



ANTI-SLAPP TEMATIKA

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¹ Bea Bodrogi contributed to the comparative study on the Strategic Lawsuits Against Public Participation in the European Union, detailing the Hungarian situation, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092013

TABLE OF CONTENTS

1. INTRODUCTION	1
2. CRIMINAL PROCEEDINGS.....	2
2.1 CRIMINAL DEFAMATION	3
2.2 SCAREMONGERING	4
3. CIVIL PROCEEDINGS.....	5
4. PETTY OFFCEN PROCEDURE.....	7
5. THE GENERAL DATA PROTECTION REGULATION (GDPR)	10

1. INTRODUCTION

Strategic lawsuits against public participation (SLAPPs) are used against public watchdogs with an active role in the protection of democracy and the rule of law in Hungary. Targets of these lawsuits include journalists, independent media outlets, academics, civil society and human rights NGOs. Filers include corporations, wealthy individuals, politicians, or governmental bodies in some instances. Strategic lawsuits are not limited to specific categories of claim and can take a variety of forms. Laws that are most vulnerable to abuse in Hungary are criminal and civil defamation, petty offence procedures and the General Data Protection Regulation (GDPR). In recent years, GDPR is increasingly discovered as an instrument to discourage, or punish critical news coverage. GDPR-based litigation and administrative proceedings emerge as new forms of SLAPP in Hungary.

In the following, these different forms of SLAPPs will be introduced with case examples with special focus on GDPR-based strategic litigation against public participation.

2. CRIMINAL PROCEEDINGS

Criminal proceedings used as SLAPP may lead to the further mitigation of criticism; threatening journalists and critical voices with criminal proceedings, making it increasingly difficult to control the power and disclose corruption.

The draconian penalties have a chilling effect on freedom of speech and the freedom of the press, silences critics, reduces the amount of criticism towards the state, and even reduces the number of corruption scandals made public because journalists and concerned citizens fear being sanctioned both financially and criminally for expressing their opinions.

2.1 Criminal defamation

Criminal defamation can be considered as a typical used SLAPP suit, mostly initiated by politicians against journalists, bloggers and civil rights activists. The main problem with the law is that when libel or defamation is committed against a public official in connection with official duty or operations, prosecution is carried out by a public prosecutor².

This means that the state takes over the burden of prosecution: the police will conduct the investigation, the prosecutor will make the accusation, and the complainant (victim) does not have to pay for all of this.

Another problem is the length of the procedures, since criminal defamation cases might last for several years before a final judgement is reached. According to the experiences of lawyers representing journalists and civil rights activists, the criminal procedures might last up to 3-5 years.

The case of Júlia Halász

444.hu's journalist, Júlia Halász, was escorted out of a Fidesz community meeting in May 2017 while one of the organisers took her phone and deleted the photos she had taken of the event. The journalist filed a complaint with the prosecutor general for having her phone taken and photos deleted, for which the investigation was terminated due to lack of evidence. At the same time, the Fidesz politician filed a lawsuit for criminal defamation against Halász because Halász wrote an article revealing the harassment she experienced during the meeting. After 5 years long litigation, Halász was found guilty of criminal defamation. The court issued Halász a reprimand, meaning that the conviction will remain on her criminal record for three years³.

² Act XC of 2017 on the Code of Criminal Procedure, Article 53 (3)

³ <https://cpj.org/2021/05/hungarian-court-convicts-reporter-julia-halasz-on-criminal-defamation-charge/>

2.2 SCAREMONGERING

The Hungarian Parliament has tightened the rules of the Criminal Code on scaremongering⁴ in March 2020, punishing with one to five years of imprisonment anyone who, during the period of a special legal order in front of a large audience, states or disseminates any untrue facts or true facts in such a distorted way that it can hinder or foil effectiveness of the protection against the danger. The amendment's goal was supposedly to take action against false rumours that may hinder the effectiveness of the defence against the Covid-19 pandemic, in practice however, it was used by authorities to silence citizens critical of the government's measures related to coronavirus.

The provisions were attacked in front of the Constitutional Court which found the legal provision in compliance with the Constitution.⁵ At the time of the decision, it was already known that several citizens had to face criminal proceedings only because they had shared their opinion about the government's measures on social media platforms⁶. In addition, these incriminated opinions were rather critical than misinformative, which were obviously not able to hinder the state's defence against covid-19.

In one, the accused posted a video on Facebook writing about poor hospital conditions she had witnessed during her covid testing. According to the police her video was able to weaken the people's trust in public healthcare and the government's pandemic related measures. Although these proceedings were later terminated, the arrests were videotaped and published by police and the law itself have a serious chilling effect on freedom of expression of journalists and ordinary social media users.

⁴ Scaremongering, Act C of 2012 on the Criminal Code, Section 337.

⁵ <https://hunconcourt.hu/dontes/decision-15-2020-on-scare-mongering>

⁶ <https://www.euronews.com/2020/05/14/hungary-critics-silenced-in-social-media-arrests-as-eu-debates-orban-s-powers>

3. CIVIL PROCEEDINGS

The main civil law provisions under which SLAPP cases are brought are the 'correction's rights and 'personality rights' that also include protection of reputation, protection of personality of politically exposed person, and defamation.

Over the last ten years in Hungary, there has been an increase in legal actions by public officials and politicians who seek redress in the courts for attacks on their reputations, and who seek to put an end to political and societal disputes by means of a court judgement.

Meanwhile, the media and news outlets get caught in the crossfire as they seek to report on such controversies and provide a forum for diverging opinions. For example, there are some politicians and government-linked organisations (gongo) who are notorious for threatening to sue, and actually suing, in response to any article that is critical of them.

The case of Telex

Telex, one of the biggest independent news portals has published several articles about the Megafon centre and its spending before the Parliamentary elections in Hungary in 2021-22.⁷ According to Telex, "Megafon centre was launched with the mission to train "professional Facebook warriors" to help them amplify their suppressed voices on social media. They call themselves opinion leaders, however their messaging overlaps with the government communications." During election period, they had paid more than € 1.3. million for ads for spreading government messages.

Telex published a series of articles in which they revealed that Megafon spends public money. Megafon initiated three press correction legal procedures⁸ against Telex for false

⁷ <https://telex.hu/english/2022/01/04/orbans-influencers-shower-cash-become-largest-social-media-spenders>

⁸ Press correction is a special way to defend personality rights on the basis of civil law in Hungary. Its main point is that if someone states or rumours a false fact, or makes a fact appear as untrue about a person in a given publication, the affected person has the right to submit his claim – as soon as possible – in order to have a rectifying communication be given out in the particular publication which shows that what part of the injurious publication states false, unfounded facts or makes a fact appear as untrue and on the contrary what is the reality. If the publisher does not satisfy its duty to correct the injurious publication from its own will, the affected person – in a

accusation, arguing that they did not receive public money from state entities. All three actions were refused by the Hungarian courts, reasoning that the journalists of Telex had drawn reasonable conclusions from real facts that Megafon was partly funded by public money. The courts emphasized that the articles discussed issues of public matter and the statements of the articles can be considered as journalistic opinion in connection with which a press correction action cannot be initiated.⁹

short period – has the right to enforce his claim to the press correction in an anticipatory procedure which allows only restricted production of evidence.

⁹ Judgement of Budapest Court, 64.P.23.010/2021/8., <https://telex.hu/belfold/2022/02/08/mindharom-per-megnyerte-telex-megafon-also-fok>

4. PETTY OFFENSE PROCEDURE

Another legal SLAPP tool used by Hungarian authorities to silence active citizens critical of the government is initiating petty offense procedures against the organizers and the participants of demonstrations¹⁰.

In this case the concern is not the law itself, but how authorities apply the legal provisions to discourage people from protesting by fining them on different legal grounds. In the past few years, authorities have been initiating mass procedures against protesters on various occasions and for various reasons.

The case of the protesters I

Several student-protests took place in Budapest in 2017 and 2018, for education rights and for better education in general. After the end of these protests, groups of students started a spontaneous demonstration in the nearby streets.

At this time the roads were still blocked by police to secure the demonstration, there was no car traffic, thus, protesters had a reason to believe that they were not committing any violations with the march.

However, shortly after police blocked their way and started a petty offense procedure against them on the ground of traffic offense because they stepped off the sidewalk and marched on the road. Later, the participants received a fine of 30.000-50.000 HUF (approx. 90-150 EUR). In all known cases the court seized the fine but gave a warning, so they still found the demonstrators liable¹¹.

The case of the protesters II

¹⁰ Act II of 2012 on infractions, infraction procedure and the infraction records system, Section 224 on minor traffic offence, available at: <https://bit.ly/33xK3Zv> (no English translation available).

¹¹ The information is based on the interview conducted with the in-house lawyer of the Civil Liberties Union, 20 November 2020.

In March 2020, during the first wave of the Covid-19 pandemic a state of danger was announced by the Hungarian government¹². During this period organizing and participating in demonstrations were banned. Because of the general ban on public gatherings active citizens who wanted to express their opinions in accordance with the provisions had to find creative ways to do so. Such were the so-called “car-honking protests” organized five times in Budapest, in April and May 2020¹³.

The purpose of the demonstrations was to protest against some of the government’s measures against the pandemic such as the hurried eviction of patients to free up hospital beds. The participants also criticized the new scaremongering law adopted by the government under the veil of a quasi-state of emergency (as described above). Protesters expressed their opinions by driving a few laps in a certain roundabout with their car while honking. Their behaviour complied with the epidemiological measures, they did not come into physical contact with each other and remained in their car all the way.

Police officers, however, fined protesters and initiated petty offense procedures in 104 cases¹⁴ on the ground of traffic offense for “making sound signals without reason” and for participating at a demonstration during the general ban. In some cases, they even fined cyclists for using their bike bells. Later, the participants received a fine of about 100.000-200.000 HUF (approx. 280-550 EUR), the largest known fine was HUF 750.000 (EUR 2.100).

¹² Government Decree 40/2020 (11 March) on the declaration of state of danger, available at: <https://bit.ly/3fQ46Ho>

¹³<https://english.atlatszo.hu/2020/05/25/car-honking-protests-cancelled-due-to-astronomical-fines-handed-out-by-budapest-police/>

¹⁴ Based on the official reply of police for a data request by HCLU. (The Hungarian Helsinki Committee and the HCLU had filed a joint complaint to the Ombudsman's Office about the actions of police).

As of now there is no final decision, the courts have yet to decide whether the protesting drivers did commit a petty offense or solely practiced their right to freedom of expression - but this can take several months or even a year. The HCLU and the Hungarian Helsinki Committee offered free legal aid to the participants.¹⁵

Due to the high amount of the fines, there were no more “car-honking” demonstrations in Budapest since participants were afraid to risk another petty offense procedure and several of them could not afford to pay this amount of money multiple times. In conclusion, petty offense procedures (which often take years to reach a final decision) can be an effective SLAPP tool since it’s sufficient at achieving chilling effect, intimidating, tiring out, and consuming financial resources of people wanting to express their opinion.

¹⁵<https://www.helsinki.hu/ha-lagzin-vagy-focisikert-unnepelve-lehet-dudalni-akkor-tiltakozaskeppen-is-szabad/>, Hungarian Helsinki Committee reported 17 cases, including 4 cases initiated against journalists.

5. The General Data Protection Regulation (GDPR)

Since personal information and stories about natural persons are the basic raw materials for journalism, GDPR has major implications for the work of the press.¹⁶ In general, GDPR leaves the handling of the potential conflict between the right to the protection of personal data and the right to freedom of expression and information to be resolved in national legal frameworks and calls for the Member States to reconcile them. According to recent decisions, however, Hungarian authorities have so far failed to adequately take free expression into account when balancing between these two fundamental rights. As a result, GDPR can be used by data subjects to silence publishers and journalists in Hungary as a SLAPP tool.¹⁷

In the following, three kinds of procedures involving GDPR will be introduced that can be used and misused by data subjects: i) preliminary injunction prior to initiating a lawsuit under civil law; ii) initiating a lawsuit under civil law to finalize prior restraint by injunction; iii) and initiating the investigation of the National Authority for Data Protection and Freedom of Information (hereinafter: Authority). The cases of Forbes represent these three SLAPP tools

First, data subjects can request a civil court to issue an injunction (interim measure) according to Section 108 of the Code of Civil Procedure¹⁸ against the publisher of a press organ which is

¹⁶ Regulation (E) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), Article 85.

¹⁷ The Hungarian Civil Liberties Union (HCLU) represents four cases in GDPR based civil and administrative procedures in which the right to data protection was invoked to repress the freedom of press, available at: <https://bit.ly/3mnh2XM>

¹⁸ Act CXXX of 2016 on the Code of Civil Procedure, Section 108, Subsection 1): A request for provisional measures may be submitted before submitting a statement of claim, if any of the conditions specified in section 103 (1) is met and the petitioner, with regard to the passing of time, substantiates the frustration of achieving the goal of ordering provisional measures, had the request been submitted after bringing the action. The Act is available at: <https://bit.ly/2VjLgPv>

preparing a report featuring the data subjects' personal data.¹⁹ Data subjects can claim that the publication of their personal data would pose an imminent threat to their rights to be vindicated in a future lawsuit and would result in irrecoverable harm without an interim measure. In case of granting the injunction, the publication is blocked temporarily, and to-be plaintiffs have approximately a month to launch the lawsuit if they do want the interim measure to stay in effect. **A typical SLAPP strategy involves using procedural tricks, such as filing a lawsuit with missing information that would result in a court request for more information from the plaintiff, thus further time may elapse** before the actual lawsuit begins – or before the interim measure loses effect. These decisions might be alarming for the freedom of the press because petitioners manage to silence journalists by abusing the GDPR and civil procedural rules. Even if data subjects ultimately decline to initiate a lawsuit, the injunction itself is enough to delay publication by at least one month, by which time the content would lose relevance and public interest.

The second type of proceeding in SLAPP strategy is the civil law litigation to finalize prior restraint. Data subjects who have been granted an injunction must ultimately initiate a civil lawsuit in order to keep the injunction in effect, and to finalize the effect of the restraint. However, petitioners of an injunction are not required to initiate a lawsuit even if the injunction is granted. The biggest concern in SLAPP involving GDPR procedures is that data subjects may achieve their aim of silencing the press or delaying the publication of a material that quickly loses relevance, **without assuming the burdens of pursuing a lawsuit**. If petitioners of the injunction do launch a lawsuit, the injunction stays in effect until the first instance ruling of the court is delivered. This can take several months, if not years. Along with the passing of time as a way of silencing the press, these procedures also impose a considerable financial burden on the defendant publisher.

¹⁹ Act V of 2013 on the Civil Code, Section 2:43, Subsection e): The right to the protection of personal data: Violation of personality rights means in particular violation of the right to keep personal secrets and the right to the protection of personal data, available: <https://bit.ly/3qggCEU>

In the third type of procedure, data subjects can file a complaint to the Hungarian National Authority for Data Protection and Freedom of Information (hereinafter: Authority) claiming unlawful processing of personal data; violation of the rights to be informed and lack of justification of overriding public interest. According to the interpretation of Article 13 and 14 by the Authority in its recent decisions in the Forbes cases (see the description in the Annex), GDPR prescribes the duty to inform the data subjects on purposes and legal basis of the data processing, which encompasses the duty of the publisher of a press organ to inform data subjects on the criteria used in applying the “legitimate interest test” as well as its result. Since Forbes failed to carry out this obligation, the Authority imposed a fine of 3000 EUR in each case. The above interpretation of the data regulations (including GDPR and the Act on the Right to Informational Self-Determination and Freedom of Information²⁰) imposes a considerable administrative and financial burden on the publishers and causes a chilling effect on journalistic investigative reporting on business life and the interrelations of economic and political influence.

The case of the Hungarian Forbes list²¹

In November 2019 the owners of Hell Energy Ltd. – an energy drink manufacturer – were informed by the journalists of Forbes Hungary that they would appear on the annual lists presenting the most successful family-owned companies and the richest Hungarians. The owners objected and demanded the restriction of the processing and the deleting of their personal data from the publisher.

²⁰ Act CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information (available only in Hungarian at: <https://bit.ly/36p4t94>)

²¹ The Hungarian Civil Liberties Union provided legal representation to Forbes in two cases both initiated in civil and administrative procedures, therefore the case description can also be found on the HCLU’s website, available at: <https://bit.ly/39oWomF>

- **Injunction in order to block the appearance on the Hungarian Forbes list**

The data subjects petitioned the Metropolitan Court of Budapest for an injunction to block any publication by Forbes Hungary. The court granted the injunction for the data subjects in its ruling on 19th December 2019, prohibiting Forbes from the publication of any personal data related to the petitioners. The decision was upheld by the Court of Appeal and the Curia (Supreme Court). The case was brought to the Constitutional Court, because the injunction has blocked Forbes from producing and circulating information in the public interest for more than 10 months now without any proper consideration of the rights of the press. Since the injunction is in force until the final judgment in the merits, it will take up to 2 or 3 years to exercise the rights enshrined in the Fundamental law, in Article 11 of the Charter and in Article 10 of the European Convention of Human Rights.

- **Civil law claim**

After 9 months, the claimants of the injunction petitioned the Metropolitan Court to decide the case in merits. The central claim asks the court to establish the violation of personality rights under the Civil Code as a result of the unlawful processing of the data. As a result of the complexity of the Hungarian civil procedure, the petition is challenged on procedural basis as well as on the merits. The case is still pending.

- **Procedures by the National Authority of Data Protection and Freedom of Information²²**

The owners of Hell Energy Ltd. also initiated an administrative procedure at the Authority. The application raised the same claims: unlawful processing of personal data; violation of the rights to be informed; lack of justification of overriding public interest. Similarly, another family (owners of the biggest building company) launched an application with the Authority, objecting

²² https://edpb.europa.eu/news/national-news/2020/hungarian-dpa-fines-forbes_hu

their appearance on the Forbes lists, raising similar questions. The Authority delivered its decision on 27th of July 2020, and respectively on 4th of August 2020. The common findings were the following. Forbes failed to carry out a reasonable “legitimate interest test”, consequently it did not document it properly, and it did not give appropriate information for the data subjects. For these violations of data protection laws, Forbes was ordered to pay 3000 EUR fine in each case (6000 EURE combined).

Forbes petitioned the Metropolitan Court of Budapest for the judicial review of the decision. The main argument is that the legal basis of the processing is Article 6 (1) e) of the Regulation, therefore the legitimate interest test and the attached proactive duty to inform the data subjects do not burden Forbes. The case is still pending.