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The Problem of Criminal Defamation : Hungary vs. The European Union

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I. Introduction

For democratic governments, peoples' freedoms of assembly, expression, press, and speech are the important avenues for the dissemination of ideas. They provide a forum for citizens to express their voice, their input into politics. The European Union (EU) recognizes these freedoms as human rights, in its Charter of Fundamental Rights of the European Union (Charter) under Articles 11 and 12.¹ Specifically, Article 11 protects the right to "hold opinions and to receive and impart information and ideas without interference by public authority," meaning the government.² However, contrary to the EU's commitment to these "fundamental rights," several of its Member States have increasingly restricted the freedoms of speech, expression, and media, and openly contested the primacy of EU law. This is a symptom of an increasingly disturbing global trend of "democratic backsliding," where national governments begin to restrict freedoms and reorganize their institutional and legal structures to entrench their power.³

¹ Charter of Fundamental Rights of the European Union, Art. 11-12, Dec. 18, 2000 (2000/C 364/01) [hereinafter "Charter"].

² *Id.*

³ This determination is based upon the Liberal Democracy Index, which looks at: 1) "whether there are free and fair elections, 2) whether leaders are constrained by the rule of law and oversight by the parliament and the judiciary, and 3) whether civil liberties are protected." Anna Lührmann and Matthew Wilson, *One-third of the world's population lives in a declining democracy. That includes the United States*, THE WASHINGTON POST (July 4, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/03/one-third-of-the-worlds-population-lives-in-a-declining-democracy-that-includes-americans/?utm_term=.ce672dad3ba0; Staffan I. Lindberg, *The Nature of Democratic Backsliding in Europe*, CARNEGIE EUROPE (July 24, 2018), <https://carnegieeurope.eu/2018/07/24/nature-of-democratic-backsliding-in-europe-pub-76868>.

In 2017, Hungary has lost its status in as a liberal democracy into an electoral democracy, along with Lithuania, Poland, and Slovakia.⁴ It has also dropped from “free” to “partly free due to sustained attacks on the country’s democratic institutions by Prime Minister Viktor Orbán’s Fidesz party, affecting the media, religious groups, academia, NGOs, the courts, and the private sector.”⁵ An analysis of the “indicators measuring the freedom of expression and alternative sources of information have declined significantly in many countries while improving in very few,” suggesting “democracies are backsliding by way of less conspicuous violations.”⁶ Hungary’s Prime Minister Orbán and Fidesz-party government have significantly curtailed basic democratic freedoms since coming to power, along with redesigning the judiciary and court system to help entrench their power.⁷ In fact, the EU Parliament has voted to “initiate sanction proceedings against the Hungarian government” for “backsliding on democracy,” declaring “there was a clear risk of serious breach of European values by the Hungarian Prime Minister.”⁸ While the vote is unlikely to succeed in significantly curtailing Orbán’s influence, it recognizes the rule-of-law crisis occurring right now in Hungary.⁹

⁴ This is a study conducted by the V-Dem Institute, which analyzes a variety of factors that determine what constitutes a liberal democracy. *Id.*; see also *V-Dem Annual Democracy Report 2018*, V-Dem Institute, UNIV. OF GOTHENBURG, https://www.v-dem.net/media/filer_public/3f/19/3f19efc9-e25f-4356-b159-b5c0ec894115/v-dem_democracy_report_2018.pdf.

⁵ *NEW REPORT: Freedom in the World 2019, featuring Special Release on United States*, FREEDOM HOUSE (Feb. 4, 2019), <https://freedomhouse.org/article/new-report-freedom-world-2019-featuring-special-release-united-states>.

⁶ Lindberg, *supra* note 3.

⁷ David Frum, *The Risks to Freedom in Hungary*, THE ATLANTIC (Apr. 5, 2019), <https://www.theatlantic.com/international/archive/2018/04/hungary-elections-orban/557294/>; Pamela Druckerman, *The News is Bad in Hungary*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/opinion/hungary-viktor-orban-press-freedom.html>.

⁸ Michael Birnbaum and Griff White, *E.U. parliament votes to punish Hungary for backsliding on democracy*, THE WASHINGTON POST (Sept. 12, 2018), https://www.washingtonpost.com/world/europe/amid-threats-to-rule-of-law-in-hungary-european-lawmakers-vote-to-start-sanctions-proceedings/2018/09/12/4ba20fe8-b63d-11e8-ae4f-2c1439c96d79_story.html?utm_term=.4d537662398e.

⁹ “Orban has teamed up with Poland, another E.U. country that has been slapped for rule-of-law problems, to protect each other against punitive measures targeting either nation that require the unanimous vote of all 28 E.U. countries.” *Id.*

This paper will comparatively examine the approach to one aspect of the freedom of speech, specifically focusing on criminal defamation laws. It will examine criminal defamation in the broader context of principles of freedoms of speech (or expression, as it is more commonly referred to) and the freedoms of the media from both an EU and Hungarian law perspective. This paper will consider the case law framework from both the Court of Justice of the European Union (CJEU) and the Hungarian courts, as well as examining the approach taken by the European Court of Human Rights (ECtHR) as a possible alternative avenue to counteract the continued restrictions on freedoms. First, this paper will present a cursory overview of the institutional and legal framework of the EU as applicable to its CJEU, and present some of the weaknesses that diminish its effectiveness when confronted with a systematic human rights violator. Second, this paper will present a cursory overview of the ECtHR, and analyze its weaknesses in protecting human rights in Hungary. Third, this paper will present the current legal framework for criminal defamation law, in context of the freedoms of speech and media, in Hungary. Fourth, the case law from the European Court of Justice (ECJ) will be considered. Finally, this paper will examine the case law of the ECtHR, and propose that in light of overall difficulty in correcting Hungary's democratic backsliding, pushing key freedom of speech cases through the ECtHR would be the best solution to reinstating a sense of self-correction within the Hungarian people.

II. The Background legal framework behind the European Union

Any comparative law discussion between the European Union and one of its Member States merits at least a cursory overview of the relevant legal framework. The relationship between the EU and its Member States is complicated, since each Member retains a strong sense of sovereignty while at the same time ceding certain decisionmaking to the EU when it joins the

Union.¹⁰ Essentially, what has begun as an economic partnership has since evolved into a complicated regulatory body with a wide variety of political and social objectives.¹¹ The EU has championed its “view of humanity and model of society” in part through a professed commitment to “human rights,” as proclaimed in the Charter of Fundamental Rights of the European Union (“Charter”).¹² Yet before analyzing the “fundamental rights” as related to freedom of speech and the media, it would be helpful to at least briefly delineate where EU law originates, and what role the courts play in its enforcement.

Two categories of law exist within the EU: 1) primary legislation, comprising of the multilateral Treaties governing the formation of the EU, and 2) secondary legislation.¹³ Secondary legislation “consists mainly of regulations, directives and recommendations adopted by the EU institutions,” which have a “direct impact” on EU citizens.¹⁴ Laws begin as proposals drafted by the European Commission, which are then sent to the Council [of Ministers] and the European Parliament “for discussion and adoption.”¹⁵ Both of these bodies must ratify through voting the proposed laws or changes to international agreements, with varying majority or unanimity voting requirements depending on the subject matter proposed.¹⁶ Interestingly, adopting the EU budget is a joint responsibility of both the Council and the Parliament, without

¹⁰ “The EU is more than just a confederation of countries, but it is not a federal state.” Pascal Fontaine, *Europe in 12 Lessons*, E.U. (2010), https://europa.rs/images/publikacije/26-EU_In_12_Lessons.pdf.

¹¹ The two foundational treaties of the European Union are the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). The TEU “focuses more on principles of democracy, human rights, and summarizes the institutions,” while the TFEU “expands on all principles and fields of policy in which the EU can legislate.” Treaty on European Union and the Treaty on the Functioning of the European Union, 2010 O.J. (C83), 2012 O.J. (C326) (hereinafter “TEU” and “TFEU”).

¹² *Id.* at 5; *see also* Charter.

¹³ *Id.* at 11.

¹⁴ *Id.*

¹⁵ *Id.* at 11-14; *see also* Article 17(2), TEU (European Commission), Article 15 TEU (Council of Ministers); Article 294, TFEU (discussing passage of legislation).

¹⁶ *Id.*

the Commission.¹⁷ Decisionmaking and voting power is heavily skewed to represent member states' governments, as the European Parliament is the only body whose members are elected directly by the people.¹⁸ In three of the four key institutions, Member States' governments have representation through their Heads of State (European Council), ministers (Council of Ministers), and jointly appointed individuals by agreement among Member States, pending approval of the Parliament (European Commission).¹⁹ While the Commission by design exercises "a substantial degree of independence" from "any national government[s]," since its members must be selected upon agreement between the various Member States, national governments still retain some indirect influence as to the Commission's overall character.²⁰ The EU's law-making institutional structure is premised on a strong foundation of democratic government elections among its Member States. For situations where the domestic government is at odds with the democratic rights of its people, such as in Hungary, the domestic government still retains a significant authoritative voice to possibly undermine any corrective decisionmaking on the EU's part. Domestic governments certainly retain the ability to form coalitions with other Members willing to support their objectives, with possibly significant impact on corrective decisionmaking if the voting requires unanimity (as in case of taxation) or even a majority.²¹

The power to enforce EU law, as passed by the Council and Parliament, belongs to the European Commission, which may curtail certain funding or file a lawsuit before the Court of Justice of the European Union ("CJEU") to bring the Member State into compliance.²² The

¹⁷ *Id.* at 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ The voting requirements for legislation are outside the scope of this paper. *See* Lisbon Treaty 2014.

²² *Id.* at 14. The CJEU is itself broken up into 2 courts: the Court of Justice, issuing preliminary rulings, some annulments and appeals, and the General Court, issuing annulments brought by private parties and sometimes, EU

CJEU “interprets and applies” the Treaties as well as EU law to ensure it “is applied in the same way in all EU countries, and settles disputes” between Member States and the EU.²³ It does so by issuing: 1) preliminary rulings, and 2) infringement proceedings.²⁴ In practice, the Member States’ national courts are “required to ensure EU law is properly applied,” but differences still arise in the interpretations among the Member States.²⁵ The burden for seeking clarification rests largely with Member States’ national courts, as they must ask for the preliminary rulings from the Court of Justice in cases of ambiguity with respect to EU law or the legality of their domestic law.²⁶ The preliminary ruling is binding upon the national court, and all other Member States’ national courts in which the same question is raised.²⁷ Infringement proceedings, on the other hand, are “taken up against a national government for failing to comply with EU law” by the Commission or EU country.²⁸ These occur less frequently than preliminary rulings, as the Commission must present the defendant State “the opportunity to reply” before the case is brought before the Court of Justice.²⁹ Sometimes, private parties may sue an EU institution in the Court of Justice if it has affected the party “directly and individually,” through their domestic courts (which may refer it to the Court of Justice) or directly before the General Court.³⁰ Decisions of the Court of Justice are final and unappealable.³¹

governments (ie. “competition law, State aid, trade, agriculture, trade marks”). *Court of Justice of the European Union (CJEU)*, E.U., https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.

²³ *Id.*; TEU Art. 19(2); Art. 19(3) (giving the CJEU authority to interpret questions of EU law).

²⁴ These are not the only types of cases before the Court. Other types of common actions in the CJEU are annulment requests (when EU law violates treaties or fundamental rights), ensuring EU institutions act when required, and sanctioning EU institutions if those do damage to private parties. *Id.*

²⁵ *Id.*

²⁶ Sometimes, domestic courts are required by law to seek a preliminary ruling from the CJEU. *Id.*; Court of Justice, CT. OF JUST. OF THE E.U., https://curia.europa.eu/jcms/jcms/Jo2_7024/en/.

²⁷ *Id.*

²⁸ The sanction for failing to comply with the Court’s judgment in such a case is the “risk of a second case being brought, which may result in a fine.” *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Only the decisions of the General Court may be appealable to the Court of Justice. *Id.*; Simon Taylor, *EU Changes Rules for Appeals Before the Court of Justice*, LAW.COM (Apr. 9, 2019),

Importantly for freedom of speech and media rights, the 2009 Treaty of Lisbon “grants the Charter [of Fundamental Rights of the European Union] the same [binding] legal force as the Treaties,” permitting its use “as the basis for taking a case” up to the Court of Justice.³² While similar in name, the European Court of Human Rights (“ECtHR”) exists as a separate and distinct avenue from the Court of Justice for litigating human rights violations, under the “auspices” of the Council of Europe.³³ This paper will briefly discuss the ECtHR, its application of the European Convention on Human Rights (“ECHR”), and its impact on the freedom of speech in part III. With respect to the ECHR, the Court of Justice has recognized it as “embodying principles of law applicable in EU Member States,” but not as a “formally binding or fully incorporated bill of rights.”³⁴ The Court of Justice’s approach appears to contradict Article F(2) of the Treaty on European Union (aka Treaty of Maastricht), which requires the EU to “respect fundamental rights” by explicitly referencing the ECHR.³⁵ In 2009, the Treaty of Lisbon “provided a legal basis for the EU to sign up to the [ECHR],” granting it actual “legal force” in an expansion of human rights protection.³⁶ However, in 2015, the Court of Justice ruled that “agreement did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction,” so the EU has not yet officially “acceded” to the ECHR.³⁷

<https://www.law.com/2019/04/09/european-union-changes-rules-for-appeals-before-the-eu-court-of-justice-292-43518/>.

³² Fontaine, *supra* note 10, at 29.

³³ *See supra* note 22.

³⁴ The CJEU has treated fundamental rights as “unwritten ‘general principles of Community law.’” Rafał Mańko, *EU accession to the European Convention on Human Rights (ECHR)*, EUR. PARLIAMENTARY RES. SERV. (July 2019), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI\(2017\)607298_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf) (citing Craig et al., *E.U. LAW* 367 (OUP 5th ed. 2011)).

³⁵ *Id.* at 3 (citing Maastricht Treaty Art. F(2)).

³⁶ The Treaty was signed in 2007, but entered into effect in 2009. Fontaine, *supra* note 10, at 29; Treaty of Lisbon, 2007/C 306/01, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.

³⁷ *EU accession to the European Convention on Human Rights (ECHR)*, EUR. PARLIAMENT THINK TANK (Jul. 6, 2017), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)607298](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)607298).

The ECHR still remains applicable, but only under the “doctrine of fundamental rights as general principles of EU law,” and not as primary law like the Charter.³⁸

The effectiveness of the Court of Justice becomes increasingly complicated when Member States refuse to accept the EU law’s primacy over their domestic law, because it allegedly contradicts the “fundamental rights” under their national constitutional law.³⁹ This phenomenon has only increased in recent years in two ways. First, several national constitutional courts have delivered “judgments ... in abstract proceedings concerning the constitutionality of international Treaties.”⁴⁰ Second, some national courts have “developed their own doctrines on the limits of the primacy of EU law in ‘ordinary’ cases” where “EU law was involved.”⁴¹ Hungary belongs to the latter category. Of course, the Court of Justice has already “confirmed that national constitutional norms in conflict with secondary legislation [EU law] should be inapplicable.”⁴² The areas of law open to such an argument tend to be “decisions on family law, the form of the State, foreign and military policy, and protection of the national language,” and not fundamental democratic rights such as the freedoms of speech and media.⁴³ The Court of Justice has “always insisted that allowing rules of national constitutional law to override EU law is tantamount to calling into question ‘the legal basis of the Community itself.’”⁴⁴ The disturbing

³⁸ “Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” TEU Art. 6(3).

³⁹ For example, Germany and Italy had refused to accept the primacy of EU law. Davide Paris, *Limiting the Counter-Limits. National Constitutional Courts and the Scope of the Primacy of EU Law*, 10 ITALIAN J. PUB. L. 205, 206 (2018) (citing Corte costituzionale, judgment of 27 December 1973, 183/1973 (*Frontini*); BVerfG, order of the Second Senate of 29 May 1974 - BvL 52/71).

⁴⁰ For example, Spain, Poland, and Belgium had their constitutional courts address this issue in decisions regarding a Treaty. *Id.* at 207 (see footnotes 5-7).

⁴¹ For example, France, the Czech Republic, and Hungary have all taken this pathway. *Id.* (citing Conseil constitutionnel, decision of 10 June 2004, 2004-496 DC (Economie numerique), and decision of 27 July 2006, 2006-540 DC (Droit d’auteur); Oustavni soud, judgment of 8 March 2006, 50/04 (Sugar quotas III); and Magyarorszag Alkotmanybirsaga, decision of 30 November 2016, 22/2016 (Refugee relocation policy)).

⁴² Gábor Halmai, *Absolute Primacy of EU Law vs. Pluralism: the Role of Courts*, https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf.

⁴³ *Id.* (FN 13 citations omitted).

⁴⁴ Paris, *supra* note 39, at 209 (internal citations omitted).

recent trend – of which Hungary abundantly participates in – employs an otherwise legitimate argument protecting the constitutional identity of a country and uses it for “merely nationalistic purposes.”⁴⁵ Such a trend increases tension within the EU, since Members now begin to buck from their Treaty obligations to defer to properly enacted EU law, in violation of Article 4(3) of the Treaty on European Union’s requirement of sincere cooperation. For this reason, some scholars have called for “the end of constitutional pluralism” within the EU “altogether,” to “avoid the disintegration of the EU as a value community.”⁴⁶ This constitutional tension, along with the natural political faction, collective action, and enforcement issues within as complicated an institutional body as the EU, set up a rather easily exploitable situation for countries pushing their sovereignty to the limits, while at the same time reaping financial and economic benefits from participating in the EU. Hungary is one of these Member States exploiting the legal limits of the EU under its current Fidesz party-controlled government, as it curtails the freedoms of its citizens by creative institutional design in the domestic and EU legal sphere. The particular details of these tensions will be examined a little bit further in section IV of this paper. While the institutional structure of the EU paints a rather grim portrait as to the EU’s ability to stop Hungary’s “democratic backsliding” using its Court of Justice, another judicial body outside the EU may be able to help, albeit incrementally.

III. The European Court of Human Rights & the ECHR

As mentioned earlier, the European Court of Human Rights (ECtHR) enforces the “human rights and political freedoms” contained within the European Convention on Human

⁴⁵ Halmai, *supra* note 42.

⁴⁶ *Id* (see footnote 31).

Rights (ECHR).⁴⁷ Individual victims of human rights violations “may submit their complaints directly” to the ECtHR, but only after meeting strict procedural requirements.⁴⁸ Since the ECtHR works separately from the EU, it “does not have authority to overrule a [domestic] decision or annual national laws.”⁴⁹ However, all of the current Member States of the EU must “respect [h]uman [r]ights” as signatories to the ECHR, which includes Hungary.⁵⁰ The ECHR would have had binding legal force in the EU framework under TEU Article 6(3), but the Court of Justice intervened, leaving the ECHR with the less persuasive status (under EU law) of a “general principle.”⁵¹ In this case, international law on treaties may present a more forceful argument for signatory countries to abide by the ECHR under the Vienna Convention on the Law of Treaties, although such an analysis is a bit beyond the scope of this paper.

ECHR Articles 10 and 11 protect the freedoms of expression, assembly, and association. Article 10 broadly protects the “right to hold opinions and to receive and impart information and ideas without interference by public authority [the government] and regardless of frontiers.” At the same time, Article 10 contains rather broad “carve out” provisions where governments may impose “formalities, conditions, restrictions or penalties as ... prescribed by law and ... necessary in a democratic society.”⁵² These “carve outs” permit regulation for purposes of broadcast media licensing, national security, public safety, protection of health or morals, including the reputations of others, and for maintaining the authority and impartiality of the

⁴⁷ “The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention, both for inter-state cases and individual applications.” Art. 32, ECHR.

⁴⁸ *European Court of Human Rights*, INT’L JUST. RESOURCE CENTER, <https://ijrcenter.org/european-court-of-human-rights/>.

⁴⁹ *Id.*

⁵⁰ Art. 1, ECHR.

⁵¹ Manko, *supra* note 34.

⁵² Article 10(2), ECHR.

judiciary.⁵³ As this paper comparatively examines the freedom of speech, especially with respect to criminal defamation law, and the freedom of the media, these “carve outs” are potential arguments Hungary may use to defend its policies. However, for reasons examined further below, procedural and institutional design issues prevent the ECtHR from having any significant impact upon safeguarding Hungarian liberties, without the need to examine a possible pretextual use of the Article 10 exception.⁵⁴ Nevertheless, despite this rather grim outlook, corroborated at least in part by Hungarian lawyers, professors, judges, and even former EUCtHR judges, litigating human rights violations through the EUCtHR still likely presents the best alternative for counteracting, at least partially, Hungary’s “democratic backsliding.”⁵⁵

Complaints to the ECtHR for ECHR violations may be lodged by “person[s], group[s] or non-governmental organization[s],” which “do[] not have to be ... citizen[s] of a State party.”⁵⁶ This seems like the perfect policing mechanism for human rights violations when the EU structure does not work properly, such as when national constitutional courts question EU law’s primacy. Unfortunately, existing strict procedural requirements make it difficult for claimants to lodge a valid complaint. Applicants must have: 1) exhausted domestic remedies, 2) filed the application within six months from the final domestic judicial decision, 3) have lodged the complaint against a State party to the Convention, and 4) “suffered a significant disadvantage” (an injury “directly and significantly” affecting the applicant).⁵⁷ Failure to meet even one

⁵³ For more safe harbor provisions, *see* Article 10(2), ECHR.

⁵⁴ “In a field as sensitive as fundamental rights, a continual strengthening of [institutional] safeguards is necessary.” Jean-Francois Renucci, INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 95 (Council of Europe 2005), available at [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01\(2005\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf).

⁵⁵ The ideas presented in this section, namely the weaknesses of existing mechanisms to “correct” Hungary’s problematic legal course, have been discussed and presented in informal conversations over the 2019 IIP Spring Break meetings. They have been recreated from notes, but unfortunately are not exact.

⁵⁶ *See* footnote 48.

⁵⁷ *Id.*

prerequisite results in denial of the application, and an effective foreclosure of any remedies. These include monetary compensation for damages by the offending state and attorneys' fees.⁵⁸ The Committee of Ministers of the Council of Europe oversees ECtHR decision enforcement, which includes overseeing that ECHR signatories "amend[] [domestic] legislation to ensure that the violation does not continue."⁵⁹ However, combined with its very limited authority as to domestic courts' decisions, this executory framework poses significant concerns that it will fail in ensuring repeat human rights violations do not occur. In fact, with respect to Hungary, the ECtHR has already failed in several ways as a mechanism to protect human rights, since Hungary repeatedly pays the imposed fines, but continues the violations.⁶⁰

First, the ECtHR's strict procedural requirements significantly restrict the amount of cases proceeding through the application stage. For example, direct "injur[ies]" prevent invested third parties such as nongovernmental or international nonprofit organizations from litigating human rights violations, curtailing effective legal advocacy to question policies. In Hungary, the combination of domestic law blocking procedural access to courts (and thus EU review) and the strict procedural requirements of the ECtHR effectively result in repeat human rights violations without redress.

Second, the exhaustion requirement along with the temporal requirement for a proper application also significantly limits ECtHR cases.⁶¹ No mechanism exists to ensure domestic courts proceed with hearing their cases in a timely fashion.⁶² Art. 35 of the ECHR requires that

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ "It is imperative that the applicant give the domestic courts the opportunity to rule substantively on a violation of the Convention's rules." Renucci, *supra* note 54, at 109-110; *see also* Art. 35-1 ECHR; Art. 47-2(a), Rules of Court.

⁶² "[T]he rule concerning exhaustion of domestic remedies ceases to be effective if the remedies provided under national law are illusory." *Id.* (citing ECtHR, 22 May 1984, *De Jong, Baljet and Van den Brink v. the Netherlands*, Series A. No. 77, § 39; ECmHR, 12 Oct. 1978, *the United Kingdom*, DR 16/32; 14 Oct. 1986, *Scoutt v. Ireland*, DR

the domestic remedy “be sufficiently certain not only in theory but also in practice.”⁶³ If there is an “absence of an effective domestic remedy, the [time] period runs from the date on which the decision (or measure) complained of took effect.”⁶⁴ In fact, Hungarian courts have recently employed tactics of procedural delay within the domestic court system, effectively placing critical human rights cases on indefinite hiatus without possibility of redress. Other potential tactics to bar an ECtHR application include punting the case back-and-forth between various domestic courts, under the guise that not all domestic remedies have been exhausted.⁶⁵ The process for a human rights violation to reach the ECtHR already takes years. Countries experiencing democratic backsliding, such as Hungary, will likely only exacerbate this problem in a tactical display of strength, delaying any effective opposition to systemic human rights violations.

Third, no mechanism exists to prevent repeat violators from essentially paying to continue to violate human rights. The ECtHR presumes that “states signatory to the Convention have undertaken to abide by the Court’s judgments, and [will recognize] the incentive effect of European case-law ... since a state found to have violated the Convention lays itself open to further [similar] applications” against it.⁶⁶ While the ECtHR is not bound to follow precedent, unlike common law systems, “in the interests of legal certainty, foreseeability, and equality

49/144; ECtHR, 29 Oct. 1992, *Open Door and Others v. Ireland*, Series A. No. 246-A, § 48; ECmHR, 8 April 1994, *Wingrove v. the United Kingdom*, DR 76/26; 24 June 1996, *Kuche v. the Federal Republic of Germany*, DR 86/63).

⁶³ See for example, ECtHR, 20 Feb. 1991, *Vernillo v. France*, Series A No. 198, § 27; ECmHR, 24 Feb. 1997, *Beer v. the Federal Republic of Germany*, DR 88/130; 7 April 1997, *Civet v. France*, DR 89/127.

⁶⁴ *Id.* at 111, (citing ECmHR, 6 July 1988, *Hilton v. the United Kingdom*, DR 57/108; 27 Nov. 1995, *Worm v. Austria*, DR 83 B/17).

⁶⁵ “The application of this [six-month] rule, is, however, relatively flexible. In general, [it] runs from the date on which the applicant was apprised of the final domestic decision if its content is sufficiently clear: this means that the period may run from the date of judgment if [it was] delivered publicly.” *Id.*

⁶⁶ *Id.*

before the law ... it should not depart, without good reason, from precedents.”⁶⁷ While Hungary largely complies with monetary judgments the Court imposes against it, in the rare cases that *do* eventually get heard, the root cause of the problem (faulty domestic law) never gets fixed. Either the monetary judgments are not significantly costly to financially deter Hungary from violations, or Hungary is not paying from its own coffers, but rather from EU coffers. While there is no concrete evidence as to the latter theory, Transparency International’s concerns with proper control mechanisms to oversee EU funding (which has definitely been in more than one instance misappropriated), suggest stricter monetary and funding controls from the EU are warranted.⁶⁸ Involving the EU in greater oversight with its funding programs, such as through the Court of Auditors, may help ensure that the repeat violator mechanism ceases with respect to human rights.

Finally, the ECtHR review mechanism simply does not work for Hungary. Protocol 16 to ECHR permits the highest domestic courts of a party to request advisory opinions on pending matters from the Court. In practice, this is an institutional mechanism that only works with nations willing to comply with the underlying premises of the ECHR. For a country like Hungary, which systematically violates certain human rights through its domestic law, this procedural mechanism makes it incredibly difficult for claimants to seek redress in a body outside Hungarian domestic courts. Essentially, through a faulty procedural framework and perverse domestic law exploiting these weaknesses, Hungarians cannot rely on the main institutional safeguard for human rights in Europe as a potential source to stem the “democratic backsliding” that is taking place.

⁶⁷ *Id.* at 122 (citing ECtHR, 8 April 2004, *Assanidze v. Georgia*, No. 71503/01, not published; 8 July 2004, *Ilascu v. Moldova and Russia*, No. 48787/99, not published).

⁶⁸ Insight taken from IIP meeting with Transparency International in Hungary.

IV. The Problem with Hungary

Before examining the EU framework on human rights in detail, Hungary's current approach to the freedoms of speech and media must be discussed. In 2018, the European Court of Human Rights decided 3,409 applications on human rights violations in Hungary, with 91 applications reaching judgment.⁶⁹ Hungary is the fifth in the amount of judgments for 2018, following Russia, Turkey, Ukraine, and Romania.⁷⁰ Considering it is a relatively small country with only about 10 million inhabitants, these understated numbers are significant, partially reflecting the decline in human rights enforcement. The current government does not suggest these statistics will improve.

In April 2018, Hungarian Prime Minister Orbán and his Fidesz party “won a third consecutive term,” continuing their majoritarian streak of power since 2010.⁷¹ Continuing the downward trend towards respecting human rights, the political approach towards migrants, nonprofits, freedoms of speech and expression, and the media read like something out of a dystopian novel. In June 2018, the Hungarian Parliament approved “government-proposed amendments to the constitution and other legislation, criminalizing services, advice, and support to migrants and asylum seekers, punishable by up to one-year imprisonment.”⁷² In October 2018, a “law on public assembly gives police more discretion to ban or disband demonstrations.”⁷³ At the same time, Hungary began to prosecute homeless people after enacted a July amendment that criminalized homelessness, ignoring “criticism ... by the UN Special Rapporteur on the right to

⁶⁹ 3318 of these applications were declared inadmissible or struck out for various reasons. *The ECHR in Facts and Figures 2018*, EUR. CT. OF HUMAN RIGHTS, https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf.

⁷⁰ *Id.* at 5.

⁷¹ HUMAN RIGHTS WATCH (Jan. 2019), <https://www.hrw.org/world-report/2019/country-chapters/european-union>.

⁷² As yet there have been no prosecutions. *Id.*

⁷³ *Id.*

adequate housing that the [law] was cruel and incompatible with human rights law.”⁷⁴ Hungary made many more troubling decisions as related to migrants and those seeking asylum, but those are outside the scope of this paper. The European Commission has also actively referred several of Hungary’s 2017 laws to the Court of Justice, including Hungary’s Higher Education Law, the law on foreign-funded NGOs, and its asylum law, as well as beginning an “enforcement action over the anti-NGO law that Hungary adopted in May” of 2018.⁷⁵ Suffice to say, the overall outlook on human rights protection in Hungary is rather grim, and shared by the Hungarian Civil Liberties Union and Transparency International. The analysis of the current state of Hungarian law will proceed in three parts: 1) a brief overview of the Hungarian legal system combined with a brief analysis of its relationship with EU law, and 2) an analysis of its law on criminal defamation.

A. The Hungarian legal structure

Hungary operates on a civil law system, much like the rest of Europe, where “courts directly interpret the words of the legislation.”⁷⁶ Hungary’s “primary,” foundational source of law is the “Fundamental Law of Hungary,” which may be amended by the Parliament with a two-thirds majority.⁷⁷ The Hungarian Parliament has significant, very powerful authority, since it also elects the Prime Minister, the President, members of the Constitutional Court, the Presidents of *both* the Constitutional Court and Curia (the Hungarian Supreme Court), the General Prosecutor, and the Commissioner for Fundamental Rights, among many, many others.⁷⁸ With the Parliament strongly within the majoritarian grip of one political party for close to a decade, it

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *About the Hungarian Legal System*, THE CONST. CT. OF HUNGARY (May 22, 2017), <https://hunconcourt.hu/about-the-hungarian-legal-system/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

is easy to see how the problematic changes threatening Hungarian rule of law and democracy have been incrementally made possible. “Secondary” sources of Hungarian law include Parliamentary Acts, and the corresponding top-down governmental, ministerial, and local decrees, as well as the “universally recognized rules and regulations of international law.”⁷⁹ Interestingly enough, the Hungarian legal system is supposed to “harmonize” its internal laws with its international obligations, although its recent decisions have departed significantly from that approach.⁸⁰

The Hungarian court system and judicial independence has also been significantly impacted by the current Fidesz-controlled Parliament. The highest instance courts in Hungary are comprised of the Curia, “the principal judicial organ,” and the Constitutional Court.⁸¹ The Curia’s “uniformity decisions” are “binding on all courts” of lower instance.⁸² However, starting in 2020, a new Administrative Court will enter the mixture. For all the emphasis the Constitutional Court’s website places on judicial political and decisional independence, the judges for the new Administrative Court system will be all likely handpicked by the Parliament, and reflect similar viewpoints to the current political party. These judicial reforms have been subject to international scrutiny, and partly inform the EU Parliament’s decision to vote on sanctioning Hungary for “threatening” fundamental European values. This questionable framework of judicial and institutional independence forms the backdrop to Hungary’s law on the freedoms of speech, expression, and the media. Even if the letter of the law protects certain “fundamental rights,” procedural delays or tactical decisions by the Prosecutor or Commissioner for Fundamental Rights not to prosecute or initiate review those rights may have significant

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

impact as to the quality of human rights in Hungary. The Commissioner for Fundamental Rights “may initiate Constitutional Court review of conformity with the Fundamental Law” for any amendments to the Fundamental Law or new regulations, or even in cases of “conflict with the provisions of an international treaty.”⁸³ The Commissioner is also supposed to annually “survey and analyze” the state of fundamental rights within Hungary, and “report” to the Parliament.⁸⁴ Perhaps this is the largest category of human rights violations – cases that do not have never gotten into court because of these discretionary decisions at the onset, and which will never end up in the CJEU or the EUCtHR.

B. Hungarian Defamation laws:

Of particular importance to truly democratic nations is their citizens’ ability to express their viewpoints freely, and the freedom of the media to disseminate a wide variety of information. The existence of criminal penalties for defamation and libel has the potential to significantly chill citizens’ speech, and the criticisms necessary to a fully functioning democratic society.⁸⁵ For these reasons, the UN Human Rights Committee has urged to “consider the decriminalization of defamation,” and cautioned that the “application of criminal law should only be countenanced in the most serious of cases and imprisonment is *never* an appropriate penalty.”⁸⁶ Criminal defamation has been declared “one of the ten key threats to freedom of expression,” and “not a justifiable restriction on freedom of expression” by international

⁸³ *Id* (these proceedings are called “Posterior Norm Control, Article 24 (2) e) of the Fundamental Law,” and “Examination of Conflicts with International Treaties Article 24 (2) f) of the Fundamental Law,” respectively).

⁸⁴ *Id*.

⁸⁵ Scott Griffen et al., DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY 7 (OSCE March 2017), <https://www.osce.org/fom/303181?download=true>.

⁸⁶ *Id*. at 7 (citing “General comment No. 34”, U.N. Human Rights Committee, 102nd session, published 12 September 2011).

organizations.⁸⁷ Several EU Member States have since repealed their criminal defamation and insult laws, but many still have a ways to go.⁸⁸

Hungary continues to have both civil and criminal defamation law with corresponding penalties, which continue to be applied “with some regularity,” including “against the media.”⁸⁹ While defamation law in general is commonplace around the world, Hungary’s democratic backsliding in recent years, combined with efforts of the majority political party to control media outlets, have placed Hungary’s laws under particular scrutiny. For example, in Hungary, politicians (and even judges!) “continue to turn to criminal libel as an avenue for responding to criticism.”⁹⁰ This places the news outlets in a catch-22 situation: “on one hand, news outlets seek to report on such controversies and to provide a forum for diverging opinions; on the other, they are also directly affected through legal action taken against them in media and personality rights cases.”⁹¹ This creates impermissible chilling effects against journalists, and in consequence against the press and the rest of the population’s right to information. Combined with the already uncertain human rights protections under the ECtHR, the current Hungarian legal regime hovers dangerously close to state censorship. For example, in 2013, Hungary introduced a new criminal defamation offense for “making fake video or sound recordings with the purpose of harming another’s reputation.”⁹² This seems contradictory to the Constitutional Court’s more progressive stance, when it declared a portion of the criminal code unconstitutional for imposing prison

⁸⁷ *Id.* at 7 (citing Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialisation and Freedom of Expression, and Criminal Defamation (2002), www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1).

⁸⁸ *Id.* at 8 (those states without criminal defamation laws include Cyprus, Ireland, Romania, the United Kingdom, but all others still have some of them on the books).

⁸⁹ *Id.* at 5 (see chart pages 32-33).

⁹⁰ *Id.* at 10.

⁹¹ Bea Bodrogi, *Civil Defamation and Media Freedom in Hungary*, INT’L PRESS INST. REPORT 5 (Feb. 2017).

⁹² Griffen, *supra* note 85, at 30.

penalties for publishing statements “likely to damage the reputation of a public official or the honour of a public authority.” However, as will be explained below, the remaining provisions of the criminal code still continue to hold significant chilling power over the freedom of speech, as public officials can still pursue private action using the libel or defamation laws, or, if the offense caused considerable injury or was spread with great publicity, suing the public prosecutor.⁹³

Hungarian defamation law centers around two competing constitutional principles of the freedom of expression and the rights to reputation, privacy and likeness.⁹⁴ The latter rights – as best can be determined – are known as “personality rights,” which in Hungary can consist of “violations to life, bodily integrity, health, personal liberty, privacy, discrimination, *defamation*, violation of personal data, facial likeness, recorded voice and violation of the right to a name.”⁹⁵ In 2014, Hungary adopted a new Civil Code, which incorporated recent jurisprudence and allowed “restitution instead of non-pecuniary damages,” which permits “claimants to request monetary compensation *without having to prove that the violation caused damage*.”⁹⁶ This recent change to the civil law makes it much easier for claimants to lodge accusations. This may have problematic consequences to impartial news coverage because of the foreseeable chilling effect upon journalists’ freedom of expression. Additionally, “members of the community” may invoke “the right to enforce claims,” which eliminates personal standing in defamation cases, and further puts these provisions at risk for abuse.⁹⁷ Civil defamation sanctions can be at

⁹³ *Id.* at 112 (citing Hungarian Code Art. 226-227).

⁹⁴ Bodrogi, *supra* note 91, at 5.

⁹⁵ *Id.* (citing Section 2:42-3 Hungarian Civil Code (2013)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 7.

minimum objective, which “can be enforced even where the defendant was not negligent,” or can tack on (permissible but not required) subjective sanctions, otherwise known as restitution.⁹⁸

On the opposite end of the spectrum, the Hungarian Criminal Code contains two defamation related offenses: 1) defamation under Art. 226 (rágalmazás), and 2) libel under Art. 227 (becsületsértés).⁹⁹ Defamation is “engaging in the written or oral publication of anything that is injurious to the good name or reputation of another person, or using an expression directly referring to such a fact.”¹⁰⁰ The listed criminal penalty is imprisonment for a period of up to one year.¹⁰¹ This penalty may be increased if the act of defamation is: 1) “committed ‘for a malicious motive or purpose,’ 2) published with great publicity (e.g. in the media), or 3) causes ‘considerable injury’ to the claimant.”¹⁰² The 2013 Art. 226A amendment makes it a misdemeanor to make the fake video or sound recordings, and introduces a criminal punishment of imprisonment “for up to two years.”¹⁰³ If these recordings are made “accessible to the public,” the term of imprisonment may be increased to three years, if “the offense is committed with great publicity (e.g. in the media) or if it causes considerable injury to the claimant.”¹⁰⁴ Clearly, this new provision attempts to deter individuals from disseminating critical information regarding public officials through media sources, undermining the freedoms of speech, expression, and media.

Libel, on the other hand, is “disseminating a false publication orally or any other way tending to harm a person’s reputation either in connection with his professional, **public office**, or

⁹⁸ *Id* (citing Section 2:51(1); 2:52-53 of Hungarian Civil Code (2013)).

⁹⁹ Griffen, *supra* note 85, at 112 (citing Art. 226).

¹⁰⁰ *Id* (citing Art. 226).

¹⁰¹ *Id*.

¹⁰² *Id*.

¹⁰³ *Id* (citing Art. 226A).

¹⁰⁴ *Id* (citing Art. 226B)

public activity or in broad publicity.”¹⁰⁵ Separate criminal offenses exist for “using a harmful or disrespectful expression directed at the Hungarian anthem, flag, coat of arms, or the Holy Crown of Hungary,” and libel or defamation against the deceased.¹⁰⁶ The penalties for each of these is the same as for ‘regular’ defamation – imprisonment of up to one year.¹⁰⁷

The threat of criminal sanctions is meted a bit in practice, since “prison sentences are often converted into a [criminal] fine.”¹⁰⁸ Fines “are awarded in daily amounts from 1,000 to 500,000 Hungarian forints for a minimum of 30 days and a maximum of 540 days.” Taking into account the current exchange rate, these fines amount to a minimum range between approximately \$100 to \$1850 dollars, and a maximum range of \$51,000 to \$923,670.¹⁰⁹ In other words, perhaps the penalty of imprisonment is not as likely, but a fairly significant financial deterrent still exists for speaking out or publishing potential critical information against a public official.¹¹⁰ For 2014, **316** people were convicted for defamation, “resulting in **16 prison sentences** (suspension not qualified) [and] 62 criminal fines,” while **213** people were convicted for libel, “resulting in **2 prison sentences** ... [and] 21 criminal fines.”¹¹¹ These statistics serve to show that the statutory penalties are not empty threats, but alive and well in certain cases, to the detriment of the peoples’ freedoms.

Moreover, when “libel or defamation is committed against a public official in connection with official duty or operations,” the government gets involved in the form of the public prosecutor.¹¹² This is an exception to the usual rules of criminal procedure which “may only be

¹⁰⁵ *Id* (citing Art. 227).

¹⁰⁶ *Id.* at 113 (citing Art. 334 Crim. Code; Art. 228 Crim. Code).

¹⁰⁷ *Id.* at 112 (citing Art. 227).

¹⁰⁸ *Id* (citing Art. 50).

¹⁰⁹ Using the forint to USD exchange rate as of May 19, 2019.

¹¹⁰ The average annual household income per capita in Hungary is a little under \$6,000. *See* CEIC Data.

¹¹¹ Bodrogi, *supra* note 91.

¹¹² Griffen, *supra* note 85, at 112.

initiated by the victim as a private accusation.”¹¹³ This exception and the threats of fines or imprisonment (which may still be possible), presents the perfect opportunity to chill speech from both citizens and the press. An attempt in the Hungarian Parliament to “repeal[] the criminal defamation laws and establish safeguards against [their] abuse” failed in December 2015, despite written support from over “30 international freedom and freedom of expression organisations.”¹¹⁴

Seemingly at odds with the prosecution statistics, the Hungarian Constitutional Court appears to give greater protection to the freedom of the press, especially for speech “as related to public life.”¹¹⁵ In 2014, the Constitutional Court reversed a criminal defamation conviction of a “magazine owner and politician” for “criminally defaming a mayor in an article he wrote for his magazine.”¹¹⁶ The magazine owner “alleged that [members of the local government, including the mayor] treated the taxpayers’ money as if it were their own” when the “city budget was in the loss.”¹¹⁷ The lower court found the magazine owner guilty, because he “had not proven those facts true.” The Constitutional Court reversed, distinguishing “value judgments,” which are “protected by freedom of expression almost without limitation,” from “factual allegations, ... subject to a burden of proof.”¹¹⁸ Here, the lower court “interpreted the definition of a factual statement too broadly, and thus illegitimately restricted [his] right to free speech.”¹¹⁹ The Constitutional Court called for “particular attention to the context” and “circumstances of

¹¹³ Art. XIX of 1998 on Criminal Procedure (Art. 52 of the Hungarian Code of Criminal Procedure).

¹¹⁴ Griffen, *supra* note 85, at 112.

¹¹⁵ *Id.* at 114 (internal citations omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

publication” in criminal cases, but the Curia appeared to take quite the opposite approach in a different case.¹²⁰

In a different case, the Hungarian Supreme Court (the Curia) upheld the criminal defamation conviction of a journalist who “wrote an opinion column for a national daily paper,” criticizing “the quality of a well-known variety of Hungarian wine produced by a state-owned corporation” as wondering why “hundreds of thousands of Hungarians drink [this] s**t.”¹²¹ The case eventually filtered through to the European Court of Human Rights, which found in favor of the journalist, distinguishing the “commercial reputational interests of a company” from an individual’s, which “might have repercussion on ... dignity.”¹²² Thus, the Hungarian courts have applied a criminal code provision focused on safeguarding an individual’s reputational harms towards a government-owned corporation, and on an expressed opinion of less factual value than the financial corruption allegations of the case discussed earlier. The stark contrast between protecting the freedom of speech in an arguably more likely scenario of defamation with penalizing an individual for publishing a wine-tasting opinion presents significant uncertainty as to how these criminal defamation laws will be applied. Uncertainty may deter public speech through the media or other avenues, and prevent valuable, valid criticism from surfacing. A state afraid of criticism is a state unwilling to respond to its people, questioning the soundness of its democratic system of governance.

It is important to note that Hungary is by far not an exception in terms of imposing criminal defamation laws. In fact, many Western EU Member States punish defamation much more severely than Hungary, such as Germany, where “slander committed through the media” is

¹²⁰ *Id.*

¹²¹ *Id.* (citing Hungarian Constitutional Court decision 13/2014 (IV. 18.)).

¹²² *Id.* (citing *Uj v. Hungary*, App. No. 23954/10 (2011)).

punishable “with up to five years in prison,” or Portugal, where “false accusation[s]” result in “up to eight years in prison.”¹²³ Hungary’s approach to criminal defamation is problematic, therefore, as an aggregate of situations where the current government has solidified its power and restricted citizens’ ability to speak out about it. But Hungary’s problem is not unique. The EU still has a long way to go in terms of eradicating criminal defamation laws to further the freedoms of speech, expression, and the media.

V. The Charter of Fundamental Rights of the European Union

Returning to the existing EU framework, the Charter of Fundamental Rights of the European Union (“Charter”) encompasses multiple values related to the freedom of speech, such as the “freedom of thought, conscience, and religion,”¹²⁴ the “freedom of assembly and association,”¹²⁵ and finally the key “freedom of expression and information.”¹²⁶ Article 11 is the fundamental “right to freedom of expression,” which includes “the freedom to hold opinions and to receive and impart information and ideas **without interference by public authority** and regardless of frontiers.” At the same time, Article 11 also states that the “freedom and pluralism of the media shall be respected” as an integral component of the overall individual freedoms of speech. Art. 11 corresponds to Art. 10 of the European Convention on Human Rights, albeit without the exceptions permitting restrictions under Art. 10(2).¹²⁷ The commentary of the Charter frequently references the case law and stance of the European Court of Human Rights, even though the ECtHR remains outside the immediate legal framework of the EU. These

¹²³ *Id.* at 7-9. There are certain translation issues with the legal terms regarding defamation, so the best approximations are used in the OSCE report.

¹²⁴ Article 10.

¹²⁵ Article 12.

¹²⁶ Article 11.

¹²⁷ Florence Benoit-Rohmer et al., *Commentary of the Charter of Fundamental Rights of the European Union* 115 (June 2006), <https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf>.

fundamental freedoms of speech are “even more broadly protected” under international law, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.¹²⁸ Under Article 52(3) of the Charter, “the meaning and scope of the right to freedom of expression is the same as those guaranteed by the ECHR.”¹²⁹ The limits imposed upon this freedom, may “not exceed those provided by Article 10(2) of the Convention.”¹³⁰ The relevant principles, therefore, as applied in the context of criminal defamation laws, will therefore be examined using case law from the ECtHR in part VI.

Unlike the ECHR, the Charter explicitly protects the freedom of the media in Art. 11, ¶ 2, “based ... on Court of Justice case-law regarding television” and Council Directive 89/552/EC (concerning the pursuit of television broadcasting activities), among others.¹³¹ The European Court of Justice case law “deals primarily with freedom of expression for commercial actors,” as reflective of the EU’s overall mission to “fulfill the free movement of goods and services.”¹³² This does not present much insight into the application of criminal defamation laws, which are primarily enforced against private individuals. In the seminal case regarding the freedom of expression as relates to media, the ECJ decided that broadcasting restrictions discriminating against news sources from outside the Member State were impermissible.¹³³ In a different case, the Court of Justice decided that a “legal prohibition to sell magazines containing competition offering prizes” helped “press diversity,” and that the restriction on the movement of goods was

¹²⁸ *Id.* at 115 (citing Art. 19 UDHR, Art. 19 ICCPR, Art. 12 UN Convention on the Rights of the Child, Art. 9 Framework Convention for the Protection of National Minorities).

¹²⁹ *Id.* at 116.

¹³⁰ *Id.*

¹³¹ *Id.* (citing ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others*, [1996] ECR I-4007 (judgment of 25 July 1991)).

¹³² *Id.* at 119.

¹³³ *Id.* at 120.

“proportionate” to the ends sought.¹³⁴ Often, the fact-specific economics and analysis of the economic agreements with the EU inform the Court of Justice’s decision, without producing easily identifiable applications as relates to the Charter. The Court of Justice has, however, protected public servants’ freedom of expression, although recognizing that this freedom may have certain confidentiality limitations in accordance with the nature of the duties the person performs.¹³⁵ But that is about the extent of the clearest case law as relates to the freedom of expression, avoiding further a further sidebar into the complicated details of political and commercial speech.

The Charter also calls upon the “constitutional traditions and international obligations” of the Member States, as all have guaranteed the freedom of expression “one of the key fundamental human rights.”¹³⁶ Given the current tensions some of these Member States exhibit with regards to EU law primacy and their own constitutional changes, this appeal to treaty obligations may not have much effective force.¹³⁷ The hope for success thus lies with Hungary’s fulfillment of the judgments that the ECtHR imposes, and that those judgments will act as an information gathering mechanism to notify the Hungarian people of freedom of expression violations its government commits against them. Given that the primacy tensions between EU law and national, domestic law arise in part because of the strong sense of sovereign independence between Member States, a bottom-up approach for governmental reform might work better. People would (ideally) vote for change at the ballot boxes, retaining the strong sense

¹³⁴ *Id.* at 120 (citing ECJ, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags und vertriebs GmbH v. Heinrich Bauer Verlag*, [1995] ECR I-3689 (judgment of 26 June 1995)).

¹³⁵ *Id.* at 119, (citing Case T-203/95R, *Connolly v. Commission*, [1999] ECR II-443 (judgment of 19 May 1999)).

¹³⁶ *Id.* at 116.

¹³⁷ Whether and how a treaty should be applied is outside the scope of this paper.

of national autonomy but also permitting the country to comply with its Treaty obligations to the EU.

VI. The European Court of Human Rights

As mentioned earlier, the European Convention on Human Rights broadly protects the freedoms of expression, assembly, and association in Articles 10 and 11, with certain caveats as “are prescribed by law.” The European Court of Human Rights has affirmed these freedoms as “the essential foundation of democratic society and one of the basic conditions for the progress and development of every human being.”¹³⁸ The ECtHR case law especially protects “information and ideas concerning matters ... of public interest,”¹³⁹ “information and ideas on political issues,”¹⁴⁰ and “artistic expression.”¹⁴¹ This strong protection for expression includes “freedom of opinion and freedom of information,” broadly encompassing speech “that may offend or shock state authorities or any section of the population.”¹⁴² The ability to disseminate critical speech about the government through the press or media appears to be one of the motivating factors behind the continued existence of criminal defamation laws.

The ECtHR has strongly enforced the freedom of expression and information.¹⁴³ For example, the ECtHR has even found that “excessive requirements” limiting speech of civil

¹³⁸ Renucci, *supra* note 54, at 22 (citing ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A. No. 24, § 49).

¹³⁹ Benoit-Rohmer, *supra* note 127, at 116 (citing Eur. Ct. H.R., *Sunday Times v. United Kingdom* (Appl. No. 6538/74), judgment of 26 April 1979, Ser. A, No. 30, para. 65; Eur. Ct. H.R., *Barfod v. Denmark* (Appl. No. 11508/85), judgment of 22 February 1989, Ser. A, No. 149)).

¹⁴⁰ *Id.* at 117 (citing Eur. Ct. H.R., *Lingens v. Austria* (Appl. No. 9815/82), judgment of 8 July 1986, Ser. A, No. 103; Eur. Ct. H.R., *Oberschlick v. Austria* (Appl. No. 11662/85), judgment of 23 May 1991, Ser. A, No. 204, paras. 57-61.).

¹⁴¹ *Id.* at 116-117.

¹⁴² Renucci, *supra* note 54, at 22 (citing ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A. No. 24, § 49).

¹⁴³ *Id.* at 23 (citing ECtHR, 23 Sep. 1998, *Lehideux and Isorni v. France*, Reprocs 1998-VII (finding a breach of Art. 10 for conviction of public defence of crimes of collaboration with the enemy for publishing a one-page advertisement relating Marshal Petain’s life as a public figure); ECtHR, 23 Sep. 1994, *Jersild v. Denmark*, Series A

servants is “contrary to Article 10,” and permissible only in “exceptional circumstances.”¹⁴⁴ As to the press, the ECtHR has been particularly cognizant of the “capital importance” of their speech, and the deterrent effects “in informing the public on matters of public interest” if that protection is not guaranteed.¹⁴⁵ The ECtHR’s attitude has generally given the “freedom of information” a “tendency to expand,” because of “its role in helping to determine people’s choices.”¹⁴⁶ Public officials, such as judges or politicians, must endure more criticism than a private individual.¹⁴⁷ The “landmark” ECtHR decision on defamation laws in *Lingens v. Austria* emphasized that “the limits of acceptable criticism are wider as regards public or political figures than as regards a private individual.” An essential component of a “democratic society,” is thus the ability to have “the government’s actions ... subject to the close scrutiny not only of the legislative authorities but also of the press and public opinion.”¹⁴⁸ Yet the line of protection for journalist freedom is withdrawn at some point, such as when an “article ... may have a decisive influence on the outcome of criminal proceedings concerning a politician.”¹⁴⁹ The ECtHR continues the line-drawing between the ‘presumption’ towards journalistic freedom and punishable offenses through its application of the Art. 10 and 11 “carve out” provisions.

The ECtHR recognizes that the freedom of the press, “which is undoubtedly of cardinal importance in a democratic society, nevertheless cannot be unlimited.”¹⁵⁰ The ECtHR has

No. 298 (disallowing state from “protect[ing] ... victims of anti-democratic behavior”; ECtHR, 22 May 1990, *Autronic AG v. Switzerland*, Series A. 178; *Sunday Times v. the United Kingdom*, 26 April 1979, Series A. no 30).

¹⁴⁴ *Id.* at 23 (citing ECtHR, 28 Aug. 1986, *Glaser v. the Federal Republic of Germany*, Series A No. 104; 28 Aug. 1986, *Kosiek v. the Federal Republic of Germany*, Series A. No. 105; 26 Sep. 1995, *Vogt v. Germany*, Series A. No. 323; ECmHR, 6 Sep. 1989, *Rommelfanger v. the Federal Republic of Germany*, DR 62/151; ECmHR, 29 May 1997, *Ahmed and Others v. the United Kingdom*, No. 22954/93, not published).

¹⁴⁵ *Id.* at 25 (citing ECtHR, 29 Feb. 2000, *Fuentes Bobo v. Spain*, No. 39293/98, not published; ECtHR, 27 March 1996, *Goodwin v. the United Kingdom*, Reports 1996-II).

¹⁴⁶ *Id.* at 25.

¹⁴⁷ *Id.* (citing ECtHR, 1 July 1997, *Oberschlick v. Austria*, Reports 1997-IV).

¹⁴⁸ *Id.* at 26-27 (citing *Lingens v. Austria*, no. 9815/82 (1986)).

¹⁴⁹ *Id.* at 25 (citing ECtHR, 29 Aug. 1997, *Da Haes and Gijssels v. Belgium*, Reports 1997-I).

¹⁵⁰ *Id.* at 27.

recognized that “certain conduct may render the person concerned civilly [or even criminally] liable” under defamation laws.¹⁵¹ The court also balances the “protection of private life” against the freedom of expression, with a strong emphasis on whether “the published photos or articles [contribute] to a debate of general interest,” as well as considering the circumstances of a case.¹⁵² The right to protection of reputation arises from Art. 8 of the ECHR, “as part of the right to respect for private life,” but it cannot be “relied on” when its loss is a “foreseeable consequence of one’s own actions,” such as committing a crime.¹⁵³ However, states invoking an exception to Art. 10 carry the burden of proof to establish that “the restriction: 1) is ‘prescribed by law’, (2) has a legitimate aim (namely, one of those enumerated in Paragraph 2), and (3) is ‘necessary in a democratic society’ to promote that aim.”¹⁵⁴ The primary limitation on Art. 10 invoked for criminal defamation laws thus appears to be the one made for “the protection of the reputation or rights of others.”¹⁵⁵

The ECtHR case law on the protection of reputation covers a wide range of both public, professional, and private individuals, organizations, and associations. Because each case arises out of the discrete legal and institutional mechanisms of the applicant’s country, only general principles as to the ECtHR’s approach to these cases may be drawn out. The seminal cases based on criminal defamation laws involve: 1) authors and publishers of books, 2) journalists and publishing companies, and 3) private persons.

¹⁵¹ *Id* (citing ECtHR, 29 March 2001, *Thoma v. Luxembourg*, Reports 2001-III).

¹⁵² These types of cases tend to go over the right to privacy and will not be further discussed in greater deal. *Id* (citing ECtHR, 8 July 1986, *Lingens v. Austria*, Series A. No. 103; 30 March 2004, *Radio-France v. France*, NO. 53984/00, not published).

¹⁵³ *Axel Springer AG v. Germany*, judgment (Grand Chamber) of 7 February 2012, §§ 83-84.

¹⁵⁴ For more information as to what these standards mean see, *id.* at 118 (citing Eur. Ct. H.R., *Observer and Guardian v. United Kingdom* (Appl. No. 13585/88), judgment of 26 November 1991, Ser. A, No. 216).

¹⁵⁵ See ECHR Art. 10(2) and Art. 11(2).

In *Ileana Constantinescu v. Romania*, the ECtHR found a violation of Art. 10 for an author's publication of a biography about her father (a well-known Romanian economist) where she questioned "certain acts ... harmful" to her father's interests and to his prestigious former colleagues.¹⁵⁶ The ECtHR emphasized the disproportionality of the criminal punishment to protecting the reputation of the economists, especially since the remarks were "made in the context of a debate of general interest" and regarding their "professional activities and involvement in an association."¹⁵⁷ In criminal defamation/libel convictions where the ECtHR had not found an Art. 10 violation, the published passages regarded someone's intimate and personal life, or where a very minute portion of the overall published work.¹⁵⁸

Regarding journalists, one of the ECtHR's seminal cases arises out of Hungary – the *Uj v. Hungary* case mentioned earlier in part IV. The ECtHR found a violation of Art. 10 based on libel conviction of a journalist describing a well-known, state owned company's wine as "s**t" to be unjustified, since 1) a "company's commercial reputation" has "no moral dimension," and 2) the article's "primary aim" was to "raise awareness about the disadvantages of the State ownership rather than to denigrate the quality of the company's products."¹⁵⁹ Other violations of Art. 10 included convictions for articles discussing or identifying individuals participating in alleged criminal offenses: mismanagement of city finances,¹⁶⁰ violating local regulations,¹⁶¹

¹⁵⁶ *Protection of Reputation: Fact Sheet*, E.U. CT. OF HUMAN RIGHTS (Mar. 2019), https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf (citing Eur. Ct. H.R., *Constantinescu v. Romania*, (Appl. No. 32563/04) judgment of 11 Dec. 2012).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing Eur. Ct. H.R., *Ojala and Etukeno Oy v. Finland*, (Appl. No. 69939/10) judgment of 14 Jan. 2014; Eur. Ct. H.R., *Ruusunen v. Finland*, (Appl. No. 73579/10), judgment of 14 Apr. 2014; Eur. Ct. H.R., *Almeida Leitao Bento Fernandez v. Portugal*, judgment of 12 Mar. 2015; Eur. Ct. H.R., *Lindon, Ochatkovsky-Laurens, and July v. France* (Appl. No. 21279/02, 36448/02), judgment 22 Oct. 2007) (finding a defamation conviction for publishing three passages of a book critical of a political party as not violating Art. 10, since the fine imposed was moderate).

¹⁵⁹ *Id.* at 11 (citing Eur. Ct. H.R., *Uj v. Hungary*, judgment of 19 July 2011).

¹⁶⁰ *Id.* at 7 (Eur. Ct. H.R., *Cumpăna and Mazăre v. Romania* (Appl. No. 33348/96), judgment of 17 Dec. 2004).

¹⁶¹ *Id.* at 8 (Eur. Ct. H.R., *Tønserbergs Blad AS and Haukom v. Norway* (Appl. No. 510/04), judgment of 1 Mar. 2007).

bribery,¹⁶² terrorism,¹⁶³ environmental pollution,¹⁶⁴ drug possession¹⁶⁵ etc. In short, the ECtHR balances in favor of journalistic speech, if the speech is an information-gathering tool on matters important to public knowledge, such as crime. It also balances against criminal defamation convictions, especially if they impose prison sentences.¹⁶⁶ On the other hand, the ECtHR tends to uphold criminal defamation convictions if they impose minor fines, or if the published statements were reckless,¹⁶⁷ concerned private life,¹⁶⁸ or containing otherwise privileged information used in a legal process.¹⁶⁹ For example, the Court has “ruled in cases involving [Greece and Italy] that the imposition of (suspended) prison sentences for defamation constitutes a violation of Art. 10 of the European Convention on Human Rights.”¹⁷⁰

On the issue of criminal defamation laws as relating to deceased persons, the ECtHR has stated that it “can accept ... that the reputation of a deceased member of a person’s family may, in certain circumstances, affect that person’s private life and identity, and thus come within the scope of Article.” But the Court has also “suggested that a defamation suit on behalf of a

¹⁶² *Id.* at 9 (citing Eur. Ct. H.R., *Colaço Mestre and SIC - Sociedade Independente de Comunicação S.A. v. Portugal*, (Appl. No. 11182/03 and 11319/03), judgment of 26 Apr. 2007).

¹⁶³ *Id.* at 11 (citing Eur. Ct. H.R., *Brunet Lecomte and Lyon Mag’ v. France* (Appl. No. 17265/05), judgment of 21 Jan. 2016).

¹⁶⁴ *Id.* at 12 (citing Eur. Ct. H.R., *Tănăsoaica v. Romania* (Appl. No. 3490/03), judgment of 19 June 2012).

¹⁶⁵ *Id.* at 13 (citing Eur. Ct. H.R., *Axel Springer AG v. Germany* (no. 2), judgment of 7 Feb. 2012 (Grand Chamber); Eur. Ct. H.R., *Hlynisdottir v. Iceland* (no. 3), judgment of 2 June 2015).

¹⁶⁶ *Id.* at 18 (Eur. Ct. H.R., *Sallusti v. Italy*, judgment of 7 Mar. 2019).

¹⁶⁷ Meaning without a reasonable factual basis. For example, conviction was upheld for a sensational story alleging a someone was raped at a baseball team’s party. See Eur. Ct. H.R., *Ruokanen and Others v. Finland* (Appl. No. 45130/06), judgment of 6 Apr. 2010; see also Eur. Ct. H.R., *Mihaiu v. Romania* (Appl. No. 42512/02), judgment of 4 Nov. 2008 (Court questioned the good faith of the applicant).

¹⁶⁸ *Id.* at 10 (citing Eur. Ct. H.R., *Standard Verlags GmbH v. Austria* (no. 2) (Appl. No. 21277/05), judgment of 4 June 2009) (alleging Austrian President intended to divorce his wife and had close contacts with two men).

¹⁶⁹ *Id.* at 17 (citing Eur. Ct. H.R., *Eker v. Turkey*, judgment of 24 Oct. 2017; Eur. Ct. H.R., *Bédât v. Switzerland*, judgment of 29 Mar. 2016 (Grand Chamber)) (breaching the confidentiality of a judicial investigation into crime).

¹⁷⁰ Griffen, *supra* note 85, at 10.

deceased person would only succeed if the living claimant had been directly affected by the impugned publication”.¹⁷¹

In short, the case law and protections of the ECHR strongly provide an incentive to counteract Hungary’s criminal defamation restrictions on the freedoms of speech and press. While the ECtHR does have some procedural issues to address, as discussed in part III, it still remains a good avenue for spreading information on human rights violations. NGOs and human rights organizations regularly tap into the ECtHR case law, and spread the information for activism in the countries they operate in. While procedurally, it may be difficult for a NGO to litigate these cases in Hungary, especially given the restrictive laws surrounding foreign-funded organizations, the information could still be used to raise awareness and spread information to the people of Hungary. Given enough information, perhaps the citizens would begin to demand internal change, and exercise their voting powers more judiciously. How much awareness or activism it would take to achieve this purpose is unclear. But the opportunity remains ripe for use.

VII. Conclusion

Criminal defamation law should be systemically eradicated, as it incentivizes problematic chilling effects upon journalist freedoms and broader freedoms of expression and speech. These core democratic freedoms are protected in the European Union as fundamental rights in the Charter of Fundamental Rights, but find their application under the European Court of Human Rights, which is not intrinsically part of the European Union.

¹⁷¹ *Id.* at 26.

Hungary remains one of the many countries on whose statutory books criminal defamation laws remain. However, taking into account the tensions between its constitutional court and the EU at large, these criminal defamation statutes remain one of the mechanisms with which Hungary can impermissibly chill critical speech from its citizens. Appealing instances of violations to the ECtHR has the best chance of spreading information to the Hungarian people, hopefully countering the democratic backsliding currently occurring under the leadership of the Fidesz government.