

Europe's Bridge Too Far

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The European Court of Justice (ECJ) issued a decision that permits individual countries to order Facebook to take down posts, photographs and videos and restrict global access to that material.

Eva Glawischnig-Piesczek, a former leader of Austria's Green Party, requested Facebook delete comments posted about her on an individual's personal page. She also argued for the limitation of worldwide access on the "offending material." The impact of this decision may be significant as defamation, libel and privacy laws vary based on country.

The internet is border-less and companies may be required to take down material that may be unlawful in one nation but is perfectly legal (maybe even constitutionally enshrined) in others. Let's take the particular set of facts displayed in this case as an example. An Austrian court had specifically found the offensive comments posted about Glawischnig-Piesczek illegal because they were intended to damage her reputation. On April 3, 2016, an anonymous user with the username "Michaela Jaskova" uploaded on his or her Facebook profile an article calling Glawischnig-Piesczek a lousy traitor, corrupt, and a member of the fascist party. In the United States, there is a distinction between the rights of a private person and the privacy rights of a public person. American courts have not specifically defined "public figure," but they do identify politicians of all levels as qualifying. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

American law, particularly in defamation litigation, errs on the side of believing that people who choose to enter the public arena are choosing to receive more scrutiny, criticism, and commentary in general. Public figures cannot claim defamation unless the statement is both provably false and the defamer is proven to have shown reckless disregard for that falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254. The bar for the comments made about Glawischnig-Piesczek to be deemed illegal in the United States would not have been met.

American law also takes into account how unreasonable it is to expect social media providers to make defamation determinations on every statement posted on their platform. Section 230 of the Communications Decency Act inoculates internet service providers (hosting companies, websites, developers, etc.) from defamation liability over user comments and content. This is not to say that internet service providers should not have any responsibilities in this sphere. Some social media services promote activism and democracy, but can also be used by hate groups for organization and recruitment purposes. The Supreme Court says that the law "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the

First Amendment”, but does not prohibit private entities from having strict codes of conduct (Boos v, Barry, 1988). Internet service providers have Terms and Conditions that they should enforce.

If American companies now must regulate content based on their illegality in any particular country, we have a legitimate issue of extraterritorial jurisdiction. ECJ has deemed that that a national court of a European Union country could order Facebook to remove posts considered defamatory, even if not considered defamatory in other regions. This is a bridge too far. Should American consumers posting comments on an American social media platform about European politicians be subject to European defamation law? No.

When I first read “[Can We Really Forget?](#)” on this blog, I was not sure how much I agreed with. My instinct was to believe that giving individuals more latitude in their internet identity could not be such a bad thing. But with this decision, the tension of imposing European laws on American companies and consumers comes way too close to infringing on our rights.

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