Online Shaming - a New Challenge for Criminal Justice

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Abstract: Online shaming is a harmful phenomenon that violates the psychological and sometimes even physical wellbeing of the target (or victim) of the action. Shaming and other forms of online hate speech also affect the use of freedom of expression in society by reducing the amount – or at least the range – of opinions expressed and information available in public. The aim of this article is to discuss whether initiating a shaming action or participating in it could or even should be criminalized. As a conclusion, we argue that an offence comprehensively covering acts of online shaming would be difficult or even impossible to formulate without violating the requirements of freedom of expression and certain fundamental principles of criminal law.

Keywords: human rights, freedom of expression, right to private life, social media, shaming, criminalizing, principles of criminal law

1. Freedom of expression and social media

Freedom of expression is an essential value in every democratic society and a fundamental right in European law. It is guaranteed in the United Nations' Universal Declaration of Human Rights and in the European Convention on Human Rights. It includes the freedom to hold opinions as well as to receive and impart information and ideas. According to the European Court of Human Rights (ECtHR) freedom of expression constitutes 'one of the essential foundations of a democratic society and one of the basic conditions for its progress'.[1] Freedom of expression is also

1 For example, *ECtHR*, *Barthold v. Germany*, App. no. 8734/79, 25 March 1985; *ECtHR*, *Handyside v. the United Kingdom*, App. no. 5493/72, 7 December 1976; *ECtHR*, *Zana v. Turkey*, App. no. 18954/91, 25 November 1997 (GC); *ECtHR*, *Von Hannover v. Germany (No. 2)*, App. nos. 40660/08 and 60641/08, 7 February 2012 (GC); *ECtHR*, *Axel Springer AG v. Germany*, App. no. 39954/08, 7 February 2012 (GC); *ECtHR*, *Gillberg v. Sweden*, App. no. 41723/06, 3 April 2012.

a social good, promoting truth, democracy and participation. It can also be regarded as an end in itself, promoting individual self-fulfilment and as an individual good.[2] As well as protecting positive and insignificant (or otherwise neutral) expressions, freedom of expression also applies to expressions that offend, shock or disturb.[3]

Another important right is the right to private life. This covers the physical, psychological and moral integrity of a person, as well as the right to establish and develop relationships with other human beings. The right to private life gives protection against public dissemination of a person's private information or photos in situations where individuals can legitimately expect that that kind of information is not published without their prior consent.[4] The right to private life guarantees dignity and autonomy since revealing private matters without consent takes away an individual's control and can deprive them of their dignity or reputation in the eyes of

2 See for more detail Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015), 13-20. Already more than fifty years ago Thomas I. Emerson, "Toward a General Theory of the First Amendment," *The Yale Law Journal* 72, no. 5 (1963): 878-879 considered freedom of expression important for four reasons: '(1) as assuring individual self-fulfilment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.'

3 For example, *ECtHR, Hertel v. Switzerland*, App. no. 25181/94, 25 August 1998, § 46; *ECtHR, Stoll v. Switzerland*, App. no. 69698/01, 10 December 2007 (GC), § 101; *ECtHR, Steel and Morris v. the United Kingdom*, App. no. 68416/01, 15 February 2005, § 87; *ECtHR, Mouvement raëlien suisse v. Switzerland*, App. no. 16354/06, 13 July 2012 (GC), § 48; *ECtHR, Handyside v. the United Kingdom*, App. no. 5493/72, 7 December 1976, § 49; *ECtHR, Observer and Guardian v. the United Kingdom*, App. no. 13585/88, 26 November 1991, § 59.

4 Regarding photos, *ECtHR, Von Hannover v. Germany (No. 2)*, App. nos. 40660/08 and 60641/08, 7 February 2012, (GC), § 96. See also *ECtHR, Lillo-Stenberg and Sæther v. Norway*, App. no. 13258/09, 16 January 2014, § 26. Regarding other kinds of private information see *ECtHR, von Hannover v. Germany*, App. no. 59320/00, 24 June 2004, §§ 50-53; *ECtHR, Sciacca v. Italy*, App. no. 50774/99, 11 January 2005, § 29; *ECtHR, Flinkkilä and others v. Finland*, App. no. 25576/04, 6 April 2010, § 75; *ECtHR, Saaristo and others v. Finland*, App. no. 184/06, 12 October 2010, § 61; *ECtHR, Von Hannover v. Germany (No. 2)*, App. nos. 40660/08 and 60641/08, 7 February 2012, (GC), § 95. See also *ECtHR, Petrina v. Romania*, App. no. 78060/01, 14 October 2008, § 27, and *ECtHR, Rothe v. Austria*, App. no. 6490/07, 4 December 2012.

others.[5] The right to private life may also cover protecting reputation[6] and honour.[7]

The Internet makes it possible to express oneself without the restrictions imposed by traditional media. As the ECtHR stated in *Delfi*, "user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression".[8] Possibilities to express oneself anonymously encourage free speech, expression of various ideas and revealing grievances and abuses. In addition to the right to expression, the Internet and search engines also play a major role in obtaining information and ideas.

As a space for open communication, social media and the Internet enable formation of online cultures (and countercultures) where individuals express their ideas and opinions quickly and world-wide to large groups of people. Unfortunately, the potential created by social media is not always used for the common good, with the result that social networking sites have become platforms for both information and disinformation. In addition, the speed of communication in social media and the ability to express oneself anonymously has increased the number of obscene insults towards individuals and ethnic, religious or other groups of people. As the ECtHR put it in *Delfi*, "Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online."[9]

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5 Päivi Korpisaari, "Balancing freedom of expression and the right of private life in the European Court of Human Rights - application and interpretation of the key criteria," *Communications Law* 22, no. 2 (2017): 39.

6 *ECtHR, Chauvy and Others v. France*, App. no. 64915/01, 29 June 2004, § 70; *ECtHR, Abeberry v. France*, App. no. 58729/00, 21 September 2004 (dec.); *ECtHR, Leempoel & S.A. ED. Ciné Revue v. Belgium*, App. no. 64772/01, 9 November 2006, § 67; *ECtHR, White v. Sweden*, App. no. 42435/02, 19 September 2006, § 26; *ECtHR, Pfeifer v. Austria*, App. no. 10802/84, 25 February 1992, § 35; *ECtHR, Fürst-Pfeifer v. Austria*, App. nos. 33677/10 and 52340/10, 17 May 2016, § 35.

7 *ECtHR, Radio France and others v. France*, App. no. 53984/00, 30 March 2004; *ECtHR, Cumpănă and Mazăre v. Romania*, App. no. 33348/96, 17 December 2004 (GC), *ECtHR, Sanchez Cardenas v. Norway*, App. no. 12148/03, 4 October 2007; *ECtHR, A v. Norway*, App. no. 28070/06, 9 April 2009, § 64.

8 *ECtHR, Delfi AS v. Estonia*, App. no. 64569/09, 16 June 2015, § 110.

9 *ECtHR, Delfi AS v. Estonia*, App. no. 64569/09, 16 June 2015, § 110.

2. *Shaming as harmful action online*

One form of harmful use of social media is online shaming, which has been a topical issue over the last few years.[10] There is no universal or commonly accepted definition of shaming, and indeed, the use of the term varies slightly. The kind of online shaming treated in this paper could also be discussed as cyber-bullying or -harassment.[11]

We understand the concept of online shaming as a certain kind of *organised* shaming or harassing action online. Shaming consists of *numerous* harassing expressions and is understood as an action in which someone *intentionally initiates* online vilification or a hate campaign against another person, usually on social media or another online platform. Online shaming refers to a systematic activity aiming at silencing people or harassing them, for example, by threatening them or disseminating their private (or untrue) information on the Internet. In the long run, only a fear of online shaming can affect the willingness of some people to participate in public discussions, which further restricts the range of topics that are discussed in public and the ways in which certain (heated or delicate) issues are discussed.

Separate acts of online shaming resemble or might constitute a criminal offence (depending also on what acts are criminalized and how in the state in question). However, acts of shaming differ from offences such as defamation or dissemination of information violating personal privacy in that the action of shaming and the harm it causes as a whole is always a sum of several, even tens or hundreds of separate acts.[12] Moreover, the complex of shaming differs from the offence of, for instance, stalking, by always being committed by several people. On the other hand, as hate speech is usually understood as expressions of hate against a person or a group based on group characteristics (such as race, sex, sexual orientation,

10 Online hate speech has an impact on victims' wellbeing, social trust, self-image and social relations. See Teo Keipi et al., *Online Hate and Harmful Content: Cross-National Perspectives* (London: Routledge, 2017).

11 The concepts of cyber-bullying and -harassment are used perhaps more often specifically in the context of studying the behaviour of youth and adolescents in the online environment as well as sexual or gender based harassment online. See e.g. Peter Coe, "The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law," *Information & Communications Technology Law* 24, no. 1 (2015): 27-29.

12 Extensively on shaming and the different ways shaming can violate the right to privacy, Emily B. Laidlaw, "Online Shaming and the Right to Privacy," *Laws* 6, no. 1 (2017).

religion, and so on), in shaming, the trigger for expressions of hate or disrespect can be basically anything, for instance, the target's opinions or ideas that they have shared, their work or position of trust.

In practice, a campaign can happen or be initiated in numerous different ways and in varying environments, and for many different reasons. One censorious, derogatory or mocking remark made by someone who reaches a wide audience, for instance on social media, can generate a flood of hateful and disrespectful comments by other people against the individual chosen as the target. The comments can be anything from mocking to threatening or they can include, for instance, dissemination of information that violates personal privacy. In addition, acts of shaming can also lead to different types of harassment beyond the online environment: "physical threat", malicious accusations, groundless complaints, stalking, calls to the family members or employer of the target, and the like.[13] Despite having some effects outside the online environment, social media is essential for shaming actions in providing a platform to initiate and perform such campaigns.

The kind of shaming described above is close to or partly overlaps with *doxing*, *trolling*, *virtual mobbing* or *flaming*, and even mere *gossiping*. In practice, these phenomena might be difficult to differentiate from each other, as it is impossible to define online shaming exhaustively. One shaming action can include a mixture of different types of harassment and different conduct can have different motives. In addition to the confusing terminology, there are some differences as to approaching the phenomenon; hence the questions that follow.[14] In the type of shaming discussed here,

13 See also Guy Aitchison and Saladin Meckled-Garcia, "Against Online Public Shaming: Ethical Problems with Mass Social Media," *Social Theory and Practice* 47, no. 1 (2021): 7.

14 For instance, online public shaming can be approached as a means of social control and moral condemnation or even an informal reputational punishment to be used when someone has (allegedly) transgressed moral norms. Seen as such, the phenomenon does not necessarily have to be considered solely and in every case harmful and wrong, but in some cases also a desirable way of collectively expressing opinions, moral commitments and condemning the morally reprehensible. Discussion from this perspective, Behnam Taebi and Azar Safari, "On Effectiveness and Legitimacy of 'Shaming' as a Strategy for Combatting Climate Change," *Science & Engineering Ethics* 23 no. 5 (2017); Paul Billingham and Tom Parr, "Online Public Shaming: Virtues and Vices," *Journal of Social Philosophy* 51, no. 3 (2020). As for recent Finnish discussion on shaming, the phenomenon is seen only as undesirable harassment, and it has been discussed mainly as an occupational issue. In other words, shaming is understood as a way to harass and silence e.g. journalists, state employees, and researchers, without any other reason

someone actively and intentionally initiates the process in which others participate by (mostly publicly, but not necessarily) commenting on the target, sending messages, and reposting others' comments and "liking" them. The aim of the process might be, for instance, to shame the target, express disapproval of them or silence them,[15] but once the process has started, it easily gets out of hand, beyond the control of the initiator or anyone participating in the shaming action. Therefore, the effects that online shaming may have on the target or public discussion in general do not necessarily equate with the original intentions of the initiator, let alone other participants.

Since the actions of online shaming are severely disturbing to the target themselves, even a risk of winding up as a target might affect the willingness of some people to participate in public discussions in general or in certain subject areas, or it might affect the way they are willing to discuss anything in public.[16] In the most alarming cases the threat of shaming affects the issues that, for instance, journalists are willing to bring up or researchers are willing to study. Thus, along with causing serious mental pain or even psychological illness to the target, online shaming or a risk of it potentially affects and distorts public discussion and the public's right to obtain information. So, from the victim's perspective, and in order to enable and encourage public discussion even on delicate or controversial issues, something definitely should be done.

There are of course some variations in the criminal codes of different states as to which offences might apply to shaming and under what conditions. However, in many cases the range of potentially applicable offences is rather wide, and in addition, the rules on complicity might apply too. Similarly, because of the complicated nature of shaming and the rather scattered criminal law provisions applicable, in practice, cases of shaming are usually difficult to get hold of and investigate or prosecute. Another

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or motivation for shaming action than the target's having a different opinion to that of the perpetrator. Seen from this perspective, shaming must be wrong and reprehensible. At the same time, however, this perspective neglects the problem of how to differentiate harmful shaming from justifiable criticism of the target.

15 Aitchison and Meckled-Garcia emphasise the importance of noticing that in online public shaming people are harassed "because of a characterisation of who or what they are", not what they say or express. Aitchison and Meckled-Garcia, "Against Online Public Shaming," 6.

16 On this kind of chilling effect and the reasons behind it, David Bromwich and George Kateb, eds., *On Liberty: Rethinking the Western Tradition* (New Haven: Yale University Press, 2003), 76. See also e.g. Aitchison and Meckled-Garcia, "Against Online Public Shaming," 6.

problem is that even if some acts participating in online shaming constitute offences, the crimes committed do not appear very serious, seen separately and not as a whole. This means that the police might not consider the crimes worth investigating, also taking into account that crimes taking place online and anonymously are difficult to investigate,[17] and no effective investigative methods are available for minor offences. As Keipi and others point out, "angry and hateful online users may easily disturb the online activity of dozens or even hundreds of other users without having to face any consequences for their actions".[18] Moreover, the ECtHR has interpreted the right to freedom of expression rather permissively,[19] and exercising caution in applying restrictions on the right to free speech can be justified on the basis that broader restrictions might lead to "a floodgate of trivial cases" and create a chilling effect.[20] As the current criminal law does not function very well in protecting targets of online shaming, would it be possible and reasonable to criminalize shaming actions in a distinct criminal law provision designed to tackle the problems described above?

3. Criminalizing online shaming?

The aim of this paper is to discuss questions relating to shaming as common European issues rather than including any comparison of different approaches to shaming or any online harassment and hate speech in different European countries. This causes certain shortcomings in terms of the

17 On the problems that anonymity causes in the context of crimes committed online, see e.g. Kathryn Chick, "Harmful Comments on Social Media," *York Law Review* 1, (2020): 102-104.

18 Keipi et al., *Online Hate and Harmful Content*, 71.

19 See *ECtHR, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* App. No. 22947/13, 2 February 2016, where the ECtHR stated that the comments were vulgar but not clearly illegal. One of the comments was "People like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead." However, compare to *Delfi*, where the comments were mainly hate speech and speech inciting violence towards the director of the ferry company.

20 Chick, "Harmful Comments on Social Media," 88 and the CPS Guidelines referred to by her, CPS/Director of Public Prosecutions, "Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media," June 20, 2013, accessed April 4 2021, http://data.parliament.uk/DepositedPapers/Files/DEP2013-1025/social_media_guidelines.pdf. On difficulties of having internet and social media crimes prosecuted, also e.g. Coe, "The Social Media Paradox".

accuracy of our claims: the ideas and claims on criminal law presented in this paper remain at a general level and might not apply to any jurisdiction as such. As Fletcher puts it: 'the languages of criminal law, with their rich moral overtones, are deeply embedded in particularistic cultures of guilt and blaming. There is no serious possibility of developing a value-free, quasi-scientific language of criminal law that could claim universal understanding.'[21] However, certain fundamental principles and values are shared by all European criminal justice systems.[22] Hence, discussing the question of criminalizing shaming at a general level is reasonable, since the essential issues of potential criminalization indeed conflict with the central values of European criminal justice.

The possibility or even need to criminalize shaming actions is examined through restrictions that the principles of legality and individual autonomy along with the requirements of freedom of expression, provide when criminalizing conduct initiating shaming or participating in shaming. The starting point must be freedom of expression as protected by Article 10 of the ECHR, and the fact that according to the ECtHR, this protects expressions broadly, including even expressions "that offend, shock or disturb the State or any section of the population."[23] Although restricting freedom of expression is possible, restrictions are limited *inter alia* to those necessary in a democratic society. As for the idea or principle of legality, this is a fundamental part of any democratic *Rechtstaat*, and is written, for example, into the European Convention on Human Rights (Article 7) as well as national constitutions and criminal laws.[24] Some of the essential requirements of the principle of legality are the requirements of written law and maximum certainty: "the condition [of written law] is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative

21 George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International. Volume One: Foundations* (Oxford: Oxford University Press, 2007), 118.

22 E.g. Alan Norrie, *Crime, Reason and History, A Critical Introduction to Criminal Law*, 2nd edn. (London: Butterworths, 2001); Kristiina Koivukari, "The crumbling narrative of modern European criminal justice" (Dissertation, University of Helsinki, 2020).

23 E.g. *Handyside v. the United Kingdom*, App. no. 5493/72, 7 December 1976, § 49.

24 See also Alexandros Kargopoulos, "Fundamental rights, national identity and EU criminal law," in *Research Handbook On EU Criminal Law*, eds. Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (Cheltenham, UK: Edward Elgar Publishing, 2016), 126-128; Christina Peristeridou, *The Principle of Legality in European Criminal Law* (Cambridge: Intersentia, 2015).

assistance given by the courts, to know which acts or omissions will make him criminally liable".[25] Moreover, the principle of individual autonomy presumes that "each individual should be treated as responsible for his or her own behaviour", which in turn must be respected in criminalizing any conduct.[26] This means, in practice, that individuals should not be punished for accidents or when they have not "recognised the harmful aspect of their conduct or its consequences".[27]

3.1 Conduct initiating shaming action

As the principles of individual autonomy and legality *inter alia* suggest, not any conduct in any manner can be made criminal. As a starting point, the Latin terms of *actus reus* and *mens rea* established in English criminal law well illustrate the questions addressed here. To put it simply, *actus reus* refers to the guilty act whereas *mens rea* refers to the guilty mind. In order to punish someone, the offender must have committed an offence defined as a criminal act in the criminal code, and must have done so intentionally (or possibly recklessly or negligently).[28] Further, as the principle of maxi-

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25 *ECtHR, Kokkinakis v. Greece*, App. no. 14307/88, 25 May 1993, § 52. See also Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* EU:C:2007:261, § 50, referring to ECtHR judgement in *Coëme and Others v. Belgium,* App. Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000. Similarly in Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* EU:C:2008:312, § 71 and in Case C-42/17 *Criminal proceedings against M.A.S. and M.B*. EU:C:2017:936.

26 Andrew Ashworth, *Principles of criminal law,* 6th edn. (Oxford: Oxford University Press, 2009), 23.

27 Norrie, *Crime, Reason and History*, 35-36.

28 E.g. Ashworth, *Principles of criminal law*. An in-depth and critical analysis of these concepts, see Norrie, *Crime, Reason and History*. In this paper, the discussion on the possibility of criminalising shaming is limited to considering it as an intentional crime for the sake of clarity. It is, however, worth noting that intention as an element of the offence of shaming might not be the first choice in all jurisdictions and regarding all participants. Moreover, there are of course major differences in the ways intention or liability in general is understood in different jurisdictions. E.g. Jeroen Blomsma, "Mens Rea and Defences in European Criminal Law" (Cambridge: Intersentia, 2012). Furthermore, discussing intention (e.g. different notions on degrees of intention) or questions of liability in detail are beyond the scope and reach of this paper; hence, where these issues are touched on, the analysis is rather cursory.

mum certainty provides that an offence must be clearly defined in law, people should be given fair warning, and it should not be too difficult to draw a line between acts that constitute a punishable offence and those that do not. These requirements must also be reflected when deciding whether and how to criminalize different acts. So, from the perspective of criminalizing online shaming, we should first be able to clearly define acts that are punishable, but this should be done so that it is possible to evaluate later in every case whether (and prove that) the offender acted intentionally.

The starting point in criminalizing online shaming must be to define conduct that initiates a hate campaign. Online shaming should be defined as direct or indirect incitement of other people to somehow disturb the target. However, as incitement could also be indirect, in practice, it would be difficult to know the actual intentions and motivations of the initiator. A critical or mocking remark made with no purpose of initiating a shaming action would easily look like the offence of shaming if other people were nevertheless provoked to post disturbing comments concerning the person criticised. Yet, according to the principle of individual autonomy, no one should be punished purely based on the consequences of an otherwise legitimate act. Moreover, the distress experienced by the target cannot form a benchmark for criminal activity, since justified and legitimate criticism may also cause different kinds of negative feelings in the one criticized. It is almost impossible to objectively evaluate the state of mind of the potential offender and to prove that they committed the crime intentionally and of their own free will, at least if at the same time we do not want to criminalize most critical remarks referring to someone personally and reaching a large audience.[29]

As we cannot know the actual motivation of the initiator, the only possibility is to try to define the circumstances indicating that the provocation and harm caused was intentional (assuming intention would be one of the essential elements of the offence). Let us assume that one criterion would be the size of the audience in the media or the site where the criticism was published, and another would be the previous activity of the initiator.

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29 Describing actions somewhat similar to shaming as informational and reputational cascades, Cass Sunstein illustrates well the dynamics of a rumour spreading in social media. In his examples, it is obvious that we cannot know the intentions and motivations of the participants as the participants might not even recognise the reasons for their actions themselves. Cass Sunstein, "Believing False Rumors," in *The Offensive Internet: Speech, Privacy, and Reputation*, eds. Saul Levmore and Martha C. Nussbaum (Cambridge, Mass: Harvard University Press, 2010), 92-96.

So, for instance, if a journalist or a researcher criticised someone's opinion on a politically sensitive or heated issue, and this provoked disturbing reactions towards the subject of criticism, the initial critical comment could be evaluated as the offence of initiating a shaming action. If we also suppose that the critical remark was made on social media, it was not the first time the journalist or the researcher in question criticised the same person, and they had many followers, the circumstances could surely be interpreted as intentional shaming even if the person in question only intended to criticise (and not to shame) someone or something. Hence, it would be difficult to distinguish (in a clearly defined and objective legal norm) between illegal shaming actions and justified criticism drawing attention to worthwhile political causes.

3.2 Conduct participating in shaming action

The example above illustrates the difficulty of criminalizing the *initiation* of online shaming so that harassing behaviour could be comprehensively criminalised while leaving out criticism that should be allowed as everyone's right to freedom of expression. It is, however, similarly difficult or even more difficult to criminalize conduct that involves *participating* in shaming action. Yet, as Aitchison and Meckled-Garcia argue, those who join in the shaming action are "still guilty of participating in a shaming action, however imperceptible their contribution".[30] The participants are indeed a crucial factor in the process, since without their contribution there would be no shaming in the first place, but perhaps only some random negative comments of less significance to the target. Therefore, if shaming were to be criminalized, it would not be enough if the offence covered only the deeds of the initiator. However, from the perspective of the principle of maximum certainty and individual autonomy, defining the liability of the participants extra carefully and clearly would be important, since everyone should be able to exercise their freedom of expression and comment on delicate issues without the fear of accidentally committing a criminal offence.

Thus, the legislator should first be able to define punishable shaming action in a way that leaves room for similar legitimate activity, such as drawing attention to important social, moral and political issues and commenting on them publicly. After this, the provision should be able to

30 Aitchison and Meckled-Garcia, "Against Online Public Shaming," 7.

define participation in shaming by differentiating conduct that contributes to punishable action (hence, should be punishable in itself) from a justifiable comment or remark that is made while a shaming action is running.

Assuming that shaming would be possible to define properly and would be criminalized as such, what kind of conduct could and should be punishable as *participating* in such action? Let us think about a situation in which someone has initiated a shaming action against another person, and as a result, several people were provoked to post public comments and send private messages to and about the target on different social media and online platforms. In assessing the liability of the participants, we would face problems of defining clearly enough the line between exercising one's freedom of expression and participation in shaming at three different stages. Firstly, how would every social media user be able to know about all or most of the comments and messages the target has received, particularly taking into account the rather rapid reaction expected in social media conversations? Secondly, how would they know when this complex of comments and messages constitutes a punishable shaming action (and not a similar action that is, however, considered justifiable criticism) hence indicating a risk of being prosecuted as a participant in case they decide to comment on the issue? Thirdly, how could they know if their own comments are considered a part of shaming action and not merely comments or criticism on a topical issue while a shaming action is still ongoing? In other words, if someone wanted to comment on the issue linked to the target and the ongoing shaming action, yet, without the intention of participating in shaming and harming the target, how could they do that without the risk of being prosecuted as a participant in shaming?

According to Article 10(2) of the ECHR, restrictions on freedom of expression must be prescribed by law, they must be necessary in a democratic society, and they must protect the interests mentioned in the Article. Criminalizing shaming does not necessarily violate any of these conditions *per se*. However, as mentioned earlier, the requirement of written law means that everyone should know "on the basis of the wording of the relevant provision … which acts or omissions will make him criminally liable".[31] Similarly to the culpability of the initiator, the above mentioned questions and many others on participation are impossible to define clearly and objectively in a law. The criteria and evaluation of those criteria would easily fall short of the requirements of the principles of legality

31 *ECtHR, Kokkinakis v. Greece*, App. no. 14307/88, 25 May 1993.

and individual autonomy as well as the requirements of objectivity and non-arbitrariness. Moreover, problems regarding the clarity of the offence would have a "chilling effect" on the permissible exercise of freedom of expression.[32]

4. Conclusions

As argued in this paper, it is difficult to investigate and prosecute offences restricting freedom of expression in terms of crimes committed in the online environment. The difference between criminalised and legitimate expressions is often equivocal even when only one person and their expression(s) are under scrutiny. In a case of online shaming, where a vast amount of expressions and different conduct are committed by numerous people, evaluating whether some of these expressions constitute some offences separately and / or together, or whether the expressions are or should be allowed or restricted according to the standards on freedom of expression is difficult.

Several reasons account for why rules on restricting freedom of expression must be clear. It is important to know what kind of criticism is allowed, but also to avoid a chilling effect on public discussion; everyone should be able to make critical remarks without fear of other people being provoked into sending hateful messages, and this leading to an accusation of online shaming. Therefore, as it is difficult to draw a line between an expression intentionally initiating a shaming action and merely making a critical remark on something or someone, it is not possible to criminalize *initiating* online shaming. Likewise, everyone should be able to make critical remarks without fear of being prosecuted as a *participant* in a shaming action without even being aware of such an action having been running.

On the other hand, everyone should be able to discuss publicly without fear of ending up as a target of online shaming. Despite being severely

32 On the "chilling effect" in the praxis of the ECtHR, see e.g. *Yaşar Kaplan v. Turkey*, App. no. 56566/00, 24 January 2006, § 35; *Aslı Güneş v. Turkey*, App. no. 53916/00, 27 September 2005 (dec.); *Nikula v. Finland*, App. no. 31611/96, 21 March 2002, § 54; *The Magyar Jeti Zrt v. Hungary*, App. no. 11257/16, 4 December 2018, §§ 83-84; *Eon v. France*, App. no. 26118/10, 14 March 2013, §§ 34-36; *Margulev v. Russia*, App. no. 15449/09, 8 October 2019, § 42; *Sylka v. Poland*, App. no. 19219/07, 3 June 2014 (dec.); *Guja v. Moldova*, App. no. 14277/04, 12 February 2008 (GC), § 78; *Fuentes Bobo v. Spain*, App. no. 39293/98, 29 February 2000, § 49 and *Heinisch v. Germany*, App. no. 28274/08, 21 July 2011, § 91.

disturbing to the target and harmful for public discussion, it is difficult or even impossible to comprehensively criminalize acts of harmful shaming without excessively restricting freedom of expression. In addition, criminalizing shaming as some kind of joint action would mean a deviation from the principles or ideas of legality and individual justice that form the cornerstones of European criminal justice systems. At least as long as criminal law concentrates on individuals and their specific and individual acts and as long as it presupposes rationality of both the law and people governed by law, criminal law is ill-equipped to deal with multifaceted social problems. However, it remains to be seen whether the EU's proposal on the Digital Services Act[33] can provide a safer online environment to citizens and afford better protection to their fundamental and human rights. While the possibilities of using criminal law to prevent hate speech are limited, other means might be used to prevent hate speech and its harmful effects.[34]

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33 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final.

34 For example, the Digital Services Act proposal includes rules for online intermediary services with notice and action procedures, complain and redress mechanisms and measures against abusive notices and counter-notices.

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