

Past, future and change: Contemporary analysis of evolving media scapes



edited by
Ilija Tomanić Trivunđža
Nico Carpentier
Hanni Nieminen



Pille Pruulmann-Vengerfeldt
Richard Kilborn
Ebba Sundin
Tobias Olsson

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Analysing How Law Shapes Journalism in Post-Communist Democracies

Nikola Belakova

1. INTRODUCTION

Journalism¹ is a “*key social institution*” generally considered “*central to democracy, citizenship and everyday life*” (Wahl-Jorgensen and Hanitzsch, 2008: xi), and thus pivotal for successful democratisation (Votmer, 2006: 1). Yet, in Central and Eastern European (CEE) democracies, the media are perceived as failing and lagging behind their Western counterparts. A widely accepted explanation attributes this failure to elites’ use of legislation to thwart criticism in the media (Sükösd and Bajomi-Lázár 2002, 13-14).

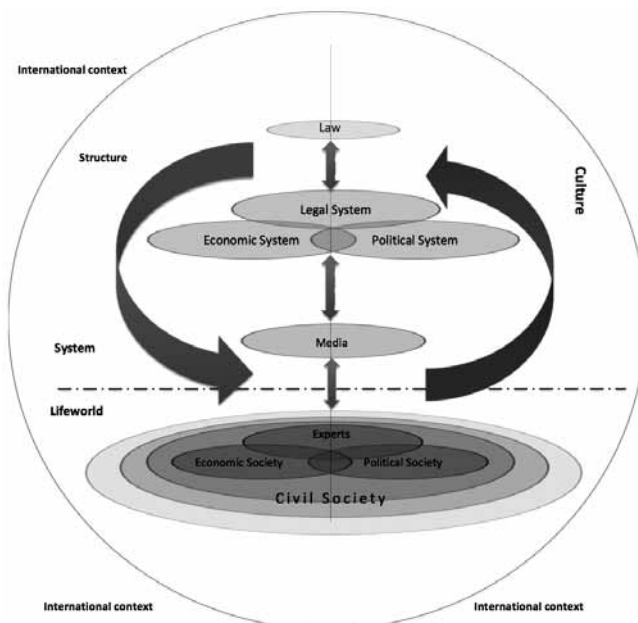
Despite the desirability of research into the operation of law and its interactions with other factors in influencing journalism in CEE democracies, a suitable analytical framework is lacking. This chapter seeks to contribute to efforts to address this lacuna by presenting an analytical framework explaining the operation of legal rules in constraining journalism in the context of democratisation. This framework was primarily developed for the purposes of investigating the case of civil defamation law in the Czech Republic and Slovakia. Although the law is apparently identical in both countries, there is a puzzling divergence of perceptions among journalists as to how the law has operated since their separation in 1993. After introducing the framework, the chapter proceeds with a brief demonstration of its application in this case. It concludes with a discussion about its potential value for further research regarding the interplay of law and journalism in Central and Eastern Europe.

1 Throughout this chapter, journalism refers both to the stories produced by journalists who work in or for media organisations and the processes of producing them.

2. THE FRAMEWORK

Employing new institutionalism theory and Cohen and Arato's (1992) model of civil society, later adopted by Habermas (1996), this framework designates a central role for law in modern democracies (Figure 1). Law is conceptualised as a dynamic construct that structures, constrains and enables the behaviour and mutual interactions between actors operating at different levels of society. In other words, law represents "the rules of the game" in a society. The various social actors, consisting of individuals and organisations, are the players. They operate either in the lifeworld or the system, each encompassing conceptually different forms of social activity (Habermas, 1984, 1987). The lifeworld comprises the familial and public spheres. It functions as a forum of communicative rationality in which individuals pursue the collective development of consensual norms. The system encompasses those self-regulating sectors of society in which decisions are guided primarily by instrumental rationality, involving strategic calculations to achieve a given objective. While this dichotomy provides a useful categorisation of actors for analytic purposes, it is not ultimate, as the system remains grounded in the lifeworld context. Systemic actors may thus at times act based on communicative rationality.

Figure 1: Formulation and operation of law in a democracy



Law does not merely provide rules for actors' interactions. By creating a "*structure of categories and definitions for understanding social relations*" and presenting a set of accepted routines for manoeuvring that structure, law also provides "*pre-conscious frameworks for making sense of the social world*" (Edelman and Suchman, 1997: 503). Defamation law, for instance, produces understandings of what is and what is not an unjustified infringement of reputation.

Law is formulated, enacted and interpreted in mutual strategic interactions between social actors. There are five categories of actors – civil society, the media and the political, economic and legal actors². Civil society, composed of voluntary organisations and associations of citizens, strives to identify the most pressing societal issues, structure the public debate around them and communicate them effectively to legislators. The media serve as citizens' sources of information and a channel of communication between the two.

In pursuit of profit maximisation, the economic actors engage with high-level decision-makers primarily through collective organisations. They communicate with the public only as far as is necessary to maintain end-markets, usually through advertising in the media. Economic elites may attempt to promote positive messages about themselves as media owners and/or to prevent negative publicity by invoking defamation law.

To remain in power, political actors have to balance the competing requirements of the economy and civil society by enacting laws. The media are the primary channel through which the government can disseminate its messages and learn of the interests of the other actors. Politicians may attempt to promote favourable messages about their conduct and performance through the media and even adopt news-management tactics to deflect criticism thereof.

In the legal subsystem, judges' goals may include promotion of one's policy preferences or ideology, career advancement, approval of the legal community and/or broader institutional legitimacy. Lawyers' motivation may include profit-making and career advancement, but also ethical and moral considerations. Legal actors themselves may occasionally use the law to protect their reputation against criticism of their pursuits in the media.

As enterprises generating profit by targeting audiences attractive to advertisers, the media belong to the system. Yet, media professionals may also view their role as “watchdogs”, best understood as lifeworld modes of operation. Since the media are the main link, or bridge, between all other actors, each of the latter may attempt to instrumentalise them to promote their own messages. Contrary to being passive channels of communication, though, as powerful agenda-setters and framers of political and economic debates (e.g. Dearing and Rogers, 1996), media actors actively influence the interactions among other actors.

In their interactions, actors act strategically. Their choices depend on their expectations about the behaviour of other actors. Since their decisions take place under conditions of uncertainty and limited information, actors are not purely rational in the pursuit of their interests. Their “decision frames” (Black, 1997: 63) are further shaped by the structural and cultural contexts of society (Pfetsch, 2004). The structural context denotes formal legal, economic and political institutions as well as the organisational structure in which actors are embedded. The cultural context encompasses the informal norms, values, beliefs, myths and traditions of society. Actors’ interactions are also influenced by the political and economic developments in the international context. The strategic interactions of actors are thus a function of different experiences with institutions and other actors confronting individuals and societies at different times, and the way the information is interpreted through their belief structure (Howard, 2003: 19; North, 1998: 250-251).

In Habermas’s (1996: 81) ideal-typical conceptualisation, law is the means by which citizens transpose collectively and democratically agreed values to the economic, political and cultural frameworks structuring their lives. Law thus becomes “a kind of ‘transmission belt’ that picks up structures of mutual recognition that are familiar from face-to-face interactions and transfers these, in an abstract but binding form, to the anonymous, systematically mediated interaction among strangers” (1996: 448).

Habermas (1987: 196), however, admits the possibility of “colonisation of the lifeworld” by systemic instrumentalism; and identifies it as the cause of the malaise of modern society. The framework allows for the possibility of law being subverted. As North (1998: 249) argues, formal rules are not usually created to be “socially efficient”; rather they “serve the interests of those with the bargaining power to create new rules”. The framework draws our attention to the interests and alliances of social actors, and to the wider structural, cul-

tural and international contexts in which they take place. These explain the kind of rules created at a particular point in time. The characteristics of the rules will, in turn, partially account for how law operates.

As a social institution, law embodies much more than the “law-on-the-books”. Far from being explicit, authoritative and static, laws are often ambiguous, contested, socially constructed and replete with unintended consequences. Judges, enforcers, lawyers and target populations have to “*negotiate the meaning of law in each application*” (Suchman and Edelman, 1996: 932). Eventually, a provisional working agreement on what the law ‘is’ and what it ‘requires’ and how it will actually operate may emerge. These interactions may reaffirm or alter the dominant understandings of law, and thus contribute to changes in its operation (Marjoribanks and Kenyon, 2004: 8) “publisher”: “The University of Melbourne Faculty of Law Legal Studies Research Paper No. 67”, “abstract”: “Legal and media commentators frequently argue that defamation law ‘chills’ media speech. But critical questions remain about whether a chilling effect exists. In particular, when media professionals produce news, are they restricted by defamation concerns? And if so, how? These questions are addressed in this paper, which provides an analysis of interview based fieldwork into news production practices and defamation law at major print media organisations in the US and Australia. On the basis of this analysis, we make three arguments. First, defamation law is perceived to have a more direct, and potentially chilling effect, in Australia. Second, despite this difference, the organisational processes for managing news production in the context of defamation law are similar. Third, journalists, editors and legal advisors actively negotiate organisational responses to defamation law. Overall, the research indicates that defamation law does not operate as a straightforward constraint, but rather through interactions and negotiations between media professionals and their legal advisors.”, “URL”: “http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530365”, “shortTitle”: “Negotiating News”, “author”: [{"family": “Marjoribanks”, “given”: “Timothy”}, {"family": “Kenyon”, “given”: “Andrew”}], “issued”: {“year”: 2004}, “accessed”: {“year”: 2012, “month”: 2, “day”: 16}, “locator”: “8”, “label”: “page”}], “schema”: “https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}.

Since the emergent local standards of practice and interpretation are an endogenous product of evolving social interactions set in particular structural and cultural contexts, the framework does not assume legal change produces instantaneous effects. Instead, law’s functioning is expected to change only gradually, as cognitive and normative beliefs become increas-

ingly institutionalised (Edelman and Suchman, 1997: 498). By implying that even identically worded legal rules may become different laws, when applied in different contexts, this framework emphasises the salience of legal culture. Defined as a legal system's underlying values, established practices and traditions, and the values, beliefs and implicit preconceptions of lawyers, lawmakers, judges and litigants, legal culture seems essential as "*a kind of lens through which all aspects of law must be perceived*" (Cotterrell, 2006: 710).

Further, the framework highlights the political and contested nature of law. Legal ambiguity often invites political manipulation and self-serving interpretation. Courts, lawyers and target populations themselves all perform as "filtering agents" with the capacity to alter the meaning of law in accordance with partisan interests and ideologies. Since law is "*made as it is enforced*" (Suchman and Edelman, 1996: 933), the framework draws attention to judicial decision-making. Judges do not merely mechanically apply "*a set of complete, self-explanatory, pre-existing legal rules*" (Shapiro, 1981: 155). Politicisation of judges based on their preferences or internal bureaucratic agendas is thus possible.

In short, it is the admixture of formal rules, informal norms or culture and enforcement characteristics that shape the operation of law. Thus, to explain how particular legislation shapes journalism at any given point in time, we must first examine the interests and alliances of the actors on which the operation of law depends. Second, we have to attend to the particular constellation of the institutional constraints, cultural trajectories and international environment of that society.

3. APPLICATION OF THE FRAMEWORK TO DEFAMATION

Defamation law seeks to regulate the publication of material harmful to reputation by balancing two public interests – free speech and the protection of reputation. Despite identical basic civil defamation provisions anchored in the Civil Code of 1964, anecdotal evidence suggests that the law in the Czech Republic operates differently from the law in Slovakia. In the Czech Republic, there have been hardly any reports of defamation threats against the media. In the few cases that have occurred, the media have usually succeeded. In contrast, the tendency of Slovak elites to file defamation claims against the media has intensified since 2008. In Slovakia, defamation is thus widely considered to be a deliberate attempt to weaken critical media coverage (Belakova, 2011). The case of defamation law in the Czech Republic and Slovakia requires a systematic examination

of the actual operation of the law. Such an examination may explore the frequency and outcomes of litigation and/or the threat thereof and the identity of claimants, as well as how law shapes journalism; be it in terms of a “chilling effect”,³ or the practices adopted to deal with defamation. Perhaps more intriguingly, it also raises questions about the factors that interplay with the “law-on-the-books” to produce such apparently divergent experiences for journalists in the two jurisdictions.

To answer these questions, the first analytical step suggested by the presented framework is to examine the players of the “defamation game” and their interests. While political and economic elites are anticipated as chief claimants, the media will often play the role of defendants. Civil society actors are expected to figure as claimants only rarely. Although potentially powerful actors who could change the behaviour of the elites through protests against misuses of defamation, they are assumed to remain passive and preoccupied by other issues. Occasionally, legal system actors may appear as claimants. However, since the defamation game revolves around litigation and/or the threat thereof, judges in particular are expected to be crucial to explaining how defamation law operates in cases involving the media. The analysis should thus pay close attention to judicial decision-making.

Next, defamation laws and other closely related procedural rules in each jurisdiction ought to be analysed as they affect the attractiveness of litigation, and hence its frequency and forms. Procedures for determining legal standing for public figures, the level of damages, jurisdictional rules and the like may influence whether elites use defamation to protect their reputation, or in an attempt to constrain journalism. Simultaneously, these factors will enter the cost-benefit calculations of the media when deciding whether or not to publish certain stories. The rate and use of defamation litigation and its effect on journalism may also depend on the existence or non-existence of more effective or more socially acceptable alternative means for achieving claimants’ goals. For instance, the use of a right of reply may trigger fewer protests on the part of civil society and bring about faster remedy in case of defamation in the media. In contrast, if the goal is to manage what is published in the public sphere, and when physical harassment of journalists is socially unacceptable, defamation law may be the most efficient tool.

3 Barendt et al. (1997: 191-192) recognise two types of chilling effect. A direct chilling effect occurs when media outputs are specifically altered in light of legal considerations. A structural chilling effect is subtler, making journalists internalise the restrictive libel regime, and thus renders certain individuals and topics off-limits.

Preliminary investigation seems to suggest that the laws and procedures related to defamation, including alternative legal tools, are almost identical. The social acceptability of using defamation linked to the strength of civil society and societal values thus seems to shed more light on the puzzle. Indeed, when investigating any chilling effect on public speech, the framework suggests that a range of structural and cultural factors other than law should be considered. Kenyon (2010) argues that media ownership, journalism practices, the style and level of civil society activism and political opposition are of particular explanatory power in this regard.⁴ Ownership influences the level of financial resources media organisations have at their disposal to run their day-to-day operations. Thus, while financially strong media may regard defamation as “irksome”, it may not produce excessive chilling effects. For instance, Cheer (2005) suggested that media in New Zealand effectively manage defamation threats, and consider them part of the daily routine. Similarly, the nature of competition in the media market may be a more important consideration for editors when running a story than the threat of defamation. For instance, Barendt et al.’s (1997: 183) study revealed that, owing to the fear that their competitors might get exclusive coverage, British tabloids rarely kill or significantly amend a story, even if it carries a risk of defamation. These factors may explain the cross-border differences in perceptions, as well as among different media outlets within the same country.

Ownership is closely connected to the ideology of media organisations that partially explains what products get published. CEE democracies have recently seen a trend of local tycoons investing in media outlets with the aim of using them to promote their business or political interests rather than to make a profit (Štětka, 2012). They are often part of clientelistic networks that still play a significant role in CEE politics. These informal networks of entrepreneurs, politicians, judges, prosecutors and media owners participate in often non-transparent and corrupt exchanges of favours with the aim of resource extraction from the state (Örnebring, 2012). The instrumentalisation of media by these tycoons ranges from ‘advertisorials’, or positive promotion, to ‘kompromat’, or smearing of rivals, in regular media outputs (506–509). In the case of ‘kompromat’, defamation may serve as a justified remedy for injured reputation.

The nature of professional journalism standards may also explain some aspects of the functioning of defamation law. Several studies (e.g. Mar-

⁴ This is not an exhaustive list. Since the international context is identical, the analysis focuses on interactions among domestic actors.

joribanks and Kenyon, 2004)"publisher":"The University of Melbourne Faculty of Law Legal Studies Research Paper No. 67","abstract":"Legal and media commentators frequently argue that defamation law 'chills' media speech. But critical questions remain about whether a chilling effect exists. In particular, when media professionals produce news, are they restricted by defamation concerns? And if so, how? These questions are addressed in this paper, which provides an analysis of interview based fieldwork into news production practices and defamation law at major print media organisations in the US and Australia. On the basis of this analysis, we make three arguments. First, defamation law is perceived to have a more direct, and potentially chilling effect, in Australia. Second, despite this difference, the organisational processes for managing news production in the context of defamation law are similar. Third, journalists, editors and legal advisors actively negotiate organisational responses to defamation law. Overall, the research indicates that defamation law does not operate as a straightforward constraint, but rather through interactions and negotiations between media professionals and their legal advisors.","URL":"http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530365","shortTitle":"Negotiating News","author":[{"family":"Marjori banks","given":"Timothy"}, {"family":"Kenyon","given":"Andrew"}],"is sued":{"year":2004,"accessed":{"year":2012,"month":2,"day":16},"prefix":"e.g."},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} have found that in publication decisions, professional standards and status remained more important than defamation considerations. Journalists would decide whether to publish on the merits of the story, and whether its publication was in the public interest, rather than based on the threat of defamation. Similarly, if professional standards were high, defamatory stories would rarely be published, and there would arguably be little need for litigation.

Journalistic practices, the role orientations of actors and perceptions of what is acceptable, as reflected in the operation of defamation law, are also shaped by the cultural context and historical traditions. Transitions trigger conflicts and confusion about norms and standards of conduct, leaving the actors to renegotiate the power balance between them. The experience with communism and/or democracy, and the presence or absence of nation-building, seem central in explaining the operation of defamation and its effects on journalism. If communism were an interruption of a strong democratic tradition, the actors would be more likely to renegotiate the rules of their relationship to make them conducive to open and critical debate and a strong civil society. This in turn would render using

defamation to silence critical voices in the media unacceptable, and could trigger civil society protests. Similarly, if nation-building is under way during transition, national and social unity may become more important than critical and open debate. The political culture would thus be more likely to accommodate elites justifying the silencing of dissonant views and opposition (Voltmer, 2006: 5).

The Czech and Slovak experiences with the democratic Czechoslovak Republic and communism were markedly different (Rychlík, 1995), as was their experience of the first years of transition (Hilde, 1999). While, for the Czechs, the “normalisation” period of communism meant stagnation and persecution, for the Slovaks it represented socio-economic development. While the Czechs embraced the democratic and liberal values of the First Republic, amid a rapidly deteriorating socio-economic situation, the Slovaks longed for a slower pace of reform. Moreover, in contrast to the Czech Republic, Slovakia contained deep ethnic cleavages and, after Czechoslovakia’s dissolution, underwent a process of nation-building needing strong, unchallenged leadership. As a result, the two countries experienced different modes of democratisation, which have potentially produced differing informal institutions, levels of civil society activism, professional journalistic values and relationships between politics and the media.

The framework assigns a great significance to judicial decision-making. Preliminary evidence suggests that it may be key to explaining the apparently divergent experiences of Czech and Slovak journalists. Czech media representatives do not generally think that the judiciary would single out the media for disproportionate punishment, or that it lacks an “understanding of media issues” (IPI, 2009). In contrast, Slovak journalists have argued that, due to the disproportionately large damages awarded to elite claimants, they are unwilling to run stories of public interest (Belakova, 2011).⁵

In their decision-making and interactions with other actors in the defamation game, judges are undeniably influenced by the prevailing societal values and traditions. In addition, the structural context of the judiciary and courts – how cases are allocated, the judicial system structure and the rules regulating judicial promotion – are expected to shape the operation

5 Prominent Slovak figures have been awarded one-off compensation ranging from 8,000 to 49,500 Euro (Bureau of Democracy, 2009). Before the watershed 2011 ruling awarding just over 40,000 Euro to a celebrity, the highest defamation award in Czech courts amounted to 12,000 Euro (iDnes.cz, 2009).

of defamation law. Several authors have drawn attention to “*the politicization of judging*” (Goldstein, 2004: 614) – a tendency of political elites to turn to prosecution in court as a way of eliminating political opponents, including the media (Maravall, 2003). Judges may be prone to such politicisation, particularly if the political regime actively controls their career opportunities and if they are subjected to a great deal of discipline by their supervisors (Shapiro, 1981: 151).

The judiciary is a hierarchically organised civil service, with judges as the ministry of justice employees. Thus, even if free from direct political control, judges may be “*closely allied with the career civil service executives*” who run the country (Ibid.: 156). Common ties and sympathy with other government executives may systematically bias judicial decision-making, since the judges are likely to be closely attuned to the viewpoints of government officials. Arguably present in all civil law countries, these connections may be reinforced in post-communist democracies due to the high level of elite continuity throughout societies (Sparks, 2008). The present political, economic and legal elites have their roots in the former regime and are often closely connected.

The situation in the judiciary and the connections between judges and clientelistic networks seem to account for the difference in judicial decision-making in defamation cases in the two jurisdictions. For instance, one of the most successful Slovak litigants is the President of the Supreme Court and former Justice Minister, who in 2009 alone was awarded over 64,000 Euro in damages (Báraba, 2009). While many of his supporters among judges have been promoted, his critics have been subject to disciplinary proceedings, salary reductions or suspension (Bureau of Democracy, 2009). As a result, journalists have voiced concerns about the judiciary’s independence in defamation cases instigated by political and business elites. One commentator even referred to a “*cartel*” between the justice system and the government that threatens media freedom in Slovakia (Šimečka, 2009).

4. CONCLUSION

Systematic examinations of how and under which conditions law influences journalism are critical to understanding what gets published in the public spheres of post-communist democracies. As Youm (2008, 290) argued, the role of the law “*in shaping or being shaped by journalism is undeniable*”. This chapter has introduced the initial scaffolding of an analytical framework that could guide examinations of the relationship between le-

gal rules and journalism, exemplified by the case of defamation law in the Czech Republic and Slovakia. There are several reasons why the framework may be beneficial to such research projects. Emphasizing the subtle interplays between normative values, material interests and cognitive assumptions, and their structural, cultural and international contexts, the framework prevents simplistic explanations. By considering the effects of history and path dependence, the presented framework helps account for the evolution of the various interplays between law and journalism. Finally, by focusing on the cognitive aspects of the strategic interactions between social actors in explaining the effects of law on journalism, this framework also puts forward the desirability of qualitative research. For, ultimately, the best way to fully understand actors' perceptions is to ask them.

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