

PREVENTING HARM OR SILENCING CRITICS?
THE DRIVE TO DECRIMINALIZE DEFAMATION
IN THE EUROPEAN UNION

by
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AUTHOR'S DECLARATION

I, the undersigned Orsolya Gulyás hereby declare that I am the sole author of this thesis. To the best of my knowledge this thesis contains no material previously published by any other person except where due acknowledgement has been made. This thesis contains no material which has been accepted as part of the requirements of any other academic degree or non-degree program, in English or in any other language. This is a true copy of the thesis, including final revisions.

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ABSTRACT

Criminal defamation laws pose a threat to freedom of expression and opinion both online and offline. Handling defamation cases through criminal courts and the possibility of getting a prison sentence for something that was said or written about someone else is not only uncivilized but it also endangers press freedom in the EU. The mere existence of the laws can have a serious chilling effect on media freedom because journalists and editors might face defamation lawsuits upon reporting on the wrongdoings of public officials or figures. There is a network of various international actors, such as IGOs, NGOs, rights advocates, academics, and also international courts that have been calling attention to the issue of criminal defamation and demanding its repeal. While in some countries in the EU their efforts have been successful, in others, such as Hungary, the situation worsened. The focus should be on harmonizing defamation laws across the EU and push for the repeal of criminal libel through an EU directive now that the Lisbon Treaty has made the EU Charter of Fundamental Rights binding.

DEDICATION

The work presented here inevitably bears the stamp of the Hungarian government's increasingly severe assaults on media and press freedom at the time of its writing. I dedicate this piece to all journalists, editors, rights activists, and advocates in Hungary and elsewhere who keep standing strong in the face of political attacks on the exercise of free expression.

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Introduction

Sometimes ensuring human rights and civil liberties is best achieved not by making certain policies and enacting legislation, but rather by terminating existing ones. Defamation law represents this case very well: certain aspects of it tend to limit free speech and expression across all countries. Today, there is an international consensus regarding criminal defamation as a dangerous and effective tool in the hands of governments to silence critics directly as well as indirectly. This study focuses primarily on the drive to decriminalize defamation in the EU.

Criminal defamation, the possibility of sending someone to prison for something they said or wrote, does not strike as a particularly pressing issue in the European Union. News about people getting imprisoned for defamation often come from less developed regions and countries of the world. The EU prides itself in taking a role as trend-setter when it comes to facilitating, upholding and respecting human rights and the rule of law, and promoting liberal democratic – in other words ‘European’ – values all around the globe. On relative terms, it is true that citizens of and in the European Union enjoy the protection of fundamental human rights and civil liberties to a great degree but it would be a serious delusion to think that the situation needs no further improvement. The drive to decriminalize defamation is an excellent example of such efforts on the part of various international actors who urge national governments to update their laws and adjust them to prevailing European standards.

Simply put, defamation is the causing of harm to a person’s reputation, dignity, and/or honor by spreading false statements about them. It can take various forms depending on how the national laws define it. In some countries not only people can be defamed but also objects, such as national symbols, and in some places defamation of religions is also acknowledged by the law. This study mainly concerns itself with a narrower view on defamation and focuses only on cases where – in the broadest sense possible - the *press* is the target of defamation

lawsuits. This means media workers such as journalists and editors, but also entails others who publish their works, for example academics. The reason for defining such a scope for this study is that these professional actors are expected to be working in the public interest, reporting, opining, and commenting on public affairs. In short, the press is supposed to keep power accountable to the public by fulfilling its role as a watchdog – the main vehicle of which is investigative reporting to uncover the wrongdoings of the powerful.

The right to freedom of expression serves as the basis of the freedom of the press. However, there are legitimate limits to freedom of speech and expression as well. One such limit is the right to good reputation. The study presented here essentially discusses whether or not the EU-wide decriminalization of defamation would help uphold freedom of expression as a fundamental human right. In addition, it also aims to discuss ways in which the individual's right to good reputation could be ensured while also protecting freedom of expression in its broadest possible sense.

Through the examination of the conflict between the two human rights and through citing examples and a more extensive case study, the study ultimately finds that criminal defamation is inconsistent with international standards relating to freedom of expression and information. As the primary purpose of criminal law is to prevent citizens from committing crimes, it is easy to see how the mere existence of criminal defamation can exert a considerable chilling effect on press freedom and can result in self-censorship among journalists and publishers.

Structure and method

The study starts off with a theoretical chapter that gives an overview of media's role in society and an analysis of the two conflicting rights involved in criminal defamation: the right to free expression and the right to good reputation. This part also considers international

standards relating to these conflicting rights as well as criteria along which they could be balanced. From this follows an account of the various actors involved in the drive to decriminalize defamation and update national laws in a way that they reflect the spirit of these standards.

A more practical understanding of theoretical implications will be presented in the third chapter that discusses the situation of defamation in Europe more closely and zooms in on one particular member state, Hungary, as a case study. Finally, the study will provide policy recommendations for the reform of defamation legislation.

To carry out the above described analysis, the study primarily relies on the method of content analysis, requiring mostly desk research. However, it works both with primary and secondary sources. Primary sources are to be understood as primary texts, such as resolutions, declarations, EU guidelines, laws, as well as judicial case reports and case files. The secondary sources are comprised of textbooks, articles, and research papers written on the topic before, as well as NGO reports, advocacy materials, or news articles.

Chapter 1: Rights, Standards, Freedoms

Media's role in society

News media is generally considered vital to the workings of democracy. The media – under which we usually understand the press – has been declared the fourth estate of power,¹ indicating the social, cultural, and political force that the institution of journalism is attributed. The access to news means the access to vital information for citizens in a democracy. Such an informed citizenry has been for a long time considered the basis of the functioning of the public sphere or spheres through which meaningful discussion and deliberation can take place in societies. However idealized this may be, the general consensus is that an independent and free press is of utmost importance for the well-being of democracies (Habermas 1962; Fenton 2010; Bennett et al. 2007).

The question of media freedom in general and press freedom in particular is, unfortunately, a timely topic in the EU. The latest World Press Freedom Index report that is published annually by Reporters Without Borders paints a worrying picture of the region's declining commitment to uphold the civil liberties that form the basis of the liberal democratic tradition they are embedded in. As the continent is still struggling to overcome the effects of the worst financial and economic crisis in a long time, it is feared that the often mentioned European values that are supposed to unite the citizenry get pushed to the background, enabling the further fragmentation of an already disintegrating region. On the other hand, never has the EU been so loud and clear about its aim to facilitate not just economic, but also social, cultural, and political integration of its member states, the basis of which is formed by a shared respect for fundamental human rights. The acceptance and taking effect of the Lisbon

¹ The first use of the term referring to the press has been attributed to Edmund Burke, who, according to Thomas Carlyle, used it in a parliamentary debate in 1787. (Gentzkow et al. 2006)

Treaty in 2009, which has made the European Union Charter of Fundamental Rights legally binding for all member states is a straight-forward manifestation of these aims (see Douglas-Scott 2011).

Media regulation is always a complex issue. Namely, media is so deeply embedded in society and culture that its regulation can never be merely in the interest of facilitating the European internal, single market that is usually the aim of the harmonization of laws across EU member states. Inevitably, regulatory efforts will bring with themselves spillovers to other, social, cultural and political areas. This, of course, works the other way around as well: media are not only social, cultural and political forces, they are also publicly and, more often, privately owned businesses. These aspects are inseparable from each other and this is what makes any kind of policy or regulation in relation to media such a delicate issue.

Media freedoms

As in this paper the question of criminal defamation is observed mainly in its quality of being used to silence journalists, editors, or publishers, it must be placed in the larger context of media freedom. The basic freedoms that have to be taken into account when it comes to media policy are freedom of expression, freedom of information, freedom of choice (media pluralism) and lately also the right to Internet access, in other words, the freedom to connect.

All of these rights or freedoms are interconnected and are all important components of establishing free media environments. Defamation is most connected to freedom of expression and to freedom of information because it pertains to the right to free speech and to the right to know.

Freedom of Expression is a broad term that refers to the right to freely communicate messages or ideas. This communication is not limited to merely speaking or writing, it can take various other forms as well, such as communicating messages through images. However,

freedom of expression is very often used interchangeably with freedom of speech, so speech here should also be understood as the right to communicate freely. The word ‘freedom’ here generally refers to the idea of communicating messages fearlessly, without the slightest threat of state interference either prior to the communication taking place or after the fact (Fraleigh and Tuman 2011:2-4). In Europe another term, ‘freedom of opinion’ is also used to designate these ideas and it is also understood under freedom of expression.

Freedom of expression underpins the idea of press freedom and its role in society to facilitate public debate. It is often characterized as a cornerstone of democracy and a fundamental human right on which all other human rights are built. Therefore, it is a right guaranteed usually on the constitutional level and there are also several international treaties and standards that protect it.

The most important one is the United Nation’s Universal Declaration of Human Rights (UDHR) that forms the basis of international human rights law. Article 19 of the UDHR states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The International Covenant on Civil and Political Rights (ICCPR) is a UN treaty – signed and ratified by all EU countries – that also guarantees everyone’s right to free expression and opinion. However, this treaty also acknowledges that there might be legitimate limitations to these rights and that freedom of expression comes with responsibilities.

In Europe, the most important regional free expression guarantees are found in the European Convention on Human Rights (ECHR). Article 10 states:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

This is very similar to the text of UDHR and it also must be noted that freedom of information – the free flow of information and ideas that stems from the right to know – goes hand-in-hand with freedom of expression. These two freedoms are inseparable. The ECHR, however, also acknowledges that these freedoms carry ‘duties and responsibilities’ with them and therefore may be subject to restriction.

Of particular importance for this study is the European Union Charter of Fundamental Rights because with the taking effect of the Lisbon Treaty in 2009 the charter has actually become legally binding for Member States. As such, the EU is now also able to investigate member states for the breach of the rights contained in the Charter. It is a significant step towards the harmonization of national laws according to the spirit of European values. In addition, with the Lisbon Treaty the EU has also gained powers to sanction divergence from these values and can start infringement procedures that can even result in the suspension of a member state’s voting rights in the EU (Harris 2013:7-8). Article 11 of the Charter states:

„1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

In this case, not only freedom of expression and information are listed as rights to be respected, but also the need to respect media freedom in general and media pluralism in particular.

Defamation and the right to good reputation

In Europe, generally there are two ways to employ national defamation legislation: through criminal law and through civil law. The purpose of criminal law is largely to prevent citizens from committing crimes by the state's power to punish criminal acts. Civil law on the other hand aims to provide suitable legal aid and compensation to those who suffered some kind of damage and seek redress. In most countries in the EU, defamation is handled both as a civil wrong and also as a criminal offence: the statute can be found both in the civil and criminal law.

There are several ways defamation can occur. Some national laws refer to the individual's right to good reputation, her right to good honor, while some express it as a right to dignity. This is subject to the text of national laws and is also dependent on cultural factors. Defamation can also occur in written and spoken form. The former is widely referred to as libel, the latter as slander. However, this written form also includes any kind of publishing of defamatory claims, so it also involves the case of broadcasting. A necessary condition is that it has to be communicated to a third party in order to qualify as defamation. In the context of this study, the terms 'defamation' and 'libel' will be used interchangeably. Furthermore, in some countries the expression 'insult' or 'insult law' is used for the statute of defamation (ARTICLE 19 Website 2014).

In terms of international treaties and standards, as mentioned above, the ICCPR does identify the right to good reputation as a legitimate limit of free speech in Article 19:

"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

However, it also states that such limitations have to be clearly identified in the law and the principle of proportionality is also to be found, as it deems that the restrictions shall only be applied if necessary.

In a similar vein, Article 10 of the European Convention on Human Rights also defines principles on the basis of which free expression might be limited:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

According to these treaties and declarations, the protection of the reputation of others does justify limiting freedom of expression – the question is, then, is the criminalization of defamation completely justified or are there other considerations that have to be taken into account? If both rights are protected and guaranteed under international provisions, how to approach the question of defamation where they should be balanced? Beyond the theoretical dilemma, the question also carries direct political significance.

The public interest

Building on the earlier outlined role of the media as public watchdog, and drawing on its main function to inform the citizenry and keep the government accountable to the public, it can be said that the statute of criminal defamation is undesirable in democracies.

Criminal defamation is not only an archaic way to handle the issue of defamation, it is also a serious threat to freedom of expression and information. The prospect for journalists and editors to face a prison sentence creates a chilling effect and could potentially prevent (investigative) reporting on the wrongdoings of public figures, which is in the public interest.

This is key to understanding that criminal defamation is simply a gravely disproportionate measure to uphold the individual's right to good reputation as opposed to the public's right to know. Furthermore, acquiring a criminal record could also have an effect on journalists' future careers. Just the procedure of being treated as a criminal is humiliating and uncivilized for a democracy.

However, this does not mean defamation should be of no concern to the press. The publication of false statements is not acceptable, given that such an act was committed knowingly. This criterion of 'actual malice' is an important element of American but also European case law, as it was established in the *New York Times vs. Sullivan* case. Moreover, the case also established the expectation that public officials and public figures in general have to tolerate more criticism than ordinary citizens. Political speech is also considered to be protected speech and its restriction in any way should be avoided in democratic systems (Úbeda de Torres 2003:8-9).

Most importantly though, it must be stressed that 'opinions' in general cannot be considered defamatory, the same way as the publication of true facts is also justified and cannot be regarded as defamatory. In short, defamatory speech can only be constituted in the publication of false statements of fact that are a result of actual malice as opposed to reckless error committed in good faith.

In case defamation has indeed been committed, it is widely believed that civil law can provide adequate redress to claimants in the form of financial compensation for instance, but other remedies can be offered as well, such as the obligation to publish corrections. This way the conflict can be handled horizontally, between two equal citizens, while criminal procedures always establish a vertical conflict between the state (with all of its resources available) and an ordinary citizen.

Chapter 2: International Actors and Their Roles in Policy Making

Talking about a ‘drive’ to decriminalize defamation in the EU suggests a long-standing, united commitment to tackling the issue by several different actors. In this chapter a brief overview will be provided on who are the main actors behind the drive, what their tools are and how they fit into the cycle of policy making. Under the term ‘drive’ basically an agenda to enforce international standards in national laws and legislation is understood.

Actors

The actors involved in the decriminalization drive are numerous and diverse. The most obvious ones are the four official mandates on Freedom of Expression (Hulin 2013). These are:

- **Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media:** the main tasks of the Representative include observing the development of media in OSCE participating States, and has an early warning function with other relevant international and national organizations. Additionally, the Representative also has a rapid response obligation, meaning in serious non-compliance cases she contacts directly with the parties involved (state or non-state actors) and contributes to the assessment and resolution of the situation. The Representative also has a general function to advocate and promote OSCE principles relating to freedom of the media.

- **United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression:** the mandate of the UN Rapporteur is worldwide, as opposed to the three other regional ones. Very briefly the tasks include gathering information on violations of freedom of expression and opinion, to make recommendations on how to better safeguard and promote these rights and to serve as advisor to other UN bodies. This was the first mandate, and the first Special Rapporteur was appointed in 1993.
- **Organization of American States (OAS) Special Rapporteur on Freedom of Expression:** has a fairly broad mandate to promote and protect freedom of thought and expression. These include preparing thematic reports, conducting country visits, as well as carrying out a range of promotional and educational activities. The Rapporteur also advises the Inter-American Commission on Human Rights.
- **African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information:** the mandate's duties are again similar, such as promoting standards, investigating violations, monitoring national laws and providing advisory services. In addition, the Rapporteur is also expected to make public interventions when necessary and compile reports on the status of free expression and access to information in Africa.

Another leading regional international organization in Europe that has been particularly active in the drive is the Council of Europe and its various bodies, such as the Parliamentary Assembly, Commissioner for Human Rights and the European Court of Human Rights (ECtHR), which enforces the already discussed European Convention on Human Rights. The Council of Europe has a strong commitment to media freedom and has a separate division

working on related issues (Council of Europe website 2014). The Council cannot make binding legislation but through the ECtHR, the main international human rights court in Europe, it does have the capacity to turn soft laws (such as treaties and standards) into hard laws. The Court is an extremely important element in the drive for decriminalization as it has a huge body of case law that is widely known to place freedom of expression at the forefront and routinely applies this principle in (criminal) defamation cases (see Smet 2010).

There are also numerous NGOs and advocacy organizations who have been active in the drive to decriminalize defamation. In general, any organization whose mission has to do with freedom of expression or media freedom has been raising its voice over the years. These organizations tend to be global in scope, and they include ARTICLE 19, Human Rights Watch, International Press Institute, Index on Censorship, Freedom House, to mention a few. Besides these large, mostly global institutions there are hundreds of local organizations that engage with the same issues, only on a local scale. One such example is the Hungarian Civil Liberties Union in Hungary.

There are professional organizations as well, who represent media workers, such as Reporters Without Borders, Committee to Protect Journalists, or the International and European Federation of Journalists. The publishing industry has also developed its business advocate organizations, such as the World Association of Newspapers and News Publishers or the International Publishers Association. Academia has also taken its fair share as there are numerous research centers at universities that are part of the drive to push for the decriminalization of defamation.

Tools

None of the actors mentioned here have decision-making power, but there are still a number of tools available for them to push for the decriminalization of defamation.

First of all, the four official mandates on Freedom of Expression make a joint declaration on a wide range of pressing issues regarding Freedom of Expression every year since 1999. The first such meeting that resulted in a declaration was initiated by ARTICLE 19, who had the idea of facilitating a forum to exchange information and strengthen co-operation between NGOs and the official mandates. By now, however, the Joint Declaration have become standard-setting exercises that are able to address problems on a much more concrete level than the ‘traditional’ standards introduced in the previous chapter. Criminal defamation is certainly one of the recurring themes in these declarations, bringing the issue to the forefront again and again (Hulin 2013:9-10).

Besides the Joint Declaration, one of the most powerful tools that these Special Rapporteurs have is their ability to engage in public diplomacy, in other words, to raise the attention of foreign publics to the issue of criminal defamation and to make recommendations for solutions.

NGOs and other civil society actors most often act as monitoring bodies and news producers. They also often compile reports and issue white papers that provide guidance to understand issues at hand. In some cases they also act as think tanks and write policy briefs and papers, the tools are not exclusive to one kind of actor. This is why sometimes academia also produces policy papers besides traditional academic research, and sometimes civil organizations will produce research papers. The same goes for conferences that can be organized by any of the actors, not just by academia, but conferences and workshops can also be run jointly.

Another extremely important aspect is the design of rankings and indices that make it possible to monitor the development of situations in different countries. These indices are also usually published annually and serve as a great reference point for any advocacy activity.

It also happens that civil society or professional organizations organize demonstrations or file petitions when a particular event triggers outrage.

Roles

The workings of what the public policy scholar Diane Stone calls transnational policy communities or networks manifests itself quite obviously in the drive to decriminalize defamation (2008). In these communities or networks, some actors are more visible than others and roles are not pre-defined either, there are fluid relations among the agents. There is even an official network for freedom of expression advocates called IFEX that connects the various actors in a more formal way.

However, what the drive to decriminalize resembles the most is a ‘transnational advocacy coalition’ that is based on very much principled beliefs. Their role lies more in agenda-setting than policy-making, as it has also been shown in the case of criminal defamation. These groups are not so much integrated into policy communities, rather, they are outsiders. (Stone 2008:24). However, agenda setting is an extremely important and integral part of policy making, so their role should not be underemphasized. According to Kingdon, they would not really be described as policy entrepreneurs, but they surely take a huge role in opening policy windows. However, the four official mandates are probably in better position to involve politicians and decision makers directly in the drive.

What is apparent, on the other hand, is that consensus can be observed in international law and standards that criminal defamation must be repealed; although so far the consensus has not been translated to national laws and regulations.

Chapter 3:

Case Study: The European Union and Hungary

The situation in the European Union

In spite of the drive to decriminalize defamation in Europe, fairly few countries have actually made the necessary legislative changes. Even if the practice of giving prison sentences to journalists is extremely rare in the EU, a formal decriminalization would be important to strengthen and uphold liberal democratic values that favor public debate and promote media freedom. However, so far only a few European countries have repealed criminal sanctions for defamation, but even in those cases there have been attempts to ‘re-criminalize’ it, for instance in Romania (Harris 2014).

While European Union countries usually do score very well in the World Press Freedom Index, even Finland - the country with the freest media – keeps criminal defamation in its laws for certain circumstances. Other established democracies also regularly score low, such as Greece and Italy. From newer member states, Croatia, Bulgaria and Hungary cannot be said to have an entirely free media environment (World Press Freedom Index 2014).

Criminal defamation has been repealed only in six of the 28 member states: Croatia, Cyprus, Ireland, Romania and the United Kingdom. Croatia however did make ‘humiliation’ a criminal offence just recently, so it looks like the commitments were more for EU accession than press freedom.

While criminal defamation does exist in the criminal law of most EU member states, it is quite rare that prison sentences are handed down for such cases. The most likely reason for that is the established case law of the European Court of Human Rights, which has usually defended the public’s interest in freedom of expression and press freedom over the private interest of the right to good reputation. Even if the practice of the ECtHR is adopted in

national courts, international standards cannot be said to be reflected in the laws, which in this way maintains an environment of legal uncertainty (Harris 2013:7-9).

Hungary: the state of defamation

Hungary is not a typical case when it comes to defamation law in the EU: the government just recently tightened regulations and increased the length of prison sentences that could be applied to defamatory actions. While somewhat of an outlier, the case of Hungary is illustrative of the dangers that criminal defamation represents towards the freedom of the press. As such, it shines a light on the reasons why the EU should indeed take a clear and firm stand in harmonizing defamation laws among its member states.

Contrary to the decriminalization drive, Hungary has actually tightened the regulations in 2013 by allowing even higher prison sentences for certain defamatory acts than previously. Such measures go hand-in-hand with the 2011 media laws that eroded the independence of the media regulatory body and generally weakened press freedom in the country. A research project at Central European University explored the new Hungarian media laws' consistency with European Union standards and legislation and concluded that there were serious shortcomings regarding the securing of media freedom. The study pointed out problematic aspects of the regulatory authority, such as its scope of action and authority, centralized structure and its lack of independence from Fidesz, the currently governing party. There are also concerns over the fact that the same body exercises regulatory, licensing as well as sanctioning authority, which provides an extremely fertile environment for the abuse of power to manipulate the market along political interests (Center for Media and Communication Studies 2012). It is in this context that the case studies have to be understood and analyzed.

In Hungary, the right to freedom of expression and opinion, as well as press freedom is guaranteed in the Constitution. Defamation, libel, or insult are present both in the Hungarian

civil and criminal law. In general, a journalist cannot be prosecuted if the publication was an opinion and not a fact. Even if she published something as a fact, in case it is a true fact, the statute of defamation or libel is not present.

The Hungarian criminal law allows for a prison sentence of up to one year, or can also punish the defendant party with a fine, or can oblige her to do community service related work. However, a prison sentence of up to 2 years can be given if libel occurred with an ill intention, in front of a large public, and causing substantial damage to the defamed party (TASZ 2002).

Nevertheless, it must be pointed out that in Hungary there was only one case in 2004 where a journalist got a prison sentence for defamation, and after an appeal the sentence was changed and the defendant only had to pay a fine in the end (HVG 2004).

Beside the problem of keeping the possibility of sending journalists to jail for libel, there is another issue with Hungarian laws and regulation that completely undermines investigative journalistic work and media freedom. Namely, public figures enjoy stronger protection by law when it comes to libel. As politicians and civil servants are involved in the notion of public figure, this gives ample room for the political abuse of defamation legislation. What's more, when politicians sue a journalist or media outlet, libel lawsuits are automatically handed over to a public prosecutor, and the costs of the process and trial will be born by the state, spending public funds. This very much encourages this harmful practice and explains why there are so many defamation cases in the country (Bodrogi 2013).

The 'Baja video' case and its regulatory consequences

In October 2013, an established, left-leaning online news portal, hvg.hu published an article with the title *'Here is the proof of cheating: votes for money and firewood in Baja'*. The article showed an amateur video recording of persons close to Fidesz (the ruling party) as

they are discussing buying votes for money and firewood at the local by-elections held in the town of Baja in September and October 2013. In a few days, however, the video turned out to be ‘fake’ in the sense that the persons in it have been said to be only acting as if they were aspiring to vote-buying. There is much uncertainty surrounding the origins of the video and to this day it has not been clarified who made it or ordered it to be made, but in a rather controversial move for a media outlet, hvg.hu decided to reveal their source and it turned out that a leader from the opposition socialist party ‘leaked’ the recording to the news portal. HVG was subsequently sued for libel by the governing Fidesz party, and Gábor Gavra, the editor-in-chief of the news portal resigned (Field 2013).

The incident brought with it serious regulatory consequences in the form of an amendment to the criminal libel law. Namely, Fidesz, using their absolute parliamentary majority, rapidly pushed through a new regulation that quickly became known as ‘Lex Gavra’, indicating its obvious tailoring to the concrete case of the Baja video.

According to the fairly vaguely worded new law, the creation and distribution of fake or falsified audio or video recordings that can harm an individual’s reputation and dignity is now punishable with a prison sentence of up to 3 years. The punitive terms break down as follows:²

- Those who create fake, falsified or untrue audio or video recordings with the aim of harming the honor of others can be punished with imprisonment of up to 1 year.
- Those who make such recordings accessible with the intention of discrediting others can be punished with imprisonment of up to 2 years.

² The text of the amendment to defamation law was published in the Hungarian Official Gazette and was translated by the author of this study.

- A prison sentence of up to 3 years can be given if the criminal act is committed in front of a large audience or public, and/or harming the interests of others.

The unusually strict law has serious repercussions for investigative journalism and press freedom, as the highest sentence is clearly aimed at keeping media outlets from publishing potentially revealing audio and visual material. However, by punishing the mere creation of such ‘defamatory’ recordings, potentially even Internet memes published on the personal blogs of ordinary citizens, as well as the creators of the memes could be subject to the law.

As it has been pointed out by Gábor Polyák from Mérték Media Monitor, a Hungarian think tank analyzing media policy, the new law poses a serious threat to media outlets by creating a harsh chilling effect that often results in self-censorship out of carefulness on the side of editors and journalists. This can seriously harm the media’s mandate as watchdog and its role as an agent to inform the electorate and wider publics in general. This kind of soft censorship undermines free expression and the fundamental right to freedom of speech can be compromised. Essentially, the bill can be understood as establishing the possibility for the government to exercise legal censorship against unwanted views. As it was discussed earlier, the law is not likely to be used for imprisonment, but according to Polyák, the message from the government to journalists is clear: we won’t hurt you, unless we want to. As such, indeed, the law does not need to be applied in order to achieve its goal – creating an environment of uncertainty through vaguely defined regulations makes media workers take extra caution and avoid conflicts.

What’s more, it has also been pointed out by lawyers and opposition politicians that even before the new law it was possible to legally handle the publication of false statements, pointing to the completely disproportional nature of the measure (Bodrogi 2013).

Online comments

Another notable defamation case recently in Hungary was when a politician holding a high position in the government sued an online news portal for comments about him. The news portal reported on a car accident in which the said politician was involved and that resulted in the death of the young woman driving the other car. Some users made comments that the politician would have deserved to die, not the woman. After the online news portal got sued by the politician, they did not wait for a court decision. Instead, the owner of the portal settled with the politician outside of the court and agreed to pay half a million Forints (about 1,700 Euros) financial compensation. The owner of the portal also agreed to publish an apology for infringing the politician's right to dignity. The politician has sued seven users as well who left the comments he found defamatory. However, prior to the national elections in April 2014, he withdrew his complaint (Origo 2013).

It is easy to see how the chilling effect of a defamation lawsuit has scared the owner of the news portal enough to admit to infringing the politician's right to good reputation and taking liability for the comment in the hopes of a less severe financial burden. There is no way of knowing what the court would have decided but in lieu of a clear policy on the liability of online publishers for third party content, the climate of uncertainty produced a highly unfavorable outcome. Namely, the very same company that owned this publication, has already back in 2011 decided to close the comment section of another of its online magazines. The editor-in-chief of Velvet.hu, an online gossip site justified their decision to abandon comment sections altogether by the recently developing case law of regarding third-party comments on websites as if they were letters to the editor and as such, could be considered edited content that falls under the authority of the Hungarian media regulatory body (Nádori 2002).

Indeed, in a very recent decision, the Constitutional Court of Hungary has ruled in the case of a real estate website that the content provider was to bear unconditional responsibility for the comments placed on its website, whether or not the content had been moderated or even if it were removed by the owner (OSCE Newsroom 2014).

Defamation in relation to the liability of online content providers is a serious threat to freedom of expression, even if it is handled through civil law. If more and more online publishers decide to close comment sections, an unnecessary limitation of public participation and free and open debate could be established, which is a soft form of censoring completely lawful content and curbs freedom of expression. Unfortunately, European Court of Human Rights case law is also moving towards holding intermediaries liable, as represented by a recent, much publicized case of an Estonian news site that had to pay damages after the ECtHR ruled it was to be held liable for defamatory comments (Banks 2013). On the other hand, there seems to be a new drive developing that puts emphasis on upholding the right to free expression online as much as offline: the EU has recently adopted its new guidelines titled Freedom of Expression Online and Offline that reaffirms its commitment to free speech and the free flow of information and ideas (Council of the European Union 2014).

Drive to where?

The Hungarian case studies presented here illustrate the problematic dimensions of criminal defamation very well. Political abuse of libel laws is not hard to see, both online and offline. International and national media freedom advocates have been constantly criticizing the Hungarian government for its extensive control over the media. Still, the situation worsened and instead of repealing criminal defamation, the government has increased the length of potential prison sentences.

Even in the cases where libel law was repealed, such as the UK, the reason for reform was not an idealistic stance on democratic values, rather a series of embarrassing incidents

(e.g. phone-hacking scandal) that opened up policy windows and eventually led to the rehaul of media laws, not to mention the absurd situation the UK faced regarding libel tourism. Other cases also show that some kind of an interest usually lies at the heart reform that is different from an internal democracy-strengthening effort, such as the prospect of EU accession. For instance, Croatia has repealed criminal defamation before its joining the EU last year, but recently the country established ‘humiliation’ as an offence in its new criminal code (Index on Censorship 2014). The drive to decriminalize defamation has been going on for a long time now – and still, not much actual success in getting national governments to repeal the law. Naturally, they don’t have much interest in giving up an effective tool of soft censorship.

On the other hand, as the Hungarian government keeps eroding media and press freedom, cases like these could in fact open windows of opportunity for the EU-wide campaign to decriminalize defamation. After the recent European Parliament elections, and the visible spread of euro-skepticism among voters, there is a spirit of the need for renewal and reform in European institutions (Barroso 2014). This, together with the EU’s approaching accession to the European Convention of Human Rights and the Lisbon Treaty’s strengthening of the commitment to civil liberties, there is a firm chance for the different streams of policy-making to join. Cases like the ones in Hungary provide a good opportunity for policy entrepreneurs to push the agenda towards decriminalization by relentless advocacy. The situation in Hungary has indeed already given rise to numerous professional conferences and in 2012 even a public hearing with the EU’s Civil Liberties Committee addressing the question of media freedom among other concerns. Following the hearing a non-legislative resolution was passed by the European Parliament that called for the continuous monitoring of Hungarian media laws among others, and see whether they are in accordance with the letter and spirit of EU law. The resolution also stated that *“the Hungarian authorities should comply with the recommendations, objections and demands of the Commission, the Council of*

Europe and the Venice Commission and amend the laws concerned, respecting the EU's basic values and standards (European Parliament Press Release 2012).”

As such, the issue or problem definition phase of policy making is kept afloat and advances the agenda. The various actors involved in the drive have been occupied with the issue for a long time, which means there is already a consensus on what would be the right policy to solve the issue: decriminalization of defamation. The joining of the problem and policy streams is then a given, and now there is a good chance the political stream might also pick up the issue, once the new European Union administration is set up after the elections. The various actors involved in the drive, however, should put more emphasis on gaining access to MEPs and international civil servants working in the EU who could have a substantial role in advancing the case on the EU level.

However, it also must be taken into account that Hungary is a fairly young democracy with a considerably underdeveloped democratic culture of political and public debate. Nothing proves this better than the recent scandal concerning Magyar Narancs, an established liberal weekly in Hungary. The magazine’s website featured an article, or rather a blog post, of admittedly questionable decency regarding child actresses in famous films and discussed their sexual appeal and attractiveness. Upon publishing the article there was considerable public uproar over the unusual topic and tone of the article. An online petition was launched that criticized the web magazine over the publication of ‘sexist and pedophilic articles.’ The petition was signed by hundreds of people who demanded an apology and a review of the liberal magazine’s stance on gender issues. The case soon got the attention of mainstream media as well, who all reported on the petition (Bede 2014).

In an unexpected turn of events, the reaction of Magyar Narancs – a publication that has for a long time been considered a bastion of liberal ideology – was to threaten the author of the petition with a defamation lawsuit. The petition was a completely legitimate way of

expressing dissatisfaction with the quality and theme of one of the magazine's articles, and it also must be stressed that it did not demand the removal of the article in question. Rather, the petition represented public debate at its finest: the magazine could have chosen to reply in an article in which it could have defended its motives to publish the article. Instead, its very first reaction was to threaten a reader with a libel lawsuit. This is an excellent illustration of Hungarian political culture still being stuck on a low level, even in institutions that certainly ought to be at the forefront of advancing it.

Within the European Union this kind of cultural divide is generally visible between the old, established democracies of Western Europe, and the new member state of Central and Eastern Europe. The harmonization of defamation policy that draws on the democratic, international standards of the EU would help young democracies such as Hungary in maturing their political culture and participation. With this in mind, the next chapter collects the main policy recommendations that such a harmonized legislation should take into account.

Chapter 4: Policy Recommendations

Based on the case studies and their analysis, it is fairly obvious that the current legislation pertaining to libel poses a grave threat to media and press freedom, as well as to freedom of expression and opinion in Hungary, and by that also in the European Union. It is necessary that the EU enacts binding legislation to address the previously outlined problematic aspects. It must be acknowledged that national governments seldom have an interest in reforming their libel laws as they can often use them to their advantage to tame opposing voices and perpetuate their positions of power. As pessimistic as it may sound, national governments should not be expected to act on the issue of libel reform on their own. Therefore, the European Union should indeed create directives that bind member states to harmonize defamation laws in accordance with the case law of the European Court of Human Rights, and also as part of the EU's accession to the European Convention on Human Rights, the spirit of which should be reflected in the national laws of all member states.

The decriminalization of libel is essential to lift that threat: the prospect of going to prison over something that somebody has written is archaic and not defensible in the contemporary European context. As it has been argued throughout this study, it is also deeply against the public interest by exerting a chilling effect on the working of the media, whose central role in a democratic society is to serve as public watchdog over those who exercise power. Hence, criminal defamation is detrimental to the principle of the rule of law as it often serves as a tool to silence critical opposition voices and can also serve as an obstacle to hold those in powerful (political) positions accountable to the public. Additionally, it poses unnecessary and unacceptable limitations to free speech and freedom of expression, with special attention to political speech. It also hinders the very much related principle of freedom

of information by posing a threat to the free flow of information and ideas in society, both online and offline. A repeal of criminal defamation in all European Union member states is necessary for the fulfillment and enjoyment of fundamental human rights and liberal democratic principles that are all part of the European Convention of Human Rights and countless other international treaties, which should be binding for all members of the Union.

Furthermore, the following policy recommendations can be made in order to strike the right balance between upholding freedom of speech and expression and the individual's right to good reputation and dignity, by the power of civil law. Ultimately, the goal of the policy should be to ensure the legitimate interests of free debate and the scrutiny of public issues, contribute to the maintenance of an informed citizenry and ensure the fearless production and flow of ideas – online as much as offline.

- **Precise definitions:** it must be clearly defined in the text of the law what is understood under vague terms such as ‘considerable harm’, otherwise, in an uncertain legal environment, media workers can become overtly cautious and unable to fulfill their role as public watchdog. They must know exactly what they can expect should proceedings against them be started. Without this, the law could be subject to interpretation to a degree that might open up the possibility of its arbitrary use for malicious purposes, which is incompatible with the constitutional right and principle of the rule of law.
- **Protection of public interest:** there should be an explicit defence in the regulation of the exercise of fair comment on public affairs, provided they are formed around true facts. However, not everything that gets published on public affairs is always in the public interest. The discussion of political matters, however, should always fall under

the category of protected speech for the sake of an informed citizenry that forms the basis of democratic societies.

- **Proportional compensation:** if the civil court finds that the plaintiff's reputation was indeed harmed by defamatory claims, the compensation must be proportional. It has been pointed out that the prospect of a prison sentence as defined by criminal law is an obvious case of disproportional measures. In the case of civil lawsuits fines that are too large would also have a serious chilling effect in terms of press freedom. Namely, the prospect of a fine large enough to bankrupt media companies would undeniably deter investigative reporting and the publishing of certain information that might bring lawsuits for the journalist, editor, or the company.
- **Set ceiling for compensation:** drawing on the above-mentioned principles, in case of fines, a ceiling should be set in the law that would define the maximum amount of damages that can be paid by media companies to plaintiffs. Otherwise disproportionate punishments would pose a threat to free expression and press freedom along the same logic as in the case of criminal defamation, leading to self-censorship and thus the silencing of opposing views.
- **Burden of proof should be on claimant:** it should be the job of the claimant to prove that harm has been caused to their reputation. This would prevent a proliferation of defamation cases and would incentivize claimants not to sue but to clarify their positions via other means, such as engaging in public debate or exercising their right to reply.

- **Officials, politicians, public figures and bodies should tolerate more criticism:** in some EU countries, as we have seen this is a serious issue. In a democracy it can be expected that public figures have to bear higher scrutiny from the press because it is simply in the public interest to uncover their wrongdoings. Offering them special protections weakens the rule of law and the state of democracy because ordinary citizens (and this involves journalists as well) will be less likely to criticize them, knowing that the consequences can be harsher.
- **No special protection and status to public officials and public figures:** Another aspect that belongs here and is very well represented in the Hungarian case studies is when the law offers stronger protections to public officials not by explicitly granting them special status but by automatically handling the cases via public prosecutors. Because of this, politicians and also other public officials – the definition of which persons exactly that includes should also be subject to scrutiny - immediately seek legal tools when unfavorable claims and opinions are published about them. A lawsuit is very easy to launch for them because the case will be investigated by the police and handled by the public prosecutor, which means their interests will be represented by the state. Additionally, in such cases they do not bear the costs of the proceedings, rather, the process is financed by the state, which means with the use of public funds. Compared to this, the prospect of a lawsuit is a (financial) burden for journalists, media outlets, and other not protected ordinary citizens, who have to hire lawyers to represent them and have to appear in front of the court.

Similarly to the problematic aspects mentioned earlier, in this case again the principle of the rule of law as defined in the Constitution of every EU member state is not upheld. Additionally, it can also be argued that another constitutional right, the right to

due process, is also challenged when public officials enjoy this kind of preferential treatment compared to private individuals in the same situation. On top of that, if the proceedings are conducted under public prosecution, then the personal data of the party who is under criminal investigation has to be entered into a registry, keeping the records on file. This does not apply in the case of a civil lawsuit (TASZ 2013).

- **Even false statements should be protected if due diligence was carried out in checking their content:** like in any other profession, journalists and editors can make mistakes and/or can be misled. If they put effort into checking their sources they should not be held legally liable for the publishing of even untrue facts if they did so in good faith.
- **Enhancing the self-regulation** of various media industries would be desirable that would involve letting the industry itself take the responsibility for mistakes (such as in the case of HVG) and bear the consequences in terms of the possibility of losing their audience.
- **Limiting intermediary liability:** online publishers and content providers should not be held liable for third party, user-generated comments placed on their websites. Holding these intermediaries responsible for potentially defamatory content, who merely provide infrastructure for public discussion and thus public participation in public affairs is seriously detrimental to safeguarding the idea of an active and informed citizenry. It must be noted that uncertainty in the regulation of this issue creates an unstable environment, so it is crucial that the EU takes a clear stand and protects online freedom of expression and opinion online as much as offline. As it was

shown, the prospect of the possibility of getting fined has already caused some content providers to altogether abandon comment sections on the websites owned by them. This unnecessarily limits the public's opportunity to participate in free debate and hinders freedom of information in the EU. It is not to say that online defamation can not be a statute under any circumstances but procedures and best practices need to be established that offer adequate protection of the right to good reputation and honor, without posing a threat to various freedoms.

This issue is possibly even more complex than balancing conflicting rights offline. The source of the complexity is the specific nature of the technology involved: the Internet and websites can be accessed from anywhere around the globe and the comments can be left anonymously. There have been attempts to eliminate anonymity from comment section but it has to be noted that it is precisely this anonymity that in many cases facilitates the fearless participation in public debate. What also follows from technological specificities is that it is an impossible – and most importantly most likely unenforceable – expectation to have publishers constantly monitor and edit comments, prior to their publication on the website. It would slow down the flow of debate, would probably lead to unnecessary prior censorship of completely lawful content and would require amounts of human and financial capital that are inaccessible to most companies. Besides, such censorship would be reminiscent of the practices of countries like China, who heavily censor Internet within their jurisdiction – both manually and algorithmically – and as such cannot be said to share and promote democratic values.

Keeping these criteria in mind, the best solution thus far has been to build a so-called safe harbor model, suggested by various international actors, among them ARTICLE 19. Such a model advocates for upholding access to public participation and debate

online and aims to handle disputes between the directly involved parties. It would involve the intermediary as a matter of last resort, who would eventually be obliged to remove defamatory comments from the website (ARTICLE 19 2013:16-18).

Conclusion

This study set out to examine whether criminal defamation laws in the European Union are capable of exerting a chilling effect on press and media freedom. By taking into account international standards relating to free expression and the right to good reputation, and through the analysis of defamation laws in Hungary and an overview of the situation in the EU in general, the findings clearly indicate that the statute of criminal defamation is not in line with European values.

Furthermore, the study also aimed to give an overview of the drive to decriminalize defamation in the EU. Drawing on the theory of transnational policy communities, the study examined different kinds of actors and their roles in agenda setting and policy making. It is clear that all the non-state actors involved in the drive have to essentially reach either state actors, or other decision-making agents, such as MEPs or international civil servants in order to achieve legislative change. In the meantime, the official mandates' role in public diplomacy could also be used more towards these ends.

Assaults on press freedom anywhere in the EU have serious, damaging consequences everywhere within the Union as well as outside of it, undermining the basis of the EU's external action mission. Therefore, decriminalizing defamation would not only help in upholding freedom of expression in the region directly, but also globally in an indirect way.

In a democracy one of the media's main functions is to check on the state and keep the public informed on abuses of power, so that they can make an informed decision when choosing their political representatives. In the light of this basic idea, it is undesirable that all the regulatory power is in the hand of the state, whose wrongdoings the media is supposed to uncover. This very idea is contradictory to the media's fundamental mandate as well as to democratic principles. Hence, the importance of promoting the self-regulation of the media cannot be overstated (Mérték Blog 2013).

For now, however, the goal is to harmonize defamation laws across EU member states so that all of the citizens of the European Union can truly enjoy and benefit from the foundations on which the EU was built as stated in the preamble of the Charter of Fundamental Rights: *“universal values of human dignity, freedom, equality and solidarity; based on the principles of democracy and the rule of law.”*

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