had to decide whether the reply was an appropriate answer to the newspaper's statements, despite including possibly disparaging remarks about the applicant.[122] The reply at issue in *Eker* included several comments that went beyond merely rebutting factual assertions and instead also noted that, relating to the applicant who wrote the piece that gave rise to the reply, 'so called journalists who write according to the wishes and desires of their boss and praise certain categories of people' are known as 'maintained or dependent journalists'.[123] Furthermore, the reply claimed that the editor had 'not fulfilled his duties' as a member of the journalist association that filed for the right of reply, including the 'payment of his contributions'[124] The Court in *Eker* correctly noted that these statements amounted to 'criticism of the applicant' as well as 'implicit insinuations as to his professional integrity'.[125] Remarkably, the judges did not object to these statements, even though the journalists' association did not have to prove the veracity of claims in the reply.[126]

A similar issue, but with a different outcome, had been decided once before. In *Melnychuk*, the Court found the application inadmissible because the reply went beyond stating the point of view of the affected person and contained criticism of the publisher.[127] In fact, *Melnychuk* noted that the newspaper had been entitled to refuse to publish a reply

[121] See Youm (n 1) 1017, 1048. Chapter 5 explores the validity of this argument.
[122] *Eker* (n 2) paras 48, 49.
[123] ibid, para 13.
[124] ibid.
[125] *Eker* (n 2) para 48.
[126] See section 3.3.3.
[127] *Melnychuk* (n 3) para 2: The reply in question called the publisher of the newspaper a 'subhuman' and a 'member' (член). Further, it gave a confusing account of the publisher's political and business activities.

because the reply 'had gone beyond simply replying to the criticism which had been made' by including 'obscene and abusive remarks about the critic'.[128]

The arguments brought forward in *Melnychuk* correspond with the recommendations issued by the CoE. Rec(2004)16 clarifies that a right of reply may be refused 'if the reply is not limited to a correction of the facts challenged'.[129] The 'explanatory memorandum' to this recommendation further details that a newspaper may rightfully refuse to publish a reply 'if it contains statements or elements which go beyond responding to the allegedly inaccurate information' or 'contains abusive language or untrue statements'.[130] Similarly, Res(74)26 stresses that although 'it is desirable to provide the individual with adequate means of protection against the publication of information containing inaccurate facts about him', the publication of a reply may be refused 'if the reply is not limited to a correction of the facts challenged'.[131]

Despite this guidance both from previous case law and the CoE, *Eker* deviates from this and is thus the first ECtHR judgment to hold a reply containing criticism against the publisher admissible. Hence, the ruling opens the door for future replies to do the same. The Court argued that the tone of the reply in the present case was 'substantially similar to the original contribution'.[132] Therefore, it seemed reasonable to allow the reply. Again, this finding reinforces the argument of those who claim that the right of reply is crucial to guarantee 'equality of arms' and a 'right to be heard' for a person who is in a weaker position than the media. The ECtHR further justified its decision by stressing that the right of reply did not obligate the newspaper to amend the original article, or prohibit them from republishing their version of the facts,[133] which is why the publication of the reply did not amount to an unjustified limitation of the newspaper's freedom of expression. Hence, rather than admitting a mistake, a newspaper is simply allowing the person who has been made the subject of an article in the media to add their own view to the story, which is a crucial aspect for distinguishing a right of reply from a simple correction or apology.[134] Nevertheless, this approach is clearly in favour of those seeking to publish

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[128] ibid.

[129] Rec(2004)16 (n 72). The same applies 'if the length of the reply exceeds what is necessary to correct the contested information'.

[130] CoE Ministers' Deputies, 'Explanatory Memorandum to the draft Recommendation on the right of reply in the new media environment. CM(2004)206 addendum', para 23 (*CoE*, 17 November 2004) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db982>.

[131] Res(74)26 (n 50).

[132] *Eker* (n 2) para 50.

[133] ibid, para 51.

[134] See section 3.3.2.

a right of reply, as it gives them more power over what to include in their response.

However, the judges failed to set out clear criteria on where to draw a line, as they did not specify what exactly renders a criticism admissible other than saying that it must be 'substantially similar to the original contribution'. This raises controversial follow-up questions, making it even more complicated to balance the rights of the individual and the publisher. For example, can a reply include an inaccurate statement of facts if the original statement did so too? Would the ECtHR have held the reply admissible if the remarks had gone beyond Mr *Eker's* professional integrity and concerned his personal life? By failing to address these questions, the Court missed the opportunity to establish clear guidelines for the affected person, the publisher and the domestic courts.

From a normative point of view, this chapter argues that allowing criticism in a reply goes beyond what is necessary to establish 'equality of arms' and thus amounts to an unjustified limitation of a newspaper's right to freedom of expression. Therefore, the Court should have decided this point differently. Most importantly, the decision did not pay enough attention to the previous case law regarding a publisher's discretionary 'editorial power' to decide whether to publish articles, comments or letters from individuals. In *Melnychuk*, the Court stressed that because of the importance of a newspaper's freedom of expression, interference with their editorial discretion could only be proportional in 'exceptional circumstances',[135] which was why the newspaper was allowed to refuse the publication of a reply containing criticism. Although the Court in *Eker* referred to the principles established in *Melnychuk* several times,[136] it did not explore why it felt that the current case justified going beyond what had been said in *Melnychuk.* Since the right of reply's normative purpose (to protect personality rights and enhance public discourse) may also be achieved without also criticising the publisher of the original statement, it is more persuasive to reject the conclusions put forward in *Eker* and thus keep the remedy's impact on editorial freedom within proportionate bounds.

Furthermore, the ruling in *Eker* might also support the argument that a right of reply has the potential to have a 'chilling effect' on a newspaper's freedom of expression. There is no universally recognised definition of the right of reply's potential 'chilling effect' in either literature or case law. Instead, the term is often described as the fear that journalists

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[135] *Melnychuk* (n 3) para 2.
[136] See *Eker* (n 2) para 45.

may be less likely to publish or pursue certain stories if they have been threatened with the publication of a right of reply or already had to publish a counter statement in response to a story against their will.[137] Closely connected to this argument is the claim that journalists are less likely to publish stories about a specific individual or an organisation if they are known for trying to enforce the publication of a right of reply. Those fears are then often summarised as the right of reply's 'chilling effect' of the press, enticing editors to avoid controversy and possible penalties, simply by failing to report or comment on matters of public concern,[138] thereby 'dampen[ing] the vigor and limit[ing] the variety of public debate.'[139]

Some scholars have criticised the persuasiveness of this argument, noting that a right of reply is unlikely to limit the public debate, 'since it is the refusal of a right to publish the opposite side of a given controversy which limits the diversity of viewpoints'.[140] Nevertheless, this potential 'chilling effect' on editorial freedom, along with the danger that this could lead to a 'paralysation' as well as 'flooding' of the press, has historically formed one of the main arguments against the implementation of a statutory right of reply in England & Wales.[141] If one would follow the arguments put forward in *Eker* and therefore broaden the scope to expressions of opinions, as well as allowing a reply to contain criticism of the newspaper responsible for the original statement, this would only increase those fears.

The same applies to the claim that a right of a reply creates a burden on the publisher in terms of cost and time, which allegedly also results in a 'chilling effect'. Famously, the US Supreme Court in *Miami Herald v Tornillo* combined this argument with the fear of a flooding of the press with replies and noted 'that, as an economic reality, a newspaper [cannot] proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the reader should have available'.[142] However, besides the justifications for the existence of a right of reply discussed

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[137] For an overview see e.g.: Koltay 2007 (n 54) 211.
[138] Hayes (n 27) 558.
[139] *Miami Herald Publishing Co v Tornillo* 418 US 241, 257 (1974); see also *NY Times Co v Sullivan* 376 US 254, 279 (1964).
[140] Wojciech Sadurski, *Freedom of Speech and its Limits* (Springer 1999) 82; see also Koltay 2007 (n 54) 206; Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld et al. (eds), The Oxford Handbook of Comparative Constitutional Law (OUP 2012) 907.
[141] See Chapter 4.
[142] *Miami Herald* (n 139) para 257.

above, publishing a reply could actually be of economic advantage to the publisher.[143] Not only might sales for the issue containing the reply increase (especially if the person replying was a public figure), but the reply might also replace or mitigate damages and this mitigation might exceed the cost of printing the reply (e.g., direct printing costs, as well as foregone revenue if such space had otherwise been used for advertising).[144]

Ultimately, the impact of a right of reply (or a functional equivalent) on the daily work of newspapers and journalists depends on how it has been implemented in a legal system. Further detail on this issue is provided in Chapters 3, 4 and 5.

3.3.3. Promptness and procedure

Another noteworthy finding in *Eker* was the unanimous decision that the lack of a hearing in the domestic courts did not cause an unfair trial. Significantly, this was the first time the ECtHR had reached this conclusion regarding the right of reply. Despite being raised in *Melnychuk*,[145] the Court did not comment on whether it agreed with the claim that the domestic proceedings regarding the right of reply interfered with the applicant's right to a fair trial. As mentioned above, the Court in *Eker* stressed that right of reply proceedings in general do not require an oral hearing.

Perhaps even more importantly, the Court highlighted that swift proceedings are crucial for the right of reply's effectiveness, which underlines the immediate and prompt nature of this remedy. The judges convincingly acknowledged that right of reply procedures, in general, are not concerned with the veracity of allegations. This was supported by the argument that those procedures usually take place 'independently of any subsequent defamation proceedings in which the veracity of any claims may be assessed in strict compliance with the adversarial principle'.[146] This is inevitable, as examining the truth or falsity of the statement complained about would require an evaluation of the evidence provided by the parties and more time. Instead, as highlighted by the Court, right of reply

143 See also Stephen Gardbaum, 'A Reply to the Right of Reply' (2008) 76(4) GWLR 1065, 1068, who argues that due to the lack of empirical insight the existence of the right of reply's chilling effect is difficult to prove; see Youm (n 1) 1057 et seq., who argues that a right of reply may actually have a *positive* impact on the press by invigorating coverage of political issues.
144 Hayes (n 27) 563.
145 *Melnychuk* (n 3) para 1: The complaint under art 6 was held manifestly ill-founded.
146 *Eker* (n 2) para 28.

proceedings usually aim, at this stage, to 'strike a balance between the rights of the affected person and the publisher'.[147] Similarly, Mullis and Scott note that 'where the truth is contested, a right of reply can assuage both parties' sense of righteousness'.[148] Again, this supports the rationale that the remedy aims to guarantee 'equality of arms' between an individual and a newspaper.

Eker's findings are consistent with previous case law and the recommendations issued by the CoE. Although not expressly mentioned by the Court, these arguments pick up on the ruling in *Ediciones Tiempo*, where the Commission held that the veracity of the reply could not be checked in 'any great detail'.[149] This was based on the argument that in order 'to be effective', a reply 'must be distributed immediately'.[150] Likewise, both the resolution and recommendation by the CoE emphasise the importance of promptness for the right of reply's efficiency. Under a heading termed 'Promptness', Rec(2004)16 highlights that the request for a reply 'should be addressed to the medium concerned within a reasonably short time from the publication of the contested information' and the reply itself should be published without 'undue delay'. However, not having to establish the veracity of one's statement in reply might run the risk of a newspaper having to print an inaccurate reply against their will. Similarly, if there is no need for a person to establish the falsity or inaccuracy of the allegations they are seeking to reply to, this may set the bar too low for what should be seen as a justified limitation with editorial freedom.

Yet, this chapter argues that the Court has struck the right balance between those who seek to publish a reply and the respective media outlet that issued the original statement. In today's fast-moving media landscape, lengthy proceedings run the risk of the challenged statement being long forgotten by the time a related trial is competed. As noted above, the Court stressed that news is a perishable commodity and even a short delay in its publication might well deprive it of all its value and interest. Therefore, only the immediate realisation of 'equality of arms' can effectively fulfil this right's normative purpose. Further, as noted in section 3.3.2, newspapers remain free to republish their version of the story as they do not have to admit the falsity or inaccuracy of the allegations that gave rise to the right of reply.

[147] ibid, para 32.
[148] Mullis and Scott 2014 (n 55) 108.
[149] *Ediciones Tiempo* (n 3) p 254.
[150] ibid.

However, even if the veracity of the original statement or that in reply cannot be checked in 'any great detail', this does not preclude the possibility of requiring a claimant to provide *prima facie* evidence for the veracity or falsity of the statements involved, or introducing any similar mechanism that aims to avoid an abuse of the remedy *without* impacting its promptness or speediness. This is because neither the case law nor the recommendations issued by the CoE go beyond laying out the basic principle that the remedy's speediness must be guaranteed. In fact, this chapter argues that some sort of safeguard against an abuse of the right of reply is needed to uphold its normative purpose. As noted above, one of the main aims of this remedy under the ECHR is to challenge untruthful information as without a right of reply, there might be a danger that potentially false statements are left as the only source of information for the public. However, if one would allow the right of reply to be abused by claimants who seek to spread inaccurate statements, this would contradict the right of reply's normative purpose. Scholars have highlighted that there 'can only very rarely be any public interest in the receipt of false information'.[151] Hence, this chapter also argues that if no such safeguards exist, this would lead to an unjustified limitation of press freedom. Chapters 3 and 4 assess if and how this issue has been addressed by the countries chosen for comparison.

4. Who should be able to exercise a right of reply?

This section explores who should be able to exercise a right of reply under the ECHR, especially whether it should be extended to include legal entities and public bodies. It assesses to what extent they may be granted standing and 'victim status' as required under Article 34 as part of the admissibility process (sections 4.1 – 4.3). Subsequently, this section examines whether a right of reply should also be available to those who are not referred to in a statement but nevertheless wish to contribute to a debate (section 4.4). Given that the judges in *Eker* found the remedy's normative foundation to rest both in Article 8 and Article 10, different answers may be given to these questions.

4.1. Background: admissibility under Article 34

Article 34 is part of the admissibility process where it is determined whether an applicant should be granted standing and 'victim status'. In order to avail of Article 34, two conditions must be met: (i) the applicant must be a 'person, non-governmental organisation or

[151] Mullis and Scott 2009 (n 56) 174.

group of individuals', and (ii) must 'make out a case that he or she is the victim of a violation of the convention'.[152]

4.2. Step 1: 'Person, non-governmental organisation or group of individuals'

While 'non-governmental organisation' has been interpreted broadly by the ECtHR, governmental bodies or public corporations under the strict institutional and operational control of a State are *not* entitled to bring an application under Article 34.[153] The Court has emphasised that 'the idea behind this principle is to prevent the contracting party acting as both applicant and a respondent party before the court'.[154] This applies not only to the central organs of the State, but also to decentralised authorities that exercise 'public functions', *regardless* of their autonomy *vis-à-vis* the central organs.[155] Thus, governmental bodies like local and regional authorities,[156] a municipality,[157] or part of a municipality that participates in the exercise of public authority,[158] are not entitled to make an application under Article 34. Further, the Court has refused to allow this rule to be circumvented by allowing public officials to bring the application in their personal capacities; such applications would be incompatible with *ratione personae* if the right invoked was in fact attributable to the public body and not to the officials.[159]

Contrastingly, commercial corporations *without* public service mandates, i.e., those that do not run a public service under governmental control, fall within the scope of non-governmental organisations under Article 34,[160] (even if they are wholly owned by the state).[161] In order to determine whether any given legal person falls within that category in practice, the Court takes account of its legal status and, where appropriate, the rights that status gives it, the nature and context of the activity it carries out and the degree of its operational and institutional independence from political authorities.[162]

Despite this clear stance, the ECtHR's right of reply jurisprudence seems to have deviated

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[152] ECHR, art 34.
[153] Schabas (n 62) 737.
[154] ibid.
[155] CoE, 'Practical Guide on Admissibility Criteria' (*CoE,* 2018), p 10 <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf>.
[156] *Radio France* (n 47) para 26.
[157] *AdM v Spain* App no 55346/00 (ECtHR, 1 February 2001).
[158] *MSA v France* App no 45129/98 (ECtHR, 23 November 1999).
[159] Harris et al. (n 47) 84; CoE Admissibility (n 155) 10.
[160] Schabas (n 62) 737.
[161] See e.g.: *ÖR v Austria* App no 35841/02 (ECtHR, 7 December 2006) para 53.
[162] *Radio France* (n 47) para 26.

from the principle of excluding 'governmental bodies' from the scope of the ECHR, considering the ruling in *Kaperzyński.* As noted in section 3.1, *Kaperzyński* concerned the application of an editor-in-chief of a local newspaper who had been convicted by a domestic court after a municipality had brought a private bill of indictment against him for failing to publish their reply to an article he had written. Although the judges decided in favour of the applicant and found that the criminal conviction imposed on the journalist was disproportional to the pursued aim, the Court did not expressly object that it was a public authority (the municipality) that had initiated the domestic proceedings. However, whilst David Björgvinsson, the presiding judge of the chamber in this case, wrote a concurring opinion, he specifically had reservations regarding this issue.

There, he agreed that there had been a violation of the editor's freedom of expression based on the proportionality of the sanctions, but stressed that additionally he would have expressly held that the municipality, being a public authority, could not invoke a right of reply. He concluded that because the prosecution had been initiated under a private bill of indictment by the municipality, this was further grounds for finding a violation of the editor's right to freedom of expression under Article 10. Björgvinsson feared that the failure to do so could be understood as implying that the 'municipality's right of reply […] has some basis in Article 10', a point of view that he emphasised he disagreed with as 'clearly a public authority […] cannot invoke rights under Article 10 of the Convention to impose on private parties a duty to publish a reply to criticism of its activities'.[163] In other words, he argued that including public authorities within the right of reply's personal scope should not be seen as desirable.

On balance, this chapter agrees with Björgvinsson. One might claim that enabling a public authority to invoke a right of reply may serve 'the greater good' as it allows the public to get to know both sides of a story and, therefore enhances both public discourse as well as reliable and comprehensive media coverage.[164] However, this position fails to acknowledge the right of reply's impact on a media outlet's editorial freedom. Throughout this chapter, the right of reply's interference with media freedom has been predominantly justified with the remedy's purpose of protecting personality rights as well as guaranteeing 'equality of arms'. Not only may a public body not rely on the former, but also

[163] *Kaperzyński* (n 3) Concurring Opinion.
[164] As often argued by German scholars, see Chapter 3.

they are in a more powerful position than an 'ordinary' individual when it comes to rebutting a statement made in the press. Particularly, they are likely to have more funds and manpower to issue a press statement in reply. Furthermore, a public body may be more likely to enforce a right of reply through courts given that they do not have to fear the costs of litigation in the same way as an 'ordinary' individual or the newspaper that is refusing to print the reply. Generally, public officials exercising their powers are also subject to wider limits of criticism than private individuals.[165] Hence, it seems more persuasive to exclude public authorities from the right of reply's personal scope and instead argue in favour of allowing open and sanction-free criticism relating to their status as political and administrative bodies, in order to avoid a chilling effect on media freedom.[166] This position corresponds with both the admissibility criteria in Article 34 and the ECtHR's heightened protection of political speech.[167]

However, it should be noted that although the majority in *Kaperzyński* did not object to the fact that a public authority had initiated the domestic proceedings, the ECtHR also did *not* expressly state that such bodies should be within the right of reply's personal scope. Since it was the newspaper's editor who had filed a complaint with ECtHR, the case was concerned with whether a right of reply was a permissible justification of the applicant's freedom of expression for the purposes of Article 10(2).[168] However, even if the Court permits a restriction on the Convention rights of others (here the editor's rights under Article 10), this is still not the same as guaranteeing that interest substantive Convention protection in its *own* right.[169] Thus, although the Court in *Kaperzyński* held that a right of reply exercised by a governmental body may be *permissible* under the ECHR, this does not make it *mandatory* for contracting states to afford public authorities such a right.[170] Considering that, as a rule, public authorities do not have standing under the ECHR, this interpretation of the case corresponds with the concepts laid out under Article 34.

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[165] See *Janowksi v Poland* App No 25716/94 (ECtHR, 21 January 1999); Schabas (n 62) 476.
[166] See the line of argument in: *Derbyshire CC v Times Newspaper* [1993] AC 534; Jacob Rowbottom, *Media Law* (Hart 2018) 83.
[167] For an overview of the case law see Harris et al. (n 47) 608 et seq.
[168] See *Kaperzyński* (n 3) para 61, where the majority held that enforcing the domestic right of reply served the purpose of protecting the reputation of a mayor and 'therefore the legitimate aim of the protection of the reputation or rights of others within the meaning of paragraph 2 of Article 10 of the Convention'. Contrastingly, *Björgvinsson* argued that the mayor had acted on behalf of the municipality and *not* in his personal capacity. However, those concerns had not been addressed by the majority.
[169] See David Acheson, 'Corporate reputation under the European Convention on Human Rights' (2018) 10(1) JML 49, 54, 55, 63; Rowbottom (n 166) 43, 44.
[170] See section 5 for further detail on positive obligations.

In conclusion, a legal entity claiming to be the victim of a violation by a contracting state of the rights set forth in the Convention and the Protocols has standing before the Court *only* if it is a 'non-governmental organisation' within the meaning of Article 34. Thus, corporate bodies as legal persons might be able to successfully make an application to the ECtHR.[171]

4.3. Step 2: 'Victim status' of corporations

It remains unclear whether corporations could claim 'victim status' and thus invoke rights deriving from Article 8 or Article 10. This depends on the nature of the rights.

4.3.1. A corporate right to reputation under Article 8?

In *Eker*, the Court based its findings regarding Article 8 on the argument that a right of reply aims to protect a person's right to a private life,[172] with a focus on reputational interest. So far, the ECtHR has left it open whether corporations could claim a right to reputation under Article 8.[173] Thus, this has been subject to controversial discussions in the academic literature.[174] On the one hand, since the ECtHR has held that the protection of 'home' in Article 8 extends to companies' business premises and the protection of 'correspondence' also applies to corporate applicants, some have argued that the Court may interpret Article 8 as protecting corporate reputation given the similarities of interests at stake.[175] Additionally, it was noted that although it might seem peculiar to allow corporations to claim rights guaranteed under the 'private life arm' of Article 8,[176] the Court has consistently stated that 'private life is a broad term, not susceptible to exhaustive definition',[177] and it 'must not be interpreted restrictively'.[178]

[171] For further discussion on 'corporate human rights' see e.g.: Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave 2010).
[172] *Eker* (n 2) para 47.
[173] See e.g.: *Firma EDV Für Sie v Germany* App no 32783/08 (ECtHR, 2 September 2014); *ÄfW v Austria* App no 8895/10 (ECtHR, 16 February 2016) para 62.
[174] See e.g.: Jan Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2(3) JETL 255; Alastair Mullis and Andrew Scott, 'The swing of the pendulum: reputation, expression and the re-centring of English libel law' (2012) 63(1) NILQ 27, 46; Eileen Weinert, 'Firma EDV v Germany – Do Companies Have Feelings Too?' (2015) 26(2) ELR 50; Acheson (n 169) 62.
[175] See Acheson (n 169) 49, 52, 62, 72; Weinert (n 174) 50.
[176] See Oster 2011 (n 174) 261–262.
[177] See *Peck v UK* App no 44647/98 (ECtHR, 28 January 2003) para 57.
[178] See *Von Vondel v The Netherlands* App no 38258/03 (ECtHR, 25 October 2007) para 48.

On the other hand, 'bringing corporate reputation within art. 8 would amount to a significant, as yet not clearly justified, extension of art. 8's ambit.'[179] This is primarily because the ECtHR's justifications for protecting an individual's reputation under Article 8 are seen to be inapplicable to companies.[180] For example, primarily relying on the justification for Article 8 protection for reputation that derives from the concept of 'psychological integrity',[181] Mullis and Scott argued that it is 'uncontroversial' that 'corporations do not possess Article 8 rights of this type' and instead 'are able to rely on Article 10(2) arguments only'.[182] Crucially, if corporate reputation is a mere interest under Article 10(2) rather than receiving protection in its 'own right', it would be narrowly construed and any doubts when striking a balance with Article 10 should be resolved in favour of the expression right.[183]

Indeed, some of the main arguments for justifying the interference of a right of reply with media freedom do not extend to corporations as it is less persuasive to justify the need to guarantee a corporation's 'equality of arms' against media reporting.[184] Different to an 'ordinary citizen', a corporation is more likely to have its own means of replying to an allegation and adding its own view to a story, whether that be through their social media accounts, by issuing a press release, or taking out advertising.[185] Furthermore, (large) corporations may be more likely to have the funds to enforce a right of reply through courts than an 'ordinary' individual. This runs the risk of a right of reply being employed strategically as a deterrent for media outlets that fear the potentially high litigation costs. This could have a 'chilling effect' on their freedom of expression, which strengthens the argument for denying corporations the right to claim rights under Article 8 in this context.

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[179] Richard Parkes, Alastair Mullis et al. (eds) *Gatley on Libel and Slander* (S&W 2017) para 2.3.
[180] See Oster 2011 (n 174) 261–262; Acheson (n 169) 65, 66; Joint Committee on Human Rights, Legislative Scrutiny: Defamation Bill (2012–13, HL 84, HC 810) paras 54 et seq.
[181] Mullis and Scott, Swing of the pendulum (n 174) 43.
[182] See ibid, 46. According to the ECtHR, both the protection of corporate *and* individual reputation can be a legitimate reason to restrict freedom of expression under Art 10(2), see e.g.: *Steel and Others v UK* App no 68416/01(ECtHR, 15 February 2005), which was the culmination of the 'McLibel' litigation in *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366. However, as noted above, even if the Court permits a restriction on Convention rights of others (here the editor's rights under Article 10), this is still not the same as guaranteeing that interest substantive Convention protection in its *own* right.
[183] See Rowbottom (n 166) 43.
[184] See Paul Bernal, 'The Right to be Forgotten as a positive force for freedom of expression' in Oliva Tasmbou et al. (eds), *The Right to be Forgotten in Europe and beyond* (Blogdroiteuropéen 2018) 82: 'the relatively strong generally have other ways to exercise their rights – particularly in comparison to the weak'.
[185] See e.g. the debate during the reform of English Defamation Law: Joint Committee on the Draft Defamation Bill, Oral and Associated Written Evidence Volume II (2010–12, HL 203, HC 930-II) 18–19, 350, 381–86, 387.

However, although corporations have their own means of adding their view to a story, they may be unlikely to reach a similar audience as the original statement did (compared to a right of reply). Indeed, both case law and the CoE acknowledge that reaching a similar audience to that of the original statement is most likely to be achieved by publishing a counter statement in the same forum as the original statement, i.e., through the media outlet that published the allegations in the first place. This is seen as the most efficient way to reach 'the same public and with the same impact'.[186] Thus, a commercial enterprise is unlikely to reach a similar audience as an allegation published in, for example, *The Sun* or the *Daily Mail* by issuing a press release in reply.[187] Even if a company has managed to gather a significant following on social media, it cannot be guaranteed that those readers who took notice of an allegation published in, for example, *The Sun* or the *Daily Mail* will also pay attention to a response published on the affected corporation's *Facebook* or *Twitter* pages.[188] These arguments particularly apply to small corporations. Furthermore, in its Rec(2004)16, the CoE recommended to also include legal entities within the right of reply's even when the protection of 'personal rights' is concerned. The recommendation notes that 'any natural or *legal person* […] should be given a right of reply […] offering the possibility to react to any information in the media presenting inaccurate facts about him or her which affect his or her personal rights' [emphasis added].[189]

Nevertheless, it is more persuasive to rely on the arguments noted above which highlight that the justifications for protecting an individual's reputation under Article 8 are seen to be inapplicable to companies. Therefore, this chapter argues that corporations should not be able to claim 'victim status' under Article 8 in the context of a right of reply.

4.3.2. 'Victim status' under Article 10

Contrasting to the rights guaranteed under Article 8, there is a consensus in the case law that 'rights bearing entities' like corporations can be victims of the deprivation of their right to freedom of expression under Article 10.[190] Article 10 is sufficiently broad in its

[186] Rec(2004)16 (n 72).
[187] See also Joint Committee Evidence (n 185) 387: During the reform of English Defamation Law, it was argued that 'protestations of innocence by the impugned party necessarily carry less weight with the public'.
[188] Koltay 2007 (n 54) 205 argues that 'no one can expect from the average reader […] to read more than one [news]paper'.
[189] See Rec(2004)16 (n 72) 2.
[190] For an overview see Schabas (n 62) 741.

drafting to accommodate companies, as the provision applies to '"everyone", whether natural or legal persons.'[191] Therefore, corporations can make applications to the ECtHR claiming a violation of this Convention right.[192]

Nevertheless, the risk of corporations strategically employing a right of reply as a deterrent for media outlets also applies to the issue of whether they should be able to invoke a right of reply under Article 10. If this were to cause the press to refrain from publishing any controversial statements, allowing corporations to invoke this remedy would contradict its purpose under Article 10 as one of the right of reply's main aims is to *guarantee* rather than restrict the flow and pluralism of information. Moreover, at the time of writing, the ECtHR has not yet been concerned with the question of whether corporations are within the right of reply's personal scope. Given that the Court in *Eker* and *Melnychuk* emphasised that a newspaper's editorial freedom may only be limited in 'exceptional circumstances',[193] there seems to be at least some room for movement when deciding this question.

Nevertheless, this chapter argues in favour of allowing corporations to claim victim status under Article 10. First, the Court in *Eker* based its finding regarding Article 10 on the arguments that a right of reply aims to guarantee not only the social need to allow false information to be challenged, but also a plurality of opinions.[194] Following this line of argument, allowing corporations to exercise a right of reply deriving from Article 10 may be seen as serving the public's interest in receiving 'information from different sources, thereby guaranteeing that they receive complete information'.[195] Similarly, Mullis and Scott highlighted that despite the arguments against a corporate right to reputation under Article 8, corporations should be entitled to a 'discursive remedy' like the right of reply.[196] This may be justified because the right of reply is focused on adding a person's view to a story instead of obtaining damages for a published allegation. Therefore, the fear of a 'chilling effect' on press freedom might be less relevant compared to that in Defamation Law. Furthermore, as noted above, it does not require a media outlet to admit the falsity or inaccuracy of the allegations that gave rise to the right of reply.

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[191] For further detail see: Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (CUP 2016) 50 et seq.
[192] See e.g.: *Sunday Times* (n 90); see also Acheson (n 169) 51.
[193] *Eker* (n 2) para 45 citing *Melnychuk* (n 3) para 2.
[194] *Eker* (n 2) para 43 citing *Melnychuk* (n 3) para 2.
[195] As outlined in Rec(2004)16 (n 72) 1.
[196] Mullis and Scott, Reframing Libel (n 47) 21.

Nevertheless, despite a corporation's potential victim status under Article 10, some of the justifications for guaranteeing an individual's freedom of expression do not extend to corporations.[197] This is particularly relevant in the case of commercial speech, which is less safeguarded than, for example, political or artistic expression in the case law of the ECtHR.[198] Therefore, although corporations may invoke a right of reply under Article 10, it may still be the case that their interference with a newspaper's freedom of expression may be seen as disproportional depending on the circumstances of each individual application to the Court.

4.4. Should 'knowledgeable individuals' be able to exercise a right of reply?

The findings in *Eker* further raise the question of whether a right of reply should also be available to those who are not referred to in a statement but nevertheless wish to contribute to the debate. Given that the judges found the remedy's normative foundation to rest both in Article 8 and Article 10, different answers may be given to this question. From an Article 8 point of view, it seems logical to only allow individuals to file a reply if they are affected and referred to by a statement.[199] This is (partly) underpinned by the judgment. When discussing Article 8, the Court solely referred to the person that the 'information or opinions disseminated by the means of mass communication' are directed at.[200]

However, as analysed above, the ECtHR highlighted that the right of reply is also founded in free speech in general and media pluralism in particular to 'allow the challenge of false information' and 'ensure a plurality of opinions'.[201] Therefore, one could argue that based on a public interest to guarantee reliable media coverage and enhance public discourse, civil society organisations, knowledgeable individuals or others who could increase the public debate on a specific topic should also be able to exercise the right to reply even if a statement did not refer to them. The problem is that the judges in *Eker* failed to clarify which aim is more important: achieving media pluralism or protecting individual personal rights.

Ultimately, it is suggested that a right of reply should not be unduly broadened to those who are not referred to. First, allowing a third party to call for a reply would strengthen

[197] Bernal (n 184) 82.
[198] For an overview see Harris et al. (n 47) 614.
[199] See also CoE Admissibility (n 155) 14.
[200] *Eker* (n 2) para 47.
[201] ibid, para 43.

the argument of those who claim that the right of reply has a 'chilling effect' on the freedom of the media. As acknowledged by the Court,[202] a right of reply interferes with editorial independence since it dictates to the editor what to publish in his or her newspaper. Additionally, it might even lead to a publisher promoting a point of view that he or she does not agree with.[203] Thus, limiting the exercise of the right to those who are referred to ensures that this restriction on the freedom of the media is kept within proportionate bounds.

Second, enabling anyone interested in a subject to make use of a right of reply might undermine the rights of those who are referred to in the statement in question. The interest of the affected person in making a reply might differ from those of third parties such as a public pressure group. This may negate the remedy's aim of protecting the individual's rights under Article 8. These arguments are underpinned by the fact that the ECtHR, so far, has not recognised a positive obligation for states to guarantee the right of reply for anyone *but* the person referred to by a statement made in the press.[204] Therefore, achieving media pluralism should be a subordinate goal of the right of reply in comparison to protecting the individual's rights. Ultimately, limiting the exercise of a right of reply to those who are referred to is the practice in most contracting states.[205]

Third, this line of argument can further be reinforced by referring to the resolution and recommendation provided by the CoE. As noted in Rec(2004)16, the Council recommends limiting the scope of the remedy to those who personally affected.[206]

4.5. Intermediate conclusion

This section demonstrated that legal entities may be within the right of reply's personal scope unless they participate in the exercise of governmental powers or run a public service under government control. However, some of the justifications for allowing an individual to publish a right of reply and thus interfere with press freedom, do not extend to corporations. If an individual has been refused a right of reply and subsequently, after having exhausted the domestic remedies, decides to file an application to the ECtHR, he or she could claim a violation of their rights under *both* Articles 8 and 10. Contrastingly,

[202] ibid, para 47.
[203] Barendt 2005 (n 74) 95.
[204] See section 5.
[205] For an overview, see Youm (n 1) 1027–51.
[206] Rec(2004)16 (n 72) Appendix number 1.

‘rights bearing entities’ like corporations could solely rely on Article 10 in the same scenario since they *cannot* claim victim status under Article 8. Thus, although private entities should not be excluded from the scope of a right of reply under the ECHR, the domestic law maker should aim to introduce a higher bar for corporations compared to ‘ordinary’ individuals for enforcing a right of reply against the will of a newspaper. Primarily, this can be justified with the fear that the *locus standi* of private legal entities would risk a ‘chilling effect’ on press freedom. In any event, this chapter argues that the right of reply’s scope should not be unduly broadened to those who are not referred to.

5. Is there a positive obligation on contracting states to provide a right of reply?

So far, this chapter has revealed the normative purpose, main functions and the personal scope of a ‘right of reply’ under the ECHR. Building on this knowledge, the following sections analyse whether there is in fact a duty for the member states of the CoE to take action to guarantee those rights protected by a right of reply under the ECHR. Article 1 of the ECHR requires a contracting party to ‘secure’ the rights and freedoms included in it and has together with the text of later articles dealing with particular rights been interpreted as imposing certain *positive obligations* upon states.[207] *Per definitionem*, a positive obligation is one whereby a state must take action to secure human rights.[208] Thus, in addition to the requirement for States not to unjustifiably interfere with the exercise of their citizens’ rights, they are sometimes also under a duty to act positively in taking the necessary steps to ensure effective protection of human rights among individuals, including preventing interference with individuals’ rights by ‘private or non-state actors’.[209] Hence, States may ‘be found responsible for acts by private individuals’ in fulfilment of their international human rights obligations.[210]

Significantly, whereas some positive obligations are present in the Convention,[211] others have been read into the Convention by the Court.[212] Generally, the ECtHR has justified

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[207] Harris et al. (n 47) 24.
[208] ibid, see also Lorna Woods, ‘Social media: it is not just about Article 10’ in David Mangan et al. (eds), *The Legal Challenges of Social Media* (EE 2017) 112.
[209] Dominika Bychawska-Siniarska, ‘Protecting the Right to Freedom of Expression under the European Convention on Human Rights’, p 90 (*CoE*, 2018) <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.
[210] ibid.
[211] See e.g.: ECHR, art 2(1).
[212] See e.g.: *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 31.

its finding of positive obligations as being necessary to make a Convention right effective.[213] As noted above, a right of reply is not mentioned *expressis verbis* in the relevant articles in the ECHR. Hence, the following sections explore the question of whether there is a positive obligation on contracting states to provide a right of reply in the printed press (section 5.1), and for online content (section 5.2).

5.1. In the printed press?

Whether there is a positive obligation on states to provide a right of reply for a person affected by statements in the printed press has been debated in both case law and academic publications.[214] The first case that offered a (brief) view was the 1986 decision in *Winer*.[215] As noted in section 3.1, although *Winer* was primarily concerned with the 'right to privacy' and whether said right was adequately protected under English Law, it also briefly touched on the right of reply. The applicant had complained of the lack of a remedy in domestic law, including a right of reply, for gross invasion of privacy. Therefore, one of the questions for the Commission was the extent of the positive obligations placed upon contracting states to protect an individual's privacy. Despite the applicant's complaint about the alleged absence of a right of reply, the Commission neither directly mentioned this issue nor discussed whether such a remedy had a normative foundation in Article 8 and might thus needed to be guaranteed by a contracting state. Instead, the Commission merely indirectly responded to the applicant's remarks regarding the need for a right of reply when dismissing his claim by noting that he remained at 'his own liberty to publish'.[216] Since this decision was concerned with allegations published in a book rather than a (printed) newspaper, this case's relevance for the purposes of this section is limited.

Whilst *Winer* was concerned with the question of whether there was a positive obligation under Article 8, it took 16 years until the Court was given the opportunity to approach the issue from a different angle. In fact, there is support for the view that the ECtHR conceded that a positive obligation to provide a right of reply exists under Article 10 in *Melnychuk*.[217] According to the Court, in certain cases there 'may' be a positive obligation for

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[213] See Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 2–5.
[214] See e.g.: Ó Fathaigh (n 25) 325.
[215] See n 42.
[216] ibid, para 3.
[217] *Melnychuk* (n 3) para 2; see also ECtHR, 'Positive obligations on member States under Article 10 to protect journalists and prevent impunity', p 5 (*Research Report*, December 2011) <https://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf>; The Leveson Inquiry, An

the state, even in the situation of privately owned media, to ensure that a person 'firstly […] had a reasonable opportunity to exercise his right of reply by submitting a response to the newspaper for publication and, secondly, that he had an opportunity to contest the newspaper's refusal.'[218] The aim of that positive obligation is 'to ensure an individual's freedom of expression in such media'.[219] Apart from that, the Court did not define what was understood by a '*reasonable* opportunity' other than saying that 'in any event', a state must ensure that a 'denial of access to the media is not an arbitrary or disproportionate interference with an individual's freedom of expression'.[220]

Although the right of reply was not the central issue of the application,[221] three years later, the Court in *Vitrenko* added to this case law by noting that there is a positive obligation not only to afford a right of reply, but also to afford a reply in the 'same manner' as the original dissemination.[222] Differently to *Melnychuk,* the ECtHR in *Vitrenko* also went beyond saying that there '*may*' be a positive obligation and instead stressed that there in fact *is* an obligation on the state to guarantee 'a reasonable opportunity [for a person] to exercise their right to reply'.[223] This is a significant development, as it somewhat reduces the margin of appreciation a member state usually enjoys when deciding whether to implement a positive obligation.[224]

Significantly, *Vitrenko's* remark that a right of reply should be published 'in the same manner' corresponds with what had been put forward by the CoE in both Rec(2004)16 and Res(74)26, which were both referred to by the Court.[225] Recalling Res(74)26, the CoE Committee of Ministers noted in its Rec(2004)16 that 'the reply should be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact'. Additionally, it details that 'in order for the right of reply to be effective, it is imperative that the medium in question takes measures to ensure that the response reaches the same attention as the contested

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Inquiry into the Culture, Practices and Ethics of the Press: Report (HC 2012–13, 780) 1846.

[218] *Melnychuk* (n 3) para 2.

[219] ibid.

[220] ibid.

[221] The Court was primarily concerned with the application of a politician who had, *inter alia*, claimed a violation of Article 10 following an official warning given to her by an electoral commission regarding defamatory remarks she had made in a television debate about an opponent and an order that she had to pay for a 50-second broadcast to allow her opponent to reply to the record. The Court rejected the application as manifestly ill-founded.

[222] See *Vitrenko* (n 43) para 1; see also Ó Fathaigh (n 25) 326.

[223] ibid.

[224] See Bernadette Rainey et al., *The European Convention on Human Rights* (OUP 2014) 328; Björgvinsson (n 52) 173, 174.

[225] *Vitrenko* (n 43) section B.

information.' Once again, this strengthens the argument that the right of reply seeks to establish a 'level playing field' and 'equality of arms' for those who are seeking to reply to an allegation.[226] However, the 2004 recommendation also considers the newspaper's interest in upholding their editorial freedom as the explanatory memorandum specifies that it is 'impossible to stipulate that the reply should always be published in exactly the same place as the original information, leaving no room for editorial discretion'.[227] It therefore notes that, 'it will be an important consideration whether a newspaper […] has tried […] to give the necessary prominence to the reply, taking also into account the seriousness of the matter, the length of the reply as well as even the extent to which other events of the day called for an extensive and prominent space in the newspaper'. As detailed in Chapter 6, these remarks are significant for assessing whether a newspaper may be obligated to print a reply on its front page.

After the remarks made in *Vitrenko*, the Court in *Kaperzyński* also added to the case law concerning the positive obligation for a right of reply. The ECtHR noted that the publication of a reply had been requested after a newspaper had published an article which 'did not amount to a gratuitous personal attack and was neither insulting nor frivolous in any way'.[228] This is different to the facts in the previous cases as in those decisions the ECtHR had to assess the need for a right of reply against a statement containing 'personal attacks' (*Melnychuk)* and 'defamatory information' (*Vitrenko*) respectively. Significantly, the Court in *Kaperzyński* clarified that the newspaper article in question did not amount to either of these. Instead, the ECtHR noted that the article contained 'a critical assessment' which was 'based on a solid factual basis, referred throughout the text'.[229] Nevertheless, the lack of a 'personal attack' and/or 'defamatory information' did not stop the ECtHR from noting that an 'obligation to publish […] a reply' against statements like that in the present case 'may be seen as a normal element of the legal framework' and, referring to *Melnychuk*, 'falls within the scope of Article 10 of the Convention'. Thus, according to the Court's ruling, one can conclude that the positive obligation on a state deriving from Article 10 to provide for opportunities to exercise a right of reply is not limited to individuals who have been personally attacked or suffered defamatory remarks. Instead, it should be extended to what the ECtHR calls a 'critical assessment of performance'. This line of argument was later confirmed and further clarified in an academic

[226] See also Ó Fathaigh (n 25) 326 et seq.
[227] Explanatory memorandum (n 130) 17.
[228] *Kaperzyński* (n 3) para 64.
[229] ibid.

piece written by the presiding judge of the ECtHR in *Kaperzyński*.[230] Ultimately, this development can be seen as a lowering of the bar for successfully enforcing a right of reply under the ECHR compared to previous case law. The Court underpinned this finding with the argument that such an obligation makes it possible, for example, for the person who feels aggrieved by a press article to present his reply in a manner compatible with the editorial practice of the newspaper concerned.[231]

Furthermore, this case law reinforces the argument that the right of reply aims to establish a 'level playing field' and 'equality of arms' between the 'weaker individual' and the more powerful mass media. Allowing a person to exercise a right of reply and thus add his own view to a story in response to a 'critical assessment of performance' instead of limiting it to defamatory remarks is likely to allow more replies to be published, which strengthens the position of the person affected by a press report. This broad(er) scope also serves the public's interest in receiving 'information from different sources, thereby guaranteeing that they receive complete information'.[232] Crucially, this finding corresponds with the recommendations made by the CoE. As detailed in Rec(2004)16, the CoE notes that 'any […] person […] should be given a right of reply […] offering a possibility to react to any information in the media […] which *affect* his/her personal rights' [emphasis added].[233] The definition employs the word 'affected', implying that it is not a condition that the contested information is actually defamatory or a violation of personal rights.[234] Nevertheless, this broadening of the scope might again strengthen the argument of those who fear the right of reply's potential 'chilling effect'.

However, it should be noted that even if a positive obligation is required under the Convention, a High Contracting Party has a margin of appreciation when assessing *what* needs to be done to comply with any positive obligation that it has under Article 10.[235] Thus, a measure of discretion, subject to the principles of effective protection and proportionality, arises in relation to *how* a particular positive obligation is discharged.[236] For example, this margin of appreciation as to how this positive obligation is implemented allows contracting states to decide if they want to ensure this 'reasonable opportunity' to

[230] Björgvinsson (n 52) 174.
[231] *Kaperzyński* (n 3) para 66.
[232] See Section 3.2.2.
[233] Rec(2004)16 (n 72) Appendix Number 1.
[234] Explanatory Memorandum (n 130) para 11.
[235] Harris et al. (n 47) 15; see also Woods (n 208) 108, 109; *Handyside* (n 85).
[236] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (CoE Publishing 2000) 30.

exercise a right of reply by means of statutory, co- and/or self-regulation.[237] Nevertheless, it is ultimately the ECtHR who has the final say on whether a member state has done enough to fulfil the duties deriving from a positive obligation if a person claims that potential shortcomings in those regards have resulted in a violation of Convention rights.

5.2. For online content?

So far, all applications under the ECHR, where the right of reply was regarded as the central issue of the decision, have concerned the 'traditional print media'.[238] Thus, it has been highlighted in the academic literature that it is uncertain whether the ECtHR would extend the positive obligation upon contracting states to provide this remedy to sectors other than the printed press.[239]

The CoE Committee of Ministers has made its position clear in relation to online content. In its Rec(2004)16, the CoE called for a right of reply extending to 'any means of communication for the periodic dissemination to the public of edited information, whether *online* or offline, such as newspapers, periodicals, radio, television and *web-based news services'* [emphasis added].[240] The Council justified its position with the argument that 'the right of reply is a particularly appropriate remedy in the online environment due to the possibility of instant correction of information and the technical ease with which replies from concerned persons can be attached to it'.[241] Thus, the CoE recommended that member states should implement a right of a reply for both off- and online media.

Such proposals have been countered with the concern that if the remedy is too broad it could 'shoehorn' the internet into a bureaucratic model of statement and counterstatement more appropriate to a 'set of litigation pleadings than to a vibrant discussion medium'.[242] Adding to this point, the UK-based human rights organisation *Article 19* also opposed the recommendation. Primarily, they feared that the suggested definition of those online pub-

[237] See also Rec(2004)16 (n 72) Preamble: 'Acknowledging that the right of reply can be assured not only through legislation, but also through co-regulatory or self-regulatory measures'.
[238] See e.g.: Björgvinsson (n 52) 175; Koltay 2013 (n 31) 76, 77; Oster 2015 (n 51) 80, 81.
[239] Björgvinsson (n 52) 175.
[240] Rec(2004)16 (n 72) preamble.
[241] ibid.
[242] See Graham Smith, *Internet Law and Regulation* (S&W 2007) 345–47.

lications that would end up having to provide a right of reply 'leads to an oversimplification of the enormous variety of content found on the Internet'.[243] Hence, the organisation argued that this would make an enormous range of information subject to the right of reply.[244] They argue that this might have a 'chilling effect' on those type of online publications that cannot be compared to the traditional mass media and yet would still have to provide a right of reply.

Before engaging in further analysis, it should be noted that Chapter 3 contains a more in-depth analysis investigating these positions as well as the question of whether and to what extent the right of reply's scope should include statements made by certain online outlets (particularly referring to social media). Thus, the following discussion focuses more on the the likelihood of the ECtHR also taking up the CoE's position.

When examining this question, one should again refer to the normative purpose of a right of reply under the ECHR. As noted above, the right of reply aims to fulfil its normative purpose by creating a forum for the affected person to express his or her own point of view publicly in the same publication. Although the Court has so far primarily been concerned with the right of reply in printed newspapers, it repeatedly emphasised that the normative purpose goes beyond this type of media. Most importantly, both *Ediciones Tiempo* and *Eker* noted that the right of reply intends 'to afford all persons the possibility of protecting themselves against certain statements or opinions disseminated by the *mass media*' [emphasis added]. Similarly, when noting that the right of reply has the purpose of contesting untruthful information and ensuring the plurality of opinions, *Melnychuk* and *Kaperzyński* highlighted the remedy's general significance for guaranteeing the values enshrined under Article 10 without limiting those arguments to one specific type of media.

Against this background, this chapter argues that, if posed with the question, the Court is likely to extend the positive obligation to afford a right of reply to at least 'press-like' online content. 'Press-like' content would limit the scope of the right to 'press-like' websites focusing completely or partially on reproducing texts or visual content of existing

[243] Article 19, 'ARTICLE 19 submission to Council of Europe on "right of reply" in new media environment' (*Press Release*, 2003) <http://www.statewatch.org/news/2003/aug/14art19.htm>.
[244] ibid.

print media,[245] for example the *Mail Online*,[246] or *BILD Online*.[247] Hence, it would cover those types of news services available on publicly accessible networks that are similar to ‘traditional media’. As discussed in Chapters 3 and 4, this is not unheard of in Germany and England & Wales. As also detailed there, some rules go even further and regulate editorial content on electronic services operated by ‘press-like’ online publications where there is no print presence. This seems a logical conclusion as the internet is not a legal vacuum and is able to reach more people than traditional newspapers,[248] i.e., services fitting this description are likely to fall under the category of ‘mass media’.

On this basis, an additional point supporting this line of argument can be made when recalling some of the main justifications for the existence of a right of reply. As noted above, one of the right of reply’s is to prevent that potentially false statements are left as the only source of information for the public. Given that people from every age group in both legal systems have increasingly been choosing online publications as their main news source,[249] it seems logical for the ECtHR to see the same necessity for this type of content. Also, the emphasis on the editorial aspect and the focus on news services could be one way of keeping the right within manageable bounds, therefore addressing the concerns voiced by *Article 19*. Ultimately, the judges in *Eker* have stressed the importance of this remedy for protecting personality rights and enhancing public discourse on several occasions. Therefore, it seems likely that the Court would apply its jurisprudence to other media content too, potentially adopting the scope suggested in the 2004 recommendation.

6. Conclusion

The main objective of this chapter was to set the scene for the comparative examination in Germany and England & Wales. It did so by critically analysing the normative purpose and main functions of a ‘right of reply’ under the ECHR. Most importantly, this chapter intended to identify the heart of this thesis: what is meant by the term ‘right of reply’ for

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[245] See Chapter 4. See also the discussion in Irini Katsirea, ‘Electronic Press: “Press-like” or “television-like”?’ (2015) 23(2) IJLIT 134.
[246] See <https://www.dailymail.co.uk/home/index.html>.
[247] See <https://www.bild.de>.
[248] See RISJ, ‘Reuters Institute Digital News Report 2019’ (2019) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2019-06/DNR_2019_FINAL_1.pdf>.
[249] See: Ofcom, ‘News Consumption in the UK: 2019’, p 7 (2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf>; Sascha Hölig et al., ‘Digital News Report Germany (*RISJ*, 2019) <http://www.digitalnewsreport.org/survey/2019/germany-2019/>.

the purposes of the comparison between the two jurisdictions? This allowed the identification of a set of criteria for what can be considered a functional equivalence to this remedy. Using those benchmarks, the following Chapters 3, 4 and 5 conduct an in-depth analysis of which rules and practices in the legal systems chosen for comparison serve a similar purpose to the 'right of reply' under the ECHR, followed by an assessment of their practical application.

In conclusion,[250] this chapter demonstrated that although it is not expressly provided for in the Convention, the right of reply's normative foundation lies both in Article 8 and Article 10. Thus, by allowing a person who has been made subject of a story in the media to promptly publish their own view in the same forum, a right of reply is intended to enable any individual to protect himself from information or opinions, disseminated by means of mass communication, which infringe his rights guaranteed under Article 8. Furthermore, the Court held that the remedy is needed not only to allow false information to be challenged, but also to ensure a plurality of opinions as part of the right to freedom of expression under Article 10. Hence, according to the ECtHR, a right of reply can be employed not merely to ensure the retraction of incorrect facts but also to offer an opportunity to vindicate reputational rights and enhance public discourse in general. Additionally, this chapter established that there is a positive obligation on contracting states to ensure 'a reasonable opportunity to exercise a right of reply' in the 'same manner' as the original statement was disseminated and an 'opportunity to contest a newspaper's refusal' to publish the view of the person an allegation is directed at. So far, the Court has established this obligation only for the printed press. However, this chapter suggests that the ECtHR is likely to extend this obligation to 'press-like' online content if posed with the question.

Significantly, the Court has also opened the door to including criticism of the publisher in the reply. This is so, even though the veracity of the content of the reply or the statements that gave rise to it do not have to be proven. However, the ECtHR failed to give clear guidance on where exactly it draws the line between admissible and inadmissible criticism. This chapter argues that this results in a state of uncertainty for individuals, publishers and domestic courts. Particularly, a right of reply without clear boundaries might have a 'chilling effect' on the (editorial) freedom of the press. This may cause the press to refrain from publishing any controversial statements or, indeed, opinions, which

[250] See also intermediate conclusions in sections 3.2.3 and 4.5.

the Court appears to accept could also trigger the right. As one of the right of reply's main aims is to guarantee pluralism of information, this would contradict the purpose of the remedy. On the other hand, limiting the right to a retraction by the publisher of incorrect facts would go too far, as adding the affected individual's viewpoint is one of the key characteristics of this remedy.

In consequence, this chapter argues that whilst a right of reply is crucial to establish equality of arms for those who are in a 'weaker' position than the media and to enhance public discourse, it should not be guaranteed at every cost. Instead, it is equally important to keep the remedy within proportionate bounds to avoid an unjustified limitation on the (editorial) freedom of the media. Thus, providing a 'level playing field' between the parties involved is the leitmotif not only for the right of reply under the ECHR but also this thesis going forward.

Chapter 3: The reply of reply in the press in Germany

1. Introduction

This chapter has two objectives. First, using the definition and characteristics of a right of reply as established in Chapter 2, it examines whether there are rules and practices within the German legal system that enable a person who has been made the subject of a story in the press to publish their own view in the same forum. Second, it evaluates how those rules work in practice. In doing so, it offers a unique investigation of how the German statutory right of reply (*Gegendarstellung*) works in action and why the lawmakers chose to implement the remedy in the way they did. This study not only sets the scene for the subsequent comparison with England & Wales, but also for the empirical work conducted in Chapter 5. This is because it demonstrates that further examination through qualitative methods is required to obtain a comprehensive insight into how the right of reply in the press works in Germany.

In order to achieve the set aims, this part of the thesis conducts a rigorous and uniquely comprehensive doctrinal analysis of the relevant case law, legislation and accompanying literature. This chapter therefore highlights the characteristics as well as the benefits and potential pitfalls of the statutory right of reply in Germany. Most importantly, it refers back to the normative purpose of the right of reply as set out by the European Court of Human Rights (ECtHR) and asks if and to what extent the German right of reply pursues similar aims. Based on this normative framework, this chapter investigates whether the identified rules provide 'equality of arms' or whether they tend to be more favourable for either the person seeking to reply to a story or the media outlet. Particularly, it assesses the potential 'chilling effect' of the German right of reply on a newspaper's constitutionally guaranteed rights. In addition to evaluating the impact of the 'equal prominence' requirement, which may obligate a newspaper to give away a significant amount of space on their front page, this also includes an examination of the scope and the judicial enforcement of the right of reply.

First, this chapter sets out the historical background of the right of reply in the printed press (section 2). This contains an investigation of the remedy's French roots and the

UK's impact on German press regulation, including the question of why Germany decided to opt for a statutory right of reply rather than (solely) relying on self-regulation.[1] Second, section 3 investigates the remedy's normative basis in Germany's codified constitution. Subsequently, section 4 examines, (i) the formal, procedural and substantive requirements of the statutory right of reply in the printed press; (ii) how it works in practice; and (iii) if and why one could argue that the remedy provides 'equality of arms'. Next, this chapter repeats this process for the right of reply for online content (section 5). Here, special attention is paid to the right of reply's scope. Lastly, section 6 comes to a conclusion.

2. Historical background

2.1. French influence pre-1945

In 1789, 'The Declaration of the Rights of Man and Citizen' gave the French press the power to report freely for the first time in their modern history.[2] However, this led to a series of defamatory newspaper articles, which had to remain uncontested due to the lack of an appropriate remedy.[3] The then Member of the French Parliament Dulaure suggested introducing a statute that would enable a person whose 'honour' had been attacked by a newspaper report to reply to the published allegations in the same forum.[4] He proposed that publishers should be obligated to print a reply free of charge to guarantee 'equality of arms' between the individual and the press.[5] Nevertheless, it was not until 1822 that his idea was (partially) adopted by the French lawmaker. The '*droit de réponse*' in the French Press Act of 1822 gave anyone *referred* to in a newspaper article a right of reply post-publication.[6] Contrasting to Dulaure's original suggestion, the '*droit de réponse*' was available to anyone *mentioned* in a newspaper article, regardless of whether it was defamatory.[7] In other words, 'if the person named by the newspaper wants to reply, that is all there is to it.'[8] This was justified with the need to guarantee equality of arms between

[1] As justified in Chapter 1.
[2] P.M. Jones, *The French Revolution 1787–1804* (Routledge 2017) 29 et seq.
[3] Klaus Sedelmeier, 'Gegendarstellung' in Martin Löffler et al. (eds), *Presserecht* (C.H. Beck 2015) 689.
[4] Axel Beater, *Medienrecht* (Mohr Siebeck 2016) 764.
[5] ibid.
[6] Friedrich Kitzinger, 'Die Berichtigungspflicht der Presse und das Recht auf Berichtigung' [1907] ZStW 872.
[7] Dominique Mondoloni, 'France' in Charles Glasser (ed), *International Libel & Privacy Handbook* (Bloomberg 2006) 221, 225.
[8] Zechariah Chafee, *Government and Mass Communications Volume 1* (UCP 1947) 149.

the 'weaker' individual and the 'powerful' press.[9] In order to protect an individual's personality rights, it was seen as necessary to allow those who have been referred to in a press report the opportunity to also add their view to the story.[10] Furthermore, the right of reply was seen to be beneficial for the public's interest as they would be provided with both sides of a story.[11] Based on the principle of *audiatur et altera pars,*[12] the idea was that the reader could then decide for himself which side of the story they believed to be true.[13]

A right of reply in German territory following the French Model was first introduced in 1831. At that time, Germany did not exist as a unified state. After the Holy Roman Empire of the German Nation had been formally dissolved in 1806, 39 German-speaking states created the 'German Federation' (*Deutscher Bund*). Since there was neither a central government nor a representative parliament,[14] each state had the power to pass legislation independently from the rest of the Federation.

The first of these 39 states to adopt a right of reply similar to the French '*droit de réponse'* was *Baden* in its 1831 Press Act (*Badisches Pressegesetz*).[15] Like the French 'original', the Baden Press Act allowed individuals to reply to an allegation published by a newspaper *regardless* of whether the original statement was harmful, inaccurate or defamatory.[16] The French '*droit de réponse'* is seen to have had a great deal of much influence on the first-ever version of the German right of reply because as a neighbouring state, *Baden* had already adopted the French 'Code Civil' and 'Code de Commerce'.[17] Moreover, *Baden* used to be one of the German states under Napoleon's control until 1813.[18] Similar provisions were also adopted by other states of the 'German Federation', including *Prussia* and *Saxony*.[19] Because the uncensored press had not been around for long, there was a fear of the potential dangers of unrestricted newspaper reporting.[20] A right of reply

[9] Kitzinger (n 6) 872.
[10] Karl Kreuzer, 'Persönlichkeitsschutz und Entgegnungsanspruch' in Gerhard Leibholz et al. (eds), *Menschenwürde und freiheitliche Rechtsordnung* (Mohr Siebeck 1974) 90.
[11] Tobias Grau, *Das Recht der Gegendarstellung im öffentlich-rechtlichen Rundfunk* (Dr. Kovac 2010) 34.
[12] Latin for 'may the other side also be heard'.
[13] Grau (n 11) 34.
[14] Mark Allison, *Germany and Austria since 1814* (Routledge 2014) 14.
[15] Willi Thiele, *Pressefreiheit* (CVB 1976) 10.
[16] Grau (n 11) 36.
[17] ibid.
[18] Daniel Nolan et al., *Germany from Napoleon to Bismarck* (PUP 1996) 1–19.
[19] Kreuzer (n 10) 70, 71.
[20] Thiele (n 15) 11.

based on the French '*droit de réponse'* was seen as an appropriate remedy to limit the perceived dangers of inaccurate articles.[21]

After the proclamation of the German Empire (*Deutsches Kaiserreich or Deutsches Reich)* in 1871 unified large parts the German territories,[22] the Imperial Press Act (*Reichspressegesetz*) was enacted on 7 May 1874. It contained the first nationwide and uniform right of reply (then referred to as *Berichtigung*), which has had a significant impact on shaping today's Press Acts.[23] Section 11 of the *Reichspressegesetz* contained a duty for the press to publish the reply of a person who had previously been referred to by a factual assertion in a newspaper article. For the first time, it was uniformly clarified that a reply must only be printed if the response itself was limited to a 'statement of facts'.[24] According to this legislation, newspapers were obligated to print the reply of anyone referred to by an assertion of fact *regardless* of the veracity of the original statement or the reply itself.[25] At the time, there was a consensus in both literature and case law that the remedy's broad scope should be welcomed.[26] It was argued that examining the veracity of a newspaper report or the reply itself would require an in-depth evaluation of the evidence provided by the parties and more time, which would jeopardise the right of reply's purpose. Such an evaluation could hinder one's opportunity to immediately and promptly reply to an article, despite this being the purpose of the remedy.[27] Consequently, instead of requiring evidence for whether the statement printed by a newspaper was harmful, inaccurate or injurious, the historical lawmaker saw it as sufficient if the press report *referred* to the person who was seeking to add his view to the story.[28] Thus, similar to the French '*droit de réponse'*, the aim was to guarantee that the public would have access to both sides of a story so that the reader could then decide for himself which side of the story he believed to be true.[29]

The historical lawmaker further justified the adoption of this statutory remedy by noting that it could not be assumed that the press would allow a person to reply to an article

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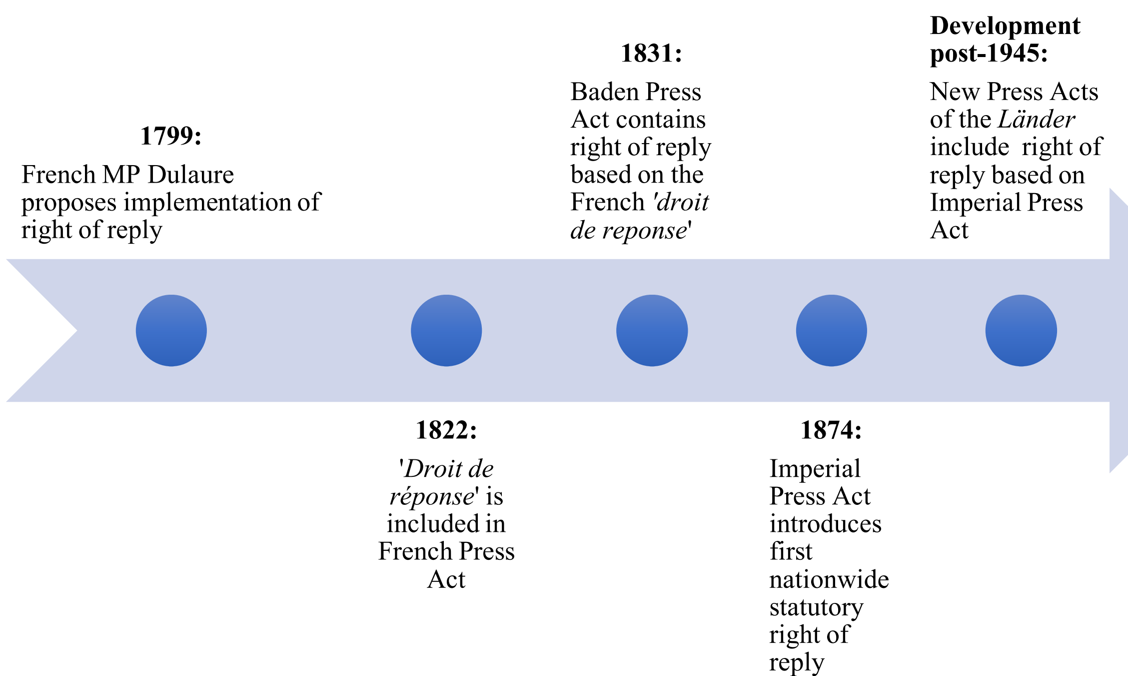
[21] Kreuzer (n 10) 92.
[22] Michael Stuermer, *The German Empire* (Phoenix 2000).
[23] Thiele (n 15) 10.
[24] Imperial Press Act, s 11.
[25] ibid.
[26] For an overview see Martin Löffler et al., *Presserecht* (C.H. Beck 1955) s 11 para 5.
[27] ibid, s 11 para 3.
[28] Kreuzer (n 10) 92.
[29] Peter Kloeppel, *Das Reichspreßrecht* (Leipzig 1894) 239.

without being legally forced to do so.[30] This assumption was based on ‘previous experiences’ of the behaviour of the ‘scandalmongering’ press.[31] Similar to the French original, section 11 of the *Reichspressegesetz* aimed to protect the public’s interest in truthful reporting and the individual’s personality rights against the press.[32] The former also explains why public authorities were enabled to exercise a right of reply, instead of it being limited to individuals, which is still the case today.[33] Allowing public authorities to invoke the statutory right of reply was seen as necessary to guarantee the ‘preservation of the state’s overall domestic tranquillity, safety and peace’,[34] which was perceived to be endangered by free and potentially inaccurate press reporting. Another result of the French influence relates to the prominence with which the reply had to be published.[35] One of the right of reply’s main aims following the French revolution was to guarantee equality of arms. Similarly, section 11 of the *Reichspressegesetz* required newspapers to print a reply in ‘the same section of the periodical using the same font’ as the original statement. The aim of this was to attain the same, or at least similar, publicity.[36]

The *Reichspressegesetz* remained in force until after the end of the Second World War before ultimately being replaced by the Press Acts of the Federal States (*Landespressegesetze*). However, the vast majority of this post-war legislation was based on the Imperial Press Act.[37] Hence, the main characteristics of the Imperial Press Act’s right of reply (limited to factual statements; equal prominence; and no need to establish the veracity of the statement one is seeking to reply to or the reply itself) still underpin today’s *Landespressegesetze*.

[30] Beater (n 4) 765.
[31] Grau (n 11) 38.
[32] Kreuzer (n 10) 92.
[33] See section 5.
[34] See Alexander Mahlke, *Gestaltungsrahmen für das Gegendarstellungsrecht am Beispiel des Internet* (Tenea 2005) 96.
[35] Julian Kraehling, *Die presserechtliche Berichtigungspflicht* (Strafrechtliche Abhandlungen 1917) 31.
[36] Kreuzer (n 10) 94, 95.
[37] ibid, 61, 74.

Figure 1: Historical origins



2.2. Allied influence post-1945

The end of the Second World War did not only bring about the end of the Nazi's reign of terror, but it also divided Germany once again. Crucially, fathoming the Allies' impact on West Germany's media policy is important for understanding the development of the statutory right of reply and why post-war Germany did not rely solely on self-regulation of the press. In essence, Germany's then-occupying forces, including the UK, were convinced that the German media had been to blame for the rise of National Socialism before 1933 and that it had contributed considerably to its stabilisation after 1933.[38] In order to keep politically biased persons from the time before 1945 away from the process of 'democratising' the German public and media landscape, the Allies introduced censorship and licensing of the press between 1945 and 1949.[39] By doing so, they wanted to prevent the reappearance of the influential press magnates who had dominated public opinion during the Weimar Republic and Nazi rule.[40]

From 1949, the regulation of the press was gradually given back to German control. Nevertheless, the Allies still heavily influenced the policy choices of the post-war lawmakers.

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[38] Rudolf Stöber, *Deutsche Pressegeschichte* (UKV 2014) 150.

[39] Alfred Frankenfeld, 'Die Verteidigung der Pressefreiheit gegen wirtschaftliche und politische Gefahren' (1954) 34(10) Wirtschaftsdienst 560.

[40] Jan Erk, 'Federalism and Mass Media Policy in Germany' (2003) 13(2) RFS 106, 109.

On 23 May 1949, the 'Basic Law of the Federal Republic of Germany' (*Grundgesetz*) was promulgated to serve as a codified constitution. The *Grundgesetz* transferred the competence for legislating on matters relating to the press to the Federal States (*Länder*). Article 70(1), which is still in force, notes that 'the Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.'[41] In other words, any subject not expressly listed in the *Grundgesetz* as being within the competence of 'the Federation' falls into the exclusive domain of the *Länder*.[42] The regulation of the press was one of them. Thus, instead of aiming for a uniform and nationwide Press Act as in the German Empire, each of the *Länder* was given the power to pass its own Press Act.

Historically, this must be seen in light of the allied occupation. Media policy was an important tool used by the Allies to reform and reshape Germany. Following the end of the war, they had installed a decentralised system of the press in their zones of occupation.[43] This was seen as a way to guarantee the freedom of the press as an important building block in a pluralist democracy.[44] The Western Allies saw political decentralization as a safeguard against an expansionist strong Germany and a way to 'denazify' and 'reeducate' Germany, which is why they encouraged the West German provinces under their occupation to adopt a federal system.[45] Therefore, the Basic Law is often described as 'a child of the Western Allies and their occupational power exercised by them in Germany' after the end of Second World War.[46] Hence, the decision to leave the regulation of the press up to the *Länder* is the result of the Allies' influence.[47]

In 1949, some of the *Länder* made use of their legislative competence and passed the first of the post-war Press Acts, which all included a statutory right of reply. The almost immediate use of these legislative powers was due to the fact that occupying forces made the implementation of a Press Act by the *Länder* a condition for abolishing the licensing requirement in the press.[48] After *Bavaria* and *Hesse* made a start, the other West German *Länder* followed their lead shortly after.[49] The Imperial Press Act of 1874 served as an

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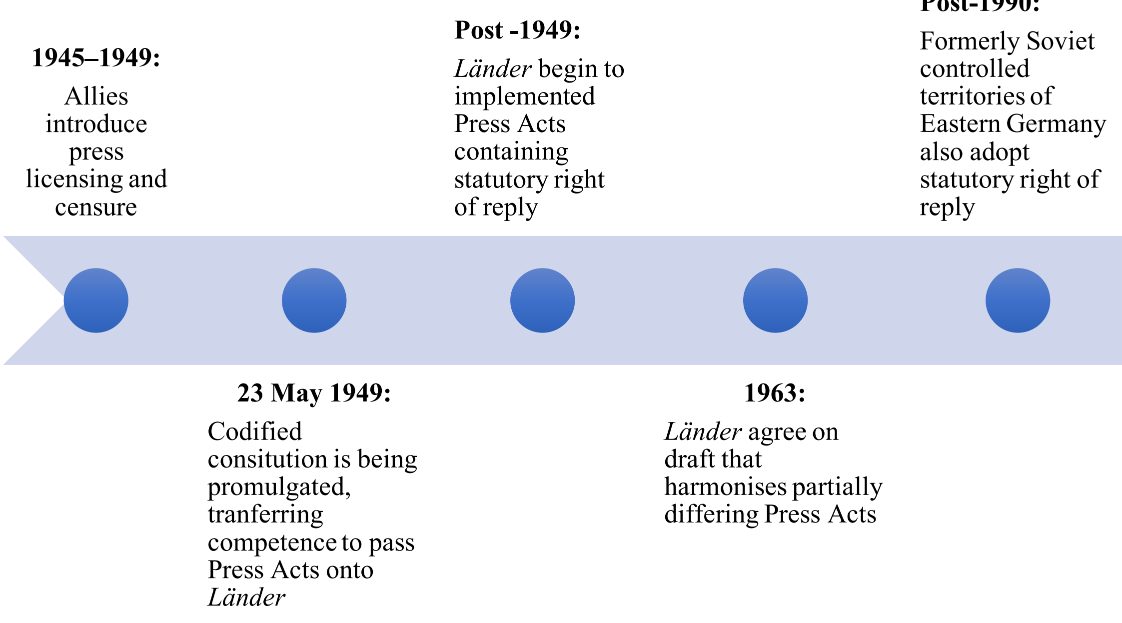
[41] See also GG, art 30.
[42] ibid, arts 70–74.
[43] Stöber (n 38) 151.
[44] Erk (n 40) 108.
[45] ibid, 107.
[46] See Jürgen Bröhmer et al., *60 Years of German Basic Law: The German Constitution and its Court* (Nomos 2012) 67.
[47] Klaus Beck, *Das Mediensystem Deutschlands: Strukturen, Märkte, Regulierung* (Springer 2012) 124.
[48] Kreuzer (n 10) 79.
[49] ibid.

inspiration during the drafting process of these post-war Press Acts. In fact, most Federal States had either fully adopted the Imperial Press Act's right of reply or merely amended it slightly before doing so.[50] Thus, despite some minor differences, all post-war Press Acts contained a statutory right of reply based on the characteristics set out in the Imperial Press Act of 1874.[51]

In 1963, the *Länder* agreed on a draft that harmonised all differing Press Acts within the Federal States.[52] Subsequently, all Press Acts were amended to fully adopt this draft.[53] The agreement contained a right of reply based on that in the Imperial Press Act and it was therefore built on the same characteristics as noted above.[54] As there have not been any major changes to the principles underpinning the statutory right of reply in the press since then, this draft agreement is the main reason why today's statutory right of reply has been designed the way it has. Following the German reunification in 1990, the formerly Soviet controlled territories of Eastern Germany also adopted their own Press Acts, including a statutory right of reply, which was based on their Western German counterparts.[55]

Figure 2: Development post-1945



[50] Hans Köbl, *Das presserechtliche Entgegnungsrecht und seine Verallgemeinerung* (DH 1966) 22, 23.
[51] See Kreuzer (n 10) 74–80.
[52] ibid.
[53] Sedelmeier (n 3) 689.
[54] Thiele (n 15) 36; Kreuzer (n 10) 61, 74 et seq.
[55] See German Schmidt et al., 'Aktuelle Probleme des Gegendarstellungsrechts' [1991] NJW 1009.

3. The right of reply’s constitutional foundation

Before assessing the right of reply’s normative foundation under Germany’s codified constitution (sections 3.2 and 3.3), section 3.1 briefly explores the relationship between the Basic Law and ‘ordinary’ statutes like the *Landespressegesetze*. This is because although a right of reply is not expressly provided for in the codified constitution, the *Grundgesetz* contains a positive obligation for the lawmaker to legislate for such a remedy.

3.1. Background

In Germany, the *Grundgesetz* has the highest ranking of any law due to the source of its authority;[56] the express statements to this effect;[57] and the entrenchment of the ‘Basic Rights’ in Articles 1–19 (*Grundrechte*). Article 20(2) and (3) as well as Article 1(3) of the Basic Law confirm the hierarchy of this legislation as well as the fact that the constitutional provisions are binding on the legislative, judiciary and executive.[58] Hence, despite being a federal state whose regions enjoy a significant degree of autonomy, all *Länder* are bound by the principles and norms of the Basic Law.[59]

Although the Basic Law primarily regulates the relationship between the state and the individual, its provisions also have a significant impact on disputes between private parties where the state is not directly involved. As repeatedly highlighted by the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), ‘the Basic Law [...] has set up an objective value system [...]. Legislation, administration, and the judiciary are given guidelines and inspiration by it.’[60] In other words, any legal provision below the *Grundgesetz* must be interpreted in line with and in light of the Basic Law. No legal norm may be in contradiction with the Basic Law and each one must be interpreted in its spirit. This objective function (*objektive Werteordnung*) has been described as the vehicle to transport the effects of fundamental rights protection into the sphere of private relationships.[61] This is primarily achieved by way of statutory interpretation and abstract

[56] GG, art 20(1).
[57] ibid, art 20(3).
[58] See Nigel Foster et al., *German Legal System and Laws* (OUP 2010) 164.
[59] See GG, art 28(1).
[60] See e.g.: BVerfG NJW 1958, 257.
[61] Bröhmer et al. (n 46) 86.

legal terms.[62] If the *BVerfG* finds a statute to be 'incompatible with the Basic Law' it has the power to 'void the law' without having to consult Parliament first.[63] If it does so, the statute in question would instantly cease to exist.[64] As detailed in section 4, the statutory right of reply is framed in abstract legal terms that require legal interpretation.

Crucially, the *Grundrechte* enshrined in Articles 1–19 of the Basic Law contain the right to freedom of expression,[65] the right to press freedom,[66] and the 'general right of personality'.[67] These rights are essential for identifying the right of reply's normative foundation under the Basic Law as well as comprehending to what extent a lawmaker may justifiably interfere with a newspaper's right to decide what to print in its publications.

3.2. The 'general right of personality'

According to the *BVerfG's* settled case law,[68] Article 2(1) read in conjunction with Article 1(1) of the Basic Law guarantees 'every person' (*jeder*) a right to freely determine and develop one's personality. This is referred to as the 'general right of personality' (*Allgemeines Persönlichkeitsrecht*).[69] There is a consensus in both case law and the literature that the right of reply's primary aim is to protect this constitutionally guaranteed 'general right of personality'. Both scholars and courts have argued that a right of reply is needed to guarantee a person's individual right to determine how he is portrayed in the media (*Recht auf Selbstbestimmung des Einzelnen über die Darstellung der eigenen Person*).[70] By enabling a person to promptly and publically defend themselves against statements concerning him that have been disseminated by 'means of mass communication',[71] the right of reply aims to prevent a one-sided display of a story.[72] Thus, it serves the purpose

[62] See e.g.: Uwe Kischel, *Comparative Law* (OUP 2019) 508.
[63] Act on the BVerfG (*BVerfGG*), s 78.
[64] *BVerfGG*, ss 95(3), 78.
[65] GG, Article 5(1) sentence 1.
[66] GG, Article 5(1) sentence 2.
[67] GG, Article 2(1) read in conjunction with Article 1(1).
[68] See e.g.: BVerfG NJW 1954, 1404; BVerfG ZD 2018, 366.
[69] For further detail see: Christian Bumke et al., *German Constitutional Law* (OUP 2019) 101 et seq.
[70] See e.g.: BGH NJW 1963, 151, 152; BGH NJW 1976, 1198, 1201; BVerfG NJW 1980, 2070, 2071; BVerfG NJW 1983, 1179, 1180; BVerfG NJW 1998, 1381; Walter Seitz, *Der Gegendarstellungsanspruch* (C.H. Beck 2017) 1; Emanuel Burkhardt, 'Gegendarstellungsanspruch' in Karl Wenzel et al. (eds), *Das Recht der Wort- und Bildberichterstattung* (Dr. Otto Schmidt 2018) 859.
[71] See BVerfG NJW 1998, 1381, 1382; Wolfgang Schulz, '§ 56 Gegendarstellung' in Reinhart Binder et al. (eds), *Beck'scher Kommentar zum Rundfunkrecht* (C.H. Beck 2018) para 7; Burkhardt (n 70) 861.
[72] See BVerfG NJW 1998, 1381, 1383; Georgios Gounalakis, 'Gegendarstellung bei gemischten Äußerungen' in Michael Stathopolous et al. (eds), Festschrift für Apostolos Georgiades zum 70. Geburtstag (C.H. Beck 2006) 189.

of protecting an individual's personality rights against 'a newspaper's significant influence on the shaping of public opinion'.[73] This is achieved by allowing a person to add his own viewpoint to a story *post-publication*.[74] Following this line of argument, someone who has been made the subject of 'public discussion' therefore needs to be provided with an opportunity to influence the depiction of himself.[75]

More specifically, the *BVerfG* has repeatedly emphasised that a right of reply should enable a person to speedily respond to factual assertions that have been published by the media through the 'use of his own words' (*mit seiner eigener Darstellung entgegenzutreten*).[76] The *BVerfG* has stressed that a person 'affected' (*betroffen*) by 'assertions of facts', be it in the press,[77] broadcasts,[78] or certain online content,[79] must have the opportunity to promptly add his view to the story in the same forum with equal prominence to the original report.[80] This focus on the remedy's speediness is one of the main reasons why there is no need for a person to establish that the statement he is seeking to reply to was harmful, injurious or inaccurate. As demonstrated below,[81] the statutory right of reply therefore does not primarily serve to establish the 'truth' but is rather a manifestation of the principle that the person referred to by a report must also be heard.[82] The *Bundesverfassungsgericht* justified this position by noting that as a rule, an individual cannot counter the news media with the same level of publicity.[83] According to the *BVerfG*, a right of reply demanding equal prominence is thus required to establish a level playing field between the 'weaker individual' and the more powerful media in order to provide an 'equal fighting chance' (*Sicherstellung gleicher publizistischer Wirkung*).[84]

Against this background, the *BVerfG* has held that there is a positive obligation deriving from the constitutionally guaranteed 'general right of personality' for the lawmaker to provide a *statutory* right of reply to safeguard individuals against the media's potential

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[73] See e.g.: BGH NJW 1963, 151; BGH NJW 1965, 1230; BVerfG NJW 1983, 1179; Sedelmeier (n 3) 687.
[74] See BGH NJW 1976, 1198, 1201; BVerfG NJW 1983, 1179.
[75] See e.g.: BVerfG NJW 1983, 1179.
[76] My translation. See BVerfG NJW 1998, 1381, 1382; BVerfG NJW 1983, 1179.
[77] See e.g.: BVerfG NJW 1998, 1381, 1382.
[78] See e.g.: BVerfG NJW 1983, 1179.
[79] See section 5.
[80] See also BGH NJW 1963, 151; BGH NJW 1964, 1134.
[81] See section 4.4.2.
[82] Sedelmeier (n 3) 688, 734.
[83] See BVerfG NJW 1998, 1381, 1383.
[84] My translation. See ibid.

impact on their personality rights.[85] This also requires the lawmaker to enable a person to enforce their statutory guaranteed right of reply through courts to provide 'effective legal protection'.[86] The *BVerfG* stressed that if there was no such legislation, this would 'degrade' an individual to a 'mere object of public debate'.[87] However, to carry out this legislative mandate in 'line with' and 'in light of' the Basic Law, a lawmaker must not only consider the individual's personality rights, but also the newspaper's rights that are interfered with.[88] If a publisher is obligated to print a statutory right of reply, the competing right is the newspaper's right to freedom of the press, as enshrined in Article 5(1) sentence 2 of the Basic Law. Different to the ECHR,[89] the freedom of the media (which contains the freedom of the press) is guaranteed explicitly and therefore separately from the general right to freedom of expression, which is set out in Article 5(1) sentence 1 of the Basic Law.

Significantly, the freedom of the press under the German constitution pays particular attention to what is commonly referred to as 'editorial freedom' (*inhaltliche Gestaltungsfreiheit*),[90] which is similar to what has been set out under the ECHR.[91] Repeatedly, the *BVerfG* emphasised that the right to freedom of the press guarantees a newspaper's editorial freedom in deciding whether to publish articles, comments and letters submitted by private individuals.[92] The notion of editorial freedom further includes the power to determine where articles may be placed within an issue of the newspaper.[93] Thus, a statutory right of reply interferes with this freedom as it might require an editor to publish material they would prefer not to.[94]

Nevertheless, the freedom of the press as guaranteed under the Basic Law is *not* absolute. As detailed in Article 5(2) of the Basic Law, it may be limited by 'provisions of general laws'. Hence, to justifiably limit a newspaper's press freedom, any interference must be prescribed by law, identical to the requirements under the ECHR. Crucially, the statutory

[85] BVerfG AfP 1993, 474; BVerfG AfP 1986, 313, 331. See also: BVerfG NJW 1998, 1381; BVerfG NJW 1983, 1179; Seitz (n 70) 324.
[86] Thomas Hoeren et al. (eds), *Multimedia-Recht* (C.H. Beck 2018) part 8 para 77; see also BGH NJW 1974, 642, 643; BVerfG NJW 1983, 1179, 1180.
[87] BVerfG NJW 1983, 1179, 1180.
[88] See BVerfG AfP 2008, 58, 60.
[89] See Chapter 2.
[90] See e.g.: BVerfG NJW 1966, 1603; BVerfG NJW 1997, 386; BVerfG NJW 2018, 1596.
[91] See Chapter 2.
[92] See e.g.: BVerfG NJW 1998, 1381, 1382; BVerfG NJW 2014, 766; BVerfG NJW 2018, 1596; BVerfG NJW 2019, 419, 420.
[93] ibid; the same applies to certain providers of online content, see section 5.
[94] See e.g.: BVerfG NJW 2017, 1537.

right of reply contained in the Press Acts of the Federal States *does* amount to a 'provision of general law' as required under Article 5(2). However, the *BVerfG* has formulated additional criteria and tests that are necessary when assessing whether an interference with the freedom of the media can be justified (*gerechtfertigt*). In addition to being (i) prescribed by a law, the restriction of the right to freedom may only be justified if it is (ii) necessary (*geeignet und erforderlich*) to achieve a legitimate aim.[95] Furthermore, the interference must have been (iii) proportionate (*angemessenes Verhältnis*) to the aim pursued.[96] As a rule, this requires a balancing of the relevant rights and interests involved on a case-by-case basis,[97] in an attempt to give both sides the greatest possible protection. Particularly, this may be achieved by interpretation of the abstract legal terms within the statute that has provided the basis for the interference.[98]

Ultimately, given these competing rights (the individual's personality rights versus the freedom of the media), the lawmaker must carry out a balancing exercise when acting upon its legislative mandate to guarantee equality of arms.[99] The same applies to the practical application of the statutory right of reply as well as the interpretation of the abstract legal terms contained within the statute by the courts.[100] As a result, the statutory right of reply, despite being underpinned by constitution, is *not* an absolute right. Thus, if certain requirements are not fulfilled, a newspaper can rightfully refuse the publication of a reply.[101] Section 4 analyses how the courts have conducted this test in practice.

3.3. Freedom of expression

It is further widely recognised in both case law and the literature that the normative purpose of the right of reply in Germany goes beyond reliance on solely the 'general right of personality'. Indeed, the *BVerfG* has emphasised that the right of reply is needed, not only to allow information to be challenged by the person it is referring to, but also to ensure a plurality of information and opinions (*Garantie der freien individuellen und öffentlichen Meinungsbildung*').[102] This is because it allows the public to get to know both sides of a

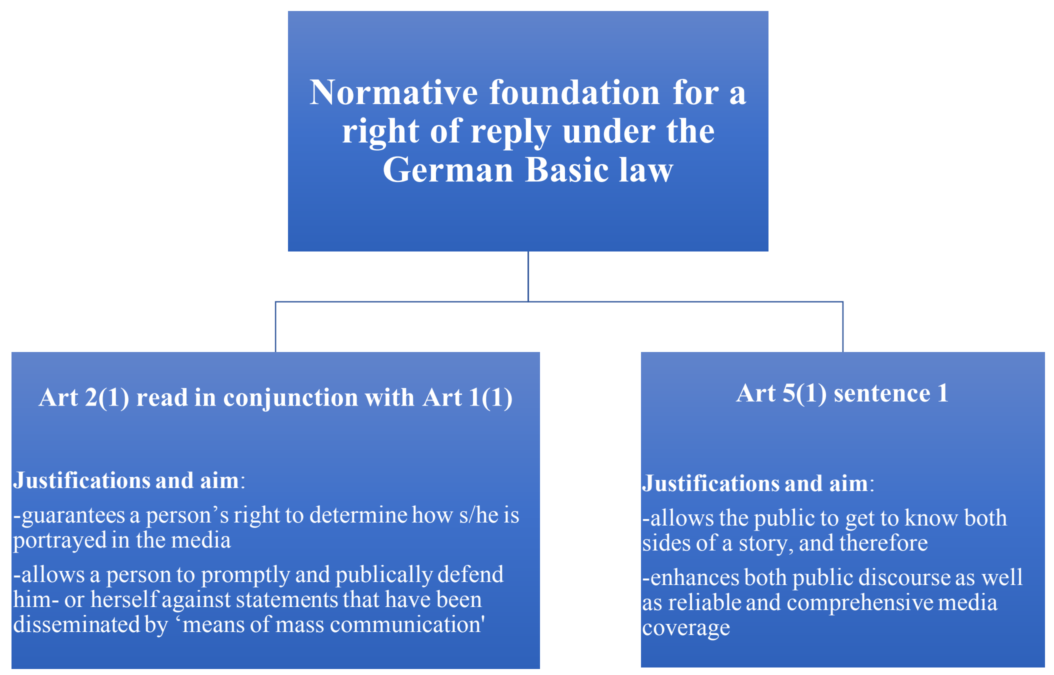
[95] See e.g.: BVerfG NJW 1986, 1239.
[96] ibid. See also: Volker Epping et al. (eds), *BeckOK Grundgesetz* (C.H. Beck 2019) art 5 para 100.
[97] See e.g.: BVerfG NJW 1994, 1147, 1148.
[98] ibid.
[99] See BVerfG NJW 1983 1179, 1180.
[100] See BVerfG AfP 2008, 58, 60.
[101] See section 3.
[102] See BVerfG NJW 1998, 1381, 1382; Sedelmeier (n 3) 688, 689.

story,[103] and hence enhances both public discourse as well as reliable and comprehensive media coverage.[104] Thus, although it is seen to predominantly serve an individual's personality rights, a right of reply can also be normatively based in Article 5(1) sentence 1 of the Basic Law (Freedom of Expression). Therefore, an obligation to publish the reply can be justified by the need to inform the public on the broadest possible basis and to make diverse sources of information available to them.

3.4. Intermediate conclusion

Although not expressly guaranteed in the text of the Basic Law, the right of reply's normative purpose under the German constitution is twofold. Its main task is to protect one's 'general right of personality' by providing an opportunity to promptly defend oneself against statements that have been disseminated by 'means of mass communication'. However, it also serves freedom of expression by securing a plurality of opinions. This is similar to what has been put forward by the ECtHR. Like the *BVerfG*, the ECtHR justified the recognition of a right of reply with the need to protect personality rights (Article 8) as well as the need to allow false information to be challenged and to ensure a plurality of information and opinions (Article 10).

Figure 3: Normative foundation



[103] BVerfG NJW 1998, 1381, 1382.
[104] Sedelmeier (n 3) 692.

4. The right of reply in the Press Acts of the Federal States

This section first provides an overview of the statutory right of reply's main characteristics as detailed in the Press Acts of the *Länder* (section 4.1). This is followed by an investigation of the right of reply's practical application and its impact on press freedom. Thus, section 4.2 examines the remedy's judicial enforcement before section 4.3 evaluates the right of reply's scope. Subsequently, section 4.4. analyses the remedy's content and form. Lastly, section 4.6 assesses who should be able to invoke the statutory right of reply.

4.1. Characteristics

Due to the harmonisation of rules after the Second World War as set out above, the provisions setting out the right of reply in all 16 Press Acts are based on the same principles and in fact are almost identical in their wording.[105] To provide an overview, the following table sets out the main characteristics that all Press Acts are based on.

[105] Any exceptions are highlighted in this Chapter.

Table 1: Right of reply in the *Landespressegesetze*

Research question	Finding
Who may request a right of reply?	-Every ‘person’ (*Person*) or ‘public body’ (*Stelle*) who has been ‘affected’ (*betroffen*) by an ‘assertion of fact’
Is it necessary to establish that the statement one is seeking to reply to was harmful, inaccurate or injurious?	-There is no need to show that the statement one is seeking to reply to was harmful, inaccurate or injurious -Instead, it is sufficient if one has been ‘*affected’* (*betroffen*) by a factual assertion published in the press
What may be contained in the reply itself?	-The reply must *not* include a display of opinion and is therefore itself limited to factual statements
How must the reply be published by the newspaper?	-The reply must be printed with ‘equal prominence’, i.e., it must be inserted with the same font and in the same section of the newspaper as the original report -It must not be edited by the newspaper -The reply must be published in the next issue that has not yet been typeset for printing -The reply must be printed free of charge unless the statement one is seeking to reply to appeared as an advertisement
Under which circumstances can a newspaper rightfully refuse to print a right of reply?	-If the reply is requested in response to an opinion or itself is not limited to statements of facts; -if the reply contains anything that might be of ‘punishable nature’; for example, a reply must not contain a defamatory statement or hate speech; -if the length of the reply ‘unreasonably’ (*unangemessen*) exceeds that of the original statement complained of (as an exception to this rule, section 10(2) sentence 4 of the Bavarian Press Act as well as section 10(3) sentence 3 of the Hesse Press Act note that a newspaper may not refuse the publication of a reply even if it ‘unreasonably’ exceeds the length of the original statement. Instead, the person seeking to publish the reply will have to pay a fee equivalent to what could have been expected had an advertiser bought this space); -if the person has no ‘legitimate interest’ (*berechtigtes Interesse*) in the publication of his reply; -if the reply has not been sent to newspaper as a written text and signed by the ‘affected’ person (as an exception to this rule, the Press Acts of *Berlin*, *Bremen*, *Lower Saxony* and *Saxony-Anhalt* also allow signature by a proxy); -if the reply has not been requested within the timeframe as set out in the Press Acts; -if the reply is requested in response to a truthful report on public sessions of the public authorities or the courts; *or* -if the reply is in a language different from that in which the contested information was made public
What type of media services are within the scope of the Press Acts?	-The Press Acts concern all ‘periodical print publications’ (*periodische Druckveröffentlichung*) -The Press Acts define this term as ‘newspapers, magazines and other printed works that appear in constant, albeit irregular, succession and at intervals of no more than six months’ -The publication of a reply may be requested from the publisher (*Verleger*) of the newspaper who has printed the statement in question and/or the editor (*Redakteur*) responsible for the article one is seeking to reply to

4.2. Judicial enforcement

If a newspaper refuses to print one's right of reply, one may achieve publication by means of judicial enforcement. Thus, this section briefly outlines the court proceedings in cases involving a right of reply. This allows a better understanding of the burden of proof in such cases, which is decisive for understanding the right of reply's practical application. Subsequently, section 4.2.2 highlights controversies surrounding the right of reply's judicial enforcement.

4.2.1. Background

In order to judicially enforce the statutory right of reply, one must bring a motion for an injunction (*Einstweilige Verfügung*) to one of the 115 Regional Courts (*Landgericht*),[106] which requires representation by an attorney (*Rechtsanwalt*).[107] The motion must aim to compel the newspaper to publish one's counter statement. The Code of Civil Procedure (*Zivilprozessordnung – ZPO*) determines that the claim must be commenced at the Regional Court that is locally responsible for where the publisher or editor resides.[108] Significantly, injunctive relief is only available by way of summary proceedings. After the Regional Court has handed down a decision, either party can appeal to the superordinate Higher Regional Court (*Oberlandesgericht)*.[109] There are 24 *Oberlandesgerichte,* spread out across all Federal States. Crucially, they are not bound by each other's judgments and are hence free to deviate in their decision-making practice.[110] Yet, it is not possible for either party to appeal to the Federal Court of Justice for Civil Matters (*BGH*), which is normally the highest appellate court for civil litigation. This is because right of reply proceedings in Germany do not allow the parties to go to 'full trial' after an injunction has been granted or refused.[111] Therefore, the Higher Regional Courts are the highest appellate court in these matters.

In practice, one must substantiate one's claim to the responsible Regional Court by providing *prima facie* evidence (*Glaubhaftmachung*) showing that (i) one was the subject

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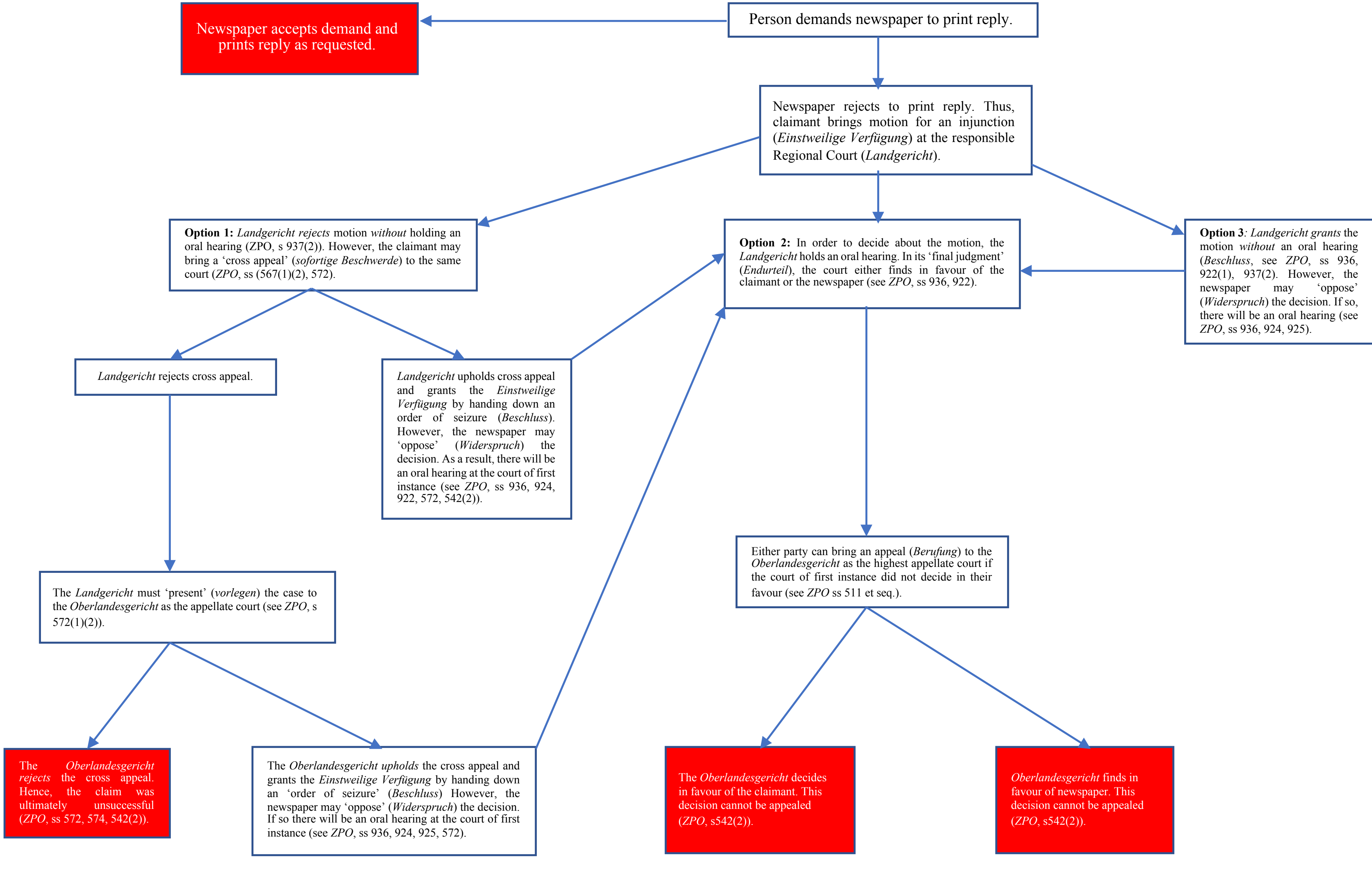
[106] See Deutsche Justiz, 'Verzeichnis der Internet-Adressen der Justiz' (2018) <http://www.deutschejustiz.de/landgerichte.html>.
[107] *ZPO*, s 78.
[108] See *ZPO*, ss 12, 13, 17, 21; Courts Constitution Act (*Gerichtsverfassungsgesetz*), ss 71(1), 23(1).
[109] In Berlin, this is called *Kammergericht*.
[110] See Raymond Youngs, *English, French & German Comparative Law* (Routledge 2014) 98.
[111] *ZPO*, ss 542(2). See also BGH NJW 1974, 642, 643. For the few exceptions see Burkhardt (n 70) 948.

of a newspaper report; (ii) one has been 'affected' by a 'factual assertion' contained in this report; and (iii) that one has unsuccessfully requested the publication of a reply, the content and form of which adhere to the requirements set out in the Press Acts, from the newspaper within the permissible timeframe.[112] As an exception to the rule in German summary proceedings, one does not have to provide any *prima facie* evidence for the veracity of claims in the reply or the statements that gave rise to it.[113] Similarly, although the statutory right of reply may only be exercised by those who have been 'affected' by a factual assertion published by a newspaper, it does not need to be established that this assertion was harmful, injurious or inaccurate.[114]

Instead, it is sufficient to demonstrate that one has been either directly or indirectly referred to and therefore identified by the factual assertion one is seeking to rebut.[115] Because of this, the conditions set out by the statute are referred to in the academic literature as mere *'formal requirements'*.[116] Only if a judge is satisfied that *all* the requirements for the publication of a right of reply as set out in the table above have been fulfilled, will he grant the injunction (*Alles-oder-nichts-Prinzip*).[117] In response to such a motion, a newspaper may demonstrate that it rightfully refused to print the reply by referring to the exceptions listed in the *Landespressgesetze*.[118] However, due to the summary nature of the proceedings, a newspaper may also only make use of *prima facie* evidence and is further limited in its use of evidence regarding the veracity of claims in the reply or the statements that gave rise to it.[119] The following unique diagram visualises the different routes a case might take.

Figure 4: Routes during a trial

[112] See *ZPO*, ss 936, 920(2), 294; Klaus Sedelmeier, 'Wann und Wann und wodurch entsteht der konkrete Leistungsanspruch auf Abdruck einer Gegendarstellung?' [2012] AfP 345.
[113] For the constitutional justifications see section 3.
[114] See e.g.: Beater (n 4) 774.
[115] See Burkhardt (n 70) 886 et seq. Chapter 6 analyses how this compares to the benchmarks set under the ECHR.
[116] See e.g.: Hubertus Gersdorf et al. (eds), BeckOK *Informations- und Medienrecht* (C.H. Beck 2014) s 1004 para 47 et seq.
[117] See Peter Enders, 'Gegendarstellung' in Peter Enders et al. (eds), *Einstweiliger Rechtsschutz* (ZAP 2016) 709.
[118] See Table 1.
[119] See section 4.4.2.



Person demands newspaper to print reply.
Newspaper accepts demand and prints reply as requested.
Newspaper rejects to print reply. Thus, claimant brings motion for an injunction (*Einstweilige Verfügung*) at the responsible Regional Court (*Landgericht*).
Option 1: *Landgericht rejects* motion *without* holding an oral hearing (ZPO, s 937(2)). However, the claimant may bring a 'cross appeal' (*sofortige Beschwerde*) to the same court (*ZPO*, ss (567(1)(2), 572).
Option 2: In order to decide about the motion, the *Landgericht* holds an oral hearing. In its 'final judgment' (*Endurteil*), the court either finds in favour of the claimant or the newspaper (see *ZPO*, ss 936, 922).
Option 3*:* *Landgericht grants* the motion *without* an oral hearing (*Beschluss*, see *ZPO*, ss 936, 922(1), 937(2). However, the newspaper may 'oppose' (*Widerspruch*) the decision. If so, there will be an oral hearing (see *ZPO*, ss 936, 924, 925).
Landgericht rejects cross appeal.
Landgericht upholds cross appeal and grants the *Einstweilige Verfügung* by handing down an order of seizure (*Beschluss*). However, the newspaper may 'oppose' (*Widerspruch*) the decision. As a result, there will be an oral hearing at the court of first instance (see *ZPO*, ss 936, 924, 922, 572, 542(2)).
Either party can bring an appeal (*Berufung*) to the *Oberlandesgericht* as the highest appellate court if the court of first instance did not decide in their favour (see *ZPO* ss 511 et seq.).
The *Landgericht* must 'present' (*vorlegen*) the case to the *Oberlandesgericht* as the appellate court (see *ZPO*, s 572(1)(2)).
The *Oberlandesgericht rejects* the cross appeal. Hence, the claim was ultimately unsuccessful (*ZPO*, ss 572, 574, 542(2)).
The *Oberlandesgericht upholds* the cross appeal and grants the *Einstweilige Verfügung* by handing down an 'order of seizure' (*Beschluss*) However, the newspaper may 'oppose' (*Widerspruch*) the decision. If so there will be an oral hearing at the court of first instance (see *ZPO*, ss 936, 924, 925, 572).
The *Oberlandesgericht* decides in favour of the claimant. This decision cannot be appealed (*ZPO*, s542(2)).
Oberlandesgericht finds in favour of newspaper. This decision cannot be appealed (*ZPO*, s542(2)).

4.2.2. Legal uncertainty?

There are two main controversies relating to the right of reply's judicial enforcement. First, as noted above, it is not possible for the *BGH* to set a precedent if the 24 Higher Regional Courts are disagreeing with each other. Instead, the only way of getting a Federal Court involved is to file a 'constitutional complaint' (*Verfassungsbeschwerde*) with the *BVerfG*.[120] A constitutional complaint allows 'anyone' (*jederman*) to claim that the decision of a Regional or Higher Regional Court has unjustifiably interfered with their constitutionally guaranteed rights.[121] However, it has been repeatedly highlighted by both the *BVerfG* and the literature that due to the court's narrow remit,[122] the opportunity to file a constitutional complaint does *not* replace the function of a Federal appellate court like the *BGH.* Therefore, the lack of jurisdiction of a Federal appellate court runs the risk of causing legal uncertainty in practice. As most of the statutory right of reply's formal requirements require interpretation by the courts on a case-by-case basis, the same scenario might be decided differently subject to the interpretation of each Higher Regional Court, which are not bound by each other's decisions. If there is no Federal appellate court with the power to set a precedent in contentious cases, this might lead to the 24 Higher Regional Courts having diverging approaches. So far, there is no (empirical) insight into the extent to which this is happening in practice and if this potential uncertainty (negatively) impacts on the press.[123]

Second, if one wants to obtain a comprehensive insight into the right of reply's practical application, one must examine how often the courts get involved. This is because a statutory right of reply might result in a 'chilling effect' on press freedom if a newspaper refrains from publishing certain stories due to a fear of litigation. Indeed, if there were a high number of such court cases, the risk of high costs might further underpin those arguments. However, it might also be the case that most disputes involving a right of reply get resolved between the individual and the publisher *without* the courts getting involved. If this is so, this would render the arguments in favour of a 'chilling effect' less persuasive.

[120] See GG, art 93(1) number 4(a) in conjunction with *BVerfGG*, ss13(8a), 78.
[121] Here, this would either be a person's personality rights or the newspaper's right to press freedom.
[122] See e.g.: BVerfG GRUR 1958, 254; BVerfG NJW 1964, 1715; Kischel (n 62) 461, 462.
[123] See e.g.: Beater (n 4) 759; Reinhart Ricker et al., *Handbuch des Presserechts* (C.H. Beck 2012) 204.

Crucially, it is not possible to answer these questions by solely relying on doctrinal methods. Even if a court has issued a decision relating to the statutory right of reply, it is left to the judges to decide whether the ruling will be made public.[124] Generally, German courts tend to only publish decisions that reinterpret or confirm a controversial point of law.[125] Hence, the outcomes of the vast majority of cases in which an issue concerning a right of reply is being disputed remains unknown to the public. Therefore, both issues are further evaluated in Chapter 5.

4.3. The right of reply's scope in the printed press

Distinguishing between 'assertions of facts' and opinions is decisive for determining the right of reply's scope since the *Landespressgesetze* limit the ambit of the remedy to the former. However, drawing a line between these two terms in the context of the right of reply has become increasingly difficult as recently highlighted by the *BVerfG's* latest judgment on this issue.[126] Hence, this section first, sets out how to draw a line between these two terms, before second, critically analysing the *BVerfG's* latest case law.

4.3.1. Theoretical background

According to the *BVerfG*, a factual assertion can be defined as a statement about events of the past or present that could theoretically be proven to be true or false.[127] This includes not only statements describing how an event has taken place (*äußere Tatsachen*), but also assertions concerning the motivations and intentions of a person who has been made subject of a press report (*innere Tatsachen*; i.e. *why* someone has decided to act in a specific way).[128] For example, a press report merely noting that a person has broken into someone else's house would fall within the former category, whereas an assertion outlining *why* he decided to do so would qualify for the latter. Setting out the motivations and intentions of *why* someone has acted the way they have may be decisive for *how* they are portrayed in public. Public opinion about someone's behaviour is likely to differ significantly depending on whether he broke into a house to steal money or to save the homeowner from

[124] See e.g.: Seitz (n 70) 281 et seq.
[125] ibid.
[126] BVerfG 2019, 419.
[127] See e.g.: BVerfG NJW 1994, 1779; BVerfG NJW 1996, 1529.
[128] See Gounalakis 2006 (n 72) 195.

a fire that had broken out.[129] However, both (hypothetical) statements share the characteristic that they could theoretically be proven to be true or false which thus qualifies them as factual assertions. Significantly, a statutory right of reply may be invoked if a newspaper is presenting a factual assertion as a result of their own research and when they are merely reporting on what someone else has said.[130] The same applies to statements that have been issued in the form of an allegation or rumour.[131]

In contrast, an expression of opinion is defined as a subjective statement involving elements of comment, interpretation and the expression of a point of view.[132] Different to a factual assertion, an expression of opinion cannot be proven to be true or false.[133] Hence, the accuracy of an opinion is not objectively verifiable due to its focus on the speaker's subjective display of his belief.[134] Whether a statement should be classified as a factual assertion or an opinion must be evaluated from the position of a 'reasonable' (*verständig*) and 'unbiased' (*unvoreingenommen*) hypothetical reader.[135] One must then assess how this hypothetical reader could have understood the statement in question considering the context of the newspaper report.[136] If in doubt, a statement must be classified as an expression of opinion to avoid an unjustified limitation of press freedom.[137]

4.3.2. Analysis of most recent case law

Applying these definitions in practice has proven to be difficult. The most recent example is a decision of the *BVerfG* handed down in late 2018. It deals with the issue of how courts must evaluate the meaning of a statement when assessing whether or not it should be classified as a factual assertion.[138] In addition to illustrating the difficulties in drawing a line between factual assertions and opinions, this judgment contains significant conclusions on how courts should balance out the different interests involved in a right of reply case.

[129] See Burkhardt (n 70) 868, 869.
[130] Schulz (n 71) para 23.
[131] Also note BVerfG NJW 2018, 1596, where the *BVerfG* held that a right of reply may not be invoked in response to questions that are open to different answers. This does not apply to rhetorical questions, which are not expected to receive an answer and instead aim to make a (hidden) statement, see: Max-Julian Wiedermann, 'Gegendarstellungen gegen Fragen – Rechtlicher Rahmen, Handlungsmöglichkeiten und alternative Rechtsmittel' [2019] AfP 496.
[132] BVerfG NJW 1994, 1779; BVerfG NJW 1995, 3303.
[133] Gounalakis 2006 (n 72) 195.
[134] ibid.
[135] See e.g.: BVerfG NJW 2017, 1537, 1538; Sedelmeier (n 3) 717.
[136] See BGH NJW 2014, 3154; Sedelmeier (n 3) 717.
[137] ibid.
[138] BVerfG NJW 2019, 419.

The case is about a front-page headline published by *BILD,*[139] which concerned the financial situation of Boris Becker, a former tennis player. In order to promote an interview with one of Becker's former business partners inside the newspaper, *BILD's* front-page headline noted:

> 'BILD EXCLUSIVE: creditor who lent Becker millions comes clean – Boris even pledged (*verpfänden*) his mother's home as security!'.[140]

However, the interview inside the newspaper made no further reference to the legal term 'pledged as security' and instead (correctly) noted that Becker had included the property in which his mother lived on a 'collateral list' (*Sicherheitenliste*) to secure repayment of a loan. Under German land law, it does make a difference whether a property is 'listed as collateral' or 'pledged as security'. The former gives a creditor a contractual right (*schuldrechtlicher Anspruch*) to the registration of a land charge on the listed properties. However, it is technically only the latter that creates a security interest over the property (*Pfandrecht*) *without* the creditor having to obtain a court order first. If Becker had pledged the house as security it would have required him as the debtor to give the creditor immediate possession of the object to obtain security. However, because Becker had merely listed his property as collateral, he therefore remained with full control over the asset. Hence, from a legal point of view, the claim in the headline ('pledged as security') deviated from what had actually happened in practice ('list as collateral').

In response to this article, Becker filed a motion for an injunction at the Berlin Regional Court as the court of first instance. The motion aimed to compel *BILD* to publish his reply to the story. His reply contained the statement: '[…] I have not pledged my mother's home as security. [...]'. The court identified the main issue of the case to be whether the headline published by the newspaper contained a factual assertion or an expression of opinion. Both the court of first instance and the *Kammergericht Berlin* as the appellate court decided the matter in favour of the claimant as they ruled that the headline contained a factual assertion. Thus, the newspaper was obligated to print the reply. The inferior courts based their decisions on the argument that the headline contained a factual assertion as it could theoretically be proven true or false whether Becker had pledged the property as security. The appellate court stressed that an average and unbiased reader would

[139] For the facts of the case, see ibid, 419, 420.
[140] My translation. Original: 'BILD EXKLUSIV Millionen-Gläubiger packt aus – Boris verpfändete auch das Haus seiner Mutter!'.

understand the term ‘pledge as security’ to mean that Becker no longer full had control over the asset in which the security interest was granted and that the creditor was entitled to liquidate the asset in the event of default. In other words, the inferior courts argued that the average reader could comprehend the difference in meaning between the terms ‘pledge as security’ and ‘list as collateral’. In response to these judgments, *BILD’s* publisher filed a constitutional complaint to the *BVerfG*. The publisher argued that the headline contained an expression of opinion rather than a factual assertion, which was why the obligation to print the reply unjustifiably interfered with their press freedom.

The *BVerfG* disagreed with the findings of the inferior courts and instead decided in *BILD’s* favour. The *Bunderverfassungsgericht* held that the appellate court failed to interpret the meaning of the headline from the point of view of an average reader and instead evaluated the meaning of the relevant term by use of its own legal understanding. However, had they approached the situation from a lay person’s position, they would have come to a different conclusion. The *BVerfG* found it unlikely that an average reader would be able to sharply distinguish between the legal terms in question. Hence, the court clarified that if a headline can be understood to have different meanings, as in the present case, a right of reply may be invoked *only if* the meaning of the contested factual claim can be determined *unambiguously* (*eindeutig bestimmbar*).[141] Otherwise, it would not be clear to the average reader which statement a person was seeking to reply to.[142] Thus, the *BVerfG* held that the challenged headline did not contain a factual claim which the *average* reader, i.e. a person without a legal background, would be able to identify unambiguously. Instead, the average reader would be more likely to understand such a headline as a value judegment of the newspaper,[143] which is outside the scope of the statutory right of reply.

This judgment is to be welcomed as it ensures that the statutory right of reply is kept within proportionate bounds. In fact, even someone with a legal background may have been unable to sharply distinguish between the two legal terms. Considering the complex design of German land law, it requires expert knowledge even beyond that which is taught at university to fully grasp the level of detail in scenarios such as the present case. Addi-

[141] BVerfG NJW 2019, 419, 420.
[142] See also BVerfG ZUM 2008, 325, 327.
[143] Michael Fricke, ‘Rechtsbegriffe sind nur eingeschränkt gegendarstellungsfähig’ [2019] GRUR-Prax 48.

tionally, since the headline had been published by a tabloid newspaper, it seems reasonable to expect a lower level of legal education from the average *BILD* reader compared to the reader of, for example, a magazine explicitly aimed at lawyers. Only if the headline had been published in the latter, one could have argued that the average reader understood the headline in the way set out by the inferior courts. This argument picks up on the *BVerfG's* repeated emphasis of the importance of the context in which a statement was published. Furthermore, this judgment highlights how the lawmaker attempted to balance the diverging rights at play. The limitation of the right of reply's scope to factual assertion demonstrates one way that newspapers can defend themselves against any attempts to publish a reply that they might feel are unjustified. As in the present case, publishers may reject the publication of a reply based on the argument that a statement does not contain a factual assertion and they can defend this position across several instances in court. Engaging in court proceedings may prevent the publication of the right of reply against their will for the time of the trial.[144]

On the other hand, the restriction of the right of reply's scope may be seen as contradicting one of its main purposes: providing a speedy and prompt opportunity for someone to respond to allegations by the 'use of his own words'. If a newspaper abuses the defence mechanism set out above to simply stall the publication of a reply, this might hinder the effectiveness of the remedy as lengthy proceedings lead to the danger that the challenged statement will be long forgotten by the time a related trial is competed.[145] Therefore, only the immediate publication of the reply can effectively fulfil the right's normative purpose. Hence, some scholars have argued in favour of extending the scope to also include expressions of opinions, which is examined in the subsequent section.

4.3.3. Extending the scope?

The arguments concerning an extension of the statutory right of reply's scope are similar to those already discussed in Chapter 2. As noted there, some scholars have rejected a potential widening of the scope to opinions because this may run the risk of 'flooding' the press with replies. This has been linked to the fear that broadening the scope could result not only in an unjustified interference with a newspaper's press freedom, but also in the right of reply becoming 'a dull and overused' remedy, as well as creating a burden

[144] See *ZPO*, ss 936, 924(3) sentence 2, 907(1); see also Burkhardt (n 70) 973.
[145] See Chapter 2.

on the publisher in terms of cost and time. Likewise, the fear of opening the 'floodgates' has been the most prominent argument brought forward by German scholars against a widening of the scope.[146] Additionally, it has been noted that the remedy could then be abused for 'propaganda and self-promotion', which would turn the media landscape into a playground of 'open polemic'.[147] Following this line of argument, the limitation of the scope is necessary to safeguard the press's interest in publishing comments and opinions sanction free. Ultimately, this is seen to serve the preservation of the public discourse in the media.[148] From this point of view, broadening the right of reply's scope would obstruct the press's task of scrutinising and criticising public events.[149]

On the other hand, some commentators note that allowing a right of reply against expressions of opinions would guarantee an efficient and comprehensive protection of personal rights. As also recognised by the ECtHR, personality rights may not only be harmed by factual assertions but also by opinions.[150] Additionally, the possibility of having access to both sides of a story might enhance public discourse. Crucially, it would make the distinction between factual assertions and expressions of opinions superfluous and thus speed up the enforcement of a right of reply in court.[151] Significantly, Beater stresses that there is no empirical evidence either supporting or contradicting the 'floodgates argument', which is why the persuasiveness of this argument is yet to be determined.[152]

4.4. The content and form of the reply

This section investigates if and how the way in which a reply must be printed can amount to an unjustified limitation of press freedom. Thus, after outlining the reply's admissible content (section 4.4.1), section 4.4.2 evaluates whether someone who is acting in bad faith may be able to abuse the remedy. Subsequently, section 4.4.3 investigates whether the practical application of the 'equal prominence' requirement amounts to an unjustified limitation of press freedom.

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[146] See e.g.: Friedrich Bischoff, 'Der Gegenkommentar' [1987] DÖV 318, 321; Beater (n 4) 763, 764; Seitz (n 70) 132, 153.
[147] See Kreuzer (n 10) 61, 80.
[148] See Beater (n 4) 765; Sedelmeier (n 3) 712.
[149] ibid.
[150] See Chapter 2.
[151] See e.g.: Rolf Stürner, *Gutachten A zum 58. Deutschen Juristentag* (C.H. Beck 1990) 91 et seq.; Rolf Stürner, 'Die verlorene Ehre des Bundesbürgers. Bessere Spielregeln für die öffentliche Meinungsbildung?' [1994] JZ 865, 876 et seq.
[152] Beater (n 4) 764; see Chapters 5 and 6 for further discussion.

4.4.1. Admissible content

As set out above, a right of reply may only be requested in response to factual assertions. Following the notion of equality of arms, the reply itself is also limited to factual statements and therefore must not contain expressions of opinion. It must further link the content of the reply to the factual assertion it is responding to in order to provide the reader with the necessary background. To do so, the reply must set out the content of the original article and thereby accurately repeat the assertions it is aiming to rebut.[153] A failure to do so empowers the newspaper to rightfully refuse the publication of the reply due to it being 'misleading' (*Irreführung*).[154] The reply itself must contain a different representation of the facts of a story than the newspaper's, in order to provide the reader with both sides of a story.[155] To illustrate that it has been written by someone other than the newspaper, it is further crucial to sign the rebuttal with the name of the person who is replying to the assertion. A failure to do so again empowers the newspaper to refuse the publication of the reply due to it being 'misleading' (*Irreführung*).[156]

In practice, the reply can either (i) simply deny the truthfulness of what the newspaper has said;[157] or (ii) deny the truthfulness of what the newspaper has said *and* present one's diverging version of the facts.[158] Significantly, a newspaper must not edit the reply's content. The following figures provide examples for each scenario:

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[153] See e.g.: Roland Rixecker, 'Anhang zu § 12. Das allgemeine Persönlichkeitsrecht' in Franz Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (C.H. Beck 2018) para 324.
[154] See Sedelmeier (n 3) 703.
[155] See e.g.: Ricker (n 123) 183 et seq. Whether this also allows a person to include criticism of the publisher is discussed in Chapter 6.
[156] See e.g.: Seitz (n 70) 90.
[157] However, the former may not be sufficient in cases where simply denying a factual assertion would mislead (*irreführen*) the average reader. For example, if a newspaper reports that a person was convicted for theft and sentenced to one year in prison although he was convicted for burglary, it is not sufficient to reply with the statement: 'I was not convicted for theft'. This is because it would conceal that the person was indeed convicted for a crime. To avoid replying in a misleading way, the rebuttal would need to say: 'I was not convicted for theft. Instead, I was convicted for burglary'. Thus, if a person wants to avoid the risk of his reply being rejected due to it being misleading, it is advisable to opt for the latter. See also Sedelmeier (n 3) 703.
[158] Beater (n 4) 778.

Figure 5: Example for (i)

GEGENDARSTELLUNG

In der BILD-Zeitung vom 17.06.2015 haben Sie auf Seite 1 behauptet „Mutter des Schlägers spuckt auf Tugce-Foto!"
Hierzu stelle ich fest: Ich habe nicht auf ein Foto von Tugce gespuckt.
Frankfurt am Main, den 23.06.2015
Rechtsanwalt Felix Damm für Sadija M
Anmerkung der Redaktion: Wir bleiben bei unserer Darstellung.
Mehr auf Seite 6

My translation:

Right of Reply

In an article published in BILD, dated 17 June 2015, you claimed the following: 'Tugce Beater's Mother spits on Tugce's Photograph!'
Regarding this, I note the following: I have not spat on Tugce's photograph.

Frankfurt am Main, 23 June 2016
Attorney Felix Damm on behalf of Sadija M.

Editor's comment: We stick to our claim.

Figure 6: Example for (ii)

Gegendarstellung

In der BILD-Zeitung vom 28.01.2019 heißt es in einem Artikel unter der Überschrift: „Mission Lifeline" auf Twitter: Seenotretter werben für Ehen mit Flüchtlingen: „Kapitän Claus-Peter Reisch (57) steht derzeit in Malta wegen des Vorwurfs der Schleuserei vor Gericht."
Hierzu stelle ich fest: „Kapitän Claus-Peter Reisch steht derzeit in Malta nicht wegen des Vorwurfs der Schleuserei vor Gericht. In dem Gerichtsverfahren geht es um die angeblich falsche Registrierung des Schiffes."
Leipzig, den 29.01.2019
Rechtsawanlt Dr. Jonas Kahl für Claus-Peter Reisch
Anmerkung der Redaktion: Herr Reisch hat recht.

My translation:

Right of Reply

In an article published in *BILD*, dated 28.01.2019, under the headline '"Mission Lifeline" on Twitter: They advertise marrying refugees', you claim: 'Captain Claus-Peter Reisch (57) is currently on trial in Malta for allegedly engaging in human trafficking.'

Regarding this I note the following: 'Claus-Peter Reisch is currently not on trial in Malta for allegedly engaging in human trafficking. Instead, this trial is concerned with the alleged false registration of a vessel.'

Leipzig, 29 January 2019.
Attorney Dr Jonas Kahl on behalf of Claus-Peter Reisch

4.4.2. Irrelevance of truth?

Because there is no need for a person to provide (*prima facie*) evidence for the veracity of his statements in reply, there is also no need for the press to admit the falsity or inaccuracy of the allegations that gave rise to the right of reply, or to amend the original article. Instead, they are free to let their readers know that under certain circumstances they are obligated to publish a reply even though the veracity or falsity of the reply or the original statement has not been established. They may also inform their readers that they stick to their representation of the facts.[159] Thus, rather than admitting a mistake, they are simply allowing the person who has been made the subject of an article in the media to add their own view to the story.[160] This is one crucial aspect for distinguishing a right of reply from a simple correction or apology, and, following both the ECtHR's,[161] and *BVerfG's* line of argument,[162] it lowers the impact on a newspaper's editorial freedom.

However, this poses the question of whether someone who is acting in bad faith would be able to abuse the statutory right of reply by forcing a newspaper to print an inaccurate reply against their will. There is a consensus in both case law and the literature that despite the aim of avoiding lengthy trials and therefore limiting the right of reply to summary proceedings, the remedy is not equivalent to a 'right to lie', as this would otherwise amount to an unjustified limitation of press freedom.[163] Hence, it is recognised by both courts and scholars that the press may rightfully refuse the publication of a reply if its content is 'obviously untrue' (*offensichtlich unwahr*).[164]

In practice, the decision over whether something is 'obviously untrue' is ultimately left to the discretion of the courts. Significantly, the burden of proof to show that this is the case lies with the newspaper.[165] Yet, newspapers are severely limited in their use of *prima facie* evidence when attempting to satisfy this burden of proof. Again, this is justified with the right of reply's focus on guaranteeing a prompt and speedy remedy. Given that

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[159] This is often added onto the very end of the reply and is called *Redaktionsschwanz* (literal translation: editorial tail), see e.g.: Figure 5; Beater (n 4) 782.
[160] See Kurt Reumann, *Waffengleichheit in der Gegendarstellung* (D&H 1971) 8.
[161] See Chapter 2.
[162] See e.g.: BVerfG NJW 1998, 1381, 1383.
[163] See e.g.: BVerfG 1998, 1381, 1383; Sedelmeier (n 3) 702.
[164] ibid, see also; BVerfG NJW 2008, 1654, 1656.
[165] See e.g.: Seitz (n 70) 107; OLG Karlsruhe AfP 2006, 168.

this was a deliberate choice of the lawmaker, it would be dogmatically wrong to circumvent this 'through the back door' by allowing the newspaper to introduce a large volume of evidence into the trial.[166]

As a result, the use of a sworn affidavit assuring the accuracy of the article,[167] or any form of circumstantial evidence, cannot be used to demonstrate that the reply is 'obviously untrue'.[168] The only situation where a court might be persuaded that a reply is 'obviously untrue' is if the individual's counter statement is so inaccurate that this is 'written all over its face' (*den Stempel der Lüge auf der Stirn trägt*).[169] In practice, this may most commonly be the case if a person has contradicted the information contained in his reply either publicly or during court proceedings (*Gerichtskundige Unwahrheit*),[170] or if the statement contained in a reply goes against what is considered 'common knowledge' (*Allgemeinkundige Unwahrheit*).[171] This must be evaluated from the of point of view of an 'average reader'.[172] However, this burden of proof has amounted to an almost insurmountable obstacle for the press.[173] Hence, the *status quo* of the German right of reply indeed runs the risk of the press having to publish inaccurate replies as long as they are not 'obviously untrue'. Crucially, this might amount to an unjustified limitation and thus have a chilling effect on press freedom if abused in practice.[174]

If a newspaper does end up printing a reply which later turns out to contain false statements, the publication may, in theory, sue for compensation of the damages they have suffered from printing the reply.[175] Particularly, the press will be interested in showing that they were not able to fill the space where they had to print the reply with advertising instead. However, this is almost impossible to achieve in practice,[176] since a newspaper would be required to demonstrate that there was no other space where they could have printed the advertisement and that publishing the reply was the sole reason for them having to decline printing the advertisement.[177]

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[166] See Beater (n 4) 772.
[167] See e.g.: Seitz (n 70) 105.
[168] Burkhardt (n 70) 906.
[169] My translation. See Seitz (n 70) 104 et seq.
[170] See *ZPO*, s 288.
[171] My translation. See e.g.: Ricker (n 123) 194.
[172] See e.g.: Enders (n 117) 707.
[173] See e.g.: Jessica Ebert, *Die Gegendarstellung in Deutschland und den USA* (LIT 1997) 53; Beater (n 4) 772; Seitz (n 70) 104 et seq.
[174] This is evaluated in Chapter 5.
[175] *ZPO*, s 945.
[176] Mahlke (n 34) 199, 200; Seitz (n 70) 379, 380; Jörg Soehring et al., *Presserecht* (Otto Schmidt 2019) 655.
[177] ibid.

4.4.3. 'Equal prominence'

As detailed in the Press Acts, a newspaper is obligated to print a reply with 'equal prominence'. In order to do so, the reply must be inserted with the 'same font' and in 'the same section' of the newspaper as the factual assertion it is replying to. This legislation aims to guarantee that the reply, if possible, attracts the same level of attention and publicity (*Publizität*) as the original statement and is therefore read by a similar audience.[178]

In practice, the press retains its editorial freedom only to the extent that it under certain circumstances it may choose which page of the relevant newspaper section the reply will be printed on. For example, if the original statement was published in the politics section that ranges from pages 10–20, the newspaper may decide which page within that range the reply should be printed on.[179] However, if the article someone is seeking to reply to had been endorsed in the table of contents of, for example, a magazine, the reply must also be 'promoted' there to allow the reader to access it as easily as the original report.[180] Following the notion of equality of arms, publishers further have to print the reply with a headline that highlights and distinguishes it from the rest of the newspaper, if this had also been the case for the original statement.[181] Courts usually direct newspapers to use the term 'Right of Reply' (*Gegendarstellung*) as a headline.[182] Nevertheless, a newspaper may rightfully refuse to print a right of reply if its length 'unreasonably' (*unangemessen*) exceeds that of the original statement.[183]

Controversially, the 'equal prominence' requirement may force a newspaper to print a reply on their front page. Whether this can still be justified with the reply's normative aims or if this amounts to an unjustified limitation of press freedom has been controversially discussed in both case law and the literature.[184] To provide some background on the right of reply's potential impact on a newspaper's front page, this section first provides one of the most well-known examples of where a newspaper had to print such a reply. The example concerns a front-page headline published by *BILD,* in which the

[178] See e.g.: Beater (n 4) 783.
[179] See Sedelmeier (n 3) 753–756.
[180] See OLG München AfP 1995, 667; Seitz (n 70) 197.
[181] Seitz (n 70) 201.
[182] ibid, 201, 202. See Figures 5 and 6.
[183] For exceptions to this rule see: Table 1; Sedelmeier (n 3) 733.
[184] See e.g.: Mathias Prinz, 'Nochmals: "Gegendarstellung auf dem Titelblatt einer Zeitschrift' [1993] NJW 3039; Mathias Prinz, 'Der Schutz der Persönlichkeitsrechte vor Verletzungen durch die Medien' [1995] NJW 817, 819; Sascha Sajuntz, 'Die Entwicklung des Presse- und Äußerungsrechts im Jahr 2015' [2016] NJW 1921; see n 186 for the *BVerfG's* case law.

newspaper posed the question whether Heide Simonis, a former top level politician, is likely to take part in the German version of the show *I'm a Celebrity Get Me Out Of Here*. Subsequently, Simonis obtained a court order compelling *BILD* to publish a front-page reply.

Figure 7: Headline published on 2 May 2006[185]

Nach Riesenerfolg bei Tanz-Show

Heide Simonis jetzt ins Dschungel-TV?

My translation:

After her success at Strictly Come Dancing

Will Heide Simonis be on I'm A Celebrity Get Me Out Of Here?

Figure 8: Reply published on 15 July 2006

Gegendarstellung

Zu der Überschrift in Bild vom 2. 5. 2006 „Heide Simonis jetzt ins Dschungel TV?" stelle ich fest: Ich habe stets erklärt, daß ich zur Teilnahme an einer solchen TV-Show nicht zur Verfügung stehe. Heide Simonis

My translation:

Right of Reply

Regarding the headline published in BILD, dated 2 May 2006, 'Will Heide Simonis be on I'm A Celebrity Get Me Out Of Here?', I would like to note the following: I have always emphasised that I would never participate in a TV-Show like this.

Heide Simonis

185 Source: Bildblog, 'Heide Simonis wehrt sich gegen "Bild"' (2006) <https://bildblog.de/1350/heide-simonis-wehrt-sich-gegen-bild/>.

Generally, the *BVerfG* has repeatedly emphasised that a newspaper's front page has the unique function of shaping a publication's identity and visually distinguishing it from its competitors.[186] Additionally, it is crucial for getting the publication's most important journalistic news and advertisements across to the reader[187] and is vital for grabbing the reader's attention. Therefore, having to publish a right of reply against the newspaper's will on their front page, so the argument goes, should be considered a serious (*schwerwiegend*) interference with a publisher's right to press freedom.[188]

However, the *BVerfG* also clarified that an obligation to print a reply on their front page does not, in principle, amount to an *unjustified* limitation of a newspaper's press freedom. This has been justified with the right of reply's normative purpose based on the protection of personality rights and freedom of expression as noted above. The *BVerfG* argued that a statement published on a newspaper's front page impacts an individual's personality rights more seriously than statement published inside the newspaper, as it is more likely to be read by a larger number of people.[189] This is based on the concept of a hypothetical reader who does not buy the newspaper but takes notice of its front page when passing by e.g., a kiosk (*Titelseiten- und Kioskleser*).[190] This *Kioskleser* will only ever note a newspaper's front page. Following the notion of equality of arms, a person 'affected' by a factual assertion published on the front page can therefore only reply with the same publicity and to the same audience if his reply is also published there. Thus, the *BVerfG* argued that the lawmaker has struck an appropriate balance between the personality rights of the individual and a newspaper's interest in solely being responsible for editing their front page by limiting the right of reply's scope, admissible content and length.

Nevertheless, the *BVerfG* also emphasised that the publication of a right of reply must not jeopardise the front page's unique function of shaping the identity of the newspaper and serving as its distinguishing feature.[191] Thus, the reply might have to be published in a smaller and/or different font size than the original report if necessary to allow enough space on the front page for other journalistic and advertising content.[192] An example is pictured below:

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[186] See: BVerfG NJW 1994, 1948; BVerfG NJW 1998, 1381, 1382; BVerfG NJW 2014, 766; BVerfG NJW 2018, 1596; BVerfG NJW 2019, 419, 420.
[187] ibid.
[188] BVerfG NJW 1998, 1381, 1382.
[189] ibid.
[190] BVerfG NJW 1998, 1381, 1382. OLG München BeckRS 2017, 127834.
[191] BVerfG NJW 1998, 1381, 1382.
[192] See KG Berlin NJW-RR 2009, 767; Burkhardt (n 70) 931.

Figure 9: Headline published on 13 February 2018[193]

DIENSTAG, 13. FEBRUAR 2018

Bild

HELENE FISCHER

Kann sie nie wieder singen?

Wieder zwei Konzerte abgesagt ++ Wunderheiler aus USA soll ihre Stimme retten ++ Und ihr Flori schickt Fotos vom Karneval

Kälte-Hölle Olympia

PROMI-AUFSTAND GEGEN SPD-CHEFS

JEDE VIERTE FRAU LEGT KEIN GELD ZURÜCK

My translation:

Helene Fischer

Will she never be able to sing again?

Again two concerts cancelled ++ Miracle healer from the US to save her voice ++ […]

Figure 10: Reply published on 19 May 2018

SAMSTAG, 19. MAI 2018

Bild

Prinz Harry und seine Meghan

Alles zur Hochzeit des Jahres

... und Diana schaut im Himmel zu

Asyl-Behörde ließ wirklich JEDEN rein!

Jogi geht auf Wagner los

Gegendarstellung

Miese Grüße aus Moskau

So sparen Autofahrer vor Pfingsten

Gegendarstellung

Sie schreiben in der BILD-Zeitung vom 13.02.2018 auf der Titelseite unter der Überschrift „Helene Fischer Kann sie nie wieder singen?"

„Wunderheiler aus den USA soll ihre Stimme retten"
Hierzu stelle ich fest:

Ich habe keinen „Wunderheiler aus USA" konsultiert.

Wien, den 15.02.2018

Helene Fischer

Anmerkung der Redaktion: Frau Fischer hat recht

My translation:

Right of reply

In a front-page article published in *BILD*, dated 13.02.2018, under the headline 'Helene Fischer: Will she never be able to sing again' you write the following:

'Miracle healer from the US to save her voice'

Regarding this, I note the following: I have never consulted a 'miracle healer from the US'.

Vienna, 15 February 2018

Helene Fischer

[193] Source: Bildblog, 'Helene Fischer widerspricht "totalem Quatsch" von "Bild"' (2018) <https://bildblog.de/96548/helene-fischer-widerspricht-totalem-quatsch-von-bild/>.

Ultimately, it seems illogical that despite having recognised the serious interference with a newspaper's press freedom if compelled to publish a front-page right of reply, the *BVerfG* did not argue in favour of introducing a somewhat higher threshold for enforcing the remedy in such cases. Therefore, this thesis argues that this runs the risk of a newspaper having to publish an inaccurate right of reply on their front page since one does not have to substantiate the veracity of one's reply. According to the law in the books, there is not much a newspaper can do to prevent this from happening, even if a case is being taken to the courts. If this would be abused in practice, the *status quo* of the German right of reply would pose the danger of amounting to an unjustified limitation as well as having a 'chilling effect' on press freedom. This can be underpinned by the *BVerfG* repeated emphasis of the front page's unique function and importance. Chapter 6 further evaluates how this *status quo* compares to the benchmarks set out under the ECtHR. Also, Chapter 5 evaluates whether and to what extent practitioners perceive this aspect of the *status quo* as having a 'chilling effect' on press freedom.

4.5. 'Legitimate interest': alternatives to a formal right of reply?

4.5.1. Background

A newspaper may refuse the publication of a right of reply if the person who is seeking to reply to a statement has no 'legitimate interest' (*berechtigtes Interesse*) in doing so.[194] Significantly, the burden of proof to show that this is the case is on the newspaper.[195] Since newspapers may only make use of *prima facie* evidence to argue their case, it is however yet to be determined if and to what extent, the requirement of 'legitimate interest' is suited to preventing claimants from abusing the statutory right of reply. Thus, the following sections investigate the practical application of this concept.

4.5.2. Reader's letter as alternative?

Scholars have discussed whether a person still has a legitimate interest in invoking a right of reply if they have already been offered the opportunity of publishing a reader's letter or participating in a follow-up article.[196] One might argue that these alternatives serve a similar purpose as the statutory right of reply as they also allow a person to add his point to a story. However, it is not possible to preclude the exercise of the statutory right of

194 Seitz (n 70) 101.
195 Except for *Hesse*, see 10(2) of the Hesse Press Act.
196 See e.g.: Reumann (n 160) 23 et seq.; Seitz (n 70) 102.

reply by offering these alternatives as the majority of Press Acts expressly note that the reply to a statement 'must not appear in form of a reader's letter'.[197] Thus, it ultimately remains within the power of the 'affected' person to 'exchange' his statutory right of reply for a reader's letter (or a follow-up article).

This finding poses the question of why the German system seems to be so averse to the publication of a reply in the form of a reader's letter. Despite its long history in British culture and society,[198] commentators have argued that a reader's letter runs the risk of not getting the same attention as the allegations it might be replying to compared to the German statutory remedy.[199] Indeed, a letter 'hidden' away amongst other readers' contributions without any particular prominence might be less likely to attract the same audience as a reply that is published equally prominent as the story it is replying to.[200] Furthermore, the exact content of a reader's letter is usually under the editorial control of the newspaper. In contrast, the statutory right of reply empowers the person who has been made subject of a newspaper report to solely determine the content of his reply. Hence, relying on a reader's letter might lead to an imbalance of power between publisher and complainant, which the German system is aiming to avoid at all costs. Similar thoughts apply to publishing the reply in the form of a follow-up article. If the view of the person who is seeking to reply to an allegation is not prominently placed within the follow-up article, there is the danger that the article will feature the publisher's arguments too dominantly.

However, this line of argument fails to consider the potential benefits of a reader's letter. For example, whilst a reply following the statutory provisions is strictly confined to a statement of fact that must directly relate to the allegations one is replying to, a reader's letter is not bound by these restrictions. Depending on the agreement with the newspaper's publisher, one might therefore be able to also add one's opinion to the letter, which is prohibited under the statutory right of reply. Moreover, the average reader may even be more likely to take note of a reply published in the form of a reader's letter, compared to a reply that is published somewhere randomly in the newspaper – always depending on where the original article was published.[201] For example, if a newspaper has an established section for publishing its readers' letters, this might become the 'go to place' for

[197] See e.g.: Hamburg Press Act, s 11(3).
[198] See Mark Hollingsworth, *The Press and Political Dissent – A Question of Censorship* (Pluto 1986) 290–293.
[199] See e.g.: Seitz (n 70) 102.
[200] Reumann (n 160) 24.
[201] Following the notion of equal prominence.

readers to look if someone has been given a right of reply. If the newspaper then made sure that the letter was placed prominently within this readers' section, there is little to no argument left for why this cannot be functionally equivalent to the right of reply. For example, *BILD* has recently started to publish its readers' letters on its front page.[202] These arguments particularly apply to online content as a reader's letter could easily be linked to the article it is replying to.[203] Considering the remedy's impact on a publisher's editorial freedom, one might even argue that it should be up to the editor to decide in which *form* he wants to implement the reply.

Thus, this thesis argues that the current legal framework disincentivises newspapers from offering the publication of a reader's letter as it does not prevent them from having to publish an *additional* reply against their will. The strict, formal and inflexible nature of the statutory right of reply might result in less opportunities to add one's view to a story compared to the hypothetical situation in which newspapers would be 'rewarded' for attempting to come to an amicable solution. Therefore, this might result in the situation where only those who have the funds to judicially enforce a reply are able to rebut a statement made in the press. As noted above, enforcing one's right of reply through the courts always requires representation by an attorney which of course increases litigation costs significantly.[204] If this is so, it would contradict two of the right of reply's main aims: enabling 'ordinary citizens' to swiftly and promptly add his view to the story and allowing the public to get to know both sides of a story.

4.5.3. Statement already included in article

Scholars have further discussed whether a person whose statement has already been included in an article still has a legitimate interest in exercising his statutory right of reply post-publication.[205] In Germany, approaching the subject of a story prior to publication and including one's comments in an article precludes the exercise of a post-publication right of reply only in certain circumstances. Considering the notion of equality of arms, this may only be the case if a comment by the person an article is referring to was published with similar prominence to that stipulated for a right of reply under the Press

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[202] Meedia, 'Titelseitengalarie 26.02.2019' (2019) <https://meedia.de/2019/02/26/titelseiten-galerie-alle-wichtigen-tageszeitungen-in-der-uebersicht-163/>.
[203] See section 4.
[204] Burkhardt (n 70) 941; Seitz (n 70) 285, 288.
[205] See e.g.: Burkhardt (n 70) 874.

Acts.[206] In other words, the response must be clearly distinguishable from the rest of the article. Furthermore, again corresponding with the notion of equality of arms, a comment must be printed more prominently depending on the seriousness of the factual assertion it is replying to.[207] Additionally, the publication is required to emphasise that it no longer upholds the factual assertion that the subject of the story is replying to.[208] Only if the newspaper fulfils these requirements does one not have a legitimate interest in also enforcing a post-publication right of reply. Whether this is the case is ultimately up to the discretion of the court.[209]

However, due to the strict, formal and inflexible nature of this exception, a newspaper can never be sure that providing a person with the opportunity to comment on an allegation pre-publication precludes the exercise of a statutory post-publication right of reply.[210] If a person feels that there is a need to add information that goes *beyond* his initial comment, this might justify an additional post-publication right of reply, even if a publication has fulfilled the requirements as set out above. This is justified with the argument that a person might object to the way in which a newspaper has implemented his comment and therefore requires an additional post-publication remedy.[211] Therefore, a newspaper may have to provide a post-publication right of reply on a nuanced point that is not decisive for the overall meaning of a story, *despite* having obtained the claimant's comment pre-publication.[212]

In any case, it should be noted that following the settled case law of the *BGH*,[213] newspapers are (subject to only a few exceptions)[214] under a *duty* to notify the subject of a story and ask for his comments to be included in the story prior to the publication of allegations

[206] Sedelmeier (n 3) 704.
[207] Seitz (n 70) 103.
[208] Soehring (n 176) 635.
[209] Burkhardt (n 70) 874.
[210] Sedelmeier (n 3) 703, 704.
[211] Burkhardt (n 70) 876.
[212] See Sedelmeier (n 3) 703; HansOLG AfP 1978, 25.
[213] See most recently BGH NJW 2015, 778.
[214] For example, if a suspect is on the run and can therefore not be contacted; if there is the reasonable expectation that the suspect will only provide an unsubstantiated denial; if the suspect has already commented on his view of the story elsewhere; if the suspected has already announced that he will not comment on the matter; if reporting a story is of particular urgency (*besonderer Eilbedürftigkeit*). See: Oliver Schlüter, *Verdachtsberichterstattung* (C.H. Beck 2011); Benjamin Korte, *Praxis des Presserechts* (C.H. Beck 2013) para 223.

concerning criminal behaviour (*Verdachtsberichtserstattung*).[215] However, in all other cases, there is no similar legally binding duty.

Against this background, this thesis argues that the status quo in Germany somewhat disincentivises newspapers from approaching the subject of a story prior to publication and therefore providing (informal) opportunities to respond to allegations *outside* the statutory framework. Although often desirable, notifying of a person prior to publication can sometimes be impractical or impossible to achieve and could even jeopardise legitimate investigation.[216] For example, seeking comment from someone prior to publication gives them the opportunity to seek an injunction in court.[217] If the prior notification of a person, in addition to including his comment in the article, more often than not fails to preclude the exercise of the statutory right of reply, it seems a logical conclusion that journalists would be less likely to notify the subject of a story if there is doubt over whether this might result in an injunction. Hence, this might limit the opportunity of adding one's view to a newspaper report to those who have the financial means to judicially enforce the statutory right of reply. Due to the high costs that can be incurred when enforcing a right of reply through the courts, those who are not sufficiently wealthy may be less likely to make use of this statutory remedy.[218]

4.5.4. Publication of a correction as an alternative?

The publication of a correction by the newspaper precludes the exercise of a statutory right of reply only in rare circumstances. Considering the notion of equality of arms, a correction would have to be published in a way that is almost identical to the publication of a statutory right of reply.[219] Therefore, the newspaper's correction must be printed with prominence equal to that of the original article;[220] it must reiterate the previously published allegations to provide the context of the correction, including a clear statement recognisable to the 'average reader' as meaning that the newspaper no longer holds this view;[221] and it must highlight the correct version of the facts whilst emphasising that this

[215] See e.g.: Lucas Brost et al., 'Einholung und Berücksichtigung der Stellungnahme bei der Verdachtsberichterstattung' [2018] AfP 287.
[216] This is discussed in Chapter 5.
[217] ibid.
[218] See n 204.
[219] Sedelmeier (n 3) 704.
[220] See Burkhardt (n 70) 877; see also LG Oldenburg AfP 1986, 84; HansOLG AfP 2010, 580.
[221] See Seitz (n 70) 110; see also KG Berlin BeckRS 2008, 19869; OLG Düsseldorf ZUM 2015, 1007.

has been put forward by the person who was referred to in the article.[222] Only then will a person *possibly* not be able to additionally invoke the statutory-publication right of reply.

However, both courts and scholars have acknowledged that due to these strict requirements, newspapers will only very rarely be able to preclude the statutory right of reply by publishing a correction.[223] Furthermore, a post-publication right of reply might still be granted *in addition* to a correction if a person aims to add information to the story that goes beyond what has been published as a correction by the newspaper.[224] Hence, one may again argue that the *status quo* in Germany somewhat disincentivises newspapers from providing (informal) opportunities to respond to allegations outside the statutory framework.

4.5.5. Safeguard against 'trivial' claims?

Furthermore, one does not have a legitimate interest in publishing one's reply if it would only add information that is of 'sheer irrelevance' (*bloße Belanglosigkeit*) to the reader.[225] Whether or not a reply is of 'sheer irrelevance' must be determined from the view of the 'average reader' and consider the context of the newspaper report.[226] For example, if a newspaper falsely reports that a person who is being accused of murder is 30 years when he is actually 31 years old, the publisher may rightfully refuse to print a reply that aims to set this straight.[227] This is because it is of 'sheer irrelevance' to the reader and for a person's interest in protecting his personality rights.[228] However, courts have set a high bar for establishing that the content of a reply is of 'sheer irrelevance' and they therefore rarely use this notion to strike out a claim for a right of reply.[229]

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[222] See e.g.: OLG Düsseldorf AfP 2016, 163.
[223] See e.g.: BVerfG NJW 2008, 1654, 1656; Sedelmeier (n 3) 703, 704.
[224] Seitz (n 70) 111; Burkhardt (n 70) 877.
[225] See e.g.: BVerfG NJW 1998, 1381, 1383; Soehring (n 176) 634.
[226] See Ricker (n 123) 193; BVerfG NJW 1998, 1381, 1383; OLG Köln AfP 2014, 340.
[227] See Seitz (n 70) 103.
[228] ibid.
[229] See e.g.: Burkhardt (n 70) 875; Sedelmeier (n 3) 703.

4.6. Who may exercise a right of reply?

4.6.1. ‘Person’

According to the *Landespressegesetze*, any ‘person’ may invoke a right of reply. This includes both ‘ordinary’ individuals and legal entities.[230] As argued in Chapter 2, this thesis suggests that although legal entities should not be excluded from the right of reply’s scope, domestic lawmakers should aim to introduce a higher bar for corporations compared to ‘ordinary’ individuals for enforcing a right of reply against the will of a newspaper. Otherwise, the *locus standi* of legal entities would go against the concept of equality of arms. For the sake of brevity, this discussion is not repeated here.

However, the arguments for implementing a higher hurdle for legal entities can be made even stronger for the German statutory right of reply. Different to the ECtHR, there is a consensus in German case law and the literature that the need for a right of reply can be *predominantly* justified with the protection of personality rights.[231] Contrastingly, the ECtHR did not specify whether it relies primarily on Article 8 or Article 10 of the ECHR. Thus, whilst one can primarily rely on Article 10 to argue in favour of a ‘corporate’ right of reply, this is more difficult under the German system due to its focus on personality rights. Significantly, although legal entities may, generally, rely on protection from the ‘general right of personality’ in certain circumstances, this Basic Right predominantly serves the interests of ‘ordinary’ individuals.[232] In other words, private legal entities enjoy less protection under the ‘general right of personality’ than individuals. Despite being primarily based on the ‘general right of personality’, the right of reply’s personal scope does not mirror this difference.

4.6.2. ‘Public bodies’

According to the *Landespressegesetze*, every ‘public body’ (*Stelle*) may invoke a right of reply. This includes any kind of public authority, [233] i.e., not only decentralised legal entities that exercise public functions, but also those that participate in the exercise of governmental powers or run a public service under full government control. As detailed in

[230] See e.g.: BVerfG NJW 1998, 1381, 1383; Ricker (n 123) 174.
[231] See section 2.
[232] See e.g.: BVerfG NJW 1997, 1841, 1843; BVerfG NJW 2002, 3619; Christoph Degenhardt, ‘Das allgemeine Persönlichkeitsrecht, Art. 2 I i. V. mit Art. 1 I GG’ [1992] JuS 361; Epping et al. (n 96) art 2 para 50.
[233] See e.g.: Seitz (n 70) 117.

section 2.1, this broad scope can be traced back to the historical origins of the remedy as the historical lawmaker saw the right of reply as being well suited for public bodies to guarantee the 'preservation of the state's overall domestic tranquillity, safety and peace'. Although the right of reply's normative purpose has shifted since, its personal scope of application has not. Thus, the remedy may be employed by, for example, the Federal Government (*Bundesregierung*),[234] State Governments (*Landesregierungen*),[235] and local councils.[236]

Ultimately, this thesis argues that allowing public authorities to exercise the statutory right of reply in the same way as an individual contradicts the notion of equality of arms. In addition to the arguments that have already been put forward against the *locus standi* of private legal entities, this suggestion can further be strengthened by referring to the German codified constitution. Public authorities may *not* rely on protection from the 'general right of personality' due to their connection with the government.[237] This is significant, since the statutory right of reply is predominantly based on this constitutional right. Indeed, it would seem peculiar if public bodies could claim protection from such Basic Rights since they were originally designed with the aim of protecting individuals *against* the actions of the state.[238]

Nevertheless, courts and scholars have argued that one may rely on the right to freedom of expression in Article 5(1) of the Basic Law to allow public bodies the exercise of the statutory right of reply.[239] They argue that allowing a public authority to invoke the statutory right of reply serves 'the greater good' as it allows the public to get to know both sides of a story. Therefore, it is seen to enhance both public discourse and reliable and comprehensive media coverage. However, this position fails to acknowledge the right of reply's impact on a newspaper's editorial freedom. As noted above, a newspaper might have to print a reply against their will on their front page even though one does not have to provide evidence for the veracity of the statements in question. These interferences with press freedom have been predominantly justified with the right of reply's purpose

[234] OLG München NJW 1976, 288.
[235] OLG München AfP 2000, 361.
[236] See Burkhardt (n 70) 885; Sedelmeier (n 3) 696.
[237] See e.g.: Degenhardt (n 232) 361; Epping et al. (n 96) art 2 para 50; Gersdorf et al. (n 116) art 2 para 33.
[238] See e.g.: Hans Jarass et al., *Grundgesetz für die Bundesrepublik Deutschland* (C.H. Beck 2018) 13 et seq.
[239] See e.g.: BerlVerfGH NJW 2008, 3491, 3493; KG Berlin BeckRS 2011, 28792; Burkhardt (n 70) 879, 880.

of protecting personality rights as well as guaranteeing equality of arms. Since public bodies may not rely on the former, it seems a logical conclusion that they are not in the same position as an 'ordinary' individual when rebutting a statement made in the press. Particularly, this applies to Federal Public Bodies, who have the funds and manpower to issue a press statement in reply. Furthermore, a public body may be more likely to judicially enforce a right of reply, given that they do not have to fear litigation costs in the same way as an 'ordinary' individual.

In Berlin, the courts have already somewhat limited the statutory right of reply for public bodies. If a public body wishes to exercise a statutory right of reply, they must show that the newspaper report was *untrue* and that it severely and negatively influenced the public's confidence in their integrity and operational ability.[240] However, this ruling is only directly relevant for the Berlin Press Act as the courts in the remaining Federal States are not bound by this judgment. Thus, in 15 out of 16 Federal States public bodies may exercise a statutory right of reply in the same way as an individual.[241] As detailed in Chapter 2, this should not be seen as desirable due to its potential chilling effect on press freedom.

5. The right of reply for online content provided by 'telemedia services'

5.1. Historical background

A statutory right of reply for online content was first made available in 1997, when the *Länder* agreed on the 'Interstate Treaty on Media Services' (*Mediendienste-Staatsvertrag – MDStV*).[242] The treaty had the rank of a statute and was uniformly applied across the whole country. Most importantly, section 10 of the *MDStV* contained the first statutory right of reply for online content. The primary aim of this treaty in general, and more specifically of the right of reply, was to avoid a legal vacuum in the regulation of online content, which has an 'impact on the shaping of public opinion' similar to that of the 'traditional media', i.e., the printed press and broadcast television.[243] Therefore, the scope of the statutory right of reply was limited to 'media services' (*Mediendienste*) providing 'journalistic-edited content' (*journalistisch-redaktionelle Angebote*).[244] In the explanatory notes to the *MDStV*, the lawmaker emphasised that section 10 was based on the right

[240] BerlVerfGH NJW 2008, 3491, 3493; KG Berlin BeckRS 2011, 28792; Sascha Sajuntz, 'Die Entwicklung des Presse- und Äußerungsrechts in den Jahren 2008-2010' [2010] NJW 2992, 2996.
[241] See Seitz (n 70) 117.
[242] My translation.
[243] Georgios Gounalakis, 'Der Mediendienste–Staatsvertrag der Länder' [1997] NJW 2993.
[244] My translation. See *MDStV* 1997, s 10(1).

of reply in the Press Acts of the Federal States.[245] Thus, it was underpinned by the same principles as its counterpart in the printed press: limited to factual statements; equal prominence; and no need to establish the veracity of the statement one was seeking to reply to or the reply itself. This also applies to its personal scope of application and how its judicial enforcement. Of course, the way in which a reply might be implemented in an online environment differs from in printed press despite being based on the same principles.[246]

In 2007, the Interstate Treaty on Media Services was replaced by the 'Interstate Treaty on Broadcasting and Telemedia' (*Rundfunkstaatsvertrag – RStV*). Like its predecessor, the *RStV* was also agreed by the Federal States, has the rank of a statute and therefore uniformly applies across the whole country. The new legislation also contained a statutory right of reply in Section 56, which is *almost* identical in its wording to that in the *MDStV*. However, the scope of section 56 was worded slightly differently as it is now limited to '*telemedia* services' (*Telemedien*) [emphasis added] providing 'journalistic-edited content'. The meaning of the term 'journalistic-edited content' and its impact on the scope of the right of reply have led to controversial discussions in both case law and the literature and this is examined below. Since being drafted in 2007, the wording of section 56 has remained unchanged.[247]

5.2. Overview

The following table provides an overview of the main characteristics of the statutory right of reply in section 56. To avoid repetition, it solely focuses on characteristics that *differ* from the right of reply in the printed press and highlights noteworthy differences in the application of the right of reply caused by the technological differences between the online and the print environment. Subsequently, section 5.3 investigates what kind of media services are within the scope of section 56.

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[245] See RDL, '*Begründung zum Mediendienste–Staatsvertrag*', p 13 (1997) <http://www.artikel5.de/gesetze/mstv-bg.html#a2>.

[246] See Table 2.

[247] See <https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gsectipesetze_Staatsvertraege/RStV_21_english_version_clean.pdf>. Note that there have been discussions between the *Länder* about amending the *RStV*, which *might* come into force in late 2020. However, no amendments have been proposed in relation to the scope or the wording of the statutory right of reply. See: RDL, 'Staatsvertrag zur Modernisierung der Medienordnung in Deutschland – Entwurf' (2019) <https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ModStV_MStV_und_JMStV_2019-12-05_MPK.pdf> (2019)>.

Table 2: Characteristics under section 56 of the *RStV*

Research questions	Findings
What type of media services are within the scope of section 56?	All 'telemedia services' providing 'journalistic-edited content'. The publication of a reply may be requested from the 'service provider' (*Diensteanbieter*) of the telemedia service (*Telemedium*) who has published the statement in question.
How does a provider have to implement the right of reply in his online service in order to comply with the notion of 'equal prominence'?	This differs depending on whether the factual assertion one is seeking to reply to is still online or has already been taken offline. *In case of the former*, the reply must be inserted with the same font, in the same size, and with the same visual impact as the original statement. Further, the reply must be added to the text of original statement ('in conjunction with it') in a way that distinguishes it from the rest of the article and makes it available on the exact same page as the factual assertion it is replying to. If a content provider decides to delete the original statement after the reply has been added, the reply must stay online until it has been available for as long as the original statement. *In the case of the latter*, the reply must be published at a 'similar' section of the online service even if that means that this is the first thing a user notices when accessing a website (similar to the front-page reply in the printed press). Additionally, the online provider must ensure that the reply can be accessed in the same way and with the same speediness (i.e. with the same number of clicks) as the original statement. Also, the reply must remain online for as long as the statement it is replying to was online.
If a newspaper publishes a factual assertion in both their print and electronic version, may one request the publication of several replies?	Yes, one may request the publication of a reply based on the Press Acts of the *Länder* as well as the *RStV* as they are concerned with different media services and therefore separate from each other.
Does a person have a 'legitimate interest' in invoking their statutory right of reply if he can comment below the article where the relevant factual assertion has been published?	Yes, as merely commenting below an online article runs the risk of not getting the same attention compared to the statutory requirement of equal prominence.
Does a person have a 'legitimate interest' in invoking their statutory right of reply if the online service has already amended the factual assertion one was seeking to reply to in order to correct an inaccuracy?	Yes, similar to the right of reply in the printed press, a publisher will only very rarely be able to preclude the statutory right of reply by correcting an inaccuracy. Instead, a statutory right of reply will still be granted *in addition* to a correction if the person who is seeking to reply aims to add information to the story that goes beyond what has been published as a correction by the newspaper.
How can one determine whether a factual assertion is subject to the statutory right of reply considering the worldwide availably of online content?	Generally, this depends on whether the content provider's headquarters are located in Germany. If so, the content is within the jurisdiction of the German statutory right of reply.

5.3. Scope

According to section 56, a right of reply may only be requested in response to a factual assertion published by the ‘service provider’ (*Diensteanbieter*) of a ‘telemedia service’ (*Telemedium*) that offers ‘journalistic-edited content’. Whilst the lawmaker provided a definition for the former two legal terms, this is not the case for the latter. Consequently, the interpretation of this term is crucial, as it is decisive for determining the scope of the statutory right of reply in section 56. Whilst some commentators interpret the term broadly and argue in favour of including blogs run by individuals as well as personal *Twitter* and *Facebook* accounts within its scope,[248] others plead for a ‘press-like’ restriction.[249] As detailed below, a restriction to ‘press-like’ content would limit the remedy’s scope to online media services that focus on completely or partially reproducing texts or visual content of the ‘traditional print media’. In addition to this dispute in the literature, there is little guidance provided by the courts. At the time of writing, there have only been two decisions by two Higher Regional Courts focusing on the question of how to interpret the scope of section 56.[250] Crucially, there has not been a decision by the *BVerfG* or any other Federal Court regarding this issue.

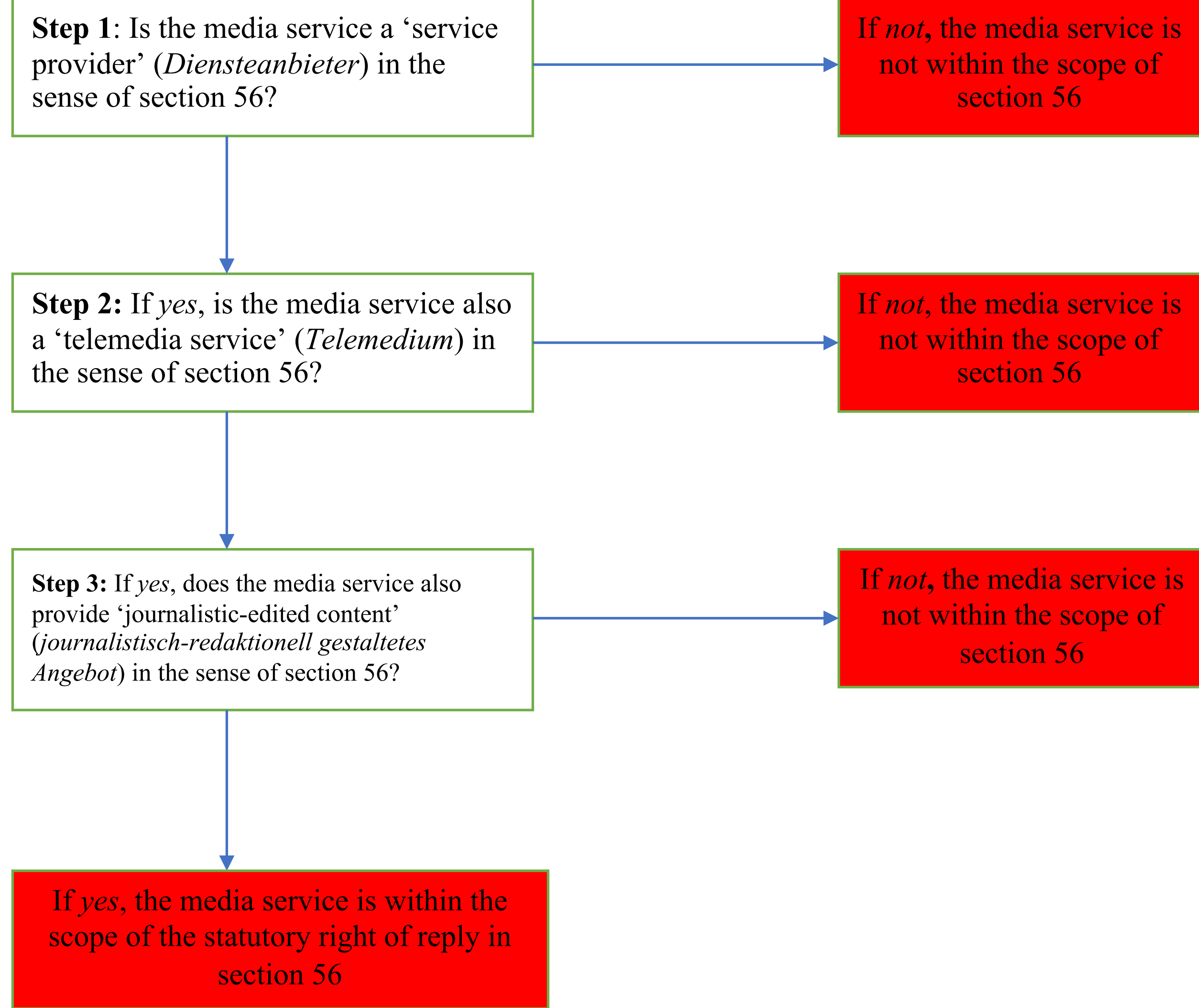
Thus, this section first investigates the meaning of the term ‘service provider’; second, it explores counts as a ‘telemedia service’; and then finally it analyses what can be understood by the term ‘journalistic-edited content’. The following diagram demonstrates which media services are within the statutory right of reply’s scope under section 56.

[248] See e.g.: Christian Weiner et al., ‘Die elektronische Presse und andere neue Kommunikationsformen im neuen rechtlichen Regulierungsrahmen’ [2006] K&R 453; Michael Zoebisch, ‘Der Gegendarstellungsanspruch im Internet’ [2011] ZUM 392, 393; Roger Mann, ‘§ 56 Gegendarstellung’ in Gerald Spindler et al. (eds), *Recht der elektronischen Medien* (C.H. Beck 2015) para 6; Seitz (n 70) 67; Wolfgang Lent, ‘Aktuelle Rechtsfragen der Gegendarstellung in elektronischen Presseangeboten’ [2016] ZUM 954; Schulz (n 71) para 38 et seq.

[249] See n 276.

[250] See OLG Bremen ZUM 2011, 416; KG Berlin ZD 2017, 139.

Figure 11: Media services within the scope of section 56



5.3.1. Step 1: Who is a 'service provider' in the sense of section 56?

Under German law, there are three different forms of a 'service provider': (i) the 'access provider', i.e. any natural or legal person providing services for accessing third-party content (e.g., search engines like Google); (ii) the 'host provider', i.e. any natural or legal person hosting third-party content (*fremde Telemedien*) and making it available online for use in the public domain (e.g., online platforms like *Facebook*, *Twitter*, etc.); and (iii) the 'content provider', i.e. any natural or legal person who makes their own content (*eigene Telemedien*) available online for use in the public domain (e.g., those who post content on said platforms and newspaper homepages).[251]

Significantly, only the latter is a 'service provider' in the sense of section 56,[252] since the lawmaker explicitly limited the scope of the statutory right of reply to content providers. Indeed, section 56 specifies that a reply may only be requested against the person who had the editorial responsibility for the factual assertion one is seeking to reply to ('*in ihrem Angebot aufgestellten Tatsachenbehauptungen*').[253] In this context, editorial responsibility requires a positive action as it involves a deliberate choice regarding whether or not a specific piece of content should be uploaded onto a platform.[254] Following this line of argument, a 'host provider' does not have the editorial responsibility as it is the 'content provider' who has the power to decide which content may be uploaded onto a platform, in addition to the manner and size with which a statement is published, and how the content is organised.[255] In other words, the 'content provider' is in charge of choosing and arranging a platform's content (*Herr des Mediums*).[256] Therefore, it seems logical to obligate the latter rather than the former to publish. However, one may come to a different conclusion if it is the host provider who is in charge of structuring the uploaded content on its platform and can decide whether contributions may be uploaded.

[251] See Telemedia Act (*Telemediengesetz*), s 2 sentence 1 number 1; see also e.g.: Michael Fricke, 'Der Gegendarstellungsanspruch im Internet' in Stefan Leible et al. (eds), *Der Schutz der Persönlichkeit im Internet* (Boorberg 2014) 125; Schulz (n 71) para 14; Burkhardt (n 70) 1013.
[252] See e.g.: Fricke 2014 (n 251) 125, 126; Mann (n 248) s 56 para 14; Schulz (n 71) para 14; Burkhardt (n 70) 1013. For a differing view see Seitz (n 70) 36.
[253] Fricke 2014 (n 251) 126; Mann (n 248) s 56 para 14.
[254] ibid.
[255] Schulz (n 71) para 14.
[256] Fricke 2014 (n 251) 126.

5.3.2. Step 2: How to define the term 'telemedia service'

Section 2(1) sentence 3 of the *RStV* defines the term 'telemedia service' as: 'all electronic information and communications services' that are not 'telecommunications' or 'broadcasting' services. The description 'electronic information and communications services' is meant to encompass *all* electronically transmitted services irrespective of their type, content or form.[257] Thus, it is a generic term that includes all telemedia, broadcasting and telecommunications services.[258] Hence, the scope of 'telemedia services' can only be determined by distinguishing it from broadcasting services on the one hand and telecommunications services on the other.[259] In other words, any electronically transmitted service that is not a telecommunications or broadcasting service is automatically a 'telemedia service'.[260] By focusing on content that is made available electronically, the lawmaker wanted to exclude the printed press from the scope of the *RStV* due to the already existing regulation of this content in the *Landespressegsetze*.[261]

In the explanatory notes, the lawmaker highlighted that the scope of telemedia services 'covers a broad range of content and services (*wirtschaftliche Aktivitäten*) that are made available electronically – either by way of distribution or on-demand – in the form of text, sound or images'.[262] The notes provide numerous examples of what should be classified as 'telemedia' including the 'electronic press', 'chat rooms' and 'teletext'.[263] However, due to the generic definition of the term and the fact that the Act does not distinguish between content that has been made available by businesses or individuals, the scope may also include less sophisticated online content like personal blogs.[264] Thus, the vast majority of online content is likely to be classified as a telemedia service.[265]

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[257] See e.g.: Wolfgang Schulz, '§ 2 Begriffsbestimmungen' in Reinhart Binder et al. (eds), *Beck'scher Kommentar zum Rundfunkrecht* (C.H. Beck 2018) para 61; Hoeren et al. (n 86) part 3 paras 71, 88. The term is broader and therefore not identical with the term 'information society services' as it is used in EU legislation, see Matthias Hartmann, 'Telemedienrecht' in Artur-Axel Wandtke et al. (eds), *Medienrecht Praxishandbuch* (De Gruyter 2014) 1337 et seq.

[258] See e.g.: Beater (n 4) 134.

[259] See e.g.: Jenny Weinand, *Implementing the EU Audiovisual Media Services Directive* (Nomos 2018) 400.

[260] Schulz (n 257) para 61.

[261] Beater (n 4) 134.

[262] RDL, 'Begründung zum 9. Rundfunkänderungsstaatsvertrag' (2006) <http://www.urheber-recht.org/law/normen/rstv/RStV-09/materialien/>.

[263] ibid.

[264] Beater (n 4) 136.

[265] See e.g.: Wolfgang Schulz et al., 'Regulation of Broadcasting and Internet Services in Germany', p 10 (*Arbeitspapiere des Hans-Bredow-Instituts Nr 13*, 2008) <https://www.hans-bredow-institut.de/uploads/media/Publikationen/cms/media/f7f75629f2781560a1b898f16a46cf87a066822c.pdf>; Zoebisch (n 248) 392; Gersdorf et al. (n 116) s 2 RStV para 6.

5.3.3. Step 3: How to define the term ‘journalistic-edited content’

This section first sets out the position presented by the courts who argued in favour of interpreting the term, and therefore statutory right of reply’s scope, very broadly. Second, this is followed by an outline of the opposing views presented by other commentators who argue for a much narrower interpretation of ‘journalistic-edited content’. Lastly, this section weighs up the arguments from both sides.

5.3.3.1. Arguments from case law

In the first of only two reported cases that have so far dealt with the question of how to interpret the term ‘journalistic-edited content’ in the sense of section 56, the *OLG Bremen* handed down its judgment in 2011.[266] The case was concerned with a press announcement that had been published on the homepage of a well-known law firm. On their website, the law firm published information under the headings ‘News’, ‘Top-News for Investors’ and ‘Media’ at regular intervals. Inter alia, the press announcement contained factual assertions reporting on the failure of an investment fund including information on how investors could claim damages from the company in charge of the fund. In response to this announcement, the company requested a right of reply based on section 56. However, the law firm argued that their homepage did not contain ‘journalistic-edited content’, and therefore it refused to publish the company’s reply.

Against this background, the court identified the main issue of the case to be whether the law firm’s homepage contained ‘journalistic-edited content’. If it did, the company’s reply would have to be published by the law firm. In its interpretation of the term ‘journalistic-edited content’, the court set out three key criteria, following a suggestion first made in the academic literature.[267] The first of these criteria requires that the content that one is seeking to reply to must have been the result of an ‘editing process’.[268] Thus, it must be apparent for the average reader that the content published by the online service has undergone an editing process, and has been purposely selected to inform its users.[269] This would exclude online services like databases from the scope of the statutory right of reply,[270] as they focus solely on uploading content onto their website, without editing it first

[266] OLG Bremen ZUM 2011, 416.
[267] See e.g.: Weiner et al. (n 248) 453; Schulz (n 71) para 48.
[268] OLG Bremen ZUM 2011, 416.
[269] ibid.
[270] Schulz (n 71) 49.

(such as *Beck-Online*, the German equivalent to *Westlaw*). Second, the *OLG* noted that the online service must be focused on publishing content aimed at engaging with a public audience and contributing to public debate as well as influencing public opinion. This could be assumed if a website covers issues that are topical and therefore likely to be 'relevant in society'.[271] Hence, if a website's exclusive purpose is to advertise a certain product or service, then it does not fulfil this criterion.[272] The same applies to online services which are exclusively focused on publishing fictional content without any reference to current or topical events, or online diaries as they are not aimed at contributing to the public debate.[273] Third, the court emphasised that the online service must be organised in a 'professional and structured working way' as a result of which a website 'continuously' publishes content that has been edited and selected as set out above. Therefore, it must be apparent for the unbiased and hypothetical reader that the online service is engaged in 'fact-checking' by using information from different sources before publishing the content.[274]

Applying these criteria to the facts of the present case, the court noted that in addition to the advertising for their legal services, the law firm used the website to regularly inform readers about news and updates from their fields of expertise by uploading edited and purposely selected content. Particularly, the court argued that because the website was divided into different news sections with different headings (News', 'Top-News for Investors', and 'Media'), this speaks in favour of an existing professional and structured way of working, aimed at engaging with the public. Hence, the court ruled that the law firm's homepage indeed contained journalistic-edited content and it therefore decided in favour of the company that had requested a publication of its right of reply.

Five years later, the *Higher Regional Court Berlin* picked up on these arguments when deciding whether an online blog run by an individual is within the scope of section 56. Again, the main issue of the case was whether the website provided 'journalistic-edited content'. Exclusively relying on the arguments presented by the *OLG Bremen* in 2011, the court stressed that since the blogger 'regularly' published content concerning current

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[271] OLG Bremen ZUM 2011, 416.
[272] Burkhardt (n 70) 1015.
[273] See Stefan Heilmann, *Anonymität for User-Generated Content?* (Nomos 2013) 372 et seq.; Schulz (n 71) para 52; Benjamin Korte, *Das Recht auf Gegendarstellung im Wandel der Medien* (Nomos 2002) 102, 103.
[274] See Wolfgang Schulz et al., 'Medienprivilegien in der Informationsgesellschaft' [2001] KritV 113, 139; Schulz (n 71) para 54.

and topical events aimed at a public audience, his online content would fall within the scope of the statutory right of reply under section 56. Based on these judgments, scholars have argued that the statutory right of reply's scope also extends to *Facebook* or *Twitter* pages run by individuals and other user-generated-content if they fulfil the set criteria.[275]

5.3.3.2. Opposing arguments in the literature

Contrasting to the view presented above, some commentators are in favour of limiting the scope of the right of reply to online publications of newspapers with a print presence,[276] including their affiliated social media accounts and mobile apps.[277] More specifically, they argue in favour of limiting the scope to online services run by newspapers with a print presence that focus completely, or partially, on reproducing texts or visual content of existing print media, such as *BILD Online*,[278] or e-paper versions of printed magazines.[279] This restriction of the scope is primarily based on the wording of the statutory right of reply in section 56. Although the legislation does not provide a definition for the term 'journalistic-edited content', it gives an example by noting that its scope contains services that are 'in particular focusing completely, or partially on reproducing texts or visual content of existing periodical print media'. From this standpoint, the law firm's website would not be within the statutory right of reply's scope due to it not also having a print presence.

5.3.3.3. Analysis and compromise

This thesis argues that to strike a balance between both sides, one must return to the right of reply's normative purpose. As noted in section 3, the German right of reply's main aim is to guarantee equality of arms between the 'weaker individual' and the more powerful media. The right of reply aims to ensure this by allowing 'ordinary citizens' to promptly and publically defend themselves against statements that have been disseminated by 'means of mass communication'. Hence, the justification for a statutory right of reply is very much built around the concept that one side is much more powerful than the other

[275] See e.g.: Lent 2016 (n 248) 914; Gersdorf et al. (n 116) s 56 RStV para 5–14.
[276] See e.g.: Jürgen Helle, Begrenzung der Gegendarstellung im MDStV [1998] CR 672, 673; Lars Rhode et al., 'Elektronische Kommunikationsangebote zwischen Telediensten, Mediendiensten und Rundfunk' [1998] CR 487, 490; Sedelmeier (n 3) 789; leaning towards this conclusion: Seitz (n 70) 83.
[277] Following the decision of LG München I AfP 2015, 71.
[278] See <https://www.bild.de>.
[279] Walter Seitz, 'ePaper-Ausgaben von Zeitungen und Zeitschriften – äußerungsrechtlich im Niemandsland?' in Roger Mann et al. (eds), *Festschrift für Renate Damm* (Nomos 2005) 295.

when it comes to the dissemination of statements, which is why the lawmaker needs to interfere.

Significantly, the *OLG Bremen* did not pay enough attention to this normative background. The criteria suggested by the court and the accompanying literature fail to limit the right of reply's scope to those online services that are more powerful than the 'ordinary citizen' in a way that is comparable to the 'traditional media'. Instead, these criteria may also require social media accounts run by an individual to provide a statutory right of reply, irrespective of their following or whether their business model involves disseminating news and information (i.e. if the business is of a commercial or non-commercial nature) or whether they have more financial and/or manpower and journalistic expertise than the 'ordinary citizen'. In fact, neither the courts nor those who endorse these criteria have questioned whether this broad scope is needed to establish equality of arms. This is somewhat surprising, considering that it was the explicit will of the lawmaker to limit the scope of section 56 to online services that are comparable to the 'traditional media'. The lawmaker provided an example of the type of services that should fall into the scope of section 56: online services that focus 'completely, or partially on reproducing texts or visual content of *existing periodical print media'* [emphasis added].

Since this was a deliberate choice by the lawmaker, it seems only logical to confine the right of reply's scope to those online services that are comparable to the 'traditional media'. Thus, this chapter suggests that there is neither a constitutional need nor does it correspond with the lawmaker's will to provide a statutory right of reply against *every* online service that regularly issues statements, even if they aim to contribute to public debate. For the purposes of a right of reply, the law should differentiate between the impact of factual assertions published by an online publication of a newspaper with a print presence, and a blog run by an individual that has 100 visitors per month.

Nevertheless, this thesis further argues that the right of reply under section 56 should *not* solely be limited to online content produced by newspapers with a print footing. Although those arguing in favour of this solution also refer to the wording of the statute, they fail to acknowledge that section 56 merely uses this type of content *as an example* but does not limit its scope to it.[280] Indeed, the statute notes that it 'in particular' (*insbesondere*) requires those services that completely or partially reproduce texts or visual content of

[280] See Fricke 2014 (n 251) 126, 127.

existing print media online to provide a right of reply. However, had the lawmaker wanted to exclusively obligate those online services with a print footing to be within the statutory right of reply's scope, it could have phrased it differently. Thus, this renders the arguments in favour of a (very) narrow application of section 56 less persuasive.

Considering the notion of equality of arms and the expressed will of the lawmaker, this thesis therefore suggests that the right of reply's scope under section 56 should be limited to online services under the editorial responsibility of news publishers that are comparable to the 'traditional media'. As argued in Chapter 2, this should be done by restricting its scope to online services that predominantly focus on delivering news to a public audience whilst applying editorial standards that are comparable to the 'traditional media'. This is in line with the recommendation made by the CoE Committee of Ministers in 2004. Also, the emphasis on the editorial aspect and the focus on news services could be one way of keeping the right within manageable bounds. This suggestion therefore addresses the concerns regarding the right of reply's potential chilling effect on those types of online publications that cannot be compared to the traditional mass media and yet would still have to provide a right of reply. This is not unheard of as certain rules and practices fulfilling the functions of a right of reply in England & Wales also apply to content of 'press-like' online services where there is no print presence, but they do not extend to blogs or social media accounts run by individuals.[281]

For the purposes of the right of reply, the question of whether an online service is comparable to the 'traditional media' could be resolved by asking whether the way in which the online service operates would make it subject to the *Landespressgesetze* if a printed version of its content existed.[282] If in doubt, this question should be assessed from the perspective of a hypothetical, average and unbiased reader. As demonstrated above, issues arising under the right of reply in the Press Acts are also regularly resolved by relying on the average reader's viewpoint.[283] Of course, this would still require a case-by-case evaluation of whether or not an online service is within the right of reply's scope under section 56. However, it seems reasonable to assume that whilst an average reader is likely to classify online publications like *Buzzfeed* as being similar to the 'traditional media'

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[281] See Chapter 4.
[282] Often referred to as 'electronic press', see Helle (n 276) 673; Rhode and Gounalakis (n 276) 490; Niko Härting, *Internet Recht* (Dr. Otto Schmidt 2005) para 1039; Volker Kitz, 'Das neue Recht der elektronischen Medien in Deutschland – sein Charme, seine Fallstricke' [2007] ZUM 368, 371; See also Mann (n 248) part 7 para 3.
[283] See section 4.3.

and therefore within the right of reply's, this would not be the case for social media accounts run by 'ordinary' individuals. Thus, this proposal allows for flexibility in the case of further technological change which is crucial considering the ongoing convergence between online and offline services. For example, a weblog that has a high number of currently updated blog entries aimed at providing news and commentary on current and topical issues to a public audience, with a high number of user comments,[284] reaching an audience comparable to that of a (local) newspaper, could be within the scope of the right of reply, even under this narrower definition of journalistic-edited content.

6. Conclusion

This chapter aimed to identify the relevant rules and practices in Germany that fulfil a similar purpose to the right of reply under the ECHR, as established in Chapter 2, followed by an assessment of their practical application. To do so, it conducted a doctrinal analysis of the relevant case law, legislation and the accompanying literature. Thereby, this chapter highlighted the characteristics, benefits and potential pitfalls of the statutory right of reply in Germany. In combination with the subsequent Chapter 4, which explores the English legal system, this part of the thesis paves the way for the empirical assessment in Chapter 5 and the comparative analysis in Chapter 6.

In conclusion, this chapter demonstrated that the statutory right of reply for newspapers, magazines and (certain) online content is bound by the imperatives of the German Basic Law; subject to the same 'formal requirements' across all media services; and affords a person a general right to have a response published on their own terms. However, it runs the risk of being abused by claimants as newspapers might end up printing inaccurate replies against their will on their front page. This potential pitfall, which is due to a person not having to establish the veracity of the statement they are seeking to reply to or the reply itself, might amount to an unjustified limitation of a newspaper's freedom of expression. This chapter further highlighted that the statutory right of reply may cause a newspaper to refrain from publishing certain stories due to the fear of litigation. Indeed, if a publisher faces a high number of court cases related to the right of reply, the risk of high costs might further strengthen those arguments.[285] It is further suggested that the

[284] Which can be an indicator for its influence on public opinion.
[285] See section 4.2.

current legal framework disincentivises media services from offering (informal) opportunities to respond to allegations *outside* the statutory framework, such as the publication of a reader's letter, a correction or a follow-up article.[286] The formal and inflexible nature of the statutory right of reply might therefore result in fewer opportunities to add one's view to a story, compared to the hypothetical situation in which newspapers would be 'rewarded' for attempting to come to an amicable solution. This might result in a situation where only those who have the funds to enforce a reply through the courts would be given the chance to rebut a statement made in the press. This runs the risk of contradicting two of the right of reply's main aims: enabling the 'ordinary citizen' person to swiftly and promptly add his view to the story and allowing the public to get to know both sides of a story. Regarding online content, this chapter argues in favour of limiting the statutory right of reply's scope under section 56 of the *RStV* to media services that are comparable to the traditional media. This can be justified through the lawmaker's intentions as well as the need to keep the remedy in proportionate bounds and to avoid a chilling effect on the freedom of expression online.

Ultimately, this chapter suggests that since there are no comprehensive insights provided in the literature or from case law,[287] the practical application of the statutory right of reply requires further examination through qualitative methods to test whether there is a difference between the 'law in the books' and the 'law in practice'. Further investigation is also required to examine whether the supposed 'chilling effect' of the statutory right of reply on media freedom is a mere academic argument or if those working in the media perceive it. These issues are further evaluated in Chapter 5.

[286] See conclusion in section 4.5.
[287] See sections 4.2.2, 4.4.2 and 4.4.3.

Chapter 4: Replying to the press in England & Wales

1. Introduction

This chapter has two objectives. First, using the definition and characteristics of a 'right of reply' as established in Chapter 2, it examines whether there are rules and practices within the English legal system that enable a person who has been made the subject of a story in the press to publish their own view in the same forum. Second, it provides an assessment of their practical application. Thus, it offers a unique investigation of how the right of reply in England & Wales (or a functional equivalent to it) works in action and why the lawmaker chose to implement (or refrained from implementing) the remedy in the way they did. By doing so, this chapter paves the way not only for the comparison with Germany, but also for the empirical work conducted in Chapter 5. This is because it demonstrates that further investigation through qualitative methods is required to obtain a comprehensive insight into how the right of reply in the press works in England & Wales.

In order to achieve this, this part of the thesis conducts a uniquely doctrinal analysis of the relevant (self-)regulatory mechanisms, legislation and the accompanying literature. Therefore, this chapter highlights the characteristics, benefits and potential pitfalls of the right of reply (or functional equivalent to it) in England & Wales. Most importantly, it refers back to the normative purpose of the right of reply as set out by the ECtHR and it asks if there are rules and practices in England & Wales that pursue similar aims. Based on this normative framework, this chapter investigates whether the identified rules provide 'equality of arms' or if they tend to be more favourable for either the person seeking to reply to a story or the media outlet.

As detailed in Chapter 1, this part of the thesis predominantly analyses the 'Independent Press Standards Organisation's (IPSO) regulations, membership agreements and annual reports. Additionally, this chapter conducts an empirical study of the regulator's complaint resolution. This investigation contains an examination of IPSO's handling of complaints, including an analysis of all 110 complaints that the regulator has had to adjudicate or mediate on under the opportunity to reply in Clause 1(iii) of the Editors' Code of Practice since its establishment in September 2014. This original approach allows significant conclusions to be drawn about which factors are decisive for IPSO's decision making and

it gives a novel insight into how the regulatory system works in practice. Before doing so, this chapter pays special attention to the historical reasons why English law does not have a statutory right of reply in the press. Particularly, it evaluates the arguments brought forward in all parliamentary debates and government-initiated inquiries since the Second World War concerned with whether the lawmaker should implement a statutory right of reply.[1] Also, this chapter examines the validity of the claim that although English law does not have a statutory right of reply in the press, some elements of the remedy are seen to exist in Defamation Law.[2]

After investigating the reasons for the absence of a statutory right of reply in the press (section 2), this chapter assesses whether the rules employed by IPSO and the Editors' Code of Practice are functionally equivalent to a right of reply (section 3). Next, section 4 examines the relevant rules contained in Defamation Law. Lastly, section 5 comes to a conclusion.

2. Why does England & Wales not have a statutory right of reply in the press?

First, this section briefly outlines why the 'heroic struggle' of the press against state repression in the 17th–19th centuries might serve as an explanation for why journalists have been averse to any form of statutory regulation (section 2.1). Second, it examines the government-initiated commissions on, and inquiries into, the press post-1947, in which the implementation of a statutory right of reply was discussed (section 2.2).[3] Third, it then explores the reasons why none of the several attempts to introduce a statutory right of reply using the Private Members' Bills (PMB) procedure in the House of Commons (HoC) were successful (section 2.3). This provides insight into why the implementation of a statutory right of reply has been rejected, the alternative solution that has been found, and the historical development of the self-regulatory system.[4]

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[1] As detailed in Chapter 1.
[2] ibid.
[3] Royal Commission on the Press, *Report* (Cmd 7700, 1949); Royal Commission on the Press, *Report* (Cmnd 1811, 1962); Royal Commission on the Press, *Final Report* (Cmnd 6810, 1977); Committee on Privacy and Related Matters, *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990); DNH, *Review of Press Self-Regulation* (Cm 2135, 1993); The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 2012–13, 780) 1667 (hereafter: Leveson Report). Due to it not debating the implementation of a statutory right of reply, this chapter does not contain an analysis of the 'Younger Committee on Privacy 1972', for further detail see e.g.: Michael Harker et al., '"Moving in concentric circles"? The history and politics of press inquiries' (2017) 37(2) LS 248, 257.
[4] As highlighted by Leveson Report (n 3) 195.

2.1. The ‘heroic struggle’ against state repression

In the UK, the winning of press freedom is attributed in part to a century-long ‘heroic’ struggle against state repression.[5] The key events in this struggle are generally said to be the abolition of the Court of the Star Chamber in 1641; the ending of press licensing and censorship in 1694; the 1792 (Fox) Libel Act; and the repeal of press taxation in the period 1853–61.[6] Scholars have argued that only with the last of these reforms did the press become fully free.[7] As emphasised by Leveson, the state’s century-long repression of the press and the history of the struggle for press freedom over the centuries ‘provides an essential background to understanding the commitment of modern democratic society to freedom of the press’.[8]

Crucially, journalists have repeatedly cited this ‘historic struggle against state repression’ as grounds for opposing any state-sponsored reform of the press.[9] For example, former *Sunday Times* journalist John Whale concluded a brief historical account of state censorship with the warning that politicians are still seeking ‘indirect ways of bringing state power to bear on unsympathetic journalism’.[10] More recently, the implementation of the Royal Charter on Self-Regulation of the Press 2014 and the following establishment of the Press Recognition Panel have led journalists to make similar references to the past oppression of press freedom in the UK. For instance, the *Daily Mail* commented on the recognition of IMPRESS as the first ‘Leveson-compliant’ regulator by saying that this event would ‘undo 300 proud years of Press freedom in Britain’ as it opens ‘the back door to control by politicians’.[11] Similarly, Paul Dacre, then editor of the *Daily Mail*, said that he feared that any form of parliamentary involvement would be the ‘thin end of the wedge’.[12] The following analysis of government-initiated inquiries and PMB should be seen against this background.

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[5] James Curran et al., *Power Without Responsibility: Press, broadcasting and the internet in Britain* (Routledge 2010) 3.
[6] Tom O’Malley and Clive Soley, *Regulating the Press* (PP 2000) 14–18.
[7] See e.g.: Fredrick Siebert, *Freedom of the Press in England 1476–1776* (UIP 1952) 25; Jeremy Black, *The English Press* 1621-1861 (SP 2001) 5; G.R. Elton, *Star Chamber Stories* (RR 2010) 3.
[8] Leveson report (n 3) 58.
[9] Curran et al. (n 5) 4.
[10] ibid.
[11] Paul Wragg, ‘The martyrdom of press freedom: what recognition of IMPRESS means and why the press fears it’ (2016) 21(4) CL 98.
[12] Leveson Report (n 3) 1655.

2.2. Government-initiated inquiries and commissions

Since 1947, there have been several government-initiated commissions on, and inquiries into, the press in which the implementation of a statutory right of reply has been discussed. The subsequent sections analyse the arguments brought forward in each inquiry report and they evaluate how industry and government decided to act on the recommendations related to the right of reply.[13]

2.2.1. Royal Commissions on the Press 1947–1977

Between 1947 and 1977, the Government set up three 'Royal Commissions on the Press' (RCP). Although only the third RCP, set up by the then Labour Government in 1974, directly discussed the implementation of a statutory right of reply, the two remaining inquiries are crucial for understanding the development of press self-regulation.

The first RCP between 1947 and 1949 focused on ownership, its effects on freedom of expression and the accurate presentation of news.[14] Chaired by William Ross, the 1947–1949 RCP commissioned a major investigation into 'the contents of newspapers and their methods of presenting news in the period 1927–1947'.[15] In its report, the Commission recognised that industrial development had increased the capacity for newspapers to 'convey and interpret to the public a mass of information on subjects as complicated as they are important', but that this had not been demonstrated in practice.[16] However, it also drew the conclusion that the statutory regulation of the press would unduly limit 'the free flow of information'.[17] The central recommendation proposed by the Commission was the creation of a 'General Council of the Press', voluntary and non-statutory, which was endorsed by the government.[18] Nevertheless, due to the reluctance of the newspaper proprietors, the General Council of the Press was only established in 1953 and it had a much narrower remit than that recommended by the Commission, as it had no written code of conduct and no lay representation.[19]

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[13] For further detail on these inquiries see: Harker et al. (n 3) 248 et seq.
[14] ibid, 253.
[15] Raymond Snoddy, *The Good, the Bad and the Unacceptable – The Hard News about the British Press* (F&F 1992) 74, 75.
[16] RCP 1949 (n 3) 164.
[17] Herman Levy, *The Press Council: History, Procedure and Cases* (Macmilllan 1967) 8.
[18] O'Malley and Soley (n 6) 54, 55.
[19] Tom O'Malley et al., *A Journalism Reader* (Routledge 1997) 130.

The Second RCP of 1961–1962, chaired by Hartley Shawcross, was triggered by a series of closures of national and provincial newspaper titles and greater concentration of ownership.[20] Furthermore, it was driven by the General Council's failed engagement with the range of reforms outlined in the recommendations of the first Commission.[21] The Commission reiterated the desirability of a voluntary basis for regulation, but stressed the need above all for an effective and credible body, with statutory backing if necessary.[22] Faced with the threat of legislation, the 'General Council of the Press' was replaced by the 'Press Council' in July 1963 and some recommendations made by the first RCP were implemented.[23]

The third RCP 1974–1977 must be seen against the wider social and economic uncertainty of the times as the newspaper industry had its own economic problems but still the concerns over the responsibilities and functioning of the Press Council persisted.[24] Ultimately, it was a combination of long-term anxieties about the economic structure of the press and how that impacted standards, independence and choice that underpinned the move to set up another commission.[25] Thus, the 1974–1977 Commission held the broadest remit so far, as it was tasked to look at every aspect of the structure and performance of the press.[26]

Crucially, the third RCP was the first to discuss the implementation of a statutory right of reply. The Commission observed that the right of reply statutes in West Germany had 'worked for a number of years' and saw 'no practical reason why it could not do so here'.[27] The background to this discussion was the Commission's finding that the Press Council did not regard 'inaccuracies' as a good ground for a complaint, unless they could be proved to arise from malice or recklessness.[28] Strengthening the concept of a right of reply was therefore seen as an opportunity for a person to defend himself against inaccurate allegations made in the press.

[20] Harker et al. (n 3) 255, 256.
[21] ibid.
[22] Geoffrey Robertson, *People against the Press* (QB 1983) 12.
[23] Select Committee on Communications, *Press Regulation: Where Are We Now?* (HL 2014–15, 135) 10 (hereafter: HOL 2015).
[24] Chaired by Maurice Finer and, following his death, succeeded by Lord McGregor of Durris.
[25] O'Malley and Soley (n 6) 71–75.
[26] Snoddy (n 15) 74.
[27] RCP 1977 (n 3) para 20.39.
[28] Robertson (n 22) 14, 15.

Nevertheless, the Commission objected to a statutory right of reply, claiming that 'the press should not be subjected to a special regime of laws, and that it should neither have special privileges nor labour under special disadvantages compared to the ordinary citizen.'[29] Instead, it made twelve recommendations, one of them emphasising that the Press Council should 'extend its doctrine of the right of reply and uphold a newspaper's making available space to those it has criticised inaccurately'.[30]

In response, the Press Council asserted that it had always upheld 'the principle' that 'once attacked' someone was 'morally entitled to and should be given the opportunity to make a reasonable reply'.[31] However, using the words 'morally entitled' and 'should be given' indirectly discloses that the Council had not been operating a '*right'* of reply since such terms ultimately confer discretionary powers upon the newspapers (and the regulator in the last instance) to decide whether a right of reply is granted. The Press Council also rejected the Commission's recommendation to create a written code of conduct with the argument that drafting a written code would be 'too difficult'.[32]

2.2.2. Report of the Committee on Privacy and Related Matters 1989–1990

In 1989, the Government set up the 'Committee on Privacy and Related Matters', which was chaired by David Calcutt (Calcutt Committee) and reported in 1990. As emphasised by Harker et al., the background to this inquiry was the behaviour of the (tabloid) press in the 1980s, which 'had become much more aggressive in its pursuit of "human interest" stories'.[33] The growing list of high-profile incidents involving harmful press behaviour tested public and parliamentary support for the Press Council and led to a 'crescendo' of criticism.[34] Many politicians were moved to call for action to curb the excesses of popular journalism.[35] In addition to this public pressure, the 'extent of parliamentary support' for two PMB before their eventual failure – one focused on introducing a privacy tort, the other on implementing a statutory right of reply – during the 1988/89 session had forced the government to act.[36]

[29] RCP 1977 (n 3) para 20.39.
[30] ibid, para 20.35–20.36.
[31] O'Malley and Soley (n 6) 78.
[32] ibid.
[33] Harker et al. (n 3) 261; Leveson Report (n 3) 205, 206.
[34] Adrian Bingham, '"Drinking in the last chance saloon" – The British press and the crisis of self-regulation, 1989–1995' (2007) 13(1) MH 79, 80.
[35] ibid.
[36] Calcutt Committee (n 3) 1; Harker et al. (n 3) 262.

Against this background, the Calcutt Committee, *inter alia*, discussed whether a statutory right of reply should be implemented.[37] The Committee first drew on the experiences of other Western European countries whose legal systems contained a statutory right of reply, including France and (West) Germany.[38] Subsequently, the Committee turned its attention to the PMB put forward by Tony Worthington in 1989. The then Labour MP had proposed a statutory right of reply more narrow in scope than the German version as it aimed to enable members of the public 'to correct inaccuracies' (as opposed to factual assertions) 'which affect them in the press'.[39]

Although Calcutt acknowledged the potential benefits of introducing such a statutory remedy, namely its enhancement of 'individual freedom by allowing a person to respond' after being 'inaccurately described or criticised in the press', he did not endorse its implementation.[40] He noted the fears voiced by journalists that any requirement upon the press to carry someone else's statement restricted their editorial freedom whilst also opening 'the door to abuse'.[41] Ultimately, the Committee rejected Worthington's proposal primarily because they felt it would be 'difficult to ascertain' whether a story contained a factual inaccuracy 'under a speedy and informal procedure'.[42] Furthermore, Worthington was criticised for not having outlined the circumstances under which 'members of the public' were 'affected' by inaccuracies. Calcutt feared that this lack of precision might result in the remedy having too broad a scope, as it could lead to a right of reply in response to 'trivial mistakes when these did not alter the thrust of otherwise accurate reports'.[43] Thus, the Commission stressed that a right of reply could only work with a clearly defined procedure and a clear definition of the circumstances in which the remedy could be invoked.[44] Arguing that Worthington's proposal lacked this level of clarity, the Committee held that right of reply cases should rather be tackled under the ambit of a revised 'code of practice […] or under the law of defamation'.[45]

As the Press Council was found to have numerous shortcomings, Calcutt recommended

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[37] For the terms of reference see: Harker et al. (n 3) 262.
[38] Calcutt Committee (n 3) 13, 14.
[39] Right of Reply HC Bill (1988–89) [101R]; see section 2.3.
[40] Calcutt Committee (n 3) para 11.15.
[41] ibid, para 11.4.
[42] ibid, para 11.15.
[43] ibid, para 11.10.
[44] ibid, para 11.8.
[45] ibid, para 11.15.

that it was replaced by a newly established body called the ‘Press Complaints Commission’ (PCC).[46] However, the Committee also prescribed in detail an alternative statutory scheme if the industry could not demonstrate that voluntary self-regulation could be made to work.[47] Calcutt further recommended that the PCC should draft, ‘publish, monitor and implement’ a (written) code of practice,[48] including a ‘right of reply’. Clause 2 of the ‘Committee’s Proposed Code of Practice for the Press’ detailed that ‘individuals or organisations should be given a proportionate and reasonable opportunity to reply to criticism or alleged inaccuracies which are published about them’.[49] This recommendation is wider in scope than Worthington’s proposal and more similar to the German *status quo* as the wording ‘criticism or alleged inaccuracy’ renounces the requirement to establish the inaccuracy of the statement one is seeking to reply to. This must be seen against the background that the Press Council had long been criticised for failing to uphold the principle of a right of reply.[50]

In line with Calcutt’s recommendations, the ‘Press Council’ was dissolved in 1990 and replaced by the PCC in 1991.[51] The new regulatory body was tasked with adjudicating on complaints under the newly drafted ‘Code of Practice’ (COP), which had been ‘drawn up by a committee of national and regional newspaper and magazine editors.’[52] Although the Code contained an ‘opportunity to reply’ in Clause 2, it fell short of Calcutt’s recommendations. According to the industry’s Code, an opportunity to reply needed only to be given when there was an actual (as opposed to an alleged) inaccuracy and it provided no opportunity in the case of mere criticism. Hence, the COP had been ‘watered down’ and ‘some of the definitions were not as strong as they should have been’.[53] As detailed in section 3, the ‘opportunity to reply’ in today’s ‘Editor’s Code of Practice’ is still based on these principles.

2.2.3. Review of Press Self-Regulation 1992–1993

When it accepted Calcutt’s recommendation that the industry be given a final opportunity to make voluntary self-regulation work, the government intimated that it would review

[46] Calcutt Committee (n 3) paras 15.20–15.22.
[47] ibid, ch 16.
[48] For all recommendations see Harker et al. (n 3) 262.
[49] Calcutt Committee (n 3) Appendix Q.
[50] Robertson (n 22) 78–88.
[51] Harker et al. (n 3) 262–264.
[52] O’Malley and Soley (n 6) 90.
[53] Bingham (n 34) 85.

the new system after 18 months to see whether regulation should be put on a statutory footing.[54] Shortly after the set-up of the PCC in 1991, the behaviour of the press had once again led to public outcry.[55] Therefore, in July 1992, the Government invited Calcutt to review the working of the PCC over the period 1991–1992.[56] Developments were also taking place in Parliament, with a further PMB proposing a statutory right of reply,[57] and the National Heritage Select Committee (NHSC) announcing its own investigation into press regulation.[58]

In his second report published in 1993, Calcutt heavily criticised the PCC's 'effectiveness' and listed the ways it had deviated from the prescriptions laid down in his first report, notably in the creation and wording of the code.[59] For the reasons set out in section 2.2.2, he stressed that the 'opportunity to reply' in clause 2 of the industry's COP fell short of the 'right of reply' he had recommended to be included in the Code. Contrasting to his first inquiry, this time he was not prepared to offer the PCC an opportunity to reform itself.[60] Instead, he recommended introducing a statutory 'Press Complaints Tribunal' tasked with enforcing a statutory COP.[61] Although he proposed to leave the drafting of the code up to the statutory regulator,[62] Calcutt expected his 1990 proposal including his version of a right of reply to form the basis of any statutory code.[63] Significantly, this was the first (and last) time that a government-initiated inquiry into the press recommended the implementation of a statutory right of reply.

Shortly after Calcutt's review, the NHSC also published its report in 1993.[64] Crucially, it disagreed with Calcutt's recommendation of a statutory press tribunal.[65] Instead, the NHSC argued in favour of continued self-regulation and it recommended that the PCC should have broader responsibilities and powers with a backstop statutory ombudsman scheme.[66] Nevertheless, the NHSC proposed to replace the 'opportunity to reply' in Clause 2 of the COP with the 'right of reply' as suggested by Calcutt.[67] This would have

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[54] Eric Barendt et al., *Media Law: Text, Cases and Materials* (Pearson 2014) 40.
[55] Harker et al. (n 3) 263.
[56] Bingham (n 34) 83.
[57] See section 2.3.
[58] Harker et al. (n 3) 263.
[59] Bingham (n 34) 86; DNH (n 3) para 3.94; 5.26; 8.2; p xi.
[60] Jeremy Tunstall, *Newspaper Power* (OUP 1996) 402 et seq.
[61] DNH (n 3), paras 6.1–6.31; 8.2.
[62] ibid, para 6.8.
[63] ibid, para 6.8.; p xii; for the code see Calcutt Committee (n 3) Appendix Q.
[64] NHSC, *Privacy and Media Intrusion* (HC 1992–3, 294).
[65] ibid.
[66] ibid, p xxi et seq.; see Harker et al. (n 3) 264.
[67] NHSC (n 64) 32.

been a significant change as a right of reply would have then been available in response to an alleged (as opposed to an established) inaccuracy.

In its 1995 response,[68] the government rejected any form of statutory regulation, arguing that many members of the public ‘would think the imposition of statutory controls on newspapers invidious because it might open the way for regulating content, thereby laying the Government open to charges of press censorship’.[69] Instead, they issued a series of recommendations for a PCC reform including changes to the COP.[70] There, the government picked up on some of Calcutt’s criticisms regarding the ‘opportunity to reply’ in Clause 2 of the COP. It noted that although ‘Clause 2 allows for an opportunity to reply in response to an inaccuracy’, it ‘is not clear whether this means inaccuracy as determined in a PCC adjudication or, as it perhaps should be, alleged inaccuracy’.[71] The government stressed that ‘there should be a fair opportunity to reply to criticism, particularly for those who (unlike politicians) do not have ready personal access to the media.’[72] Therefore, they argued in favour of renouncing the requirement to establish the inaccuracy of the statement one is seeking to reply to. These proposed changes to the COP were seen as ‘particularly important’ to ‘achieve a fairer balance between press and individuals […]’.[73]

Although the industry responded that ‘amending and tightening the code would be the PCC’s priority’,[74] it failed to implement the governments recommendations concerning the right of reply. However, one change was made to the ‘opportunity to reply’ in Clause 2 of the COP: the amended version of the Code required that ‘a fair opportunity to reply to inaccuracies *must* be given to individuals or organisations when reasonably called for’.

Although this change falls short of both Calcutt’s and the government’s recommendations, it somewhat removes the discretionary powers of the newspapers and the regulator over whether or not a right of reply is granted. Instead, it makes the publication of a right of reply mandatory as soon as all other requirements are fulfilled. Nevertheless, it does not address the main criticism put forward by Calcutt and the government as it still requires the existence of an actual (as opposed to an alleged) inaccuracy. This version of

[68] SoS for National Heritage, *Privacy and Media Intrusion* (Cm 2918, 1995).
[69] ibid, para 2.5.
[70] ibid, paras 2.6–2.15.
[71] Emphasis added. See SoS 1995 (n 68) 34.
[72] ibid.
[73] ibid, 35
[74] Richard Shannon, *A Press Free and Responsible* (JM 2001) 195.

the opportunity to reply remained unchanged until December 2015, even after IPSO had been tasked with enforcing the 'Editor's Code of Practice'.[75] Table 1 summarises the proposed changes to the opportunity to reply in the COP since the PCC's establishment and how it has been implemented in practice.

[75] See section 3.1 for changes thereafter.

Table 1: Development of the opportunity to reply

Year	Code or proposal	Content
June 1990	Calcutt Committee's Proposed Code of Practice	**Clause 2 Right of reply** Individuals or organisations should be given a proportionate and reasonable opportunity to reply to criticisms or alleged inaccuracies which are published about them.
December 1990	Press Industry's Code of Practice	**Clause 2 Opportunity to reply** A fair opportunity for reply to inaccuracies should be given to individuals or organisations when reasonably called for.
December 1992	Press Industry's Code of Practice	**Clause 2: Opportunity to reply** A fair opportunity to reply to inaccuracies should be given to individuals or organisations when reasonably called for.
March 1993	The NHSC's Proposed Code of Practice	**Clause 2 Right of Reply** Individuals or organisations should be given proportionate and reasonable opportunity to reply to criticisms or alleged inaccuracies which are published about them.
July 1995	Changes proposed by the Secretary of State for National Heritage	Although 'Clause 2 allows for an opportunity to reply in response to an inaccuracy', it 'is not clear whether this means inaccuracy as determined in a PCC adjudication or, as it perhaps should be, alleged inaccuracy'. Thus, the government stressed that 'there should be a fair opportunity to reply to criticism, particularly for those who (unlike politicians) do not have ready personal access to the media.'
December 1997	PCC's Code of Practice	**Clause 2 Opportunity to reply** A fair opportunity to reply to inaccuracies must be given to individuals or organisations when reasonably called for

2.2.4. The Leveson Inquiry 2011–2012

The Leveson Inquiry was established by the Government in 2011 in response to the failure of the PCC to address widespread breaches of legal and ethical standards of journalism, most notably in the form of so-called phone hacking.[76] Although it was primarily set up because of a single action – the hacking of the mobile phone of a murdered teenager, Milly Dowler – the inquiry went beyond the issue of phone hacking.[77] Its terms of reference included an investigation of the press' relationship with politicians and the police; the extent to which the 'current policy and regulatory framework [had] failed'; and whether there had been a 'failure to act on previous warnings about media misconduct'.[78]

As part of this inquiry, several academics and practitioners submitted evidence outlining their views on whether the government should implement (or refrain from implementing) a statutory right of reply. Most notably was the contribution of the 'Media Regulation Roundtable' (MRR),[79] because it was the submission referred to predominantly by Leveson when discussing the potential implementation of a statutory right of reply in his report.[80] Therefore, this section primarily focuses on critically analysing this proposal. Leveson also briefly referred to the ECtHR's jurisprudence on the right of reply and the Court's concession that a state has a positive obligation to ensure a reasonable opportunity to exercise a right of reply as well as an opportunity to contest a newspaper's refusal.[81] However, he did not further develop this point.

The MRR was the name for a series of meetings and discussions between academics, journalists and practising lawyers brought together by the Reuters Institute for the Study

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[76] See e.g.: Jonathan Heawood, 'Independent and effective? The post-Leveson framework for press regulation' (2015) 7(2) JML 130.
[77] HC Deb 13 July 2011, vol 531, cols 311–312.
[78] Leveson Report (n 3) 4–5. For further detail see e.g.: Tom Gibbons, 'Building trust in press regulation: obstacles and opportunities' (2013) 5(2) JML 202; Barendt 2014 (n 54) 189; Paul Wragg, 'The legitimacy of press regulation' [2015] PL 290; Harker et al. (n 3) 271 et seq.
[79] MRR, 'Final Proposal For Future Regulation of the Media: A Media Standards Authority' (June 2012) <https://inforrm.org/wp-content/uploads/2012/07/future-regulation-of-the-media-final-proposal-june-2012.pdf>; see also MRR, 'A Proposal for future regulation of the media' (February 2012) <https://inforrm.files.wordpress.com/2012/02/proposal-for-msa-final.pdf>.
[80] Leveson Report (n 3) 1667. Also highlighted by Mark Thomson, 'Was Leveson Wrong to Reject a Statutory Right of Reply?' (2013) <http://blogs.lse.ac.uk/mediapolicyproject/2013/01/28/was-leveson-wrong-to-reject-a-statutory-right-of-reply/>.
[81] Leveson Report (n 3) 1846. See Chapter 2 for the ECtHR's jurisprudence.

of Journalism and the Media Standards Trust 'to discuss issues of Future Media Regulation'.[82] In its submission, the MRR proposed to replace the PCC with the 'Media Standards Authority' (MSA).[83] Although established by 'enabling legislation', the MSA would not have had the power to impose statutory sanctions on the press as sanctions would have only been imposed under the terms of a five-year 'rolling contract', which publications would have been free to enter into.[84] As one of the incentives to join this new regulator, the Roundtable proposed a statutory right of reply only available against 'non-participants'.[85]

This legislation would have enabled 'any person who claims that information published' in the press is 'inaccurate, misleading or distorted […] to have a reply or correction published in the same publication'.[86] Since the MRR merely requires a person to '*claim*' that information is inaccurate, it is similar to Calcutt's proposed right of reply, as both proposals do not require the existence of an established inaccuracy. Similar to the ECtHR,[87] the MRR argued that renouncing this requirement can be justified with the aim of providing a prompt and speedy remedy.[88] Furthermore, the reply or correction, which would have had to be judicially enforced, would have to be published 'in the same manner as the information on which the demand for a reply or correction is based'.[89] Hugh Tomlinson, responsible for drafting the written evidence,[90] further clarified this proposal. In a hearing conducted as part of the Leveson Inquiry, he stated that a right of reply would be the appropriate remedy if there was a 'dispute about the facts of a case' as it would allow a person to set out his version of a story *without* a court having to establish the facts of a case.[91] Tomlinson further confirmed that as long as the court 'can see that there's an argument the other way', i.e., 'another side of a story', a person 'has the right of reply in an appropriate and proportionate manner.'[92] Contrastingly, a correction would be granted if there was no dispute about the facts of a case and a court could then be asked to establish whether a story was inaccurate.[93]

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[82] MRR June 2012 (n 79) 3; the roundtable had 14 participants.
[83] MRR June 2012 (n 79) 3.
[84] ibid.
[85] See ibid for further incentives.
[86] ibid, 26
[87] See Chapter 2.
[88] MRR June 2012 (n 79) 25, 26.
[89] ibid.
[90] ibid, 2.
[91] Transcript Oral Hearing Leveson Inquiry Day 92 pm, p 57, 58 (13 July 2012) <https://discoverleveson.com/hearing/2012-07-13/1110/?bc=15>.
[92] This quote refers to a question posed during the hearing which was affirmed by Tomlinson with 'Yes'. See ibid, p 58 lines 17–23, 57, 58.
[93] ibid, p 57.

However, the MRR did not fully consider the potential pitfalls of its proposed remedy. First, the MRR's proposal does not restrict the right of reply to those who have been referred to in the newspaper article they are seeking to respond to, which also allows third parties to invoke the remedy. Although such a broad personal scope may help to guarantee reliable media coverage and enhance public discourse, this thesis has repeatedly argued that a right of reply should not be unduly broadened to third parties. Most importantly, keeping it narrow ensures that the remedy's restriction of a newspaper's freedom of expressions is kept within proportionate bounds.[94] Second, the proposal did not pay sufficient attention to scenarios in which a claimant might be in 'bad faith'. Although Tomlinson clarified that the right of reply would be precluded in situations where it is obvious to the court that a person is attempting to publish an inaccurate reply,[95] this is unlikely to sufficiently safeguard a newspaper's freedom of expression. As detailed by Tomlinson, the main characteristic of the MRR's proposed right of reply is that the court would not be concerned with an investigation of the facts of the case.[96] Moreover, a person does not have to establish that the statement he is seeking to reply to was inaccurate. This is similar to the German statutory right of reply and may run the risk of unjustifiably limiting a newspaper's freedom of expression as it might be forced to publish inaccurate replies against their will.[97] The only additional safeguard outlined by Tomlinson is the court's power to strike out vexatious claims at their discretion, according to Part 3 Rule 3.4. of the Civil Procedure Rules (CPR).[98]

In his report, Leveson criticised that the MRR had not detailed whether the equivalent to the statutory right of reply in the self-regulatory 'MSA Code' would be more onerous, less onerous or the same. Since the statutory right of reply was meant to primarily act as an incentive for publishers to join the self-regulatory body, he argued that this is unlikely to succeed if the statutory right is less onerous than the code provisions.[99] On the other hand, he noted that if the statutory provision was stronger than, or the same as, the code's provisions there might be some question over the benefits to the public of the self-regulatory system.[100] Thus, he did not see why publishers should effectively be able to opt out

[94] See Chapter 2.
[95] Oral Hearing (n 91) p 57, 58. Also, a right of reply would be refused if it contained 'illegal or offensive' content or had not been requested within 14 days of the original statement's publication, see MRR June 2012 (n 79) 26.
[96] ibid.
[97] See Chapter 3.
[98] Oral Hearing (n 91) 61.
[99] Leveson Report (n 3) 1667.
[100] ibid.

of a statutory obligation by joining a trade body that does not give equivalent public protection.[101]

However, this fails to acknowledge that even if the statutory right of reply and the self-regulatory code provisions were identical, there would still be an incentive for newspapers to join the MSA. A statutory right of reply would expose 'non-participants' to legal costs and place the procedure under the control of a judge rather than the MSA.[102] Hence, if a publisher decided to join the MSA, it would become part of a system that deals with complaints involving a right of reply without the danger of legal costs but with industry participation. Leveson also missed the MRR's argument that in addition to serving as an incentive, the statutory right of reply was intended to extend the rules employed under the 'MSA Code' to publishers that had opted to not participate in voluntary self-regulation.[103] Thus, it is only logical if both the statutory right of reply and the self-regulatory code provisions offer the same level of protection.

Leveson further argued that since 'critical features of a right of reply are its immediacy and its ready availability', it is difficult to see 'how providing a mechanism through the courts will achieve either of these objectives'.[104] Although the MRR's proposal set out a tight timescale in which a right of reply would have to be requested,[105] this criticism is justified. While one may counter Leveson's view by noting that a claimant can apply for summary judgment under Part 24 of the CPR,[106] which, if granted, can significantly speed up a trial, it is not guaranteed that the claimant's application will satisfy the test derived from rule 24.2 of the CPR. Instead, a claimant's application for summary judgment may only succeed if 'the defendant has no real prospect of successfully defending the claim or issue' and if there is no other 'compelling reason' why the case should be disposed of at a trial.[107] The word 'real' does not require the summary judgment defendant, i.e., the newspaper, to show that their case will probably succeed at trial. Instead, the word 'real' is equal to the term 'better than merely arguable'.[108] Furthermore, a court may not grant

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[101] ibid.
[102] See also: Thomson (n 80).
[103] MRR June 2012 (n 79) 25.
[104] Leveson Report (n 3) 1667.
[105] MRR June 2012 (n 79) 25, 26.
[106] Note that part 53 of the CPR exclusively provides for summary disposal in accordance with the Defamation Act 1996.
[107] CPR, part 24 rules 24.2(a)(ii) and 24.2(b).
[108] See e.g.: *IFC v Utexafrica SPRL* [2001] C.L.C. 1361.

summary judgment if a defendant needs more time to investigate the claim.[109] If unsuccessful, an application for summary judgment could ultimately result in delay of a trial and is likely to lead to an adverse cost order against the claimant.[110] Therefore, an application for summary judgment can be a 'double-edged sword'.

Another relevant issue related to enforcing a right of reply through the courts is costs. As repeatedly emphasised by Leveson, any remedy relying on court enforcement faces issues relating to the 'high cost and real complexity of civil law and procedure'.[111] Leveson highlighted that both claimants and publishers had complained about 'how slow and expensive it is to take an issue to court'.[112] Particularly, he referred to debates regarding the risk of a 'chilling effect' on a newspaper's freedom of expression due to the risk of high litigation costs.[113] For the same reasons, Leveson noted that there might be 'very real difficulties facing those seeking access to justice'.[114] However, only the latter had been addressed in the MRR's proposal.[115]

Ultimately, Leveson did not recommend the implementation of a statutory right of reply. Instead, he concluded his inquiry by recommending that the PCC be replaced with a system of voluntary self-regulation, underpinned by legislation.[116] In response to the findings of the Leveson Report, the PCC was closed on 8 September 2014.[117] Shortly after, IPSO and IMPRESS were established, which is further detailed in section 3.

2.3. Private Members' Bills

2.3.1. Role of PMBs

This section analyses PMBs in the HoC that (unsuccessfully) attempted to introduce a statutory right of reply. Although the vast majority of PMBs are unlikely to ever reach the statute book, there is evidence in the academic literature that the tabling of PMB dealing with concerns over press behaviour can prompt action on the part of government or

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[109] See e.g.: Stuart Sime et al. (eds), *Blackstone's Civil Practice 2019* (OUP 2019) para 3-05.
[110] ibid.
[111] Leveson Report (n 3) 1768.
[112] ibid.
[113] ibid, 1499 et seq; 1504 et seq.; 1784 et seq.
[114] ibid, 1512 et seq.
[115] MRR June 2012 (n 79) 25, 26.
[116] The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary* (HC 2012–13, 779) 16 et seq. (hereafter: Leveson Executive Summary); Barendt et al. 2014 (n 54) 44, 45.
[117] HOL 2015 (n 23) 18.

industry.[118] Scholars have highlighted that the government's initial proactive response to the Calcutt Committee's recommendations was influenced by the potential embarrassment of having to talk out a series of backbench bills.[119] Furthermore, as noted above, Calcutt's (first) report paid specific attention to a PMB proposal when discussing the value of a statutory right of reply. Additionally, proposals to introduce a statutory right of reply by means of a PMB have triggered self-initiated reforms of the PCC,[120] and they aimed to 'complement thinking' around government-initiated reviews.[121] As emphasised by Harker et al., it would be too simplistic, therefore, to dismiss the potential of PMB to influence the government by virtue of the very low probability of their reaching the statute book.[122] Instead, they may form 'the vocal point for public and media debate' and thus ultimately lead to a change in government policy.[123]

2.3.2. Analysis of PMBs

In June 1981, the then Labour MP Frank Allaun presented his 'Right of Reply in the Media' Bill to the HoC which proposed the introduction of a 'legal right of reply'.[124] This would have allowed any 'individual, organisation or company' to request the publication of a right of reply with equal prominence as the original statement if a newspaper 'carried a factually inaccurate or distorted report' referring to them. Allaun justified the need for such a statutory remedy with the Press Council's failure to uphold the concept of a right of reply.[125] Therefore, he claimed that the UK was 'lagging behind' other legal systems such as those in West Germany or France.[126] Moreover, he hoped that a statutory right of reply would 'draw some of the claws of the media magnates'. [127] As the bill ran out of time in that session,[128] it was not debated any further.

This time with cross-party support, Allaun moved again and introduced his 'Right of Reply in the Media' Bill for a second time on 1 December 1982.[129] The motivation behind this bill was to 'give the ordinary man and woman some protection against powerful'

[118] See e.g.: Harker et al. (n 3) 252, 270 et seq.; O'Malley and Soley (n 6) 86 et seq.
[119] Bingham (n 34) 81; Harker (n 3) 270.
[120] O'Malley and Soley (n 6) 86 in reference to HC Bill (1988–89) [101R].
[121] Leveson Report (n 3) 210 in reference to HC Bill (1992–93) [157].
[122] Harker et al. (n 3) 270.
[123] ibid.
[124] HC Bill (1981–82) [92], see also HC Deb 2 June 1981, vol 5, cols 793–794.
[125] ibid, col 792.
[126] ibid.
[127] ibid.
[128] O'Malley and Soley (n 6) 80.
[129] HC Bill (1982–83) [22].

media'.[130] However, the Conservative-led government opposed the bill arguing that it did not want 'special laws that only apply to the press' since they felt this would undermine editorial power and therefore unjustifiably limit press freedom.[131] The bill was also heavily criticised for proposing a right of reply against misinterpretations and distortions of facts as opposed to limiting its scope to factual inaccuracies.[132] The opposing politicians were worried that this statute would be abused and open the 'floodgates' to 'allegations of distortion in every sphere'.[133] Claiming it would open 'an Aladdin's cave for professional protesters and lawyers',[134] MPs argued that the statutory remedy ran the risk of creating a press flooded with hundreds of replies a day, meaning that newspapers would have to double their size to print all of the complaints.[135] Ultimately, it fell ten short of the votes it needed to proceed to the committee stage.[136]

Only a few years later, the then Labour MP Austin Mitchell presented his 'Right of Reply' Bill on 12 June 1984.[137] Similar to Allaun, he proposed to give 'members of the public' a right of reply against 'allegations made against them' in the media.[138] If necessary, the reply would have had to be published with equal prominence.[139] Without further debate, the bill was defeated and did not proceed to the next stage.[140]

In December 1988, the then Labour MP Tony Worthington introduced his 'Right of Reply Bill',[141] which had a second reading in February 1989.[142] Contrasting to earlier PMBs, Worthington proposed to limit the right of reply's scope to factual inaccuracies (as opposed to also including misinterpretations and distortions of facts), thereby aiming to increase 'the Government's difficulty in rejecting the proposal.'[143] Besides implementing a 'speedy' and 'simplified' remedy, the bill was intended to act 'as a deterrent.'[144] Once again, the Conservative government objected to the bill because it did not want the press

[130] HC Deb 18 February 1983, vol 37, col 73.
[131] ibid, col 613.
[132] ibid, col 601.
[133] ibid, col 609.
[134] ibid.
[135] HC Deb 18 February 1983, vol 37, col 576; col 579; cols 600–2, 609.
[136] ibid, col 621.
[137] HC Bill (1983–84) [190].
[138] HC Deb 12 June 1984, vol 61, cols 779–791.
[139] ibid, col 781.
[140] HC Deb 5 July 1984, vol 63, col 667. See also Unfair Reporting and Right of Reply HC Bill (1987–88) [34] by Anne Clwyd, which was almost identical in its wording to Mitchell's proposal. However, it was never processed and, therefore, never debated in parliament.
[141] See n 39, see also HC Deb 21 December 1988, vol 144, col 455.
[142] HC Deb 3 February 1989, vol 146, cols 546–612.
[143] ibid, col 549.
[144] ibid, col 586.

to be subject to statutory control or to special laws that only applied to the press and not to the 'ordinary citizen.'[145] Furthermore, it criticised Worthington's proposal as not being workable,[146] something that would be reiterated by Calcutt the year after.[147] Another recurring argument was the fear of people 'flooding' the press with unnecessary replies against minor mistakes, followed by the claim that the right of reply is more of a 'moral entitlement' that should not be turned into a statutory right.[148] Those supporting the bill tried to dispel the criticisms by referring to countries like Germany, who 'have had the right of reply for 100 years' and have made it work.[149] Eventually, during a debate on the bill on 21 April 1989, the government announced a review 'of the general issue of privacy and related matters.'[150] As noted in section 2.2.2, the Calcutt Committee was established but, in return, Worthington's bill fell short.

In between the publication of the first and second Calcutt report, the then Labour MP Clive Soley presented his 'Freedom and Responsibility of the Press Bill' in June 1992.[151] Soley proposed to 'require newspapers to present news with due accuracy and impartiality'.[152] The aim of part of this proposal was to give individuals a cheaper and less risky statutory remedy as an alternative to libel proceedings which would allow them to present their own views after being affected by factual inaccuracies in the press.[153] Similar to the German right of reply, his bill therefore focused on establishing equality of arms between the supposed 'weaker' individual and the 'powerful' media. In parliament, Soley's bill was heavily attacked. As before, the 'floodgates argument' was brought forward, with Peter Thurnham MP claiming that the bill could result in a 'paralysation of the press' and it would, thus, lead to a 'chilling effect.'[154] Other MPs argued that the press was already working under a tight regime and should, therefore, be free from any further state intervention.[155] Ultimately, Soley's bill failed to obtain a third reading,[156] primarily because the government announced that it would await the outcome of the NHSC report.[157]

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[145] ibid, col 582.
[146] ibid.
[147] ibid, col 585; see section 2.2.2.
[148] ibid, col 563.
[149] ibid, col 600.
[150] HC Deb 21 April 1989, vol 151, col 595.
[151] HC Bill (1992–93) [157].
[152] HC Deb 10 June 1992, vol 209, col 311.
[153] Clive Soley, 'The Philosophy and rationale of the freedom and responsibility of the press bill' (1992) 1(2) JFRC 140, 141.
[154] Standing Committee F 10 March 1993, vol 8, p 12.
[155] ibid, pp 12, 25, 38.
[156] Bingham (n 34) 81.
[157] O'Malley and Soley (n 6) 93.

Twelve years later, the then Labour MP Peter Bradley presented his 'Right of Reply and Press Standards' Bill in 2005.[158] His PMB sought to give any natural or legal person 'to whom the editorial material relates' or anyone 'with a legitimate interest in the editorial material' a right of reply against a 'factual inaccuracy',[159] which would have to be published with due prominence.[160] In comparison, his bill proposed a much broader personal scope than the German statutory right of reply as the latter requires that a claimant has been personally 'affected'.[161] Moreover, the bill aimed to replace the PCC with a statutory 'Press Standards Board', which could have sought enforcement of its rulings though the courts.[162] As with several times before, the government – Labour at that time – opposed the bill because of its belief that the press should be free from any state intervention.[163] The government claimed that if implemented, the bill would end 'more than 300 years of press freedom'.[164] Ultimately, the bill was defeated after its second reading.[165]

2.4. Intermediate conclusion

This examination of government-initiated inquiries into the press has demonstrated that one of the main historical arguments against the implementation of a statutory right of reply has been that the press should not be subject to a special regime of law. Instead, it was seen to be desirable to keep the press free from state intervention. However, this can only be said for the time between the first RCP and the first Calcutt Report. After Calcutt's second report had already recommended the introduction of statutory legislation (including a right of reply against alleged inaccuracies), Leveson also somewhat deviated from this narrative. His main argument against the implementation of statutory right of reply was no longer that the press should be kept free from any kind of state intervention, but rather the concern over whether enforcing such a remedy through the courts could work in practice. This was based on issues surrounding high litigation costs and his doubts over whether 'providing a mechanism through the courts' would achieve the 'critical features of a right of reply', i.e. its 'immediacy and its ready availability'. Indeed, a main criticism throughout all the relevant inquiries was that no proposal for a statutory right of reply had presented a coherent and workable way for producing speedy decisions when

[158] HC Bill (2004–05) [39].
[159] HC Deb 25 February 2005, vol 431, col 606.
[160] ibid.
[161] See Chapter 2.
[162] HC Deb 25 February 2005, vol 431, cols 607, 613.
[163] ibid, col 618.
[164] ibid.
[165] ibid, col 629.

distinguishing between accurate and inaccurate statements. However, none of the inquiries rejected the concept of a right of reply in principle, as they were instead concerned with its practicality. In fact, all government-initiated inquiries criticised the relevant self-regulatory body at the time for having failed to uphold the concept of a right of reply.

Additionally, all PMBs proposing the implementation of a statutory right of reply were criticised for the potential pitfalls of a such a statutory remedy. Particularly, opposing politicians claimed that the remedy might open the 'floodgates' to 'allegations of distortion in every sphere', which might result in a press flooded with hundreds of replies a day. This would, consequentially, result in a curtailment of press freedom. This criticism seemed to have somewhat influenced the content of the PMB proposals. Whilst Allaun, Mitchell and Clywd suggested that the remedy be available in response to 'inaccuracies, misinterpretations or distortions of facts', Worthington responded to criticisms in parliament by narrowing down the scope to the correction of 'factual inaccuracies'. Neither Soley nor Bradley deviated from this. However, although the majority of those PMB suggested establishing a new statutory committee or authority,[166] all of them were criticised for not having presented a coherent concept for the funding of those bodies, which proved to be one of the main reasons for their failure.

As noted above, another reason for the failure of the PMBs was the nature of the legislative system, as they were introduced by backbench MP. Also, 6 out of 7 PMBs were presented to parliament by a member of the opposition,[167] which made the bills even less likely to secure a majority in parliament. The subsequent section turns its attention towards the current version of the Editors' Code of Practice as enforced by IPSO.

3. The right of reply in the Editors' Code of Practice

After the Leveson Inquiry, two self-regulatory bodies, IPSO and IMPRESS, were established. As detailed in Chapter 1, this thesis focuses on IPSO. One of the regulator's main functions is to 'handle complaints about breaches' of the Editors' Code of Practice (ECP),[168] which contains the 'opportunity to reply'. This section examines the clauses

[166] See Harker et al. (n 3) 252.
[167] Except that of Peter Bradley.
[168] IPSO, 'Articles of Association', para 8 (2019) <https://www.ipso.co.uk/media/1814/ipso-articles-of-association-2019.pdf>.

enshrined in the ECP to see whether the self-regulatory regime contains rules and practices that are functionally equivalent to a 'right of reply' as set out in Chapter 2. In doing so, this part investigates the motivations behind the drafting of the opportunity to reply clause (section 3.1), how the complaints process under IPSO's rules and regulations is carried out (section 3.2) and whether IPSO could enforce its rulings if necessary (section 3.3). Lastly, section 3.4 conducts a systematic analysis of IPSO's resolution of complaints. Appendix A outlines the in-house complaints handling procedure of *The Guardian* and the *Financial Times* as an example of how self-regulation operates amongst publications that have not joined either of the regulatory bodies. Appendix B contains an overview of IPSO's arbitration scheme.[169]

3.1. The drafting of the opportunity to reply

The ECP, which is framed by the 'Editors' Code of Practice Committee' (ECPC), is enshrined in the contractual agreement between IPSO and publishers.[170] Clause 1(iii) of the Code's latest version details that 'a fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.' If a newspaper has refused a person an opportunity to reply, a complaint may be brought under this clause. Although the obligations under the clause seem clear, its wording allows room for movement. Particularly, the Code neither defines when an inaccuracy is 'significant', nor does it provide an insight into when an opportunity to reply is 'reasonably called for'. The only guidance is contained within the 'Editors' Codebook', which is also drafted by the ECPC and includes detail of how IPSO has interpreted the Code in the past.[171] The Codebook describes the opportunity to reply as 'a remedy beyond a simple correction' which is suited to making readers 'aware of the [complainant's] position'.[172] However, as the Editors' Codebook is 'non-binding', this does not change that IPSO is the 'final arbiter of the code'.[173]

Crucially, the drafting of the clause seems to amount to a more modest obligation than that recommended by Calcutt in his 1990 report. As noted above, Calcutt's draft Code provided for a 'proportionate and reasonable opportunity to reply to criticisms or alleged

[169] IPSO has not yet published a final ruling on an arbitration.
[170] IPSO, 'Scheme Membership Agreement' (2019), clause 3.3 <https://www.ipso.co.uk/media/1813/ipso-scheme-membership-agreement-2019-v-sep19.pdf>.
[171] ECPC, The Editors' Codebook (2019) <https://www.editorscode.org.uk/downloads/codebook/codebook-2019.pdf>.
[172] ibid, 28, 29.
[173] ibid, p 5.

inaccuracies' as opposed to 'actual' inaccuracies. Also, the current version of the opportunity to reply seems to be more restrictive for complainants compared to earlier versions of the ECP. Between 1997 and the revision in December 2015,[174] the ECP detailed that, 'a fair opportunity to reply to *inaccuracies must* be given when reasonably called for.' [emphasis added].[175] Since the current version of the opportunity to reply requires the existence of 'significant inaccuracies' (as opposed to mere 'inaccuracies'), the bar for bringing a complaint under this clause seems to have been raised. Furthermore, the changing of the wording of the clause from 'must' to 'should' increased the discretionary powers of the newspapers and the regulator over whether a right of reply was granted. Additionally, 'the opportunity to reply' was moved from having a clause by itself (Clause 2) and it was instead included in the 'Accuracy' clause in sub-clause 1(iii). Since the ECPC has not published the results of the consultation or the contributions to the consultation that led to this amendment,[176] there is no transparent insight into the motivation behind this change.

Nevertheless, this gap may be filled by examining the ECPC's composition. In fact, the issue of who should be in charge of writing the ECP has been subject to controversial discussions in the past. Crucially, Leveson criticised the ECPC because of its industry dependence as it was then 'wholly made up of serving editors'.[177] Although the ECPC has survived the developments following the Leveson Inquiry, its composition has changed.

Under the current regulatory framework, the ECPC is a subcommittee of the Regulatory Funding Company (RFC),[178] which convenes the ECPC by appointing its members at the discretion of the company's directors.[179] At the time of writing, the ECPC is made up of 12 appointed members, nine of whom work as newspaper editors in addition to three 'independent lay members', and its chairman Neil Benson, a former Group Executive

[174] See section 2.2.3.
[175] ECP 2015, clause 2.
[176] See Marcus Keppel-Palmer, 'The Emperor's new clothes – IPSO's new version of the Editors' Code of Practice' (2016) 27(3) ELR 92. Since then, the ECPC has begun to publish insights into the reasons behind amendments to the ECP, see: ECPC, 'Press Information' (June 2019) <https://www.editorscode.org.uk/downloads/press_releases/Editors-Code-Review-Press-Release-19-06-2018.pdf>.
[177] Leveson Executive Summary (n 116) para 42.
[178] RFC, 'Articles of Association', para 2.2 (2013) <http://www.regulatoryfunding.co.uk/write/MediaUploads/15840651-v1-final_rfc_articles.pdf>.
[179] ibid, paras 10.9, 10.10, 11.

Editor at *Trinity Mirror*.[180] Furthermore, IPSO's CEO and Chairman are members *ex officio*.[181] Since there is a majority of editors responsible for writing the ECP, this directly contravenes some of Leveson's key recommendations.[182]

In his report, Leveson rejected the idea of a standards code written by a committee like the ECPC. He highlighted that 'a new system must have an independent process for setting fair and objective standards',[183] which is why any kind of standards code (like the ECP) must ultimately be the responsibility of, and adopted by, the board of the regulatory body that is enforcing it.[184] Furthermore, he stressed that a code committee with a majority of serving editors should not be acting in more than an advisory role as this would otherwise 'not allow for independent setting of standards' and thus run the risk that the Code would be weighted in favour of the press.[185] He emphasised that it would seem 'quite wrong' if editors would 'actually be responsible for setting standards'.[186] Instead, responsibility for the Code should lie with the regulator who would be enforcing it.[187] Despite these recommendations, the ECPC has more than an advisory role as it is responsible for writing the Code. Also, the composition of the committee and the promulgation of the code are delegated entirely to the ECPC.[188] Although changes to the ECP are subject to IPSO's and the RFC's approval,[189] the drafting of the ECP is not within IPSO's responsibility.[190]

This issue was also addressed in Pilling's 'External Review of IPSO',[191] which had been commissioned by the regulator. Different to Leveson, Pilling did not see an issue with the ECPC's composition and tasks as he noted that 'the Code's effectiveness depends on its being, and being seen to be, principally the responsibility of editors who know the business'.[192] Although Leveson had made it clear that he 'simply d[id] not accept' the argument that only 'serving editors' had enough experience to define the code, or that 'serving

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[180] ECPC, 'About us' (2019) <https://www.editorscode.org.uk/about_us.php>.
[181] ibid.
[182] See also: MST, 'The Independent Press Standards Organisation (IPSO) – Five Years On', p 23 (*MST*, 2019) <http://mediastandardstrust.org/wp-content/uploads/2019/10/MST-IPSO-2019-Final-Version.pdf>.
[183] Leveson Report (n 3) 1649.
[184] Leveson Executive Summary (n 116) para 7.
[185] Leveson Report (n 3) 1750.
[186] ibid, 1624.
[187] ibid, 1627.
[188] RFC (n 178) para 10.9.
[189] ibid, paras 10.11, 10.12.
[190] Joseph Pilling, 'The External IPSO Review', p 52 (2016) <https://www.ipso.co.uk/media/1278/ipso_review_online.pdf>.
[191] ibid.
[192] ibid, p 13.

editors' were not affected by self-interest,[193] Pilling failed to acknowledged this.

So far, this chapter has demonstrated that there has been an aversion within the industry to any kind of rule that would afford individuals a general right to have a response published on their own terms against the will of a newspaper. Thus, it seems only logical that a committee primarily made up of editors would argue in favour of a high(er) bar for a right of reply. Section 3.3 examines the practical application of the clause.

3.2. IPSO's complaints process

On receiving a complaint, IPSO first assesses whether it falls within the regulator's remit and whether it raises a possible breach of the ECP.[194] IPSO regulates the editorial content of its members that is published in a 'printed newspaper or magazine' and on 'electronic services operated by regulated entities such as websites and apps, including text, pictures, video, audio/visual and interactive content produced by their members'.[195] The latter also includes edited or moderated reader comments on newspaper and magazine websites,[196] as well as social media pages run by and affiliated with its members.[197] IPSO also regulates editorial content on electronic services operated by members where there is no print presence.[198] Consequently, the ECP does not distinguish between online and print material as it applies the same rules to both types of content.

Generally, IPSO can consider complaints within four months of the date of publication or of the conduct complained about from 'any person who has been directly and personally affected by the alleged breach of the Editors' Code'.[199] Crucially, the regulator has repeatedly emphasised that it considers a third-party call for an opportunity to reply as not 'fair'. Therefore, it will always strike out a complaint under the 'opportunity to reply clause' if the statement in question is not directed at the complainant.[200] However, both legal entities and public authorities may bring a complaint under the ECP.[201]

[193] Leveson report (n 3) 1624.
[194] IPSO Regulations, para 12 (2019) <https://www.ipso.co.uk/media/1732/ipso-regulations-2019.pdf>. However, even if the complaint fulfils both requirements, IPSO is not obligated to consider the complaint, see para 8.
[195] ibid, paras 1.1–1.2.
[196] See e.g.: Decision of the Complaints Committee (DCC) 05484-18 *A woman v Press Gazette* (2019).
[197] See e.g.: DCC 18875-17 *Dickinson v Mail Online* (2018).
[198] IPSO Regulations (n 194) para 3. Regarding IPSO's jurisdiction for online content see ibid paras 2–3.
[199] ibid, para 8; 11. Where an article remains accessible on the publisher's website, IPSO may take complaints forward within 12 months of publication.
[200] See e.g.: DCC 13416-16 *Versi v Express.co.uk* (2017).
[201] See section 3.4.5.

If a complainant has not previously been in contact with the publication, he is referred to the publisher in the first instance, and the two parties have 28 days in which to correspond directly with a view to reaching a satisfactory resolution.[202] The regulator will consider a complaint earlier than that only if either the publication requests it or IPSO considers an earlier involvement to be 'essential'.[203] Hence, IPSO is not obligated to take on complaints directly from complainants in the first instance and a dispute only becomes a matter for the regulator when bilateral resolution is not possible. Instead, each publisher must maintain an in-house complaint handling procedure that complies with IPSO's rules and regulations and the ECP.[204]

In practice, there is no standardised name for the head of this in-house procedure. For example, *Associated Newspapers*, then publisher of the *Daily Mail*, has chosen the name 'readers' editor';[205] *News UK*, publisher of *The Sun*, utilises the name 'ombudsman' instead.[206]Significantly, it is ultimately up to the publishers to decide how fast a complaint is processed within these 28 days, as the complaint cannot demand IPSO's involvement at an earlier time. This *status quo* might prolong the complaints process, which would contradict the right of reply's normative purpose to allow a person to swiftly respond to allegations published in the media.[207] Furthermore, as in-house complaints editors are necessarily either employed or paid by the publishers, this first internal stage of the complaints process is neither unbiased nor independent from the industry and it is therefore likely to be more favourable towards the interests of the press. As stressed by Calcutt, in-house complaints procedures run the risk that the responsible editor will 'frequently […] disagree with the complainant over whether the original coverage was unfair or inaccurate'.[208]

In fact, it is not transparent whether publishers resolve all the complaints received directly from readers exclusively under IPSO's rules or if they only do so if someone complains to the regulator in the first instance. For example, *Associated Newspapers*' annual state-

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[202] IPSO Regulations (n 194) para 13.
[203] ibid.
[204] SMA (n 170) clauses 3.3.1–3.3.5.
[205] Associate Newspapers, 'Annual statement to the IPSO 2017', p 5 (March 2018) <https://www.ipso.co.uk/media/1617/associated-newspapers-annual-statement-2017-for-publication.pdf>.
[206] News UK, 'News UK IPSO Annual Report 2017' (March 2018), p 4 <https://www.ipso.co.uk/media/1657/news-uk-annual-statement-2017-for-publication.pdf>.
[207] See Chapter 2.
[208] Calcutt Committee (n 3) para 13.4.

ment to IPSO notes that complaints which arrive ‘outside the IPSO system’ are investigated internally but do not go through an ‘independent process of investigation and adjudication.’[209] The publisher considers it ‘unfair to both the complainants and the journalists’ to offer a view on whether or not there was a breach of the ECP in these cases.[210] As the publisher fails to define when it considers a complaint to have arrived ‘outside the IPSO system’, it remains unclear whether all complaints are dealt with under the same rules.

Despite the obligation on publishers to submit ‘annual statements’ to IPSO,[211] there is no comprehensive insight into how complaints under the opportunity to reply clause are resolved internally. Publishers are merely obligated to publish brief details of their compliance process, and a statement regarding compliance with the ECP including any adverse findings of the regulator and the steps taken to address such findings annually.[212] However, they do not have to publish how many complaints they have handled internally or the exact outcomes of those complaints.[213] IPSO only finds out about the outcome of an in-house complaint is if it has not been resolved by the publisher and is therefore referred back to IPSO after the 28-day period. Contrastingly, when a publisher deals with a complaint that they receive directly or during the referral period there will be no record of that complaint, which may lead to opaque decisions during IPSO’s complaints process. Pilling recommended changing this *status quo*, and noted that recording these complaints would ‘help IPSO ensure that it has good understanding of the extent to which the Code is complied with […] across all of its members’.[214] Although IPSO promised to ‘review this with our members’,[215] and despite having updated its regulations in 2019, this issue still exists.[216]

If a complaint has not been resolved internally, IPSO investigates the complaint by writing to both the editor of the publication and the complainant, in order to mediate a satisfactory outcome.[217] If the complaint has not been mediated successfully, the Complaints

[209] Associate Newspapers (n 205) 11.
[210] ibid.
[211] See <https://www.ipso.co.uk/monitoring/annual-statements/>.
[212] IPSO Regulations (n 194) Annex A.
[213] ibid.
[214] Pilling (n 190) 30–31.
[215] IPSO, ‘The Pilling Review: IPSO’s response’, para 34 (2016) <https://www.ipso.co.uk/media/1304/the-pilling-review-response.pdf>.
[216] See also MST 2019 (n 182) 5, 6.
[217] IPSO Regulations (n 194) paras 16–21.

Committee will then decide whether there has been a breach of the ECP and, if a complaint is (partly) upheld, whether 'remedial action' is required.[218] Both the complainant and the publisher can appeal to the 'Independent Complaints Reviewer' (ICR),[219] but only on the ground that the decision is 'substantially flawed.'[220] However, whether or not a complaint is referred to the ICR is left to IPSO's discretion,[221] and the final decision over a complaint is in any case made by the Complaints Committee.[222]

For comprehensiveness, it should be noted that in 2018 for the first time, the High Court dealt with the question of whether decisions made by IPSO's complaints committee were subject to judicial review proceedings for the purposes of Part 54 of the CPR.[223] Ultimately, the High Court did not decide whether IPSO was amenable to judicial review, and instead assumed for the purposes of this case that the court had jurisdiction to review the lawfulness of the challenged decisions. Warby J argued that he could do so since he did not uphold the grounds of the claim,[224] and the parties agreed on the jurisdictional issue. However, he stressed that if another judicial review claim was brought against IPSO, there should be a 'full adversarial examination of the [jurisdictional] question'.[225] Nevertheless, he provided some guidance on how a court should exercise its public law judicial review jurisdiction in relation to IPSO, if it exists. Quoting a passage in *Ex parte Stewart-Brady*,[226] Warby J found it 'highly persuasive' that even if a court decided that IPSO should be subject to judicial review, it 'will not get into a position where it adopts a technical interpretation of the Code of Practice and then relies on that technical interpretation as a justification for intervening.'[227]

3.3. IPSO's enforcement powers

As noted above, the regulator derives its authority solely from the voluntary contractual submission of its members. During the Leveson Inquiry, this form of regulation was criticised for the regulator's supposed lack of enforcement powers.[228] Leveson highlighted

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[218] ibid, paras 29–31.
[219] See <https://www.ipso.co.uk/what-we-do/people/independent-complaints-reviewer/>.
[220] IPSO Regulations (n 194) para 32.
[221] ibid, paras 34, 35.
[222] ibid, paras 36, 37.
[223] *Coulter v IPSO* [2018] EWHC 919 (QB).
[224] ibid*,* para 36.
[225] ibid.
[226] *R v PCC, ex parte Stewart-Brady* [1997] EMLR 185.
[227] *Coulter* (n 223) para 37.
[228] Leveson Report (n 3) 1637, 1638.

that if there was only a contractual relationship between the publishers and the regulator, the latter has only one method of enforcement of its decisions, 'which is to take action in the courts for an order for performance of the contract'.[229] Since this would incur costs for the regulator, Leveson argued that 'there will always be a matter of judgment for the regulator as to whether it is a good use of his resources (both in time and money) to take proceedings', which ultimately might make a regulator unwilling to take action in such cases.[230] Additionally, a publisher would always be able to contest in court whether a fine or other decision can be properly enforced under the contract.[231] Leveson stressed that this 'adds a layer of expense and complexity to the regulator's enforcement process',[232] which could not be compensated by the fact that failure to comply with regulatory decisions could lead to the opening of a full scale investigation, since the conduct and outcome of this could also be challenged in court. He emphasised that such a system 'could be frustrated by a publisher who, although having joined the system, was not inclined to cooperate'.[233] If such a publisher would therefore 'appeal every decision and argue every point', the regulator would either have to devote a substantial amount of his resources to dealing with the problem or abandon the attempt to enforce decisions.[234]

Indeed, Leveson's criticisms can be applied to IPSO's regulatory system. As detailed in clause 17 of the 'Scheme Membership Agreement' (SMA) between the publishers and the regulator,[235] 'the courts of England […] shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement'. Therefore, if a publisher refused to abide by IPSO's rulings, despite having previously agreed to do so,[236] the issues relating to cost and complexity of any relevant court proceedings as highlighted by Leveson might arise. This is even though IPSO has set up an 'enforcement fund' as detailed in clauses 1 and 10 of the SMA.[237] The purpose of this fund is to contribute 'towards the costs and expenses of the Regulator in bringing enforcement actions against, or carrying out investigations into the conduct of, Regulated Entities referred to in clause

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[229] ibid, 1637.
[230] ibid.
[231] See also Martin Moore et al., 'A Free and Accountable Media', p 35 (*MST*, 2012) <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/06/MST-A-Free-and-Accountable-Media-21-06-12.pdf>.
[232] Leveson Report (n 3) 1637.
[233] ibid.
[234] ibid. Further issues arise in relation to the remedy that could be granted if IPSO decided to take an action in court after a publisher refused to abide by its rulings. For example, the regulator might attempt to obtain an order for specific performance. However, an in-depth discussion goes beyond the scope of this thesis. For further detail see e.g.: Hugh Beale et al. (eds), *Chitty on Contracts* (S&W 2018) ch 27.
[235] see n 170.
[236] ibid, clause 3.3.8.
[237] See also IPSO AoA (n 168) para 11.4.7.

10'. Clause 10 details that IPSO can 'require' regulated entities 'which publish national newspapers' to 'guarantee a payment (which amount shall be determined by the Regulatory Funding Company) which shall be payable on demand to the Regulator to be used as, or as part of, the Enforcement Fund'. In addition, the enforcement fund will consist of any 'fines and costs contributions' received by the regulator. This was established in response to the Leveson Inquiry, which recommended that a 'news regulatory body should establish a ring-fenced enforcement fund, into which receipts from fines could be paid, for the purpose of funding investigations'.[238]

However, the way in which IPSO's enforcement fund is set up fails to meet the relevant recommendation from the Leveson Report. As highlighted by the MST,[239] it is left to the RFC's discretion to decide the size of any payment other than monies received from fines and costs contributions.[240] Therefore, it cannot be said that it is within IPSO's power to 'establish' an emergency fund independently, as it would require the RFC's approval.[241] Since IPSO has, as of yet, not fined any publishers, it therefore remains unclear if sufficient funds would be available to take action in court against a publisher who refuses to abide by IPSO's rulings. The only information about such funds was published in the 2016 Pilling Report, which noted that IPSO 'has only £100,000 in its budget to conduct a standards investigation'.[242] However, this does not account for any potential litigation costs. Furthermore, whether the enforcement fund is 'ring-fenced', as recommended by Leveson, also remains unclear given the RFC's power to determine the size of payments.[243] In fact, Pilling noted that although 'there is no reason to believe that the RFC would refuse to meet a reasonable request in those circumstances', this *status quo* 'would certainly limit the extent to which IPSO could claim to be independent.'[244]

In response to these arguments, one might claim that it seems unlikely for a publisher to ignore IPSO's rulings after having voluntarily entered into a contract with the regulator. Yet, Leveson disagreed with this line of argument. He argued that 'the idea that publishers will cooperate […] because they join the system voluntarily rings rather hollow' as it is not 'inconceivable' that some would do so 'because they can see the weaknesses in the

[238] Leveson Report (n 3) 1797.
[239] MST 2019 (n 182) 14.
[240] RFC AoA (n 178) para 24.4.
[241] MST 2019 (n 182) 15.
[242] Pilling (n 190) p 29.
[243] MST 2019 (n 182) 15.
[244] Pilling (n 190) 29.

system that would allow them to frustrate its effective operation.'[245] However, Leveson's arguments are based on the assumption that publishers will happily take the risk of having to pay litigation costs just for the sake of disrupting IPSO's self-regulatory system. Considering the financial pressure on newspapers due to declining revenues and circulation, this assumption seems somewhat flawed and is thus further investigated in Chapter 5.

In any event, the biggest weakness of IPSO's rules and regulations in relation to the enforcement of rulings is that, due to the doctrine of privity of contract, under no circumstances can the complainants themselves take action in order to force publishers to abide by their contractual duties. This is emphasised in clause 14 of the SMA, which notes that 'save as expressly provided in this Agreement […], no person other than a party to this Agreement will have any rights under this Agreement.' Due to the *status quo* of IPSO's relationship with the publishers, the complainant does not have enough power to 'force' the regulator to take action against a newspaper that refuses to abide by its rulings.

3.4. The 'opportunity to reply' in practice

This section examines how the opportunity to reply works in practice and what factors are decisive for IPSO's decision-making practices when having to adjudicate on a complaint concerning this clause. As noted in section 3.1, this requires gaining further insight into how the terms 'significant inaccuracy' and 'reasonably called for' are interpreted by the regulator.

3.4.1. Procedure

This section undertakes a systematic analysis of all the decisions made by IPSO's complaints committee where a newspaper refused to grant a person's request to publish an opportunity to reply, which then led to a complaint under the opportunity to reply clause.[246] This includes all complaints where IPSO successfully mediated this issue between the publisher and the complainant, in which case the regulator would not determine whether there had been a breach of the ECP. The data consists of all rulings and resolution statements made since IPSO has been set up as a regulatory body on 8 September 2014

[245] Leveson Report (n 3) 1637.
[246] Following the methodological approach as outlined by David Acheson, 'Empirical insights into corporate defamation: an analysis of cases decided 2004–2013' (2016) 8(1) JML 32; see also: Maryam Salehijam, The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) TLR 34.

up until the time of writing, 1 July 2019. The primary benefit of this approach is that an exhaustive study of the regulator's entire body of complaint decisions on the opportunity to reply provides a complete picture of IPSO's decision-making practice on this issue. Due to the transition period between IPSO's establishment and the ECP's revision in December 2015, the regulator has adjudicated on complaints under both the 'old' and the current version of the opportunity to reply clause. Thus, this study also provides insight into whether the amendment to the clause has made any difference in practice. Appendix C sets out how the data set was generated.

3.4.2. Limitations

This study is not suited to providing an insight into how often people contact publications and demand their own view to be published in response to a story in a newspaper outside the complaints reported by the regulatory body. The same applies to the issue of how frequently newspapers are (voluntarily) publishing a reply because a complaint was resolved between the newspaper and the complainant without IPSO becoming involved. As noted above, there are no data available about the number of complaints concerning the opportunity to reply that are resolved by the newspapers internally. Thus, it is yet to be determined whether the referral of a complaint to the regulator is the *ultima ratio* and therefore only happens as a last resort after the internal process has 'failed', or if this happens with most complaints. In the case of the former, the complaints adjudicated on by IPSO could only be considered the 'tip of the iceberg' and they are therefore not representative of the day-to-day application of the opportunity to reply. Even if a complaint is resolved by IPSO, the regulator is not obligated to publish the outcome of a complaint ruling or mediation resolution.[247] Hence, IPSO might have adjudicated on additional complaints, but the researcher does not have access these complaints.

3.4.3. Results and discussion

First, section 3.4.4 sets out general observations about the data set. Second, the chapter focuses on the findings of the analysis in relation to the main research questions – it evaluates how the terms 'reasonably called for' and 'significant inaccuracy' are interpreted by the regulator (sections 3.4.5 and 3.4.6) Section 3.4.7 comes to a conclusion.

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[247] IPSO Regulations (n 194) paras 18, 40.

3.4.4. General observations

The final data set consisted of 96 'rulings' and 14 'resolution statements'. The former were published after IPSO's complaints committee had adjudicated on a complaint, the latter in case of a successful mediation between the complainant and the publisher. Eighty-nine of these 110 complaints were lodged between 8 September 2014 and 31 December 2015, and they were therefore adjudicated against the 'old' opportunity to reply clause, i.e. Clause 2 of the ECP in its 2012 version. The remaining 21 complaints were lodged after 1 January 2016 and they were hence adjudicated against Clause 1(iii) of the revised ECP. The following table provides an overview of the outcome of these complaints.

Table 2: Overview

Code provisions	Time period	Breach – sanction: action as offered by publication	No Breach after investigation	Resolved by mediation	Total number of complaints
ECP 2012 Clause 2	8 September 2014 – 31 December 2015	1	77	11	89
ECP 2016 – 2019 Clause 1(iii)	1 January 2016 – 1 July 2019	4	14	3	21
					110

When comparing the total number of complaints, the decrease in adjudications and mediation resolutions after the revision of the ECP in late 2015 is striking. One may claim that this is due to the changes in the drafting of the opportunity to reply clause which now requires the existence of 'significant inaccuracies' as opposed to 'inaccuracies'. Indeed, complainants may now be less likely to bring a complaint under this clause due to the revised ECP supposedly containing 'extra hurdles'.

However, this study offers a different explanation. As noted above, if a newspaper has refused a person an opportunity to reply, a complaint may be brought under this clause. Necessarily, this implies that someone who lodges a complaint under this clause has unsuccessfully requested the publication of his opportunity to reply from the newspaper – *before* complaining to IPSO. As detailed in section 3.4.6, the opportunity to reply clause also does not amount to a duty for publishers to contact the subject of a story prior to

publication. However, between 8 September 2014 and 31 December 2015, 28 out of 78 (35.89 %) adjudicated complaints under this clause were ruled out simply because the complainant had never actually (unsuccessfully) requested the publication of his reply from the newspaper. Because a complaint under the opportunity to reply clause may only ever be upheld if a newspaper has refused the request of publication of a reply by the subject of the story, these complaints never stood a chance of succeeding. Contrastingly, none of the complaints brought after 1 January 2016 that were adjudicated against the revised version of the ECP were ruled out for this reason. Hence, the number of frivolous and outright unsubstantiated complaints under the opportunity to reply clause seems to have been reduced drastically since the revision of the Code.

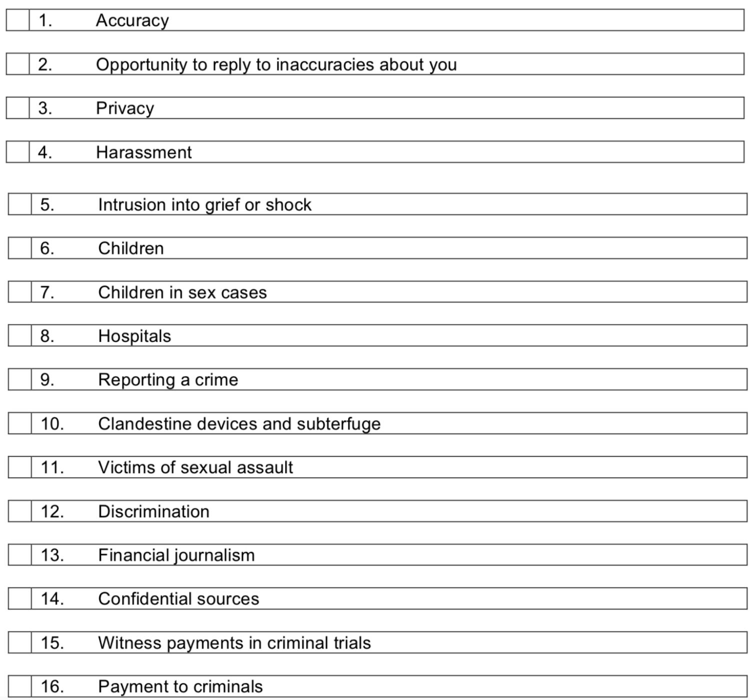
This chapter argues that this is not due to the requirement for the existence of 'significant inaccuracies' as opposed to 'inaccuracies', but it is more likely to be because the opportunity to reply was changed from being a clause by itself (Clause 2) to being a sub-clause. As part of the revisions of the ECP in late 2015, it has instead been included in the 'Accuracy' clause in sub-clause 1(iii), which makes a difference in practice. When lodging a complaint with IPSO, part of the process is to determine which part of the ECP may have been breached. To do so, IPSO has released a 'complaints form', which can be accessed on IPSO's website,[248] and it is pictured in Figure 1 below. Before the revision of the ECP, complainants could simply select the stand-alone 'opportunity to reply clause' as (one of) the ground(s) for their complaint, even if those complaints had no substance (since they had not requested the publication of their post-publication reply from the newspaper in the first place). This ran the risk of artificially increasing the number of complaints under this clause because it allowed complaints to cite the clause even though it was guaranteed to be unsuccessful. With the opportunity to reply now being a mere sub-clause of Clause 1, it is no longer visible on the complaints form. Thus, instead of simply ticking a box, the complaints analysis has revealed that the regulator will only ever make a ruling on the opportunity to reply clause if the complainant has requested the publication of his reply from the newspaper *before* coming to IPSO.

Hence, whilst under the 'old' ECP it was the complainant's choice to assess whether a complaint under the opportunity to reply clause fitted the facts of a complaint, it is now in IPSO's power to 'screen' a complaint and decide which sub-clauses are relevant. Therefore, it seems a logical conclusion that this 'streamlining' of complaints since the

[248] See <https://www.ipso.co.uk/complain/complaints-form/>.

amendments in 2016 has lowered the number of frivolous and outright unsubstantiated complaints under this clause. Hence, there might be a decline in the number of people citing that clause due to its reduced visibility, but not necessarily in the number of people requesting an opportunity to reply. This might disadvantage ‘ordinary citizens’, as only those familiar with the ECP would be aware that newspapers may be under an obligation to provide an opportunity to reply. Figures 1 and 2 illustrate the reduced visibility of the opportunity to reply clause.

Figure 1: Complaints form 8 September – 31 December 2015



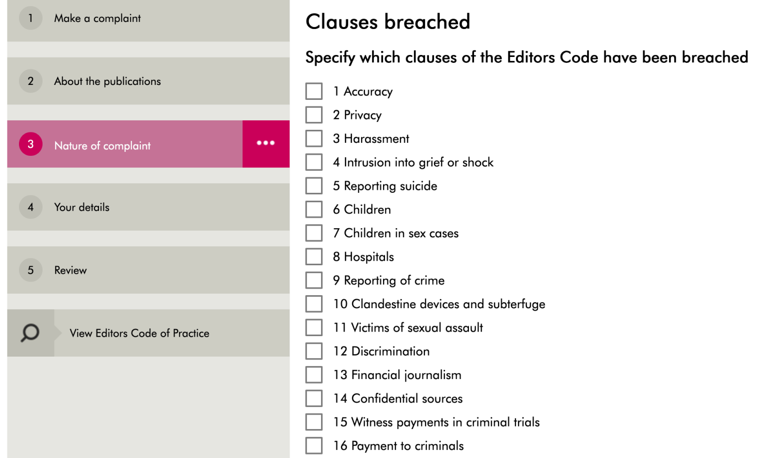
Editors' Code of Practice

Please tick **at least one** of the clauses of the **Editors' Code of Practice** which you believe has been breached. We advise you to read the Code beforehand.

Clauses*

- [ ] 1. Accuracy
- [ ] 2. Opportunity to reply to inaccuracies about you
- [ ] 3. Privacy
- [ ] 4. Harassment
- [ ] 5. Intrusion into grief or shock
- [ ] 6. Children
- [ ] 7. Children in sex cases
- [ ] 8. Hospitals
- [ ] 9. Reporting a crime
- [ ] 10. Clandestine devices and subterfuge
- [ ] 11. Victims of sexual assault
- [ ] 12. Discrimination
- [ ] 13. Financial journalism
- [ ] 14. Confidential sources
- [ ] 15. Witness payments in criminal trials
- [ ] 16. Payment to criminals

Figure 2: Complaints form 1 January 2016 – present



1 Make a complaint
2 About the publications
3 Nature of complaint
4 Your details
5 Review
View Editors Code of Practice

Clauses breached

Specify which clauses of the Editors Code have been breached

- [ ] 1 Accuracy
- [ ] 2 Privacy
- [ ] 3 Harassment
- [ ] 4 Intrusion into grief or shock
- [ ] 5 Reporting suicide
- [ ] 6 Children
- [ ] 7 Children in sex cases
- [ ] 8 Hospitals
- [ ] 9 Reporting of crime
- [ ] 10 Clandestine devices and subterfuge
- [ ] 11 Victims of sexual assault
- [ ] 12 Discrimination
- [ ] 13 Financial journalism
- [ ] 14 Confidential sources
- [ ] 15 Witness payments in criminal trials
- [ ] 16 Payment to criminals

If a complaint under the opportunity to reply clause was resolved by IPSO mediation, the regulator did not determine whether there had been a breach of the ECP. Although only a minority of complaints collected for this study were resolved in this way (14 out of 110, i.e., 12.72%), it was striking that the mediation stage allows for great flexibility with regard to how the newspaper and the complainant choose to settle a dispute. For example, although originally aimed at responding to a story, some complaints were resolved by a 'payment of goodwill' to the complainant.[249] Nevertheless, as pictured in figure 3 below, most of these complaints were resolved by the publication of a correction or reader's letter, whose functional equivalence to a right of reply is examined below. Because IPSO merely publishes a brief summary of the mediated outcome, it cannot be determined whether the regulator takes an active role (if any) in the negotiation between the complainant and the newspaper or if this is left solely to the concerned parties. In the case of the latter, the mediation stage might fail to provide a 'level playing field' and equality of arms. If a complaint is brought by an 'ordinary citizen' without any legal (or journalistic) knowledge, he might be disadvantaged when negotiating with experienced journalists or a newspaper's lawyers.[250]

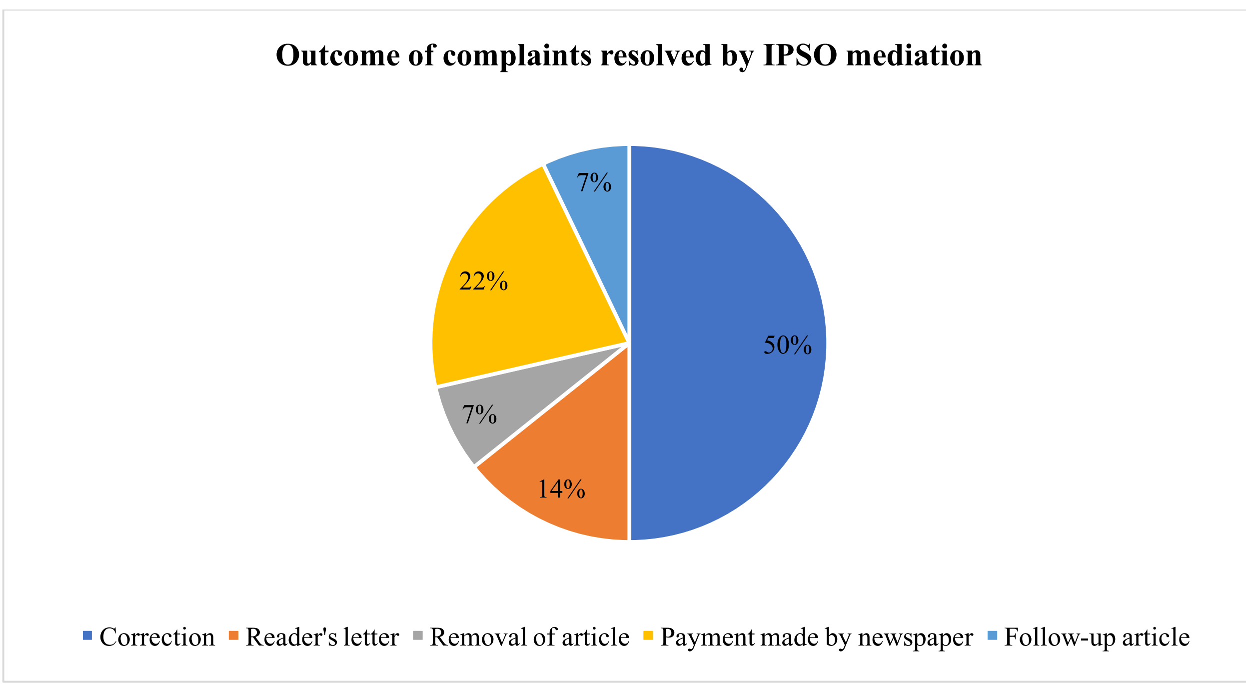


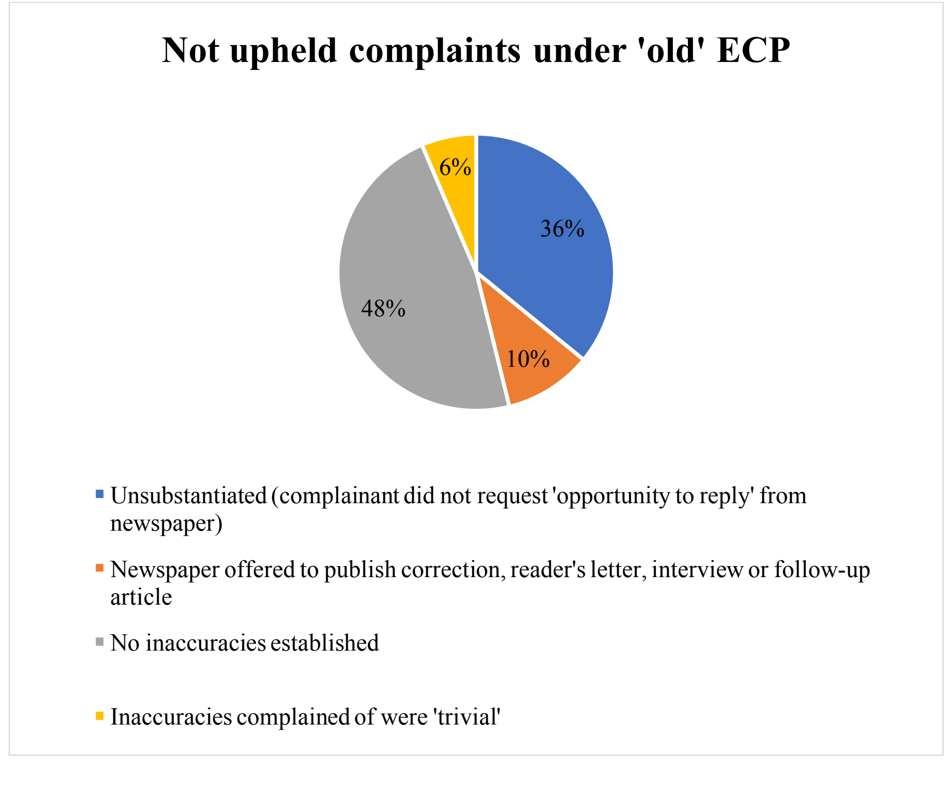
Figure 3: Complaints resolved by mediation

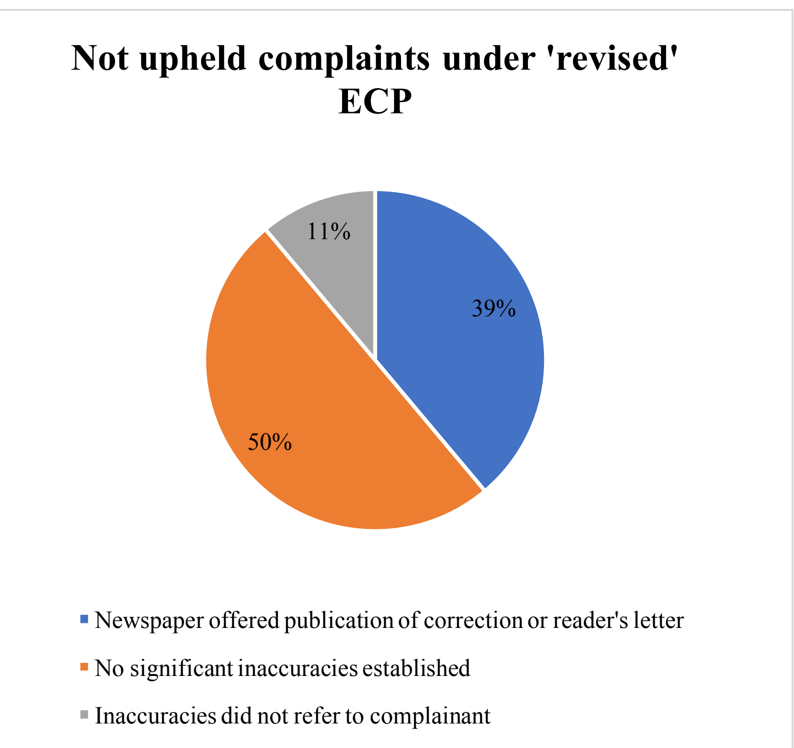
[249] See e.g.: DCC 02679-15 *McIntosh v Scottish Daily Star* (2015).
[250] See: Leveson Report (n 3) 1555 et seq., 1632 et seq.

Nevertheless, it is striking that under both versions of the code, the vast majority of complaints that IPSO adjudicated on were not upheld. Given that 77 out of 78 (98.71%) complaints adjudicated on against the 'old' ECP were not upheld, it seems peculiar that the bar for bringing a complaint under the opportunity to reply clause was raised to require 'significant inaccuracies'. However, the analysis of IPSO's complaints adjudications has revealed that the reasons why many complaints were not upheld were other than the lack of (significant) inaccuracies. This is because IPSO's self-regulatory regime contains several incentives for newspapers to come to an amicable agreement with the complainant at an early stage of the complaints process to avoid a breach of the ECP. As detailed below, in all the complaints where a newspaper offered to publish a reader's letter, correction or follow-up article, the regulator did not uphold the complaint under the opportunity to reply clause. The following diagrams provides an overview of all the complaints that were not upheld by the regulator and they illustrate why IPSO decided to do so.[251]

[251] This excludes complaints resolved by mediation.

Figure 4: Reasons for why complaints were not upheld





3.4.5. ‘Reasonably called for’

This analysis revealed that even if an article contains a ‘significant inaccuracy’, an opportunity to reply is not ‘reasonably called for’ if a publisher has offered the complainant the opportunity to publish a reader’s letter,[252] to be interviewed,[253] to correct any established inaccuracies,[254] or to participate in a follow-up article.[255] The same applies if the complainant’s comments had already been included in the article complained about.[256] Different to Germany, it is therefore a matter for a newspaper’s editorial judgement to decide how the opportunity to reply is put into practice.[257] However, this raises the question of whether these alternative resolutions fulfil the same functions as the right of reply under the ECHR.

3.4.5.1. Is a reader’s letter functionally equivalent to a right of reply?

The aim of the right of reply under the ECHR is that a person who has been made the subject of a story may publish their own view in the same forum with ‘as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact’.[258] Therefore, this thesis has argued that a reader’s letter might not attract the same attention as the story it is replying to if it is ‘hidden’ away amongst other reader’s contributions.[259] Under IPSO’s regime, the complainant has little to no chance of influencing how prominently his reply will be published. Different to a ‘correction’ under clause 1(ii), the ‘due prominence’ requirement does not apply to the ‘opportunity to reply clause.’[260] Instead, the prominence given to an opportunity to reply is determined by the editorial judgement of the newspaper.[261] This makes it unlikely that a reply will be published on a front page, given the fierce resistance of editors to giving up such space voluntarily. Hence, allowing a newspaper to avoid a breach of the opportunity to reply clause by offering the publication of a reader’s letter might lead to an

[252] DCC 00120-14 *Wilson v Press & Journal* (2014); 05173-15 *Swinarska v That’s Life* (2015); 02749-16 *ABB v The Times* (2016).
[253] DCC 03096-14 *Purcell v The Herald* (2015).
[254] DCC 01429-14 *Arunkalaivanan v Birmingham Mail* (2015); 01557-17 *HIAI v The Belfast Telegraph* (2017).
[255] DCC 01983-15 *Foster v Event Magazine* (2015); 00180-15 *Morley v Hull Daily Mail* (2015).
[256] DCC 01300-14 *Luyken v Daily Mirror* (2014).
[257] ECPC (n 171) 28, 29.
[258] See Chapter 2.
[259] See Chapter 3.
[260] ECPC (n 171) 28, 29.
[261] ibid.

imbalance of power between the publisher and the complainant, as the latter has no influence on how the letter is put into practice. Similar thoughts apply to publishing the reply in form of a follow-up article. If the view of the person who is seeking to reply to an allegation is not prominently placed within the follow-up article, the article may feature the publisher's arguments too dominantly. Likewise, conducting an interview as a way of adding one's view to a story post-publication enables the publisher to choose questions that leads the interview in a direction away from what the complainant wanted to articulate.

One example of the newspaper's editorial power in such situations is the complaint of *The Royal Marsden NHS Foundation Trust v The Spectator* (2015).[262] It concerned a first-person piece by a cancer surgeon who had previously worked for the complaining NHS Trust. The article was highly critical of the way in which the Trust had allegedly treated the surgeon as an employee. Because of this, the NHS Trust contacted the newspaper with the aim of adding their side to the story. It had provided a statement outlining its position and requested that it be published in full in the next available print edition of the magazine and alongside the online version. Because the magazine refused to publish the statement and instead offered to publish a letter in their readers' section, the NHS Trust filed a complaint under the opportunity to reply clause. However, because the magazine had offered the publication of a reader's letter, IPSO did not find the publisher to be in breach of this clause.

Crucially, this thesis argues that it is important to take the potential benefits of a reader's letter into consideration. A letter contains the complainant's personal view of the issue that gave rise to the complaint, is written by and published in the name of the complainant and, therefore, adds their viewpoint to the story. Further, the average reader might be more likely to take note of a reply published on an established letters page compared to a reply published somewhere randomly in the newspaper always depending on where the original article was published. If a newspaper has an established section for publishing its readers' letters, this might become the 'go to place' for readers to look if someone has been given a right of reply.[263] If the newspaper then places the letter prominently within this readers' section, the publication of a reader's letter can serve a similar function to that of the right of reply under the ECHR. In an online environment, it is possible to

[262] DCC 05386-15.
[263] As argued in Chapter 3.

simply add the reader's letter alongside the article it is replying to, either in full or in the form of a hyperlink. However, under IPSO's regime this is up to the newspaper, which indeed runs the risk of opaque decisions. Nevertheless, allowing newspapers to decide how a right of reply is put into practice keeps the limitation on their editorial freedom (and thus their freedom of expression) in proportionate bounds.[264]

Ultimately, this thesis argues that IPSO's decision-making practice concerning the opportunity to reply incentivises newspapers to offer alternatives such as the publication of a reader's letter at an early stage of the complaint's process to avoid a breach of the ECP. A resolution at an early stage of the complaints process serves the right of reply's normative aim of enabling a person to swiftly and promptly add his view to the story as well as allowing the public to get to know both sides of a story. The flexible nature of the opportunity to reply somewhat rewards newspapers for allowing a person to reply to a story.

3.4.5.2. Is a 'correction' functionally equivalent to a right of reply?

Similar thoughts apply to the offer to publish a correction. The main aspect of distinguishing a right of reply from a correction is that the former does not obligate the newspaper to admit to the publication of an inaccuracy.[265] Instead, it simply allows the person who has been made the subject of an article in the media to add their own view to the story. Furthermore, a right of reply can be employed not merely to ensure the retraction of incorrect facts but also to offer an opportunity to vindicate reputational rights by adding additional points to a story. As noted above, the Editor's Codebook describes the opportunity to reply as 'a remedy beyond a simple correction', which is suited to making readers 'aware of the [complainant's] position'.[266]

Nevertheless, IPSO has held on several occasions that if a newspaper promptly offers to publish a correction under the terms of Clause 1(ii) of the ECP,[267] a complaint under Clause 1(iii), i.e. the opportunity to reply, will not be upheld due to it not being 'reasonably called for'.[268] This can be beneficial for the complainant since a correction under clause 1(ii) must be published with 'due prominence'. Whilst under IPSO's regime, the regulator has been given the power to determine 'the nature, extent and placement' of

[264] See Chapter 3.
[265] See Chapter 2.
[266] ECPC (n 171) 28, 29.
[267] For what IPSO considers as *prompt* see DCC 05814-15 *Brocklehurst v The Sun* (2015).
[268] See e.g.: *Arunkalaivanan* (n 254); *HIAI* (n 254).

corrections,[269] this does not apply to the opportunity to reply since the way in which it is put into practice and the prominence it is given are matters for editorial judgement.[270] The test of what is 'due' must have regard for multiple factors, including the seriousness of the error, the effect on the complainant, the importance of bringing the error to the readers' attention, and the prominence of the original article.[271] For example, where a newspaper has an established corrections column, the requirement for due prominence may be met by publishing a correction in that column, even when this appears further back in the newspaper.[272] Yet, front page corrections are generally reserved for the most serious cases.[273]

However, this study has revealed that one should distinguish between a 'retracting correction' and a 'clarifying correction'. Whilst the former merely retracts a statement without adding the complainant's view to a story, the latter also contains the complainant's point of view, which was not mentioned in the original article and therefore adds additional information to a story. This thesis argues that only a 'clarifying correction' should be considered to be functionally equivalent to a right of reply. If a newspaper can avoid a breach of clause 1(iii) by simply retracting a statement without also adding the complainant's point of view, it falls short of the right of reply's normative aim of enhancing public discourse by providing the reader with both sides of a story. Additionally, it would allow a newspaper to preclude a complainant's decision over which additional information he feels needs to be added to a story to provide a full picture.[274]

An example of a 'clarifying correction' is the complaint of *Claire Carey v The Daily Telegraph*.[275] It concerned an article published on the *The Daily Telegraph's* website about the complainant after she had contributed a question for Labour leader *Jeremy Corbyn's* first PMQs. She had asked how the proposed changes to tax credit thresholds would help 'hard-working families', and had subsequently been interviewed on BBC's *Newsnight* in relation to her concerns about the government's proposed changes to tax credits. The article was published after the complainant's television appearance and it

[269] IPSO Regulations (n 194) para 30.
[270] ECPC (n 171) 28, 29.
[271] Ian Walden, 'Press regulation in a converging environment' in David Mangan et al. (eds), *The Legal Challenges of Social Media* (EE 2017) 77, 78.
[272] See e.g.: DCC 14012-16 *Dhody's v Express & Star* (2017).
[273] See IPSO's guidance on how to apply the due prominence requirement: <https://www.ipso.co.uk/media/1486/promience_v8.pdf>.
[274] See e.g.: *Arunkalaivanan* (n 254).
[275] DCC 05807-15 (2015).

questioned Carey's willingness to work and support her family as it stated that it was not 'fair for taxpayers to fund the complainant's choice to have five children and work part-time'. In response to this article, Carey filed a complaint with IPSO and alleged a breach under the opportunity to reply clause. However, IPSO did not uphold her complaint under this clause because the newspaper had offered to publish a correction to be published alongside the original online article. Significantly, instead of a mere retraction of inaccuracies, the correction prominently featured the complainant's differing point of view, which should be seen as functionally equivalent to a right of reply. Both the original article and the response are pictured in the figures below.

Figure 5: Original article

The Telegraph

HOME » NEWS » POLITICS » LABOUR

Why should I pay for Jeremy Corbyn's friend Claire to have so many children?

The star of Corbyn's first PMQs is unhappy about tax credit cuts. But it's not the taxpayer's job to backstop unaffordable choices

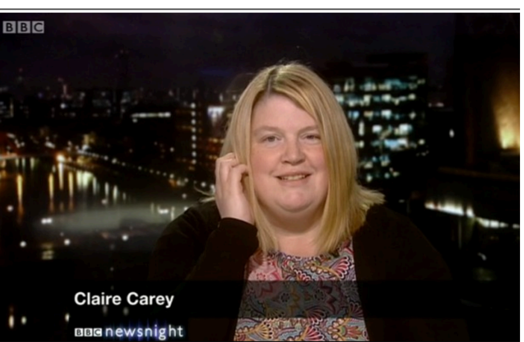


Figure 6: Correction published alongside article

CORRECTION: This article has been changed since it was first published. Claire Carey has been in touch to say: "The question posed at PMQs was 'How is changing the threshold of entitlement to tax credits going to help hard working people or families?' I have not stated - as the article originally suggested - that I think I personally am entitled to work part time nor do I expect other families to pay for me. We also have hard earned taxes to pay. Our income will in fact decrease by £2,500. I calculated this personally rather than using a general average. Contrary to what the article originally suggested, I did not opt to have five children to 'delay the day' when I could work full time. I have worked full time and part time in opposite shifts to my husband so avoiding the need to pay for childcare."

In addition, the article originally stated that the Institute of Fiscal Studies (IFS) had said the maximum loss to any family from the changes would be £1,000. In fact, the IFS took the figure of £1,000 as an average for 3 million families. We are happy to make these matters clear and apologise for the errors.

Thus, IPSO's regime also incentivises newspapers to offer alternatives to an opportunity to reply such as the publication of a correction at an early stage of the complaint's process. This serves the right of reply's normative aim of enabling a person to swiftly and promptly add his view to the story as well as allowing the public to get to know both sides of a story (in the case of a clarifying correction). Nevertheless, the decision about the content of a correction and whether it will be of a 'retracting' or 'clarifying' nature is up to either the discretion of IPSO or the goodwill of the publisher. Therefore, the complainant does not have enough power to influence the process, which runs the risk of downgrading the opportunity to reply to a 'right to request a reply'.

3.4.6. 'Significant inaccuracy'

Even if an opportunity to reply is reasonably called for, a complaint under this clause will only ever be upheld if an article contains 'significant inaccuracies'. This section demonstrates that defining this term requires a two-step process. First, the regulator investigates whether the published information was 'inaccurate' before secondly assessing whether this inaccuracy was 'significant'.

3.4.6.1. When is information inaccurate?

When determining what is inaccurate, IPSO does not operate under formal rules of evidence,[276] and it is not designed to function as a 'fact-finding-tribunal', i.e. it does not make formal findings of fact.[277] Instead, IPSO's Complaints Committee is required to, 'as best as it can identify areas in which there is a factual dispute between the complainant and publication that has a bearing on the judgment it is required to make as to whether the Code has been breached'.[278] In doing so, it 'assesses the evidence that has been provided to it by the parties or otherwise obtained by the Executive through the investigation process'.[279] Thus, there is no burden of proof in a legal sense to prove the truth or falsity of a published statement on either publisher or complainant.

[276] IPSO, 'Complaints Committee Handbook' (2016) 18 <https://www.ipso.co.uk/media/1466/handbook_aug17.pdf> (hereafter: CCH).
[277] See e.g.: DCC 01824-17 *Kwik fit v The Mail on Sunday* (2017).
[278] CCH (n 276) 18.
[279] ibid.

In order to file a complaint under Clause 1, the complainant first has to provide a written outline of his concerns by reference to the ECP.[280] This often contains the reasons why a complainant is alleging that a publisher has published inaccurate information.[281] Next, the publisher *may* counter this allegation by either providing evidence for the truth of the fact,[282] or by showing that there is no reason to doubt the source where the information came from.[283] Therefore, although there is no formal burden of proof, IPSO follows the principle that the publication must show that it has carried out a structured investigation, whilst assessing at each stage whether the information it has obtained justifies the further use of the information.[284] This duty of the press derives from sub-clause 1(i) of the ECP, which highlights that the press 'must take care' not to publish inaccuracies. 'Taking care' in this context urges publishers to include all relevant sides of the story although there is no obligation for them to notify the subjects of stories ahead of publication.[285] Thus, the requirement of accuracy is not absolute.[286] Moreover, it will be satisfied if the press can demonstrate that it did a 'thorough job on a story'.[287] Hence, if the press can show that it included all sides of the story using verified and credible sources, IPSO is less likely to declare a story as inaccurate.[288]

Although there is no obligation to contact the subject of a story prior to publication, it can have an impact on whether IPSO considers published information to be inaccurate.[289] Therefore, there is an incentive for newspaper to obtain comments from the subject of a story pre-publication, as a complaint under Clause 1(iii) is less likely to be upheld if all sides have been included in an article. This is beneficial for the subject of a story, as adding one's comment to the initial report has one major advantage compared to a post-publication right of reply: if a person is approached to provide comments on an allegation, it is almost certain that they will be able to publish their own view to the same and identical audience as the allegations they are replying to. Contrastingly, a post-publication right of reply will only ever have the chance of reaching a *similar* audience (even if it is published with equal prominence) as it is not publicised at the exact same time and in the exact same forum.

[280] IPSO Regulations (n 194) para 10.2.
[281] See e.g.: DCC 12309-15 *Hussain v The Times* (2016).
[282] See e.g.: DCC 00544-15 *Walker v Daily Mirror* (2015).
[283] See e.g.: DCC 05764-15 *A Man v Daily Record* (2016).
[284] CCH (n 276) 19; See e.g.: DCC 06017-15 *Burnham v The Sun* (2015).
[285] ECPC (n 171) 13.
[286] See e.g. DCC 00141-17 *Raftery v The Sentinel* (2017).
[287] ECPC (n 171) 13–15.
[288] ibid.
[289] ibid.

Similar to the right of reply in Germany, a complaint under the opportunity to reply clause may only be lodged with IPSO concerning an inaccuracy on a general point of fact.[290] Consequentially, a complaint under this clause will not be upheld if the alleged inaccuracy concerns an article that is presented as a personal interpretation of facts or if it is clearly presented as an opinion piece.[291]

3.4.6.2. When is an inaccuracy significant?

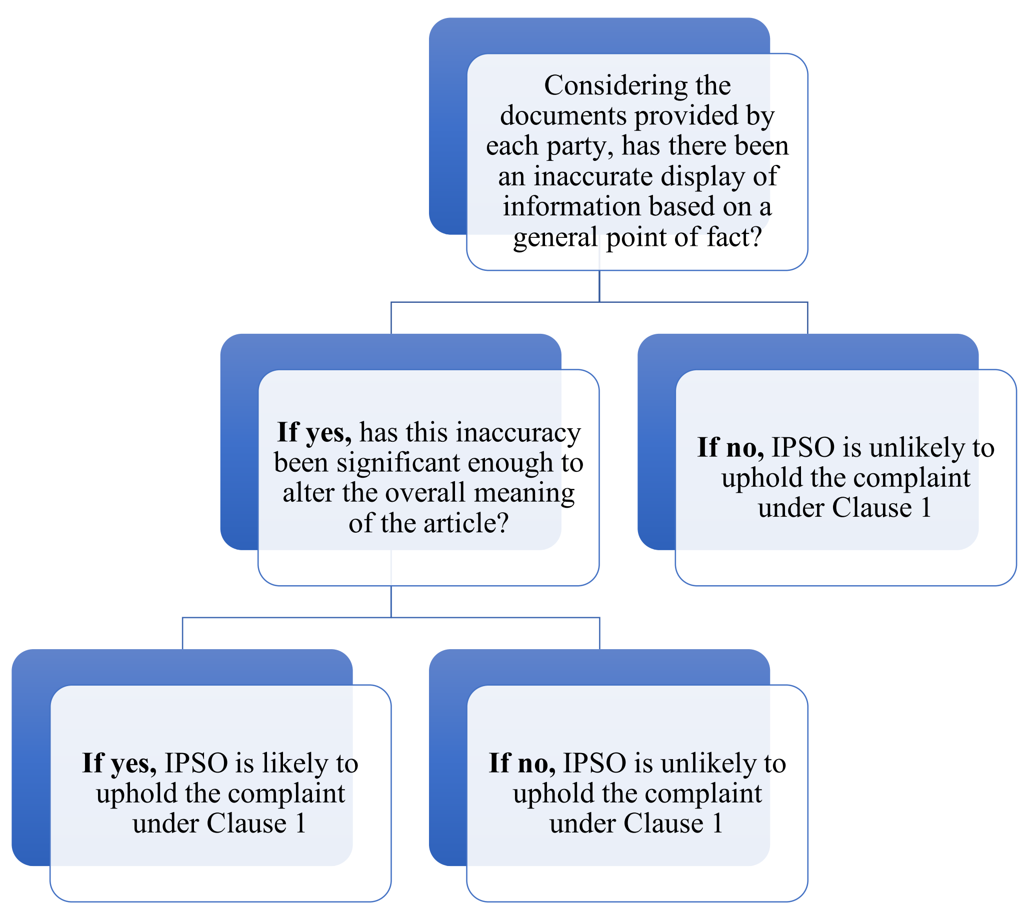
However, even if an article contains an inaccuracy, a complaint lodged under the opportunity to reply clause will not be successful unless this inaccuracy is found to be 'significant'. The Editors' Codebook emphasises that this is a 'question of judgment'; i.e. it must be evaluated on a complaint-by-complaint basis. This study has revealed that IPSO holds the view that an inaccuracy is not significant unless it alters the 'overall meaning of the article'.[292]

An example is the complaint of *Yates v Mail Online*.[293] Here, Robert Yates complained that *Mail Online* had refused him an opportunity to reply in response to the allegation that his mother and step-father had engaged in sexual activity while he was in the room at eight years of age. However, he had in fact been 12 years old at the time of the incident, which was acknowledged by the newspaper during the complaints process. Inter alia, his complaint under the opportunity to reply clause aimed to set the record straight and clarify the timeline by adding his view to the story. Nevertheless, IPSO noted that, 'the discrepancy regarding the complainant's age during the alleged incident was not significant, such that it […] would alter the overall meaning of the article'. Therefore, it did not require an opportunity to reply (or correction) under the terms of the ECP.[294] Similarly, inaccuracies like confusing the complainant's job title;[295] the distinction between having seven jobs in a decade or seven jobs in seventeen years;[296] or mixing up whether the complainant had resigned voluntarily from his workplace or had been released by his employer,[297] have

[290] See Niall Duffy, 'IPSO one year on' (2016) 7(2) JML 120. See Chapters 2 and 3 for further discussion.
[291] See e.g.: DCC 02297-14 *Harley v Wales Online* (2015); 03109-15 *Emmott v The Daily Telegraph* (2015), DCC 01446-16 *Booth v Daily Mail* (2016); See also *Coulter* (n 223) paras 62 et seq.
[292] See e.g.: DCC 02466-14 *Yates v Mail Online* (2015); DCC 03158-14 *Ivleva v Mail Online* (2015); DCC 13872-16 *CGM (Australia) v Mirror.co.uk* (2017).
[293] DCC 02466-14 (2015).
[294] The complaint was partially upheld under Clause 3 (Privacy). However, this is unrelated to the question whether the article contained (significant) inaccuracies.
[295] *Ivleva* (n 292).
[296] DCC 02462-14 *Salter v The Sunday Telegraph* (2014).
[297] *Booth* (n 291).

not been seen as significant enough to require an opportunity to reply. In comparison, the inaccurate claim that a charity was indirectly responsible for death threats against an MP was found to be a 'significant claim given its seriousness'.[298] The following diagram illustrates the process which the complaints committee undergoes when assessing the existence of a significant inaccuracy:

Figure 7: IPSO's assessment under clause 1(iii)



3.4.7. Intermediate conclusion

On balance, the practical application of the opportunity to reply does not necessarily provide for 'equality of arms' and it seems to be more favourable for the newspaper. Furthermore, the results strengthen the argument that the opportunity to reply amounts to a more modest obligation than that recommended by Calcutt in his 1990 report. The requirement of an 'actual (significant) inaccuracy' under Clause 1(iii) of the ECP, rather

[298] DCC 07445-18 *Just Yorkshire v The Times* (2019). The newspaper avoided a breach of the ECP by offering the publication of a reader's letter. See also: Brian Cathcart et al, 'Unmasked: Andrew Norfolk, The Times Newspaper, and Anti-Muslim Reporting – A case to answer', pp 25 et seq. (*MRC*, 2019) <https://www.mediareform.org.uk/wp-content/uploads/2019/06/Norfolk_Report-FINAL.pdf>.

than an alleged inaccuracy, creates uncertainty for both parties. Neither IPSO nor the ECPC have developed clear guidance regarding when an inaccuracy is significant (other than that it must alter the overall meaning of an article). Because of this, where to draw the line between an 'acceptable' and 'unacceptable' alteration remains unclear and it is left to IPSO's discretion. While the 'significant inaccuracy requirement' may be desirable to root out vexatious claims, it slows down the complaints process as its interpretation requires a two-step complaints-by-complaints analysis as soon as the complainant and the newspaper disagree on the facts of a case. This disadvantages the complainant, as a lengthy complaints process risks the challenged statement being long forgotten by the time a reply is published. As noted above, all government-initiated inquiries into the press have highlighted 'immediacy and its ready availability' as the 'critical features of a right of reply'.

Furthermore, the analysis of IPSO's complaints adjudications has revealed that whether or not the subject of a story is able to add his own view to a story post publication is up to either IPSO's discretion or the goodwill of the publisher. Even if a complainant 'reasonably called' for an opportunity to reply in response to 'significant inaccuracies', the way in which a reply is put into practice and the prominence it is given are primarily matters for the newspaper's editorial judgement. In most complaints, the regulator is willing to accept a newspaper's determination of whether a reply is 'reasonably called' for and in which form it should be published. Indeed, in only 5 out of 96 adjudicated complaints the regulator found the publisher in breach of the opportunity to reply clause. Crucially, newspapers might even preclude a complainant's opportunity to reply by simply retracting previous inaccuracies. This chapter argues that this power imbalance undermines a person's chance of deciding which information he feels needs to be added to a story to provide a full picture. Although a 'clarifying correction' in the terms of clause 1(ii) of the ECP is functionally equivalent to the right of reply under the ECHR, it is predominantly the publisher's decision (and in the last instance IPSO's) whether or not to offer such an alternative.

However, the current self-regulatory system provides several incentives for newspapers to come to an amicable agreement with the complainant at an early stage of the complaints process. There are also incentives for newspapers to obtain comments from the subject of a story pre-publication and to include his perspective in the article, which serves the function of displaying both sides of a story. In fact, the decline of complaints adjudications

under the revised version of the opportunity to reply clause may be due to newspapers voluntarily providing a right of reply. This is further investigated in Chapter 5.

4. Defamation Law

Although there is a consensus in the literature that English law does not have a statutory right of reply in the press,[299] some elements of the remedy are seen to exist in Defamation Law.[300] However, scholars have highlighted that the use of those options is 'haphazard', and 'their availability as a matter of law is limited'.[301] Therefore, they note that claimants often become 'embroiled in expensive and lengthy litigation' instead of obtaining a desired 'swift correction or a right of reply'.[302] Generally, the Defamation Act 2013 has been criticised for missing an opportunity to develop a bigger role for 'mandated discursive remedies' such as a right of reply.[303] Notably, Mullis and Scott took a stance similar to the ECtHR as they argued that such remedies could serve 'to vindicate reputation, to promote freedom of expression, and to secure the provision to the general public of the fullest possible information […]'.[304] Against this background, this section investigates which rules in English Defamation Law may serve a similar function to the right of reply as set out by the ECHR. First, it examines the 'offer to make amends' procedure; second, the qualified privilege under the Defamation Act 1996; third, the 'public interest defence' under the Defamation Act 2013; fourth, the summary disposal of defamation claims; and fifth, the court's power to order the defendant to publish a summary of a judgment under section 12 of the Defamation Act 2013.

4.1. 'Offer to make amends'

The 'offer to make amends' process aims to enable defendants who accept that they have made a mistake to avoid prolonged and expensive litigation and make 'reasonable amends'.[305] Under sections 2–4 of the Defamation Act 1996, the offer itself, besides being

[299] See Chapter 1.
[300] See e.g.: Alastair Mullis and Andrew Scott, 'Reframing libel: taking (all) rights seriously and where it leads' (2012) 63(1) NILQ 5, 19; Andrew Scott, '"Ceci n'est pas une pipe": The Autopoietic Inanity of the Single Meaning Rule' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2013) 52; Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) MLR 87, 107–108.
[301] ibid.
[302] Mullis and Scott 2014 (n 300) 108.
[303] See e.g.: ibid, 107–108; Jacob Rowbottom, *Media Law* (Hart 2018) 106–107.
[304] Mullis and Scott 2014 (n 300) 107–108.
[305] Richard Parkes, Alastair Mullis et al. (eds), *Gatley on Libel and Slander* (S&M 2017) para 29.28.

in writing, must satisfy three prerequisites. First, it must contain a correction to, and apology for, the original statement. Second, it must state a willingness to publish that correction and apology in a manner that is 'reasonable and practicable' in the circumstances. Third it must be clear that the publisher consents to pay the aggrieved party such a sum as may be agreed between them or determined judicially.[306] If the offer is accepted in principle, then the precise terms of the apology and the amounts of costs and damages are negotiated.[307] If agreed, the claimant may not bring or continue proceedings in respect of the publication concerned, but is only entitled to enforce the offer. [308] If rejected, the offer is a defence in defamation proceedings.[309] However, this defence is subject to the qualifications set out in section 4(3) of the 1996 Act.[310]

As noted above, the publication of a correction can be functionally equivalent to a right of reply as set out under the ECHR. Particularly if it goes beyond a mere retraction of inaccuracies and also contains the complainant's point of view, which was not mentioned in the publication complained of.[311] If the claimant is able to at least somewhat influence the content of the correction or apology during the negotiations, it is likely that he will be able to add his view to a story. However, the 'offer to make amends' process ultimately falls short of affording individuals a general right to have a response published on their own terms as the initiative to make this offer rests with the publisher.[312] Furthermore, where the parties cannot agree the wording or publication of the apology or correction, the power lies entirely with the defendant and neither the person aggrieved nor the court can dictate what the defendant does in these respects.[313] Thus, ultimately the risk assessment of the publisher determines if and how a person may have the chance to add his view to a story under this process.

[306] Defamation Act 1996, s 2(3), (4).
[307] Christian Witting, *Street on Torts* (OUP 2015) 558.
[308] Parkes, Mullis et al. (n 305) para 29.31. The rules governing the enforcement of offers of amends are set out in CPR PD 53, para 3.
[309] Parkes, Mullis et al. (n 305) 29.39.
[310] See Barendt et. al. 2014 (n 54) 438.
[311] See section 3.4.5.
[312] See Maryan McMahon, 'Defamation Claims in Europe: A Survey of the Legal Army' [2002] Communications Lawyer 24, 26.
[313] See Parkes, Mullis et al. (n 305) para 19.4.

4.2. Qualified privilege under Defamation Act 1996

If a defendant can show that a statement was made on a privileged occasion, he has a defence to defamation. Privilege may be absolute or qualified. Absolute privilege provides a 'complete defence' where it is immaterial whether the defendant was malicious. Contrastingly, proof of malice will defeat qualified privilege.[314] The Defamation Act 1996 confers qualified privilege on the publication of 'fair and accurate' reports of certain public meetings and proceedings.[315] For example, this includes proceedings at any public meeting or sitting in the UK of a local authority;[316] at a press conference held anywhere in the world for the discussion of a matter of public interest,[317] or at a general meeting of a listed company.[318] However, there is no defence of privilege under this section 'if the plaintiff shows that the defendant was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and refused or neglected to do so'.[319] Under section 15(2), '"in a suitable manner" means the 'same as the publication complained of or in a manner that is adequate and reasonable in the circumstances'. When the libel has appeared in a newspaper, the defendant should insert such a letter or statement in the same part of the newspaper.[320] Otherwise, the defendant, fails to afford the subject of the story a reasonable opportunity to contradict the defamatory allegation.[321]

Therefore, this legislation incentivises, for example, newspapers to publish a reply whose characteristics are similar to those outlined under the ECHR, as the reply would have to be published in the same manner as it was disseminated and this allows the affected person to set out his differing view of the story in his own words. However, as it is a defence mechanism for the defendant, the qualified privilege under the 1996 Act does not amount to a general *right* for the individual to have a response published in their own terms.[322] If

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[314] Barendt et al. 2014 (n 54) 418.
[315] Defamation Act 1996, s 15 read in conjunction with Schedule II Part 1 as amended by Defamation Act 2013, s 7.
[316] Defamation Act 1996, Sch I Pt 2 para 11.
[317] ibid, para 11A.
[318] ibid, para 13.
[319] Defamation Act 1996, s 15(2). This distinguishes it from other 'reporting privileges' at common law and statute, see Jason Bosland, 'Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales' (2011) 31(1) OJLS 89.
[320] Parkes, Mullis et al. (n 305) para 16.8.
[321] This defence of privilege is further subject to the statement being 'in the public interest' and for 'public benefit', see Defamation Act 1996, s 15(3).
[322] One should also note the 'reply to attack' qualified privilege at common law. This entails the principle that under certain circumstances a 'person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be

a newspaper refuses the publication of such a reply, the consequence is not that the court becomes empowered to order the publication of the reply. Instead, the newspaper merely loses its qualified privilege. Thus, what the law gives the claimant instead of an enforceable right of reply is a measure of compensation for the frustration of his moral right to have his view of a story published. He is given an opportunity to sue where otherwise he would be unable to do so: the privilege standing in his way is demolished by the publisher's refusal to publish a 'reasonable reply'.[323] Therefore, it is again up to the publisher's 'risk assessment' to determine whether a person may have the chance to add his view to a story under this process. Also, because the scope of the defence is limited to the neutral reporting (republication) of *defamatory* allegations made by others in the context of certain public meetings that are in the public interest' and for 'public benefit', its practical relevance is limited.

4.3. 'Public interest defence'

Another potential legislative incentive for publishers is the newly established 'public interest defence' in section 4 of the Defamation Act 2013, which abolished the 'common law defence known as the Reynolds defence'.[324] This is noteworthy, because when it emanated from the judgment of the House of Lords in *Reynolds v Times Newspapers* in 2002, [325] the 'Reynolds defence' established a variant of qualified privilege at common law. The House of Lords formulated an extended qualified privilege defence, so that the defendant is not liable if he has published false defamatory allegations on a matter of public interest, provided that in publishing them the requirements of 'responsible journalism' have been satisfied.[326] The decision in *Reynolds* set a non-exhaustive list of ten factors to identify when a journalist has acted 'responsibly'.[327] One of these was to provide an 'opportunity to comment' to the subject of a story by contacting him prior to the publication,

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privileged, provided they are published bona fide and are fairly relevant to the accusations made', see Parkes, Mullis et al. (n 305) paras 14.51 et seq. However, making use of this type of qualified privilege does not enable a person who has been made the subject of a story in a newspaper to publish their own view in the *same forum*. Instead, it merely ensures that those who wish to publicise a statement *in response* to a defamatory statement *themselves* have a defence to defamation. Crucially, this thesis has repeatedly argued that reaching a similar audience to that of the original statement is most likely to be achieved by publishing a counter statement in the same forum as the original statement, i.e., through the media outlet that published the allegations in the first place. For further detail see Chapter 2.

[323] Andrew Martin, 'The Right of Reply in England' in Martin Löffler et al. (eds), *The Right of Reply in Europe* (C.H. Beck 1974) 37.

[324] Defamation Act 2013, s 4(6).

[325] [2001] 2 AC 127, 178.

[326] Eric Barendt, 'Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and reportage' (2012) 63(1) NILQ 59.

[327] See Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the

in order to ask for his side of the story, and, if provided, implement the 'gist' of his view.[328] As argued above, being able to comment on an allegation before publication can provide for a strong right of reply. Although there were exceptions to this requirement,[329] this defence served as an incentive for media outlets to provide a 'pre-publication' right of reply to help establish defences for potential defamation lawsuits.[330]

However, under the 2013 Act there is no separate requirement for responsible journalism. Therefore, the question arises of whether this incentive is also present under the new 'public interest defence'. Under section 4(1), the defendant must show that: (i) the statement complained of was a statement on a matter of public interest; and (ii) he reasonably believed that publishing the statement complained of was in the public interest ('the reasonable belief test'). In deciding this, under section 4(2), the court 'must have regard to all the circumstances of the case'. Furthermore, the 2013 Act directs the court to 'make such allowance for editorial judgement as it considers appropriate' when evaluating the defendant's beliefs.[331]

In the literature, commentators have argued that the 'reasonable belief test' brings in the factors relevant under *Reynolds*.[332] Indeed, the notes accompanying the 2013 Act anticipated that the line of case law would constitute a 'helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied' and would be taken into consideration 'where appropriate'.[333] Moreover, the notes state that section 4 'is […] based […] on and […] is indented essentially to codify the common law defence' in *Reynolds.*[334] The recent case of *Economou v de Freitas* has affirmed that the court will continue to have regard for the Reynolds factors when assessing whether the defendant's belief was reasonable.[335] Therefore, it seems likely that the *Reynolds* factors are still relevant under the new 'public interest defence'. As noted above, the weight given to these and any other relevant factors varies from case to case.[336] Also, the standard of conduct

Production of Knowledge Online' [2014] PL 489, 490.

[328] See Parkes, Mullis et al. (n 305) para 15.1.

[329] Barendt 2012 (n 326) 69 et seq.

[330] See James Price et al., *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) 62.

[331] Defamation Act, s 4(4).

[332] See e.g.: Parkes, Mullis et al. (n 305) para 15.5 et seq.

[333] See Defamation Act 2013 Explanatory Notes, s 4.

[334] ibid.

[335] [2018] EWCA Civ 2591 para 102; Jacob Rowbottom, 'Citizen journalists, standards of care, and the public interest defence in defamation', p 1 (INFORRM, 2018) <https://inforrm.org/2018/12/18/citizen-journalists-standards-of-care-and-the-public-interest-defence-in-defamation-jacob-rowbottom/>.

[336] Price et al. (n 330) 75.

required of a newspaper must have regard for ‘practical realities’.[337] Thus, although not amounting to a *duty* for media outlets to seek comment prior to publication on every occasion, there remains an incentive to do so to establish a defence for potential defamation lawsuits.

4.4. Summary disposal of claim

Sections 8–10 of the Defamation Act 1996 set out the procedure for the summary disposal of defamation claims.[338] Under these rules, a court is empowered at any stage of the proceedings to consider the strength of the claim and the defences raised, and to dispose of the claim summarily in favour of either party.[339] If the court grant’s a claimant’s application for summary relief, the claimant may, *inter alia*, obtain such of the following as may be appropriate: (i) a declaration that the statement of which he complains was false and defamatory; and (ii) an order that the defendant publish or cause to be published a suitable correction and apology. The content of any correction and apology as well as the time, manner, form and place of its publication are for the parties to agree upon.[340] Only if the parties cannot agree on the wording may the court direct the defendant to publish or cause to be published a summary of the court’s judgment agreed by the parties or settled by the court, in accordance with the rules of the court.[341] Furthermore, if the parties cannot agree on the time, manner, form or place of publication, the court may give such directions on these matters as it considers reasonable and practicable in the circumstances.[342] If the publication of a correction, ‘declaration of falsity’ or a summary of the court’s judgment would be achieved during summary proceedings, this would further serve the right of reply’s aim of adding a person’s view to a story ‘swiftly’ and ‘promptly’.

However, a court will only ever give judgment for the plaintiff and grant him summary relief if it ‘appears to the court that there is no defence to the claim which has a realistic prospect of success’.[343] Crucially, it has been stressed in both case law and the literature that the test of ‘realistic prospect of success’ under section 8 of the Defamation Act 1996 is the same as that under Part 24 of the CPR,[344] which has already been analysed in section

[337] See *Economou* (n 335) paras 84, 93.
[338] The rules of court provided for by section 10 are included in CPR, Part 53.
[339] See Mullis and Scott, Reframing Libel (n 300) 19.
[340] Defamation Act 1996, s 9(2).
[341] ibid.
[342] ibid.
[343] And that there is no other reason why the claim should be tried, see Defamation Act 1996, s 8(3).
[344] For an overview see Parkes, Mullis et al. (n 305) para 30.22.

2.2.4. As detailed there, it cannot be guaranteed that the claimant's application will satisfy the test set out under section 8. If unsuccessful, an application for summary judgment could ultimately result in the delay of a trial and it is likely to lead to an adverse cost order against the claimant.[345]

For claimants, there is also the danger that the defendant might stall the publication of any correction or apology by simply refusing to agree on the time, manner, form or place of publication even if summary relief is granted by the court. This would require further intervention by the court and thus delay the publication of the claimant's viewpoint. Ultimately, this might jeopardise the right of reply's envisaged immediacy and promptness.[346] In practice, the procedure under sections 8–10 of the Defamation Act 1996 has not been used as much as was envisaged by the lawmaker.[347] This is because claimants may choose whether they want to apply for summary judgments under the procedure set out in the Defamation Act 1996 *or* Part 24 of the CPR. However, it is the latter route that has been employed most frequently over the last decade or so.[348] This is primarily because under section 8 the court can only adjudicate on the whole of the claim or defence. Contrastingly, under Part 24 of the CPR, the application for summary judgment can be confined to a particular issue, such as the extent of publication, responsibility for publication, qualified privilege, honest comment or malice.[349] Therefore, a successful application may not be decisive of the action but it will often emasculate the claim or defence and lead to a favourable settlement.[350]

4.5. Section 12 of the Defamation Act 2013

In cases where the court gives judgment for the claimant in an action for defamation, the judge may order the defendant to publish a summary of the judgment under section 12 of the Defamation Act 2013.[351] The wording of any summary as well as the time, manner, form and place of its publication are to be for the parties to agree.[352] However, if the

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[345] ibid.
[346] See Chapter 2.
[347] See Michael Jones et al. (eds), *Clerk & Lindsell on Torts* (S&M 2018) para 22-251.
[348] See Parkes, Mullis et al. (n 305) para 30.17.
[349] ibid, para 30.32
[350] ibid. Libel claims which are settled out of court often include an agreement that an appropriate correction or apology will be published, and sometimes that an apologetic statement in open court will be made. See Scott 2013 (n 300) 52 et seq.
[351] Defamation Act 2013, s 12(1).
[352] ibid, s 12(2).

parties cannot agree on the wording, the wording is to be settled by the court.[353] Furthermore, if the parties cannot agree on the time, manner, form or place of publication, the court may give directions on these matters that it considers reasonable and practicable in the circumstances.[354]

For example, in the case of *Rahman v ANL & ANR*,[355] the successful libel claimant asked the court to compel the defendant broadcaster to publish a summary of the judgment. Granting the application, the court stressed that a summary of the judgment had to be published by the defendant to ensure that the viewers of the original libellous material were informed of the claimant's vindication.[356] The judge emphasised that it was not clear for viewers of the original allegations that the claimant had been vindicated at trial and he had no reason to believe that they had become aware of the outcome of this trial. Thus, the judge concluded that vindication would only come by making viewers of the original programme aware of the outcome. Therefore, the defendant broadcaster was ordered to provide a statement throughout the course of one day in the timeslots during which the original programme had been broadcast.[357]

This thesis argues that this procedure should not be considered functionally equivalent to the right of reply as set out under the ECHR. This is primarily because to obtain the publication of a summary of a judgment, the claimant must, necessarily, first obtain a successful judgment. However, if a claim for defamation goes to full trial, this may include an investigation into the truth or falsity of the claims involved, for example if the defendant invokes the defence of 'Truth' as set out in section 2 of the Defamation Act 2013. However, the ECtHR repeatedly highlighted that swift proceedings are crucial for the effectiveness of a right of reply. Therefore, the veracity of the statements contained in the reply or the statements that gave rise to it should not be checked in 'any great detail' and not be 'carried out in strict compliance with the adversarial principle'.[358] Also, as noted above, the 'high cost and real complexity of civil law and procedure' is likely to make this remedy unavailable for 'ordinary citizens'.[359] It is yet to be determined what impact section 12 will have on the 'law in practice' considering that the vast majority of

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[353] ibid, s 12(3).
[354] ibid, s 12(4).
[355] [2016] EWHC 3570 (QB).
[356] ibid, para 20.
[357] ibid, para 24.
[358] See Chapter 2.
[359] However, IPSO's arbitration scheme may help to reduce costs significantly in such cases, see Appendix B.

defamatory claims are unlikely to ever get to the stage where the court gives judgment.[360]

4.6. Intermediate conclusion

In conclusion, English Defamation Law falls short of affording individuals a general right to have a response published in their own terms. Even though a declaration of falsity or correction may be published under certain circumstances, the wording and time, manner, form and place of its publication are either subject to agreement with the defendant or left to the court's discretion. Nevertheless, scholars are right to claim that some elements of the right of reply are seen to exist in Defamation Law. Under the current legislation, the view of the right of reply seems to be essentially *defensive*: it is one of the few ways that the media can demonstrate good faith and responsible reporting. This is nowadays counselled as a way to help establish defences to defamation. Most importantly, section 15 of the Defamation Act 1996 and section 4 of the Defamation Act 2013 incentivise media outlets to allow the subject of a story to add his view to a story post-publication (section 15) or prior to publication of an allegation (section 4).

5. Conclusion

This chapter aimed to identify the relevant rules and practices in England & Wales that fulfil a similar purpose to that of the right of reply under the ECHR, as established in Chapter 2, followed by an assessment of their practical application. It did so by conducting a doctrinal analysis of the relevant (self-)regulatory mechanisms, legislation, and accompanying literature. Moreover, it undertook a systematic analysis of IPSO's complaints resolution. Therefore, this chapter highlighted the characteristics, benefits and potential pitfalls of the right of reply in England & Wales. In combination with Chapter 3, which explored the German legal system, this part of the thesis paves the way for the comparison in Chapter 6.

In conclusion, the English legal system seems to fall short of affording individuals a general right to have a response published on their own terms in the press. Under the ECP,[361] the opportunity to reply does not necessarily provide for 'equality of arms' and seems to be more favourable for the newspaper. The way in which a reply is put into practice and

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[360] Farrer & Co, 'A quick guide to the Defamation Act 2013' (2014) 25(2) ELR 62.
[361] See intermediate conclusions in sections 2.4 and 3.4.7.

the prominence it is given are primarily matters for the newspaper's editorial judgment, even if a complainant 'reasonably called' for an opportunity to reply in response to 'significant inaccuracies'. Furthermore, although a 'clarifying correction' in the terms of clause 1(ii) of the ECP is functionally equivalent to the right of reply under the ECHR, it is predominantly up to the publisher's goodwill (and in the last instance IPSO's) to offer such an alternative to the complainant. Thus, this results in a 'right to request a reply' instead of a right of reply.

However, it was demonstrated that the current self-regulatory system incentivises newspapers to resolve a complainant at an early stage of the complaints process. There are also incentives for newspapers to obtain comments from the subject of a story pre-publication and to include his perspective in the article not only in the ECP but also in Defamation Law.[362] Yet, the practical impact of those incentives and to what extent newspapers are voluntarily providing a right of reply without IPSO becoming involved are yet to be determined. Against this background, Chapter 5 further investigates the practical application of those rules and practices. Subsequently, Chapter 6 compares the existing rules and practices to those contained within the German legal system.

[362] See intermediate conclusion in section 4.6.

Chapter 5: Replying to the press in Germany and England & Wales: A qualitative insight

1. Introduction

This chapter reports on the fieldwork undertaken in England and Germany, which investigated the right of reply's impact on the work of the press. After the analysis undertaken in Chapters 3 and 4, its primary aim is to fill in the identified gaps in knowledge and focus on the law in practice. In order to achieve this, this novel research provides an original thematic analysis of 25 semi-structured elite interviews conducted with judges, journalists, editors, solicitors, barristers and in-house lawyers working for newspapers focusing on their views and experiences with the right of reply in the press. Subsequently, it discusses the findings in light of the research conducted in the previous chapters. In doing so, this part of the thesis also sets the scene for the comparative analysis in Chapter 6.

The background to this study is the research carried out in Chapters 3 and 4. After conducting an in-depth study in both legal systems, some issues relating to the practical application of the right of reply (or a functional equivalent to it) have remained unsolved. Particularly, the right of reply's actual impact on the daily work of newspapers remains unclear. This is primarily because there is no comprehensive insight into how often people contact publications and demand their own view to be published in response to a story in a newspaper. Furthermore, it is yet to be determined how frequently newspapers publish a reply *without* the regulator (England & Wales) or courts (Germany) becoming involved. But most significantly, it therefore remains unclear whether the right of reply's supposed 'chilling effect' is a mere academic argument or whether those working in the media perceive it.

For England & Wales, after conducting a systematic analysis of IPSO's complaints resolution, Chapter 4 argued that under the self-regulatory Editors' Code of Practice (ECP), the 'opportunity to reply' does not provide for 'equality of arms' and seems to be more favourable for the newspaper. However, the chapter also stressed that the systematic analysis of IPSO's complaints resolution is not suited to providing a comprehensive insight into how often people contact publications and demand their

own view to be published in response to a story in a newspaper outside the complaints reported by the regulatory body. The same applies to the issue of how frequently newspapers are (voluntarily) publishing a reply because a complaint has been resolved between the newspaper and the complainant without IPSO becoming involved. Against this background, this chapter provides an insight into the internal procedures for dealing with complaints under the ECP. It is then possible to examine how the press deals with requests for a right of reply without involving the regulator and whether the number of these requests is so high that it could potentially lead to a 'chilling effect.' Additionally, Chapter 4 noted that the current self-regulatory system provides several incentives for newspapers to come to an amicable agreement with the complainant at an early stage of the complaints process. Under Defamation Law, newspapers are also incentivised to obtain comments from the subject of a story pre-publication and to include his perspective in the article, which serves the function of displaying both sides of a story. However, the practical impact of those incentives is yet to be determined. By speaking to those who deal with such issues regularly, this chapter fills this gap in knowledge.

For Germany, Chapter 3 noted that the statutory right of reply might amount to a 'chilling effect' on press freedom if a newspaper refrains from publishing certain stories due to a fear of litigation. However, as there is no comprehensive insight provided from either case law or the literature, it is yet to be determined how frequently newspapers are requested to print a right of reply and how often such disputes require the courts to become involved. By drawing on the experience of judges and other experts in this field, this chapter fills this gap in knowledge. It is then possible to examine how the press deals with requests for a right of reply when the court does not become involved and whether those working for the newspaper view the right of reply in its *status quo* as having a 'chilling effect' on press freedom. In addition, Chapter 3 highlighted that since there is no federal appellate court with the power to set a precedent in contentious cases concerning the right of reply's judicial enforcement, this might lead to the 24 Higher Regional Courts employing diverging approaches. However, there is no (empirical) insight into the extent to which this is happening in practice. In this chapter, material from practice is presented about these issues.

After exploring the benefits of conducting semi-structured interviews (section 2.1), this chapter gives an overview of the participants in this study and the interviews'

content and style (section 2.2). Subsequently, it outlines the technique used to analyse the data (section 3). Next, sections 4–7 engage with the thematic analysis and discussion of the data findings. Lastly, section 8 comes to a conclusion.

2. Method of data collection

2.1. Semi-structured interviews

The data for this chapter have been gathered by conducting semi-structured interviews. In this approach, the researcher prepares an interview guide, but does not rigidly adhere to it, either in terms of the precise wording of the questions, or the order in which the questions are asked in the actual interview.[1] The strength of this approach lies in its capacity to reflect the complexity of legal processes and the complexity of the relationship between process and outcome.[2] Appendix D further outlines the benefits of semi-structured interviews.

2.2. Sample and content of interviews

2.2.1. Overview of participants

Whilst the majority of the participants preferred to remain anonymous, some of the respondents explicitly requested to be fully named, including their exact job title and all the citations attributed to them. In order to protect the personal data of those who wished to remain anonymous, only Professor Christian Schertz, Jonathan Heawood, Greg Callus and Lutz Tillmanns have been identified as named interviewees in this chapter. All the other interviewees are referred to by an anonymised letter and number, along with their professional role.

[1] Virginia Braun et al., *Successful Qualitative Research* (SAGE 2013) 78. See also section 2.2.3.
[2] John Baldwin et al., 'Empirical Research in Law' in Mark Cushnet et al. (eds), *The Oxford Handbook of Legal Studies* (OUP 2005) 891.

Table 1: Overview of participants

Anonymised code	Role description	Country	Name	Interview type and date
E001	Editor of an online magazine	Germany	Anonymised	In person, March 2018
RE002	Reader's editor of a regional newspaper	Germany	Anonymised	Skype interview, April 2018
RE003	Reader's editor of a regional newspaper	Germany	Anonymised	Telephone interview, April 2018
RE004	Reader's editor of a national newspaper	Germany	Anonymised	In person, June 2018
L005	Professor in Media Law and a partner at a law firm focused on enforcing the right of reply against the press	Germany	Professor Christian Schertz	In person, May 2018
L006	Professor in Media Law and a partner at a law firm focused on defending the press	Germany	Anonymised	In person, May 2018
L007	Partner in a law firm with an expertise in Media Law doing both claimant and defendant work	Germany	Anonymised	Telephone interview, May 2018
R008	Chief Executive Officer of the German Press Council (*Presserat*)	Germany	Lutz Tillmanns	In person, May 2018
IL009	Head of Media Law at a national newspaper publisher	Germany	Anonymised	In person, June 2018
IL010	Head of Legal at a national daily newspaper	Germany	Anonymised	In person, June 2018
IL011	In-house lawyer at a national news magazine	Germany	Anonymised	In person, July 2018
IL012	In-house lawyer at a national news magazine	Germany	Anonymised	In person, July 2018
J013	Judge in the Press Law Division (*Pressekammer*) of a Higher Regional Court (*Oberlandesgericht*)	Germany	Anonymised	Telephone interview, July 2018
J014	Presiding judge in the Press Law Division of a Higher Regional Court	Germany	Anonymised	In writing via email, July 2018
J015	Presiding judge in the Press Law Division of a Regional Court (*Landgericht*)	Germany	Anonymised	Telephone interview, July 2018
JL016	Academic and journalist with an expertise in Media Law	England	Anonymised	Telephone interview, March 2018
R017	Chief Executive Officer of IMPRESS	England	Jonathan Heawood	Telephone interview, March 2018
R018	Senior member of a national press regulator	England	Anonymised	In person, April 2018
RE019	Journalist and a former reader's editor of a national newspaper	England	Anonymised	Telephone interview, April 2018
E020	Editorial director at a publisher of regional newspapers	England	Anonymised	Telephone interview, June 2018
E021	Editorial director of a publisher of national and regional newspapers	England	Anonymised	In person, June 2018
IL022	Head of Legal for a publisher of national and regional newspapers	England	Anonymised	In person, June 2018
R023	Barrister and Editorial Complaints Commissioner at the Financial Times	England	Greg Callus	Email and telephone interview, August 2018
S024	Partner in a solicitor's firm with an expertise in media law advising both regional and national newspapers	England	Anonymised	Telephone interview, July 2018
IL025	Senior Editorial Legal Counsel at a national tabloid newspaper	England	Anonymised	Telephone interview, October 2018

2.2.2. Selection of participants

As this chapter adopts a qualitative approach, it tends to focus on a smaller number of observations or data sources, whether people or events, that are considered to be 'data rich' and thus worthy of study and to examine them in-depth.[3] This selection is based on the argument that the qualitative researcher is (usually) not concerned with whether the chosen participants are statistically representative because his or her aim is not to obtain findings that are generalisable to an entire population.[4] The word *qualitative* implies an emphasis on the qualities of entities and on processes and meanings that are not experimentally examined or measured in terms of quantity, amount, intensity or frequency.[5]

In total, 25 interviewees participated in this empirical project. This included judges, editors, journalists from both national and regional newspapers, in-house lawyers, members of press regulators and practising lawyers. This broad range of participants avoids bias, which is crucial for any form of qualitative legal research.[6] The interviews were conducted between March and October 2018. Depending on the participant's choice and availability, most interviews were carried out in-person at the interviewee's workplace. This included several flights to, and overnight stays in, Germany. Another eleven interviews were held via telephone or using Skype. The interviews lasted approximately 45 to one hour and were audio-recorded. These recordings were transcribed and, if they were originally held in German, translated by the researcher. Additionally, two participants were interviewed in writing via email. Section 3 further outlines the transcription and coding process.

As this chapter's research questions are primarily focused on how the right of reply works in practice, the sample is limited to 'key informants' who have access to this type of information. The key informants were particularly knowledgeable about the enquiry setting and articulate about their knowledge; they were people whose expertise was particularly useful in helping the researcher to understand what was

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[3] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Herbert Krittler et al. (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 934–935.
[4] ibid.
[5] Norman Denzin et al., 'The Discipline and Practice of Qualitative Research' in Norman Denzin et al. (eds), *Collecting and Interpreting Qualitative Materials* (SAGE 2013) 17.
[6] Ian Dobinson et al., 'Legal Research as Qualitative Research' in Mike McConville et al. (eds), *Research Methods for Law* (EUP 2017) 42.

happening and why.[7] This type of participant is often critical to the success of a qualitative study, as 'such persons not only provide with insights into a matter but also can suggest sources of corroboratory or contrary evidence' for the research questions.[8] Therefore, all the participants had been concerned with the issues outlined above for the majority of their professional career and they are leading experts in the field. [9] Appendix E contains further detail on the selection criteria for the participants.

2.2.3. The interviews' content and style

As noted above, semi-structured interviews are usually based on an interview guide that directs the conversation towards providing information necessary for answering the research questions whilst also giving the interviewee flexibility to express what he or she thinks is important to explain patterns of behaviour.[10] Primarily, the interview guide contained a series of open-ended question about the participant's views, opinions and experiences regarding the right of reply. It aimed to answer the research questions set out in the introductory section and to find out how the individuals perceive their own roles and resources as well as how they interpret formal and informal rules.

Therefore, the researcher developed an interview guide by considering which information might be useful in answering the research questions. The theoretically based questions to be asked of the participants were important also because of the comparative nature of the project and they formed the basis for the coding of the interview data.[11] The nature of the questions varied according to the participant's particular role or background.[12] Due to the broad range of respondents, the basic interview schedule was adapted according to the role of the interviewee and modified as the interviews progressed to focus on issues raised by the respondents. However, each interviewee was posed a similar set of core questions, which are illustrated in Appendix F. Further explanation about the questions posed is provided in sections 4–7.

[7] Michael Patton, *Qualitative Research and Evaluation Methods* (SAGE 2002) 321.
[8] Robert Yin, *Case study research: design and methods* (SAGE 2014) 90.
[9] As recommended by Patton (n 7) 321, 322.
[10] Alan Bryman, *Social Research Methods* (OUP 2016) 470.
[11] See section 3.
[12] See example interview guides in Appendix N.

2.3. Ethical considerations

Any research project using human participants requires the consideration of any potential ethical issues. The ethical considerations which arose during this research and the procedures employed to solve them (including a sample of the information sheet and consent form) are explained in Appendices G and I–M.

3. Analytic technique

This study adopts the qualitative approach of thematic analysis. Thematic analysis is a method for identifying, analysing and reporting patterns (themes) within qualitative data; it minimally organises and describes a data set in rich detail.[13] A theme can be defined as capturing 'something important about the data in relation to the research question and represents some level of patterned response or meaning within the data set'.[14] Most importantly, it must be relevant to the investigation's research questions or research focus, build on the codes identified in the transcripts and provide the researcher with the basis for a theoretical understanding of his data.[15] Significantly, a rigorous thematic approach can produce an insightful analysis that answers the research questions set out at the beginning.[16] Identifying themes requires an intimate knowledge of the data, which can be achieved by collecting the data oneself, transcribing the data oneself and reading the data a number of times before eventually 'coding' the transcripts.[17] The searching, coding and labelling of themes was done by hand and solely by the researcher.

Coding is best thought of as a process for aiding the researcher's familiarisation and understanding of their data.[18] Hence, it allows the researcher to explore and condense the data into manageable categories that allow the data to be understood in ways other than what has just been said or observed.[19] On the basis of this coding,

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[13] Virginia Braun et.al., 'Using thematic research in psychology' [2006] QRIP 77, 79.
[14] ibid, 82.
[15] Bryman (n 10) 584.
[16] Braun et al. 2006 (n 13) 97.
[17] Dennis Howitt, *Introduction to Qualitative Research Methods in Psychology* (Pearson 2016) 162.
[18] Alexander Seal, 'Thematic Analysis' in Nigel Gilbert et al. (eds), *Researching Social Life* (SAGE 2016) 445.
[19] ibid.

the researcher can then identify themes that integrate substantial sets of these codings.[20] Codes and themes can be either data derived using a 'bottom up' inductive approach, closely linked to the semantic content of the data, or they may be research driven using a deductive 'top down' approach, in which implicit meanings are identified.[21] In this research project, the researcher conducted a structured thematic analysis and used a mixture of theory-driven and inductive ways of thematic analysis and coding,[22] with the coding operating on two levels. This approach allowed the findings presented in earlier chapters, as well as the research questions mentioned in the introductory sections, to be integral to the process of deductive thematic analysis, while also allowing for themes and subthemes to be drawn directly from the data using inductive coding.[23] Appendix H outlines further detail on this approach and the coding development. Further explanation about the form and definition of each theme is provided in sections 4–7, which analyse and discuss the four main distinct themes that were derived from the interview transcripts after the coding procedure: (i) understanding of the term 'right of reply'; (ii) attitudes towards a right of reply; (iii) request handling by the newspapers; (iv) legal uncertainty in Germany.

4. Theme 1: Understanding of the term 'right of reply'

4.1. Relevance of theme for research questions

As detailed in Chapter 1, there is no universal definition of the term 'right of reply'. Therefore, to avoid confusion about what respondents are referring to as a 'right of reply', it was necessary to allow them to share their interpretation of the term without pushing them towards any preoccupied positions. As detailed in Chapter 1, the comparison between the legal systems aims to go beyond rules in England & Wales that use the exact same terminology as the German statutory right of reply and vice versa. Hence, also considering the different status of (statutory) press regulation in both countries, it would have been methodologically wrong to assume that each participant interpreted this term in the exact same way. Instead, the participants were asked about their understanding of the term 'right of reply'. Additionally, they

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[20] Duncan Cramer et al., *Introduction to Research Methods in Psychology* (Pearson 2014) 372.
[21] Braun et al. 2006 (n 13) 83.
[22] Richard Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (SAGE 1998) ch 2.
[23] Jennifer Fereday et al., 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5(1) IJQM 1, 4.

were posed open-ended questions, focusing on whether they thought that there were rules and practices within their legal system that enabled a person who had been made the subject of a story in a newspaper to publish their own view in the same forum, either pre- or post-publication.

The purpose behind this approach is twofold: First, it allows the respondents to set the scene of the interview and focus on those rules that he or she understands to be most significant for the understanding of the right of reply in his or her jurisdiction. As the primary purpose of this chapter is to understand how a right of reply (or a functional equivalent to it) affects those who are dealing with it on almost a daily basis, it was crucial for the interviewees to tell the researcher what they connected with a right of reply rather than the other way around. Second, starting the interview with a question related to the understanding of the *terminus technicus* produced responses that are crucial for finding out if and how participants in each country differ in their understanding of a right of reply depending on their occupation. Revealing potential alterations in responses can then assist to understand and explore the reasons for certain differences and similarities.

4.2. Findings in England

The findings of this theme reveal noteworthy differences between both countries in how the respondents interpret and understand the term 'right of reply'. Also, they strenghten some of the arguments that were made after the analysis of the English legal system in Chapter 4.

In England, the majority of the participants highlighted that they understood a right of reply to be when a newspaper might allow the subject of a story to contribute to the original publication *either* pre- or post-publication. However, the participants differed in how they set out the primary function of a right of reply. This depended on whether the answer was given by a journalist or someone who had been legally educated. Although all of the journalists were aware of the ECP, most of them had not come across the post-publication 'opportunity to reply' in Clause 1(iii). Instead, most journalists or editors who participated in this study felt that a right of reply's main function was to give the person featured in the story an opportunity to contribute *before* rather than post-publication; i.e. they assigned less meaning to the

post-publication aspect of a right of reply. For example, Participant *E020*, an editorial director at a publisher of regional newspapers, described his understanding of the term right of reply as follows:

> 'Any kind of organisation or individual that's has been criticised or reported on should be given a right of reply in the initial article. […] So, for me a right to reply is for people to be able to put their perspective on an issue in the first instance'.[24]

Additionally, there was a consensus in the responses of all the English participants that, from their perspective, newspapers feel in most cases *legally obligated* to contact the subject of a story prior to publication in order to include their reply in the original article. According to the interviewees, the reason for this can be found in Defamation Law, which is the confirmation of a point argued earlier on in this thesis. As detailed in Chapter 4, contacting the subject of a story prior to publication is one of the few ways in which the media can demonstrate good faith and responsible reporting in the UK. Hence, it is nowadays counselled as a way to help the newspaper establish defences to defamation such as under section 4 of Defamation Act 2013. However, it should be noted that although there are incentives to do so, technically, there is no duty for journalists to contact a person prior to the publication of allegations, neither under the ECP, nor under Defamation Law.[25]

Participant *R023*, Barrister and Editorial Complaints Commissioner at the Financial Times, also sees the primary function of a right of reply as consulting the 'affected' person pre-publication. Contrasting to most of the journalists, however, he also relates to it as a post-publication mechanism. Most importantly, his response explains why the interviewed practitioners assigned less meaning to the post-publication aspect of a right of reply:

> 'I think of it in two different ways. First, the 'right to reply' which is gathered from a person about to be the subject of a story in the pre-publication phase. […] The purpose of the pre-publication right to reply isn't just so as to give the reader both sides of the story: [it] is particularly about procedural fairness to the subject. […] Second, there is the post-publication 'right to reply', which is after the newspaper has published something […], the subject is so exercised that they demand the newspaper run a rebuttal they have written. […] This is a matter of substantive fairness: has the subject been 'unfairly' covered, or would it be 'unfair' not to allow them the chance to respond to the allegations in their own words, in

[24] Interview participant E020 (England, 1 June 2018).

[25] See Chapter 4, for further discussion see: Louisa Taylor, 'Balancing the right to a private life and freedom of expression: is pre-publication notification the way forward?' (2018) 9(1) JML 72; see also Culture, Media and Sport Committee, *Press Standards, Privacy and Libel* (HC 2009-10, 362-II) 28 et seq.; The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 2012–13, 780) 1888.

> the same newspaper? Newspapers […] don't owe overarching substantive duties of 'fairness' […], but some people think there is an ethical obligation to be as fair as possible and that a 'right to reply' is a mechanism for that.'[26]

Against this background, there are two follow-up questions that require further analysis: First, if journalists feel legally obligated to contact the subject of a story pre-publication, does this imply that they will do so in any case or are there exceptions to this supposed rule? Second, what action is taken by journalists and what advice is given by their lawyers if a newspaper fails to contact a person about to be the subject of a story in the pre-publication phase? Those issues are explored in section 6.

Crucially, most respondents felt that granting someone the opportunity to publish a reply post-publication should be considered as a generous gesture by the newspaper rather than something editors feel obliged to do, *despite* it being regulated in Clause 1(iii) of the ECP. Those interviewees who were aware of the 'opportunity to reply' in Clause 1(iii) stressed that they did not feel that it would be possible to enforce this against the will of the newspaper. For example, participant *IL025*, Senior Editorial Legal Counsel at a national tabloid newspaper, simply disregarded this rule in the ECP. He then set out why he believes that a pre-publication consultation primarily fulfils the function of a right of reply in England:

> 'English law is tended to concentrate more on providing a pre-publication response and sort of building that into the defence by saying to a party, "well if you contact the subject of the story beforehand and you don't bother to find out what their response is and you don't print it fairly for the benefit of readers, then you will find that you don't have a defence under section 4". […] The opportunity to reply that we have in the Editors' Code, which was largely done away with in recent years, that is not really a right of reply. It is not really pursued. […] IPSO and before that the PCC had sort of denuded the opportunity to reply of any real value by saying that it was not an absolute right […] and that is why is has shrunk in its present format. So, in the present code, a fair opportunity to reply should be given when reasonably called for, well, that's not a right of reply […].'[27]

A similar view was shared amongst the participants from regional newspapers. Interviewee *E021*, editorial director of a publisher of national and regional newspapers, described his understanding of a post-publication right of reply as follows:

> 'What we're saying is if they have asked for a reply then we are taking the decision that we want to offer them one. So, therefore it's our decision, it's not their decision.'[28]

These findings underpin the criticism of the suitability of the 'opportunity to reply'

[26] Interview participant R023 (England, 27 August 2018).
[27] Interview participant IL025 (England, 8 October 2018).
[28] Interview participant E021 (England, 5 June 2018).

as a post-publication right of reply, which was raised from a complainant's point of view in Chapter 4. After analysing both IPSO's rules and regulations and their complaints handling of this clause, it was argued that even if a complainant 'reasonably called' for an opportunity to reply in response to 'significant inaccuracies', the way in which a reply is put into practice and the prominence it is given is are primarily matters for the newspaper's editorial judgment. In most complaints, the regulator is willing to accept a newspaper's determination of whether a reply is 'reasonably called' for and in which form it should be published. This chapter argues that the received responses support the conclusion that the complainant indeed does not have enough power to influence the process, resulting in a 'right to request a reply' instead of a right of reply.

Nevertheless, the interviewees also spoke in much detail about how they were handling requests for a reply post-publication and under what circumstances they were happy to grant such a remedy to a complainant even though they felt that it was at their discretion. This is explored in section 6.

4.3. Findings in Germany

One of the first main differences between the legal systems to derive from these interviewees was that in contrast to their English colleagues, the German respondents unanimously argued that they understood the term 'right of reply' to mean a person's right to add his view to a story *post*-publication. In fact, all of the participants exclusively referred to the statutory provision when asked about whether they thought that there were remedies within their legal system that enabled an individual or organisation that had been made subject of a story in a newspaper to publish their own view in the same forum, either pre- or post-publication. For example, *RE002*, a reader's editor of a regional newspaper, described her view as follows:

> 'When it comes to what the term right of reply means to me, I am strictly sticking to the legal obligation of providing a right of reply post-publication as detailed in the Press Acts of the Federal State.'[29]

Participant *E001*, an editor on an online magazine explained that, from his point of view there is no room for interpretation, as he felt that those involved in newspapers perceived the right of reply as 'a very very narrowly regulated term from the press

[29] Interview participant RE002 (Germany, 20 April 2018).

law'.[30] Thus, their understanding of the term has been shaped by the definition employed by the Press Acts of the *Länder*.

5. Theme 2: Attitudes towards a right of reply

5.1. Relevance of theme for research questions

This chapter aims to examine whether the right of reply's supposed 'chilling effect' on a newspaper's freedom of expression is a mere academic argument or if those working in the media perceive it. However, there is no universally recognised definition of this term.[31] Thus, rather than asking whether they felt that the right of reply has a 'chilling effect', the participants were asked to share their views on whether they thought that journalists were less likely to publish or pursue certain stories if they had been threatened with the publication of a right of reply, or already had had to publish a counter statement in response to a story. Significantly, there seemed to be differing views on this issue from the participants from Germany and those from England, depending on how one defines the term 'right of reply'.

In the interviews, this topic was approached from two different perspectives: first, the interviewer explored whether the participants felt that the existing rules and remedies that fulfilled the function of a right a reply in their jurisdiction (explored in theme 1) had a restricting impact on the work of newspapers; and second, they were asked about the reasons for this conception. Thus, in each interview, the participants shared their views about the power of the person seeking to reply to an article and the newspaper. Particularly, this theme revealed how they perceived the bar for enforcing a right of reply *against* the will of a newspaper. Also, it uncovered disparities between the 'law in the books' and the 'law in practice' and revealed whether there were any differences in the perceptions of a (statutory) right of reply's impact on press freedom between journalists, editors and (practising) lawyers.

[30] Interview participant E001 (Germany, 16 March 2018).
[31] See Chapter 2.

5.2. Findings in Germany

In Germany, the responses focused on three main aspects. First, the majority of the respondents agreed they did not think that the statutory post-publication right of reply had a 'chilling effect' on press freedom, primarily because the bar for enforcing the remedy against the will of a newspaper is higher than it seems from the 'law in the books' (section 5.2.1). Second, the participants from the regional and national newspapers shared different experiences about how frequently they had to deal with a person requesting the publication of a right of reply and represented by a legal expert (section 5.2.2). Third, some of those interviewees who worked either as or with journalists said that although they did not feel that the right of reply in its *status quo* amounted to an unjustified limitation of press freedom, they often had to deal with situations where claimants who were represented by a legal expert were abusing the remedy (section 5.2.3). Crucially, those participants stressed that this runs the risk of causing a 'chilling effect' on press freedom if the number of cases of abuse increases and if this is not properly addressed by the lawmaker.

5.2.1. General views on *status quo*

As detailed in Chapter 3, the statutory right of reply affords anyone 'affected' by an 'assertion of fact' a general right to have a response published on their own terms. As the reply must be publicised in the 'same forum' and with 'equal prominence', the legislation may require a newspaper to publish a right of reply on their front page. Significantly, there is no need for the 'affected' person to provide evidence for the veracity of the original statement or the reply itself. Also, one does not have to establish that the statement, that one is seeking to reply to was harmful, injurious or inaccurate. Instead, as soon as a person's request to publish a right of reply adheres to the requirements as set out in the Press Acts of the Federal States, a newspaper is obligated to publish the counter statement as soon as possible.[32] Because of this, the academic literature refers to the conditions set out in the statutes as mere *'formal requirements'*. Against this background, it was argued that the bar for forcing a newspaper to print a right of reply seems rather low, which might be abused in practice and hence puts the press in danger of being 'flooded' with re-

[32] For the exceptions to this rule see Chapter 3.

quests to print replies. If so, this would lead to a serious restriction of editorial independence. In order to evaluate the extent to which this is happening in practice, the interviewees were asked several open-ended questions to explore their attitudes and experiences.

Most importantly, it was striking that all of the participants argued that although it seems rather straightforward in theory, enforcing a right of reply against the will of a newspaper requires extremely specialised legal expertise and is nearly impossible to achieve without it. For example, participant *L006*, a Professor in Media Law and a practising lawyer with a focus on defendant work, highlighted that this is why he does *not* feel that the current legislation amounts to an unjustified limitation of a newspaper's freedom of expression. He said:

> 'A layman is not able to enforce a right of reply, that always goes wrong. [...] Even lawyers, unless they specialise in this area, are usually unable to formulate a right of reply. This is insane, although one does not have to provide any substantive evidence, the formal requirements set a high bar.'[33]

Crucially, if a right of reply cannot be enforced against the will of a newspaper without first consulting a lawyer who is specialised in the field, it is far less accessible to an 'ordinary citizen' than its normative purpose – to establish 'equality of arms' for those who are in a 'weaker' position than the media – would suggest.[34] Also, this may lower the risk of the remedy being abused to 'flood' the press with requests to print replies. Furthermore, the fact that this response was given by someone who is exclusively doing defendant work for the press makes this statement more credible than if it had been given by someone who solely did claimant work, as the former is likely to have better insight into the views and opinions of newspapers on this issue. Yet, both sides shared similar arguments on the right of reply's impact. Particularly, other respondents reiterated that even legally trained specialists in that area can struggle to enforce a right of reply through the courts on the first attempt. For example, respondent *L005*, a Professor in Media Law and a partner at a law firm focused on enforcing the right of reply against the press, said:

> 'It sounds very straightforward in theory but is very complicated in practice. […] The right of reply in Germany is, unfortunately, not straightforward, one has to have a lot of experience in formulating a right of reply […]. Honestly, there are maybe two handfuls of lawyers in Germany who are able to formulate right of replies, simply because it is very very complicated to do. One must master all of these formal requirements, which are necessary to enforce a right of reply, and one must be highly specialised, which is a little bit absurd,

[33] Interview participant L006 (Germany, 22 May 2018).
[34] See Chapter 2.

although it is a civil right, [...] enforcing it has, due to the formal requirements, become very complicated.[35]

Of course, one may argue that this participant is unlikely to provide an objective account as he is exclusively focused on claimant work. However, similar views were also shared by the participants working as journalists and editors. For example, *RE003*, reader's editor of a regional newspaper spoke about his year-long experience in dealing with right of reply requests and he highlighted that only a few claimants succeeded in enforcing a right of reply against the will of the newspaper, even after consulting a legal expert:

> 'There are two handfuls of media lawyers who actually know how to deal with it. […] I have had a lot of lawyers who tried to enforce a right of reply for their clients but completely failed to adhere to the formal requirements.[36]

Since the majority of the German participants shared a similar view, this chapter argues that the formal requirements of the statutory right of reply act as a safeguard for newspapers. In other words, newspapers are more powerful in relation to the right of reply than the 'law in the books' would suggest. Participant *L006* specified which of the right of reply's formal requirements prevented ordinary citizens from exercising this remedy:

> The bar is not low. This is despite that one only has to show that one is 'affected' by a statement and one does not need to provide evidence for the veracity of one's reply. These are two facilitations, that is correct. However, the other requirements are strict and are applied rigorously and are not trivial. Particularly, the fact that a right of reply may only be invoked in response to factual assertions and not opinions rules out a lot of requests. Then you have the hurdle that the length of the reply must not exceed that of the original statement complained of, so if a reply is too long it gets returned to the sender. Also, there are the deadlines, there are a lot of requirements that need to be fulfilled before one actually has to publish a reply in the newspaper. This is what makes it so difficult in Germany. [...].[37]

This stance was also confirmed by the judges who took part in this study. For example, respondent *J015,* presiding judge in the Press Law Division of a Regional Court, shared a similar view as he compared the right of reply's *status quo* with the aim of the historical lawmaker:[38]

> 'The historical aim to establish a right of reply as an easily enforceable right of the citizen against the in quite powerful press, that certainly is not how it works today. The benefit for the claimant not to be required to provide any evidence for the veracity of his reply is severely limited by the high formal hurdles of the statutes.'[39]

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[35] Interview participant L005 (Germany, 23 May 2018).
[36] Interview participant RE003 (Germany, 19 April 2018).
[37] Interview L006 (n 33).
[38] Chapter 3 contains detailed historical insight.
[39] Interview participant J015 (Germany, 30 July 2018).

The participants shared additional examples from their experience in practice, which further strengthened this conclusion. Particularly, they highlighted that although most people have heard of a right of reply, they usually do not know that this is a formal and statutory remedy with very specific requirements. This often leads to frivolous attempts to enforce the publication of a reply by lay people, which can be easily turned down by newspapers with no consequences. For example, *IL009*, Head of Media Law at a national newspaper publisher, spoke about the lack of knowledge when confronted with requests by readers who had not consulted legal experts before contacting the newspaper:

> 'I do not recall – and I have been doing this for 20, 18 years – a single occasion were an ordinary layperson successfully enforced the publication of a reply against the will of a newspaper. […] Without legal advice, without support from a legal expert, nobody can do it. [...] A layperson fails 100 percent of the time because of the formal requirements, he cannot do it himself. Another 50, 60 percent of the lawyers also fail, there is only one handful of law firms in Germany [...] who know what they are doing. [...] These major formal hurdles are a protection against the escalating use of a right of reply.'[40]

Ultimately, these insights demonstrate that despite a person not having to establish that the statement they are seeking a reply to was harmful, injurious or inaccurate, the bar for enforcing a right of reply in Germany is not as low as it seems. A person affected by a press report only has a chance of getting their view published against the will of the newspaper if they take up professional legal advice. In addition to this finding, it was noteworthy that all the participants opposed the idea of replacing the statutory right of reply with a self-regulatory regime, primarily due to the supposed danger of a fragmentation of rules.

5.2.2. Perceived impact on daily work of journalists

The findings so far have indicated that only those who have the financial means to take up the advice of one of the few specialised lawyers are likely to successfully invoke a statutory right of reply. Because of this, none of the participants objected to that not only individuals but also public authorities may invoke the statutory right of reply. This contrasts with this thesis' view that including public authorities within the right of reply's personal scope should not be seen as desirable.[41] However, participants approached this issue from a practical point of view as they noted that public authorities do not often make use of their statutory right of reply as they

[40] Interview participant IL009 (Germany, 20 June 2018).
[41] See Chapters 2 and 3.

are facing budget restraints and therefore do not want to face the financial risk that judicial enforcement of the remedy would entail. For example, participant *J013,* judge in the Press Law Division of a Higher Regional Court, noted:

> As a rule, a public authority will never make use of it [the statutory right of reply]. […] They often simply do not have the budgetary resources to judicially enforce such a remedy, which is why I believe most of the time they come to their senses and simply accept a report in the press.[42]

This finding somewhat contradicts an argument made in Chapter 2, where it was noted that public bodies should not be able to invoke a statutory right of reply as they are be more likely to judicially enforce the remedy, given that they do not have to fear litigation costs in the same way as an 'ordinary' individual. However, if they are indeed facing budget restraints as it was reported by the participants, this makes it unlikely that they have the funds to employ the right of reply strategically as a deterrent against newspapers that fear the potentially high litigation costs.

Despite these findings so far, however, it may still be the case that journalists refrain from publishing controversial stories as soon as they have either been threatened with the possibly of having to publish the reply of a person who is represented by a legal expert or have already had to publish a counter statement in response to a story. Thus, this section provides insight into how *frequently* people request the publication of a right of reply by using a lawyer and how the potential risk of having to pay litigation costs affects those who work in the press. Most importantly, it was striking to see that there seem to be noteworthy differences between the national and the regional press in relation to this question.

All of the participants working as either editors or journalists in the *regional* press emphasised that they very rarely had to deal with the request to print a right of reply from someone who had taken up professional legal advice. For example, *RE003* said:

> 'I do not feel that we have to deal with a lot of legally represented readers that seek to reply to an article. It is in fact much more the opposite; it happens very rarely.'[43]

Instead, the interviewees from the regional press reported that those who have been made subject of a story are more likely to contact them informally in order to come

[42] Interview participant J013 (Germany, 16 July 2018).
[43] Interview RE003 (n 36).

to an amicable agreement. The reasons for that and how regional newspapers handle these informal complaints are further explored in section 6.

In contrast, respondents from the *national* press reported that they regularly had to deal with requests from legally represented individuals or organisations who sought to invoke their statutory right of reply. However, the participants noted that they did not feel overburdened or 'flooded' by the numbers of requests. For example, when presented with the arguments from the literature that a statutory post-publication right of reply may amount to an overburdening of the press, interviewee *IL009* referred to his work for a tabloid newspaper and noted that the formal requirements for enforcing a right reply are a reason why the number of requests is manageable. He said:

> 'These very very significant and major formal requirements are a protection against the excessive use of the right of reply. In practice, I do not feel that we are flooded with replies. Instead, even a newspaper like us, we approximately have to publish less than ten replies a year prominently on our front page'.[44]

When presented with this insight from practice, judges shared a similar view and drew from their experiences in court. For example, participant *J013* agreed with the conclusions of the previous extract and noted that:

> 'I have not noticed a flooding of the press with replies. We have had a manageable number of cases involving a right of reply in the last three years. I think it has been like this for the last ten years.'[45]

Considering these extracts, one may argue that if the press does not feel overburdened with the number of requests, it is doubtful that journalists will be less likely to publish or pursue certain stories if they have been threatened with the publication of a right of reply or have already had to publish a counter statement in response to a story. Crucially, this would contradict one of the main arguments from the academic literature against a legally enforceable right of reply.[46] Indeed, both lawyers and journalists working for national newspapers stressed that rather than 'silencing journalists', requesting the publication of a right of reply may even cause the opposite. If (financially) backed by their publisher, requesting the publication of a right of reply might even incite journalists to investigate a story further. The interviewees argued that this is primarily because even if the subject of the story is successful

[44] Interview IL009 (n 40).
[45] Interview J013 (n 42).
[46] See Chapter 2.

with their request, a newspaper is unlikely to suffer any financial disadvantages other than the court fees, unless the reply is published on the front page.[47] For example, *IL009* provided insight into his daily work with journalists working for a publisher of several national newspapers and he disagreed with the supposed 'silencing effect' of the right of reply.

> 'This argument only applies if the consequences are damaging for the newspaper. So, if a journalist already had to admit to his editor three times that his reporting caused damages payments of 20,000 EUR each, he probably does not want to do it a fourth time, which is why he might be a bit more cautious in his reporting. […] However, my impression is that this does not apply to a right of reply. Actually, my experience with journalist is that they are more likely to say: "He might have a right of reply […] but we will stick with our results and we will continue working on this story. […] He won't get us to shut up." It is therefore often the case that it motivates the journalists to investigate even further […]. If we have to print a reply where a journalist says, "how cheeky is that, that's an obvious lie, unfortunately I have to publish the reply but it's an obvious lie", then this might even incite new reporting on this topic.'[48]

Significantly, one may argue that these experiences contradict the assumption in the literature that a statutory right of reply creates an unbearable cost burden for press publishers.[49] However, it is important to bear in mind that the relevant court fees and litigation costs in Germany are significantly lower than in the UK.[50] Therefore, the same argument could not be applied if one wanted to argue in favour of implementing a potential statutory right of reply enforced through court in the UK.[51] In fact, it would even be wrong to assume that no publisher in Germany has to worry about potential litigation costs, as both the national and regional press have been experiencing threats to their sustainability. Similar to their colleagues in the UK, newspapers in Germany are suffering from a decline in circulation numbers and advertising revenues,[52] which ultimately leads to less money being available for lawyers and court fees. Therefore, it was not surprising to see that this concern was also raised by the participants from the national press, who were fully aware that not all publishing houses are able to employ an in-house legal team, primarily because of financial reasons. Respondent *IL012*, an in-house lawyer at a national news magazine, compared the situation of his employer with smaller publishers and argued:

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[47] See section 6.
[48] Interview IL009 (n 40).
[49] See Chapter 2.
[50] See e.g.: Hermann Dahlitz, *Kostentragungspflicht im deutschen und englischen Zivilprozess-recht* (Peter Lang 2018).
[51] See discussion in Chapter 4.
[52] See Sally Broughton Micova, Felix Hempel and Sabine Jacques, 'Protecting Europe's content production from US giants' (2019) 10(2) JML 219, 226.

> ‘The potential dangers of the right of reply do not manifest in our work. Our publishing house has the passion, and currently still the money, […] to say: “We are convinced of the way we’ve worked”. [...] This is different in other publishing houses and most importantly: they often do not have the money to defend themselves. [...] The chilling effect would therefore primarily impact smaller publishers [...] who neither have enough money nor the necessary legal knowledge. If the supposed luminary of German press law sends a letter threatening to sue a publisher, this will not scare us. However, other publishers would be scared [...].’[53]

This extract supports the argument that although currently the national press does not feel threatened by requests from legally represented persons who seek to publish a reply post-publication, this might change in the future if the financial downward spiral for press publishers continues. Of course, one may question this assumption as not even participants working for regional newspapers, who are supposedly under more financial pressure, did not mention this during their interviews. However, it is only logical that they do not feel threatened under the current framework as the interviews showed that they only very rarely encountered such requests in the first place. They might evaluate the situation differently if they had to deal with legal experts on a more regular basis, which ultimately depends on who they cover in their stories and whether a subject of a story is known to be litigious. If the significant declines in revenues and circulation for press publishers are going to continue, there is indeed a danger that not only regional but also national publications might be less likely to fight the publication of a right of reply in court or simply no longer investigate controversial subjects due to the financial risk of having to go to court. Thus, this chapter argues that this (financial) aspect of the *status quo* runs the risk of having a ‘chilling effect’ on a newspaper’s freedom of expression.

In addition to the different frequencies of legally represented individuals requesting the publication of a right of reply, the interviews revealed that there is also a difference in the way that national and regional newspapers handle requests. This is further explored in section 6.

5.2.3. Identified issues that might lead to a chilling effect in the future

So far, the findings have indicated that the statutory right of reply cannot be enforced without consulting a lawyer who is specialised in the field. Also, participants working as either journalists or editors or as their in-house lawyers emphasised that as a rule, they did *not* feel that the right of reply in its *status quo* amounted to an

[53] Interview participant IL012 (Germany, 20 July 2018).

unjustified limitation of their editorial independence. Nevertheless, some interviewees, especially those working either as or with journalists, stressed that they often had to deal with situations where claimants were abusing the remedy.

Speaking from experience, those interviewees claimed that although the bar is sufficiently high for 'ordinary citizens', there are some legal experts who try to abuse the fact that claimants do not have to establish the falsity of a published allegation or the truth of the statement in reply. Thus, if a person who acts in 'bad faith' has the financial means to take up the advice of one of the few specialised lawyers, there is not much a newspaper can do to prevent the publication of a right of reply even if said reply contains inaccuracies. As detailed in Chapter 3, in such cases a newspaper may only rightfully refuse the publication of a reply if its content is 'obviously untrue'. However, the decision over whether something is 'obviously untrue' is ultimately up to the discretion of the courts, who have set high hurdles for newspapers to overcome if they want to show that a reply contains 'obvious' inaccuracies. Since a newspaper might thus be forced to print a reply containing inaccuracies on their front page, the interviewees stressed that this ran the risk of having a chilling effect on press freedom *if* the number of cases of abuse increased and if this was not properly addressed by the lawmaker. Although the number of people currently abusing the remedy this way was reported to be manageable, the participants emphasised that no one could guarantee that this would always be the case.

More specifically, the interviewees who highlighted these issues criticised the work and ethics of the 'one or two handfuls of lawyers' who were experts in judicially enforcing a right of reply. Some of the participants working either for or with *national* newspapers noted that the individuals or organisations represented by those law firms often tried to abuse the remedy for their own purposes. Respondent *IL011*, an in-house lawyer at a national news magazine, spoke about his experiences with those lawyers and highlighted that although he did not think that the German statutory right of reply amounted to an unjustified limitation of press freedom, it might be abused to publish inaccurate statements, which could lead to a 'chilling effect' if attempted on a regular basis:

> '[They lie] regularly, very regularly. [...] Some even tell a pack of lies. [...]. This brings me back [...] to your first question: Does a right of reply amount to an unjustified limitation of

> press freedom? I would still say: No. [...] But a right of reply must not contain a right to lie, it should rather be concerned with the truth.[54]

This experience was shared by other participants working for or with national newspapers. When asked about his experiences with claimants represented by a legal expert, respondent *IL010*, Head of Legal at a national daily newspaper, noted that:

> 'The right of reply is a double-edged sword, because there is a potential to abuse it. Heading: A reply can contain lies as long as it is not 'obviously untrue' […] We frequently have to deal with the situation where we know that the reply that someone is seeking to publish contains a lie but we do not have any legal means to prevent publication.'[55]

Of course, both extracts should be treated with caution as these respondents are employed by newspapers and they might therefore be pursuing an agenda that aims to leave the researcher with a negative impression of how the right of reply works in practice. However, due to the broad and highly experienced range of participants, it was possible to confront the lawyers in question with the allegations from the newspapers. Unsurprisingly, those who predominantly represented claimants denied these allegations and noted that they would never encourage this to happen. In fact, some interviewees stressed that they would actively discourage clients from doing so. Nevertheless, participant *L007*, partner in a law firm with an expertise in media law doing both claimant and defendant work, acknowledged the potential for abusing this situation and gave insight into how he would respond if a client asked him to include false statements in a reply. Most importantly, he noted that if a client wants to go ahead with a right of reply, despite knowing that it has no substance to it, it is ultimately the client's decision to do so. He said:

> 'Theoretically, a reply can contain untruthful statements. […] When I examine whether the client has a right of reply, I will ask him to describe the facts and […] if […] the facts describe a situation where I would say, "Well, the reply contains untruthful statements", then I sometimes have to overcome the hurdle of where the client says, "I still want to enforce it that way". I would then say, "It is your right to do so, but it may happen that your claim is not successful". Therefore, the affected person will have to answer the question whether he really wants to take the risk that comes with trying to publish a reply that contains a lie.'[56]

Therefore, the interviews support the assumptions made in Chapter 3, where it was argued that because one does not have to provide evidence for the veracity of the original statement or the reply itself, the German right of reply runs the risk of being abused in practice. However, as noted above, participants from national newspapers highlighted that this is limited to those who are legally represented by legal experts

[54] Interview participant IL011 (Germany, 20 July 2018).
[55] Interview participant IL010 (Germany, 20 June 2018).
[56] Interview participant L007 (Germany, 15 May 2018).

in the field. Nevertheless, from a lawmaker's point of view, there is the danger that this could be exploited further in the future if more people did the same, which could lead to an unjustified limitation of press freedom.

5.3. Findings in England

In England, the participants' views on whether the existing rules and remedies that fulfil the function of a right a reply had a restricting impact on the work of newspapers depended on how they understood the term 'right of reply'. Therefore, the following sections distinguish between the perceived impact of a post-, (section 5.3.1) and pre-publication right of reply (section 5.3.2).

5.3.1. Post-publication right of reply

As in theme 1, the interviewees agreed that they currently do not think that it is possible for a person seeking to publish a reply post-publication against the will of the newspaper to succeed. Consequently, all of the participants highlighted that they did not believe that journalists were less likely to publish or pursue certain stories if they had been threatened with the potential publication of a right of reply. Particularly, the majority of the respondents stressed that as long as the decision over whether to grant a post-publication reply remains with the editor of the newspaper in question, this would sufficiently protect newspapers from any potential 'chilling effect' that such rules may have. For example, interviewee *RE019,* a journalist and former reader's editor of a national newspaper, explained this point of view by arguing:

> 'Editors need to be able to edit. Journalists need the freedom to write. If you compromise their work all the time by saying, "well if you do that then we have to go to Mr X and ask him to write a piece that says X", that's wrong'.[57]

In addition to this line of argument, respondent *R023* emphasised the significance of the contractual relationships between IPSO and the publishers as an explanation for why those working for newspapers do not perceive the 'opportunity to reply' in the ECP as an unjustified limitation of the newspaper's freedom of expression. As noted in Chapter 4, IPSO's main function is to enforce the ECP, which is framed

[57] Interview RE019 (England, 5 April 2018).

by the ECP Committee and is enshrined in the contractual agreement between IPSO and publishers. He argued that:

> 'The simple answer to that, in the newspaper context, is that the FT Editorial Code (like the IPSO Code […] and other newspaper editorial codes) are self-imposed, or agreed as a matter of contract. If and insofar as they import an obligation to publish a person's 'right to reply', they do so as voluntarily as the application of any provision of the Code.'[58]

Respondent *IL022*, Head of Legal for a publisher of national and regional newspapers, also highlighted that whether or not a newspaper subjects itself to regulation under the ECP is a self-imposed decision, which is why he does not feel that even an upheld complaint would have a 'chilling effect'. He noted:

> 'We have an investment in the Editors' Code and involvement in self-regulation. It is something we support and we encourage. […] So, where we have fouled up, that is a consequence, but I can't see necessarily why that would have a chilling effect. […] The only effect it should have is to make sure that we are compliant with the code that we have created and endorse.'[59]

On the one hand, this *status quo* may be seen as beneficial for press freedom. If newspapers are in charge of deciding whether or not to subject themselves to the regulation of the ECP, which contains an 'opportunity to reply, this strengthens their editorial freedom. On the other hand, one may argue that this *status quo* might lead to the unequal treatment of someone who has been affected by allegations in the media and is seeking to publish his own view in the same forum since a newspaper can freely decide whether or not it wants to sign up to one of the self-regulatory bodies. As noted in Chapter 1, IMPRESS has made a deliberate decision against including a rule similar or equal to the ECP's 'opportunity to reply'. Participant *R017*, Chief Executive Officer of IMPRESS, explained this omission by noting that he struggled 'to understand what it looks like in practice'. [60] He also argued that a right of reply runs the risk of 'opening a Pandora's box, where you potentially have an infinite series of replies and counter replies and it's not clear how that advances the public interest'.[61] Also, national publications like *The Guardian* or the *Financial Times,* who have not joined either of the regulatory bodies and instead operate an in-house complaint handling procedure, could technically abolish a right of reply from their self-imposed codes whenever they want to. In fact, a similar line of argument even applies to publications that have (voluntarily) decided to join

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[58] Interview participant RE023 (England, 27 August 2018).
[59] Interview participant IL022 (England, 25 June 2018).
[60] Interview participant R017 (England, 15 March 2018).
[61] ibid.

IPSO, as they have the power to 'unsubscribe' from their membership with the regulator.[62] Thus, the only recourse for a person who wants to invoke a right of reply from a publication that has not signed up with IPSO is either using the in-house complaints procedures or bringing a claim under Defamation Law. Whilst this thesis argues that the former creates an 'inequality of arms' between the complainant and the newspaper, the latter has been found to be unsuited to providing a satisfactory alternative due its complexity as well as the risk of high litigation costs.[63]

Nevertheless, the majority of respondents from both regional and national press reported that they had to frequently deal with requests to publish a reply post-publication. For example, interviewee *E021* noted:

> 'It happens quite a lot. That's what we're in the business of doing. Someone will read an article […] and they say "well, […] I think they've been very unfair to […] our organisation, I want to reply to that, I want to send a letter, I want a follow up story".'[64]

This experience was shared by colleagues from the national press. For example, interviewee *IL025* reported that people were requesting replies 'all the time'.[65] This is a significant addition to the findings in Chapter 3, where the assumption was made that due to the low number of IPSO adjudications involving the opportunity to reply, newspapers were not dealing with a high number of such requests. However, a high number of requests does not necessarily equal a high number of published replies. Further, it is yet to be determined whether there are any differences in this regard between the national and regional press. This is further explored in section 6.

5.3.2. Pre-publication right of reply

As detailed in section 4, newspapers feel in most cases legally obligated to contact the subject of a story prior to publication, in order to include their reply in the original article. However, none of the interviewees felt that this had a 'chilling' effect on their work. In contrast, interviewees working as or with journalists highlighted that they saw it as a journalistic standard that helped them to provide enough detail

[62] A publisher may, by giving not less than 12 months' notice in writing, terminate the contractual agreement with IPSO on the sixth anniversary of the effective Date or with effect from the end of each subsequent five-year period, see IPSO, 'Scheme Membership Agreement' (2019), clause 11.2 <https://www.ipso.co.uk/media/1813/ipso-scheme-membership-agreement-2019-v-sep19.pdf>.
[63] See Chapter 4.
[64] Interview E021 (n 28).
[65] Interview IL025 (n 27).

for a story. Respondent *E020* said that he would always contact the subject of the story and stressed:

> 'If we are writing stories about people or about issues or events we know that people are involved in then it is only fair that you get the perspective of both sides of an argument, of both sides of an issue. […] There is very little point in running a one-sided story.'[66]

However, as noted above, some extracts must be treated with caution as these respondents are employed by newspapers and therefore might potentially pursue an agenda that aims to leave the researcher with a positive impression of their work. Thus, the researcher used the semi-structured format of the interviews to examine whether journalists indeed contacted the subject of a story in any case or if there were there exceptions to this supposed rule. This is further explored in section 6.

Crucially, some interviewees highlighted that because contacting the subject of a story prior to publication to ask for his side of the story helps the newspaper to establish defences to defamation,[67] it actually causes the opposite of a 'chilling effect'. Thus, like their German colleagues, the respondents highlighted that financial disadvantages were the main threat to editorial independence. For example, participant *R023* said:

> 'I don't think I agree that there is a chilling effect – my understanding of a 'chilling effect' is a set of consequences so severe that newspapers will self-censor. I don't think newspapers are bothered enough by 'right to reply', compared to the other sanctions they face in other contexts (fines, criminal penalties, damages, costs), for it to qualify as a 'chilling effect'. […] It's a low financial price to agree to pay, unlike damages, fines and claimant's costs. Newspapers may not want to give them and may object to them on principle, but they don't hurt in the way financial sanctions hurt and chill free expression.'[68]

Interviewee *IL022* also argued against a 'chilling effect' of this pre-publication right of reply and argued:

> 'What is much more likely to have a chilling effect are our libel laws and cost laws. Those are things that are deeply damaging to newspapers.'[69]

Ultimately, the interviews have shown that the hard cost of giving a right to reply nowadays (in the post-print era) is very limited and in the case of rebuttals, it is a low financial price to agree to pay, unlike damages, fines and the claimant's costs. Similarly, all of the participants emphasised that a complaint under the ECP, even if lodged by a public authority, does not put newspapers at a risk of having to pay

[66] Interview E020 (n 24).
[67] See Chapter 4.
[68] Interview R023 (n 26).
[69] Interview IL022 (n 59).

hefty damages or legal costs, which is what publishers are most concerned about. As the English legal system falls short of affording individuals a general right to have a response published on their own terms that may be enforced through the courts,[70] this significantly lowers the dangers of financial burdens for English newspapers compared to German publications as the latter are subject to the statutory right of reply.

6. Theme 3: Request handling by the newspapers

6.1. Relevance of theme for research questions

This theme explores how newspapers and their in-house lawyers handle requests for the publication of a reply post-publication and under which circumstances they decide to grant such a request. As detailed in Chapters 3 and 4, newspapers can either try to resolve such a request amicably by offering an (informal) opportunity to respond to allegations, for example through the publication of a reader's letter, a correction or a follow-up article, or they can let the court (in Germany) or regulator (in England) decide the matter. However, there is currently no answer to the question of how frequently newspapers are publishing a reply *without* the regulator (England & Wales) or courts (Germany) becoming involved. Also, it is yet to be determined if and how the different incentives (or in Germany the lack thereof) for newspapers to offer said alternatives to a 'formal' reply impact on the right of reply's practical application in each legal system.

This section presents material on these issues. Although the findings of Theme 2 revealed that newspapers in England feel that they frequently receive requests for the publication of a reply, it remained unclear how often those requests are granted and whether the national and regional press differ in this regard. These findings also support the analysis of cases and complaints conducted in previous chapters and they allow the researcher to come to conclusions about the main differences (and similarities) between the statutory and self-regulatory remedies.[71] Hence, this theme explores the experiences of the participants and generates data that shows the understanding, interpretations and motives behind editorial choices over which replies are published and which are not.

[70] See Chapter 4.
[71] See Chapter 6.

Furthermore, as noted above, the interviewees in England noted that they felt legally obligated to contact the subject of a story pre-publication. This theme provides insight into whether this implies that they will do so in any case, or whether there are exceptions to this supposed rule. This includes an examination into what action is taken by journalists and what advice is given by their lawyers if a newspaper fails to contact the subject of a story in the pre-publication phase.

6.2. Findings in Germany

In Germany, the interviewees revealed that there are differences in the way national and regional newspapers handle requests. Particularly, this concerns the issue of how often disputes involving a right of reply go to court. Regional newspapers seem to be more likely to negotiate an amicable agreement than their national counterparts and sometimes they even voluntarily publish a formal right of reply post-publication. Contrastingly, national newspapers seem less likely to do so and the decision of whether they have to publish a reply post-publication is predominantly made by the courts. As noted in section 4, the findings of the following sections only apply to situations where the person seeking to reply to an article is legally represented, as those who have not taken up legal advice are not able to overcome the formal hurdles.

6.2.1. National publications

Participant *L005*, who predominantly represents clients seeking to invoke the statutory right of reply, spoke about his experiences in dealing with national newspapers. He highlighted that in order to publish a formal reply in those publications, one usually has to go to court. He said:

> ‘We have been experiencing it very rarely that newspapers publish a reply voluntarily. Unfortunately, one always has to go court first, often up to the highest appellate court, until one has formally enforced a right of reply. Particularly, SPIEGEL and BILD never print anything voluntarily. One has to enforce it in court […] in almost 90 per cent of all cases.’[72]

Of course, one may argue that there could be several reasons why newspapers would refuse to publish such requests voluntarily. For example, it would be only logical for newspapers to decline requests for the publication of a reply if its content

[72] Interview L005 (n 35).

and form do not adhere to the requirements set out in the Press Acts.[73] However, this experience was also shared by other respondents who predominantly work for claimants. Significantly, respondent *L007* stressed that the main reason for this difference between regional and national publications regarding the voluntary publication of a reply is that regional newspapers possess fewer financial resources than national publications. This results in a lower willingness of the former to bear the cost risk of defending a claim in court. Instead, they are more likely to (voluntarily) publish the requested reply. He noted:

> 'You normally [...] have to go to [...] court. At least if national publishers are involved, as they are willing to take a certain cost risk. Hence, it is still the case [...] that they only very rarely publish a reply voluntarily […] The rule is still that you have to enforce a right of reply in court.'[74]

When questioned about how often disputes involving a right of reply are resolved between the claimant and the publisher *without* the courts becoming involved, all of the participants working for national newspapers stressed that it depends on which part of the newspaper the reply would be published in. If a person requested the publication of a reply on the front page, newspapers would not publish it voluntarily *in any event*, even if all statutory requirements are fulfilled. Instead, the 'affected' person would have to attempt to enforce their right of reply in court, which requires legal representation by an attorney. Considering the costs of taking up the advice of an attorney specialised in the field,[75] again this lowers the chances of 'ordinary citizens' enforcing the publication of their right of reply against the will of a newspaper. For example, participant *IL010* said:

> 'We do not voluntarily print replies on the front page and we will always go to court over that. We are usually quite successful in arguing for our way. [...] At the end of the day, the result is somewhat unpredictable, but we will certainly never voluntarily print front page replies.'[76]

As detailed in Chapter 3, a newspaper's front page has the function of shaping a publication's identity and visually distinguishing it from its competitors. Additionally, it is crucial for getting the publication's most important journalistic news and advertisements across to the readers. Therefore, it is not surprising that newspapers refuse to voluntarily publish a front-page reply and instead would rather take the financial risk of defending their refusal to do so in court. In fact, some participants

[73] See Chapter 3.
[74] Interview L007 (n 56).
[75] See Chapter 3.
[76] Interview IL010 (n 55).

reported that because of the 'special meaning of the front page', newspapers often try to persuade claimants in right of reply proceedings to withdraw their legal action by offering alternative resolutions to the dispute. This may include a payment to the claimant or the promise of publishing articles that portray the claimant in a good light. For example, participant *J015* shared his experience in court:

> 'Front page is hell for the press […] If they lose a legal action and thus have to print a reply on the front page, then there are situations where the press – which demonstrates how reluctant they are to print a reply on their front page – tries to buy off the claimant's right of reply. […] I do not know the exact prices, sometimes they may also agree on publishing an article that generously portrays the claimant in a good light. However, I have come across a few cases where they have made such payments. The press fears printing such replies like the devil fears the holy water.'[77]

In addition to these insights, the majority of the respondents working for newspapers also highlighted that most of the requests brought forward by legal experts end up in court, even if they do *not* concern a publication on the front page. They argued that this is primarily because attorneys acting on behalf of their clients are often not interested in an amicable agreement even if it would contain the publication of a follow-up article, interview or reader's letter and instead they try to test out how far they can push the newspaper. As detailed in Chapter 3, this may be due to the fear that alternatives such as a reader's letter may not attract the same publicity as a statutory right of reply. However, as the newspapers do not want to set a precedent by agreeing to the publication of a reply that does not adhere to the formal requirements, they then see it as necessary to go to court. Other participants alleged that some attorneys are not interested in coming to an agreement because they can charge higher fees if the courts become involved. For example, participant *IL012* noted:

> 'If an attorney does not have a permanent contractual relationship with his client, i.e. if a client only makes use of his services once in a blue moon, then the attorney might make use of this opportunity and get the court involved to charge the client more money'.[78]

Of course, these statements have to be treated with caution, as those working for newspapers may be unlikely to argue in favour of those representing a person seeking to publish a reply. Nevertheless, the findings allow the assumption that most requests made to a national newspaper require the involvement of the courts. Therefore, this thesis suggests that the right of reply's judicial enforcement should be seen as a double-edged sword for both claimants and defendants. For claimants, it

[77] Interview J015 (n 39).
[78] Interview IL012 (n 53).

allows the publication of one's right of reply against a newspaper's will but at the same time it limits the access to the remedy to those who are willing to take the financial risk of going to court. For defendants, it safeguards them against an extensive use of the right of reply but it also runs the risk of putting 'smaller' media outlets who do not have significant financial resources at risk if they decide to fight the publication of a right of reply in court.

6.2.2. Regional publications

Contrastingly, all of the participants from regional publishers reported that the vast majority of these requests are resolved *without* the courts becoming involved and instead are dealt with an amicable agreement between the 'affected' person and the newspaper. Different to national newspapers, those respondents noted that despite the lack of incentives to do so, they often offer to publish a follow-up article or reader's letter where they retain editorial control. One could argue that there are several possible reasons for this different attitude, one of them being that regional newspapers are more likely to publish a reply voluntarily in order to not upset their readers. In fact, this was the narrative pursed by the participants. For example, interviewee *RE003* said:

> 'Such requests should be dealt with by talking to the people involved and giving them the opportunity to share their view. […] From my experience, I believe that the reader appreciates it if we are transparent and stand to our weaknesses. […] We will therefore always be accommodating in such situations'[79]

However, this statement must be treated with caution, as the interviewees might be unlikely to portray their employer in a negative light. Due to the financial pressure that newspapers are experiencing in Germany, it might indeed be more likely that they try to avoid litigation as far as possible to avoid paying legal fees.[80] The majority of participants working for regional newspapers reported that they did not have an in-house legal team and instead they took up external legal advice when needed. This might amount to a 'chilling effect' if those newspapers, due to the financial pressure, end up publishing a reply or feel pressured to offer alternatives although the requested right of reply does not adhere to the formal requirements. However, none of the interviewees reported that this had happened in their work.

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[79] Interview RE003 (n 36).
[80] See section 5.2.2.

6.3. Findings in England

One of the main differences deriving from these interviews is that in contrast to the German participants, interviewees from *both* regional and national newspapers in England reported that they usually resolved such requests with the publication of a reader's letter or a follow-up article. Therefore, the participants from England noted that the majority of requests for printing a right of reply in response to a story are resolved *without* IPSO becoming involved. This difference between the legal systems can be explained primarily by the different incentives (or in Germany the lack thereof) to resolve requests for printing a right of reply amicably at an early stage by offering said alternatives to a 'formal' right of reply.[81] This thesis has repeatedly argued that those incentives are beneficial for the right of reply's normative purpose, as a lengthy complaints process (or court process in the case of Germany) runs the risk of undermining the right of reply's envisaged speediness and promptness. Furthermore, these findings allow the assumption that the referral of a complaint to the regulator is the *ultima ratio* and therefore only happens as a last resort after the internal process has 'failed'. Therefore, the complaints adjudicated on by IPSO, which were analysed in Chapter 4, can indeed only be considered the 'tip of the iceberg' and are therefore not representative of the day-to-day application of the 'opportunity to reply'. This finding also serves as an explanation for the relatively low number of complaints where IPSO adjudicated on whether or not an 'opportunity to reply' should be granted. As an example of a regional newspaper participant, *E021* noted:

> 'The bulk of complaints will be resolved without IPSO becoming involved. […] Very very few […] will go for full adjudication. They'll only go for full adjudication if we felt that we'd exhausted all avenues or we didn't believe that we had breached the code and we were prepared for the committee to adjudicate on it.'[82]

Similar experiences were shared by participants working for the national press. Interviewee *IL025* noted:

> 'A large number of complaints […] are dealt with directly between the parties […] without IPSO having to get involved. […] The system works on the basis that a large number of complaints do get resolved [without IPSO getting involved].'[83]

However, this chapter argues that this *status quo* runs the risk of opaque decisions

[81] See Chapters 3 and 4.
[82] Interview E021 (n 28).
[83] Interview IL025 (n 27).

during IPSO's complaints process. This finding reinstates the issues raised regarding the 'opportunity to reply' clause in the ECP from a complainant's point of view. As argued in Chapter 4, it is not transparent whether publishers resolve all the complaints exclusively under IPSO's rules and regulations. Particularly, when a publisher deals with a complaint that they receive directly or during the referral period there will be no record of that complaint, which runs the risk of opaque decisions during IPSO's complaints process. The fact that the overriding majority of complaints involving a post-publication right of reply are resolved without IPSO becoming involved increases the danger of these opaque decisions occurring.

When questioned about their views on this potential issue, the newspapers highlighted their willingness to offer reader's letters, follow-up articles or interviews. In particular, regional newspapers highlighted their flexibility regarding solutions to complaints and their ability respond quickly to readers' concerns. Thus, this was similar to what was reported in Germany. For example, interviewee *E021* noted:

> 'We would virtually always give them a reply. Because we are all about audience engagement. We're all about creating a conversation with our readers.'[84]

Participant *E020* followed up on that and focused on the 'special relationship' between him as an editorial director and the readers of a local paper:

> 'If people disagree with things that we've written, […] then we have our letters pages where people will raise issues and put forward their opinions about absolutely anything. […] I consider it absolutely fundamental to good journalism, freedom of expression and […] public discourse. […] From my point of view, I don't need anyone to legislate that for me because we're already doing that […]. The way we often describe a local paper is the glue that binds the community together, providing a space for that kind of public discourse is actually fundamental.'[85]

Again, these extracts should be treated with caution, as the participants might want to portray their work in a good light to influence the research results. In fact, although the participants emphasised the benefits of a speedy complaints resolution for complainants, one may argue that the willingness to come to an amicable agreement (and thus avoid the danger of an upheld complaint) also stems from an ulterior motive. Throughout the history of British press regulation, newspapers repeatedly faced the danger of statutory regulation after failing to demonstrate that voluntary

[84] Interview E021 (n 28).
[85] Interview E020 (n 24).

self-regulation 'could be made to work'.[86] During the interviews, the English participants repeatedly voiced their rejection against any form of a statutory right of reply similar to that in Germany as they felt that this would have a 'chilling effect' on their work since they would no longer be in charge of who may publish a reply in their newspaper. For example, participant *IL025* highlighted his view that any form of a legal obligation to publish a post-publication right of reply runs the risk of 'inhibit[ing] journalism and it will have a chilling effect'.[87] Similarly, participant *RE019* stressed that 'there's always been a visceral rejection of any idea of government having anything to do with the running of newspapers in this country' and that 'other nations which have state controlled press, are in a terrible state very often politically and often economically too'.[88] Therefore, it is not only within the complaint's but also within the newspaper's interest to resolve complaints amicably and avoid breaches of the ECP. This is because a working system of press self-regulation makes it less likely that the government sees the need to launch another inquiry into the press,[89] or to introduce statutory legislation, which newspapers aim to avoid at all costs.

In any case, despite the advantages noted above of allowing the subject of a story to 'informally' respond to allegations by way of, for example, a reader's letter, there are also downsides to this approach. Chapter 4 noted that a reader's letter might not attract the same attention as the story it is replying to if it is 'hidden' away amongst other reader's contributions. Similar lines of argument apply to the publication of an interview or follow-up article. Also, under the ECP, the way in which a reply is put into practice and the prominence it is given are primarily matters for the newspaper's editorial judgement. This is different to their German colleagues, who risk having to publish an additional 'formal' right of reply in addition to a previously published reader's letter.[90] Hence, in Germany it ultimately remains within the power of the 'affected' person to decide against exercising his statutory right of reply in exchange for the publication of a reader's letter. Contrastingly, this empirical research strengthens the argument that under IPSO's self-regulatory regime if

[86] See Chapter 4.
[87] Interview IL025 (n 27).
[88] Interview RE019 (n 57).
[89] Some academics have called for further reform of the press, see e.g.: Brian Cathcart, 'Brexit, Leveson 2 and why 2019 could be the year for press reform' (*INFORRM*, 2018) <https://inforrm.org/2018/12/14/brexit-leveson-2-and-why-2019-could-be-the-year-for-press-reform-brian-cathcart/>.
[90] See Chapter 3.

and how the subject of a story is able to add his view to a story post-publication is up to either the regulator's discretion or the goodwill of the publisher.

In relation to the pre-publication right of reply, it was noted earlier that journalists felt legally obligated to contact the subject of a story pre-publication.[91] However, it remained unclear whether this implied that they would do so in any case or whether there were exceptions to this supposed rule. In case of the former, one could argue that this might provide a better opportunity to reply to an article than the German post-publication remedy, because a pre-publication right of reply of any kind has one major advantage. If a journalist contacts the affected individual or organisation before the publication of any allegations,[92] a person is likely to be able to publish his own view to the *same and identical audience* as the allegations in question, which is a benefit compared to a post-publication right of reply.[93] Approaching the subject of a story prior to publication also serves the right of reply's normative purpose of allowing 'ordinary citizens' to add their view to a story. If journalists *actively seek* comments from the subject of a story, even if this person is not aware that they are entitled to a right of reply, there is no need for an 'ordinary citizen' to obtain a court order to add his view to a story.

When questioned about their conduct in practice, the responses differed amongst participants. For example, *RE019* noted that not only regional but also national newspapers would always contact the subject of a story. He noted:

> 'Journalism does not ever not go to the other side and say, "we are we going to publish this, we need to have your thoughts on it". It might go quite late in the day, it might give them a bit of a fright, they may only have half a day in which they can respond. But if you were to go to any newsroom and talk to any journalist it's drilled into people that you have to get the other side's point of view.'

This view was shared by interviewee *S024*, a partner in a solicitor's firm with an expertise in media law advising both regional and national newspapers. He stressed that if one of his clients failed to do so, he would advise to get in touch with the subject of the story immediately. He noted:

> 'My question will always be: "Have you tried to contact the person?". Always. And if they come back and say, "no", the answer is: "Well, you better go and do it." 'If there isn't a

[91] See section 4.
[92] German newspapers are, generally, under a *duty* to notify the subject of a story and ask for his comment prior to publication only in the case of allegations concerning criminal behaviour, see Chapter 3.
[93] See Chapter 4.

final sentence which says, "we tried to contract Mr X and he refused to comment", or something similar, then we'd tell them to make that extra call, to make that extra inquiry. It's standard practice.'[94]

Again, these extracts have to be treated with caution, considering the potential interests that might be at stake. Most importantly, these impressions contradict some of the findings gained from the analysis of IPSO's complaints resolution, where those who were made subject of a story often complained that they had not been contacted prior to publication.[95] Thus, it is not surprising that other participants did not agree with this account and instead mentioned certain situations where a pre-publication response may not be obtained, which is more in line with the evidence gathered from the complaints resolution analysis. Particularly, participant *IL025* noted that if newspapers are 'certain' that their account of facts is correct or if there is a danger that the subject of the story might seek to obtain an injunction, they will not seek comment pre-publication. He noted:

> 'I'm sure that every journalism school let alone the lawyers involved with journalists would say that it's a good thing to go beforehand. Now, there are complications, what about the position of where it's been clear in the past that this person never responded or whatever. How does that affect it? […] So, each case has to be decided on its own merits and terms on that. There is another complicating point and that is an injunction […] It's quite clear that you can get an injunction and indeed got frequently for breaches of privacy or breaches of confidence pre-publication. […] And then the third question is, if you are convinced about the factual basis of something there is no purpose in going to a person beforehand […] because you know the factual position. There's nothing they can say to you pre-publication that affects the facts of it.'[96]

Generally, this thesis argues in favour of allowing exceptions from any potential requirement to contact a person prior to the publication of allegations. Although desirable for the purposes of a right of reply, prior notification of the subject of a story can sometimes be impractical or impossible to achieve and could even jeopardise a legitimate investigation, which runs the risk of having a chilling effect on a newspaper's freedom of expression.[97] However, this extract also highlights some misunderstandings of the functions of a right of reply. Even if the newspapers are certain that their account of facts is correct, the subject of a story might still be interested in adding his point of view to the story. This is primarily because it the context of a story might change depending on how it is presented to the reader. In any event, despite the claim that all journalists feel 'legally obligated' to contact the

[94] Interview participant S024 (England, 27 July 2018).
[95] See Chapter 4.
[96] Interview IL025 (n 27).
[97] See Chapter 3. For further discussion see also: Taylor (n 25) 72.

subject of a story, the interviews demonstrated that there are exceptions to this supposed rule. Once again, this weakens the position of the person who is seeking to add his view to a story.

7. Theme 4: Legal uncertainty in Germany

7.1. Relevance of theme for research questions

One of the aims of this thesis has been to go beyond the 'law in the books' and equally focus on the 'law in action'. The assessment of the right of reply's *status quo* in Germany in Chapter 3 demonstrated that the courts play a significant role in the practical application of the statutory remedy. This was further highlighted during the analysis of the interviews, where it was reported that most right of reply cases involving a national newspaper require involvement of the courts, rather than being amicably resolved between the 'affected' person and the publisher. Significantly, respondents also mentioned issues related to the (in)consistency of how courts interpret the formal requirements laid out in the Press Acts. Particularly, the participants working for newspapers emphasised that this is often abused by claimants and may have a 'chilling effect' on press freedom if the number of cases of abuse increases and this is not properly addressed by the lawmaker.

Thus, this theme focuses on these problems raised by the participants regarding the proceedings in court and it subsequently analyses the interviewees' suggestions for how the lawmaker could address these issues. Due to the broad range of participants, it was possible to gain a unique impression of the judges' views on this situation and establish whether they saw the need for a potential reform of the law.

7.2. Analysis and discussion of findings

As detailed in Chapter 3, in order to judicially enforce the statutory right of reply one must bring a motion for an injunction to one of the Regional Courts. The motion must aim to compel the newspaper to publish one's counter statement. The Code of Civil Procedure determines that the claim must be commenced at the Regional Court that is locally responsible for where the publisher or editor resides. After the Regional Court has handed down a judgment, either party can appeal to the superordinate Higher Regional Court, which are spread out across all the Federal States

and their jurisdiction in these cases depends upon the residence of the defendant. Most importantly, they are not bound by each other's judgments and are hence free to deviate in their decision-making practice. Yet, it is not possible for either party to appeal to the Federal Court of Justice for Civil Matters (*BGH*), which is normally the highest appellate court for civil litigation. Therefore, it is not possible for the *BGH* to set a precedent to solve a controversial debate if the Higher Regional Courts disagree on a point of law.

According to the received responses, this has led to issues in practice. Interviewees highlighted that they had experienced severe differences in the application of the law between the Higher Regional Courts. In their view, the fact that they cannot appeal to the *BGH* to set a precedent has led to legal uncertainties, causing issues for both claimants and newspapers. For example, the respondents repeatedly referred to the debate about whether a person seeking to reply to an article should be allowed to amend the content of his reply during the oral proceedings, if the court finds that it does not meet the formal requirements. In the academic literature, two main solutions are suggested: on the one hand, it is argued that this should be possible as long as the new version of the reply is signed by the claimant and is submitted to the newspaper (or the lawyer representing them) in court.[98] This solution would favour the claimant, as it allows him or her to enforce the reply against the will of the newspaper more efficiently without having to restart their efforts, including another court application. On the other hand, some scholars argue that it should not be possible to amend a reply during an oral hearing, as this might disadvantage the newspapers.[99] Instead, if a claimant fails to adhere to the formal requirements, this should be treated as if the court has found in favour of the newspaper and therefore the claimant should be required to completely restart his efforts to enforce the publication of a reply. This would then require another court application, which of course raises the costs for the claimant and can therefore be seen to be in favour of the newspaper. This 'reverse chilling effect' was highlighted as beneficial for newspapers by participant *IL011*:

> Of course, it is beneficial for us if a claimant cannot amend his reply because it raises the bar for enforcing a right of reply. Nevertheless, I would defend the existence of this rule because for once it has a reverse chilling effect. […] It is a way to discipline the claimant

[98] See e.g.: Emanuel Burkhardt, 'Gegendarstellungsanspruch' in Karl Wenzel et al. (eds), *Das Recht der Wort- und Bildberichterstattung* (Dr. Otto Schmidt 2018) 962.
[99] See e.g.: Jörg Soehring et al., *Presserecht* (Otto Schmidt 2019) 652–655.

not to excessively try his luck and his chances, which means that he won't overburden the proceedings in court.[100]

Although scholars have noted that courts sometimes come to different conclusions when deciding this debate, the extent to which this is happening in practice has never been empirically researched.[101] Therefore, the findings presented in this chapter offer an unparalleled insight into the experience of practitioners related to this issue.

Significantly, most of the respondents reported severe differences in courts' decision making relating to this issue. For both claimant and defendant, it is often simply unforeseeable which line of argument the court will agree with. For a newspaper, the outcome of a case might simply depend on where a publisher resides given that a claim must be commenced at the court that is locally responsible.[102] In practice, this might result in the situation where the statutory right of reply has less impact on the editorial freedom of a newspaper that coincidentally resides near a court that is known to be 'defendant friendly' compared to a publisher that has its headquarters near a 'claimant friendly' court. In other words, if a newspaper coincidentally resides near a court that allows amendments during the oral hearing in court, it is more likely to be obliged to print a reply post-publication than a newspaper that has its headquarters near a 'defendant friendly' court. This was highlighted by participant *L006*, who noted:

> 'The jurisprudence of the Regional and Higher Regional Courts regarding the formal requirements is extremely varying in part. Therefore, it ultimately depends upon the location of the publishing house whether or not you have to publish a lot of replies. To name a notable example: Berlin is a claimant friendly court for right of replies. This means that if someone tries to force you to print a reply, Berlin allows the claimant to amend his reply during the oral proceedings. [...] This is entirely different in Hamburg. Hamburg will rule in favour of the newspaper as soon as the claimant has to change a comma. The claimant then has to pay the costs and file a new claim. [...] This leads to very different results in practice. The German right of reply is a like a patchwork quilt, we have very differing case law. [...] There are massive differences in the jurisprudence of the Higher Regional Courts. As far as a right of reply is concerned, the location of the publishing house is absolutely crucial.'[103]

[100] Interview participant IL011 (n 54).
[101] See: Axel Beater, *Medienrecht* (Mohr Siebeck 2016) 759; Reinhart Ricker et al., *Handbuch des Presserechts* (C.H. Beck 2012) 204; Chapter 3.
[102] See Chapter 3.
[103] Interview L006 (n 33).

When confronted with these findings, the majority of the respondents working as judges agreed with this observation and partially shared this criticism. For example, interviewee *J013* said:

> 'It is certainly the case that some press law divisions have a tendency to be more press-friendly than others.'[104]

When questioned about the reasons behind these diverging approaches, none of the participants could provide an explanation. However, this chapter argues that these differences between the courts are primarily due to the complexity and contentiousness of the statutory right of reply. As detailed in Chapter 3, most of the formal requirements set out in the Press Acts require interpretation by the courts and can often only be decided on a case-by-case basis. For example, how to distinguish between 'factual assertions' and opinions or how the press can show that the reply in question is 'obviously untrue' have been controversially discussed by both academics and practitioners for decades, with no end in sight. Therefore, when a court has to decide whether or not a motion for a mandatory injunction with the aim of invoking a right of reply should be granted, this decision may be subject to several nuanced points that are unique to the relevant case and to which there is no consensual approach in the literature or case law. In such cases the (Higher) Regional Courts are obliged to construe ordinary national legislation such as the Press Acts of the Federal States in conformity with the rights and principles enshrined in the German Basic Law and they must interpret the Press Acts in a 'constitution-consistent' way (*verfassungskonforme Auslegung*).[105] Apart from that, however, they may come to their own conclusions depending on the circumstances of each case, which, considering the large number of Higher Regional (24) and Regional Courts (115) and the absence of a Federal Appellate Court, is bound to lead to diverging approaches and thus legal uncertainty.

In order to address this issue and provide more of a 'level playing field' where the outcome of a case would not depend on which court a claim is commenced in, some participants suggested a change of the *status quo*. For example, *J015* noted:

> I think it [a reform] is necessary. [...] Certainly, there are aspects where this might be helpful because the application of the law could otherwise […] drift too much apart as some courts are stricter than others. […] If there was the possibility to give leave to appeal on a point of law one could clarify legal uncertainties in cases where both Higher Regional

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[104] Interview J013 (n 42).

[105] See e.g.: Martin Brenncke, *Judicial Law-Making in English and German Courts* (Intersentia 2018) 142 et seq.

> Court A and Higher Regional Court B say: "Well, we have completely different views on that."'[106]

In practice, this suggestion would have the following effect. If there is an obvious difference between the decision-making practices of the courts on an issue that has a practical impact, it should be made possible for both claimant and defendant to apply for leave to appeal on a point of law (*Revision*) to the *BGH*. This would have two major benefits: first, it would allow the *BGH* to set a precedent for controversial issues, which would provide guidance for the Higher Regional Courts and result in legal certainty. This would particularly beneficial for addressing the debate concerning the right of reply online. Second, as it would be necessary to apply for leave to appeal, the decision about whether an issue is so significant that it requires clarification to avoid an uneven playing field would be up to the discretion of the courts. Thus, the judges would have an opportunity to come to an unbiased decision regarding whether further guidance is needed. This would avoid the courts becoming clogged up by belligerent claimants or stubborn defendants. However, considering the complexity of the German legal system, a full evaluation of if and how said proposals would work in practice is beyond the scope of this thesis.

8. Conclusion

This chapter reported on fieldwork undertaken in England and Germany that investigated the right of reply's impact on the work of the press as well as the differences and similarities between both jurisdictions. After the analysis undertaken in Chapters 3 and 4, it aimed to fill in the identified gaps in knowledge. Hence, it intended to focus more on the 'law in practice'. In order to achieve its aim, this novel research provided an original thematic analysis of 25 semi-structured elite interviews. Based on the conclusions of this part of the thesis, the subsequent Chapter 6 conducts a comparative analysis and gives further insight into the reasons for the differences and similarities between Germany and England & Wales in relation to the right of reply.

In conclusion, the research conducted in this chapter affirmed some of the assumptions made in previous parts of this thesis and portrayed the right of reply from an

[106] Interview J015 (n 39).

angle that has so far not been discussed in the literature. Notably, the German participants portrayed the domestic statutory right of reply legislation as a double-edged sword. On the one hand, they stressed that although it seems rather straightforward in theory, enforcing a right of reply against the will of a newspaper requires extremely specialised legal expertise and is nearly impossible to achieve for a lay person, or even a lawyer who is not an expert in this area of law. This often leads to frivolous attempts to enforce the publication of a reply, which can be easily turned down by the newspapers with no consequences.

Furthermore, this chapter revealed that in the vast majority of cases, national newspapers are likely to turn down a request to print a right of reply and the courts then need to become involved. Due to the lack of incentives for newspapers to provide (informal) opportunities to respond to allegations outside the German statutory framework, such as the publication of a reader's letter, individuals must take the financial risk of going to court if they still wish to get their voice heard. Thus, this chapter argues that the statutory right of reply is far less accessible to the 'ordinary citizen' than its normative purpose would suggest and it is therefore only partially successful in establishing 'equality of arms' for 'weaker' individuals against a newspaper. Hence, the 'formal requirements' of the statutory right of reply act as a safeguard for newspapers. This part of the research stresses that this not only limits the danger of being 'flooded' by requests to print replies but it also demonstrates that the newspapers are more powerful in relation to the right of reply than what it seems from the 'law in the books.' If (financially) backed by their publisher, requesting the publication of a right of reply might even incite journalists to investigate a story further.

On the other hand, this chapter affirmed the assumption made in Chapter 3 that *if* a claimant takes up the advice of one of the few specialised lawyers, there is not much a German newspaper can do to prevent the publication of a right of reply, even if said reply contains inaccuracies. Particularly, this danger concerns regional newspapers as they are less likely to fight the publication of a right of reply in court. This is not only due to their aim of avoiding upsetting their readers but also due to the fact that they have fewer financial resources compared to national publications, which results in a lower willingness to bear the cost risk of defending a claim in court. Therefore, it was argued that those aspects of the *status quo* run the risk of

having a ‘chilling effect’ on a newspaper’s freedom of expression. Additionally, due to Germany’s federal structure and the way in which the right of reply may be enforced in court, there is an inconsistency in how judges interpret the formal requirements laid out by the relevant legislation. This leads to legal uncertainty, causing issues for both claimant and defendants. In conclusion, this thesis therefore suggests that the right of reply’s judicial enforcement in Germany should be seen as a double-edged sword for both claimants and defendants.[107]

Contrastingly to their German colleagues, whose understanding of the term is shaped by the definition employed by the Press Acts of the *Länder*, journalists based in England stressed that they see a right of reply’s main function as giving the subject of a story an opportunity to contribute *before,* rather than post-publication, to a story. This chapter argued that this is because contacting the subject of a story prior to publication to ask for his side of the story and if provided, implementing the ‘gist’ of his view is one of the few ways that the media can demonstrate good faith and responsible reporting and thus establish defences to defamation. Although this focus on the pre-publication aspect runs the risk of falling short of a general right to have a response published on one’s own terms,[108] it allows a person to respond to allegations in the exact same forum and at the exact same time if granted. Therefore, this chapter argues that this serves the right of reply’s purpose of providing a prompt and speedy opportunity to respond to allegations.

The chapter further explained that English participants noted that the majority of requests for printing a right of reply in response to a story (i.e. post-publication) are resolved *without* IPSO becoming involved. Instead, different to the German participants, journalists and lawyers from *both* regional and national newspapers in England reported that they usually resolve such requests with the publication of a reader’s letter or a follow-up article, for example. This chapter suggests that this difference between the legal systems can be explained primarily by the different incentives (or in Germany the lack thereof) to resolve requests for printing a right of reply amicably at an early stage by offering said alternatives to a ‘formal’ right of reply.

[107] See section 6.2.1.
[108] See Chapter 4.

Nevertheless, this chapter concludes that the empirical investigation strengthened the previously made assumption that the 'opportunity to reply' in the ECP does not provide for 'equality of arms' and is more favourable towards the newspaper. In fact, it was demonstrated that providing a right of reply post-publication is often seen as a somewhat 'generous gesture' by publishers. It is a process that editors feel in charge of rather than something they feel obligated to do, despite it being regulated in the ECP.[109] Consequentially, journalists do not feel that the self-imposed rules under the ECP including the 'opportunity to reply' amount to a 'chilling effect' on press freedom. Instead, the participants from both legal systems perceive any kind financial sanctions such as litigation costs or damages as the main threat to editorial independence.

[109] See section 4.2.

Chapter 6: Conclusions and ways forward

1. Introduction

This thesis set out to examine which rules and practices in Germany and England & Wales perform an equivalent function and serve a similar purpose to that of the 'right of reply' under the ECHR. Furthermore, it aimed to explore how they work in practice as well as identify the reasons for the differences and similarities between the legal systems in relation to this question. In doing so, it sought to offer a unique and original investigation into how the right of reply in those jurisdictions works in action and why the respective lawmakers chose to implement (or refrained from implementing) the remedy in the way they did. In order to see whether this has been achieved throughout the research conducted in this study, the purpose of this final part is to bring together the analysis in the preceding chapters in order to draw conclusions and reflect on the consequences of the thesis' findings. Therefore, this part of the thesis carries out a comparative analysis between the relevant rules and practices identified in both jurisdictions, using the definition and criteria of the right of reply established under the ECHR as a benchmark. The comparison of those functional equivalences is based on the research carried out in chapters 2–5.

Hence, to set the scene, this part of the thesis first provides an overview of the key findings and arguments developed in each of those chapters (section 2). Second, whilst further drawing on the research undertaken in the preceding chapters, it conducts the comparative analysis as outlined above (section 3). Third, it evaluates the potential ways forward for the right of reply as a remedy and its (ir-)relevance in an online environment (section 4). Lastly, this chapter reflects on future research that may be carried out on the basis of this thesis' conclusion and makes final remarks (section 5).

2. Summary of key findings and arguments

2.1. The 'right of reply' under the ECHR

After the introductory Chapter 1, **Chapter 2** set the scene for this study by critically analysing the normative purpose and main functions of a 'right of reply' under the ECHR. Most importantly, it identified the heart of this thesis: what is meant by the term 'right of reply' for the purposes of this research? The answer to this question identified a set of

criteria and benchmarks for what can be considered a functional equivalence to this remedy, which informed the subsequent examination of the *status quo* in Germany and England & Wales. By conducting a uniquely comprehensive analysis of the ECtHR's jurisprudence and the relevant documents issued by the CoE, this chapter went beyond the existing knowledge and thus provided a significant contribution to the literature.

Chapter 2 argued that the main function of the right of reply under the ECHR is to enable a person who has been made the subject of a story in the media to speedily and promptly publish their own view in the same forum. Furthermore, it demonstrated that the normative purpose of such a right of reply is twofold. From an Article 8 point of view, it allows a person to protect themselves from information or opinions, disseminated by means of mass communication, that would be likely to infringe their rights under said Article. From an Article 10 point of view, it not only allows false information to be challenged, but also ensures a plurality of information and opinions. Hence, a right of reply can be employed not merely to ensure the retraction of incorrect facts but also to offer an opportunity to vindicate reputational rights and enhance both public discourse and reliable media coverage. Additionally, Chapter 2 established that there is a positive obligation on contracting states to ensure 'a reasonable opportunity to exercise a right of reply'.[1] Although the ECtHR has established this obligation only for the printed press, this chapter argued that the Court is likely to extend it to 'press-like' online publications if posed with the question.

Nevertheless, the chapter also concluded that although a right of reply serves to establish 'equality of arms' for those who are in a 'weaker' position than the media, it is not absolute as the limitation on a newspaper's freedom of expression must be kept within proportionate bounds. Thus, Chapter 2 stressed that in order to provide a 'level playing field' between the publisher and the 'affected' person, one must take into account not only the individual's rights but also the newspaper's interests.

2.2. The right of reply in the press in Germany

Using the definition and characteristics of a right of reply as established in Chapter 2, **Chapter 3** examined whether there are rules and practices within the German legal system that enable a person who has been made the subject of a story in the press to publish

[1] As discussed in section 3.

their own view in the same forum. Furthermore, it evaluated how those rules work in practice. In order to achieve this, this part of the thesis conducted a doctrinal analysis of the relevant case law, legislation and the scholarly literature including an investigation into the constitutional background and the historical origins of the statutory right of reply.

In conclusion, Chapter 3 demonstrated that the statutory right of reply is bound by the imperatives of the German Basic Law; subject to the same 'formal requirements' across all media services; and affords a person a general right to have a response published on their own terms. However, it runs the risk of being abused by claimants as newspapers might be forced to print inaccurate replies against their will on their front page. Chapter 3 argued that this potential pitfall might unjustifiably limit a newspaper's freedom of expression. It further suggested that the current legal framework disincentivises media services from offering (informal) opportunities to respond to allegations *outside* the statutory framework such as the publication of a reader's letter, a correction or a follow-up article.

Ultimately, the chapter concluded that the practical application of the statutory right of reply requires further examination through qualitative methods to test whether there is a difference between the 'law in the books' and the 'law in practice'. Further insight was also required to examine whether the supposed 'chilling effect' of the statutory right of reply on media freedom is a mere academic argument or if those working in the media perceive it.

2.3. Replying to the press in England & Wales

Chapter 4 pursued similar aims as Chapter 3. Its main objective was to identify the relevant rules and practices in England & Wales that fulfil a similar purpose to that of the right of reply under the ECHR, as established in Chapter 2. This was followed by an assessment of their practical application. In order to achieve this, Chapter 4 examined the relevant (self-)regulatory mechanisms, legislation and the scholarly literature. Furthermore, it provided a significant contribution to the existing literature by undertaking a novel and original systematic analysis of IPSO's complaints resolution. It also carried out an investigation into the historical reasons for why England & Wales does not have a statutory right of reply in the press.

In conclusion, Chapter 4 argued that the English legal system seems to fall short of affording individuals a general right to have a response published on their own terms in the press. Under the self-regulatory Editors' Code of Practice (ECP), the 'opportunity to reply' does not provide for 'equality of arms' and seems to be more favourable for the newspaper. Thus, the complainant does not have enough power to influence the process, resulting in a 'right to request a reply' instead of a right of reply. Similarly, although some elements of a right of reply are seen to exist in Defamation Law, the use of those options is 'haphazard' and 'their availability as a matter of law is limited'.[2]

Nevertheless, Chapter 4 demonstrated that in contrast to the German statutory remedy, the current self-regulatory system provides several incentives for newspapers to come to an amicable agreement with a complainant at an early stage of the complaints process and provide him with an 'informal' right of reply. Likewise, the view of the right of reply in Defamation Law seems to be essentially *defensive*: it is one of the few ways that the media can demonstrate good faith and responsible reporting. Hence, contacting the subject of a story *prior* to the publication of an allegation to obtain his view of a story is nowadays counselled as a way to help establish defences to defamation. However, the chapter stressed that the practical relevance of those incentives requires further examination through qualitative methods to test whether there is a difference between the 'law in the books' and the 'law in practice'.

2.4. Replying to the press in Germany and England & Wales: A qualitative insight

After the analysis undertaken in Chapters 3 and 4, the primary aim of **Chapter 5** was to fill in the identified gaps in knowledge. In order to achieve this, it reported on the unique fieldwork undertaken in England and Germany that investigated the right of reply's impact on the work of the press as well as the differences and the similarities between both jurisdictions. This novel research provided an original thematic analysis of 25 semi-structured elite interviews conducted with judges, editors and lawyers, focusing on their experiences with the right of reply in the press. Subsequently, it discussed the findings in light of the research conducted in the previous chapters, filled in identified gaps in knowledge and thus provided a significant contribution to the existing literature.

[2] See Chapter 4.

For Germany, the participants highlighted that although it seems rather straightforward in theory, enforcing a right of reply against the will of a newspaper requires extremely specialised legal expertise and is nearly impossible to achieve for an ‘ordinary citizen’ or even a lawyer who is not an expert in this area of law. Significantly, Chapter 5 further revealed that in the vast majority of cases, national newspapers are likely to turn down a request to print a right of reply, and the courts then need to become involved. Thus, it was argued that the statutory right of reply is far less accessible to the ‘ordinary citizen’ than its normative purpose would suggest. This not only limits the danger of being ‘flooded’ by requests to print replies but also demonstrates that the newspapers are more powerful in relation to the right of reply than what it seems from the ‘law in the books.’ This original insight into the practical application of the statutory right of reply in Germany challenged some of the most common criticisms brought forward against a mandated reply remedy,[3] and thus advanced the existing knowledge significantly. Nevertheless, Chapter 5 also emphasised that *if* a claimant has the financial resources to take up the advice of one of the few specialised lawyers, there is not much a German newspaper can do to prevent the publication of a right of reply even if said reply contains inaccuracies. Additionally, it was established that there is an inconsistency of how judges interpret the ‘formal requirements’ underpinning the statutory right of reply, leading to legal uncertainty.

For England & Wales, Chapter 5 demonstrated that in contrast to their German colleagues, journalists based in England stressed that they see a right of reply’s main function as giving the subject of a story an opportunity to contribute *before,* rather than post-publication, to a story. Chapter 5 argued that this is because of the incentives contained within Defamation Law and the publishers’ aim to avoid having to pay any legal costs. Furthermore, the chapter demonstrated that the majority of requests for printing a right of reply in response to a story are resolved amicably *without* IPSO becoming involved. Different to Germany, even national newspapers resolve such requests by the publication of a reader’s letter or follow-up article, which is primarily due to the different incentives in the legal systems to offer such alternatives to a ‘formal’ right of reply. However, Chapter 5 also strengthened the previously made assumption that the ‘opportunity to reply’ in the ECP does not provide for ‘equality of arms’ as providing a right of reply post-publication is often seen as a somewhat ‘generous gesture’ by publishers, rather than something they feel obligated to. Most importantly, this comprehensive investigation into the workings of IPSO’s self-regulatory system provides a novel contribution to the literature.

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[3] See Chapters 2 and 4.

3. Comparative analysis

The previous part of this chapter provided an overview of the key findings and arguments developed in each of the thesis' chapters. This section draws further on the undertaken research and conducts the comparative analysis between the legal systems using the criteria of the right of reply established under the ECHR as a benchmark. In order to achieve this, it first draws on Chapter 2 to establish said benchmarks (section 3.1), before then exploring the differences and similarities between Germany and England & Wales (sections 3.2–3.8).

3.1. What are the benchmarks for the comparison?

As detailed in Chapter 2, there is a positive obligation under the ECHR for contracting states to ensure that a person has 'a reasonable opportunity to exercise his right of reply by submitting a response to a newspaper for publication and, secondly, that he had an opportunity to contest the newspaper's refusal' (section 3.2). It was also demonstrated that there is a positive obligation to afford a reply in the same manner as the original dissemination (section 3.3). Furthermore, this positive obligation is not limited to individuals who have been personally attacked or suffered defamatory remarks. Instead, it should be extended to what the ECtHR calls a 'critical assessment of performance' (section 3.4). Also, although not explicitly included as part of the positive obligation on contracting states, on several occasions the Court also highlighted that swift proceedings are crucial for the effectiveness of the right of reply. Thus, the ECtHR emphasised that the veracity of the statements contained in the reply or the statements that gave rise to it should not be checked in 'any great detail' (section 3.5).

In addition to what is being *required* to be guaranteed by the state, the analysis of the ECtHR's jurisprudence revealed further detail regarding what infringements on a newspaper's freedom of expression caused by the exercise of a right of reply are considered *permissible*. Following the ECtHR's most recent case law, the reply itself may not only contain statements of facts that are necessary to rebut the contested information published by a newspaper but also criticism of the respective publisher as long as the reply's 'tone' is 'substantially similar' to the original article (section 3.6). Furthermore, the Court sees it as permissible that a right of reply may be exercised against both factual assertions and opinions (section 3.7). Concerning the personal scope of the remedy, Chapter 3 noted that

it is further permissible for a state to also allow public authorities to invoke a right of reply (section 3.8).

3.2. 'Reasonable opportunity' to exercise a right of reply and 'contest of refusal'

Chapter 3 demonstrated that the statutory right of reply contained within the Press Acts of the *Länder* does amount to 'a reasonable opportunity to exercise his right of reply by submitting a response to a newspaper for publication'. As detailed there, the *Gegendarstellung* enshrined within the legislation enables a person referred to by an 'assertion of fact' published by a newspaper to frame his own answer in response. If the requested right of reply adheres to the content and form requirements as set out in the Press Acts, the newspaper is then obligated to publish the person's reply. If a publisher rejects to print the demanded response, one may contest this refusal by bringing a motion for an injunction at the competent Regional Court, which can order the newspaper to print a reply. This satisfies the second part of the positive obligation as formulated by the ECtHR. The same conclusions apply to the statutory legislation setting out the right of reply for telemedia services providing 'journalistic-edited content',[4] which is based on the same principles as its counterpart in the printed press. Nevertheless, the empirical investigation in Chapter 5 demonstrated that only those who have the financial means to take up the advice of one of the few specialised lawyers are likely to successfully invoke a statutory right of reply. Crucially, having established this difference between the 'law in the books' and the 'law in action' not only helps understanding why, generally, the majority of the participants working for German newspapers do not 'fear' the statutory right of reply, but also underpins the significance of this research.

In contrast to Germany, neither of the identified functional equivalences to a post-publication right of reply in the press in England & Wales afford a person a general *right* to have a response published on their own terms. As detailed in Chapters 4 and 5, under the current self-regulatory regime it is primarily within a newspaper's discretion and a matter for its editorial judgement to decide if and how the 'opportunity to reply' as set out in clause 1(iii) of the ECP is put into practice. This thesis argues that this difference between the legal systems is primarily due to the different historical origins of the relevant rules and practices. In England & Wales, the drafting of the 'opportunity to reply' in the ECP has been heavily influenced by the industry, who are unlikely to advocate for a strong

[4] See section 4 for discussion regarding the scope for online content in both legal systems.

right of reply given editors' fierce resistance against any interferences with their editorial freedom. In contrast, the *status quo* of the German statutory right of reply in the press can be explained primarily by the influence of the French '*droit de réponse*' in the early 1800s and the influence of the Allies on the developments in press regulation after the end of the Second World War.[5]

However, one may argue that the identified rules that fulfil the function of a post-publication right of reply in England & Wales nevertheless meet the requirements set out by the ECtHR. This is primarily because the Court has not sought to define what was understood by a 'reasonable opportunity to exercise his right of reply' other than saying that a newspaper's denial of publishing a person's reply must not be 'arbitrary and disproportionate'. In other words, it does not require contracting states to guarantee an unfettered right of reply. This is only logical, considering that even if a positive obligation is required under the Convention, contracting states have a margin of appreciation when assessing what needs to be done to comply with any positive obligation that they have under Article 10. Thus, a measure of discretion, subject to the principles of effective protection and proportionality, arises in relation to how a particular positive obligation is discharged. For example, this margin of appreciation as to how this positive obligation is implemented allows contracting states to decide if they want to ensure a 'reasonable opportunity' to exercise a right of reply by means of statutory, co- and/or self-regulation.[6] Therefore, this thesis argues that Clause 1(iii) of the ECP, which details that one may 'reasonably call' for an 'opportunity to reply', satisfies the requirement to allow a person to submit a reply to a newspaper for publication.

If a newspaper refuses to publish said reply, the question then arises whether there is an 'opportunity to contest the newspaper's refusal' as required by the ECtHR. As detailed in Chapter 4, a person that has been refused an 'opportunity to reply' may lodge a complaint with IPSO who may request the publication of a 'clarifying correction', which is functionally equivalent to a right of reply. Despite the lack of a judicial remedy or judicial supervision against IPSO's decisions,[7] this seems to satisfy the ECtHR's test. This is because the ECtHR in *Melnychuk*, i.e. the case which first established a positive obligation to provide a right of reply, did *not* hold that as part of the positive obligation on contracting states are required to ensure that a newspaper's refusal may be challenged in *court*.

[5] See Chapter 3.
[6] See Chapter 2.
[7] See Chapter 4.

Instead, the Court made a reference to section 8 ('Settlement of Disputes') of the CoE Committee of Ministers' 2004 Recommendation on the Right of Reply when discussing this issue.[8] There, it is detailed that 'if a medium refuses a request to make a reply public' it should be possible for a person to 'bring the dispute before a tribunal or another body with the power to order the publication of the reply.' According to the official explanatory notes to this recommendation also provided by the Committee of Ministers, 'this could be an ordinary court, an independent regulatory authority or a self-regulatory body whose members have agreed to abide by its decisions'.[9] Thus, even though one may argue that IPSO is not an independent regulatory authority,[10] it falls within the latter category.

However, one may nevertheless argue that IPSO does not actually have the 'power to order the publication of the reply' in the hypothetical scenario where a publisher does not abide by IPSO's rulings, since the regulator derives its authority solely from the voluntary contractual submission of its members. As detailed in Chapter 4, during the Leveson Inquiry this form of regulation was criticised for the regulator's supposed lack of enforcement powers. This thesis demonstrated that due to the costs and the complexity of any relevant court proceedings, there is the risk that IPSO might be unwilling to take action against publishers who refuse to abide by its rulings. It was further noted that, due to the doctrine of privity of contract, under no circumstances can the complainants themselves take action in order to force publishers to abide by their contractual duties.

Yet, as detailed in Chapter 4, the analysis of IPSO's complaints resolution did not reveal a scenario where a publisher refused to abide by an IPSO ruling. As already argued in Chapter 5, this might be because a working system of press self-regulation makes it less likely that the government sees the need to launch another inquiry into the press, or to introduce statutory legislation, which newspapers aim to avoid at all costs. Indeed, the qualitative examination of the workings of the press showed that the majority of the participants working for newspapers noted that they, as a rule, are happy to provide complainants with an (informal) opportunity to add their view to a story in response to allegations in order to avoid a breach of the ECP. This unparalleled insight into how the

[8] Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies). See Chapter 2.
[9] CoE Ministers' Deputies, 'Explanatory Memorandum to the draft Recommendation on the right of reply in the new media environment. CM(2004)206 addendum', para 33 (*CoE*, 17 November 2004) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db982>.
[10] See e.g.: MST, 'The Independent Press Standards Organisation (IPSO) – Five Years On', p 23 (*MST*, 2019) <http://mediastandardstrust.org/wp-content/uploads/2019/10/MST-IPSO-2019-Final-Version.pdf>.

regulatory system works in practice once again demonstrates the significance of this (empirical) research.

In any event, further issues arise in relation to those publications that operate outside IPSO's self-regulatory regime. As detailed in the Introductory Chapter, an analysis of the rules employed by IMPRESS is beyond the scope of this thesis. Regarding publications like *The Guardian* or the *Financial Times,* who have not joined either of the regulatory bodies, it was noted that they operate an in-house complaint handling procedure. Even if this enables a person to submit a right of reply for publication, it does not satisfy the second part of the ECtHR's test as it is not possible to bring the dispute before a tribunal or another body with the power to order the publication of the reply.

3.3. 'Critical assessment of performance'

As demonstrated in Chapter 2, the positive obligation to provide for a right of reply is not limited to individuals who have been personally attacked or suffered defamatory remarks. Instead, it should be extended to what the ECtHR calls a 'critical assessment of performance'. If measured by this benchmark it is striking that in comparison, the German statutory right of reply is wider in scope. With the same principle applying in all separate right of reply statutes across all media services, the remedy may be invoked by anyone who has been 'affected' by an 'assertion of fact'. This merely requires a person who is seeking to invoke a right of reply to show that the statement in question either directly or indirectly refers to him.[11] Hence, a person does not have to show that the statement he is seeking to reply to was harmful, inaccurate or injurious. Despite this comparatively low threshold, Chapter 5 demonstrated that the drafting of the legislation does not lead to a 'flooding' of the press with requests to print replies due to the safeguarding function of the legislation's 'formal requirements'. In other words, this original and novel research established the differences between the theoretical and practical impact of the statutory right of reply in Germany.

Similarly, the scope of the 'opportunity to reply' in the ECP is *not* limited to personal attacks or defamatory remarks. However, Chapter 4 demonstrated that different to Germany, it is subject to the existence of 'significant inaccuracies' (as opposed to alleged inaccuracies) within the story a person is seeking to reply to. Thus, if the complainant and

[11] There are a few exceptions, see Chapter 3.

the newspaper disagree over whether a story is significantly inaccurate, IPSO will only uphold a complaint if an inaccuracy is so significant that it altered the 'overall meaning of the article'. In contrast, under the German rules a person who has been made the subject of a story that contains several factual assertions may decide for themselves which of those statements of fact he is replying to,[12] independently of whether this assertion altered the overall meaning of the article. In other words, one might successfully invoke a right of reply as soon as a newspaper article contains one factual assertion that refers to the person who is seeking to reply.[13] If an article contains several factual statements, there might be several rights of replies whereas this is not possible under the English system. Thus, whilst the 'significant inaccuracy requirement' roots out attempts to obtain a right of reply in response to a 'minor inaccuracy' in England & Wales, one is likely to be able to (judicially) enforce the publication of those replies in Germany.[14]

However, this thesis has demonstrated that the practical relevance of this difference between the legal systems is not as significant as it seems from the 'law in the books', primarily because in Germany a layperson is not able to force a newspaper to print a reply by himself. Therefore, similar to the situation in England & Wales, whether 'ordinary citizens' who have not taken up the advice of one of the few specialised lawyers will be successful in attempting to add their own view to a story often depends on the newspaper's willingness to grant such an opportunity. This is another crucial example for where the novel research conducted in this thesis has demonstrated that despite seeming diametrically opposite on paper, the practical application of the statutory right of reply remedy in Germany and its functional equivalent in England & Wales often produces similar outcomes.

In any event, normatively it can be questioned whether obligating a newspaper (and thus limiting their freedom of expression) to print a right of reply against 'minor alleged inaccuracies' is necessary and required to protect a person's personality rights as guaranteed under Article 8. Furthermore, from an Article 10 point of view it can be doubted whether the obligation to print a reply against minor (alleged) inaccuracies that do not amount to a 'critical assessment of performance' (as it may be the case in Germany) is necessary to

[12] See e.g.: Klaus Sedelmeier, 'Gegendarstellung' in Martin Löffler et al. (eds), *Presserecht* (C.H. Beck 2015) 723; Axel Beater, *Medienrecht* (Mohr Siebeck 2016) 768.
[13] If all other requirements are fulfilled. See e.g.: Emanuel Burkhardt, 'Gegendarstellungsanspruch' in Karl Wenzel et al. (eds), *Das Recht der Wort- und Bildberichterstattung* (Dr. Otto Schmidt 2018) 873.
[14] For the historical background see Chapters 3 and 4.

enhance the public discourse and thus justifies the interference with a newspaper's editorial power. On the other hand, limiting the scope of a right of reply to 'significant inaccuracies' (as opposed to alleged inaccuracies) slows down the complaints process and may ultimately jeopardise the remedy's desired immediacy and ready availability.

3.4. 'Same manner as the original dissemination'

Chapter 3 demonstrated that in Germany, a right of reply must be publicised with 'equal prominence' as the factual assertion it is replying to. This requirement, which is enshrined within the relevant legislation for all media services, aims to guarantee that the reply, if possible, attracts the same level of attention as well as publicity (*Publizität*) as the original statement and is therefore read by a similar audience. After tracing the origins of this requirement back to the 19th century, this thesis noted that in order to provide for 'equality of arms', a newspaper may be obligated to print a reply on its front page if this had also been the case for the original statement.[15] Significantly, Chapter 3 questioned the persuasiveness of the German Federal Constitutional Court's (*BVerfG*) argument that despite the 'unique function' of a newspaper's front page, this should, generally, be seen as a justified limitation of press freedom. If compared to the benchmarks set under the ECHR, it is striking that the ECtHR similarly stressed the importance of publishing the reply 'in the same manner as it was disseminated'. Furthermore, the CoE added that 'the reply should be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact'. On first glance, one may therefore conclude that the German *status quo* is in line with the parameters set under the ECHR.

However, neither the ECtHR nor the CoE have indicated whether this also requires a publication on the front page. In fact, it is yet to be determined if the ECtHR would find a front-page reply to be a permissible limitation of press freedom. On the one hand, the ECtHR has repeatedly stressed the importance of a right of reply for protecting a person's rights guaranteed under Articles 8 and 10 as well as ensuring a plurality of information and opinions. The interference with a newspaper's freedom of expression was further justified with the argument that a right of reply as interpreted by the ECHR does not obligate the newspaper to amend the original article, or prohibit them from republishing

[15] See section 4 for further consideration of this requirement in an online environment.

their version of the facts. One might therefore claim that the same arguments could be applied to a publication on the front page.

On the other hand, the ECtHR also emphasised that a newspaper's editorial freedom may only be limited in 'exceptional circumstances'. Although the Court has recognised the right of reply as an exception to this rule, it must not unjustifiably interfere with a newspaper's freedom of expression. However, whilst the ECtHR so far only extended the right of reply's scope to individuals who have been affected by a 'critical assessment of performance', the German statutory right of reply is wider in scope.[16] Thus, the scenario may arise where a German newspaper is obligated by the Press Acts of the *Länder* to print a reply on their front page in response to a factual assertion that does not amount to a 'critical assessment of performance'. Despite the margin of appreciation available to contracting states in such cases,[17] it seems likely that considering the unique function of a newspaper's front page and the importance of upholding a newspaper's freedom of expression, the ECtHR could come to different conclusions than the *BVerfG*.

In contrast to the German statutory rules, IPSO's self-regulatory regime gives a complainant little to no chance of influencing how prominently his reply will be published. This is because different to the 'correction' under clause 1(ii) of the ECP, the 'due prominence' requirement does not apply to the 'opportunity to reply' under clause 1(iii). Instead, the prominence given to an 'opportunity to reply' is determined by the editorial judgement of the newspaper. In comparison, the German rules therefore appear to favour the individual whilst the English rules sit at the other end of the spectrum, appearing to favour the newspaper. This difference between the German and English rules and practices may be explained by the fact that the ECP is written by a committee primarily made up of editors, who have historically resisted rules that would obligate them to limit their editorial power. However, Chapter 4 demonstrated that IPSO's complaints resolution incentivises newspapers to offer the publication of a 'clarifying correction' in the terms of Clause 1(ii), which should be seen as functionally equivalent to a right of reply. Crucially, however, it is predominantly the publisher's decision (and in the last instance IPSO's) whether or not to offer such an alternative to a complainant. Indeed, in most complaints, the regulator is willing to accept a newspaper's determination if and how a reply should be published.

[16] See section 3.
[17] See Chapter 2.

Chapter 4 further demonstrated that certain rules employed under English Defamation Law incentivise publications to publish a reply to defamatory allegations with equal prominence either as part of the story where the allegations are first aired or post-publication to vindicate a person's reputation. However, the majority of rules that contain elements of a right of reply make the wording, time, manner, form and place of its publication either subject to agreement with the defendant or leave it up to the court's discretion. Thus, in contrast to the German statutory right of reply, the defendant (i.e. the newspaper) seems to be more powerful when it comes to negotiating if and how a reply may be published, which is why a publication of a reply 'in the same manner' as the original allegation is not always guaranteed.

Nevertheless, although this difference between the legal systems exists according to the 'law in the books', it is seminal to note the significant and original findings in Chapter 5 in order to comprehend its practical relevance. There, the participants working for German newspapers stressed that if a person requested the publication of a reply on the front page, they would not publish it voluntarily *in any event*, even if the person is legally represented and all statutory requirements are fulfilled. Therefore, not only is the publication of a right of reply on the front page solely in reach for claimants who are financially able to take an action in court, but it is also likely that the newspapers will pull every stop available to prolong publication for as long as possible. This may jeopardise the remedy's desired immediacy and ready availability. Hence, similar to England & Wales, a claimant might have to negotiate with a newspaper in order to obtain a *speedy* publication of his reply in such cases, making a publication on the front page less likely.

3.5. Veracity

As detailed by the ECtHR, right of reply proceedings should not be concerned with the veracity of the reply in 'any great detail'. In general, right of reply procedures in German courts for all media services are not concerned with the veracity of the allegation in question or the reply to it. As a result, a person does not have to provide (*prima facie*) evidence, neither for the veracity of his reply nor for the falsity of the original statement. This is primarily because it has historically been seen as necessary for the promptness of the remedy, as examining the truth or falsity of the statement complained about would require an evaluation of the evidence provided by the parties and more time. Crucially, this is congruent to what has been put forward by the ECtHR in this context.

Similar to the German rules, IPSO's complaints process is *not* concerned with making formal findings of fact and, therefore, does not operate under formal rules of evidence. Instead, Chapter 4 demonstrated that IPSO's Complaints Committee is required to, 'as best as it can identify areas in which there is a factual dispute between the complainant and publication that has a bearing on the judgement it is required to make as to whether the Code has been breached'. In doing so, it 'assesses the evidence that has been provided to it by the parties or otherwise obtained by the Executive through the investigation process; and reaches a judgment as to how that dispute should be resolved'. Therefore, there is no burden of proof in a legal sense to prove the truth or falsity of a published statement on either publisher or complainant.

However, due to the 'opportunity to reply' being subject to the existence of 'significant inaccuracies' (as opposed to factual assertions), there are more opportunities for newspapers to defend themselves against a person's attempt to enforce the publication of an inaccurate reply compared to Germany. Most importantly, if a complainant alleges that a newspaper refused him an opportunity to reply despite having published inaccurate information, the publisher *may* counter this allegation by either providing evidence for the truth of the fact, or by showing that there has not been any reason to doubt the source where the information came from. In contrast, the German statutory right of reply severely limits newspapers in their use of (*prima facie*) evidence when attempting to establish the accuracy or inaccuracy of the statements involved. Thus, although in Germany a newspaper may refuse the publication of a reply if its content is 'obviously untrue' (*offensichtlich unwahr*), Chapters 3 and 5 demonstrated that this burden of proof on the publications has amounted to an almost insurmountable obstacle to overcome.

In fact, the empirical investigation in Chapter 5 provided the significant insight that national newspapers in Germany often had to deal with situations where claimants who were represented by a legal expert were abusing this *status quo* and attempted to force the publisher to print a reply containing inaccuracies. Crucially, those participants stressed that this runs the risk of causing a 'chilling effect' on press freedom if the number of cases of abuse increases and if this is not properly addressed by the lawmaker. This novel and original research therefore significantly contributes to the existing literature by providing a new, and substantiated, view of how the law impacts practice.

In comparison, the significant inaccuracy requirement under the ECP acts as a barrier for those who are acting in bad faith. Different to Germany, it is therefore less likely that

newspapers will have to print a reply that contains inaccuracies against their will. Normatively, this is beneficial for a newspaper's editorial freedom, yet slows down the complaints process and thus weakens the immediacy and promptness of the right of reply.[18] In contrast, the German statutory right of reply is much more focused on the protection of personality rights at the cost of a newspaper's freedom of expression. In fact, the German right of reply legislation seems to assume that the person seeking to reply to an article is predominantly acting in good faith although this thesis has provided significant and original empirical evidence that often this is not the case. Considering the remedy's historical origin,[19] it seems like the historical lawmaker has deliberately taken the risk of the press having to print an inaccurate reply in favour of allowing someone who has been referred to by the media to 'set the record straight'. Since Chapter 5 of this thesis produced novel findings which demonstrated the negative impact of this approach on press freedom, it provided practical insights crucial for the contemporary understandings and interpretations of the *status quo* in Germany.

3.6. Admissible content of the reply

Chapter 2 demonstrated that the ECtHR found the content of a reply to be admissible *despite* it including disparaging remarks about the editor responsible for the original statement. In fact, the reply at issue in *Eker* included several comments that went *beyond* merely rebutting factual assertions. Particularly, it stressed that the editor who wrote the piece which gave rise to the reply is part of a group of 'so called journalists who write according to the wishes and desires of their boss and praise certain categories of people' who are therefore known as 'maintained or dependent journalists'. Furthermore, the reply claimed that the editor had 'not fulfilled his duties' as a member of the journalist association who filed for the right of reply, including the 'payment of his contributions'. Despite noting that this amounted to a 'criticism of the applicant' as well as 'implicit insinuations as to his professional integrity', the ECtHR did not object to these statements, primarily based on the argument that the reply's tone was 'substantially similar to the original contribution'.[20] As discussed in Chapter 2, this thesis argues that this goes beyond a justified limitation of a newspaper's right to freedom of expression.

[18] However, note the differences regarding incentives to come to an amicable solution at an early stage of the complaints process as discussed in section 2.
[19] See Chapter 3.
[20] Chapter 2 argues that this goes beyond a justified limitation of a newspaper's right to freedom of expression.

Crucially, the German position is in line with what this thesis has put forward. Although German scholars have recognised that the *tone* of a reply may mirror that of the original statement,[21] for example, if a factual assertion published by a newspaper contained slang words the reply to it may do so as well, a German court would have come to different conclusions than the ECtHR. There is a consensus in both case law and the literature that a newspaper may rightfully refuse the publication of a right of reply if it goes beyond what is necessary to rebut the factual assertion in question and instead contains statements or remarks that are not related to the original contribution.[22] This can be justified with the reply's normative purpose, which is focused on protecting personality rights and providing the public with both sides of a story rather than allowing someone to reciprocate personal insults and criticism. As noted by Sedelmeier, this avoids newspaper's turning into a 'romping place of public polemics' (*Tummelplatz öffentlicher Polemik*).[23] Limiting the content of a right of reply to a rebuttal of the factual assertions published by a newspaper further prevents an additional restriction of the press's editorial freedom and keeps the remedy within proportionate bounds. Thus, the requirements under the German system for the reply's content are stricter compared to what has been put forward in the ECtHR's latest judgment.

Under the English system, the situation is less clear. The systematic analysis of IPSO's complaints resolution did not reveal a scenario where a newspaper refused the publication of a right of reply because it contained criticism of the editor. Furthermore, IPSO's rules and regulations did not provide additional insight. However, considering the findings of this thesis, it seems unlikely that a person would be successful in attempting to enforce the publication of a reply containing criticism of the editor. As noted above, different to Germany, IPSO's 'opportunity to reply' does not enable a person to frame his own answer in reply without further editorial control of the newspaper in most cases. Given this editorial power over the publication of the reply that is not present for media outlets in Germany, it therefore seems unlikely that an editor would allow a response to go beyond merely rebutting factual assertions.

Similar conclusions apply to the rules and practices identified in English Defamation Law. As noted above, the majority of rules that contain elements of a right of reply make the wording, time, manner, form and place of its publication either subject to agreement

[21] See e.g.: Burkhardt (n 13) 902.
[22] See e.g.: Walter Seitz, *Der Gegendarstellungsanspruch* (C.H. Beck 2017) 92.
[23] Sedelmeier (n 12) 728.

with the defendant or leave it up to the court's discretion. Thus, in contrast to the German statutory right of reply, a defendant is more powerful when negotiating the content of the reply. Hence, a reply is unlikely to contain criticism of the editor responsible for the original statement, even if this is not prohibited per se.

3.7. Extension to opinions

Chapter 2 demonstrated that despite contrasting recommendations made by the CoE, the ECtHR views it as permissible for contracting states to extend the scope of a right of reply to both factual assertions and opinions even though this potentially increases the remedy's interference with press freedom. Nevertheless, the functional equivalences identified for comparison in both legal systems are limited in scope to factual statements.[24]

As detailed in Chapters 2 and 3, this thesis suggests that this limitation should be welcomed. Although it may be argued that extending the right of reply's ambit to opinions is necessary to afford a comprehensive protection of an individual's rights guaranteed under Article 8 and thus to ensure 'equality of arms', the downsides of such a broad scope still prevail. Most importantly, restricting the remedy's scope and hence keeping it in proportionate bounds, is necessary to safeguard the media's interest in publishing comments and opinions 'sanction free'. Ultimately, this helps to preserve the public discourse in the media. Following this line of argument, allowing a right of reply against an expression of opinion would obstruct the press's task of scrutinising and criticising public events.

3.8. Permissible personal scope

Chapter 2 further argued that although the ECtHR did not make it part of the positive obligation on contracting states, it views it as *permissible* to also include public authorities within the right of reply's personal scope. Except for the rules and practices identified in English Defamation Law, this thesis demonstrated that both the German statutory right of reply and the rules employed under the ECP may be invoked by public authorities. However, from a normative point of view, this thesis repeatedly argued that including public authorities within the right of reply's personal scope should not be seen as desirable. This is primarily due to the right of reply's impact on a newspaper's editorial freedom. Throughout this thesis, the right of reply's interference with press freedom has been

[24] See Chapters 3 and 4.

predominantly justified with the remedy's purpose of protecting personality rights and guaranteeing equality of arms. Not only may a public body not rely on the former, Chapter 3 argued that also they are in a more powerful position than an 'ordinary' individual when it comes to rebutting a statement made in the press. Since public authorities must further be open to criticism as political and administrative bodies, it therefore seems more persuasive to exclude them from the right of reply's scope to avoid a chilling effect on press freedom.

Nevertheless, Chapter 5 revealed that journalists and editors in both jurisdictions do not seem to desire a change of this *status quo*. From a German perspective, this is primarily because public authorities do not often make use of their statutory right of reply as they are facing budget restraints and therefore do not want to face the financial risk that the judicial enforcement of the remedy would entail. From an English perspective, it was noted that a complaint under the ECP, even if lodged by a public authority, does not put newspapers in risk of having to pay hefty damages or legal costs, which is what publishers are most concerned about. This is another example for where the research conducted throughout this thesis challenged a perception from the 'law in the books', demonstrated how the law works in action instead and thus made a significant contribution to the existing literature.

4. Going forward – the right of reply in an online environment

As people from every age group have increasingly been choosing online publications as their main news source,[25] this section pays particular attention to the operation of a right of reply online and synthesises the arguments regarding this issue made throughout this thesis. In order to achieve this, it briefly reiterates the *status quo* in both legal systems (section 4.1), including a comparative analysis of the differences and similarities, before assessing potential challenges for operating a right of reply online going forward (section 4.2).

4.1. Comparative analysis of the *status quo*

As detailed in Chapter 3, section 56 of the Interstate Treaty on Broadcasting and Tele-

[25] See Chapter 2.

media (*Rundfunkstaatsvertrag*) contains a statutory right of reply for (certain) online content. According to this legislation, a right of reply may only be requested in response to a factual assertion published by the 'service provider' of a 'telemedia service' that offers 'journalistic-edited content'. Whilst the lawmaker has provided a definition for the former two legal terms, this is not the case for the latter. This thesis demonstrated that the interpretation of this term is crucial, as it is decisive for determining the remedy's scope. Although some commentators interpret the term very broadly and argue in favour of including blogs run by individuals and personal social media accounts within its scope, this thesis disagreed with this position. Instead, it suggested a more restrictive approach limited to 'press-like' content, i.e., online services under the editorial responsibility of news publishers that are comparable to the 'traditional media'.[26] Based on the normative considerations outlined in Chapter 2, this position was primarily justified with the need to keep the remedy in proportionate bounds and to avoid a chilling effect on freedom of expression online. Hence, this thesis not only challenged the existing academic literature and the case law, but also put forward a more nuanced position, which underpins the originality of this thesis.

In comparison, the relevant rules identified for the printed press in England & Wales also extend to (certain) online content. Chapter 4 detailed that IPSO regulates the editorial content of its members that is published not only in a 'printed newspaper or magazine' but also on 'electronic services operated by regulated entities such as websites and apps, including text, pictures, video, audio/visual and interactive content produced by their members'. The latter also includes edited or moderated reader comments on newspaper and magazine websites, as well as social media pages run by and affiliated with its members. Furthermore, IPSO also regulates editorial content on electronic services operated by members where there is no print presence. Consequently, the clauses contained within the ECP do not distinguish between online and print material as it applies the same rules to both types of content. Additionally, the rules within English Defamation Law also apply to content published online.

However, whilst in relation to Germany this thesis argued in favour of restricting the right of reply's scope to keep it within proportionate bounds, it concludes that in contrast, the scope of the identified rules and practices in England & Wales may be too narrow. This

[26] See Chapter 3.

is because numerous UK online publications which can be seen as providing similar services as the 'traditional media' have neither joined either of the press self-regulatory bodies nor are they subject to regulation by Ofcom. This includes some of the most used websites for news in the UK,[27] such as *The Independent* as well as the UK versions of the *Huffington Post*, *Buzzfeed* and *Sky News.* The same applies to popular websites of newspapers with a print presence,[28] who have decided against submitting themselves to either of the two regulatory bodies such as *The Guardian* or *The Observer.*

In conclusion, there is a lacuna in relation to the right of reply for certain online platforms that could join one of the self-regulatory bodies but decided not to which is similar to the *status quo* in the printed press. As a result, the only recourse for a person who has been denied a right of reply by these online publications is either using the in-house complaints procedures or bringing a claim under Defamation Law. Whilst this thesis argues that the former creates an 'inequality of arms' between the complainant and the newspaper, the latter has been found to be unsuited to providing a satisfactory alternative due its complexity and the risk of high litigation costs.[29]

4.2. Looking ahead – challenges in operating a right of reply online?

Chapters 3 and 4 also addressed the issue of whether a right of reply can be operated online in a way that fulfils its normative purpose similar to that in the traditional media.[30] In conclusion, this thesis argues that the rules and practices identified in the legal systems are likely to achieve this aim. Primarily, this is because they found a solution to how the concepts for implementing a post-publication right of reply from the 'analogue world' can be adjusted to fit the technological differences present in an online environment.

For Germany, Chapter 3 detailed that the way in which a right of reply must be publicised to meet the statutory requirement of 'equal prominence' depends on whether the original statement is still online or whether it has already been taken offline. In case of the former, the reply must be inserted with the same font, in the same size and with the same 'visual impact' as the original statement. Furthermore, it must be added to the text of original

[27] Ofcom, 'News Consumption in the UK: 2019', p 58 (2019) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf>.
[28] ibid, 58.
[29] See Chapter 4.
[30] See also there for jurisdictional issues in an online environment.

statement ('in conjunction with it') in a way that distinguishes it from the rest of the article and makes it available on the exact same page as the factual assertion it is replying to. In the case of the latter, the reply must be published at a 'similar' section of the online service even if that means that this is the first thing a user notices when accessing a website (similar to the front-page reply in the printed press). Additionally, the online provider must ensure that the reply can be accessed in the same way and with the same speediness (i.e. with the same number of clicks) as the original statement. Also, the reply must remain online for as long as the statement it is replying to was online.

For England & Wales, the analysis of IPSO's complaints resolution revealed that the regulator and the newspapers follow a similar approach to ensuring that a reply is publicised with due prominence online (if required because of the significance of the inaccuracy). As detailed in Chapter 4, newspapers may offer a complainant the publication of a 'clarifying correction' or readers' letter alongside the original article to avoid a breach of the ECP, which was seen to be functionally equivalent to a right of reply as outlined under the ECHR. Furthermore, if posed with the question how a counter statement may achieve 'due prominence', IPSO will generally take into account the prominence with which an article is published on a homepage. In fact, IPSO may require an editor to publish a 'clarifying correction' on their homepage even when that article did not feature there originally.

Against this background, one may argue that, going forward, a 'formal' right of reply will become irrelevant in a social media context due to the various ways one may 'informally' reply to content posted online, for example by inserting one's view in the comment or reply section. However, this thesis suggests a different view. First, a reply publicised by the publisher responsible for the original statement is likely to attract more attention compared to a comment underneath a post or tweet hidden amongst hundreds of other replies even if the latter can be produced more speedily. Second, there are numerous ways in which technological opportunities can ensure that a formal right of reply attracts at least a similar level of publicity as the original statement,[31] whereas an 'informal' reply (especially for an individual) is less likely to reach a similar audience. For example, a right of reply in response to a post publicised on *Twitter* or *Facebook* can be 'pinned' to the top

[31] See e.g.: Craig Silverman, 'Eruption, Interrupted – What's the best way to correct an errant tweet?' (*CJR*, 2010) <https://archives.cjr.org/behind_the_news/eruption_interrupted.php>. For social media in general, see Ian Walden, 'Press regulation in a converging environment' in David Mangan et al. (eds), *The Legal Challenges of Social Media* (EE 2017) 75 et seq.

of the profile of the content provider who was editorially responsible for posting the original statement. Anyone visiting the profile would then see this 'pinned' post first, which could ensure a heightened attention and more visibility for a person's reply.

Furthermore, similar to online articles on newspaper's websites, posts made on *Facebook* can be edited so that they also contain a person's reply, may it be in form of a 'clarifying correction' or a readers' letter (or a 'formal' right of reply in case of Germany), alongside the original article.[32] This would ensure that anyone who reads the post after it was edited is also aware of the person's reply, which is a benefit for the person seeking to publish a reply compared to the printed press. In case a social media platform limits the number of characters to be used in a single post such as *Twitter,* a similar outcome could be achieved by composing the reply in a 'thread' consisting of several tweets. Alternatively, one could publicise a single tweet that contains a link to the reply on the publication's website including an announcement on whose behalf and in response to what article the right of reply is being published. Also, publishers could be obligated to (re-)post a reply multiple times if this had also been the case for the original statement. Given that it is possible to track how many people have seen a post on, for example, *Twitter* or *Facebook,* one may even suggest that this should be done until a similar number of people have seen the statement in reply.[33] Although one may counter this suggestion by saying that it is impossible to 'control' other people's timelines, it is crucial to note one can similarly not guarantee who will read a reply published in a printed newspaper.

However, from a normative point of view, it is important to reiterate that although the limitation on a publication's editorial freedom may be seen as less serious online, given that the finite space argument is redundant in the digital era, where there is no *de facto* limit on a publication's capacity,[34] the remedy should be kept within proportionate bounds. For the same reasons, potential proposals that would obligate publishers to 'promote' a social media post (i.e. to pay for advertising) to ensure the reply receives adequate publicity should not be pursued as this would put an unjustified financial burden on publishers.

[32] However, an edit that serves the sole purpose of merely retracting (alleged) inaccuracies instead of also adding a person's view to a story should not be seen as functionally equivalent to a right of reply, see Chapter 3.
[33] This does not necessarily mean that those are the *same* readers who have seen the original statement.
[34] See Damien Carney, 'Up to standard? A critique of IPSO's Editors' Code of Practice and IMPRESS's Standards Code: Part 1' (2017) 22(3) CL 77, 82.

Nevertheless, remembering the right of reply's normative purpose to establish equality of arms between the 'weaker' individual and the more powerful mass media, one may question whether the 'power balance' is different online. Particularly, there might be no need to guarantee 'equality of arms' for an individual who has obtained a following on social media comparable to the readers of a (local) newspaper, as he or she is likely to have his or her own means of replying to an allegation. However, this fails to appreciate that the term 'equality of arms' also indicates that a right of reply aims to reach a similar audience like the statement that gave rise to the reply. As discussed in Chapter 2, this can most likely be achieved by publishing one's reply in the same forum as the original statement, i.e., the media outlet that published the allegations in the first place. Indeed, only a person with a very large following would be able to reach a similar audience compared to an allegation published by, for example, the social media accounts of *The Sun* or the *Daily Mail*. In fact, even *if* one has gathered a significant following on social media, it cannot be guaranteed that those readers who took notice of an allegation published by, for example, *The Sun* or the *Daily Mail* will also pay attention to a response published on the affected person's *Facebook* or *Twitter* pages.

A recent example of how a right of reply may be operated on social media platforms is pictured in the figures below. It concerns an article by the *Hamburger Morgenpost*, a German regional newspaper, which was publicised on their *Twitter* account. There, the newspaper alleged that business man Frank Otto hosted a party at his house that required the police to get involved. After Otto invoked his statutory right of reply as detailed in section 56 of the *RStV*, the newspaper was obligated to publicise his view of the story on *Twitter*.

Figure 1: Tweet publicised on 23 June 2019

My translation:

Bottle throws, riots, arrests: Riot-party in Frank Otto's Alster-Villa

Figure 2: Reply publicised on 19 August 2019

My translation:

RIGHT OF REPLY regarding our article about Frank Otto, dated 23 June 2019

Right of reply

The URL https://twitter.com/mopo/status/1143032789203337216 contains an article, dated 23 June 2019, with the headline 'Bottle throws, riots, arrests: Riot-party in Frank Otto's Alster-Villa', which asserts the following:

> 'Bottle throws, riots, arrests: … in Frank Otto's Alster-Villa'

Regarding this, I note that:

The incidents described did not take place in my house.

Hamburg, 15 August 2019 Frank Otto

5. Final remarks and future research

The findings of this thesis suggest that there is ample scope for further research in this area. First, one could address the shortcomings identified in both jurisdictions and explore if and how inequalities between the press and the person who is seeking to reply could be rebalanced and whether redrafting of the existing rules should be considered. For Germany, Chapter 5 noted that some participants proposed to allow both claimant and defendant to apply for leave to appeal on a point of law to the Federal Court of Justice for Civil Matters (*BGH*) in right of reply cases in order to tackle the concerns over legal uncertainty raised above. However, considering the complexity of the German legal system, a full evaluation of if and how said proposal would work in practice goes beyond the scope of this thesis. Thus, further evaluation is required to test whether said changes are desirable and fit for purpose.

A future project focused on Germany could examine if and how involving the German Press Council (*Presserat*) within the process of invoking a right of reply could be beneficial for the remedy's normative purpose. In cases where a person and a newspaper disagree over whether a right of reply should be published, the *Presserat* could be tasked with acting as the first point of contact after which claimant or defendant could 'appeal' those decisions to the competent *Regional Court*. However, it would have to be examined if the *Presserat's* composition, funding and structure would be suited to take over this task.

For England & Wales, it could be explored how one may tackle the fragmentation of rules and practices fulfilling the function of a right of reply employed by newspapers and instead ensure that they are all subject to the same ruleset. The basis to this research could be Leveson's considerations regarding the financial and legal incentives for newspapers to join a 'recognised' regulator,[35] with a view to examine why those recommendations have so far not achieved the desired outcome as well as what could be done instead. Similar to the methods employed in this thesis, this future project could include a series of in-depth interviews with journalists, lawyers and policy makers. Additionally, considering the government's plans to establish a new 'duty of care' for certain online intermediaries

[35] The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 2012–13, 780) 1781 et seq.

such as social media platforms, which will be overseen by an independent regulator,[36] it will be important to monitor potential implications for a right of reply online.

Finally, any change or policy recommendation concerning the *status quo* in either of the legal systems based on this thesis' findings should remember the normative values that have underpinned this research. Whilst a right of reply is crucial to protect an individual's personality rights and enhance public discourse, it should not be guaranteed at every cost. Instead, it is equally important to keep the remedy within proportionate bounds to avoid an unjustified limitation on the (editorial) freedom of the media. Thus, the notion of 'equality of arms' between the parties involved should be the *leitmotif* not only for the present but also going forward.

[36] HM Government, 'Online Harms White Paper' (June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf>.

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Appendix A: Chapter 4 – Unregulated national newspapers

As noted in Chapter 1, *The Guardian* and the *Financial Times* (FT) have not joined either of the regulatory bodies. *The Guardian* has not joined IPSO because it was not 'satisfied […] that IPSO was entirely independent in the way we would hope'.[1] In contrast, the FT said that its current regulatory approach and decision not to join a regulator, was based on 'its standing as an increasingly digital news operation with a global footprint'.[2] Furthermore, it argued that due to their main competitors also being 'global news organisations, each of which applies its own system of independent regulation', there is no industry standard.[3] However, both publications operate an in-house complaint handling procedure.[4]

In order to file a complaint against editorial content published in *The Guardian*, one may fill out a complaint form, describing whether the complaint concerns an online or print article and which part of the 'Guardian News & Editorial Code' it breaches.[5] The 'Guardian News & Editorial Code', which has last been updated in August 2011, is based on the PCC's version of the ECP and applies the same rules for both online and print content. Therefore, it contains an 'opportunity to reply' against 'inaccuracies' (as opposed to significant inaccuracies) if 'reasonably called for'.[6] Ultimately, it is up to the Guardian's 'Reader's Editor' to suggest an 'appropriate remedy'.[7] As argued in Chapter 4, as in-house complaints editors are necessarily either employed or paid by the publishers, this internal stage of the complaints process is neither unbiased nor independent from the industry and it is therefore likely to be more favourable towards the interests of the press. In order to boost their internal system, the newspaper has further established a Review Panel, employed externally by the 'Scots Trust', where the complainant can appeal to against decisions by the Reader's Editor only concerning clauses set out within the 'PCC Code'.[8] Since 13 April 2017, any decision of the review panel must be published on the

[1] Select Committee on Communications, Press Regulation: Where Are We Now? (HL 2014–15, 135) 10 (hereafter: HOL 2015) 34.
[2] ibid.
[3] ibid.
[4] Neither of those internal systems would be deemed compliant under the Royal Charter Recognition System, see HOL 2015 (n 1) 35.
[5] Guardian, 'How to make a complaint about Guardian content' (2017) <https://www.theguardian.com/info/2014/sep/12/-sp-how-to-make-a-complaint-about-guardian-or-observer-content>.
[6] 'The Guardian's Editorial Code' (August 2011) <https://www.theguardian.com/info/2015/aug/05/the-guardians-editorial-code>.
[7] ibid.
[8] Guardian, 'The review panel' (2019) <https://www.theguardian.com/info/2014/nov/20/review-panel>.

Guardian's website.[9] Apart from that, there is no record of the outcomes of readers' complaints.[10]

In the FT, readers' complaints are managed by an 'Editorial Complaints Commissioner' if a complaint under the 'FT Editorial Code' has not been resolved by an editor of the publisher in the first instance.[11] The 'FT Editorial Code' has the exact wording of the current version of the ECP and simply replaces the references to IPSO with references to the complaint commissioner.[12] The complainant first has to email an editor and, in case of an unsatisfactory outcome, can only afterwards proceed to the next stage.[13] Since 2014, the 'Editorial Complaints Commissioner' has adjudicated on 22 complaints.[14] Apart from that, there is no record about the number and the outcome of readers' complaints.

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[9] ibid.
[10] Guardian, 'Review Panel Decisions' (2019) <https://www.theguardian.com/info/complaints-and-corrections>. *The Guardian* also runs an online 'response column', which 'offers those who have been written about in the Guardian an opportunity to reply', see <https://www.theguardian.com/commentisfree/series/response>.
[11] Financial Times, 'FT Editorial Code of Practice' (2019) <https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/9c/1b/9c1b0bb6-a2f4-4711-91ef-329e67eadeb1/1_july_2019_editorial_code_of_practice.pdf>.
[12] ibid.
[13] ibid.
[14] See <https://aboutus.ft.com/en-gb/ft-editorial-code/>.

Appendix B: Chapter 4 – IPSO's arbitration scheme

IPSO operates an arbitration scheme as a separate service from its complaints handling. Claimants are not entitled to pursue a claim simultaneously with a Code Complaint which relates to the same subject matter.[1] Being first launched in July 2016 as a 'voluntary arbitration scheme',[2] IPSO introduced a 'compulsory' version in May 2018.[3] Despite the existence of this compulsory scheme, not all of IPSO's members are obligated to accept a request for arbitration. Instead, only if a publication has agreed to participate in the 'compulsory' IPSO arbitration scheme, they must accept any 'genuine' arbitration claim.[4] In contrast, publishers who decided to opt for the voluntary version have the discretionary power to turn down a request to arbitrate a case.[5] However, the majority of national publishers have decided to participate in the compulsory version of the scheme.[6]

Most importantly, a claimant may bring a claim for defamation against the publisher of a statement.[7] The arbitrator has the same powers to grant relief as a court and must apply the law applicable to the seat of the arbitration in this regard.[8] Therefore, both the Defamation Act 2013 and the Defamation Act 1996 must be applied if a claim is brought under the arbitration scheme. This also allows newspapers to rely on the defences contained within the legislation. At the time of writing, IPSO has not yet published a final ruling on an arbitration.

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[1] IPSO, 'Arbitration Scheme Rules', para 5.6 (2018) <https://www.ipso.co.uk/media/1582/arbitration-scheme-rules-310718.pdf>.

[2] IPSO, 'IPSO Pilot Arbitration Scheme Summary' (2016) <https://www.ipso.co.uk/media/1263/ipso-pilot-arbitration-scheme-summary-july-2016.pdf>.

[3] See IPSO, 'Press watchdog to run compulsory arbitration scheme' (2018) <https://www.ipso.co.uk/news-press-releases/press-releases/press-watchdog-to-run-compulsory-arbitration-scheme/>.

[4] Arbitration Scheme Rules (n 1) 3.

[5] ibid, para 1.

[6] See <https://www.ipso.co.uk/arbitration/participating-publications/>.

[7] See IPSO, 'Further things to think about when considering an arbitration claim' (2018) <https://www.ipso.co.uk/media/1319/further-things-to-think-about-when-considering-an-arbitration-claim.pdf>.

[8] Arbitration Scheme Rules (n 1) 31.2. However, damages are capped to a maximum of 60k under the compulsory scheme and 50k under the voluntary scheme.

Appendix C: Chapter 4 – Generating the data set

In order to generate the data set, the researcher conducted searches on IPSO's website. The regulator publishes its complaint adjudications, as well as a successful outcome of a mediation process, online under a section called 'rulings and resolution statements'.[1] By use of the tools provided on IPSO's website, the search was then further limited to complaints brought under the 'opportunity to reply' clause, i.e. Clause 2 of the ECP in its 2012 version for complaints lodged before 1 January 2016 and Clause 1(iii) of the revised ECP for those after. Adjudications were collected for all complaints in which IPSO made a finding as to whether there had been a breach of the 'opportunity to reply' clause after a person complained that a newspaper refused to grant them an 'opportunity to reply'. Statements about the outcome of a mediation process were included in the dataset if a person had originally complained that a newspaper had refused to grant them an 'opportunity to reply' before eventually settling with the publisher. After collecting the data, each complaint was coded on topics relevant to the research questions and this along with other information was recorded on a spreadsheet to be analysed. The coding is further illustrated in Table 1 below. Subsequently, the outcome of each complaint, as adjudicated by IPSO, was listed against one of the following categories:

- Breach – sanction as offered by publication
- Breach – sanction: publication of adjudication
- Breach – sanction: publication of correction
- No breach – after adjudication
- Resolved – IPSO mediation

As recommended by the literature,[2] the researcher was conscious not to unnecessarily restrict the analysis solely to those areas as this might result in missing out on important information. Instead, the researcher kept alert to the possible existence of 'interesting patterns and data that lurk beneath the surface'.[3]

[1] See: <https://www.ipso.co.uk/rulings-and-resolution-statements/>.
[2] See e.g.: David Acheson, 'Empirical insights into corporate defamation: an analysis of cases decided 2004–2013' (2016) 8(1) JML 32, 36.
[3] ibid.

Table 1: Coding

Research question	Code
Did the complaints committee discuss whether the article the person was seeking to reply to contained 'significant inaccuracies'?	'Significant inaccuracy'
Did the complaints committee discuss whether the opportunity to reply was reasonably called for?	'Reasonably called for'
If the complaint was upheld, what was the 'remedial action' prescribed (if any) by the complaints committee?	'Remedial Action'
If the complaint was not upheld, what was the reason for this decision?	'Not upheld'

Appendix D: Chapter 5 – Benefits of semi-structured interviews

The data for Chapter 5 has been gathered by conducting semi-structured interviews. In this approach, the researcher prepares an interview guide, but does not rigidly adhere to it, either in terms of the precise wording of questions, or the order in which questions are asked in the actual interview.[1] Through these kinds of qualitative interviews, the participant can provide their opinion, motivation and experiences regarding the research questions posed by the interviewer.[2] In general, semi-structured interviews are often used in policy research and use questions and aspects that must be covered to ensure complete and consistent information across different interviews.[3] Furthermore, they are best suited for exploring understanding and perception of 'data rich' people on the issues in question.[4]

In contrast to a completely unstructured interview, this type of empirical research allows the interview to focus on areas or topics that are closely related to the research questions under consideration.[5] Open-ended and flexible questions are likely to get a more considered response than closed questions and therefore provide better access to interviewee's views, interpretation of events, understandings as well as experiences and opinions.[6] Furthermore, semi-structured interviews are better suited for this study than, for example, sending out structured questionnaires or surveys by email or post. This is because, first, semi-structured interviews are more likely to reveal differences in the meanings attached to apparently equivalent terminology in each jurisdiction and, second, concerns about confidentiality are likely to be addressed better through interviews.[7] Ultimately, this type of interview research interview offers more opportunities for dialogue and exchange between the interviewer and the interviewee.[8] Hence, this 'flexible and powerful tool'[9] attempts to understand the world from the participant's point of view to unfold the meaning

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[1] Virginia Braun et al., *Successful Qualitative Research* (SAGE 2013) 78.
[2] Sarah Tracy, *Qualitative Research Methods: Collecting Evidence, Crafting Analysis, Communicating Impact* (Wiley–Blackwell 2013) 132.
[3] Andrea Fontana and James Frey, 'The Interview – From Structured Questions to Negotiated Text', in Norman Denzin and Yvonna Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (SAGE 2003) 648.
[4] Braun et.al. 2013 (n 1) 81.
[5] Silvia Rabionet, 'How I Learned to Design and Conduct Semi-structured Interviews: An Ongoing and Continuous Journey' (2011) 16(2) The Qualitative Report 564.
[6] Bridte Bryne, 'Qualitative interviewing' [2004] Researching Society and Culture 179, 182.
[7] Andrew Kenyon, *Defamation – Comparative Law and Practice* (UCL Press 2006) 394.
[8] Lesley Noaks and Emma Wincup, *Criminological Methods – Understanding Qualitative Methods* (SAGE 2004) 79.
[9] Rabionet (n 5) 563.

of their experiences.[10] Most importantly, interviews are especially helpful for acquiring information that is left out of formal documents, which reflect power holders' points of view.[11] In other words, the qualitative interview can be used to encourage the participant to describe, as precisely as possible, what they feel about the relevant research questions to progress knowledge in the chosen research area.[12] Also, participants with expertise in the field often not only speak about things that cannot be observed but also recall and summarise a wide range of observations in seconds, which would take weeks and months of observational work to achieve.[13]

Ultimately, this research method aims to expand knowledge about the things that can happen and how they are intercepted in a particular social world.[14] The strength of this approach lies in its capacity to reflect the complexity of legal processes and the complexity of the relationship between process and outcome.[15] It is also well suited to exploring the meaning which people place on legal events.[16] Hence, the representations drawn from this material is meaningful in terms of how legal discourse understands certain phenomena involved in the practical application of the right of reply.

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[10] Svend Brinkmann and Steinar Kvale, *Interviews – Learning the Craft of Qualitative Research Interviewing* (SAGE 2015) 3.
[11] Thomas Lindlof and Bryan Taylor, *Qualitative Communication Research Methods* (SAGE 2011) 221.
[12] Carol Gribich, *Qualitative Data Analysis – An Introduction* (SAGE 2013) 3; Brinkmann and Kvale (n 10) 33.
[13] Clive Seale, *The Quality of Qualitative Research* (SAGE 1999) 59.
[14] Mandy Burton, 'Doing empirical research – Exploring the decision making of magistrates and juries' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 58.
[15] John Baldwin et al., 'Empirical Research in Law' in Mark Cushnet et al. (eds), *The Oxford Handbook of Legal Studies* (OUP 2005) 891.
[16] Matthew Miles and Michael Huberman, *Qualitative Data Analysis* (SAGE 1994) 207.

Appendix E: Chapter 5 – Selection criteria of participants

As detailed in Chapter 5, the series of semi-structured interviews primarily focused on how the right of reply works in practice and how it impacts on the daily work of newspapers. Therefore, the sample was limited to 'key informants' that have access to this type of information. Key informants are particularly knowledgeable about the inquiry setting and articulate about their knowledge; i.e. people whose expertise can prove particularly useful in helping a researcher to understand what is happening and why.[1] Those type of participants are often critical to the success of a qualitative study, as 'such persons not only provide with insights into a matter but also can suggest sources of corroboratory or contrary evidence' for the research questions.[2] Key informants, as a result of their personal skills, position within a society or special expertise,[3] are able to provide more information and a deeper insight into what is going on around them.[4] Therefore, all participants have been concerned with issues relating to the right of reply (or a functional equivalent to it) for the majority of their professional career and are leading experts in their field.[5] The subsequent sections contain further detail on the selection criteria for the participants in each country.

1. Participants based in Germany

As the German statutory right of reply may be judicially enforced if a newspaper refuses to publish it,[6] it was crucial to contact judges and lawyers who have been the leading experts in this field in order to get an insight into what steps are taken before a request to publish a reply eventually ends up in court.[7] Also, those individuals are likely to provide an account of how exactly the negotiations in and outside of the courts take place. In order to get the viewpoint of both sides, this study includeed interviews with practising lawyers who are focused on working for newspaper publishers as well as with practitioners who specialise in claimant work. Both practising lawyers and in-house lawyers were ap-

[1] Michael Patton, *Qualitative Research and Evaluation Methods* (SAGE 2002) 321.
[2] Robert Yin, *Case study research: design and methods* (SAGE 2014) 90.
[3] Martin Marshall, 'Sampling for qualitative research' (1996) 13(6) FP 522, 523.
[4] Martin Marshall, 'The key informant technique' (1996) 13(1) FP 92.
[5] As recommended by Patton (n 1) 321, 322.
[6] See Chapter 3.
[7] Note that there is no Barrister/Solicitor divide in Germany.

proached by email after searching listing services for the leading media lawyers in Germany.[8] In order to assess how the right of reply impacts on the daily work of a newspapers, the researcher also contacted journalists and editors of both national and regional newspaper. This is of particular importance for investigating the question of how regularly a right of reply is requested by an ‘affected’ person. Those participants were also contacted by email. Finally, the researcher sent over 40 letters to judges serving at Regional Courts and Higher Regional Courts.[9] Getting judges to participate in this research was aimed at understanding how the courts operate in right of reply cases.

2. Participants based in England

In England, the search for suitable participants was supported by the earlier conducted in-depth study of IPSO’s membership agreements, annual reports and complaints regulation.[10] The work undertaken in Chapter 4 helped to identify individuals who are responsible for dealing with the issues concerning the Editors’ Code of Practice. For example, each publisher that is a member of IPSO must maintain an in-house complaint handling procedure for complaints brought under the Editors’ Code of Practice. The name of the head of this in-house procedure must then be included into the publisher’s annual statement to IPSO. The analysis of these materials disclosed that complaints arising under the Editors’ Code of Practice are sometimes dealt with by journalists, editors, the in-house legal teams or a combination of the three. Therefore, it was important to conduct interviews with a broad range of participants. This also avoided bias. Most importantly, as for participants in Germany, the selection was exclusively based on whether the participant has the knowledge and experience that is required to provide an insight into the research questions of Chapter 5. As the majority of the regional publishers in the UK no longer employ an in-house legal team due to financial reasons and make use of specialised solicitors instead,[11] it was also necessary to get the perspective of one of those individuals in order to cover the whole range of people involved in the complaints resolution process. This selection was exclusively based on listing services for leading media lawyers in the UK.[12] All of the participants were contacted via email.[13]

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[8] See for example: <http://www.legal500.de/c/deutschland-2018/medien/presse-und-verlage#table_101> and <https://www.juve.de/handbuch/de/2019/fuehrendenamen/24562>.
[9] See Appendix K.
[10] See Chapter 3.
[11] See e.g.: Freddy Mayhew, ‘Independent and Evening Standard cut in-house legal team with loss of four jobs’ (13 June 2016) <https://www.pressgazette.co.uk/independent-and-evening-standard-cut-in-house-legal-team-with-loss-of-four-jobs/>.
[12] See for example: <https://www.legal500.com> and <https://www.chambers.com>.
[13] See Appendix J.

Appendix F: Chapter 5 – Core topics and core questions used to design the basic interview schedule

Topics	Core questions
Status quo in legal system	-Are there any rules or practices within your legal system that enable an individual or organisation who has been made the subject of a story in a newspaper to publish their own view in the same forum, either pre- or post-publication? -Some see the obligation to publish a reply against the will of a newspaper as an unjustified limitation of a publisher's editorial freedom, which ultimately leads to journalists being less likely to publish or pursue controversial stories. However, others consider it as the guarantee of 'equality of arms' for a person aiming to protect their personality rights and as a necessary instrument to enhance public discourse and reliable media coverage. What is your view on this? -What do you understand by the term 'right of reply'?
Hypothetical changes to *status quo*	-If you have identified a rule or practice within your legal system that enables a person who has been made the subject of a story in a newspaper to publish their own view in the same forum, either pre- or post-publication, do you feel that there is a need to reform these rules or practices? If so, why? If no, why not? -For participants based in England: What is your view on a hypothetical reform of the *status quo* where the lawmaker decided to implement a statutory right of reply that would legally obligate newspapers to provide someone affected by an allegation made in a newspaper with the opportunity to respond in the same forum without having to establish the veracity of his or her reply? -For participants based in Germany: What is your view on a hypothetical reform of the *status quo* where the lawmaker decided to abolish the statutory right of reply and replace it with a self-regulatory rule or practice?
Impact on daily work of journalists	If someone requests the publication of a reply to an article that made him or her the subject of this story, what steps, if any, are usually taken to resolve this request?
Frequency	From your experience, how often do people request to reply to an article in a newspaper?
Role of court or regulator	-For participants based in England: From your experience, do you feel that most requests where someone demands to reply to an article get resolved between the complainant and the publisher without IPSO becoming involved, or is it usually the case that these complaints get referred to IPSO because the parties involved could not come to an amicable agreement? -For participants based in Germany: From your experience, do you feel that most requests where someone demands to reply to an article get resolved between the complainant and the publisher without the courts becoming involved, or is it usually the case that these complaints get referred to the courts because the parties involved could not come to an amicable agreement?
Power balance	From your experience, is it possible for a person to enforce the publication of his or her reply against the will of a newspaper?

Appendix G: Chapter 5 – Ethical considerations

1. How has informed consent been obtained?

All interviewees were initially approached by email or letter. Before conducting an interview, they received a pack containing an information sheet and a consent form.[1] The information sheet contained the researcher's name and status at UEA, a brief rationale/description of the study including its purpose, value and why the particular individual is being invited to take part. Furthermore, the respondent was made aware of what will happen to any findings, whether the data will be shared with others, whether the interview will be audio-recorded and transcribed and of their entitlement to withdraw consent. Also, they were made aware that the identity of the participants would not be revealed in any publications. Also, participants were asked to sign the consent form which required respondents to agree to the terms of the interview prior to participating.

2. How have confidentiality and anonymity been addressed?

Issues of confidentiality and anonymity were raised in initial correspondence with potential interviewees, in the information sheet, in the consent form and at the start of each interview. Participants were made aware that their participation in this study, as well as their personal data, is kept confidential in accordance with data protection rules at all time. Furthermore, it was highlighted that any reference to this interview in the written analysis will be made in a way that will not disclose their identity. Although the majority of participants preferred to remain anonymous, some of the respondents explicitly requested to be fully named, including their exact job title and all citations attributed to them. The researcher has kept written records of where the participants requested to be specifically identified in the research. In order to protect the personal data of those who wished to remain anonymous, only Professor Christian Schertz, Jonathan Heawood, Greg Callus and Lutz Tillmanns have been identified as named interviewees. All other interviewees are referred to by an anonymised letter and number, along with their professional role.

[1] See Appendices L and M for an example of the information sheet and the consent form.

Also, the researcher made sure to agree with all participants on how to describe their professional role in a meaningful way without disclosing the participants identify. Therefore, all respondents have given their explicit consent on how their professional role is described in this analysis. Furthermore, all participants have agreed to the use of quotations. Quotations used are direct transcriptions from the interviews. Also, participants were given the right to approve the transcript and to authorise the citations used by the researcher.

Appendix H: Chapter 5 – Analytic technique and coding development

As noted in Chapter 5, the method of analysis chosen for the interview data is a qualitative approach of thematic analysis. Thematic analysis is a method for identifying, analysing and reporting patterns (themes) within qualitative data, which minimally organises and describes a data set in rich detail.[1] A theme can be defined as capturing 'something important about the data in relation to the research question and represents some level of patterned response or meaning within the data set'.[2] Most importantly, it must be relevant to the investigation's research questions or research focus build on codes identified in transcripts and provide the researcher with the basis for a theoretical understanding of his data that can make a theoretical contribution to the literature relating to the research focus.[3] Significantly, a rigorous thematic approach can produce an insightful analysis that answers the research questions set out at the beginning of the investigation.[4] Identifying themes requires an intimate knowledge of the data, which can be achieved by collecting the data oneself, transcribing the data oneself and reading the data a number of times before eventually 'coding' the transcripts.[5]

Coding is best thought of as a process for aiding the researcher's familiarisation and understanding of their data.[6] Hence, it allows exploring and condensing the data into manageable categories that allow the data to be understood in other ways than what has just been said or observed.[7] On the basis of these codings, the researcher can then identify themes which integrate substantial sets of these codings.[8] Codes and themes can be either data-derived using a 'bottom up' inductive approach, closely linked to the semantic content of the data, or they may be research-driven using a deductive 'top down' approach, in which implicit meanings are identified.[9] In other words, the researcher can either code for specific research questions (which maps onto the more deductive approach) or the specific research questions can evolve through the coding process (which maps onto the

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[1] Virginia Braun et.al., 'Using thematic research in psychology' [2006] Qualitative Research in Psychology 77, 79.
[2] ibid, 82.
[3] Alan Bryman, *Social Research Methods* (OUP 2016) 584.
[4] Braun et al. 2006 (n 1) 97.
[5] Dennis Howitt, *Introduction to Qualitative Research Methods in Psychology* (Pearson 2016) 162.
[6] Alexander Seal, 'Thematic Analysis' in Nigel Gilbert and Paul Stoneman (eds), *Researching Social Life* (SAGE 2016) 445.
[7] ibid.
[8] Duncan Cramer and Dennis Howitt, *Introduction to Research Methods in Psychology* (Pearson 2014) 372.
[9] Braun et al. 2006 (n 1) 83.

inductive approach).[10] When applying the deductive approach, the researcher, on the basis of what is known about in a particular domain and of theoretical considerations in relation to that domain, deduces research questions (or hypotheses) that must then be subjected to empirical scrutiny.[11] Thus, when conducting thematic analysis deductively, the researcher brings in existing theoretical concepts or theories that provide a foundation for 'seeing' the data, for what 'meanings' are coded and for how codes are clustered to develop themes. [12] It also provides the basis for interpretation of the data.[13] A deductive orientation is less bound by the semantic meaning in the data than an inductive orientation.[14]

In this research project, the researcher conducted a structured thematic analysis and used a mixture of theory driven and inductive ways of thematic analysis and coding,[15] with the coding operating on two levels. This approach complemented the aims of Chapter 5 by allowing the findings presented in earlier chapters as well as the research questions mentioned in the introductory sections of Chapter 5 to be integral to the process of deductive thematic analysis.[16] It also allowed for themes and subthemes to be drawn directly from the data using an inductive coding.[17] This ability to move back and forth between deductive/theory-driven coding and inductive coding is one of the benefits of thematic analysis.[18] This method is different than a purely inductive approach, in which the researcher allows themes and sub-themes to emerge solely from the interview data.[19] This was a conscious choice made in order to maintain the structure and focus on the comparative framework of the thesis.

At the beginning of this analytical coding process, familiarisation with the data was internalised through transcription and, if appropriate, translation of the interviews.[20] The

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[10] ibid, 84.
[11] Bryman (n 3) 21.
[12] Virginian Braun et al., 'Thematic Analysis' in Poul Rohleder and Antonia Lyons (eds), *Qualitative research in clinical and health psychology* (Palgrave 2015) 95.
[13] ibid.
[14] Gareth Terry et al., 'Thematic Analysis' in Carla Willig and Wendy Rodgers (eds), *The SAGE Handbook of Qualitative Research in Psychology* (SAGE 2017) 22.
[15] Richard Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (SAGE 1998) ch 2.
[16] Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5(1) International Journal of Qualitative Methods 1, 4.
[17] ibid.
[18] ibid.
[19] See Bryman (n 3) 584–585.
[20] See Braun et. al 2006 (n 1) 87.

audio recordings of the interviews were listened to a number of times for their accurate translation and transcription. In the next stage, the researcher read through all the transcripts line by line repeatedly to become familiar with the data. After generating initial coding features of the data relevant to the research questions in a systematic fashion across the entire set,[21] the coding process was started. Coding was done manually with coloured markers and then the excerpts were physically reorganised according to codes with duplications made where necessary. The initial deductive coding began with topic coding drawn from the topics and questions set out in Appendix F.[22] When satisfied that the codes generated from the transcripts were aligned with the research questions and therefore fit for purpose, the data-driven coding followed with a focus on identifying patterns of meaning. In the process, the codes were refined to match the responses given by the interviewees and added additional inductively gathered codes that reflected experiences that came up frequently in the transcripts. The table below illustrates the changes:

Table 1: Coding development

Deductive codes driven by research questions	**Refined and added codes**
Status quo in legal system	Understanding of the term 'right of reply'
	Potential 'chilling effect' of identified rules and practices
	Practical relevance of identified rules and practices
Hypothetical changes to *status quo*	Content of the reply
	Legal fees in Germany
	Perceived dangers of a (statutory) right of reply
	Perceived benefits of (statutory) right of reply
Frequency	Frequency in national press
	Frequency in regional press
Impact on daily work	Impact on national newspapers
	Impact on regional newspapers
Role of court or regulator	IPSO's role
	Role of the courts
	Legal uncertainties in German courts
Power balance	Final decision maker

[21] ibid.
[22] As recommended by Lyn Richards, *Handling Qualitative Data – A practical guide* (SAGE 2015) 110.

Within each of these coding categories, the researcher continued to treat German and English participants separately. Because comparison starts with the logic of the matrix,[23] the researcher then identified commonalities and differences within each theme between the two countries. This can be seen as a form of the 'word tables' based on a uniform framework that Yin recommends for synthesising qualitative comparative studies.[24] The use of common basic interview guides and asking core questions of the data proved useful to this process.

Subsequently, the identification of potential themes required the researcher to reflect on the initial and later refined codes that had been generated and to gain a sense of the continuities and linkages between them.[25] This included checking if the potential themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2).[26] The next step was to identify all data that related to the already classified patterns.[27] In order to achieve this, the responses were re-read line by line with particular attention being paid to the themes identified from the first stage of the data analysis and the research questions set out in the introductory sections of Chapter 5. Responses dealing with the same issue were grouped together in analytic categories and given provisional labels and definitions. Next, the responses were again re-read to see if they contained any further relevant information to the provisional themes. Finally, the themes were then given their final analytical form and definition and were refined further through systematic examination. An in-depth explanation about the form and definition of each theme and how they represent the continuities and linkages between the codes is provided in sections 4–7 of Chapter 5. The searching, coding and labelling of themes was done by hand and solely by the researcher.

[23] Richard Rose et al., 'Comparing forms of comparative analysis' (1991) 39(3) Political Studies 446, 454.
[24] Robert Yin, *Case Study Research and Applications: Design and Methods* (SAGE 2018) 194–195.
[25] Bryman (n 3) 586.
[26] See Terry et al. (n 14) 23.
[27] Jodi Johnson, 'A Pragmatic View of Thematic Analysis' (1995) 2(1) The Qualitative Report 1.

Appendix I: Ethical Approval UEA

Research and Innovation Services

University of East Anglia
Norwich Research Park
Norwich NR4 7TJ
United Kingdom

Tel: +44 (0) 1603 591574
Email:grec@uea.ac.uk
https://portal.uea.ac.uk/ren/research-integrity

Felix Hempel
School of Law
UEA

Monday 29 January 2018

Dear Felix,

Our reference: GREC 17-876

I am writing to you on behalf of the University of East Anglia's General Research Ethics Committee, in response to your request for ethical approval for your project 'IPSO, Ofcom, and the Mediengesetze der Länder – A comparative analysis of the right of reply in England, Wales, and Germany'.

Having considered the information that you have provided in your correspondence I am pleased to confirm that your project has been approved on behalf of the Committee.

You should let us know if there are any significant changes to the proposal which raise any further ethical issues.

Please let us have a brief final report to confirm the research has been completed.

Yours sincerely,

pp. Polly Harrison, Secretary
General Research Ethics Committee

Appendix J: Examples for invitation by email to participants from Germany and England

Subject: Interview request – right of reply and press regulation

Dear […],

I am a doctoral researcher at the University of East Anglia Law School. My research focuses on comparative press regulation in general and, more specifically, on the impact of the right of reply on press freedom. As part of my project, I am conducting interviews about the right to reply as well as other pre-and post-publication matters concerning the Editors' Code of Practice with editors, practising lawyers and regulatory bodies.

Given your position as [redacted], as well as your outstanding knowledge in the field of press regulation, I feel that your views and opinions on the matter would make a significant contribution to this project. As I have already spoken to journalists and editors, I would appreciate getting your perspective on the subject. The interview is supposed to last around 45–60 minutes and would focus on general questions regarding your opinion on the right of reply and different aspects of the Editors' Code of Practice and under Defamation Law. Furthermore, I would ask you some questions about your experience in dealing with complaints under the Editors' Code of Practice. Of course, I would not be asking for any trade secrets or anything proprietary and can offer complete anonymity.

Therefore, I would be very grateful if you could please let me know whether you would, in principle, consider participating in this research. For your convenience, I have attached an information sheet outlining the most important aspects regarding this project as well as a consent form. Of course, please feel free to contact me at any time if you require any further information.

Thank you very much in advance for your efforts and consideration.

Kind regards,

Felix Hempel
PhD Candidate & Associate Tutor
UEA Law School

University of East Anglia, Norwich Research Park, NR4 7TJ
Email: **F.Hempel@uea.ac.uk**
Profile Page: **https://www.uea.ac.uk/law/people/profile/f-hempel**

This email is intended for the named recipient only. It may contain privileged and confidential information. If you are not the intended recipient, notify the sender immediately and destroy this email.

Any views or opinions expressed are solely those of the author and do not necessarily represent those of the University of East Anglia. Whilst all efforts are made to safeguard emails, the University cannot guarantee that attachments are virus free or compatible with your systems, and does not accept liability in respect of viruses or computer problems experienced.

Betreff: Interviewanfrage für Studie im Presserecht

Sehr geehrte/r […],

ich bin Doktorand und wissenschaftlicher Mitarbeiter an der juristischen Fakultät der University of East Anglia in Großbritannien. Meine Forschung beschäftigt sich mit rechtsvergleichender Presseregulierung, das Hauptaugenmerk liegt dabei auf dem Gegendarstellungsrecht und dessen Wirkung auf die Pressefreiheit. Zur Gewinnung von Einblicken aus der Praxis führe ich zudem Interviews mit Journalisten und mit dem Gebiet des Presserechts befassten Rechtsanwälten über deren Ansichten zum Gegendarstellungsrecht und der Presseregulierung.

Aufgrund Ihrer Tätigkeit als [redacted] sowie Ihrem ausgewiesenen Fachwissen im Presserecht bin ich der Auffassung, dass Ihre Meinungen und Ideen zu dem Thema einen signifikanten Beitrag zu dieser Interviewreihe darstellen würden. Nachdem ich bereits Gespräche mit Journalisten und Rechtsanwälten in Großbritannien geführt habe, wäre ich sehr dankbar, einen Einblick in Ihre Perspektive zu erhalten. Die Dauer eines Interviews beträgt ungefähr 60 Minuten zu einer Zeit und an einem Ort Ihrer Wahl. Selbstverständlich können wir das Gespräch auch über Skype oder per Telefon führen. Inhaltlich ginge es, wie oben bereits erwähnt, um Ihre Meinung zum Gegendarstellungsrecht und unterschiedlichsten Themen im Bereich der Presseregulierung. Ich wäre Ihnen sehr dankbar, wenn sie mir mitteilen könnten, ob Sie interessiert wären, an diesem Forschungsprojekt teilzunehmen.

Damit Sie sich ein vollumfängliches Bild machen können, habe ich zudem alle wichtigen Informationen über dieses Projekt in einem Dokument zusammenfasst, bitte entnehmen Sie dies dem Anhang dieser E-Mail. Für weitere Nachfragen stehe ich selbstverständlich zu jeder Zeit zur Verfügung.

Für Ihre Bemühungen bedanke ich mich im Voraus und verbleibe,

mit freundlichen Grüßen

Felix Hempel

PhD Candidate & Associate Tutor
UEA Law School
University of East Anglia, Norwich Research Park, NR4 7TJ
Email: F.Hempel@uea.ac.uk
Profile Page

This email is intended for the named recipient only. It may contain privileged and confidential information. If you are not the intended recipient, notify the sender immediately and destroy this email.

Any views or opinions expressed are solely those of the author and do not necessarily represent those of the University of East Anglia. Whilst all efforts are made to safeguard emails, the University cannot guarantee that attachments are virus free or compatible with your systems, and does not accept liability in respect of viruses or computer problems experienced.

Appendix K: Invitation letter sent to judges in Germany

Felix Hempel
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Norwich Research Park
Norwich
NR4 7TJ
Großbritannien
Email: F.Hempel@uea.ac.uk
Mobil: 0044 7763 517306

Vorab per E-Mail

28. Mai 2018

Interviewanfrage für Studie im Presserecht

Sehr geehrter ,

ich bin Doktorand und wissenschaftlicher Mitarbeiter an der juristischen Fakultät der University of East Anglia in Großbritannien. Meine Forschung beschäftigt sich mit rechtsvergleichender Presseregulierung, das Hauptaugenmerk liegt dabei auf dem Gegendarstellungsrecht und dessen Wirkung auf die Pressefreiheit. Zur Gewinnung von Einblicken aus der Praxis führe ich zudem Interviews mit Journalisten sowie Rechtsanwälten und Richtern mit besonderer Expertise im Medienrecht über deren Ansichten zum Gegendarstellungsrecht und der Presseregulierung.
Aufgrund Ihrer Tätigkeit als sowie Ihrem ausgewiesenen Fachwissen im Presserecht bin ich der Auffassung, dass Ihre Meinungen und Ideen zu dem Thema einen signifikanten Beitrag zu dieser Interviewreihe darstellen würden. Nachdem ich bereits Gespräche mit Journalisten und

Rechtsanwälten in Großbritannien geführt habe, wäre ich sehr dankbar, einen Einblick in Ihre Perspektive zu erhalten.

Die Dauer eines Interviews beträgt ungefähr eine Stunde zu einer Zeit und an einem Ort Ihrer Wahl. Selbstverständlich können wir das Gespräch auch über Skype oder per Telefon führen. Alle persönlichen Informationen, die Sie im Laufe dieses Interviews preisgeben, werden streng vertraulich behandelt und nicht an Dritte weitergegeben. Inhaltlich ginge es, wie oben bereits erwähnt, um Ihre Meinung zum Gegendarstellungsrecht und unterschiedlichsten Themen im Bereich der Presseregulierung.

Ich wäre Ihnen daher sehr dankbar, wenn Sie mir bis zum **30.06** mitteilen könnten, ob Sie, oder ein/e anderer/e Richter/in Ihrer Kammer, interessiert wären, an diesem Forschungsprojekt teilzunehmen. Sie können mich jederzeit unter den oben angegebenen Kontaktdaten erreichen.

Damit Sie sich ein vollumfängliches Bild machen können, habe ich zudem alle wichtigen Informationen über dieses Projekt in einem Dokument zusammenfasst, welches Sie der Anlage entnehmen können. Für weitere Nachfragen stehe ich selbstverständlich zu jeder Zeit zur Verfügung.

Für Ihre Bemühungen bedanke ich mich im Voraus und verbleibe

mit freundlichen Grüßen

Felix Hempel

Anlage

Appendix L: Example information sheets for participants in England and Germany

INFORMATION SHEET

Title of Project: The right of reply in the press
Name of Researcher: Felix Hempel
Position of Researcher: Felix Hempel is a PhD Candidate at the University of East Anglia Law School

You are being invited to take part in a research study. Before you decide, it is important for you to understand why the research is being carried out and what it will involve. Please take time to read the following information carefully. Please feel free to ask me at any time if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part.

1. **What is the purpose of this project?**

The main purpose of this project resides in the question of to what extent press regulation in general and, more specifically, the right of reply impacts the (editorial) freedom of the press in England & Wales. Therefore, I would like to get an impression of your views on the right of reply and the main issues surrounding pre-and post-publication matters. This includes asking questions about the scope, nature and purpose of a right of reply, a correction and an apology. Furthermore, I would ask you some questions about your experience in dealing with complaints under the Editors' Code of Practice.

2. **Why have you been chosen?**

You have been chosen because you have expertise knowledge in the field. Furthermore, I feel that your views and opinions on the matter would make a significant contribution to this study.

3. **Do you have to take part?**

No. It is up to you to decide whether or not to take part. If you do, you will be given this information sheet to keep and be asked to sign a consent form. You are still free to withdraw at any time and without giving a reason.

4. **Will your taking part in this study be kept confidential?**

All personal information which is collected about you during the course of the research will be **kept strictly confidential**. Every step will also be taken to assure your **anonymity** in accordance with the data protection guidelines.

5. What do you have to do if you take part?

I shall visit you at a place of your choosing to conduct an interview for as long as you feel willing/able to talk. However, the interview should not take longer than 45–60 minutes. Alternatively, we can conduct the interview via phone or Skype. If, at the end of a session, you feel there is more that you would like to say, it should be possible to meet again. With your consent, the interview will be **audio-recorded and transcribed**. Of course, you can ask to stop the tape or discontinue the interview at any point without giving any reason. If you wish, I will send a copy of the interview transcript to a pre-arranged safe address.

6. What will happen if you do not want to carry on with the study?

If you agree to be interviewed, you can withdraw at any time during or after the interview. However, I would ask to be able to use all data collected up to the point of your withdrawal, which would be kept subject to confidentiality procedures.

7. Complaints

I do not anticipate any problems arising during this project. However, if you do have a concern about any aspect of this study or the conduct of the researcher, please feel free to contact my research supervisor Professor Michael Harker by email at M.Harker@uea.ac.uk or by post to Professor Michael Harker, University of East Anglia Law School, Norwich Research Park, NR4 7TJ.

8. What will happen to the data after the interview?

I will label the interview recording with a code number. This guarantees that your personal data **will be kept confidential** in accordance with the data protection guidelines. After transcribing the recording, the data from the interview will be analysed for a final written project.

9. What will happen to the results of the research study?

The results of the research study will be written up and form the basis of my PhD thesis. Parts of the study may also be submitted for publication. However, any quotations of this interview used in my PhD thesis or other publications **will be anonymised** in accordance with the data protection guidelines. Participants will be given id numbers that will be used to generate codenames for documents and interview data. Subject to your consent, I would refer to you as [redacted] Of course, it is up to you to let me know if you would prefer to be referred to differently.

10. Who is funding the research?

The research is a PhD project funded by the University of East Anglia Faculty of Social Sciences Graduate School for Doctoral research studies.

11. Who has reviewed the study?

This study has been ethically approved by the University of East Anglia's General Research Ethics Committee.

Thank you for taking the time to read this information sheet.

Contact Details:
Felix Hempel
PhD Candidate
University of East Anglia Law School, Norwich Research Park, NR4 7TJ
Email: F.Hempel@uea.ac.uk

INFORMATIONSBLATT

Projekttitel: Die Gegendarstellung im Presserecht im 21. Jahrhundert
Name des Forschers: Felix Hempel
Position: Felix Hempel ist Doktorand und wissenschaftlicher Mitarbeiter an der juristischen Fakultät der University of East Anglia in Großbritannien.

Bevor Sie entscheiden, ob Sie an dieser wissenschaftlichen Studie teilnehmen möchten, ist es wichtig, dass Sie verstehen, warum dieses Projekt durchgeführt wird und was eine Zusage Ihrerseits bedeuten würde. Für weitere Nachfragen stehe ich selbstverständlich zu jeder Zeit zur Verfügung.

1. Was ist das Ziel dieses Projekts?

Das Hauptaugenmerk meiner Forschung liegt auf der Frage, welchen Einfluss das Gegendarstellungsrecht im Speziellen und die Presseregulierung im Allgemeinen auf die Freiheit der Medien in Deutschland und Großbritannien haben. Die empirische Untersuchung dieses Problems soll dazu beitragen, verschiedene Szenarien für Gesetzesänderungen im Bereich des Presserechts voranzubringen. Inhaltlich konzentrieren sich die Interviews daher auf den Umfang, das Ziel und den Sinn des Rechts auf Gegendarstellung und der Presseregulierung.

2. Wieso wurden Sie ausgewählt?

Aufgrund Ihrer Tätigkeit als [illegible] sowie Ihrem ausgewiesenen Fachwissen im Presserecht bin ich der Auffassung, dass Ihre Meinungen und Ideen zu dem Thema einen signifikanten Beitrag zu dieser Interviewreihe darstellen würden.

3. Müssen Sie an dieser Studie teilnehmen?

Nein. Ob Sie einem Interview zustimmen oder nicht ist allein Ihre Entscheidung. Selbst nachdem Sie zugestimmt haben, steht es Ihnen jederzeit frei, diese Entscheidung ohne Angaben von Gründen zu widerrufen.

4. Wird Ihre Teilnahme vertrauenswürdig behandelt?

Alle persönlichen Informationen, die Sie im Laufe dieses Interviews preisgeben, werden streng vertraulich behandelt und nicht an Dritte weitergegeben. Dies stellt sicher, dass die Durchführung dieses Projektes mit den geltenden Datenschutzrichtlinien übereinstimmt.

5. Was passiert, wenn Sie einem Interview zusagen?

Sofern Sie zur Teilnahme an diesem Projekt bereit sind, werden Ich Sie an einem Ort und zu einer Zeit Ihrer Wahl interviewen. Selbstverständlich können wir das Gespräch auch

über Skype oder per Telefon führen. Das Interview selbst sollte nicht länger als 30 Minuten dauern, wobei es Ihnen freisteht, das Gespräch zu jeder Zeit zu beenden. Mit Ihrer Zustimmung wird die **Befragung mit einem Diktiergerät aufgezeichnet**, um diese anschließend **schriftlich zu protokolieren**. Sofern Sie es wünschen, werde ich Ihnen eine Kopie dieses Protokolls zusenden.

6. Was passiert nach dem Interview?

Ich werde die Interviewaufnahme mit einer Codenummer kennzeichnen. Dies garantiert, dass Ihre persönlichen Daten nicht an Dritte weitergegeben werden und schützt zudem Ihre Anonymität.

7. Was passiert, wenn sie sich von dem Projekt zurückziehen möchten?

Sie können sich jederzeit, ohne Angaben von Gründen, von dem Projekt zurückziehen kann

8. Beschwerden

Bei Beschwerden können sie sich jederzeit an meinen Doktorvater, Professor Dr. Michael Harker, wenden. Sie können Ihn per Email (m.harker@uea.ac.uk) oder per Post (Michael Harker, University of East Anglia Law School, Norwich Research Park, NR4 7TJ) kontaktieren.

9. Wie werden die gesammelten Informationen analysiert?

Nach dem Protokolieren des aufgezeichneten Interviews wird der Inhalt der Aufnahme für ein Kapitel meiner Doktorarbeit analysiert. Teile dieser Studie könnten zudem zur Veröffentlichung in einer wissenschaftlichen Zeitschrift eingereicht werden. Dabei wird jegliche Bezugnahme auf Ihre während des Interviews getroffenen Aussagen zum Schutz Ihrer persönlichen Daten, in Übereinstimmung mit den geltenden Datenschutzrichtlinien, **anonymisiert** erfolgen. Die Teilnehmer erhalten eine Identifikationsnummer, die zur Generierung von Codenamen für Dokumente und Transkripten verwendet wird. Mit Ihrer Zustimmung würde ich Sie als [redacted] bezeichnen. Selbstverständlich steht es Ihnen frei, eine andere Bezeichnung zu wählen.

10. Wer finanziert die Durchführung dieses Forschungsprojektes?

Dieses Forschungsprojekt ist Teil meiner Doktorarbeit und wird von der juristischen Fakultät der University of East Anglia finanziell gefördert.

11. Wer hat die Studie ethisch überprüft?

Die Durchführung dieser Studie wurde von der Ethikkommission der Universität East Anglia überprüft und genehmigt. Vielen Dank, dass Sie sich die Zeit für das Durchlesen dieses Informationsblattes genommen haben.

Kontaktdaten:

Felix Hempel
PhD Candidate
University of East Anglia Law School, Norwich Research Park, NR4 7TJ
Email: F.Hempel@uea.ac.uk

Appendix M: Example consent forms for participants in England and Germany

Project Number: 17-876
Participant anonymised initials:

CONSENT FORM

Title of Project: The right of reply in the press

Name of Researcher: Felix Hempel

Please initial box

1. I confirm that I have read and understood the Information Sheet provided to me for the above project and have had the opportunity to ask questions. ☐

2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason. ☐

3. I understand and agree that taking part includes being interviewed and audio recorded. ☐

4. I agree that the audio recorded data will be transcribed by the researcher. ☐

5. I understand and agree that the results of the research study will be written up and form the basis of the researcher's PhD thesis. Parts of the study may also be submitted for publication. ☐

6. I understand that my participation in this study, as well as my personal data, will be kept confidential in accordance with data protection guidelines at all time. I understand that I will remain anonymous and that no identifying details will be used in the reporting of the findings. ☐

7. I agree to the use of anonymised quotations in the researcher's PhD thesis or other publications as described in the information sheet. ☐

8. I agree to take part in this project. ☐

______________________	______________	____________________
Participant anonymised initials	Date	Signature

Felix Hempel	______________	____________________
Name of Researcher	Date	Signature

Do you have any suggestion for the best way to refer to you and your position for the purposes of anonymising?

____

Projektnummer: 17-876
Anonymisierte Initialen Teilnehmer:

EINVERSTÄNDNISERKLÄRUNG

Projekttitel: Die Gegendarstellung im Presserecht im 21. Jahrhundert

Name des Forschers: Felix Hempel

Bitte füllen Sie die Boxen mit Ihren anonymisierten Initialen aus

1. Ich bestätige, dass ich das Informationsblatt für das oben genannte Projekt gelesen und verstanden habe und die Gelegenheit hatte, Fragen zu stellen. ☐

2. Ich verstehe, dass meine Teilnahme an diesem Interview freiwillig ist und dass ich mich jederzeit ohne Angaben von Gründen, von dem Projekt zurückziehen kann. ☐

3. Ich verstehe und bin damit einverstanden, dass das Interview mit einem Diktiergerät aufgezeichnet wird. ☐

4. Ich verstehe und bin damit einverstanden, dass das aufgezeichnete Gespräch anschließend durch den Forscher schriftlich protokolliert wird. ☐

5. Ich verstehe und bin damit einverstanden, dass der Inhalt des aufgezeichneten und protokollierten Interviews für ein Kapitel der Doktorarbeit des Forschers analysiert wird. Teile dieser Studie könnten zudem zur Veröffentlichung in einer wissenschaftlichen Zeitschrift eingereicht werden. ☐

6. Ich verstehe, dass meine persönlichen Daten zu jeder Zeit, gemäß den geltenden Datenschutzrichtlinien, vertraulich behandelt werden. Ich verstehe, dass jede Bezugnahme auf dieses Interview in der schriftlichen Analyse des Projektes so erfolgt, dass meine Identität nicht preisgegeben wird. ☐

7. Ich stimme der Verwendung von, wie im Informationsblatt beschriebenen, anonymisierten Zitaten in der Doktorarbeit des Forschers oder anderen Publikationen zu. ☐

8. Ich stimme der Teilnahme an diesem Projekt zu. ☐

______________________	________________	______________________
Anonymisierte Initialen Teilnehmer	Datum	Unterschrift
Felix Hempel	________________	____________________
Name des Forschers	Datum	Unterschrift

Haben Sie einen Vorschlag, wie ich Ihre Rolle am besten beschreiben könnte, um Ihre Anonymität zu gewährleisten?

____

Appendix N: Examples for individual interview guides

Interview guide in-house lawyer in England

1. Could you please outline your main tasks as in-house lawyer?

2. What do you understand by the term 'right of reply'?

3. Are there rules or practices within the English legal system that enable an individual or organisation who has been made subject of a story in a newspaper to publish their own view in the same forum either pre- or post-publication?

4. From your point of view, is it possible for an individual or organisation to enforce the publication of his or her reply against the will of a newspaper?

5. In your daily work, do you get involved when someone raises a complain under the Editors Code of Practice? If so, how? If no, who else is dealing with it?

6. Say someone raises a complaint under the Editors' Code of Practice with one of the newspapers from your publishing group. What are steps are usually taken to resolve these complaints?

7. If someone requests the publication of a reply to an article that made him or her subject of this story, what steps, if any, are usually taken to resolve this request?

8. From your experience, how often do people request to reply to an article?

9. From your experience, do you feel that most requests where someone seeks to reply to an article get resolved between the complainant and the publisher without IPSO becoming involved, or are these complaints usually referred to IPSO because the parties involved could not come to an agreement?

10. If you have identified a remedy within your legal system that enables a person individual or organisation who has been made subject of a story in a newspaper to publish their own view in the same forum either pre- or post-publication, do you feel there is a need to reform these rules or practices?

11. Some see the obligation to publish a reply against the will of a newspaper as an unjustified limitation of a publisher's editorial freedom, which ultimately leads to journalists being less likely to publish controversial stories. However, others consider it as the guarantee of 'equality of arms' for a person aiming to protect their personality rights and as a necessary instrument to enhance public discourse. What is your view on this?

12. If there is a complaint about an article and you notice that the journalist responsible has not sought comment from the subject of the story, what kind of advice would you give the journalist?

Interview guide judges in Germany

1. Was verstehen Sie unter dem Begriff der „Gegendarstellung“?

2. Einige sehen die Verpflichtung eine Gegendarstellung zu veröffentlichen als eine unzumutbare Einschränkung der Pressefreiheit an, welche die redaktionelle Unabhängigkeit erheblich beeinträchtigt. Andere betrachten es jedoch als notwendiger Garant für die Waffengleichheit von Personen, weshalb im Zweifelsfall auch der Abdruck einer Gegendarstellung auf der Titelseite als gerechtfertigt anzusehen ist. Was ist Ihre Auffassung diesbezüglich?

3. Gemäß den Pressegesetzen der einzelnen Bundesländer bedarf es zur Geltendmachung eines Gegendarstellungsanspruches lediglich des Nachweises, dass der Antragssteller durch eine Aussage „betroffen“ ist. Eine Ansicht fordert nun, dass die Gegendarstellung nur gegen nachweisbar unwahre Tatsachenbehauptungen verfügbar sein sollte, um die Presse vor einer „Überflutung“ mit Gegendarstellungen zu schützen. Eine andere Ansicht sieht die gegenwärtige Lage jedoch als notwendig, um eine effektive und schnelle Durchsetzung der Gegendarstellung zu garantieren. Was ist Ihre Auffassung diesbezüglich?

4. In Teilen der englischen Medienlandschaft herrscht das Vorurteil, dass in Deutschland nahezu 100% der Gegendarstellungsverlangen vor Gericht von Erfolg gekrönt sind. Was ist Ihre Auffassung diesbezüglich?

5. Ist es Ihrer Erfahrung nach möglich, den Abdruck einer Gegendarstellung gegen den Willen der jeweiligen Zeitung ohne Zuhilfenahme rechtlicher Beratung durchzusetzen?

6. Sollte der Betroffene Ihrer Meinung nach die Möglichkeit erhalten, die Gegendarstellung im Rahmen des gerichtlichen Verfahrens abzuändern, falls diese nicht vollständig den gesetzlichen Vorschriften entspricht?

7. Macht es in der Praxis Ihrer Erfahrung nach einen Unterschied, in welchem der Oberlandesgerichtsbezirke der Abdruck einer Gegendarstellung verhandelt wird?

8. Ist es Ihrer Erfahrung nach eher die Ausnahme oder die Regel, dass Widerspruch beziehungsweise Beschwerde gegen den Beschluss des erstinstanzlichen Gerichts erhoben wird?